FOLEY HOAG LLP

Product Liability **Update**

In This Issue:

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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 Supreme Judicial Court (Finally) Enforces Agreement for Individualized Arbitration of Unfair and Deceptive Practices Claims Following United States Supreme Court Decision Reversing Another State High Court's Ruling that Such Agreements Are Unenforceable Where They Effectively Deny Any Remedy Due to Impracticality of Pursuing Same

In *Feeney v. Dell, Inc*., 466 Mass. 1001 (Aug. 1, 2013) (*"Feeney III"*), plaintiffs filed a putative class action claiming the defendant computer retailer had violated Mass. Gen. L. ch. 93A (the Massachusetts unfair and deceptive practices statute) by collecting sales tax on plaintiffs' purchase of service contracts when no such tax was actually due. Defendant, represented by **Foley Hoag LLP**, successfully moved to compel arbitration of the named plaintiff's individual claim pursuant to sale terms and conditions mandating arbitration on an individual basis of all claims. Although the arbitrator ruled for defendant on the merits and the trial court entered judgment dismissing the suit, the Massachusetts Supreme Judicial Court ("SJC") in *Feeney v. Dell, Inc.*, 454 Mass. 192 (2009) (*"Feeney I"*) (see **August 2009 Foley Hoag Product Liability Update**), reversed the trial court's order compelling arbitration on the ground that the arbitration agreement violated Massachusetts public policy favoring classwide resolution of small-value consumer claims and therefore was unenforceable. The Court rejected the argument that its ruling was preempted by the Federal Arbitration Act ("FAA"), reasoning that the act makes agreements to arbitrate enforceable "save upon such grounds that exist at law or in equity for the revocation of any contract," and a public policy defense is such a generally applicable ground.

Several years later, while on remand to the trial court, defendant moved to reinstate the judgment of dismissal, arguing *Feeney I* had been overruled by the United States Supreme Court's decision in *Concepcion v. AT&T Mobility LLC*, 131 S. Ct. 1744 (2011) (see **July 2011 Foley Hoag Product Liability Update**), which held that the FAA preempts state-law contract rules that would be an obstacle to accomplishing the act's objective of enforcing arbitration agreements as written, including any class action waiver included therein. After the trial court denied defendant's motion, the SJC granted interlocutory review and, in *Feeney v. Dell, Inc.*, 465 Mass. 470 (Jun. 12, 2013) (*"Feeney II"*), interpreted *Concepcion* as concluding the FAA does not preempt a state law rule holding an agreement for individualized arbitration unenforceable where the cost or complexity of pursuing such a claim would effectively preclude a consumer from obtaining any remedy (see **July 2013 Foley Hoag Product Liability Update**).

Shortly thereafter, however, the United States Supreme Court in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (Jun. 20, 2013) (see **July 2013 Foley Hoag Product Liability Update**), held an agreement mandating individualized rather than classwide arbitration enforceable even though the cost of arbitrating exceeded any potential individual recovery, and defendant sought rehearing of *Feeney II*. In *Feeney III*, the SJC issued a brief opinion acknowledging that *American Express* had "explicitly rejected" *Feeney II's* interpretation of *Concepcion* and made clear that the likelihood that a plaintiff's claim would actually be pursued or enforced in an individual arbitration did not affect whether the agreement to arbitrate was enforceable under the FAA. Although it characterized the Supreme Court's reasoning in *American Express* as "untenable," the SJC accepted that the decision was a controlling statement of federal law and thus reversed the trial court's order denying reinstatement of the judgment of dismissal.

