FOLEY HOAG LLP

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.

Massachusetts Federal Court Holds Japanese Escalator Accident Study Inadmissible for Lack of Authentication and Demonstrated Connection to Facts of Case, Defendant's Introduction of New Shoe Design in Response to Study Inadequate to Show Superiority of New Design

In *Geshke v. Crocs, Inc.*, 2012 WL 3877620 (D. Mass. Sep. 7, 2012), a child was injured when her sandal-design shoe got caught in an escalator. Notwithstanding multiple signs near the escalator alerting pedestrians to "avoid sides," and "keep tennis shoes away from sides" and specifically warning parents to "attend children" and "PARENTS – Your children must obey these rules," the child boarded the escalator standing all the way to its side and several steps in front of her parents. As the escalator descended, the child's right foot became caught between the moving step and the escalator's side skirt, contorting her foot upside down at a 90-degree angle. Thereafter, the child's mother sued the shoe's 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), among other claims, alleging design defects and failure to warn of the shoe's dangers to young children riding escalators. The manufacturer moved for summary judgment arguing that plaintiff's failure to support her design defect claim with expert testimony precluded a finding of liability and her disregard of the conspicuous signs posted near the escalator precluded any finding that a warning by the manufacturer would have prevented the child's harm.

To establish her design defect claim, plaintiff sought to forego expert testimony and rely instead on the manufacturer's "own admissions" that a safer alternative design existed and allegedly "irrefutable" findings of the Japanese Ministry of Economy, Trade and Industry (METI) based on a study by Japan's National Institute of Technology and Evaluation (NITE). The study analyzed various types of footwear and their relation to escalator entrapment and determined that a sandal design figured in virtually every reported instance of shoe entrapment. In the wake of the study, METI requested that defendant re-design its shoes to incorporate a harder material to better guard against the danger of entrapment, and defendant in fact did so, releasing in Japan a new children's shoe using harder material and accompanied by an escalator warning hangtag. Plaintiff maintained that defendant had conceded the existence of a safer and feasible alternative design by releasing the new shoe in response to the METI-NITE findings.

The court did not find plaintiff's reliance on this evidence sufficient to survive the manufacturer's motion for summary judgment. The court held the METI-NITE study would be inadmissible at trial because the report had never been properly authenticated and plaintiff offered no evidence, by expert testimony or otherwise, to connect the report to the specific facts of the case. For example, there was no identification of

the make or model of the shoes involved in the study, the escalator model specific to each entrapment, the sandals' contact location, the specifications of the individual shoes and/or the angle of entrapment. While it was undisputed the manufacturer had introduced a new design in response to the study, plaintiff offered no evidence the new design was in fact safer for children riding an escalator, and therefore, evidence of the mere existence of the new design, without more, was insufficient to survive summary judgment.

As to plaintiff's failure-to-warn claim, the court held that, in light of the myriad signs posted near the escalator entrance, an "earlier redundant warning" by the manufacturer would have done nothing to avert the child's accident. Accordingly, the court allowed the manufacturer's motion for summary judgment.

Massachusetts Federal Court Holds Plaintiff's Civil Engineering Expert Not Qualified to Opine on Alternative Designs in Construction Loader Suit and Opinions Not Shown Reliable Because Expert Performed No Testing Regarding Proposed Designs' Feasibility and Effectiveness

In *Carlucci v. CNH America LLC*, 2012 WL 4094347 (D. Mass. Sep. 14, 2012), plaintiff was injured in a driveway paving accident when his co-worker backed over his foot while operating a skid-steer loader (a compact, highly maneuverable, four-wheel bucket loader) designed and manufactured by defendant. At the time of the accident, plaintiff was hand-grading gravel with a shovel while his co-worker operated the loader in front of him. Although the loader had a rear window in the operating cage, the co-worker testified it was difficult to see out that window if he followed the safety manual's instructions to use a lap belt at all times. Accordingly, the co-worker was using a visual reference point on the driveway wall to guide how far back he could go without entering plaintiff's space when he ran over plaintiff's foot.

Plaintiff sued the loader's manufacturer in Massachusetts Superior Court for negligence, breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability) and violation of Mass. Gen. L. ch. 93A (the Massachusetts unfair and deceptive practices statute), alleging the machine was defectively designed and did not include sufficient warnings. Defendant removed the case to the United States District Court for the District of Massachusetts and, after discovery, moved to exclude the testimony of plaintiff's expert and then for summary judgment. Plaintiff's expert proposed to opine that the loader was defectively designed because defendant failed to include devices to increase rear visibility, and the warnings should have advised using a spotter when pedestrians were in the area. The expert proposed a number of alternative designs to reduce the risk of back-up injuries, including the addition of: (1) mirrors in the operator's cage on both sides of the loader; (2) a rear-view camera sending a signal to a closed-circuit television inside the cabin; (3) a strobe light or back-up sensor tied to an audible alarm of increasing frequency; or (4) a rear guard or bumper.

