FOLEY HOAG

Product Liability **Update**

In This Issue:

September 2023

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.

UNITED STATES SUPREME COURT

United States Supreme Court Holds Pennsylvania Statute Expressly Providing That Foreign Corporations Registering To Do Business In State Are Subject To "General Personal Jurisdiction" Does Not Violate Due Process, As Registration Under Those Circumstances Constitutes Consent, Which Is Valid Basis For Jurisdiction

In *Mallory v. Norfolk Southern Ry.*, 143 S.Ct. 2028 (2023), a railroad employee sued his employer in the Pennsylvania Court of Common Pleas under the Federal Employers' Liability Act, alleging his cancer was caused by exposure to various carcinogens at work. Plaintiff was a Virginia resident, defendant was a Virginia corporation headquartered in that state and plaintiff's alleged exposure occurred in Ohio and Virginia. Due to the suit's lack of connection to Pennsylvania, defendant moved to dismiss, arguing the exercise of personal jurisdiction would violate due process.

Plaintiff conceded the court lacked specific jurisdiction over his claims, but argued defendant had registered to do business in Pennsylvania and the state's personal jurisdiction statute expressly provided that qualification as a foreign corporation under Pennsylvania laws permitted Pennsylvania courts "to exercise general personal jurisdiction" over the corporation. Defendant argued that provision was unconstitutional under the Supreme Court's decisions in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011) and *Daimler AG v. Bauman*, 571 U.S. 117 (2014), which held that due process normally permitted the exercise of general personal jurisdiction only where a corporation was incorporated or had its principal place of business. Ultimately, the Pennsylvania Supreme Court agreed with defendant and ordered the suit dismissed.

After the United States Supreme Court granted plaintiff's petition for review, the Court, in a fractured series of opinions, reversed. The plurality opinion was authored by Justice Gorsuch, joined in full by Justices Thomas, Sotomayor and Jackson and joined in part by Justice Alito. In the portions with which all five justices concurred, the Court held the issue was governed by *Pennsylvania Fire Ins. Co. of Philadelphia v. Hold Issue Mining & Milling Co.*, 243 U.S. 93 (1917). In that decision, the Court held that a Pennsylvania insurance company that had registered to do business in Missouri and appointed the state's insurance superintendent as its agent for service as required by a Missouri statute could, consistent with due process, be sued in Missouri state court for claims having no connection to the state because the statute provided that by

appointing the agent the insurer accepted that service on the agent was as "valid as if served upon the company." Because *Pennsylvania Fire* was never overruled, the Pennsylvania statute at issue here was "explicit" in providing for jurisdiction upon corporate registration and defendant conceded at argument that it "understood" this provision at the time of registration, due process did not forbid the exercise of jurisdiction. The Court noted it "need not speculate whether any other statutory scheme and set of facts would suffice to establish consent to suit."

In the portions of the opinion not joined by Justice Alito, the plurality noted that the Court had long held that due process permits the exercise of general personal jurisdiction over *individuals* —sometimes dubbed "tag" jurisdiction—in any state in which they could be found and served with process, and suggested that corporations were not "entitle[d] . . . to a more favorable rule." The plurality also would not overrule *Pennsylvania Fire* in light of the Court's later due process decisions starting with *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), which required jurisdiction to be consistent with "fair play and substantial justice," and including *Goodyear* and *Daimler*, as those decisions only addressed defendants who—unlike defendant here—had not consented to jurisdiction. And in connection with "fair play and substantial justice" more generally, defendant engaged in extensive business in Pennsylvania, including employing over 5,000 people and maintaining over 2,400 miles of track there.

In a brief separate concurrence, Justice Jackson emphasized that the lack of personal jurisdiction was a waivable defense, and the consequences of corporate registration in this case were clear. In his lengthier partial concurrence, Justice Alito agreed that *Pennsylvania Fire* had not been expressly overruled, nor was it impliedly overruled by the Court's later due process decisions involving "*non-consenting corporations*," so that decision controlled "due to the clear overlap with the facts of this case." But "there is a good prospect" that the Pennsylvania statute violates the dormant commerce clause, which prohibits states from discriminating against or unduly burdening interstate commerce. Subjecting foreign corporations to general jurisdiction that domestic corporations are not subject to in other states disadvantages foreign corporations in relation to domestic ones, and it is a significant burden to require foreign corporations to defend against all claims even when they have no connection to the forum. The plurality opinion had acknowledged that defendant's argument to this effect was not addressed by the Pennsylvania Supreme Court and "remains for consideration on remand."

