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PRODUCTS LIABILITY | FREQUENTLY ASKED QUESTIONS

What Manufacturers, Suppliers and Distributors Need to Know About Products Liability in Massachusetts

Answers to the questions in-house counsel and out-of-state counsel most often ask about defending products liability litigation in Massachusetts courts.

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THE BASICS

Does Massachusetts have a products liability statute?

No. Massachusetts does not have a comprehensive products liability act. Product claims are governed by a combination of the common law of negligence and the implied warranty of merchantability codified in the Uniform Commercial Code, G.L. c. 106, §§ 2-314 and 2-318. *Back v. Wickes Corp.*, 375 Mass. 633, 639 (1978). Lack of privity is no defense: the warranty runs against the manufacturer, seller, lessor, or supplier of the goods in favor of anyone the defendant might reasonably have expected to use, consume, or be affected by them. G.L. c. 106, § 2-318.

Does Massachusetts recognize strict liability in tort?

No. Massachusetts has never adopted strict liability in tort under Section 402A of the Restatement (Second) of Torts. Instead, the Legislature transformed the implied warranty of merchantability into a remedy the Supreme Judicial Court has called "congruent in nearly all respects" with § 402A and "fully as comprehensive as the strict liability theory of recovery" adopted elsewhere. *Back v. Wickes Corp.*, 375 Mass. 633, 639-40 (1978).

The warranty is imposed by law as a matter of social policy, not by contract. *Id.* at 639–40. The practical result is that breach of the implied warranty of merchantability functions as Massachusetts's strict-liability cause of action. *Id.* at 639. In sales of consumer goods, a seller cannot exclude or modify the implied warranty of merchantability. G.L. c. 106, § 2-316A.

Do component-part suppliers face the same liability as manufacturers of the finished product in Massachusetts?

Under the component-parts doctrine, the manufacturer or distributor of a non-defective component incorporated into an integrated product is generally not liable for harm caused by a defect in the integrated product. *Nemirovsky v. Daikin N. Am., LLC*, 488 Mass. 712 (2021). The doctrine applies even where the component was designed specifically for the integrated product; a component supplier is exposed only where the component itself is defective or where it substantially participated in integrating the component into the defective design. *Id.*

WARRANTY, NEGLIGENCE & BURDEN OF PROOF

What must a plaintiff prove in a Massachusetts products liability case, and who bears the burden?

In a warranty claim the plaintiff must prove the product was defective and unreasonably dangerous—unfit for the ordinary purposes for which such goods are used—and that the defect caused the injury. *Back v. Wickes Corp.*, 375 Mass. 633, 641 (1978). The buyer must also give notice of the breach within a reasonable time, but failure to give notice bars recovery only if the defendant proves it was prejudiced. G.L. c. 106, §§ 2-318, 2-607(3)(a).

Warranty liability "focuses on whether the product was defective and unreasonably dangerous and not on the conduct of the user or the seller," so a defendant may be liable even though it designed, manufactured, and sold the product with all due care. *Colter v. Barber-Greene Co.*, 403 Mass. 50, 62 (1988). On causation, the plaintiff need only show it was more probable than not that the defect caused the harm; the plaintiff need not eliminate every other possible cause. *Id.* at 55.

How does a negligence claim differ from a warranty claim in Massachusetts?

Negligence focuses on the defendant's conduct—duty, breach, causation—and imposes liability only where the manufacturer failed to use reasonable care to eliminate foreseeable dangers. *Colter v. Barber-Greene Co.*, 403 Mass. 50, 61 (1988).

A product manufacturer is held to the standard of the ordinary, reasonably prudent manufacturer in like circumstances. *Back v. Wickes Corp.*, 375 Mass. 633, 643 (1978).

The two theories are asymmetrical: a defendant "may be found to have breached its warranty of merchantability without having been negligent, but the reverse is not true." *Colter v. Barber-Greene Co.*, 403 Mass. 50, 62 (1988). A finding of negligence necessarily entails a warranty breach.

CHAPTER 93A

How does Massachusetts Chapter 93A apply to product claims?

