STATE COURT

DOCKET WATCH

February 2004

The Federalist Society for Law and Public Policy Studies–State Courts Project

Nationwide Class Action Litigation (Oklahoma)

The Oklahoma Supreme Court recently handed down a decision upholding the certification of a nationwide class action against DaimlerChrysler Corporation involving state-law breach of warranty claims brought on behalf of approximately one million minivan owners. The court's ruling makes it easier to maintain nationwide class actions alleging warranty theories. In reaching its result, the court held that in a nationwide breach of warranty class action, Oklahoma's choice of law rules provide that the law of the state where the manufacturer resides will govern all claims, without regard to where the products were purchased or the claimants live. This holding is a unique development, and a petition for rehearing is pending before the Oklahoma court.

In the late 1990s, several law firms filed three class actions against automobile manufacturers and dealers, including DaimlerChrysler, contending that certain minivan airbags are defective. Those cases involved allegations that the *propensity* of the airbags to deploy with undue force and in collisions at lower than appropriate speeds caused the plaintiffs economic injury in the form of reduced vehicle value. Those cases were consolidated before a federal judge in Louisiana, who in 1998 rejected each of the cases on the merits.

Rather than appealing in those cases, several of the law firms involved, as well as a three-lawyer plaintiffs' firm from Sallisaw, Oklahoma, recruited two plaintiffs, including one from Oklahoma, to serve as named plaintiffs in a new round of litigation raising the same claims as in the earlier cases. In August 2000, these lawyers filed a nationwide class action against DaimlerChrysler in Sallisaw, in Sequoyah County District Court, contending that the airbags in certain 1996 and 1997 DaimlerChrysler minivans are defective. None of the roughly one million vehicles at issue was sold in Sequoyah County. The case was assigned to Judge John Garrett, who is currently presiding over approximately one dozen other nationwide class actions involving the same tiny Sallisaw law firm.

In February 2002, the trial court certified a nationwide class as to all claims brought by the plaintiffs: breach of express warranty, breach of implied warranty of merchantability, breach of implied war-

(Continued on pg. 6)

Tort and Federal Preemption (Florida)

The Florida state court system recently closed its books on an important tort and federal preemption case, which was tried back in May through June of 1996. The litigation was first brought by the parents of John Castillo, a boy tragically born with a rare birth defect leaving him with microscopically sized eyes – a condition known as "microphthalmia." Parts of the trial were broadcast on Court TV. Castillo's parents alleged that the boy's mother was exposed to a DuPont chemical during her pregnancy with John. Specifically, they alleged that while the pregnant Mrs. Castillo was walking her infant daughter past a "u-pick" agricultural field across from a shopping center in Miami, she became interested in a tractor on the edge of the field which she saw "bucking and jerking." Testifying that she was somewhat fascinated by the sight, she eventually claimed to have voluntarily drawn closer until she became drenched with a clear spray from the tractor, as if she had been standing in the rain. The spray was alleged to have contained the DuPont fungicide Benlate – often applied to tomatoes and certain other crops after disease appears on the plants.

The jury found for the plaintiffs and awarded $4 million in damages, which it apportioned in a ratio of 99.5% against DuPont and 0.5% against the farm owner.

In addition to questioning the veracity of Mrs. Castillo's version of events (whether the spray contained Benlate, and how the plaintiff could have been exposed to it), DuPont challenged the scientific testimony on which the tort case was based. Plaintiffs retained two experts, both of whom had spent most of their professional lives at the time in Liverpool, England. Dr. Richard van Velzen, a Dutch doctor, took the cells of humans and mice, placed them into petri dishes, and then added various concentrations of Benlate. He testified to have found that the lowest level at which cell damage occurred was 20 parts per bil-

(Continued on pg. 7)

JUDICIAL INTERPRETATION AND SEPARATION OF POWERS (CALIFORNIA)

A recent California decision respecting the reach of that state's motion for reconsideration rule presented some important developments regarding the nature of judicial power. The decision offers perspectives on both the scope of judicial independence in a system of separated powers and the power of courts to "reform" legislative language in lieu of striking the offending text.

A California appellate court declined to apply the express language of a state statute that precluded motions for reconsideration, while simultaneously refusing to hold the statute unconstitutional. In 1990, the Scott Company of California filed suit for damages arising from the construction of the San Jose Convention Center. Scott named as defendants the general contractor on the project, and three sureties that issued bonds to the general contractor. Protracted litigation followed, eventually leading Scott to seek the removal of the trial judge. While Scott's removal request was pending, the sureties filed a motion for summary judgment, which the judge denied. Soon after, the trial judge voluntarily withdrew from the case, and the matter was reassigned.

Following reassignment, the sureties moved for reconsideration under the California Code of Civil Procedure. The sureties argued that the removal proceedings interfered with their ability to support their initial motion, and prohibited them from demonstrating that a provision of the California Civil Code prohibited Scott's claim. Significantly, the sureties did not argue that the substantive grounds for their motion were "new or different law" as required under Section 1008 of the California Code of Civil Procedure. Despite this deficiency, the trial court agreed with the sureties argument, granted the motion for reconsideration, and entered summary judgment against the plaintiff.

