

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.

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Massachusetts Superior Court Grants New Trial and Imposes Monetary Sanctions on Expert Witness for Fraud on Court

Plaintiff in *Wojcicki v. Caragher*, 18 Mass. L. Rptr. 581, 2004 WL 3120099 (Mass. Super. Ct. 2004), brought a medical malpractice wrongful death action alleging that the defendant physician negligently treated plaintiff’s wife when she was taken to the emergency room following a severe stroke because the doctor failed to offer thrombolytic therapy (tissue plasminogen activator or “t-PA”).

The doctor defended in part by claiming that t-PA therapy was not indicated because the patient had cancer. Trial testimony focused on a study regarding the effectiveness of t-PA therapy and defendant presented a neuro-oncologist expert who testified that no cancer patients had participated in the study. To support his conclusion on cross-examination and re-direct, the expert implied that he had reviewed two CD-ROMs

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containing the data for every patient in the study and they revealed that no cancer patients participated. The trial ended with a jury verdict for defendant.

After trial, plaintiff's counsel determined that according to the CD-ROMs some study patients reported that they did have cancer and plaintiff moved for a new trial based on this newly discovered evidence. Subsequent court-ordered depositions revealed that in his work on the case the expert had not reviewed the CD-ROMs; he claimed he had ascertained that cancer patients were not involved in the study through a short phone conversation with the study's lead biostatistician, but she testified she had never spoken with the expert, was out of town the day of the supposed conversation and would not have answered his question as he had described.

The court found that the expert had committed fraud on the court, based on his testifying to a fact that he did not know to be true, misleading the court regarding his review of the CD-ROMs and testifying falsely regarding his conversation with the biostatistician, and ordered a new trial. The judge also levied the extraordinary sanction that defendant and the expert pay plaintiff's reasonable costs, including attorneys' fees relating to the first trial and post-trial proceedings, as well as the cost of providing jurors for a second trial. Although the judge found no direct authority addressing the issue of sanctions against a non-party witness, she ruled that the court possessed the inherent power "to do what is necessary to secure the administration of justice."

Massachusetts Superior Court Grants Summary Judgment to Laser Manufacturer on Failure-to-Warn Claim Under "Learned Intermediary" Doctrine Where Manufacturer Provided Adequate Warning to Physician

In *Chamian v. Sharplan Lasers, Inc.*, 18 Mass. L. Rptr. 308, 2004 WL 2341569 (Mass. Super. Ct. 2004), plaintiff alleged she suffered severe facial scarring and skin discoloration following laser resurfacing cosmetic surgery. Plaintiff sued the physician, a plastic and reconstructive surgeon who had attended numerous training courses on laser resurfacing and received specialized training by the manufacturer, alleging that the surgeon, with the advice of a technician provided by the laser owner, had set the laser for an inappropriate exposure mode. Plaintiff also sued the laser manufacturer and owner, claiming breach of warranty, negligent failure to warn and negligent training.

The laser was a registered medical device that could only be used to perform surgery by licensed physicians. The manufacturer warned that "lower power densities may cause excessive thermal injury to underlying tissue through conducted heat," and specified the exact operating parameters to be used during resurfacing treatment. The technician had read the manual but set the laser to a low power density exposure mode not recommended for skin resurfacing.

The manufacturer and owner moved for summary judgment. Because plaintiff had adduced no evidence that the design and manufacture of the laser were defective or that it had malfunctioned during the surgery, the court granted summary judgment on all design defect claims. The court also dismissed the failure-to-warn claim, ruling that because a physician was using the device, the manufacturer owed no duty to warn the patient directly and instead discharged its duty by warning the physician of the risks as a "learned intermediary," relying on Massachusetts law that in a case involving medical products

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prescribed or used by a physician or trained medical personnel any duty to warn runs to the physician, not the patient. The warning's statement that the final decision was up to the physician did not "water down" the warning's effectiveness where it was indisputably the physician's responsibility to exercise his clinical judgment to determine the appropriate laser settings. Finally, the court dismissed the negligent training count, holding that plaintiff failed to identify any shortcoming in the manufacturer's training and that the doctor and technician's alleged misuse of the laser were not by themselves sufficient to find any breach of duty by the manufacturer.

Massachusetts Federal District Court Finds Latex Glove Claims Barred by Statute of Limitations Because Plaintiff Was on Notice of Possible Claims More Than Four Years Before Suit

In *Murphy v. Aero-Med, Ltd.*, 345 F. Supp. 2d 40 (D. Mass. 2004), yet another latex glove case involving statutes of limitations (*see, for example, Salemme v. Aero-Med in November 2004 Foley Hoag Product Liability Update*), plaintiff sued latex glove manufacturers and distributors for allegedly causing her severe latex allergy. Plaintiff brought claims of negligence, breach of warranty and violation of Mass. Gen. L. ch. 93A, the Massachusetts unfair and deceptive practices statute. Defendants moved for summary judgment arguing that plaintiff's claims were barred by the applicable statutes of limitations. The United States District Court for the District of Massachusetts granted the motion, holding it was clear from the record that plaintiff's claims had accrued more than four years before the action was commenced.

