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Product Liability Defenses

Product sellers and manufacturers may defend themselves from product liability claims by refuting the arguments made by plaintiffs or by raising additional facts and arguments that might reduce or defeat the person's claims. The types of defenses available to a product manufacturer or seller will vary depending upon the location of the lawsuit and the facts of the case. This report will discuss the general elements of some of the most commonly applied product liability defenses.

In a product liability lawsuit, the product manufacturer or seller being sued ("the defendant") may defend themselves two basic ways. They may directly refute the facts and arguments made by the person ("the plaintiff") who commenced the lawsuit (e.g., by proving that they did not manufacture or sell the allegedly defective product, that the product was not defective, or that the product defect was not the proximate cause of the plaintiff's injuries). The defendant may also raise additional facts and arguments, which, if true, might defeat or mitigate the plaintiff's claim, even if everything in the plaintiff's claim was true (e.g., by showing that the person caused his/her own injury by using the product in a manifestly unreasonable or unexpected manner). This second type of defense is commonly called an affirmative defense.

The type of defenses that will be available will depend upon the location of the lawsuit and the facts of the case. Defenses may arise from common law (i.e., from prior legal decisions) and statute. Because of this, different jurisdictions may allow different defenses or may modify traditional defenses to meet local needs. There are also different defenses available for defending contract and tort claims. In addition, the conduct of the parties may waive or create defenses for the specific transaction.

This report will discuss the general elements of some of the most commonly applied product liability defenses. Because different jurisdictions will have different rules, it is extremely important to be aware of the defenses that are available in the particular jurisdiction where the lawsuit is being brought.

Statutory Defenses

State laws may provide defenses to product liability claims. These defenses may be included in general statutes applicable to all types of tort and contract claims, or they may be contained in state product liability statutes and apply solely to products liability actions.

Statutes of Limitation

Statutes of limitation are laws that place time limits on a plaintiff's right to seek remedy for a cause of action. Failure to file a lawsuit within this time period, if plead as a defense, effectively bars the injured person's right of action on the specific matter. The purpose of these laws is to ensure that lawsuits are filed in a timely manner.

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The time limits of statutes of limitations will vary depending upon the jurisdiction and the cause of action. In general, products liability actions based upon tort are typically limited to two years after the alleged injury, or damage complained of, occurs, but may vary from one to six years. The time limit may be different for personal injury claims and property damage. Statutes of limitations for contract claims are generally longer, and typically start at either the time of the transaction creating the warranty, or at the time that the defect constituting the breach was discovered.

Determining when a cause of action accrues can be difficult, especially in the context of injuries associated with toxic chemicals, where the injury causing incident is not easy to define. Different courts apply different rules in these cases (as examples, one court may determine that the injury occurred at first exposure to the chemical while another may use the time that the disease manifests itself or should have been discovered).

Statutes of limitations may be suspended under circumstances, such as during the infancy of a plaintiff. This suspension is called "tolling."

Statutes of Repose

Statutes of repose are laws which limit liability by placing an absolute time limit within which an action may be filed that is measured from the date of the first sale of the product. Product sellers are not liable for harm that occurs after this time period unless they provide a warranty that extends that time period or unless they act in bad faith. Statutes of repose are different from statutes of limitations in that, while a statute of limitations places a time limit on a plaintiff's right to seek a remedy for an injury, a statute of repose extinguishes the obligation of the product manufacturer.

The time limit for a statute of repose may be randomly chosen or it may be based upon the "useful sales life" of the particular type of product. In general, useful sale life begins with the delivery of the product and extends for that period of time during which the product would normally perform or be stored in a safe manner. Factors that may be used to determine useful sale life include: the amount of wear and tear to which the product was subjected; the effect of deterioration from natural causes and from other conditions under which the product was used or stored; the normal practices of the user, similar users, or the product seller with regard to the circumstances, frequency, and purposes of the product's use, and with regard to repair, renewal, or replacement; representations, instructions, and warning made by the product seller regarding proper maintenance, storage, or use of the product, or its expected useful sales life; and any alteration or modification by the user or a third party that might shorten or lengthen the sales life.

