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# 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 Supreme Judicial Court Holds Motor Vehicles' Failure to Comply with Applicable Safety Regulations Constitutes Injury For Purposes of Unfair or Deceptive Practices Statute Even Where Plaintiffs Suffer No Physical Injury or Financial Loss; Also Adopts Heightened Pleading Standards

In *Iannacchino v. Ford Motor Co.*, --- N.E.2d ----, 2008 WL 2375179 (Jun. 13, 2008), plaintiffs, who sought to represent a class of Massachusetts owners of certain 1997-2000 motor vehicles, sued the defendant manufacturers for violation of Mass. Gen. L. ch. 93A (the Massachusetts unfair and deceptive practices statute), breach of express and implied warranties, and unjust enrichment, alleging that the vehicles' door handles were defective for failing to comply with Federal Motor Vehicle Safety Standard 206 (FMVSS 206) relating to door latch strength. Although none of the putative class members' door latches had malfunctioned at the time of suit, plaintiffs alleged their vehicles were unsafe due to the defect, their vehicles were worth less than they would have been had defendant complied with FMVSS 206, and plaintiffs would, at some unspecified time, incur the cost of repairing the vehicles. The trial court granted defendants' motion for judgment on the pleadings on all claims except implied warranty and reported the case to the Massachusetts Appeals Court for interlocutory review. The Supreme Judicial Court granted direct appellate review on its own initiative.

The court observed that, to bring an action under ch. 93A, § 9, a consumer must have been "injured" by defendant's unfair or deceptive act or practice. The court accepted plaintiffs' argument that, if their vehicles failed to comply with FMVSS 206, plaintiffs would have suffered an injury because they "would have paid for more (viz., safety regulation-compliant vehicles) than they received." In reaching this conclusion, the court purported to distinguish *Hershenow v. Enterprise Rent-A-Car Co. of Boston*, 445 Mass. 790 (2006) *(see January 2006 Foley Hoag Product Liability Update)*, which held that consumers who rented a car under a collision damage waiver provision that violated Massachusetts statutory law had not suffered an "injury" for ch. 93A purposes, on the ground that the purported injury in that case had ended when the customers returned their cars, while the present plaintiffs continued to own allegedly noncompliant vehicles. The court neither discussed the fact that a ch. 93A, § 9 claim is not limited to persons with an ongoing injury nor identified any specific allegation supporting its conclusion that consumers would pay more for an FMVSS 206-compliant vehicle than a non-compliant one.

The court further concluded, however, that plaintiffs had failed adequately to allege "a legally required standard that the vehicles were at least implicitly represented as meeting, but allegedly did not." Plaintiffs' complaint asserted that defendant had failed to use the most common government-approved test to demonstrate the latches' compliance with FMVSS 206 and had instead used another test; at argument, however, plaintiffs conceded the test used by defendant was, in fact, also government-approved. Further, because plaintiffs needed to allege non-compliance with a legal requirement, plaintiffs' allegation that the latches failed to meet defendant's self-imposed internal standards was inadequate. Because plaintiffs' ch. 93A and breach of implied warranty claims were based on the same economic theory of injury and the same set of alleged facts, the court also dismissed plaintiffs' warranty claim.

Finally, although the issue was not raised by the parties, the court sua sponte overruled its longstanding test for the adequacy of a complaint: it should be dismissed only if plaintiff can "prove no set of facts in support of his claim which would entitle him to relief." Instead, the court adopted the standard that was recently set forth by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly,* 127 S. Ct. 1955 (2007): "Factual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." "What is required at the pleading stage are *factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief."*

## Massachusetts Federal District Court Remands Asbestos Failure-to-Warn Claims to State Court Where Affidavits Failed to Demonstrate Colorable Federal Contractor Defense

In *Hilbert v. McDonnell Douglas Corp.*, 529 F. Supp. 2d 187 (D. Mass. 2008), a former U.S. Navy aircraft mechanic sued defendants for negligence, strict liability and breach of warranty related to their failure to warn about the dangers of handling asbestos without proper protection. Previously, a different defendant had removed the case from state to federal court based on the federal contractor defense only to see the case remanded to state court. *(See October 2007 Foley Hoag Product Liability Update.)* After plaintiff's deposition yielded additional details of his alleged exposure, another defendant removed the case to the United States District Court for the District of Massachusetts and plaintiff again moved to remand.

