FOLEY HOAG LLP

Product Liability **Update**

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January 2013

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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.

First Circuit Holds Unfair and Deceptive Practices Claim Precluded by Judgment for Defendant in Earlier Product Liability Action in Which Plaintiff Did Not Appeal Denial of Leave to Assert Claim and Which Involved Same Issues and Evidence

In *Hatch v. Trail King Industries, Inc.*, 699 F.3d 38 (1st Cir. Nov. 2, 2012), plaintiff was paralyzed after a hydraulically operated drop gate on the trailer he operated fell on him, and sued the trailer manufacturer in the United States District Court for the District of Massachusetts alleging negligence, breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability) and loss of consortium. After the deadline for completing fact discovery and after defendant moved for summary judgment, plaintiff moved to amend the complaint to add claims under Mass. Gen. L. ch. 93A, § 9 (the Massachusetts unfair and deceptive practices statute) based on defendant's alleged breach of warranty and other conduct. The court denied plaintiff's motion as untimely. Shortly thereafter, plaintiff filed a new action in Massachusetts Superior Court asserting the same ch. 93A claims. Defendant removed the case to federal court and moved to dismiss based on the proceedings in the original action or, alternatively, to stay the new action pending resolution of the original one. With plaintiff's assent, the court granted a stay, the original action proceeded to trial and the jury returned a defense verdict. Plaintiff appealed the judgment, but not the court's denial of his motion to amend the complaint, which was affirmed by the United States Court of Appeals for the First Circuit (see **October 2011 Foley Hoag Product Liability Update**).

The district court then turned its attention back to plaintiff's stayed ch. 93A action in which defendant's motion to dismiss was still pending. The court granted the motion, holding plaintiff had engaged in impermissible claim-splitting and that, in any event, there was no basis for the court to find plaintiff's ch. 93A claims had merit when the same evidence and issues had been presented to and rejected by the jury in the original action. Plaintiff appealed, arguing that ch. 93A, § 9(8) – which provides that "failing to recover an award of damages or other relief in any . . . judicial proceeding, except proceedings authorized by this section, . . . shall not constitute a bar to . . . relief authorized by this section" – excludes claims under ch. 93A, § 9 from the normal rules of claim preclusion.

The First Circuit affirmed, holding that, under either federal or state law, plaintiff's ch. 93A claim was precluded on account of his failure to appeal the district court's denial of his motion to amend the complaint in the original action to add that claim. Under federal law, the denial of a motion to amend constitutes a binding adjudication on the merits of the claims that were the subject of the proposed amended pleading. Here, plaintiff made strategic choices to try to add the ch. 93A claim more than eight months after the deadline for amending the pleadings and four months after discovery had closed, and

not to appeal the district court's denial of his motion to amend, and plaintiff was required to live with his choices absent a strong countervailing interest not present here. Plaintiff's ch. 93A claim also was precluded under Massachusetts law, notwithstanding the language of ch. 93A, § 9(8). Although the Massachusetts Supreme Judicial Court had never interpreted that language, the First Circuit held that nothing in the sub-section operated as an exception to the normal rules of claim preclusion, especially where plaintiff had been given ample opportunity to amend his complaint but failed timely to do so, and did not appeal the denial of his untimely motion.

Finally, the court rejected plaintiff's argument that defendant acquiesced to the separate ch. 93A action through its efforts to keep the ch. 93A claim out of the original action, and thus should be estopped to assert a preclusion defense. The court found defendant's positions were neither inconsistent nor designed to mislead the district court.

First Circuit Holds Indemnity Judgment Against Supplier of Tainted Meat Supported by Sufficient Evidence, Including Videotaped Deposition Testimony of Supplier's Former Expert That Supplier Was "Probable" Source of the Meat

In *Long v. Fairbank Reconstruction Corp.*, 2012 WL 5871043 (1st Cir. Nov. 21, 2012), thirty-two people in the northeastern United States were sickened by an outbreak of E. coli that was traced to defendant's meat processing facility in Ashville, New York. Two of the people infected, both of whom had purchased packages of ground beef from a supermarket in Maine, sued defendant in the United States District Court for the District of Maine seeking compensation for their medical expenses and other damages. Defendant then filed a third-party complaint against the slaughtering and processing company that had allegedly supplied the tainted beef, seeking common law and contractual indemnification in the event defendant was found liable to plaintiffs.