Chapter 93A is central to Massachusetts products practice. It provides that unfair or deceptive acts or practices in trade or commerce are unlawful, G.L. c. 93A, § 2, and a material and substantial

breach of the implied warranty of merchantability can itself constitute a 93A violation. *Calimlim v. Foreign Car Center, Inc.*, 392 Mass. 228, 235 (1984); *Canal Electric Co. v. Westinghouse Electric Corp.*, 406 Mass. 369, 378–79 (1990).

The statute's damages and fee provisions give it teeth:

- **Multiple damages.** For a willful or knowing violation—or, under § 9, a bad-faith refusal to make a reasonable settlement offer in response to the demand letter—the court must, once the fact-finder makes that culpability finding, award at least double and up to treble damages. G.L. c. 93A, §§ 9, 11. The multiplier is not automatic on an ordinary violation.
- **Attorney's fees.** A prevailing plaintiff "shall" be awarded reasonable attorney's fees and costs on any finding of a § 2 violation, even absent multiple damages. G.L. c. 93A, §§ 9, 11.
- **Demand letter and tender (consumer claims under § 9).** A consumer must serve a written demand for relief at least 30 days before suit; a respondent who makes a reasonable written tender can cap the plaintiff's recovery at the amount tendered. G.L. c. 93A, § 9(3). Even a willful violator can limit its multiple-damages exposure by tendering a reasonable settlement. *Kohl v. Silver Lake Motors, Inc.*, 369 Mass. 795, 803 (1976). Business claims under § 11 require no pre-suit demand letter.

There is one notable limitation. Where a 93A claim is merely duplicative of the underlying warranty claim, the plaintiff recovers actual damages plus fees, not a double recovery. *Canal Elec. Co.*, 406 Mass. at 378–79; *Calimlim*, 392 Mass. at 236.

DESIGN DEFECTS

What test does Massachusetts use for design defects?

Massachusetts applies a risk-utility balancing test, not a pure consumer-expectation test. The fitness of a design is "a question of degree, depending largely, although not exclusively, on reasonable consumer expectations," and the jury weighs factors including the gravity of the danger, the likelihood of harm, the mechanical feasibility of a safer alternative design, the cost of an improved design, and the adverse consequences of an alternative. *Back v. Wickes Corp.*, 375 Mass. 633, 642–43 (1978).

The Supreme Judicial Court has confirmed that Massachusetts has applied risk-utility balancing—with consumer expectations as one factor but not the determinative one—"since well before the Third Restatement articulated this liability standard." *Evans v. Lorillard Tobacco Co.*, 465 Mass. 411, 426 (2013).

Is a reasonable alternative design required in Massachusetts?

Yes. To establish a prima facie design defect, the plaintiff must prove "the availability of a technologically feasible and practical alternative design that would have reduced or prevented the plaintiff's harm." *Evans v. Lorillard Tobacco Co.*, 465 Mass. 411, 428 (2013). In this respect

Massachusetts follows the risk-utility, reasonable-alternative-design standard of Section 2(b) of the Restatement (Third) of Torts: Products Liability. *Id.* at 426-28. This is a notable contrast with jurisdictions (like its neighbor, Rhode Island) that follow a pure consumer-expectation test and require no alternative design.

EXPERTS

What standard applies to expert testimony in Massachusetts?

Massachusetts follows a *Daubert*-style gatekeeping standard as reflected in Mass. G. Evid. § 702. In *Commonwealth v. Lanigan*, 419 Mass. 15 (1994), the Supreme Judicial Court adopted the basic reasoning of *Daubert v. Merrell Dow Pharmaceuticals*, holding that reliability is implicit in the standard for admitting expert testimony and that the trial judge has a "gatekeeper role" to assess whether the reasoning or methodology underlying the proffered opinion is scientifically valid. *Id.* at 26. General acceptance in the relevant scientific community remains a significant factor, but a proponent may establish reliability by other means. *Id.*

STATUTE OF LIMITATIONS & REPOSE

What is the statute of limitations for product claims in Massachusetts?

