

Avoiding defense traps in slip-and-fall cases against Costco

Here's your game plan to litigate against Costco, including a trove of discovery documents that may prove invaluable

By Jake Cohen

There is no question that Costco plays hardball in litigating slip-and-fall matters, often forcing plaintiffs to march all the way down the litigation path to the eve of trial before Costco will pay a reasonable settlement; and usually not until Costco's motion for summary judgment is denied. Hence, to make taking a slip-and-fall case against Costco viable, it is imperative that you approach the case properly and handle it meticulously from the outset.

Federal court removal "trap"

It is an utmost certainty that at the outset of the lawsuit Costco will remove the case to federal court on the basis of diversity jurisdiction. It has 30 days to do so following receipt of the first pleading in the state-court case. (28 U.S.C. § 1446(b)(1), (2)(B), (3),(c)(1).) Costco's removal on this basis will likely be successful because Costco is incorporated and has its principal place of business in Washington state. The fact that Costco will reap a significant advantage if it is able to successfully remove the case to federal court will be reflected in Costco's valuation of the claim, which will be considerably lower than if the case stays in state court.

For example, because unanimous verdicts are required in federal civil trials (Fed. Rules Civ. Proc., rule 48), while only a 9-3 verdict is needed in California state courts, all Costco needs to do is convince a single juror to "hold-out" to escape all liability. Additionally, the timing requirements in federal court are often shorter than in state court in California, which Costco will use to its advantage against plaintiffs' counsel, who are unaccustomed to the learning curve associated with litigating in federal court. In addition, because California's premises-liability doctrine is inherently complicated and multi-layered, Costco's intimate familiarity with the federal court system will afford it additional opportunities to derail a plaintiff's case if the plaintiff's counsel is not well-versed in the Federal Rules of Civil Procedure.

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It therefore behooves plaintiffs' counsel to do everything in their power to keep the case in state court. One way to defeat federal diversity jurisdiction is to add a nondiverse party as a defendant, such as a responsible employee or manager. (28 U.S.C. § 1441(b)(2); see also *Spencer v. United States Dist. Ct. for Northern Dist. of Calif*. (9th Cir. 2004) 393 F3d 867, 870.) From a practical perspective, it is therefore critically important to ascertain the identity of the general manager, manager on duty at the time of the incident, and/or any involved employees, before the case is filed. This can be done by utilizing an investigator to call or survery the subject Costco location as well as by running skip-traces on the individuals who are identified so those individuals can be properly named in the complaint.

In the slip-and-fall context, naming a manager or employee in this fashion is proper because the manager or employee are agents of Costco and have a duty to maintain the premises in a condition that would not pose an unreasonable risk of harm to Costco's customers. (*Leroy West v. Costco Wholesale Corporation* (C.D. Cal., Nov. 30, 2020, No. LACV2004265JAKFF-MX) 2020 WL 7023777; see also *Perkins v. Blauth*, 163 Cal. 782, 787 (1912); *PMC, Inc. v. Kadisha* (2000) 78 Cal.App.4th 1368, 1381; and *Gallegos v. Costco Wholesale Corporation* (C.D. Cal., June 2, 2020, No. CV203250DMGGJSX) 2020 WL 2945514, at 3, fn. 3.)

Liability theories and framing the case

To prevail in a slip-and-fall case against Costco under California's premises-liability law, the plaintiff must generally establish that Costco was on "notice" of the subject dangerous condition before the incident occurred. (See CACI No. 1003 Unsafe Conditions.) Notice can be proven by showing Costco or one of its employees "actually" knew of the subject dangerous condition by, for example, showing that an employee was depicted on the surveillance footage as having seen the spill yet failed to take action to clean it up before the subject slip and fall happened.

