LITIGATING THE PRODUCTS LIABILITY CASE: LAW AND PRACTICE

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DISCOVERY

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I. Recap of New York Products Liability Law

A. Products liability law developed as a hybrid of common law contract, warranty, and tort law as a means to provide consumers recourse for injuries caused by defective products. Each of the common law theories had limitations that made it difficult, if not impossible, for consumers to pursue claims for injuries caused by mass produced products. The law of products liability developed to address this perceived injustice, holding that everyone in the chain of distribution was responsible for the sale of an allegedly defective product. This represented a new and novel theory of tort liability in which the focus was on the product itself and not the parties' conduct, the forseeability of harm to a remote user, or on the terms of any contract.

B. When a consumer brings a strict products liability action, there is no need to prove that the defect was caused by any negligence or fault of the manufacturer.[1] All that a plaintiff needs to prove is that the defect was in the product when it left the manufacturer's hands and was a proximate cause of the damage.[2] The most common definition of product defect is a product that is not reasonably safe for its intended or foreseeable purpose.

C. There are three separate and distinct types of product defects. In general, "Manufacturing Defects" are deviations from the manufacturer's specifications. This would include such things as imperfections in tires that cause them to blow out or unwanted contaminants in food.[3] "Design Defects" are different than manufacturing defects in that the product was manufactured as intended, but what is challenged instead is the reasonableness of the product

[1] *Godoy v. Abamaster of Miami, Inc.*, 754 N.Y.S.2d 301 (2d Dept. 2003).

[2] *Voss v. Black & Decker Manufacturing Co.*, 59 N.Y.2d 102 (1983).

[3] *See e.g. Michael v. Gen. Tire, Inc.*, 747 N.Y.S.2d 40, 41 (2d Dept. 2002) (accident precipitated by tire blow out)

design itself. This would include claims that a product design should have included a safety feature, such as a guard or an interlock, or should have been redesigned in such a way as to reduce or eliminate a particular risk.[4] Finally, a "Warnings Defect" can exist notwithstanding the product's proper design and manufacture if proper warnings, cautions, or instructions would be necessary to ensure the safe use of the product but were not given or were insufficient.

D. There are three major tests to determine whether a design defect exists.

1) Risk/Utility Test: The risk-utility test defines a defectively designed product as one whose utility does not outweigh the danger inherent in its introduction into the stream of commerce. The idea behind the risk-utility test is the belief that no product can be completely accident-proof, therefore, before determining whether a product is defective, a determination must be made on whether the benefits of the challenged design outweigh the risk of the danger inherent in such design. This requires a balancing of the likelihood of harm against the burden of taking precautions against such harm. Generally, the risk-utility test balances a number of factors.

2) Consumer Expectation Test: The consumer expectation test provides that the plaintiff must show that the product was dangerous beyond the expectation of the ordinary consumer. If the product is one within the common experience of ordinary consumers, it is generally sufficient if the plaintiff provides evidence concerning: (1) his or her use of the product, (2) the circumstances surrounding the injuries, and (3) the objective features of the product which are relevant to an evaluation of its safety. An inference of defect may arise from evidence of unsafe and unexpected product performance.

3) Alternative Safer Design: Another test employed by the fact finder to determine whether a design defect exists in a product is the alternative safer design test, which requires a plaintiff to demonstrate that a feasible alternative safer design exists.[5] The burden will be on the plaintiff to prove that a practicable and cost-effective design alternative existed which would have prevented plaintiff's harm. If a plaintiff is not able to provide affirmative proof of a feasible design alternative, a plaintiff will not be able to establish that the product's design was defective. It is not enough to prove that the current design possesses inherent dangers. Usually, proving an alternative safer design is a necessary element in any design defect claim.

