The California Supreme Court recently ruled in *Elsner v. Uveges* (2004) 34 Cal. 4th 915, that the regulations of the California Occupational Safety and Health Act (“Cal/OSHA”) are admissible in negligence actions against private third parties. This overturns a long-standing rule in existence since the inception of the Cal/OSHA program and may lead to significant liability for employers, and, at the least, more entanglement in lawsuits in the future.

As a general rule, government regulations are admissible in negligence actions to establish a standard of care, the breach of which creates a presumption of liability. Under the legal principle known as “negligence per se,” a plaintiff can establish a strong presumption of the defendant’s negligence by showing that the defendant violated a protective statute or regulation that was intended to protect against the type of harm suffered by the plaintiff. For example, in a two-car crash apparently caused by Driver A’s questionable U-turn, Driver B can establish that Driver A was “negligent per se” by showing that the U-turn violated a particular protective statute in the Vehicle Code that was intended to protect against the type of hazardous driving that resulted in the collision. The negligence per se rule is codified in section 669 of the California Evidence Code.¹

In 1971, the Legislature enacted Labor Code section 6304.5, which carved out an exception to the negligence per se rule with respect to Cal/OSHA regulations. Under the 1971 rule, employees could not introduce Cal/OSHA statutes and regulations as evidence of a standard of care in negligence actions against parties other than their own employers for workplace injuries. (But since employee negligence actions against their employers are barred by the exclusivity rule of the workers’ compensation statute, this was not a particularly meaningful “carve-out.”) Effective January 1, 2000, the Legislature amended section 6304.5 with language that was difficult to reconcile for internal consistency and that appeared, in part, to rescind the 1971 rule and make Cal/OSHA safety rules admissible in third-party negligence actions based on Evidence Code section 669.
The case highlights the greater impact that Cal/OSHA regulations can now have and the need for compliance with a body of highly technical regulatory laws when workers other than the employer’s employees are present in the workplace.

In *Elsner v. Uveges*, Rowdy Elsner, an employee of a roofing subcontractor, was working on a scaffold that had been constructed under the supervision of general contractor Carl Uveges. The scaffold collapsed, and Elsner injured his ankle. Elsner sued Uveges for negligence and other torts. The lawsuit turned on whether the construction of the scaffold was negligent. Elsner sought to show that the construction of the scaffold did not comply with Cal/OSHA safety orders and that therefore Uveges was negligent per se. Uveges argued that the Cal/OSHA regulations were not admissible under section 6304.5, and that the proper standard of care should be based on industry custom and practice for scaffold construction jobs. In its evidentiary rulings, the trial court ruled in favor of Elsner that the standard of care was based on Cal/OSHA regulations and not industry practice. Elsner then won a jury verdict against Uveges.

On appeal, Uveges urged a narrow interpretation of the 2000 revisions to section 6304.5, arguing that the new amendment had not in fact altered the 1971 rule barring the admission of Cal/OSHA regulations in third-party negligence actions. Under this interpretation, Uveges argued that the standard of care should have been based on industry practice rather than Cal/OSHA safety orders. The court of appeals agreed with Uveges and reversed the lower court.

On appeal, the Supreme Court ruled that under the 2000 revisions, section 6304.5 permitted the introduction of Cal/OSHA regulations and safety orders in negligence actions against private third parties. The Supreme Court, however, saved Uveges from the impact of the new rule, holding that the 2000 statutory amendment could not be applied retroactively to Elsner’s 1998 accident.

While Uveges was excused from the reach of the new law because Elsner’s accident pre-dated the amendment, employers in California should take note that workers injured in accidents occurring in 2000 and beyond may now introduce Cal/OSHA regulations and safety orders in negligence actions against private third parties. Some observers have opined that this may have an impact on employers’ insurance rates as actions of this nature increase. The case highlights the greater impact that Cal/OSHA regulations can now have and the need for compliance with a body of highly technical regulatory laws when workers other than the employer’s employees are present in the workplace.

