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PRODUCT LIABILITY

2020 YEAR IN REVIEW

Massachusetts federal and state courts issued a number of important product liability decisions in 2020. These involved a number of rulings on issues surrounding personal jurisdiction. The **Product Liability practice group** at Nutter recently reviewed these cases. Highlighted below are some of the key cases and issues decided in the past year.

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UNITED STATES FIRST CIRCUIT COURT OF APPEALS

Imamura v. General Electric Company

957 F.3d 98 (1st Cir. April 24, 2020)

Significant Holding: The First Circuit upheld dismissal of a suit against GE by Japanese citizens, stating that an adequate alternative forum was available in Japan, even if the plaintiffs may not be able to obtain recovery specifically from GE in Japan.

After a tsunami caused a tragic nuclear disaster, Japanese citizens and businesses brought a putative class action against GE, alleging negligence, strict product liability for manufacturing and design defects, and damage to real property under Massachusetts law.

The District Court had dismissed the suit, holding that the defendant met its burden of showing both that an adequate alternative forum existed in Japan, and that considerations of convenience and judicial efficiency strongly favor litigating the claim in Japan.

In assessing the first prong of the doctrine of forum non conveniens, the District Court found that many plaintiffs successfully received satisfactory compensation through lawsuits in Japanese courts, and that remedies provided were not so clearly inadequate or unsatisfactory as to constitute no remedy at all.

In assessing the second prong, the District Court held that, on balance, (i) the relevant private interest factors counseled in favor of dismissal because of the difficulty in accessing Japanese documents and witnesses, and (ii) that the public interest factors also favored dismissal because complex choice of law questions would burden the U.S. court.

The First Circuit reviewed for abuse of discretion as to the first prong only. It held that the District Court did not abuse its discretion by taking into account Japan's administrative compensation scheme. The First Circuit stated that while the plaintiffs may not be able to obtain recovery in Japan specifically from GE, Japan nevertheless addresses the same types of claims through a carefully designed tripartite administrative compensation scheme.

UNITED STATES DISTRICT COURT

Ericson v. Conagra Foods, Inc.

1:20-cv-11022-ADB 2020 WL 6912105 (D. Mass. Nov. 24, 2020)

Significant Holding: The District Court held it lacked personal jurisdiction over an out-of-state manufacturer because the product that caused injury was not manufactured in Massachusetts, and mere awareness that the product may end up in Massachusetts did not constitute purposeful availment.

The plaintiff brought action against Conagra Foods, Inc. alleging she was injured by a cooking spray product. The defendant moved to dismiss for lack of personal jurisdiction.

The court found no general personal jurisdiction under the Massachusetts long-arm statute because the plaintiff failed to show that the defendants regularly do or solicit business in Massachusetts, or that they derive substantial revenue from goods sold in Massachusetts.

The court further stated that even if the Massachusetts long-arm statute permitted the court to exercise jurisdiction, it would still lack jurisdiction under the Due Process Clause of the Fourteenth Amendment.

Because the defendants are neither incorporated in Massachusetts nor do they have their principal place of business in Massachusetts, plaintiff could not allege general jurisdiction. The court also found that specific jurisdiction was lacking. First, there was no demonstrated contact with Massachusetts because the allegedly defective spray can was manufactured in Illinois and sold to a distributor in New York. Second, mere awareness that the product may end up in Massachusetts did not constitute purposeful availment. Lastly, after considering the "Gestalt factors," the court concluded it would be unreasonable for it to exercise jurisdiction over the defendants. The court transferred the case to the Northern District of Illinois, citing strong public interest to support transfer over dismissal.

UNITED STATES DISTRICT COURT

Taupier v. Davol, Inc.

3:19-cv-10184-KAR 2020 WL 5665565 (D. Mass. Sept. 23, 2020)

Significant Holding: The District Court concluded that Restatement (Second) of Torts Section 402A, comment k, did not bar the plaintiff's breach of implied warranty claim based on the defendant's position that the medical device at issue was unavoidably unsafe.

The plaintiff brought action against the manufacturer of a polytetrafluoroethylene mesh patch alleging that the mesh patch migrated and deteriorated over time and perforated his large intestine. The defendant moved to dismiss for failure to state a claim.

The court opined on the various claims alleged by the plaintiff, but of note was the court's opinion on the breach of the implied warranty of merchantability based on a design defect claim. The defendant argued that this claim was categorically barred because the mesh patch is "unavoidably unsafe" as set forth under comment k to section 402A of the Restatement (Second) of Torts. The court noted, however, that the defendant failed to cite any Massachusetts authority to support their contention. The court further noted that traditionally in Massachusetts, comment k has been applied only to prescription drugs, and neither the SJC, the Massachusetts Appeals Court, nor the First Circuit has addressed the question of whether Massachusetts applies comment k to bar breach of warranty claims for defectively designed implanted medical devices.

