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 Recognizes Claim Against Brand-Name Drug Manufacturer By Generic Drug User Where Failure To Warn Is Reckless

In *Rafferty v. Merck & Co.*, 479 Mass. 141 (2018), plaintiff alleged defendant negligently failed to update the label for its brand-name prescription prostate drug to warn that sexual side effects could persist even after discontinuing the drug. Although plaintiff never used defendant's drug, but only its generic equivalent, he contended defendant owed a duty to generic users because defendant knew that under the Federal Food, Drug and Cosmetic Act ("FDCA") generic manufacturers were required to use the same warning label as the brand-name drug. Plaintiff also asserted defendant's failure to warn violated Mass. Gen. L. ch. 93A, the state unfair and deceptive practices statute.

After the Massachusetts Superior Court granted defendant's motion to dismiss all claims, holding defendant did not owe a duty to persons who did not use its product, plaintiff appealed, and the Massachusetts Supreme Judicial Court ("SJC") granted direct review. In its opinion, the SJC acknowledged the conflicting public policy concerns affecting plaintiff's "innovator liability" claim, under which the manufacturer of the original, i.e., innovator, brand-name drug would be responsible for injuries to generic users; the theory was advanced with greater urgency after the United States Supreme Court held in *PLIVA v. Mensing*, 564 U.S. 604 (2011) ***(see July 2011 Foley Hoag Product Liability Update)***, that the FDCA preempts failure-to-warn claims against generic manufacturers because under the statute they cannot change the content of their own labels. The SJC recognized that allowing innovator liability for negligent failure to warn would subject branded manufacturers to litigation and liability costs for the entire market even though such manufacturers typically retain less than 10% of the market once a generic equivalent becomes available. On the other hand, foreclosing claims by generic users would leave more than 90% of consumers without any remedy for harms caused by inadequate warnings.

Ultimately, the court sought a middle ground—not argued for or briefed by either party—by refusing to recognize innovator liability claims for negligent failure to warn, but permitting claims that a failure to warn was "in reckless disregard of an unreasonable risk of death or grave bodily injury." The court distinguished recklessness from negligence in that the defendant's conduct must both be

intentional and involve "a high degree of probability that substantial harm will result," *i.e.*, "the harm must be a probable consequence" of defendant's conduct The court acknowledged that recognizing any form of innovator liability was distinctly a minority position among courts that had considered the issue, and no other jurisdiction had imposed a recklessness standard for such claims.

The SJC vacated the dismissal of plaintiff's entire suit, directing the trial court to permit plaintiff to amend his complaint if he wished to assert a reckless failure-to-warn claim. The court affirmed dismissal of plaintiff's ch.93A claim, however, holding defendant's labeling conduct did not occur in the course of any "trade or commerce" involving the drug plaintiff had used.

Massachusetts Superior Court Holds "Late and Limited" Personal Representative Lacks Authority to Pursue Either Decedent's Pre-Death Tort Claims Or Wrongful Death Claims

In *Bennett v. R.J. Reynolds Tobacco Company*, 34 Mass. L. Rep. 547 (Mass. Super. Ct. Jan. 8. 2018), plaintiff sued a tobacco manufacturer in Massachusetts Superior Court asserting claims of civil conspiracy and wrongful death arising out of decedent's alleged death from a tobacco-related disease. After filing suit, and more than three years after decedent's death, plaintiff was appointed decedent's "late and limited" personal representative pursuant to Mass. Gen. L. ch. 190B, § 3-108(4), part of Massachusetts' version of the Uniform Probate Code ("MUPC"). Defendant moved to dismiss all claims, arguing representatives appointed under § 3-108(4) lack authority to bring either pre-death tort claims that belonged to decedent or wrongful death claims.

Noting this was a case of first impression, the court looked first to the statutory language. Under § 3-108(4), a late and limited representative may be appointed more than three years after decedent's death, the deadline for appointing a fully-empowered representative, but such a representative "shall have no right to possess estate assets . . . beyond that necessary to confirm title thereto in the successors to the estate." The court also referred to the MUPC Estate Administration Procedural Guide published by the probate court's administrative office, which states that "[a] PR's authority [under § 3-108(4)] is limited by statute to *confirming* title to estate assets in the successors and paying expenses of administration, if any."

Based on the statutory language, the court found plaintiff had no standing to possess or pursue the pre-death civil conspiracy claim. That claim had belonged to the deceased and then devolved on his death to the estate as an asset, but the statute was clear that a late and limited representative cannot possess estate assets *except* to confirm title in estate beneficiaries.

