of specifying the use of non-OEM parts: (1) breached State Farm's standard contract because it does not restore policyholders' cars to their pre-loss condition by using parts of like kind and quality; and (2) constituted an actionable misrepresentation under the Illinois Consumer Fraud Act regarding the "standard, quality or grade of the goods and services" provided under the State Farm insurance policy.[8]

State Farm insisted that the substance of policies varied from state to state (destroying the element of commonality), and that four of the five named plaintiffs had little to no connection with the State of Illinois. But the circuit court certified a nationwide class with respect to both the breach of contract and consumer fraud claims.[9] At trial, though no plaintiff proved that they suffered any actual injury, the jury awarded plaintiffs over $1 billion in damages.[10] On appeal, the Fifth District Appellate Court (the appellate court for both Madison and St. Clair counties) generally affirmed the circuit court's decision.[11]

The Illinois Supreme Court, however, reached a very different conclusion. With respect to the breach of contract claim, the court held that "there is simply no evidentiary support for the lower courts' conclusion that all of State Farm's various polices are uniform" and that because the policies are materially different "the commonality and predominance requirement[s] [] cannot be met."[12] The court went on to hold that for multiple reasons the verdict could not even be upheld with respect to any possible subclass.[13] Most notably, it reasoned that the breach of contract verdict may not be upheld with regard to any subclass because plaintiffs failed to establish that any policyholder suffered any *actual damage*.[14]

The court similarly reversed the circuit and appellate court with respect to the Illinois Consumer Fraud Act claim. Without reaching State Farm's arguments that the circuit court's certification of a nationwide class with respect to the Illinois Consumer Fraud Act claims violated Illinois' choice-of-law rules, as well as various federal constitutional provisions, the court held as a matter of statutory interpretation that the Act can only apply "if the circumstances that relate to the disputed transaction occur primarily and substantially in Illinois."[15] As applied to the facts of this case, the court further held that the Act did not permit a cause of action for out-of-state plaintiffs because the "overwhelming majority of circumstances relating to [their] disputed

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Campbell v. Air Touch Cellular d.b.a. Verizon Wireless

by John Shu

This class action settlement involving AirTouch Cellular and Cellco Partnership, which do business as the more commonly known Verizon Wireless, is one of the largest in American history. The lead plaintiff, Marcy Campbell, and the other plaintiffs, filed the original complaint in July 2001 in California Superior Court, San Diego County, before Judge William C. Pate, claiming that Verizon improperly and inadequately disclosed billing, sales and marketing practices. The case went to mediation before Judge J. Lawrence Irving, United States District Court for the Southern District of California (Retired). Judge Irving is currently Special Counsel at Lerach Coughlin Stoia Geller Rudman & Robbins LLP, a well-known plaintiff's class-action firm.

The plaintiffs filed the first amended complaint in November 2001. The nationwide class representatives home states included Arizona, California, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Maryland, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Washington and Wisconsin. The complaint asserted six class action and private attorney general claims, asserting causes of action under California Business and Professions Code §§ 17200 and 17500 (Unlawful, Deceptive and Unfair Business Practices; Unfair, Deceptive and Misleading Advertising); the Consumers Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.*, which makes unlawful "methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods to any consumer;" breach of contract; negligent misrepresentation; and fraudulent misrepresentation, concealment and failure to disclose.

The plaintiffs alleged that Verizon utilized a variety of deceptive and misleading marketing, advertising, sales and billing practices in its cellular telephone service, such as miscalculating airtime usage, making unauthorized changes in the terms of its customers' contracts, and charging hidden fees on its customers' accounts.

Campbell and Verizon entered into a class action settlement agreement in April 2002, pursuant to the parties' mediation before Judge Irving. Under the agreement, Verizon agreed to provide a revised customer service agreement and user guide to all current customers. Verizon also agreed to provide a coupon to class members. The coupon could be used for (1) $15.00 off a one-

Verizon Settlement

year contract for wireless service with Verizon; (2) $30.00 off a two-year contract for wireless service with Verizon; (3) a 25% discount on Verizon merchandise, up to a maximum of $15.00; or (4) a free "hands free earbud."