Three years. Tort personal-injury actions must be brought within three years after the cause of action accrues. G.L. c. 260, § 2A.

Personal-injury warranty claims run on the same three-year period, not the four-year UCC period: the three-year limitation in G.L. c. 106, § 2-318 governs tort-based (personal injury/property) warranty claims, while the four-year period of § 2-725 applies only to contract-based (economic-loss) claims. *Bay State-Spray & Provincetown S.S., Inc. v. Caterpillar Tractor Co.*, 404 Mass. 103, 105–06 (1989); *Nemirovsky v. Daikin N. Am., LLC*, 488 Mass. 712, 728–29 (2021). Chapter 93A claims, which plaintiffs often plead alongside product claims, carry a four-year limitations period. G.L. c. 260, § 5A.

Does Massachusetts apply a discovery rule?

Yes. A cause of action does not accrue and the limitations clock does not start until the plaintiff "discovers or with reasonable diligence should have discovered that (1) [she] has suffered harm; (2) [her] harm was caused by the conduct of another; and (3) the defendant is the person who caused that harm." *Davalos v. Bay Watch, Inc.*, 494 Mass. 548, 552 (2024) (quoting *Magliacane v. Gardner*, 483 Mass. 842, 851 (2020)); *see also Bowen v. Eli Lilly & Co*., 408 Mass. 204 (1990) (applying discovery rule to product-injury claim).

What is the limitations period for wrongful death in Massachusetts?

Three years from the date of death, or three years from when the executor or administrator knew or reasonably should have known of the factual basis for the claim. G.L. c. 229, § 2. The wrongful-death statute expressly reaches deaths caused by a breach of warranty under Article 2 of the UCC. *Id.*

Does Massachusetts have a statute of repose for product claims?

No. Massachusetts does not have a general products-liability statute of repose. There is a six-year statute of repose for tort actions arising from deficiencies in the design, planning, construction, or administration of improvements to real property, G.L. c. 260, § 2B, but it does not protect product manufacturers. Section 2B shields only providers of "individual expertise" akin to architects and contractors—"not . . . mere suppliers of standardized products." *Dighton v. Fed. Pac. Elec. Co.*, 399 Mass. 687, 696 (1987). A product manufacturer's liability is governed by the UCC, c. 106, § 2-318, not by § 2B. *Id.*

WARNINGS

When is a manufacturer liable for failure to warn in Massachusetts?

A manufacturer must warn of dangers that were reasonably foreseeable at the time of sale. Under the implied warranty of merchantability, "a defendant will not be held liable under an implied warranty of merchantability for failure to warn or provide instructions about risks that were not reasonably foreseeable at the time of sale or could not have been discovered by way of reasonable testing prior to marketing the product." *Vassallo v. Baxter Healthcare Corp.*, 428 Mass. 1, 22–23 (1998). The manufacturer is held to the knowledge of an expert in the field. *Id.*

Does Massachusetts follow the learned intermediary doctrine?

Yes, with a notable exception. For prescription drugs, the manufacturer's duty to warn runs to the prescribing physician, the "learned intermediary," rather than to the patient, though the manufacturer remains directly liable to the patient for breach of that duty. *MacDonald v. Ortho Pharm. Corp.*, 394 Mass. 131, 135–36 (1985).

Massachusetts carved out an exception for oral contraceptives: because of the patient's active role in the decision and the limited role of the physician, the manufacturer owes a direct duty to warn the user of known or knowable risks. *Id.* at 136–39.

Does a manufacturer have a post-sale duty to warn under Massachusetts law?

Yes. Massachusetts recognizes a continuing duty to warn of risks discovered after sale, governed by a reasonableness standard, adopting the rule of Section 10 of the Restatement (Third) of Torts: Products Liability. *Lewis v. Ariens Co.*, 434 Mass. 643, 647–50 (2001). The duty arises only where a reasonable person would warn and where those to be warned can be identified and effectively reached; it did not extend to a remote second-hand purchaser who acquired a used product sixteen years after the original sale—"a universe too diffuse and too large" to identify. *Id.* at 649. An early formulation of the duty appears in *doCanto v. Ametek, Inc.*, 367 Mass. 776 (1975). There is no duty, however, to advise purchasers of post-sale safety improvements to a product that was reasonably safe when sold. *City of Boston v. U.S. Gypsum Co.*, 37 Mass. App. Ct. 253, 264 (1994).

