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PRODUCT LIABILITY
2019 YEAR IN REVIEW

*Massachusetts state and federal courts issued a number of important product liability decisions in 2019. 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.*

MASSACHUSETTS SUPREME JUDICIAL COURT

Stearns v. Metropolitan Life Insurance Co, et al.
481 Mass. 529 (March 1, 2019)
379 F. Supp. 102 (D. Mass. May 14, 2019) (disposition upon SJC's answer to certified question)

Significant Holding: Following the U.S. District Court's March 2018 denial of manufacturer's motion for summary judgment, defendant sought interlocutory appeal to the U.S. Court of Appeals for the First Circuit. [The U.S. District Court's previous decision, *Stearns v. Metropolitan Life Ins. Co.*, 308 F. Supp. 3d 471 (D. Mass. March 30, 2018) was included in **Nutter's 2018 Year in Review.**] Because the application of the Massachusetts Statute of Repose was an issue of Massachusetts law without controlling precedent, however, the U.S. District Court certified the following question to the Massachusetts state Supreme Judicial Court ("SJC"): whether the Statute of Repose can be applied to bar personal injury claims arising from diseases with extended latency periods. The SJC answered in the affirmative, and, therefore, the U.S. District Court entered judgment in favor of manufacturer. (Cypher, J. for the SJC) (Zobel, J. for the D. Mass.)

Summary: Plaintiffs June Stearns and Clifford Oliver, as co-executors of the estate of Wayne Oliver, brought a wrongful death action against General Electric Company ("GE"), among others, alleging that Mr. Oliver developed mesothelioma as a result of his work around steam turbine generators designed, manufactured, and sold by GE. Plaintiffs alleged that Mr. Oliver, a pipe inspector, was exposed to asbestos, between 1971 and 1978, as a result of his work around asbestos-containing insulation which was mixed, cut, and applied to certain piping systems of GE turbine generators. GE not only designed, manufactured, and sold the stream turbine generators at issue, but also supervised their installation. Plaintiffs alleged that Mr. Oliver's exposure to asbestos led to his development of mesothelioma in 2015 and death in 2016.

GE filed a motion for summary judgment on grounds that Plaintiffs' claims were barred under the Massachusetts Statute of Repose, G. L. c. 260, § 2B. In March 2018, the U.S. District Court denied GE's motion on grounds that the Statute of Repose did not apply to asbestos exposure claims due, in part, to the extended latency period between exposure and manifestation of injury. GE subsequently sought interlocutory appeal, which Plaintiffs opposed. The U.S. District Court denied GE's motion, but instead certified the following question to the Massachusetts SJC:

"[W]hether or not the Massachusetts statute of repose, [G. L. c.] 260, § 2B, can be applied to bar personal injury claims arising from diseases with extended latency periods, such as those associated with asbestos exposure, where defendants had knowing control of the instrumentality of injury at the time of exposure."

Statute of Repose: The Massachusetts Statute of Repose sets a six-year time limit for tort actions arising out of any deficiency or neglect in the design, planning, construction, or general administration of an improvement to real property.

In answering the certified question, the SJC first looked to the intent of the Massachusetts legislature in enacting the Statute of Repose, which was to "limit the liability of architects, engineers, contractors, and others involved in the design, planning, construction, or general administration of an improvement to real property in the wake of case law abolishing the long-standing rule that once an architect or builder had completed his work and it had been accepted by the owner, absent privity with the owner, liability was cut off as a matter of law." *Stearns*, 481 Mass. at 533-34.

The SJC then rejected Plaintiffs' attempt to read

exceptions into the Statute of Repose where a defendant was in control of the improvement to real property at the time of the incident giving rise to the cause of action or where the injury at issue was a disease with an extended latency period. The SJC held that the language of the Statute of Repose is "unequivocal" and "forbids us from considering the fact that a plaintiff did not discover or reasonably could not have discovered the harm before the six-year period of the statute of repose expired." *Id*. at 535 (internal quotations omitted).

Accordingly, the SJC answered the certified question in the affirmative as follows:

"Section 2B completely eliminates all tort claims arising out of any deficiency or neglect in the design, planning, construction, or general administration of an improvement to real property after the established time period has run, even if the cause of action arises from a disease with an extended latency period and even if a defendant had knowing control of the instrumentality of injury at the time of exposure."

