Foley Hoag LLP

Product Liability **Update**

In This Issue:

October 2011

Foley Hoag LLP publishes this quarterly Update concerning developments in Product Liability and related law of interest to product manufacturers and sellers.

First Circuit Holds Trailer Manufacturer Not Liable for Negligence or Breach of Implied Warranty of Merchantability Where Trailer Was Built to Plaintiff's Employer's Exact Specifications and Design Was Not Obviously Unsafe

In *Hatch v. Trail King Industries, Inc.*, 2011 U.S. App. LEXIS 18000 (1st Cir. Aug. 29, 2011), plaintiff was paralyzed after a hydraulically operated drop gate on the trailer he operated fell on him, trapping him underneath. The trailer and its gate were manufactured by defendant according to the exact specifications of plaintiff's employer. Plaintiff sued the manufacturer in the United States District Court for the District of Massachusetts for negligence and breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability), alleging the trailer gate was defective and that the addition of a safety pin or chain would have prevented the accident.

After the district court instructed the jury that a defendant who manufactures a product according to the buyer's specifications could not be liable under either a negligence or implied warranty theory, unless the design defect was so obvious it would have been unreasonable for defendant to manufacture according to the design, the jury returned a defense verdict. Plaintiff appealed, and the United States Court of Appeals for the First Circuit affirmed.

On appeal, plaintiff argued defendant was improperly attempting to disclaim its implied warranties. The court held defendant had made no such attempt, but rather the issue was whether an implied warranty of merchantability even arises where the manufacturer of a defective product simply followed the specifications of another. Finding no clear Massachusetts precedent, the court looked to the principles expressed in the Restatement (Second) of Torts, § 402A and § 404. Under § 402A, which Massachusetts substantially follows in an implied warranty personal injury case, a seller is strictly liable when it sells any product in a defective condition unreasonably dangerous to the consumer. Under § 404, "an independent contractor [who] negligently makes, rebuilds, or repairs a chattel for another is subject to the same liability as that imposed upon negligent manufacturers of chattels." Comment a to the section, however, notes that "[t]he contractor is not subject to liability if the specified design or material turns out to be insufficient to make the chattel safe for use, unless it is so obviously bad that a competent contractor would realize that there was a grave chance that his product would be dangerously unsafe."

The court first rejected plaintiff's argument that § 404 was inapplicable by its terms because defendant was a manufacturer, not an independent contractor. Terming the purported distinction unhelpful, the court noted that the real issue was the respective roles played by defendant and plaintiff's employer in designing the defective product. Here, where the product was built to the employer's exact specifications, the court adopted the rationale of another court in a similar case that "to hold [defendant] liable for defective design would amount to holding a non-designer liable for design defect. Logic forbids any such result." Moreover, the rationale for strict liability did not apply because the manufacturer did not launch its product into the general stream of commerce; indeed, where a product is built to the consumer's specifications, the manufacturer is in no better position than the consumer to assume the costs of design safety.

Finally, the court noted that although both sides had made lengthy policy arguments, in the absence of controlling Massachusetts case law the court had no authority to extend Massachusetts product liability law beyond the provisions of the Restatement (Second), which Massachusetts generally follows.

Massachusetts Superior Court Holds Expert Testimony Regarding Technical Feasibility of Extracting Nicotine to Below Addiction Thresholds and Adding Flavors to Resulting Product Admissible Because Supported by Scientific Research and Data, But Testimony Concerning Consumer Reaction to Product Inadmissible Due to Lack of Such Data

In *Haglund v. Philip Morris, Inc.*, No. 2001-02367, 2011 WL 2737240 (Mass. Super. Ct. Apr. 20, 2011), plaintiff sued the defendant tobacco company in Massachusetts Superior Court for breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability) and wrongful death on behalf of her deceased relative, a smoker who died of lung cancer. Plaintiff alleged that defendant, with knowledge of the dangers posed by cigarettes, consciously designed its products with addictive nicotine levels even though a safer, reasonable alternative design existed at the time—namely, a non-addictive cigarette, achievable through "nicotine extraction." Plaintiff alleged that had defendant manufactured its cigarettes using the alternative design, decedent would not have become addicted and died. Defendant responded that it was not possible to reduce the amount of nicotine in delivered smoke to the level required to make a cigarette non-addictive, and in any event such a reduced nicotine cigarette would be inferior in taste and other qualities so that it would not be attractive to consumers.

In support of her claim, plaintiff offered an expert to testify that it was technically feasible for defendant to manufacture a cigarette that was both non-addictive and comparable in taste and other properties to a regular cigarette. As trial approached, defendant moved in limine to preclude plaintiff's expert's testimony because: (1) it was based on speculation, rather than data of the type that scientists ordinarily rely upon, and (2) the scientific principles he relied upon were not reliable. The court granted the motion in part, ruling plaintiff's expert could testify that it was technically feasible to extract nicotine to below the level of addictiveness and add flavors to such a de-nicotinized cigarette, but not as to how the resulting product would be perceived by smoking consumers.