Where a manufacturer does issue a recall, evidence of the recall may be admissible in a products action if the jury could find that the recalled defect existed in the plaintiff's product. *Santos v. Chrysler Corp.*, 430 Mass. 198, 207 (1999).

Does Massachusetts apply a heeding presumption?

Yes. "The law permits an inference that a warning, once given, would have been followed." *Evans v. Lorillard Tobacco Co.*, 465 Mass. 411, 442 (2013). Once the plaintiff establishes that a warning should have been given, the burden shifts to the defendant to come forward with evidence rebutting the inference. *Id.*

DEFENSES

Is there a state-of-the-art defense in Massachusetts?

Yes, for failure-to-warn claims, and this is a significant point of divergence from some neighboring states.

In *Vassallo*, the Supreme Judicial Court abrogated its prior rule (from *Hayes v. Ariens Co.*, 391 Mass. 407, 413 (1984)) that had presumed a manufacturer knew of all risks regardless of the state of the art and amounted to strict liability for failure to warn. *Vassallo v. Baxter Healthcare Corp.*, 428 Mass. 1, 19–23 (1998).

Massachusetts now applies a reasonableness/state-of-the-art standard: liability attaches only for risks reasonably foreseeable or discoverable by reasonable testing at the time of sale. *Id.* For design and manufacturing defects, however, warranty liability does not turn on the defendant's care—it focuses on whether the product was defective and unreasonably dangerous. *Colter v. Barber-Greene Co.*, 403 Mass. 50, 61–62 (1988).

Does comparative negligence apply to product liability claims in Massachusetts?

It depends on the theory of liability.

For negligence claims, Massachusetts follows modified comparative negligence: a plaintiff's recovery is reduced by her share of fault but is barred entirely if her negligence is greater than the combined negligence of all defendants against whom she seeks recovery (i.e., more than 50 percent where there is a single defendant). G.L. c. 231, § 85.

For breach-of-warranty (strict-liability) claims, comparative negligence does not apply. *Correia v. Firestone Tire & Rubber Co.*, 388 Mass. 342, 353 (1983).

This warranty-versus-negligence distinction is one of the most significant aspects of Massachusetts products practice.

Is assumption of the risk a defense to a warranty claim in Massachusetts?

Yes, Massachusetts recognizes a variation of an assumption of the risk defense. Because warranty liability focuses on the product rather than the user's conduct, the only duty imposed on the user is to act reasonably with respect to a product she knows to be defective and dangerous. A plaintiff who, after discovering the defect and appreciating its danger, nonetheless proceeds to use the product unreasonably is barred entirely from recovery—her conduct is deemed the proximate cause of her injury as a matter of law. *Correia v. Firestone Tire & Rubber Co.*, 388 Mass. 342, 354–57 (1983).

This is a complete bar, not a proportional reduction, and ordinary contributory negligence does not diminish recovery. *Id.* The defendant must prove the plaintiff knew of the defect and its danger and voluntarily and unreasonably used the product; the defense combines a subjective knowledge element with an objective reasonableness standard and differs from traditional assumption of risk. *Allen v. Chance Mfg. Co.*, 398 Mass. 32, 34 (1986).

Is post-sale alteration of a product a defense in Massachusetts?

A post-sale modification does not automatically relieve the manufacturer of liability. A manufacturer must anticipate the environment in which its product will be used and design against reasonably foreseeable risks, including foreseeable alteration, such as removal of a guard that "invites its own removal." *Colter v. Barber-Greene Co.*, 403 Mass. 50, 59 n.11 (1988). Whether the modification and resulting injury were reasonably foreseeable is a jury question. *Id.*

Is compliance with government regulations a defense in Massachusetts?