But that scenario is unlikely to occur. Hence, a plaintiff will likely have to rely on alternative theories of liability to prove that Costco was on "constructive" notice of the subject dangerous condition. (See CACI No. 1011 Constructive Notice Regarding Dangerous Conditions on Property.) In "constructive" notice cases, there are three main areas of attack for a plaintiff to prevail against Costco on liability:

1. That Costco created the subject dangerous condition by installing flooring polished to remove all slip-resistive qualities when wet;
2. That Costco failed to have a reasonable inspection procedure in place and/or failed to conduct a reasonable inspection prior to the subject slip and fall as depicted on the subject surveillance footage; and
3. That Costco was on notice of earlier slip-and-falls that occurred under substantially the same circumstances as the instant case.

Creation of the dangerous condition

California's premises liability doctrine is well-settled that "[w]here…'the evidence is such that a reasonable inference can be drawn that the condition was created by employees of the [defendant], then [the defendant] is charged with notice of the dangerous condition.'" (*Getchell v. Rogers Jewelry* (2012) 203 Cal.App.4th 381, 385; see also *Hatfield v. Levy Bros*. (1941) 18 Cal.2d 798, 806; CACI Nos. 1003 & 1012 (2012 Ed., Dec. 13, 2011).) Accordingly, to show that Costco was on "constructive" notice of the subject dangerous condition you must analyze the flooring where the slip-and-fall occurred. There is abundant evidence that has already been made public record in past litigation that shows that the flooring that was selected by Costco in use at all of its stores poses a slip-hazard when wet.

This must be proven by obtaining Costco's floor-selection policies and procedures manuals using requests for production of documents in discovery, as well as by eliciting testimonial admissions from Costco's designated "person most knowledgeable" relating to flooring selection; and from evidence gathered at a site inspection conducted by plaintiff's liability expert.

I personally did this work-up and attached materials to my client's motion for summary judgment and opposition to Costco's motion for summary judgment, in *Jayashree Singh v. Costco Wholesale Corporation*, et al., (ND Cal), Case No. 5:20-cv-08180-NC at docket numbers "114" and "116," respectively. All of this evidence was made public record following the court's revocation of Costco's confidential protective order in that matter and can be accessed through PACER.

Failure to have or conduct a reasonable inspection procedure

A store owner can be held to be on "constructive" notice of a subject slip hazard for failing to have a reasonable inspection procedure in place; or by failing to actually conduct a reasonable inspection prior to the instant incident. (*Sapp v. W.T. Grant Co*. (1959) 172 Cal.App.2d 89, 91; see also *Ortega v. Kmart* (2001) 26 Cal.4th 1200, 1210, 1212-1213; *Hale v. Safeway Stores, Inc*. (1954) 129 Cal.App.2d 124, 128; *Louie v. Hagstrom's Food Stores, Inc*. (1947) 81 Cal.App.2d 601 607-609; and *Moore v. Wal-Mart Stores, Inc*. (2003) 111 Cal.App.4th 472, 479.)

To assess whether this theory of liability is viable, discovery must be propounded to obtain Costco's safety-inspection procedure manual, the subject "sweep sheet" or daily safety-inspection log covering the area where the slip and fall occurred, and the surveillance footage that captures the area where the incident occurred from two hours before until two hours after the incident.

Plaintiff's counsel must compare the "sweep sheet" to the surveillance footage and safety inspection procedure manual to assess whether any Costco employee who could be alleged to have initialed the "sweep sheet" even appeared on the

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surveillance footage at all. It is surprising how often an employee signs off on a "sweep sheet" but is unable to be identified on the surveillance footage at deposition.

On the other hand, if a Costco employee is shown to conduct what appears to be a dedicated safety inspection on the surveillance footage, you must determine whether the employee conducted the inspection in compliance with Costco's written safety-inspection procedure manual.

If the surveillance footage does not depict any Costco employee as having conducted what appeared to be a dedicated safety inspection, that employee and Costco's designated "person most knowledgeable" regarding safety inspections should be deposed to confirm that no Costco employee was depicted as conducting a "Costco-compliant" safety inspection as depicted on the surveillance footage.

