FOLEY HOAG LLP

Product Liability **Update**

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

Massachusetts Appeals Court Holds Trial Court Properly Instructed Jury on Absolute "Unreasonable Use" Warranty Defense Where Plaintiff Ignored Warning Label and Safety Manual and Had Been Drinking, and Instruction Adequately Explained Difference Between Defense and Comparative Negligence

In *Rose v. Highway Equipment Co.*, 2014 Mass. App. LEXIS 108 (Aug. 27, 2014), plaintiff sued the manufacturer of a broadcast spreader—a "sander" that mounts on a truck chassis in order to disperse abrasives like sand and salt onto road surfaces—in Massachusetts superior court after he severely injured his hand while oiling the spreader's chain. Plaintiff asserted claims for negligence and breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability), arguing the spreader was defectively designed.

Plaintiff alleged he was injured while reaching backward for the oil bottle when he suddenly felt a tug at his shirt sleeve and was unable to extricate himself from the spreader before his hand and forearm were pulled in. Defendant impeached this testimony and presented evidence plaintiff had been drinking beer all afternoon and fell into the spreader after losing his balance from a ladder on the side of the truck. On the negligence count, the jury found plaintiff was seventy-three percent responsible, which foreclosed recovery under the Massachusetts comparative negligence statute, Mass. Gen. L. c. 231, § 85. On the warranty claim, the jury found plaintiff's use of the spreader was unreasonable, barring recovery on that claim as well. Plaintiff appealed both the judge's decision to instruct the jury on the unreasonable use defense in the first place and the specifics of the judge's instruction.

The Massachusetts Appeals Court affirmed. The court first noted that while, unlike a negligence claim, a breach of warranty claim primarily concerns the nature of the product rather than the actions of the user, the "duty to act reasonably" is nonetheless always imposed on the user. Accordingly, under longstanding authority, "[w]hen a user unreasonably proceeds to use a product which he knows to be defective and dangerous, he violates that duty and relinquishes the protection of the law," and such conduct is a complete bar to warranty recovery. Here, the evidence was sufficient to support submitting this defense to the jury. Although plaintiff's boss had instructed him to stay away from the front of the spreader when oiling it, plaintiff admitted he had oiled it multiple times from both the front and back because he thought it would be easier. Plaintiff also admitted he saw the spreader's warning label and knew about its safety manual, but never read either, and understood that if he put his hand in the spreader he

could get hurt. While there was conflicting testimony about the amount of alcohol plaintiff had consumed on the day of the accident, his decision to drink beer before oiling the spreader also supported the judge's decision to instruct the jury on unreasonable use.

Regarding the specifics of the judge's instruction, it followed a model jury instruction often used in superior court save for one phrase, by which the judge referred to "the implied warranty version in effect of the contributory negligence defense described earlier" to segue between describing the implied warranty claim and its unreasonable use defense. Plaintiff claimed this phrase improperly harmonized the absolute defense of warranty liability with the liability apportionment principles of comparative negligence. The appellate court disagreed, concluding that this language, read in context, was likely meant merely as an introductory signal to the jury, indicating that unreasonable use was an affirmative defense similar in its general nature to the comparative negligence defense that the judge had just explained in his negligence charge. Indeed, the jury was never instructed to weigh plaintiff's conduct in relation to defendant's on the warranty claim, and the judge underscored for the jury multiple times that the negligence and warranty claims were distinct.

Massachusetts Federal Court Grants Summary Judgment Against Claim Fire Truck Was Defectively Designed Due to Lack of Redundant Hose Restraints Where Plaintiff Offered No Expert Testimony Regarding Reasonableness of Design or Causation

In *King v. Pierce Manufacturing, Inc.*, 2014 U.S. Dist. LEXIS 122078 (D. Mass. Sep. 2, 2014), a woman was fatally injured in 2010 when, while walking down the street, she was struck by the nozzle of a hose that had come loose from a passing fire truck. The truck was built by defendant in 2002 to the specifications of the local fire department, which included hose compartments with covers to secure the hoses but not redundant hose restraints offered by defendant to provide extra security for the hoses. When the truck was built, the National Fire Protection Association ("NFPA")'s governing standard neither required nor recommended redundant restraints. In 2005, however, the standard was amended, in response to a proposal by defendant's representative to the standard-developing committee, to require such restraints—but not any recall or retrofit of older trucks—following an incident involving another company's truck in which a young girl was killed by a dislodged hose. Decedent's death was the first accident of its kind that defendant's trucks had ever experienced. Following the accident, the fire department purchased redundant restraints in the form of netting from defendant for all the department's trucks, at a cost of $524 each.

