How to Spot and Develop a Successful Product Liability Case

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I. Introduction

Products liability is one of the most dynamic fields of law in the United States. The cost and complexity in this field is evolving so rapidly that without thorough preparation the attorney will find the path to success strewn with many unforeseen and technical pitfalls. The author has endeavored in the present article to acquaint the practicing lawyer with the information necessary to evaluate a client's claim competently in a products liability cases. It is not meant to be a primer on product liability law, but simply to help the practitioner identify potential product liability claims and preserve critical evidence.

The first point is that lawyers handling personal injury lawsuits may have legitimate product liability claims existing in their current caseloads. Obviously, if an attorney was hired to investigate potential sources of compensation for an injured client, and if it appears that a product defect may have contributed to the client's injuries, his duty should include inquiry into a potential products case. The evidence required to prove a product claim can be very different from the typical personal injury case.

It is my experience that product liability cases most commonly arrive disguised as ordinary road wreck cases, and it is up to the attorney to determine whether the case should also be a product liability case. The last section of this paper includes a listing of facts to look for involving different defects in automotive product liability cases, which is offered as sort of a checklist on those type cases. While automotive product liability cases seem to be the most common, this article is intended to offer applicable advice on any product liability claim.

II. "Break It" Questions

Your evaluation of a product liability case should begin with the correct answer to the below questions. In my opinion, the case stops if the answer to any of these questions is no.

1. Has your client suffered catastrophic injuries?

I told a potential client recently on the telephone that the simple fact that she was calling me made it likely that she didn't have a product liability case. The preparation of a products case is time-consuming and expensive. Few other cases demand such thorough preparation on as many different fronts, all of which require substantial

financial expenditure. These costs can include expert witness fees, product testing, discovery, purchase of identical products, purchase of alternative designs, extensive travel, deposition costs, preparation of trial exhibits, jury consultants, and vehicle storage.

The principal source of expense arises out of the need for expert testimony. Increased legal requirements and court rulings concerning the admissibility of expert testimony has further worked to increase the costs. Experts who once could come in and testify concerning a topic from their experience are now forced to publish, test and further prove their opinions. All of this can be wildly expensive. You can expect your expert to conduct an extensive investigation of the product, its history, and the industry, and to compare the product with competing products sold. In order to have a sufficient foundation on which to testify, the expert may need to purchase identical products as well as products that are potential alternative designs. It will take numerous conferences with the expert in order to inform you of all the relevant information on the product at issue.

Another reason products liability actions are so expensive relates to the defense strategy. Many product manufacturers and sellers fight a "war of attrition." They are keenly aware that the resources of the Plaintiffs' law firm footing the bill is typically more limited than their own and that disparity will result in some claims never being filed.

All of these factors make it generally impracticable to pursue a product defect case in the absence of catastrophic injuries and significant economic losses to offset the costs. I have been involved in product defect cases where the expenses approached a million dollars. Admittedly these are rare and it is my experience that the average product defect case expense is around $100,000 and $150,000. It is of no benefit to your client if you spend $150,000 for a $200,000 injury award.

2. Do you have the product?

I've run across numerous cases that appeared to have merit and substantial damages, but the product was no longer around. A product case without the product is the equivalent of car without an engine. It isn't going anywhere. In some exceptional circumstances, it may be possible to proceed without the product, but this is not advisable and rare. One such situation may be when a design defect exists and all similar products are defective for the same reasons.

Proving defect in the manufacturing defect case would be next to impossible. This is because you are trying to prove the product did not perform as designed. To do so would require one to point to a specific failure and determine why it failed. You see the difficulty when the product is not available.

It is also important to check the jurisdiction's law on this issue. Many states, like Alabama, have law that suggests that a product case cannot be sustained without the product. You can save yourself a lot of pain by knowing this before expending substantial sums of money and losing at summary judgment.

You have substantial burdens even if you have a design defect case and the state law allows you to proceed. Imagine the cross of your expert. So sir, you're saying that my client's whole line of widgets is defective and you haven't even seen the product at issue.

