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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 State Law Claims Against Drug Manufacturer for Allegedly Misleading Efficacy Representations in FDA-Approved Label Preempted by Food, Drug and Cosmetic Act Because Plaintiffs' Requested Label Changes Were Not Based on Newly Acquired Information and Thus Manufacturer Could Not Have Made Them Without FDA Approval

In *In re: Celexa and Lexapro Marketing and Sales Practices Litigation*, 2015 U.S. App. LEXIS 2632 (1st Cir. Feb. 20, 2015), plaintiffs purchased a prescription antidepressant drug to treat their adolescent son's major depressive disorder but did not obtain the results they hoped for. Alleging that information in the drug's label had misled both their son's physician and them as to the drug's effectiveness, plaintiffs sued the manufacturer in the United States District Court for the Central District of California on behalf of themselves and all other Californians who purchased the drug for an adolescent from March 2009 to the present. Plaintiffs claimed defendant omitted material information about the drug's efficacy from the label in violation of California consumer protection laws, causing plaintiffs to spend money on a drug that was no more effective than a placebo. Plaintiffs sought an injunction ordering defendant to cease selling the drug under its current label and to seek approval from the United States Food and Drug Administration ("FDA") for a new, accurate label. The Judicial Panel on Multidistrict Litigation transferred the case to the United States District Court for the District of Massachusetts as part of an ongoing multidistrict litigation, and defendant moved to dismiss on the grounds that plaintiffs' claims failed under a safe harbor provision in the California consumer protection laws and were preempted by the Food, Drug, and Cosmetic Act ("FDCA"). The district court allowed the motion under California law without reaching the preemption issue.

On plaintiffs' appeal, the United States Court of Appeals for the First Circuit affirmed, but on preemption grounds and without reaching the California law issues. The court first described the lengthy process, under the FDCA and applicable regulations, by which a manufacturer must obtain FDA approval before selling a prescription drug. The manufacturer must submit a new drug application that includes, among other things, full reports of all clinical investigations that show whether the drug is effective in use and the proposed labeling. The FDA may approve the drug only if it determines there is "substantial evidence that the drug will have the effect it purports or is represented to have," and the proposed label is not "false or misleading in any particular." Following approval, the manufacturer cannot change the label without prior FDA approval except under 21 C.F.R. § 314.70(c)(6)(iii), the "changes being effected" or "CBE" regulation,

which permits such unilateral changes only if they reflect newly acquired information and are intended to delete false or misleading information about indications for use or effectiveness, or to add or strengthen warnings about the drug's potential uses. Such newly acquired information may consist of data, studies or analyses not previously submitted to FDA if the information reveals "risks of a different type or greater severity or frequency than previously included in submissions to FDA."

Here, defendant had obtained FDA approval to sell the drug for treatment of major depressive disorder in adolescents based on the results of four clinical studies, two of which showed no efficacy and two of which found efficacy that was statistically significant but only barely. In approving the drug, FDA made a specific finding that the drug's label, which described the results of the four studies, was not false or misleading. Plaintiffs' complaint took issue with the FDA's allegedly low standards for approving antidepressants generally as well as the agency's conclusion that the drug was effective for major depression in adolescents. Under plaintiffs' claim, the only way for defendant to avoid liability would be to change the drug's label, which was prohibited by the FDCA—hence rendering the claims preempted—unless permitted by the CBE regulation. However, the only post-FDA approval information pleaded in plaintiffs' complaint was from two academic articles which, respectively, (1) evaluated the efficacy of antidepressant drugs generally and (2) criticized FDA's approval of defendant's drug. The first article did not specifically address anti-depressant efficacy for major depression in adolescents, while the second, much like plaintiffs' complaint, looked at the same information FDA had at the time of approval and merely offered a different conclusion than the agency had reached. Accordingly, neither article disclosed risks of a different type or greater severity or frequency than previously known to FDA, and defendant could not have used the CBE procedure to unilaterally change its label. Indeed, plaintiffs seemingly conceded as much by explicitly asking for an order directing defendant to seek FDA approval of a new label.

