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.

United States Supreme Court Holds Due Process Forbids California's Exercise of General Jurisdiction Over German Manufacturer in Suit by Argentinian Plaintiffs Involving Argentinian Subsidiary Because Even if California Sales and Facilities of American Subsidiary Were Imputed to Manufacturer It Was Still Not "At Home" in California

In *Daimler AG v. Bauman, et al*., 134 S. Ct. 746 (Jan. 14, 2014), twenty-two Argentinian citizens sued a German car manufacturer in the United States District Court for the Northern District of California, alleging defendant's Argentinian subsidiary collaborated with state security forces during the country's 1976-83 "Dirty War" to kidnap, torture and kill plaintiffs or relatives employed by the subsidiary. Plaintiffs asserted claims under the federal Alien Tort Statute and Torture Victim Protection Act, as well as California and Argentina common law, and sought to hold defendant vicariously liable for its subsidiary's conduct.

In response to defendant's motion to dismiss for lack of personal jurisdiction, plaintiffs argued jurisdiction could be based both on defendant's own contacts with California and those of its wholly-owned U.S. distributor. The latter was incorporated in Delaware and had its principal place of business in New Jersey, but it sold defendant's vehicles throughout the United States, including in California, where it had a number of facilities and accounted for 2.4% of defendant's worldwide sales. Plaintiffs argued the distributor was defendant's agent for jurisdictional purposes even though the parties' agreement provided the distributor was an "independent contractor" with no authority to act on defendant's behalf as agent or otherwise. The district court granted defendant's motion, but the United States Court of Appeals for the Ninth Circuit, after initially affirming, granted a rehearing and reversed, holding that the distributor—which the court assumed fell within the California courts' general jurisdiction—was defendant's agent for jurisdictional purposes, and with imputation of the distributor's California contacts, defendant was subject to general jurisdiction as well.

The United States Supreme Court granted certiorari and reversed, holding due process precluded the exercise of jurisdiction. The Court relied heavily on its recent decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011) (see **July 2011 Foley Hoag Product Liability Update**), in which the Court distinguished between the contacts necessary for the exercise of "general" or "all-purpose" jurisdiction, at issue here, as opposed to "specific" jurisdiction, which is limited to claims arising from or relating to defendant's contacts with the forum. In *Goodyear*, the Court held general jurisdiction may be asserted over a foreign defendant only if its contacts with the forum are so continuous and pervasive "as to render [it] essentially at home" in that state, the

paradigmatic examples of which are being incorporated or having a principal place of business there.

Here, even assuming the U.S. *distributor* was "at home" in California, and that its contacts there were imputable to defendant on an agency theory or otherwise, there still would be no basis for general jurisdiction because defendant's contacts with the state (the distributor's sales and facilities) were not sufficient to render *defendant* "at home" there. To hold otherwise, the Court observed, would conflate general and specific jurisdiction and presumably justify a similar global reach by the courts of any other state in which defendant's subsidiary had sizeable sales. Such an expansive assertion of jurisdiction would not permit out-of-state defendants to structure their conduct with some minimum assurance as to where they would be subject to suit, as required by due process. While expressly preserving the possibility that a corporation's activities, either its own or imputed, in a forum other than its place of incorporation or principal place of business might be so substantial as to render it "at home" there, the Court suggested this would be "an exceptional case," in contrast to the facts presented here.

Finally, noting the transnational context of the dispute, the Court observed that broad exercises of general jurisdiction as countenanced by the circuit court's ruling could pose risks to American foreign policy, including efforts to negotiate agreements on the mutual recognition and enforcement of judgments with nations that objected to such uninhibited jurisdictional approaches. The desire to avoid such risks only "reinforced" the Court's view that the lower court's ruling violated due process.

United States Supreme Court Holds Class Action Fairness Act Does Not Allow Federal Court Removal of State Attorney General Suit Asserting Restitution Claim on Behalf of Numerous Unnamed Citizens Because Statute's "Mass Action" Definition Requires Presence of 100 or More Actual Named Plaintiffs

In *Mississippi ex rel. Hood, AG v. AU Optronics Corp. et al.*, 134 S. Ct. 736 (Jan. 14, 2014), the State of Mississippi sued several manufacturers of liquid crystal display screens in Mississippi state court, alleging the manufacturers had formed an international cartel to restrict competition and raise prices in violation of Mississippi antitrust law. The state sought an injunction against defendants' practices and restitution for purchases by Mississippi citizens. Defendants removed the case to the United States District Court for the Southern District of Mississippi, relying on the Class Action Fairness Act of 2005 ("CAFA"). Under CAFA, as long as there is diversity of citizenship between any single plaintiff and defendant, and the aggregate amount in controversy exceeds $5 million, a defendant may remove to federal court any class action or "mass action," the latter defined as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact."

