FOLEY HOAG LLP

Product Liability **Update**

In This Issue:

January 2015

- First Circuit Holds Plaintiff Lacks Standing to Recover for Allegedly Defective Product Based on Risk of Future Harm From Lightning Strike Where Complaint Contained Insufficient Facts to Demonstrate Risk Was Beyond Speculative or That Product Failed to Comply with Industry or Regulatory Standards
- Massachusetts Federal Court Holds Defendants Not Subject to General Personal Jurisdiction Due to Lack of In-State Incorporation or Principal Place of Business, and Transfer to Court Having Jurisdiction Not Authorized as One Transfer Statute Applies Only Where Subject Matter Jurisdiction is Lacking and Another Only Where Venue is Improper
- Massachusetts Federal Court Holds Manufacturer's Repeated Representations Pumps Originally Designed for Whirlpools Could Be Successfully Used With Spa Tubs Sufficient to Create Jury Question on Implied Warranties of Merchantability for Ordinary Purpose and Fitness For Particular Purpose
- Massachusetts Federal Court Holds Threat of Physical Injury to Persons Not Required for Tort-Based Failure-to-Warn Claims, and "Economic Loss Doctrine" Does Not Bar Tort-Based Claims Against Manufacturer of Allegedly Defective Component for Damage to Product Into Which Component Was Incorporated if Latter Was Made by Different Entity Than Component Manufacturer
- Massachusetts Federal Court Holds Smartphone's Random Shutdowns While in "Sleep" Mode Insufficient to State Warranty Claim Where Shutdowns Were Infrequent and Remedied by Pressing "On" Button, and Expert's Personal Observations of Plaintiff's Phone Did Not Provide Reliable Basis for Opinion of Defect in Model or Causation of Plaintiff's Shutdowns

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 Plaintiff Lacks Standing to Recover for Allegedly Defective Product Based on Risk of Future Harm From Lightning Strike Where Complaint Contained Insufficient Facts to Demonstrate Risk Was Beyond Speculative or That Product Failed to Comply with Industry or Regulatory Standards

In *Kerin v. Titeflex Corp.*, 2014 U.S. App. LEXIS 21057 (1st Cir. Nov. 4, 2014), plaintiff owned a home with an outdoor fire pit supplied with natural gas through corrugated stainless steel tubing ("CSST"). Although CSST can fail when exposed to powerful electrical forces such as lightning, it is widely used and approved by both government and industry regulatory bodies. Even though plaintiff's CSST had never caused a problem, he sued its 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). Citing reports of 141 home fires that "involved" both CSST and lighting, plaintiff alleged his CSST was defectively designed because, in the event of a nearby lightning strike, it was vulnerable to puncture and fire and defendant had failed to warn of this risk. He sought damages in the amount of his "overpayment" for the allegedly defective product or, in the alternative, the cost of remedying the alleged safety issue.

The district court dismissed for lack of standing under Article III of the United States Constitution, holding "it is obvious that Plaintiff cannot clear the 'injury in fact' hurdle." The court reasoned that the "strand of conjecture . . . is simply too attenuated," requiring both a lightning strike and one that effects a puncture in the CSST. The court also concluded that even if plaintiff had standing, he failed to state a claim because he did not allege "an applicable standard against which [defendant's] due care could be measured" as required to claim economic injury from a defective product under Massachusetts law (**see April 2014 Foley Hoag Product Liability Update**).

On appeal, the United States Court of Appeals for the First Circuit affirmed, although it deviated somewhat from the district court's reasoning. The appellate court first noted that "the law of probabilistic standing is evolving, and it is conceivable that product vulnerability to lightning might, in some circumstances, constitute injury." Typically, plaintiffs suing based on an enhanced risk of harm allege two types of injury—(1) the risk of future harm itself, and (2) the present cost or inconvenience created by the increased risk (*e.g.*, the cost of mitigation or replacement)—either of which can confer standing so long as the alleged injury is not too speculative. Whether the risk of future harm is too speculative depends on the chances the harm will occur, and here plaintiff

failed to allege facts sufficient to calculate or even estimate that risk. It was impossible to evaluate the significance of 141 alleged fires that "involved lightning and CSST" in the absence of allegations concerning the time frame over which these fires occurred, the frequency of lightning strikes in general, the proportion of homes struck by lightning or the likelihood of fire from such strikes. Nor did plaintiff allege CSST was the cause of the damage in the 141 fires. Finally, the fact that regulatory bodies had studied the risk of lightning-related CSST failures and concluded it was both permissible and manageable supported the district court's conclusion that the risk of future harm was not so great as to confer standing.

