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

First Circuit Holds Foreseeability of Health Risk Is Standard For Failure To Warn Even Though Claim Is For Property Remediation, And Bulk-Selling Chemical Manufacturer Had Post-Sale Duty To Warn Only Direct Customers Even If End Users Could Be Traced

In *Town of Westport v. Monsanto*, 877 F.3d 58 (1st Cir. 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 PCBs—odorless and colorless alleged human carcinogens sometimes used as plasticizers—in caulk at a middle school. The district court granted summary judgment against all claims, ruling, among other things, that the town had not shown health risks to building users were reasonably foreseeable at the time of the PCBs' sale, and if defendants had any post-sale duty to warn they adequately discharged it by warning their bulk caulk manufacturer customers of possible toxic effects in their workers (see August 2017 Product Liability Update).

On plaintiff's appeal, the United States Court of Appeals for the First Circuit affirmed. Plaintiff first argued the district court improperly focused on the foreseeability of PCBs' risks to human health rather than harm to property, as plaintiff had not sued for personal injury. The appellate court disagreed, as plaintiff's requested remedy of property remediation costs would be warranted only if there was a risk to human health. Plaintiff also argued health risks were foreseeable based on studies showing potential risks of PCBs used in paint, but the appellate court agreed plaintiff had produced no evidence showing such studies were relevant to any risk posed by PCBs in caulk.

The court also rejected plaintiff's two remaining arguments. As to the claim that defendants had a post-sale duty to warn end customers of the caulk, the court held that even if defendants had actual knowledge of their caulk manufacturer customers, and they in turn had actual knowledge of the end customers, defendants were not required to track and warn the latter; rather, their warnings to their own customers sufficed. Finally, the court agreed with the district court that no Massachusetts authority permitted recovery for negligent marketing without a finding of a defective design, which was absent here, and any state court dicta suggesting such a claim might exist for inappropriately marketing a product to children was at best factually inapplicable.

Massachusetts Appeals Court Holds Manufacturers of Non-Defective Component Parts Have No Duty to Warn of Risks Arising From Addition of Other Components In Finished Product

In *Pantazis v. Mack Trucks*, 92 Mass. App. Ct. 477 (2017), plaintiff's husband died after his clothing was caught in the exposed spinning universal joint of his dump truck, a part of the mechanical system used to tilt the truck's dump body. Decedent had purchased the truck as an incomplete vehicle—containing only a chassis, cab and engine—almost two decades earlier and had it transformed by unknown persons or entities into a dump truck through addition of the dump body and tilting system. Plaintiff brought a wrongful death action in Massachusetts Superior Court against the manufacturers of the original incomplete vehicle and the power take-off, a separate part of the tilting system, alleging breach of a duty to warn or, in the alternative, a voluntarily assumption of such a duty. As neither defendant had manufactured the equipment that caused decedent's death, the trial court granted summary judgment.

On plaintiff's appeal, the Massachusetts Appeals Court affirmed, holding that because the potential danger created by the truck's spinning universal joint arose from the assembly of component parts into a finished system, defendants had no duty to warn either assemblers or end users of the risks presented. Decedent had the choice to transform defendants' components into a vehicle outfitted for a wide variety of uses, from a flatbed truck to a fire truck, and as manufacturers of non-defective component parts, defendants had no duty to warn of risks posed by the assembled product that arose out of the addition of other components by downstream actors.

In response to plaintiff's argument that both defendants had provided limited warnings about the dangers of wearing loose clothing near or working around exposed rotating parts, and therefore voluntarily assumed a duty to warn of the risks of the universal joint added later by the other unknown actors, the court declined to expand defendants' limited duties as component part suppliers.