Several state courts have abolished statutes of repose promulgated by their legislatures on the grounds that they are unconstitutional. The bases for these arguments include that the time limits are arbitrary or unreasonable, are not substantially related to the object of the legislation, or that they violate the privileges and immunities clauses of the respective state constitution. Other states have upheld these statutes because they represent the will of the people.

Conduct Defenses

The conduct of the product user or a third party may be relevant for determining whether the product was the proximate cause of the plaintiff's injury. The conduct of the manufacturer may be relevant for determining the level of care they followed in producing the product.

Contributory Fault/Negligence

Historically, if the conduct of the user did not meet the standard of reasonable care for a user of the product, and that lack of care was a proximate cause of the injury, that user was completely barred from recovering on product liability actions based upon negligence under the theory of contributory negligence. The negligent conduct of the user, not the product,

was seen as being the proximate cause of the injury. This defense has been eroded in many states because the "all or nothing" standard is perceived as harsh to plaintiffs. In states where it is still allowed, it is an important product liability defense.

Comparative Negligence

Comparative negligence is related to contributory fault. Under this doctrine, the trier of fact compares the proportionate contribution that the product defect made to the injury with the causal connection of the plaintiff's conduct in apportioning damages. These contributions may reduce the amount of damages awarded or completely bar recovery.

Most jurisdictions follow one of two basic formulations of this rule. In jurisdictions that follow the rule of "pure comparative fault," the award is reduced by the proportion of the plaintiff's fault in causing the accident, and the plaintiff will not be barred from recovery, unless his conduct is the sole proximate cause of the injury. Therefore, if the plaintiffs were determined to be 80 percent liable for their injuries, they would receive only 20 percent of any awarded damages. In jurisdictions that follow the rule of "modified comparative fault," the negligence of the plaintiff must be less than the negligence of the defendant in order for the plaintiff to recover. Therefore, if the plaintiffs were 80% responsible for their injuries, they would not recover any damages at all. Jurisdictions following the modified comparative fault rule treat cases of equal fault differently. Some jurisdictions have adopted a "50% rule" and hold that plaintiff may recover if his negligence was not greater than the defendant or combined negligence of all defendants. Others hold that the plaintiff can only recover if his negligence is less than that of the defendant(s), the so called "49% rule."

Assumption of Risk

Assumption of risk is the voluntary and unreasonably proceeding to encounter a known danger. The assumption of risk defense requires the manufacturer or seller to prove that persons injured while using the allegedly defective product voluntarily and unreasonably exposed themselves to the risk posed by the defective product with knowledge and appreciation of the danger. Depending upon the jurisdiction, assumption of risk may act as a complete defense to liability or may be used to reduce the amount of the damages awarded, depending upon the degree of fault apportioned to the injured party.

There are three basic elements that must be proven to establish this defense: the plaintiff had actual knowledge of the facts or circumstances creating the risk; the plaintiff understood that these circumstances created a risk; and the plaintiff had the opportunity to confront or avoid the risk, and the plaintiff voluntarily chose to confront it.

The test for assumption of risk is subjective and depends upon the knowledge of the injured party. It often involves claims over the person's awareness and appreciation of the specific defect and danger that caused their injuries rather than just general danger conducted with the use of the product

The doctrines of assumption of risk and contributory negligence frequently overlap. One of the ways that the defenses are distinguishable is that underlying motivation for contributory negligence is carelessness, while the motivation for assumption of risk is recklessness.

Product Alteration/Moderation

Alteration or modification of product by the plaintiff or a third party may provide a total or partial defense to liability. In general, an alteration occurs whenever a person or entity, other than the product manufacturer or seller, changes the design, construction, or formula of a product, or removes warnings or instructions that accompanied or were displayed on the product.