Implied Breach of Warranty: Upon receipt of the SJC's answer to the certified question, GE sought entry of judgment in its favor as to all counts of Plaintiffs' complaint. While conceding that their other claims were now barred by the Statute of Repose, Plaintiffs argued that the Statute of Repose did not apply to their claim for breach of the implied warranty of merchantability because it was premised on GE's role as a supplier (as opposed to its role as designer) of asbestos-containing insulation for use in connection with the construction of its turbine generators.

The U.S. District Court, however, rejected Plaintiffs' attempt to "circumvent § 2B by suing a defendant for product liability as a supplier when the defendant's role in a project was not so limited." *Stearns*, 379 F. Supp. 3d at 105. Instead, the U.S. District Court found that GE's role as a supplier of insulation was "merely incidental" to its primary activity, "which included designing, planning, and constructing the particularized generators, [and therefore held that GE was] a protected actor under § 2B." *Id*. Accordingly, the U.S. District Court entered judgment in favor of GE on all counts.

APPEALS COURT OF MASSACHUSETTS

Fitzpatrick v. Wendy's Old Fashioned Hamburgers of New York, Inc. et al.

96 Mass.App.Ct. 410 (Nov. 7, 2019)

Significant Holding: The Appeals Court of Massachusetts held that it was error for a trial judge to declare a mistrial where she failed to consider alternate, lesser remedial measures as a remedy for plaintiff counsel's improper closing argument, including counsel's use of the so-called "reptile theory." Although the Appeals Court agreed that portions of counsel's closing were outside the bounds of permissible argument, the Appeals Court noted "numerous indications" in the record suggesting that the jury was not misled by the improper argument. Instead, it appeared to the Appeals Court that the trial judge ordered a mistrial as a form of sanction for the improper conduct, which constituted an abuse of discretion. (Wolohojian, J.)

Summary: Plaintiff Meghan Fitzpatrick brought claims for breach of implied warranty of merchantability and violation of the Massachusetts Consumer Protection Act, c. 93A, against Wendy's Old Fashioned Hamburgers of New York, Inc. ("Wendy's") as well as its hamburger supplier, JBS Sounderton, Inc. ("JBS") and distributor, Willow Run Foods, Inc., after sustaining tooth and gum injuries due to the presence of a bone fragment in the hamburger she purchased from a Wendy's restaurant.

During Plaintiff's closing argument, counsel made, as the trial judge noted, "several objectionable statements," some rooted in the "rhetorical principles described in the book Reptile: The 2009 Manual of the Plaintiff's Revolution." *Fitzpatrick*, 96 Mass.App.Ct. at *7-*8 (internal quotations omitted). For example, Plaintiff's counsel stated during closing:

"Are these [safety rules] important rules in our community? Are we going to enforce them? Are you going to enforce them? If the rules that we talked about here, the safety rules, if those are important you need to speak to that and your verdict needs to speak to that. You[r] verdict will speak volumes echoing outside of this Courthouse."

Id. at *6. Defense counsel did not object during Plaintiff's closing, nor did counsel request a limiting

instruction. Rather, Defendants requested a mistrial on grounds that Plaintiff "improperly attempted to integrate himself with the jury, and had impermissibly spoken about not rewarding the defendants' conduct, punishing big companies, and what might happen in the future." *Id*. at *7 (internal quotations omitted).

While the trial judge issued limiting instructions to the jury in an effort to mitigate any improper aspects of Plaintiff's closing, the judge allowed the jury to render its verdict before ruling on the motion for mistrial. The jury returned a verdict in favor of the plaintiff and awarded damages in the amount of $150,005.64, which represented "the sum of the lowest figure suggested by plaintiff's counsel during his closing plus the amount the plaintiff spent on her Wendy's meal." *Id*. at *8. After the verdict was recorded, the defendants again requested a mistrial, however, the trial judge deferred ruling pending briefing by the parties. Ultimately, the trial judge granted a mistrial, concluding that "the prejudicial aspects of the closing argument likely influenced the jury's verdict, thereby depriving the Defendant[s] of a fair trial." *Id*. at *8.

On retrial, a different jury also found in plaintiff's favor, but awarded significantly less damages in the amount of $10,000. Plaintiff appealed the trial court's grant of a mistrial.

