O'Connor Carnathan and Mack LLC

Session Watch

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FEATURED DECISION:

Commonwealth v. Purdue Pharma, L.P.,

2019 Mass. Super. LEXIS 589 (Sept. 16, 2019) (Sanders, J.).

Complaint Against Opioid Manufacturer Survives Dismissal

The Commonwealth alleged Purdue Pharma, L.P. and Purdue Pharma, Inc. (collectively, "Purdue") violated Chapter 93A and created a public nuisance through deceptive practices in the marketing and sale of opioid products (primarily OxyContin) in Massachusetts. The Commonwealth alleged that Purdue downplayed the addictive properties of its opioids in its messaging to doctors and influenced prescribing to inappropriate patient populations. The complaint also alleged that Purdue targeted doctors who were already suspected of overprescribing. The Commonwealth alleged that Purdue's actions significantly contributed to the opioid epidemic in Massachusetts, thereby imposing a heavy financial burden on the Commonwealth. Purdue moved to dismiss under Mass. R. Civ. P. 12(b)(6).

The court denied Purdue's motion to dismiss. Much of Purdue's argument in support of dismissal consisted of disputing the factual basis of the Commonwealth's allegations, which could not be resolved on a motion to dismiss. The court also rejected Purdue's legal argument that the complaint's allegations conflict with federal law (FDA approval of the opioids at issue). The court held that there was nothing about the Commonwealth's claims that would make it impossible for Purdue to comply with both state and federal regulations. The court pointed out that the complaint did not challenge the content of the opioid labels or seek to remove the opioids from the marketplace; rather, the complaint alleged that Purdue's marketing practices were inconsistent with the label warnings. For similar reasons, the court rejected Purdue's argument that its conduct was a "permitted practice" exempt from Chapter 93A. The court explained that, to prove the "permitted practice" exemption applies, a defendant must demonstrate that the regulatory scheme affirmatively permits the alleged unfair practice. The Commonwealth's complaint described practices "which no state or federal regulatory authority has condoned."

The court also rejected Purdue's argument that, for purposes of the nuisance claim, the complaint failed to allege infringement on a "public right." The court held that the complaint's allegations were sufficient to support a claim that Purdue's conduct interfered with public health and safety.

Finally, the court rejected the contention that the learned intermediary doctrine broke the chain of causation between Purdue's conduct and the harm alleged. The learned intermediary doctrine asserts that a drug manufacturer's duty to warn may be discharged if the manufacturer provides the physician with an adequate warning. The chain of causation is not broken, however, where the manufacturer's misleading conduct affects the prescribing decision. ■

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Hyperactive, Inc. v. Young,

2019 Mass. Super. LEXIS 533 (Aug. 28, 2019) (Davis, J.).

Res Judicata Did Not Bar Litigation of Claims Based on Events Occurring Subsequent to First Action

Plaintiff Hyperactive, Inc. ("Hyperactive") brought suit against defendant D. Douglas Young ("Young"), one of its two shareholders, alleging that he conspired with one of Hyperactive's competitors to steal Hyperactive's confidential and proprietary trade secrets, customer relationships, and key employees. Several months prior to Hyperactive bringing suit, Young had filed a separate lawsuit in Norfolk Superior Court against the other Hyperactive shareholder, Douglas Buckley ("Buckley") (the "Norfolk Action"). In the Norfolk Action, Young challenged Buckley's alleged decision to reduce Young's compensation, alleged that Buckley had disparaged Young, alleged that Buckley had blocked Young's efforts to acquire Buckley's shares of Hyperactive stock, and alleged that Buckley wrongfully caused Hyperactive to retroactively reimburse him for fourteen years of travel expenses. The Norfolk Superior Court allowed Buckley's motion to dismiss in the Norfolk Action, and separate and final judgment entered.

