Defenses in a Product Liability Claim

written by:
Mark Schultz, Esq.
COZEN O'CONNOR
Suite 400, 200 Four Falls Corporate Center
West Conshohocken, PA 19428
(800) 379-0695
(610) 941-5400
mschultz@cozen.com

Atlanta
Charlotte
Cherry Hill
Chicago
Dallas
Las Vegas*
London
Los Angeles
New York
Newark
Philadelphia
San Diego
San Francisco
Seattle
Washington, D.C.
Wichita
Wilmington

**Affiliated with the Law Offices of J. Goldberg & D. Grossman.*

DEFENSES IN A PRODUCT LIABILITY CLAIM

I. Introduction

Several defenses arise time and time again in a typical product liability claim. Consequently, a substantial portion of a trial attorney's time in a product liability case involves deflecting illusory defenses and substantively addressing meritorious product liability defenses. As described below, many of the usual defenses revolve around the product user's conduct at the time of the accident. This article is intended to provide only a taste of the defenses available in product liability claims. State courts across the county have addressed these issues and have adopted unique nuances, which go beyond the limited scope of this article. For each specific factual scenario, the governing state law for strict product liability defenses should be consulted.

II. Abnormal Use/Misuse Defense

It is well settled that in order to recover on a theory of strict product liability, a plaintiff must prove that (1) the product was defective; (2) the defect was a proximate cause of the plaintiff's injuries; and (3) the defect existed at the time it left the manufacturer's control. Liability under Section 402A of the Restatement (Second) of Torts may only be imposed upon proof that the product lacked an element necessary to make it safe for its intended use. Whether a use was intended for a product depends on whether the use was "reasonably foreseeable" by the seller.

In many product liability cases, defendants will assert that the use of the product by the plaintiff was "abnormal" or a "misuse" of the product. Although lawyers and judges alike term "misuse" as a defense in a product liability action, in reality, it is part of the plaintiff's case to prove the intended use of the product. Therefore, if a plaintiff does not establish that he was using the product in an intended manner, a judge or jury could conclude that a plaintiff has failed to prove an essential part of its cause of action. Moreover, some courts have found that the issue of misuse of a product only becomes relevant where the plaintiff's use was either "unforeseeable or outrageous."

Some defendants have even argued that whenever someone is injured while using a product, the use must have been an unintended one (i.e., the "intended use of the product does not involve injuring anyone"). However, courts have consistently held that this is an invalid argument and that accidents are included among the "intended uses" of a product.

III. Assumption of the Risk Defense

Of all the defenses to a strict product liability claim under Section 402A of the Restatement (Second) of Torts, assumption of the risk is raised in virtually every case involving a product user who is injured. Courts across the country vary in their application of assumption

of the risk to strict product liability claims. However, most courts permit assumption of the risk as a viable defense in such actions. Essentially, assumption of the risk is based on the notion that, by taking the chance of injury from a known risk, the plaintiff has consented to relieve the defendant of its duty toward him. This defense typically involves a subjective awareness of the risk inherent in an activity and the willingness to accept it. Although assumption of the risk and contributory negligence theories sometimes overlap because certain conduct by the plaintiff may exhibit all of the elements of both, assumption of the risk is a separate defense with a distinct character. Assumption of the risk must be evaluated in terms of deliberate conduct on the part of the product user. Before the doctrine of assumption of the risk will be applied to prevent recovery, the evidence must establish conclusively that the plaintiff was subjectively aware of the risk.

There are four versions of assumption of the risk as outlined in the Restatement of Torts. However, only one will typically arise in a product liability matter.

1. *Consent Defense*

Under the "consent defense", the assumption of risk occurs in cases where a plaintiff expressly consents to relieve a defendant of its obligation to exercise care for the protection of the plaintiff. In these cases, the plaintiff agrees to take his or her chances as to injury from a known or possible risk. Restatement (Second) of Torts Section 496A, comment c(1). This form of assumption of the risk, where a defendant can establish that a plaintiff expressly consented to encountering the risk of injury before it occurred, is extremely rare in a products liability case.

2. *Implied Agreement to Relieve Defendant of Responsibility*

The second form of assumption of the risk recognized by the Restatement involves a situation where the plaintiff has voluntarily entered into some relation with the defendant which he or she knows to involve a risk. In these circumstances, the plaintiff is regarded as tacitly or impliedly agreeing to relieve the defendant of responsibility. These situations typically arise when a spectator attends a sporting event where it is known that baseballs or hockey pucks leave the playing area. Restatement (Second) of Torts Section 496A. Again, it would be most unusual for a defendant in a strict product liability matter to prove that the plaintiff entered into some relationship with the product manufacturer that led to an assumption of the risk.

3. *Voluntary Acceptance of Risk Created by the Defendant*

The third form of assumption of the risk involves a situation where a plaintiff is aware of the risk created by the conduct of a defendant and subjectively agrees to accept the risk and to encounter it. Restatement (Second) of Torts Section 496A, comment c. Realistically, this is the only version of the defense that can be properly raised in a product liability case, but it is difficult to prove.

