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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 Supreme Judicial Court's Recognition of Cause of Action for Projected Medical Monitoring Costs Based on Mere Subclinical Physiological Changes and Increased Risk, Rather Than Clinically Manifest Harm, Is Significant for Tort Law in Massachusetts, and Perhaps Elsewhere

As detailed in an October 21, 2009 **Foley Hoag Product Liability Alert**, the Massachusetts Supreme Judicial Court ("SJC") in *Donovan v. Philip Morris USA, Inc.,* 455 Mass. 215 (2009), recognized a cause of action for projected medical monitoring costs based on a plaintiff's mere subclinical physiological changes and increased risk, and despite the absence of clinically manifest harm. Further analysis of the decision reveals that it may have a significant impact on tort liability in Massachusetts, and even nationally.

Plaintiffs in *Donovan* filed a putative class action in the United States District Court for the District of Massachusetts on behalf of all Massachusetts residents age 50 or older who had smoked defendant's cigarettes for twenty or more pack-years, asserting design defect claims for the cigarettes' alleged delivery of unreasonably high carcinogen levels. None of the plaintiffs or putative class members suffered from any clinically manifest smoking-related illness; rather, they alleged subclinical changes in their lung tissues and a resulting significant increase in their risk of lung cancer. On defendant's motion to dismiss, the district court certified to the SJC, among other things, the question whether Massachusetts recognized a cause of action for medical monitoring under the circumstances alleged.

The SJC rejected defendant's argument that longstanding tort principles required plaintiffs to prove physical harm manifested at least by objective symptomatology in order to recover, and held that subclinical physiological changes and increased risk would adequately establish the element of injury under Massachusetts law and the alleged medical necessity of monitoring would adequately establish the element of damages. Accordingly, the court held that a plaintiff states a claim for medical monitoring if he or she proves, among other things: (1) legally culpable conduct, such as negligence, breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability) or violation of Mass. Gen. L. ch. 93A (the Massachusetts unfair or deceptive practices statute); (2) resulting exposure to a hazardous substance that produced subcellular changes substantially increasing the risk of serious disease; (3) that an effective medical test for reliable early detection of the disease exists; and (4) such medical tests are reasonably necessary, conformably with the standard of care.

The *Donovan* decision is likely to be cited by parties and courts seeking to expand tort liability in Massachusetts and elsewhere for a number of reasons. For one thing, the decision can be cited as beginning to reverse a clear trend *away* from recognizing medical monitoring claims in the absence of a manifest physical injury, a trend that started with the United States Supreme Court's decision in *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997), and continued with seven of the last eight state high courts to consider the issue. Moreover, although it asserted that its holding was consistent with existing Massachusetts law regarding the extent of physical harm necessary to justify imposing liability in tort, the court overtly embraced the need to *expand* such liability due to the hazards of "modern living." Thus the court argued that while "tort law developed . . . when the vast majority of tortious injuries were caused by blunt trauma and mechanical forces[,] [w]e must adapt to the growing recognition that exposure to toxic substances and radiation may cause substantial injury which should be compensable even if the full effects are not immediately apparent."

In addition, the court suggested it might go even further in a future case, stating that it would "leave for another day consideration of cases that involve exposure to levels of chemicals or radiation *known* to cause cancer, for which immediate medical monitoring may be medically necessary although *no* symptoms or subclinical changes have occurred." (second emphasis added). Taking advantage of this suggestion, a group of plaintiffs filed a putative class action in Massachusetts federal court shortly afterward seeking medical monitoring for persons implanted with an allegedly defectively designed medical device, even though plaintiffs did not allege they had suffered any actual symptoms or even subclinical changes. *Hanks v. Davol, Inc.,* No. 09-11901-NMG (D. Mass.).

Moreover, although *Donovan* expressly allowed recovery only for the projected costs of medical monitoring, the court's recognition of subcellular changes as an adequate injury to support recovery of these tangible costs could also potentially support recovery for related, and highly subjective, emotional distress damages such as for the *fear* of developing the disease for which monitoring is required. While the court suggested that a higher degree of injury would be required to support a claim for negligent infliction of emotional distress than for physical injury, the court had said precisely the opposite in an earlier opinion.

Finally, although the issue was not presented in *Donovan*, the court pronounced in dicta that the "single controversy rule," which normally requires a party to include in a single action all related claims that the party has against the opposing party, would not bar a future action by a medical monitoring plaintiff if she subsequently contracted the disease at issue, as "[t]his rule was never intended to address the problem of toxic torts, where a disease may be manifested years after the exposure."