The administrator of decedent's estate sued the truck manufacturer in the United States District Court for the District of Massachusetts for negligence, breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability) and wrongful death, alleging the truck was defectively designed because it was not equipped with a redundant hose restraint that would have prevented the hose from coming loose. The manufacturer moved for summary judgment on the ground that plaintiff had not offered any expert testimony regarding the alleged defectiveness of the truck's design or causation.

The court first noted that "in a products liability case of any sophistication, a plaintiff's failure to support her claims of a design defect with expert testimony is almost always fatal." The only exceptions are where the unreasonableness of the dangers presented by the product's design are matters of common knowledge and understanding. Defendant offered the expert testimony of a mechanical engineer who had inspected the truck and opined that it was not defective or unreasonably dangerous, and that the accident was caused by the fire department's failure properly to stow the hose in the hose compartments. Plaintiff offered no expert testimony in rebuttal, arguing instead that "common sense is all that is required to determine whether the fire truck should have had [redundant] hose restraints." The court disagreed, holding that without the aid of expert testimony the average juror would not be capable of making rational decisions about fire truck design, the history and applicability of fire apparatus design standards, appropriate accessories, risk and utility analyses, the relative safety of available alternative designs and accident causation, and would instead be forced to make such determinations based on speculation and conjecture.

Moreover, apart from the absence of expert testimony, plaintiff's "common sense" argument failed due to the lack of reasonable foreseeability of plaintiff's injury and the

intervening cause represented by the fire department's failure properly to stow the hose. Not only was there an absence of prior similar accidents or applicable safety standards requiring redundant hose restraints in 2002 that would have put defendant on notice of the risks attendant to its design, but there also was no evidence that the fire department, if notified of the risk, would in fact have purchased such restraints for its trucks at the time. In addition, plaintiff did not offer any evidence to rebut the defendant's expert's conclusion that the accident was caused by the department's improper storage of the hose rather than any lack of restraints. Accordingly, the court granted defendant's motion and entered judgment against plaintiff on all claims.

Massachusetts Federal Court Holds Triathlon Participant's Release and Indemnity Agreement Has Different Effects on Different Claims But Is Not Enforceable As To Claims For Gross Negligence

In *Angelo v. USA Triathlon*, 2014 U.S. Dist. LEXIS 131759 (D. Mass. Sep. 19, 2014), a young man died while participating in the swim portion of a triathlon organized by defendant. His estate administrator and wife sued in Massachusetts superior court for decedent's wrongful death and conscious pain and suffering before death, and for negligent infliction of emotional distress upon the wife. Defendant removed the case to the United States District Court for the District of Massachusetts based on diversity of citizenship, and asserted counterclaims for indemnity based on decedent's execution of two separate indemnity agreements prior to his participation in the triathlon. Defendant then moved for partial summary judgment on its counterclaims.

Approximately one year before the triathlon, decedent agreed to a "Waiver and Release of Liability, Assumption of Risk and Indemnity Agreement" when he renewed his membership in the defendant organization. The agreement broadly provided that decedent released, waived, covenanted not to sue and would indemnify and hold harmless the defendant (and a number of other entities) with respect to any claims that may arise out of, result from or relate to decedent's participation in events sponsored by defendant. Decedent further agreed to indemnify, defend and hold defendant harmless if the decedent, or anyone else acting on his behalf, nevertheless brought a claim against defendant. He signed a virtually identical agreement when he registered for the triathlon at issue several months before competing. Only decedent, as the race participant, signed the forms.

