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 Federal Court Dismisses Suit By Japanese Plaintiffs Against Massachusetts Reactor Designer For Japanese Disaster Based On Forum Non Conveniens, Citing Japanese Compensation System That Provided Alternative Forum Albeit Only Against Different Party, Difficulties In Obtaining Evidence From Japan And Weak Local Interest In Suit

In *Shinya Imamura v. GE*, 371 F. Supp. 3d 1 (D. Mass. 2019), multiple Japanese individuals and businesses sued a nuclear reactor designer headquartered in Massachusetts for property damage and economic harm caused by the 2011 tsunami and resulting nuclear disaster at the Fukushima Daiichi Nuclear Power Plant. Plaintiffs alleged defendant negligently designed the plant's reactors and safety mechanisms, including by lowering the bluff over the ocean where the plant was built, placing emergency generators and seawater pumps in the basement without protection against flooding, not ensuring a backup power source in case the generators failed, and not including sufficient space for emergency equipment.

Defendant moved to dismiss on multiple grounds, including the doctrine of forum non conveniens, which permits dismissal when an alternative forum in another nation is available that is both fair to the parties and substantially more convenient for them or the courts. Here defendant argued that under a Japanese statute, the plant's operator was strictly and solely liable for all damages arising from the disaster, and the statute provided three avenues to obtain compensation: (1) submitting claims directly to the operator; (2) mediating claims through a Nuclear Damage Claim Dispute Resolution Center; and (3) lawsuits in a Japanese court. Plaintiffs did not dispute these avenues were available, but argued that because they did not provide a remedy from defendant, dismissal was inappropriate.

The court agreed with defendant that Japan provided an adequate alternative forum even though damages could only be recovered from the operator, emphasizing the operative question was whether the forum offered an adequate remedy for plaintiffs' injuries regardless of source, not whether they could maintain precisely the same suit. The court noted the operator had paid tens of billions of dollars to business entities and individuals, including for property damage and economic loss, and was indemnified by the Japanese government. In addition, private and public interest factors, most notably the difficulty in obtaining evidence located in Japan, the difficulty of enforcing compulsory process against parties located there and the lack of a strong local interest in the dispute by either the United States or Massachusetts supported dismissal. Accordingly, the court granted defendant's motion.

Massachusetts Federal Court Grants Parents' Motion to Voluntarily Dismiss Their Claims With Prejudice Based On Insufficient Scientific Evidence Of Causation But Minor Son's Without, Finding No Prejudice To Defendant As Underlying Law Normally Permits Minors To Bring Claims Years Later On Reaching Majority

In *Kutzer v. GlaxoSmithKline LLC* , 2019 U.S. Dist. LEXIS 84461 (D. Mass. May 20, 2019), parents sued a pharmaceutical company alleging its drug caused their son's birth defects and asserted claims both on behalf of their son for his injuries and themselves for emotional distress and loss of consortium. Although the action was filed in the United States District Court for the District of North Dakota, it was transferred to the United States District Court for the District of Massachusetts as part of a multi-district litigation ("MDL"). Under the court's orders, discovery was initially limited to service of a plaintiff fact sheet and collection of medical and other records. Defendant then moved for summary judgment, arguing plaintiffs' claims were preempted because their requested warning would not be approved by the United States Food and Drug Administration.

Following argument on defendant's summary judgment motion, plaintiffs moved under Fed. R. Civ. P. 41(a)(2) to dismiss their suit with prejudice as to their own claims but without prejudice as to their son's. Plaintiffs asserted they sued after being told by their son's physicians that his birth defects were "possibly" caused by the drug, but recently learned medical science had not yet established causation for such defects. Defendant opposed, seeking dismissal of all claims with prejudice.

Under Rule 41(a)(2), a plaintiff may voluntarily dismiss his claims after defendant files an answer or summary judgment motion only with court approval. The dismissal will be without prejudice unless the court otherwise orders, but governing First Circuit case law permits such a dismissal only if no other party will be prejudiced. The court held the mere prospect that defendant might be subject to subsequent suit did not constitute prejudice, and the claim it had expended significant resources to litigate the case was exaggerated where it had merely answered, collected records and moved for summary judgment on preemption grounds common to every case in the MDL.

