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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 Federal District Court Grants Summary Judgment Against Failure-to-Warn Claim Involving Wall Heater Because Danger was Open and Obvious, and Against Design Defect Claim for Lack of Expert Testimony

In *Public Service Mutual Insurance v. Empire Comfort Systems, Inc.*, 2008 WL 3884342 (D. Mass. Aug. 22, 2008), a fire insurer, acting as subrogee of its insured hotel, sued the manufacturer of a gas-fired wall heater for negligent failure to warn and negligent design or manufacture; strict liability; breach of warranty; and breach of contract, all to recover damages caused by a fire that resulted when a hotel employee leaned a mattress against the heater. Defendant moved for summary judgment.

The court granted defendant's motion as to plaintiff's claim that the sticker on the heater warning of the danger of placing combustible items on or near the heater was inadequate due to its small size and that other English written warnings were inadequate to convey the danger to a non-Anglophone such as the hotel employee who precipitated the fire. The court noted that defendant had no duty to warn against open and obvious hazards. Because the employee had testified he knew that the unit was a heater, that it posed a fire danger, that one could not lean combustible material against it for any length of time, and that it was warm shortly before he placed the mattress on it, the court found both that a reasonably intelligent person would have perceived the fire risk from leaving the mattress against the heater and that the employee himself had perceived the risk to substantially the same extent as any warning would have provided.

The court also granted defendant's motion as to plaintiff's claim of negligent design or manufacture. The court observed that, except in rare situations not applicable here, Massachusetts law requires expert evidence to support a negligent design claim; because plaintiff had offered no expert testimony to identify any defect in the heater, the design claim failed as a matter of law. Further, the court found no evidence that the heater was negligently manufactured; to the contrary, evidence demonstrated that it was functioning properly, as it was warm.

The court rejected the strict liability claim because Massachusetts does not recognize such a claim. Finally, the court rejected plaintiff's claims of breach of the implied warranties of merchantability (the Massachusetts near-equivalent of strict liability) and fitness for a particular purpose. First, because plaintiff presented no evidence that the heater was malfunctioning or defective, the court concluded that the heater satisfied the warranty of merchantability. Second, because the hotel had relied on a heating contractor rather than the

heater's manufacturer when selecting the heater, the manufacturer could not have known of any particular purpose the hotel intended for the heater. Hence, plaintiff's claim of breach of an implied warranty of fitness failed as a matter of law.

Massachusetts Federal District Court Remands Pharmaceutical Failure-to-Warn Claim to State Court, Holding Defendant's Argument that Claim Challenged FDA's Authority to Approve Warning Raised Preemption Defense Rather than Demonstrated that Claim Arises Under Federal Law

In *Tofanelli v. Biogen Idec, Inc.*, 2008 WL 3824775 (D. Mass. Aug. 5, 2008), plaintiff's decedent died of an opportunistic brain infection allegedly caused by a prescription drug that had previously been approved by the United States Food and Drug Administration ("FDA") under an accelerated approval process. Plaintiff sued two pharmaceutical manufacturers in Massachusetts Superior Court for their alleged failure to provide adequate warning of the risk of opportunistic infection where that risk was allegedly evident from data gathered in pre-marketing clinical trials. Defendants removed the case to the United States District Court for the District of Massachusetts, alleging plaintiff's claims arose under federal law, and plaintiff moved to remand.

The court observed that, for the removal to stand, plaintiff's claims must either be completely preempted by federal law or fall within the "federal ingredient" doctrine, under which a putative state law claim is considered to arise under federal law if plaintiff's right to relief "necessarily depends on resolution of a substantial question of federal law." Defendants argued that federal ingredient jurisdiction existed because the complaint effectively challenged the FDA's regulatory authority to approve the initial and accelerated marketing of the drug without incorporating into the drug's labeling any warning regarding opportunistic infection, so that the complaint implicated a substantial federal interest in protecting the FDA's authority.