On appeal, Scott argued that the trial court lacked jurisdiction to grant the motion for reconsideration. The appellate court agreed that the sureties failed to satisfy the statutory requirements for reconsideration under Section 1008(a), because the authorities raised in the motion were not new or different law.

Scott then argued that pursuant to Section 1008(e), the trial court's ruling was impermissible. Section 1008(e), the appellate court explained, expressly provides that "[n]o application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section." Therefore, Scott asserted, because the sureties failed to comply with subsection (a), subsection (e) compelled reversal as the trial court had no jurisdiction to reconsider the motion for summary judgment.

The appellate court recognized that Section 1008(e) was intended to revise the prior practice of allowing courts to reconsider their rulings on any grounds. The appellate court concluded that given the express language of subdivision (e), "there can be no question that the legislative changes . . . were intended to make the procedural requirements of section 1008 exclusive and jurisdictional."

The appellate court then observed that California courts have the inherent power to insure the orderly administration of justice, a power that derives from the California Constitution. The court also noted that under the state constitution, the resolution of specific controversies is considered a "core" or "essential" function of the judiciary that may not be usurped by another branch. Thus, although the legislature may regulate the practices and procedures of the courts, it may not "defeat or materially impair" the essential functions of the judiciary.

Based on this reasoning, the court agreed that the jurisdictional limitation of subdivision (e) constituted an impermissible interference with the core functions of the courts. The appellate court explained that depriving a court of jurisdiction to reconsider its own rulings would create a significant impediment to fair and expeditious adjudication. The court also declined to interpret subdivision (e) as discretionary, because the provision "makes absolutely clear the intent" of the legislature to limit the courts' powers. For these reasons, the court concluded, subdivision (e) appeared to be unconstitutional.

Nonetheless, the court stated that "we believe that reformation is a viable alternative to declaring the provision unconstitutional." Using the legislature's stated intent of discouraging repetitious litigation as a guide, the appellate court reasoned that Section 1008 should be reformed to allow motions for reconsideration where judicial resources would be conserved. In this case, concluding that the trial judge lacked jurisdiction to reconsider the summary judgment motion would result in "any number of motions for judgment in various forms before, during, and after trial." Therefore, by reconsidering the motion at this "early stage" in the case, the trial court obviated the need for further litigation, and fulfilled the legislatures' intent. For these reasons, the appellate court declined to hold Section 1008 unconstitutional, and instead held that the motion for reconsideration was a proper exercise of the trial court's constitutionally independent authority.

The case is *Scott Co. of California v. United States Fidelity & Guaranty Ins. Co.*, 107 Cal. App. 4th 197 (2003).

FROM THE EDITORS…

The Federalist Society, in an effort to increase knowledge of and dialogue about state court jurisprudence, presents this second issue of State Court Docket Watch. This publication, which will be issued four times a year, is one component of the Society's State Courts Project. Docket Watch will present original research on state court jurisprudence, illustrating new trends and ground-breaking decisions in the state courts. The articles and opinions reported here will, we hope, help to focus debate on the role of state courts in developing the common law, interpreting state constitutions and statutes, and scrutinizing legislative and executive action. We hope this resource will increase the legal community's interest in more assiduously tracking state court jurisprudential trends.

This issue presents six case studies. An important class actions case from Oklahoma is highlighted in this issue, as its repercussions may extend beyond state borders. Another case from California respects judicial independence and the nature of judicial power. A decision from New York concerns changing the nature of school funding and resulting separation of powers concerns. A fourth case from Ohio concerns the application of common law doctrines to loans contingent on the outcome of pending litigation. A Florida tort and federal preemption case is also detailed. A sixth case from Texas concerns the extraterritorial application of state antitrust law.

We look forward to hearing your comments and suggestions. Please feel free to contact us at fedsoc@radix.net.

Education Policy (New York)

The New York Court of Appeals, which is the highest State Court in New York State, recently issued its decision in *Campaign for Fiscal Equity Inc. et. al. v. The State of New York, et. al*. (2003 WL 21468502). This case, with separation of powers implications, fundamentally changed the method by which schools are funded in New York.

The plaintiffs in Campaign for Fiscal Equity were suing on behalf of all school children in New York City. Their underlying concern was an allegation that while New York City had approximately 37% of the schoolchildren in New York State, its school system received only 34% of state school aid. Their main legal argument rested upon the following provision of the New York State Constitution: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." (Article 10, Section 1 of the New York State Constitution). Precedent had interpreted this clause to mean each child is entitled to a "sound basic education." Thus, plaintiffs claimed the lack of proportional State funding was violating their right to a sound basic education.

The defendants included several State agencies. Among them were the State Education Department and the State Board of Regents. They are the agencies required under the New York State Constitution to create and implement education policy.

