Supplement to the Los Angeles and San Francisco
Daily Journal
FEBRUARY 20, 2019

TOP VERDICTS OF 2018

The largest and most significant verdicts and appellate reversals in California in 2018

TOP DEFENSE VERDICTS

Bahamas Surgery Center LLC v. Kimberly-Clark Corp. et al.

case INFO

Fraud

Central District

U.S. District Judge Dolly M. Gee

Defense Lawyers: Theodore J. Boutrous Jr., Julian W. Poon, Theane D. Evangelis, Gibson, Dunn & Crutcher LLP

Plaintiff's Lawyers: Michael J. Avenatti, Ahmed I. Ibrahim, Eagan Avenatti LLP



JULIAN W. POON

In a rollercoaster ride of a class action, a federal jury awarded a massive $454 million verdict in 2017 against two companies accused of fraudulently marketing medical gowns. After the trial, defendant Kimberly-Clark Corp. hired Gibson, Dunn & Crutcher LLP. Its attorneys — Theodore J. Boutrous, Jr., Julian W. Poon, and Theane D. Evangelis — convinced a federal judge to slash the award by 95 percent.

"Looking back, it was intense but our team loved it," said Poon, a partner in Gibson Dunn's Los Angeles office. "We enjoy parachuting in to a challenging, high-stakes situation and then quickly thinking of ways of how best to defend our client's interest."

Filed by Michael J. Avenatti of Eagan Avenatti LLP in 2014 on behalf of 428 California medical centers, the suit alleged Kimberly-Clark and co-defendant Halyard Health Inc. fraudulently marketed and sold Microcool surgical gowns that failed to prevent communicable disease from passing through to the wearer.

Gibson Dunn partner Evangelis said even though plaintiffs' counsel lacked evidence of personal harm, he attempted to mislead the jury by disguising its overcharging claims as product liability and personal injury.

"Plaintiff's case was like a chameleon," Evangelis said. "Plaintiff presented to the jury what was effectively a mash-up of the evidence relating to a bunch of different theories: misrepresentation, concealment, product liability, personal injury, but of course, this wasn't a product liability case and there wasn't one bit of evidence of personal harm."

U.S. District Judge Dolly M. Gee of Los Angeles agreed. She ordered the award be reduced to $19.5 million for Kimberly-Clark and $1.3 million for Halyard.

"Defendants' conduct was egregious — but that assessment must be tempered by a consideration of the fact that this case presented evidence of only economic harm and not emotional or physical harm," Gee wrote in her decision.

The ratio of punitive to compensatory damages, 90-to-1 for Kimberly-Clark and 382-to-1 for Halyard, was neither reasonable nor proportional under the U.S. Supreme Court precedent set by *State Farm Mut. Auto. Ins. Co. v. Campbell*, Gee added.

Poon said the key to their success in the post-trial phrase was Gibson Dunn's three-pronged approach of a motion for judgment as matter of law, remittitur of the runaway verdict, and de-certification of the plaintiff class.

"While Judge Gee only granted our motion for a substantial remittitur, cutting the jury verdict by 95 percent, we think our multi-pronged strategy was critical to our success of the post-trial motion stage in district court and establishes a solid foundation for our pending appeal in the 9th Circuit," he said.

The case is currently being briefed to the 9th U.S. Circuit Court of Appeals on cross appeals filed by Kimberly-Clark, Halyard and the plaintiff class.

Poon said while he is happy with Gee's ruling, Gibson Dunn is pursuing an even further reduction in punitive damages from $19.4 million — a 5-to-1 ratio of punitive to compensatory damages — down to zero or something close to it.

He expects the briefing to be completed in the first half of this year and oral arguments to be scheduled next year.

— Blaise Scemama

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