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[4] *See Robinson v. Reed-Prentice Div. of Package Mach. Co.*, 49 N.Y.2d 471, 479, 426 N.Y.S.2d 717, 720, 403 N.E.2d 440, 443 (1980) (defining design defect as a defect that "presents an unreasonable risk of harm, notwithstanding that it was meticulously made according to [the] detailed plans and specifications" of the manufacturer).

[5] *Bolm v. Triumph Corp.*, 71 A.D.2d 429, 438, 422 N.Y.S.2d 969, 975 (4th Dept. 1979), *mot. dismissed*, 50 N.Y.2d 928, 431 N.Y.S.2d 1015 (1980).

E. A separate, final basis for recovering for injuries caused by a defective product is a breach of warranty claim, which includes (1) breach of an express warranty, and also (2) breach of an implied warranty of merchantability.

II. The Discovery Devices

A. The discovery devices in any products liability action in New York state are generally set forth in Article 31 of the New York Civil Practice Law and Rules ("CPLR"). CPLR § 3101 states that there "shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." Under this standard, disclosure is required "of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." *Allen v. Crowell-Collier Publ. Co.*, 21 N.Y.2d 403, 406, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968).

B. The disclosure devices include the following:

1) Depositions

2) Interrogatories

3) Demands for discovery and inspection of documents or property

4) Physical and mental examinations of plaintiffs

5) Requests for admissions (notices to admit)

6) Also: demands for a verified bill of particulars[6]

C. "Limited limitations" on the use of discovery devices:

1) A party may not serve both interrogatories and a demand for a bill of particulars on another party. (CPLR 3130(1)). Usually, this will relate to a defendant's discovery on the plaintiff.

[6] Technically, this is not a "disclosure" device in New York, but instead a request to amplify a pleading. Regardless, a Demand for Verified Bill of Particulars is usually served with a defendant's initial discovery demands on a plaintiff and may be thought of as being part of discovery.

2) "In the case of an action to recover damages for personal injury, injury to property or wrongful death predicated solely on a cause or causes of action for negligence, a party shall not be permitted to serve interrogatories on and conduct a deposition of the same party … without leave of court." (CPLR 3130(1)).

Practice point: Although a products liability action may include a cause of action for negligence, this will not serve to preclude the defendant from serving interrogatories on the plaintiff and also taking the plaintiff's deposition. The reason is because a products liability action is not predicated "solely on a cause of action for negligence" and, as such, the discovery limitation in CPLR 3130(1) will not apply. In short, both disclosure devices (propounding interrogatories on a party and taking that same party's deposition) may be freely used and are generally always used in products liability cases.

D. There are three categories of matters protected from disclosure. They are privileged matters which are absolutely immune from discovery (CPLR 3101(b)); attorney's work product, also absolutely immune; and materials prepared in anticipation of litigation or for trial, which are subject to disclosure *only* on a showing of substantial need and undue hardship in obtaining the substantial equivalent of the materials by other means (CPLR 3101(d)(2)).

In addition to these three categories, some common objections to discovery demands include that the particular demands are vague, ambiguous, overly broad, and/or unduly burdensome.[7]

E. Plaintiff's versus defendant's discovery in products liability litigation:

The scope of a defendant's discovery demands on the plaintiff in a products liability action is usually predictable and straightforward. Stated otherwise, there really is not too much variation and the discovery disputes are likely to be predictable if any do arise. On the other hand, a plaintiff's discovery demands on the defendant are likely to dig for deeper levels of information arguably relevant to the plaintiff's claims; an explanation follows below:

1) A defendant will generally request that the plaintiff provide information regarding the specific product and its current location, the allegations of the claimed defect, the nature of the plaintiff's alleged injuries and

[7] A proposed deposition that would require witnesses to respond to questions regarding events that took place up to 35 years ago was unduly burdensome. *Sahu v. Union Carbide Corp.*, 2009 U.S.Dist. LEXIS 86958 at *25 (S.D.N.Y. Sept. 22, 2009).

damages (with authorizations permitting the release of any and all pertinent medical, employment, and other records), and the amounts being alleged for any special damages.

