

## In This Issue:

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- First Circuit Upholds Design Defect Verdict Involving Table Saw, Holding Plaintiff Adequately Proved Availability of Feasible Alternative Design Despite Weight and Price Differences From Existing Saw, and Hence Verdict Also Did Not Impermissibly Ban Entire Category of Product
- Massachusetts Superior Court Finds Personal Jurisdiction Over Foreign Ski Manufacturer Where Plaintiff Purchased Allegedly Defective Skis in Massachusetts from Store Located Through Search Function on Manufacturer's Website
- Massachusetts Federal Court Holds Trademark Licensor that Substantially Participated in Design of Excavating Machine Liable as "Apparent Manufacturer" Even Though Licensor Did Not Participate in Machine's Sale
- Massachusetts Federal Court Holds Plaintiffs in Class Actions Arising Out of Lead in Fruit Products Lacked Injury in Fact, and Hence Standing, Where Products Had Harmed No One and Complied with Federal Standards; Threat of Future Physical Injury Too Speculative, and Plaintiffs Did Not Allege Diminished Value That Could Constitute Economic Injury
- Massachusetts Federal Court Finds Testimony of Frequent Plaintiff's Expert on Design of Stove Burner Knob Admissible Because Expert Was Qualified as Licensed Mechanical Engineer, and Methodology of Relying on Personal Inspection, Fire Investigator Findings and Prior Incident Reports Was Reliable; Potential Bias Was Matter for Cross-Examination
- Massachusetts Federal Court Holds Expert Testimony Supporting Causal Link Between Infant Formula and Plaintiff's Injuries Required to Prevail on Claims; Court Stays Discovery and Dismisses Without Prejudice for Failure to Produce Expert Report or Affidavit

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

### **First Circuit Upholds Design Defect Verdict Involving Table Saw, Holding Plaintiff Adequately Proved Availability of Feasible Alternative Design Despite Weight and Price Differences From Existing Saw, and Hence Verdict Also Did Not Impermissibly Ban Entire Category of Product**

In *Osorio v. One World Technologies, Inc.*, -- F. 3d --, 2011 U.S. App. LEXIS 20174 (1st Cir. Oct. 5, 2011), the plaintiff construction worker was severely injured when his hand slipped into the blade of a table saw manufactured by defendant. The saw – a small, lightweight and inexpensive “benchtop” model – had been purchased by plaintiff’s employer at Home Depot for only \$179. Plaintiff sued 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), alleging the saw should have incorporated a novel technology known as “SawStop” that causes a saw blade to immediately stop and retract when it contacts human flesh. After an eight-day trial, the jury returned a \$1.5 million verdict for plaintiff. Defendant moved for judgment as a matter of law, arguing, among other things, that plaintiff failed to present evidence of a feasible alternative design because the proposed “SawStop” design would be significantly heavier and far more expensive (more than twice the cost), and that the jury verdict effectively imposed “categorical liability” by banning the sale of lightweight, inexpensive table saws. The court denied defendant’s motion.

On appeal, the United States Court of Appeals for the First Circuit affirmed. The court noted the factors cited by the Massachusetts Supreme Judicial Court in *Back v. Wickes Corp.*, 375 Mass. 633 (1978), as relevant to a design defect claim: “[1] the gravity of the danger posed by the challenged design, [2] the likelihood that such danger would occur, [3] the mechanical feasibility of a safer alternative design, [4] the financial cost of an improved design, and [5] the adverse consequences to the product and to the consumer that would result from an alternative design.” According to the First Circuit, however, plaintiff is not required to “present an alternative design that meets all the above-cited *Back* factors prima facie.” In other words, plaintiff does not himself have to present evidence addressing all the factors; rather, defendant is free to present evidence on any factors that it wishes the jury to consider, and Massachusetts law requires only that, on balance, the factors support the jury’s conclusion as to whether the challenged design is unreasonable. Here, the jury heard extensive testimony on all aspects of the proposed alternative design, including testimony from plaintiff’s expert that adding SawStop technology would not prevent the saw from being portable between jobsites and would add “less than \$150” to its price. Without specific discussion or analysis, the court pronounced that it “did not conclude that the added cost or increased weight of Osorio’s proposed alternative design is fatal to his case as a matter of law.”