Massachusetts Supreme Judicial Court Holds Toy Seller's Failure to Ensure Pool Slide Complied with Federal Safety Regulation Supports Liability Verdict, Non-Compliance Plus Seller's Right to Indemnification From Manufacturer Supports Gross Negligence Finding Justifying Punitive Damages, and Approximately 7:1 Compensatory-to-Punitive Damages Ratio Does Not Violate Due Process

In *Aleo v. SLB Toys USA, Inc.*, 466 Mass. 398 (2013), a young wife and mother was rendered quadriplegic in the presence of family members, and died the next day, when an inflatable pool slide failed to bear her weight and she struck her head on the concrete lip of the above-ground pool into which she was attempting to slide head-first. Her husband and estate sued the slide seller in Massachusetts Superior Court asserting claims for negligence, breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability), wrongful death and violation of Mass. Gen. L. ch. 93A (the Massachusetts unfair and deceptive practices statute) based on the slide's allegedly defective design and seller's failure adequately to warn of its dangers. A jury found defendant liable for negligence, breach of warranty and wrongful death and awarded compensatory damages of $2.64 million. The jury also found defendant grossly negligent and awarded $18 million in punitive damages. The Massachusetts Supreme Judicial Court ("SJC") granted direct appellate review.

On appeal, the SJC held the evidence supported the jury's negligence and breach of warranty findings, focusing primarily on the fact that the slide had not been tested or certified pursuant to 16 C.F.R. § 1207, a federal safety standard that was applicable to the slide and had been entered into evidence. Defendant argued strenuously that the standard pre-dated the existence of, and was inapplicable to, inflatable slides, but the Court held defendant had not preserved that issue for appeal. The standard, which was intended to prevent accidents of the type that killed decedent, required pool slides to be capable of supporting 350 pounds, while the manual and label for the accident slide stated it would only support 200. The Court also held that these facts, along with evidence that the slide's Chinese manufacturer had agreed to indemnify defendant for losses due to a product defect, from which the jury could reasonably conclude that defendant "was indifferent to the safety of the slide," were sufficient to support the jury's finding of gross negligence and hence its award of punitive damages.

As to the punitive damages amount, the SJC rejected defendant's argument that the $18 million award was grossly excessive and violated due process. First, the Court found defendant had acted reprehensibly (although not intentionally) by not ensuring the slide's compliance with safety regulations in the face of risk of catastrophic injury, and noted defendant had imported thousands of such slides. Second, the ratio of punitive to compensatory damages was in the single digits (approximately 7:1), which courts have generally found consistent with due process. Third, defendant could potentially have been subject to civil penalties up to $1.25 million for importing thousands of non-complying slides, and the approximately 14:1 ratio of punitive damages to potential civil penalties was also within the range found by other courts to satisfy due process. The Court rejected defendant's argument that an approximately 1:1 ratio of punitive to compensatory damages was the maximum consistent with due process because the compensatory award alone was already "substantial," ruling that where "the monetary value of noneconomic harm might have been difficult to determine," as here, higher ratios are justifiable.

The SJC also determined the trial court properly excluded the opinion of a defense expert who had used a mannequin to simulate the accident and was prepared to opine that decedent could not have been injured by sliding, as opposed to diving, down the slide. The Court noted that, in contrast to the circumstances of the actual accident, the expert's mannequin

was considerably taller than decedent, had a rigid neck, had rigid and outstretched arms and took longer to reach the bottom of the slide than decedent had. Indeed, the expert herself admitted her experiments did not accurately reflect the accident circumstances.

Massachusetts Federal Court Holds Expert Opinion That Benzene Caused Acute Promyelocytic Leukemia Inadmissible Because "Differential Diagnosis" Unreliable Where Majority of Disease Cases Are of Unknown Cause, "Linear No-Threshold" or "No Safe Level" Theory is Scientifically Unreliable and Physician Was Unqualified to Draw Conclusions From Widely Disparate Epidemiologic Studies

In *Milward v. Acuity Specialty Products Group, Inc.*, 2013 WL 4812425 (D. Mass. Sept. 6, 2013), a husband and wife sued three chemical companies in the United States District Court for the District of Massachusetts, claiming workplace exposure to defendants' benzene-containing products caused the husband to develop acute promyelocytic leukemia ("APL"). In support of their claim, plaintiffs proffered the testimony of a toxicologist to opine on general causation, which testimony was previously held admissible by the United States Court of Appeals for the First Circuit (see **April 2011 Foley Hoag Product Liability Update**), and two experts who would opine on topics relating to specific causation. The first expert, an industrial hygienist, would quantify the husband's exposure from the defendant's and other products, while the second, a physician, would opine that, based on the exposure estimate, there was a reasonable medical probability that exposure to benzene was a cause-in-fact of plaintiff's APL. Defendant moved to exclude the testimony of both experts and for summary judgment.

