

# **RIGHT UNDER YOUR NOSE**

## **HOW TO TELL IF A PRODUCT LIABILITY SUIT IS BURIED WITHIN YOUR ROAD WRECK CASE FILES**

**By Lee Wallace**

**The Wallace Law Firm, L.L.C.  
2170 Defoor Hills Rd.  
Atlanta, Georgia 30318  
404-814-0465  
www.thewallacelawfirm.com  
lee@thewallacelawfirm.com**

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Automobile product liability cases are difficult to spot. Clients seldom come in asking you to file a product liability suit. Instead, product liability cases usually arrive disguised as ordinary road wreck cases, and it is up to you as the lawyer to determine whether the case also should be a product liability case.

### **HOW TO SPOT A PRODUCT LIABILITY CASE**

Your case warrants further investigation if it has any of the characterizing features listed below. These features are simply guidelines; they are by no means exhaustive, and certainly not every road wreck case that has one of these features is a good product liability case.

#### **A. Seat Belts**

- (1) The client's seat belt came unlatched during the wreck.**

Don't rely on the accident report in determining whether your client was belted. If a person's seat belt fails, often the emergency personnel arriving on the scene conclude that the person must not have been wearing a belt.

- (2) The client was wearing her belt, but the belt did not hold her in place in her seat.**

The belt should hold your client in place; sometimes the belt “spools out” instead, and the client hits the interior parts of the car.

- (3) **The client was small, and was injured where the seat belt ran across her neck or upper chest.**

Some seat belts are hung too high, so that they cut across the necks of women, children or smaller men.

- (4) **In a car with an automatic shoulder belt and a manual lap belt, the person was wearing only the automatic belt and suffered injuries to the body parts nearest the belt (usually the chest or neck).**

Studies have shown that when the automatic belt slides across the person wearing it, many people assume they are “belted” and never realize that they need to fasten the lap belt in order to make the restraint system effective. These cases generally are characterized by severe neck injuries, including decapitation.

## **B. Airbags**

- (1) **In a frontal collision at more than a few miles per hour, the airbags did not deploy.**

Airbags are not designed to deploy in every possible situation, but they should deploy in a frontal crash. New cars also may be equipped with air bags designed to deploy in side impacts.

- (2) **An airbag deployed for no reason and caused the client to wreck.**

Several vehicles have been recalled recently because their airbags deploy for no reason. When an airbag suddenly deploys into a driver’s face, the driver no longer can see oncoming traffic and a wreck is likely.

- (3) **An airbag deployed during a wreck or for no reason, and the airbag itself severely injured the client.**

Some airbags deploy so fiercely that they become missiles aimed at the chest, head and face of the person they are supposed to protect. GM has been especially critical of the violent deployment of side airbags in its competitors’ cars. The

manufacturers do have the technology to make the airbags effective but still have them deploy at much slower speeds.

### **C. How the Vehicle Held Up**

- (1) A fire occurred, whether in the engine or around the gas tank.**

Fires generally warrant investigation, even more particularly in a low speed collision or in the absence of a collision.

- (2) After the wreck, the seats were out of their normal positions.**

For example, you may find that the seat backs on one or both front seats are pushed or reclined backward toward the back seat.

- (3) During a rollover, the roof crushed downward toward the heads of the passengers in the vehicle.**

Roofs are (or should be) designed to stand up in a rollover. Sometimes the roof collapses on top of the passengers, usually causing spinal or head injuries.

- (4) The "occupant space," or the area in which the people in the vehicle sit, was severely compromised, especially in a situation where damage that extensive was unexpected.**

One measuring stick for determining whether the vehicle suffered excessive crush is to look at the "striking vehicle" -- the vehicle that collided with your vehicle. Taking into account the difference in size between the two vehicles, did your vehicle incur a lot more damage?

- (5) The client (or decedent) was ejected from the vehicle.**

Sometimes witnesses will note that after the accident a door or hatchback was standing open or a window or windshield had come out of the vehicle.

**(6) Bolts sheered off or otherwise failed to hold during the collision.**

If the bolts fail, key pieces of the vehicle may come loose during the collision, or the vehicle may be crushed excessively.

**(7) The client was in a conversion van that failed to hold up in the collision.**

Some conversion vans alter the original design of the vehicle in a way that makes the vehicle particularly susceptible in a crash.