First Circuit Holds Notice of Removal Filed More than 30 Days After Service of Complaint Timely Under Class Action Fairness Act Because Defendant Did Not Have Sufficient Information Readily Obtainable from Plaintiffs' Papers to Determine Amount in Controversy Until Email from Plaintiffs' Counsel

In *Romulus v. CVS Pharm., Inc.*, 770 F.3d 67 (1st Cir. 2014), the defendant pharmacy chain maintained a policy requiring its shift supervisors to remain on premises during rest or meal breaks when there were no other managerial employees on duty. A group of shift supervisors at defendant's Massachusetts stores filed a putative class action in Massachusetts Superior Court alleging defendant's refusal to pay them for such break time was a violation of Mass. Gen. Laws ch. 149, § 148, the Massachusetts Wage Act, and Mass. Gen. Laws ch. 151, §§ 1A and 1B, the Massachusetts Overtime Statute. In their complaint, plaintiffs sought unpaid wages and costs for the breaks, beginning in July 2008, but did not provide any information regarding the number of breaks at issue or the total amount of damages claimed.

During preliminary discovery, defendant produced electronic time and attendance data for all its Massachusetts shift supervisors. Using these data, plaintiffs' counsel calculated the total number of meal breaks when no other shift supervisors were on duty during a subset of the period from July 2008 to commencement of the action, and reported the number to defendant's counsel by email on January 18, 2013. On February 15, 2013, defendant filed a notice of removal, arguing the number of meal breaks reported in the email, if extrapolated over the entire period from July 2008 to commencement of the action, created a reasonable probability that the amount in controversy exceeded \$5 million as required for federal jurisdiction under 28 U.S.C. § 1332(d), part of the Class Action Fairness Act of 2005 ("CAFA"). Defendant further argued its removal was timely under 28 U.S.C. § 1446(b)(3), which provides that "if the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." The district court granted plaintiffs' motion to remand the case to state court, holding defendant had not demonstrated either that its removal was timely or that the amount in controversy

exceeded \$5 million. The court made no findings on the latter issue, but held plaintiffs' email did not qualify as an "other paper" under §1446(b)(3) because it was based entirely on information that had been in defendant's possession since the start of the case.

The United States Court of Appeals for the First Circuit reversed, holding the removal deadline under §1446(b)(3) only starts to run when removability can first be ascertained from plaintiff's own papers, *i.e.*, when those papers either provide a clear statement of damages or set forth sufficient facts to allow damages to be deduced through simple calculation. The defendant has no duty to investigate facts beyond those provided by plaintiff. Moreover, relying on decisions of two other courts of appeals and the Senate report accompanying CAFA's passage, the court held the term "other paper" must be read expansively and can include informal papers such as counsel's email in this case. As to the amount in controversy, the court gave no deference to the district court's conclusion, which it did not support by any actual factual findings, and held that defendant's simple multiplication and extrapolation resulted in a damages estimate of approximately \$5.5 million, sufficient to show a reasonable probability that more than \$5 million was at issue.

First Circuit Holds Due Process Permits Personal Jurisdiction Over Foreign Defendant That Entered Into Contract with Massachusetts Plaintiff for Work Largely to Be Performed by Plaintiff There, and Had Extensive Contacts with Plaintiff in Course of Performance Even Though Only by Phone and Email

In *C.W. Downer & Co. v. Bioriginal Food & Science Corp.*, 771 F.3d 59 (1st Cir. Nov. 12, 2014), plaintiff, a Massachusetts-based investment bank, entered into a contract with defendant, a Canadian manufacturer, to serve as exclusive financial advisor regarding the possible sale of the latter's business. The parties' agreement was negotiated and entered into through phone and email communications initiated after defendant's de facto chairman visited plaintiff's offices in Boston, and the agreement made plaintiff's compensation contingent on completion of a sale. Over the next several

years, plaintiff performed various services under the agreement at its Boston offices—including preparing financial memoranda, soliciting potential buyers and receiving and analyzing bids—and plaintiff and defendant communicated frequently, again by phone and email, but defendant's personnel never physically visited Massachusetts.

When defendant independently sold itself to a third party and refused to pay plaintiff based on that sale, plaintiff sued in Massachusetts Superior Court for, among other things, breach of contract and violation of Mass. Gen. Laws ch. 93A (the Massachusetts unfair and deceptive practices statute). Defendant removed the case to the United States District Court for the District of Massachusetts, which dismissed on the ground that defendant's phone and email contacts with Massachusetts were insufficient to support the exercise of personal jurisdiction under due process.