2) On the other hand, the plaintiff's discovery on the defendant "*is generally much more far-reaching than that of the defendant, potentially subject to a great deal more abuse, and harder for a court to control*."[8]

For example, a plaintiff may request (and succeed in obtaining) information regarding:

i) competing and prior designs;

ii) whether other purchasers or users experienced similar problems with the product and whether they reported any problems to the seller or manufacturer;

iii) whether other purchasers or users were warned of any potential danger posed by the product;

iv) other lawsuits involving the defendant's products;[9]

v) prior accidents involving different but similar products;

vi) similar, if not identical, models;[10] and

vii) different products using a same component part alleged to be defective.[11]

In view of this, discovery may drag on, judicial intervention may be required to determine the proper scope of discovery, and multiple discovery demands, building upon the information learned in the prior discovery demands, may be served.

[8] See Frumer & Friedman, Products Liability, § 17.01[1][c][i].

[9] *See e.g. Scozzaro v. Matarasso*, 2012 N.Y. Misc. LEXIS 3743, at *5, 2012 NY Slip Op 32049U (prior reports involving similar incidents of burning or scarring resulting from laser equipment could be material to issue of notice).

[10] *See e.g. Culligan v. Yamaha Motor Corp.*, 110 F.R.D. 122, 126 (S.D.N.Y. 1986)

[11] *See e.g. Fine v. Facet Aerospace Prods. Co.*, 133 F.R.D. 439, 441 (S.D.N.Y. 1990)

F. *Request for admissions practice point* –

In any products liability case, documents relating to the product produced during discovery may or may not be authenticated at depositions. In order to ensure the documents are properly authenticated for potential dispositive motion practice and/or at trial, it may be worth serving a notice to admit (after the conclusion of discovery) requesting that the entity who produced the documents admit or deny that the documents are "true and accurate copies of documents produced by [the party] in this litigation, and were made by or at the direction of [the party] [or received by the party] in the regular course of [the party's] business, that they were made at the time of the acts, transactions, occurrences or events described therein, or within a reasonable time thereafter, and were stored in [the party's] files in the regular course of [the party's] business."

III. The Importance and Utility of Interrogatories in Products Liability Litigation

A. Interrogatories are a critical component of the discovery process in any products liability action. Multiple sets of interrogatories are likely to be served as new and additional facts are learned through responses to prior demands. Obtaining answers to interrogatories, and the general background information and other factual information included in the answers, will undoubtedly be required prior to conducting depositions.

B. A plaintiff's interrogatories to a defendant are likely to include requests for the following information:

1) the defendant's connection to the product (that is, the defendant's participation in the design, manufacture, distribution, maintenance and/or servicing of the subject product, from the date of the design to the present time)

2) whether the defendant sold, leased, or provided the product to a retail store or some other entity

3) a complete description of the product (for example, size, weight, dimensions, color, etc.)

4) an explanation regarding how the product operates

5) the existence of any plans concerning the design of the product

6) the person(s) who designed the product

7) knowledge prior to the alleged accident of any defects in the product

8) the existence of any recalls and, if so, information related thereto

9) prior complaints regarding the product

10) repairs or inspections of the product

11) related litigation involving the same or similar products, or different products with the same component part at issue

12) photographs, statements, and identification of persons having knowledge

13) expert witnesses

C. A defendant's interrogatories to the plaintiff are likely to include requests for the following information:

1) identification of the alleged defective product

2) the plaintiff's connection to the product, including, for example, the date of purchase, acquisition, etc.

