FOLEY HOAG LLP

Product Liability **Update**

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Foley Hoag LLP publishes this quarterly Update primarily concerning developments in product liability and related law from federal and state courts applicable to Massachusetts, but also featuring selected developments for New York and New Jersey.

MASSACHUSETTS

Massachusetts Supreme Judicial Court Applies "Transient Jurisdiction" Doctrine To Hold Nonresident Individuals' Intentional, Knowing And Voluntary Presence In Massachusetts At Time Of Service Sufficient To Establish Personal Jurisdiction Even If Claims Have No Relationship To State

In *Roch v. Mollica*, 481 Mass. 164 (2019), a member of a Massachusetts college softball team, a New Jersey resident, suffered injuries from an alleged hazing incident during a team trip to Florida at a property owned by the coach's parents, who were New Hampshire residents. She sued the parents in Massachusetts Superior Court, alleging they "negligently allowed a dangerous act of initiation or hazing" and "negligently failed to obtain or seek immediate medical attention" for her, and served them when they later attended a softball game in Massachusetts. After defendants moved to dismiss for lack of personal jurisdiction, the trial court judge granted the motion, holding that service of process does not itself confer jurisdiction, as the two are distinct concepts and plaintiff's claim otherwise had no connection to Massachusetts.

On plaintiff's appeal, the Massachusetts Supreme Judicial Court granted direct appellate review on its own initiative and reversed. The court first noted that the common law doctrine of "transient jurisdiction," under which in-state service is sufficient to establish jurisdiction over a nonresident defendant, is longstanding and well established, both in Massachusetts and nationwide. The court then examined numerous statutes conferring personal jurisdiction over nonresidents, including Mass Gen. L. ch. 223A, § 3, the state "long-arm" statute, but did find not any to demonstrate the clear legislative intent that would have been required to abrogate the pre-existing transient jurisdiction doctrine.

The court acknowledged it had previously "require[d] that personal jurisdiction be conferred by statute," before then going on to assess whether jurisdiction also comported with due process, but declined to apply that concept to transient jurisdiction. Under the doctrine, the court held, service on any individual who is "intentionally, knowingly, and voluntarily in the Commonwealth" is sufficient to confer jurisdiction as a matter of Massachusetts law. As to defendants' argument this doctrine was unfair, the court responded that the exercise of jurisdiction was reasonably foreseeable to defendants who by their presence had availed themselves

of many benefits of the Commonwealth, such as its roads and availability of emergency services, and in any event could still move to dismiss on grounds of forum non conveniens. Notably, the court confined its recognition of transient jurisdiction to individuals, and did not address whether it applied to corporations.

Regarding whether the exercise of transient jurisdiction was consistent with due process, the court held it was, relying on the United States Supreme Court's ruling in *Burnham v. Superior Court of California*, 495 U.S. 604 (1990), that jurisdiction over a New Jersey resident, whose California resident spouse had served him with a California divorce suit while he was in that state on business, comported with due process. Although multiple opinions issued in that case, because "at least eight of the Justices on the *Burnham* court would uphold the constitutionality of transient jurisdiction over defendants who are intentionally, knowingly, and voluntarily in the forum State when served with process," due process was satisfied.

Massachusetts Federal Court Holds Personal Jurisdiction Over Out-Of-State Manufacturer Satisfies Due Process As Manufacturer Had Account Executive Based In Massachusetts And Sold To Hardware Chain's Out-Of-State Distribution Center Knowing It Shipped Products To Massachusetts

In *Duarte v. Koki Holdings Am., Ltd.*, 2018 U.S. Dist. LEXIS 200013 (D. Mass Nov. 27, 2018), plaintiff brought suit for negligence and breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability) in the United States District Court for the District of Massachusetts after allegedly being injured by a table saw manufactured by defendant. Plaintiff claimed the saw should have included a "dead man's" switch or other design that would have prevented his injury. Although plaintiff's employer had purchased the saw in Massachusetts, likely from a store of a hardware chain that sold most of defendant's saws, defendant moved to dismiss for lack of personal jurisdiction. Defendant argued it was a Delaware corporation with a principal place of business in Georgia, had no employees, offices or property in Massachusetts and did not sell its saws there.