Finally, the dissenting opinion, authored by Justice Barrett and joined by Chief Justice Roberts and Justices Kagan and Kavanaugh, argued that a state could not "compel" or "manufacture" a foreign corporation's "consent" to general jurisdiction based on the corporation's registering to transact business in the state, a requirement that every state imposes, because the Court's precedent has long made clear that merely transacting business within a state, and even substantial business, is an insufficient basis to support the exercise of general jurisdiction consistent with due process.

MASSACHUSETTS

Massachusetts Supreme Judicial Court Holds Wrongful Death Claims Barred Where Decedents' Underlying Personal Injury Claims Were Barred By Statute Of Limitations At Time Of Death, As Wrongful Death Claims Under Massachusetts Law Are Derivative Of Decedent's Claims

In *Fabiano v. Philip Morris USA, Inc.*, 492 Mass. 361 (2023), representatives of the estates of two decedents brought separate actions under the Massachusetts wrongful death statute, Mass. Gen. L. c. 229, § 2, against cigarette manufacturers and sellers in Massachusetts Superior Court. Plaintiffs alleged that decedents, who had started smoking as minors and later developed emphysema and lung cancer respectively, had died due to their use of defendants' cigarettes, and asserted claims based on negligence, breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability) and conspiracy.

Defendants in both actions moved to dismiss, arguing plaintiffs' wrongful death claims were barred because the statutes of limitations on decedents' underlying personal injury claims had already run at the time of decedents' deaths. Defendants relied on Massachusetts Supreme Judicial Court ("SJC") precedent, in the context of an arbitration agreement executed by a decedent, holding that wrongful death actions are derivative of decedent's claims and cannot be brought if the decedent himself could not have sued at the time of his death. Based on this precedent, the trial court dismissed both actions.

After allowing plaintiffs' applications for direct appellate review, the SJC affirmed. The court first reiterated its previous holdings—which were based in part on language in several clauses of the wrongful death statute permitting suit "under such circumstances that the decedent could have recovered damages for personal injuries if his death had not resulted"—that wrongful death claims are indeed derivative of the decedent's own personal injury claims, and cannot be brought if decedent couldn't have sued at the time of his death. Even though the "under such circumstances" language was not repeated in the specific clause of the statute that mentioned death claims premised on breach of warranty, the court rejected any distinction between those claims and negligence-based claims, as the court's prior holdings were not based on the "under such circumstances" language alone but also on the overall structure and purpose of the wrongful death statute as well as case law about such statutes both in Massachusetts and in other jurisdictions.

In response to plaintiffs' argument that their claims were expressly permitted under the wrongful death statute's three-year limitations period, the SJC noted that that provision set the time period in which a wrongful death claim that at one time existed could be brought, but here no such claim ever existed. The court also noted that the vast majority of jurisdictions where wrongful death claims were considered derivative of, and not independent from, the decedent's personal injury claims had held that death claims are barred where the statute of limitations on decedent's claims had expired as of the date of his death.

First Circuit Court of Appeals Holds State Law Claims Against Dietary Supplement Manufacturer For False And Misleading Statements Preempted By Federal Food, Drug, And Cosmetic Act ("FDCA"), As Statements Regarding Physiological Role And Benefits Of Main Ingredient Were "Structure/Function" Claims For Which Defendant Had Substantiation As Required By FDCA, Even If Defendant Lacked Substantiation At Specific Dose Included In Product

In *Ferrari v. Vitamin Shoppe Indus. LLC*, 70 F.4th 64 (1st Cir. 2023), plaintiffs sued the manufacturer of dietary supplements with the main ingredient glutamine in the United States District Court for the District of Massachusetts, alleging the supplements did not provide the "muscle growth" their labels promised and bringing claims for false advertising, misbranding, unjust enrichment and breach of express and implied warranty. The labels recited that glutamine is "involved in protein synthesis," has been shown to "help preserve muscle" and "helps support muscle growth and recovery as well as immune health." They also recited that "[i]ntense exercise can deplete glutamine stores" but "supplemental glutamine is thought to replenish these stores allowing for enhanced recovery."

