

MASSACHUSETTS

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Massachusetts Federal Court Holds Case Law Permitting Common-Law Indemnification Of One Negligent Party By Another Where Former's Negligence Is Insignificant Compared To Latter's Not Implicitly Overruled By 1962 Statute Permitting Contribution Between Joint Tortfeasors, Lack Of Detail In Indemnification Cross-Claim Not Fatal Where Entitlement Would Depend On Facts Not Available From Plaintiff's Complaint

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NEW YORK/NEW JERSEY SUPPLEMENT

Second Circuit Holds Plaintiff's Expert's Opinion That Removal Of Meat Grinder Guard Was Foreseeable Properly Excluded Due To Expert's Lack Of Knowledge Of Performance Of Grinder And Plaintiff's Workplace, And Negligence And Strict Liability Design Defect And Failure-To-Warn Claims Failed As It Was Undisputed Grinder Was Not Defective When Sold But Instead Had Been Materially Modified Post-Sale, And Any Lack Of Warning Was Not Proximate Cause Where Plaintiff Admitted He Knew Of Dangers

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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First Circuit Holds Federal Protection Of Lawful Commerce In Arms Act ("PLCAA") Permits Most Of Mexico's Claims Against Gun Manufacturers And Distributor For Costs Of Drug Cartels' Gun Violence, As Allegations Of Knowingly Aiding And Abetting Sales By Dealers That Violated State and Federal Statutes Satisfies PLCAA's "Predicate Exception" For Statutory Violations, And Claimed Damages Such As Healthcare And Law Enforcement Costs Due To Gun Violence Are Sufficiently Direct To Be Proximately Caused By The Violations

In *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc.*, 91 F.4th 511 (1st Cir. 2024), the Mexican government sued seven United States gun manufacturers and one gun distributor in the United States District Court for the District of Massachusetts to recover healthcare, law enforcement, judicial and other costs caused by Mexican drug cartel gun violence.

Mexico asserted claims for negligent design, marketing and distribution, strict liability for defective design and public nuisance, alleging defendants adopted "military style" designs they knew would appeal to the cartels, including guns with high magazine capacities and firing rates and semi-automatic guns that were easily convertible into automatic weapons. Mexico also alleged defendants knew their distribution systems facilitated illegal trafficking to the cartels that defendants could have prevented by proper distributor contracts, as a large portion of guns seized in Mexico were sold by a relatively small number of licensed United States dealers who repeatedly sold large quantities to the same individuals, or maintained inadequate security measures that facilitated gun thefts. Many other seized guns were sold by "kitchen table" dealers, who operated out of their homes, at gun shows or through websites and failed to conduct background checks or comply with reporting requirements.

Each defendant moved to dismiss all counts of the complaint for failure to state a claim, and the district court granted each motion. The court held all claims were barred by the federal Protection of Lawful Commerce in Arms Act ("PLCAA"), which prohibits civil actions "brought by any person against a manufacturer or seller of a [firearm] . . . resulting from the criminal or unlawful misuse of a qualified product by the person or a third party."

On Mexico's appeal, the United States Court of Appeals for the First Circuit reversed. The court first rejected Mexico's threshold argument that based on the presumption that

statutes do not apply extraterritorially, or principles of international comity, the PLCAA does not apply to lawsuits by foreign governments for harm suffered outside the United States. The court noted that the concerns the statute addressed—the filing of lawsuits against American gun manufacturers in American courts—were actually domestic in nature.

With the statute applicable, Mexico argued its claims fit within the PLCAA’s “predicate exception” permitting suits where a gun manufacturer or seller’s knowing violation of “a state or Federal statute applicable to the sale or marketing of the product . . . was a proximate cause of the harm for which relief is sought.” While defendants argued Mexico’s claims were based on the common law of torts and not on any statutes, the court held the determining factor was not the legal theory on which recovery was sought but rather the conduct that was alleged to have caused the harm. Here, Mexico alleged its harm was caused both by defendants’ aiding and abetting downstream sales that violated various state and federal statutes, and by defendants’ own sale of semi-automatic weapons that were capable of being converted to fire automatically in violation of the federal ban on machine guns. While the first set of statutory violations was adequately pled, the second violation was not, as the United States Supreme Court had held that possession of a convertible semiautomatic weapon was not knowing possession of a machine gun.