Failure to Consider Lesser Remedial Measures: As an initial matter, the Appeals Court held that it was error for the trial judge to fail to consider "whether alternate, lesser remedial measures [in lieu of mistrial] would suffice to remediate counsel's improper argument." *Id*. at *9. While the Appeals Court acknowledged that Defendants had not objected to any specific statements during closing, moved to strike such statements, nor proposed curative instructions, the Appeals Court nonetheless held that it was error for the trial judge "to simply defer dealing with the issue until after trial when those remedial measures would no longer be available to her." *Id*.

Reptile Theory: The Appeals Court agreed with the trial judge that aspects of Plaintiff's counsel's closing argument using the "reptile theory" were impermissible. For example, the Appeals Court noted that Plaintiff's "counsel's references to 'we' and 'us' impermissibly integrated the jurors with the plaintiff (and counsel) within a community of the 'average customers'." *Id*. at *12. In addition, the Appeals Court agreed it was impermissible for Plaintiff to argue that "defendants were part of a community of 'big companies' who try to shirk responsibility, come up with 'excuses,' and 'confuse things'," or to suggest "that 'when Wendy's and JBS sells all those burgers, they are more than happy to take our money. … But when a burger hurts somebody, no responsibility. No accountability. Shame on them, honestly—shame on them'." *Id*.

However, the Appeals Court held that it was error for the trial judge to focus on the "egregiousness of [the conduct], or the disrespect to the court shown by" Plaintiff's counsel, rather than "focus[ing] on the harmful impact of the errors." *Id*. at *10. The Appeals Court noted "numerous indications [in the record] that the jury were not misled, … swept away by bias or prejudice, or otherwise failed to come to a reasonable conclusion." *Id*. at *11. For example, "the jury took their time deliberating over the case; their question to the judge revealed that they were focused on the evidence; and their damages award was neither disproportionate to, nor unsupported by, the evidence." *Id*.

Accordingly, the Appeals Court vacated the trial judge's order granting a mistrial, set aside the verdict from the second trial, and remanded the case to the trial judge for reconsideration of the motion for mistrial under the correct standard, i.e. "whether the impermissible advocacy resulted in a miscarriage of justice such that a mistrial is required." *Id*. at *11.

MASSACHUSETTS SUPERIOR COURT

Commonwealth v. Purdue Pharma, L.P. et al.
36 Mass.L.Rptr. 56 (Mass. Sup. Ct. Sept. 17, 2019)

Significant Holding: The Massachusetts Superior Court denied manufacturer's motion to dismiss in an action by the Commonwealth alleging that manufacturer's deceptive marketing and sale of opioid products "significantly contributed to the opioid epidemic in Massachusetts." The Superior Court rejected manufacturer's federal preemption and "permitted practice" defenses on grounds that the Commonwealth's state-law claims were not in conflict with federal Food and Drug Administration ("FDA") approval. The court also rejected

manufacturer's assertion that the Commonwealth had not alleged violation of a public right, finding that an infringement of the public health and safety was sufficient to set forth a public nuisance claim. Finally, the court rejected manufacturer's learned intermediary defense to causation in light of the Commonwealth's allegations that manufacturer failed to adequately warn physicians of the risk of opioid addiction. (Sanders, J.)

Summary: Plaintiff Commonwealth of Massachusetts alleged that Purdue Pharma, L.P. and Purdue Pharma, Inc. (collectively "Purdue") manufactured opioid medications, including OxyContin. The Commonwealth also alleged that, in the years following Purdue's release of OxyContin in 1996, opioid-related deaths rose across the nation, including in Massachusetts. *Purdue Pharma, L.P.*, 36 Mass.L.Rptr. at *1. In 2007, Purdue reached a consent agreement with the Commonwealth, among other states, which prohibited Purdue from making any "false, misleading, or deceptive" statements in its marketing of OxyContin. *Id*. Here, the Commonwealth alleged that, despite its 2007 agreement, Purdue continued to "downplay its opioids' propensities for addiction and abuse in its messaging to doctors so as to persuade them to prescribe the opioids at greater frequency, at ever-higher (and more expensive) doses, and for longer treatment durations." *Id*. The Commonwealth further alleged that "Purdue knew that its marketing tactics caused more patients to become addicted and substantially increased the likelihood that they would overdose and die." *Id*.