After defendant settled with plaintiffs, the third-party indemnification claims proceeded to trial, focusing on the "traceback" analyses that led defendant's experts to conclude the tainted meat came from the third-party defendant's shipments rather than another supplier's. The jury returned a verdict for defendant, the district court denied the supplier's post-trial motions for relief and the supplier appealed.

The United States Court of Appeals for the First Circuit affirmed, rejecting the supplier's arguments that (1) there was insufficient evidence its meat was contaminated and had been included in the packages purchased by plaintiffs, and (2) the trial court should not have admitted the videotaped deposition of the supplier's former expert witness testifying that the supplier was a "probable" source of the tainted beef. Regarding the deposition testimony, the trial court had previously denied the supplier's motion *in limine* to preclude the deposition's use at trial so long as defendant could establish it qualified as former testimony of an unavailable witness under Fed. R. Civ. P. 32(a)(4) and Fed. R. Evid. 804(b)(1). The court of appeals held the deposition testimony had been properly admitted at trial, not only because the supplier never objected to its introduction at any time after denial of its motion *in limine*, but because there was sufficient foundation for the expert's opinion. The court also found ample other evidence supporting the jury's conclusion that the *E. coli* came from the supplier's meat, including (i) United States Department of Agriculture records concluding the supplier's meat was in the packages defendant shipped to the supermarket in question, (ii) testimony of multiple experts who examined the supplier's internal records and reached the same conclusion, and circumstantial evidence that (iii) the same *E. coli* strain which sickened plaintiffs had appeared in the supplier's meat in California, and (iv) there were other positive *E. coli* tests at the supplier's facility on the same date as the shipment to the supermarket in question.

Massachusetts Appeals Court Affirms Judgment for Manufacturer of Malfunctioning Yacht Engines Because No Evidence Plaintiff's Engines Malfunctioned During Express Warranty Period and Manufacturer Not Liable for Distributor's Breach of Repair Contract

In *Sauvageau v. Detroit Diesel Corp.*, 82 Mass. App. Ct. 1121 (Mass. App. Ct. Nov. 14, 2012), plaintiff purchased an ocean yacht in November 2002 from its original owner, who had taken delivery of the yacht in July 2001. The yacht was powered by two diesel engines, manufactured by defendant, which came with a two-year express warranty. In early 2003, defendant circulated to plaintiff and others a modification bulletin stating it had located a potential defect with one of the engines' components, which it would replace free of charge. As instructed by the modification bulletin, plaintiff contacted defendant's authorized distributor to request an appointment to perform

the repairs. The repairs were never performed, however, and the component part in one of plaintiff's engines malfunctioned in August 2004, resulting in significant damage to that engine. Plaintiff sued defendant and the distributor in Massachusetts Superior Court asserting claims of breach of contract (based on the modification bulletin), breach of express warranty and violation of Mass. Gen. L. ch. 93A (the Massachusetts unfair and deceptive practices statute), and seeking to recover the costs of repairing and rebuilding the engines.

After the court granted defendant summary judgment on the breach of warranty claim, finding it barred by the two-year term of the express warranty, the remaining claims proceeded to trial. A jury found only the distributor, not defendant, liable for breach of contract, and the court ruled that the ch. 93A claim against defendant also must fail since plaintiff could not succeed on the underlying breach of warranty and contract claims. Following the trial court's denial of plaintiff's motion for judgment notwithstanding the verdict on the breach of contract claim, plaintiff appealed.

Plaintiff first argued that his warranty claim was not time-barred, notwithstanding that the engine failure occurred more than two years after the tender of delivery to the original owner. Plaintiff argued the warranty was not conditioned on "failure of the engine" but rather on "any malfunction occurring during the warranty period," and that defendant had admitted plaintiff's engine was malfunctioning by circulating the modification bulletin in early 2003. Because nothing in the summary judgment record suggested plaintiff's particular yacht was malfunctioning at that time, however, the Massachusetts Appeals Court affirmed summary judgment on the warranty claim.

The court also affirmed the judgment for defendant on the breach of contract and ch. 93A claims. With respect to the contract claim, the court held the jury could have reasonably found that only the distributor, not defendant, entered into and breached a contract with plaintiff to repair the engine. With respect to the ch. 93A claim, the court held that a plaintiff cannot prevail on a ch. 93A claim when he cannot prevail on the individual underlying claims – here, the contract and warranty claims. Thus the trial court's dismissal of the ch. 93A claim was appropriate.

