California Court of Appeal Affirms Forum Non Conveniens Dismissal of Nonresident Plaintiffs

Plaintiffs’ lawyers frequently use joinder to forum-shop. In particular, they often collect plaintiffs from around the country and join them with a few local plaintiffs and a “nominal” local defendant to try to keep the case in their chosen state court forum. In David v. Medtronic, Inc., 188 Cal. Rptr. 3d 103 (Cal. Ct. App. 2015), the California Court of Appeal affirmed a trial court’s rejection of this tactic, holding that it was proper to sever and dismiss the out-of-state residents based on forum non conveniens, despite the presence of a nominal defendant.

In David, 36 residents of various states were joined with a single California resident in a suit alleging injuries caused by the medical device Infuse. In addition to the makers of the product, plaintiffs joined an individual California physician whom they alleged played a part in developing the device. The defendants moved to (i) sever each plaintiff’s case; (ii) dismiss the non-California residents’ claims on the grounds of forum non conveniens; and (iii) transfer venue of the single California plaintiff’s claims to a different California county. The trial court granted all three requests.

The California appellate court first held that, while plaintiffs did not properly preserve their objection to severance, even if the issue were properly before the court the standards for permissive joinder were not met. It was not enough for plaintiffs to claim injury from the same type of device. Instead, the court found severance appropriate because plaintiffs “had different surgeries, performed by different surgeons, with different knowledge and exposure to different representations by” defendants.

The court then held that the forum non conveniens dismissal of the out-of-state residents was proper even though plaintiffs could not secure jurisdiction over the nominal defendant, Dr. Michelson, in any alternative forum. Typically, a defendant seeking dismissal based on forum non conveniens is required to show that the plaintiff can bring the lawsuit in a different and more suitable forum. But the court recognized that where a defendant is merely nominal, inability to secure jurisdiction over that defendant should not be an obstacle to dismissal. Although plaintiffs had effectively conceded that Dr. Michelson was merely a nominal defendant, the court also provided some guidance as to when a defendant is nominal, explaining that “it is apparent that establishing liability against Dr. Michelson . . . will be somewhat of an uphill battle . . . ancillary to the main war” of whether the manufacturing defendants are liable.

David thus offers a firm rebuke of plaintiffs’ forum-shopping techniques and should prove useful in future forum non conveniens challenges in California.
More Tort Reform in Texas

Texas was once a favorite destination for plaintiffs' lawyers looking to bring product liability suits. But tort reform legislation continues to change that picture. Most recently, two bills were passed by the Texas Legislature, HB 1692 and SB 735, that further protect against forum shopping and overbroad discovery of a defendant's net worth.

First, HB 1692 limits out-of-state plaintiffs from filing personal injury or wrongful death claims in Texas state courts when the claims involve incidents that occurred outside of the state. Prior law in Texas prohibited the dismissal of personal injury and wrongful death claims filed by nonresidents on forum non conveniens grounds so long as just one plaintiff in the action resided in Texas. But HB 1692 amends the relevant statute, Texas Civil Practice and Remedies Code section 71.051(e), to provide that only plaintiffs who are residents of Texas or derivative claimants of legal residents of Texas have this immunity to forum non conveniens. Under the new provision, the forum non conveniens analysis must be made individually with respect to each plaintiff, and the out-of-state plaintiffs can no longer “piggyback” on the in-state residents' claims to stay in Texas courts. The bill was signed into law on June 16, 2015, and applies to all state court actions commenced on or after that date.

Second, SB 735, which has not yet been signed into law by the governor, is intended to limit the circumstances in which facts relating to the net worth of a defendant are discoverable in personal injury or wrongful death cases. Under prior law, a plaintiff would typically cast a wide net seeking net worth discovery on the basis that it was relevant to exemplary damages. The bill, however, would add a new section 41.0115 of the Texas Civil Practice and Remedies Code, allowing discovery of net worth evidence only when a plaintiff has first “demonstrated a substantial likelihood of success on the merits of a claim for exemplary damages.” The new law also requires plaintiffs to make a threshold showing of good cause before such discovery is allowed. The bill would further limit discovery by authorizing only the least burdensome method available to obtain net worth evidence. Further, SB 735 would clarify the definition of net worth to “the total assets of a person minus the total liabilities of the person on a date determined appropriate by the trial court,” further helping to narrow the focus of discovery both temporally and substantively.

If signed into law, SB 735 will take effect September 1, 2015, and will apply to new actions commenced on or after that date.

Fourth Circuit Embraces Strict Pleading Requirement for False-Advertising Claims

On June 19, 2015, the Fourth Circuit held that to state a claim for false advertising based on a theory that representations about the health effects of a product are actually false, a plaintiff must allege that all reasonable experts in the field agree the representations are false. See In re GNC Corp.; Triflex Prods. Mktg. & Sales Practices Litig. (No. II), No. 14-1724, 2015 WL 3798174 (4th Cir. June 19, 2015).

In In re GNC Corporation, plaintiffs filed putative class actions alleging that GNC and Rite Aid violated state consumer protection laws by marketing health supplements as promoting joint health, even though many studies showed that the main ingredients are no more effective than a placebo in treating osteoarthritis symptoms. Plaintiffs asserted that the companies’ representations were literally false because the vast weight of the competent and reliable evidence indicated that glucosamine and chondroitin do not provide the promised benefits. The district court granted the companies’ motion to dismiss, holding that a manufacturer is not liable for false advertising under a literal falsity theory if at least one qualified expert opines that the representations are truthful, even if the overwhelming scientific evidence is to the contrary. Accordingly, the district court dismissed the complaint without prejudice and granted plaintiffs’ leave to re-file. Rather than amend the complaint, plaintiffs appealed.

The Fourth Circuit panel unanimously affirmed the district court’s judgment because plaintiffs failed to allege that all reasonable scientists agreed glucosamine and chondroitin do not provide the relief promised by the companies. The Court emphasized plaintiffs’ allegations that the “vast weight” and “overwhelming weight” of reliable evidence showed the ingredients not to be effective. The Court viewed these allegations as an implicit concession that some reliable scientific evidence supports their efficacy. And statements cannot be “literally false” if there is a reasonable difference of scientific opinion on the question. The Court did, however, leave open the possibility that other cases might state a claim by alleging either that no reasonable scientist would agree with the representations at issue or by alleging a different theory that the representations are misleading.
as opposed to literally false.

*In re GNC Corporation* is a significant victory for dietary supplement manufacturers and others that face false advertising claims under state law, even if it leaves some maneuvering room for plaintiffs’ lawyers.

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