

Philadelphia Report



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Class Action

Decertifying Neurontin class action

Philadelphia Court of Common Pleas recently issued an important opinion decertifying class claims arising from the prescription medication Neurontin. In the same opinion, the court also granted summary judgment on plaintiffs' class claims for breach of express warranty.¹

Neurontin was developed and approved by the Food and Drug Administration ("FDA") in 1993 for use as an anti-convulsant for people who have epileptic seizures. The FDA also approved Neurontin for use to manage pain after a herpes zoster skin rash outbreak. Neurontin has been the subject of litigation nationwide after it was alleged that employees of Warner-Lambert, now

a Pfizer subsidiary,² had marketed Neurontin for a variety of other non-FDA approved uses, called off-label uses, including bipolar disorder and nerve-related pain. Although physicians may prescribe a medication for off-label use, federal law prohibits a drug company from promoting off-label uses of an approved medication. In 1995 and 1996, Warner-Lambert was charged in a criminal case in a Massachusetts federal court with violations of the law relating to off-label promotion and entered into a plea agreement under which it pled guilty to two specific offenses and agreed to pay a \$240 million fine.

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City Ordinance

Leave required for victims of domestic or sexual violence

New Philadelphia Ordinance Takes Effect

On January 5, 2009, a new Philadelphia ordinance took effect requiring city employers to provide unpaid leave to employees needing time off for reasons related to sexual or domestic violence. This ordinance, known as the "Entitlement to Leave Due to Domestic or Sexual Violence," was opposed by employers

who viewed it as overbroad, yet lauded by victims' rights organizations.

The ordinance requires city employers with 50 or more employees to provide up to 8 workweeks of unpaid leave to eligible employees. Employers with less than 50 employees are required to provide up to four workweeks of unpaid leave. This leave can be

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Class Action

(continued)

The Pennsylvania Neurontin class action began when Gregory Clark claimed that he was prescribed Neurontin in 2003 for post-surgical knee pain as a direct result of defendant manufacturers' marketing tactics. According to plaintiffs in *Clark*, Neurontin was deliberately and unlawfully marketed by the defendant manufacturers, Pfizer and Warner-Lambert, for non-FDA approved uses including various pain syndromes and neuropathies and for doses above the maximum approved dosage.

In June 2007, Philadelphia Common Pleas Judge Mark I. Bernstein certified a class in *Clark* defined as all persons who purchased Neurontin in Pennsylvania "for personal family or household purposes from 1995 to the present other than for the treatment of partial seizures associated with epilepsy (as adjunctive therapy) or for the management of post-herpetic neuralgia (pain associated with herpes zoster skin rash outbreaks)."

In its most recent opinion, however, the court entered summary judgment on some of the central claims in the case and

decided that the remaining claims could not proceed as a class action.

The *Clark* plaintiffs had made class claims seeking a refund of all non-insured payments by consumers under theories of breach of express warranty under the Pennsylvania Uniform Trade Practices and Consumer Protection Law ("UTPCPL"), misrepresentation, negligence and negligence *per se*. The UTPCPL defines an express warranty as "any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain...." 13 Pa. C.S. § 2312. The focus of a UTPCPL express warranty claim is on whether the alleged warranty has become part of the "basis of the bargain." In its recent opinion, the court concluded that there was no evidence of record that plaintiffs saw or heard or in any way received any warranties that Neurontin could be used in circumstances not approved by the FDA. The court further concluded that as a matter of law "[t]he alleged fraud on the medical profession which is the essence of plaintiffs' claims does not create any warranty." The court granted summary judgment in favor of defendants on the express warranty claim.

Plaintiffs' remaining class claims sounded in tort. The court concluded that some class members had suffered no injury and that some patients who were prescribed Neurontin for off-label use received a medical benefit. Without specifying the rationale of its decision, the court granted summary judgment as to class members who benefited from prescribed off-label uses of Neurontin and denied summary judgment as to class members who received no benefit from off-label uses of Neurontin.