Compliance with government regulations is not a complete defense.

Compliance with a government standard, such as FDA labeling requirements, is admissible to show the absence of negligence, but it is not conclusive and does not preempt or define the common-law duty. *MacDonald v. Ortho Pharm. Corp.*, 394 Mass. 131, 139–40 (1985).

In a warranty claim, the inquiry is whether the product was defective and unreasonably dangerous, not whether the defendant exercised due care, so compliance evidence directed at due care carries reduced relevance; due care is "foreign to" warranty liability. *Rice v. James Hanrahan & Sons*, 20 Mass. App. Ct. 701, 708 (1985).

JOINT LIABILITY, CONTRIBUTION & SETTLEMENT

Does Massachusetts follow joint and several liability?

Yes. Massachusetts retains the traditional common-law rule of joint and several liability in tort, and has repeatedly declined to replace it with proportional (several-only) liability. *Shantigar Found. v. Bear Mountain Bldrs.*, 441 Mass. 131, 141–42 (2004); *see also Chelsea Housing Authority v. McLaughlin*, 482 Mass. 579, 586 n.10 (2019). A plaintiff may recover full damages from any liable party, who may then seek contribution from the others. *Commonwealth v. Boston Edison Co.*, 444 Mass. 324, 336 n.4 (2005).

Can a manufacturer seek contribution from other responsible parties in Massachusetts?

Yes. Under the Massachusetts contribution statute, G.L. c. 231B, a right of contribution exists among two or more persons jointly liable in tort for the same injury, even before judgment, in favor of a tortfeasor who has paid more than its pro rata share. G.L. c. 231B, § 1. Contribution is available even where the joint tortfeasors are liable on different theories. For example, a negligent defendant may seek contribution from one liable in breach of warranty, and vice versa. *Wolfe v. Ford Motor Co.*, 386 Mass. 95, 98–99 (1982).

A separate contribution action, where judgment has entered, must be commenced within one year after the judgment becomes final. G.L. c. 231B, § 3.

How are contribution shares determined in Massachusetts?

Contribution shares are equal (pro rata) shares. They are not determined by comparative fault. In determining pro rata shares, "their relative degrees of fault shall not be considered." G.L. c. 231B, § 2. The Supreme Judicial Court has confirmed that the comparative negligence statute did not change this, holding that relative fault plays no role in apportioning contribution. *Zeller v. Cantu*, 395 Mass. 76, 81–83 (1985). This is a meaningful contrast with jurisdictions that apportion contribution by comparative fault.

How does a co-defendant's settlement affect the verdict against the defendants who go to trial in Massachusetts?

A good-faith release given to one tortfeasor does not discharge the others (unless its terms so provide), but it reduces the plaintiff's claim against the remaining defendants "to the extent of any amount stipulated by the release . . . or in the amount of the consideration paid for it, whichever is the greater." G.L. c. 231B, § 4. A good-faith settlement also discharges the settling tortfeasor from all liability for contribution. *Id.* A low settlement figure alone is not evidence of bad faith; the nonsettling defendant bears the burden of proving the settlement lacked good faith. *Slocum v. Donahue*, 44 Mass. App. Ct. 937, 938 (1998).

DAMAGES & TRIAL EVIDENCE

Does Massachusetts cap damages in product liability cases?

No. There is no cap on compensatory or non-economic damages in an ordinary product case. The statutory caps that exist are confined to particular defendants: a $500,000 cap on pain and suffering and other general damages applies only to medical-malpractice actions against health care providers (with exceptions), G.L. c. 231, § 60H, and governmental defendants are capped at $100,000 under the Tort Claims Act, G.L. c. 258, § 2. Neither reaches a private product manufacturer.

Are punitive damages available in Massachusetts?

