

HOW TO RECOGNIZE AND DEVELOP A PRODUCT LIABILITY CASE

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- * **WHAT TO LOOK FOR:
How to Tell Whether You have a Case**
- * **WHAT TO LOOK OUT FOR:
How to Avoid the Most Common Mistakes**
- * **WHAT TO DO:
What to Do if You Think You Have a Case**

When a manufacturer makes a defective product that hurts someone, consequences reverberate throughout society. The injured person loses his health, and incurs lost wages, medical bills, and sometimes a lifelong impairment. A disability or medical insurance company may bear the brunt of the tangible costs, or society as a whole may bear the costs through Medicaid or other government programs. Spouses and children lose the companionship of a loved one, and often the standard of living to which they were accustomed before the injury. Society loses a taxpayer, either temporarily or permanently.

When a defective product caused the losses, logically the manufacturer of the product should shoulder the burdens of the loss, and not the injured individual or his family, or the society through its government programs. The

manufacturer in turn either will spread the losses across its customer base, or accept temporary losses and resolve to change its manufacturing methods.

Given the wide range of products, no lawyer can know about all of the products that might injure a potential client. At the same time, product liability cases do share certain common principles, and you can measure virtually any case against those principles.

This paper is designed to help you spot a valid product liability case, and then to know what to do with the case once you have accepted it. It also warns you about the most common pitfalls to avoid.

I. **WHAT TO LOOK FOR:**
How to Tell Whether You have a Case

With millions of products on the market, no article could catalog every way each type of product could fail. Product liability cases do have common themes, though, stemming from the basic theory of product liability law.

When product engineers design products, they follow a hierarchy called “design, guard, warn.” Under that hierarchy, if the product designers know about a particular risk, then they should *design* the product so that they eliminate that risk. If the product cannot be designed so as to eliminate that risk, then the manufacturer should *guard* against the danger (e.g., by putting a guard over a rotating piece). If the manufacturer cannot design the risk out of the product, and has no way to adequately guard against it, then at a minimum the manufacturer should *warn* consumers about the dangers, so that they can take precautionary measures and avoid the risk.

Product liability law follows these same basic principles, and so product liability suits fall into three broad categories:

(1) A product, or one of its components, failed.

In this category of cases, the manufacturer could have designed the risk out of the product, but did not do so. This category can be subdivided into products that fail because of their *design defects* (e.g., a grinding wheel breaks apart because the manufacturer designed the wheel without a strong “daisy wheel” in the center), and products that fail because of their *manufacturing defects*, or the way in which that particular product was manufactured (e.g., a furniture manufacturer uses a bad batch of glue, and the furniture made with that batch of glue falls apart).

(2) The product either did not have an important safety device, or the safety device did not work properly.

In this category of cases, while arguably the manufacturer had no way to eliminate a risk entirely, the manufacturer could have put in an effective safety device that would have protected against the risk. For example, a manufacturer cannot design a ladder so that no one can fall from it, but a manufacturer can design a ladder with a safety brace that keeps it from collapsing. The manufacturer would be liable if it omitted the safety device, perhaps to save money. To cite another example, a manufacturer cannot design a workable saw without it being quite sharp, but it could put a guard over the whirring blade, so that the consumer’s hand is protected from the saw.

(3) The product did not have a warning about what could go wrong, or the warning did not fairly alert users to the danger.

If the manufacturer cannot design the risk out of the product, and cannot guard against it, then at a bare minimum the manufacturer should warn people about the risk. Furthermore, the warning needs to be adequate to tell consumers what the risk is, and how they can avoid it. For example, a warning that says “Breathing fumes may cause temporary discomfort,” is not effective if what it really ought to say is: “Breathing fumes may cause death”. Warnings also may be ineffective if they are illegible (for example, the warning label fades over time), lack pictures, are not in a language appropriate for the people using the product, or are located in a place where the person who needs the warning is unlikely to see it.