First Circuit Articulates Criteria for Accepting Discretionary Appeal Under Class Action Fairness Act of Order Remanding Putative Class Action to State Court, Holds Class Certifiability Is Irrelevant to Existence of Federal Jurisdiction

In *College of Dental Surgeons of Puerto Rico v. Connecticut General Life Insurance Company*, 585 F.3d 33 (1st Cir. 2009), a statutorily-created, compulsory-membership association of Puerto Rico dentists sued multiple insurance companies in a Puerto Rico trial court alleging that defendants' practices violated Puerto Rico law and harmed association members. Plaintiff sought class action treatment under Puerto Rico statute, declaratory and injunctive relief and $150 million in damages. Certain defendants removed the action to the United States District Court for the District of Puerto Rico under the expanded diversity jurisdiction provisions of the Class Action Fairness Act ("CAFA"). On motions of plaintiff and other defendants, however, the district court remanded the action, reasoning that CAFA jurisdiction was lacking because the complaint did not sufficiently define the putative class to meet the requirements of Fed. R. Civ. P. 23. The United States Court of Appeals for the First Circuit, pursuant to 28 U.S.C. § 1453(c)(1), granted the removing defendants' application for interlocutory appeal from the remand order.

The court first observed that § 1453(c)(1) grants federal courts of appeals discretionary authority to accept an appeal from a district court decision on a motion to remand a putative class action—whereas remand orders were not appealable before CAFA—but does not elaborate on how that discretion should be exercised. The court accordingly articulated criteria

bearing on its willingness to accept such an appeal, including: whether the CAFA question presented is important, unsettled, consequential to the resolution of the case, likely to evade review absent interlocutory appeal and likely to recur; whether the district court's order is sufficiently final to permit review; and the balance of harms.

Turning to the trial court's order, the court noted that CAFA created federal jurisdiction for class actions—defined as any civil action filed under Fed. R. Civ. P. 23 or any "similar [s]tate statute or rule . . . authorizing an action to be brought by 1 or more persons as a class action"—in which the amount in controversy exceeds $5 million and any defendant is diverse in citizenship from any plaintiff. Under the statutory language, therefore, the court held that the relevant issue for jurisdictional purposes was not whether the proposed class satisfied the requirements of Fed. R. Civ. P. 23 on the bare pleadings, but simply whether the suit had been "brought . . . as a class action" under Puerto Rico statute, which it had. In response to appellees' contention that the suit could not have been brought as a class action because the association lacked standing to assert class claims on its members' behalf, the court applied federal standing law to conclude that plaintiff had associational standing to sue on its members' behalf, at least with respect to the claims for declaratory and injunctive relief. Accordingly, the court reversed the remand order.

First Circuit Holds Defendant's Opposition to Plaintiff's Motion to Remand Cured Failure to Consent to Removal, Holds District Court Abused Discretion in Precluding Testimony by Untimely-Disclosed Expert Where Practical Effect of Preclusion was Dismissal and Party Offering Expert Had Not Violated Other Court Orders

In *Esposito v. Home Depot U.S.A., Inc.,* 590 F.3d 72 (1st Cir. 2009), an individual whose fingers were severed by a power saw sued the saw's manufacturer, packager and retailer in Rhode Island state court alleging the saw was defectively designed. The manufacturer and packager removed the case to the United States District Court for the District of Rhode Island and the retailer shortly thereafter filed an answer. Plaintiff moved to remand based on the retailer's failure to consent to the notice of removal, and all three defendents opposed the motion, but the trial court denied the motion on the ground that, under the circumstances, the retailer's answer constituted consent. Subsequently in the litigation, plaintiff failed to disclose his expert engineer by the court-ordered deadline and—six weeks after the deadline had passed—moved to extend the deadline by 90 days. The trial court denied the motion, thereby precluding plaintiff's expert from testifying, and then granted defendants' motion for summary judgment premised on plaintiff's lack of an expert. Plaintiff appealed to the United States Court of Appeals for the First Circuit.

On the removal issue, the court first observed that although the "rule of unanimity" requires all defendants to consent to removal of most multi-defendant cases, courts are divided about how a defendant may express its consent. The court further noted that a defendant's failure to consent to removal is not a jurisdictional defect and therefore may be cured or waived. Declining to establish a "wooden rule," the court instead held that any procedural defect in the removal was cured when the retailer opposed plaintiff's motion to remand, if not when the retailer filed its answer. The court stated that, in this case—where the parties had already extensively litigated the case in federal court—to conclude that the retailer's failure to consent now required remand "would place form before function."

