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Departure from Established Tort Theories Inappropriate for Breast Implant Litigation

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Liquidated damages provision held invalid

Having decided to apply § 1671(d), the court next laid out the test for when liquidated damages are valid under this subdivision. This test consists of two elements which must be satisfied. First, it must have been "impracticable or extremely difficult to fix the actual damage." Civil Code § 1671(d). Second, the amount of the damages "must represent the results of a reasonable endeavor by the parties to estimate a fair average compensation for any loss that may be sustained." *Garrett v. Coast & Southern Fed. Sav. & Loan Assn.*, 511 P.2d 1197 (Cal. 1973). If either of these elements is not met, the liquidated damages provision is void, and the breaching party is liable only for the actual damages which result from the breach.

The court first looked at the "reasonable endeavor" test. The court again cited to the *Garrett* decision, which says that a court must look to a party's motivation and purpose in imposing the liquidated damages. While the Bank argued that its purpose was merely to recoup its cost, there was much evidence at trial which indicated that the Bank intended to generate profits through its late and overlimit fees, profits designed to exceed the actual damages suffered. The court of appeal held that the trial court had adequately weighed the evidence on this issue, and refused to question the trial court's decision that the Bank's motivation was to generate profits above and beyond its actual loss.

In making its decision that the Bank had not made a reasonable endeavor to estimate loss, the trial court was persuaded by the fact that the Bank had undertaken no form of analysis to determine its potential losses from a breach. The Bank argued that this represented error, because the law does not require a formal analysis or cost study. The court of appeal found no error, explaining that the trial court had not required a cost study per se, merely "some form of analysis." The court supported this requirement by the trial court, stating that an estimate of loss "cannot occur without some sort of analysis of the loss that is to be compensated."

As the court of appeal found no error in the trial court's ruling on the "reasonable endeavor" issue, it did not examine the impracticability issue. Because the Bank did not make a reasonable endeavor to estimate the loss resulting from a breach, the court affirmed the ruling that the liquidated damages provision in the credit card agreement was void under §1671(d). The court thus upheld that portion of the plaintiffs' judgment which represented the fees collected as liquidated damages.

Case closes a chapter in credit card fee litigation

In sum, the California Court of Appeal reduced the $13,971,830 judgment for the plaintiffs by $9,076,304, which represented the Bank's actual damages. Nevertheless, the court upheld the remaining $4,895,526 of the judgment, representing invalid liquidated damages that the Bank assessed upon the plaintiffs in the form of late and overlimit fees for their breach of the credit card agreement. However, the court noted in conclusion that new legislation expressly permits credit card issuers to impose late and overlimit fees of certain amounts. Fin.Code, § 4001, subd. (a). Thus, this case "appears to close a chapter in credit card fee litigation."

Departure from established tort theories inappropriate for breast implant litigation

by Dana Shannon

The court in ***In re New York State Silicone Breast Implant Litigation*, 631 N.Y.S. 2d 491, 166 Misc. 2d 85 (1995)**, held that the plaintiffs' claim for market share liability is inapplicable to breast implants since manufacturers are generally ascertainable, and all manufacturers' products are not identical. Additionally, the court held that the plaintiffs' claim for concert of action liability is inappro-

priate since no evidence exists that the manufacturers agreed to commit a tort or acted to further an agreement to commit a tortious act. Accordingly, the court granted the defendants' motion to dismiss the portions of the plaintiffs' complaint seeking market share and concert of action liability.

The plaintiffs, whom allegedly suffered damages due to silicone breast implants ("implants"), sued assorted manufacturers of the implants and silicone gel manufacturers (collectively, "the defendants"). Plaintiffs contend that the implanted prostheses caused various physical maladies. Although the complaint contained a variety of claims, the instant case concerned only the motion to dismiss plaintiffs' market share and concert of action theories.

Market share liability hinges on fungibility of product and inability to identify the manufacturer

The court noted that both market share liability, which results in several liability, and concert of action liability, which establishes joint and several liability, deviate from established tort law and are used sparingly by the courts. Turning its focus on market share liability, the court noted that market share liability first appeared in *Sindell v. Abbott Labs*, 607 P.2d 924 (Cal. 1984), a case involving diethylstilbestrol ("DES"), a synthetic hormone. In *Sindell*, several defendants acted identically, thus any one of them might have caused the plaintiff's harm. The court remarked that *Sindell* approved market share liability based on several factors, including the desire that a wrongdoer bear the cost of injury rather than an innocent plaintiff whose suit would be dismissed due to her inability to identify a particular manufacturer.

