FOLEY HOAG LLP

Product Liability **Update**

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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.

United States Supreme Court Holds Due Process Forbids Exercising Specific Jurisdiction Over Nonresident Plaintiffs' Claims Against Nonresident Defendant Where Claims Did Not Arise From Defendant's Contacts with Forum, Rejecting "Sliding Scale" Approach Giving Weight To Defendant's "Extensive" Forum Contacts Unconnected to Plaintiffs' Claims

In *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), a group of California residents and non-residents sued the manufacturer of a prescription anticoagulant for injuries allegedly caused by the drug, asserting claims that included strict product liability, negligent misrepresentation and misleading advertising. Defendant, a Delaware corporation headquartered in New York, had two research laboratories and several hundred employees in California, but did not develop the drug or its marketing strategy there, and moved to quash service of the nonresidents' summonses for lack of personal jurisdiction.

The trial court denied the motion, finding defendant's California contacts sufficient to confer general jurisdiction over defendant. The California Supreme Court vacated the ruling, however, following the United States Supreme Court's holding in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) (***see April 2014 Foley Hoag Product Liability Update***), that general jurisdiction only existed where a corporation's forum contacts were so continuous and pervasive "as to render [it] essentially at home," the paradigmatic examples being its state of incorporation or principal place of business.

On remand, the nonresident plaintiffs now argued for specific jurisdiction, contending defendant's forum contacts were such that plaintiffs' claims could be said to "aris[e] out of" or at least "relat[e] to" those contacts. The trial court again denied defendant's motion, and the California Supreme Court affirmed. In so doing it applied a "sliding scale" approach under which the connection required between defendant's forum contacts and plaintiffs' claims could be relaxed the more "extensive" those contacts were, and here defendant's in-state research facilities as well as marketing and promotional activities allegedly giving rise to similar claims by the resident plaintiffs—as to which defendant did not contest jurisdiction—sufficed.

The United States Supreme Court granted certiorari and reversed. The Court first explained that due process limitations on state courts' jurisdiction over nonresident defendants not only protect them from the burdens of distant litigation, but are a consequence of territorial limitations on states' powers in our federal system. Thus it is only a defendant's in-state activity specifically giving rise to a claim that subjects defendant to a state's authority.

The Court rejected the California Supreme Court's approach taking into account the volume of defendant's in-state contacts unconnected with plaintiffs' claims as resembling a "loose and spurious" form of general jurisdiction. Under due process, defendants' California laboratories and employees, which were not connected with plaintiffs' claims, were irrelevant to specific jurisdiction. Moreover, the fact that *resident* plaintiffs were prescribed, obtained and took the drug in California, allegedly due to defendant's misleading marketing there, did not allow the state to assert specific jurisdiction over the nonresidents' claims: "What is needed—and what is missing here—is a connection between the forum and the specific claims at issue."

Finally, the Court rejected plaintiff's argument that defendant's decision to contract with a California company to distribute the drug nationwide was sufficient to establish jurisdiction. A contract with an in-state entity does not by itself create specific jurisdiction, and plaintiffs did not allege defendant engaged in any acts relevant to their claims with the distributor or was derivatively liable for its conduct, nor could they even show the drugs they took were sold by the distributor.

Massachusetts Federal Court Holds Compliance With Requirement to Plead Fraud With Particularity Not Excused Where Multi-District Litigation Court Orders Filing of Master Complaint, But Rule Only Requires Specificity in Pleading Misrepresentations, Not Reliance

In *In re Zofran (Ondansetron) Products Liability Litigation*, 2017 U.S. Dist. LEXIS 61701 (D. Mass. Apr. 24, 2017), a multi-district litigation ("MDL") in the United States District Court for the District of Massachusetts, parents and guardians of children with birth defects sued the manufacturer of an anti-nausea prescription drug, alleging it caused the birth defects. Plaintiffs originally brought individual birth defect actions in various districts, which the Judicial Panel on Multidistrict Litigation transferred to the court for consolidated pretrial proceedings. Plaintiffs filed a master complaint asserting numerous claims, including negligent misrepresentation, fraudulent misrepresentation and concealment, and violation of Mass. Gen. L. ch. 93A (the state unfair and deceptive practices act), based on allegedly false and misleading labeling and promotional statements concerning the drug's safety during pregnancy. Defendant moved to dismiss these claims for failure to plead fraud with particularity as required by Fed. R. Civ. P. 9(b).