Similarly, plaintiff's "overpayment" or cost-of-replacement injury theory was also too speculative to confer standing. The court noted that such a theory is more likely to support standing where the product at issue violates, or may soon violate, a statute, regulation or standard of conduct; in such a case, the legislature or executive agency has already identified the risk as injurious and thus the need for mitigating action is clearer. Here, however, plaintiff conceded the CSST did not violate any regulatory standard, which is required to state a claim for a defective product in the absence of actual damage. Thus, his alleged present economic injury was entirely dependent on his unsupported allegation that the CSST was defective, coupled with a risk of future injury the court had already found was too speculative.

Massachusetts Federal Court Holds Defendants Not Subject to General Personal Jurisdiction Due to Lack of In-State Incorporation or Principal Place of Business, and Transfer to Court Having Jurisdiction Not Authorized as One Transfer Statute Applies Only Where Subject Matter Jurisdiction is Lacking and Another Only Where Venue is Improper

In *Federal Home Loan Bank of Boston v. Ally Financial, Inc.*, 2014 U.S. Dist. LEXIS 140975 (D. Mass. Sep. 30, 2014), a plaintiff bank sued, among others, certain credit rating agencies in the United States District Court for the District of Massachusetts alleging they understated the risk of private label mortgage-backed securities sold to plaintiff. The agencies moved to dismiss for lack of personal jurisdiction, arguing their contacts with Massachusetts were not such as to render them "essentially at home" in the state, as is required for the exercise of general or "all-purpose" jurisdiction. The court denied the motion, but shortly thereafter the United States Supreme Court held in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), that "only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there," the paradigmatic examples being the defendant's place of incorporation or principal place of business (**see April 2014 Foley Hoag Product Liability Update**). Defendants then moved for reconsideration of their motion to dismiss. Plaintiff opposed, and also argued that even if the court lacked personal jurisdiction it should sever and transfer the claims against the rating agencies to the Southern District of New York, where personal jurisdiction existed.

Regarding general jurisdiction, the court first noted that the Supreme Court's opinion in *Daimler* made clear that whether a defendant is "essentially at home" in the forum state is not determined by the quantity of the defendant's contacts there, as "[a] corporation that operates in many places can scarcely be deemed at home in all of them." Under this "tighter assessment of the standard," the rating agencies could not be subject to general jurisdiction. Although they had activities in Massachusetts that generated significant revenue, they had similarly substantial contacts with dozens of other states. Moreover, the agencies were neither incorporated nor had their principal places of business in the state, and there was no indication this was an "exceptional case" under *Daimler* such that general jurisdiction should be extended beyond those paradigmatic forums.

Regarding the plaintiff's request for severance and transfer, two statutes potentially authorized such a transfer but there were unsettled questions regarding the applicability of each. Plaintiff principally relied on 28 U.S.C. § 1631, which permits a "court" that finds "there is a want of jurisdiction" to transfer a suit to another "court" in which the suit "could have been brought." There is substantial disagreement among courts, however, as to whether the statute applies when *either* subject matter *or* personal jurisdiction is lacking, or only when the former is. Although the United States Court of Appeals for the First Circuit has acknowledged this controversy, it has declined to weigh in. The district court held the statute applies only when subject matter jurisdiction is lacking, noting the legislative history indicates the statutory objective was to ameliorate that kind of defect, and there is some textual support for that position as the statute's definition of "court"

includes appellate and administrative tribunals where subject matter jurisdiction is often an issue.

Plaintiff also argued the case could be transferred under 28 U.S.C. § 1406(a), which authorizes transfer of a case "laying venue in the wrong district . . . to any district or division in which it could have been brought." Notwithstanding the statute's textual limitation to venue-related issues, it has commonly been cited by courts as authorizing a transfer to cure a lack of personal jurisdiction. The court noted, however, that although it is clear that where venue is improper the statute authorizes transfer to a district with proper venue even if defendant was not subject to jurisdiction in the original district, it remains uncertain whether the statute "may be a vehicle for transfer when venue is *proper* in the original district, as here—that is, where there is no venue defect calling for correction." Accordingly, the court also declined to transfer the case under § 1406(a), and dismissed all claims against the rating agencies to permit an immediate appeal to the First Circuit to clarify the interpretation of both transfer statutes.

