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Fraud class actions: Ninth Circuit vacates $24 million class judgment on standing and predominance grounds

by James F. Bogan III

Takeaway: Class actions present significant risk, because a certified class exposes a class defendant to class-wide liability. Most defendants agree to settle rather than face the risk of a class verdict. But sometimes a class defendant will roll the dice, hoping it will prevail either at trial or on appeal. In a recent case, *Bahamas Surgery Center, LLC v. Kimberly-Clark Corporation*, --- Fed.Appx. ---, Nos. 18-55478, No. 18-55483, & No. 18-55558, 2020 WL 4218313 (9th Cir. July 23, 2020), the class defendants did just that. Although the district court entered judgment against the class defendants in the amount of $24 million, they were ultimately saved on appeal by a split panel of the Ninth Circuit Court of Appeals.

By way of background, Bahamas Surgery Center, LLC (Bahamas), sued Kimberly-Clark Corporation (KC) and Halyard Health, Inc. (Halyard), for fraud, asserting that KC and Halyard misrepresented the efficacy of surgical gowns in terms of blocking the spread of pathogens. Bahamas presented evidence that the surgical gowns had been labeled as compliant with a specific standard going to that efficacy – the Association for the Advancement of Medical Instrumentation (AAMI) Liquid Barrier Level 4 standard – when in fact the gowns did not meet that standard.

In a case tried in the Central District of California, a jury agreed that the class defendants had defrauded the class and awarded the class compensatory and punitive damages in the whopping amount of $450 million. But the district court later substantially reduced that award, entering judgment in the amount of $24 million. See *Bahamas Surgery Ctr., LLC v. Kimberly-Clark Corp*., et al., No. 14-8390-DMG (PLAx), Am. Order re Defs.' Mot. for a New Trial, Remittitur, or Amendment of J., etc., Dkt. 577 (C.D. Cal. Apr. 11, 2018). Both Halyard and KC appealed, prevailing on separate grounds.

The panel agreed with Halyard that Bahamas lacked standing to pursue either individual or class claims against Halyard, given that Bahamas did not purchase any surgical gowns from Halyard. According to the panel, "[e]ven if other class members have valid claims against Halyard, that cannot retroactively cure the district court's improper certification of a class wherein the named plaintiff (Bahamas) lacked standing to pursue those claims." 2020 WL 4218313, at *1.

The panel agreed with KC that the district court abused its discretion by refusing the decertify the "fraudulent concealment class" that prevailed at trial. In most of the purchases by the class, the AAMI rating was not displayed on the packaging. In those transactions, according to the majority, there was "no evidence that a reasonable person would attach importance to AAMI test failures." *Id.* at *2. Moreover, the evidence on which the district court relied (to demonstrate the essential fraud element of materiality under California law) "applied only to the subset of transactions in which class purchasers had seen representations about the Gowns' AAMI rating." *Id.* The majority concluded: "Because the record does not support the conclusion that common questions regarding the materiality of the omissions predominated in the defined class, the district court abused its discretion in failing to

decertify the class." *Id.*

Judge Fletcher concurred in part and dissented in part, concluding that he would have affirmed the judgment against KC. *Id.* at *2 (Fletcher, J., concurring in part and dissenting in part). According to Judge Fletcher, California law does not require a fraud plaintiff to be exposed to a fraudulent representation to succeed on a claim of fraudulent *concealment*. In Judge Fletcher's view, "[t]he trial record contains ample evidence from which a reasonable juror could have found, as the jury found here, that a reasonable purchaser of the surgical gowns in question would have considered it important that the gowns had failed industry-standard strike-through tests." *Id.*

The panel vacated the judgment, remanding with instructions that the claims against Halyard be dismissed, and remanding for further proceedings against KC, presumably to adjudicate claims against KC on an individual and not a class basis. So the defendants' gamble paid off, although the odds may have been longer had they drawn a different panel.