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Foley Hoag LLP publishes this quarterly Update primarily concerning developments in product liability and related law from federal and state courts applicable to Massachusetts, but also featuring selected developments for New York and New Jersey.

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Massachusetts Appeals Court Affirms Failure-To-Warn Verdict Against Cigarette Manufacturer, Holding Jury Could Infer Plaintiff Would Have Heeded Cancer Warning If Given, And Plaintiff's Medical Expert's Testimony Basing Causation On Cancer's Location Was Not Unfair Surprise Requiring Mistrial Where Expert Earlier Cited Location To Rule Out Other Causes And Defendant Accepted Two Of Trial Judge's Lesser Remedies But Did Not Utilize Mid-Trial Continuance

In *Woodley v. Philip Morris USA Inc.*, 105 Mass. App. Ct. 1109 (2025), plaintiff developed laryngeal cancer after smoking cigarettes—in large part defendant's brand—for many years. He sued the manufacturer in Massachusetts Superior Court for negligent design, breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability) for design defect and failure to warn, violation of Mass. Gen. L. ch. 93A (the state unfair and deceptive practices statute), fraud and misrepresentation, and conspiracy to commit same. Summary judgment eliminated the fraud, misrepresentation and conspiracy claims. A jury then found for the manufacturer on plaintiff's design defect claim, but for plaintiff on his warning claim, and the trial judge dismissed the ch. 93A claim.

Defendant appealed the resulting failure-to-warn judgment, arguing the trial court erred in denying defendant's motion for judgment notwithstanding the verdict for lack of evidence of warning causation and motion for a mistrial based on unfair surprise in plaintiff's medical causation expert's testimony. The Massachusetts Appeals Court rejected both arguments and affirmed.

On the first issue, the manufacturer argued that no reasonable jury could have found plaintiff would have stopped smoking if warned about the risk of cancer (the relevant events preceded any warnings on cigarette packages), as plaintiff's own addiction expert testified plaintiff was already addicted by another manufacturer's cigarettes before switching almost exclusively to defendant's, and when asked what defendant could have done to prevent his cancer plaintiff acknowledged he could think of nothing. The Appeals Court, however, noted that under Massachusetts Supreme Judicial Court authority, a jury could infer that if an adequate warning had been given plaintiff would have heeded it, and that shortly after his testimony noted above plaintiff had testified he would have wanted to know that "if [he] continued smoking, [he] would get cancer." Accordingly, the jury acted permissibly in finding causation.

On the second issue, defendant argued that plaintiff's expert opined at trial that causation of plaintiff's cancer was proven in part by its location in the subglottic region of his larynx, a ground he had not mentioned in his expert report or deposition. The trial judge characterized the expert's testimony as a "big change" and offered defendant three measures to remedy it—additional time to cross-examine the expert, the opportunity to call a previously retained expert, and an opportunity to locate and call an additional "last minute expert." The manufacturer utilized the first two measures but did not seek a continuance. The Appeals Court, however, asserted that the expert's testimony was not qualitatively different from his earlier disclosures, as he had consistently opined that smoking was a primary cause of plaintiff's cancer, and had used the cancer's location to rule out other causes; in addition, defendant's failure to request a continuance undermined its claim of unfair surprise. Accordingly, the trial court had not abused its discretion in denying a mistrial.

Massachusetts Federal Court Holds Long-Arm Statute Authorizes Jurisdiction Over UK Bicycle Part Seller As Its Emails To Massachusetts Residents Who Initially Contacted It And Significant Volume Of Sales To Such Residents Constituted "Transacting Business" In State, And Promise To Deliver Product To Massachusetts, Even If Through Third Party, Was "Contract To Supply Things" In State; Jurisdiction Also Comported With Due Process

