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PRODUCT LIABILITY UPDATE

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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.

In This Issue:

Massachusetts Supreme Judicial Court Holds Cigarette Manufacturers Cannot Assert Decedent Caused Own Injuries Even Though He Knew the Dangers and Acted Unreasonably in Smoking--Defense Limited to When Smoker's Conduct Was "Overwhelmingly Unreasonable"

Plaintiff in *Haglund v. Philip Morris Inc.*, 446 Mass. 741 (2006), brought a wrongful death action claiming her husband died from lung cancer caused by defendant's breach of the implied warranty of merchantability, the Massachusetts near-equivalent of strict liability, in failing to design defendant's cigarettes so as to be nicotine-free and hence non-addictive. Defendant denied its cigarettes were defective but asserted that, if they were, recovery was barred because decedent used them unreasonably knowing of their danger and defect, a defense available to all product sellers under *Correia v. Firestone Tire and Rubber Co.*, 388 Mass. 342 (1983).

Plaintiff stipulated that decedent knew of the cigarettes' danger and acted unreasonably in beginning and continuing to smoke. She nonetheless moved for summary judgment that the *Correia* defense was unavailable to cigarette manufacturers, arguing theirs are the only product which when used as intended cause injury. The trial judge treated plaintiff's motion as one to strike the defense, denied the motion and granted defendant summary judgment based on plaintiff's stipulation. On plaintiff's appeal, the Massachusetts Supreme Judicial Court ("SJC") granted direct appellate review, and members of **Foley Hoag LLP's Product**

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Liability and Complex Tort Practice Group submitted an *amicus curiae* brief on behalf of the Product Liability Advisory Council**.**

The SJC stated that the availability of the *Correia* defense presumed consumers could choose between reasonable and unreasonable product uses so that they should bear responsibility if they chose the latter. Despite the absence of an evidentiary record, the Court ruled as a matter of law that cigarettes "cannot be used safely" in ordinary use, *i.e.*, "no nonunreasonable use of cigarettes . . . is possible," so the *Correia* defense cannot normally be invoked by a cigarette manufacturer. In so ruling, the Court noted, but did not comment on the significance of the fact, that Congress has determined that cigarettes' sale and use are lawful so long as the familiar federally-required warnings are given.

The Court did hold the *Correia* defense would remain available if defendant proved the consumer's use was "so overwhelmingly unreasonable as to make the imposition of warranty liability . . . fundamentally unfair," such as if she knew she had a medical condition that could be exacerbated by smoking. Because the defense could be available under such circumstances, and insufficient discovery had occurred to determine whether there was evidence of such circumstances in the present case, the Court upheld the trial court's refusal to strike the defense but vacated the summary judgment for defendant and remanded for the case for further proceedings.

Massachusetts Supreme Judicial Court Reverses New Trial and Sanctions in Medical Malpractice Action, Finding Insufficient Evidence of Fraud on the Court by Defense Expert

In *Wojcicki v. Caragher*, 447 Mass. 200 (2006), plaintiff sued his late wife's physician for three years of hemiparalysis allegedly resulting from failing to administer tissue plasminogen activator ("t-PA") during the wife's ischemic stroke. The physician asserted decedent was not an appropriate candidate for t-PA because she was at increased risk of intracranial bleeding as she was being treated for breast cancer and tests had not yet determined whether it had spread to her brain. After trial, the jury found for the physician. Plaintiff moved for a new trial or relief from judgment, claiming a defense expert had provided false and misleading testimony of an increased intracranial bleeding risk and in so doing had committed fraud on the court.

Plaintiff alleged the expert testified that a study showing t-PA's reduction of long-term stroke disability included no cancer patients when in fact 59 of the 624 study participants had been diagnosed with cancer at some point during their lives. Plaintiff also claimed the expert lied in a post-trial deposition ordered by the court when he stated that one of the study's biostatisticians told him that patients with active cancer were excluded from the study; plaintiff submitted an affidavit from the biostatistician stating the study did not track whether its participants had active cancer and she had never had a conversation with the defense expert. The trial court granted a new trial and imposed sanctions on defendant and his expert *(see February 2005 Foley Hoag Product Liability Update)*. Defendant appealed.

A single justice of the Massachusetts Appeals Court stayed further proceedings pending appeal. The Massachusetts Supreme Judicial Court then granted plaintiff's application for direct appellate review and reversed the new trial and sanctions order. The Court explained that fraud on the court exists only when there is the most egregious conduct involving corruption of the judicial process and even perjury does not constitute fraud on the court absent such corruption. Here, while the defense expert's testimony was disturbing, it was difficult to conclude from the record that the testimony that no cancer patients were included in the t-PA study was false. Moreover, even if plaintiff could prove the testimony false, this evidence was not "newly discovered" because it could have been obtained as of the time of trial and therefore no new trial was justified. For the same reasons, the SJC also reversed the award of sanctions.

Massachusetts Superior Court Finds Unfair and Deceptive Trade Practices Claims Involving "Light" Cigarettes Neither Barred by Exemption for Conduct Permitted by Federal Law Nor Preempted by Such Law

Plaintiffs in *Aspinall v. Phillip Morris, Cos., Inc.*, C. A. No. 98-6002 (Mass. Super. Ct. Aug. 9, 2006), alleged that defendants' use of the descriptors "lights" and "lowered tar and nicotine" in marketing their cigarettes violated Mass. Gen. L. ch. 93A, the Massachusetts unfair and deceptive trade practices statute, because many smokers did not actually receive less tar and nicotine than if they had smoked regular cigarettes. The Massachusetts Superior Court certified a class of all Massachusetts purchasers of the cigarettes during the four years preceding suit and the Massachusetts Supreme Judicial Court affirmed that order (*see November 2004 Foley Hoag Product Liability Update*).

