Can a smaller firm handle a products-liability case?

You may want to reconsider suing Toyota over a defective brake design, but an exploding battery in a laptop computer is very manageable

By Chuck Geerhart

Many PI lawyers think of products liability cases as huge, time consuming and costly. Some are – like medical device, pharmaceutical and automotive design/crashworthiness cases. However, there are many product liability cases arising out of ordinary, everyday products that fail to perform as safely as the reasonable consumer expects. Some examples from my career include: a bathroom cleaner with inadequate warnings; a blender with broken metal blades; a recreational vehicle with an inadequate (low) handrail; a hot beverage container that separated, scalding the plaintiff; a pallet jack whose weld separated; a cold pack with inadequate warnings, an exploding battery in a laptop computer, a car jack that failed and crushed the plaintiff underneath, and a plastic chair that buckled and collapsed when the plaintiff sat in it.

My goal here is to inform smaller firm practitioners how they might be able to handle a product liability case. This article is not intended as comprehensive on the law of products liability; I provide an overview only. An excellent practice guide is by Cotchett and Cartwright, California Products Liability Actions (Lexis/Nexis, Matthew Bender). There is also a short and handy primer on products law in the West Rutter Guide, Cal. Prac. Guide Pers. Inj. Ch. 2(II)-D.

Snapshot of the law

Here is what we plaintiffs' lawyers like about products liability. First, as you may recall from law school, products liability is strict liability, not negligence. Generally speaking, the reasonableness of the manufacturer's conduct is not at issue, with some caveats noted within. Liability attaches upon proof of the product "defect" and a sufficient causal connection between defendant, the product and plaintiff's injury. (See *Romine v. Johnson Controls, Inc*. (2014) 224 Cal.App.4th 990, 1000 – In order for there to be strict liability, the product does not have to be unreasonably dangerous – just defective.)

When a user (or even a bystander) is injured by a defective product, plaintiff may plead multiple alternative theories, including strict liability (design, manufacturing or warning defect), negligence, and breach of warranty. (*O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 347; See Judicial Council Form PLD PI-001-5, Cause of Action – Product Liability.)

Manufacturing defect refers to a product that physically deviates from the intended design and is substandard compared to other models of the same product. (*Gonzalez v. Autoliv ASP* (2007) 154 Cal.App.4th 780, 792.) The weld that broke on the pallet jack would be an example of this.

Warning defect, sometimes called failure to warn, encompasses nonexistent or inadequate warnings to consumers of the dangers of using the product. Be careful with warning defect cases: Whereas "manufacturing" and "design" defects are evaluated solely with reference to the product, "warning" defects are measured by the product defendant's conduct – the "defect" relates to a "failure extraneous to the product itself." (*Webb v. Special Elec. Co., Inc*. (2016) 63 Cal.4th 167, 185.)

The landmark case of *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 426-429, established alternate tests to prove design defect: consumer expectation or risk-benefit. The simple test in most cases is whether the product did not perform as safely as an ordinary consumer would have expected it to perform when used or misused in an intended or reasonably foreseeable way. This is known as the consumer expectation test and the quoted language is from CACI 1203.

"[T]he consumer expectation test is reserved for cases in which the everyday experience of the products users permits a conclusion that the products design violated minimum safety assumptions, and is thus defective regardless of expert opinion about the merits of the design." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 567.) Thus, under the consumer expectation test, you may not even need to retain an expensive liability expert, so long as the jury could conclude the product did not perform as safely as the reasonable consumer expects (e.g., the coffee thermos that separates and scalds the plaintiff; the car jack that suddenly collapses). Expert testimony as to what consumers ordinarily expect is generally improper. (*Chavez v. Glock, Inc*. (2012) 207 Cal.App.4th 1283, 1303.)

Defendants will often try to convince the court to instruct the jury solely using the risk-benefit test, which requires the jury to weigh the risks of the design against the benefits and thereby forces the jury to consider the *reasonableness* of the design. This can implicate expensive

expert testimony. Fortunately, courts less frequently allow risk-benefit arguments by the defense unless the product is extremely complicated. And even when a product is fairly complicated, such as an automobile braking system, the consumer expectation test may be applied.

> The consumer expectations test is not foreclosed simply because expert testimony may be necessary to explain the nature of the alleged defect or the mechanism of the product's failure. (*Soule*, supra, 8 Cal.4th at p. 569, fn. 6.) As observed in *West v. Johnson & Johnson Products, Inc*. (1985) 174 Cal.App.3d 831, 866-867), whether a product's design and performance met the informed expectations of the ordinary consumer is a question distinct from, even if derivative of, the factual issues of what that design was and how it functioned.