At the trial level, 72 witnesses testified. The plaintiffs maintained that a teacher shortage, the poorer quality of teachers, classroom overcrowding, poor facility maintenance, and higher dropout rates in New York City schools were reasons why funding needed to be increased. The defendants offered testimony that well-publicized cases of corruption and financial waste in the New York City school system, union contracts giving teachers shorter workdays in New York City, recruiting problems with teachers due to inner city crime, socioeconomic factors (e.g. immigrant children arriving and not knowing any English), the state constitutional policy of local control over education, and test results that were at the national level, are good reasons for not granting a higher percentage of education funding to the City. The defendants maintained there was no violation, and that even if there was one, simply appropriating more money would not make a difference in solving many of the school district's problems.

The trial court found a "systemic failure" that amounted to a state constitutional violation, granting a judgment in favor of the plaintiffs. Upon appeal, the Supreme Court, Appellate Division reversed. The plaintiffs then appealed to the New York State Court of Appeals.

In June 2003 the bulk of the trial court decision was reinstated by a 4-1 decision. In its decision, the New York State Court of Appeals placed a gloss on substantive education policy by concluding that the constitutional right of a "sound basic education" required an ability to vote and to understand jury instructions. In so doing, the court held it was only "fixing a few signposts in the road." The court further found that what aid the political process is allocating to New York City schools is not in relation to the needs of New York City students. The court thereupon ordered the State Legislature to equalize funding.

In dissent, Justice Read stated that it was not the role of the Courts to be formulating education policy and that the state constitution did not mandate a "sound basic education." She maintained that "sound basic education" was a judicially created right. She also found no causal connection between alleged state underfunding of New York City schools and student performance there and that the remedy was well beyond the prudential bounds of the judicial function. Justice Read also speculated that the decision will provoke lawsuits for the next ten years to see if any new budget expenditures can meet the education policy established by the court.

In the *New York Times*, the Executive Director of the nationally based Great City Schools association praised this decision, stating "Here was a very prominent court on the national stage saying you cannot low-ball the quality of education for kids just because of their socioeconomic background. Most courts haven't said that." Legislators said that implementing the decision would cause enormous budget strains in the midst of a fiscal crisis, possibly pitting New York City lawmakers against their rural and suburban counterparts.

Champerty and Maintenance (Ohio)

The Supreme Court of Ohio applied the state's common law doctrines of champerty and maintenance to loans contingent on the outcome of pending litigation. In 1998, Roberta Rancman was seriously injured in a car accident. She later filed suit against the State Farm Insurance Company seeking benefits under a policy issued to her estranged husband. Rancman then contracted with the Interim Settlement Funding Corporation for an advance on the outcome of her case. Interim agreed to advance Rancman $6,000 in exchange for the first $16,800 she recovered within the following twelve months, $22,200 within the following eighteen months, or $27,600 within two years. Interim later advanced another $1,000 secured by the next $2,800 she might recover on her claim. Rancman had no obligation under the contract if the case was not resolved in her favor.

Although Rancman settled her case for $100,000 within twelve months of the advance, she refused to honor the contract with Interim. Instead, she repaid the $7,000 advance with eight percent interest per annum, and filed suit seeking recision and a declaratory judgment that Interim's sales practices were unfair. A trial court concluded the loans violated Ohio's usury law, and an intermediate court of appeals affirmed.

On appeal to the Supreme Court of Ohio, Interim defended the contracts, arguing that the advances to Rancman were investments, and thus outside the applicable usury limits. The supreme court declined to address this defense, and instead held that the advances were void as champerty and maintenance. The supreme court noted that in recent years, the state's longstanding prohibition on third-party financing of lawsuits has been largely addressed by the provisions of the state professional responsibility code regulating attorneys. Nonetheless, the court held, these regulations did not abrogate the common law doctrines of champerty and maintenance.

The court held that Interim's advancements constituted champerty by seeking to profit from Rancman's case, and constituted maintenance by purchasing a share of her suit.

The supreme court detailed at length the disincentive to settle imposed by the agreements. The court noted that because Rancman had no obligation if she failed to recover on her action, Rancman would only settle for an amount above the repayment sum, plus costs and fees. Translating this concern into dollars, the supreme court calculated that Interim's right to the first $19,600 recovered within twelve months, and attorney fees of one-third her recovery, meant that Rancman would not settle for less than $28,000. The court concluded that the contract might therefore prolong litigation in contravention of established public policy.

The case is *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217 (Ohio 2003).

Extraterriorital Application of

In a recent opinion affirming a jury verdict against The Coca-Cola Company and several Coca-Cola bottlers, the Texas Court of Appeals at Texarkana applied the Texas Free Enterprise and Antitrust Act ("TFEAA") to enjoin allegedly anticompetitive conduct in three neighboring states. Specifically, the court enjoined the defendants from engaging in a variety of marketing activities in an interstate geographic region (the "Relevant Geographic Territory") encompassing eleven counties in Texas, three counties in Oklahoma, twenty-one counties in Arkansas, and five parishes in Louisiana. The Texas court held that the promotional activities at issue clearly violated the TFEAA. This case is interesting because similar practices had been upheld under the federal antitrust laws and the competition laws of other states.