In May 2002 Judge Pate preliminarily approved the proposed settlement agreement and certified a settlement class for the period of January 1, 1991 through and including November 2, 2003. Out of the more than 23 million notices of proposed settlement Verizon mailed to potential class members, it received sixty-two objections and approximately 4,300 opt out requests. Three prominent consumer advocacy groups were among the objectors: Consumers Union of the United States, Inc. (Consumers Union), Utility Consumer Action Network (UCAN), and the Wireless Consumers Alliance (WCA). In September 2002 Judge Pate rejected the proposed settlement primarily because it did not provide sufficient benefits to members of the proposed class and because of deficiencies in the class notice. Judge Pate also expressed concern about the inclusion of an entire customer agreement in the body of the settlement agreement, and the lack of an adequate valuation of the plaintiffs' claims.

The parties returned to mediation before Judge Irving. In October 2003 Campbell, Verizon, and 26 new intervenors, including UCAN and WCA, entered into a revised class action settlement agreement. Verizon agreed to revise its customer service agreement and user guide for all current customers, including making specific disclosures; make its customer agreement available in Spanish; double the time period within which customers could dispute their bills; and provide two separate vouchers to class members. The first voucher allowed class members to choose one of the following without have to enter into or renew a Verizon contract: (1) $15.00 off a one-year contract for wireless service with Verizon; (2) $30.00 off a two-year contract for wireless service with Verizon; (3) six months of limited free text messaging; (4) a 25% discount on wireless telephone accessories up to a maximum discount of $15.00; (5) 120 minutes of long distance via a third-party calling card; or (6) a $3 per bill credit for up to eight months over a two-year contract.

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transactions" occurred outside of Illinois.[16] Moreover, since the lone Illinois-named plaintiff had failed to suffer any actual damage as a result of the violation of the Act, all of the Illinois Consumer Fraud Act claims were dismissed.[17]

In a separate opinion, concurring in part and dissenting in part, Justice Freeman implied that the stark language and apparent shift in philosophy advanced by the majority was a direct reaction to the allegations of abuse in the class action arena that have been leveled at the Illinois courts.[18] While stating that "it would further no end to feign ignorance" of these allegations, he cautioned the majority to "tread carefully" considering the "ongoing national debate" among elected officials in the U.S. Congress and the Illinois General Assembly.[19]

A few months later, in November 2005, the Illinois Supreme Court issued a second decision that made it more difficult for out-of-state plaintiffs to file class actions in Illinois jurisdictions with pro-plaintiff reputations. In *Gridley v. State Farm Mutual Automobile Insurance Company*,[20] the court reversed the lower decisions and ordered the Madison County circuit court to grant State Farm's motion to dismiss based upon forum non conveniens.[21] Gridley, a *Louisiana* resident filed suit in Madison County as a representative of a nationwide class of individuals who had purchased an automobile that was previously declared a "total loss" by State Farm and for which State Farm failed to obtain a salvage title, as required by *Louisiana* statute.[22] In his suit, Gridley alleged two causes of action: (1) unjust enrichment and (2) violation of the Illinois Consumer Fraud Act.[23] State Farm moved to dismiss the complaint, arguing that the Illinois Consumer Fraud Act could not apply to Gridley's complaint (which was premised on events in Louisiana) and that Gridley's remaining common law claim should be dismissed pursuant to the doctrine of forum non conveniens. The circuit court denied State Farm's motion in its entirety, reasoning that Illinois had a "significant interest" in the litigation because State Farm was headquartered in Illinois and Gridley sought recovery under Illinois law.[24]

On appeal, the Fifth District Appellate Court held that the circuit court did not have sufficient facts to make an informed decision on State Farm's forum non conveniens motion and remanded the case for further discovery.[25] In reaching its conclusion, the appellate court focused on the putative class. It concluded that the identity and location of potential class members, as well as the availability of documentary and physical evidence on a class-wide basis, should be considered when making a forum non conveniens decision in the class action context.[26]

Welding Fume: A Disappearing Mass Tort?