The court gave more credence to defendant's argument the suit should never have been brought, noting it is "certainly not appropriate for a plaintiff to file a lawsuit in the hope that evidence of causation will turn up somewhere along the way," and "one of the unfortunate features of mass product-liability litigation is the presence of substantial numbers of lawsuits with marginal or even non-existent evidence of liability." Nonetheless, defendant's requested relief was not only to bar plaintiffs themselves from re-filing, to which they were agreeable, but also their minor son. Because North Dakota law tolls the statute of limitations for a minor's claims until he is eighteen, it "specifically contemplates" that such claims "may be brought on evidence that would be deemed stale in almost any other context, and . . . proceed on a different track from the related claims of his parents." In addition, the court expressed doubt that clear scientific evidence linking the drug to the injuries would emerge later, thus minimizing any potential unfair prejudice to defendant. Accordingly, the court permitted dismissal of the son's claims without prejudice.

Massachusetts Federal Court Holds Diversity of Citizenship Created By Plaintiffs' Voluntary Dismissal Of Some Claims Against Non-Diverse Defendant But Summary Judgment On Last Claim Not Result Of Plaintiffs' Voluntary Acts And Hence Not Basis For Federal Jurisdiction, Plaintiffs' Token Discovery Requests To Defendant Did Not Establish Fraudulent Joinder Where Claim Was Reasonably Possible Under Applicable Law

In *Brown v. GlaxoSmithKline LLC (In re Zofran (Ondansetron) Prods. Liab. Litigation)*, 2019 U.S. Dist. LEXIS 99811 (D. Mass. June 13, 2019), plaintiffs alleged a prescription drug caused birth defects in their child, and filed suit in Oregon state court against both the Pennsylvania manufacturer and Oregon hospital where the drug was administered. The manufacturer removed the action to the United States District Court for the District of Oregon, arguing the hospital's joinder as a defendant was fraudulent and should be ignored, thus creating federal jurisdiction based on diversity of citizenship

between plaintiffs and the manufacturer. After plaintiffs moved to remand the suit to state court, it was transferred to a multi-district litigation ("MDL") in the United States District Court for the District of Massachusetts and that court remanded, concluding that because the Oregon Supreme Court had not yet decided whether a hospital could be held strictly liable as a "seller" of a prescription drug there was at least a reasonable possibility Oregon law would recognize that claim against the hospital.

After two more years of litigation, the Oregon court granted the hospital summary judgment on plaintiffs' strict liability claim (the only one remaining against it) and dismissed the hospital from the suit. The manufacturer again removed the suit to Oregon federal court, plaintiffs again moved to remand and the case was again transferred to the MDL. Addressing the remand motion, the court cited the "voluntary-involuntary" doctrine established by the United States Supreme Court under which a case that is not removable at the time of filing, but becomes facially so after dismissal of non-diverse defendants, may be removed "only if diversity results from a voluntary act of the plaintiff." The Court reasoned that "although a defendant should not be allowed to change his circumstances after the complaint is filed for the sole purpose of effectuating removal, there is no reason to protect the plaintiff against the adverse consequences of the plaintiff's own voluntary acts." Here, although plaintiffs had voluntarily dismissed two of their claims against the hospital, their strict liability claim was not dismissed due to their voluntary acts but only after a contested summary judgment motion, so the voluntarily-involuntary doctrine precluded removal.

As an alternative removal ground, defendants renewed their previous fraudulent joinder argument, asserting plaintiffs' conduct after the first remand, including taking only minimal discovery from the hospital, showed their own recognition there was no reasonable likelihood of a claim against it. The court, however, while recognizing that plaintiffs' failure to depose any of the hospital's employees or serve anything beyond "token" discovery requests did not "inspire confidence that they intended to prosecute their claims vigorously," held defendant had not met its burden of showing, through clear and convincing evidence, that "there [was] no reasonable possibility of a cause of action." Accordingly, the court once again remanded the action.

Massachusetts Federal Court Holds Expert Testimony Regarding Significant Differences Between Failed Product And New Sample Could Support Finding Of Manufacturing Defect, But Mere Negligence or Warranty Breach Due To Such Defect Does Not By Itself Establish Unfair Or Deceptive Practices

In *Arbella Mut. Ins. Co. v. Field Controis, LLC*, 2019 U.S. Dist. LEXIS 58319 (D. Mass. Apr. 4, 2019), the motor assembly in a vent damper in the ductwork of a home boiler allegedly malfunctioned, causing the damper to remain closed and preventing the boiler from operating, leading to frozen pipes and water damage. The homeowner's insurer sued the damper and motor manufacturers in the United States District Court for the District of Massachusetts for the cost of repairing the insureds' home, and asserted claims for negligence and breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability) for both a manufacturing defect and failure to warn, and for violating Mass. Gen. L. ch. 93A (the Massachusetts unfair and deceptive practices statute). Defendants eventually moved for summary judgment, arguing plaintiff had no evidence to support a finding of manufacturing defect, or that any warning failure caused plaintiff's harm.