On the state's motion to remand the action to state court, the district court construed the words "persons" and "plaintiffs" in the mass action definition as synonymous with "real parties in interest," and held that the suit met this criterion because its restitution claim sought to benefit 100 or more (unnamed) Mississippi consumers. The court nevertheless remanded the action because CAFA's "general public exception" excluded from a mass action a suit in which "all of the claims . . . are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute." The United States Court of Appeals for the Fifth Circuit reversed, agreeing that CAFA required looking to the real parties in interest but noting that not "all" of the state's claims were asserted on behalf of the general public, as the restitution claim sought to benefit only actual purchasers.

The Supreme Court granted certiorari and reversed, holding CAFA's definition of "mass action" plainly required the "100 or more persons" proposing to try their claims jointly be actual named "plaintiffs." Had Congress intended to include within the definition claims brought on behalf of named or unnamed real parties in interest, it easily could have drafted language to that effect as it had in other CAFA sections that used the phrase "named or unnamed persons." Moreover, the overall context in which CAFA was enacted made clear that "100 or more persons" and "plaintiffs" were intended to be one and the same. First, the statute used the terms "persons" and "plaintiffs" similarly to the way they were used in Fed. R. Civ. P. 20, which permits "[p]ersons" to join in a lawsuit as "plaintiffs" where their claims raise common legal or factual issues, a provision of which Congress was presumed to be aware and

under which "persons" clearly refers to named "plaintiffs." Indeed, if "100 or more persons" could include unknown individuals as well as named plaintiffs it would be exceedingly difficult for a court to evaluate whether their claims raised common questions. Additionally, by specifying elsewhere in the statute that mass actions not include any action in which claims are joined by a defendant's motion, Congress demonstrated its focus on the persons who are actually proposing to try claims together as "plaintiffs."

Nor, the Court held, was it plausible that Congress intended "plaintiffs" to mean real parties in interest. The term has always been understood to mean the parties bringing suit. Moreover, if it were stretched to include all unnamed individuals with an interest in the action, CAFA's requirement that jurisdiction exist "only over those plaintiffs whose claims [exceed $75,000]" would present courts with the impossible task of identifying the unnamed parties whose claims fell below the threshold. Indeed, even if such individuals could be identified, their claims would have to be severed from those over which there was federal jurisdiction, meaning the state's lawsuit would still proceed partially in state court in parallel with the federal action. Finally, CAFA's provision prohibiting the transfer of mass actions to a different federal court "unless a majority of the plaintiffs request transfer" also suggested "plaintiffs" referred to named parties only. Were it otherwise, a court might have to identify and communicate with hundreds of thousands, if not millions, of unnamed real parties in interest to determine whether transfer was appropriate, an absurd result Congress was unlikely to have intended.

First Circuit Holds Other Incidents of Escalator Entrapment Involving Defendant's Shoe, and Defendant's Re-Design of Shoe Following Foreign Regulatory Report on Incidents, Insufficient to Support Inference That Design Presented Greater Entrapment Risk than Other Shoes

In *Geshke v. Crocs, Inc.*, 2014 U.S. App. LEXIS 954 (1st Cir. Jan. 17, 2014), a child was injured when her sandal-design shoe got caught in an escalator. 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. The court granted summary judgment against plaintiff's claims on the grounds that she failed to support her design defect claim with expert testimony and her disregard of conspicuous signs posted near the escalator precluded any finding that a different warning by the manufacturer would have prevented the child's harm (see **October 2012 Foley Hoag Product Liability Update**).

On plaintiff's appeal as to the warning claim only, the United States Court of Appeals for the First Circuit found the key issue to be whether plaintiff had offered sufficient evidence to permit a jury to find that the shoe's design posed a heightened risk of escalator entrapment, so as to support a duty to warn in the first place. Plaintiff argued such a risk could be inferred from the fact that defendant had received approximately a dozen complaints during a three-year period from customers claiming to have had their feet entrapped in an escalator while wearing the shoe. The appellate court found this anecdotal evidence insufficient, however, as none of the complaints indicated whether the incidents had been caused by dangers normally attendant to escalator use as opposed to some special danger posed by the shoe, and there was no evidence the number of complaints was comparatively higher than those received by other shoe manufacturers.

