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Western District Case Notes

■ **Kevin M. Hogan and Sean C. McPhee** SPECIAL TO THE DAILY RECORD

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STANDING/INJURY-IN-FACT

In *In re Fisher-Price Rock 'N Play Sleeper Marketing, Sales Practices, & Products Liability Litigation*, 19-md-02903-GWL (Feb. 8, 2023), defendants sought dismissal of a class action contending that the class representative was a satisfied customer who suffered no loss and, therefore, lacked standing. In opposition, the class representative argued that she was injured because she "overpaid" for the product in that she never would have purchased it if defendants had disclosed what they knew about the risk of infant death associated with the product. She also argued that her claim for statutory damages was sufficient to confer standing. Noting first that subject matter jurisdiction is lacking where standing is absent, and that named plaintiffs who represent a class must allege and show that they were personally injured, the court concluded that the class representative alleged a concrete and particularized injury sufficient to establish standing because overpayment for a product — even one that performs adequately and does not cause any physical or emotional injury — can be a cognizable injury-in-fact. And while the parties dispute the amount of damages plaintiff may be entitled to recover, that is a factual issue for a jury, but the class representative's allegations that she was misled into purchasing the product were sufficient to establish standing for jurisdictional purposes. Accordingly, the motion was denied.


Kevin M. Hogan


Sean C. McPhee

PLEADING REQUIREMENTS UNDER FALSE CLAIMS ACT

In *Pilat v. Amedisys, Inc., 17-cv-00136-JLS* (Mar. 13, 2023), two relators filed a *qui tam* action on behalf of the United States, 21 states, and the District of Columbia asserting claims under the federal False Claims Act and the false claims acts of those states, contending that, during their employment with defendant, they observed defendant engage in numerous fraudulent practices directed at government-funded health care programs. Recognizing that such claims are subject to the heightened pleading requirements of Fed. R. Civ. P. 9(b), which essentially requires a plaintiff to identify the "who, what, when, where and how of the alleged fraud," the court determined that the relators failed to allege false claims or fraudulent conduct with the requisite specificity. In reaching this conclusion, the court found that the allegations were merely conclusory, hypothetical statements regarding a purportedly fraudulent scheme, and failed to allege actual instances where the scheme occurred, or that false claims were actually submitted to the government for reimbursement. Similarly, although the relators cited to their "personal knowledge," they did not provide any details as to patients, invoices, records, providers, dates, supervisors, or the like. And while pleading on "information and belief" is permitted, that "must not be mistaken for license to base claims of fraud on speculation and conclusory allegations." Finally, while complaints dismissed under Rule 9(b) are "almost always dismissed with leave to amend," because this was the relators' third amended complaint, and an earlier motion to dismiss raised similar — if not identical — arguments regarding the insufficiency of the relators' claims, the court dismissed the complaint without leave to amend.

RES JUDICATA

In *Stensrud v. Rochester Genesee Regional Transportation Authority*, 19-cv-6753-EAW (April 14, 2023), plaintiffs sought monetary damages under 42 U.S.C. § 1983 and New York state law because defendant had taken by eminent domain certain property owned by plaintiffs. Prior to commencing the lawsuit, plaintiffs first had sought additional compensation for the taking in New York State court. Following a bench trial and an award of less compensation than originally sought, plaintiffs appealed the award contending that the state trial court issued an adverse evidentiary ruling that deprived them of a full and fair opportunity to litigate the matter of just compensation. That appeal, however, was not successful and defendant eventually satisfied the state court judgment in its entirety. In the subsequent federal lawsuit, defendant moved for summary judgment on grounds that plaintiffs' claim was barred by the doctrine of *res judicata* as a result of the state court's decision and judgment. The court agreed, granted the motion, and dismissed the federal claim, because the claims asserted in the instant lawsuit arose out of the same transaction as the claim resolved by the state trial court's decision and judgment. The same two parties had litigated the taking of the same property and thus the subsequent lawsuit was barred by claim preclusion under New York law. That the state court had refused to consider a particular valuation theory in reaching its determination of what constituted just compensation for the taking of the property was not a valid grounds to evade the preclusive effect of prior judgment. The doctrine of *res judicata* does not depend on whether the prior judgment was free from error. According to the court, *res judicata* is specifically designed to avoid instances where plaintiffs seek a second bite at the apple based on their disagreement with the state trial court's determination. Instead, the remedy for an erroneous legal ruling is the appellate process and not a second lawsuit in a different court.

