Strict-products-liability claims can help you hold more defendants responsible

A solid negligence claim should not cause you to overlook strict products liability

By Steven Kronenberg
The Veen Firm, P.C.

Strict-products-liability claims can help you hold more defendants accountable for your client's injuries. Even in a relatively simple vehicle collision case, considering whether a product manufacturer shares responsibility for the target defendant's conduct can pay substantial dividends if you put in the work to develop supporting facts.

What is a products-liability claim?

A products-liability claim can arise from the defective design of a product line (CACI 1203, 1204), a manufacturing defect that only affects one or a small number of them (CACI 1202), or a failure to warn of a knowable product danger (CACI 1205). In addition to the general instructions for all products, there is a specific instruction regarding food allergens, "when the presence of the allergenic ingredient would not be anticipated by a reasonable user or consumer." (*Livingston v. Marie Callenders Inc.* (1999) 72 Cal.App.4th 830, 838-839; CACI 1206.)

Strict liability arises from a public policy that prohibits profiting from selling defective products while socializing the cost of their harm: "the purpose of [strict products] liability is to insure that the cost of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 63.)

In addition to strict-liability claims, one should consider pleading a cause of action for negligently failing to recall (or retrofit) a defective product. (CACI 1223.) The evidence supporting the strict-liability claims will very likely also apply to this cause of action. The key issues are proving that the manufacturer "knew or reasonably should have known that the [product] was dangerous or was likely to be dangerous when used in a reasonably foreseeable manner" and that a "reasonable" defendant in similar circumstances would have recalled or retrofitted it. (CACI 1223 [citing *Hernandez v. Badger Construction Equipment Co.* (1994) 28 Cal.App.4th 1791, 1827 – "Failure to conduct an adequate retrofit campaign may constitute negligence apart from the issue of defective design"].)

Why spend time on a strict-products-liability claim when my negligence claims are solid?

More leverage against known defendants

The more covered claims you can plead against a known defendant, the more leverage you have. Smart defense counsel will know that if your case proceeds to trial, the plaintiff will have multiplied the opportunities to educate the jury about all of the ways that the defendant prioritized profits over safety.

Punitive damages are also cognizable for strict-products-liability claims. (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 402.) Although insurance does not provide coverage for these damages, defense counsel will very likely increase pressure on the carrier to settle the covered claims.

Strict-liability claims *do not* require proving negligence. (CACI 1200 et seq.; but see *Sanchez v. HitachiKoki, Co.* (2013) 217 Cal.App.4th 948, 956 [strict liability does not require a manufacturer to ensure product safety].) So jurors can still hold a defendant accountable when defense counsel argues that the defendant was not negligent.

No pre-injury release of strict-liability claims

Some critical affirmative defenses to a negligence claim are not cognizable in strict liability. Products are often sold with manuals or terms and conditions that include "fine print" purporting to warn the consumer that he or she is assuming the risk of injury. However, "no written agreement can operate to allow a supplier of defective products to avoid strict-products-liability." (*Westlye v. Look Sports, Inc.* (1993) 17 Cal.App.4th 1715, 1743.)

More potential defendants (and more coverage)

Strict-liability claims may also help you identify more target defendants. Because insurance policies usually cover strict-products-liability claims to the same extent as negligence claims (other than punitive damages), consider that more insurance may be available to compensate for your clients' injuries.

Standards for proving that a product was defectively designed

California relies on two tests to determine whether a product was

defectively designed: the consumer-expectation test and the risk-benefit test. (CACI 1203, 1204.) In Brian Chase's victory in *Romine v. Johnson Controls*, the court held that even when a product or mechanism of injury might be relatively complex, in some cases, a plaintiff can proceed under *only* the consumer-expectation test. (*Romine v. Johnson Controls* (2014) 224 Cal.App.4th 990, 1004, 1005 ["That causation for a plaintiff's injuries was proved through expert testimony does not mean that an ordinary consumer would be unable to form assumptions about the product's safety . . . . Accordingly, the trial court properly instructed the jury on the consumer expectations test" and excluded defendant's risk-benefit evidence]; see *McCabe v. American Honda Motor Co.* (2002) 100 Cal.App.4th 1111, 1126.)

***Consumer-expectation test* (*Keep it simple*)**

Simplicity is a huge advantage of the consumer-expectation test. The key element is proving whether the product "did not perform [1] as safely as an ordinary consumer would have expected it to perform when [2] used or misused in an intended or reasonably foreseeable way." (CACI 1203.)

This means that "*regardless of expert opinion about the merits of the design,*" a product is defective if "the everyday experience of the product's users permits a conclusion that the product's design violated minimum safety assumptions." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 567 [italics in original].) *Expert testimony is not admissible, because it is not helpful to determine the trier of fact's common experience*, so "[t]he manufacturer may not defend a claim that a product's design failed to perform as safely as its ordinary consumers would expect by presenting expert evidence of the design's relative risks and benefits." (*Id.* at p. 566; see *Romine v. Johnson Controls, Inc., supra,* 224 Cal.App.4th at pp. 1004-1005.)