Continued from Cover...

mass medico-legal screening programs. And they have achieved dismissal of thousands of claims through a case administration order entered by federal district judge Kathleen O'Malley, who is presiding over the federal multidistrict litigation proceeding, *In re Welding Fume Products Liability Litigation*, in Cleveland.[2] Moreover, while plaintiffs' counsel have recently sought to preserve their mass tort through aggregated litigation procedures, their proposals to hold "issues" trials and certify a medical monitoring class are deemed by defendants to be contrary to the great weight of federal caselaw.

I. The Trial Record In The welding fume Litigation

The welding fume cases involve allegations that the manganese in welding fumes causes neurological disorders. While there have been case reports in which individuals, such as smelters severely over-exposed to manganese, have contracted a rare neurological disorder known as manganism (characterized by a particular pattern of tremors, facial masking and a distinctive gait known as "a cock walk"), the ailments alleged in the current cases are far more diffuse, ranging from muscle weakness to insomnia to poor handwriting to sexual dysfunction. A substantial number of plaintiffs are individuals who have been diagnosed with Parkinson's Disease and now allege that they really suffer from manganism. Almost all the plaintiffs in the litigation were diagnosed at mass medico-legal screenings, in which plaintiff-hired neurologists conducted five-minute examinations and then diagnosed thousands of welders with this rare disorder. In fact, more than seventy percent of the plaintiffs diagnosed with this condition were diagnosed by the same doctor.

There have been seventeen welding fume trials in state and federal court over the last several years. Sixteen have resulted in defense verdicts.[3] Most recently, in the federal multi-district litigation (MDL) proceeding, a Cleveland jury returned defense verdicts in the *Goforth* and *Quinn* cases—the first multiple-plaintiff trial in the history of the welding litigation.[4] Plaintiffs had originally moved to consolidate seven individual claimants' cases for trial, in the hopes of gaining the well-established tactical benefits of multi-plaintiff cases. The court denied their

The second coupon could be used for either a "hands free earbud" or a $15.00 credit toward a different hands-free device. The hands-free devices were compatible with handsets other cellular carriers sold.

The revised settlement also provided for a 25% refund of early termination fees paid by class members whose service was (1) terminated by Verizon (or one of its predecessors) and (2) whose contract did not specifically permit Verizon (or one of its predecessors) to charge an early termination fee if it terminated the customer's service. Verizon agreed to provide either reprogramming of a wireless handset or a long distance calling card for 30 minutes of service to class members who had purchased a locked handset from a predecessor company called PrimeCo. Class members could also claim a partial refund if the class member's wireless service had properly terminated in the middle of a billing cycle and the class member did not receive a pro rata return of the last month's access fee. Finally, a class member could claim up to 600 minutes of additional wireless airtime or 300 minutes on a third-party long distance calling card if the class member paid more than a minimum amount in additional charges because of delayed billing of roaming charges on calling plans that did not disclose that issue.

On December 1, 2003, the court entered an order certifying a new settlement class and preliminarily approving the revised settlement. Verizon sent over 27 million settlement notices to present and former customers in the class. It published settlement notices eleven separate times in *USA Today*, *The Wall Street Journal*, *Parade* magazine, and the Spanish language newspaper supplement Vista, which have a collective circulation of over 39 million. Verizon also published the settlement notice on a website that included a toll-free number providing further information on the revised settlement. Verizon received 51 timely objections to the revised settlement and 4,255 opt out requests. No consumer advocacy group or government agency objected to the revised settlement.

In May 2004 Judge Pate issued his final order and judgment approving the revised settlement. The Court of Appeal affirmed in March 2006. Nixon Peabody LLP in New York and Pillsbury Winthrop LLP in San Diego represented Verizon Wireless.