**II. WHAT TO LOOK OUT FOR:
How to Avoid the Most Common Mistakes**

Certain factors, while not dispositive, can make it difficult for you to successfully bring a product liability suit. Give these factors particular thought before you take a case. Is there strong evidence of any of these factors? Can you exclude that evidence at trial? Is there countervailing evidence that suggests the factor was irrelevant in your case?

(1) Drinking/drug use.

Consider what effect drinking or drug use by your client or by the person using the defective product will have on the jury’s view of the case.

(2) Your client was “at fault” for the incident.

Give thought to how the jury will perceive your client’s role in the incident. Will the jury believe your client was contributorily negligent (in a claim for negligent product liability), or assumed the risk (in a claim for strict liability product liability)?

(3) Your client misused the product.

If your client misused the product, the jury may conclude that your client, and not the manufacturer, should be responsible for the injuries. For example, if the client was hurt when a wood sander exploded, but at the time he or she was using the sander on rock instead of wood, and at many times the recommended rpm’s, the case will be more difficult to win.

(4) The product was altered.

The manufacturer will scrutinize the product to see whether it had been altered in any way before the plaintiff used it. For example, in an auto rollover case, the manufacturer will inspect the tires to see whether the tires are the ones recommended by the manufacturer. If the product had been altered, then the manufacturer will claim that the reason the product failed was because of the alteration. It will argue it cannot be held responsible for what happened, because the product the client used was not the same one that the manufacturer built.

(5) Your client failed to heed safety warnings.

For example, if the product says to wear safety goggles, and the client did not, the case will be harder to bring.

(6) The product is more than a few years old.

Many states have statutes of repose, which are akin to statutes of limitations. Statutes of repose provide that a person cannot sue a manufacturer for a defective product that is more than a certain number of years old, or that was “first sold” more than a certain number of years ago. You will need to check your state law to see whether your state has a statute of repose, and whether the statute has any exceptions that would apply in your client’s case.

(7) Preemption issues.

To oversimplify, preemption is a legal doctrine that resembles the concept of trumps in a game of cards. When a federal law on a topic contradicts a state law on the same topic, the federal law trumps, or “preempts,” the state law. Manufacturers use this legal doctrine to argue that when a federal agency requires them to meet certain standards before they sell products, a state court cannot hold the manufacturers liable for making a defective product under state tort law standards. Start by finding out whether your manufacturer was regulated and whether it complied with the regulations. Then dive into the case law. Preemption law is all over the map, and whether preemption applies can depend on the agency that provided the regulations (the statutes creating some agencies

contain special provisions that provide their regulations do not preempt the common law), the type of product, and a host of other factors.

(8) The damages are too low to justify the case expense outlay.

Product liability cases tend to be very expensive because manufacturers are willing to spend vast sums to win them. Manufacturers fight these cases tooth and nail both because they are worried about copycat cases from other consumers, and also because they are concerned that their sales will drop if their reputation for safety becomes tarnished by a bad result.

**III. WHAT TO DO:
What to Do if You Think You Have a Case.**

(1) Preserve the product intact, exactly as it was at the time the client was injured.

The product will be evidence in your case. If the product were severely damaged in the incident, however, the owner of the product may be considering throwing it away or repairing it. If the incident revealed an obvious defect in the product, the owner may be considering modifying or altering the product to eliminate the defect. Ideally you should buy the product yourself, or at least inspect and photograph it (and have your experts do the same) before the product is repaired or altered. To prevent the product from being thrown away or repaired, write a letter explaining that the product is evidence and demanding that the product be preserved in the condition in which it was found after the incident. When you cannot get control of the product, at least try to document what changes were made to it after the incident in which your client was hurt.

(2) Do not settle the insurance part of the case yet.

You need to examine all of the facts before you settle out with some defendants. If you settle before you have considered all the ramifications of dismissing one defendant, you inadvertently may weaken or destroy your product liability case by allowing the manufacturer to point to an “empty chair” at trial, or by losing access to potential trial venues.

(3) Uncover the history of this product and similar products.

