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Tort Reform Law Alert

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Significant Decisions from 2010 Affecting Consumer Litigation

In 2010, the Ohio Supreme Court has dealt with a variety of issues affecting our corporate clients that are subject to lawsuits brought by consumers. These issues span from initiating a lawsuit—including how to identify an unknown defendant in a summons and complaint, to the admissibility of evidence at trial—in particular, ruling that evidence of write-offs by medical providers is admissible. Based on the broad range of topics analyzed by the Ohio Supreme Court, perhaps it is not surprising that the Court also approved the exercise of jurisdiction of Ohio courts over non-resident defendants who reach into the state through electronic media such as internet blogs.

Despite the broad jurisdiction of Ohio courts, the Ohio Supreme Court deferred to the state legislature's rulemaking authority finding that the General Assembly intended to limit the ability of an employee to sue his employer for an intentional tort only under certain circumstances. In addition, the District Court for the Northern District of Ohio recognized that the state legislature created substantive rights under the Ohio Consumer Sales Practices Act ("OCSPA") including the right to bring a class action on behalf of consumers. Under the Northern District's interpretation of a recent U.S. Supreme Court decision, the right to bring a class action under the OCSPA cannot be modified or abridged by the application of Rule 23 of the Federal Rules of Civil Procedure.

Although a consumer's ability to bring a class action under the OCSPA is limited by the language of the statute, manufacturers should not be surprised to see an increase in consumer litigation with the launch of the Consumer Product Safety Commission's ("CPSC") electronic database of consumer reports that will be made available online in March 2011. For more information regarding the CPSC database and significant Ohio court decisions from 2010, an analysis of these topics follows.

1. Class Actions Under the Ohio Consumer Sales Practices Act

The District Court for the Northern District of Ohio recently considered the application of the U.S. Supreme Court's decision *Shady Grove Orthopedic Assoc. P.A. v. Allstate Ins. Co.*, 130 S.Ct. 1431, 176 L.E.2d 311 (2010) to the OCSPA, R.C. 1345.01 *et seq*. See *McKinney v. Bayer Corp.*, No. 10-CV-224, 2010 WL 3834327 (N.D. Ohio Sept. 30, 2010). In *Shady Grove*, the Supreme

Court held that Rule 23 preempted a New York law, which prohibited a plaintiff from bringing a class action for the recovery of a penalty or minimum statutory damages. The district court in *Shady Grove* dismissed the plaintiffs' class claim and the Second Circuit Court of Appeals affirmed because the trial court lacked jurisdiction over the suit for statutory interest—a penalty under the New York law. In a 5-4 decision, the Supreme Court reversed the appellate court's decision because the New York law conflicted with Rule 23, and Rule 23 rather than the New York law controlled the class certification issue.

In *Shady Grove*, the Supreme Court followed a two-step analysis to reach its conclusion. First, the Court considered whether Rule 23 answered the question in dispute and conflicted with the state statute. Five members of the Court, the plurality and Justice Stevens, agreed that Rule 23 answered the question of whether a plaintiff could bring suit for certain damages and was in direct, irreconcilable conflict with the state law.

The second issue the Court considered is whether the application of Rule 23 violates the Rules Enabling Act. The plurality and Justice Stevens agreed that Rule 23 did not violate the Rules Enabling Act, but they reached agreement on this point through divergent analytical routes. According to the plurality opinion, the federal rule is procedural and therefore always preempts a conflicting state law. Justice Stevens, who provided the fifth vote needed to reverse the judgment, disagreed. Justice Stevens explained that Rule 23 may violate the Rules Enabling Act when in conflict with a state statute that sets forth substantive rights and remedies. Because the state law was procedural in form, Justice Stevens agreed that Rule 23 did not violate the Rules Enabling Act and preempted the state law.

In *McKinney*, Porter Wright argued on behalf of Defendants Bayer Corporation and Bayer Pharmaceutical Company, LLC ("Bayer") that Justice Stevens's analysis is controlling and that Rule 23 does not preempt the substantive requirements of the OCSPA. The district court agreed.