3. Are you still within the applicable statute of limitations or statute of repose?

Your state's statute of limitations for a personal injury case will likely be applicable to a product liability claim. Many states, like Georgia, have an additional time limitation called a statute of repose. Statutes of repose provide that no action for a product defect can be field beyond a certain period of years, typically 10 to 12 years, after the product entered commerce.

III. "Scratch Your Head" Questions

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. Was your client a driver or a passenger? This could make a big difference. While juries are not typically sympathetic to intoxicated drivers, you may have a better claim with a passenger. Many states, like Florida, also have good law on alcohol use. The determination on whether alcohol comes into evidence depends on your claim. For instance, in a seat belt case you may have a better argument that alcohol is irrelevant than a stability claim. That is because the control of the vehicle is not at issue, but that of a seatbelt that is designed to protect both the intoxicated and non-intoxicated. The belt doesn't know the difference.

2. Excessive Speed

Manufactures will argue that speed kills. This is called the big wreck defense. They contend that there was nothing that could be done to protect the occupant in this unforeseeable collision. Additional problems proving this case will be testing. Plaintiff's experts routinely rely on defendant's internal crash and sled tests to prove liability. However, they rarely run tests in excess of 35 mph and at 55 mph in very limited scenarios. Proving your defect when the impact speed was 85 mph will likely make the internal testing of very limited use. This is not to mention the impact your client's breaking of the law by speeding will be on the jury.

3. Preemption

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. Manufacturers usually argue that auto product liability suits should be dismissed because

the state law is preempted by the federal regulations. These arguments usually lose, but in some limited areas they do not.

IV. Additional Considerations

1. Preservation of Scene and Evidence

Preserving the scene is critical to a product liability case. This is many times difficult because the scene will be an employer's manufacturing facility or a public highway. Having an expert on the scene early can assure that evidence you need to prosecute your claim was not destroyed or lost.

2. Witness Interviews

These cases can be highly technical. These cases are in many ways the battle of the experts. The lawyer and the plaintiff's expert heavily rely on internal documents produced by the manufacturing discussing the design, manufacture and testing of the product in question. As exciting as this is to the lawyers and experts, it is not to the jury. I believe cases are won and lost, many times, on the testimony of the fact witnesses.

Witness interviews should be conducted as soon as possible. The investigating officers who were present on the scene, as well as any emergency personnel, must be interviewed. The manufacturer's lawyers will interview these witnesses. Their goal will be to increase the speed of the impact, place your client without the belt, or establish drinking.

3. In State Defendant (Insurance Proceeds)

Many times the accident at issue was caused by another motorist's or individual's negligence. Insurance companies may offer a settlement for their insured's negligence early in the litigation. Settling with these defendants, often times for very limited amounts, can be very costly to your client.

We call federal court the case graveyard. That may be extreme but the additional scrutiny by the court, legal requirements, evidentiary requirements and juries can subtract substantial value from your client's case. The effect on the product liability case should be carefully considered prior to accepting the insurance proceeds.

V. Product Liability Claims Involving Vehicles

Products liability cases may often be hidden in your motor vehicle cases. It is important to know what to look for in order to fully evaluate all aspects of your case. Any accident that results in catastrophic injury, such as death, paralysis, or brain damage should be reviewed in order to determine if a products liability claim is present.

Seat Belt Defects

When they work properly, restraint systems in automobiles and trucks indisputably prevent or lessen injury in crashes. When they fail, seatbelts can allow or even cause serious injury and death. This section is intended to identify some restraint system design defects in modern automobiles in order to acquaint lawyers with potential product liability theories where the injuries are particularly serious and can support the significant case expense required.

A typical auto crash can be viewed as having two collisions. The first collision occurs when the vehicle impacts another vehicle or fixed object. The second collision occurs when a vehicle occupant impacts the interior or is ejected. The second collision immediately follows the first collision-- often only by milliseconds. Seat belts and airbags are designed, in part, to prevent the second collision or minimize its injury causing effects.

