FOLEY HOAG LLP
ATTORNEYS AT LAW

PRODUCT LIABILITY UPDATE

April 2005

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

In This Issue:

Congress Enacts Class Action Fairness Act of 2005 Giving Federal Courts Expanded Jurisdiction Over Interstate Class Actions

Reacting to past abuses in which class actions of national interest have been decided in state courts, often in a manner biased against out-of-state defendants, Congress recently passed, and the President promptly signed, the Class Action Fairness Act of 2005 (the "Act"). The Act applies to all class actions filed on or after February 18, 2005, and significantly expands federal courts' jurisdiction over interstate class actions.

Previously, federal district courts had jurisdiction over state law-based class actions involving United States citizens only where the claims of each of the proposed class representatives exceeded $75,000 and each representative was a citizen of a different state than each defendant. Under the Act, federal courts are at least initially given jurisdiction over any class action involving 100 or more class members so long as the *aggregate* amount of all class members' claims exceeds $5,000,000 and *any* class member is a citizen of a different state than *any* defendant.

After creating such broad federal jurisdiction, however, the Act proceeds to establish both discretionary and mandatory limitations on its exercise based on the relative degrees of national and intra-state interest. Thus the federal court *may* decline to exercise

jurisdiction if more than one-third, but less than two-thirds, of the class members as well as all "primary" defendants (a term not defined by the Act) are citizens of the forum state, depending on "the interests of justice" and "totality of the circumstances." In so determining, the court must consider whether (1) the class claims involve matters of national or interstate interest; (2) the claims will be governed by the law of the forum state; (3) the claims have been pleaded in a manner that seeks to avoid federal jurisdiction; (4) the action was brought in a forum with a distinct nexus to the class members, alleged harm or defendants; (5) the number of class members who are citizens of the forum state is substantially larger than the number from any other state and the other class members' citizenship is dispersed among a substantial number of states; and (6) one or more other class actions asserting the same or similar claims have been filed within the previous three years.

Moreover, the federal court *must* decline jurisdiction if two-thirds or more of all class members as well as all "primary" defendants are citizens of the forum state, or if all of the following conditions are met: (1) more than two-thirds of the class members are citizens of the forum state; (2) at least one defendant from whom significant relief is sought and whose alleged conduct forms a significant basis for the asserted claims is a citizen of the forum state; (3) the "principal" injuries (again, an undefined term) resulting from the alleged conduct of each defendant were incurred in the forum state; and (4) no other class action asserting the same or similar factual allegations against any of the defendants has been filed during the previous three years.

The Act also eliminates for class actions various rules that normally restrict removal to federal court of actions originally filed in state court. Thus the statute renders inapplicable the usual requirements that actions in which jurisdiction is based on diversity of citizenship be removed within one year of their commencement and that all defendants consent to the removal, as well as the prohibition against removal if any defendant is a citizen of the forum state. The Act also changes for class actions the normal rule that a district court order granting or denying a motion to remand the action to state court is not appealable. Now the court of appeals may agree to review such an order if review is sought within seven days; if the appeal is not resolved within 60 days, however (one ten-day extension for good cause or a larger extension by agreement of the parties is allowed), the appeal is automatically denied.

In addition to governing class actions, the Act also provides for identical federal jurisdiction over the claims of all plaintiffs in "mass actions" -- cases of 100 or more persons proposed to be tried together -- whose claims exceed $75,000.

Finally, the Act imposes various limitations on class action settlements where part of the consideration to class members consists of coupons, and requires the federal courts to submit recommendations to Congress within a year on best practices to ensure the fairness of class action settlements and appropriateness of class counsel's fees.

Massachusetts Superior Court Vacates Product Liability Default Judgment Against Foreign Manufacturer as Inconsistent with Jury Verdict for Domestic Marketer

In *Pleva v. Pro-Tech Power, Inc. et al.*, No. 96-2577-B (Mass. Super. Ct. March 8, 2005), plaintiff severed his hand while using an electric table saw made by a Taiwanese manufacturer and marketed by an American saw company under its own trade name. Plaintiff sued the manufacturer and marketer under strict liability and negligence theories alleging the saw was defectively designed and defendants had failed to warn of the saw's dangers.

The manufacturer failed to appear and was defaulted; the case then proceeded without it. The court dismissed the failure-to-warn claim because plaintiff agreed he did not and would not have read any warnings provided. At trial, the American marketer was treated as the "ostensible manufacturer." The jury returned a defense verdict, specially finding that while the saw was defective such defect was not the cause of plaintiff's injury (presumably accepting the defense argument that plaintiff's unforeseeable misuse caused the accident). At plaintiff's request, however, the jury was allowed to assess damages against the manufacturer because of its default. After the jury returned a multi-million dollar verdict against the company, it retained **Foley Hoag's Product Liability and Complex Tort Practice Group** to attempt to reverse the resulting default judgment.

The manufacturer filed two motions to vacate, the first based on the manufacturer's lack of minimum contacts with Massachusetts so as to permit its courts to exercise personal jurisdiction and the second based on the inconsistency between the default judgment against the manufacturer and the jury verdict for the marketer. The court denied the first motion but granted the second. Applying a rarely-cited 1872 United States Supreme Court decision as argued by the manufacturer, the court agreed that a default judgment against a non-appearing defendant cannot stand where a co-defendant secures a trial verdict that would necessarily have applied to the defaulting defendant had it appeared. Here, the court found that because the American marketer had been tried as the ostensible manufacturer, it stood in the shoes of the manufacturer for liability purposes and the defense verdict in the marketer's favor would necessarily have applied to the absent manufacturer.

