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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 Affirms Summary Judgment for Vinyl Chloride Suppliers, Holding Sophisticated User Doctrine Only Required Analysis of Decedent's Employer's Knowledge of Product's Risks, Not Whether Suppliers Reasonably Relied on Employer to Transmit Warnings to Employees

In *Taylor v. American Chemistry Council*, 576 F.3d 16 (1st Cir. 2009), plaintiffs sued numerous defendants on numerous claims in the United States District Court for the District of Massachusetts based on their decedent's death from cancer allegedly caused by vinyl chloride ("VC"), a chemical with which he had worked. After various defendants left the case, the remaining defendants, all of which had supplied VC to decedent's employer, moved for summary judgment against plaintiffs' claims of failure to warn of the risks of VC, fraud by involvement in a trade group brochure that contained allegedly false and misleading statements about those risks, and civil conspiracy by aiding decedent's employer's alleged fraud in incorporating portions of the brochure into its own safety manual. The trial court granted the motion (*see October 2007 Foley Hoag Product Liability Update*), and plaintiffs appealed to the United States Court of Appeals for the First Circuit.

Plaintiffs first argued that Massachusetts' sophisticated user doctrine—which permits a supplier to avoid liability for failing to warn a sophisticated end user of a risk when the user would have appreciated the danger to the same extent as a warning would have provided, and which formed the basis for the trial court's grant of summary judgment on the failure-to-warn claims—required an analysis of whether it was reasonable for defendants to rely on decedent's employer to deliver warnings to decedent. The court, however, reasoned that the rationale of the doctrine is to eliminate the need to provide superfluous warnings to a user who already appreciates the product's risks. The court concluded that whether an intermediary employer can be relied upon to transmit a warning is a different question than whether the user is sufficiently sophisticated to render the warning superfluous in the first place. Applying the sophisticated user doctrine, the court found decedent's employer to be sufficiently sophisticated to appreciate various risks of VC through its leading position in the industry, its maintenance of a medical staff and library of literature regarding VC safety, and publications and intra-industry communications about VC safety studies.

Turning to plaintiffs' fraud claims, the court concluded there was no evidence that any defendant was responsible for any allegedly false and misleading statements about VC safety in the trade group brochure. The court held that, although defendants were members of the committee that drafted the brochure, it would be speculative without more to conclude that they were responsible for the specific statements at issue.

Finally, the court affirmed summary judgment against plaintiffs' civil conspiracy claims, concluding there was no evidence that defendants knew that the employer had incorporated

portions of the brochure into the employer's own safety manual. Without knowing this, defendants could not be said to have intended to aid the employer, as required to make out a civil conspiracy claim.

First Circuit Reverses Summary Judgment for Beryllium Suppliers, Holding Jury Could Find Plaintiff Reasonably Did Not Know Likely Cause of Her Harm Until Limitations Period and Sophisticated User Doctrine Did Not Apply Because Jury Could Find Plaintiff's Employer Did Not Know Particulars of Beryllium Risk

In *Genereux v. American Beryllia Corp.*, 577 F.3d 350 (1st Cir. 2009), plaintiff allegedly contracted chronic beryllium disease ("CBD") from workplace exposure to beryllium dust. She and members of her family sued firms that had supplied beryllium-containing products to her former employer in Massachusetts Superior Court for negligence, breach of warranty, failure to warn, fraudulent concealment, violation of Mass. Gen. L. ch. 93A (the Massachusetts unfair and deceptive trade practices statute) and loss of consortium. Defendants removed the case to the United States District Court for the District of Massachusetts based on 42 U.S.C. § 1442(a)(1), which permits removal of any action against a person acting under a federal officer. Defendants thereafter obtained summary judgment against plaintiff's common-law claims based on the applicable three-year statute of limitations and against plaintiff's statutory claims based on the sophisticated user doctrine, which permits a supplier to avoid liability for failing to warn a sophisticated end user of a risk of a product when the user would have appreciated the danger to the same extent as a warning would have provided ([see February 2008 Foley Hoag Product Liability Update](#)). Plaintiff appealed to the United States Court of Appeals for the First Circuit.

