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Product Liability **Update**

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May 2010

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

Massachusetts Federal District Court Dismisses Product Liability Claims Based on "Benefit-of-the Bargain" Theory, Holding Neither Pure Economic Loss Nor Apprehension of Future Harm Is Legally Cognizable Injury Where Product Has Not Malfunctioned

In *Watkins v. Omni Life Science, Inc.*, 2010 WL 809820 (D. Mass. March 9, 2010), two Oklahoma residents brought a purported class action against a medical device manufacturer in the United States District Court for the District of Massachusetts asserting claims, among others, for breach of implied warranty, violations of Mass. Gen. L. ch. 93A (the Massachusetts unfair and deceptive practices statute) and violations of the consumer protection laws of all other states as a result of the allegedly defective design of a hip prosthesis. Although neither plaintiff alleged that the hip had malfunctioned, they claimed injury because the hips were "substantially likely" to fail and thus less valuable than plaintiffs believed, *i.e.*, that they did not receive the benefit of their bargain. Plaintiffs also alleged injury in the form of apprehension that the hips would fail in the future.

Defendant, represented by members of **Foley Hoag LLP's Product Liability and Complex Tort Practice Group**, moved to dismiss all claims on the basis that plaintiffs had not pled a legally cognizable injury. Plaintiffs argued that their injuries resembled those alleged in *Aspinall v. Philip Morris Cos., Inc.*, 442 Mass. 381 (2004) (see *November 2004 Foley Hoag Product Liability Update*), in which smokers who bought low-tar cigarettes that for some smokers did not in fact deliver low tar levels were held to have suffered an injury under ch. 93A because they "paid more for the cigarettes than they would otherwise have paid." The court, however, held that plaintiffs' alleged injury was analogous to those alleged in *Iannacchino v. Ford Motor Co.*, 451 Mass. 623 (2008) (see *August 2008 Foley Hoag Product Liability Update*), where plaintiffs had "received a product which is . . . functioning as it was intended" and, therefore, had suffered no legally cognizable harm. The court held that plaintiffs' apprehension of a heightened risk of product failure was not sufficient to support a claim where the product had not actually failed or caused plaintiffs harm.

With respect to the non-ch. 93A claims, the court held that the benefit of the bargain theory of economic loss did not constitute a legally cognizable injury supporting recovery in tort. Rather, such recovery would be permitted only if there was personal injury or property damage.

First Circuit Vacates Denial of Class Certification in Environmental Tort Claims, Holding that, on Fuller Analysis, Common Issues May Predominate and Class Treatment May Be Superior Method of Litigating Claims

In *Gintis v. Bouchard Transportation Co.*, 596 F.3d 64 (1st Cir. 2010), plaintiffs sued the owners and operators of a barge that ran aground and spilled fuel oil in Buzzards Bay, on behalf of themselves and a putative class consisting of other owners of residential property abutting the bay, in the United States District Court for the District of Massachusetts. Plaintiffs alleged violations of Mass. Gen. L. ch. 21E, § 5 (strict liability for damage to real property from an oil spill), and Mass. Gen. L. ch. 91, § 59A (double damages for negligent discharge of petroleum), as well as common law nuisance. The district court denied plaintiffs' motion for class certification, finding that common issues of law and fact did not predominate over individual issues. Plaintiffs appealed to the United States Court of Appeals for the First Circuit.

The court of appeals, with former Supreme Court Justice Souter sitting by designation, first criticized the trial court for relying heavily on a single earlier decision of the district court and ignoring contrary out-of-circuit precedent. The court then noted that significant common issues were apparent from the record, including whether data gathered by environmental regulators in the aftermath of the spill could be used to show harm to individual parcels, and whether plaintiffs could use an expert economist to appraise damages to individual parcels based on the severity and duration of contamination from the spill. The court also noted that class certification might be a superior method of trying the cases because it was unlikely that class members could sensibly litigate their claims individually due to the likelihood of individual recoveries between $12,000 and $39,000 and the need for expensive expert testimony.

The court ultimately declined to decide whether the district court's denial of class certification was an abuse of discretion, citing the court's "spare treatment of contending factual claims." Instead, because the district court's analysis was insufficiently rigorous, the appellate court vacated the class certification denial and remanded the issue for plenary consideration.

Massachusetts Federal District Court Holds Statute Limiting Exclusions of Warranty Applies Only to Consumer Transactions, Finds Disputes Concerning Whether Buyer Gave "Precise and Complete" Specifications Negating Implied Warranty and Whether Plaintiff Was Sophisticated User

In *Hatch v. Trail King Industries, Inc.*, 2010 WL 1565296 (D. Mass. April 20, 2010), plaintiff sued a trailer manufacturer in the United States District Court for the District of Massachusetts for negligence and breach of warranty based on defective design and failure to warn theories after being injured by a collapsing 900-pound trailer gate. Defendant moved for summary judgment, arguing the defective design claims failed as a matter of law because plaintiff's employer was the sole designer of the trailer and defendant was merely a fabricator that built to the specified design. Defendant also argued that plaintiff's failure-to-warn claims were precluded by the sophisticated user doctrine. Plaintiff cross-moved for summary judgment arguing that the defense that defendant had disclaimed any implied warranty of merchantability was barred by Mass Gen. L. ch. 106, § 2-316A, which provides that "[a]ny language, oral or written, used by a seller or manufacturer of consumer goods and services, which attempts to exclude or modify any implied warranties of merchantability . . . shall be unenforceable."

