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*Foley Hoag LLP publishes this quarterly Update concerning developments in Product Liability and related law of interest to product manufacturers and sellers.*

### **Massachusetts Supreme Judicial Court Holds Face Amount of Medical Bills Admissible as Evidence of Reasonable Value of Services Rendered to Personal Injury Plaintiff, But Range of Payments Generally Accepted by Plaintiff's Providers in Satisfaction of Such Bills Also Admissible**

In the just-decided case of *Law v. Griffith*, --- N.E. 2d. ---, 2010 WL 2803893 (Mass. July 20, 2010), plaintiff was injured in an automobile accident when she was struck by defendant's vehicle. Thereafter, she brought a negligence action in Massachusetts Superior Court. Before trial, the judge allowed defendant's motion to exclude plaintiff's medical bills from evidence because the amounts actually paid by plaintiff's medical insurer, and accepted by her providers, were significantly lower than the amounts the providers had billed. As a result, the parties' stipulation regarding the amounts actually paid was introduced at trial. After a jury verdict in plaintiff's favor, she appealed, challenging the judge's exclusion of the bills and admission of the amounts actually paid. The Massachusetts Appeals Court determined that the judge erred in declining to admit the medical bills as evidence of the value of plaintiff's medical services, and therefore that a new damages trial was required. The Massachusetts Supreme Judicial Court ("SJC") then granted further appellate review.

The SJC first examined the language of Mass. Gen. L. ch. 233, § 79G, which provides that itemized medical bills for services rendered to an injured person "shall be admissible as evidence of the fair and reasonable charge for such services or the necessity of such services or treatments." Because § 79G unambiguously states that medical bills are admissible to establish the reasonable value of services rendered where the services are related to the injury for which the claim was made, the court held that the trial judge's decision to exclude plaintiff's bills was error.

The court next turned to whether defendant's proffered evidence of the amounts actually paid to plaintiff's medical providers also was admissible. Here, the court considered both: (1) the second sentence of § 79G, which affirms the right of any party to proffer other medical records, as well as testimony, to rebut the valuation suggested by the medical bills; and (2) the common-law collateral source rule, under which outside sources of compensation actually paid for a plaintiff's injuries cannot reduce her recoverable damages in tort. In reconciling the two principles, the court concluded that evidence of the amounts actually paid to and accepted by the plaintiff's medical providers is not admissible,

but evidence may be introduced concerning the range of payments that those providers generally accept from both self-paying patients and third-party payors for the types of medical services plaintiff received. The court noted that currently prevailing jury instructions may need to be modified to be consistent with the court's opinion, but deferred to trial judges to fashion appropriate instructions in particular cases.

### **Massachusetts Federal District Court Certifies Medical Monitoring Injunctive and Damages Class Action for Smokers with Only Subcellular Injury, Holding Alleged Common Need for Monitoring Supported Classwide Injunctive Relief and Predominated Over Individualized Issues**

In *Donovan v. Philip Morris USA, Inc.*, 2010 WL 2532650 (D. Mass. June 24, 2010), plaintiffs filed suit in the United States District Court for the District of Massachusetts seeking to pursue a class action on behalf of Massachusetts residents age 50 or older who had smoked defendant's cigarettes for twenty or more pack-years, asserting claims for breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability), negligence and violation of Mass. Gen. L. ch. 93A (the Massachusetts unfair and deceptive practices statute) based on the cigarettes' allegedly defective design in delivering unreasonably high levels of carcinogens. Plaintiffs sought equitable relief in the form of a court-supervised program of medical surveillance, requiring facilities, equipment and medical personnel, in which low-dose CT scans would be used for the early detection of any lung cancers that the class members might develop. Answering a certified question on defendant's motions to dismiss and for summary judgment, the Massachusetts Supreme Judicial Court ("SJC"), *Donovan v. Philip Morris USA, Inc.*, 455 Mass. 215 (2009), held that plaintiffs could state a damages claim for future medical monitoring even though none of the putative class members presently suffered from any manifest smoking-related illness or disease ([see May 2010 Foley Hoag Product Liability Update](#)).

With the SJC's guidance in hand, the federal district court turned to the class action issues. Defendant did not contest the preliminary factors of numerosity, commonality, typicality and adequacy under Federal Rule of Civil Procedure 23(a).

However, defendant argued that certification of a class was inappropriate under Rule 23(b)(2) because defendant had not acted on grounds generally applicable to the class justifying injunctive or declaratory relief or under Rule 23(b)(3) because the individual issues outweighed the common issues. The court disagreed, certifying a class under both Rule 23(b)(2) and Rule 23(b)(3) for purposes of plaintiffs' implied warranty and ch. 93A claims, but denying class certification as to the negligence claim.