Massachusetts Federal Court Holds Manufacturer's Repeated Representations Pumps Originally Designed for Whirlpools Could Be Successfully Used With Spa Tubs Sufficient to Create Jury Question on Implied Warranties of Merchantability for Ordinary Purpose and Fitness For Particular Purpose

In *Softub, Inc. v. Mundial, Inc.*, 2014 U.S. Dist. LEXIS 138274 (D. Mass. Sep. 30, 2014), the plaintiff manufacturer of portable spa tubs began purchasing from defendant a new integrated pump and motor intended to make the tubs run more quietly. Defendant's pump had originally been designed for use in whirlpools, which are typically drained after each use, rather than spa tubs, which remain full for extended periods. Whereas a whirlpool pump operates only when the tub is in use and filled with water, a spa pump must operate for longer durations and be able to withstand exposure to chemicals and debris in the water. Notwithstanding these differences, defendant represented its pump would be "a perfect fit" for plaintiff's spas and gave a five-year performance warranty. Shortly after plaintiff started using the pumps, however, it began to receive complaints and warranty claims from its customers and dealers who had experienced cracking and locking of the rotors that caused the pump to stop operating. Unbeknownst to plaintiff, defendant was also receiving similar complaints from the two other spa manufacturers to which it sold the pumps. After plaintiff continued to experience problems, defendant stopped selling its pumps to plaintiff.

Plaintiff brought suit in the United States District Court for the District of Massachusetts, asserting claims for breach of contract, breach of express warranty, breach of the implied warranties of merchantability and fitness for a particular purpose and violation of Mass. Gen. Laws ch. 93A (the Massachusetts unfair and deceptive practices statute), among others. In support of its claims, plaintiff offered an engineer's expert testimony that the pump suffered from a number of design flaws which "either individually or collectively caused the pumps to fail while in use with [plaintiff's] spa." Defendant moved (i) to exclude the expert's testimony as inherently unreliable and hence inadmissible under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), as well as legally insufficient to establish a causal relationship between any alleged defect and the failure of any particular spa, and (ii) for summary judgment on all of plaintiff's claims.

The court first observed that plaintiff's claims for breach of warranties, both express and implied, were "[a]t the heart of this case." Moreover, "this is in essence a contract case, and [plaintiff]'s claims for breach of warranty sound in contract. This is not a tort-based products liability action, where the plaintiff is an end-user, lacking privity with the manufacturer, who was injured by some alleged defect in a product's design or manufacture that rendered it 'unreasonably dangerous.'" To prevail on its claims, plaintiff needed to prove only that the pump failed to perform its ordinary or manifestly intended function. Accordingly, plaintiff's expert's failure to arrive at a more precise causation opinion did not make it unreliable or legally insufficient, as it might have were this a traditional product liability case. While in the court's view the expert's opinion was not even necessary for plaintiff to meet its burden of proof, the court found the testimony would be helpful to the jury as a corroborating overview of the evidence that the pumps were unsuitable for use in spa applications, and thus denied the *Daubert* motion.

The court also denied defendant's motion for summary judgment on the implied warranty claims. As to the warranty of fitness, even though plaintiff had superior knowledge of spa design and manufacture and conducted its own testing of the pump prior to purchasing it, the court held that a reasonable jury nevertheless could find that plaintiff had relied on defendant's statements to ensure that the pump was indeed fit for the particular

purpose of spa applications. Regarding the implied warranty of merchantability, the court rejected defendant's argument that the pump's relatively low failure rate in the whirlpool applications for which it was originally designed demonstrated the absence of a genuine dispute as to whether the pump was fit for its ordinary purposes. Defendant's position that the pump was not intended for use in spas—announced only after it terminated its relationship with plaintiff—was undermined by statements both in the pump's manual (touting its suitability for use in spas) and on its label (stating it was "[f]or use with Hot Tubs and Spas only"). Additionally, defendant had sold the pump to at least two other spa manufacturers before also terminating those relationships when the failure rates proved unacceptably high. Thus, a jury reasonably could find that spa use constituted an ordinary purpose of the pumps.

