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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.*

### **Massachusetts Appeals Court Holds Trademark Licensor That Substantially Participated in Design, Manufacture or Distribution of Product Is Liable as “Apparent Manufacturer”**

In *Lou v. Otis Elevator Co.*, 77 Mass. App. Ct. 571 (2010), a young boy’s hand was caught and injured in an escalator located in a department store in China. The boy sued the American company that had licensed its trademark and the relevant escalator technology to the escalator’s Chinese manufacturer (which itself was a joint venture among the defendant, a Chinese elevator firm and a Chinese governmental investment group) for breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability), and his parents sued for loss of consortium. After the Massachusetts Superior Court entered judgment on a jury verdict for the plaintiffs, defendant appealed to the Massachusetts Appeals Court.

Defendant first argued that the trial court’s jury instructions improperly extended the apparent manufacturer doctrine—which makes one liable for a product that he “puts out as his own”—to a non-seller of the product. The appellate court observed that the instructions were consistent with comment d to the Restatement (Third) of Torts: Products Liability § 14, which treats a trademark licensor that substantially participates in the design, manufacture or distribution of a product licensed to use that trademark as a potentially liable seller of that product. The court interpreted comment d not as an extension of the apparent manufacturer doctrine, but rather as a limitation created in response to case law in some jurisdictions that had held trademark licensors liable for product defects even where the licensor had no role in designing or manufacturing the product. The court adopted comment d, rejecting defendant’s argument that an “apparent manufacturer” who is not also a seller is entitled to a privity defense under Mass. G.L. c. 106, § 2-318, the Massachusetts statute that eliminates the defense of lack of privity where the manufacturer, seller or supplier might reasonably have expected the plaintiff to use or be affected by the goods sold.

Defendant also argued that the trial court’s award of prejudgment interest under Massachusetts law was improper, and that Chinese law should have applied. The appellate court explained that Chinese law does not provide for prejudgment interest because—in contrast to Massachusetts law—Chinese law considers an injured plaintiff’s entitlement to damages to accrue only upon judgment. The court determined that, because the defendant’s liability was determined pursuant to Massachusetts law, Massachusetts had a stronger interest in determining when the defendant’s obligation to pay damages accrued, and thus the award of prejudgment interest was proper.

## **First Circuit Affirms Judgment that Amended Complaint in Product Liability Action Filed Over a Year After Expiration of Statute of Limitations Did Not Relate Back to Original Complaint Because Defendant Added by Amended Complaint Was Not on Notice of the Action Within 120 Days of its Filing**

In *Coons v. Indus. Knife Co.*, -- F.3d ----, 2010 WL 3516849 (1st Cir. Sept. 10, 2010), plaintiff injured his hand while changing an industrial paper-cutting knife. Three years later, he sued the knife manufacturer and distributor in the United States District Court for the District of Massachusetts under various product liability theories. Over a year later, defendant discovered new evidence that a different entity was the actual manufacturer and filed a third-party claim against that entity. After the new party filed its own third-party claim against another party in the supply chain, plaintiff was granted leave to amend his complaint to add claims against both new third-party defendants. After the original defendant left the case, the new defendants moved to dismiss under the applicable three-year Massachusetts statute of limitations. The court denied the motion as untimely, and the case proceeded to trial.

At the close of plaintiff's case, defendants moved for judgment as a matter of law on the statute of limitations ground. The court denied the motion, but without prejudice. After the jury returned a verdict finding only one defendant liable and awarding damages, the remaining defendant filed a motion to alter or amend the judgment, again arguing the claims were barred by the limitations statute. The court found that the defense was meritorious and entered judgment for the defendant, at which time plaintiff appealed.

First, the United States Court of Appeals for the First Circuit dismissed plaintiff's argument that defendant had waived the limitations defense by failing to raise it through a pre-trial motion or a renewed motion for judgment as a matter of law. The court held the defense was pleaded in defendant's answer and thus a pre-trial motion was not required. The court also agreed with the district court that defendant's motion for a new trial could be treated as a renewed motion for judgment as a matter of law.

On the merits of the limitations defense, the court noted that because plaintiff filed his amended complaint well outside the

three-year limitations period, the claims against defendant were time-barred unless the amended complaint "related back" to the original complaint. Federal Rule of Civil Procedure 15(c) allows relation back either under a "federal test" set forth in the rule or when the law that provides the applicable statute of limitations – here, Massachusetts law – allows relation back. One element of the federal test requires that the new defendant have received notice of the action within 120 days after the complaint is filed so that the new defendant is not prejudiced in defending on the merits. Here, the court held that defendant did not receive notice of the action within the required time period. Further, the court held plaintiff had forfeited his state law relation back argument by failing to raise it in opposition to defendant's post-judgment motion. Although plaintiff argued it was defendant's burden, as part of its statute of limitations defense, to demonstrate the claim did not relate back, the court held defendant had satisfied its burden upon demonstrating that the amended complaint was filed outside the limitations period, shifting the burden to plaintiff to demonstrate that the statute of limitations did not apply.