The case began when a group of carbonated soft-drink (CSD) bottlers whose products compete with Coca-Cola beverages sued the defendants in Texas trial court for restraint of trade, monopolization, and interference with existing and prospective business relationships. The plaintiffs complained that the defendants were using promotional contracts called "Calendar Marketing Agreements" (CMAs) to exclude competitors' products from valuable retail store space and to induce local retailers to promote Coca-Cola beverages over competing drinks from other manufacturers.

The more than 100 CMAs in the case were independent contracts governing specific relationships between Coca-Cola bottlers and local retailers in one or more of the four States implicated by the suit. However, all of the agreements did require Coca-Cola bottlers to provide promotional payments to retailers in exchange for preferred promotional activities including advertising, product placement, and sale pricing that favored Coca-Cola beverages. The duration of the CMAs ranged from one to several years and the majority of the contracts were terminable at will by either party. Coca-Cola's CMAs are similar to promotional agreements employed elsewhere in the beverage and other retail industries.

The plaintiffs alleged that the CMAs were anticompetitive because they did more than give retailers volume discounts for purchasing certain quantities of Coca-Cola products. The plaintiffs alleged that the agreements violated the antitrust laws because they required retailers to exclude competing products from prime shelf and floor space, restricted retailers' ability to advertise competing brands in their stores and in local media during certain times of year, and, in some cases, required retailers either to carry only Coca-Cola brands of certain drinks or to price competitors' beverages at or above the price of Coca-Cola products.

At trial, the plaintiffs presented evidence that: (1) Coca-Cola products occupied a 75 to 80 percent share of the relevant market (*i.e.*, the market for branded CSDs in sales territories occupied by the plaintiffs); (2) Coca-Cola's CMAs adversely affected the plaintiffs' distribution and sales; and (3) at least one retailer felt compelled to accept a Coca-Cola CMA that restricted its ability to promote non-Coca-Cola products it desired to sell. The plaintiffs also presented expert opinion testimony that Coca-Cola's CMAs were consistent with an attempt by a monopolist to gain control of the relevant retail distribution chain.

The defendants' countered plaintiffs' claims with (1) uncontroverted evidence that the CMAs fostered price competition in the relevant market; (2) evidence that plaintiffs' products remained available for purchase throughout the relevant market; (3) evidence that Coca-Cola continued to face vigorous competition from Pepsi products, which occupied approximately 15% of the relevant market; and (4) evidence that the defendants' conduct did not preclude the plaintiffs from offering retailers their own CMAs on terms equal to, or better than, the challenged Coca-Cola agreements.

At the close of the evidence, the jury found that the defendants had willfully violated the TFEAA by monopolizing and unreasonably restraining trade in the alleged CSD market. The jury also found that the defendants violated Texas common law by interfering with the plaintiffs' existing or prospective business relationships. Based on these verdicts, the jury awarded the plaintiffs $14.6 million in damages for lost profits and for future lost profits or franchise value.

Following a post-trial hearing, the court issued a final judgment incorporating the jury's verdict and enjoining the defendants from engaging in the challenged marketing activities with any retailer in the four-state "Relevant Geographic Territory" alleged in the complaint.

The defendants appealed the trial court's final judgment to the Sixth Court of Appeals at Texarkana. They began by challenging the trial court's injunction of conduct in neighboring States as contrary to the TFEAA and to precedents limiting the extraterritorial application of state antitrust laws. They then challenged the lower court's finding of antitrust liability on the grounds that: (1) the plaintiffs evidence proved, at most, harm to competitors, not to competition or consumers as required by Texas law; (2) the antitrust laws do not preclude even monopolists from using price cuts or other incentives, including short-term exclusive dealing contracts, to win business from rivals; and (3) the plaintiffs failed to demonstrate that the challenged CMAs harmed consumers or impaired competition to a greater extent than similar promotional practices upheld by federal and other state courts.

In a published opinion issued in July 2003, the appellate court affirmed every aspect of the trial court's judgment except its award of attorneys' fees, which it remanded for reconsideration.

The Court of Appeals began by upholding the lower court's use of the TFEAA to enjoin the defendants' marketing practices inother states. Rejecting the defendants' contention that the lower court erred in applying the TFEAA extraterritorially, the court held that the statute by its terms encompasses out-of-state activities because it applies to any trade or commerce that occurs "partly" within the state. The court then relied on this language to distinguish several precedents limiting the extraterritorial application of state antitrust laws, including a Fifth Circuit decision refusing to apply the TFEAA to conduct that occurred in California, on the grounds that those cases did not involve equally broad mandates or, in the Fifth Circuit case, out-of-state conduct that occurred "partly" within Texas.