In so ruling, the court noted that under Massachusetts law, the proponent of expert testimony must establish five foundational requirements: (i) the testimony will assist the trier of fact; (ii) the witness is qualified as an expert in the relevant area; (iii) the witness' opinion is based on facts and data in the record, not speculation; (iv) the opinion is based on reliable principles or methods; and (v) the expert has applied the principles and methods in a reliable manner to the facts of the case. Here, the proffered expert had extensive education in the field of chemistry, and equally extensive training and experience in the process of chemical extraction. Regarding de-nicotinization, the expert's specific opinon that defendant could have produced a cigarette with a nicotine level of 0.0001%, far below the threshold for addictiveness, was based on supporting research documents and data. Similarly, with respect to the issue of flavor, the court found data and research supporting the expert's testimony that it was feasible to add flavors back to a product after it had been de-nicotinized, and that the resulting product would still resemble an ordinary cigarette in physical appearance.

With respect to the rest of the expert's testimony, however, the court found there were insufficient data "to make the leap to offer expert witness opinion testimony about how smoking consumers would view the de-nicotinized product." The only research cited by the expert in support of his opinion that a de-nicotinized cigarette would be accepted by consumers was a 1975 study showing that 75% of smokers of a specific brand of low tar and nicotine cigarettes produced at that time viewed the cigarettes as comparable in taste and flavor to the brand's regular cigarettes. The nicotine levels of the cigarettes involved in that study, however, were far in excess of the 0.0001% level regarding which the expert proposed to testify.

Massachusetts District Court Appellate Division Holds Statute of Limitations Bars Claim for Breach of Implied Warranty of Merchantability for Roofing Shingles Delivered Twenty Years Earlier Because Any Such Claim Accrued on Tender of Delivery, But Express Warranty Claim Survives Because of Fact Dispute Regarding Any Time Limitations Imposed by Warranty

In *Howard v. IKO Manufacturing, Inc.*, 2011 WL 2975813 (Mass.App.Div. July 20, 2011), plaintiff purchased, in late 1990, roof shingles which he claimed came with a "forty- or fifty-year warranty" but began to disintegrate in less than twenty years. Plaintiff complained to the manufacturer on December 2, 2008 and, exactly one year later, brought suit in Massachusetts District Court claiming, among other things, breach of express warranty and the implied warranty of merchantability. The manufacturer moved to dismiss, or in the alternative for summary judgment, on the basis, among others, that plaintiff's warranty claims were barred by the statute of limitations. In support, the manufacturer attached an unsigned "specimen" warranty which ran for thirty years, required claims for repair or replacement to be made within thirty days of discovery of the defect and limited the time for bringing an action to one year after the cause of action accrued. After hearing, at which the trial judge stated he was treating defendant's motion as one to dismiss rather than for summary judgment, the motion was allowed. Plaintiff appealed.

The Massachusetts District Court Appellate Division first decided to treat the trial court's order as an entry of summary judgment because, despite the judge's statement at the hearing, the order itself did not clearly state that the judge had excluded matters outside the pleadings from consideration. The court then determined that the trial judge should not have considered the specimen warranty attached to the manufacturer's motion because it was not supported by any affidavit. Moreover, plaintiff's affidavit stated that the specimen warranty had not applied to his purchase and that he had received a forty- or fifty-year warranty. Without the specimen warranty, and in the face of plaintiff's affidavit, the manufacturer could not meet its burden of establishing that there was no genuine issue of material fact as to the applicable time for plaintiff to file his complaint.

Beyond this, the court noted that even if the trial judge had considered, and could consider, the specimen warranty, the critical issue was whether there was a genuine issue of material fact as to whether the consumer's cause of action accrued before December 2, 2008, the cutoff date under the specimen warranty. The manufacturer submitted no evidence on this issue, simply arguing that if plaintiff complained to the manufacturer on December 2, 2008, he must have known of the alleged defect prior to that time. Noting that it was at least possible that plaintiff learned of the alleged breach on the same day he complained, the court found that defendant failed to show there was no genuine issue of material fact as to whether plaintiff had timely filed his express warranty claim.

Turning to plaintiff's claim for breach of the implied warranty of merchantability, the court noted that such a warranty is contract-based and does not extend to future performance. Accordingly, any cause of action accrued when delivery was tendered, here 1990, regardless of whether the buyer had knowledge of a defect. Consequently, the court affirmed the dismissal of plaintiff's implied warranty claim, holding it was barred by the statute of limitations, which required the action to be brought within four years of when the cause of action had accrued.

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

David R. Geiger
Chair

Matthew C. Baltay
Update Editor

Dakis Dalmanieras

James J. Dillon

Jonathan M. Ettinger

Jeffrey S. Follett

Barbara S. Hamelburg

Michael B. Keating

Colin Zick

Creighton K. Page
Associate Editor

Eric A. Haskell

Nabeel Ahmad

Brian C. Carroll

Brian L. Henninger

Eric J. Huang

Joseph P. Lucia

Matthew E. Miller

FOLEY HOAG LLP