A seat belt defect may apply if any of these factors are present:

- The occupant is believed to have been belted but found unbelted post accident
- The occupant is belted but contacts the vehicle interior which results in injury
- The seat belt buckle is latched after the accident but the occupant is ejected or outside the belt
- The seat belt webbing is "spooled" out or loose after the accident
- The belted occupant is injured but the passenger compartment is intact
- The vehicle is equipped with a "passive" or automatic door mounted belt system.

In any such cases, securing the vehicle is critical to the proper investigation of the potential product claim.

DaimlerChrysler Gen III Buckle

DaimlerChrysler designed and sold the Gen III seat belt buckle from 1993 to 2004. The buckle is dangerously prone to unlatching during auto accidents and may have been installed in as many as 16 million Chrysler, Dodge and Jeep vehicles. The unlatching is caused when the buckle opens as a result of inadvertent contact on the release button with the occupant or a vehicle component.

The Gen III buckle's release button rises high above the buckle's casing. This design causes the buckle to fail an important industry standard created to prevent unintended unlatching of buckles. DaimlerChrysler changed to the Gen III from a good design that passed industry standards.

Seat Belt Spool Out

The heart and soul of the shoulder belt is the retractor, which locks the seat belt webbing and holds the occupant in place. When the retractor fails to properly lock, excessive webbing "pays out" of the retractor and results in seat belt slack. Sometimes as little as a few inches of slack can mean the difference between an injury-free event and catastrophic or fatal injuries. In a frontal collision, for example, a properly locked shoulder belt should prevent injuries due to contact with the steering wheel, windshield or A-pillar. When the retractor locks fails to lock, or locks late, the occupant may move forward and contact these objects.

Conventional seat belt retractors are designed with an internal pendulum or ball sensor, which swings forward during rapid deceleration as in braking or upon impact. However, many times, this system can fail. If the teeth on the retractor spool do not engage the latch plate quick enough, then excessive slack is spooled out before locking. In order to lessen this slack, certain manufacturers introduced web-grabber or pretensioning devices in the late 90s. These devices sense the impact and create tension early in the collision- preventing forward excursion of the occupant. The web-grabbing or pretensioning devices are more expensive to manufacturers; and thus, are generally only used in their high-end vehicles. Litigation over low-end, high-volume, vehicles is often the easiest.

Retractor spool out cases often turn on the forensic evidence found on the belt system. This physical evidence, called "load marks", is typically left on the belt webbing, inside the retractor, buckle, or D-ring when the retractor locks under accident conditions. The necessity of forensic evidence makes it almost impossible to prove without the vehicle and its components. Hence, securing the vehicle early is critical.

Front and Side Airbag Defects

Not all airbag systems are created equal. Issues may include whether the cause of the injury itself was an overpowered or untethered airbag, whether the airbag fired late or not at all, or even whether a part of the bag tore or failed during deployment. An airbag defect may apply if any of these factors are present:

- The airbag is deployed in a collision slower than 10 miles per hour
- The frontal airbag failed to deploy with obvious damage to the front bumper or sensor areas
- The side torso or head airbag failed to deploy with obvious damage to the side of the vehicle
- The side head airbag failed to deploy in a rollover crash
- The occupant is severely injured despite or because of airbag deployment

Untethered Airbags

Many mid to late 90s model vehicles did not equip their passenger airbags with internal tethers. Internal tethers were designed to limit the rearward excursion of the bag into the passenger compartment. An occupant should come into the bag instead of the bag into the occupant, which can cause catastrophic facial injuries, including serious eye injury or even death. Internal tethers were a cheap solution to this dangerous condition. I have found that early airbags in the Ford Escort, Ford Windstar and Toyota Camry failed to use tethers in the passenger airbag.

Torn Tether

I was recently involved in a case where the tether in a Geo Metro driver bag tore, allowing the bag to deploy six inches further back. And, at such power, the driver was driven back into the seat so hard that he bent back the seatback and broke his neck. The tether, designed to limit rearward deployment, failed leaving the occupant a paraplegic.

Failure to Deploy

Numerous vehicles are now equipped with both frontal and side airbag systems. Frontal airbags are designed for deployment in frontal collisions. Side airbags are, likewise, designed for deployment in side collisions. Airbag deployment failure can be the result of numerous factors, including improper positioning of sensors, removal of sensors, defective sensors, and sensor rotation.