Massachusetts Appeals Court Holds Failure to Prove When Product Manufacturer Lost Or Destroyed Documents Precluded Adverse Spoliation Inference, And School Not Negligent For Serving Choke-Risking Food Product Absent Knowledge of Risk

In *Santiago v. Rich Prods. Corp.*, 92 Mass. App. Ct. 577 (2017), an elementary school student choked on a meatball served by the cafeteria at lunch. School personnel tried to help, and called for emergency services, but by the time the meatball was dislodged the child had suffered severe brain injuries leaving him blind, quadriplegic and unable to speak. The student and his family sued the meatball manufacturer and city in Massachusetts Superior Court, alleging the meatball contained an ingredient that made it particularly tough and likely to cause choking, and the city failed to adequately supervise the cafeteria. The trial court granted summary judgment for the city, finding plaintiff had not offered any evidence supporting a finding of negligence. At trial, the court declined to instruct that the jury could make an adverse inference against the manufacturer because it had not retained documents showing the meatball's composition, and the jury found that although the manufacturer was negligent in its meatball formulation, that negligence had not caused the child's injury.

On plaintiff's appeal, the Massachusetts Appeals Court affirmed. Regarding spoliation, the court noted plaintiff had failed to establish when the formulation documents went missing, a "threshold issue" necessary to show the manufacturer lost or destroyed the documents when it knew, or a reasonable person should have known, of their significance to a reasonably possible litigation. Although plaintiff argued the manufacturer violated its own policy requiring that documents be retained for three years, so the jury could infer this showed defendant's knowledge of the documents' significance, the court noted that a corporate reorganization during those years could have explained the loss. In addition, plaintiffs failed to show any prejudice because other evidence, including the manufacturer's current meatball formula as well as regulatory submissions indicating the formulation had remained unchanged, allowed plaintiffs to explore their defective ingredient claim.

As to the city, it could not be found negligent merely for having served a potentially dangerous product. The school

had no reason to know of any issues with the meatball, as it was approved by the United States Department of Agriculture and purchased through the National School Lunch Program. Also, although plaintiffs offered evidence that at times students engaged in potentially risky practices such as eating contests, or finishing quickly when school personnel announced only a few minutes remained during lunch period, plaintiffs failed to show any specific additional steps the school should have taken in supervising the students' eating.

Massachusetts Federal Court Holds Indemnity And Contribution Claims Against Product Sellers For Settlement Of Related Action Not Ripe Absent Evidence Of Actual Settlement Payments, But Damages Claims Not Subject To Dismissal Because No Certitude From Pleadings And Judicially Noticed Documents That Plaintiff Was On Inquiry Notice Of Claims Outside Limitations Period

In *Barnstable Cty. v. 3M Co.*, No. 17-40002, 2017 U.S. Dist. LEXIS 207414 (D. Mass. Dec. 18, 2017), a county leased and later purchased town property, using it for decades until 2009 to operate a firefighting school where trainees extinguished live fires with aqueous film-forming foam ("AFFF") that included hazardous chemicals such as perfluorooctanesulfonic acid ("PFOS"). In January 2016, the town discovered its groundwater was contaminated with PFOS and filed a state court action against the county, alleging the PFOS came from the firefighting school and seeking damages in excess of $5 million. During the suit, the state issued a Notice of Responsibility ("NOR"), pursuant to Mass. Gen. L. c. 21E, ordering the county to undertake immediate corrective action even without any finding of fault, and the county therefore incurred substantial remediation costs. The county and town then entered into an agreed judgment obligating the county for $2.9 million plus certain future costs, without any factual stipulations or admission of liability by the county.

In January 2017, the county sued multiple AFFF manufacturers and sellers 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, alleging defendants' AFFF was used at the firefighting school and seeking damages for property damage, remediation, environmental monitoring and other costs. The county also sought a declaratory judgment for common law indemnification and contribution for the county's immediate NOR response costs as well as its settlement of the town's state court suit. Several defendants moved to dismiss the declaratory judgment claims under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, arguing the claims were not yet ripe, and all claims under Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

Regarding defendants' request to take judicial notice of several documents cited in the motions, the court stated that such notice is appropriate if a fact is not subject to reasonable dispute because it is either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned." The court thus took notice of pleadings from the state court action to establish the action's existence and claims and defenses asserted, and an environmental group's report incorporated by reference in the county's complaint to establish when the county was on notice of alleged contamination. The court declined to take notice of the county's alleged admission in its state court answer that it adopted a policy in 2009 against the use of AFFF because the facts as to whether AFFF was used on the county's property were "still subject to reasonable dispute," and concluded a PowerPoint slide on the county's YouTube page did not appear as reliable as other public documents.