Turning to the sanction issue, the court acknowledged that Fed. R. Civ. P. 37(c)(1) permits the trial court to sanction a party for failing to timely disclose an expert, including by excluding the expert's testimony. The court also articulated the factors relevant to its review of the trial court's sanction decision, and noted that it may reverse only for abuse of discretion. Here, however—where denying plaintiff's motion to extend the expert deadline effectively disposed of plaintiff's case, because it left him without an expert to support his design defect theory—the court construed the sanction levied by the trial court as one that carried the force of a dismissal and stated that, for that reason, "the justification for [the sanction] must be comparatively more robust."

The court acknowledged that plaintiff never offered a legitimate reason for his late disclosure, and had prejudiced defendants by causing them to prepare a summary judgment motion premised on the expert's exclusion. The court also noted, however, that plaintiff had neither previously failed to comply

with court-ordered deadlines, nor ignored warnings from the district court, nor—by all appearances—ignored the expert deadline for reasons of gamesmanship. The court accordingly concluded that the trial court had abused its discretion by imposing "a fatal sanction" for "a single oversight."

One judge on the panel, a district court judge sitting by designation, dissented from the majority's decision on the sanction issue, arguing that the majority improperly applied the higher standard for levying a sanction of dismissal, rather than the lower Rule 37(c)(1) standard for levying a sanction of witness preclusion.

Massachusetts Federal District Court Remands Claims to State Court Based on Defendants' Failure to Express Unanimous Consent to Removal Within Thirty Days of Service of Both First- and Last- Served Defendants

In *Abdullah v. American Products Co.,* 661 F. Supp. 2d 84 (D. Mass. 2009), plaintiff sued the manufacturer and seller of a sports cycle in Massachusetts Superior Court for negligence and violation of Mass. Gen. L. c. 93A (the Massachusetts unfair and deceptive trade practices statute) after he was injured while riding the sports cycle. The seller removed the action to the United States District Court for the District of Massachusetts and plaintiff moved to remand. Only then did the manufacturer consent to the action's removal.

The court observed that, pursuant to the "rule of unanimity," all defendants must consent to removal of most multi-defendant cases. The court additionally observed that 28 U.S.C. § 1446 requires a defendant to remove an action within thirty days of being served with the complaint. The court outlined two standards recognized in the case law for measuring the thirty-day removal window. Under the "first-served defendant" approach, all defendants have thirty days to either remove or consent to removal from the time the first defendant is served with the complaint, regardless of whether the other defendants have been served by the time that window closes. Under the "last-served defendant" approach, the action may be removed by consent of all defendants within thirty days after the last defendant is served.

The Court declined to decide which approach to adopt, as the manufacturer's consent was untimely under either approach. The court rejected the manufacturer's argument that it had not retained counsel at the time of the seller removed, holding that, although the "last-served defendant" approach "excuses earlier-served defendants from having to consent to removal within 30 days of being served, it does not afford them a license to consent whenever they please."

Massachusetts Superior Court Holds Claim That Cigarettes Should Have Delivered Lower Nicotine Dose Does Not Improperly Seek to Ban Entire Product Category, Plaintiff Need Not Show Decedent Would Have Used Low-Nicotine Product to Prove Causation

In *Haglund v. Philip Morris, Inc.,* 2009 WL 3839004 (Mass. Super. Ct. Oct. 20, 2009), the widow of a man who had died of lung cancer sued a cigarette manufacturer in Massachusetts Superior Court for breach of the implied warranty of merchantability based on the allegedly defective design of defendant's cigarettes to deliver too much nicotine. In support of her claim, plaintiff proposed an alternative design of a "non-addictive cigarette" delivering a much lower nicotine dose.

Defendant moved for summary judgment, arguing first that the design defect claimed by plaintiff was not unique to its cigarettes but rather was characteristic of all cigarettes, so that the claim would improperly render all cigarettes unlawful. The court rejected this argument, asserting that plaintiff's claim was specific to defendant—that defendant breached the implied warranty of merchantability because its specific cigarettes contained a design defect (i.e., excessive nicotine)—not merely "that all cigarettes are bad."