Because Massachusetts courts have interpreted Mass. Gen. L. ch. 223A, § 3, the state "long-arm" statute, to authorize the exercise of personal jurisdiction over a specific claim to the fullest extent permitted by due process, the court turned to the three-pronged due process standard articulated by the United States Court of Appeals for the First Circuit. First, plaintiff's claim must be sufficiently related to the defendant's forum activities, which the district court noted to be a "flexible, relaxed standard." Second, the defendant must have purposefully availed itself of the privilege of conducting activities in the forum, "thereby invoking the benefits and protections of that state's laws and making the defendant's involuntary presence before the state's courts foreseeable." Under this prong, merely placing products into the general stream of commerce is not sufficient; rather, "additional conduct" specifically targeting the forum is required. Third, the exercise of specific jurisdiction must be reasonable, applying a number of "Gestalt factors."

Here, plaintiff pointed to two key facts that ultimately led the court to deny defendant's motion. For one, while defendant did not currently have any Massachusetts employees, at the time of the alleged injury it employed a Northeast Account Executive who worked out of his Massachusetts home and whose territory included the state. In addition, although defendant did not directly sell its saws in Massachusetts, it did sell them to the hardware chain's Connecticut distribution center, knowing it serviced retail outlets in Massachusetts.

The court first held, without any real analysis, that these two actions by defendant were sufficiently "related" to plaintiff's claim. Further, they constituted "additional conduct" beyond simply placing the saws into the stream of commerce, which sufficed to show purposeful availment, as the Connecticut sales set the saws "on a sure course to retailers in Massachusetts." Finally, defendant did not challenge the reasonableness of subjecting it to jurisdiction in Massachusetts.

Interestingly, in applying the First Circuit's due process case law, the court did not mention at all, much less address, the United States Supreme Court's relatively recent opinion in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773

(2017). In that case the Court held due process forbids the exercise of specific jurisdiction over claims against a nonresident defendant where the claims are not connected to the defendant's in-state conduct (see Foley Hoag August 2017 Product Liability Update).

Massachusetts Federal Court Applies Restatement (Second) Of Torts' "Comment k" To Hold Prescription Drug Not Unreasonably Dangerous in Design As Matter Of Law, And "Learned Intermediary" Doctrine To Hold No Duty To Warn Patient Directly Of Risks

In *Burnham v. Wyeth Labs, Inc.*, 2018 U.S. Dist. LEXIS 210822 (D. Mass. Dec. 14, 2018), a pro se plaintiff alleged he had been admitted to a hospital for his major depressive disorder, was prescribed a prescription anti-depressant and thereafter suffered negative side effects, including "shaking" chest muscles, an elevated heart rate and confusion. Shortly after checking himself out against medical advice, plaintiff allegedly experienced suicidal ideation, went to a police station, doused a police car with gasoline and lit the car on fire. Plaintiff then sued the anti-depressant manufacturer for these events in the United States District Court for the District of Massachusetts, alleging a "product liability claim." Defendant moved to dismiss, arguing plaintiff failed to state a claim under Massachusetts law.

The court interpreted plaintiff's claim as asserting a breach of the implied warranty of merchantability (Massachusetts' near-equivalent of strict liability) and noted that to prevail on such a claim plaintiff needed to demonstrate defendant made or sold a product with a manufacturing, design or warning defect that rendered the product unreasonably dangerous and caused his injury. Regarding the first theory, the court found no support for a manufacturing defect, as plaintiff made no allegations suggesting the drug as he ingested it deviated from its intended design.

Regarding a design defect, the court followed comment k of § 402A of the Restatement (Second) of Torts, which defines strict liability, to hold that a design defect claim is not cognizable for a prescription medication. Comment k notes that "[t]here are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use," and "this is especially common in the field of drugs"; indeed, "for this very reason [many drugs] cannot legally be sold except . . . under the prescription of a physician." Accordingly, so long as a prescription drug "is properly prepared and accompanied by proper directions and warnings," as a matter of law it "is not defective, nor is it unreasonably dangerous."

Finally, regarding failure to warn, the court applied the "learned intermediary" doctrine to hold that the manufacturer's duty to warn extended only to the prescribing physician, not the patient himself. Because plaintiff only alleged defendant had failed to warn him, and not his prescribers, his warning claim also failed. The court therefore dismissed plaintiff's complaint in its entirety.