Regarding the wrongful death claim, the court noted that under Mass. Gen. L. ch. 229, § 2, part of the Massachusetts wrongful death statute, damages for wrongful death are not estate assets but rather belong to statutory beneficiaries, but the statute also requires that "damages under this section shall be recovered in an action of tort by the executor or administrator of the deceased." The court commented that whether a late and limited representative is an "executor or administrator" under this section was less than clear, as the legislature had failed to amend the section after adopting the MUPC, which eliminated the terms "executor" and "administrator" in favor of "personal representative." In a pre-MUPC decision, however, the Massachusetts Supreme Judicial Court had held that a "voluntary administratrix," one of several categories of administrators and representatives under the then-prevailing probate code, was not an executor or administrator under the wrongful death statute because the probate code deprived voluntary administrators of the power to sue. Accordingly, although the issue was not "free from all doubt," because a late and limited representative's power to sue was limited by ch. 109B, § 3-108(4), the court held plaintiff was not authorized to bring the wrongful death claim, and granted defendant's motion to dismiss.

Massachusetts Federal Court Holds Implied Warranties Do Not Explicitly Extend To Future Performance, So Claims Accrue Under Statute of Limitations On Delivery, But Express Warranty For Period Of Years Does So Extend, Hence Claims Accrue On Plaintiff's Knowledge of Alleged Defect

In *Pagliaroni v. Mastic Home Exteriors, Inc.*, Civil Action No. 12-10164-DJC, 2018 U.S. Dist. LEXIS 25096 (D. Mass. Feb. 15, 2018), four homeowners had installed wood-polymer composite outdoor deck material that allegedly cracked, warped and developed mold. They brought a putative class action in the United States District Court for the District of Massachusetts against the manufacturer and distributor of the deck material, alleging a design defect in the polymer's formula and asserting claims for breach of express and implied warranties, negligence, negligent misrepresentation, unjust enrichment and violations of Mass. Gen. L. ch. 93A—the state unfair and deceptive practices statute—and other states' consumer protection laws. After the court denied plaintiffs' motion for class certification, defendants moved on statute of limitations grounds for summary judgment against plaintiffs' individual claims, which arose from purchases in four different states, including Massachusetts.

As to the Massachusetts plaintiff's claims, the court first analyzed the breach of implied warranty claim, governed by a four-year statute of limitations set forth in Mass. Gen. L. c. 106, § 2-725, part of Massachusetts' version of the Uniform Commercial Code. Under § 2-725(2), "[a] breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered." Defendants argued the statute began to run in 2006 when the deck was installed, making plaintiff's 2012 filing untimely, while plaintiff argued the statute was tolled by defendants' fraudulent concealment of their knowledge the deck material was susceptible to premature cracking. The court held that an implied warranty, by its very nature, did not "explicitly extend[] to future performance," hence plaintiff's claim accrued on delivery and was untimely.

The court also found plaintiff's express warranty claim time-barred under the same statute of limitations, but for different reasons. The express warranty represented the deck would be free from defects in material and workmanship for twenty-five years, and thus plainly explicitly extended to future performance, but on the undisputed evidence plaintiff had actually discovered cracking, swelling and mold no later than 2007, rendering the claim untimely.

As to plaintiff's non-warranty claims, the ch. 93A claims were subject to a four-year limitations period under that statute and the negligence and unjust enrichment claims to Massachusetts' general three-year tort limitations period. Even assuming Massachusetts law would apply a discovery rule to all these claims, because plaintiff had discovered problems in his deck in 2007 the claims were time-barred. Nor could his fraudulent concealment allegations, even if supported in the record, change this result, as such concealment will not toll a limitations period where, as here, plaintiff nevertheless possesses knowledge of facts supporting his claim.

The court then proceeded to analyze the limitations issues for the non-Massachusetts claims, dismissing some of them for reasons similar to the Massachusetts claims but preserving others where there were fact disputes such as regarding when a particular plaintiff had knowledge of deck problems. Defendants also argued the existence of a contractual arrangement and the "economic loss" rule precluding recovery in tort for purely economic loss barred the non-Massachusetts unjust enrichment and negligence claims, respectively, and the court agreed, noting plaintiffs did not oppose either argument.