The cases have repeatedly held that with this type of assumption of the risk, the danger must <u>subjectively</u> be understood by the plaintiff who then voluntarily (not

negligently) decided to accept the risk. Therefore, in the typical punch-press situation where the operator is aware of the risk of using the machine without a guard, but inadvertently places his or her hand at the point of operation, the plaintiff should not be charged with assuming the risk of injury. Moreover, some courts have determined that being compelled to take a risk by an employer obviates the "voluntariness" prong of the assumption of the risk defense. Therefore, an employee who is aware of the risk but is required by his employer to use the product cannot be deemed to have "voluntarily" accepted this risk.

4. *Unreasonable Acceptance of a Known Risk*

The fourth form of assumption of the risk involves a plaintiff who voluntarily encounters a known risk as a result of his own negligence. Restatement (Second) of Torts Section 496A. Since negligence in accepting the risk is typically inadmissible in a product liability case, this form of defense should never be given to the jury. Notwithstanding this, courts have consistently confused this issue and allowed the jury to evaluate a plaintiff's negligence in encountering the risk. Typically, it is yet another way for a defendant to get the plaintiff's comparative negligence in front of the jury.

IV. Intended User Defense

Although Section 402A of the Restatement (Second) of Torts provides that manufacturers/sellers of defective products can be liable to the "user or consumer", some courts have engrafted an additional requirement that a plaintiff prove he was an "intended user of the product." Essentially, these cases stand for the proposition that an unintended user who utilized a product in a reasonably intended fashion, cannot recover.

For example, in Griggs v Bic Corporation, 981 F.2d 1429 (3d Cir. 1992), the Third Circuit Court of Appeals addressed the issue of "intended user." The Court ruled that a young child was not an intended user of a Bic lighter. The Court held that there is a "duty" in strict liability law to guard against foreseeable use by intended users in the context of the initial determination of defect. Therefore, no matter how foreseeable an injury may be, such as operating a cigarette lighter, unless the user was an intended one (from the standpoint of the manufacturer), the defendant may very well be immune from strict liability.

V. Substantial Change Defense

If there has been a substantial modification made to the product, which was not reasonably foreseen by the manufacturer, and if the modification is a superseding cause of the user's injury, the manufacturer is relieved of liability even if there was a design defect existing at the time the product was delivered to the purchaser. Section 402A specifically states that a seller of a product will be liable for injuries caused by that product if "it is expected to reach the end-user or consumer without substantial change in the condition in which it was sold." See Section 402A (1)(b) Restatement (Second) of Torts. By its very terms, Section 402A indicates that only unexpected, substantial changes will absolve the seller of a product from liability for injuries

caused by that product. Accordingly, in order to establish this defense, there must be an "unforeseeable" substantial change that is a superseding cause of the accident. That is, if alterations to the product should have been "reasonably anticipated" by the seller, the changes would be substantial within the meaning of 402A only if they were negligently or improperly implemented. For some courts, the test in such a situation is whether the product manufacturer could have reasonably expected or foreseen such an alteration.

VI. Technical Defenses Based on the Law

In certain limited situations, a defendant can argue that a state law product liability claim is barred because of a federal statute governing the manufacture and distribution of the product. The United States Supreme Court has held that federal preemption of state law can occur (1) where Congress explicitly preempts the state law; (2) where a state law actually conflicts with federal law; and (3) where Congress has implicitly indicated an intent to occupy a given field to the exclusion of state law. The following list of categories identifies areas where federal preemption may become a defense available to a product manufacturer:

1. Automobiles – The National Traffic and Motor Vehicle Safety Act of 1996, 49 U.S.C. Section 30101, *et. seq*. is an expansive law dealing with uniform regulations for motor vehicle safety.

2. Drug Labeling – The duty of a drug manufacturer, packer or distributor to label prescription drugs is governed by 21 U.S.C. Section 352 and accompanying regulations.

3. Medical Devices – The Medical Device Amendments of 1976 (MDA), 21 U.S.C. Section 360c, *et. seq*., to the Food, Drug and Cosmetic Act prohibits states from requiring safety or effectiveness standards "different from, or in addition to any requirement applicable under the Medical Device Amendments."

4. Certain Chemicals – The Federal Insecticide, Fungicide and Rodenticide Act provides for limited preemption of certain chemicals and related devices. This federal statute can be found at 7 U.S.C. Section 136v.

Essentially, defendants raise federal preemption under these acts of Congress when they claim their product complies with the federal statute and regulations governing the product in question. In these circumstances, once a determination is made that the product manufacturer has complied with the federal laws, any state law product liability claims are barred and expressly preempted by federal law.

VII. Conclusion

As outlined above, manufacturers of products are equipped with an arsenal of defenses that can be raised in product liability claims. Manufacturers are not the defenseless, deep-pocket insurers of their products as they would have supporters of tort reform believe. Rather, courts

have merely required that manufacturers produce a product that is free of defects when it leaves the manufacturer's control. The defenses described above perpetuate this protection.

PHILA1\1591168\1 099995.000