FOLEY HOAG LLP

Product Liability **Update**

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Foley Hoag LLP publishes this quarterly Update concerning developments in product liability and related law of interest to product manufacturers and sellers.

Massachusetts Federal Court In Prescription Drug Case Holds "Learned Intermediary" Rule Requiring Warnings Only To Prescribing Physician Applied Even Though Patient and Caregiver Were Physicians, But Experts' Affidavits of Inadequate Warnings Created Presumption Adequate Warning Would Have Been Heeded And Hence Triable Issue on Causation

In *Li Liu v. Boehringer Ingelheim Pharms. Inc.*, No. 14-13234, 2017 U.S. Dist. LEXIS 8959 (D. Mass. Jan. 23, 2017), plaintiffs filed a wrongful death action in the United States District Court for the District of Massachusetts against the manufacturer and distributor of a prescription anticoagulant, which they alleged caused the 80-year old decedent's death due to uncontrollable brain bleeding following a fall. Plaintiffs asserted negligence claims based on defective design and failure to warn. After being transferred for pre-trial management to a multi-district litigation in the United States District Court for the Southern District of Illinois, the case was remanded to the District of Massachusetts for further discovery and trial.

Defendants ultimately moved for summary judgment, arguing (1) plaintiffs' design claims were preempted, (2) there was no evidence to find the drug's label warnings were inadequate and (3) there was no evidence to establish proximate cause. Regarding design defect, plaintiffs alleged the drug was defectively designed because safer alternative designs existed, it was not as safe as any other drug in the same class and it did not comply with its own specifications. Because plaintiffs had produced no evidence in support of these allegations, however, the court dismissed them without reaching defendants' preemption argument.

The court next examined plaintiff's two warning arguments, *i.e.*, that the label did not adequately warn that the risk of major bleeding was greater than with other anticoagulants, and that it was particularly acute for patients over 80. Because plaintiffs offered two physicians' affidavits asserting defendants knew of these risks but omitted them from the label, and that decedent—who was a physician himself—would not have been prescribed or taken the drug if this warning had been included, the court found a triable issue existed as to the warnings' adequacy.

In this connection, however, the court rejected plaintiffs' contention that the "learned intermediary" rule—under which a prescription drug manufacturer's duty is normally only to give an adequate warning to the prescribing physician, and not directly to the patient—was inapplicable as both decedent and his daughter (who assisted with his care) were physicians with the education and skills to judge whether the drug

was suitable. The court noted there was no evidence either individual played an active role in the decision to use the drug, the daughter admitted she lacked experience with the drug and cardiac condition for which it was prescribed and she never asked the prescriber about the drug or to review its label.

Lastly, regarding proximate cause, the court noted that plaintiffs' physicians' affidavits that the label was deficient created a rebuttable presumption that the prescribing physician would have heeded an adequate warning. Because the prescriber testified at deposition that he would still have prescribed the drug even if he knew its bleeding risk was greater than with other blood thinners, defendants had rebutted the presumption as to this theory. Because there was no prescriber testimony that his decision would have been the same if warned the risk was higher for patients over 80, however, the presumption remained with respect to this theory, and the court therefore denied summary judgment.

Massachusetts Supreme Judicial Court Holds Post-Judgment Interest Is Not Included in "Amount of the Judgment" to be Doubled Or Trebled For Willful Violation of Mass. Gen. L. Ch. 93A, Massachusetts' Unfair And Deceptive Trade Practices Statute

In *Anderson v. Nat'l Union Fire Ins. Co. of Pittsburgh PA*, 476 Mass. 377 (2017), several family members brought a personal injury action in Massachusetts Superior Court against a not-for-profit health care system and its bus driver for injuries the plaintiffs' father sustained when struck by a bus owned and operated by the health care system. Plaintiff subsequently brought a separate action against the health care system's insurance carriers and claims representatives under Mass. Gen. L. ch. 93A (the Massachusetts unfair and deceptive business practices statute) and under Mass. Gen. L. ch. 176D (the Massachusetts unfair and deceptive insurance practices statute), alleging willful failure to conduct a reasonable investigation of plaintiff's claims and effectuate a prompt, fair and equitable settlement. Upon the parties' joint motion, proceedings in the second action were stayed pending resolution of the first.

