

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2008

PHILADELPHIA, MONDAY, JANUARY 14, 2008

VOL 237 • NO. 9 \$3.00

ALM

Opening Remarks Made In Contract Breach Case Against Morgan Lewis

BY GINA PASSARELLA
Of the Legal Staff

Water filtration company Puro-lite and its owners Stefan and Don Brodie hired Morgan Lewis & Bockius more than 20 years ago to help grow their burgeoning business overseas because it was one of the largest firms in the world.

But the firm's alleged advice to the U.S.-based company in 1993 to continue to sell to a Cuban business put the Brodies in unfriendly waters of their own, according to their attorney in opening remarks Friday.

Marc E. Kasowitz of Kasowitz Benson Torres & Friedman in New York is representing the Brodies and Puro-lite in a breach of contract claim against Morgan Lewis after

Opening Remarks continues on 9

INSIDE THE LEGAL

www.thelegalintelligencer.com

9 Recruiter's Page

11 Experts & Services

12 Classified

13 Public Notices

23 Legal Listings

Postal ID on Page 8

More Class Actions Appear Headed to Federal Court

BY AMARIS ELLIOTT-ENGEL
Of the Legal Staff

The viability of trying class actions in Philadelphia Common Pleas Court seemed to be affirmed in 2007 with the Superior Court upholding a \$5.6 million verdict against Kia Motors and with retail titan Wal-Mart ordered to pay almost \$190 million to a plaintiff class because of violations of state wage laws.

But because of a federal law, the 2005 Class Action Fairness Act (CAFA), several attorneys theorized that neither case would likely have been tried in City Hall. Instead, the cases would have been removed to the U.S. District Court for the Eastern District of Pennsylvania.

CAFA became the effective law of the land in February 2005. The law created a new category of federal jurisdiction over diversity of citizenship, interstate class action complaints, including any class actions where the controversy exceeds \$5 million, where there are more than 100 class members and where the citizenship of one member of the plaintiff class is different from the citizenship of one member of the defendants.

Under CAFA, a class action lawsuit that made allegations similar to those at the heart of the *Wal-Mart* class action — that consumer appliances chain Best Buy did not compensate employees for off-the-clock security searches and for missed rest breaks — was removed to federal court in the fall.

Gerald Lawrence of Lowey Dannenberg Cohen in West Conshohocken, one of the plaintiff attorneys in *Hall v. Best Buy Co. Inc.*, said the case probably would have proceeded in Philadelphia Common Pleas Court except for the CAFA jurisdiction. Michael Donovan of Donovan Searles, lead counsel for *Hummel v. Wal-Mart* and *Braun v. Wal-Mart* and co-counsel for *Samuel-Bassett v. Kia Motors America Inc.*, said that if those class actions hadn't been filed pre-CAFA, they too probably would have been removed



LAWRENCE



DONOVAN



HEIM

to federal court.

Philadelphia-based class actions are not the only class actions that are being removed to federal courts. The Eastern District of Pennsylvania has the eighth-highest increase of diversity class action filings among federal district courts, according to an interim report from a study being conducted by the Federal Judicial Center.

The same report said the other district courts with the highest increases are in California, Florida, Illinois, New Jersey, New York and Texas. Class actions in the 10 districts with the highest increases in such litigation make up 30.7 percent of the country's class actions with diversity of citizenship.

Philadelphia-specific data from the First Judicial District could not be obtained before deadline.

Attorneys from the Greater Philadelphia area are noting anecdotally a decline in the number of class actions proceeding in Pennsylvania cases. But both plaintiff and defense attorneys report that it is too soon to tell the exact impact on the litigation of class actions from the increasing number of class actions proceeding in federal court.

Stephen Burbank, the University of Pennsylvania Law School's David Berger professor for the administration of justice, who was involved in a two-day scholarly col-

loquia on CAFA, said there are very few statistics yet about CAFA's impact.

But he believes that one impact is very clear: The federal judiciary is deciding some state law questions, including antitrust litigation by states.

"The state courts have lost the ability to enforce their law," Burbank said.

Donovan's greatest concern is not with the actual uptick in class actions in federal court but that federal judges will increasingly decide controversies involving predominantly state law questions.

"It's causing more of a rift between the courts in terms of interpreting state law," Donovan said. "We're starting to see quite a divergence in the federal courts' prediction of state law in comparison to what the state courts believe the state law is."

Donovan, however, said he does not believe there are significant differences in trying a class action in Pennsylvania state court or federal court.