Only where a statute authorizes them. Massachusetts does not permit common-law punitive damages. Punitive damages must rest on express statutory authority. The principal avenue in product cases is the wrongful-death statute, which authorizes punitive damages of not less than $5,000 where the death was caused by the defendant's malicious, willful, wanton, or reckless conduct, or by gross negligence. G.L. c. 229, § 2. The Supreme Judicial Court has upheld a substantial punitive award against a product manufacturer under this provision. *Aleo v. SLB Toys USA, Inc*., 466 Mass. 398 (2013). In addition, Chapter 93A authorizes multiple (double or treble) damages, which function punitively (see Chapter 93A above).

Does Massachusetts add prejudgment interest to product liability verdicts?

Yes, and it is substantial. Defendants should account for prejudgment interest, which accrues at 12 percent per year from the commencement of the action on damages for personal injury and property damage. G.L. c. 231, § 6B.

How are a plaintiff's medical bills presented to the jury in Massachusetts?

Itemized medical bills and records, subscribed and sworn under the penalties of perjury, are admissible as evidence of the fair and reasonable charge for the services, their necessity, the diagnosis, the prognosis, proximate cause, and resulting disability—provided written notice and a copy are served by certified mail at least ten days before introduction. G.L. c. 233, § 79G.

The statute does not permit excluding a provider's bill merely because an insurer paid a lower negotiated amount. *Law v. Griffith*, 457 Mass. 349, 352–53 (2010). The defendant may not introduce the amount the insurer actually paid, but it may offer evidence of the range of payments the provider accepts as payment in full for the same services to rebut the reasonableness of the billed charges. *Id*. at 353–61.

Does Massachusetts follow the collateral source rule?

Yes. A tortfeasor's liability is not reduced by insurance payments or other compensation the plaintiff received from independent sources; the rule has both a substantive (damages) and an evidentiary component, and its purpose is tort deterrence. *Law v. Griffith*, 457 Mass. 349, 354–55 (2010); *Corsetti v. Stone Co.*, 396 Mass. 1, 16–17 (1985). The evidentiary bar is not absolute: evidence of a collateral source may be admitted in the trial justice's discretion for a limited purpose, such as the plaintiff's credibility or motive. *Corsetti*, 396 Mass. at 17-18.

OTHER THEORIES OF LIABILITY

Is public nuisance a viable theory against product manufacturers in Massachusetts?

The appellate law is cautious, but public nuisance theories have survived the pleading stage in the trial courts. The Supreme Judicial Court has described the traditional scope of public nuisance as an unreasonable interference with a right common to the public, and in *Jupin v. Kask*, 447 Mass. 141,

158–59 (2006), it held that the home storage of lawfully owned, unloaded firearms is not a public nuisance—while expressly leaving open that "far more egregious conduct" might qualify. *Id.* at 159 n.16.

Superior Court decisions have allowed product-related public-nuisance claims to proceed past a motion to dismiss against firearms manufacturers, *City of Boston v. Smith & Wesson Corp.*, No. 199902590, 2000 WL 1473568 (Mass. Super. Ct. July 13, 2000), and against opioid manufacturers and distributors, *Commonwealth v. Purdue Pharma, L.P.*, No. 1884CV01808BLS2, 2019 WL 5495866 (Mass. Super. Ct. Sept. 17, 2019), *City of Boston v. Purdue Pharma, L.P.*, No. 1884CV02860, 2020 WL 416406 (Mass. Super. Ct. Jan. 3, 2020) (manufacturer defendants), and *City of Boston v. Purdue Pharma, L.P.*, No. 1884CV02860, 2020 WL 977056 (Mass. Super. Ct. Jan. 31, 2020) (distributor defendants), rejecting the argument that such claims are merely repackaged products liability.

HOW CAN AP&S HELP?

AP&S has defended manufacturers, suppliers, and distributors in Massachusetts state and federal courts. The firm's products liability and toxic tort practice spans aviation and aerospace, chemical, and other industrial and consumer products, and it has defended manufacturers and distributors against public nuisance claims in opioid, climate change, and wind turbine litigation. With offices in Rhode Island, Massachusetts, New Hampshire, and New York, AP&S works with in-house counsel and national counsel as lead or local counsel, from early case assessment through trial and appeal.

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