1 California Evidence Code section 669(a) states: “The failure of a person to exercise due care is presumed if: (1) He violated a statute, ordinance, or regulation of a public entity; (2) The violation proximately caused death or injury to person or property; (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.”

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In an effort to curb perceived abuses from certain multi-state class actions filed in state courts, Congress has enacted the Class Action Fairness Act of 2005. It became effective on February 18, 2005. Aimed primarily at consumer class actions (but also affecting certain employment law class actions), the Act changes existing law in three important respects.

First, it grants federal district courts original jurisdiction of any class action in which the matter in controversy exceeds $5 million, exclusive of interest and costs, and diversity of citizenship exists between any one member of the plaintiff class and any defendant. This differs from prior law, which required that there be complete diversity between all named plaintiffs, on the one hand, and all defendants on the other. Often, plaintiffs would name an individual defendant from the same state as one of the plaintiffs in order to destroy diversity and thus avoid removal to federal court. Now, diversity is determined not just by the residency of the named plaintiffs but by that of any member of the alleged class. If any member of the class is from a different state than any one defendant, then, if the amount in controversy is met, there is federal jurisdiction.

Alternatively, the federal court must decline jurisdiction if more than two thirds of the class reside in the forum state and all of the primary defendants reside there. If between one third and two thirds of the class reside within the forum state, then the federal court has discretion, based on factors specified in the Act, to decline jurisdiction. These qualifications reflect the forum-shopping impetus for the Act.

Second, the Act authorizes the removal of class actions meeting the new diversity requirements from state court to federal court. Congress no doubt believed that this would result in closer scrutiny of whether the case should proceed as a class action than was thought to occur in some state courts. Further, removal to federal court permits closer scrutiny of certain class settlements, as next described.

Third, the Act addresses the perceived abuse of coupon settlements. In certain class actions, settlement would provide that class members receive coupons worth merchandise or services from a defendant. Typically, there has been a low redemption rate of such coupons, if between one third and two thirds of the class reside within the forum state, then the federal court has discretion, based on factors specified in the Act, to decline jurisdiction.
This newsletter addresses recent employment law developments. Because of its generality, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.

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resulting in limited actual value being provided to the class. Nonetheless, such settlements also often provided that class counsel’s fees would be based on the value of coupons issued. As a result, class counsel would receive substantial fees for litigation producing limited benefits to the class. The Act imposes strict limits on this practice.

If a coupon settlement is proposed, the court may approve the settlement only after it holds a hearing and makes a written finding that the settlement is fair, reasonable, and adequate to class members. In addition, if class counsel has a contingency fee arrangement with plaintiffs, then an award of attorneys’ fees based upon a class settlement with coupons must be valued by the amount of coupons redeemed, rather than the value of coupons issued. To the extent that the fee is not based on the value of coupons, the Act specifies that attorneys’ fees awarded are to be based on the amount of time reasonably expended by class counsel, in addition to which, as under prior law, the court may apply a multiplier.

In one respect the Act imposes new obligations on defendants. Within ten days of the filing of a proposed settlement of a class action, each defendant participating in the proposed settlement must file with specified state and federal officials a copy of the complaint, the proposed settlement, and proposed class notices, among other things. Failure to comply permits class members to decline to comply with the settlement and to choose not to be bound by it.

The effect of the Act on employment class actions may be limited. Often in such actions, more than two thirds of the class reside in the forum state because the claims are limited to alleged violations of that state’s laws. Thus, only if none of the primary defendants reside in the state can it be removed to federal court. In addition, settlement of employment class actions rarely entails the award of coupons, and so that aspect of the Act would generally not apply. Finally, in California at least, employers may decline to remove to federal court, as state court class certification requirements are in some respects more stringent than federal. Multi-state employment class actions, however, like consumer class actions, may now end up more frequently in federal court.

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