***Risk-benefits test* (*Battle of the experts*)**

A product may also be defective "if, in light of the relevant factors . . . , the benefits of the challenged design do not outweigh the risk of danger inherent in such design." (CACI 1203; *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 418.)

Defendants often attempt to argue that this test is fairer (to them) than the consumer-expectation test, because the jury can consider more evidence. A battle of the experts can make a jury's decision more difficult, but on the plus side, if defendant designates its own personnel as experts and they testify about their opinions, you may be able to claim that the defendant waived attorney-client privilege and work-product protections. (*County of Los Angeles v. Sup.Ct.* (*Hernandez*) (1990) 222 Cal.App.3d 647, 657.)

Applying the consumer-expectation test to identify additional defendants

We recently resolved a case in which a commercial truck collided with a cyclist, causing fatal injuries. The big rig was unlawfully driving on a "restricted" street that prohibited trucks. In response to police questions about why he was driving a huge truck on this small street, the driver stated that he was just following directions from his GPS device.

At first glance, the driver's statement appeared to be just an attempt to avoid responsibility. Even if true, would jurors really hold a GPS unit manufacturer accountable for this? But the more we learned, the more we concluded that the facts supported a strict product liability claim against the GPS device manufacturer under the consumer-expectation test.

Who is the "ordinary consumer?" Truck drivers.

An "ordinary consumer" is someone who "ordinarily use[s]" the product. (*Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220, 1232.) Based on the *Romine* case and jurors' anticipated experience using GPS map apps on their smart phones, we concluded the court would likely grant a motion in limine for plaintiff to proceed under the consumer-expectation test only.

We anticipated that the court would find that commercial truck drivers were these ordinary consumers for two reasons. First, the manufacturer's marketing unmistakably targeted commercial drivers. It posted videos touting that the device

was "trucker tested," promoted its truck-specific routing abilities, and marketed it as *a commercial truck safety device*.

Second, only a commercial driver would pay a hefty premium for truck-specific features instead of using free smartphone apps or cheaper standalone GPS devices. Advance route planning is critical for truck safety. Unlike cars that can drive almost anywhere, big rigs can only drive on specific roads designed for these big, heavy vehicles. Trucks usually cannot safely improvise or make U-turns, so it is extremely important to plan their route right the first time. Planning a safe route with paper maps can also be cumbersome and takes time away from profitable driving.

How safely did truckers expect this GPS to perform?

How does one evaluate the expectations of a truck driver? "In determining whether a product's safety satisfies [the consumer-expectation test], the jury considers the expectations of a hypothetical reasonable consumer . . ." (*Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 126, fn. 6.)

The prerequisites for truck driving school to train for a commercial driver's license present a low barrier of entry: one must be 18, pass a physical exam, and be able to read and understand "basic" English. (a-1truckschool.com/admissions/.) Drivers typically are not required to attain any academic degree, so the device should be easy to use and provide safe directions.

We also researched government recommendations to identify evidence of consumer expectations. The Federal Motor Carrier Safety Administration advises commercial truckers who use GPS devices to make sure (a) that their unit is specifically designed for commercial vehicles, and (b) to "*follow the route recommended by the navigation system*." (FMCSA-ADO-13-007 [emphasis added]; available at https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/GPS_Visor_Card_508CLN.pdf.) If the authorities advise truck drivers to follow truck-specific GPS directions, then presumably those are *safe* directions.

We then conducted an exhaustive search to identify what the *defendant determined* were reasonable expectations of a hypothetical truck driver. This included analyzing Internet Archive versions of the manufacturer's website, operator's manuals, advertisements, social media, and product reviews. A consistent theme emerged: The manufacturer repeatedly represented that its GPS provided the best, "fully updated" maps so that commercial truck drivers could avoid driving on streets that prohibited trucks.

Specifically, we identified manufacturer representations that the device would prevent accidents and tickets by selecting lawful truck routes instead of restricted streets. The manufacturer advertised that it was America's "most trusted source for maps," and it clearly intended truck drivers to rely on these representations. So we contended that a reasonable truck driver would conclude that the device was at least as accurate as the company's hard copy road atlases (that for years had identified the road at issue as prohibiting trucks).

Archived web pages and press releases boasted that the device "*ensure[d] safe navigation* of the vehicle on truck-approved roads." The manufacturer also represented that the GPS unit would "*prevent accidents* and tickets by using roads and bridges that accommodate truck height, width, and length." The device provided "*the safest, most efficient route* for trucks." Incredibly, the manufacturer's social media postings represented that truckers who used the device would "avoid accidents" and not "have to worry about paying" fines for traveling on restricted (non-truck) routes.

