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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 Holds Employer Was Sophisticated User and Dismisses Former Employee's Claims Against Manufacturers and Suppliers of Beryllium-Containing Products

In *Genereux v. American Beryllia Corp.*, 2007 WL 3024787 (D. Mass. 2007), plaintiff contracted chronic beryllium disease (CBD) as a result of working with beryllium-containing products supplied to her former employer by defendants. She asserted claims in the Massachusetts Superior Court for negligence, breach of warranty, fraudulent concealment, violation of Mass. Gen. L. ch. 93A (the Massachusetts unfair and deceptive trade practices statute) and loss of consortium. Defendants removed the case to the United States District Court for the District of Massachusetts and sought summary judgment.

Defendants first argued that the statute of limitations barred all of plaintiff's claims. The court noted that a cause of action accrues, and the limitations period begins to run, when a plaintiff has "knowledge or notice" of her injury, even if she does not then apprehend its full nature or extent, and is able to "recognize some causal connection between the defendant's actions" and her injuries. Here, the court held plaintiff's causes of action accrued when her physician informed her that her shortness of breath and wheezing could be the result of exposure to beryllium through her employment, and ordered a blood test to determine whether she had contracted CBD — not when she was actually diagnosed with the disease the following year — because plaintiff was at that time sufficiently apprised of the casual connection between beryllium exposure and her injury. The court therefore granted summary judgment against plaintiff's common law claims, which she had failed to bring within the applicable three-year limitations period, but denied summary judgment on plaintiff's statutory claims, which she had brought within the applicable four-year period.

Defendants next sought to avoid liability under the bulk supplier doctrine, which allows a supplier of bulk products "to discharge its duty to warn end users of a product's hazards by reasonable reliance on an intermediary." The court declined to grant summary judgment on the basis of this doctrine, however, because it normally applies to bulk raw materials or liquids that may have numerous commercial uses, of which it would be impractical for the supplier to warn. The court instead found that whether the

bulk supplier doctrine shielded defendants — who supplied discrete, finished products to plaintiff’s former employer — raised a question of material fact.

Defendants also sought to avoid liability through the sophisticated user doctrine, which permits a manufacturer to avoid liability for failing to warn a sophisticated end user of a risk or hazard when the user would have appreciated the danger “to the same extent as a warning would have provided.” The court determined that plaintiff’s former employer, rather than plaintiff herself, was the relevant end user, noting that plaintiff was not a consumer of the beryllium-containing products and that this determination was consistent with precedent. The court then determined that the employer was sufficiently sophisticated to cope with the dangers of beryllium without further warning because its employees knew beryllium was dangerous, its policies and internal memoranda highlighted the dangers of the substance and defendants actually provided the employer with warnings of those dangers. Thus, the court held that the sophisticated user doctrine applied and granted summary judgment against all of plaintiff’s claims.

Massachusetts Federal District Court Dismisses Claims Against Pharmaceutical Skin Cream Manufacturer for Lack of Expert Testimony of Design Defect, Failure to Warn and Proximate Cause

In *Haughton v. Hill Laboratories, Inc.*, 2007 WL 2484889 (D. Mass. 2007), plaintiff sued defendant — the manufacturer of a topical prescription cream for the treatment of melasma — after allegedly suffering burning and permanent scarring on her face from using the product. Plaintiff asserted claims of negligent failure to warn, breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability), breach of an implied warranty of fitness for a particular purpose and intentional infliction of emotional distress. Defendant removed the action from the Massachusetts Superior Court to the United States District Court on the basis of diversity of citizenship jurisdiction and moved for summary judgment.

The court granted defendant’s motion. The court first dismissed plaintiff’s claim of negligent failure to warn, noting that Massachusetts adheres to the “learned intermediary rule” — under which a prescription drug manufacturer’s duty is to warn the prescribing physician rather than the patient — concluding that there was no evidence plaintiff’s doctors were unaware of the risks of the drug. The court next dismissed plaintiff’s two claims of breach of implied warranty, noting that a plaintiff must demonstrate that a product is defective and unreasonably dangerous to make out a claim for breach of implied warranty. The court concluded that plaintiff’s proffered statement that the drug “did not work as intended,” without the support of expert testimony, was insufficient to demonstrate either a design defect or proximate causation. Finally, the court dismissed plaintiff’s claim of intentional infliction of emotional distress, concluding that, absent evidence that defendant marketed a defective drug, there was no basis for such a claim.

Massachusetts Federal District Court Holds Plaintiff Not Responsible for Loss of Allegedly Negligently-Manufactured Sandal, Denies Summary Judgment Based on Inference of Negligence Under *Res Ipsa Loquitur* Doctrine

In *Hofer v. The Gap, Inc.*, 516 F. Supp. 2d 161 (D. Mass. 2007), plaintiff alleged she was injured when a sandal she was wearing for the first time broke as she descended a hotel stairway, causing her to lose her balance and fall into an ornamental pool containing sharp rocks. Plaintiff sued the parent of the sandal’s retailer for negligent manufacture and breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability). Plaintiff also sued the hotel for negligent maintenance and negligent infliction of emotional distress, and sued both the hotel and the website through which she had booked her trip for negligent failure to warn. The alleged sandal manufacturer moved for summary judgment.