Plaintiff worked for the American Red Cross as a phlebotomist and wore latex gloves labeled "hypoallergenic" when drawing blood donations. In May 1993, she began sneezing and experiencing itchy eyes at work, which she attributed to cat and pollen allergies compounded by powder in her latex gloves; her hands also began burning, itching, oozing and breaking out. In December 1993, plaintiff wrote the first of four notes to her supervisor discussing her allergic reaction, complaining of open sores on her hands and asking for powder-free gloves. Plaintiff finally received powder-free gloves in February 1994 after obtaining a doctor's note, but her symptoms did not improve. In March 1995, plaintiff saw a different doctor, who tested her and diagnosed a latex allergy. She filed suit in February 1998.

The court concluded that plaintiff's claims were barred by the three- and four-year statutes of limitations, because the claims accrued in December 1993 when she had open sores on her hands that were clearly attributable to her gloves and not to any preexisting allergies. Plaintiff argued that her claim did not accrue then because she had sought medical treatment and her physician did not diagnose the problem, she was unaware of the existence of latex allergies and defendants had fraudulently concealed that their gloves could cause allergies by labeling them "hypoallergenic." The court found none of these arguments persuasive, finding no evidence in the record that medical treatment was sought and that a reasonable person in plaintiff's position would have investigated the cause of her injuries in December 1993 and learned that she might have a cause of action.

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Massachusetts Federal District Court Allows Deposition of Plaintiff's Former Attorney Concerning Spoliation of Evidence in Wrongful Death Claim Against Golf Cart Manufacturer

In *Carey v. Textron*, 224 F.R.D. 530 (D. Mass. 2004), the estate of a decedent killed while operating a golf cart brought a wrongful death claim against the manufacturer. Plaintiff retained an attorney, who made immediate efforts to preserve the golf cart as evidence so that he and an expert could examine it. After an employee who worked at the country club where the accident occurred witnessed two unidentified men examining the cart, it disappeared. The manufacturer asserted that the plaintiff might have engaged in spoliation of evidence and sought to take the deposition of the plaintiff's then former attorney. Plaintiff sought a protective order, claiming that the attorney-client privilege and work-product doctrine protected the former attorney from such a deposition.

The United States District Court for the District of Massachusetts denied plaintiff's motion. The court explained that the attorney-client privilege only protects *communications* between a lawyer and client, and none of the information defendant was seeking related to such communications. As to work-product, the court considered the application of two different standards for determining when a deposition of counsel is appropriate. Under one test, opposing counsel may be deposed only when no other means exist to obtain the information at issue, the information is relevant and not privileged and the information is crucial to the case. Under another test, the court would broadly consider all relevant facts and circumstances, including the attorney's role relating to discovery in the case, the need to question the attorney and the possibility of encountering privileged or work-product protected issues. The court concluded that here either standard would allow a limited deposition. In so ruling, the court reasoned that the attorney no longer represented plaintiff, the information sought was important to resolution of the case and the attorney might be the only identifiable person in possession of such information.

Massachusetts Superior Court Denies Contractor's Indemnity Cross-Claim for Defense Costs Against Manufacturer Because Contract Lacked Indemnity Provision and Contractor Was Defending Against Its Own Conduct

Plaintiffs in *Zabilansky v. American Building Restoration Products*, 18 Mass. L. Rptr. 386, 2004 WL 2550469 (Mass. Super. Ct. 2004), sought compensation for personal injuries and property damage suffered from exposure to an interior wood sealant. They sued the contractor who recommended and applied the sealant, along with its manufacturer and distributor, alleging negligence, breach of implied and express warranties, unfair and deceptive trade practices and intentional misrepresentation. The contractor cross-claimed against the manufacturer seeking indemnification for any liability as well as for defense costs, alleging that any liability it faced was either due solely to the manufacturer's warranty breach or merely derivative of the manufacturer's negligence. After the jury found for the contractor on all of plaintiffs' claims, the contractor pursued its claim for indemnification for its defense costs.

The court rejected each of the contractor's indemnity theories. As to contractual indemnity, there was no express provision in the contractor's sales contract with the manufacturer creating such a right, nor were there any unique or special aspects of the contractual relationship from which such a right might be implied. Further, while

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Massachusetts law recognizes tort-based indemnity where a faultless party is forced by operation of law to defend solely against another party's wrongful act, here the contractor was forced to defend its own recommendation and application of the allegedly defective sealant and the manufacturer had been absolved of any liability for its conduct.

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

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