Class certification under Rule 23(b)(2) is appropriate when "there is group harm that a group injunctive remedy will correct." First, the court examined each element of the medical monitoring cause of action as set out by the SJC in *Donovan* to determine whether there was a group injury that may be proven on a class-wide basis. Focusing on plaintiffs' allegation that everyone with a twenty pack-year smoking history necessarily has suffered subcellular harm, the court held that such a group injury existed and that the individual nature of defendant's affirmative defenses did not preclude class-wide proof except with respect to plaintiffs' negligence claim, where individualized issues of comparative negligence would defeat class certification. In contrast, the court was not troubled by individualized issues posed by the "overwhelmingly unreasonable use" defense to breach of warranty claims – a special defense in cigarette cases created by the SJC in an earlier decision – holding that the defense was so narrow that the class member who would satisfy it would be "rare, if she exists at all." Second, the court held that the medical monitoring relief sought by plaintiffs was injunctive and such relief was appropriate because plaintiffs' injuries are not adequately compensable by monetary damages, even though the SJC had held in its earlier opinion that the claim for future medical expenses "may be satisfied by an adequate remedy at law." Accordingly, the court granted class certification under Rule 23(b)(2) with respect to plaintiffs' breach of warranty and ch. 93A claims.

The court also granted class certification as to plaintiffs' non-negligence claims under Rule 23(b)(3). Rule 23(b)(3) requires that: (i) questions of law or fact common to class members must predominate over any individual questions, and (ii) class treatment must be superior to other methods of adjudicating the case. Having already found that all seven elements of the medical monitoring cause of action may be proven on a class-

wide basis (under the court's Rule 23(b)(2) analysis), the court held that common issues predominated over the individual. Again, the court noted that the only individual issues related to the affirmative defense of comparative negligence, and therefore the court denied class certification as to plaintiffs' negligence claim. As to the second requirement under Rule 23(b)(3), the court found that class action treatment was a superior method of adjudicating the controversy because individual class members would not be able to litigate the claims on their own. In granting plaintiffs' class certification in part, the court observed that "going forward, plaintiffs still face a substantial hurdle of proving liability" but "plaintiffs have demonstrated that they are able to do so as a class."

### **First Circuit Affirms Dismissal of Putative Class Action Against Manufacturer of Recalled Heartworm Medication, Holding Massachusetts Unfair and Deceptive Practices Statute Requires Proof of Economic Loss**

In *Rule v. Fort Dodge Animal Health, Inc.*, --- F. 3d ----, 2010 WL 2179794 (1st Cir. Jun. 2, 2010), plaintiff twice had her dog injected with a heartworm medication that later was recalled due to reported adverse reactions including death. Although plaintiff's dog suffered no adverse consequences and did not develop heartworm, plaintiff alleged she would not have paid the same price for the product had she been aware of the risk the product posed to her dog. Plaintiff filed a putative class action against the medication's manufacturer in the United States District Court for the District of Massachusetts, alleging negligence, breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability), breach of the implied warranty of fitness for a particular purpose, breach of contract and violation of Mass. Gen. L. ch. 93A (the Massachusetts unfair and deceptive practices statute) seeking damages measured by the difference between the actual value of the medication and what its value would have been had it not been "defective." The trial court granted defendant's motion to dismiss ([see May 2009 Foley Hoag Product Liability Update](#)), and plaintiff appealed the dismissal of the merchantability and ch. 93A claims to the United States Court of Appeals for the First Circuit.

The appellate court first observed that no recovery is available for breach of the implied warranty of merchantability where the defect that allegedly rendered the product unmerchantable caused no injury, the threat of injury no longer exists and nothing still possessed by plaintiff is lessened in value. Because plaintiff's dog had consumed the medication, not developed heartworm and not suffered any adverse consequences from the medication, the court affirmed dismissal of this claim.