Defendant next argued that plaintiff could not prove that its cigarettes caused decedent's death because plaintiff had conceded that her late husband would not have smoked the allegedly safer, low-nicotine alternative design cigarettes. The court, however, held that a plaintiff in a defective design claim need only demonstrate the defect and a feasible safer alternative design—not anything about the injured party's conduct with respect to the alternative design. The court also observed that the Massachusetts Supreme Judicial Court has

suggested that, even if defective design plaintiffs did have the burden to show that the injured party would have used the safer alternative design, such a burden would not apply in a case such as this one because no addicted smoker could switch to a non-addictive low-nicotine cigarette.

Defendant next argued that plaintiff could not establish the feasibility of her proposed alternative design because the technology to create such a product did not exist when the decedent began smoking, and because the low-nicotine product would not be accepted by consumers. The court stated that, because cigarettes are inherently dangerous and "cannot be used safely for the ordinary purposes for which they are fit, namely smoking," the plaintiff need only show "an available alternative design that would reduce the risk without undue cost or interference with the [cigarette's] performance" to overcome summary judgment. Because the parties' experts disagreed about whether technology at the time decedent began smoking could have produced such an alternative design, or whether the market could have supported such a product, the court held that summary judgment was inappropriate.

Defendant finally argued that plaintiff's claims were preempted by federal law, suggesting that Congress had recognized the lawfulness of cigarettes with significant doses of nicotine by not regulating the amount of nicotine in cigarettes despite extensively regulating other aspects of cigarettes, including their labeling. The court, however, held that Congress' silence was insufficient to preempt plaintiff's claim. The court also cited the Family Smoking Prevention and Tobacco Control Act, enacted on June 22, 2009, which authorizes the United States Food and Drug Administration "to set national standards controlling the manufacture of tobacco products and the identity, public disclosure, and amount of ingredients used in such products," but expressly does not preempt product liability suits under state law about such matters.

Massachusetts Federal District Court Transfers Putative Class Action to California Federal District Court Based in Part on Pendency of Factually Identical Class Action There

In *Wiley v. Gerber Products Company,* 667 F. Supp. 2d 171 (D. Mass. 2009), a purchaser of fruit juice snacks for toddlers brought a putative class action against the snacks' manufacturer in the United States District Court for the District of Massachusetts based on the snacks' allegedly deceptive packaging. Plaintiff alleged fraud, breach of warranties and intentional misrepresentation under Massachusetts and New Jersey law. Defendant moved to transfer the case to the United States District Court for the Southern District of California, where a factually-identical class action already was pending.

The court first cited 28 U.S.C. § 1404(a) for the proposition that, for the convenience of parties and witnesses, in the interest of justice, a federal district court may transfer an action to any other district where the action might have been brought. The court rejected plaintiff's argument that, as a Massachusetts resident who bought the snacks in Massachusetts, she could not have brought the action in California. The court reasoned that, under the general venue statute, 28 U.S.C. § 1391, a corporate defendant may be sued wherever it "resides," which in turn is defined as wherever it is subject to personal jurisdiction, and defendant had consented to personal jurisdiction in California.

Turning to whether transfer was warranted, the court first held that the possibility of consolidating duplicative actions can and should be a consideration in deciding a motion to transfer, and that in such a circumstance, the preferred venue is that of the first-filed action. The court rejected plaintiff's argument that Massachusetts was a more convenient forum than California, holding that "the proper inquiry is not whether Massachusetts is more convenient than California in the abstract but instead whether sanctioning a second, nearly identical action here is more convenient than transferring the case for the purpose of consolidation." The court rejected plaintiff's argument that the court's familiarity with Massachusetts law weighed against transfer, noting that the putative nationwide class action would require choice of law analysis and the court had no special competence in the law of any other state. Finally, the court held that plaintiff's choice of forum, which traditionally weighs against transfer, was entitled to less deference because plaintiff was proceeding on behalf of a nationwide class.

Massachusetts Federal District Court Permits Expert Testimony Regarding Hastening of Amyotrophic Lateral Sclerosis Symptoms by Toluene Despite Lack of Exposure Measurements and Epidemiological Studies, Excludes Physician Testimony About Negligence As Invading Province of the Jury

In *Allen v. Martin Surfacing*, 263 F.R.D. 47 (D. Mass. 2009), the survivors of a college football coach who died of amyotrophic lateral sclerosis ("ALS") sued the firm that had resurfaced a gymnasium adjacent to decedent's office for negligence and wrongful death in the United States District Court for the District of Massachusetts. Plaintiffs alleged that toluene, a chemical defendant had used during the weeklong resurfacing project, had accelerated the decedent's development of ALS' symptoms and defendant had negligently failed to warn of the chemical's toxic nature. Defendant moved for summary judgment and/or to preclude the testimony of plaintiffs' expert industrial hygienist, neurotoxicologist and occupational physician.