The court denied both parties' motions. At the outset, the court held that § 2-316A applies only to "consumer" purchases and not to commercial sales between businesses. Accordingly, the statute was inapplicable to plaintiff's claims because plaintiff's employer, a commercial entity, was the buyer.

Turning to defendant's motion, the court first observed that the sophisticated user doctrine provides that no duty to warn exists when the end user knows or reasonably should know of a product's dangers. The court suggested it was "highly doubtful" that plaintiff was a sophisticated user, but held that, at the very least, a factual dispute remained on that issue.

Similarly, the court held that factual disputes remained concerning defendant's involvement in designing the allegedly defective trailer, and therefore summary judgment

was inappropriate. Despite evidence that the trailer was a "specialty design" and the employer had developed certain specifications for defendant, the court held that there may be no exclusion of implied warranties absent evidence that the buyer's specifications were "precise and complete," which defendant had not shown to be undisputed.

Massachusetts Appeals Court Holds that Actual Filing, Rather Than Mere Service, of Motion to Amend Complaint to Add Defendants Is Required to "Commence" Action Against Such Defendants for Purpose of Statute of Repose

In *Blaney, et al. v. Lowell General Hospital, et al.*, 2010 WL 1509600 (Mass. App. Ct. April 20, 2010), plaintiffs commenced a medical malpractice action in Massachusetts Superior Court against a hospital in 2001 and sought to amend the complaint in 2004 to add several of its nurses as defendants. Plaintiffs' claims arose out of an incident occurring in January 1998. Under Mass. Gen. L. ch. 260, § 4, medical malpractice actions shall be "commenced" within three years after the cause of action accrues, but in no event later than seven years after the occurrence of the injury-causing act or omission.

In November 2004, two months before the expiration of the seven-year statute of repose period, plaintiffs served on counsel for the hospital, but pursuant to Superior Court rules did not actually file, a motion to amend the complaint. Thereafter, counsel for the hospital wrote a letter to plaintiffs' counsel stating, "You need not file your Motion to Amend . . . until such time as we have discussed this matter further . . . . I will not be filing an opposition until we have spoken about this matter." Plaintiffs' counsel did not actually file the motion to amend until February 17, 2006, thirteen months after the statute of repose had expired. Although a Superior Court judge allowed the motion to amend over the nurses' opposition, in 2009 the nurses filed a motion for judgment on the pleadings based on the statute of repose, and that motion was granted by a different Superior Court judge. Plaintiffs then appealed.

The Massachusetts Court of Appeals affirmed. Relying on a 2002 decision of the Massachusetts Supreme Judicial Court, the court held that: (1) the operative date for "commencement" of an action for purposes of a statute of repose is the date of filing of a motion to amend a complaint to add a party; and (2) the policies underlying the statute of repose do not require that the motion for leave to amend comply with all applicable rules (here, that filing of a motion only takes place after receipt of the opposition) as long as the motion is actually accepted for filing within the statute of repose period. The court then noted that "statutes of repose are harsh"; accordingly, despite any arguably dilatory or obstructive conduct by defendants' counsel, there is no equitable estoppel or tolling of such a statute except as specifically provided therein. The court further noted that plaintiffs had unilateral control over the filing of the motion to amend, and readily could have filed it in time to meet the statutory deadline.

Massachusetts Federal District Court Holds Plaintiff in Product Liability Action May Proceed Under Theory of Res Ipsa Loquitor in Absence of Expert Testimony Establishing Product Defect, But Expert Testimony Is Required to Prove Medical Causation

In *Laspesa v. Arrow International, Inc.*, 2009 WL 5217030 (D. Mass. Dec. 23, 2009), plaintiff sued the manufacturer of an epidural catheter in the United States District Court for the District of Massachusetts for severe pain she experienced upon removal of the catheter after it had become lodged in her back when the catheter was used for anesthesia during childbirth. Plaintiff brought claims of negligence based on design, manufacturing and warning defects, breach of express warranties, breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability), breach of the implied warranty of fitness for a particular purposes and loss of consortium. Defendant moved for summary judgment on the ground that plaintiff had not disclosed any experts, which defendant argued was necessary to prove the elements of each cause of action.

The court granted defendant's motion in part, agreeing that only an expert could establish the necessary elements of whether the design was unreasonably dangerous, whether the device deviated from its design and whether the physicians were adequately warned about the catheter's risks. The court nevertheless held that "Massachusetts' expansive treatment of the *res ipsa loquitor* doctrine" could allow plaintiffs to prove the existence of an unspecified defect based on the mere

occurrence of the incident. Under this doctrine, plaintiffs could defeat summary judgment if they could show that: (1) the device causing the accident was in the exclusive control of the defendant at the time of the incident; and (2) the accident was of the sort that would not happen in the ordinary course unless the product was defective or the defendant was negligent. With respect to the first element, the doctor performing the procedure testified at his deposition that the catheter was new and taken right "out of the box." The court held that the second element was satisfied by evidence that the FDA has characterized catheter separation as "unusual" and defendant's expert's testimony that the doctor followed the recommended procedures for removing the catheter.

The court further held, however, that although plaintiff might be able to establish defendant's negligence or the existence of a product defect without expert testimony, she could not prove that any such defect or negligence caused her pain without expert testimony because such testimony is generally necessary for questions of medical causation. Plaintiff had not designated any experts to explain the cause of her pain nor moved to extend discovery so that such an expert could be designated. In contrast, defendant had designated an expert to opine that plaintiff's pain was attributable to a preexisting condition. Accordingly, the court granted summary judgment for the defendant.

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

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