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J&J Gets Class Certification Redo Under Multiple State Laws (1)

Johnson & Johnson convinced a federal appeals court to vacate class certification of claims that two of its baby products are deceptively labeled ''natural,'' but failed to shrink the case to one state.

The trial court must reconsider whether class certification is appropriate for claims under the consumer protection laws of 17 in addition to the plaintiff's home state of Connecticut, the U.S. Court of Appeals for the Second Circuit said July 24.

But the case survived a challenge over named plaintiff and Connecticut resident Heidi Langan's standing to sue on behalf of consumers in other states.

The standing aspect of the ruling is ''an important development in class action jurisprudence'' because the decision gives plaintiffs a possible way to avoid personal-jurisdiction issues that come up when plaintiffs from multiple states sue in a single case, class action attorney Andrew J. McGuinness told Bloomberg Law.

If an individual California consumer has standing, for example, ''there's no need to bring 25 or 50 other people in from out of state'' and run into problems with personal jurisdiction, as long as the predominance requirement is met, said McGuinness.

He's based in Ann Arbor, Mich., and has represented both plaintiffs and defendants.

McGuinness referred to the Supreme Court's 2016 decision in *Bristol-Myers Squibb v. Super. Court*, a case involving personal-injury plaintiffs from multiple states. *Bristol-Myers* was another example of higher courts addressing defense challenges to suits that cross state lines—in that case, a jurisdiction challenge.

Only one other federal appeals court, the Seventh Circuit, has addressed the standing issue, according to the Second Circuit's opinion.

Predominance Scrutinized The Second Circuit's decision to vacate class certification revolved around the issue of whether common issues predominate over individualized ones.

A panel of the U.S. Court of Appeals for the Ninth Circuit considered a predominance issue in January in *In re Hyundai & Kia Fuel Economy Litig.* It surprised many observers when it rejected a class settlement of consumer fuel-efficiency claims, saying class status isn't appropriate for nationwide cases involving variations in state law. The settling parties are seeking rehearing by the full court.

In the J&J case, the Second Circuit didn't go so far as to say a multistate class couldn't be certified. But it said a district court needs to take ''a close look'' at whether common legal questions predominate over individualized ones, as Federal Rule of Civil Procedure 23(b)(3) requires.

A single paragraph in the lower court's decision wasn't sufficient to analyze variations in state law and a possible need for subclasses, the Second Circuit said.

''This decision confirms that Rule 23 requires a rigorous analysis of the variations in state law to determine whether predominance is met,'' Amanda Groves of Winston & Strawn LLP in Charlotte, N.C., told Bloomberg Law in an email.

''This was also part of the *In re Hyundai* decision, but context is very important here,'' she said.

The Hyundai case involved a settlement class while *Langan* was a litigated class where state-law analysis is the norm, Groves said. The decision here, requiring a thorough analysis of predominance, isn't surprising, she said.

Johnson & Johnson faces massive litigation over personal injuries allegedly caused by its talc, pharmaceutical, breast implant, and other products. The J&J unit sued here is Johnson & Johnson Consumer Cos.

'Obvious Truth' About Plaintiffs Class actions under Rule 23 ''are an exception to the general rule that one person cannot litigate injuries on behalf of another,'' the Second Circuit said here.

It's an ''obvious truth'' that class action plaintiffs litigate others' injuries, which they wouldn't have individual standing to sue over, the court said.

It ''makes little sense to dismiss the state law claims of unnamed class members for want of standing when there was no requirement that the named plaintiffs have individual standing to bring those claims in the first place,'' the court said.

That's where the predominance inquiry comes in, and it requires a more in-depth analysis than the district court gave it, the appeals court said.

Madison H. Kitchens of King & Spalding LLP in Atlanta said there's power in both types of defense challenges.

The ''Second Circuit appeared to treat the issue as implicating *either* Article III standing or predominance under Rule 23. But this is not necessarily a binary question—it often implicates both,'' he told Bloomberg Law in an email.

Izard, Kindall & Raabe, LLP represented Langan. Kramer Levin Naftalis & Frankel LLP represented J&J.

The case is *Langan v. Johnson & Johnson*, 2d Cir., No. 17-01605, 7/24/18.

By Peter Hayes and Martina Barash

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To contact the reporter on this story: Peter Hayes in Washington at PHayes@bloomberglaw.com

To contact the editor responsible for this story: Steven Patrick at spatrick@bloomberglaw.com

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