Defendants then moved for summary judgment, arguing first that chapter 93A exempted from liability any conduct "otherwise permitted under the laws as administered by any regulatory board or officer acting under statutory authority of the Commonwealth or of the United States." The court noted that the exemption only applies where an overlapping regulatory scheme "affirmatively permits" the challenged practice. Here, defendants argued that two consent decrees between the Federal Trade Commission ("FTC") and cigarette manufacturers, which permitted the use of terms such as "low," "lower" and "reduced" in advertisements if accompanied by a clear and conspicuous disclosure of tar and nicotine content as measured by the FTC's test method, permitted defendants' allegedly unfair advertising practices. The court held, however, that the consent decrees were intended solely to apply to cigarette *packaging* and thus did not "affirmatively permit" the other forms of marketing at issue here.

Defendants next argued that plaintiffs' claims were expressly or impliedly preempted by the Federal Cigarette Labeling and Advertising Act ("FCLAA"), which specifies that "no requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising and promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." The court stated that implied preemption normally exists when state law actually conflicts with federal law or the latter so thoroughly occupies the relevant field as to infer that Congress left no room for the states to act. Where a statute expressly defines the scope of preemption, however, matters beyond that reach are not preempted, thus because the FCLAA contained an express preemption provision the court did not consider defendants' implied preemption argument. As for express preemption, the court reasoned that state law actions are preempted only if the underlying legal duty is a "requirement or prohibition based on smoking and health … with respect to the advertising and promotion" of cigarettes. Here, because the underlying duty was not to deceive rather than one "based on smoking and health," the claims were not preempted.

Massachusetts Superior Court Finds Federal Board Safety Act of 1971 Preempts State Law Claims for Failure to Warn in Boat Accident Case

In *Wood v. Northside Marina*, 20 Mass. L. Rep. 618 (Mass. Super. Ct. 2006), plaintiffs were injured in a boating accident when gasoline vapors that had built up in the engine compartment of their yacht caught fire after the yacht engine was started, causing the vessel to explode. Plaintiffs sued the manufacturer of the blower used to diffuse gasoline fumes from the engine for negligent failure to warn and the blower distributor for breach of the implied warranty of fitness for a particular purpose. The manufacturer moved for summary judgment on the basis, among others, that the Federal Board Safety Act of 1971 ("FBSA"), 46 U.S.C. § 4301 *et seq.*, preempted plaintiffs' failure-to-warn claim and the blower's label was sufficient as a matter of law. The label warned that gasoline vapors can explode and users should run the blower for four minutes and then check the engine compartment for vapors before starting the engine. Plaintiffs had failed to run the blower at all.

The Massachusetts Superior Court granted summary judgment on the failure-to-warn claim because the FBSA expressly provided that state laws or regulations establishing a performance or safety standard different from the federal standard were preempted. Applying established preemption precedent, the court explained that a tort action has the same regulatory effect as a state statute and thus can be preempted in the same manner. Here, because the United States Coast Guard had adopted regulations defining the warnings required for a blower pursuant to the FBSA, and the manufacturer's warning complied with those regulations, any common law claim asserting the warning should have had a different content was preempted. The court denied summary judgment against the warranty of fitness claim based on disputed factual issues.

Massachusetts Superior Court Denies Class Certification Under Unfair and Deceptive Practices Statute Where Named Plaintiffs Could Not Prove Any Damage Caused by Defendants

In *Besseck v. New England Water Heater Co.*, 2006 WL 2089702 (Mass. Super. Ct. July 5, 2006), plaintiffs brought a putative class action against a water heater manufacturer alleging it violated Mass. Gen. Laws ch. 93A, the Massachusetts unfair and deceptive trade practices statute, by unilaterally altering material terms relating to pricing of form contracts for leasing the heaters. Plaintiffs sought recovery of the costs to remove, replace and dispose of their water heaters as well as all monies paid above the original rental prices. Plaintiffs moved to certify a class of all Massachusetts residents who had been customers of defendants. Although the named plaintiffs each had one of defendant's water heaters and had paid defendant monthly rent, they conceded they had never signed a lease with defendant.

The Massachusetts Superior Court denied class certification, relying on the recent case of *Hershenow v. Enterprise Rent-A-Car Co. of Boston, Inc.*, 445 Mass. 790 (2006) *(see January 2006 Foley Hoag Product Liability Update)*, which held that a plaintiff may not maintain a chapter 93A claim if he did not actually suffer any injury caused by defendant's allegedly wrongful act. Here, the named plaintiffs admitted they never entered into one of the allegedly improper adhesion contracts on which suit was based. They were also unable to demonstrate any monetary damages caused by defendant's alleged refusal to remove and dispose of old water heaters, as one plaintiff admitted she still had her water heater and the other had no evidence of payments to remove or dispose of his heater. Thus plaintiffs did not satisfy the "commonality" requirement for class certification as they did not have claims that class members who had actually executed the adhesion contracts might have.

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

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