Young subsequently filed a third party complaint against Buckley in the Suffolk Superior Court case brought by Hyperactive. Many of the allegations in that third party complaint were similar to the allegations made in the Norfolk Action. The third party complaint also included new allegations that Buckley had ousted Young from Hyperactive and sought a judicial declaration that the Hyperactive partnership had been dissolved. Buckley moved to dismiss the third party complaint on res judicata grounds.

The court allowed the motion with respect to the claims that were repetitive of those brought in the Norfolk Action, as those claims "were, or could have been, adjudicated in the Norfolk Action." The court denied the motion as to the ouster and declaratory claims, explaining that the alleged ouster became effective after the events giving rise to the claims in the Norfolk Action. The court stated that "[r]es judicata does not bar the litigation of claims between prior legal opponents based upon new wrongful conduct." ■

Governo Law Firm, LLC v. CMBG3 Law, LLC,

2019 Mass. Super. LEXIS 444 & 488 (July 25 and Sept. 4, 2019) (Salinger, J.).

Prejudgment Interest Statute Does Not Apply to Equitable Disgorgement of Profits Earned By Misuse of Confidential Information

The Governo Law Firm, LLC ("Governo Firm") brought suit alleging that six of its former partners and their new law firm took copies of certain of its electronic files and databases. Following a jury trial, the jury found that defendants converted some files belonging to the Governo Firm, that defendants breached their duty of loyalty, and that all but one defendant conspired to commit a tort. The jury found that defendants did not misappropriate any trade secrets or violate Chapter 93A. The jury awarded $900,000 in unjust enrichment damages, less than one-third of the amount sought by the Governo Firm. The court denied defendants' post-trial challenge to the judgment, finding that the jury's verdict was consistent with a reasonable view of the evidence.

The court was not persuaded by defendants' argument that certain of the defendants could not be liable for conversion because there was no evidence that those defendants personally copied the files at issue. The court held that the Governo Firm was not required to prove that each defendant participated in wrongfully taking property from the Firm – their refusal to return the

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files was sufficient. The court also disagreed with defendants' argument that copying intangible electronic files cannot give rise to a claim for conversion.

The court also rejected defendants' argument that the Governo Firm could not seek unjust enrichment damages on its conversion claim. Although damages for conversion of physical property are typically measured by the value of the converted goods at the time of the conversion, a different measure of damages was appropriate in this case because defendants took only copies of the materials and left the originals intact.

The court also upheld the jury's finding of breach of duty of loyalty based on the defendants' taking of proprietary materials of the Governo Firm and using those materials to compete against it. The fact that the jury found that those materials were not trade secrets did not bar a breach of duty claim.

The court also rejected the defendants' argument that the $900,000 jury verdict should be vacated because there was no evidence that defendants earned $900,000 in profit by using the Governo Firm's proprietary materials. Defendants' argument failed because "it mistakenly assumes that the Governo Firm had the burden of proving what part of Defendants' profits was attributable to use of Plaintiffs' database." The court explained that, if a defendant fails to segregate the portion of its profits attributable to the trade secrets from the portion attributable to other factors, it "cannot complain after the verdict that a jury's award of some or all of the defendant's net profits as compensation to the plaintiff is excessive."

The court agreed with defendants, however, that the Governo Firm had no statutory right to recover prejudgment interest because a monetary award to disgorge profits earned by misuse of confidential information is an equitable remedy, "not damages within the meaning of the statutes that govern prejudgment interest."