Plaintiff first argued removal was untimely. The court observed that, under 28 U.S.C. § 1446(b), removal must be made within thirty days of receiving notice the action is removable. When the basis of removal is a federal contractor defense, a defendant receives such notice when plaintiff provides sufficiently specific facts to permit identification of the contracts through which the defense would be asserted. Here, the complaint was not sufficiently specific because it merely described "various ships, shipyards, and airfields." Plaintiff's deposition testimony and discovery, however, had listed the specific aircraft plaintiff had maintained as well as the brake manufacturer associated with them. Defendant's removal within thirty days of receiving this information therefore was timely. Moreover, because of the presence of this new information, defendant was not estopped from removing the case by the prior removal decision.

On the merits, the court observed that removal under 28 U.S.C. § 1442(a)(1) is proper where: (1) the removing defendant demonstrates a colorable federal defense; (2) a causal nexus exists between defendant's acts under color of a federal office and the conduct giving rise to plaintiff's claims; and (3) defendant was "acting under" a federal officer. In turn, a colorable federal contractor defense to plaintiff's failure-to-warn claim required defendants to show that: (1) the government exercised its discretion and required certain warnings; (2) the contractor provided the warnings required by the government; and (3) the contractor warned the government about any dangers in the equipment's use that were known to the contractor but not the government.

With respect to the first element, defendants argued the Navy had promulgated specifications that were so precise defendants could not have conformed to them while warning about asbestos. In support, defendants offered the affidavit of a retired Air Force Colonel stating that the Air Force "would not have approved any warnings" and any suggestion by a contractor to include asbestos warnings "would have been futile." The court, however, found the affidavit inadequate because the affiant was an Air Force, rather than Navy, officer and statements that the Air Force "would not have approved" warnings were therefore speculative as to the Navy.

The court also rejected affidavits of defendants' employees claiming defendants had no control over the content of warnings, as the affiants failed to support their assertions with specific contractual or regulatory language. The court thus held defendants had not shown the government had controlled the content of permissible warnings and had therefore failed to make out a colorable federal contractor defense. For the same reason, there was no nexus between defendant's acts under color of federal office and plaintiff's claims. The court remanded the case to state court.

## Massachusetts Federal District Court Upholds Removal of Asbestos Failure-to-Warn Claims to Federal Court Under Federal Officer Removal Statute Because Defendant Established Colorable Military Contractor Defense

In *O'Connell v. Foster Wheeler Energy Corp.*, --- F. Supp. 2d ----, 2008 WL 1722079 (D. Mass. 2008), plaintiff sued a marine pump manufacturer in Massachusetts Superior Court for negligent failure to warn of the dangers of defendant's allegedly asbestos-containing products. Plaintiff claimed he was exposed to the products while employed at a shipyard and that such exposure caused him to develop mesothelioma. Defendant removed the action to the United States District Court for the District of Massachusetts pursuant to the federal officer removal statute, 28 U.S.C. § 1442(a)(1), and plaintiff moved to remand.

The court observed that removal under 28 U.S.C. § 1442(a)(1) is proper where: (1) the defendant was "acting under" a federal officer; (2) the defendant has a colorable federal defense; and (3) a causal nexus exists between defendant's acts under color of office and the conduct that gives rise to the plaintiff's claims. In turn, a colorable military contractor defense exists where: (1) the government exercised its discretion and required certain warnings; (2) the contractor provided the warnings required by the government; and (3) the contractor warned the government about those dangers in the equipment's use that were known to the contractor but not to the government.

Here, the court held that affidavits from Navy personnel established the first two elements of a colorable military contractor defense by showing defendant was acting under the Navy's pervasive control and within reasonably precise specifications imposed by it. The affidavits further supported the second element by establishing that any deviation from the Navy's prescribed warnings scheme would have resulted in rejection of the equipment. Finally, the third element was satisfied because the Navy's state-of-the-art knowledge of asbestos-related hazards indicated that defendant could not have been aware of any risks unknown to the Navy. Unlike the affidavits in *Hilbert v. McDonnell Douglas Corp.* (see above), the affiants in this case had personal knowledge of the relevant specifications and contracting practices and demonstrated that the Navy regulated the content, as well as the form, of permissible warnings and written materials.