Defendant first argued, pursuant to spoliation doctrine, that plaintiff had improperly failed to preserve the sandal and it would be unfairly prejudicial to proceed with plaintiff’s claims while depriving defendant of any opportunity to

inspect the sandal. The court, however, observed that the sandal went missing after plaintiff was rushed to the hospital in the aftermath of the accident, and that both a hotel employee and plaintiff's traveling companion had observed the sandal at the accident scene. The court accordingly found that the loss of the sandal was not the result of plaintiff's intentional or negligent acts and, therefore, spoliation doctrine did not apply.

Defendant next argued plaintiff had produced no evidence to establish that its negligence caused her injuries. The court, however, found plaintiff's testimony and corroborating affidavits from her mother and friend were sufficient to support a conclusion that defendant manufactured the sandal. The court also found the evidence was sufficient to support an inference that defendant was negligent in manufacturing the sandal, and that such negligence caused plaintiff's injuries, under the doctrine of *res ipsa loquitur*, as the sandal's breaking during its first use is the type of occurrence that does not usually happen in the absence of negligence, and plaintiff's testimony demonstrated that her injury was more likely caused by defendant's negligence than some other cause. The court also rejected defendant's argument that plaintiff's claim must fail for lack of expert testimony, emphasizing plaintiff had not asserted a claim of negligent design, and accordingly denied summary judgment against plaintiff's negligent manufacturing claim.

Finally, the court held it could not grant summary judgment against plaintiff's breach of implied warranty claim because, under Massachusetts law, if a defendant acted negligently, it must also be found to have breached the implied warranty of merchantability.

Massachusetts Superior Court Dismisses Claims Against Bicycling Equipment Manufacturer and Supplier for Lack of Expert Testimony of Design Defect, Failure to Warn and Proximate Cause

In *Bardige v. Performance Specialists*, 2007 WL 3012673 (Mass. Super. 2007), plaintiff, who suffered ailments related to the presence of an "accessory navicular bone" in his foot, allegedly was injured by his use of "cant wedges,"

inserts that fit between the cleat of a cycling shoe and the shoe itself and are meant to improve forefoot alignment and tracking while cycling. Plaintiff sued defendants, the manufacturer and fitter of the cant wedges, for negligence, breach of express warranty, breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability) and breach of an implied warranty of fitness for a particular purpose. Defendants moved for summary judgment.

The court granted summary judgment against plaintiff's negligence claim, concluding plaintiff's failure to offer expert testimony to support his claims of design defect and proximate causation were fatal to the claim. The court refused to consider letters submitted from plaintiff's podiatrists because the letters were neither sworn nor signed under penalties of perjury and therefore were not admissible "affidavits" under Massachusetts Rule of Civil Procedure 56.

The court next granted summary judgment against plaintiff's claim of breach of express warranty because, among other things, plaintiff offered no evidence that defendants had made any express warranty about the product's suitability for persons with an accessory navicular bone.

The court then granted summary judgment against plaintiff's claim of breach of the implied warranty of merchantability, rejecting plaintiff's argument that defendants failed to warn or provide instructions regarding the risk that cant wedges may pose to the alleged 10–19% of the population with accessory navicular bones. The court again refused to accept as admissible evidence the letters submitted from plaintiff's podiatrists.

Finally, the court granted summary judgment against plaintiff's claim of breach of an implied warranty of fitness for a particular purpose. Even assuming that defendant knew of the particular purpose to which plaintiff would put the cant wedges at the time of purchase, the court concluded plaintiff's pre-existing medical problems made proximate causation "far from obvious," and noted that plaintiff had submitted no expert testimony to support causation.

Massachusetts Superior Court Holds Presence of Defendant's Trademark on Product Creates Triable Issue Whether Defendant Manufactured Product But Does Not Determine Issue as a Matter of Law

In *Lou v. Otis Elevator Company*, 2007 WL 4099326 (Mass. Super. 2007), plaintiff was injured after becoming entrapped in an escalator in a department store in the People's Republic of China. Plaintiff sued defendant, whose trademark appeared on the escalator, for his injuries. Plaintiff sought partial summary judgment to establish that defendant manufactured or sold the escalator.

The court recited evidence by defendant indicating that the actual manufacturer of the escalator was China Tianjin Otis Elevator Company, Ltd., an entity that was initially organized as a joint venture among Tianjin Elevator, China International Trust & Investment Corporation Development Co., Ltd. and Otis Far East Holdings Company, and that currently is wholly-owned by a Chinese holding company that is itself owned by Otis Far East Holdings Company (a subsidiary of defendant) and Tianjin Elevator. The court also noted that the technology for the escalator was provided by defendant pursuant to a Technical Cooperation Agreement between defendant and the joint venture.

On this record, the court denied plaintiff's requested summary judgment, reasoning that the presence of a trademark on a product may provide evidence for a factfinder to determine that the product was manufactured by the trademark holder, but does not lead to that determination as a matter of law.

The court thus concluded the presence of defendant's mark on the escalator should be taken to a jury for determination whether the mark actually indicated defendant's status as the escalator's manufacturer. The court's summary judgment denial was followed two months later by a plaintiff's verdict in the amount of \$3.35 million.

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