Finally, the court entered a permanent injunction requiring Defendants to delete certain documents taken from the Governo Firm. The court also ordered the parties to meet and confer regarding postjudgment security, noting that "Defendants cannot avoid a reasonable request for postjudgment security by making unexplained and factually unsupported assertions that the requested relief would be unjust or unnecessarily disrupt CMBG3 Law's ongoing business operations." ■

Element Prods. v. Editbar, LLC,

2019 Mass. Super. LEXIS 535 (Aug. 30, 2019) (Davis, J.).

Settlement Payment Could Not Be Used to Offset Equitable Forfeiture Order Under Joint Tortfeasors Act

Plaintiff Element Productions, Inc. ("Element") alleged that one of its former executives, defendant Mark Hankey ("Hankey"), secretly assisted Editbar, LLC ("Editbar") and Stir Films, LLC ("Stir Films") in establishing a business to compete against Element. Editbar and Stir Films were originally named as defendants but agreed to make a monetary settlement payment shortly before trial. After a jury-waived trial on the remaining claims, the court found in favor of Element on its breach of contract and breach of loyalty claims against Hankey but held that Element failed to prove damages. The court did, however, order Hankey to repay, as equitable restitution, the compensation he received from Element during his final year of employment, to the extent it exceeded the fair value of the services he provided.

Hankey asked the court to order, pursuant to the Joint Tortfeasors Act, that the amount of restitution he was ordered to pay be reduced by the amount of the settlement payment made by Editbar and Stir Films. Element argued that the Joint Tortfeasors Act does not apply to an equitable forfeiture order. The court agreed with Element and denied Hankey's motion. The court held that the settlement payment and the restitution order did not constitute compensation for the "same injury" for purposes of the Joint Tortfeasors Act. The settlement payment was intended to partially compensate Element for its claimed actual losses, while the court had explicitly declined to award monetary damages for such claimed losses. The requirement that Hankey forfeit part of his pay was not compensation for Element's claimed losses but, rather, was restitution for payment for services Hankey did not properly perform. ■

Mass. Bay Transp. Auth. v. Clear Channel Outdoor, Inc.,

2019 Mass. Super. LEXIS 465 (July 26, 2019) (Sanders, J.).

Sovereign Immunity Blocks Claims against Government Agencies Under Billboard Statutes

This case involves a dispute between plaintiff, the Massachusetts Bay Transportation Authority ("MBTA"), and defendant, Clear Channel Outdoor, Inc. ("Clear Channel"), regarding which of them has the right to operate certain billboards on MBTA property. The MBTA brought suit against Clear Channel, and Clear Channel asserted counterclaims adding the Massachusetts Department of Transportation's Office of Outdoor Advertising ("OOA") as a party and asserting, among other things, claims for violation of G.L. c. 93, § 31 and G.L. c. 93D, § 5 (the "Billboard Statutes"). The Billboard Statutes permit interested parties to seek equitable relief preventing erection or maintenance of billboards that do not comply with the statute. The MBTA and OOA moved to dismiss the counterclaims under the Billboard Statutes on the grounds that they were immune from suit.

The court allowed the MBTA and OOA's motion to dismiss, agreeing that the doctrine of sovereign immunity prevented Clear Channel from pursuing those counterclaims. The court noted that the Billboard Statutes contain no express waiver of sovereign immunity and rejected Clear Channel's argument that a waiver should be imputed. The court stated, "[n]either statute contains specific language suggesting that it provides a remedy against a government agency to a person aggrieved by that agency's decision" and explained that the "principal targets" of equitable claims under the statutes are the billboards' private owners, not the government agencies that regulate them.

Finally, the court was not convinced that the MBTA's actions in entering the market for billboard permits and obtaining permits for use by a commercial entity "stray[ed] so far from its core functions that a waiver of sovereign immunity can be implied." The court noted that the income the MBTA generates from permitting commercial activity on its property helps to defray the cost of its transportation services. ■

D'Auria v. D'Auria,

2019 Mass. Super. LEXIS 477 (Aug. 23, 2019) (Sanders, J.).

Nonsignatories Had Standing to Compel Arbitration Under Doctrine of Equitable Estoppel

This case involves a dispute among family members with respect to ownership interests in AGP, LLC ("AGP"). In 2010, defendant Louis D'Auria ("Louis"), a minority owner of AGP, transferred his ownership interest into a trust (the "Trust") and named his children, including plaintiff Michael D'Auria ("Michael"), as beneficiaries. At the same time, AGP's owners executed a Buy Sell Agreement, which contained provisions governing the assignment and transferability of AGP's shares. The Buy Sell Agreement also contained an arbitration clause requiring arbitration of claims "arising out of or relating to" the Agreement and was signed by Michael, Louis' daughter, Lisa (on behalf of the Trust), and Lisa's husband. Michael and Lisa were the original trustees of the Trust but were later replaced.