Turning to the other two prongs of federal officer removal, the court determined that the Navy's substantial control over defendant meant that defendant was "acting under" a federal agency and, because the Navy's control impeded defendant's ability to fulfill any state law duty to warn, there was a causal nexus between defendant's acts and plaintiff's claims. The court thus denied plaintiff's motion to remand.

## Massachusetts Federal District Court in Tractor Back-Over Case Grants Summary Judgment Against Failure-to-Warn Claims Because Plaintiff Did Not Read Warnings, Grants Summary Judgment Against Punitive Damages Claims, Finds Genuine Issues of Fact Regarding Design Defect Claim

In *O'Neil v. Electrolux Home Products, Inc.*, 2008 WL 2066948 (D. Mass. May 14, 2008), plaintiffs sued the designer, manufacturer and marketer of their lawn tractor and grass catcher attachment for negligence and gross negligence; willful, wanton and reckless conduct; breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability); violation of Mass. Gen. L. ch. 93A (the Massachusetts unfair and deceptive practices statute); and negligent infliction of emotional distress after plaintiff backed over his young son, killing him. Defendants moved for summary judgment against all claims.

The United States District Court for the District of Massachusetts noted that a product may violate the implied warranty of merchantability if it has a defective design or inadequate warnings. With respect to the former, plaintiffs argued the tractor's design was defective due both to the absence of a mechanism disengaging the mower blades when operating in reverse as well as an enlarged rear blind spot caused by the grass catcher attachment. Defendants countered the design was not defective because it was not dangerous beyond the contemplation of an ordinary consumer, who would appreciate the danger of contact with the mower's blades. The court ruled that, while ordinary consumers understand the dangers of mower blades, they may not be aware of an increased risk of back-over accidents due to an enlarged blind spot when using the grass catcher attachment. The court also found plaintiffs had demonstrated the feasibility—and, in fact, had demonstrated other manufacturers' actual use—of a safer alternative design embracing back-over protection. The court also found plaintiffs could prove that the injury to their son was caused by the blind spot. Accordingly, the court denied summary judgment on plaintiffs' defective design claims based on warranty, negligence and ch. 93A theories.

With respect to the failure-to-warn claim, the court first held a jury could conclude the warnings did not convey a fair indication of the nature and extent of the danger because they did not warn of the grass catcher attachment's impact on visibility. The court also held, however, that additional warnings would not have prevented the accident because plaintiff admitted he did not read the safety rules in the owner's manual. Accordingly, the court granted summary judgment on plaintiffs' failure-to-warn claim.

Finally, the court found no evidence from which a jury could conclude defendants had acted willfully, wantonly, recklessly, or with gross negligence. The court observed that only about five back-over accidents occurred annually, compared to 700,000 tractors manufactured annually, and defendants included safety systems and warnings on the tractor, were researching the possibility of adding child safety systems, and complied with voluntary industry standards. The court thus granted summary judgment against plaintiffs' punitive damages claim.

## First Circuit Enforces Contractual Provision Relieving Manufacturer in Commercial Case of Liability for Negligent Design, Manufacture and Advertising of Goods

In *Trans-Spec Truck Service, Inc. v. Caterpillar Inc.*, 524 F.3d 315 (1st Cir. 2008), plaintiff ordered custom-built trucks from a third party. Plaintiff arranged for defendant to supply the trucks' engines pursuant to a contract that included a disclaimer relieving defendant of all liability for negligence in "the manufacture or supply of goods or the provision of services." Within two years of the trucks' delivery, many of them had become inoperable due to flywheel malfunctions in their engines.

Plaintiff sued defendant in the United States District Court for the District of Massachusetts for breach of warranty, violation of Mass. Gen. L. ch. 93A (the Massachusetts unfair and deceptive practices statute), and negligent design, manufacture and marketing of the engines. The court dismissed as time-barred the breach of warranty and ch. 93A claims and granted summary judgment against the negligence claim. Plaintiff appealed.