Finally, as to whether defendants’ alleged statutory violations were a proximate cause of the harm at issue, defendants argued the large number of causal steps between defendants’ legal sale of firearms and gun violence in Mexico, and the fact that the violence was criminal in nature, broke the chain of proximate causation. The court, however, noted that defendants’ challenged conduct was not their initial legal sales to distributors but rather their aiding and abetting of downstream illegal trafficking, the mere presence of multiple causal steps did not render the resulting harm unforeseeable and criminal acts did not break the causal chain where such acts were foreseeable—or even, as Mexico alleged, known to defendants. Defendants also argued that most of Mexico’s claimed damages went beyond direct harm to gun violence victims and were thus “wholly derivative” and too remote to permit recovery. While the court agreed that some potential harms like decreases in property values and working population were too derivative, others such as healthcare and law enforcement spending were direct harms suffered by the Mexican government and were recoverable.

Massachusetts Federal Court Holds Case Law Permitting Common-Law Indemnification Of One Negligent Party By Another Where Former’s Negligence Is Insignificant Compared To Latter’s Not Implicitly Overruled By 1962 Statute Permitting Contribution Between Joint Tortfeasors, And Lack Of Detail In Indemnification Cross-Claim Not Fatal Where Entitlement Would Depend On Facts Not Available From Plaintiff’s Complaint

In *Arbella Prot. Ins. Co. v. Revision Energy, Inc.*, Civil Action No. 1:23-cv-10508-IT, 2024 U.S. Dist. LEXIS 9488 (D. Mass. Jan. 18, 2024), an insurer sued a solar panel manufacturer and a solar installation company in the United States District Court for the District of Massachusetts, bringing claims including negligence and breach of express and implied warranties arising from defendants’ respective design, manufacture and installation of solar panels at the insured’s property which allegedly malfunctioned and caused a fire. The manufacturer brought a cross-claim for common-law indemnification against the installer, which moved to dismiss the claim.

Under Massachusetts law, while common-law indemnification is not normally available where both parties are negligent, there are exceptions to that rule. For one, indemnification is available where one party did not join in the negligent conduct but is merely vicariously liable for the other party’s negligence. Here, however, the manufacturer’s cross-claims did not articulate how it could be found vicariously liable for the installer’s conduct.

Second, a few Massachusetts cases have allowed a negligent party to recover indemnification if that party’s negligence was “insignificant” in relation to the other’s. While the installer argued these decisions had been implicitly overruled based on the absence of any such case law since Massachusetts enacted a statutory right to contribution among joint tortfeasors in 1962, the court declined to “re-write” pre-existing law without a clear directive from the Massachusetts courts. The installer then argued that the manufacturer’s cross-claim did not identify how both defendants could be at fault but its own negligence be insignificant compared to the installer’s. The court, however, noted that this could depend on whether the facts ultimately showed that the manufacturer’s negligent manufacturing somehow made the panels more susceptible to damage from negligent installation. Because such facts were not yet available on

plaintiff's pleadings, the lack of details in the cross-claim were not fatal and the court denied the motion to dismiss.

Massachusetts Federal Court Dismisses Express Warranty and Failure-To-Warn Claims Against Manufacturer Of Plastic Water Line Connector That Cracked For Failure To Identify Promise By Manufacturer That Created A Warranty Or Proposed Warning That Would Have Prevented Harm, But Holds Design and Manufacturing Defect Claims Sufficient As Former Need Not Identify Safer Alternative Design At Pleading Stage And Latter, Although "Barebones," Referred To "Improper Injection Molding Practice[s]"

In *Aspen Am. Ins. Co. v. Brasscraft Mfg. Co.*, Civil Action No. 23-10679-FDS, 2024 U.S. Dist. LEXIS 14082 (D. Mass. Jan. 26, 2024), an insurer sued the manufacturer of a toilet water supply line in the United States District Court for the District of Massachusetts, alleging breach of express and implied warranties and negligence after a plastic connector for the line cracked and caused flooding that resulted in significant damage to the insured's property. Defendant moved to dismiss for failure to state a claim.

Because the complaint did not identify any specific affirmation or promise by the manufacturer, the court dismissed plaintiff's express warranty claims.

