

Nutter

2024 Year In Review

Product Liability Litigation



Prepared By



David L. Ferrera
617.439.2247
dferrera@nutter.com



Ritika Bhakhri
617.439.2073
rbhakhri@nutter.com



Meaghan Rose Costello
617.439.2058
mcostello@nutter.com

Massachusetts courts issued several important product liability decisions in late 2023 and 2024. Nutter's [Product Liability practice group](#) reviewed these cases and report on their significant holdings as follows (click on the case name for a full discussion):

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I. United States First Circuit of Appeals

Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc.

91 F.4th 511 (1st Cir. Jan. 22, 2024)

Significant Holding: *The First Circuit held that common law claims are exempt from the Protection of Lawful Commerce in Arms Act (which prohibits certain lawsuits against manufacturers and distributors of guns) if a predicate statutory violation proximately caused the harm.*

The Mexican government filed suit against multiple American gun manufacturers and one American gun distributor seeking damages and injunctive relief for the harms it allegedly suffered as a result of the defendants' deliberate facilitation of gun trafficking into Mexico, particularly of the military-style guns of interest to the Mexican cartel.

In response, the defendants moved to dismiss the complaint. The District Court dismissed the complaint, finding that Mexico's claims were barred under the Protection of Lawful Commerce in Arms Act ("PLCAA"), which prohibits civil actions against manufacturers and sellers of guns for harms resulting from a third-party's unlawful misuse of the weapon.

On appeal, the First Circuit reversed the District Court's decision and remanded for further review, focusing on the text of 15 USCA § 7903(5)(A)(iii) to strictly encompass statutory claims. The relevant part of the statute exempts claims is:

"an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought."

The First Circuit interpreted this exemption language to include common law claims if a predicate statutory violation proximately caused the harm. Here, Mexico plausibly pled that the defendants knowingly violated various federal statutes by aiding and abetting in the sale and exportation of military-style weapons without a license and by engaging in marketing tactics with the intent of expanding their profitable and illegal markets in Mexico.

II. United States District Court of Massachusetts

In Re: Evenflo Co., Inc. Mktg., Sales Pracs & Prods. Liab. Litig.

707 F. Supp. 3d 103 (D. Mass. Dec. 20, 2023)

Significant Holding: *Following remand from the First Circuit, the District Court held that NHTSA did not convey primary jurisdiction in federal court where claims sounded in economic harm rather than the unsafe nature of the booster seats themselves.*

In this putative class action against a manufacturer of car seats for children, the District Court considered the plaintiffs' motion to amend their complaint after the **First Circuit remanded the case affirming dismissal of the plaintiffs' injunctive relief claims but reversing dismissal of the plaintiffs' monetary claims**. The plaintiffs had alleged that the company misrepresented one of its seat's safety features which put children at risk of serious injury. After remand, the plaintiffs moved to file a second amended consolidated class action complaint. The defendants opposed the motion, asserting that the primary jurisdiction doctrine instructs that the case is better suited for administrative adjudication by the National Highway and Traffic Safety Agency ("NHTSA"). The District Court held that the primary jurisdiction doctrine did not prevent the plaintiffs from amending their complaint because the plaintiffs' claims did not necessitate the unique expertise of an administrative body. Rather than making a claim about the safety of the seats themselves, which might rely on interpretation of complicated NHTSA matters and trigger the primary jurisdiction doctrine, the plaintiffs' claims rested on the defendant's marketing and packaging misrepresentations about the accurate features of the seat.

In Re: Zofran (Ondansetron) Prods. Liab. Litig.

No. 1:15-MD-2657-FDS, 2024 WL 841413 (D. Mass. Feb. 28, 2024)

Significant Holding: *Multidistrict litigation defendant, who prevailed on summary judgment, was allowed to recover certain litigation-related costs under 28 U.S.C. § 1920 and Fed. R. Civ. P. 54(d).*

In this multidistrict litigation proceeding resulting from product-liability claims that Zofran (ondansetron) caused serious birth defects, **following summary judgment for the defendant** the District Court considered the defendants' motion for entry of bill of costs. The court granted the motion in part, providing guidance on recoverable fees.

First, as to costs associated with removing each case to federal court, the court denied the request, explaining that the fees were not necessarily incurred in the defense of the cases but simply to remove the proceedings to federal court. Second, as to transcript fees, the court denied recovery of costs associated with depositions of the defendant's own employees and deposition costs incurred in preparation of non-dispositive motions. But the court allowed recovery of costs associated with depositions of non-employees that the defendant relied upon in support of its motion for summary judgment. Lastly, the court also allowed recovery of costs associated with subpoenas and acquiring the plaintiffs' medical records, noting they were reasonably necessary to the action, and the voluminous scope of medical records was not dictated by the defendant.

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McCabe v. Ford Motor Co.