Ultimately the court concluded that the SJC would likely follow the jurisdictions that employ a product-by-product analysis for three reasons. First, the SJC has stated as a matter of social policy that holding sellers liable for the quality and safety of their products supports the breach of warranty theory of liability. Exempting manufacturers from liability would frustrate SJC's articulated policy. Second, even courts that exempt manufacturers of prescription drugs from strict liability based on comment k have applied a case-by-case analysis to medical devices. Lastly, comment k has been viewed as another name for the risk-utility test which the SJC has accepted.

DaSilva v. Toyota Motor Corp., et al.

20-cv-10984-ADB 2020 WL 3977405 (D. Mass. July 14, 2020)

Significant Holding: The District Court found that the plaintiff sufficiently alleged claims for breach of implied warranty of merchantability and negligence against the in-state seller, thus precluding diversity jurisdiction.

This lawsuit resulted from a car crash caused by the sudden acceleration of a 2010 Toyota Camry which led to the death of the driver. The plaintiff claimed a defective electronic throttle control system in the car, and named as co-defendants both the automobile manufacturer and the Massachusetts-based dealership that sold the car.

Defendants removed the case to the District Court and the plaintiff asked that the case be remanded due to lack of

DaSilva v. Toyota Motor Corp., et al.—Continued

20-cv-10984-ADB 2020 WL 3977405 (D. Mass. July 14, 2020)

complete diversity. The defendants asserted that the auto dealership "Boch defendants"—who are Massachusetts residents—were fraudulently joined to disrupt complete diversity.

The court found that the plaintiff sufficiently stated a claim against the Boch defendants for breach of the implied warranty of merchantability because the Boch defendants sold the car when it had a defective electronic throttle control system. For the sake of a complete record, the court also found that the plaintiff sufficiently state a claim against the Boch defendants for negligence. As a result, the court remanded the case to state court due to lack of complete diversity.

Doucet v. FCA US LLC

19-cv-10514-ADB 2020 WL 128655 (D. Mass. Jan. 10, 2020)

Significant Holding: The District Court exercised personal jurisdiction over an out-of-state manufacturer who expressly assumed predecessor's liabilities.

The plaintiff allegedly suffered severe injuries due to the defects in the design and production of a Chrysler manufactured in 2004. In 2009, Chrysler LLC filed for bankruptcy and sold certain assets to FCA. The Master Transaction Agreement defined "Assumed Liabilities" to include product liability claims that arise from Chrysler products sold before the bankruptcy sale date.

FCA filed a motion to dismiss for lack of personal jurisdiction. The court held that a corporation's contact may be imputed to its successor if forum law would hold the successor liable for the actions of its predecessor. Given the explicit language in the MTA regarding assumed liabilities, the court held that FCA was subject to the same jurisdiction contacts that would have applied to Chrysler.

The court found personal jurisdiction existed because the defendant sold vehicles in Massachusetts; the claims arose out of and were related to the car's sale in Massachusetts; and because exercising jurisdiction in Massachusetts would not impose an unusual burden on the defendant.

SUPREME JUDICIAL COURT

The SJC did not have any decisions of note in the areas of product liability in 2020.

APPEALS COURT

Laporte v. Vlad

97 Mass.App.Ct. 1121 (June 1, 2020)

Significant Holding: The Appeals Court affirmed granting of the defendant's motion for summary judgment because plaintiff failed to provide evidence contradicting the defendant manufacturer's records that all sterility requirements were met.

Plaintiff, as personal representative, filed suit alleging medical malpractice, wrongful death, and product liability against various defendants. The decedent was prescribed anti-inflammatory medication manufactured by Pharmacia.

Plaintiff's expert opined that Pharmacia's manufacturing and/or delivery process caused the specific vials injected into the decedent to crack, causing the contents of those vials to be compromised. Pharmacia filed a motion for summary judgment and a motion to exclude the expert opinions and testimony of the plaintiff's expert. Both motions were allowed and the plaintiff appealed.

The appeals court granted Pharmacia's motion for summary judgement because the plaintiff's expert opinion did not discuss the manufacturing process at Pharmacia and Pharmacia's records show all the vials manufactured during the relevant time period passed all requirements before leaving Pharmacia's control.

SUPERIOR COURT

Barnes v. Lahey Clinic Hospital, Inc., et al.

1981-cv-03791 2020 WL 5993145 (Middlesex Cnty. Sup. Ct. Aug. 24, 2020)

Significant Holding: The Trial Court held that the denial of a kidney transplant due to likely exposure to bacteria from the defendant's medical device was an actual, physical injury.

The plaintiff had heart surgery during which a 3T system was used. It was later discovered that the 3T systems developed bacteria in their water tanks which infected patients with NTM bacteria. The plaintiff could not get a kidney transplant surgery because of likely exposure to NTM bacteria and receives dialysis instead. The plaintiff brought this suit alleging negligence by LivaNova in its marketing, sale, and distribution of the 3T system.

