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 Holds No Personal Jurisdiction Over Foreign Manufacturer Which, Although It Used A Nationwide United States Distributor, Did Not Specifically Target Massachusetts For Sales

In *Preferred Mut. Ins. Co. v. Stadler Form Aktiengesellschaft*, 2018 U.S. Dist. LEXIS 55475 (Mar. 30, 2018), a homeowners' insurer as subrogee sued the retailer, U.S. distributor and Swiss manufacturer of an air purifier that allegedly caused a fire in the insured's Massachusetts home in the United States District Court for the District of Massachusetts, alleging negligence and breach of warranty. The Maine-based retailer and Ohio-based distributor in turn filed cross-claims against the manufacturer, which moved to dismiss all claims, arguing the court lacked personal jurisdiction.

The court first noted that the requirements for jurisdiction under the Massachusetts long-arm statute, Mass. Gen. L. ch. 223A, § 3, were easily satisfied, as defendant "derive[d] substantial revenue from goods used or consumed" in Massachusetts. In applying the due process constraints on the exercise of personal jurisdiction, the court then held that general jurisdiction was "plainly inapplicable," as the manufacturer was not incorporated in Massachusetts and did not have its principal place of business there.

Turning next to the possible exercise of specific jurisdiction, the court found the Swiss manufacturer had not "purposefully availed" itself of "the privilege of conducting activities" in Massachusetts, as required by the Supreme Court's decision in *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011) ***(see July 2011 Foley Hoag Product Liability Update)***. The court stressed that under Nicastro the defendant's contacts with the state must be "voluntary," and personal jurisdiction was permitted only when defendant "targeted the forum."

Here, no such targeting had occurred. While the distributor claimed that during regular Skype calls the manufacturer and distributor discussed sales and buyers, including important online retailers located in Massachusetts, the court found the calls discussed these topics "generally" but included no instructions from the manufacturer to target Massachusetts. Hence, although the manufacturer placed its products into the stream of commerce it did not do so with a specific intention that they would end up in Massachusetts as opposed to the United States generally.

Notably, the court added that "wanting to stay out of foreign courts is not illegitimate in itself," and the manufacturer's decision to sell through a U.S. distributor "might well be specifically intended to try to limit the likelihood the company would have to answer suits anywhere in the world." Due process requires that defendants be afforded a degree of predictability, and allows them to structure their conduct so as to not be subject to suit anywhere in the world. The court stressed that this did not mean that plaintiffs have no remedy—they simply must sue the manufacturer in Switzerland, or another forum where the manufacturer is amenable to suit.

Massachusetts Appeals Court Holds Company's Report Of Hundreds Of Prior Car Crashes Into Stores At Other Company Locations Sufficiently Similar To Be Admissible In Suit Arising From Crash Into Specific Store

In *Dubuque v. Cumberland Farms Inc.*, 93 Mass. App. Ct. 332 (2018), a woman inside a convenience store was struck and killed by an out-of-control car that entered the store at high speed. Her estate sued in the Massachusetts Superior Court for negligence and gross negligence, alleging the store could have prevented the accident by installing protective barriers. A jury found for plaintiff, and defendant appealed, arguing it deserved a new trial because the trial judge improperly allowed plaintiff to introduce an internal corporate report detailing hundreds of car crashes into stores at other company locations.

On appeal, the Massachusetts Appeals Court first noted that admission of evidence of prior accidents is generally disfavored, but if there is substantial similarity between the past and present occurrences it may be admitted to show defendant was on notice of the risk of an accident. Defendant proposed a detailed scheme for analyzing whether past crashes were substantially similar, considering factors such as the density of the store's location, vehicle speed and whether the driver had become incapacitated, and argued none of the prior crashes was admissible. Plaintiff contended that all crashes in the report were sufficiently similar, since they involved crashes into stores.

The appellate court agreed with plaintiff, holding that absolute identity was not required and that there was sufficient similarity among a sufficient number of the prior accidents for the report to be admitted. The similarity of any individual accident, the court noted held, went only to weight, not admissibility, and in accordance with that principle the trial judge had properly instructed the jury to consider a past accident only to the extent the jury as factfinder found it substantially similar.

Massachusetts Federal Court Holds Friction Testing Expert's Testimony Admissible As Tests He Performed Were Reliable, And Fact That Other Tests Were Not Performed Was Merely Ground For Cross-Examination

In *Botelho v. Nordic Fisheries, Inc.*, No. 15-11916-FDS, 2018 U.S. Dist. LEXIS 83743 (D. Mass. May 23, 2017), a seaman slipped and injured his head working on a fishing vessel, and brought claims in the United States District Court for the District of Massachusetts for, among others, negligence and unseaworthiness. The primary factual dispute was whether plaintiff had slipped on the ship's deck alone or on a fish lying on the deck. Plaintiff disclosed an expert who tested the friction of the ship's deck and plaintiff's boot, but performed no tests using a fish, and opined that if the deck had had a non-skid surface plaintiff would not have slipped, either on the deck or a fish. Defendant moved to exclude this testimony as unreliable and hence inadmissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) which requires the proponent of expert testimony to show it is reliable in order to be admitted.

Defendant first argued the expert's opinion was inadmissible because he had never tested the boot/fish and fish/deck interfaces. The court held, however, that whether or not the expert had performed any particular

test was not relevant to the admissibility issue; rather, the correct inquiry was only whether the tests he *did* perform were methodologically reliable. Here, the expert had tested the ship's deck and plaintiff's boot, and provided pages of analysis based on accepted friction principles. Accordingly, this methodology was reliable enough, and defendant could cross-examine the expert regarding his reasoning for not performing other tests.