Massachusetts Appeals Court Affirms Defense Judgment in Automated Door Case, Holding No Error in Excluding Misleading Accident Reenactment Video and *Res Ipsa Loquitur* Jury Instruction Not Warranted When There Was Evidence Plaintiff Fell Without Any Contact from Door

In *Mizayaki v. Stanley Works*, 2012 WL 6049083 (Mass. App. Ct. Dec. 6, 2012), an elderly woman fell in a pharmacy doorway, allegedly because its bi-fold doors closed unexpectedly on her, and suffered a fractured hip and other injuries. Plaintiff sued the door manufacturer and pharmacy in Massachusetts Superior Court alleging negligent design and maintenance of the doors, breach of express and implied warranties of merchantability (the latter the Massachusetts near-equivalent of strict liability) and violation of Mass. Gen. L. ch. 93A (the Massachusetts unfair and deceptive practices statute). After trial, at which plaintiff dropped all but the negligence claims against the pharmacy, the jury found (1) both the manufacturer and the pharmacy had acted negligently, but the negligence had not been a substantial contributing cause of plaintiff's injuries, and (2) the manufacturer had committed no breach of warranty. The trial court then dismissed plaintiff's ch. 93A claim, which the court had reserved for itself.

Plaintiff appealed, arguing the trial court: (1) should not have excluded a video reenactment of the injury by plaintiff's grandchildren; (2) should not have dismissed the ch. 93A claim; (3) gave improper jury instructions as to "substantial contributing cause"; (4) should have instructed the jury as to *res ipsa loquitur*; (5) should have ordered a new trial because the jury's findings were against the weight of the evidence; and (6) should have required the jury to deliberate further to reconcile alleged inconsistencies in its answers to special verdict questions. The Massachusetts Appeals Court rejected each of these arguments and affirmed the judgment.

First, the court held the trial judge properly exercised his discretion in excluding the video evidence because the reenactment had not been conducted under circumstances sufficiently similar to those of the accident. For example, whereas plaintiff testified she had walked straight toward the pharmacy entrance at a normal pace behind another person, the grandchildren approached the doors at various different angles and speeds. Accordingly, the reenactment was misleading and its prejudicial effect outweighed any possible

relevance it may have had for impeachment or other purposes. Second, there was no error in dismissing the ch. 93A claim because the jury had already rejected the warranty claim upon which it was based, and the trial judge was entitled to adopt this finding as his own.

There was also no error in the jury instructions regarding causation. The instruction that a substantial contributing cause can be one of several causes but must be one "without which [the accident] would not otherwise have occurred" was proper, and in any event plaintiff did not object to it at trial. Nor did the trial court err in refusing to instruct as to *res ipsa loquitur*, as that is appropriate only "when an accident is of the kind that does not ordinarily happen unless the defendant was negligent in some respect and other responsible causes including conduct of the plaintiff are sufficiently eliminated by the evidence." Here, there was abundant evidence that plaintiff could have fallen without any contact from the doors at all: (i) no witness saw the doors close on plaintiff; (ii) she suffered numerous infirmities that posed a fall risk, including Parkinson's disease and a right leg that was shorter than her left; and (iii) she was not taking her Parkinson's medication at the time of the accident, which could have created problems of cognition and balance. For all these reasons, the court affirmed the trial judge's refusal to grant a new trial or to alter or amend the judgment. Finally, the court held that even though negligent design of a product by definition constitutes a breach of warranty, the jury's finding that the manufacturer was negligent was not necessarily inconsistent with its finding of no breach of warranty because the negligence finding could have been based on negligent maintenance, rather than design, of the doors. In any event, any actual inconsistency would have been harmless as it would not have altered the jury's finding of no causation.

Massachusetts Federal Court Holds Expert Testimony Fire Was Caused by Microwave Malfunction, Together with Evidence Microwave's Condition Was Unchanged Since Purchase, Avoids Summary Judgment on Design Defect Claim Even Though Expert Could Not Identify Specific Defect in Microwave

In *Massachusetts Property Ins. Underwriting Assn. v. LG Electronics U.S.A., Inc.*, 2012 WL 5288810 (D. Mass. Oct. 22, 2012), the home of one of plaintiff's insureds burned down from a fire that was allegedly caused by a microwave oven designed, manufactured and sold by defendants. After the fire department investigator concluded the most probable cause of ignition was a "malfunctioning microwave," the insurer hired its own fire expert. Based on his examination of the property, and interviews with the fire department and homeowner, the expert opined that the fire had originated "in the kitchen at the location of the microwave oven," and that "[t]he ignition source of the fire came from a malfunction within the microwave oven at the top where the fan motor, circuit board and control circuitry is located." He further stated that his investigation "eliminated the mechanical and electrical components of the dwelling, including the plug that was used to energize the microwave."