What is an intended or reasonably foreseeable (mis)use?

A manufacturer must "foresee some degree of misuse and abuse of his product, either by the user or by third parties, and to take reasonable precautions to minimize the harm that may result from misuse and abuse [citation]." (*Fluor Corp. v. Jeppesen & Co.* (1985) 170 Cal.App.3d 468, 479 [holding that strict product-liability claim will lie against manufacturer of defective airplane navigation chart].) The determination of reasonably foreseeable misuse is a question of fact. (*Wright v. Stang Manufacturing Co.* (1997) 54 Cal.App.4th 1218, 1235.)

These qualifications are also important for considering foreseeable (mis)uses and to rebut the sophisticated user affirmative defense. That defense requires the defendant to prove that the user knew the risks "including the degree of danger involved (i.e., the severity of the potential injury), and how to use the product to reduce or avoid the risks, to the extent that information is known to the manufacturer." (*Buckner v. Milwaukee Electric Tool Corp.* (2013) 222 Cal.App.4th 522, 536.)

Once again, we turned to the manufacturer's own representations to determine foreseeable (mis)uses. It posted an instructional video demonstrating how to use the device "safely," i.e., turn it on, select the destination, and "get going," without reviewing any fine-print disclaimers, cross-referencing to paper maps, etc. Advertisements also represented that the company's paper maps were indexed to the GPS, not vice versa. So we contended that the company must have known that busy, modest-income truck drivers bought the GPS to *replace* paper maps. If drivers had to spend time cross-referencing their GPS directions with cheaper paper maps, they never would have bought the expensive GPS in the first instance.

Written "release" does not apply to strict liability claims

Throughout the litigation, the manufacturer contended that the truck driver assumed the risk of device errors, because each time the device was turned on, he pressed "OK" on the touch screen. This purported to acknowledge a long, fine-print "Warning and Legal Consent" that allegedly required the user to "assume full risk and responsibility

for use of the product" and referred to "warnings and disclaimers included in the product materials." (None of these were addressed in the manufacturer's how-to video.) Essentially, the driver's only options were to press "OK" to accept or to do so after reading a "tutorial." The written instructions were no better – the do's and don'ts were provided in 18 pages of 10-point type, with two pages of "Warnings, End-User License Agreement, and Warranty" in 7-point type.

While the manufacturer might have been able to argue that the truck driver assumed the risk of the manufacturer's negligence, recall that written releases like this are not cognizable in strict-liability claims. (*Westlye v. Look Sports, Inc.*, *supra*, 17 Cal.App.4th at p. 1743.)

Failure to warn

A manufacturer can be held strictly liable for failing to warn of a product's defect that was known or knowable at the time of sale. (CACI 1205 [citing *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 1000].)

A deep dive into social media, forum postings, and archived internet content demonstrated that the manufacturer had actual notice for years that the device directed trucks to drive on restricted streets. Developing this evidence required a substantial investment of time, but no bills from experts.

In addition to the manufacturer's Facebook page and responses to negative consumer product reviews on vendor websites, we pored over trucking forum "support threads" that included several consumer complaints *and manufacturer's responses* (within thousands of postings about other issues):

A trucker complained that the device "tries to route me down non-truck routes while telling me the truck route is illegal for me." The manufacturer replied and asked the driver to contact the company to discuss. Another driver complained that the unit directed him to drive on roads clearly labeled with "no thru trucks" signs. The manufacturer was "disappointed to hear" about this trouble and requested contact to discuss it further. In response to a complaint that the device directed a truck to drive in a "no truck" area, the company conceded that "sometimes the device gives a route that is not truck-friendly [i.e., unlawful] when there are no better options available."

The manufacturer's responses demonstrated (1) actual notice of the defect; (2) failure to disclose it to customers outside of the small audience of forum members; and (3) that it was attempting to fix the problem but not conducting a recall.

Conclusion

While we were initially skeptical of the facts supporting this claim, we were able to resolve it favorably before trial. A deep dive into social media and the Internet Archive demonstrated that the manufacturer had known for years that the device did not perform as safely as truckers expected when used in a reasonably foreseeable way.

The moral of this strict-products-liability story: It is okay to view long-shot claims skeptically, but a thorough investigation can pay off.


Kronenberg

Steven A. Kronenberg is an attorney with The Veen Firm, P.C., *and works on the Label Trial Team. His practice helps the catastrophically injured (particularly those who have suffered food-related injuries and damages), protects consumers (through class-action claims arising from food fraud, false advertising, and defective products) and safeguards employees' rights (including restaurant staff and food processing workers). He has more than a decade of experience litigating complex matters from their inception through trial and appeal. He founded the Food Law Practice Group at his former defense firm and publishes articles on these issues in trade journals and foodlawblog.com. For more information, visit www.veenfirm.com.*