The Commonwealth's complaint alleged violations of the Massachusetts Consumer Protection Act, c. 93A, and public nuisance as a means "to offset the costs of the opioid epidemic, which has been declared a public health emergency in Massachusetts." *Id*. at *2.

In response, Purdue, as well as certain former directors and officers of Purdue, filed a motion to dismiss for failure to state a claim.

Preemption: Purdue argued that the complaint must be dismissed because its allegations conflict with the FDA's approval of OxyContin. Conflict preemption occurs "where compliance with both federal and state regulations is a physical impossibility." *Id*. at *3. The Superior Court rejected Purdue's preemption defense, however, reasoning that the Commonwealth's complaint did not "challenge the contents of the relevant opioid labels, nor [did] it seek to remove Purdue's opioids from the marketplace. Instead, the Complaint contains numerous allegations that Purdue's marketing activities were *inconsistent* with [the FDA-approved] label warnings." *Id*. at *3 (emphasis in original).

Permitted Practice Under Chapter 93A: Next, Purdue argued that its conduct was permitted by federal law, based on FDA approval, and therefore constituted a "permitted practice" under c. 93A. Under G. L. c. 93A § 3, "transactions or actions otherwise permitted under laws as administered by any regulatory board or officer acting under statutory authority of the commonwealth or of the United States" are exempt from c. 93A liability. Similar to Purdue's preemption defense, the Superior Court rejected Purdue's assertion that the FDA's approval of its high-dose opioids gave rise to the "permitted practice" exemption, reasoning that the FDA did not affirmatively approve the conduct at issue. Neither the FDA nor any other regulatory agency had approved Purdue's alleged "marketing practices that minimized addiction risks, promoted misuse of drugs, and targeted inappropriate patient populations." *Purdue*, at *4.

Public Nuisance: As to the Commonwealth's public nuisance claim, Purdue argued that the claim should be dismissed because there was no allegation that it had infringed on a "public right." A public nuisance is one that "interferes with the exercise of a public right by directly encroaching on public property or by causing a common injury." *Purdue*, at *4 (internal quotations omitted). Relying on the Supreme Judicial Court's decision in *Sullivan v. Chief Justice for Admin. and Mgmt. of Trial Court*, 448 Mass. 15 (2006), the Superior Court determined that interference the public health and safety constituted interference with a "public right." *Id*. at *4. The court therefore held that the Commonwealth's allegations that Purdue downplayed the risk of opioid addiction thereby contributing to an "opioid epidemic" in Massachusetts were sufficient to set forth a claim for interference with a public right.

The court also rejected Purdue's assertion that the Commonwealth was merely seeking to "repackage[] [a] product liability claim that cannot as a matter of law be brought as a public nuisance claim," citing Massachusetts courts that have allowed public

nuisance claims based on the manufacture of "dangerous products" to proceed to discovery. *Id*. at *5.

Causation: Purdue also asserted that, because its opioids must be prescribed to patients by a physician, the doctor's act in prescribing the medication constituted an intervening cause relieving Purdue of liability. Noting the similarities between Purdue's defense and the learned intermediary doctrine, the Superior Court acknowledged that a drug manufacturer's duty to warn an end user may be discharged where the manufacturer provides the doctor with an adequate warning. The court rejected Purdue's defense, however, because the Commonwealth had alleged that Purdue, by "actively undermining the warnings on its products, … caused physicians to write prescriptions they otherwise would not have written." *Id*. at *5. Accordingly, the court denied Purdue's motion to dismiss.

On September 16, 2019, the day before the Superior Court issued its decision denying Purdue's motion to dismiss, Purdue filed a Notice of Suggestion of Bankruptcy and, as a result, further proceedings are stayed pending resolution of the bankruptcy.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

In re: Celexa and Lexapro Marketing and Sales Practice Litigation

915 F.3d 1 (1st Cir. Jan. 30, 2019)

Significant Holding: The First Circuit reversed entry of summary judgment, rejecting manufacturer's assertion that the FDA's 2009 approval of manufacturer's antidepressant drug to treat depression in adolescents precluded a jury from finding that *pre-approval* (i.e. off label) uses of the drug were ineffective for purposes of establishing injury under the Racketeer Influenced and Corrupt Organizations Act ("RICO") because "when Forest is said to have made these marketing efforts, it could not have pleaded reliance on FDA approval."