As an initial matter, plaintiffs argued Rule 9(b) should not apply to a court-ordered MDL master complaint, as its whole purpose is to promote efficiency through uniform pleadings. The court disagreed, holding Rule 9(b) applies with equal force to MDL and individual actions, and creation of an MDL does not suspend the federal rules. Moreover, a master complaint has no effect until adopted by an individual plaintiff's short-form complaint, which could always add particularized fraud allegations.

Regarding plaintiffs' claim that the manufacturer knowingly misrepresented the drug's pregnancy risks in advertising and marketing efforts, the court held the claim violated Rule 9(b) because it failed to identify the time, place or content of even one specific allegedly false statement by defendant. Plaintiffs' allegations that the manufacturer made misrepresentations to individual patients and their medical providers failed for the same reason.

By contrast, plaintiffs' claim that the manufacturer made misrepresentations in the drug's labeling did identify a specific allegedly false statement and applicable time period. Moreover, the court held Rule 9(b)'s particularity requirement was limited to the allegedly misleading statement itself and did not encompass the prescriber's reliance on the label, even though that is an element of fraud, so the master complaint's general reliance allegations were sufficient. The court therefore granted the manufacturer's motion to dismiss the advertising and marketing claims, but denied it as to the labeling claims.

Massachusetts Federal Court Holds No Design Defect Claim Against Chemical Manufacturers For Products' Inherent Dangers, No Failure-to-Warn Claim Where Defendant Reasonably Relied On Bulk Purchasers to Warn End Users and No Post-Sale Duty to Warn Due to Inability to Identify End Users

In *Town of Westport v. Monsanto*, 2017 U.S. Dist. LEXIS 53815 (D. Mass., April 7, 2017), a municipality sued manufacturers of polychlorinated biphenyls ("PCBs") in the United States District Court for the District of Massachusetts for breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability) and negligence based on defective design and failure to warn after plaintiff discovered that PCBs, odorless and colorless alleged human carcinogens, were included as plasticizers in caulk that was manufactured by an unknown third party and used at one of plaintiff's schools. Defendants moved for summary judgment on all claims.

Regarding design defect, the court rejected the municipality's argument that, as the manufacturers indisputably made non-PCB containing plasticizers, a feasible alternative design necessarily existed. Drawing parallels to an earlier case in which a different municipality sued PCB manufacturers based on the chemicals' presence in caulk, *Town of Lexington v. Pharmacia* (***see October 2015 Foley Hoag Product Liability Update***), the court held plaintiff's claim was that PCBs themselves, not defendants' *design* of them, were inherently dangerous, but Massachusetts law does not permit categorical liability for an entire class of products. Moreover, plaintiff's argument would have imposed liability on defendants for a third party's decision to use PCBs in its caulk.

The court further held that, even if a non-PCB plasticizer constituted a feasible alternative design, plaintiff had no evidence that any risk from PCB-plasticized caulk was reasonably foreseeable when the school was built. Plaintiff offered evidence defendants may have known PCB-containing plasticizers were volatile, but that information related to the plasticizer's effectiveness, not health or environmental risks, and any knowledge PCBs could volatilize at dangerous levels was limited to other products. Indeed, the record included no scientific studies showing PCB exposure at the levels detected in the school actually posed a danger.

Regarding plaintiff's failure-to-warn theories, it was undisputed defendants supplied their PCBs to caulk manufacturers in bulk and warned about possible toxic effects for industrial workers. While plaintiff argued defendants had a further duty to warn end users, the court held that under the bulk supplier doctrine defendants were entitled to rely on the vendees' independent obligation to warn such users. The court also rejected plaintiff's argument that defendants had a post-sale duty to warn arising out of subsequent knowledge, as there was no evidence they could have identified plaintiff or any other end user to convey a warning.

Finally, under settled Massachusetts law a defendant that did not breach the implied warranty of merchantability for defective design or failure to warn could not be found negligent under the same theory, thus plaintiff could not succeed on its negligence claims. The court also noted that the lack of any foreseeable risk of injury from PCB plasticizers in caulk would independently doom any negligent claims, including for alleged negligent marketing.