The United States Court of Appeals for the First Circuit affirmed the dismissal of the breach of warranty and ch. 93A claims because the claims accrued at tender of delivery and plaintiff did not bring the claims within the four-year limitations period required by Mass. Gen. L. ch. 106, § 2-725(1)-(2) and ch. 260, § 5A, respectively.

The court also affirmed summary judgment on the negligence claim. The court held that a contractual exculpatory clause is enforceable unless the clause is unconscionable. Here, the disclaimer did not result in unfair surprise as it was "[n]either opaquely worded nor hidden in small print" and was negotiated at arm's length by sophisticated commercial parties.

The court rejected plaintiff's numerous arguments for concluding that the disclaimer was unconscionable. First, the court rejected the argument that, by "bragg[ing] that engine up like there was no tomorrow" prior to finalizing the sale while failing to disclose a patent it held for an improved flywheel housing that was not used in the engines, defendant had "affirmatively misrepresented" that the design and manufacture of its engines

was not negligent and thus deprived plaintiff of any meaningful choice in negotiating the contract. The court dismissed defendant's statements as "classic seller's talk" and concluded that defendant's "effort to improve on a piece of equipment cannot be viewed as evidence that unimproved equipment was negligently designed or manufactured." Next, the court rejected the argument that enforcing the disclaimer would be unconscionable because it would leave plaintiff without remedies, reasoning that plaintiff had contractual remedies that it had failed to assert in a timely fashion. The court also rejected plaintiff's argument that the contract's exclusive warranty remedies' failure of their essential purpose rendered the disclaimer invalid, reasoning that, even if the warranty remedies did fail of their essential purpose, under Mass. Gen. Laws ch. 106, § 2-719(2), this would preserve all statutory warranty remedies but not the tort remedy of negligence. Finally, the court rejected the plaintiff's argument that defendant's promise to "make [plaintiff] whole" waived the disclaimer, reasoning that the defendant's promise was vague and did not implicate any of the contractual provisions sufficiently to effect waiver.

## Massachusetts Federal District Court Holds Medical Journal's Interest in Confidentiality of Peer Review Process Outweighs Defendant's Need for Discovery of Communications Between Journal Editors and Authors

In *In re Bextra and Celebrex Marketing Sales Practices and Product Liability Litigation,* 249 F.R.D. 8 (D. Mass. 2008), plaintiffs alleged that defendant's pharmaceutical products caused cardiovascular and other injuries. Plaintiffs alleged that defendant was placed on notice of the products' risks by articles published in a peer-reviewed medical journal. Defendant therefore subpoenaed from the journal all documents concerning manuscripts about the products submitted to the journal for publication, whether accepted or rejected, and eventually moved to compel production only of all communications between the journal's editors and the authors of such articles. The journal opposed and sought a protective order, arguing the motion would compel the production of confidential peer reviewer comments.

The court analyzed the motions under Fed. R. Civ. P. 26(b)(2)(C), which requires the court to limit discovery where "(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; . . . or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." The court first found that no more convenient, less burdensome or less expensive sources were available, as obtaining the same information piecemeal from the authors of the published articles would require "substantially more effort" and would not yield information regarding unpublished articles submitted by other authors.

The court then weighed the burden against the likely benefit of the proposed discovery. The benefit was limited because, although the communications likely contained peer reviewer comments that could be used to impeach the authors, the comments were unlikely to address the issue of what defendant knew or should have known through the articles' publication. Also, defendant already had access to its own expert analysis and, in any event, the journal was entitled to the protections afforded by Fed. R. Civ. P. 45(c)(3)(B)(ii) against the compelled production of analysis by an unretained expert that does not describe the specific occurrences in dispute and results from a study that was not requested by a party.

Further, the burden to the journal of the proposed discovery was very significant. The court stated that the journal's confidentiality interest was heightened because the journal could not effectively advance and disseminate medical knowledge without the frank opinions of peer reviewers, who would not participate if their comments and identities were subject to disclosure in unrelated litigation. The court held that this heightened confidentiality interest justified protection commensurate with that afforded journalists. The court thus denied defendant's motion to compel and granted the journal's motion for a protective order.

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

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