If there is a Costco employee seemingly depicted on the surveillance footage as having conducted a dedicated safety inspection, that employee, as well as Costco's "person most knowledgeable" should be questioned, at length, with respect to the requirements of Costco's safety-inspection procedure manual and an attempt should be made to elicit admissions that the subject Costco employee did not actually conduct an inspection in accordance with the manual. In addition, the plaintiff should retain a liability expert to review the surveillance footage and Costco's safety-inspection procedure manual to develop opinions that Costco's existing hourly floor walk procedure is unreasonable on its face given the sheer size of the Costco location and with respect to the subject Costco employee who allegedly conducted the inspection not being in compliance with Costco's written safety-inspection procedure manual.

Again, you can access the material I filed along these lines through PACER in *Jayashree Singh v. Costco Wholesale Corporation*, et Case No. 5:20-cv-08180-NC at docket Numbers "114" and "116."

Prior incidents that occurred under substantially the same circumstances

A store owner can also be held to be on "constructive" notice of a subject slip hazard where the plaintiff proves the existence of prior slip-and-fall incidents that occurred under substantially the same circumstances as the instant slip and fall. (*Howard v. Omni Hotels Mgmt. Corp.* (2012) 203 Cal.App.4th 403, 432; see also *Kopfinger v. Grand Central Public Market* (1964) 60 Cal.2d 852; *Genrich v. State of California* (1988) 202 Cal.App.3d 221, 248; *Simmons v. Southern Pac. Transportation Co.* (1976) 62 Cal.App.3d 341; *Martindale v. City of Mountain View* (1962) 208 Cal.App.2d 109; *Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225; and *Hilts v. Solano County* (1968) 265 Cal.App.2d 161.)

To investigate this theory, written discovery must be propounded to Costco to identify and produce documents concerning prior slip-and-fall incidents at the subject Costco location; the deposition of Costco's designated "person most knowledgeable" regarding prior slip-and-falls must be taken to elicit admissions that the prior slip and falls occurred under substantially the same circumstances as the instant slip-and-fall; and plaintiff's liability expert should be given the related discovery and testimony for purposes of developing opinions with respect to those identified prior slip-and-falls having occurred under substantially the same circumstances as the instant slip-and-fall.

Discovery in exchange for protective order "trap"

Costco will often insist that plaintiffs stipulate to an overbroad, vague, and ambiguous confidential protective order with respect to all documents Costco produces in discovery as well as with respect to any testimony recorded from Costco's employees and designated "persons most knowledgeable."

In effect, Costco may refuse to allow plaintiff to conduct discovery unless the plaintiff first agrees to the stipulated confidential protective order – giving plaintiffs no choice but to file a motion to compel discovery to avoid the protective order.

This is highly improper and does not appear to have any legitimate purpose other than reducing Costco's liability exposure by preventing "smoking gun" liability documents and testimony pertaining to public safety from making its way into the hands of the public, including similarly situated plaintiffs intending to engage Costco in litigation.

Although the Discovery Act authorizes a court to grant a protective order to protect a party or other affected person from unrestricted disclosure of trade secrets and other confidential information, such a protective order may only be granted "for good cause shown." (Code Civ. Proc., §§ 2017.020, 2019.210, 2025.420, subd. (b)(13)-(15), 2020.090, subd. (b)(4)-(7), 2031.060, 3426.5; 2031.060, subd. (b)(4)-(6), 2025.420, subd. (b), 2033.080, subd. (b), 2034.250.) To relieve themselves of the "good cause" requirements, defendants, such as Costco, often attempt to facilitate a stipulated confidential protective order which will be routinely granted by the court without any consideration as to whether "good cause" exists for the protective order. Such an arrangement runs afoul of the public's interest in disclosure of information regarding public health and safety hazards. (*Cf. Mary R. v. B. & R. Corp.* (1983) 149 Cal.App.3d Supp. 308, 314-315; see also *Stadish v. Super. Ct.* (1999) 71 Cal.App.4th 1130, 1149; *Westinghouse Elec. Corp. v. Newman & Holtzinger* (1995) 39 Cal.App.4th 1194, 1208-1209.)