## **Massachusetts Federal District Court Holds Jury Instruction on Proof of Design Defect Need Not State Explicitly that Defendant May Be Liable If Product Is Unreasonably Dangerous to "Foreseeable Bystanders" as Well as Foreseeable Users**

In *O'Neil v. Electrolux Home Products, Inc.*, 2010 WL 3504191 (D. Mass. Sep. 7, 2010), plaintiff's two-and-one-half year old son was killed after plaintiff accidentally backed over him with a lawn mower. Plaintiff sued the mower's manufacturer in the United States District Court for the District of Massachusetts asserting claims for negligence, gross negligence, breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability) and violations of Mass. Gen. L. ch. 93A (the Massachusetts unfair and deceptive practices statute) based on the allegedly defective design of the mower.

At trial, the judge instructed the jury that they should find a design defect if the product was "unreasonably dangerous to foreseeable users and, therefore, unfit for its ordinary foreseeable uses." The jury instruction, which also listed a number of factors to be considered in determining whether the mower was "reasonably safe," was nearly identical to

the instruction plaintiff had requested. After several hours of deliberation, the jury submitted a question to the court asking for the definition of “unreasonably dangerous” and a list of criteria. In response, the judge proposed to submit a written text of his oral instruction. Plaintiff’s counsel then objected to the phrase “unreasonably dangerous to its foreseeable users,” requesting instead the phrase “unreasonably dangerous to its foreseeable users or foreseeable bystanders.” When defendant countered that the written response should not use language different from the judge’s oral instruction, to which plaintiff had not objected, the judge provided the text of his original instruction to the jury. After a verdict for defendant, plaintiff moved for a new trial.

After determining that plaintiffs had not waived their right to challenge the supplemental written instruction by failing to object to the original oral one, the court turned to the issue of whether the written instruction misstated the law or was misleading to the jury. Plaintiffs argued that omitting the “foreseeable bystander” language erroneously implied that defendant could be liable only to foreseeable users of the mower, and not foreseeable bystanders such as plaintiff’s son. The court rejected this argument, holding that the “foreseeable users” language was part of well-settled Massachusetts law; indeed, plaintiff’s own proposed instructions, which the court had essentially adopted, did not include the “foreseeable bystander” language. In any event, the court held that the full jury charge, considered in the context of the parties’ opening and closing statements and the testimony at trial, adequately apprised the jury that defendant could be liable for the son’s injuries even though the son was not himself a user of the lawn mower, and therefore was not misleading.

### **First Circuit Denies Interlocutory Appeal of Class Certification in Medical Monitoring Action by Smokers Against Cigarette Manufacturer, Holding Interlocutory Review Would Unnecessarily Impede Progress of Case**

In *Donovan et al. v. Philip Morris USA Inc.*, No. 10-8025 (1st Cir. Sep. 1, 2010), a class of asymptomatic Massachusetts smokers sued the defendant cigarette manufacturer in the United States District Court for the District of Massachusetts asserting claims for breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict

liability), negligence and violation of Mass. Gen. L. ch. 93A (the Massachusetts unfair and deceptive practices statute) and seeking a court-supervised program of medical monitoring to detect early signs of lung cancer. Plaintiffs alleged that the cigarettes were defectively designed in that they delivered unreasonably high levels of carcinogens, thereby increasing the risk of cancer. Answering a certified question on defendant’s motions to dismiss and for summary judgment, the Massachusetts Supreme Judicial Court held that plaintiffs could state a damages claim for future medical monitoring expenses even though none of the putative class members presently suffered from any manifest smoking-related illness or disease (see [May 2010 Foley Hoag Product Liability Update](#)).

Thereafter, the federal district court approved plaintiffs’ motion for class certification for the implied warranty claims, but not their negligence claims, ruling that plaintiffs should be able to pursue the claims as a class even though they still had significant work to do in proving liability (see [July 2010 Foley Hoag Product Liability Update](#)). Defendant sought leave to appeal the class certification decisions under Fed. R. Civ. P. 23(f), arguing that an immediate appeal was appropriate because of the many novel and important issues in the lawsuit.