The United States Court of Appeals for the First Circuit reversed. The court first noted the three factors that govern whether a defendant's conduct creates the minimum contacts necessary to establish personal jurisdiction over a specific claim: "(1) whether the claim directly arises out of, or relates to, the defendant's forum state activities; (2) whether the defendant's in-state contacts represent a purposeful avilment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's law and making the defendant's involuntary presence before the state's courts foreseeable; and (3) whether the exercise of jurisdiction is reasonable."

Although defendant had not contested relatedness below, the district court nevertheless held defendant's in-state activities were not sufficiently related to the dispute to confer jurisdiction. The First Circuit disagreed, holding the requirement was satisfied because defendant "had an ongoing connection with Massachusetts in the performance under the contract" and plaintiff's "claims arise from the alleged breach of that contract."

The court also held the purposeful avilment requirement satisfied. For one thing, the contract at issue had originated only after defendant voluntarily visited plaintiff's Boston offices. In addition, the contract envisioned that plaintiff would perform extensive work in Massachusetts, and the parties' four-year working relationship included multiple "intense" periods with frequent cross-border communications, many of which

were voluntarily directed by defendant into Massachusetts. Indeed, plaintiff's own activities in Massachusetts could be attributed to defendant for jurisdictional purposes, as they were not "unilateral" activities of plaintiff but rather had been commissioned by defendant through the parties' contract. Moreover, remote communications can "constitute contacts that sustain personal jurisdiction." The United States Supreme Court has recognized that "it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications," and "[j]urisdiction has been upheld where the defendant purposefully reached out 'beyond [its] State and into another by, for example, entering a contractual relationship that envisioned continuing and wide-ranging contacts in the forum State.'" Here, that was precisely the case.

Finally, the court concluded that the exercise of jurisdiction was reasonable because Massachusetts had a significant interest in providing a forum for its citizens to litigate their contractual disputes and the parties "identified few burdens, interests, or inefficiencies" that would arise from litigating in Massachusetts. That defendant was located in a foreign country was not of particular moment since the Canadian-United States border did not impose any special burdens, all parties transacted business in a common language and Canadian law would still govern the substantive issues in the case.

Massachusetts Supreme Judicial Court Holds Administrative Agency's Fact Findings Relating to Defendant's Breach of Duty Entitled to Preclusive Effect in Subsequent Class Action, But Class Certification Properly Denied As Requiring Individualized Assessment of Causation for Each Putative Class Member

In *Bellermann v. Fitchburg Gas and Electric Light Company*, 470 Mass. 43 (2014), thousands of people in central Massachusetts were left without power for up to two weeks after a major ice storm. The Massachusetts Department of Public Utilities ("DPU") opened an investigation into the defendant electric utility company's preparation for and response to the storm. In a 215-page decision, the agency concluded the company had violated its obligation to provide safe and reliable service, finding "numerous and systematic"

deficiencies, including practices that prevented the company from restoring service in a timely manner and a failure to provide the public with useful and accurate information during the events, which "resulted in the inability of customers to plan appropriately for an extended outage." The utility did not appeal.

Thereafter, twelve individuals and businesses sued in Massachusetts Superior Court on behalf of themselves and others who had lost power during the storm, alleging defendant was grossly negligent and violated Mass. Gen. Laws ch. 93A (the Massachusetts unfair and deceptive practices statute). Plaintiffs claimed inconvenience and economic losses caused by (1) prolonged power outages due to defendant's failure to restore power timely, and (2) an inability to plan for the outage durations due to defendant's inaccurate communications. Plaintiffs moved to certify a class, and both sides moved for partial summary judgment on the preclusive effect of the DPU's decision and liability under ch. 93A. The superior court denied class certification and summary judgment, but held defendant would be precluded from re-litigating the issues decided by the DPU.

After granting direct appellate review, the Massachusetts Supreme Judicial Court ("SJC") affirmed. Regarding class certification, the court agreed that while plaintiffs had demonstrated defendant's unfair and deceptive conduct as to all putative class members, plaintiffs had failed to show that such conduct caused "similar injury" to the class. To the contrary, either of plaintiffs' injury theories would require proof of causation on an individual or small group basis. Thus even assuming defendant's systemic failures had a general tendency to delay restoration efforts, relying on that tendency to prove causation for each class member would involve impermissible speculation or generalization, as many customers, especially those who experienced shorter outages, may not have suffered any outage prolongation due to defendant's conduct. Nor was this merely a question of damages, as claims of customers who did not suffer a longer outage than otherwise would have occurred failed for lack of causation. Similarly, even if defendant made deceptive statements regarding the expected scope and duration of outages, this would not prove interference with all class members' ability to plan for the outages, since not all were exposed to the same statements and the asserted time frames for power restoration may have been accurate as to many class members.