The First Circuit also affirmed denial of class certification, rejecting plaintiff's attempt to certify a class of third-party payors who had paid for off-label prescriptions of manufacturer's medications based on the Supreme Court's 2018 decision in *China Agritech, Inc. v. Resh* on the issue of class-action tolling. While the First Circuit acknowledged that plaintiff's individual claims were tolled upon the filing of a prior class action, it held that the tolling effect of the prior class action did not extend to plaintiff's attempt to certify a subsequent class. (Kayatta, J.)

Summary: Plaintiffs Renee Ramirez and Painters and Allied Trades District Council 82 Health Care Fund ("Painters") alleged that, from 1998 through 2009, Defendant Forest Pharmaceuticals, Inc. and Forest Laboratories, Inc. (collectively "Forest") fraudulently induced physicians to write prescriptions for its antidepressant drugs, Celexa and Lexapro, for the treatment of depression in minors.

In 2009, the FDA approved Lexapro to treat depression in adolescents, i.e. individuals between the ages of 12 and 17. Lexapro was not approved, however, to treat children under the age of 12, and Celexa was never approved to treat any individual under the age of 17. Yet, the First Circuit noted that the trial court record "strongly suggests that Forest engaged in a comprehensive off-label marketing scheme from 1998-2009 aimed at fraudulently inducing doctors to write pediatric prescriptions of Celexa and Lexapro when Forest had insufficient reason to think that these drugs were effective … for treatment of depression in children… ." *In re: Celexa and Lexapro*, 915 F.3d at 6.

Plaintiff Ramirez had purchased Celexa and Lexapro for her young son from 2003 through 2010 as prescribed by her son's neurologist. Plaintiff Painters had reimbursed its pediatric insured for off-label prescriptions of Celexa and Lexapro beginning in 1999. Based on their payments for off-label prescriptions of Celexa and Lexapro, Plaintiffs filed a complaint in November 2013 asserting violations of RICO, the Minnesota Consumer Fraud Act, the Minnesota Unfair Trade Practices Act, and for unjust enrichment.

In June 2016, the District Court denied certification of two classes of health-insurance companies that had paid for off-label pediatric prescriptions of Celexa and Lexapro. In 2018, the District Court entered summary judgment in favor of Forest. On appeal, the First Circuit reversed entry of summary judgment, but affirmed the denial of class certification.

Summary Judgment: In order to succeed on a RICO claim, a plaintiff must demonstrate an economic injury and establish that the defendant's racketeering conduct caused the injury. Here, Plaintiffs asserted that their payment for ineffective prescriptions of Celexa and Lexapro constituted economic injury. On appeal, Forest argued that the FDA's 2009 approval of Lexapro for treatment of depression in adolescents foreclosed a jury determination on efficacy. The First Circuit disagreed, however, holding that the FDA's subsequent approval of Lexapro did not preclude a jury from finding that pre-approval uses of the drugs were ineffective because "when Forest is said to have made these marketing efforts, it could not have pleaded reliance on FDA approval." *In re: Celexa and Lexapro*, 915 F.3d at 9-10. Turning to the evidence in the lower court record, including studies demonstrating that the drugs had either a "detrimental effect" or "no beneficial effect" in the treatment of adolescents, the First Circuit then held that a genuine issue existed as to the efficacy of Celexa and Lexapro.

Further, based on evidence that Forest had spent money to induce doctors to prescribe Celexa and Lexapro to pediatric patients, the First Circuit also held that there existed a genuine issue of fact as to causation. Accordingly, the First Circuit reversed the District Court's entry of summary judgment.

Class Action Tolling: Plaintiff Painters also appealed the District Court's denial of certification of a class of third-party payors who had paid for or reimbursed their insureds for prescriptions of Celexa and Lexapro prior to FDA approval. The First Circuit, while suggesting that Plaintiff may have met the predominance element for certification (contrary to the District Court's decision), affirmed the denial based on the four-year statute of limitations.

In March 2009, a putative class action, of which Painters was a member, was filed against Forest for violations of RICO. Both the District Court and First Circuit agreed that Painters' statute of limitations began to run at that time. Such class action was dismissed in June 2010.

