# Judith Perritano to Present “Product Liability Litigation – Significant Issues to Watch for in 2017”

Judith Perritano is presenting “Product Liability Litigation – Significant Issues to Watch For in 2017” in a live Webinar sponsored by The Knowledge Group on April 27, 2017.

Ms. Perritano has more than twenty years of experience in the defense and trial of complex personal injury cases. She has handled a wide variety of multi-party cases, from pre-suit investigation through trial including Products Liability, toxic torts, automobile, eminent domain, and construction-related claims.

Register for the Webinar.

About “Product Liability Litigation – Significant Issues to Watch For in 2017”

As defective products continue to cause harm and injuries among consumers, product liability claims have become commonplace in the market. Manufacturers who intend to avoid and survive the ever complex litigation process must secure advance product liability litigation strategies. Keeping themselves abreast with the significant issues and latest legal developments in product liability is also imperative to mitigate possible liability risks and financial losses.

In this two-hour LIVE Webcast, a panel of distinguished professionals and thought leaders organized by The Knowledge Group will provide the audience with an overview of the latest trends and critical issues in Product Liability Litigation. Speakers will also offer insights on the best practices in developing and implementing effective litigation strategies while ensuring compliance with product liability law.

Some of the major topics that will be covered in this course are:

- Product Liability – An Overview
- Recent Court Decisions and Product Liability Claims
- What to Prove in Product Liability Cases
- Common Litigation Pitfalls and Challenges
- Latest Regulatory Issues and Developments
- Risk Mitigation Strategies
- Best Compliance Practices

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# Claims Against Town over Enforcement of Local Ordinances and Environmental Laws Dismissed

PIERCE DAVIS & PERRITANO LLP

## Notable PDP Victories

*Gregory Smith v. Town of North Andover*, Essex Superior Court, C.A. No. 2016-00407-A (October 25, 2016)

The Essex Superior Court recently granted a Motion to Dismiss in favor of the Town of North Andover and three current/former town officials. The case stemmed from a 1997 lawsuit between the plaintiffs and the Sutton Pond Condominium Trust (Sutton Pond) involving a sewer pumping station located on Sutton Pond property. The plaintiffs were seeking to enforce:

- a prior settlement agreement and arbitration award against Sutton Pond;
- a declaratory judgment to enforce local ordinances and environmental laws against the Town;
- a Chapter 93A claim against Sutton Pond;
- a civil conspiracy claim against Sutton Pond and the Town; and
- a claim of fraud and deceit against Sutton Pond and individual town defendants.

All claims against the Town and its officials were dismissed, as well as three claims against Sutton Pond.

Representing the Town, PDP attorney Adam Simms, argued that the plaintiffs did not have standing to compel the Town to enforce local bylaws or state law. Additionally Simms argued under the Massachusetts Tort Claims Act ("MTCA"), G.L. c. 258, that the Town was immune from any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition that was not originally caused by the municipality. G.L. c. 258, §10(j). The Court agreed.

On the claims of alleged conspiracy between the Town and Sutton Pond, and fraud and deceit claims against individual Town defendants, the Court again found that the plaintiffs failed to state a claim upon which relief may be granted and dismissed all claims. The Court agreed with Simms' argument that the plaintiffs' claims did not meet the "particularity" requirements of Mass. R. Civ. P. 9(b), and presented no or insufficient facts to support their claims of fraud and deceit.

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# Town Immune for Student Injured by Errant Shot Put During High School Track Meet

## Notable PDP Victories

***Nicole Algeri v. Town of Reading*, Middlesex Superior Court, C.A. No. 2014-00281 (February 14, 2017)**

PDP prevailed on a motion for judgment on the pleadings on behalf of the firm's client, the Town of Reading, when the

Middlesex Superior Court ordered dismissal of a negligence claim brought by a former student who was struck in the head by her teammate's shot put throw before a high school track meet. The outcome of the case bolsters the strength of municipal immunity under the Massachusetts Tort Claims Act, G.L. c. 258, §§ 1, *et seq*.