Massachusetts Federal Court Holds Threat of Physical Injury to Persons Not Required for Tort-Based Failure-to-Warn Claims, and "Economic Loss Doctrine" Does Not Bar Product Manufacturer's Tort-Based Claims Against Manufacturer of Allegedly Defective Component for Damage to Product Because Parties' Bargain Included Only Purchase of Component, Not Finished Product

In *AcBel Polytech, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 2014 U.S. Dist. LEXIS 129259 (D. Mass. Sep. 12, 2014), plaintiff was the manufacturer of a power supply unit ("PSU") intended to supply a consistent stream of power to high-end data storage devices, made by plaintiff's customers, into which the PSU was incorporated. A critical component of the PSU was a voltage regulator designed and manufactured by defendant, which was intended to prevent power surges from damaging the PSU and/or data storage device. Plaintiff purchased the regulator from defendant's Hong Kong distributor, although it negotiated the price directly with defendant.

Sometime in 2008 or 2009, defendant redesigned the voltage regulators and, by 2010, began shipping them to plaintiff without notifying it of the design change. After receiving complaints from a different customer, defendant tested the regulators and concluded the design modification had made the component vulnerable to the accumulation of humidity and water, causing it to short circuit and fail. In late 2010, therefore, defendant reverted back to its previous design but again did not disclose to plaintiff that the design had changed or that the reason for the change was the defectiveness of the interim design. By that time, plaintiff had purchased approximately 195,000 defective regulators for incorporation into its PSUs, many of which had already been deployed by plaintiff's customers in the field and begun failing at an alarming rate. Plaintiff and its most heavily affected customer incurred extensive costs to replace failed or at-risk PSUs in the field, and plaintiff and the customer entered into a settlement agreement in connection with which the customer assigned its claims against defendant to plaintiff.

Plaintiff filed suit in the United States District Court for the District of Massachusetts asserting claims on behalf of itself and its customer for commercial breach of warranty, negligent design and failure to warn, design and warning defects in breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability), and violation of Mass. Gen. Laws ch. 93A (the Massachusetts unfair and deceptive practices statute). Defendant moved to dismiss the complaint in its entirety arguing, among other things, that: (i) the commercial breach of warranty claims failed for lack of privity; (ii) the tort-based design and warning defect claims failed as duplicative of the commercial warranty claims; (iii) the tort-based failure-to-warn claims should be dismissed for lack of any allegation that defendant's conduct posed a threat of physical injury to any person; (iv) all tort-based claims should be dismissed under the "economic loss doctrine," which bars recovery in tort for purely economic losses; and (v) the ch. 93A claims should be dismissed because defendant's conduct did not occur "primarily and substantially in Massachusetts" as required by the statute.

The court first agreed that plaintiff's commercial breach of warranty claims required privity, a conclusion seemingly at odds with Mass. Gen. L. ch. 106, § 3-318's provision that lack of privity is not a defense to a warranty claim "if the plaintiff was a person whom the manufacturer . . . might reasonably have expected to use, consume or be affected by the goods." In any event, the court held plaintiff's allegation that it negotiated the price of the voltage regulators directly with defendant sufficed to establish privity, as did the allegation that defendant's distributor acted as its agent in selling the regulators to plaintiff.

Regarding the tort-based design and warning defect claims, the court noted that Massachusetts law recognizes tort-based claims under the implied warranty of merchantability as distinct from contract-based claims under that warranty, and that by pleading "design defect" and "failure to warn" plaintiff had invoked the tort-based theories. Defendant's contention that the failure-to-warn claims required an allegation of threatened personal injury was based on a recent First Circuit case stating that "a warning is not needed unless there is some dangerous aspect of the product against which the warning might act to mitigate risk." The court noted, however, that it was not clear that the "dangerous aspect" discussed in that case must always entail physical danger to a person, and that other cases found a warning duty originated in "the manufacturer's superior knowledge as to the foreseeable dangers." Here, where plaintiff alleged both that defendant had superior knowledge of the voltage regulators' design problems and that industry standards required disclosure of significant design changes to customers, the court held the failure-to-warn claims were adequately pleaded.

Nor did the economic loss doctrine mandate dismissal of all tort-based claims. The court acknowledged that the rule required some "damage to property other than the [defective] product itself," and that some courts had held the rule bars claims involving a defective component that caused damage only to the product into which it was incorporated. But in these cases the purchase of the component and the overall product had been "part of the same bargain," a circumstance that was not applicable here where the regulator and PSU were manufactured by different entities and the only product plaintiff "bargained for" was the component. Finally, the court declined to dismiss plaintiff's ch. 93A claim because plaintiff alleged it suffered injury at its Massachusetts facility and there was a sufficient "business nexus" between defendant and plaintiff's customer, also based in Massachusetts, even if there was no privity of contract between them.