Regarding negligent manufacturing, the court concluded plaintiff offered sufficient evidence to support a finding the motor at issue differed from the product normally produced by the manufacturer in a way that would create an unreasonable risk of injury. Plaintiff's expert had performed testing comparing the insureds' damper motor, which he concluded had not been disturbed or manipulated after its sale, to a newly purchased one, found the new motor operated properly and identified several differences in the motor at issue that contributed to its failure. While defendants challenged the test results as not scientifically reliable and hence inadmissible, in part because the expert lacked specifications for the motor's intended design as well as information about conditions in the insureds' home, the court held these issues went only to the weight to be afforded the testing, not its admissibility. Moreover, since in Massachusetts "negligence and a breach of warranty of merchantability are somewhat intertwined," the same evidence could support a finding of breach of the implied warranty of merchantability.

The court, however, granted summary judgment against plaintiff's failure-to-warn claims. First, the court held plaintiff failed to submit sufficient evidence to prove its suggested warning—that if the damper failed the heating system would not operate—was either a cause-in-fact or proximate cause of any injury, as such a warning would not have provided the homeowners with any information to avoid the harm other than by having the system monitored by heating professionals, but such professionals would already be aware of the damper's function and the homeowners did have the system inspected. Further, the damper's manual included a form of warning recommending annual inspection by qualified personnel.

Regarding its ch. 93A claim, plaintiff argued that negligence in connection with a product automatically establishes a breach of the implied warranty of merchantability, which in turn automatically establishes a 93A violation. The court, however, concluded that while it is established Massachusetts law that negligence creates a warranty breach, and that such breaches may constitute a 93A violation, "neither the Massachusetts legislature nor the Supreme Judicial Court has gone so far as to find that all breaches of warranties are inherently deceptive or unfair." Plaintiff's "bare-bones" negligence count did not facially describe or give defendants fair notice of a 93A claim, nor had plaintiff offered evidence to support a finding that any negligent manufacturing defect was unfair or deceptive, so the court granted summary judgment on that claim.

Massachusetts Federal Court Holds Turbine Manufacturer's Role As Supplier Of Asbestos Insulation Installed On Its Generators Merely Incidental To Its Role As Generator Designer And Builder, Hence Statute of Repose for Torts Arising from Real Property Improvements Barred Plaintiff's Claims

In *Sterns v. Metro. Life Ins. Co.*, 2019 U.S. Dist. LEXIS 80799 (D. Mass. May 14, 2019), a pipe inspector's estate sued a steam turbine manufacturer in the United States District Court for the District of Massachusetts, alleging his mesothelioma was caused by exposure to asbestos insulation on defendant's generators. After defendant moved for summary judgment under Mass. Gen. L. ch. 260, § 2B, a statute of repose setting a six-year time limit for tort actions "arising out of any deficiency or neglect in the design . . . [or] construction . . . of an improvement to real property," the court certified to the Massachusetts Supreme Judicial Court ("SJC") a question about the applicability of the statute, and the SJC held it indeed applied to "personal injury claims arising from diseases with extended latency periods, such as those associated with asbestos exposure." (*see* April 2019 Foley Hoag Product Liability Update).

Following the SJC's decision, plaintiffs argued their claims for breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict-liability) were not barred by § 2B, as those claims were premised on defendant's role as a supplier of goods, *i.e.*, the generators' insulation, that were the actual cause of plaintiff's harm. Here, defendant had both sold the insulation that was to be applied to the generators and hired subcontractors for its installation. The district court, however, granted summary judgment, holding defendant's role as a supplier was merely incidental to its designing, planning and construction of the generators, and plaintiffs therefore could not escape the statute of repose by "recast[ing] their negligence claim in the form of a warranty claim."

NEW YORK/NEW JERSEY SUPPLEMENT

New York Court of Appeals Holds Due Process Prohibits Personal Jurisdiction Over Ohio Gun Merchant Who Sold Gun In Ohio To Resident Who Resold It Illegally To Shooter In New York, As Defendant Had No Contacts With State And Purchaser's Comment He Wouldn't Mind Opening Gun Shop There Insufficient To Constitute Defendant's Purposeful Availment of Privilege Of Conducting Activities In State

In *Williams v. Beemiller, Inc.*, 2019 N.Y. LEXIS 1358, *1 (May 9, 2019), a bystander injured in a New York gang-related shooting sued multiple defendants involved in the distribution and sale of the firearm used in the shooting in New York

Supreme Court. One of the defendants, an Ohio firearm merchant and federal firearm licensee, sold the gun in Ohio to an individual who presented Ohio identification and said he was in the process of becoming a federal firearms licensee and acquiring inventory to open a shop in Ohio. Instead, he brought the gun to New York and illegally resold it to the gang member who shot plaintiff.