In *Sheldon v. DT Swiss AG*, 2024 U.S. Dist. LEXIS 222132 (D. Mass. Dec. 6, 2024), plaintiff sued the manufacturer (a Swiss corporation) and seller (a UK corporation) of a ratchet wheel-mounting system ("RWS") purchased on-line from Massachusetts in the United States District Court for the District of Massachusetts, alleging the RWS malfunctioned, causing plaintiff's bicycle to crash and him to suffer serious injuries. Both defendants moved to dismiss plaintiff's complaint—which included design and manufacturing defect claims—for lack of personal jurisdiction. The court granted the manufacturer's motion but denied the seller's without prejudice, finding that jurisdiction would satisfy due process but discovery was needed to determine whether the seller's contacts with Massachusetts

satisfied the state's long-arm statute, Mass. Gen. L. ch. 233A, § 3. ([See January 2024 Product Liability Update](#))

Following jurisdictional discovery, the seller renewed its motion to dismiss, which the court then denied. Regarding the long-arm statute, its § 3(a) authorizes jurisdiction over a defendant as to any cause of action arising from defendant's "transacting any business" in the state. Defendant argued it did not satisfy this standard because any contacts it had with Massachusetts were merely "fortuitous," as it did not advertise in the United States, let alone Massachusetts, and it only contacted customers there who had previously subscribed or been auto-enrolled in its newsletter after creating an account. The court rejected this argument, holding that even if defendant only solicited customers who had contacted it first, its more than 700 sales worth more than £127,000 in 2019 alone negated any claim of "fortuitous" contacts.

In addition, jurisdiction was also authorized by the long-arm's § 3(b), as plaintiff's claims arose from defendant's "contracting to supply services or things in the commonwealth." While defendant cited Massachusetts Supreme Judicial Court authority that § 3(b) did not apply to a product shipped to Massachusetts by an independent third-party carrier, the court held that the cited case involved only a "shipment contract," whereas defendant had made a "delivery contract" under which defendant was responsible for transport of its goods to Massachusetts regardless of its use of a third-party carrier.

Finally, the Court reaffirmed its prior holding that exercising jurisdiction was consistent with due process. Given defendant's high volume of marketing emails to persons like plaintiff with a Massachusetts billing address, there was a "demonstrable nexus" between defendant's Massachusetts contacts and plaintiff's claims. In addition, "though a close call," the volume of these emails and significant growth in defendant's revenue from Massachusetts sales—a twenty-fold increase since 2012—showed defendant had "purposefully availed itself of Massachusetts." Finally, exercising jurisdiction over defendant was reasonable since the potential need for travel or remote proceedings would not impose an unusual burden.

New York Federal Court In Product Liability Suits Against Polyethylene Orthopedic Products Manufacturer Holds Requests For (1) All Communications With Any Foreign Regulatory Body And (2) All Discovery Produced in Litigation Involving Any Of Defendant's Orthopedic Products Overbroad And Disproportionate To Needs Of Case, But Expresses Willingness To Consider Narrower Requests Tailored To Specific Products At Issue

In *In re Exactech Polyethylene Orthopedic Prods. Liab. Litig.*, 2024 U.S. Dist. LEXIS 184064 (E.D.N.Y. Oct. 3, 2024), plaintiffs in hundreds of lawsuits consolidated in a multi-district litigation in the United States District Court for the Eastern District of New York allege that a medical device manufacturer's hip, knee and ankle implants' polyethylene liners wore out prematurely, and assert a variety of state law tort claims, including for strict liability and negligence, for resulting injuries. Plaintiffs moved to compel defendant to produce its communications with foreign regulatory agencies regarding any of defendant's orthopedic products, and discovery produced in other litigations involving any such products. Defendant responded that the information sought was irrelevant, overly broad and disproportionate to the needs of the case.

The court denied plaintiffs' motion without prejudice. As to foreign regulatory communications, regardless of the contours of each country's particular regulatory scheme defendant was obligated to notify authorities of "potential health and safety risks associated with its orthopedic products." Accordingly, at least some such communications would be relevant to "the central issues of notice and causation," including what the manufacturer knew about the potential risks of its orthopedic products, when it acquired that knowledge, and what follow-up it took as a result. Nonetheless, as framed plaintiffs' requests were overly burdensome and disproportionate to the needs of the case, as they failed to specify "from which countries, regulatory agencies, or authorities" defendant should produce records, rendering the requests overbroad "all documents" discovery. The court expressed a willingness to consider subsequent more narrowly tailored requests.