(*Bresnahan v. Chrysler Corp.* (1995) 32 Cal.App.4th 1559, 1568-69.)

Note that the manufacturer may also be liable for the consumers foreseeable misuse of the product. For example, if someone stands on a plastic lawn chair, that is very likely foreseeable misuse. Driving a Camaro at 90 mph is also foreseeable misuse (although also probably comparative fault) in a crashworthiness case.

Another thing plaintiffs' attorneys like about products liability: Strict products liability among the defendants is joint and several: i.e., any defendant in the stream of commerce (and causally connected to the product defect) is responsible for all of plaintiff 's damages attributable to the defective product. (Stream of commerce means from manufacturer/designer through all middlemen to ultimate seller.) Defendants may seek indemnity from each other. (*Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d 256, 262, *Bailey v. Safeway, Inc.* (2011) 199 Cal.App.4th 206, 212, *Springmeyer v. Ford Motor Co.* (1998) 60 Cal.App.4th 1541.)

Prop. 51 (Civil Code, § 1431.2) does not apply in products-liability actions. Because it is not based on fault *per se*, strict liability for injury caused by a single product is not affected by Prop. 51. (*Bostick v. Flex Equipment Co., Inc*. (2007) 147 Cal.App.4th 80, 93-95, *Wimberly v. Derby Cycle Corp*. (1997) 56 Cal.App.4th 618, 625-633.)

If there is another defendant who could be liable under negligence theory (such as a grocery store), then liability may be apportioned to that entity. Liability among joint tort-feasors may be apportioned on comparative fault basis; such apportionment may appropriately be effected between strictly liable defendant and negligent defendant, as well as between multiple negligent defendants. (*Safeway Stores, Inc. v. Nest-Kart*, (1978) 21 Cal.3d 322, 325-26.)

Now for the practical part

Here are other reasons you should like a good products-liability case:

1. You usually dont need to sue or serve any foreign entities. Because of joint and several stream of commerce liability, when you sue over that defective car jack manufactured in China, you dont need the Chinese company as a defendant – just good old OReilly Auto Parts (or any other retailer), based right here in the USA. There are usually good commercial insurance policies covering the seller of the product.
2. There are many avenues for discovery. You will usually be in state court, unless there is diversity jurisdiction (which you can defeat by suing a local retailer) or federal preemption (beyond this article's scope). Dont worry about how big the defendant corporation is, or how high-powered their counsel. You can craft sets of discovery that will help you prove the defect and will also make the defense work and pay attention to your meritorious case. (I have standard sets of interrogatories and document demands I have used in design and warning defect cases. If you want a copy, please email me at cgeerhart@gmail.com and specify whether you want Word or Wordperfect versions.)

Here are some types of discovery you can demand: 1) all historical design documents, 2) all design changes, 3) recalls, 4) patents, 5) consumer or other complaints about the product, 6) other lawsuits or claims for personal injury, 7) all warnings/instructions and changes thereto, and 8) evidence of prior and subsequent accidents involving the product – all admissible to show defect or notice of defect. (*Ault v. International Harvester Co*. (1974) 13 Cal.3d 113, 121-122 – other similar accidents admissible to show product defect.)

Don't expect the defense to cooperate

Warning: many, if not most, product defendants tell their lawyers to stonewall. You will likely have to bring at least one motion to compel discovery to force them to play fair. But you will win the motion, and things should go more smoothly after that.

Because strict liability is not based on negligence or culpable conduct, evidence of subsequent remedial measures, ordinarily barred in negligence cases under Evidence Code section 1151, is discoverable and admissible. (*Ault, supra*, at 117-120.) This is an extremely powerful hammer in products cases. Many defense lawyers do not understand this, and you may have to explain it.

Caveat: If you find yourself stuck in Federal Court, no evidence of subsequent remedial measures may be admitted, even in diversity cases, except for the purpose of proving ownership, control, or the feasibility of precautionary measures. (See FRE 407.)

What about automotive design defect cases?

You may have a client who was horribly injured (or killed) in an accident where there is no source of recovery other than the automaker. These cases may involve a design defect (stuck accelerator in a Toyota, or an airbag either explodes or fails to deploy, or a crashworthiness issue (such as the frame collapses). Be very careful with these cases. The automakers fight them tooth and nail. You will need more experts than you can imagine, potentially costing

hundreds of thousands of dollars. I would recommend that small firm practitioners associate with a firm with a proven track record trying automobile products-liability cases.

Conclusion: You can handle a products case!

In every case you handle, look to see if there may be a products liability angle. There are products involved in many of our cases. We sometimes do not see the liability angle until we are well into exploring the claim.

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