3) the installation of the product

4) the use or purpose for which the product was intended

5) the plaintiff's familiarity with the product

6) the period of time the plaintiff was using the product

7) any warnings that the plaintiff received

8) the date, time, and location of the occurrence

9) allegations of the defendant's negligence and any actual or constructive notice to the defendant

10) allegations concerning the product's design, manufacturing, and/or warnings defect

11) any statutory allegations

12) plaintiff's alleged injuries and dates, if any, confined to bed, hospital, and/or home

13) plaintiff's alleged loss of earnings, if any, and special damages

14) collateral sources

15) photographs, statements, and identification of persons having knowledge

16) expert witnesses

IV. Deposition Practice Points

A. After exchanging interrogatories, the next step in the discovery process is usually engaging in depositions.

B. Your goals at depositions in products liability cases (or any case for that matter) are likely to include some or all of the following:

to learn the facts; nail down what you know; establish facts essential to your case; get and explain documents; establish/confirm damages and the bases for them; develop a prima facie case (know the elements of your cause of action or defense(s) and have them in front of you); preserve testimony; block a claim or a defense; get the witness's perspective (his or her point of view); lock in the witness to prevent future "creativity"; locate and develop impeachment material; force a settlement; locate missing witnesses; and find out who knows key information.[12]

B. In addition, with respect to your questions, you should generally:[13]

1) ask open-ended questions (you want to encourage the witness to talk)

2) ask "WHY" (the deadly question for cross-examination is often the perfect question for a deposition)

3) ask short questions and use simple language

[12] This list is based in part on John Moye's Deposition Course Book published by the Professional Education Group.
[13] *Id.*

4) violate the rules of evidence – you are entitled to. Ask for hearsay, rumors, conversations, and letters and the like, and subsequent remedial measures.

5) don't simply take "I don't know" or "I don't remember" for an answer; if the witness doesn't know or can't remember, ask: did you once know the answer to the question? Who did you tell? Is there anything that might bring back your recollection? What other documents might have the information? Where would they be? What other people might know the answer? What have you heard about this matter? Who might know where to find the information? If you had to find the answer to the question, where would you look (or who would you ask)?

6) get specific answers, not general rules or procedures that were "usually" followed

7) ask the witness to help you understand important areas

8) eliminate ambiguities

C. Deposing experts in the products liability case – when taking an expert's deposition (this would pertain to a federal, not New York state court, action), you should get the expert's curriculum vitae before the deposition if you can. You should also prepare by doing some background reading and educating yourself regarding the substantive areas at issue. You can also do this (and should do this) through talking to your own expert first. Also, read everything the witness has written on the issue he or she will be testifying about. Let the expert do the talking – you will learn more from his or her own words. Do not cross-examine the witness, except towards the end of the deposition to see how the witness will stand up to the pressure of trial. Resist using the expert to test your theory of the case. Also, ask for reports and drafts of reports. If any were destroyed, ask when and on whose instructions. Further, ask who helped the expert test his or her theory, or who supplied all of the information on which it rests. If the witness is vague, ask if that is the best he or she can do. Also ask if there are other view points that people in the field recognize. Finally, you should ask what the witness reads to stay current.[14]

[14] See "A Day in Discovery," Advanced Professional Training with James W. McElhaney, Chapter Eight – Expert Depositions.

V. Expert Discovery

A. Proof of a defect is generally not within lay knowledge and, as such, requires expert testimony.

B. State versus federal rules:

1) New York Rule: Trial "by ambush" was replaced in the 1980s with minimal disclosure requirements for expert witness information. The noteworthy aspects of expert disclosure in New York state cases include the following: (a) an attorney must set forth the expert's opinions in a response pursuant to CPLR 3101(d) and, in doing so, does not need to attach any report by the expert provided that all of the expert information required by CPLR 3101(d) is set forth by the attorney in the response (while a response pursuant to CPLR 3101(d) often includes the expert's report, the response does not need to attach the report); ii) expert reports need not be exchanged; and iii) expert depositions are not permitted.

Moreover, the Frye rule allows an expert to testify if the opinions are shown to be "generally accepted" in the field of specialty.

2) Federal Rule: Expert reports detailing the expert opinions and bases therefor must be exchanged. Parties may also take depositions of opposing experts and opinion testimony may be offered at trial only if relevant and reliable, as measured by the Daubert rule.

