Defending Product Liability Actions: Ten Key Takeaways

Nicholas E. Wheeler
Cosgrave Vergeer Kester LLP

Product liability litigation differs in a number of respects from other tort claims seeking recovery for personal injury or property damage. Discussed below are ten ways in which product liability law is distinctive.

Distinguishing liability theories from legal theories

Nearly all product liability claims break down into one of two liability theories—design defect or manufacturing defect.[1] Under the first, the soundness of the product's design from a safety standpoint is called into question. Under the second, manufacturing defects are alleged to result from some mishap in the manufacturing or inspection process. Failure-to-warn is sometimes described as a third theory of product claims, but is more properly viewed as a subtype of design defect claims.[2]


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The typical legal theories under which either design defect or manufacturing defect claims can be brought are strict product liability, negligence, and breach of warranty. The strict liability claim is the most common, as the plaintiff can recover even when "[t]he seller or lessor has exercised all possible care in the preparation and sale or lease of the product."[3] Product claims brought under warranty theories must comply with a number of provisions under Oregon's Uniform Commercial Code.[4] Finally, the same factual theory of product defect can be pled under all three legal theories, giving a plaintiff three opportunities to establish liability with the jury.

The indeterminate defect theory

Sometimes the manner in which a product has failed is unclear. Oregon law thus recognizes in limited circumstances the "indeterminate defect theory," which is the product equivalent of a *res ipsa loquitor* theory.[5] "In the type of case in which there is no evidence, direct or circumstantial, available to prove exactly what sort of manufacturing flaw existed, or exactly how the design was deficient, the plaintiff may nonetheless be able to establish his right to recover, by proving that the product did not perform in keeping with the reasonable expectations of the user."[6] It is unlikely that a plaintiff can simultaneously proceed on both specific and indeterminate defect theories.[7]

Failure-to-warn claims

Failure-to-warn theories are both commonly pled and commonly misunderstood. A manufacturer has a duty to warn consumers about dangers of which the manufacturer is or should be aware that may result from a particular use of the manufacturer's product. The classic example is the warning on a hairdryer not to use it in the bathtub for risk of electrical shock. A manufacturer does not, however, have a duty to warn consumers that its product is inherently defective or dangerous.[8] While a plaintiff in a defective-power-saw case might typically allege that the defendant failed to warn consumers that the saw's blade was poorly guarded, the defendant should move against that allegation.[9] The proper allegation in that instance is that the saw was defectively designed because it failed to incorporate sufficient blade guarding.

Scope of potentially liable defendants

Exposure for strict product liability extends well beyond manufacturers, and includes all other parties that distribute,

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lease, or sell the product.[10] This includes middlemen who may never take physical possession of the product in the context of reselling it, but it likely does not extend to brokers who merely facilitate a sale without taking ownership of the product.[11] Further, for used products, sellers other than the manufacturer are generally not subject to strict liability.[12]

The Consumer Expectations Test

Oregon's law on product liability is codified at ORS 30.900-928. The Legislature directed that the statute be construed in accordance with certain comments to Restatement (Second) of Torts § 402A. Comment i to that provision states "[t]he article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." This language has been coined the "consumer expectations test," and is tracked verbatim in UCJI No. 48.03.

Comparative fault—with two twists

Comparative fault is a defense to a claim for strict product liability, notwithstanding the fact that the defendant's liability is imposed irrespective of fault in the traditional sense (negligent conduct).[13] The "fault" that is compared against the plaintiff's negligence is "putting a dangerously defective product on the market."[14] Adding a further twist is the fact that the jury is specifically instructed to disregard "any unobservant, inattentive, ignorant, or awkward failure to discover or to guard against" the defect alleged by the plaintiff.[15] The practical result of this jury instruction is greater uncertainty as to whether a jury would impose comparative fault in a given case.

Statute of limitations

Statute of limitations and statute of repose defenses deserve additional consideration from defense counsel in product cases for three reasons. First, in some instances, the statute of limitations is shorter. For example, ORS 30.905(1) provides for a two-year statute

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of limitations for a claim for property damage, where a typical negligence-based property damage claim is six years under ORS 12.080(4). A second related issue is that when a court determines that the "gravamen or predominant characteristic" of a plaintiff's claim falls within the definition of a "product liability civil action" under ORS 30.900, the ORS Chapter 30 time limitations control, regardless of how the plaintiff characterizes the claim.[16] Third, for products manufactured outside of Oregon, if the statute of repose in the jurisdiction where the product was manufactured is shorter that Oregon's statute of repose, the foreign statute will be applied.[17]