Defendant's primary complaints regarding the hygienist's exposure opinion were based on alleged flaws in the factual assumptions on which the opinion was based. The court held these were matters that affected the testimony's weight, not its admissibility, and could be developed by counsel on cross-examination. The court also held that the methodology used to estimate plaintiff's exposure was sufficiently reliable, notwithstanding the absence of actual exposure data which made the parties' estimates inherently uncertain, and therefore the hygienist's testimony was admissible.

The court held, however, that the physician's causation opinion was inadmissible. The physician based her opinion primarily on the fact that plaintiff's exposure to benzene preceded his development of APL, her assertion that a survey of epidemiologic studies showed an increased risk of acute myeloid leukemia ("AML") following low-dose exposures to benzene and a "differential diagnosis" analysis by which the expert arrived at the most likely cause of plaintiff's injury by ruling out other probable causes. The court first held that while differential diagnosis is a useful and accepted means of assessing causation when a disease has a discrete set of causes that can be systematically eliminated based on the evidence, it is not so useful in cases like this where most instances of the plaintiff's disease--here, 70-80%--are of unknown cause.

The court then rejected the theory that any level of benzene exposure is sufficient to cause leukemia, based on a "no safe level" or "linear no-threshold" model of causation, as a basis for the expert's causation opinion, noting that multiple courts have found an absence of scientific evidence supporting such an analysis as a reliable methodology for determining causation. With that model rejected, and because the expert could not quantify a threshold exposure level below which there was no significant chance of developing APL or AML, she could not claim the husband's cumulative exposure surpassed any such threshold.

Finally, the court rejected the expert's assertion of an increased risk associated with plaintiff's benzene exposure level based on levels at which peer-reviewed epidemiologic studies had purportedly shown a significantly increased risk of AML. The expert conceded at deposition that she was neither an epidemiologist nor a researcher and did not intend to weigh different epidemiologic studies. The court thus found her unqualified to choose among studies that reached dramatically different conclusions about the level of exposure that significantly increases leukemia risk, and hence to draw reliable conclusions about whether the husband's cumulative exposure had indeed resulted in such a risk. In short, the expert's "professed inability to engage with the conflicting epidemiological literature makes her opinion based on that literature unreliable and unhelpful to a jury."

Having excluded the expert's specific causation opinion, the court held plaintiffs could not establish that the husband's benzene exposure was more likely than not a cause-in-fact

of his leukemia--let alone that benzene from the defendant's products was a substantial contributing factor in that causation--and granted summary judgment for defendant.

Massachusetts Federal Court Holds No Issue Preclusion on Design Defect Arises from Prior Jury Verdict for Different Plaintiff Under Different Law, and Failure-to-Warn Claim Fails Because No Evidence Plaintiff Would Have Behaved Differently If Proposed Warning Had Been Given

In *Connell v. BRK Brands, Inc.*, 2013 WL 3989649 (D. Mass. Aug. 1, 2013), decedent was killed by a fire started by a lit cigarette she left in her bed. The smoke alarm nearest to her bedroom (none was inside it) sounded at some point during the fire, but it was not known exactly when. The administratix of decedent's estate sued the alarm manufacturer in the United States District Court for the District of Massachusetts asserting, among other claims, negligence and breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability) based on the allegedly defective design of the smoke detector and inadequate warning of its dangers.