Steven Schwartz, a partner at Chimicles & Tikellis, a class action law firm with a national practice, echoed Donovan's concern about federal judges deciding questions of Pennsylvania law and his belief that a solid case will do well in either state or federal court.

Class Actions continues on 10

It's not only WHAT they say... It's HOW they say it

James DeCrescenzo Reporting, LLC

Transcripts with
Synchronized Audio.
Exhibits Scanned and
Searchable. FREE 24 Hour
Online File Repository.

(215) 564-3905



1880 JFK Boulevard 6th Floor Philadelphia, PA 19103

www.jdreporing.com

Opening Remarks

continued from 9

Griffin and Joseph Hennessy — have since died young from a stroke and brain cancer, respectively, O'Brien said.

Hennessy still went into court while dying of cancer, however, with an oxygen tank and in a wheelchair, to testify on Brodie's behalf, O'Brien said.

Senior partners at the firm, he said, talked

with the U.S. attorney in Philadelphia, Michael Stiles, and the chief of the U.S. Department of Justice at the time in support of the Brodies.

O'Brien said the bottom line is that the Brodies pled guilty to certain charges and admitted that they "intentionally and willfully" violated U.S. laws.

"They are convicted felons and they always will be," O'Brien said of the Brodies.

Expected to testify in the case, he said, is Morgan Lewis partner John C. Dodds and

former partner Ed Dennis. Sitting at the defense table with O'Brien and Conrad O'Brien partner Nancy Gellman was Morgan Lewis Senior Counsel Thomas "Tim" M. Kittredge.

Clifford E. Haines of Haines & Associates is serving as local counsel for the Brodies and Purolite.

The Brodies were eventually indicted by 2000, Kasowitz said. Don Brodie took a plea deal and Stefan Brodie had his guilty verdict overturned by the trial judge, U.S. District Judge Mary A. McLaughlin. The 3rd U.S.

Circuit Court of Appeals eventually reinstated the verdict and the case was sent back for a new trial as alternatively ordered by McLaughlin. Brodie took a plea deal before the second trial began and received a one-year probation and a \$10,000 fine, according to court records.

In 2005, Sheppard threw out the claims of legal malpractice and breach of fiduciary duty against Morgan Lewis because of a two-year statute of limitations, but allowed to stay the breach of contract claim under the four-year statute of limitations. *

Class Actions

continued from 1

"Obviously the business interests that lobbied Congress to pass CAFA and the defendants that remove cases to federal court pursuant to CAFA believe they will get a more favorable hearing," Schwartz said. "From our perspective we believe if a case is meritorious we should do well regardless of the forum where it is litigated."

In the case of *Best Buy*, there is a parallel case pending in another federal court, so it was logical to seek to have the Philadelphia Common Pleas-filed class action removed to the Eastern District, said Robert Heim, a partner at Dechert who is a lead defense attorney in the *Best Buy* case.

Lawrence said the *Best Buy* class action was filed in state court because of the reputation of Philadelphia's Commerce Court and his and his co-counsel's experience in that court, but later on it became clear from *Best Buy* that the number of potential past and current employee class members was much higher than his initial research indicated. Lawrence said he was happy to be in federal court with the case as well.

Although the drive for CAFA was the argument that some state courts, like Madison County in Illinois, were extremely plaintiff-friendly and federal courts were less so, several area attorneys said Philadelphia Common Pleas Court did not have a reputation for leaning toward plaintiffs or defendants.

"I think the Commerce Court judges and the judges who have presided over class actions are very well-respected and are not seen as plaintiff-friendly or defendant-friendly," Heim said. "They call it as they see it in a given case."

Heim's opponent in the *Best Buy* case also believes the Philadelphia courts are balanced on class actions and that CAFA was more

driven to target other jurisdictions.

"Certainly CAFA has had an impact on the ability of plaintiffs to proceed in state courts. I think, in part, because in many areas of the country there isn't a venue like the Commerce Court that's well-respected by both the plaintiffs and the defense bar," Lawrence said.

Joseph Kernen, a partner at DLA Piper and a defense attorney, said Philadelphia did not have a "huge, bad" reputation as an aggressively plaintiff-friendly venue, but he believes that the defense bar is generally more comfortable with being in federal court and welcomes the effect of CAFA.

Kernen said the issue was not so much with judges but with the differences in federal and Philadelphia County juries.

"There's certainly a perception that a Philadelphia County jury will give larger awards than a federal jury on certain cases," Kernen said.