The case arises from an accident involving a student at the Town's high school, who claimed that she suffered a serious head injury when a teammate threw a shot put in a prohibited area during warmups before a track meet.

The plaintiff sued the Town for negligence, alleging that the school failed to properly supervise the shot put event by allowing its athletes to warm up outside a designated area. At oral argument, the plaintiff expanded her claim and alleged that the school "armed" students with shot puts outside of a sanctioned area and in violation of Massachusetts Interscholastic Athletic Association rules and regulations.

The Town moved to dismiss the Complaint on the ground it was immune under Section 10(j) of the Massachusetts Torts Claims Act ("MTCA"), which bars claims against public employers based upon their failure to prevent or diminish the harmful consequences of a condition or situation not originally caused by the employer, including the "violent or tortious conduct of a third party." G.L. c. 258, § 10(j).

Superior Court Justice Helene Kazanjian dismissed the plaintiff's complaint, ruling that Section 10(j) applied to protect the Town from suit and liability. The student's claim was based on the Town's alleged failure to protect her from the harmful consequences (i.e., a head injury) of a condition or situation (another student throwing a shot put during practice before a track meet). The Court reasoned that the Town was immune from such a claim because it did not engage in an affirmative act which "originally caused" the harmful condition or situation, and under Section 10(j) the Town is not subject to liability based solely on its alleged failure to prevent the student-athletes from warming up for a track meet outside of a designated throwing area. In reaching its decision, the Court reasoned:

Here, the allegation is merely that the shot puts were located in a prohibited area at the time of the incident and that the coach was not supervising the teammate adequately when she picked one up and threw it in the direction of Algeri. There is no allegation that the Town instructed, encouraged or even allowed the students to warm-up or practice in that area …. The mere placing of shot puts where students had access to them, was not the condition or situation that caused Algeri's injury. Rather, the teammate's decision to pick-up and throw the shot put in a prohibited area was the specific condition or situation that materially caused Algeri's injury.

This decision is also notable as yet another instance distinguishable from the Appeals Court opinion in *Gennari v. Reading Public Schools*, 77 Mass. App. Ct. 762 (2010), which disregarded the SJC's guidance that Section 10(j) "was intended to provide some substantial measure of immunity from tort liability to government employers."

As previously reported in our newsletters, in *Gennari*, the Appeals Court held that Section 10(j) immunity was unavailable to a public school for a claim brought against it by a first-grader who was injured during recess when he was accidently pushed from behind by a fellow student, causing him to fall and strike his face against a concrete bench. Specifically, in *Gennari*, the Appeals Court reasoned that the principal's "affirmative decision" to conduct recess in an unsafe, concrete courtyard was the "original cause" of the student's injuries, thereby divesting the school of Section 10(j) protection.

Declining to follow *Gennari*, the Superior Court here rejected plaintiff's contention that merely placing the shot puts on the ground before the meet began in an allegedly prohibited area was an "affirmative decision" that negated the Town's entitlement to immunity.

PIERCE DAVIS & PERRITANO LLP

## Pierce Davis & Perritano Prevails in Asbestos Fiber Drift Case

Pierce Davis & Perritano (PDP) recently obtained a defense verdict in an almost six-week toxic tort trial in Connecticut.

After three weeks of jury selection, three weeks of trial and nearly five hours of deliberations, the jury returned a verdict in favor of PDP's client on all counts. PDP's client manufactured "matrix" circuit board and plastic compounds that contained asbestos as a reinforcing agent. The plaintiff's decedent lived between 2 and 2 ½ miles from the defendant's manufacturing plant at various times throughout his life. The plaintiff's decedent died from mesothelioma in 2015 and his wife sued the defendant manufacturer alleging that he contracted mesothelioma as a result of fugitive asbestos emissions released into the environment from the defendant's plant. PDP was successfully able to demonstrate to the jury that plaintiff's decedent was not exposed to asbestos from the defendant's plant and that, consequently, the defendant did not cause his disease.