On appeal, the First Circuit acknowledged that Painters' membership in the March 2009 putative class action tolled the limitations period for its *individual* claims until June 2010 based on the long-standing Supreme Court decision in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). However, the First Circuit affirmed the District Court's denial Painters' attempt to certify a new class of third-party payors because the tolling effect of the prior class action does not extend to a subsequent class action under the Supreme Court's 2018 decision in *China Agritech, Inc. v. Resh*, 138 S.Ct. 1800 (2018). The First Circuit reasoned that: "To hold otherwise would be to allow a chain of withdrawn class-action suits to extend the limitations period forever." *In re: Celexa and Lexapro*, 915 F.3d at 17. As Painters was on notice of its claim as of March 2009, but it did not file its complaint until more than four years later in November 2013, the First Circuit affirmed denial of class certification.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Tomasella v. Nestlé USA, Inc.

364 F. Supp. 3d 26 (D. Mass. Jan. 30, 2019)

Significant Holding: The District Court granted manufacturer's motion to dismiss plaintiff's claims for violation of the Massachusetts Consumer Protection Act and unjust enrichment based on manufacturer's alleged failure to disclose the labor practices of its suppliers on its product packaging. The District Court held that manufacturer's omission had "nothing to do with the central characteristics of the chocolate products sold, such as their physical characteristics, price, or fitness for consumption" and therefore "it would not be objectively reasonable for a consumer to… make a purchase decision based on any such [omission]." (Burroughs, J.)

Summary: Plaintiff Danell Tomasella, on behalf of a putative class of individuals who purchased Nestlé USA, Inc.'s ("Nestlé") chocolate products from 2014 through 2018, alleged that Nestlé marketed and distributed chocolate products that contained cocoa beans which were harvested by the use of child and slave labor. Plaintiff further alleged that Nestlé did not disclose on its chocolate product packaging any information about its suppliers' use of child and slave labor. Plaintiff alleged that she would not have purchased or paid as much for Nestlé's chocolate products had it disclosed the use of child and slave labor in its supply chain. In response, Nestlé filed a motion to dismiss for

failure to state a claim.

Massachusetts Consumer Protection Act: Any person injured by a defendant's use or employment of any unfair or deceptive act in the conduct of any trade or commerce may bring a claim for violation of the Massachusetts Consumer Protection Act, G.L. c. 93A.

• ***Deceptive Conduct:*** Here, Plaintiff's complaint alleged that Nestlé's failure to disclose its suppliers' use of child and slave labor deceived Plaintiff and similarly-situated consumers who otherwise would not have purchased Nestlé's chocolate products.

The District Court recognized that, generally, an omission may constitute a deceptive act where a defendant "fails to disclose to a buyer or prospective buyer any fact, the disclosure of which may have influenced the buyer or prospective buyer not to enter the transaction." *Tomasella*, 364 F. Supp. 3d at 32 (internal quotations omitted). The court, however, disagreed that Nestlé's alleged omission could have influenced Plaintiff's purchasing decision, noting that the alleged omissions "have nothing to do with the central characteristics of the chocolate products sold, such as their physical characteristics, price, or fitness for consumption." *Id*. at 33. Accordingly, the District Court dismissed Plaintiff's c. 93A claim based on deceptive conduct because "it would not be objectively reasonable for a consumer to affirmatively form any preconception about the use of child or slave labor in Nestlé's supply chain [based on Nestlé's alleged omission], let alone to make a purchase decision based on any such preconception." *Id*. at 35. "Nestlé's act of offering chocolate for sale implies that the product is fit for human consumption, … but does not on its own give rise to any misleading impression about how Nestlé or its suppliers treat their workers." *Id*.

• ***Unfair Conduct:*** Similarly, the District Court rejected Plaintiff's argument that Nestlé's omission constituted an unfair act in violation of c. 93A. The court noted that Plaintiff had failed to identify any authority requiring disclosure of the use of child or slave labor in Nestlé's supply chain, "nor has she set forth any established concept of unfairness tethered to the disclosure of the labor abuses of a manufacturer's supplier." *Id*. at 36. Further, the court noted that Nestlé had publicly disclosed the labor practices within its supply chain, and therefore reasoned that the "absence of such information on its actual product packaging is not immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Id*. at 36.