With respect to the implied warranty of merchantability claim (the Massachusetts near-equivalent of strict liability), the court interpreted the allegation that defendant "design[ed], manufactur[ed], . . . and/or suppl[ied] the water supply valve and/or supply line's coupling nut in a defective and unreasonably dangerous condition" to assert claims for both defective design and manufacture. With respect to the former, the court noted that at trial plaintiff would normally be required to prove the availability of a technologically feasible and practical alternative design that would have reduced the harm, which defendant argued plaintiff had not alleged even in conclusory fashion. But based on a prior decision by the United States Court of Appeals for the First Circuit that Massachusetts law "may tolerate a finding of design defect even in the absence of [such] evidence," the court held that

specifically alleging such a design was not required at the pleading stage.

Regarding the manufacturing defect claim, while plaintiff's complaint was admittedly "barebones," it did allege that the connector was sold in a "defective" condition and made reference to "improper injection molding practice[s]," which the court held was sufficient.

Finally, plaintiff's negligence claim was similarly non-specific, but the court read it as asserting claims for negligent design, manufacture and failure to warn, the latter based on an allegation of failure to provide "proper and adequate" warnings. The court dismissed the first two claims as duplicative of plaintiff's corresponding implied warranty claims, as Massachusetts law had held the two types of claims to be "in most substantive aspects . . . congruent." The court also dismissed plaintiff's failure-to-warn claim, as the complaint did not identify any warning that would have prevented the harm as required by Massachusetts law.

NEW YORK/NEW JERSEY SUPPLEMENT

Second Circuit Holds Plaintiff's Expert's Opinion That Removal Of Meat Grinder Guard Was Foreseeable Properly Excluded Due To Expert's Lack Of Knowledge Of Performance Of Grinder And Plaintiff's Workplace, And Negligence And Strict Liability Design Defect And Failure-To-Warn Claims Failed As It Was Undisputed Grinder Was Not Defective When Sold But Instead Had Been Materially Modified Post-Sale, And Any Lack Of Warning Was Not Proximate Cause Where Plaintiff Admitted He Knew Of Dangers

In *Khusenov v. Prokraft Inc.*, 2024 U.S. App. LEXIS 5384 (2d Cir. Mar. 6, 2024), a butcher's apprentice who lost his arm using a meat grinder after another butcher store employee removed its safety guard sued the grinder's manufacturer in the United States District Court for the Eastern District of New York, asserting claims of negligence and strict products liability for both design defect and failure to warn, and breaches of express and implied warranties. After discovery, defendant moved to preclude the testimony of plaintiff's expert

who sought to opine on the foreseeability of the safety guard's removal, and for summary judgment on all of plaintiff's claims. The district court granted both motions.

On plaintiff's appeal, the United States Court of Appeals for the Second Circuit affirmed. The court first held that the district court had not abused its discretion in excluding plaintiff's expert's opinion that meat grinder users were likely to remove the safety guard to obtain higher meat-processing rates. The expert, although a licensed professional engineer, admitted he had not ascertained the grinder's processing capabilities, had not attempted to place meat into the grinder, did not know the processing rate for workers at the butcher shop and did not know of any studies supporting his conclusion that the grinder was incapable of achieving its advertised processing rates. Accordingly, the expert's opinion was not sufficiently reliable to be admissible.

Second, plaintiff's strict liability design defect claim failed as a matter of law because it was undisputed the grinder was sold with a safety guard installed, which both parties' proposed experts agreed would have prevented plaintiff's injury had it remained in place. Thus, plaintiff could not show the product was defective at the time it was sold.

Third, plaintiff's negligent design claim failed for similar reasons, as it was undisputed the butcher shop's employees substantially modified the grinder. Under New York law, material alterations by a third party which work a "substantial change in the condition in which the product was sold by destroying the functional utility of a key safety feature, however foreseeable that modification may have been, are not within the ambit of a manufacturer's responsibility." Here, the record lacked any evidence that the meat grinder was intentionally manufactured to be used without the safety guard, and it was otherwise undisputed the grinder's substantial modification had destroyed a key safety feature.

Finally, plaintiff's failure-to-warn claims failed because the manufacturer's warning label, which plaintiff claimed he never saw and which he contended should have said "Danger" instead of "Warning," was as a matter of law not the proximate

cause of his injury. Because plaintiff admitted at his deposition that he was fully aware through general knowledge and common sense of the meat grinder's dangers, that knowledge defeated his failure-to-warn claims.

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