

Class settlement over hose defect nets \$320M

'Race to the court' kept case in Mass.

By Lisa K. Bruno

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Avoid the federal courts. So goes the traditional wisdom for plaintiffs in consumer class actions, who typically steer towards more plaintiff-friendly state jurisdictions.

But it was by fighting to *keep* their clients' case in federal court in Massachusetts that two Boston attorneys said they achieved a \$320 million nationwide settlement against The Goodyear Tire & Rubber Co. — 75 percent of it attributable to the New England class they represented.

Attorneys Kevin T. Peters and Christopher Weld Jr. represented homeowners in six New England states whose property contained an allegedly defective radiant heating hose manufactured by Goodyear. Their complaint contended that the hose broke down over time, resulting in water damage or failed heating systems.

Initially confronted by the difficulties typical of class certification, due to differences in the laws of the six states as well as the variation between each plaintiff's use of the hose and damages, the plaintiffs' attorneys had to craft their complaint with care, to highlight the commonality between the claims.

But class certification proved to be only half the battle, as Goodyear's sudden and steep financial decline in the midst of the lawsuit — during which it was hemorrhaging \$1 billion a year, by some estimates — also complicated the settlement process.

Having rejected an offer made in mediation as inadequate, the attorneys found themselves fending off attempts to "roll" their suit into a national settlement class action filed by competing counsel in New Jersey.

A race to the courthouse to secure a preliminary injunction, followed by motions under the All Writs Act enabled them to preserve the suit in U.S. District Court in Boston and, ultimately, gain sufficient leverage to hammer out the successful deal, which was then parlayed into a national settlement.

The resolution was in the interest of all parties, Weld said, noting that the New England suit threatened Goodyear with bankruptcy and jeopardized the livelihood of its 90,000 employees.

"Most importantly, it was in the interest of our clients, who are receiving in the vicinity of 50 percent of their damages, which is extraordinary in a class action," he remarked.

A Settlement Report for this case appeared in the June 6 issue of *Lawyers Weekly*.

UNITED WE STAND

The lawyers for the New England plaintiffs originally contemplated filing suit in state court in Massachusetts, acknowledged Weld.

However, because state rules do not allow plaintiffs to opt out of the action once a class is certified, he explained, the commonwealth was not seen as friendly to multi-state classes. The suit, when filed, was brought in federal court as a matter of simplicity, Weld stated.

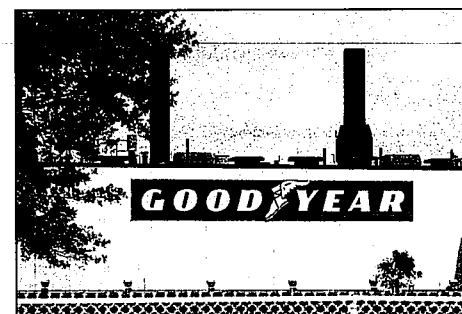
"For one thing, we had a lot of confidence in the federal judges here," he explained. "I wasn't all that anxious to bring a case in state court outside of Massachusetts because I'm not admitted, I'd have to bring in local counsel and it added a layer of complexity that I thought wasn't necessary."

The process of certifying the class, however, remained a thorny one, given the multi-state nature of the action.

"The challenge in this case was drafting the complaint initially to make sure that there was as much uniformity among the state laws as possible," observed Peters.

That meant pleading claims that relied on standardized law, such as the Uniform Commercial Code, and forgoing valid claims that would have called for individual inquiry, such as charges of fraud.

While Goodyear characterized the causes of action as presenting very diverse issues between subclasses that made certification of a class impossible, recounted Peters, the plaintiffs focused on persuading the judge that any nuances between state laws were not significant in terms of



the overall management of the case.

When it appeared as if U.S. District Court Judge Nancy Gertner might certify the six-state class, Goodyear unexpectedly challenged the jurisdiction of the federal court, arguing the claims could not be aggregated because not all the plaintiffs had met the jurisdictional minimum of \$75,000 in damages.

From a strategic point of view, the jurisdictional minimum presents a problem in any class action involving consumer products, Weld observed. He noted that in the present case, each plaintiff's use of the hose varied, as did the damages, depending on whether the hose was installed in a high-end home or simply under a driveway.

Describing it as a "divide and conquer" tactic, Weld observed that Goodyear's challenge, if successful, would have forced the plaintiffs to bring up to six different state actions or to seek multi-state certification in another jurisdiction.

"I think Goodyear felt they had a chance to beat the class certification each time they had an opportunity to do so," he said. "If they had six shots at it, they might be able to get rid of one or more of these state actions on a piecemeal basis."

Federal circuit courts had split over whether the Civil Justice Reform Act of 1990 superseded the U.S. Supreme Court's 1973 decision in *Zahn v. International Paper Co.*, which stated that every plaintiff must meet the amount in controversy requirement, Peters explained. In a "compelling" decision, he reported, Gertner declared that *Zahn*, as precedent, was dead.

While the issue has been rendered moot by

this year's Class Action Fairness Act, Peters pointed out, this did not occur until well after the conclusion of the case.

In another blow to the defense, Gertner agreed with the plaintiffs that differences in the claims did not swamp their commonality or the management of the case and certified the class — as to both liability and damages.

"That was a huge threat to Goodyear," remarked Peters, who estimated that the defendant's exposure in the case ranged between \$500 million and \$1 billion.

ATTEMPTED END RUN

The certification of the class prompted Goodyear to resolve the case, but the settlement process quickly became complex for Weld and Peters.