Massachusetts Federal Court Holds No General Or Specific Jurisdiction Over Component Product Distributor As It Was Not Incorporated Or Headquartered in Massachusetts, And Its Sales And Installation Activity Out Of Which Claims Arose Did Not Take Place In, And Were Not Directed To, Massachusetts

In *Ace Am. Ins. Co. v. Oyster Harbors Marine, Inc.*, No. 15-cv-10200-ADB, 2018 U.S. Dist. LEXIS 21938 (D. Mass. Feb. 23, 2018), an insurer, as subrogee of a yacht owner, sued the marina that sold the yacht in the United States District Court for the District of Massachusetts, invoking the court's admiralty and maritime jurisdiction to assert express and implied warranty, negligence and strict liability claims alleging defects in the yacht started a fire and damaged the yacht. The marina filed a third-party complaint against the yacht manufacturer for breach of warranty, indemnity and contribution, and the manufacturer in turn filed a fourth-party complaint against both the distributor-installer and the manufacturer of the yacht's bow thruster, which the insurer's expert had suggested as the fire's likely cause. After a series of cross-claims and counterclaims were filed, the thruster distributor-installer moved to dismiss the thruster manufacturer's cross-claims for breach of contract, indemnity and contribution for lack of personal jurisdiction and improper venue.

The court first noted that personal jurisdiction in admiralty cases is national in scope, so that plaintiff need only show defendant has adequate contacts with the United States as a whole—not an issue here—and that defendant has been properly served pursuant to a federal statute or rule. Under Fed. R. Civ. P. 4, service on a defendant is proper so long as defendant is subject to the jurisdiction of a court of general jurisdiction in the state in which the federal court is located. Accordingly, the thruster manufacturer needed to show that the Massachusetts courts could exercise personal jurisdiction over the distributor under the state's long-arm statute and consistent with due process.

Applying this standard, the court granted the distributor's motion to dismiss, holding the exercise of jurisdiction in Massachusetts was not consistent with due process. Under the governing United States Supreme Court decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) ***(see April 2014 Foley Hoag Product Liability Update)***, the state court could exercise general jurisdiction over a defendant corporation for any and all claims only if its contacts with a state were so continuous and systematic as to render the corporation "essentially at home" in the state, which generally requires it to be incorporated or headquartered there. Here, however, the distributor was incorporated and had its principal place of business in Florida, and its sales of various products into Massachusetts on eighty-four occasions over an eight-year period, national advertising and occasional participation in Massachusetts trade shows did not render the distributor "essentially at home" in the state.

Nor could Massachusetts courts exercise specific jurisdiction over the particular claims at issue, as that requires showing (1) defendant purposefully availed itself of the privilege of conducting activities in the state, (2) the claim relates to defendant's activity in the state and (3) the exercise of jurisdiction is fair and reasonable. Here, however, the distributor installed the thruster at the yacht manufacturer's facility in North Carolina and played no role in delivering the yacht to Massachusetts, hence the distributor engaged in no purposeful in-state activities out of which the manufacturer's claims arose. Although the distributor may have introduced a defective product into the "stream of commerce," its sales and marketing activities in Massachusetts were "negligible," its other state contacts showed no intent to cultivate a market there and mere awareness that the yacht may have been sold to a Massachusetts customer does not show purposeful availment of the privilege of doing business there. And while considerations of fairness and reasonableness might favor Massachusetts as a forum in this particular case, convenience and efficiency could not overcome the other missing elements of a jurisdictional showing.

Massachusetts Superior Court Holds Putative Class Action Not Mooted by Defendant's Unaccepted Tender of Full Damages To Representative Plaintiff, Class Certification Not Proper For Fraud And Similar Claims Due To Individualized Reliance Issues But Proper For Unfair And Deceptive Practices Claim Where Only Damages Would Be Individualized

In *Silva v. Todisco Services, Inc.*, 2018 Mass. Super. LEXIS 23, No. 1684 CV 02778-BLS2 (Mass. Super. Ct. 2018), a towing company towed plaintiff's vehicle from a private parking lot without his consent, and imposed mileage and fuel surcharges to retrieve the vehicle. Plaintiff brought a putative class action in Massachusetts Superior Court against the towing company, alleging the surcharges were illegal because the tow slip did not provide information required by Massachusetts Department of Public Utilities ("DPU") regulations, and asserting claims for violation of Mass. Gen. L. ch. 93A (the Massachusetts unfair and deceptive practices statute), declaratory relief, negligent misrepresentation, fraud and unjust enrichment.

