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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.

United States Supreme Court Holds Federal Cigarette Labeling and Advertising Act Does Not Preempt State Law Claim Alleging Unfair and Deceptive Advertising of “Light” Cigarettes

In *Altria Group, Inc. v. Good*, 555 U.S. ___ (Dec. 15, 2008), smokers of “light” cigarettes sued a cigarette manufacturer in the United States District Court for the District of Maine, claiming that defendant’s advertising fraudulently conveyed the message that “light” cigarettes deliver less tar and nicotine to the smoker, in violation of the Maine Unfair Trade Practices Act (“MUTPA”). The district court dismissed plaintiffs’ claims as preempted by the Federal Cigarette Labeling and Advertising Act (“Labeling Act”), 15 U.S.C. § 1334(b), but the United States Court of Appeals for the First Circuit reversed. The United States Supreme Court granted certiorari.

The Court first held that the Labeling Act’s two stated purposes—(1) to inform the public of the health hazards of cigarette smoking and (2) to protect commerce, including by avoiding non-uniform cigarette advertising regulations with respect to any relationship between smoking and health, to the maximum extent consistent with the former purpose—would not be served by limiting states’ authority to prohibit deceptive statements in cigarette advertising.

The Court therefore analyzed the text of the preemption provision at issue: “[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes” labeled in accordance with the Labeling Act. The Court noted that the plurality opinion in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), had applied this provision by inquiring “whether the legal duty that is the predicate of the common-law damages action constitutes a requirement or prohibition based on smoking and health with respect to advertising or promotion, giving that clause a fair but narrow reading.” Adopting and applying this rubric, the Court held that the “duty not to deceive” imposed by the MUTPA was unrelated to smoking and health. The Court rejected defendants’ argument that the gravamen of plaintiffs’ MUTPA claim was failure to warn, concluding that the MUTPA claim alleged a breach of the duty not to deceive. The Court also distinguished *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001)—which held that state regulations promulgated “to address the incidence of cigarette smoking and smokeless tobacco use by children under the legal age” and “to prevent access to such products by underage customers” were preempted by the Labeling Act—on the ground that the regulations at issue in *Reilly* addressed cigarette advertising specifically, while MUTPA “is a general rule that creates a duty not to deceive.”

The Court finally held that plaintiffs' MUTPA claim was not impliedly preempted as an "obstacle" to an alleged policy of the Federal Trade Commission ("FTC") promoting the development and consumption of low tar cigarettes, concluding that the FTC has no such policy.

Massachusetts Supreme Judicial Court Affirms Denial of Certification of Nationwide Class Based on Lack of Opt-Out Rights Under Massachusetts Law, Affirms Denial of Statewide Class Based on Dissimilarities Among Class Members as to Statute of Limitations Defense

In *Moelis v. Berkshire Life Ins. Co.*, 451 Mass. 483 (2008), individuals who purchased "disappearing premium" life insurance policies sued the insurer when the premium did not "disappear" as advertised, alleging violation of Mass. Gen. L. ch. 93A, the Massachusetts unfair and deceptive practices statute. Plaintiffs moved to certify a nationwide class—or, in the alternative, a statewide class—of policyholders under Mass. Gen. L. ch. 93A, § 9(2). The trial court denied certification of a nationwide class on the ground that it could not properly exercise personal jurisdiction over the out-of-state class members, and denied certification of a statewide class due to dissimilarities among the class members with respect to defendant's statute of limitations defense. The trial court reported its decision to the Massachusetts Appeals Court, and the Supreme Judicial Court granted direct appellate review on its own initiative.

Represented by **Foley Hoag LLP**, defendant obtained a unanimous affirmation of both denials. With respect to the putative nationwide class, the court observed that federal due process entitled nonresident plaintiffs to "some protection" in the form of either: (1) notice, an opportunity to be heard and participate in the litigation, and the opportunity for the plaintiff to remove herself from the class; or (2) satisfaction of the traditional test for a nonresident defendant's "minimum contacts" with Massachusetts, namely the nonresident's purposeful availment of the privilege of conducting activities in Massachusetts. The court held that the putative class fell short of the first test because neither Mass. Gen. L. ch. 93A, § 9(2) nor Mass. R. Civ. P. 23 permits a judge to allow individual plaintiffs to "opt out" of a class action. The court further held that the putative class failed to satisfy the second test, finding that

the class members' purchasing a policy from an out-of-state agent and then mailing annual premium payments to defendant in Massachusetts were insufficient to establish minimum contacts. The court rejected plaintiffs' argument that the traditional test should require "less substantial contact" when applied to nonresident plaintiffs than to nonresident defendants.

With respect to the putative statewide class, the court observed that ch. 93A, § 9(2), requires putative class members to be "similarly situated," and that affirmative defenses should be considered in this analysis. Noting that defendant raised a statute of limitations defense, the court held that the potentially different information available to each class member would affect the date of accrual of her claim against defendant. The individualized nature of these inquiries rendered the members not similarly situated.

Massachusetts Federal District Court Holds that Class Counsel Fees in Claims-Made Settlements Will Be Awarded By Reference to Value of Benefits Actually Claimed By Class Members, Rather than Maximum Possible Benefits

In *re TJX Companies Retail Security Breach Litigation*, --- F. Supp. 2d ---, 2008 WL 4786658 (D. Mass. Nov. 3, 2008), consumers whose credit card and other personal information was stolen by computer hackers brought a class action against the retailer whose security systems had been breached. After defendant settled the suit, agreeing to pay class members' claims on an as-made basis, class counsel filed a petition for attorneys' fees totaling \$6,500,000 for the approximately 7,400 hours expended on the case.