Turning first to the statute of limitations issue, the court observed that a claim governed by Massachusetts' discovery rule accrues when a reasonable person in plaintiff's position knows or should know that she was injured and that defendants' conduct was the likely cause. Noting that plaintiff was initially misdiagnosed with asthma before she decided to take a blood test for CBD, the court held that plaintiff was not on notice that beryllium was the "likely cause" of her symptoms at the time of her initial misdiagnosis, in part because she had an independent history of asthma. The court moreover described plaintiff's decision to take the blood test as "merely an initial step in

exploring the possibility" of CBD, also insufficient to put plaintiff on notice. The court suggested that plaintiff's claims "arguably accrued when she received the "abnormal" results of the blood test, but declined to hold as much because even the date on which the lab had analyzed plaintiff's blood was within the three-year limitations period. Accordingly, a reasonable juror could conclude that plaintiff learned that beryllium was the likely cause of her injury at some point within the limitations period, and summary judgment against her common law claims was improper.

The court next observed that the sophisticated user doctrine relieves a manufacturer of a duty to warn of a product's latent dangers if the end user knew or reasonably should have known of those dangers. The court emphasized that Massachusetts law requires the end user to know of the particular dangers that form the basis of plaintiff's claims. Defendants argued that plaintiff's former employer was aware of the risk of CBD, but the court—although agreeing that the employer was the relevant end user—rejected defendant's argument as "stated too broadly." The court instead held that the relevant particular dangers the employer needed to have known of included: (1) the need to periodically air-sample beryllium operations; (2) the need to use local exhaust ventilation in all beryllium operations; (3) the possibility of secondhand exposure through clothing worn home by one who was working with beryllium dust; (4) the possibility of exposure through polishing operations; and (5) that risk existed at a concentration of 2 micrograms per cubic meter. Reviewing the record, the court held that issues of fact existed as to whether plaintiff's former employer was aware of some of these aspects and risks of exposure.

The court rejected defendants' attempt to invoke the bulk supplier doctrine as an alternative ground for affirming summary judgment, holding that issues of fact existed as to whether defendants had supplied their products to plaintiff's former employer in bulk. The court also rejected defendants' argument that plaintiff had produced no evidence that plaintiff worked with their products, noting the record showed that defendants had supplied certain beryllium products to plaintiff's workplace and that she testified to having worked with products matching their descriptions. The court finally rejected defendants' argument that plaintiff's employer was the proximate cause of her injuries, holding that fact questions existed as to whether the employer exercised appropriate care in substituting its own beryllium warnings for defendants' and whether the employer implemented appropriate hygienic practices.

Massachusetts Federal District Court Finds Jurisdiction Over Complaint Against Fetal Gender Detector Manufacturer and Distributor, Holding Counsel's Affidavit Showed Amount in Controversy Exceeded Jurisdictional Minimum Under Class Action Fairness Act and Plaintiffs Alleged Defendant Had Opportunity to Cure Warranty Breach as Required for Magnuson-Moss Act Jurisdiction

In *Blumer v. Acu-Gen Biolabs, Inc.*, --- F. Supp. 2d ---, 2009 WL 2251426 (D. Mass. Jul. 28, 2009), purchasers of a product that was represented to detect the gender of a fetus by analyzing a maternal blood sample filed a putative class action in the United States District Court for the District of Massachusetts against the product's manufacturer and distributor. Plaintiffs alleged claims of unjust enrichment, violations of the Uniform Commercial Code, civil conspiracy, negligence, negligent misrepresentation, violation of the Magnuson-Moss Act and violation of Mass. Gen. L. ch. 93A, the Massachusetts unfair and deceptive practices statute. After the court dismissed the action without prejudice for lack of subject matter jurisdiction, plaintiffs moved to amend their complaint. Defendants opposed the motion to amend on the ground that the proposed amended complaint failed to cure the jurisdictional defects in plaintiffs' earlier complaint.

The court first noted that the Class Action Fairness Act ("CAFA") provides federal diversity jurisdiction over class actions: (1) that consist of at least 100 proposed members; (2) that involve an aggregate matter in controversy in excess of \$5,000,000; and (3) in which any member of the plaintiff class is a citizen of a different state from any defendant (i.e., minimal diversity of citizenship exists). Focusing on the amount in controversy requirement, the court found that plaintiffs' general damages fell short of the jurisdictional minimum: the product was sold for \$275 and the proposed class numbered 6,521 members, yielding an amount in controversy of \$3,586,550. The court, however, found that numerous class members had incurred consequential damages, principally by undergoing additional medical procedures after being told by defendants, in response to complaints that the product had incorrectly predicted fetal gender, that their fetus might have chromosomal abnormalities or other maladies. The court credited plaintiffs' counsel's affidavit estimating that such consequential damages averaged \$1,000 per plaintiff, a figure that yielded an amount in controversy well above CAFA's jurisdictional minimum.