Defendant moved to dismiss the claims as preempted by the Federal Food, Drug, and Cosmetic Act ("FDCA"), which requires dietary supplement manufacturers making a "structure/function" claim—which "describe[s] the role of a nutrient or dietary ingredient intended to affect the structure or function in humans," or "characterize[s] the documented mechanism by which a nutrient or dietary ingredient acts to maintain such structure or function"—to have "substantiation that [the claim] is truthful and not misleading." The FDCA expressly preempts any state law requirement "that is not identical to the requirement of" the statute. The district court granted defendant's motion.

On plaintiffs' appeal to the United States Court of Appeals for the First Circuit, the court affirmed. As to plaintiffs' argument that the statements at issue were not structure/function claims because they went beyond descriptions of the nutrient to refer to the effects of the product itself, the court concluded the statements were limited to the nutrient glutamine and merely referring to "supplemental" glutamine or mentioning that glutamine was in the product did not invalidate otherwise permissible structure/function claims.

Plaintiffs next argued that even if the statements were structure/function claims, they lacked substantiation because the labeling referred to "supplemental" glutamine, and defendants lacked substantiation specifically about supplemental as opposed to naturally occurring glutamine. The court, however, found this distinction meaningless, plaintiffs also conceded supplemental and natural glutamine play the same role in the body, and defendant's expert presented a number of studies showing that glutamine supplementation achieves the various benefits the labeling describes. While plaintiffs' expert countered that those benefits were only achieved at doses higher than in defendant's products, he conceded glutamine itself

can achieve those effects so there was no evidence that defendant's claims about the physiological role of glutamine lacked substantiation. Nor were the claims misleading by omitting that glutamine supplementation has no effect at the doses included in the products, because under First Circuit precedent structure/function claims are only misleading if they omit a nutrient's conflicting or harmful effect or are untruthful as to the nutrient's claimed effect. As defendant's labeling fully complied with the FDCA's requirements, plaintiffs' claims seeking to impose different requirements were preempted.

Massachusetts Supreme Judicial Court Holds Long-Arm Statute And Due Process Permit Personal Jurisdiction Over Product Liability Claims Against Successor To Manufacturer That Initially Sold Vehicle To Rhode Island Dealership, Where Vehicle Was Subsequently Transferred To And Sold By Massachusetts Dealership, And Then Sold Through Private Sale To Plaintiff In New Hampshire Where Accident Occurred, As Claims "Aris[e] From" Predecessor's Massachusetts Dealership Contracts

In *Doucet v. FCA US LLC*, 492 Mass. 204 (2023), court-appointed guardians sued an automobile manufacturer in Massachusetts Superior Court, alleging their mentally incapacitated adult family member's injuries in a New Hampshire car accident were due to design and manufacturing defects. A predecessor corporate entity manufactured the car and sold it to a Rhode Island dealership, which transferred it to a Massachusetts dealership which then sold it to a Massachusetts resident; the car later changed hands through private sale before plaintiffs' family member, a New Hampshire resident, purchased it in 2013.

Defendant, a Delaware corporation headquartered in Michigan that had assumed liability for the original manufacturer's products in a bankruptcy proceeding, removed the case to the United States District Court for the District of Massachusetts based on diversity of citizenship, and moved to dismiss for lack of personal jurisdiction. The federal court held jurisdiction over plaintiffs' claims was proper under Mass. Gen. L. ch. 223A, § 3, part of the state's long-arm statute, as "arising from" defendant's predecessor's "transacting any business" in the state, and did not violate due process [View May 2020 Product Liability Update], but also granted plaintiffs' motion to remand the case to state court because plaintiffs had properly joined the Massachusetts dealership that sold the car, which defeated federal diversity jurisdiction.