For similar reasons, the court also rejected defendant's argument that the jury's verdict imposed "impermissible" categorical liability. The court noted that "[t]he absence of an alternative design is a defining characteristic" of such liability, but here there was evidence of such an alternative.

Although the court twice described the principle it was applying as that a plaintiff is not required to "present an alternative design that meets all the above-cited *Back* factors prima facie," or "make a prima facie showing of a feasible alternative design meeting the *Back* factors," at one other point it suggested that Massachusetts law "may tolerate a finding of design defect even in the absence of evidence supporting the existence of a feasible alternative design" at all. This, of course, was not at issue in the case because, as the court itself had repeatedly emphasized, there was evidence of a feasible alternative design. Moreover, the case cited by the court in support of its suggestion, as the court's own description acknowledged, held merely that there need not be expert evidence of such an alternative where a jury could find it "of their own lay knowledge." Finally, the proposition suggested by the court would be a marked retrenchment from long-established law in the First Circuit, which held in *Kotler v. Am. Tobacco Co.*, 926 F.2d 1217, 1225 (1st Cir. 1990), that in a negligence- or warranty-based design defect case "the existence of a safer alternative design is a *sine qua non* for the imposition of liability," and hence recovery is "dependent on proof of the existence of a safer alternative design – a design which reasonably could, or should, have been adopted."

### **Massachusetts Superior Court Finds Personal Jurisdiction Over Foreign Ski Manufacturer Where Plaintiff Purchased Allegedly Defective Skis in Massachusetts from Store Located Through Search Function on Manufacturer's Website**

In *Lafond v. Salomon North America, Inc.*, C.A. No. 2008-1383 (Mass. Super. Dec. 19, 2011), plaintiff was injured when one of his ski bindings broke while skiing in Utah. Plaintiff sued the ski manufacturer in Massachusetts Superior Court asserting claims of negligence, breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability) and violation of Mass. Gen. L. ch. 93A (the Massachusetts unfair and deceptive practices statute). The manufacturer, a French corporation with its principal place of business in Annecy, France, moved to dismiss for lack of personal jurisdiction.

It was undisputed that the French manufacturer did not have any office or employees in Massachusetts, had not entered into any contracts to perform services there, had not visited the state to market, promote or solicit sales of its products, and distributed its products in the United States through an independent distributor in Utah. Defendant did, however, maintain a website, accessible in Massachusetts, which included a search function whereby consumers could locate stores in Massachusetts and elsewhere that sold defendant's products. Plaintiff utilized that search function to locate a store in Boston where he purchased the skis at issue.

To exercise personal jurisdiction over a foreign defendant, the defendant's conduct must fall within the limits of both the Massachusetts "long-arm" statute and the due process requirements of the United States Constitution. Addressing the statute first, the court found its exercise of jurisdiction proper under Mass. Gen. L. ch. 223A, § 3(a), which provides for jurisdiction over, among others, "a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's . . . transacting any business in this commonwealth." The court found defendant's solicitation of business in Massachusetts through its website, and specifically the search function, was sufficient to satisfy the "transacting business" requirement. Moreover, because plaintiff found his skis through the website, it was clear his claim "arose out of" this business. In so holding, the court distinguished defendant's website, which intentionally directed buyers to retailers in Massachusetts where they could buy defendant's products, from passive websites that provided information but did not solicit business.

For similar reasons, the court also found the exercise of personal jurisdiction satisfied the requirements of due process, which are met when: (1) a defendant purposefully avails itself of the privilege of conducting business in a state; (2) the lawsuit arises out of defendant's conduct in the state; and (3) the exercise of jurisdiction would not offend traditional notions of fair play and substantial justice. As to "purposeful availment," the court found defendant's operation of its website, which intentionally solicited business from Massachusetts customers, sufficient to meet this requirement. Plaintiff's claim also was "related" to defendant's contacts with Massachusetts because, as noted in the court's analysis under the "long-arm" statute, plaintiff found the product through defendant's website. Finally, the exercise of personal jurisdiction over defendant was "fair" because: (1) Massachusetts clearly has an interest – at least as strong as France's – in adjudicating claims of its residents injured by

products sold in the state by a company that solicits business there; (2) it is impractical to expect plaintiff to pursue his claim in France; and (3) Massachusetts is as effective a forum as Utah or France, as the relevant evidence and witnesses are scattered among the three locales. The court added it would not comport with traditional notions of fair play and justice to allow a foreign corporation, whose plant is a great distance from a state where it causes its products to be marketed, to insulate itself from liability simply by selling the products through an out-of-state independent distributor.