Defendant also argued the expert's testing was unreliable because its conditions, such as location on the ship, amount of water present and air temperature, were too dissimilar to those of plaintiff's accident. The court summarily rejected this argument, holding that it went more to weight than admissibility and was again more properly material for cross-examination.

Massachusetts Federal Court Holds Maine Law Applies to Wrongful Death Claim Involving Asbestos Exposure And Injury In Maine From Products Designed In And Shipped From Massachusetts, But Leaves Door Open To Applying Massachusetts Law To Contribution Claims

In *Burleigh v. Alfa Laval, Inc.*, 2018 U.S. Dist. LEXIS 77891 (D. Mass. May 9, 2018), a shipyard mechanic's widow sued a steam turbine manufacturer and others in the United States District Court for the District of Massachusetts, alleging her husband died from asbestos exposure sustained during twenty years of work at a Maine shipyard and asserting, among others, negligence, breach of warranty and wrongful death claims. Although the turbine manufacturer designed and supplied the turbines from its Massachusetts principal place of business, it and other defendants moved to apply Maine law both to plaintiff's claims and to contribution claims among the defendants, noting differences between the two states' laws.

The court first addressed conflicts between the wrongful death statutes, applying § 146 of the Restatement (Second) of Conflict of Laws (1971), which provides that in personal injury actions the state of the injury controls "unless with respect to the particular issue, some other state has a more significant relationship." Determining whether another state has a more significant relationship requires analysis under both Restatement § 6, setting forth factors applicable to all actions such as the policies of the respective states and the parties' expectations, and § 145, listing factors applicable to tort actions such as the places of injury and tortious conduct, and the parties' home states.

Under § 145, the court noted that when the injury occurs in one state but the allegedly causal conduct in another, the place of injury generally controls, especially when the injured individual is closely connected with that state. Accordingly, the facts that decedent resided in Maine and was injured there outweighed the facts that the turbine manufacturer's allegedly tortious conduct and principal place of business were in Massachusetts. In addition, the parties' relationship was centered in Maine¬ as decedent interacted with the manufacturer's products there.

Turning to § 6, while Massachusetts' wrongful death statute does not cap compensatory or punitive damages, aiming both to compensate plaintiffs and hold tortfeasors fully responsible, Maine's statute aims to prevent unreasonable recovery by capping both. Here, Massachusetts' interest in compensating plaintiff was lessened as neither she nor decedent was a resident, but the state still had an interest in punishing the manufacturer as its conduct occurred in-state. In addition, uniformity of result slightly favored Massachusetts because the manufacturer presumably made sales to a variety of states, but the parties' expectations favored Maine because, among other things, the injury occurred there. On balance, as the court could not find that Massachusetts had a more significant relationship to the liability issues than Maine, its law as that of the place of the injury applied.

Regarding contribution, the court tentatively ruled that Maine law would apply, based on that state's connection to the plaintiff and injury. However, the court noted that the issue was not fully argued nor was the record fully developed, and future facts linking the alleged joint tortfeasors to Massachusetts could ultimately compel the court to apply Massachusetts law to the contribution issues.

NEW YORK/NEW JERSEY SUPPLEMENT

New York Federal Court Holds Residents Foreseeably Affected By Chemical Sold To Manufacturing Facility May Sue Chemical Supplier For Failure To Warn Manufacturer Of Risks Even Though Residents Did Not Purchase Or Use Product, Allegation Of Water And Air Contamination By Chemical Sufficiently Supported Claim For Loss Of Property Value

In *Wickenden v. Saint-Gobain Performance Plastics Corp.*, No. 1:17-CV-1056, 2018 U.S. Dist. LEXIS 103591 (N.D.N.Y June 21, 2018), husband and wife residents of a village sued local manufacturers of stain- and water-resistant fabrics and Teflon®, as well as their perfluorooctanoic acid ("PFOA") suppliers, in the United States District Court for the Northern District of New York for personal injuries and property damage allegedly resulting from contamination of the municipal water and air by the manufacturers' PFOA discharges. Both plaintiffs claimed PFOA blood levels approximately thirty to fifty times the United States average, and the husband alleged he had developed kidney cancer as a result. Plaintiffs asserted the PFOA suppliers were liable for failure adequately to warn of the compound's risks under both negligence and strict liability theories.

The suppliers moved to dismiss, arguing they owed no duty to plaintiffs as they were neither users nor purchasers of the products, and extending a duty to mere bystanders would result in unlimited liability to an indeterminate class of potentially affected persons. While the court agreed the sellers' duty extended only to the manufacturers as the products' purchasers and users, that duty included informing the manufacturers about the risks PFOA posed to foreseeable bystanders as well as the techniques that could be employed to reduce those risks. Because plaintiffs lived in the vicinity of the facility the manufacturers had successively operated, they were foreseeable bystanders and thus could sue the suppliers for their breach of duty to the manufacturers. The court also noted that imposing a duty on the suppliers was supported by the facts that they were in a superior position of knowledge as compared to bystanders, and the economic impact of a duty would not be overly burdensome.

The sellers also moved to dismiss plaintiffs' strict liability claim on the ground that they had failed to allege they were only exposed to PFOA from the sellers. The court rejected this argument, holding it was not necessary that plaintiffs identify the sellers as the only proximate cause of their injuries but merely that it was reasonably probable defendants were the source of PFOA that was a substantial factor in causing their harm. As plaintiffs had alleged the sellers produced the majority of the PFOA used and eventually discharged by the manufacturers, these allegations sufficed.

Finally, one of the sellers moved to dismiss plaintiffs' property damage claim, arguing they failed adequately to allege their property had been directly affected by the seller's conduct. The court disagreed, holding the allegation that defendant's failure to warn caused the contamination of the municipal water supply and a consequent reduction in plaintiffs' property value was sufficient.

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