Massachusetts Federal Court Holds Smartphone's Random Shutdowns While in "Sleep" Mode Insufficient to State Warranty Claim Where Shutdowns Were Infrequent and Remedied by Pressing "On" Button, and Expert's Personal Observations of Plaintiff's Phone Did Not Provide Reliable Basis for Opinion of Defect in Model or Causation of Plaintiff's Shutdowns

In *Rothbaum v. Samsung Telecommunications America, LLC*, 2014 U.S. Dist. LEXIS 138252 (D. Mass. Sep. 29, 2014), plaintiff purchased a smartphone which soon began randomly shutting down while in "sleep" mode, requiring plaintiff to press the "on" button to regain functionality. Plaintiff reported the problem to the defendant manufacturer, which sent her a replacement phone of the same model. She used the replacement phone for the next eighteen months, experiencing approximately one random shutdown per month, and then commenced a putative class action in the United States District Court for the District of Massachusetts asserting claims for breach of the implied warranty of merchantability and violation of Mass. Gen. Laws ch. 93A (the Massachusetts unfair and deceptive practices statute). Plaintiff alleged the manufacturer knowingly sold a defective phone and its promised warranty remedy was inadequate because it merely allowed plaintiff to replace one defective phone with another. Plaintiff's primary evidence of the defectiveness of the replacement phone was the proffered expert testimony of an engineer. After discovery, but before class certification, the manufacturer moved to exclude the expert's testimony and for summary judgment, arguing there was no evidence the replacement phone was defective. The court allowed both motions.

Plaintiff's expert observed the phone over a six-day period, during which time the phone was kept in "sleep" mode and the expert occasionally pressed the "on" button to determine whether the phone had shut down. He observed one shutdown and concluded from this the phone was defective. The expert also reviewed the manufacturer's internal documents concerning other returned phones and concluded that all of the model's phones suffered from the same defect. The court excluded both opinions, finding they were not sufficiently reliable to be admitted as evidence and did not utilize the expert's specialized knowledge in a manner that would be helpful to the jury. The opinions were based only on the expert's minimal personal observation of

plaintiff's phone and a highly selective and distorted reading of defendant's documents which, on the whole, supported a conclusion that only a very small percentage of defendant's phones were susceptible to random shutdowns. Accordingly, the court allowed the expert to offer fact testimony regarding his personal observation of the replacement phone, but not opinion testimony as to whether the shutdowns were caused by a design defect or some other cause such as plaintiff's addition of apps to the phone, as the manufacturer argued.

In the absence of expert testimony, the court found the remaining evidence insufficient to support plaintiff's implied warranty and ch. 93A claims. Regarding the former, plaintiff's problems with her replacement phone were not serious enough to breach the implied warranty of merchantability because the phone, even assuming periodic random shutdowns, did not lack its "operative essentials." The implied warranty of merchantability does not require sellers to provide flawless goods, and there was no evidence plaintiff missed calls, emails or other messages as a result of the infrequent shutdowns; indeed, she continued to use her replacement phone for eighteen months notwithstanding the shutdowns. While some courts have held random shutdowns sufficient to support an implied warranty claim, they have done so only where the shutdowns were far more frequent and/or rendered the phones completely unusable unless the user removed and reinserted the battery, while plaintiff was able to regain functionality simply by pressing a button. Similarly, there was no evidence the manufacturer's promised warranty remedy of a replacement phone was inadequate, as there was no reason to believe 100% of defendant's phones were defective as plaintiff's expert had attempted to opine.

Finally, to the extent plaintiff's ch. 93A claim was based on the alleged warranty breach, it failed for the same reasons. To the extent the claim was based on defendant's alleged failure to disclose the random shutdown defect to customers, it also failed because there is no duty to disclose a *potential* product problem as opposed to a present and actual one. Here, the evidence would only permit a reasonable factfinder to conclude that a small percentage of defendant's phones had a shutdown problem, which did not require disclosure.

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

David R. Geiger
Chair

Matthew C. Baltay
Update Editor

Creighton K. Page
Associate Editor

Jonathan M. Ettinger
Jeffrey S. Follett
Barbara S. Hamelburg
Michael B. Keating
Matthew E. Miller
Colin J. Zick
Catherine C. Deneke
Elizabeth Holland
Daniel McFadden
Daniel J. Procaccini
Shrutih Tewarie

FOLEY HOAG LLP