Plaintiff also argued defendant had effectively admitted the dangerousness of the shoe's design through its response to a Japanese regulatory agency's report concluding that shoes similar to defendant's had a higher tendency to become entrapped in escalators than other types of shoes. Following release of the report (the substance of which was excluded by the district court as inadmissible), defendant re-designed its shoe to incorporate a harder material and added a hangtag with a specific warning about the dangers of riding escalators. The court of appeals also found this evidence lacking in probative value, however, as a company's earnest response to a regulator's concern is not, in and of itself, sufficient to warrant a conclusion that the concern is justified, especially where the jury would not have heard the basis of the concern, or even what it was, as the underlying report had been excluded (a decision plaintiff did not challenge on appeal). Moreover, defendant's newly added warning regarding escalator safety made no mention of any danger posed by the shoes rather than escalators generally. Accordingly, even if this subsequent remedial measure was admissible—an issue the parties did not raise and the court did not address—it would have been insufficient to demonstrate the shoes were more prone to escalator mishaps than other footwear.

Massachusetts Federal Court Holds Conjectural Threat of Future Injury in Event of Lightning Strike Insufficient to Confer Article III Standing, and No Recovery in Tort for Purely Economic Harm Absent Violation of Governmental Standards

In *Kerin v. Titeflex Corp.*, 2014 U.S. Dist. LEXIS 1390 (D. Mass. Jan. 7, 2014), plaintiff owned a home with an outdoor fire pit supplied with natural gas by corrugated stainless steel tubing ("CSST"). CSST is widely used and approved by both government and industry regulatory bodies, and the CSST in plaintiff's fire pit had never caused a problem. Nonetheless, plaintiff filed suit in the United States District Court for the District of Massachusetts asserting negligence and breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability). Citing a few rare occasions in which CSST in other people's homes may have been "involved" in a fire following a lightning strike, plaintiff alleged the CSST in his home was defectively designed because it was vulnerable to puncture in the event of a nearby lightning strike and defendant had failed to warn of this risk. Defendant moved to dismiss on the ground that plaintiff lacked sufficient injury to confer standing under Article III of the United States Constitution.

The court first observed that, to demonstrate Article III standing, plaintiff must establish (1) an "injury in fact," (2) a causal connection between the injury and defendant's alleged conduct and (3) that the injury would likely be redressed by the requested relief. A cognizable injury for standing purposes must be "concrete and particularized," as well as "actual or imminent, not conjectural or speculative," hence a threatened future injury must be "certainly impending" to confer standing. Here, it was obvious plaintiff could not demonstrate a cognizable injury in fact. Noting that "[t]he capriciousness of a lightning strike is the stuff of folklore," the court held that the string of events that would have to materialize for any injury to result was so speculative it could not provide a foundation for standing.

Moreover, dismissal of plaintiff's complaint was appropriate on the separate ground that it did not allege an applicable standard against which defendant's conduct or product could be measured. Citing a decision under Mass. Gen. L. ch. 93A, the state's unfair or deceptive practices statute, the court stated that the "[Massachusetts] Supreme Judicial Court has recognized claims for economic injury stemming from a defective product, but only where 'the standard that a product allegedly fails to meet is . . . one legally required by and enforced by the government.'" Here, plaintiff conceded this was not true of CSST.

Massachusetts Superior Court Holds Claims for Intentional and Negligent Misrepresentations or Omissions Regarding Drug's Risks Need Not Identify Which of Multiple Defendants Made Which Misrepresentations or Manner in Which Patient or Her Physician Relied on Same

In *Gentile v. Biogen Idec, Inc.,* 2014 Mass. Super. LEXIS 11 (Feb. 14, 2014), a patient who suffered from multiple sclerosis was prescribed an immunosuppressant drug manufactured by defendants. While still on the medication, she died of progressive multifocal leukoencephalopathy ("PML"), a brain disease thought to be caused by immunosuppressant drugs such as defendants'. The administrator of decedent's estate sued in Massachusetts Superior Court alleging, among other things, that the drug was defectively designed, and that defendants fraudulently concealed material facts about the drug's risks and negligently misrepresented the extent of those risks in the drug's labeling, consent forms and advertising. Before either defendant had been served, the out-of-state defendant removed the case to the United States District Court for the District of Massachusetts, but it remanded after concluding that 28 U.S.C. § 1441(b) does not permit removal of a suit that properly joins a defendant citizen of the forum state until at least one defendant has been served (see **April 2013 Foley Hoag Product Liability Update**).