On remand, defendant again moved to dismiss for lack of jurisdiction, and the state court granted the motion, finding jurisdiction not supported by either the long-arm statute or due process. Following plaintiffs' appeal to the Massachusetts Appeals Court, the Massachusetts Supreme Judicial Court ("SJC") transferred the case sua sponte and reversed. Although the court did not explicitly discuss defendant's argument that its predecessor's actions in the forum could not be imputed to itself for jurisdictional purposes, the court impliedly rejected that position, concluding that defendant "through its predecessor" transacted business in Massachusetts through its agreements with dealerships there (the court did add that defendant itself later continued those relationships). Moreover, under a "but for" test plaintiffs' claims arose from those dealer agreements, as the Massachusetts dealership's sale of the car—which the court characterized as defendant's "distributing" the car through that dealership—was "the first step in a train of events" that resulted in plaintiffs' family member's injury in New Hampshire; accordingly, the fact that defendant's predecessor actually sold the car to a Rhode Island dealership was immaterial.

The court also rejected defendant's argument that this "but for" connection was too attenuated to satisfy due process, which requires plaintiffs' claims to have a demonstrable nexus to defendants' forum contacts. Because the car was first sold to a private consumer in Massachusetts by a Massachusetts dealership with whom defendant's predecessor had a contractual relationship, there was a sufficient relationship between plaintiffs' claims and defendant's predecessor's Massachusetts transactions.

The court's decision seems potentially troublesome on multiple grounds. For starters, imputing defendant's predecessor's Massachusetts conduct to defendant for jurisdictional—as opposed to liability—purposes without any discussion or citation of authority is hardly jurisprudentially ideal. Second, while a claim that defendant's predecessor breached its agreement with a Massachusetts dealer would clearly "aris[e] from" that agreement, it would seem that a

product liability claim that the predecessor sold a car that was defective and unreasonably dangerous would arise from the predecessor's *sale* of the car, which occurred in Rhode Island, not its dealership agreement. And stating that the predecessor "distribut[ed]" the car in Massachusetts, when in fact its *dealer* did, would seem to impute the conduct of a wholly independent entity to the predecessor.

Massachusetts Appeals Court (1) Reverses Verdict Against Cigarette Manufacturer For Negligent Marketing And Vacates Punitive Damages Possibly Based Thereon, As Plaintiff Had Insufficient Evidence Defendant's Marketing That Appealed To Minors Caused Decedent To Start Smoking, But (2) Affirms Plaintiff's Verdicts For Conspiracy And Deceptive Practices Based On Marketing Falsely Suggesting "Light" Cigarettes Were Safer, And For Design Defect As Low-Nicotine Cigarettes Would Have Been Less Addictive

In *Coyne v. R.J. Reynolds Tobacco Co.*, 102 Mass. App. Ct. 1122 (2023) (issued pursuant to Appeals Court Rule 23.0), plaintiff sued a cigarette manufacturer on behalf of his wife's estate for negligent marketing, conspiracy, breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability) and violation of Mass. Gen. L. ch. 93A (the state unfair and deceptive trade practices statute) in Massachusetts Superior Court, alleging defendant's actions caused his wife to begin smoking as a minor and become addicted, ultimately leading to her death from lung cancer. Following a jury verdict on all claims that included punitive damages nearly double the compensatory award, and denial of defendant's motion for judgment notwithstanding the verdict, defendant appealed to the Massachusetts Appeals Court, arguing there was insufficient evidence to support any of plaintiff's claims.

With respect to negligent marketing, defendant did not dispute that it had a duty "to avoid marketing cigarettes in a manner calculated to induce purchases by minors," but argued there was no evidence any violation of that duty had caused decedent to begin smoking. There was no available testimony from decedent herself about why she began smoking, and her sister and childhood friend could not point to any marketing by defendant that influenced her decision. In a summary disposition under the court's Rule 23.0, the court held that although direct evidence that decedent's reason for smoking was based on defendant's marketing was not required, there needed to be a "reasonable inference" "based on probabilities rather than possibilities," and evidence of the marketing alone was insufficient. Accordingly, the trial court should have directed a verdict against this claim.