The court, however, found that federal ingredient jurisdiction did not exist, describing defendants' argument as "simply a

preemption defense hopefully recast in different words," and noting that the existence of a federal defense to a claim does not mean that the claim itself arises under federal law. The court noted that defendant's preemption argument, which also was advocated by the United States in support of a petition for certiorari in *Wyeth v. Levine*, 128 S. Ct. 1118 (2008)—namely, that state product liability claims are preempted when they challenge labeling that the FDA approved after being informed of the relevant risk—was inconsistent with current Massachusetts law, that different courts had resolved the issue differently and that the issue was now pending before the United States Supreme Court. The court concluded, however, that the fact that the preemption issue was unsettled and interesting did not confer federal jurisdiction over it. The court thus granted plaintiff's motion to remand.

Massachusetts Appeals Court Holds Employer's Corporate Parent Cannot Be Held Vicariously Liable for Employer's Allegedly Negligent Conduct Toward Employee Under Respondeat Superior Theory Where Suit Against Employer was Dismissed With Prejudice

In *Walsh v. Comprehensive Addiction Programs, Inc.*, 891 N.E.2d 717, 2008 WL 3051544 (Mass. App. Ct. 2008), plaintiff sustained injuries in the course of her employment and sued her employer for negligence and her employer's corporate parent for vicarious liability. Plaintiff voluntarily dismissed with prejudice her suit against her employer, but a jury found the corporate parent liable to plaintiff. Defendant moved for judgment notwithstanding the verdict, arguing that the dismissal with prejudice of the employer barred the vicarious liability claim. The trial court denied the motion and defendant appealed.

The Massachusetts Appeals Court reversed. The court found first that, because the jury determined that defendant owed no independent duty to plaintiff, the sole basis for holding defendant liable was vicarious liability for the employer's conduct. The court held, however, that under the Massachusetts Workers' Compensation Act (the "Act"), an employee's voluntary dismissal with prejudice of her lawsuit against her employer is conclusive as to the issue of the

employer's liability for negligence and thus precludes as a matter of law any finding that the employer's owner is vicariously liable for such conduct. That plaintiff likely dismissed her lawsuit against the employer because the employer was immune from suit under the Act in any event did not change the result. To permit a vicarious liability claim, the court said, would "do violence to the effective functioning of the workers' compensation scheme" because it would encourage a vicariously-liable party to seek indemnification from the employer who is intended to be insulated from liability under the Act.

Massachusetts Appeals Court Reverses Judgment for Plaintiff on Chapter 93A Claims Based on Inadequate Notice Where Trial Court Did Not Construe Complaint to Allege Chapter 93A Claims Until First Day of Trial

In *A.A. Aarons Interiors, LLC v. D.M. Reid Associates, Ltd.*, 2008 WL 3106728 (Mass. App. Ct. Aug. 8, 2008), plaintiff sued defendant for three counts of breach of contract and two counts of "tortious conduct," including "knowing, deliberate and wrongful conduct [that] has caused [plaintiff's] business activities to suffer unbearable setbacks." The complaint also alleged that defendant's conduct had caused "unbearable harm" warranting "punitive damages." On the first day of trial, after opening statements, the court informed the parties that it would treat the two self-styled "tortious conduct" counts as actually claims under Mass. Gen. L. ch. 93A, the Massachusetts unfair and deceptive practices statute, reasoning that the only way plaintiff could claim "punitive damages" was pursuant to that statute. Defendant objected that it had received no notice of any such claim and that ch. 93A was never discussed in the parties' pretrial memoranda. The trial on the ch. 93A claim nonetheless proceeded and judgment was entered against defendant on those claims.

On appeal, the Massachusetts Appeals Court conceded that the complaint could fairly have been read to state ch. 93A claims had the parties treated it as such, but reversed based on the insufficient notice defendant actually received of the ch. 93A claims. The court observed that the complaint did not mention ch. 93A and that, while the complaint mentioned "punitive damages," the terminology used under ch. 93A is "multiple damages." The court also observed that plaintiff never attempted to amend the complaint to more clearly plead claims under ch. 93A. The court held that adequate notice to a defendant in a ch. 93A claim is necessary to effectuate one of the important goals of ch. 93A, namely, to promote reasonable settlement offers. The court thus vacated the judgment on the purported ch. 93A claims.

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