The court then considered the jurisdictional issue, noting it is usual to decide that question before the legal validity of claims. As there had been no adjudication of the county's liability in the state court action, and there was no support for the claim the county had actually paid any settlement expenses, the claims of indemnity and contribution for such costs were purely contingent and therefore unripe. Because the record was unclear about the actual nature of the settlement, however, the court granted the county leave to amend to address this issue.

On the merits, defendants argued the county's claims for negligence and breach of the implied warranty of merchantability were all barred by Massachusetts' three-year tort statute of limitations. Under the "discovery rule," the limitations period did not begin to run until plaintiff learned, or reasonably should have learned, it had been harmed by a defendant's conduct. Here, based on the complaint and judicially noticed documents, the court could not conclude with certitude that the county was on sufficient inquiry notice of its claims before January 2014. Although certain facts—such as the county's sampling of its own groundwater well in the fall of 2013—at least raised the specter of such notice, dismissal for untimeliness was premature because notice is an especially intricate factual inquiry in toxic tort litigation and numerous fact questions remained. The court dismissed all claims against one defendant on the alternative ground that the complaint failed to specify any link between that defendant's products and the training school and thus raised no more than the "sheer possibility" of that defendant's liability.

Finally, defendants argued the county's indemnification and contribution claims for the immediate NOR response costs should be dismissed because c. 21E creates a new response duty that did not exist at common law and a distinct procedure to recover associated costs from other responsible parties, which should supplant any common law theories. The court agreed.

Massachusetts Federal Court Holds Third-Party Administrator Did Not Fail To Effect Fair Settlement By Offering $250,000 When Jury Later Returned $16M Verdict, Or Offering $1.9M Post-Verdict, As Administrator Contested Causation and Damages With Expert Evidence Throughout Trial And Punitive Damages Posed Appealable Issues

In *Calandro v. Sedgwick Claims Mgmt. Servs.*, 2017 U.S. Dist. LEXIS 192523 (D. Mass. Nov. 21, 2017), a nursing home resident fell and was taken to a hospital, where treating physicians noted several previously undiagnosed medical conditions that contributed to her death five weeks later. Decedent's administrator brought a wrongful death action against the nursing home and decedent's personal physician, alleging they negligently failed to properly diagnose and treat the conditions. The nursing home's insurer retained a third-party administrator ("TPA") to handle the claim, and an investigator the TPA engaged issued two reports about the factual basis for plaintiff's claims.

The administrator demanded $500,000 to settle against both defendants and rejected joint offers of $275,000 and $300,000. When the physician settled separately for $250,000 days before trial, the TPA also offered $250,000, which plaintiff rejected. After a trial in which the nursing home conceded negligence but vigorously contested causation and damages through expert testimony, the jury awarded $1.5 million in compensatory and $12.5 million in punitive damages. The insurer then took day-to-day control of the claim away from the TPA and offered a $1 million settlement, which the administrator declined.

The administrator next demanded $40 million from the insurer and TPA under Mass. Gen. L. ch. 93A, which forbids unfair or deceptive practices, and Mass. Gen. L. ch. 176D, which defines certain insurance practices as unfair and deceptive. The insurer settled both the underlying and c. 93A/c. 176D claims on behalf of itself and the nursing home for $16 million, while the TPA made a $1.9 million offer which the administrator rejected. He then sued the TPA for $40 million in the United States District Court for the District of Massachusetts under c. 93A and c. 176D.

Following a bench trial, the court found in favor of the TPA. Plaintiff claimed the TPA violated c. 176D, § 3(9)(f), which prohibits "[f]ailing to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear," as the TPA had only offered $250,000 to settle the underlying claims but the jury rendered a $16 million verdict. The court noted, however, that liability is not reasonably clear if elements of a claim are the subject of good faith disagreement. Here the nursing home, although conceding negligence, fought both causation and damages throughout trial based on expert testimony. Moreover, the TPA acted reasonably by making at least two settlement offers—$275,000 jointly with decedent's physician and $250,000 individually—at key stages as the

parties disclosed their expert opinions. As to plaintiff's claim the TPA violated c. 176D, § 3(9)(c) by failing "to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance premiums," the TPA did investigate the claims, including by retaining the investigator who issued two separate reports.