I would recommend that plaintiffs' counsel resist the temptation to make this agreement with Costco in exchange for obtaining the discovery that the plaintiff is rightfully entitled to. Instead, for the sake of similarly situated plaintiffs, I would urge plaintiffs' counsel to follow through with a righteous motion to compel discovery responses.

For example, in the *Singh* case I was successful in my motion to have the

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court revoke Costco's protective order as reflected in docket numbers 58, 61, 67, 68, 70, 71, 77, 80, 83. Consequently, all the hard-earned liability-related documents and testimony that was unearthed during discovery was made public record and should be a boon to similarly situated plaintiffs who choose to vindicate their rights against Costco.

Surveillance footage spoliation "trap"

As discussed above, the surveillance footage capturing the hours leading up to an incident of the area where the subject slip-and-fall occurred is essential to investigating plaintiff's liability theory that it be inferred that Costco is on "constructive" notice of the subject slip hazard for failure to have actually conducted a reasonable safety inspection prior to the incident. For example, if the hours of surveillance footage leading up to the incident show that no Costco employees were depicted on the surveillance footage conducting a safety inspection of the area where the incident occurred, this would be "smoking gun" evidence for plaintiff on this liability theory.

However, despite Costco's "persons most knowledgeable" testifying that Costco has a formal surveillance-retention policy and procedure that mandates that at least two hours before until two hours after the incident of surveillance footage be retained, it is still possible – if not expected – that Costco may nonetheless only retain and produce a limited snippet of that footage. To prevent this from happening, it is critical that plaintiff's counsel send an "evidence preservation" letter to Costco as soon as possible, specifically requesting that Costco preserve surveillance footage of the area where the incident occurred from two hours before until two hours after the subject incident.

This letter is critical because Costco's designated "persons most knowledgeable" have testified that at 90 days, its surveillance footage is automatically overwritten due to the nature of Costco's surveillance system. Furthermore, given the fact that Costco may refuse to produce any surveillance footage until litigation commences and only in response to a request for production of documents – often only after a stipulated protective order is agreed to – much more than 90 days may pass before plaintiffs are able to obtain the subject surveillance footage.

CACI Instruction 204 – Willful Suppression of Evidence – is given if there is evidence of suppression shown by way of a spoliation motion. Therefore, if Costco fails to preserve the full duration of surveillance footage in accordance with their surveillance-retention policy and procedure, plaintiff's counsel should take every step necessary to ensure that the evidence has been gathered in discovery that supports Costco's suppression of said surveillance footage.

In the *Singh* case, Costco only produced 20 minutes of surveillance footage, despite having received an "evidence preservation" letter after the incident and in violation of Costco's surveillance-retention policy and procedure as testified to by Costco's "person most knowledgeable." The court ultimately granted my client's spoliation motion and ordered that an adverse-inference instruction be given at trial. You can see these documents at docket numbers 86, 87, and 115.

Motion for summary judgment practice

Costco will file a motion for summary judgment in any slip-and-fall cases that it litigates. Given this certainty, there is no reason plaintiff's counsel should not file an offensive motion for summary judgment. This tactic uses the civil procedure rules to plaintiff's advantage, putting Costco on the defensive, rather than adopting a "wait-and-see" approach based on Costco's motion for summary judgment before conducting necessary discovery and/or retaining a liability expert oppose Costco's motion.

By diligently conducting discovery in preparation for an offensive motion for summary judgment, including retaining a liability expert, plaintiff will have preemptively gathered and organized all liability-related evidence, which can be used as ammunition to directly dispute any "material" facts alleged by Costco in its forthcoming motion for summary judgment.

In *Singh*, I used this approach, and the court granted my motion while denying Costco's motion. The case resolved shortly thereafter.

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