Contact ATLA and other list serves to which you belong. In addition, the following websites may prove useful in your initial investigation of the product. You can link to all of these websites from the “Defective Products” page of my website, www.thewallacelawfirm.com.

Websites that can help you find out if the product has been recalled:

Six federal agencies have banded together to create one central web page where you can search to see whether a product has been recalled by the federal government. The six agencies are:

United States Coast Guard
Consumer Product Safety Commission – CPSC
Environmental Protection Agency – EPA
Food & Drug Administration – FDA
National Highway and Traffic Safety Administration – NHTSA
United States Department of Agriculture – USDA

You can access the site at: <http://www.recalls.gov/index.html>

You also can get specific recall information from the websites of the six agencies.

Consumer product recalls
Consumer Product Safety Commission – CPSC
<http://www.cpsc.gov/cpsc/pub/prerel/prerel.html>

Cars and motor vehicles, tire, motor vehicle equipment, and child safety seat recalls

National Highway and Traffic Safety Administration – NHTSA

<http://www-odi.nhtsa.dot.gov/cars/problems/recalls/recallsearch.cfm>

Boats and boating equipment safety alerts

United States Coast Guard

<http://www.uscg.mil/hq/g-m/moa/safea.htm>

Foods, drugs, medical devices, biologics (vaccines and blood products), animal feed and drugs, cosmetics, radiation-emitting products

Food & Drug Administration - FDA

<http://www.fda.gov/opacom/7alerts.html>

Meat, poultry and processed egg recalls

United States Department of Agriculture - USDA

http://www.fsis.usda.gov/Fsis_Recalls/Open_Federal_Cases/index.asp

Emission related recalls

Environmental Protection Agency

<http://www.epa.gov/oms/recall.htm>

A website that can help you find out whether a similar accident has occurred (for workplace injuries):

OSHA accident investigation files

<http://www.osha.gov/pls/imis/accidentsearch.html>

Websites with useful information about products and defects:

OSHA

<http://www.osha.gov/oshstats/index.html>

Consumer Product Safety Commission

<http://www.cpsc.gov/>

Center for Science in the Public Interest

<http://www.cspinet.org/>

Consumers Union (the publisher of Consumers Report)

<http://www.consumersunion.org/>

ANSI (American National Standards Institute) standards

http://www.ansi.org/public/std_info.html

The Association for Trial Lawyers of America/American Association for Justice

<http://www.atla.org>

(4) Locate lawyers who have had cases involving similar products.

Again, contact ATLA and other list serves to which you belong.

(5) Count the cost.

Product liability cases tend to be expensive for plaintiffs to bring, primarily because of the cost of fighting manufacturers, who generally are willing to spend large amounts of money to defend their products. Manufacturers are convinced that the publicity surrounding a plaintiff's verdict will alert other plaintiffs and lawyers to the defect in a particular product. Furthermore, a verdict that a particular product is defective will harm sales of that product and other products made by the manufacturer. In order to win at any cost, then, the manufacturer will hire numerous experts to present its defenses in the case, and the plaintiff's lawyer will have to have his or her own costly experts. For many small firms, a product liability case can eat up the case expense reserves and the manpower that the firm needs to keep its bread and butter cases going. It is important to determine up front whether your firm can carry the case or whether you will need help.

(6) Hire the experts who truly know the field.

In federal court, choosing an expert is especially perilous in light of Daubert and its progeny. Manufacturers may even argue that the plaintiff's experts must actually perform full-scale testing of their theories of the case. To find an expert, first seek a recommendation from other lawyers who have handled similar cases. If you need to find an expert on your own, search the web to find potential experts who are already working in the field you need. For direction, go to the Law Library Research Xchange, <http://www.llrx.com/columns/finding.htm>, a website that has a discussion of how to find experts on the World Wide Web. Also search LawInfo.com, <http://www.lawinfo.com>, a commercial site that has some expert witness listings.

CONCLUSION

When your client has been seriously injured by a product, you must consider whether the product manufacturer bore part of the responsibility for the injuries. By following the guidelines above, you can successfully navigate the fine line between missing a good case, and taking a bad one.

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