A jury found for plaintiffs in the personal injury action and judgment was entered for $2,244,588.93. After unsuccessful appeals, defendants paid plaintiffs the judgment amount plus five years of statutorily-mandated post-judgment interest, for a total of $3,252,857.80. A Superior Court judge then found that the insurers and claims representatives had willfully violated chapters 176D and 93A and awarded plaintiffs treble damages, which the court calculated by tripling the full $3,252,857.80 payment. The Massachusetts Appeals Court affirmed both the liability finding and damages computation.

After granting further appellate review, however, the Massachusetts Supreme Judicial Court vacated the judgment, holding that post-judgment interest is not included in calculating multiple damages under Mass. Gen. L. ch. 93A, which provides that the sum to be doubled or trebled is "the amount of the judgment." The Court first determined that the plain statutory language did not answer the question, although this conclusion seems somewhat surprising in that it is hard to imagine how the amount of a "judgment" could include sums that do not arise until after, *i.e.*, "post," the judgment. Nonetheless, to resolve the perceived ambiguity, the Court examined the prejudgment and post-judgment interest statutes, Mass Gen. L. ch. 231, § 6B and ch. 235, § 8, respectively. While the former provides that prejudgment interest is to be "added by the clerk of court to the amount of damages," so that it becomes an integral part of the judgment, the latter provides that every "judgment . . . shall bear interest from the day of its entry," highlighting that post-judgment is separate from the judgment itself and only serves to compensate the prevailing party for any delay in its payment.

Massachusetts Federal Court Upholds Personal Jurisdiction Over Plane Crash Claims Against Maintenance Contractor Where Complaint Alleged Single Instance of In-State Maintenance Was Related To Claims, Contrary To Contractor's Affidavit, But Rejects Veil-Piercing Imputation of Contractor's Contacts To Other Defendants As Complaint Did Not Allege Facts Showing Active Direction Of And Participation In Contractor's Activities

In *Katz v. Spiniello Companies, et al.*, No. 16-11380, 2017 U.S. Dist. LEXIS 41449 (D. Mass. March 22, 2107) plaintiffs sued multiple defendants in the United States District Court for the District of Massachusetts for wrongful death from a small airplane crash based on theories of, among others, negligent

design, manufacture and maintenance of the plane's "gust lock" device. Four defendants moved to dismiss for lack of personal jurisdiction: the locking device manufacturer; the maintenance contractor for the plane; the plane manufacturer; and the common parent company of both the maintenance contractor and plane manufacturer. Plaintiff did not allege general jurisdiction over any of the defendants, instead only asserting jurisdiction in connection with the particular claims at issue.

The court first noted that the Massachusetts long-arm statute was coextensive with the limits of constitutional due process, which permits the exercise of specific jurisdiction only when: (1) defendant's forum-state activities are related to the claim at issue; (2) defendant, by its contacts with the forum, purposefully availed itself of the benefits and protections of that state's laws; and (3) the exercise of jurisdiction would be reasonable after balancing the interests of the parties, the forum state and the judicial system.

As to the locking device manufacturer, the court held its Massachusetts contacts—limited to registering to do business in the state and briefly renting space for one employee there—were unrelated to plaintiffs' claims as the contacts did not involve defendant's manufacturing or selling the product in the state. Moreover, the mere presence of defendant's gust lock device in Massachusetts as a consequence of its release into the stream of commerce was insufficient to show defendant's purposeful availment of the benefits of Massachusetts law. The court thus granted the locking device manufacturer's dismissal.

Regarding the maintenance contractor, the Court held that a single instance of maintenance over a year before the crash was sufficiently related to plaintiffs' claims to support personal jurisdiction. Although defendant offered affidavits attesting that the maintenance was unrelated to the gust lock, the court held plaintiffs' complaint allegations to the contrary were sufficient to survive a motion to dismiss. Further, the contractor purposefully availed itself of the benefits of Massachusetts law because, among other things, it owned and operated an in-state maintenance facility with over 225 employees. And the exercise of jurisdiction was reasonable because the burden of proceeding in Massachusetts was low in light of the contractor's in-state contacts and was in any event outweighed by the state's heightened interest in an in-state death allegedly arising from negligent maintenance that also occurred in-state. The court thus denied the contractor's dismissal motion.

Finally, plaintiffs conceded the aircraft manufacturer and its corporate parent had no individual contacts with Massachusetts but argued jurisdiction existed nonetheless because their relationships with the maintenance contractor justified piercing the corporate veil between the entities and imputing the latter's contacts to them. The court, however, held that plaintiffs pled nothing to show that either entity dominated the maintenance contractor by actively directing and participating in its affairs in a manner that would justify such imputation. The court also rejected plaintiffs' argument that the presence in Massachusetts of other aircraft made by the plane manufacturer supported the conclusion that it purposely availed itself of the benefits of the forum. The court therefore granted both defendants' motions to dismiss.