Having ruled on certain class issues as a matter of law, the court then granted a motion for decertification, finding that individual questions of fact now predominate as to which class members benefited from the use of Neurontin and whether an individual class member suffered a compensable loss, making the case wholly unsuitable for class resolution.

Endnotes:

¹ For a copy of the Court's opinion, see *Clark v. Pfizer Inc. et al.*, June Term 2004, No. 1819 (Slip Op. Feb. 9, 2009).

² Pfizer acquired Warner-Lambert in 2000.

City Ordinance (continued)

taken on an intermittent basis and can be taken during any 12-month period.

Unpaid leave under this ordinance may not be in addition to the 12 weeks afforded under the Family and Medical Leave Act ("FMLA"). For example, if an employee entitled to eight weeks leave under this ordinance has taken more than four weeks of FMLA leave, then any leave under this ordinance will be reduced so as not to exceed 12 weeks of total unpaid leave. However, unlike the FMLA, leave under this ordinance is available from the inception of employment, without any minimum length of employment required.

Who Is Eligible

An employee who is a victim of "domestic or sexual violence" or who has a "family or household member" who is a victim of domestic or sexual violence is eligible for leave. "Domestic or sexual violence" encompasses stalking, attempted or actual infliction of bodily injury, rape, sexual assault, indecent assault, incest, false

imprisonment, physical or sexual abuse of minor children, and sexual exploitation of children. "Family or household members" is broadly defined to include present and former spouses, parents, children, current or former sexual partners, persons who share the same biological parenthood and other persons related by blood.

Eligible employees can take unpaid leave to:

- Seek medical attention for physical or psychological injuries;
- Obtain services from a victim services organization;
- Obtain counseling;
- Participate in safety planning, such as relocating, or take actions related to "economic security;"
- Seek legal assistance, including preparing or participating in any legal proceeding related to or derived from domestic or sexual violence.

Employer Entitled to Notice and Certification

Employees taking leave must provide their employer with at least 48 hours' advance notice of the intent to take leave, unless such notice is not practicable. If an unscheduled absence occurs, the employer may not take adverse action against the employee if, within a reasonable period after the absence, the employee provides the employer with a certification.

Certification required is essentially written proof that the employee or the employee's household or family member is a victim of domestic or sexual violence. It can take the form of an employee's sworn statement *and* one of the following: (1) documentation from an employee, agent or volunteer of a victim services organization, an attorney, a clergy member, a medical or other professional from whom the employee or the employee's family or household member has sought assistance in

Arbitration

Ensuring a timely appeal from an arbitration award

Anne's attorney, Bob, carefully reviewed an arbitration agreement for his client, Anne, before she invested more than \$200,000 in a mutual fund. Bob had heard that big companies inserted arbitration provisions into their customer agreements to preclude their customers from any shot at justice when the big company breached the agreement. Not so this time. Yes, the agreement said that Anne gave up her right to a jury trial. But that was okay with Bob. He liked arbitration because he knew it could be a less-costly and more-expeditious alternative to litigation.

After Anne's investment was virtually wiped out – the mutual fund company invested the bulk of Anne's monies in a company called Bear Stearns a couple of months ago – Bob filed an arbitration demand against the mutual fund company, asserting negligence, fraud and a host of other interesting common law claims. The arbitration process did not cost a lot and lasted a mere three months from the filing of the arbitration demand to the arbitrator's decision. Um, Anne lost on every aspect of every claim.

But that was not the end of the matter. Bob prepared a well-researched petition to vacate the award. Reason: the arbitrator slept through most of the hearing. Bob's compelling brief cited a recent decision in which a trial court granted a petition to vacate an arbitration award because the arbitrator "fell asleep intermittently throughout both days of the hearing, which included sleeping during the testimony of several witnesses." *A. Perrotta Contracting Inc. v. Four Brothers*, 2 Pa. D. & C. 5th 225, 226 (C.P. 2007).

