



A defendant for your products-liability case

Depending on special relationships with the product manufacturer, an insurance company may be liable

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Product safety – the Fords and Boeings of this world formalize their safety programs with budgets and discrete departments to inspect, test, warn, instruct and advise about hazards. Smaller manufacturers may not have this luxury. They may rely on third-party vendors or their insurance company to perform these design and safety tasks.

When an insurance company assumes responsibilities traditionally held by the product manufacturer, such as inspecting products for safety hazards and creating hazard warnings, you may be able to argue it assumes some of the same liabilities as the manufacturer. Methodically analyze potential legal duties of the manufacturer's insurer and craft a case plan that includes this potential defendant in your products liability case.

There are many possible scenarios, and none are necessarily typical, so be on the lookout. Examples from our experience include:

- An insurance company who holds itself out to have specialized knowledge of the type of equipment the defendant manufactures and creates product hazard warnings for the manufacturer;
- An insurance company's contracts expressly provide that the company will perform safety reviews and make recommendations about product safety;

- An insurance company conducts annual safety inspections of the manufacturer's equipment and provides written recommendations.

Legal duties

The insurance company's duty can be framed in a number of ways:

Product designer

Manufacturer

If the insurance company is directly involved in the design of the product because it has tested, inspected or approved its design, the insurance company is arguably a *de facto* manufacturer of the product with all attendant duties.

In this scenario, the insurance company may be liable under strict product liability as well as product-liability negligence. California follows a "stream of commerce" approach, extending strict liability to those who are an "integral part of the overall producing and marketing enterprise that should bear the cost of injuries from defective products." Thus, the strict product-liability doctrine covers a broad range of potential defendants beyond the obvious manufacturer – subject, of course, to a causal connection to the product defect. (*Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d 256, 262; see *Peterson v. Super. Ct. (Banque Paribas)* (1995) 10 Cal.4th 1185, 1191, 1198.)

Special Relationship

A special relationship creates not just a duty to behave reasonably oneself, but also a duty to control or warn of the

conduct of another person. The manufacturer's insurance company who inspected the product, commented and instructed regarding product safety or warnings, and provided safety labels, and on whose advice the manufacturer relied and obeyed, has a special relationship with the manufacturer. It has a duty to protect the end users of the manufacturer's products against the manufacturer's negligence and a duty to instruct and warn of safety issues.

A special relationship between entities may impose special duties on one of the entities, including the duty to warn of or protect against the harmful acts of third persons. (*Tarasoff v. Regents of U.C.* (1976) 17 Cal.3d 425, 435-436.) Generally, there are three entities involved: defendant, wrongdoer and plaintiff. The special relationship may exist between defendant and wrongdoer, or between defendant and plaintiff. (*Ibid.*)

Generally the defendant must have some level of control over the wrongdoer's conduct. (*Todd v. Dow* (1993) 19 Cal.App.4th 253, 259.) Special relationships generally involve some kind of dependency or reliance on the defendant. (*Olson v Children's Home Society* (1988) 204 Cal.App.3d 1362, 1366.) In this case, alleging a special relationship could be used both to establish the insurance company's duty and also to counter any defense that the insurance company has no duty to prevent harmful acts by the manufacturer. In the special relationship formula, the insurance company is the



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defendant and the manufacturer is the wrongdoer.

By analogy, the insurance company's relationship to plaintiff is similar to an engineer's relationship to someone injured by a construction project in which the engineer gave bad advice. The duty of the engineer who designs and participates in the construction of the improvements may extend to third persons not in privity of contract. The engineer's liability may be based on negligent testing and research, negligent design, or a negligent opinion. (See, e.g. *Shurpin v. Elmhirst* (2d Dist. 1983)148 Cal.App.3d 94, 103.)

Some authorities frame a special relationship as follows:

- The extent to which the transaction was intended to affect the plaintiff;
- The foreseeability of harm to the plaintiff;
- The degree of certainty that the plaintiff suffered injury;
- The closeness of the connection between the contractor's conduct and the injury suffered;
- The moral blame attached to the contractor's conduct; and
- The policy of preventing future harm. (Miller & Starr, 11 Cal. Real Est. § 29:37 (3d ed.), citing, *Aas v. Superior Court* (2000) 24 Cal.4th 627, 637-638 [analyzing the relationship between an engineering consultant and third persons].)