Michael brought suit challenging actions taken with respect to the Trust after he was removed as trustee. Specifically, he alleged that he was not informed regarding the Trust's operations, that defendants made certain assignments and transfers of AGP shares in an effort to deprive Michael of inheriting those shares upon Louis' death, and that defendants were retaliating against Michael by raising AGP's rent. Defendants moved to compel arbitration. Michael argued that some of the disputes at issue

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were not covered by the arbitration clause and that the defendants who requested arbitration had no standing to do so because they were not signatories to the Buy Sell Agreement.

The court began its standing analysis by referring to the doctrine of equitable estoppel, under which a nonsignatory may compel arbitration where the signatory raises allegations of interdependent and concerted misconduct by the nonsignatory and one or more of the signatories. The court found that defendants had standing because one of them is the current trustee of the Trust, which was a signatory to the Agreement, and the others were alleged to have engaged in a common scheme with one of the original signatories.

With respect to arbitration, the court held that counts of the complaint relying on allegations of unlawful transfer or assignment of AGP shares were "arguably covered" by the arbitration clause and, therefore, should be brought before the arbitrator to determine whether such claims are, in fact, arbitrable. The claims for wrongful retaliation and failure to provide Trust information, however, were outside the scope of the arbitration clause. ■

Verto Mgmt. v. John Hancock Life Ins. Co. U.S.A.,

2019 Mass. Super. LEXIS 476 (Aug. 27, 2019) (Sanders, J.).

Court Denies Request for Preliminary Injunction Requiring Continuation of Terminated Agency Relationship

Plaintiff Verto Management, LLC ("Verto") was created to manage certain renewable energy assets owned by Defendant John Hancock Life Insurance Company ("John Hancock"). In January of 2018, John Hancock and Verto entered into an agreement with respect to the management arrangement. That agreement, among other things, provided that John Hancock could not terminate the agreement within the first four years except for cause. In July of 2019, John Hancock informed Verto that Verto was to no longer manage the renewable energy assets. Verto then brought suit alleging breach of the parties' agreement and moved for a preliminary injunction requiring John Hancock to continue to employ Verto as its agent. John Hancock denied having terminated the agreement in its entirety and argued that it had continued to pay Verto for services it had rendered.

The court denied the request for a preliminary injunction. Although Verto had made out a "compelling case" of breach of contract, the court was not convinced that the balance of harms weighed in Verto's favor. In addition, Verto's requested relief was "extraordinary" because it was asking the Court to require John Hancock to continue to employ Verto as John Hancock's agent "with virtually unfettered authority" to manage John Hancock's assets. The court stated that to impose an affirmative duty on John Hancock to maintain that kind of relationship when John Hancock had lost trust and confidence in Verto was "not supported" by agency law, which permits a principal to revoke an agent's actual authority "notwithstanding any agreement between principal and agent." Although an agent may claim that the revocation constitutes a breach of contract, the agent may not seek specific performance as a remedy.