Having affirmed the TFEAA's application to all commercial conduct occurring "partly" within the state, the court held that the defendants' marketing activities were subject to the Act and clearly affected Texas consumers. In support of this determination, the court emphasized that a number of the CMAs covered sales areas that included stores both inside and outside Texas, and that the defendants voluntarily agreed to the application of Texas law when they negotiated and executed all the challenged agreements in the state. The court then concluded that it was unnecessary to apply the other state antitrust laws invoked in the complaint because the defendants failed to allege any material difference between those laws and the TFEAA.

In conducting its extraterritoriality analysis, the court did not offer its insight as to why the absence of Texas business operations for certain of the plaintiffs was not relevant. Nor did it offer information about its assessment of the defendants' evidence that (i) some of the challenged CMAs governed retailers and operations wholly outside the state, or (ii) that only one of the more than 100 CMAs in the case contained a Texas choice of law provision. It simply rejected as untenable Coke's "position that the effects of competition appear and dissipate at state lines." It did not consider the propriety of limiting the TFEAA's application to wholly intrastate conduct or to conduct that affects primarily Texas consumers.

The court next considered the jury's finding of antitrust liability. With respect to market definition, the court held that Coca-Cola's evidence that branded CSDs compete with other beverages created, at most, a fact issue for the jury about whether the product market should be limited to branded CSDs. The court then upheld the jury's decision to so limit the market despite the plaintiffs' failure to submit market studies because the alleged market was "generally well known" and "familiar" to consumers.

On the issue of geographic market, the court held that the plaintiffs were not required to "prove" that the area in which the defendants faced competition and to which retailers could reasonably turn for supplies should be limited to the areas occupied by the plaintiffs' distributorships. Rather, the court held that the franchise territories were "readily ascertainable areas" of competition and that retailers' ability to purchase beverages from suppliers outside these areas was irrelevant absent proof that such "outside" suppliers had a "major impact" on the plaintiffs' territories.

Having defined the relevant market, the court upheld the jury's finding that the defendants' CMAs unreasonably restrained trade in that market. The court held that the plaintiffs were not required to demonstrate the requisite harmful effect on competition with specific evidence of market foreclosure because Coke's large market share was alone sufficient to demonstrate such an effect. The court acknowledged that the individual promotional tactics Coke allegedly used to achieve its market share had been upheld in other jurisdictions. But the court reasoned that these cases were distinguishable because they did not involve the same combination of marketing tactics present in Coca-Cola's CMAs.

In reaching this conclusion, the court specifically rejected a line of state and federal precedents refusing to find even exclusive dealing contracts anticompetitive where such contracts are of limited duration or terminable at will. The court acknowledged that Coca-Cola's CMAs were typically not exclusive and that they were all either of short duration or terminable at will. The court also acknowledged that other bottlers (notably Pepsi bottlers not party to the action) used similar agreements to compete in the alleged market. But the court held that these facts were not barriers to liability because: (i) the CMAs did not have to foreclose all competition in the market to violate the antitrust laws; and (ii) the defendants' use of the CMAs to increase their already large market share was sufficient to show the CMAs' adverse effects on competition as a function of consumer choice.

The court applied the same reasoning to reject the defendants' argument that the CMAs did not unreasonably restrain trade because their procompetitive benefits —most notably lower prices on bottled beverages —outweighed their adverse effect on competitors' sales. The defendants argued that, by fostering price competition among competing bottlers, tthe CMAs benefited consumers and competition in precisely the manner contemplated by the antitrust laws and that any resulting harm to Coke's competitors was a necessary consequence of, not a justification for condemning, the agreements. The court rejected this argument on the grounds that the purpose of the antitrust laws is not simply to foster price competition , but to ensure the existence of more than one real supplier of a product. Applying this theory, the court upheld the lower court's determination that Coca-Cola's CMAs presented a sufficient threat to consumer product choice to justify liability.

The court concluded its antitrust analysis by upholding the jury's verdict that the defendants unlawfully monopolized, or attempted to monopolize, the relevant CSD market. The court acknowledged that monopoly market share is unlawful only if it is willfully acquired or maintained as a result of something other than a superior product or business strategy. The court upheld the monopolization finding on the grounds that Coca-Cola used the CMAs to maintain or increase its already large market share by taking business away from rivals. But the court did not offer its insight regarding how it weighed the following issues: whether retailers' acceptance of the challenged CMAs was based on more than the superiority of Coke products or Coke's ability to offer better prices or promotional incentives than its competitors, how the challenged CMAs would preclude an equally efficient rival from competing with Coke by offering retailers the same or better promotional terms, and use by Pepsi bottlers of similar CMAs to maintain market share.

The appellate court's judgment in *Harmar* raises several important legal questions — about the purpose of modern competition laws, the importance of uniform enforcement of federal and state antitrust statutes, and the propriety of extraterritorial application of state antitrust principles — whose significance extends far beyond application of the TFEAA.