Unjust Enrichment: The District Court also dismissed Plaintiff's clam for unjust enrichment. Unjust enrichment is an equitable remedy which may be maintained only where a plaintiff lacks an adequate remedy at law, regardless of whether the legal remedy is viable. *Id*. at 37. The court held that Plaintiff had an adequate legal remedy, her claim for violation of c. 93A, and therefore dismissed the unjust enrichment claim.

Hildreth v. Camp Planner International USA Corp.

19-12355-FDS, 2019 WL 6911672 (D. Mass. Dec. 19, 2019)

Significant Holding: The U.S. District Court granted plaintiff's motion for remand to state court holding that manufacturer failed to demonstrate that the amount in controversy exceeded the jurisdictional threshold of $75,000, despite allegations in plaintiff's complaint that she was "severely, permanently, and grievously injured." (Saylor, J.)

Summary: Plaintiff Haileigh Hildreth, a Massachusetts resident, broke a bone in her back when the straps of her hammock broke, causing her to fall to the ground. She brought a claim against Camp Planner International USA Corporation ("Camp Planner"), a California citizen and the manufacturer of the straps, in Massachusetts state court, alleging that Camp Planner failed to provide clear instructions regarding how to attach the straps to trees and failed to warn about the danger of not properly attaching the straps. Shortly after the filing of the complaint, Camp Planner removed the case to the U.S. District Court asserting diversity jurisdiction. Plaintiff then filed a motion for remand asserting that the amount in controversy did not exceed $75,000.

Diversity Jurisdiction: To establish diversity jurisdiction, a defendant must demonstrate that (1) a diversity of citizenship exists between the parties and (2) the amount in controversy is greater than $75,000. There was no dispute that diversity of citizenship existed between the Massachusetts plaintiff and California defendant. Instead, the issue before the court was whether defendant had met its

burden of establishing the $75,000 jurisdictional threshold.

Generally, courts look to the plaintiff's complaint to determine the amount in controversy, however, a defendant can proffer evidence to demonstrate that the amount in controversy meets the necessary threshold. Pursuant to 28 U.S.C. 1446(c)(2), "if a plaintiff's complaint demands monetary relief of a stated sum, that sum, if asserted in good faith, is deemed to be the amount in controversy." *Hildreth*, 2019 WL 6811672, *2 (internal quotations omitted). Here, Plaintiff's complaint did not allege a specific amount of damages; instead, the complaint alleged that she "was severely, permanently, and grievously injured" and that she "did spend and will continue to spend great sums of money" due to her injuries. *Id*. at *1. Nonetheless, in her civil action cover sheet, Plaintiff stated that her damages were $58,900.40, including $8,900.40 for medical expenses and $50,000 for pain and suffering.

Although the District Court recognized that a civil action cover sheet is "inherently imprecise" and "is not in itself dispositive" of the amount in controversy, the court nonetheless relied on Plaintiff's cover sheet as determinative of the amount in controversy because it was the only evidence in the record as to Plaintiff's damages. Defendant, while asserting that Plaintiff's recovery "could exceed well over the $75,000 threshold," failed to provide any evidence in support of its contention. Further, although Defendant suggested that Plaintiff may incur future medical expenses or suffer a lost earning capacity, i.e. damages that were not addressed in the civil action cover sheet, the court noted that Plaintiff had expressly represented that she had "made a full recovery, did not have any lost wages, [and was not] totally disabled." *Id*. at *3. Accordingly, the District Court held that diversity jurisdiction could not be established because the amount in controversy did not exceed $75,000 and remanded the claim to state court.

THIS ADVISORY WAS PREPARED BY DAVID FERRERA, MICHAEL LEARD, AND LAURA MARTIN 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.

In the *U.S. News & World Report / Best Lawyers* survey of "Best Law Firms," a client described the group as "dedicated and excellent strategic thinkers. They align the defense strategy with the business objectives."*

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* 2020 "Best Law Firms" survey.
- Nutter has been named a "Go-To" law firm in Torts Litigation by Johnson & Johnson.
- *Chambers USA 2019* recognized Nutter in the Litigation: General Commercial category.

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" 2018 chapter supplement 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. Recent 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.

MEET OUR TEAM

Partners

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