**D. How the Vehicle Handled in the Wreck**

**(1) The vehicle rolled over, particularly while it was on the road.**

Because of their design, some vehicles are more likely to roll over than others.

**(2) A tire caused or contributed to the wreck, because it blew out or for some other reason.**

Tires that fail while a car is proceeding down the road can cause the driver to lose control of the car.

**E. Something Odd Happened to the Vehicle or the Occupants**

Many of the best cases are ones where any lay person can see that something strange occurred to the vehicle or the occupants (e.g., a vehicle broke in half in a low-speed collision). If what happened seems odd to you, it probably will seem odd to a jury, too.

**WHAT TO LOOK OUT FOR**

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 matters? 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 a driver or by your client will have on the jury's view of the case.

**(2) "At fault" Driver**

Everyone, including car manufacturers, knows that cars crash. Under the legal doctrine of "crashworthiness," manufacturers are responsible for building vehicles that can stand up to reasonably foreseeable uses -- which include reasonably foreseeable crashes. Nonetheless, manufacturers continue to blame drivers for the accident itself in order to absolve themselves of blame. Give thought to how the jury will perceive a driver who was at fault for the collision.

**(3) Excessive speed**

Manufacturers can be counted on to argue that "speed kills," *i.e.*, that no vehicle could have been manufactured to stand up to the extreme rigors of the accident your client was in. Ask yourself how effective that argument will be in your case.

**(4) Preemption Issues**

"Preemption" is the legal equivalent of "trumps" in a game of spades. Federal courts have held that when the federal government makes a law, states cannot undermine that law by passing their own, different laws. In essence, the federal law "trumps" the state law. Since the federal government has passed regulations about how vehicles must be manufactured, manufacturers usually argue that auto product liability suits should be dismissed because the state tort law is preempted by the federal regulations. Preemption is a complex legal doctrine that deserves its own paper. For purposes of this paper, suffice to say that for a number of reasons the manufacturers lose the preemption argument in auto product cases, although some courts have upheld

preemption in certain discrete instances (e.g., for cases alleging an automobile is defective because airbags were not installed). You should research this issue before you take a product liability case.

#### **(5) Statute of Repose**

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. In practice, these laws are extremely unfair, and hit especially hard in the automobile products area, where products are frequently used for many, many years. The end result of these statutes is that poorer people, who of necessity must use older products, cannot sue, whereas richer people, who can afford newer cars, can sue. The laws also are very arbitrary, allowing suit by someone who is hurt by a product one day, and barring suit by someone hurt by the same product the very next day.

#### **(6) Damages Too Low to Justify Case Expense Outlay**

For a variety of reasons, product liability cases are enormously expensive to bring. Case expenses often run between \$250,000 and \$1,000,000. Even more than in other cases, then, you must carefully scrutinize the damages to see whether they will justify the outlay of expenses you are about to make.

### **WHAT TO DO IF YOU THINK YOU MAY HAVE A PRODUCT LIABILITY CASE**

You’ve looked at all the factors, considered the downside, and you think you may have a product liability suit. Now what? Here are some of the steps you will need to take.

#### **(1) Preserve the vehicle intact.**

(2) **Do not settle the insurance part of the case yet.** You need to examine all of the facts before you settle out some defendants.

(3) **Know the field.** Automobile products have lengthy histories. Has this vehicle been recalled or investigated by NHTSA for a similar problem? Have other vehicles had similar problems?

(4) **Know the manufacturer.** Has the manufacturer had similar problems with other vehicles? Have the manufacturer and its experts and employees made statements in other cases that may be useful to you here?

(5) **Get the key documents** about the defect or the manufacturer that have been produced in other litigation.

(6) **Know the standard defenses** manufacturers use and whether those defenses apply to your case.

(7) **Count the cost.** Product liability cases are enormously costly. Determine whether you have the funds yourself or whether you will need help.

(8) **Hire the experts who truly know the field.** The right experts can help you determine whether you truly have a case and, if you do, can help you successfully bring that case.

## CONCLUSION

When a client is catastrophically injured in a car wreck, you must consider whether the automobile manufacturer bore part of the responsibility for the injuries. By following the guidelines above, you can make that determination, successfully navigating that fine line between missing a good case, and taking a bad one.

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**www.thewallacelawfirm.com**  
**lee@thewallacelawfirm.com**

*Lee Wallace practices personal injury, product liability and whistleblower/qui tam/False Claims Act law in Atlanta, Georgia, in her own firm.*

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