In scrutinizing the proposed fee award to ensure its fairness and reasonability, the court first compared the fee award to the settlement, which class counsel asserted provided benefits exceeding \$200,000,000 to the class. The court noted, however, that \$200,000,000 represented the maximum possible benefit for the class; as of October 30, 2008, class members had claimed only \$6,100,000 in benefits, which the court described as "a figure unlikely significantly to increase." The court distinguished decisions from other circuits requiring the award of fees based on the "entire basket of benefits," as opposed to those actually claimed, on the ground that those cases involved a "common fund" of benefits—created by judgment or by settlement—to be distributed to the class members, while this

case involved a settlement obligation by defendant only to pay class members' claims on an as-made basis. The court noted that "there is support for the proposition that the reasonableness of a fee award properly may be judged in comparison to the benefits actually claimed by the class." As the court observed, allowing class counsel's fees to be tied to the payout caps in claims-made settlements encourages counsel to push for higher such caps to benefit their fee petition without any real expectation that the additional funds actually will be claimed by the class. Permitting such an approach, the court stated, "arguably sets up a conflict between counsel and the class by creating an incentive for counsel to accept a settlement unlikely to yield a high claiming rate."

Despite these concerns, the court approved the fee petition, noting that it had been fashioned pursuant to the lodestar/multiplier approach and the only factor that gave the court pause was the relation of the fee to the benefit conferred on the class. The court cautioned that "[i]n the future, however, plaintiffs' counsel can expect that this Court, when confronted with reversionary common fund or claims-made settlements, will award attorneys' fees *by reference to the value of benefits actually put in the hands of the class members.*"

Massachusetts Federal District Court Dismisses Claims Against Missile System Manufacturer Because United States Army's Successful Assertion of State Secrets Privilege Over System's Technical Specifications and Other Information Prevented Manufacturer from Presenting Fair Defense

In *White v. Raytheon Co.*, 2008 WL 5273290 (D. Mass. Dec. 17, 2008), the estate and minor children of a United States Navy combat pilot who died when shot down by an errant "friendly" missile while on patrol over Iraq sued the missile system's manufacturer in the United States District Court for the District of Massachusetts, alleging negligent design and manufacture, breach of warranty, gross negligence (for punitive damages) and violation of Mass. Gen. L. ch. 93A, the Massachusetts unfair and deceptive practices statute. After the parties propounded discovery to the United States Army, the United States intervened as an interested party and the Secretary of the Army filed a declaration asserting state secrets privilege over: (1) technical information regarding the design and

performance of the missile system; and (2) the rules of engagement for, and military orders applicable to, the battery that fired the missile that shot down plaintiffs' decedent. Defendant then moved to dismiss.

The court noted that the state secrets privilege "is a common law evidentiary rule that protects information from discovery when disclosure would be inimical to the national security." The court observed that the state secrets privilege is not to be lightly invoked but, when it is invoked, the court's review is limited to determining whether, "under the particular circumstances of the case, there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." The court credited the Secretary's invocation of the privilege, thereby barring discovery of the information at issue.

Plaintiffs argued that the court's resolution of the privilege issue should not result in dismissal of their claims, contending that they could prove their claims without resort to secret or privileged information. Defendant, however, argued that it would be unable to put on a government contractor defense—which requires a manufacturer of military equipment to prove that its equipment conformed to "reasonably precise specifications" approved by the United States and that it warned the United States of known dangers in the use of the equipment—without relying on the technical and operational information over which the Secretary had asserted the privilege. Defendant also argued that plaintiffs could not prove their claims of negligent design and manufacturing without inquiring into the missile system's technical specifications and manufacturing process. Finally, defendant argued that plaintiffs could not make out the causation element of their claims without recourse to the rules of engagement and operational orders given to the involved missile battery, in light of evidence that conduct by Army personnel may have constituted a superseding cause of the shoot-down. The court, despite agreeing that plaintiffs could make out a prima facie case without using privileged materials, nonetheless found "no practical means by which [defendant] could be permitted to mount a fair defense without revealing state secrets," and accordingly granted the motion to dismiss.

Massachusetts Superior Court Grants Summary Judgment For Crane Manufacturer Because Crane Owner’s Discarding of Allegedly Defective Components Prevented Plaintiff From Proving Claims

In *Hanlan v. Chandler*, 2008 WL 5608253 (Mass. Super. Ct. Nov. 13, 2008), plaintiff was injured when the arm of a crane under which he was working unexpectedly dropped after experiencing a rod and cylinder failure. Prior to the accident, the crane had passed through multiple owners over a thirty-year period, not all of whom were known. After the accident, the crane’s owner discarded the failed rod and cylinder. Plaintiff sued the crane’s manufacturer and owner for negligence and breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability), and the manufacturer moved for summary judgment.

With respect to plaintiff’s claim of negligent design and manufacture, the court held that it was impossible to tell whether the rod and cylinder were defective—or even whether they were original to the crane, and hence supplied by the manufacturer—without the parts themselves, and accordingly further held that plaintiff had no reasonable expectation of demonstrating a causal link between the manufacturer’s alleged negligence and his injuries. With respect to plaintiff’s claim that the manufacturer breached the implied warranty of merchantability by failing to warn of the danger of rod and cylinder failure, the court similarly held that, without the discarded components, plaintiff had no reasonable expectation of proving that the manufacturer’s knowledge of the rod and cylinder’s dangerousness gave rise to a duty to warn. Although plaintiff argued that another, earlier, litigation involving crane arm failure gave rise to a duty on the part of the manufacturer to warn the crane’s owners, the court held that any duty to warn created by the prior litigation did not benefit the crane’s current owner in light of the crane’s long and twisted ownership history, and the manufacturer’s consequent inability to identify the crane’s current owner. The court accordingly granted summary judgment against plaintiff on both counts.

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