The alarm utilized ionization technology to detect smoke based on its chemical properties, rather than photoelectric sensor technology which detects smoke based on its interruption of a light beam. Multiple industry groups and regulatory agencies have found that, although "photoelectric smoke alarms generally respond faster to smoldering fire conditions and ionization smoke alarms generally respond faster to flaming fire conditions, both types provide adequate protection." After discovery, plaintiff sought partial summary judgment, arguing defendant should be precluded from litigating whether its ionization-only smoke detector was defectively designed because a jury in a New York federal action brought by a different plaintiff already had determined that it was, and thus collateral estoppel, also referred to as "issue preclusion," was appropriate. Defendant opposed the motion and itself sought summary judgment on the grounds that there was no competent evidence to establish the smoke detector was defective and unreasonably dangerous and there was no evidence the alarm failed to sound in a timely fashion or its warnings were inadequate, thereby causing the decedent's death.

As to plaintiff's motion, the court noted that to invoke collateral estoppel based on a prior litigation between defendant and another party, *i.e.*, "non-mutual" collateral estoppel, plaintiff must establish that: (1) the issue sought to be precluded was the same as that involved in the prior proceeding; (2) the issue was actually litigated in that proceeding; (3) the issue was determined by a final judgment or order; and (4) determination of the issue was essential to the judgment or order. Here, preclusion was not appropriate both because plaintiff could not establish the issue was identical to that litigated in the New York action, and also for reasons of public policy and fundamental fairness. Regarding identity of the issues, the prior proceeding was decided under New York law, and there was no evidence that Massachusetts law, which governed plaintiff's claim, was identical; indeed defendant argued the laws of the two states differed in material respects. Regarding fairness, there were several verdicts from other jurisdictions in which juries had determined that ionization-only smoke alarms were *not* defectively designed, and it would be unfair to allow plaintiff to cherry-pick the lone verdict that favored her position.

As to defendant's motion, the court noted that the absence of evidence on both design defect and causation created "a compelling argument" that summary judgment was warranted on the design defect claim. The court nevertheless denied the motion because it was not convinced that no reasonable jury could find for plaintiff, even though the inferences the jury would have to make to reach that result were "at best tenuous." The court did grant summary judgment against plaintiff's claim the smoke detector's warnings were inadequate for failing to advise that ionization technology was slower in responding to smoldering fires than photoelectric technology, as there was no evidence decedent would have replaced the alarm with a photoelectric one if the proposed warning had been given. Indeed, there was no evidence she had ever read any of the warnings that were given, and if she had, the evidence was that she ignored them. For example, the instructions advised that each bedroom should have a smoke alarm inside it (but there was none in decedent's bedroom), stated the alarm should have been replaced two years before the fire and warned against smoking in bed. Thus the "rank speculation" in which the jury would have to engage to find for plaintiff rendered her failure-to-warn claim insufficient as a matter of law.

Massachusetts Federal Court Holds "Economic Loss Doctrine" Does Not Bar Claim for Breach of Implied Warranty of Fitness for Particular Purpose to Recover for Purely Economic Loss Because Claim Was Contractual, Not Tort-Based, in Nature

In *Sharp v. Hylas Yachts, Inc.*, 2013 WL 4517181 (D. Mass. Aug. 26, 2013), the owner of a luxury yacht sued its manufacturer after the yacht broke down on multiple occasions, requiring significant expense to perform repairs and design modifications to fix the alleged defects. The lawsuit, brought in the United States District Court for the District of Massachusetts, asserted claims for negligence, breach of express and implied warranties, breach of contract and violation of Mass. Gen. L. ch. 93A (the Massachusetts unfair and deceptive practices statute) and sought damages for loss of use, costs of repair and other additional expenses. The suit did not allege any personal injury or damage to property other than the yacht itself.

