

Split Ninth Circuit Panel Vacates \$24M Judgment in Hospital Gown Advertising Class Action

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A split Ninth Circuit panel recently overturned a \$24 million judgment in a class action lawsuit against Kimberly-Clark and its spinoff, Halyard Health. [*Bahamas Surgery Center v. Kimberly-Clark et al.*, No. 18-55478 \(9th Cir. July 23, 2020\).](#)

Plaintiff class representative Bahamas Surgery Center accused the defendants of misrepresenting the effectiveness of their surgical gowns at stopping the spread of disease. According to plaintiff, defendants falsely represented that their surgical gowns were compliant with the Association for the Advancement of Medical Instrumentation (AAMI) industry standard, but failed to disclose testing failures that in fact rendered them noncompliant. Based on these allegations, the district court allowed Plaintiffs to pursue class claims for fraudulent concealment and violation of California's Unfair Competition Law. At trial, the jury found defendants violated these laws and awarded the class \$450 million in compensatory and punitive damages. The district court subsequently reduced this award, entering judgment in the amount of \$24 million.

On appeal, defendant Halyard argued that the district court erred in finding the class representative had standing to bring claims against Halyard. Halyard was spun off from Kimberly-Clark shortly after the lawsuit was initiated, so it did not exist at the time of plaintiffs' alleged injuries. The district court found standing based on a juridical link between defendants, but the Ninth Circuit panel reversed. Even though Halyard also sold gowns following the spin-off, the class representative did not purchase any gowns from Halyard and none of *its* injuries were traceable to Halyard's conduct. Without its own claim against Halyard, the panel held the class representative could not seek relief on behalf of other class members — even those with potentially valid claims against Halyard. The Ninth Circuit therefore set aside the judgment against Halyard and remanded with instructions to dismiss the claims against it.

Kimberly-Clark argued that the district court abused its discretion by refusing to decertify the class for lack of predominance. The panel agreed, finding that individual issues predominated regarding the materiality of the purported non-disclosure of AAMI test failures, and that the lack of predominance

was fatal to certification as to both the fraudulent concealment and UCL claims. The evidence the district court relied on to find materiality only applied to transactions involving gowns labeled with an AAMI rating. However, for a majority of the class members, the gowns they purchased did not display an AAMI rating on the packaging. Finding no evidence a reasonable person would consider omissions relating to AAMI test failures material where the gown had not been labeled with an AAMI rating, the Ninth Circuit vacated the judgment against Kimberly-Clark and remanded for further proceedings.

The dissent in part opined that the lower court was correct not to decertify the fraudulent concealment class for lack of predominance. The dissenting judge noted that based on his reading of California law, a plaintiff need not show that individual class members were exposed to specific misrepresentations to succeed on such a claim.

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