### **Massachusetts Federal Court Holds Trademark Licensor that Substantially Participated in Design of Excavating Machine Liable as “Apparent Manufacturer” Even Though Licensor Did Not Participate in Machine’s Sale**

In *Anunciacao v. Caterpillar, Inc.*, 2011 WL 4899969 (D. Mass. Oct. 13, 2011), plaintiff was severely injured when he was run over at work by an excavating machine bearing defendant’s name and trademark logo. While defendant had participated in the design and developmental testing of the machine, and had licensed the right to use its logo to the manufacturer, the machine was manufactured and sold exclusively by one of defendant’s Japanese affiliates. Plaintiff sued defendant (and the Japanese affiliate) in the United States District Court for the District of Massachusetts asserting claims for, among other things, breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability). Defendant moved for summary judgment on the ground that it could not be held liable under Massachusetts warranty law because it had not sold or contracted to sell the machine.

In support of its motion, defendant argued that, under Massachusetts law, a party who has not sold or leased, or contracted to sell or lease, the allegedly defective product cannot be held liable for breach of implied warranty. Defendant conceded its argument was inconsistent with the recent Massachusetts Appeals Court decision in *Lou v. Otis Elevator Co.*, 77 Mass.App.Ct. 571 (2010) ([see October 2010 Foley Hoag LLP Product Liability Update](#)), which held that “a non-seller trademark licensor who participates substantially in the design, manufacture, or distribution of the licensee’s products may be held liable under Massachusetts law as an apparent manufacturer.” The Appeals Court’s decision was the first time a Massachusetts court had applied the “apparent manufacturer” doctrine to an entity outside the distribution

chain, *i.e.*, a non-seller, and defendant argued *Lou* improperly extended the doctrine. Specifically, defendant argued *Lou* was wrongly decided because it was inconsistent with *Mason v. Gen. Motors Corp.*, 397 Mass. 183 (1986), an earlier Massachusetts Supreme Judicial Court decision holding that a person injured test-driving a car could not sue the dealership for breach of implied warranties because there was no sale or lease, only a bailment.

The court rejected defendant’s argument, finding *Mason* inapplicable because here a sale actually had occurred and the issue was whether defendant, as a trademark licensor that had substantially participated in the product’s design, could be treated the same as the entity that actually manufactured and sold the product. This exact issue had been decided in *Lou*, and the Appeals Court had rejected all the same arguments presented by defendant here. The court further noted it was not improper for *Lou* to have relied to some degree on comment d to § 14 of the Restatement (Third) of Torts: Product Liability, especially where the Appeals Court found the comment consistent with the Massachusetts warranty statute because it permitted liability against not only a seller or lessor but also a “manufacturer.” The court further held that comment d was consistent with warranty law in other jurisdictions that, unlike Massachusetts, previously had addressed the issue. Because *Lou* was directly on point, and consistent with Massachusetts law, the court denied defendant’s motion.

### **Massachusetts Federal Court Holds Plaintiffs in Class Actions Arising Out of Lead in Fruit Products Lacked Injury in Fact, and Hence Standing, Where Products Had Harmed No One and Complied with Federal Standards; Threat of Future Physical Injury Too Speculative, and Plaintiffs Did Not Allege Diminished Value That Could Constitute Economic Injury**

In *In re Fruit Juice Products Marketing and Sales Practices Litigation*, C.A. No. 11-MD-02231-MAP (D. Mass. December 21, 2011), the Environmental Law Foundation (“ELF”), a non-profit organization, sent notices to numerous manufacturers of juice and packaged fruit products, including defendants, alleging their products contained amounts of lead greater than the permissible daily intake level set by the California Safe Drinking Water and Toxic Enforcement Act of 1986. The notice prompted the United States Food and Drug Administration