Anne's arbitration hearing lasted one day, not two. However, the arbitrator slept more than just intermittently; he slept all afternoon. Bob concluded that he had a winner. He told Anne that, after the court overturns the arbitration award, she would have a second bite at the apple, in a brand new hearing. The brand new arbitrator would be awake and alert, especially when Bob presented lots of Power Point slides in support of Anne's claims.

Bob appropriately filed Anne's petition in state court, not federal court, because

there was no federal question or diversity of citizenship. Going into state court delighted Bob because he believed that a judge there would sympathize with Anne.

Bob correctly recognized that the Federal Arbitration Act ("FAA"), 9 U.S.C. § 9 *et seq.*, governs because Anne had filed her claims under National Association of Securities Dealers ("NASD") rules. As Bob properly concluded, the FAA has a three-month time limit to file a petition to overturn an arbitration award. Bob made sure he timely filed the petition by filing it on the 87th day after the sleepy arbitrator's award.

Less than a week later, Bob received an envelope from the court. Rather soon, he thought, for an order vacating the arbitration award, particularly because the mutual fund had yet to file its response to Bob's petition. Had he filed the petition in the wrong office? Had he forgotten to attach a required document to the petition? Bob collapsed into the nearest chair when he read the order, which said all too simply, "upon consideration of petitioner's petition to vacate arbitration award and without awaiting respondent's response, the court *sua sponte* dismisses the petition as untimely."

Surely, Bob thought, the court was mistaken. After all, the arbitration agreement between Anne and the mutual fund company stated that the parties had contracted to arbitrate their claims under the FAA, which has a three-month time limit to seek to vacate an arbitration award. If a different time limit did apply, the time to challenge an arbitration award would vary, based on the procedural law of the state where the petition was filed. Talk about a lack of uniformity – parties seeking to challenge arbitration awards subject to NASD rules would have different time limits to file their petitions; the time limit would depend on the law of the state where the party filed the petition.

After spending a few minutes doing legal research, Bob was surprised to find that a recent Pennsylvania Supreme Court decision, *Moscattello v. Hilliard*, 939 A.2d 325 (Pa. 2007), demonstrated that he had it all wrong. Here is what the Pennsylvania Supreme Court said:

- Pennsylvania has a 30-day time limit to seek to overturn an arbitration award. This time limit applies in both common law arbitration, 42 Pa. CONS. STAT. ANN. § 7314(b), and statutory arbitration, *id.* at § 7342(b).
- Federal law preempts conflicting state law only if the latter "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."
- The 30-day limit in Pennsylvania to contest an arbitration award – a procedural rule – does not undermine federal policy. Therefore, the FAA does not preempt state law on the issue of the time limit to challenge an arbitration award.
- The Pennsylvania 30-day time limit governs because "it more quickly renders arbitration awards final."

As he drafted a letter to his malpractice carrier – he wanted to ensure that he timely informed his carrier of Anne's to-be-filed malpractice claim – Bob summarized his strategy for the next time he loses an arbitration claim subject to the NASD:

- Read the arbitration agreement to determine the governing law.
- Don't pay any attention to the preceding rule if you seek to overturn an arbitration award and you have to figure out whether federal or state procedural rules apply.
- Apply the applicable state procedural rule if you file your petition in state court. Apply the applicable federal procedural rule if you file your petition in federal court.
- Don't pay any attention to the preceding rule if the state procedural rule "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Do pay attention to the preceding rule if the state procedural rule does not "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," especially if application of the state procedural rule would better reach the result that the FAA's rules sought to achieve.

Got it?

This article previously appeared in The Legal Intelligencer.

Court of Common Pleas

Judicial assignment changes

The following judicial assignment changes in the Philadelphia Court of Common Pleas became effective as of January 5, 2009.

Complex Litigation Center – Honorable Sandra Mazer Moss

Judge Moss has returned as Coordinating Judge of the Complex Litigation Center, the court's mass torts program, which had been formerly headed by Judge Allan L. Tereshko since 2001. Judge Moss helped designed the mass tort program in the early 1990s when she was the asbestos calendar judge during period of time when former Supreme Court Justice Ralph J. Cappy served as the court's liaison to the First Judicial District. Judge Moss will continue to preside in Courtroom 653 City Hall.