Massachusetts Superior Court Grants Summary Judgment Because Component Part Manufacturer Had No Duty to Warn of Danger Created by Product Assembler Who Was Also a Knowledgeable User

In *Dusoe v. Union Carbide Corporation, et al.,* No. 981470C, 2005 WL 705960 (Mass. Super. Ct. Jan. 20, 2005), plaintiff, an experienced mechanic and welder, was injured when a welding torch he had assembled from various components exploded as he was using it to dismantle a boiler. Plaintiff was attaching a replacement oxygen tank to the torch's oxygen regulator when the explosion occurred. Plaintiff sued the manufacturer of the regulator, one of the components he had used in assembling the torch, alleging that the manufacturer failed to warn of the risk of operating a torch system without incorporating check valves to safeguard against a backflow and explosion.

The Massachusetts Superior Court allowed defendant's motion for summary judgment, noting that the manufacturer had merely manufactured a part which, over twenty

years later, the welder had himself integrated into a "dangerously altered" welding torch. As a manufacturer has no duty to warn of dangers arising from another party's—here plaintiff's—integration of the part into an assembled product, defendant could not be liable for failing to warn of the use or misuse of its oxygen regulator in an assembled welding torch. The court explained that this rule was supported by "the attenuated foreseeability of such risks."

The court also explicitly considered plaintiff's own experience and knowledge in assessing defendant's duty to warn. Noting that this consideration might not be independently sufficient to excuse the manufacturer from warning of known dangers, the court held that plaintiff's subjective and objectively chargeable knowledge drove his claim even "further below the line of any reasonable expectation of proof."

Massachusetts Superior Court Grants Summary Judgment Against Claim of Defect in Valve or Installation Due to Lack of Expert Testimony

In *Safety Insurance Co. v. Home Store, Inc.*, 18 Mass. L. Rptr. 688, 2005 WL 503731 (Mass. Super. Ct. Jan. 25, 2005), homeowners had been in their new house less than a month when their basement was flooded with 200 gallons of fuel oil after a heating system valve broke. When the homeowners returned, they found their two dogs in the basement covered in oil. The dogs had ingested fuel oil and required treatment at an animal hospital.

After the homeowners' insurance company paid their claim it sued the general contractor that built the home and the two subcontractors that installed the heating system, alleging both a defect in the valve and faulty installation. The contractor moved for summary judgment, proffering expert evidence that attributed the valve break not to a defect or "over-torqueing during installation" but rather "a one-time overload."

Plaintiff elected not to rebut this evidence with its own expert testimony, arguing instead that a jury could infer a defect in the valve or its installation from the valve's failure so soon after the owners took control of the house. The court noted that the plaintiff had, in fact, engaged an expert to inspect the valve but ultimately asked him not to write up his opinions. In any event, the court held that a jury could not reasonably conclude without the aid of expert testimony that the valve failure was due to a defect in the valve or its installation. Because such a conclusion was beyond the knowledge of an ordinary lay fact finder, without expert testimony it would necessarily constitute "speculation and conjecture." The court therefore granted summary judgment.

Massachusetts Superior Court Dismisses Massachusetts Unfair and Deceptive Trade Practices Claim for Lack of Connection to Massachusetts

Although not a product liability case, the decision in *Fillmore v. Leasecomm Corp.*, 18 Mass. L. Rptr. 560, 2004 WL 3091642 (Mass. Super. Ct. Nov. 15, 2004), illustrates territorial restrictions on the scope of Massachusetts' unfair and deceptive trade practices statute, M.G.L. 93A ("Chapter 93A"), which could apply in a product liability claim brought by a business. In *Fillmore*, plaintiff entered into separate contracts with a Massachusetts-based company and a California-based business in Washington state to

enable his e-commerce business located there to complete credit card transactions on the Internet. When the Massachusetts-based company notified plaintiff that he was breach of their agreement for non-payment, plaintiff filed a class action in Massachusetts alleging that both contracting companies, through a series of fraudulent representations and high-pressure sales tactics, induced him to enter into agreements from which he obtained no benefit. Plaintiff asserted a variety of claims, including under section 11 of Chapter 93A, which governs unfair or deceptive trade practices claims by businesses or other entities in commerce. Defendants moved to dismiss the entire complaint.

While the Massachusetts Superior Court granted defendants' motion, the court's discussion of Chapter 93A's application to the California company is worthy of mention. Section 11 expressly prohibits recovery for unfair or deceptive trade practices that did not occur "primarily or substantially within the Commonwealth." Under relatively recent authority, the courts employ a "center of gravity" approach to this issue; where neither the deceptive or unfair practice nor the injury caused by the practice took place in Massachusetts, recovery is barred. Here, the California company's allegedly aggressive sales tactics and its agreement with plaintiff all took place on the West Coast, where plaintiff's e-commerce business failed. Accordingly, the Chapter 93A claim had to be dismissed.

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

David R. Geiger,
Chair
James J. Dillon
Jonathan M. Ettinger
Jeffrey S. Follett
Barbara S. Hamelburg
John H. Henn
Vickie L. Henry
Michael B. Keating
Colin J. Zick

Matthew C. Baltay
Update Editor
John M. Gransky
Associate Editor
Bradley E. Abruzzi
Jessica V. Barnett
Dakis Dalmanieras
Katherine J. Fick
Lucy Fowler
Kirk Hanson
Gabriel M. Helmer

Brian L. Henninger
Ian J. McLoughlin
Paula McManus
Matthew E. Miller
Carter D. Morse
Laura J. Rowley
Ericka Harper Snyder
Jamie L. Wacks
Ashley A. Weaver
Lynn M. Zuchowski