("FDA") to check the lead levels of some of the products and conclude that "[a]most all of the products ... contained a small amount of lead, but in each case the level found would not pose an unacceptable health risk." Notwithstanding FDA's conclusion, various individual plaintiffs brought suits in multiple federal district courts against various defendants. The suits were consolidated for pre-trial purposes in a multi-district litigation in the United States District Court for the District of Massachusetts, and amended complaints by two groups of individual plaintiffs asserting class actions against two groups of defendants were filed. Based on the ELF notice, plaintiffs alleged the lead in defendants' products could lead to health risks and claimed, among other things, violations of state consumer protection laws and breach of the implied warranties of merchantability and fitness for a particular purpose. Defendants moved to dismiss the complaints, arguing, among other things, that plaintiffs lacked standing because none of them had been physically injured by defendants' products. The court agreed and allowed defendants' motion.

The court first observed that to establish standing under Article III of the United States Constitution, a plaintiff must demonstrate, among other things, that he has suffered "injury in fact." Here, plaintiffs offered two arguments. First, plaintiffs alleged the lead in defendants' products placed plaintiffs and their children at risk of future physical injury from lead poisoning. Second, plaintiffs alleged they suffered economic injury by purchasing products that defendants advertised as safe, but in fact contained dangerous lead amounts, rendering the products unsuitable for their intended purpose.

On the first argument, the court noted that to establish standing in a product liability case based on a threat of future harm, a claimant must plead a credible or substantial threat to his or her health. Here, however, there were no allegations that plaintiffs or anyone else ever had suffered any type of injury from defendants' products, nor had the products been recalled or failed to comply with any federal standards. Consequently, any claimed risk of future harm was too speculative to constitute injury in fact.

On plaintiffs' second argument, the court determined that any allegation of economic injury also lacked substance. Plaintiffs had paid for fruit products, received such products and consumed them without suffering harm. Plaintiffs failed to allege the products had any diminished value because of the presence of lead or that they would have purchased different or cheaper products had they known about the lead.

Because plaintiffs thus received the benefit of their bargain in purchasing the products, their claim that the lead levels in the products were unsatisfactory to them was insufficient to demonstrate injury in fact.

### **Massachusetts Federal Court Finds Testimony of Frequent Plaintiff's Expert on Design of Stove Burner Knob Admissible Because Expert Was Qualified as Licensed Mechanical Engineer, and Methodology of Relying on Personal Inspection, Fire Investigator Findings and Prior Incident Reports Was Reliable; Potential Bias Was Matter for Cross-Examination**

In *Bertrand v. General Electric Co.*, 2011 WL 4381014 (D. Mass. Sept. 21, 2011), plaintiffs' house had burned in the middle of the night from a fire that started when one of the kitchen stove-top burners ignited a plastic cutting board. Plaintiffs, a family with eighteen cats, had a practice of placing the cutting board atop the stove at night to prevent the cats from coming in contact with the burners. Although the stove had been turned off for at least twenty-four hours before the fire, arriving firefighters found the control knob for one burner in an "on" position. Plaintiffs claimed a defectively designed ignition switch had caused the "push-to-turn" safety feature of the control knob to fail, permitting one of the cats to activate the burner and start the fire. Plaintiffs sued the stove manufacturer for negligence and breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability) in the United States District Court for the District of Massachusetts.

In support of their claim, plaintiffs offered the expert testimony of a mechanical engineer employed by a company that provides a wide variety of investigative, engineering and consulting services to law firms, almost exclusively on the plaintiff's side. The proffered expert would testify that the stove was defective because it failed to include certain specifications to ensure that the "push-to-turn" safety feature could not be bypassed. During his own inspection of the stove after the fire, the expert found that, on two of six attempts, he was able to turn the control knob to the "on" position without first depressing it. This was consistent with findings of the town fire investigator, who also was able to turn the knob from "off" to "on" without depressing it. The expert then concluded that, because of the design defect, it was possible one of

plaintiffs' cats could have turned the stove on without having to depress the knob. Indeed, there was evidence of at least one other reported incident of a cat igniting a fire by turning the control knob on one of defendant's stoves.