The court similarly referred to the first New York case allowing market share liability, *Hymowitz v. Eli Lilly and Co.*, 539 N.E.2d 1069 (N.Y. 1989). *Hymowitz*, the court noted, involved mass litigation over DES, and *Hymowitz*, like *Sindell*, turned on the identicality of the product, the generic marketing, and the resulting inability of the plaintiffs to identify the particular manufacturer responsible for the injurious drug.

Next, the court considered the use of market share liability outside the DES context. The court again emphasized the extreme rarity with which courts allow market share liability actions to proceed. The overriding reason courts reject market share theories, the court noted, is that the product at issue is not fungible.

Turning to the issue before them, the court found that breast implants are not fungible products, and that implant manufacturers are identifiable. Specifically, the court found:

> "[t]here are differences in the design and composition of the implants; the warning inserts in each of the products vary; and the products are not generically marketed. Most importantly, the majority of women involved in the breast implant litigation have been able to identify all or some of the manufacturers of their implants."

In addition, the court noted that manufacturers market under specific manufacturer names. Recalling that *Hymowitz* found market share liability necessary in the context of an identical generically marketed product, the court found breast implants distinguishable. The court dismissed plaintiffs' claim for market share liability, noting that in the realm of implants such a sharp deviation from traditional tort theories is unwarranted.

Concert of action liability requires an agreement to commit a tortious act

Next, the court evaluated plaintiffs' claim for concert of action liability. Plaintiffs asserted that the defendants' statements to governmental agencies and the defendants' product marketing made a concert of action theory appropriate. Specifically, the plaintiffs claimed that the defendants met to prepare implantation standards and devise responses to both the FDA and a Congressional subcommittee charged with evaluating implants. In addition, the plaintiffs argued that all of the manufacturers depended upon early silicone research by the same chemical company, then marketed the product before it underwent sufficient testing, thereby hiding or distorting known risks.

The court noted that

concert of action liability results from an express or tacit understanding of a common agreement among all defendants to carry out a tortious act. Furthermore, each defendant must have committed a tort, and at least one defendant must have committed a tortious act stemming from the agreement among the defendants. However, mere parallel activity among the defendants, such as in marketing and product development, the court noted, fails to prove the agreement required to maintain a concert of action theory. The court found that the plaintiffs' reliance on the defendants' marketing methods and statements to governmental entities were misplaced. The court found that the defendants' activities were parallel and therefore precisely the type of activities that fail to establish concert of action liability. Furthermore, the court noted that the plaintiffs made no showing of an express or tacit agreement to carry out a tort, nor had proof surfaced of any action taken pursuant to such an agreement. Thus, the court dismissed plaintiffs' claim based on a concert of action theory.

State law preempts Housing Authority's lease provision

by Jane Cady

In ***Doe v. Portland Housing Authority*, 656 A.2d 1200 (Me. 1995)**, the Supreme Court of Maine denied a request to invalidate a provision contained within a Portland Housing Authority ("PHA") lease. The lease provision banned the possession of all firearms on leased premises. The court held that Maine law preempted the PHA regulation because the state law overrode the PHA lease clause. Me. Rev. Stat. Ann., tit. 25, § 2011 (West 1994). Because of the preemption, the court found it unnecessary to explore any of the constitutional issues raised by the appellants.

The appellants, Jane and John Doe, were both skilled and licensed gun users who possessed firearms in their PHA residence. They contended the PHA lease violated several of their constitutional rights, including the right to bear arms, the right to defend life and liberty, and equal protection of the laws. The trial court held the lease provision did not violate these constitutional guarantees. Additionally, the trial court found state law did not preempt the PHA ban on firearms. Therefore, the court upheld the lease provision and denied the Does' request.

PHA qualifies as a political subdivision

The Supreme Court of Maine decided if the PHA qualified as a political subdivision within the meaning of Me. Rev. Stat. Ann., tit. 25, § 2011 (West 1994), it was not necessary to examine the constitutional issues raised by the appellants. State law preempts regulations of its constituents' political units if there is an expressed intent to do so. Thus, if PHA is a political subdivision, title 25, section 2011 of the Maine Code preempts its firearm regulation.

The PHA contended there is no preemption because only orders, ordinances, rules, and regulations of political subdivisions are affected. The PHA argued it is not a political subdivision because it is not specifically enumerated in the statute. Secondly, the purpose of title 25, section 2011 of the Maine Code is to make firearm regulations uniform so that hunters traveling through Maine will not be subjected to different regulations when they cross town lines. Therefore, the PHA claimed that the legislature had no intent to preempt the PHA lease.

The statute is not clear on its face whether the PHA is a political subdivision. The PHA is neither defined within the statute nor specifically named as one of the enumerated examples. However, the statute makes it clear that the enumerated agencies are only examples and the list is nonexclusive. Therefore, the Maine Supreme Court turned to the legislative history to assist in the interpretation of the statute.