With respect to the specific marketing practices at issue in the case, the appellate court's decision is viewed by some as being in tension with three federal precedents upholding similar promotional activities, most notably the Fifth Circuit's decision in *Bayou Bottling, Inc. v. Dr Pepper Co*., 725 F.2d 300, 304 (5th Cir. 1984). The appellate court did attempt to distinguish these cases on the ground that they did not involve the same combination of marketing tactics present in *Harmar*. But there is no specific explanation of *why* the combination in *Harmar* had a more pernicious effect on competition than the practices upheld in the federal cases.

The court's absence of specific reasoning as to how Coca-Cola's combination of tactics crossed the line that separates vigorous competition (which necessarily harms competitors) from anticompetitive conduct that hurts consumers should not be overlooked because it goes directly to the purpose of antitrust enforcement. In condemning Coca-Cola's CMAs as anticompetitive, the court did not differentiate between the defendants' use of legal practices, like volume discounts or pass-through promotional payments, that foster price competition and their use of potentially anticompetitive tactics, like price matching restrictions, that may harm consumers by depriving them of the opportunity to purchase rival products at the most competitive prices. Because it does not contain this analysis, the court's opinion does not offer insights on how to distinguish the precedents upholding marketing practices similar to the CMAs or when agreements can be challenged despite their price-lowering effects.

With respect to competition policy generally, the basic tenets underlying the Texarkana court's decision are different from other reccent antitrust jurisprudence. As noted above, the court's decision to condemn the CMAs as an

(Continued on back page)

National Class Action (Continued from pg. 1)

ranty of fitness, and fraud and deceit. In response to DaimlerChrysler's argument that the laws of all fifty states and the District of Columbia would apply to the case, based on where the claimants' vehicles were purchased, Judge Garrett relied primarily on the July 2001 decision of the federal district court in Indiana in *In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation*, 155 F. Supp. 2d 1069 (S.D. Ind. 2001), where, among other things, the court certified a nationwide class action alleging similar "no injury" warranty claims based on the purported *propensity* of certain vehicles to roll over. In May 2002, the Seventh Circuit reversed that decision, holding that the laws of all fifty states would have to be applied to the breach of warranty claims. 288 F.3d 1012 (7th Cir. 2002), *cert. denied*, 123 S. Ct. 870 (2003).

On February 25, 2003, the Oklahoma Supreme Court issued its decision reversing certification of the fraud and deceit claim, but affirming certification of the nationwide class as to the various warranty claims. *Ysbrand, et al. v. DaimlerChrysler Corp., et al.*, No. 97,469, 2003 OK 17. The main issue was whether the commonality element of the class certification inquiry could be satisfied with respect to state-law warranty claims arising from vehicle purchases made throughout the country. The court rested its decision on the class action nature of the litigation, seeking to distinguish Oklahoma's "most significant relationship" test set forth in the *Restatement (Second) of Conflicts of Law*, and the *Restatement* presumption that normally the state where a purchase is made provides the governing law in warranty actions. The court also opined that the Seventh Circuit's reversal of the district court's ruling in *Bridgestone/Firestone*, upon which the trial court had relied in granting certification, was not dispositive and that the district court's analysis "remains persuasive."

The court acknowledged that "[a]ll 50 states and the District of Columbia bear some relationship to the parties and transactions in this dispute by virtue of the nationwide sales of the minivans." According to the court, "[t]he question becomes whether the relationship of each state where the vehicles were purchased is more significant to the parties and this litigation than that of Michigan, the principal place of business of DaimlerChrysler." The court focused on the fact that "Michigan is the only state where conduct relevant to all class members occurred." Further buttressing this lowest-common-denominator approach to choice of law analysis, as the court saw it, was the inconvenience caused by variations in states' laws. "The needs of the interstate system and the basic policies of predictability and uniformity of result require that the issue of product defect be determined in one forum with one result rather than in 51 jurisdictions with the very real possibility of conflicting decisions." Rejecting DaimlerChrysler's constitutional and common-law arguments, the court held that "Michigan law applies" to all warranty claims. Thus, in the court's view, there was no obstacle to class certification. DaimlerChrysler has petitioned for rehearing, arguing that the Oklahoma Supreme Court's decision is at odds with precedent under the Due Process, Commerce, and Full Faith and Credit Clauses of the United States Constitution. The parties have squared off regarding two cases--*Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981)--which hold that the Constitution requires an individualized analysis of choice of law issues that focuses on which state's law should apply to each class member's claims. The Oklahoma courts have taken an approach that identifies the jurisdiction with the most significant relationship to the *class action as a whole*, which in the case of products liability actions will generally, if not always, be the defendant's home state. Thus, there will almost always be a state with *some* contact to all class members' claims. Under Oklahoma's rule, that state's law governs *all* claims nationwide, thereby permitting a class action to proceed.