Defendants then moved to dismiss the claims for negligent and fraudulent misrepresentation, arguing they had not been pled with particularity as required by Mass. R. Civ. P. 9(b). Specifically, defendants argued plaintiff had not specified (1) the exact statement(s) defendants knew or should have known were false, (2) which defendants made the statement(s), and (3) the manner in which decedent or her doctor relied on them. Rather, plaintiff alleged only that defendants, individually and collectively, concealed or misrepresented material facts so that some information or warnings about the drug's risks were never available to decedent or her doctor, and that decedent had relied on defendants' express and implied warranties of safety as well as the drug's labeling, advertising and consent forms in deciding to undergo treatment.

The court first held that the heightened pleading standards of Rule 9(b) applied to both the intentional and negligent misrepresentation claims because both were based on allegations of fraudulent conduct. Notwithstanding the lack of specificity in the complaint, however, the court found the allegations of all the alleged misrepresentations, taken together, were sufficient to meet the rule's standard with respect to the particular statements and speakers at issue. Moreover, it was not necessary to identify the particular statement(s) on which decedent or her doctor relied, as "due to the ongoing misrepresentations alleged, a requirement that [plaintiff] directly specify which misrepresentations were relied upon would be impractical and not required under the Mass. R. Civ. P. 9(b) standard." Accordingly, the court denied defendants' motion.

This result, if allowed to stand, would appear to substantially negate Rule 9(b) by denying defendants in a multi-defendant fraud case fair notice of which of them is alleged to have made which misstatement when, where and to whom, not to mention by allowing plaintiffs to avoid the rule altogether simply by invoking the talisman—nowhere reflected in the rule itself—of an "ongoing misrepresentation."

Massachusetts Federal Court Holds Statute of Limitations for Claims Against Entity in Bankruptcy Proceedings Tolled Only Until 30 Days After Confirmation of Reorganization Plan, Which Constituted Notice of Expiration of Automatic Stay Against Claims

In *Barraford v. T&N Ltd.*, 2014 U.S. Dist. LEXIS 24401 (D. Mass. Feb. 25, 2014), plaintiff's husband died of mesothelioma in 2002 after having been regularly exposed to asbestos from one of defendants' construction products in the 1960s and 1970s. In 2001, defendants and their parent corporation filed for protection under Chapter 11 of the United States Bankruptcy Code, resulting in an automatic stay of all pending claims and suits against them. When plaintiff's husband died approximately a year later, she sued thirty asbestos product manufacturers in Massachusetts Superior Court, but did not file a claim in the bankruptcy proceeding or seek relief from the stay to join defendants in her lawsuit. Defendants' bankruptcy reorganization plan, which became effective in 2007, discharged them of all liabilities other than pending and future asbestos claims, limited their liability for such claims to their available insurance and assigned such claims to a trust created pursuant to a "channeling injunction" under section 524(g) of the Bankruptcy Code.

In 2011, the trust, acting as plaintiff's assignee, sued defendants in Massachusetts Superior Court, asserting claims for wrongful death, negligence and breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability), among others, and alleging that exposure to defendants' product caused decedent's mesothelioma. Defendants removed the action to the United States District Court for the District of Massachusetts on the basis of diversity jurisdiction and, following discovery, moved for summary judgment on the ground plaintiff failed to produce adequate evidence of causation. After the court denied the motion, defendants moved for judgment on the pleadings, arguing plaintiff's claim was barred by the statute of limitations. Plaintiff objected to the motion as untimely and improperly relying on evidence outside the pleadings, but the court decided the motion on the merits, treating it as a further motion for summary judgment.

Although plaintiff's suit was commenced far more than three years—the applicable limitations period—after her husband's death in 2002, she argued the period was tolled by section 108(c) of the Bankruptcy Code, which provides that the limitations period for a claim against an entity in bankruptcy does not expire until "30 days after notice of the termination or expiration of the [automatic] stay . . . with respect to such claim." Under the Code, the stay is in effect from filing of the bankruptcy petition until the court grants or denies a discharge to the debtor(s), including, for example, through confirmation of a reorganization plan. Plaintiff argued the stay had not terminated "with respect to [her] claim," however, because the debtors had not been discharged as to that claim—it had merely been transferred to the trust. The court rejected this argument, holding all that was required for expiration of the stay was the granting of "a discharge," and this had occurred when defendants' reorganization plan was confirmed in 2007, even if it did not discharge liability for plaintiff's specific claim. Indeed, the fact that section 524(g) allows for a channeling injunction as part of a reorganization plan only confirmed that the stay dissolved upon plan confirmation, as "[a]n injunction would be unnecessary if the automatic stay were still in place." Accordingly, as plaintiff sued more than thirty days after the 2007 plan confirmation, her claim was untimely.

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