To successfully invoke the defense, a manufacturer/seller must show that the alteration or modification was either a cause of the harm alleged or the cause of the harm alleged.

The level of causation will vary by jurisdiction. Conversely, in cases where the alteration or modification was reasonably foreseeable, courts have found the product to still be defective because of the manufacturer's/seller's failure to provide adequate warnings or instructions with respect to the alteration or modification.

The rationale for this defense is that defectiveness is measured up to the time that the manufacturer/seller relinquished control of the product. The product seller should not be responsible for injuries caused by changes made by others after it left its control.

Misuse

Manufacturers are not insurers of their products. Misuse of a product of a substantial and unforeseeable nature may be a defense against claims of negligence, warranty, and strict liability.

In general, misuse is defined as the use of product for a purpose neither intended nor reasonably foreseeable by the manufacturer. It occurs when the product user does not act in a manner that would be expected of an ordinarily, reasonably prudent person likely to use the product under the same or similar circumstances. Traditionally, it covered two types of conduct—use of the product for an improper purpose and use of the product in an improper manner. The misuse of a product by the plaintiff or other party may result in a reduction or apportionment of damages to the extent that such misuse was the proximate cause of the plaintiff's harm.

To be successful, most jurisdictions require a manufacturer to show that the product was in a safe condition when it reached the consumer; that the plaintiff used the product in a manner that was different than intended; that this misuse was either the cause or a cause of the plaintiff's injuries; and that the misuse was not reasonably foreseeable by the manufacturer or seller. Courts have tremendous latitude in determining whether a misuse is substantial and unforeseeable. Types of uses that have been found to be reasonably foreseeable include using a product beyond its intended life, failure to follow instructions, installing the product incorrectly, misassembly of the product, altering the product, or using of a product attachment that was not marketed with it. Misuses that have been found to be unforeseeable include removing permanently fixed safety guards; disregarding basic safety warnings; and having an unskilled member of the general public use a professional product that is sold only in trade stores.

State of the Art

Manufacturers may be allowed to present evidence that their product was "state of the art" at the time that that it was designed or manufactured. Different courts define the term "state of the art" differently; in general, it means the technical, mechanical, and scientific knowledge used for manufacturing, designing, or labeling the same or similar products was of the level that was in existence and reasonably feasible at the time the product was available. An alternative definition is the best technology reasonably available at the time that a specific product was first sold.

In presenting state of the art evidence, the manufacturer essentially argues that they should not be responsible for a particular product risk, because at the time of manufacture, that risk was generally unknown or the means for avoiding it was unknown or unavailable. State of the art is distinguishable from mere compliance with industry custom or standard because industry custom refers to what is currently being done in the industry; while state of the art refers to what feasibly could have been done.

The use of this defense is highly debated, and courts differ on whether the defense should be allowed for claims based upon strict liability. Often they make the distinction between whether the claim involves a manufacturing defect, in which case the manufacturer's knowledge is irrelevant to the cause of the nonconformity, and cases alleging inadequate design and warnings where the manufacturer's

awareness of potential dangers or choices between competing designs is more relevant.

In some jurisdictions, statutes provide that it is an affirmative defense in a products liability action that the product conformed to the state of the art. Other jurisdictions establish rebuttable presumption that a product, which conformed to the state of the art, is not defective.

Contract Defenses

Manufacturers may incorporate defenses to product liability claims in their contracts. The primary contract defenses are requiring prompt notice of breach, disclaimers of warranties, and limitations on remedies available in the event of a breach. These defenses have all but been discarded in actions seeking recovery for a consumer's injuries and are typically used only in transactions between commercial parties.