On the other hand, there was sufficient evidence to support plaintiff's conspiracy and ch. 93A claims, based on plaintiff's expert's testimony that the cigarette industry created "light" cigarettes in response to research showing that smokers would think they were healthier when in fact they were just as harmful, and testimony from decedent's daughter that decedent switched to defendant's "light" cigarettes because they were "healthier" and as "a road to quitting."

The court also found sufficient evidence to support plaintiff's breach of warranty claim based on design defect, as plaintiff's expert testified to the availability of several safer alternative designs, including low-nicotine cigarettes. While defendant argued such cigarettes could also cause cancer and thus were equally defective, the court held plaintiff's expert testimony supported a conclusion that such cigarettes eliminated a different defect because they were less addictive and therefore easier to quit.

Lastly, despite having upheld the verdict on three of plaintiff's four claims, the court vacated plaintiff's punitive damages award because the court could not determine whether the jury's findings of grossly negligent and malicious, willful, wanton or reckless conduct on which the award was premised were based on the negligent marketing claim for which the court had found insufficient evidence. The court therefore remanded for a new trial on punitive damages.

Second Circuit Holds Failure-To-Warn Claims Against Intermediate Seller Of Exploding Compressed Air Tank Preempted By Hazardous Materials Transportation Act Of 1975 ("HMTA"), As Claims Were Based On Lack Of Adequate "Marking," Including "Instructions Or Warnings," On Tank's "Container," And Would Impose Obligations Not "Substantively The Same" As Those Under HMTA

In Buono v. Tyco Fire Products, LP, 78 F.4th 490 (2d Cir. 2023), an employee of a fire suppression system services company sued multiple parties in the Supreme Court of New York, including the intermediate seller of a compressed air tank that exploded while the employee attempted to test a fire suppression system, causing serious injury. As to the seller, plaintiff alleged claims for negligent design and manufacturing, breach of warranty and strict product liability and negligence for failure to warn.

Defendants removed the case to the United States District Court for the Southern District of New York based on diversity of citizenship jurisdiction and, after discovery, plaintiff voluntarily dismissed certain defendants altogether and dismissed his warranty and negligent design and manufacturing claims against the intermediate seller. The seller then moved for summary judgment against plaintiff's remaining claims regarding the lack of a warning on the tank about the danger of overfilling it, principally arguing the claims were expressly preempted by the Hazardous Materials Transportation Act of 1975 ("HMTA"), and the district court granted the motion.

On plaintiff's appeal, the United States Court of Appeals for the Second Circuit affirmed. Section 5125(b) of the HMTA expressly preempts any state law that (1) is "about" any of the subjects enumerated in the provision, which include the design, manufacture, inspection, "marking," maintenance or repair of a "package, container, or packaging component" that is represented as qualified for use in transporting hazardous materials in commerce, and (2) is not "substantively the same" as a provision of the HMTA or regulations under it.

Here, plaintiff's failure-to-warn claims satisfied both requirements. First, the tank was qualified to transport hazardous materials, and plaintiff's claims were "about" the "marking" of "a package, container, or packaging component" of the tank, i.e., its exterior, as the term "marking" encompasses "instructions or warnings." Second, plaintiff's claims were not "substantively the same" as the HMTA requirements, because the HMTA imposes civil liability only for "knowing" violations, while the employee's negligence and strict liability claims require a less culpable mental state that would "sweep more broadly than federal law."

Finally, plaintiff argued that the HMTA's preemption provision was inapplicable to the intermediate seller because, among other things, the Hazardous Material Regulations ("HMR") promulgated under the statute include both "manufacturing" and "transportation-function" regulations, but the former regulations do not regulate labeling, and while the latter regulations do, the seller was not engaged in a transportation function when it sold the tank. The court, however, rejected this argument as contrary to the HMTA's plain text, which does not condition preemption on whether the statute "regulates the defendant's specific conduct at a specific time." Rather, and as previously agreed by the United States Court of Appeals for the Third Circuit, preemption exists so long as the statute's subject-matter and non-similarity requirements are met.