I have litigated cases involving failure to deploy of the frontal airbag in the Ford Taurus and Acura Integra. Recently, a Texas jury awarded the plaintiff $38 million in a side airbag case involving a 2001 Suburban.

Late Deployment

In these cases the black box shows deployment of the bag at 100 to 150 milliseconds. Generally this is after the main collision- allowing the driver's head to be vulnerably close to the deploying airbag. This proximity frequently results in unnecessary bag inflicted injury to the occupant. This frequently occurs during pole or tree impacts, where the car companies may have cut corners on their developmental testing to develop the algorithm for the sensor manufacturers.

Roof Crush

Many occupants, although belted, are severely injured in rollover accidents due to the failure of the passenger compartment to maintain its integrity. Characteristics of these cases are that the roof is crushed five or more inches or the roof is deformed sideways creating an opening over occupant's head. I have litigated roof crush cases involving the Ford F-150, Ford Explorer, Ford Astro Van, and Chevrolet Suburban.

We recently learned in depositions of Ford's corporate representative that late 90's models of the Ford Explorer roof barely pass the minimum government standards and fail Ford's internal standards. A Jacksonville, Florida jury recently returned $10 million dollar verdict when a woman was killed due to the lateral crush of her roof resulting in the exposure of her head.

Rollover

A rollover defect may be present if all of these factors apply:

- The vehicle rolls over on the roadway
- The road is paved, smooth and dry
- The tire marks on the road end abruptly
- There is no "tripping mechanism" like a pothole or curb

15 Passenger Van Rollover

One of the most dangerous vehicles on the road in terms of rollover is a vehicle marketed for use by ball teams, scout troops, churches and day care centers. Data from 1991-2000 in the fatal accident reporting system (FARS) of the National Highway Traffic Safety Administration (NHTSA) indicate that about 52% of the 15-passenger vans involved in a single vehicle, fatal accident were in a rollover. This compares to 33% of passenger automobiles involved in accidents. Additionally, 81% of 15-passenger van fatalities are from single vehicle rollover accidents.[1] NHTSA research reported in 2001 that 15-passenger vans with 10 or more occupants had three times the rollover ratio than did those with fewer than 10 occupants. Fifteen-passenger vans with 10-15 occupants

[1] W. Riley Garrott, Barbara Rhea, Rajesh Subramanian and Gary Heydinger, *The Rollover Propensity of Fifteen-Passenger Vans*, Research Note, Washington, D.C., NHTSA, April 2001.

had a rollover ratio of 85% compared with the ratio of 28.3% for vans with fewer than five occupants.

On April 9, 2001, NHTSA issued a "consumer advisory" cautioning users of 15-passenger vans of an increased risk of rollover under certain conditions. Based on analysis of rollover propensity carried out by the Agency's contractors, NHTSA warned that the risk of rollover increased "dramatically" as the number of occupants increased from fewer than 5 occupants to over 10 passengers.[2] According to analysis, 15-passenger vans were three times more likely to roll over in single vehicle crashes when 10 or more occupants occupied the vans. It noted that "it is important that these vans be operated by experienced drivers."

Dual rear wheels, originally recommended by Ford engineers for the extended van back in the mid-1970s, have been shown in testing to given enough additional track width and rear traction to prevent oversteer in most emergency driving. Testing performed under scientific conditions, using computer controlled steering, showed that the General Motors van, for example, could not be made to lose control in either the J-turn or the avoidance maneuver at speeds up to 60-miles per hour even when loaded.

Ejection Protection

Lift gate failure

Chrysler minivans manufactured between 1984 and 1995 were built with lift gate latches that opened under extremely low forces. Many of those vehicles have been recalled or are no longer in service. However, many other vehicles are sold with lift gates that are constructed of fiberglass. During collisions, the locks remain locked, but the fiberglass lift gate brakes away leaving a large ejection portal.