Another point of contention will be how other jurisdictions that have considered the question have rejected the "no injury" claims that the plaintiffs assert against DaimlerChrysler. Daimler has suggested that, in most states, if an alleged defect has not actually materialized and caused harm, and the product has functioned properly at all times, then there has been no cognizable injury, and no claim will lie in tort or warranty. Michigan law appears to be unsettled as to whether such "no injury" claims are cognizable, and the State of Michigan has joined as *amicus curiae* supporting DaimlerChrysler's petition for rehearing. Michigan has argued that for an Oklahoma court to apply Michigan law nationwide under these circumstances "violates basic constitutional principles of State sovereignty and comity."

For more information about the Federalist Society and previous issues of *State Court Docket Watch*, please visit the Federalist Society's web site at *http://www.fed-soc.org*.

lion ("ppb"). These studies were not published or peer-reviewed. Taking these findings several steps further, the plaintiffs' other expert, Dr. Charles Howard, testified that together with peer-reviewed rat studies, van Velzen's work showed that: (1) exposure to Benlate that resulted in maternal blood stream concentrations of 20 ppb could cause the birth defect microphthalmia; and (2) Mrs. Castillo's blood levels would have achieved that level based on crediting her testimony about her exposure and making various assumptions about how much spray from the tractor got on her skin, and how much Benlate would typically have been included in a spray containing Benlate.

DuPont attacked the qualifications of the two experts, and also assailed these conclusions on several grounds, including: (1) the petri cell experiments, being a completely artificial environment, could establish nothing about the human dosage levels needed to prove birth defect causation; (2) the rat studies involved exposure by the gavage method (force feeding of massive dosages down the rats' throats and into their stomachs), where ingestional exposure at levels as low as 20 ppb produced no effect in the rats, and birth defects in the rats only at doses one-thousand times greater or more. DuPont also defended on the ground that its product could not possibly have been deemed defective as a matter of products-liability tort law where it would have been misused if it was sprayed by the farm owner on Mrs. Castillo in the scenario alleged. The product's federally approved warning label required it to be sprayed so as to minimize drift and required other precautions that were not taken by the farmer, if one credited Mrs. Castillo's version of how she was exposed to Benlate. Finally, DuPont argued that a finding of liability was preempted by the Federal Insecticide, Fungicide, and Rodenticide Act.

A three-judge panel of the intermediate Florida appeals court unanimously reversed on February 9, 2000. *E.I. DuPont de Nemours & Co. v. Castillo ex rel. Castillo*, 748 So. 2d 1108 (Fla. 3d DCA 2000). That court held that there was no admissible evidence against DuPont that Benlate was sprayed on Mrs. Castillo while she was pregnant, and that the methods used by the plaintiffs' experts were not generally accepted in the scientific field of teratology (birth defect causation).

After the intermediate appellate decision, Dupont offered information about the plaintiffs' expert witnesses, especially about Dr. van Velzen. Dupont believed the information to be relevant because the ethical issues presented by it could be the basis for impeaching the qualifications of the experts.While both were colleagues at the Alder Hey Children's Hospital in Liverpool (collaborating on research including many of the papers they offered as the basis for their qualifications to opine about birth defect causation at trial), Dr. van Velzen had retained thousands of body parts from children on whom he had performed autopsies, including severed heads, one of which he kept on his desk. He kept them in his personal offices in the basement of the hospital. All of the organs and other body parts were taken without parental consent. The British government convened an official inquiry, which condemned van Velzen's conduct, as did several members of Parliament, from that body's floor. The official report, entitled the Royal Liverpool Children's Inquiry Report is available at *http://www.rlcinquiry.org.uk/*.

The British Report summarized its findings of wrongdoing by van Velzen as follows: "Professor van Velzen was guilty of the following activities:

- immediately upon his arrival, Professor van Velzen ordered the unethical and illegal retention of every organ in every case for the overriding purpose of research;
- falsifying records, statistics and work output;
- falsifying research applications;
- falsifying post mortem reports;
- lying to parents about his post mortem methods and findings;
- causing an unnecessary excessive, illegal and unethical build up of organs following post mortem examination, ostensibly for research but with no likelihood that the bulk of the organs stored in containers would ever be used for research
- absenting himself from clinical practice without any or proper cause."

Dr. van Velzen, who had left Liverpool for Nova Scotia in 1995, apparently brought his practices to Canada, where he ultimately pleaded guilty to the crime of committing an indignity against a human body. He had been caught storing human body parts in a private storage facility in Canada. See 2001 WL 2320795, 2001 WL 23429954.

The plaintiffs sought and obtained Florida Supreme Court review. DuPont provided information about the professional proceedings against van Velzen in Britain as supplemental evidence after the case was argued on February 5, 2001. A majority of the court held that there was sufficient evidence that Mrs. Castillo was sprayed with Benlate, upheld the admissibility of the scientific testimony of the Castillos' experts, Drs. van Velzen and Howard, and rejected DuPont's federal preemption argument. *Castillo v. E.I. DuPont de Nemours & Co*., 854 So. 2d 1264 (Fla. July 10, 2003).