As the attorneys concentrated on discovery in anticipation of trial, Goodyear ran into significant financial problems. A number of accounting scandals, shareholder suits, union problems and a management shake-up caused the value of Goodyear's stock to slide from \$80 per share, at the time the complaint was filed, to \$4 per share, Weld said.

Suddenly, he remarked, the biggest issue in the case, in terms of real outcome, was the defendant's ability to pay. In the meantime, a couple of individual cases that had gone to trial yielded mixed results.

"There was a lot of jockeying for position going on," Weld commented.

In this setting, Goodyear and the New England plaintiffs, together with plaintiffs in two class actions brought in Colorado and New Mexico, engaged in mediation.

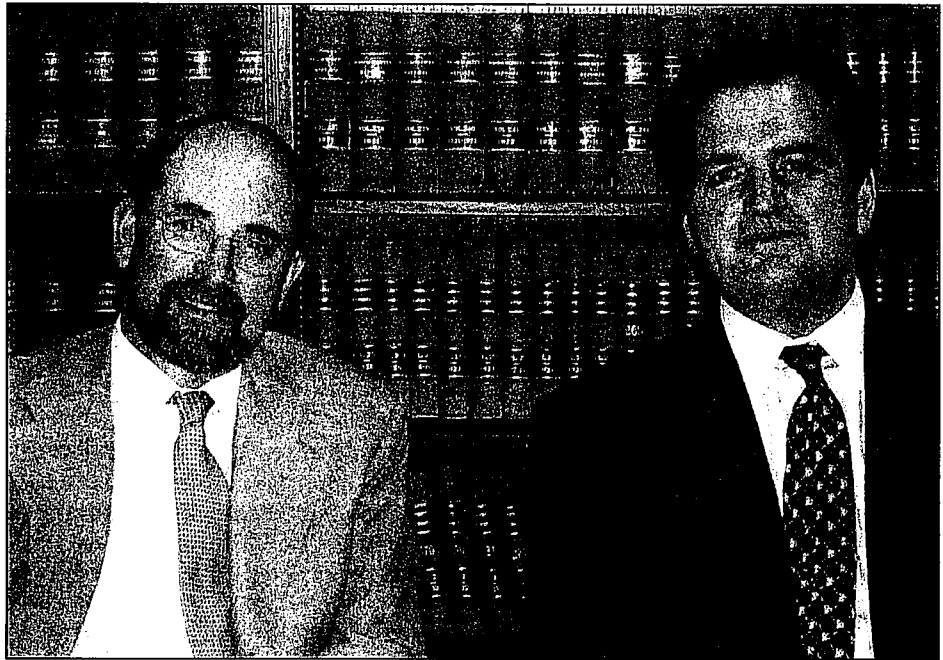
Although a figure was put on the table, plaintiffs' counsel concluded it was "woefully inadequate," having consulted an expert regarding Goodyear's financial status.

"Simply, we just did not believe it was as bad as Goodyear said it was," Weld recalled, noting the parties were millions of dollars apart.

While the door remained open, he said, there was a large amount of distrust on the part of the plaintiffs, who suspected they were not receiving all of Goodyear's financial information.

Only days after negotiations broke off, Weld reported, Goodyear began talks with a different set of plaintiffs' lawyers, a group that had never been active in the national litigation, with a case based in New Jersey.

"They then engaged in what we regarded as improper or secret negotiations, purportedly on behalf of all the classes in the country," he said, observing that competing counsel accepted, with



CHRISTOPHER WELD JR. (left) and KEVIN T. PETERS
Plaintiffs' lawyers said class action settlement was in the interest of all parties

only minor variations, the offer that had been rejected as too low.

Goodyear immediately moved to certify the New Jersey action as a national settlement class, according to Weld, effectively concluding all other cases in the country.

Anticipating such a move, Peters had drafted the "guts" of a motion asserting the inviolability of the Massachusetts federal District Court's jurisdiction and seeking to prevent the New England class from being included in the national settlement.

Following an ex parte hearing, Gertner granted the requested preliminary injunction on the very day the settlement was to be signed.

"It was very close," remarked Weld, who said the order was faxed to Goodyear as it met with the New Jersey class counsel to draft the final agreement.

Invoking the All Writs Act, New England counsel persuaded Gertner that no court should infringe upon the Massachusetts federal court's jurisdiction over the six-state class. Weld noted that under the very same statute, their colleagues in Colorado and New Mexico, who had filed their actions in state court, were not in as good a position to resist the jurisdiction of the New Jersey federal court.

Faced with the carve-out of the New England class, Goodyear's cry was of impending bankruptcy. The attorneys stepped up their engage-

ment of experts to examine Goodyear's financial structure, which Weld noted was very complicated, given its size.

"We wanted to make sure that we tried our hardest to get what we thought was the last dollar out of them that they could sustain," he said. "As a mediator put it, the patient needs to get off the operating table without dying."

Given further problems in Goodyear's European sector and battles over the availability of insurance coverage, the New England plaintiffs' attorneys came up with a couple of alternative payment schemes. However, they no longer had the connections to approach Goodyear, and so made the strategic decision to recruit the assistance of the competing New Jersey group, offering them the prospect of an improved settlement.

Although skeptical, counsel for the New Jersey plaintiffs duly arranged a meeting. Over the course of a handful of sessions, a deal was worked out that increased the original settlement figure by approximately 25 percent, Peters reported, and ultimately was adopted as the national settlement.

"A 44-state settlement would have been very difficult to approve, as Goodyear still had the problem of facing extraordinarily big liability in Massachusetts that could have destroyed the company," he said. "The settlement was in everybody's interest."

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