The insurer, as subrogee of its insured, brought suit in the United States District Court for the District of Massachusetts asserting claims of 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) against the microwave's manufacturers, and warranty and ch. 93A claims against its seller. After plaintiff dismissed its claims against the seller, the manufacturers moved for summary judgment arguing there was insufficient expert testimony to establish a defect in the microwave or that the defect caused the fire. Specifically, defendants argued plaintiff had not met its burden because the expert was unable to identify the precise defect within the microwave and the manner in which that defect caused the fire.

The court denied defendants' motion, holding it was sufficient under Massachusetts law for the expert to link the fire to the microwave without being specific as to the exact defective part. Importantly, it was undisputed that the microwave was in the same condition as it had been when purchased, and the homeowner testified he had used the microwave earlier that day without any problem. Thus, although the expert did not specifically use the word "defect" to describe the cause of the fire, and did not pinpoint the precise source of the ignition within the microwave oven, no higher degree of specificity was required under the circumstances. Rather, the expert's opinion that the fire had been caused by a microwave malfunction, coupled with the undisputed fact that the microwave was in the same condition it had been in on the date of purchase, was sufficient for a jury reasonably to infer that some defect in the microwave, present at the time of sale, caused the fire.

Massachusetts Federal Court Holds Plaintiff in Prescription Drug Failure-to-Warn Case Couldn't Use "Heeding Presumption" to Prove Causation, as Prescribing Physician Would Still Weigh Drug's Risks and Benefits in Light of Any Warning, But Prescribing Physician's Colleague Could Testify That Standard Practice in Community Was to Convey Manufacturers' Warnings to Patients

In *Fecho v. Eli Lilly and Company*, 2012 WL 6681895 (D. Mass. Dec. 21, 2012), four sisters born between 1952 and 1958 alleged that *in utero* exposure to diethylstilbestrol ("DES"), a synthetic estrogen formerly prescribed to prevent miscarriage, caused them to develop breast cancer approximately 40 to 50 years later. Plaintiffs sued the alleged manufacturer in the United States District Court for the District of Columbia alleging, among other things, that the manufacturer negligently failed to warn of the risks of DES as required by governing Pennsylvania law.

After the case was transferred to the United States District Court for the District of Massachusetts, defendant moved for partial summary judgment as to causation, arguing there was no admissible evidence that, had it warned of an increased risk of breast cancer in female offspring, the prescribing physician would have altered his behavior such that the injury would have been avoided. Members of **Foley Hoag LLP's Product Liability and Complex Tort Practice Group**, along with several other national law firms, represented the defendant.

In opposing the motion, plaintiffs argued that Pennsylvania law's rebuttable presumption of proximate causation in failure-to-warn cases involving involuntary workplace exposure to asbestos (a so-called "heeding presumption" that had a warning been given, the plaintiff would have "heeded" it to avoid the harm) should be applied to plaintiff's involuntary exposure to prescription drugs *in utero*. Alternatively, plaintiffs argued causation could be proved by the testimony of two of the prescribing physician's patients and one of his colleagues regarding his usual prescribing and warning practices.

With respect to plaintiff's heeding presumption argument, the court first noted that under the "learned intermediary" doctrine followed by Pennsylvania law, a prescription drug manufacturer's duty to warn runs to the prescribing physician, not the patient (or her *in utero* fetus). Accordingly, because the physician has a choice whether to prescribe a particular medication after weighing its risks and benefits, a presumption based on involuntary exposure was inapplicable. Moreover, the Pennsylvania cases applying a heeding presumption all involved strict liability claims rather than negligent failure to warn, and numerous Pennsylvania decisions had rejected application of a heeding presumption in the prescription drug context.

Turning to plaintiffs' alternative argument, the court first noted that the former patients' and colleague's testimony regarding the doctor's prescribing practices was inadmissible, as the witnesses had never seen the physician prescribe medication to a patient and therefore lacked personal knowledge of his responses to prescription drug warnings. The court then ruled, however, that the colleague could provide lay opinion testimony concerning the routine practices of the medical community in which both he and the prescribing physician practiced, specifically that it was standard practice for physicians to pass manufacturers' warnings on to their patients. The court held that a jury could infer from such testimony that the prescribing physician would have communicated any warning by the manufacturer to plaintiffs' mother, and that she would have then declined the medication. Accordingly, defendant's summary judgment motion was denied. The court cautioned, however, that its ruling would not necessarily apply at trial if there were then a different evidentiary record.

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

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