Regarding issue preclusion, the SJC affirmed the lower court's decision because the issues as to which plaintiffs sought preclusion were essential to the DPU's judgment and identical to issues in the litigation, defendant had an incentive to litigate those issues in the DPU proceedings and it was not unfair to give preclusive effect to the agency findings. The SJC held the DPU's reliance on extensive public comments from individuals who were not subject to cross-examination was inconsequential because the agency did not rely on the comments in deciding the issues proffered for preclusive effect. Nor was it important that the utility bore the burden of proof in the administrative proceedings, whereas plaintiffs had the burden in the litigation, as the DPU "did not recite the burden of proof in its investigatory decision, and the decision contains no language suggesting that the DPU's factual findings rested on [the company]'s failure to carry its burden."

Massachusetts Federal Court Holds Regular Cigarettes Not Defective Unless Proposed Safer Design with Ultra-Low Tar Would Have Been Acceptable to Rational, Informed, Non-Addicted Consumers, But Proof of Any Decreased Lung Cancer Risk with Alternative Design Sufficient to Establish Causation for Medical Monitoring Claim

In *Donovan v. Philip Morris USA, Inc.*, 2014 U.S. Dist. LEXIS 1272177 (D. Mass. Dec. 12, 2014), a class of asymptomatic Massachusetts individuals with a history of over twenty pack-years of smoking sued the defendant cigarette manufacturer in the United States District Court for the District of Massachusetts asserting claims for breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability), negligence and violation of Mass. Gen. L. ch. 93A (the Massachusetts unfair and deceptive practices statute), and seeking a court-supervised program of medical monitoring to detect early signs of lung cancer. Answering a certified question on defendant's motions to dismiss and for summary judgment, the Massachusetts Supreme Judicial Court ("SJC") held plaintiffs could state a damages claim for medical monitoring costs even though none of the putative class members presently suffered from any manifested smoking-related illness or disease ("Donovan I," see [May 2010 Foley Hoag Product Liability Update](#)). The district court then granted class certification as to plaintiffs'

implied warranty claims (see [July 2010 Foley Hoag Product Liability Update](#)), the United States Court of Appeals for the First Circuit denied defendant's petition for interlocutory review (see [October 2010 Foley Hoag Product Liability Update](#)), and the district court denied defendant's motion to decertify the class following the United States Supreme Court's class certification rulings in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (see [April 2012 Foley Hoag Product Liability Update](#)).

After completing the court-approved plan for disseminating class notice, plaintiffs renewed earlier motions to, among other things: (1) strike defendant's affirmative defense that plaintiffs' proposed safer alternative design—an ultra-low-tar cigarette—was not a reasonable one; and (2) grant plaintiffs partial summary judgment to the effect that defendant's failure to adopt the alternative design was a proximate cause of plaintiffs' injury.

Regarding plaintiffs' proposed alternative design, the court noted that a product's defectiveness under Massachusetts implied warranty law is determined using a risk-utility balancing test that considers: (1) the magnitude and probability of the foreseeable risks; (2) the instructions and warnings accompanying the product; (3) the nature and strength of consumer expectations regarding the product; (4) the relative advantages and disadvantages of the product compared to plaintiff's proposed alternative design; and (5) the likely effects of the alternative design on product cost and performance. Through its affirmative defense, defendant sought to apply the last three factors to argue against any finding of product defect or unreasonable danger, as plaintiffs' proposed alternative design "would result in undue interference with the . . . performance of the product, thereby making the alternative design unreasonable" and impractical.