Massachusetts Federal Court Finds Genuine Dispute Regarding Identity of Forklift Manufacturer Where Website Information Revealed Multiple Entities Linked To Trade Name on Lift And Defendant's Affidavits Did Not Negate All Possibility of Responsibility for Product

In *Whitley v. Kion N. Am. Corp.*, No. 16-10005, 2017 U.S. Dist. LEXIS 41441 (D. Mass. March 22, 2017), a forklift truck flipped over and crushed plaintiff's leg. Although the lift was later destroyed, a photograph of it depicted a distinctive trade name and logo, and the owner provided its serial number. Plaintiff brought suit in Massachusetts Superior Court, ultimately against an entity whose previous corporate name included the trade name, asserting claims of negligence and breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability) and alleging defendant manufactured the lift. Defendant removed the case to the United States District Court for the District of Massachusetts based on diversity of citizenship among the parties.

Before any discovery was conducted, defendant moved for summary judgment, asserting it did not in fact design, manufacture or sell the forklift. The company's product manager stated in an affidavit that he was familiar with the products of both the company and its "predecessor companies" dating back to 1977, and none of them had built or sold the lift. The company's cost accountant added in an affidavit that the company's computer system, which dated to 2001, did not reflect a sale by the company or its predecessors of a lift with the serial number at issue, or any warranty claim regarding such a lift sold before that date. In response, plaintiff requested discovery, which the court permitted, and plaintiff issued written discovery requests but did not seek the deposition of either affiant or the forklift's owner or distributor.

Defendant then renewed its summary judgment motion. In response, plaintiff argued there were publicly available web sites for both a material handling group and a heavy truck group, each of which used the trade name at issue (and the latter of which linked to the names of one or more German companies), and a search on either yielded defendant's name as a United States-based "partner." The court first noted that defendant's cost accountant did not make clear his computerized search had "cover[ed] all avenues of inquiry," including demonstrating access to the records of all other entities whose name incorporated the trade name and why a search mostly going back only to 2001 would suffice. Moreover, the product manager's affidavit did not explain how he could tell from the photo that defendant was not responsible for the lift, and defendant did not explain its relationship to the other entities that used the trade name. Based on this record, the court concluded defendant had not met its burden under Fed. R. Civ. P. 56(a) to demonstrate the lack of any genuine dispute regarding the manufacturer's identity, and therefore denied defendant's motion without prejudice to renewal if defendant could demonstrate that some other entity for which it was not responsible "could have manufactured" the lift.

Massachusetts Federal Court Compels Disclosure of Plaintiff's Adult Criminal Record Because Relevant to Defendants' Defenses and Regulation Explicitly Contemplates Release of Information For Litigation Purposes Through Valid Court Order

In *Harden v. Bos. Sci. Corp.*, No. 15-cv-11503-MLW, 2017 U.S. Dist. LEXIS 58965 (D. Mass. Apr. 18, 2017), plaintiff brought negligence claims in the United States District Court for the District of Massachusetts against a property owner, general contractor and subcontractor for whom plaintiff worked after a ladder he was using collapsed. After plaintiff revealed a prior criminal record at a deposition, defendants sought plaintiff's official Criminal Offender Record Information ("CORI") by serving a subpoena on the Massachusetts Department of Criminal Justice Information Services ("DCJIS"). When DCJIS objected, defendants moved to compel production while plaintiff moved to quash the subpoena and for a protective order.

A United States magistrate judge ruled, without further exposition, that plaintiff's adult CORI was within the scope of discoverable material under Fed. R. Civ. P. 26 because it was relevant to defendants' defenses; presumably, the court had in mind that the information could be directly admissible to impeach plaintiff's credibility under F.R.E. 609. The court rejected plaintiff's argument that CORI was privileged, finding no statutory basis for this assertion and specifically noting a provision of DCJIS's regulations, 803 C.M.R. § 2.07(3)(b), that permits an attorney to seek a non-client's CORI "for litigation purposes" through a valid court order. Accordingly, the court granted defendants' motion to compel, but limited disclosure of the information to defense counsel, their agents and potential witnesses solely for the purpose of defending the case at issue. The court also cautioned that its order was restricted to plaintiff's adult CORI only, and DCJIS should not produce any information regarding any juvenile offenses.

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