Defendant was authorized to sell handguns only to Ohio residents, which he primarily did through retail sales at gun shows, maintained no website, retail store or telephone listing and did no advertising. For each transaction, including the one at issue, he verified the purchaser had a government-issued ID demonstrating Ohio residency. Defendant moved to dismiss the suit for lack of personal jurisdiction. The trial court denied the motion, the Appellate Division of the Supreme Court reversed and the New York Court of Appeals granted plaintiff leave to appeal.

The court noted that due process would preclude the exercise of personal jurisdiction over defendant unless he had "minimum contacts" with New York by which he "purposefully avail[ed] [him]self of the privilege of conducting activities within the state." Plaintiff argued the gun defendant sold eventually reached New York and that, based on the purchaser's comments that he "wouldn't mind having a shop in Buffalo," defendant should have had a reasonable expectation that would happen. Citing the United States Supreme Court's decision in *Walden v. Fiore*, 571. U.S. 277 (2014), however, the court emphasized that the constitutional inquiry "focuses on the relationship among the defendant, the forum, and the litigation," and the litigation "must arise out of defendant's own contacts with the forum and not contacts between the plaintiff (or third parties) and the forum state."

Here, even viewing the facts in the light most favorable to the plaintiff, the purchaser's comment fell short of demonstrating defendant's own purposeful availment of the privilege of conducting activities in New York. Defendant did not advertise his products in New York, nor were the purchaser's statements sufficient to give defendant notice of an eventual suit there. Accordingly, the court affirmed the personal jurisdiction dismissal.

New York Court of Appeals Holds Coke Ovens Designed And Manufactured By Defendant Using Standardized Process But Adapted To Coke Plant's Requirements, And Installed As Oven Battery By Defendant, Were Products Creating Strict Liability Duty To Warn Despite Service Component Of Defendant's Work

In *Matter of Eighth Judicial Dist. Asbestos Litig.*, 2019 NY Slip Op. 04640 (June 11, 2019), plaintiff sued the successor-in-interest to a manufacturer of coke ovens used in a New York coke plant's oven battery in the New York Supreme Court, alleging decedent's exposure to emissions from the ovens while working as a "lid man" atop the battery caused his lung cancer. A typical oven was about thirteen feet high and a foot and a half wide, and the newest battery comprised seventy-six ovens. After the plant's engineers approved defendant's plans for the battery, defendant would then construct the battery on-site either as a general contractor or through subcontractors. Defendant moved for summary judgment on plaintiff's strict product liability failure-to-warn claims, arguing its contract with the plant was for services and the ovens were not products subject to strict liability. The trial court denied defendant's motion, the Appellate Division of the Supreme Court reversed and the New York Court of Appeals then granted plaintiff's motion for leave to appeal.

The court acknowledged that its strict liability case law did not clearly define a "product," so it looked to the theory behind failure-to-warn strict liability and the types of manufacturers upon whom a warning duty had been imposed. In many decisions, industrial machines had "been assumed to be products for strict liability purposes," the case law "has not focused on creating an exhaustive list of the product's physical characteristics but has instead focused on [its] potential dangers" and the "overarching concern" in assigning a duty was to "settle upon the most reasonable allocation of risks, burdens and costs among the parties and within society."

Characterizing the issue as whether defendant had met its burden to show its ovens were not products as a matter of law, the court cited defendant's role as an expert designer in the coke oven market and the standardized design and installation process defendant used for all its ovens, despite

the need for alterations to the scale and specifications of individual batteries. Defendant's advertising brochures also depicted completed ovens and their functionality, "indicating that [it, not the coke plant] was the commercial source of the product." In response to defendant's citation of authority that a coke oven battery was real property for tax purposes, the court noted other affixed real property such as elevators and large turbines that had been subject to strict product liability claims, and that "the mere presence of a service component in [a] transaction does not mean that the furnished item is not a product to which a duty to warn may apply."

Accordingly, the court reversed the Appellate Division and denied summary judgment, holding the coke ovens were sufficiently similar to the types of products in its prior case law to support a duty to warn. The court cautioned, however, that whether defendant was actually liable for a failure to warn would be "an inherently fact-sensitive inquiry," and it was not extending strict liability warning duties to "general contractors who may be involved in the construction of buildings where defective products are housed."

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