720 F. Supp. 3d 14 (D. Mass. Mar. 8, 2024)

Significant Holding: *Consumers failed to state a breach of express warranty claim where the complaint did not plead facts to show that (i) Ford was provided an opportunity to repair or replace the allegedly defective part or (ii) Ford announced that the problem could not be fixed.*

This putative class action arose from the plaintiffs' lease or purchase of Ford vehicles containing the 10R80 10-speed transmission. The plaintiffs brought breach of warranty and other claims alleging that the transmission caused vehicles to hesitate, lunge, shift roughly, and sometimes even lose power while accelerating. The complaint also contended that because Ford had instructed technicians on how to address harsh shifts in vehicles with the 10R80 10-speed transmission, the defendant was aware of the defect. Ford moved to dismiss the complaint in its entirety for failure to state a claim upon which relief can be granted. The District Court granted the defendant's motion to dismiss as to the express warranty, 15 U.S.C. § 2301, negligence, and the unjust enrichment claims, but denied as to the breach of implied warranty, fraud and Chapter 93 claims.

The plaintiffs' breach of express warranty claim stemmed from Ford's "New Vehicle Limited Warranty" under which Ford promised to repair malfunctioning vehicle parts during the coverage period. The warranty required that the vehicle be brought to a Ford dealership for a warranted repair. To state a claim for breach of express warranty under Massachusetts law, the plaintiff must prove, among other things, that "the defendant promised a specific result and the defendant failed to deliver on his promise and, therefore, breached the express warranty." The District Court dismissed this claim because the complaint did not allege facts to show that Ford was given an opportunity to cure the alleged defect.

Next, the District Court explained that in some cases, if a futility excuse exists, the plaintiff may not need to give the defendant an opportunity to repair the defect. But the court found that merely conclusory allegations of futility, as the plaintiffs made here, are not sufficient. While the complaint alleged that other Ford owners had taken their vehicles to the dealership and Ford could not repair their vehicles to their satisfaction, it did not allege that these plaintiffs were aware of that fact.

The court also dismissed the plaintiffs' claim for violation of the Magnusson-Moss Warranty Act ("MMWA") for, among other things, failure to satisfy the Act's jurisdictional requirement of 100 named plaintiffs. The plaintiffs argued that MMWA's specific jurisdictional threshold had been superseded by the general class-action requirements of the Class Action Fairness Act ("CAFA"). But the court found that the plain text of the MMWA expressly states a 100-named-plaintiffs requirement and, in the absence of a showing that Congress implicitly repealed the MMWA when it passed CAFA, dismissed the plaintiffs' claim.

Liberty Mutual Ins. Company v. Broan-Nutone, LLC

731 F.Supp.3d 205 (D. Mass. Apr. 26, 2024)

Significant Holding: *Expert's conclusion that a fan's vibration caused a fire was excluded because his conclusion was not based on valid cognitive testing.*

After a fire occurred within a family home damaging it, the plaintiff insurer hired an expert to investigate the cause of the fire. The plaintiff's expert, a certified fire investigator and licensed engineer, determined that the fire likely began when electrical activity within the ceiling fan ignited dust. The plaintiff filed suit against the defendant fan manufacturer, alleging its fan caused the fire and claiming breach of implied warranty of merchantability, negligence, breach of implied warranty of fitness for a particular purpose, and violation of Chapter 93A.

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After conclusion of discovery, the defendant moved for summary judgment, largely combining it with its motion to exclude the plaintiff's expert's testimony as unreliable. While the defendant agreed that the plaintiff's expert was qualified and used proper industry standards to conduct his investigation, it took issue with his conclusion that the fan's vibration caused the fire because he had no evidence of unusual vibrations. The court noted that without reference to empirical data for his conclusion, there was too great an analytical gap between the data and the opinion proffered. For this reason, the court allowed the motion to exclude the plaintiff's expert's testimony. Without expert testimony to prove the presence of a defect, the plaintiff could not succeed on its design or manufacturing defect theories and thus the court granted the defendant's motion for summary judgment.

This update is for information purposes only and should not be construed as legal advice on any specific facts or circumstances. Under the rules of the Supreme Judicial Court of Massachusetts, this material may be considered as advertising.

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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 2025 “Best Law Firms” survey by *Best Lawyers*.
- Nutter has been named a “Go-To” law firm in Torts Litigation by Johnson & Johnson.
- *Chambers USA 2024* recognized Nutter in the Litigation: General Commercial category.

In the *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.

*This comment was collected as part of the Best Lawyers® “Best Law Firms” research process.

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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 Organization

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 and the Litigation Counsel of America.
- 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

Nelson G. Apjohn	617.439.2246	napjohn@nutter.com
Stephen J. Brake	617.439.2223	sbrake@nutter.com
David L. Ferrera	617.439.2247	dferrera@nutter.com
Sarah P. Kelly	617.439.2461	skelly@nutter.com
Michael J. Leard	617.439.2159	mleard@nutter.com
Brian K. Lee	617.439.2490	blee@nutter.com
Sara Lonks Wong	617.439.2139	slonks Wong@nutter.com
Melanie V. Woodward	617.439.2130	mwoodward@nutter.com

Associates

Ritika Bhakhri	617.439.2073	rbhakhri@nutter.com
Natalie M. Cappellazzo	617.439.2390	ncappellazzo@nutter.com
Natalia Peña	617.439.2250	npena@nutter.com
Maya Ginga Ritchie	617.439.2035	mgritchie@nutter.com
Mariel T. Smith	617.439.2183	msmith@nutter.com

e-Discovery Specialists

Kate Jansons Johns	617.439.2658	kjohns@nutter.com
Paige Smith	617.439.2253	psmith@nutter.com