Thereafter, the manufacturer brought a third-party complaint against the manufacturer of several components used in the yacht's construction, asserting claims for, among other things, indemnification, contribution, breach of contract, breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability) and breach of the implied warranty of fitness for a particular purpose. The component manufacturer moved for summary judgment, arguing that the "economic loss doctrine" barred all tort-based and implied warranty claims as a matter of law and there was insufficient evidence the components it manufactured were defective. After the court ordered the yacht manufacturer to respond regarding the applicability of the economic loss doctrine--under which purely economic losses are unrecoverable under tort-based theories, including strict liability--the manufacturer conceded its implied warranty of merchantability claim was barred, but argued its claim for breach of the implied warranty of fitness for a particular purpose was contractual in nature and thus unaffected by the doctrine.

The court acknowledged that numerous courts have held that actions under Massachusetts law for breach of implied warranties are the functional equivalent of strict liability in other jurisdictions. On a closer examination, however, it was clear that those courts were referring to claims for breach of the implied warranty of merchantability under Mass. Gen. L. ch. 106, § 2-314 and § 2-318, not the implied warranty of fitness for a particular purpose under § 2-315. Moreover, even for the former claims, the Massachusetts Supreme Judicial Court has distinguished between contract-based and tort-based breach of warranty actions, only the latter of which are the functional equivalent of strict liability. Accordingly, because here the yacht manufacturer's warranty claim was contract-based and the damages it sought were contractual, the claim was not barred by the economic loss doctrine.

Massachusetts Federal Court Dismisses Claims Against Hip Implant Manufacturers Because Plaintiff Failed to Allege Specific Facts Regarding Alleged Defects, Express Warranties and How Defendants' Conduct Caused Her Injuries

In *Exum v. Stryker Corp.*, 2013 WL 3786469 (D. Mass. July 17, 2013), plaintiff's mother underwent a total right hip anthroplasty during which her hip was replaced with a prosthetic implant allegedly designed, manufactured and marketed by defendants. The implant subsequently failed, allegedly because its acetabular component had "migrated anteriorly and medially" and become "anteverted 60 degrees." To alleviate her extreme pain, and avoid "catastrophic failure" and associated health complications, the treating physician recommended a revision surgery to remove and replace the implant, and plaintiff's mother died during that surgery. Thereafter, plaintiff sued in Massachusetts Superior Court, alleging defects in the device caused her mother's injuries and death and asserting claims for negligence, breach of express and implied warranties, including the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability), wrongful death and violation of Mass. Gen. L. ch. 93A (the Massachusetts unfair and deceptive practices statute). Defendants removed the case to the United States District Court for the District of Massachusetts on the basis of diversity jurisdiction and moved to dismiss. The court allowed the motion, dismissing the action in its entirety.

Both the negligence and implied warranty of merchantability claims failed because plaintiff did not identify any facts plausibly demonstrating that the device was defectively designed or manufactured or that any such defect caused plaintiff's injury or death. For example, plaintiff alleged no facts to support her summary conclusion that the migration of the acetabular component was the result of a product defect. Neither did she allege that the device's migration or

anteversion was the kind of occurrence that ordinarily does not happen in the absence of manufacturer negligence and, therefore, the doctrine of *res ipsa loquitur* that would allow an inference of negligence did not apply.

The court then held that plaintiff's express warranty claim could not survive because plaintiff failed to allege any promise made by defendants or that such promise became "part of the basis of the bargain." Similarly, the court dismissed plaintiff's claim of breach of an implied warranty of fitness for a particular purpose because plaintiff did not allege any particular purpose of the implant that differed in any way from its ordinary one. Because plaintiff's negligence and breach of warranty claims were inadequately pled, and plaintiff had not alleged any facts that would support a claim that defendant acted willfully, wantonly or recklessly, the wrongful death claim--and the related loss of consortium claim--also was dismissed. Finally, the court dismissed plaintiff's Mass. Gen. L. ch. 93A claim, finding that plaintiff failed to specify any acts or practices engaged in by defendants that would violate the statute.

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