Michael D. Leedberg, Joel F. Pierce and Alexandra Nassopoulos Vilella tried the case for PDP. The plaintiff called experts Barry Castleman, David Christiani, and David Mitchell; experts Christy Barlow and Paul Scott (both of ChemRisk) and Leonard Bruckman (formerly of the CT DEP) testified for the defense.

This is a significant victory for PDP's client and for the asbestos defense bar generally, as the plaintiffs' bar continually seeks out new theories of liability in an effort to expand the universe of toxic tort plaintiffs. "Fiber drift" or neighborhood exposure cases such as this are in the forefront. In 2015, PDP was involved in another asbestos fiber drift case in which a Connecticut state court jury also returned a defense verdict. Attorney Leedberg served as local counsel in the 2015 case, with Joseph Cagnoli of the law firm of Segal McCambridge serving as lead counsel. These two cases are thought to be the only defense verdicts in fiber drift cases in Connecticut.


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## John Davis to Present "Hot Topics in Employment Law" – March 15, 2017

John Davis is presenting “Hot Topics in Employment Law” at the 15th Annual MCLE-MMLA Municipal Law Conference on March 15, 2017.

Mr. Davis is head of the firm’s Governmental Liability and Civil Rights Practice Group. His practice focuses on the defense of cities, towns, and other public employers in suits alleging civil rights violations, discrimination, harassment, negligence, and educators’ and school board liability.

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# First Circuit Grants Qualified Immunity in Political Discrimination Case

## *Lopez-Erquicia v. Weyne-Roig*, 846 F.3d 480 (1st Cir., Jan. 25, 2017)

The First Amendment protects government employees against politically-motivated removal. “[F]reedom to associate with others for the common advancement of political beliefs and ideas is a form of ‘orderly group activity’ protected by the First and Fourteenth Amendments.” *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973), quoting *NAACP v. Button*, 371 U.S. 415, 430 (1963). Courts, however, recognize an exception to this rule “for instances in which political affiliation is an ‘appropriate requirement for the effective performance of the public office involved.’” *Galloza v. Foy*, 389 F.3d 26, 28 (1st Cir. 2004), quoting *Branti v. Finkel*, 445 U.S. 507, 518 (1980). “This exception helps to ensure that elected representatives will not be hamstrung in endeavoring to carry out the voters’ mandate.” *Id.*, citing *Elrod v. Burns*, 427 U.S. 347, 367 (1976).

As the First Circuit recently acknowledged, the line between non-policymaking positions (which are protected) and policymaking positions (which are *not* protected) is not always clear. In November 2012, Puerto Rico voters elected Alejandro Garcia Padilla, the Popular Democratic Party candidate, as their new governor. In January 2013, Governor Padilla appointed Angela Weyne-Roig, to serve as Puerto Rico’s new Insurance Commissioner. Shortly after she was instated, Weyne-Roig summoned the Director of the Commission’s Anti-Fraud Special Investigations (AFSI) Division, Ana Maria Lopez-Erquicia, to her office. Lopez-Erquicia was a member of the opposition New Progressive Party. Weyne-Roig informed Lopez-Erquicia that “things would be changing.” And change they did. Within months, Weyne-Roig eliminated the AFSI Division and reassigned Lopez-Erquicia to the Legal Affairs Division. Claiming the change was based on her political affiliation, Lopez-Erquicia filed suit. The district court denied defendant’s motion for summary judgment based on qualified immunity. On appeal, the First Circuit reversed.