Daubert v. Merrell Dow Pharmaceuticals, 1993 – US Supreme Court established factors for determining reliability of proffered testimony. Judge is the "gatekeeper" who must determine reliability, not the jury.

The Daubert factors including the following:

- Is the expert qualified to give the opinion?
- Has the theory been (or can the theory be) tested?
- Has it been subject to peer review and/or publication?
- What is its known or potential rate of error?
- Has it attracted widespread acceptance in the relevant scientific community?
- Was the theory developed solely for litigation?

3) If an expert is excluded as unreliable, summary judgment or a directed verdict (whichever the case may be) should be granted.

VI. Sanctions

A. Failure to provide discovery: CPLR 3126 authorizes various forms of relief for a refusal to comply with a prior discovery order issued by the court or a willful failure to provide discovery. Specifically, the court may: (1) order that the issues to which the information is relevant be deemed resolved in accordance with the claims of the party who obtained the prior discovery order; (2) prohibit the disobedient party from supporting or opposing designated claims or defenses; or (3) strike a pleading.

See e.g. In re Fosamax Prods. Liab. Litig. (Neal v. Merck & Co.), 2009 U.S.Dist. LEXIS 1989, at *3-*6 (S.D.N.Y. Jan. 9, 2009) (failure to provide plaintiff profile form as required by CMO resulted in dismissal); *Lindquist v. Pillsbury Co.*, 1 A.D.3d 410, 411, 766 N.Y.S.2d 689 (2003) (because plaintiff failed to provide information about cracked jar despite stipulation to do so, court properly precluded her from offering evidence regarding jar and dismissed complaint); *McCarthy v. Handel*, 297 A.D.2d 444, 746 N.Y.S.2d 209, 213 (2002) (because plaintiffs had been twice warned that their responses to defendant's expert demands were inadequate, their prolonged failure to supplement CPLR 3101(d)(1)(i) disclosure by specifying alleged product defects justified precluding their expert from testifying regarding nondisclosed matters); *Kihl v. Pfeffer*, 94 N.Y.2d 118, 122, 700 N.Y.S.2d 87, 722 N.E.2d 55 (1999) (trial court did not abuse its discretion in dismissing the complaint against the manufacturer for plaintiff's failure to respond to its interrogatories within court-ordered time frames).

B. Spoliation: The intentional or negligent destruction or loss of material evidence by a litigant before his or her adversary has had an opportunity to inspect the evidence.

1) Sanctions for spoliation can include:

i) striking or precluding testimony or evidence

ii) adverse inference charge (see New York Pattern Jury Instructions, section 1:77.1), stating that the jury may conclude that the missing evidence, if produced in court, would not have supported the party's position (that is, the party that destroyed or lost the evidence) with respect to the issue to which the destroyed or missing evidence relates.

iii) monetary sanctions

2) Where independent evidence exists that permits the affected party to adequately prepare its case, striking of the spoliator's pleadings is

unwarranted, and a less drastic sanction, such as the imposition of costs or an adverse inference charge, may be appropriate.

3) Dismissal of the action is often appropriate where the spoliated evidence is the specific instrumentality giving rise to the plaintiff's injuries. For alleged design defect cases, however, the loss of the instrumentality is not automatically prejudicial to the manufacturer, since the defect should be present in other products of the same design.

VII. Other Considerations

A. Conducting non-destructive testing (a superficial examination) versus destructive testing (anything that alters the evidence): prior to performing destructive testing, you need to notify every potentially interested party and also establish agreed to protocols regarding where, when, and how the testing will be performed, what will be done, and what equipment will be used.

B. Obtaining publicly available documents and information may assist one's discovery and investigative efforts - for example, a request for documents made pursuant to the Freedom of Information Act ("FOIA"). Information that the federal government possesses may be useful to the both the plaintiff and defendant.