Plaintiffs offered the testimony of William Ewing, an industrial hygienist with almost thirty years of experience focusing on the properties of airborne contaminants, to establish that the decedent's exposure to the mixture of solvents (including toluene) used in the resurfacing process bordered on or surpassed applicable guideline limits. Defendant challenged Ewing's qualifications and methods, including his reliance on self-reported symptoms and lack of air sampling data specific to the resurfacing project in question. The court held that although Ewing did not have any specific expertise in toluene, his general industrial hygiene experience qualified him to testify. The court also found that defendant's challenges to Ewing's methodology went to the weight of his testimony rather than its admissibility.

Plaintiffs also offered the testimony of Dr. Marcia Ratner, a neurotoxicologist with experience in the diagnosis and treatment of patients with neurodegenerative disorders, to establish both general causation (i.e., that toluene hastens the onset and progression of ALS by adding toluene's known neurotoxic effects to similar neurodegenerative effects that characterize ALS) and specific causation (i.e., toluene had such an effect upon decedent specifically). Defendant challenged Dr. Ratner's qualifications as lacking particular expertise with ALS, as well as the methodological reliability of her opinions. The court held that Dr. Ratner's general qualifications were sufficient and her lack of expertise regarding ALS specifically was a matter of weight, rather than admissibility. Further, the court found that a lack of epidemiological studies supporting her general and specific causation theories did not render them inadmissible and that, although the novelty of Dr. Ratner's theory of specific causation and the fact that it arose from the particular set of facts at issue cut against its reliability, her testimony was nonetheless sufficiently reliable to be admitted.

Finally, plaintiffs offered Dr. Christine Oliver, an occupational physician with over thirty years of experience, to opine that the defendant was negligent both in failing to warn the decedent of the toxicity of the mixture of solvents (including toluene) used in resurfacing the gym floor and in failing to ensure adequate protection of the employees working in the building. Although the court did not limit the admission of Dr. Oliver's medical opinions, and permitted her to testify regarding whether defendant's practices met industry standards, it excluded her opinion that defendant was negligent because this was fundamentally a matter for the jury to decide.

Massachusetts Superior Court Denies Summary Judgment for Asset Purchaser Regarding Successor Liability Where Purchaser Retained Two Key Seller Employees, Honored Seller's Warranties and Used Seller's Logo, and Seller Ceased Operations

In *Dominguez v. Ruland Manufacturing Co., Inc.,* 2009 WL 3083865 (Mass. Super. Ct. 2009), a worker who was injured while cleaning a centrifuge machine sued the machine's manufacturer and seller, as well as the corporation that bought all of the manufacturer's assets prior to plaintiff's injury, in the Massachusetts Superior Court. The asset purchaser moved for summary judgment on the ground that it was not liable for the manufacturer's products.

The court stated that an asset purchaser does not assume the seller's liabilities unless: (1) the purchaser expressly or impliedly assumes the liabilities; (2) the transaction is a de

facto merger or consolidation; (3) the purchaser is a mere continuation of the seller; or (4) the transaction is a fraudulent effort to avoid the seller's liabilities. Because the parties focused on the de facto merger exception, the court articulated factors relevant to determining whether a de facto merger has occurred: (1) there is continuity of the seller's management, personnel, physical location, assets and general business operations; (2) there is a continuity of the seller's shareholders within the purchaser's ownership; (3) the seller ceases ordinary business operations, liquidates and dissolves; and (4) the purchaser assumes the obligations of the seller ordinarily necessary for the uninterrupted continuation of the seller's business operations.

The purchaser argued that it had not engaged in a de facto merger because the only two employees of the manufacturer that continued to work for the purchaser were not corporate directors or stockholders, and because the manufacturer had sold its assets only because its owner had wanted to get out of the business.

Regarding the first argument, the court held that the fact that the continuing employees were not directors or stockholders did not preclude a finding that there was a continuity of management, personnel and business operations, especially considering that the two continuing employees were the manufacturer's sales manager and product designer. With respect to the second argument, the court noted that—regardless of the intent behind the sale—the manufacturer had in fact liquidated and dissolved shortly after the sale, so that the court could not preclude a finding that a de facto merger had occurred. The court also noted that the manufacturer had described the purchase as "joining forces" with the purchasers, and the purchaser continued to honor the manufacturer's warranties as well as use its name and logo. As there were thus disputed issues of fact relevant to successor liability, the court denied the purchaser's motion for summary judgment.

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

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