Massachusetts Federal Court Holds Pennsylvania's Strict Statute of Limitations Applies to Negligent Maintenance Claim Because Statute Was Supported By Strong Policy Favoring Expeditious Litigation And Pennsylvania Was Place Of Injury, Outweighing Massachusetts' Interest In Recouping Plaintiff's State-Paid Medical Expenses

In *Mukarker v. City of Philadelphia*, No. 16-10355-PBS, 2017 U.S. Dist. LEXIS 29616 (D. Mass. Mar. 2, 2017), a Massachusetts plaintiff sued a New Jersey manufacturer and maintainer of people-moving products in the United States District Court for the District of Massachusetts alleging he sustained injuries falling over a stuck luggage rack that blocked the exit of a moving walkway at the Philadelphia International Airport. Plaintiff asserted claims for negligent maintenance and strict liability. Discovery was stayed and defendant moved for summary judgment, arguing Pennsylvania's two-year statute of limitations barred the negligence claim and defendant could not be held strictly liable because it did not design, manufacture, sell, distribute or install the particular walkway at issue.

Concerning the applicable statute of limitations, the court held Restatement (Second) of Conflicts of Laws § 142 required application of Massachusetts' three-year statute of limitations, which had not yet expired, so long as it would advance a substantial interest of the forum and not seriously impinge upon the interests of other interested states, here Pennsylvania. Defendant argued that, as site of both the alleged negligent maintenance and injury, Pennsylvania had a considerably

more significant relationship to the parties and conduct at issue and hence its statute should apply, while plaintiff argued Massachusetts had a more substantial interest in recouping plaintiff's medical expenses that were paid for by his state-sponsored insurance plan.

The court first noted that Pennsylvania's strict statute of limitations was strongly supported by policy judgements about the importance of expediting litigation. That state interest, the fact that Pennsylvania was the location of the alleged injury and precedent of the Massachusetts Supreme Judicial Court led the court to conclude that these considerations outweighed Massachusetts' more general interest in having its residents compensated for injuries so that it might recoup state-paid health benefits.

Regarding the strict liability claim, defendant offered the bid it had submitted to the airport, which was solely to maintain the moving walkway, as well as an affidavit stating on information and belief that it did not design, distribute, install or sell the walkway. As discovery had been stayed pending defendant's summary judgment motion, however, the court denied the motion without prejudice to permit plaintiff to take targeted and proportional discovery concerning the assertions in defendant's affidavit.

Massachusetts Federal Court Holds Supplier of Original Jack Assembly Components Could Be Liable, Even Though Replacement Jack Was in Use During Accident, If Remaining Portion of Original Assembly Or Failure to Provide Adequate Warnings Contributed To Plaintiff's Injuries

In *Goodrich v. Garlock Equip. Co*, C.A. No. 4:15-CV-40030-TSH, 2017 U.S. Dist. LEXIS 33850 (D. Mass. Mar. 9, 2017), plaintiff sued an auto parts distributor in the United States District Court for the District of Massachusetts for injuries sustained while using the jack assembly of an asphalt melter to perform maintenance on the melter, alleging the distributor was negligent and breached express and implied warranties with respect to the jack assembly's design, manufacture and warnings. Plaintiff asserted the distributor supplied the melter manufacturer with the original jack assembly components, which consisted of a jack and a mounting bracket that the manufacturer welded to the melter. Although plaintiff was using a different brand replacement jack at the time of the accident, he alleged the distributor failed to provide the melter manufacturer with the instructions and warnings supplied by the original jack's manufacturer, which expressly cautioned that only the same brand replacement parts should be used and no body part should be placed under the jack. The distributor moved to dismiss on the ground it had not supplied the product in use at the time of plaintiff's accident.

The court first noted that plaintiff's complaint would survive dismissal if it alleged sufficient facts to plausibly entitle plaintiff to relief. Here, although plaintiff acknowledged he had been using a replacement jack not supplied by defendant, it was reasonable to assume defendant's original mounting bracket was still welded to the melter and thus could have contributed to the accident. Further, defendant's failure to provide the original jack assembly's safety warnings could have caused the melter manufacturer to fail to include adequate warnings with its finished product, or contributed to the use of an inappropriate choice of replacement jack by plaintiff. As either plausible scenario could entitle plaintiff to relief, the court denied the distributor's motion to dismiss.

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