The same rationale may apply to the insurer in the examples above.

Contract

The insurance company contract with the manufacturer may have express clauses to provide services. For example, perhaps the insurance company contracted for the right to provide product safety consultation services, including product inspections and recommendations regarding labeling. In that case, plaintiff was either a third-party beneficiary of the contract or a person who may sue based on the insurance company's implied duties in the contract to perform consultation services reasonably.

Assumption of duty

The insurance company, by contract or practice, may advise the manufacturer about various aspects of its product that relate to safety, such as guarding, warning, labeling, etc. By undertaking to offer such advice, the company assumes a duty to do so reasonably. The insurance company knows or should know the manufacturer will rely on and follow the insurance company's safety recommendations. It also knows or should know that end users will be harmed if the insurance company makes negligent recommendations, provides inadequate or incorrect instructions, or negligently supplies labels and warnings.

This list of legal theories is not exhaustive. It is a jumping off point for you to think about your own cases in light of duties imposed on parties other than the defendant product manufacturer.

Make your case: investigate, plead and discover

With your potential legal theories in mind, you can create a case plan that allows you the flexibility to name the insurance company from the outset or add it in at a later time by Doe Amendment.

As you investigate, keep in mind that some insurance companies offer to provide consulting services for product safety. Check the insurance company's Web site. If you're lucky, you'll come across an ad where the company offers services, such as to help customers assess product liability, offer guidance to establish a product safety plan, review and advise about guarding and warning labels, or review and advise about user manuals.

When you are ready to file your complaint, plead causes of action – and acts – that will potentially apply to the insurance company. This way, if you do not name them initially when you file, you can amend the complaint to substitute the insurance company as a Doe defendant.

If your original causes of action do not relate back to the insurance company, you might have to file a Motion to Amend to add the company as a

defendant, which, depending on timing and other factors, might not be granted by the Court. If that happens, you are left to pursue important discovery through the insurance company as a third party. If the insurance company is an out-of-state entity, this process can be cumbersome and expensive.

Here are two examples:

Negligence – Product Liability

At all times herein mentioned, defendants MANUFACTURER and DOES 1-100, and each of them, were engaged in the business of designing, manufacturing, assembling, compounding, testing, inspecting, developing, packaging, labeling, fabricating, constructing, analyzing, distributing, merchandising, recommending, advertising, promoting, marketing, selling, leasing, servicing, repairing, maintaining, inspecting, instructing regarding, training regarding, and warning regarding [THE CLASS OF PRODUCT], including [THE SPECIFIC PRODUCT] for use by members of the general public.

Negligence – Service, Repair and Maintenance

On or before [DATE OF INJURY], defendants [MANUFACTURER] and DOES 1-100, and each of them, agreed to keep [THE SPECIFIC PRODUCT] in good repair, make inspections of [THE SPECIFIC PRODUCT], and/or perform work necessary for the safety and maintenance of the equipment. Defendants [MANUFACTURER] and DOES 1-100, and each of them, voluntarily assumed a duty to inspect and maintain the safety of [THE SPECIFIC PRODUCT].

After you file, your initial discovery requests should include Demands for Production for all contracts between the manufacturer and its insurer. Look for clauses in the insurance contracts or riders that discuss the insurer's right to perform inspections, provide warnings or instructions, report on findings or make recommendations. Demand all reports and recommendations.



At deposition, establish that if the insured refuses to follow the insurance company's advice, the company could refuse to insure the insured, or it could raise its premiums.

Conclusion

In the end, the insurance company will be in a very uncomfortable position as a defendant alongside its own insured. When the insurance company is uncomfortable, you are more likely to get what you want – justice for your client.



Leary

Elinor Leary represents plaintiffs in a broad range of civil litigation, from premises and products liability to professional negligence. She devotes a significant portion of her practice to public interest work. She is a member of the San Francisco Trial Lawyers Association, Consumer Attorneys of California, The American Association for Justice, Queen's Bench Bar Association and the University of San Francisco Inns of Court.



Veen

William Veen founded The Veen Firm as a sole practitioner in 1975, gradually developing it into a firm of talented attorneys and staff who represent severely injured workers and consumers. He is a member of the American Board of Trial Advocates, and he was honored as the Trial Lawyer of the Year by the San Francisco Trial Lawyers Association in 2003. Find the Web site at www.veenfirm.com.