With respect to Verto's argument that, without the preliminary injunction, it would be put out of business, the court stated that "this is not the kind of economic loss that amounts to irreparable harm." Although the court recognized that Verto "may very well fail" without the management business, "John Hancock is Verto's only client and the investments Verto manages belong only to John Hancock; terminating that relationship would not have any direct impact on anyone else." ■

City of Revere v. Mass. Gaming Comm'n,

2019 Mass. Super. LEXIS 462 (July 12, 2019) (Sanders, J.).

Open Meeting Law Claims Dismissed in Case Involving Wynn Casino License

A group of plaintiffs alleged that the Massachusetts Gaming Commission ("Commission") violated the Open Meeting Law ("OML"), G.L. c. 30A, §§ 1-25, in connection with its decision to award a gaming license to Wynn MA, LLC ("Wynn"). The Attorney General had previously conducted an investigation that found OML violations, but recommended only additional training in response. Both sides moved for summary judgment. The Commission acknowledged that it held some meetings in violation of the OML but argued that those violations were inadvertent and cured by subsequent extensive public deliberations. The plaintiffs argued that the violations were repeated and systemic and called for the gaming license to be vacated.

The court allowed the Commission's motion and denied the plaintiffs' motion. The court explained that there was no evidence in the record that any of the identified meetings involved substantive discussions regarding who should be awarded the gaming license. There was also ample record evidence that compliance with the OML was a priority of the Commission and that it conducted its business with the OML in mind. In addition, some of the meetings identified by plaintiffs were informational or educational and did not constitute impermissible deliberations.

The court also held that the remedy requested by plaintiffs provided an independent basis for allowing the Commission's summary judgment motion. The court stated that nullifying the award of the license to Wynn would be an abuse of discretion and would have drastic consequences, as it would undo years of work and may require closing of an already-opened casino that cost millions of dollars to build. The OML violations at issue, if any occurred, did not support the "draconian" remedy requested by plaintiffs. Although the court recognized that summary judgment is not typically decided on the basis of the remedy requested, in this case, the court held that no court could lawfully order the remedy of nullification on the facts alleged, and "trial would be a needless waste of time and effort." ■

Musclepharm Corp. v. White Winston Select Asset Fund Series Fund MP-18, LLC,

2019 Mass. Super. LEXIS 588 (Sept. 19, 2019) (Sanders, J.).

Abuse of Process Claim Based on Conclusory Allegations Dismissed

Plaintiffs MusclePharm Corporation ("MusclePharm") and its CEO, Ryan Drexler ("Drexler"), brought suit against White Winston Select Asset Fund Series Fund MP-18, LLC, White Winston Select Asset Fund, LLC (collectively, "White Winston") and others. White Winston owns close to twenty percent of MusclePharm's outstanding shares. White Winston had initiated an earlier lawsuit in Nevada state court (the "Nevada Action"), challenging a decision by a special committee of MusclePharm's board of directors approving a refinancing of millions of dollars in loans Drexler had made to MusclePharm. White Winston applied for, and received, a Temporary Restraining Order ("TRO") in the Nevada Action preventing Drexler from exercising certain debt conversion rights he received in connection with the refinancing.

In the Massachusetts action, Plaintiffs alleged that the Nevada Action was groundless and defendants filed it in order to prevent MusclePharm from honoring its financial obligations to Drexler and to coerce Plaintiffs to make a payment to defendants. Plaintiffs also alleged that the TRO application in the Nevada Action was based on misrepresentations. Plaintiffs alleged violation of Chapter 93A, tortious interference with contract, civil conspiracy, and abuse of process. Plaintiffs sought to recoup as

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damages the costs of having to defend against the TRO.

Defendants moved to dismiss the Massachusetts complaint, which the court allowed. The court held that the statements that the defendants made in the Nevada Action were subject to the litigation privilege and could not serve as the basis for Plaintiffs' Massachusetts complaint. To the extent that the Plaintiffs claimed that their claims were based on the filing of the complaint in the Nevada Action, the court also rejected that argument.