The manufacturer also argued that the court lacked jurisdiction over plaintiffs' Magnuson-Moss Act claims which were based on the manufacturer's failure to comply with its offer of a "200% refund" if the product's gender prediction was incorrect—because: (1) plaintiffs had failed to afford it the opportunity to cure its failure to comply with the refund offer, as the statute requires before federal jurisdiction may be asserted; and (2) many of the named plaintiffs had actually received the refund, and plaintiffs accordingly had failed to satisfy the Magnuson-Moss Act's requirement of at least 100 plaintiffs. The court rejected defendant's first argument, instead crediting plaintiffs' allegation in the proposed complaint that defendant denied their requests for the refund. The court also rejected defendant's contention that many of the named plaintiffs had actually received the refund, holding that such an argument was directed to the merits of those plaintiffs' claims and was not appropriately resolved on a motion to amend the complaint to cure jurisdictional defects.

Massachusetts Federal District Court Remands Asbestos Failure-to-Warn Claims to State Court, Holding Defendants Demonstrated No Colorable Federal Contractor Defense Where They Did Not Show Government Prescribed Content of Warning Rather Than Simply Remaining Silent

In *Holdren v. Buffalo Pumps, Inc.*, 614 F. Supp. 2d 129 (D. Mass. 2009), plaintiffs sued numerous manufacturers in Massachusetts Superior Court claiming failure to warn of dangers associated with asbestos and asbestos-containing products. Defendants removed the case to the United States District Court for the District of Massachusetts under 28 U.S.C. § 1442(a)(1), which permits removal of civil actions against persons acting under a federal officer, asserting a federal contractor defense of immunity from having followed United States Navy specifications. Plaintiff then moved to remand the action to state court for lack of jurisdiction.

The court first noted that, to support removal under § 1442(a)(1), a defendant must demonstrate: (1) a colorable federal defense; (2) that the defendant acted under a federal officer; and (3) a "causal connection" between the acts taken under color of office and the conduct for which the plaintiff has sued. The court further noted that a "colorable" federal contractor defense to a failure-to-warn claim is established by showing that: (1) the government issued reasonably precise specifications governing warnings; (2) the contractor provided the warnings required by the government; and (3) the contractor warned the government

about the dangers in the equipment's use that were known to the contractor but not to the government.

With respect to the colorable federal contractor defense, the court noted that, although defendants produced evidence relating to the Navy's control over the design of the products and ships themselves, defendant had produced no evidence demonstrating that the Navy exercised control over the accompanying labels, manuals and warnings either by mandating a set of approved warnings or rejecting a manufacturer's suggested warning. The court rejected defendants' argument that any attempt to warn of the hazards of asbestos would have been futile because the Navy would have rejected the attempt, concluding that the Navy's silence on the issue of asbestos hazards signified that the issue had not been raised rather than that the Navy knew of such hazards and exercised its discretionary judgment not to issue a warning. The court accordingly concluded that defendants failed to show that there was any underlying Navy policy that would have prevented them from satisfying their state law duty to warn about asbestos, and therefore they had not established a colorable federal contractor defense. For the same reason, the court also held that defendants failed to establish a causal connection between any acts taken under color of federal office and the conduct for which defendants were sued.

Massachusetts Superior Court Holds Order Requiring Nursing Home to Disclose Non-Party Patient's Medical Records Relevant to Litigation Does Not Violate Health Insurance Portability and Accountability Act (HIPAA) or Massachusetts Unfair or Deceptive Practices Statute

In *Mercier v. Courtyard Nursing Care Center*, 2009 WL 1873746 (Mass. Super. Ct. Jun. 11, 2009), a resident of a nursing home sued the home in Massachusetts Superior Court for negligence after being assaulted by another resident. Plaintiff moved to obtain medical records maintained by defendant regarding the resident who had allegedly committed the assault.

Defendant contended that disclosure of the records would violate both the Health Insurance Portability and Accountability Act (HIPAA)'s prohibition on disclosure of medical records

without a patient's authorization and Mass. Gen. L. ch. 94D, § 10B, the Massachusetts Unfair and Deceptive Practices Statute. The court, however, held that a federal regulation implementing HIPAA permitted disclosure of medical records "in the course of a judicial proceeding," including in response to a court order, subpoena or discovery request. The court further observed that, although a Massachusetts regulation states that unauthorized release of a patient's personal or medical record violates ch. 93A, the regulation contains a specific exception for disclosures "required by law." The court held that disclosure pursuant to a court order requiring production of records constituted such a disclosure.

The court also held that the sought-after records were likely to lead to admissible evidence regarding defendant's knowledge of the alleged propensity for violence of the resident who had committed the assault, and therefore ordered production of the records.

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

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