New York Federal Court Holds Third-Party Payors Seeking National Class Action For Healthcare Costs Allegedly Attributable To Defective Joint Replacement Devices Lacked Standing To Assert Product Liability Claims Against Manufacturer, As Complaint Did Not Allege Facts Plausibly Showing Payors Suffered Actual Injury Such As Payment For Revision Surgeries And That Such Injury Was Caused By Device Defect Rather Than Failures For Other Reasons

In *MSP Recovery Claims, Services LLC v. Exactech, Inc.*, No. 23-cv-1098, No. 22-MD-3044, 2023 U.S. Dist. LEXIS 105627 (E.D.N.Y. June 14, 2023), the assignee of third-party payors who made Medicare and other benefit payments to reimburse the healthcare costs of individuals who underwent joint replacement surgeries with allegedly defective devices sued the devices' manufacturer in the United States District Court for the Northern District of Florida. The payors asserted claims

on behalf of themselves and a putative nationwide class of all such third-party payors for breaches of warranties, violation of the Magnuson-Moss Warranty Act, violations of state consumer protection statutes and various common law torts.

After the suit was transferred to the United States District Court for the Eastern District of New York as part of a multi-district litigation centralizing nearly 600 suits arising out of the manufacturer's allegedly defective joint replacement devices, the manufacturer moved to dismiss for lack of subject matter jurisdiction, arguing the court lacked either federal question or diversity of citizenship jurisdiction, and also that the providers lacked Article III standing to pursue their claims.

The court first held it lacked federal question jurisdiction because the only federal law claim asserted by plaintiffs was under the Magnuson-Moss Warranty Act ("MMWA"), which contains a preemption provision at 15 U.S.C. § 2310(d)(1) rendering the statute "inapplicable to any written warranty the making or content of which is otherwise governed by Federal law." Because the making or content of any product representation by defendant would be regulated by the United States Food and Drug Administration under the Federal Food, Drug, and Cosmetic Act, the providers' MMWA claims were preempted and therefore could not support federal question jurisdiction. The court did, however, have diversity of citizenship jurisdiction pursuant to the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d)(2), as the proposed nationwide class likely contained at least one class member not from defendant's home state of Florida, and the complaint plausibly alleged that the amount in controversy exceeded CAFA's minimum threshold of $5,000,000.

Nonetheless, the court dismissed the third-party payors' claims for lack of standing, as Article III of the United States Constitution only recognizes an "actual case or controversy" if plaintiff has suffered an injury-in-fact and there is a causal connection between that injury and the conduct complained of. As to injury-in-fact, while the complaint summarily asserted the devices plaintiffs paid for were "worthless," it elsewhere alleged only that the devices failed at a higher-than-expected rate, not that they were certain to fail and therefore had no value. Those allegations were fatal to standing because a "mere risk of harm" does not constitute injury in fact; rather, any such risk had to have "actually materialized," *i.e.*, plaintiffs needed to have been "forced to pay additional amounts due to the defects," such as the cost of revision surgeries, and the complaint contained no factual allegations plausibly demonstrating such harm.

Similarly, the complaint failed adequately to support a "causal nexus" between plaintiffs' claimed injuries and defendant's conduct. While plaintiffs' theory was that they paid for defective devices which in turn required additional payments to remediate the resulting complications, the complaint did not specify any revision surgeries that plaintiffs paid for due to a defective device, and indeed the complaint acknowledged that device failures and revision surgeries could be attributable to a variety of causes other than device defects. Absent, "at a minimum," specific allegations of the "names of the patients for whose surgeries" the providers paid, "the dates of those surgeries, and the devices used," the complaint lacked sufficient facts establishing why such payments were made, let alone that they were "fairly traceable" to device defects.

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

David R. Geiger
Practice Group Chair and Update Editor

Matthew C. Baltay
Kristyn Bunce DeFilipp
Jonathan M. Ettinger
Christopher E. Hart
Matthew E. Miller
Creighton K. Page
Madeleine Rodriguez
Peter A. Sullivan
Shrutih V. Tewarie
Colin J. Zick

Fernando Berdion-Del Valle
Jasmine Brown
Susanna Chi
Christian A. Garcia
Caroline Holliday
Rachel Kerner
Aaron Lang
Joanna McDonough
Leah Rizkallah

Peter G. Ellis
Associate Editor

James M. Gross,
Associate Editor

FOLEY HOAG