2009 Day Forward Major Jury Program – Honorable Jacqueline F. Allen

Judge Allen has been assigned as team leader of the 2009 Day Forward Major Jury Program. Judge Allen will continue to preside in Courtroom 480 City Hall.

2006 Day Forward Major Jury Program – Honorable Allan L. Tereshko

Judge Tereshko has switched places with Judge Moss as the team leader of the 2006 Day Forward Major Jury Program. Judge Tereshko will also be the team leader for civil cases initiated prior to 2006 and will continue to preside in Courtroom 243 City Hall.

City Ordinance

(continued)

addressing the violence or its effects; (2) a police or court record; or (3) "other corroborating evidence."

All information provided to the employer must be kept in strict confidence. Disclosure of this information is permitted only if requested or consented to in writing by the employee, or as otherwise required by applicable law.

The Employer's Obligations

An employer shall not discharge, discriminate or retaliate against an employee because he or she has exercised rights under this ordinance. Upon return from leave, an employer must restore the employee to the same or equivalent position held prior to taking leave, with equivalent pay, benefits and conditions of employment.

Employers are required to maintain existing health coverage for employees while on leave. Premiums paid for maintaining this health coverage may be recovered if the employee does not return from leave for reasons unrelated to the continuation, recurrence or onset of domestic or sexual violence which triggered the entitlement to leave.

Information about the leave must be posted in a conspicuous place where notices to employees are customarily posted. Posters must be prepared or approved by the Philadelphia Human Relations Commission and are available on its website at www.phila.gov/humanrelations/.

Superior Court

Clarifying a party's right to four peremptory challenges

The Pennsylvania Superior Court in *Bednar et al. v. Dana Corp.*, 2008 PA Super 283 (2008) recently clarified that the four peremptory challenges allocated to each party in a civil trial pursuant to Rule 221 of the Pennsylvania Rules of Civil Procedure are not dependent on the number of jurors. The Superior Court reversed the trial court's ruling that limited each side to three peremptory challenges because the case was tried before a jury of eight jurors. Concluding that Rule 221 unambiguously allowed four peremptory challenges

regardless of the size of the jury to be impaneled, the Superior Court remanded the case for a new trial. In Pennsylvania, the denial or impairment of the right to exercise peremptory challenges is reversible error that does not require a showing of prejudice; however, the Superior Court concluded that to the extent such a showing of prejudice was necessary to warrant a new trial, such prejudice arose from the denial of the appellant's proscribed procedural right.

Contributors to This Issue

Ellen D. Bailey
ebailey@eckertseamans.com

Charles F. Forer
cforer@eckertseamans.com

Albert G. Bixler
abixler@eckertseamans.com

Elizabeth S. Gallard
egallard@eckertseamans.com

Maureen P. Fitzgerald
mfitzgerald@eckertseamans.com

Rachel Castillo Rosser
rrosser@eckertseamans.com

Contacts

Business Litigation
Mitchell L. Bach
mbach@eckertseamans.com

Mass Tort/Class Action
Albert G. Bixler
abixler@eckertseamans.com

Product Liability/Civil Litigation
Edward A. Gray
egrays@eckertseamans.com
Dennis P. Ziemba
dziemba@eckertseamans.com

Mediation/ADR
Charles F. Forer
cforer@eckertseamans.com

**ECKERT
SEAMANS**

Philadelphia, PA
215.851.8400

Boston, MA
617.342.6800

Charleston, WV
304.346.5500

Harrisburg, PA
717.237.6000

Pittsburgh, PA
412.566.6000

Southpointe, PA
724.873.2870

Washington, DC
202.659.6600

West Chester, PA
610.738.8850

White Plains, NY
914.949.2909

Wilmington, DE
302.425.0430