In allowing defendant's motions, the court found plaintiff's expert was not qualified to opine as to the design of a skid-steer loader, and in any event, his failure to test any of his proposed alternative designs rendered his methodology unreliable. Regarding qualifications, the expert was a civil, not mechanical, engineer, and although he was a member of several professional societies and organizations and had taught courses and developed training manuals on construction safety, none of his experience involved questions of skid-steer loader design. Thus while the expert's background demonstrated some expertise in workplace safety generally, it did not reveal any experience, let alone expertise, in the safe design of skid-steer loaders.

Even if the court had found the expert qualified, it would have excluded his testimony as unreliable. The expert did not test the feasibility of any of his several proposed alternative designs, nor did he cite any studies showing the designs would have been effective on a skid-steer loader (as opposed to other heavy construction equipment) or prevented plaintiff's accident. Although the court stopped short of holding that alternative design testing is mandated in Massachusetts design defect cases, here the lack of such testing, coupled with other factors, meant the expert had not adequately weighed the costs and benefits of the alternative designs. Thus, because plaintiff could not meet his burden under Massachusetts law to show by expert testimony "that an alternate design was available which would reduce the risk of harm without interfering with the product's functionality or unduly increasing its cost," the court entered summary judgment against plaintiff's design defect claims. Finally, the expert's opinion about the allegedly inadequate warnings also was inadmissible, not only because it had not been described in his expert report, but because the expert's failure to propose an alternate warning that allegedly would have been effective or appropriate in the circumstances rendered the opinion unreliable. Accordingly, the court also entered summary judgment against plaintiff's failure-to-warn claims.

Massachusetts Federal Court Holds Due Process Bars Personal Jurisdiction Over Distributor's Third-Party Complaint Against Italian Manufacturer as Contract Clause Providing for Dispute Resolution in London, and Other Factors, Made Exercise of Jurisdiction Inconsistent with "Traditional Notions of Fair Play and Substantial Justice"

In *New London County Mutual Ins. Co. v. United Pet Group, Inc.*, 2012 WL 3206345 (D. Mass. Aug. 6, 2012), two Massachusetts homeowners alleged that a defective aquarium heater purchased in Massachusetts had caused a fire in their house. Plaintiff insurer, as subrogee of its insured homeowners, sued the heater's distributor, an Ohio company, in Massachusetts Superior Court. The distributor removed the case to the United States District Court for the District of Massachusetts based on diversity of citizenship and filed a third-party complaint against the heater's Italian manufacturer, asserting claims for indemnification, contribution and breach of warranty under a distribution agreement between the parties. The manufacturer moved to dismiss for lack of personal jurisdiction.

In opposing the motion, the distributor argued the manufacturer was subject to personal jurisdiction under the Massachusetts long-arm statute, M.G.L. c. 223A, § 3(a), because the claim arose out of the manufacturer's "transacting any business" in the Commonwealth by placing its product in the national stream of commerce, knowing it could be sold in Massachusetts. The manufacturer argued that United States Supreme Court precedent prohibits the exercise of jurisdiction based on the "stream of commerce" absent evidence the manufacturer specifically targeted the forum state, and there was no such evidence here.

The court first noted that the "transacting any business" clause of the long-arm statute has been interpreted to authorize jurisdiction to the full extent allowed by the due process clause of the United States Constitution. Therefore, determining whether jurisdiction is proper requires consideration of: (1) whether the claims arise out of or are related to the manufacturer's in-state activities; (2) whether the manufacturer, by those activities, has purposefully availed itself of the laws of the forum state; and (3) whether the exercise of jurisdiction comports with fair play and substantial justice. The court resolved the issue solely under the third element, holding that the exercise of jurisdiction would offend traditional notions of fair play and substantial justice. Perhaps the most important factor guiding the court was that a forum selection clause in the parties' distribution agreement designated London as the place for dispute resolution, and thus the parties never could have expected that litigation between them would take place in Massachusetts. The court also found that being forced to litigate in Massachusetts would result in undue expense and burden for the manufacturer, and that Massachusetts had little interest in entertaining an indemnification and contribution dispute between Italian and Ohio parties. Accordingly, the court allowed the manufacturer's motion to dismiss.