Plaintiff McKinney sued Bayer for allegedly violating the OCSPA among other claims through advertisements regarding the benefits of selenium—an element of Bayer's multivitamin products, One-A-Day® Men's Health Formula® and One-A-Day® Men's 50+ Advantage®. Plaintiff sought to represent a class of Ohio consumers who purchased the multivitamin products. Under the OSCPA, a consumer can assert a class action only if the defendant has notice that its alleged violation is substantially similar to an act or practice previously declared deceptive by the Ohio Attorney General or the courts. Because Plaintiff failed to identify the rule or decision providing notice to Bayer, Bayer moved to dismiss Plaintiff's class claim under the OSCPA.

While Bayer's motion to dismiss was pending, the Supreme Court issued its *Shady Grove* decision, which controlled the issue of whether Rule 23 preempted the notice requirement for a class action brought under the OCSPA. Unlike the New York statute at issue in *Shady Grove*, the district court found the OCSPA provides substantive rights and remedies to consumers and cannot be modified by Rule 23 in violation of the Rules Enabling Act. Because Rule 23 does not preclude the OCSPA requirements for a class claim, the Court dismissed Plaintiff's OCSPA class claim for lack of notice.

The *McKinney* decision is not the only decision from the Northern District of Ohio recognizing that Rule 23 does not preempt the prerequisite for class certification found in the OCSPA. See also *In Re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litg.*, No. 1:08-WP-65000, 2010 WL2756947 (N.D. Ohio July 12, 2010). Both of these decisions are favorable to the defense bar because they recognize there are limits to class claims brought under the OCSPA, and those limits cannot be eliminated by Rule 23.

2. Employee Intentional Tort Actions

Like the district court, the Ohio Supreme Court recognized limits imposed by the state legislature on an employee's intentional tort action against his employer. See *Kaminski v. Metal & Wire Products Co.,* 125 Ohio St.3d 250, 2010-Ohio-1027. In *Kaminski*, the Court upheld R.C. 2745.01 finding the statute permissibly limited common law intentional tort actions against employers to situations where an employer **intends** to cause harm to an employee.

Sections 34 and 35 of Article II of the Ohio Constitution empower the legislature to pass laws that, respectively, provide for the "comfort, health, safety, and general welfare" of employees and that establish a state workers' compensation fund. Although the state workers' compensation fund provides employees their exclusive remedy for injuries incurred on the job, employees maintain a common law cause of action for injuries resulting from an employer's intentional conduct. In 2005, the legislature passed R.C. 2745.01, which limited employees' common law intentional tort recovery by requiring an injured employee to prove that his employer acted with the belief that injury was substantially certain to occur. Under the statute, "substantially certain means that an employer acts with the deliberate intent to cause an employee to suffer an injury."

Rose Kaminski, a press operator at Metal & Wire Products Company, filed a lawsuit against Metal & Wire following a workplace injury. She alleged that the company had committed an intentional tort against her and that R.C. 2745.01 was "in its entirety unconstitutional." The trial court granted summary judgment in favor of the employer. The court of appeals, however, agreed with Kaminski's contention that R.C. 2745.01 was unconstitutional. The court relied upon Supreme Court cases interpreting former (now repealed) versions of the employer intentional tort statute.

The Supreme Court reversed. The Court found more persuasive its past interpretation that "Section 35 does not forbid legislation that affects employees' tort recovery without affecting employees' receipt of workers' compensation." In finding R.C. 2745.01 constitutional, the Court also noted that a majority of states have enacted similar statutes that narrowly define employer intentional torts. By so doing, the legislature limits the ability of employees to circumvent the workers' compensation system and ensures that that system remains the principal means of recovery for injured workers.