Heim said even in places like Philadelphia, where judges handling class actions have a reputation of being fair, companies whose principal place of business is out of state still prefer the federal forum.

"The body of class action law that has been developed in the federal courts under Rule 23 is believed to be more consistent and more fully developed than it is in state courts," Heim said. "It's a ... comfort-level factor."

Even in state courts where judges are believed to be balanced, federal courts provide an advantage for class action defendants by providing the opportunity to consolidate numerous class actions filed in different state courts by the federal multidistrict litigation mechanism, said defense attorney Heim and Seamus Duffy, a partner at Drinker Biddle & Reath.

Duffy called the coordination of multiple class actions "the most significant advantage" of the ability to remove cases under CAFA.

Jonathan Shub, a partner at Seeger Weiss and a plaintiff attorney with a focus on consumer rights and consumer electronics, said he believes that the federal judiciary has

become more conservative because of appointments by President George W. Bush, and CAFA was pushed by "big business and corporate America."

He said a number of those appointees are "more hostile to consumer rights. ... The little guy that we represent in most of these class actions don't have the same rights."

But while plaintiff attorneys and defense attorneys may be viewing CAFA through the general perspectives of their respective bars, adversaries on both sides of class actions are strategizing in the new CAFA landscape, resulting in some unintended consequences.

Jeffrey Weil, a senior partner in Dechert's trial group, said trial lawyers will be forum shopping to select "what they view as a more favorable federal circuit" for state-level cases that will ultimately be removed.

Duffy said CAFA has flip-flopped his arguments against plaintiff attorneys in some cases. He now is in the "crazy process of explaining how significant the plaintiffs' damages" might be, while plaintiffs attorneys are now arguing that their cases are not really as big as they traditionally have argued. The strategy is to argue that claims involve a controversy of less than \$5 million and should remain in state courts, Duffy said.

Donovan noted that it is in the defendants' interest to show damages are in the excess of \$5 million, but that some plaintiffs will still file in state court in order to get free discovery.

Lawrence said there are exceptions to CAFA that permit some cases, such as controversies related to corporate governance, to stay in state courts.

Alan Feldman of Feldman Shepherd Wohlgelemer Tanner & Weinstock and one of the co-counsel in the *Kia* class action, said that there will likely be more "congestion in federal court as more and more class actions transfer to federal court or are brought initially in federal court. The balance that had existed ... will no longer be the case. Actions are likely to dry up in state courts."

The number of class actions removed to

federal courts fell during the Federal Judicial Center's period of study, which the center interpreted as a sign that plaintiff attorneys are anticipating the removal of class actions to federal court because of CAFA and filing the cases in federal court to begin with, the center said in its April report.

In April, the Federal Judicial Center reported a 46-percent increase in class action activity between the sixth-month period of January and June 2006 and the sixth-month period of July and December 2001.

The center found that a lot of the increase was from an uptick in federal question cases, but the center has found an increase in class actions with diversity of citizenship jurisdiction.

Class actions increased from 27 cases per month pre-CAFA to 53.4 cases per month post-CAFA, the center reported in its April interim report, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts*. The increase is concentrated in state-law contract and fraud claims.

A total of 16,000 class actions were filed in or removed to federal court between July 1, 2001, and June 30, 2006.

While CAFA was passed into law because of the perception of the relative tendencies of federal and state courts to favor defendants and plaintiffs, respectively, another recent study by the Federal Judicial Center, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?* found that — while defense attorney perceive that federal courts are more friendly to them and plaintiffs attorneys believe that state courts are more friendly to them — attorney perceptions of forum friendliness was not an accurate predictor of how a judge would rule.

"State forums were not typically more favorable for plaintiffs," the study concluded. "And federal forums were not typically more favorable for defendants. Plaintiff and defendant expectations proved to be true in about half of the cases, which suggests that those outcomes were highly likely to have occurred by chance." *

UPCOMING SUPPLEMENTS

Coming Up In *The Legal Intelligencer*

Pro Bono • Issue Date: Jan. 21, 2008 • Closes: Jan. 10, 2008

Litigation #1 • Issue Date: Jan. 28, 2008 • Closes: Jan. 17, 2008

E-Discovery #1 • Issue Date: Feb. 4, 2008 • Closes: Jan. 24, 2008

Call your Account Manager for more details.

Lizanne Hayes • 215-557-2492

Marcella McHugh • 215-557-2484

Barrie Harmelin • 215-557-2375

John Palmer • 215-557-2335

Law Firms

Lana Ehrlich • 215-557-2392

The Legal Intelligencer