Massachusetts Federal Court Holds Suicide Does Not Bar Wrongful Death Claim As Matter Of Law Where Complaint Plausibly Supports Plaintiff's Lack Of Capacity To Resist Due To Mental Instability

In *Williams v. Kawasaki Motors Corp., U.S.A.*, 2018 U.S. Dist. LEXIS 212444 (D. Mass. Dec. 18, 2018), decedent was severely injured in a motorcycle accident. He sued the motorcycle manufacturer and dealership in the United States District Court for the District of Massachusetts, alleging, among other things, negligence and breach of the implied warranty of merchantability (Massachusetts' near-equivalent of strict liability). After filing his initial complaint, and approximately five years after the accident, he committed suicide, after which his estate moved to amend the complaint to add, among other things, a wrongful death claim. Defendants opposed, arguing the proposed death claim was futile because decedent deliberately took his own life, which as a matter of law was an intervening cause cutting off any liability.

The court first noted that, under Massachusetts law, a plaintiff's

suicide after a serious accident is not a categorical bar to a wrongful death action but only cuts off liability if plaintiff makes a conscious suicide choice, with sufficient understanding of the "physical nature and consequences" of the act. By contrast, if plaintiff, due to mental instability stemming from the accident, is rendered incapable of resisting the impulse to commit suicide, defendant can still be held liable.

Here, the estate sufficiently alleged, "albeit barely," facts supporting the latter scenario, as the proposed amended complaint asserted decedent's death was "a result of his 'severe burn, emotional, and psychological injuries,' that the accident caused [his] death by suicide, and that the defendants, either by negligence or breach of warranty, caused the accident." It was not necessary that the estate allege the details of decedent's mental state, or the precise circumstances that led to his suicide. Accordingly, the court allowed the motion to amend.

NEW YORK/NEW JERSEY SUPPLEMENT

Second Circuit Holds Putative New York And California Consumer Class Adequately States False Advertising And Deceptive Business Practices Claims, As "Whole Grain" Representations On Front Of Cracker Box Would Plausibly Lead Reasonable Consumer To Believe Grain Was Predominantly Whole Grain Even Though First Grain On Side-Panel Ingredients List Was Enriched White Flour

In *Mantikas v. Kellogg Co.,* 910 F.3d 633 (2nd Cir. 2018), New York and California consumers filed a false advertising and deceptive business practices putative class action in the United States District Court for the Eastern District of New York against a food products company, alleging its crackers labeled as "whole grain" or "made with whole grain" misleadingly caused consumers to believe the crackers contained predominantly whole grain when in fact their primary grain was enriched white flour. The crackers came in two different boxes, one with "whole grain" in large print in the center of the box and "[m]ade with 5g of whole grain per serving" in small print at the bottom, and the other with "[m]ade with whole grain" in large print in the center and "[m]ade with 8g of whole grain per serving" in small print at the bottom. Both boxes also contained a "nutrition facts" panel on the side stating that a serving size was 29 grams and, under FDA food labeling regulations, listing the ingredients in descending order by weight. The first ingredient in each list was "enriched white flour," whereas "whole wheat flour" was listed second or third, depending on the box.

The district court dismissed plaintiffs' claims, holding a reasonable consumer would not likely believe the crackers were predominantly whole grain since the front of the packaging clarified they contained only five or eight grams of that ingredient. On plaintiffs' appeal, the United States Court of Appeals for the Second Circuit reversed. The appellate court agreed with the district court that any misstatements alleged by plaintiffs had to be viewed in light of the label as a whole. Here, however, even though the front of the packaging accurately set forth the amount of whole grain content in small letters, this did not tell consumers the crackers' enriched white flour content substantially exceeded their whole grain portion, and since the phrase "[w]hole grain" or "[m]ade with whole grain" was on the front of the packaging in large bold font it would be reasonable for consumers to expect the crackers to be primarily whole grain.

The court also rejected defendant's argument that the ingredient lists on the boxes' side panels rendered plaintiffs' claims implausible, as the specification that the total serving size was 29 grams did not adequately dispel the inference the crackers were predominantly whole grain where it did not indicate what percentage of that total weight was grain of any kind. The court also stated that "reasonable consumers should not be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side."

In reaching its holding, the court distinguished claim-dismissing precedent cited by defendant because those cases involved claims that a product label misled consumers about the quantity or significance of an ingredient that was not the primary one. By contrast, because crackers are typically made predominantly of grain, it was plausible for a reasonable consumer to look to claims on the packaging to discern the predominant grain type. Accordingly, defendant's front-and-center "whole grain" claims were plausibly misleading.

This Update was prepared by Foley Hoag's Product Liability and Complex Tort Practice Group, which includes the following members:

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