Notice

In a commercial transaction covered by the Uniform Commercial Code (UCC), a buyer who has accepted goods must notify the seller of any breach of warranty within a reasonable time after the buyer discovers or should have discovered the breach. The notice of breach is considered to be a condition precedent of filing a warranty action, and failure to provide timely notice will bar the buyer from any remedy that could have been asserted because of the breach. This notice provision can be modified by the agreement of the parties provided that the modification was not unconscionable or manifestly unreasonable. As a general rule, notice is not required under causes of action based upon statutory or common law warranties arising outside the scope of the UCC.

Disclaimers

In general, warranty liability is subject to disclaimer by the seller. Liability based upon implied warranty may be limited or disclaimed by the seller. Express warranties generally cannot be disclaimed. The seller may state in the agreement that he does not warrant at all, that he warrants against specific acts, or that liability is limited to particular remedies, such as replacement, repair, or return for the purchase price. Disclaimers are subject to strict construction in the courts, and may be voided or not enforced because they are against public policy. In general, disclaimers will not be effective to avoid responsibility for personal injuries

Both federal and state laws affect warranty disclaimers. Warranty disclaimers, modifications, and limitations must meet the requirements of the Magnusson-Moss Warranty Act to be effective. Under this law, a manufacturer may not disclaim or modify any implied warranty with respect to the product if it makes any written warranty or, at the time of sale, enters into a service contract with the purchaser. The manufacturer may limit any implied warranties, but the limitation must be conscionable and the writing must meet specific disclosure standards.

Section 2-316 of the UCC contains the primary code provisions concerning the seller's right to exclude or modify warranties. The text of this paragraph is included in the Appendix of this report. Paragraph 2-316(2) of the UCC prescribes the manner in which implied warranties may be disclaimed. This paragraph provides that a disclaimer of implied warranty of merchantability must mention the word merchantability to be effective and that any exclusion or modification of an implied warranty of fitness be in writing in a conspicuous manner. In addition, disclaimers are subject to the general code provisions on unconscionability.

Limitation of Remedy

Under the UCC, a manufacturer may limit the remedy available to a buyer for breach of contract; for example, damages may be liquidated in the agreement to a fixed amount, or the seller may limit the remedy to repair and replacement of the defective goods, or a return of the goods for the purchase price. Section 2-718 and 2-719 prescribe the manner that this may be done. The text of these paragraphs is

included in the Appendix. As with disclaimers, limitations on remedy are subject to the general Code provisions on unconscionability. Section 2-718(3) specifically states that limitations on consequential damages for personal injuries are unconscionable on its face.

Product Examination

Under Section 2-316 of the UCC a buyer is precluded from recovery for implied warranties if a reasonable inspection would have identified the defect in the injury causing product. This defense is not available against latent defects.

Other Defenses

Other arguments commonly raised in product liability actions include compliance with government and industry standards, unusually susceptible consumers, sealed containers, and contract specification defenses.

Compliance with Government Standards

In some jurisdictions, a manufacturer's compliance with any mandatory federal or state statutes, or administrative regulations, at the time a product was manufactured may be a complete or partial defense to product liability claims. The manufacturer must show that the standard was in existence at the time the product was manufactured, that the injury-causing aspect of the product was covered by the standard, and that the product was in compliance with the standard. Alternatively, failure of a product to comply with a mandatory governmental standard may be used as evidence that the product was defective.

Federal Pre-emption

Under the pre-emption doctrine, a manufacturer's compliance with a federal product safety law may provide a defense against claims based upon state common law or state product liability law. The purpose of this doctrine is to eliminate possible conflicts between national uniform guidelines established by conduct and different or additional state standards regulating the same conduct. Determining whether pre-emption exists, and the scope of that pre-emption, is often a difficult analysis. Courts will evaluate the statute in question to determine whether Congress expressed a clear intent to pre-empt state law or whether the pre-emption is implied from the comprehensiveness of the legislation.

Compliance with Industry Standards

In general, compliance with voluntary industry standards and customs are admissible as evidence in a product liability lawsuit, but are not conclusive of non-liability. Evidence of compliance may be used to demonstrate that the manufacturer acted in a reasonable manner, when the conduct of the manufacturer is at issue.