3. Personal Jurisdiction Over Non-Resident Defendants

The Ohio Supreme Court issued a decision this summer that brought Ohio's personal jurisdiction jurisprudence into step with recent technological advances. See *Kauffman Racing Equipment, LLC v. Roberts*, 126 Ohio St.3d 81, 2010-Ohio-2551. In *Kauffman Racing*, the Court found that Ohio courts may exercise jurisdiction over non-resident defendants based upon allegedly defamatory statements made on the internet.

Plaintiff Kauffman Racing Equipment, LLC (KRE) is an Ohio company that constructs engine blocks and other automotive equipment. Defendant Scott Roberts is a resident of Virginia who purchased an engine block from KRE's website without ever physically entering Ohio. Roberts posted numerous criticisms of KRE on consumer websites, seeking to affect the reputation of KRE and its owner, Steve Kauffman. Kauffman personally received inquiries about Roberts' internet postings from at least five Ohio residents. KRE filed a complaint against Roberts in the Knox County Court of Common Pleas, seeking money damages for defamation and intentional interference with contracts and business relationships.

Ohio's long-arm statute, R.C. 2307.382(A), provides a list of acts by defendants that give rise to personal jurisdiction in Ohio, including:

> (3) Causing tortious injury by an act or omission in this state * * *
> (6) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state.

The Court noted that although Roberts' allegedly defamatory comments on the internet could potentially have been seen by anyone in the world, they had clearly been published in Ohio because at least five Ohioans saw the comments. Consequently, Roberts had committed the alleged tort of defamation in Ohio, placing his action within the scope of R.C. 2307.382(A)(3).

The Court further observed that although the defamatory statements were made in Virginia, Roberts made the comments with the specific purpose of causing injury to an Ohio resident. Roberts could have reasonably expected injury to KRE to occur in Ohio, where KRE is located. The requirements of R.C. 2307.382(A)(6) were

therefore satisfied as well. The Court found that granting jurisdiction over Roberts to Ohio courts comported with due process because Roberts had expressly targeted the effects of his actions at an Ohio resident.

The *Kauffman Racing* decision reveals that the personal jurisdiction of Ohio courts will not be easily overcome in light of modern technology and the ability of all persons including non-residents to reach into Ohio through the internet.

4. Identifying and Serving Unknown Defendants

While non-resident defendants who reach into Ohio through cyberspace cannot easily escape the jurisdiction of Ohio courts, neither can plaintiffs prolong the jurisdiction of Ohio courts past the time allowed by the statute of limitations by simply identifying John Doe defendants as placeholders. See *Erwin v. Bryan*, 125 Ohio St.3d 519, 2010-Ohio-2202, 929 N.E.2d 1019. In *Erwin*, the Supreme Court held that Rule 15(D) of the Ohio Rules of Civil Procedure does not permit plaintiff to amend her complaint and substitute a known defendant for a "John Doe" defendant after the statute of limitations has expired. Under Rule 15(D), a plaintiff may file a complaint against a defendant whose name is unknown to plaintiff, but the complaint must state that plaintiff has not been able to discover the name of the defendant, the summons must contain the words "unknown name," and the summons and complaint must be served on the defendant despite the unknown name of the defendant.

During discovery, the plaintiff in *Erwin* learned that an additional doctor and his practice might have been responsible for the death of plaintiff's husband. The trial court allowed plaintiff to amend her complaint for wrongful death and substitute the newly discovered doctor and his practice for John Doe individual defendant and John Doe medical practice. After allowing this amendment, the trial court awarded summary judgment to the newly-added doctor and his practice finding plaintiff's claims against them were barred by the two-year statute of limitations. On appeal, the Fifth District Court of Appeals reversed finding that a defendant who is unaware of the culpability of a person or entity at the time of filing the complaint may designate a defendant by a fictitious name under Rule 15(D) until the name of the defendant becomes known.