The Chief Justice and one other justice dissented. The dissenters argued that the Florida Supreme Court had no jurisdiction to take the case. Unlike the United States Supreme Court, the Florida Constitution provided in relevant part that cases that did not pose legal splits of authority on some issue among lower Florida courts were not just a discretionary basis for denying state Supreme Court review, but an absolute jurisdictional prohibition on further review. The dissenters also argued that there was no competent evidence against DuPont that Mrs. Castillo was sprayed with Benlate.

The Florida Supreme Court later denied rehearing on September 4, 2003. None of the members of the Florida Supreme Court mentioned the supplemental evidence submitted regarding the plaintiffs' scientists in reversing the intermediate appellate court and reinstating a $4 million jury verdict.

ANTITRUST (CONTINUED FROM PG. 4)

unreasonable restraint of trade despite their price lowering potential was based primarily on the notion that the court had a duty to protect the existence of "more than one real supplier of a type of product." The antitrust laws do condemn conduct (such as predatory pricing) that threatens to eliminate alternate suppliers on grounds other than efficiency or product superiority. The reason is that such conduct harms consumers by eliminating legitimate competitive restraints on the defendants' price, output, or quality. The antitrust laws do not, however, prevent even a monopolist from gaining market share from a rival based on efficiency (*i.e.*, price) or product superiority. *See, e.g.*, *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *Cargill, Inc. v. Monfort of Colo., Inc.,* 479 U.S. 104, 116 (1986); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*., 509 U.S. 209, 221-23 (1993); *Virgin Atlantic Airways Ltd. v. British Airways, PLC*, 257 F.3d 256, 266-72 (2d Cir. 2002).

The Texarkana court's focus on the number of suppliers in the market irrespective of their efficiency or ability to compete appears to revive the notion, perhaps most famously expressed in the Second Circuit's 1945 decision against Alcoa, that the antitrust laws exist to protect even less efficient rivals from the competition by larger, and more efficient, market players. *See, e.g., United States v. Aluminum Co. of America*, 148 F.2d 416, 431 (2d Cir. 1945). In this respect, the Texarkana decision is in tension with other federal antitrust cases that have rejected the *Alcoa* court's approach to antitrust enforcement because it "encourages inefficient conduct" and ultimately harms consumers by preventing successful market players from engaging in vigorous competition. *E.g*., R. Posner, Antitrust Law 262-62 (2d ed. 2001) (citing a series of Supreme Court and federal appellate court decisions rejecting *Alcoa*, including the Fifth Circuit's opinion in *Bayou Bottling*).

The Texarkana court's focus on Coca-Cola's market share as evidence of its anticompetitive behavior is similarly in tension with other cases. At least two Texas cases have held that monopolists may engage in vigorous price or quality competition that harms, "if not destroy[s]," their competitors. *E.g., Caller Times Pub. Co. v. Triad Communications*, 826 S.W.2d 576 (Tex. 1992); *Cargill*, 479 U.S. at 116. The Texarkana court did not explain how the challenged CMAs allowed Coca-Cola to reduce or eliminate its competitors' market share on the basis of something other than quality or efficiency. Did the jury improperly condemn the agreements simply because they helped Coca-Cola maintain its dominant market position? This question is important because current antitrust doctrine requires courts to differentiate between aggressive competition and unlawful, anticompetitive acts, both of which adversely affect competitors but only the latter of which adversely affects consumers.

The significance of the court's antitrust determinations is amplified by its decision to apply its antitrust analysis to conduct in neighboring states. It is not clear from the court's opinion whether all the CMAs in the case governed activities occurring, in whole or in part, within Texas. Nor is it clear that the Texas legislature intended the TFEAA's protections to extend to out-of-state plaintiffs with no business operations in Texas.

The court's decision to protect non-Texas plaintiffs by enjoining commercial activity in other states raises important constitutional and prudential questions about the reach of state antitrust statutes. The court's application of the TFEAA to marketing practices in neighboring states raises Commerce Clause issues. And the court's extraterritorial application of the Texas Act should be assessed in light of federal due process precedents protecting the interest that litigants and states have in regulating local conduct.

Other states have limited the application of their antitrust laws to wholly intrastate conduct or to conduct that primarily affects in-state consumers. The Texarkana court's decision rejects this approach and, like its antitrust analysis, suggests a potential conflict with other jurisprudence encouraging interstate competition to the full extent permitted by federal law and, accordingly, a more limited approach to state antitrust enforcement.

The Texarkana court's opinion is reported at *The Coca-Cola Company et al. v. Harmar Bottling Co. et al.*, 111 S.W.3d 287 (Tex. App. – Texarkana 2003), and has been the subject of commentary in the National Law Journal and the BNA Antitrust & Trade Regulation Reporter. *See Texas Court Sustains Coke Monopoly Finding*, NATIONAL L.J., p. 14 (Aug. 4, 2003).

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