To decide whether a particular position falls within the ambit of First Amendment protection, a court must examine the extent to which the job “involve[s] government decisionmaking on issues where there is room for political disagreement on goals or their interpretation.” 846 F.3d at 485, quoting *Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 241-42 (1st Cir. 1986) (*en banc*). Such analysis starts with the “particular responsibilities” of the position at issue to determine whether it resembles a “policymaker, a privy to confidential information, a communicator, or some other office holder whose function is such that party affiliation is an equally appropriate requirement.” Next, a court should consider “secondary factors” such as “relative pay, title, and legal or legislative classification . . ..” Here, the responsibilities of the AFSI Director suggested that the position was one of a policymaker or advisor. Those responsibilities included coordinating the work of the Division with federal, state and local authorities, developing and interpreting applicable rules and regulations, and advising (and sometimes substituting for) the Deputy Commissioner. Puerto Rico law, however, classified AFSI Director as a “career”

position, from which employees may only be terminated for cause, and not as a "trust" position, for which employees may be selected and removed at will.

On balance, the First Circuit stressed that '"[a]ctual functions of the job . . . control' our analysis." 846 F.3d at 487, quoting *Olmeda v. Ortiz-Quinonez*, 434 F.3d 62, 66 (1st Cir. 2006). Here, the "actual functions" of the AFSI Director suggested that Lopez-Erquicia's role was that of an official involved in Insurance Commission policymaking, at least as an advisor. Therefore, because it was not clearly-established that Lopez-Erquicia was protected from politically-motivated removal under the First Amendment (indeed, she most likely was *not*), the Court held the defendant was entitled to qualified immunity. Based on the factual nature of the First Circuit's analysis, it appears future defendants may enjoy qualified immunity in all but the most egregious cases of political retribution.

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## First Circuit Declines to Address Appropriate Causation Standard in FMLA Retaliation Cases

*Chase v. U.S. Postal Service*, 843 F.3d 553 (1st Cir. Dec. 14, 2016)

The First Circuit Court of Appeals recently declined to resolve an outstanding issue over the appropriate causation standard to apply in Family and Medical Leave Act (FMLA) retaliation cases, thereby leaving the question for another day.

The FMLA prohibits an employer from retaliating against an employee for taking protected leave. To recover for retaliation, an employee must prove that:

1. he availed himself of a protected FMLA right (*i.e.*, he engaged in protected conduct);
2. he was "adversely affected by an employment decision"; and
3. "there was a causal connection between [his] protected conduct and the adverse employment action." *Chacon v. Brigham & Women's Hosp.*, 99 F. Supp. 3d 207, 214 (D. Mass. 2015), quoting *Orta-Castro v. Merck, Sharp & Dohme Quimica P.R., Inc.*, 447 F.3d 105, 113-14 (1st Cir. 2006).

Describing motive as "the critical issue" in any FMLA retaliation action, the District Court (after a bench trial) entered a judgment of dismissal below in favor of plaintiff's employer and direct supervisor for firing Robert Chase, a letter carrier, while he was out of work on protected leave.

On appeal, the First Circuit affirmed. The case turned on the third element of proof – whether there was a causal connection between Chase's protected activity and his termination. Department of Labor (DOL) regulations call for the application of a "negative factor" causation standard; according to the DOL, an employer is prohibited from using an employee's decision to take FMLA leave as a "negative factor" in any employment action. 29 C.F.R. § 825.220(c). See *Henry v. United Bank*, 686 F.3d 50, 55 (1st Cir. 2012). But following the decision in *University of Tex. Sw. Med. Ctr. v. Nassar*, 133 S.Ct. 2517 (2013), wherein the Supreme Court held that Title VII retaliation claims "must be proved according to traditional principles of but-for

causation . . .," the question has arisen as to whether FMLA retaliation plaintiffs must satisfy the same standard. Under the more stringent "but for" test, a plaintiff is required to show that "the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." *Nassar*, at 2533.

Citing plaintiff's lack of evidence that his supervisor either knew or should have known that Chase was on protected FMLA leave at the time of his termination, the First Circuit ducked the appropriate standard issue and affirmed the decision below.

> Given that Chase is unable to prevail even under the more lenient "negative factor" test, we save for another day the question of Nassar's impact on FMLA jurisprudence with respect to the required causation standard . . ..