Unusually Susceptible Consumer

The unusually susceptible consumer defense generally arises in cases involving foods, drugs, cosmetics, or other products intended for intimate bodily use. As a general rule, a manufacturer is entitled to assume that his products will be used in a normal manner by a normal buyer and will not be held responsible for injuries that are traceable to rare and unforeseen allergies and susceptibilities that may exist in a particular person. In cases where the manufacturer knows, or has reason to believe, that the product will cause such reactions in a substantial number of people, they are obligated to at least warn of the possibility of harm.

Sealed Containers

The sealed container or original packaging defense may be used by non-manufacturing product sellers (e.g., wholesalers, distributors, and retailers) to protect themselves from product liability claims based on negligence. The basis for this defense is that the seller could not have been expected to discover the defect because it is not reasonable to have them open and test each product that they sell. The defense does not protect product sellers from easily discoverable defects. It also does

not extend to warranties made by the seller to the purchaser, such as warranties of merchantability. Additionally, it is not applicable under strict liability.

Government Contractor

The government contractor defense provides that a manufacturer cannot be held liable for product-caused injuries for products supplied to the U.S. Government and produced in accordance with mandatory government specifications. The defense is primarily used in association with products supplied to the U.S. military.

There are three basic elements to this defense: (1) the manufacturer must show that the U.S. government approved reasonably precise specifications; (2) that the equipment conformed to those specifications; (3) and that they warned the U.S. government about any dangers in the use of the equipment that were known to the supplier but not the government. The three conditions serve to immunize the contractor only when the government actually participated in discretionary design decisions, whether by designing the product itself or by approving the specifications prepared by the contractor.

Contract Specifications

The contract specifications defense provides that a manufacturer cannot be held liable for producing a product with specifications that are beyond his control. It is different from the government contractor defense in that it applies to any products manufactured to the order or specification of another, whether that party is a governmental or private party.

There are several different formulations to this defense. In general, a contractor is not liable for damages resulting from a defective design provided by another unless the design specifications were so unreasonable, or obviously defective and dangerous, that a reasonably competent contractor would realize that there is a grave chance his product would be dangerously unsafe and likely to cause injury.

The defense does not apply to cases where the contractor defectively manufactured the product in violation of specifications. Courts are split on whether it is applicable to liability actions based in strict liability.

References

1. 62A Am. Jur. 2d Products Liability §§1314-1517 (1997 & 2003 Supp.).
2. Commerce Clearinghouse, Inc. (CCH). "Defenses" in *CCH Product Liability Reporter.* Chicago, IL: CCH, 2002.
3. Hirsch, Donald. *Casualty Claim Practice, 6th Ed.* New York, NY: Irwin/McGraw Hill, 1996.

Appendix: U.C.C. Provisions Related to Warranty Disclaimers and Limitations

The following paragraphs are excerpted from the Uniform Commercial Code (UCC). They contain the three basic code provisions related to warranty disclaimers and limitations.

§ 2-316. Exclusion or Modification of Warranties

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).

§ 2-718. Liquidation or Limitation of Damages; Deposits

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

(2) Where the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceeds

(a) the amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with subsection (1), or

(b) in the absence of such terms, twenty percent of the value of the total performance for which the buyer is obligated under the contract or $500, whichever is smaller.

(3) The buyer's right to restitution under subsection (2) is subject to offset to the extent that the seller establishes

(a) A right to recover damages under the provisions of this Article other than subsection (1), and

(b) The amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.

(4) Where a seller has received payment in goods their reasonable value or the proceeds of their resale shall be treated as payments for the purposes of subsection (2); but if the seller has notice of the buyer's breach before reselling goods received in part performance, his resale is subject to the conditions laid down in this Article on resale by an aggrieved seller (Section 2-706).

§ 2-719. Contractual Modification or Limitation of Remedy

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

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