In *Evans v. Lorillard Tobacco Co.*, 465 Mass. 411 (2013) (see [July 2013 Foley Hoag Product Liability Update](#)), the SJC rejected a cigarette company's argument that ultra-low-tar-and-nicotine cigarettes were not a feasible or practical alternative design because "ordinary" cigarette smokers would not smoke them, holding that the appropriate inquiry was "whether the design alternative unduly interfered with the performance of the product from the perspective of a rational, informed consumer, whose freedom of choice is not substantially impaired by addiction." Under that standard, the SJC affirmed a breach of warranty verdict against the

company. Here, plaintiffs contended that, after *Evans*, any “decision of a non-addicted smoker to select a more dangerous cigarette is *per se* unreasonable,” so that consumer acceptability was rendered moot. The district court disagreed, holding that *Evans* narrowed but did not remove the consumer acceptability calculus. Thus the jury would still be entitled to consider consumer expectations on the issue of the cigarettes’ defectiveness, and plaintiffs would need to show that the alternative design would have been acceptable to a rational, informed, non-addicted consumer. Moreover, the jury could find defendant’s cigarettes were not unreasonably dangerous based on evidence that low-tar cigarettes have been rejected by consumers for decades for reasons unrelated to addiction, such as undesirable taste. Accordingly, the court denied plaintiffs’ motion to strike the defense.

Regarding proximate cause, plaintiffs argued there was no genuine dispute that the excess harm caused by defendant’s cigarettes, as compared to plaintiffs’ proposed safer alternative, was a substantial contributing factor in causing plaintiffs’ injury, *i.e.*, the subcellular lung damage that elevated their risk of cancer. Defendant argued that *Donovan I* defined plaintiffs’ “injury” as the actual need for medical monitoring, hence plaintiffs needed to prove they would not have required such monitoring if they had smoked ultra-low-tar cigarettes. Defendant further argued there was no such evidence, and indeed there were factual questions whether the alternative cigarettes would even have reduced, much less eliminated, their risk of lung cancer. The court sided with plaintiffs, holding the “injury” requiring proof was not the need for medical monitoring but rather the “subcellular change[] that substantially increased the risk of serious disease,” and that plaintiffs need not show the alternative cigarettes would have completely, or even meaningfully, prevented such changes— “[a]ll that Plaintiffs have to show is reduction in risk.” Because it was undisputed that lower tar cigarettes are associated with some decreased lung cancer risk, summary judgment was warranted on that issue.

Massachusetts Federal Court Holds Manufacturer’s Disclaimer of Implied Warranties to Consumers Unenforceable, Express and Implied Warranty Claims Sufficient Where Plaintiff Alleges Humidifier Leaked and Required Substantial Maintenance But Manufacturer Refused to Repair or Replace It

In *Leach v. Honeywell International Inc.*, Civ. Action No. 1:14-12245-LTS (D. Mass. Nov. 17, 2014), plaintiff purchased a humidifier with a written warranty that the product would be free from defects for five years and the manufacturer would repair or replace it if it malfunctioned or was determined to be defective during the warranty period. The warranty also purported to disclaim all other express or implied warranties and to limit the manufacturer’s liability to the cost of repairing or replacing the humidifier. Plaintiff’s humidifier allegedly began to leak almost immediately after being installed, and later its heating coils became caked with mineral deposits. When plaintiff informed the manufacturer of the alleged defect, the manufacturer responded that the problem likely originated with the humidifier’s gasket and plaintiff should hire a professional to service the unit. The manufacturer refused to send a replacement gasket, replace the humidifier or pay the cost of having a professional repair it.

Plaintiff filed a putative class action in the United States District Court for the District of Massachusetts on behalf of himself and all other purchasers of the humidifier model asserting, among other claims, breach of express warranties, breach of the implied warranties of merchantability (the Massachusetts near-equivalent of strict liability) and fitness for a particular purpose, negligence and violation of Mass. Gen. Laws ch. 93A (the Massachusetts unfair and deceptive practices statute). All of plaintiff’s claims were based on his allegations that the humidifiers were unreasonably dangerous and “can cause exterior drains to clog and flood, can result in damage to HVAC duct work, and can adversely affect air quality.” Plaintiff did not allege that he or anyone in the putative class suffered any personal injury or damage to property other than the humidifier itself. The manufacturer moved to dismiss, arguing it had expressly disclaimed the implied warranty of merchantability, plaintiff had not alleged sufficient facts to support any claim for breach of express or implied warranties and, in any event, the claims were barred by the “economic loss” doctrine.