Without acknowledging the issue, the First Circuit appears to have silently sided with the Second, Third, Fifth and Eighth Circuits[1] by impliedly agreeing that individuals (*e.g.*, direct supervisors) can be held directly liable under the FMLA. Although two judges of the District of Massachusetts have so held – see *Mason v. Mass. Dep't of Env'l Protection*, 774 F. Supp. 2d 349, 371 (D. Mass. 2011); *Chase v. U.S. Postal Service*, 2013 WL 5948373, *14 (D. Mass. 2013) – not all courts are in agreement. Contra, *Mitchell v. Chapman*, 343 F.3d 811, 829 (6th Cir. 2003); *Wascura v. Carver*, 169 F.3d 683, 686 (11th Cir. 1999).

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[1] *Graziadio v. Culinary Inst. of America*, 817 F.3d 415, 422 (2nd Cir. 2016); *Haybarger v. Lawrence Cty. Adult Prob. & Parole*, 667 F.3d 408, 417 (3rd Cir. 2012); *Modica v. Taylor*, 465 F.3d 174, 188 (5th Cir. 2006); *Darby v. Bratch*, 287 F.3d 673, 681 (8th Cir. 2002).

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## Massachusetts Appeals Court Strikes Down First Amendment Retaliation Claim

*Cristo v. Evangelidis*, 90 Mass. App. Ct. 585 (Oct. 28, 2016)

Government employees do not lose their rights to free speech upon entering the public workplace. But as the Massachusetts Appeals Court recently confirmed, the First Amendment does not protect a government employee for statements made pursuant to his or her official duties.

For several years, Jude Cristo worked as Human Resources Director/Payroll Director in the Worcester County Sheriff's Department. In 2010, Cristo complained to the acting sheriff and deputy superintendent about certain activities of two of his co-workers – one who was spending work hours off-site campaigning for sheriff but still marking himself as present in the office, another who was assisting in the first co-worker's campaign while at work but falsifying his time records. In

November 2010, the defendant, Lewis Evangelidis (not the first co-worker), was elected as Sheriff of Worcester County. In January 2011, two days after his inauguration, Sheriff Evangelidis terminated the plaintiff. The plaintiff's position, Evangelidis explained, was being abolished, and Cristo lacked the financial experience necessary to perform the duties of the new position of Director of Administration and Finance/CFO.

Claiming he was terminated because of his internal complaints about co-workers, Cristo brought an action against Evangelidis for retaliation in violation of his First Amendment rights under 42 U.S.C § 1983. Evangelidis moved for summary judgment on the grounds of qualified immunity. The Superior Court Judge denied the defendant's motion, noting that the plaintiff's speech was on a matter of "public concern" and, therefore, protected under the First Amendment. On appeal, the Appeals Court reversed.

Relying on the Supreme Court decision of *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Appeals Court reaffirmed that, in order to enjoy First Amendment protection, the speech of a government employee must not only be on a matter of "public concern," but the employee must also be speaking "as a citizen." While the question of whether Cristo's speech was on a matter of "public concern" was "easily answered in the affirmative," the Appeals Court concluded that his complaints about co-workers were made within the scope of his official duties, and not as a citizen. To reach this conclusion, the Appeals Court examined the context in which Cristo's speech occurred. Five factors appeared determinative:

- First, Cristo learned about the matters he reported in the course of performing his official duties.
- Second, the matters about which he reported were directly related to those duties.
- Third, Cristo aired his complaints while on duty.
- Fourth, he did not share the contents of his complaints with anyone but his immediate supervisors.
- And, finally, Cristo made use of no forum outside the workplace to communicate his complaints.

Because the plaintiff's claim was based exclusively on the First Amendment of the United States Constitution, and not on the free speech protections in Part 1, Article XVI of the Massachusetts Declaration of Rights, the Appeals Court declined to express an opinion on whether the workplace speech of a public employee is better protected under State law than it is under Federal law.

No doubt, future plaintiffs will test this theory.