Turning to the ch. 93A claim, the court reviewed the Massachusetts Supreme Judicial Court's decisions on the "injury" requirement of ch. 93A – including the recent decision in *Iannacchino v. Ford Motor Co.*, 451 Mass. 623 (2008) ([see Aug. 2008 Foley Hoag Product Liability Update](#)) – to determine whether ch. 93A, in the absence of physical injury, requires plaintiff to prove economic loss. After observing that "some tension remains in the language used as between the earlier and the later SJC decisions," the court ultimately held that "the most recent SJC cases . . . appear to have returned to the notion that injury under Chapter 93A means economic injury in the traditional sense." While plaintiff's damages theory might be viable where a consumer buys a product and realizes before consuming it that some deception about a latent risk has rendered the product less valuable than the price paid for it, in the present case, plaintiff had consumed the product by administering it to her dog, had received the benefit she sought from the product (i.e., her dog did not develop heartworm) and had suffered no adverse consequences from the product (i.e., her dog did not sicken or die). Accordingly, plaintiff had not suffered – and could not in the future suffer – any economic injury cognizable under ch. 93A, requiring dismissal of her claim.

### **Massachusetts Federal District Court Precludes Manufacture and Design Defect and Causation Testimony From Plaintiff's Expert and Grants Summary Judgment Where Expert's Only Training and Experience Were in Accident Reconstruction**

In *Morse v. Ford Motor Co.*, 2010 WL 2733607 (D. Mass. July 9, 2010), plaintiff, a passenger in her husband's automobile, was injured when he lost control of the car and struck the guardrail. Plaintiff sued the car's manufacturer in the United

States District Court for the District of Massachusetts alleging negligence, breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability) and violation of Mass. Gen. L. ch. 93A (the Massachusetts unfair and deceptive practices statute). In support of her claims, plaintiff offered the opinion of a single expert to testify that the accident was caused by a defective tie rod assembly in the wheel and that the failure of the passenger-side air bag to deploy aggravated plaintiff's injuries. Defendant moved to disqualify the expert and for summary judgment.

The court granted defendant's motions, finding the expert unqualified to offer opinions as to manufacture and design defects of the car or the cause of plaintiff's injuries. The court first noted the two fundamental criteria for admission of expert testimony under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993): (1) the expert must be sufficiently qualified by knowledge, skill, experience, training or education; and (2) the expert's testimony must be relevant, reliable and helpful to the fact-finder. As to the first requirement, the court found plaintiff's expert unqualified. Although by his own description he had substantial experience in accident reconstruction as a Registry of Motor Vehicles employee and had testified as an expert in hundreds of cases in Massachusetts, he did not have even a college degree and had no education or experience in the area of safety or mechanical engineering or the design and manufacture of automobiles. Similarly, his expert testimony in prior cases had involved only accident reconstruction and never safety engineering or product liability. In addition, the court found that the expert's opinions were not reliable as he had no knowledge regarding the design of the vehicle's airbag system and he had not reviewed any Ford engineering or manufacturing documents, design specifications or an exemplar tie rod assembly. Because the disqualified expert was the only expert identified by plaintiff, the court granted summary judgment for the defendant.

## **Massachusetts Appeals Court Affirms Preclusion of Expert Testimony that Holster Was Unfit for Particular Purpose Because Expert Had No Experience With Particular Holster or Holster Design Generally**

In *Mandracchia v. Michaels of Oregon Co.*, 925 N.E.2d 573 (Mass. App. Ct. April 29, 2010), the plaintiff police officer was injured by his own weapon during the arrest of a criminal suspect after the suspect grabbed the officer's firearm from his holster. Plaintiff sued the holster's manufacturer and seller for breach of warranty, negligence and violation of Mass. Gen. L. ch. 93A (the Massachusetts unfair and deceptive practices statute). At trial, the judge precluded plaintiff's expert, an experienced law enforcement officer, from offering his opinion that the holster was not fit for police use. The judge also permitted defendants to introduce evidence that plaintiff was aware that the suspect previously had wrestled a firearm away from a police officer. After a jury verdict for defendants on all claims, plaintiff appealed both evidentiary rulings.

The Massachusetts Appeals Court first held that it was within the trial judge's broad discretion to admit evidence regarding plaintiff's awareness of the suspect's previous attempt at grabbing a firearm from a policeman's holster, as such evidence was relevant to plaintiff's state of mind.

Turning next to whether plaintiff's expert should have been allowed to opine that the holster was not fit for police use, the court noted that determining whether a witness is qualified to offer a particular expert opinion is a matter of judicial discretion and that the judge may look to "his own common sense, as well as the depth and quality of the proffered expert's education, training, experience, and appearance in other courts," in determining whether the opinion is reliable and would be helpful to the jury. Although plaintiff's expert was an experienced police officer, he had no scientific background, was not a ballistics expert, had no experience in holster design or construction and had no experience with the particular holster in question. Accordingly, the trial judge was well within his discretion in excluding the testimony.

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