The Supreme Court reversed the appellate court's decision recognizing that allowing plaintiffs to use fictitious names as placeholders for unidentified defendants would abrogate the statute of limitations. The plaintiff in *Erwin* knew the names of the doctors who treated her husband but failed to sufficiently investigate her potential claims, identify, and serve them with the summons and complaint before the statute of limitations expired. Because plaintiff did not comply with Rule 15(D), her amended complaint against the newly-added defendants did not relate back to the date of the original complaint and was time-barred.

Based on this decision, the plaintiffs' bar should be leery to designate fictitious names as defendants in a complaint without performing due diligence sufficient to at least identify the defendant and provide a proper address for service. Likewise, where a plaintiff attempts to substitute a defendant for a fictitious name after the statute of limitations has expired, defense counsel should carefully analyze whether plaintiff has met the requirements of Rule 15(D).

5. The Admissibility of Write-Off Evidence

Finally, in 2010, the Ohio Supreme Court also considered whether evidence of write-offs by medical providers is admissible at trial. See *Jacques v. Manton*, 125 Ohio St.3d 342, 2010-Ohio-1838. Despite the common law and statutory rules concerning collateral sources, evidence of medical write-offs is admissible to prove the amount of actual compensatory damages.

Richard Jacques was injured in an automobile accident and was billed $21,874.80 for the medical services related to his treatment. Pursuant to agreements with the medical providers, however, Jacques' insurance carrier only paid $7,483.91 on his behalf. At trial, the defendant sought to introduce evidence of the more than $14,000 in write-offs by the medical providers. The trial court precluded the evidence and a jury awarded Jacques $25,000 in damages. The court of appeals affirmed.

At common law, evidence of payments to a plaintiff from a source other than the defendant, such as an insurance carrier, was inadmissible at trial. The "collateral source rule" prevented the defendant from benefitting from third-party payments to the plaintiff. The Court, however, had recognized that "because no one pays a write-off, it cannot possibly constitute *payment* of any benefit from a collateral source" and had thus permitted evidence of such write-offs to be introduced at trial.

The legislature largely abrogated the common law rule in 2004 by enacting R.C. 2315.20 which provides:

> In any tort action, the defendant may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the damages that result from an injury, death, or loss to person or property that is the subject of the claim upon which the action is based, except if the source of collateral benefits has * * * a contractual right of subrogation * * *

The issue in *Jacques* was whether R.C. 2315.20 also applied to write-offs. The Court found that it did not, observing that both the common law and statutory versions of the collateral source rule were concerned with actual payments made by third parties for the benefit of the plaintiff. The statute aimed to prevent a double-payment windfall for the plaintiff. Write-offs, in contrast, are amounts *not* paid by third parties. Therefore, neither the common law rule nor the statute regarding collateral sources preclude the admission of evidence concerning write-offs. Admitting such evidence allows a jury to determine the actual amount of medical expenses incurred by the injured plaintiff.

6. Internet Database of Consumer Reports to the Consumer Product Safety Commission

Beginning in March of 2011, incident reports filed by consumers with the Consumer Product Safety Commission (CPSC) will be made publicly available in a searchable online database at www.saferproducts.gov. Members of the public currently can access this information by making a request for the reports under the Freedom of Information Act. The Consumer Product Safety Information Act of 2008 (CPSIA), however, mandated that the CPSC establish a database of such reports that was searchable and readily accessible to the public. Consumers will be able to file reports online, as well as by telephone and postal mail.

Although the CPSC will investigate incident reports and will not post materially inaccurate information on the database, the website will contain a disclaimer stating that the CPSC cannot ensure the accuracy or completeness of the reports. The CPSIA requires that reports be transmitted to the manufacturer of the product in question within five days of being filed. Manufacturers will then have an opportunity to comment on the report and those comments will be posted on the database along with the report. Most reports will appear on the database within fifteen days of being filed.

Because consumer reports, even those of questionable accuracy, will soon be more readily available to the public, more consumer complaints are likely to follow. Manufacturers should take time to review those reports and respond as appropriate to avoid misperceptions about their product but also with an eye toward potential litigation.