Door latch failure

Similar to lift gates, door locks have failed during all types of accidents. In addition to the lock itself failing, deformation of the door can trigger the lock mechanism to unlock. It is reasonable to expect the door to stay closed during an accident. If it doesn't, it is reasonable to ask why. You may consider a door latch failure case if your client was catastrophically injured after being ejected from an open door. I was recently involved in a door latch case from a Mazda 929 where movement of the outside sheet metal of the vehicle caused the door to open during an impact.

Tire Failure

The Firestone tire tragedy resulting in the recall of that tire alerted the public to tire safety issues. Tire failure can and does cause accidents. When the tread separates

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[2] U.S. DOT "Consumer Advisory," April 9, 2001.

from the tire, the vehicle can become very difficult to control resulting in an accident. You may have a tire case if a tire failure leads to loss of control and accident.

Aged Tires

An issue that is just now coming to the attention of consumer watchdog organizations and tire experts involves "field-aged tires". Recently, NHTSA released the first series of data from its "Phoenix" Tire Dataset study--comparing aged and new tires of the same make. The data shows a notable reduction in robustness, particularly for tires that were "in service".

The agencies' purpose was to assure that tires meeting federal standards will wear out before they catastrophically fail in order to prevent another Firestone tire debacle. The Phoenix testing showed that aged tires (those older than 4 years) could not meet the minimum federal tire standards. Unfortunately, many tire manufactures, tire stores and service shops keep an inventory of tires long after the manufacture date. These tires, while looking new, can be dangerously prone to failure. There is presently a push by consumer organizations to require manufacture dates be placed on the tire. Tire manufactures oppose this warning.

Fuel System Litigation

Vehicle manufacturers have a duty to the public to design vehicles that will not create a fire hazard in survivable collisions. However, government safety standards only reduce the chance of fire in some types of crashes and automotive manufacturers have failed to adopt their own standards to avoid such fires. Despite the fact that automotive manufacturers have long been aware of the risk of fires associated with defective fuel systems, the incidence of vehicle fires has continued to be a serious problem.

Any fuel leak creates a very high danger of fire in the event of a collision. Only three elements are required to create a post collision fire: fuel, oxygen and an ignition source. Oxygen is readily available and there are numerous ignition sources present during a collision. Thus, if a fuel leak occurs, the potential for a fire is substantial. There are several common fuel system defects that can cause fuel leaks, which result in post-collision fires. Consider a fuel fed fire case if both of these factors apply:

- The occupant was killed or seriously injured by fire
- The occupant suffered no skeletal or other life threatening injuries

Seat Design Litigation

As a direct result of weak and defective designs of automobile seats and their components, such as seatbacks, recliner mechanisms and seat tracks, thousands of otherwise preventable injuries occur each year in rear-impact collisions. The problems

with seats stem from an inadequate Federal Motor Vehicle Safety Standard, caused in part by the resistance of some manufacturers to reasonable and safer proposed standards. Likewise, the history of seatback design evolution shows an industry ignoring its own engineers by rejecting inexpensive safe alternative designs that have been available for decades.

Seat Track Failure

Seats are designed with seat tracks to accommodate passengers of different heights, weight and seating preferences. The locking mechanism can fail allowing the seat to slide forward into the steering wheel or a deploying airbag.

Seat Back Failure

Seat back failure in rear collisions can result in several problems. For example, it can be difficult to maintain control of a vehicle without the support of the seatback. In rear impacts, even seat belted occupants can be ejected rearward into the rear of the car or out the back window. Rear seat occupants are also at risk as the seat back collapses onto them. I litigated a case against Mazda where a rear seat occupant was trapped by the collapse of the front seat while the vehicle burned.

A Tennessee jury recently awarded $10 million to the plaintiff in a seat design case involving a 1997 Ford Escort. In that case, the rear seat failed and the occupant was propelled rearward striking her neck on the back seat. She was rendered a paraplegic. An Illinois jury awarded $27 million to the plaintiff in a case involving a 1996 Escort. The seatback broke and the driver died of head injuries. Other vehicles involved in litigation around the country include the Nissan Quest, Geo Storm, and Mazda Protégé. A number of vehicles have insufficient seat structures.