NONMUTUAL OFFENSIVE COLLATERAL ESTOPPEL

In *McTyere v. Apple, Inc.*, 21-cv-01133-LJV (Mar. 21, 2023), plaintiffs commenced a putative class action alleging defendant made false representations when it sold them digital content and later removed their access to that same digital content. Defendant moved to dismiss on the grounds that its representations were not misleading and because plaintiffs had not adequately alleged they were injured by the misrepresentations. Plaintiffs opposed the motion on multiple grounds, including that defendant was precluded from raising the arguments in its motion to dismiss based on "nonmutual offensive collateral estoppel." More specifically, plaintiffs argued that, because a District Court in California decided that similar claims brought by different plaintiffs against the same defendant were sufficient to withstand a motion to dismiss, collateral estoppel should bar dismissal of plaintiffs' claims in this action. After recognizing that the doctrine of nonmutual offensive collateral estoppel precludes a defendant from relitigating an issue the defendant previously litigated and lost to another plaintiff, the court noted that the issues must be identical, and they are not if the second action involves application of a different legal standard, even though the factual setting of the suits may be the same. The court then found that, although the claims in both cases relate to defendant's representations, the two cases involve claims arising under completely different state laws, rendering nonmutual offensive collateral estoppel inapplicable. The court, however, denied the motion in any event, holding that reasonable consumers might have been misled by defendant's conduct, and that plaintiffs adequately alleged an injury sufficient to state a claim.

NON-PARTY SUBPOENAS

In *Brennan et. al. v. Mylan Inc. et. al.*, 22-mc-6015-FPG (March 10, 2023), two non-party witnesses filed motions for an order quashing deposition subpoenas under Rule 45(d)(3)(A)(iv) and for a protective order from further efforts at discovery under Rule 26(c)(1). Rule 45 provides that a subpoena recipient may move to quash a subpoena if compliance would subject them to an "undue burden." Whether an undue burden exists depends on the relevance of the discovery sought, the parties' need for the information, the breadth of the request, and the burden imposed. The court found that defendants, who had served the subpoenas, were seeking relevant and needed testimony that was sufficiently narrow in breadth and scope, the two non-party witnesses were undisputedly

knowledgeable and the best source of the information sought, and the witnesses did not allege the discovery would cause any expense or inconvenience. Movants, therefore, had not met their burden of proving the subpoenas would result in an undue burden. The court also denied the request for a protective order for two reasons. First, the non-party witnesses did not submit the certification required by Rule 26(c)(1) that they had conferred in good faith with defendants in an effort to resolve the discovery dispute. In addition, the factors that weighed against a finding of undue burden also weighed against a finding of good cause that the order was needed to protect the non-party witnesses from annoyance, embarrassment, oppression, or undue burden or expense. Without an undue burden or good cause, the motion to quash or for a protective order was denied.

DISCOVERY DISPUTE CONCERNING INTERROGATORIES

In *Liberty Mutual Ins. Co. v. Guereschi*, 17-cv-01152-WKS (Feb. 28, 2023), plaintiff sought damages against a former employee for alleged breaches of non-solicitation and confidentiality agreements. In discovery, plaintiff served interrogatories asking defendant to disclose the identities of plaintiff's customers that he solicited following the termination of his employment with plaintiff. In his responses, defendant contended that some of those customers were cultivated as a result of his "independent efforts," and not as a result of his prior relationship with plaintiff. Based on this "independent efforts" defense, plaintiff served six additional interrogatories, each of which referenced an attached list of 459 people, and asked defendant to describe his supposed pre-existing relationships with those customers, as well as the details of his "independent efforts." Defendant objected to the additional set of interrogatories on the grounds that they exceeded the number allowed under the Federal Rules of Civil Procedure, and because they were unreasonable and unduly burdensome. Defendant then moved for a protective order, and plaintiff cross-moved to compel. In deciding the motions, the court found that plaintiff had only served a total of 24 interrogatories, which is below the limit of 25 set by Fed. R. Civ. P 33(a)(1), and rejected defendant's argument that the most recent set of interrogatories "functionally comprise hundreds of separate interrogatories," holding that a question asking about communications of a particular type should be treated as a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each such communication. Thus, while "the response may be voluminous and time-consuming," the requests did not constitute hundreds of individual interrogatories, and did not run afoul of the numeric limit set in Rule 33. As a result, defendant was ordered to provide responses.

DISCOVERY STAYS

In *Tripathy v. Schneider et. al.*, 21-cv-6392-FPG (March 7, 2023), defendants requested that discovery be stayed pending a decision in their motion for summary judgment. Citing the three-factor test for establishing good cause under Rule 26(c), the court declined to hold discovery in abeyance. Whether there is good cause to stay discovery pending a dispositive motion, a court considers the strength of the dispositive motion, the breadth of the discovery sought, and the prejudice a stay would have on the non-moving party. Here, the court concluded that the strength of the grounds proffered by defendant in support of the motion weighed in favor of a stay. The breadth of the discovery sought to be stayed, however, was relatively narrow in part because the parties had nearly completed discovery. In addition, a stay would further delay the litigation if the summary judgment motion were denied, to the prejudice of plaintiff. The court thus concluded the second and third factors together outweighed the first factor and weighed against a stay and, accordingly, the court denied the request.

Kevin M. Hogan is the Managing Partner at Phillips Lytle LLP. He concentrates his practice in litigation, intellectual property and environmental law. He can be reached at khogan@phillipslytle.com or (716) 847-8331. Sean C. McPhee is a partner with Phillips Lytle LLP where he focuses his practice on civil litigation, primarily in the area of commercial litigation. He can be reached at smcphee@phillipslytle.com or (716) 504-5749.