The defendant argued that because plaintiff has not yet developed an infection from the 3T system, he failed to allege an actual, physical injury. The court disagreed and ruled that "the deprivation of needed, available medical treatment which has forced [plaintiff] to undergo a painful and expensive alternative – whose causation can be traced directly to the 3T system" was an actual, physical injury.

THIS ADVISORY WAS PREPARED BY DAVID FERRERA AND RITIKA BHAKHRI OF NUTTER'S LITIGATION DEPARTMENT. FOR MORE INFORMATION, PLEASE CONTACT YOUR NUTTER ATTORNEY AT 617.439.2000.

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PRODUCT LIABILITY DEFENSE

For decades, product liability defense has been one of the cornerstones of Nutter's highly successful litigation practice. Leading multinational companies have turned to Nutter to defend cases in courts throughout the United States and around the world involving allegedly defective medical devices, pharmaceuticals, consumer health care products, industrial materials, and automotive and heavy equipment products. We are dedicated to our client's objectives and aggressively prepare cases for trial. That approach has led to major defense verdicts, but it has also led to many more pre-trial dismissals and favorable settlements without the negative publicity that often encourage further lawsuits.

OUR COMMITMENT TO BUILDING A CULTURE AND ATMOSPHERE OF LEGAL EXCELLENCE HAS LED TO TOP INDUSTRY ACCOLADES, INCLUDING:

- Nutter earned a Tier 1 ranking for Product Liability Litigation—Defendants in Boston in the *U.S. News & World Report/Best Lawyers* 2021 "Best Law Firms" survey.
- Nutter has been named a "Go-To" law firm in Torts Litigation by Johnson & Johnson.
- *Chambers USA 2020* recognized Nutter in the Litigation: General Commercial category.

In the *U.S. News & World Report / Best Lawyers* survey of "Best Law Firms," clients described the group as follows*:

- "Nutter is absolutely a top notch firm."
- "Dedicated and excellent strategic thinkers. They align the defense strategy with the business objectives."
- "Nutter McClennen & Fish attorneys are excellent litigators and also excellent trial lawyers. They are very strong at strategy. They are more business savvy than many other litigators. They are results oriented with a practical approach. I also very much enjoy the Nutter lawyers I work with. They are smart and have a good sense of humor."

REPRESENTATIVE EXPERIENCE

Nutter's Product Liability Defense practice group has a proven track record of successfully resolving complex cases. We have:

- Defended life sciences mass torts in a variety of contexts such as: medical devices, including artificial knees, hips, and spinal discs, cardiac devices, surgical instruments, bone cement, surgical sutures, spinal fusion plates, tissue morcellators, and latex gloves; pharmaceuticals, including antibiotics, anti-inflammatory drugs, and birth control patches; and consumer products, including baby powder, contact lenses, and facial cleansers.
- Defended claims arising from alleged exposures to asbestos-containing products; vinyl chloride; toxic dust from commercial printing facilities; and a wide variety of industrial solvents and chemicals.
- Successfully tried, arbitrated, and mediated cases involving allegedly defective automotive and industrial vehicle products, and various industrial and commercial materials used in all kinds of products and manufacturing processes.
- Represented clients in various roles, including as trial counsel, national counsel, leading expert teams, and local counsel.

PRODUCT LIABILITY DEFENSE

INDUSTRY EXPERTISE

Nutter lawyers are frequently sought after by the media for their insights on cutting-edge developments in the products liability sector, including medical devices, pharmaceuticals, asbestos, automotive liability, 3D printing and artificial intelligence, cybersecurity, food and beverage litigation, and other topics.

Nutter's products liability lawyers have been featured in *Bloomberg, Corporate Counsel,* IADC's *Drug, Device and Biotechnology Committee Newsletter, Risk Management Magazine, Medical Design & Outsourcing,* DRI's *The Voice, Inside Counsel, Medical Device and Diagnostic Industry (MD+DI), Additive Manufacturing Today, Massachusetts Lawyers Weekly,* MCLE's *Massachusetts Courtroom Advocacy, Medical Design & Outsourcing* and the *Products Liability Litigation Newsletter.*

A member of the group also co-authored the "Product Liability" chapter in the Massachusetts Superior Court Civil Practice Jury Instructions and currently serves as chair of the Massachusetts Supreme Judicial Court's Standing Advisory Committee on the Rules of Civil and Appellate Procedure.

A LEADER IN PROFESSIONAL ORGANIZATIONS

Nutter is highly active in numerous organizations, strengthening its industry knowledge and cultivating relationships with key members of the business community. Highlights include:

- Presented at ACI's Drug and Medical Device Litigation Conference, DRI's Drug and Medical Device Seminar, International Association of Defense Counsel's (IADC) Annual Meeting, the American Bar Association, and the Boston Bar Association.
- Selected as Fellows of the American College of Trial Lawyers, the Litigation Counsel of America, and 2019 Benchmark Litigation Star.
- Participated in conferences addressing motor vehicle product liability litigation, pharmaceutical, medical device, biotech, and asbestos litigation, and the food and beverage sector.

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