Defendants moved to strike the proposed expert's testimony and, if that relief were granted, for summary judgment on the ground that plaintiffs lacked expert testimony as to the reasonableness of the stove's design. Defendants argued the expert's training and experience as an "all-purpose" mechanical engineer did not qualify him to opine about stove design, and that his conclusions were unsupported by a reliable engineering methodology. The court denied defendants' motions.

The court first noted the two gateposts that frame the exercise of a judge's discretion as to whether to admit an expert's proposed testimony: (1) whether the witness is sufficiently qualified by knowledge, skill, experience, training or education; and (2) whether the proposed testimony is both relevant and reliable. Regarding the former, the court found the expert, as a licensed mechanical engineer, well within his competence in opining about the workings of the burner switch. The court noted that defendant's objection to the expert appeared to be based more than anything on the contention that he was a "hired gun" for plaintiffs; while a fair subject for cross-examination, this was not grounds to exclude his testimony. Nor did the court find any deficiencies in the expert's methodology. To the contrary, the expert had relied on a variety of proper bases for his opinions, including: (i) the fact that no alterations had been made to the stove after its purchase; (ii) the results of his own investigation and that of the town firefighters and fire investigator; and (iii) the fact that there had been at least one other report of a cat starting a fire by igniting a similar stove. Finally, the court noted plaintiff was not required to eliminate all possible causes of the fire for the jury to infer that defendant's negligence was the cause. Instead, plaintiff needed only to show the fire was more likely than not the result of that negligence.

## **Massachusetts Federal Court Holds Expert Testimony Supporting Causal Link Between Infant Formula and Plaintiff's Injuries Required to Prevail on Claims; Court Stays Discovery and Dismisses Without Prejudice for Failure to Produce Expert Report or Affidavit**

In *J.P. v. Mead Johnson Co.*, 2011 WL 3490258 (D. Mass. Aug. 10, 2011), plaintiff's child was diagnosed with autism and other neurological conditions after ingesting infant formula manufactured by defendant. Plaintiff sued 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), alleging that two synthetic supplements added to the formula – DHASCO and ARASCO, designed to mimic fatty acids naturally occurring in human breast milk – had caused the child's conditions.

Several months after plaintiff filed his complaint, the court stayed discovery and ordered plaintiff to identify an expert and file an expert report supporting the factual basis for his claims. After plaintiff filed a series of documents entitled "Rule 26 Expert Disclosures" that neither identified an expert nor described the scope of proposed expert testimony, the district court granted the manufacturer's motion to dismiss without prejudice and adopted the recommendation of a magistrate judge that "any subsequent lawsuit brought against [defendant] raising similar claims must be supported by an expert affidavit as to causation." The magistrate had noted that plaintiff would have no prospect of prevailing on his claims without an expert opinion supporting the allegation that the manufacturer's formula caused his son's medical conditions.

Approximately one year later, plaintiff again sued the manufacturer, asserting essentially the same allegations. Although he attached numerous exhibits to his complaint, including scientific articles and various correspondence, he did not file an expert affidavit opining on the causal link between the manufacturer's formula and his son's conditions. After the manufacturer again moved to dismiss, plaintiff responded by filing an "expert report" from a physician who opined that, because DHASCO and ARASCO function differently than the human-derived fatty acids they are designed to mimic, more safety-related research should have been done before they were added to infant formula. The report did not mention plaintiff's son, his medical conditions or the defendant manufacturer, and made no attempt to link the child's injuries

to the manufacturer's product. Accordingly, the district court again dismissed the complaint without prejudice for the same reasons as the first complaint – namely, that without expert testimony plaintiff could not prevail on his claims and it would be a waste of resources to require the court and defendant to incur additional time and expense to litigate the matter.

The court's order requiring an early expert report or affidavit from plaintiff in a case where expert testimony is required on an essential element of his claim is a valuable procedural device that can save enormous resources. Defendants in product liability and other complex tort cases should seek such an order more frequently.

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

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