With respect to Plaintiffs' tortious interference claim, the court stated that it could not see how the filing of the Nevada Action resulted in any harm that was causally related to an interference with a contractual relationship. The complaint contained nothing to suggest that Drexler's inability to convert his debt resulted in any harm to anyone. Plaintiffs' abuse of process and Chapter 93A claims failed because Plaintiffs did not explain how the defendants used the Nevada Action to obtain an unfair advantage. ■

Fed. Home Loan Bank of Bos. v. Ally Fin., Inc.,

2019 Mass. Super. LEXIS 484 (Aug. 20, 2019) (Kaplan, J.).

Existence of Third Party's Complaint Making Similar Claims Insufficient to Trigger Statute of Limitations

Plaintiff Federal Home Loan Bank of Boston (the "Bank") brought suit against various groups of defendants, referred to separately as Credit Suisse and Nomura/RBS, alleging that the offering documents used to market certain residential mortgage-backed securities contained materially false representations. The Bank asserted, among other claims, violations of the Massachusetts Uniform Securities Act ("MUSA") and negligent misrepresentation. Defendants moved for summary judgment, which the court allowed in part and denied in part.

The court dismissed some of the negligent misrepresentation claims against Credit Suisse because it did not make the representations at issue, and merely passing along false information was insufficient to impose liability. The court also dismissed some of the MUSA claims against Nomura/RBS because Nomura/RBS were not sellers of the certificates to the Bank. The MUSA claims against Credit Suisse, however, were viable because the evidence supported an inference that Credit Suisse jointly solicited the Bank to purchase the securities and engaged in that joint marketing effort in service of its own financial interests.

The remaining claims against Nomura/RBS survived summary judgment. The court found genuine factual disputes regarding whether the offering documents contained untrue statements and noted that "[s]tate of mind almost always has to be proved by reliance on circumstantial evidence." In addition, the court rejected Nomura/RBS' argument that the negligent misrepresentation claims were time barred because the Bank should have been aware of a complaint, filed more than three years before its complaint, alleging similar misrepresentations by Nomura. Although there is a lack of Massachusetts authority addressing the issue, the case law from other jurisdictions indicated that the filing of a third party complaint, without more, is not sufficient to trigger the statute of limitations.

The court also held that, with respect to the elements of a negligent misrepresentation claim, actual knowledge of the specific transaction at issue is not required, so long as plaintiff establishes the defendant's actual knowledge of a "substantially similar transaction." ■

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Mullins v. Corcoran,

2019 Mass. Super. LEXIS 1194 (Sept. 10, 2019) (Davis, J.).

Plaintiff Could Not Use Subsequent Derivative Suit to Re-Litigate Issues Decided in Prior Action

Plaintiff Joseph Mullins ("Mullins") brought suit against Defendants in connection with a dispute concerning the proposed development of property in Somerville. Mullins had brought a prior Superior Court action ("Prior Action") in which Defendants prevailed following a trial. In the Prior Action, Mullins alleged that Defendants breached a contract and their fiduciary duties to Mullins. Mullins had unsuccessfully moved to amend his complaint in the Prior Action to add, among other things, a derivative action on behalf of the limited liability company (the "LLC") in which Mullins was a minority shareholder. Mullins then brought the second Superior Court action, asserting the derivative claim and two individual claims for breach of contract and breach of fiduciary duty.

Defendants moved for judgment on the pleadings on the grounds that the court's findings in the Prior Action barred Mullins' claims in the second action. The court allowed that motion, holding that the prior rulings prevented Mullins "from establishing numerous, crucial factual allegations that underlie his present claims."

With respect to the derivative claim, the court held that it merely echoed the factual allegations of the other counts and was therefore similarly barred to the extent that Mullins and the LLC were in privity with one another. The court noted that the LLC was owned entirely by the parties to the Prior Action and the fiduciary duties owed to Mullins and the LLC "were essentially the same, such that [the LLC]'s interests were adequately represented." The court stated that it was "entirely consistent with due process and common-law principles of fairness to reject Mr. Mullins' attempt to relitigate, in the guise of a derivative action on behalf of [the LLC], the same issues that he . . . tried to a conclusion in the Prior Action." ■