Among other issues, defendant argued that the district court erred in certifying the class under Rule 23(b)(2) because plaintiffs’ request for medical monitoring should not be considered injunctive relief, and the court erroneously focused on whether plaintiffs alleged a group injury as opposed to whether plaintiffs constituted a “cohesive” class. The United States Court of Appeals for the First Circuit, however, denied defendant’s petition for appeal on the basis that interlocutory review of the class certification order would not be more effective than a traditional appeal at the conclusion of the litigation, but would instead risk unnecessarily bogging down an already complex case. The appellate court explained that it would only allow interlocutory review based on the existence of novel issues if those issues could not effectively be reviewed at the end of the case.

## **Massachusetts Federal District Court Grants Summary Judgment for Pharmaceutical Manufacturer on Failure-to-Warn Claims Because Plaintiff Could Not Prove Drug Was Substantial Contributing Factor to Injuries or that Prescribing Physician Relied on Manufacturer's Alleged Misrepresentation**

In *In re Neurontin Marketing and Sales Practices and Products Liability Litigation*, 2010 WL 3169485 (D. Mass. Aug. 10, 2010), plaintiff was prescribed an anti-epileptic drug off-label, along with approximately 15 other drugs, to treat seizure-like symptoms she experienced after a stroke. Thereafter, plaintiff continued to experience seizure-like symptoms and also suffered "black-outs," depression and constant lethargy. After consulting a neurologist who told her she had been over-medicated and took her off several drugs, including the anti-epileptic, plaintiff stopped experiencing most of her symptoms. She then sued the anti-epileptic drug's manufacturer in the United States District Court for the District of Massachusetts alleging the manufacturer had failed to adequately warn of potential adverse effects.

Defendant moved for summary judgment on three grounds: (1) plaintiff had no expert to testify that the drug caused her injuries; (2) plaintiff conceded the side effects she suffered were disclosed on the drug's labels; and (3) there was no evidence that plaintiff or her prescribing physicians would have acted differently had there been additional warnings. With respect to causation, the court first observed that under Massachusetts law, a plaintiff must show that defendant's conduct was a substantial contributing factor to the injury. Although plaintiff had designated her neurologist as a causation expert, in his deposition he refused to testify that the anti-epileptic drug was a substantial contributing cause to her injuries. Thus, the court held plaintiff could not establish causation.

The court also found summary judgment appropriate on the second and third grounds of defendant's motion. Because plaintiff's claims were based on an alleged failure to warn of risks associated with the drug, the claims were governed by the learned intermediary rule, which provides that a prescription drug manufacturer's duty to warn runs only to the physician and it is the physician's duty to warn the consumer.

Here, plaintiff conceded that many of her symptoms were in fact listed on the label. Further, plaintiff offered no evidence that her physician's decision to prescribe the drug was a result of any failure to warn or misrepresentation by the manufacturer.

## **Massachusetts Appeals Court Affirms Denial of New Trial in Defective Design Case Where Defense Counsel Made Inappropriate Comment During Closing About Harm to Society When Manufacturers Are Sued, But Trial Judge Effectively Cured Any Prejudice With Instruction that Jury Disregard Remark**

In *Resende v. C.H. Babb Co., Inc.*, 77 Mass. App. Ct. 1112 (2010), plaintiff severely injured her arm when her sleeve got caught in a factory machine and, despite pulling the emergency stop cord, the machine continued for several seconds. Although the machine included a physical guard to prevent workers from making inadvertent contact, the guard was not in place at the time of the accident. Plaintiff sued the machine's manufacturer and the company that linked the emergency stop to the electrical system, asserting product liability and negligence claims. After settling with the electrical system company, the case proceeded to trial against the machine's manufacturer.

In closing argument at the conclusion of trial, defendant's counsel stated: "Charlie and the good folks at [the defendant manufacturer] are good guys and deserve better than this. Unfortunately, it's no wonder why so few manufacturers are left in the United States." On plaintiff's objection, the court immediately and forcefully instructed the jury to disregard the comment. After a jury returned a verdict for defendant, plaintiff moved for judgment notwithstanding the verdict or for a new trial. The court denied the motion and plaintiff appealed.

The appellate court held that defense counsel's comment was inappropriate for a variety of reasons, including because it was unsupported by the evidence. Nevertheless, the mistake was not fatal because the trial judge neutralized the comment's effect through his forceful instruction. There was no objection to the judge's instruction, and neither did plaintiff move for a mistrial. Accordingly, there were no grounds for a new trial.

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

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