Massachusetts Superior Court Denies Foreign Manufacturer Summary Judgment for Lack of Personal Jurisdiction, Holding Manufacturer Waived Defense Through Participation in Discovery and Motion Practice Regarding Merits of Suit

In *American Int'l Ins. Co. v. Ziabicki Import Co.*, 2012 WL 3039228 (Mass. Super. Ct. July 5, 2012), a valuable painting was damaged when the nails securing the picture hangers to the wall snapped and the painting fell from the wall. The homeowners' insurer, as subrogee, sued the picture hangers' German manufacturer and its Wisconsin-based distributor in Massachusetts Superior Court for negligence, breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability) and violation of Mass. Gen. L. ch. 93A (the Massachusetts unfair and deceptive practices statute), alleging the picture hangers were defectively designed and manufactured.

The manufacturer answered the complaint, asserting lack of personal jurisdiction among its defenses, and expressly reserved its rights to contest jurisdiction. Thereafter, however, the manufacturer cross-claimed against the distributor, answered the latter's cross-claim, served the plaintiff and distributor with discovery requests, responded to plaintiff's interrogatories, deposed multiple witnesses and joined in a motion for an order allowing it to inspect the accident scene. After nearly two years of participating in discovery and motion practice relating to the merits, the manufacturer moved for summary judgment based on both the personal jurisdiction defense and the merits.

The court first observed that the manufacturer had "an airtight claim that this Court lacks personal jurisdiction over it unless its actions during the course of this lawsuit waived or forfeited that defense." The manufacturer had never had any contacts with or presence in Massachusetts – it had never contracted

with Massachusetts businesses, maintained an office or employees in Massachusetts, advertised, marketed, sold or shipped products directly to Massachusetts or known or expected that its products might end up there. Nonetheless, the court found the manufacturer had invoked the benefits and protections of Massachusetts' laws – including procedural rules compelling an adverse party to disclose information not otherwise available – and thus waived its jurisdictional defense when it chose to litigate the case on the merits for nearly two years after asserting the defense. The court also found that plaintiff's expert's testimony that the picture hangers and nails were excessively brittle due to defects in design and manufacture presented a genuine issue of material fact on the merits of plaintiff's claim. Accordingly, the court denied the manufacturer's motion in its entirety.

Massachusetts Federal Court Dismisses Plaintiff's Direct Claims Against Massachusetts Corporations Previously Joined as Third-Party Defendants Because Direct Claims Would Destroy Diversity Jurisdiction; Dismissal Would Not Prejudice Parties Because Corporations Would Remain in Suit as Third-Party Defendants

In *Erickson v. Johnson Controls, Inc.*, 2012 WL 3597204 (D. Mass. Aug. 17, 2012), plaintiff was injured when an air-conditioning unit fell on him while he was trying to remove its shrink wrap. Plaintiff sued the manufacturer in Massachusetts Superior Court for negligence, breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability) and violation of Mass. Gen. L. ch. 93A (the Massachusetts unfair and deceptive practices statute), alleging the unit and shrink wrap were defectively designed and the manufacturer failed to warn of the risks. The manufacturer, a Wisconsin corporation, removed the case to the United States District Court for the District of Massachusetts based on diversity jurisdiction, and shortly thereafter filed a third-party complaint for contribution and indemnification against the general contractor and subcontractors overseeing the construction, which were all Massachusetts corporations. The third-party defendants filed cross-claims against one another and a fourth-party complaint against plaintiff's employer, also a Massachusetts corporation. A year later, the court allowed plaintiff to amend his complaint to add direct claims against the third-party contractors and subcontractors. While the subcontractors answered the amended complaint, the general contractor moved to dismiss on the ground that diversity jurisdiction had been destroyed when plaintiff, a Massachusetts resident, asserted direct claims against third-party defendants also based in Massachusetts.

Under long-established precedent, a federal court has diversity jurisdiction only where there is complete diversity of citizenship of the parties – i.e., no plaintiff can be a citizen of the same state as any defendant – and the addition of a non-diverse defendant through an amended complaint would defeat jurisdiction. In such a circumstance, if the newly added non-diverse defendant is not legally indispensable, the court has two options – it may either (i) remand the case to state court, or (ii) preserve diversity jurisdiction by dismissing the new defendant. In considering the second option, the court must consider the extent to which dismissal would prejudice any of the parties to the litigation.

Here, plaintiff's addition of the new non-diverse parties in his amended complaint defeated diversity, and because each was merely a potentially liable joint tortfeasor, they were not indispensable parties. In allowing the motion to dismiss, the court found that, although the possibility of piecemeal litigation is generally vexing to the parties and judicial system, here there would be no substantial prejudice to the parties because the litigation was in its early stages and both of the newly added defendants would remain in the action as third-party defendants. Accordingly, the time and effort already expended by those defendants and plaintiff would not be for naught.

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