Regarding the propriety of the TPA's post-verdict settlement conduct, even if the $1 million post-verdict offer violated c. 176D, it was an offer by the insurer, not the TPA. And its own $1.9 million post-judgment offer was fair and reasonable as it included the compensatory damages, costs and pre- and post-judgment interest, while the punitive damages award could be challenged on appeal.

NEW YORK/NEW JERSEY SUPPLEMENT

Second Circuit Holds Expert Testimony Intra-Uterine Device Could Cause Post-Insertion Uterine Perforation Inadmissible Because Experts' Theories Were Not Generally Accepted, Experts Lacked Pre-Litigation Expertise With Device And Uterine Perforation, And Experts Assumed Existence of Phenomenon At Issue; Court Declines To Decide If Opposing Party Admissions Can Substitute For Expert Causation Testimony But Holds Proffered Admissions Insufficient

In *In re Mirena IUD Prods. Liab. Litig.*, 16-2890-c(L), 16-3012-cv(CON) (Oct. 24, 2017 2d Cir.), a multi-district litigation ("MDL") consolidated in the United States District Court for the Southern District of New York, plaintiffs sued the manufacturer of an intrauterine device ("IUD"), asserting design and manufacturing defect, failure-to-warn, fraud and other claims for injuries allegedly caused by the device's perforating their uteruses, or becoming embedded in or migrating from its original location which increases the risk of perforation. While defendant had warned the device could perforate the uterus during insertion, termed a "primary perforation," plaintiffs asserted their injuries were due to a *post*-insertion or "secondary perforation," a risk defendant had not disclosed. Defendant denied the IUD was able to cause secondary perforations and asserted plaintiffs' injuries were caused by a primary perforation that was only later detected.

Defendant moved for summary judgment against all claims, arguing plaintiffs had no evidence of general causation, *i.e.*, that the device did actually cause secondary perforation in at least some women, as their experts' opinions to this effect were not shown to be reliable and hence were inadmissible under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). Plaintiffs opposed the motion with their experts' testimony as well as (1) statements from defendant's employees, including e-mail excerpts, a PowerPoint slide and a sentence in deposition testimony, all appearing to say that secondary perforation can occur, and (2) a change defendant made to its warning label stating that perforation may occur most often during insertion although it may not be detected until sometime later. The district court granted defendant's motion, holding plaintiff's expert testimony inadmissible and that, even if a defendant's admissions could serve as a substitute for expert testimony, the admissions here were too ambiguous to prove causation.

On plaintiff's appeal, the United States Court of Appeals for the Second Circuit affirmed. Regarding the *Daubert* issue, the experts' theories were not shown to be generally accepted in the obstetrics and gynecology community, as the experts failed to identify any scientific authorities that directly supported the existence of secondary perforation, and what authority there was actually cast doubt on the phenomenon's existence. Moreover, the experts lacked pre-litigation expertise regarding the phenomenon—two of them did not have specialized experience with the device or uterine perforation and the third had not even heard of secondary perforation before the litigation—and had developed their theories solely for the lawsuits. Further, the experts all assumed the existence of secondary perforation as the basis for their causation opinions, while the issue in the case was whether secondary perforation occurred at all.

With respect to plaintiffs' other proffered causation evidence, the appellate court, like the district court, did not decide whether party admissions could serve as a substitute for expert causation testimony, but agreed that even if they could the putative admissions at issue would be insufficient to do so. The deposition testimony and warning change merely raised the possibility the device could cause secondary perforation but did not affirmatively establish it did. Similarly, the brief email excerpts discussing reports of secondary perforation were merely anecdotal and of limited probative value, and plaintiffs failed to establish any context for the single PowerPoint slide that also hinted secondary perforation could occur.

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