Plaintiffs argued defendant's motion should be denied because the indemnity agreements (1) could not function to release claims by individuals other than decedent for wrongful death or negligent infliction of emotional distress, and (2) were in any event unenforceable insofar as they purported to exempt defendant from liability for its own grossly negligent conduct. Regarding the first argument, plaintiffs contended the indemnity agreements were at least ambiguous as to whether they bound only the decedent and his estate, or also others such as his wife. The court disagreed, holding "the indemnity agreements clearly were intended to indemnify losses arising from an action for wrongful death as a claim 'aris[ing] out of' the decedent's participation in the triathlon," and that language was also broad enough to reach plaintiff's claim for negligent infliction of emotional distress. However, any recovery on the emotional distress claim would belong to the wife individually, not decedent's estate, and any recovery on the wrongful death claim would also not belong to the estate but rather would be held in trust for the benefit of decedent's statutory wrongful death beneficiaries. Accordingly, while defendant was entitled to indemnity from decedent's estate on these two claims, it was not entitled to recover indemnity from the wife's share of any recovery on these claims. Plaintiff's claim for decedent's conscious pain and suffering was different in that it was brought on behalf of the estate and any recovery would become its asset. For that reason, defendant was entitled to recover indemnity from any proceeds of that claim, and indeed decedent actually released the claim by the terms of the indemnity agreement.

To the extent plaintiff's wrongful death and conscious pain and suffering claims were based on defendant's alleged gross negligence, however, the court held the indemnity agreement would be unenforceable. The court noted it had found no controlling authority from the Massachusetts Supreme Judicial Court ("SJC") regarding whether an indemnity agreement is enforceable to protect a party from liability for its own gross negligence. However, the Massachusetts Appeals Court has refused to enforce release provisions to bar a claim for gross negligence, and other Massachusetts federal court judges have predicted the SJC would likewise refuse to enforce an indemnity agreement in that context.

Massachusetts Federal Court Holds Complaint Alleging Defendant Breached Warranties by Selling Automobile Prone to Catching Fire Did Not State Claim for Unfair Trade Practices In Absence of Allegations Defendant Knew of Defect Prior to Plaintiff's Loss, or Some Other Unfair Conduct

In *Utica Nat. Ins. Co. v. BMW of North America, LLC*, 2014 U.S. Dist. LEXIS 131010 (D. Mass. Sep. 18, 2014), a car manufactured by defendant caught fire while parked overnight at a garage, damaging the garage, its equipment and other vehicles owned by the garage and its customers. It was determined that the fire originated in the automobile, and the garage's insurer paid its claim for fire damages. A few months later, defendant recalled certain automobile models, including the one that had caught fire, because an electronic circuit board was prone to overheating, potentially causing smoldering that could result in fires. The recall report disclosed that the model at issue had a total of two recalls, three investigations, nineteen complaints and twenty-nine service bulletins, but it did not identify the dates on which the complaints were received.

The garage's insurer, as its subrogee, sued defendant in Massachusetts superior court for negligence, breach of warranties, strict liability and violations of Mass. Gen. L. c. 93A (the Massachusetts unfair and deceptive practices statute) based on alleged defects in the car's design rendering it susceptible to fires. Defendant removed the case to the United States District Court for the District of Massachusetts on the basis of diversity of citizenship, and moved to dismiss the strict liability and c. 93A claims. Plaintiff did not oppose dismissal of the former claims, but disputed defendant's contention that a business plaintiff suing for unfair trade practices under § 11 of c. 93A needs to allege something more than a mere breach of warranty to state a plausible claim for recovery.

Rejecting plaintiff's argument, the court first noted that the Massachusetts Supreme Judicial Court has held that a breach of warranty is not per se actionable under § 11 of c. 93A, as distinguished from § 9 of the statute which provides a remedy for non-business plaintiffs such as consumers. Rather, a § 11 plaintiff must show defendant "acted in some significantly unfair or deceptive fashion"—in other words, plaintiff "must allege a breach of warranty 'plus,' where that 'plus' is conduct by [defendant] which, if true, would render the breach repugnant to the milieu of the commercial marketplace." Here, plaintiff's complaint alleged only that a breach of warranty defect caused damage and defendant later issued a recall to correct the defect, and the undated complaints noted in the recall report were insufficient to support an inference that defendant knew of the defect prior to the time of the fire. Absent such an inference, there was nothing in the complaint to support a claim under § 11. Moreover, plaintiff could not cure the complaint's deficiencies by making additional allegations in its brief opposing the motion to dismiss, especially where these were more akin to "rhetorical flourishes" than actual facts. The court hinted it might entertain a motion to amend the complaint if plaintiff were properly to allege certain additional facts—concerning earlier fires in the car model and other litigation involving defendant—that its counsel referred to at the motion hearing, but based on the existing record the court allowed defendant's motion.

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

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