Regarding discovery produced in other litigation, plaintiffs requested it for any suit involving "claims for personal injury or fraud . . . concerning Your Orthopedic Products," but the court construed this request as applying only to a product liability suit involving defendant's metal-finned tibial tray and a *qui tam* False Claims Act suit, as they were specifically identified by plaintiffs in the request. The court agreed that documents from the product liability suit could potentially be relevant depending on other information to be provided by the plaintiff but the *qui tam* documents were not since that case centered on types of claims not at issue here. Even as to the product liability suit, however, plaintiffs' requests were overbroad and not proportionate to the needs of the case because plaintiffs did "not specify exact discovery responses, depositions, or expert reports" sought, leaving the court unable to fully assess the relevance of the information requested. Again, the court expressed its willingness to consider a narrower request that was "specific to the orthopedics products at issue in this MDL."

Third Circuit Holds Purchasers Of Antifungal Spray Subject To Recall For Benzene Contamination Sufficiently Alleged Economic Injury To Demonstrate Standing Where They Alleged Purchase From Recalled Lots, Recall Deemed Contaminated Products Unfit For Use And Testing Of Recalled Samples Demonstrated Vast Majority Were Contaminated, But Merely Alleging Purchase Within Recall Period Not Sufficient To Demonstrate Injury And Standing

In *Huertas v. Bayer US LLC*, 120 F.4th 1169 (3d Cir. 2024), defendant recalled two antifungal spray products with lot numbers beginning with TN, CV, or NAA that were distributed between September 2018 and September 2021 (the "recall period"), after discovering that samples were contaminated with the carcinogen benzene. Nine plaintiffs who had purchased the products during the recall period filed a putative national class action—with state-specific subclasses—in the United States District Court for the District of New Jersey, alleging the contaminated products were worth less than the uncontaminated product they had bargained for, and seeking damages under various state law causes of action.

The district court dismissed plaintiffs' amended complaint with prejudice for lack of standing, holding plaintiffs failed to allege sufficient facts making it plausible that they suffered economic loss from any increased risk of suffering physical harm, and plaintiffs' argument that the products they purchased were "worthless" lacked support in any particularized facts.

On plaintiffs' appeal to the United States Court of Appeals for the Third Circuit, the appellate court reversed as to four plaintiffs but affirmed as to five. First, all plaintiffs had plausibly alleged that contaminated products were worth less than the product for which they had bargained, as the recall notice noted benzene was a human carcinogen and not an intended ingredient in the products, and further instructed consumers to discard any recalled products. A product purchased as fit for use as an anti-fungal, but not in fact so usable, was "necessarily" worth less than a fit product.

As to whether the named plaintiffs had sufficiently alleged the products they had purchased were actually contaminated, the answer varied among the named plaintiffs. As to four plaintiffs who alleged their products came from the recalled lots, the recall itself was not sufficient to infer that the products were contaminated, but (1) plaintiffs had also alleged that tests performed by a pharmaceutical testing laboratory on thirteen samples of the recalled sprays found that twelve contained detectable benzene levels and eleven contained levels exceeding FDA's guideline limit, and (2) after the dismissal below defendant had filed a complaint against a third party alleging it harmed defendant by manufacturing the product components that contained benzene and thus had caused defendant to sustain damages due to its recall. The court therefore remanded for the district court to consider the plausibility of plaintiffs' contamination allegations in light of these facts.

The court, however, held the remaining five plaintiffs' claims were properly dismissed, as they had failed to allege their products contained a TN, CV, or NAA lot number, and simply buying the product within the recall time frame was not enough to plausibly allege contamination.



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