Plaintiff moved to certify a class of all plaintiffs whose vehicles were towed by defendant without consent—either as a "trespass tow" at the request of the property owner or manager, or "police tow" requested by local police—and who were required to pay the same surcharges. Defendant opposed, arguing plaintiff's individual claim was moot because defendant had sent him a check for full trebled damages, the maximum possible recovery, which plaintiff had rejected, and plaintiff had not demonstrated the action satisfied the substantially similar class action requirements of Mass. R. Civ. P. 23 and ch. 93A.

The court held defendant's unilateral tender of payment did not moot the putative class representative's claims, as he sought relief beyond money damages, including class-wide injunctive relief and a declaration of rights. Even if plaintiff had sought only money damages, the tender would not moot the class action, because an unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect.

Regarding the merits of class certification, the court denied certification on the negligent misrepresentation and fraud claims, as they required an individualized consideration of whether each class member reasonably relied on a material statement or omission by defendant. Similarly, the unjust enrichment claims would require an individualized assessment of class members' subjective expectations of the amount defendant could charge for a tow.

The court held, however, that certification was appropriate for the ch. 93A claims, although only for individuals whose vehicles were "trespass towed," as plaintiff had only been subjected to that variety of tow. Although some individualized inquiry into damages would be required if plaintiff succeeded on the merits, the need for such later inquiry would not preclude class certification where all other requirements were met. Here plaintiff's claims were typical of those of the class, there were common questions of law or fact and there was similarity of injury, as all the putative class members had been subjected to trespass tows and compelled to pay similar charges to get their vehicle back, without receiving information required by DPU regulations. The numerosity requirement was also satisfied because, based on defendant's own reports to the DPU, there were thousands of similarly situated plaintiffs who had been subjected to the trespass tows and surcharges.

NEW YORK/NEW JERSEY SUPPLEMENT

New York Appellate Division Holds Under Sophisticated Intermediary Doctrine Product Manufacturer's Warnings To Plaintiffs' Employer About Product Risks Merely Some Evidence Of Adequate Warning, Not Complete Defense As Matter Of Law, And Evidence Plaintiffs Sometimes Disregarded Employer's Safety Policies Insufficient To Negate Causation As To Manufacturer Warnings

In *Rickicki v. Borden Chem.,* 1098-CA-15-02155, 2018 N.Y. App. Div. LEXIS 2211 (Mar. 16, 2018), two industrial workers who allegedly suffered silicosis from exposure to silica dust sued various silica manufacturers in the New York Supreme Court (the state trial court), asserting

negligence and product liability claims for failure to warn of the latent dangers of silica dust inhalation. The trial court granted defendants' motion for summary judgment, holding they could not be held liable for failure to warn because plaintiffs' employers were "sophisticated users" fully aware of the dangers of silica dust inhalation. On plaintiffs' appeal, however, the Appellate Division of the Supreme Court vacated the dismissal, holding that while the "sophisticated intermediary" theory was accepted in New York, issues of fact remained as to whether plaintiffs' employers were indeed knowledgeable about the risks.

On remand, defendants submitted evidence purporting to establish the employers' knowledge and again moved for summary judgment, which the trial court again granted. This time the court held the record established the employers' sophistication as a matter of law, and also that defendants' failure to warn was not the proximate cause of the employees' injuries.

On plaintiff's second appeal, the Appellate Division again reversed the trial court's summary judgment grant, holding the sophisticated intermediary doctrine does not establish a complete defense to a failure to warn claim against a product manufacturer where the manufacturer adequately warned plaintiff's employer of the risks or the employer was otherwise knowledgeable about them. While evidence of such employer knowledge is relevant to whether the manufacturer provided adequate warnings, it does not establish a defense as a matter of law. In this respect the sophisticated intermediary doctrine in the workplace context differs from the "learned intermediary" doctrine in the area of prescription drugs or medical devices, under which the manufacturer *does* discharge its duty by providing adequate warnings to prescribing physicians, with no need for a direct warning to patients. The court noted that the latter doctrine is premised on features of the physician-patient relationship that are not present in the relationship between an industrial employer and its employees.

Finally, the appellate court held that the trial court erred in holding that any failure to warn was not the proximate cause of plaintiffs' injuries, as evidence that plaintiffs sometimes disregarded their employer's safety policies was insufficient to establish as a matter of law that warnings by defendants about the dangers of silica dust would have been superfluous.

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