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## Injury Suit Against School Dismissed: Lawson v. N. Berkshire Voc. Regional Sch. Dist.

***Lawson v. North Berkshire Vocational Regional School District*, Pittsfield Sup. Ct.**

PDP successfully argued a Motion to Dismiss based upon inadequate presentment under M.G.L. c. 258. The litigation

stemmed from an injury which occurred during school hours at a regional vocational technical high school in western Massachusetts. The Plaintiff, who was a junior in high school, fell from a step ladder during a shop class project and sustained significant facial injuries, including the loss of several adult teeth.

Counsel for the plaintiff brought suit against the school district alleging that school staff failed to adequately supervise the minor plaintiff. Prior to bringing suit, plaintiff's counsel submitted several M.G.L. c. 258 presentment letters to the school district. The first letter was simply addressed "To whom it may concern" and the subsequent letters were addressed to the principal and superintendent. PDP prepared a Motion to Dismiss on the grounds that the letters did not constitute adequate presentment, as the presentment letters were not directed to an appropriate "executive officer" of the school district, per the requirements of the statute. In the case of a regional school district, presentment must be made to the regional school committee. See M.G.L. c. 258, § 1.

Plaintiff's Opposition to the Motion to Dismiss focused on the fact that the school district had constructive notice of the claim through the letters sent to the principal and superintendent and also to the school district's insurer. The Court issued a brief written decision after oral arguments on the Motion to Dismiss. In its decision, the Court granted dismissal for the Defendant, noting that the plaintiff's deficient presentment letters were fatal to his claim. Going forward, this decision should prove helpful in defending future claims in which suit is brought against a regional school district and the question of adequate presentment is at issue.

**QUESTIONS?**

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# Town Immune from Suit on Claims of Misrepresentation and Fraud: Trustees of the John T. Rose Family Trust v. Town of Pepperell

***John & Mary Ellen Rose, Trustees of the John T. Rose Family Trust v. Town of Pepperell*, Middlesex Sup. Ct.**

PDP successfully argued a Motion for Summary Judgment in a case involving homeowners who had an underlying water line on their property burst. In the late 1990's the Town of Pepperell installed the water line at issue on the plaintiffs' horse farm. In 2014, some sixteen to seventeen year after the water line was installed, plaintiffs claimed that the water line "burst," causing tens of thousands of gallons of water to spill into the earth. The plaintiffs were billed by the Town for the water that spilled as a result of the break. Plaintiffs faulted the Town for improperly "installing and maintaining" the water line and applied for an abatement of their water bill. The abatement request was ultimately denied by the Town, and the plaintiffs filed suit.

Counsel for the plaintiffs brought suit against the Town seeking recovery under theories of: misrepresentation and fraud; unjust enrichment; negligence and a violation of M.G.L. Ch. 165 § 11B. At the conclusion of discovery, the Town moved filed a Motion for Summary Judgment on all counts of plaintiffs' Complaint. In that motion, PDP argued that the Town was immune from suit on claims of misrepresentation and fraud pursuant under the Mass. Tort Claims Act, M.G.L. c. 258, § 10(c). We also argued that that the plaintiffs could not maintain a cause of action for unjust enrichment because they were obligated to pay their water bill despite the circumstances of the water usage. Furthermore, we argued that plaintiffs failed to comply with the presentment requirement of Mass. Gen. Laws ch. 258, § 4. Therefore, their negligence claim failed as a matter of law. In addition, we argued that Plaintiffs' negligence claim was barred by M.G.L. c. 260, § 2B, the Massachusetts Statute of Repose. Finally, PDP argued that plaintiffs' claim of a violation of M.G.L. Ch. 165 § 11B failed as a matter of law as the Town is not a "water company" as defined by the statute.

The Court issued a written decision after oral arguments on the Motion for Summary Judgment in which it agreed with PDP's argument and granted summary judgment on all counts of plaintiffs' Complaint.

**QUESTIONS?**

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