The court first held the allegations of plaintiff's complaint were sufficient to state a claim for breach of express warranties, whether based on the defectiveness of the humidifier or the manufacturer's failure to abide by its promised repair or replacement remedy. Regarding the implied warranty claims collectively, the court then held that the manufacturer's attempted disclaimer of such warranties with respect to consumer goods was unenforceable under governing Massachusetts case law. With respect specifically to the implied warranty of merchantability, plaintiff's allegations that the humidifier leaked, its coils were defective and substantial maintenance was required plausibly stated a claim that the humidifier did not meet reasonable consumer expectations and thus was not fit for its ordinary purpose. The court also held the economic loss doctrine—which prohibits recovery of purely economic losses in tort actions absent personal injury or damage to property other than the product itself—barred recovery only to the extent plaintiff sought recovery in tort, so the court only dismissed plaintiff's "strict liability" and "negligent design" claims on this ground, not his contract-based claims for breach of the implied warranty of merchantability.

The court also dismissed plaintiff's claim for breach of the implied warranty of fitness for a particular purpose, as plaintiff made no allegation he envisaged a use for the humidifier other than its ordinary use, or that he communicated such use to defendant as part of his purchase. Finally, the court refused to dismiss the ch. 93A claim, noting that a consumer's claim for "fail[ure] to perform or fulfill any promises or obligations arising under a warranty," as opposed to a business' similar claim, per se violates ch. 93A.

Massachusetts Superior Court Holds Manufacturer and Seller of Propane-Powered Dryer Voluntarily Assumed Duty to Warn of Risks of Propane Not Supplied by Them, as They Provided Some Warnings on Dryer and in Instruction Manual, But Dismisses Punitive Damages Claims Due to Defendants' "Appreciable" Warning Efforts

In *DiPasquale v. Suburban Propane L.P.*, 2014 Mass. Super. LEXIS 170, 171 (Mass. Super. Ct. Dec. 15, 2014), a woman was killed by an explosion and fire while using a propane-powered dryer she had purchased six years earlier. Her son, a licensed gas fitter, had connected the dryer to her home's

gas system using copper tubing and fittings from a previous dryer. Five days before the fire, decedent called her propane supplier to report her tank was out of gas. A service technician performed a leak test, which found no signs of leakage, verified that other appliances in the home connected to the propane tank were working properly and briefly ran the dryer. He did not visually inspect the gas system, however, a procedure that the supplier had trained its technicians to perform but was not part of its written policies. Decedent signed a work order and received a delivery ticket, both of which included safety information about propane systems such as the dangers of flowing gas and what to do if the owner smelled gas. After the fire, investigators discovered the copper tubing connected by decedent's son to the gas system had detached, causing a leak, but based on the amount of gas remaining in the tank the leaking could not have begun until about three days after the technician's visit.

Decedent's executrix sued the dryer manufacturer and seller as well as the propane supplier in Massachusetts Superior Court for wrongful death, among other claims, and sought punitive damages for defendants' alleged gross negligence in failing adequately to warn of the dangers associated with propane. Plaintiff also alleged the supplier had been negligent in its repair services. All three defendants moved for summary judgment, arguing they had no duty to warn of propane's risks because decedent must have been aware of the danger, having used propane for several years; the manufacturer and seller also argued they had no duty because they were not the propane manufacturer or seller. In addition, all defendants contended the warnings given were adequate, and different or additional warnings would not have prevented decedent's death. Finally, the propane supplier argued its leak test had been "by the book" and the investigators determined the leak could not have begun until after the service call.

The court first recognized that, ordinarily, only the propane supplier would have had a duty to warn of the dangers associated with that product. Here, however, the dryer manufacturer and seller had voluntarily assumed such a duty because both the dryer and its instruction manual included numerous warnings about the risk of fire from leaking gas, as well as instructions about what to do if the owner smelled gas. Nor did decedent's prior use of propane relieve defendants of their duty to warn, as such past experience did not establish she was aware of all the relevant dangers. Once past the duty

issue, the court denied summary judgment against plaintiff's ordinary negligence claims, finding the evidence revealed genuine issues of fact regarding whether defendants' warnings were inadequate or a proximate cause of decedent's death, as well as regarding the negligence and causation issues involved with the supplier's repair services.

The court did grant summary judgment against plaintiff's punitive damages claim, however. The Massachusetts wrongful death statute authorizes punitive damages only where defendants acted in a willful, wanton or reckless manner, or were grossly negligent. Here, the evidence could not support a finding of gross negligence because even if a jury were to find defendants' warnings inadequate, defendants did make an attempt to warn of propane's risks, which demonstrated the exercise of some "appreciable" level of care.

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