The misuse defense

It is a common misconception that abnormal use or misuse of a product will constitute a defense to strict product liability. To rise to the level of a defense, the misuse has to have been so unusual that it was unforeseeable to the manufacturer.[18] Further, a manufacturer has a duty to warn consumers of the dangers of foreseeable misuse.[19]

Noneconomic damages cap applies

The Oregon Court of Appeals recently concluded that the $500,000 statutory cap on non-economic damages under ORS 31.715 was constitutional as applied to a claim for strict product liability. The court reasoned that "[t]he common law, as it existed in 1857, did not recognize the type of action that is now codified in ORS 30.920." As a result, application of the cap did not violate Article I, section 17 of the Oregon Constitution, which prevents legislative interference with a jury's assessment of noneconomic damages in qualifying common law claims.

Indemnity among multiple liable defendants

Under Oregon law, multiple non-manufacturer defendants within the chain of distribution of a defective product can be simultaneously strictly liable to the plaintiff. When that occurs, the right to indemnity from the manufacturer for design or manufacturing defects is fairly well established.[20] Oregon cases describe such non-manufacturer defendants as being only "secondarily liable," which fits within Oregon's well-established case law permitting common law indemnity from "primarily liable" tortfeasors.[21]

Conclusion

In summary, while product liability cases overlap in certain respects with other personal injury/property damage tort claims, many facets of these claims are distinctive. Understanding these distinctions from the outset of a case will focus the issues, facilitate formulation of defense strategies, and aid in exposure assessment.

Endnotes

1 *Phillips v. Kimwood Machine Company,* 269 Or 485, 491 (1974), overruled on other grounds by *McCathern v. Toyota Motor Corporation,* 332 Or 59 (2001).
2 *Phillips,* 269 Or at 491 n 2.
3 ORS 30.920(2)(a).
4 *See, e.g.,* ORS 72.6070(3)(a) and ORS 72.8010(1).
5 *See Helms v. Halton Tractor Co.,* 66 Or App 890, 893 (1984) (coining the term "indeterminate defect theory").
6 *Heaton v. Ford Motor Co.,* 248 Or 467, 471-72 (1967).
7 *Weems v. CBS Imports Corp.,* 46 Or App 539, 542-45 (1980).
8 *Smith v. Fred Meyer, Inc.,* 70 Or App 30, 32-33 (1984).
9 *Id.*
10 ORS 30.900.
11 *See, e.g., Ames v. Ford Motor Co.,* 299 F Supp 2d 678, 680 (SD Tex 2003) ("[A] broker who merely enables a

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transaction between a true seller and purchaser, without exercising control over the product," is not a "seller" for purposes of strict product liability).

12 *Tillman v. Vance Equipment Co.,* 286 Or 747, 755-57 (1979).

13 ORS 30.920(2)(a).

14 *Sandford v. Chevrolet Div. of Gen. Motors,* 292 Or 590, 597 (1982).

15 *Id.* at 598; UCJI No. 48.08.

16 *Weston v. Camp's Lumber & Bldg. Supply, Inc.,* 205 Or App 347, 358 (2006), *opinion adh'd to as modified on recons,* 206 Or App 761 (2006).

17 ORS 30.905(2)(b), (4)(c).

18 *Lakin v. Senco Products, Inc.,* 144 Or App 52, 66 (1996), *aff'd*, 329 Or 62 (1999), *opinion clarified,* 329 Or 369 (1999).

19 *Phillips,* 269 Or at 501-03.

20 Restatement (Third) of Torts: Prod. Liab. § 2, Comment a (1997) ("wholesalers and retailers will be able to pass liability costs up the chain of product distribution to the manufacturer . . . [and] local retailers can pay damages to the victims and then seek indemnity from manufacturers.").

21 See *Smith Radio Communications, Inc. v. Challenger Equipment, Ltd.,* 270 Or 322, 325 (1974) ("There is no doubt that if Smith Radio merely delivered the Electrobug to U.S. Plywood as received by it from Challenger and did not cause any defect in the device, it was merely passively or secondarily liable and entitled to indemnity."); *Davison v. Parker,* 50 Or App 129, 137 (1981), *overruled on other grounds* by *Dale's Sand & Gravel Co., Inc. v. Westwood Const.,* 62 Or App 570, 573-74 (1983), *which, in turn, was overruled on other grounds* by *Strader v. Grange Mut. Ins. Co.,* 179 Or App 329, 338 (2002) ("Where a retailer delivers goods to a buyer without creating a defect in the product, it is only secondarily liable for that defect and is entitled to indemnity from the manufacturer.").

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