

## 1. DEFENSES IN A PRODUCT LIABILITY CLAIM

### **Introduction**

There are numerous illusory and potentially meritorious defenses to product liability claims. Several defenses are raised in almost every product liability action. Most of the usual defenses concern the conduct of the product user at the time of the injury.

This article is intended to provide only a brief description of the defenses available to product liability claims. State courts across the country have addressed these defenses and have adopted unique nuances with respect to their applicability. This article of limited scope does not address the approaches adopted by each state. For a specific factual scenario, the governing state law for strict product liability defenses should be consulted.

#### A. Abnormal Use/Misuse Defense

It is well settled that a plaintiff asserting a strict product liability theory of liability must prove (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 Restatement (2d) of Torts §402A may only be imposed upon proof that the product lacked an element necessary to make it safe for its intended use. Whether a certain use was an intended use depends on whether the use was "reasonably foreseeable" by the seller.

Defendants in product liability cases frequently assert the defense that the use of the product by the plaintiff was "abnormal" or a "misuse" of the product. The argument is that the damages were caused by the user's negligent use of the product and not by any defect in the product. Some courts have held that the plaintiff bears the burden of proving that the product was being used in an intended manner when the injury occurred and that a plaintiff who does not bear this burden fails to prove a necessary element of its prima facie case. Most courts, however, hold that the misuse defense becomes relevant only when the defendant shows that the use was either "unforeseeable or outrageous."

#### B. Assumption of the Risk Defense

The assumption of the risk defense is raised in virtually every case brought by a product liability plaintiff who was actually using the product when the injury occurred. Essentially, the assumption of the risk defense asserts that, by taking the chance of injury from a known risk, the plaintiff agreed to assume the risk of injury. The defense typically involves a subjective awareness of the risk inherent in an activity and the willingness to accept it.

Although the assumption of risk and contributory negligence defenses 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. For the assumption of the risk defense to actually bar recovery, the evidence must establish that the plaintiff knew, or should have known, of the specific risk and proceeded forward with the risky conduct.

There are four versions of assumption of the risk as outlined in the Restatement of Torts. However, only the consent defense version of the doctrine typically arises in a product liability case. Under the “consent defense”, assumption of risk occurs when a plaintiff expressly consents to relieve a defendant of its obligation to exercise care for the protection of the plaintiff. The plaintiff agrees to take his or her chances as to injury from a known risk. Restatement (2d) of Torts §496A, comment c(1).

Courts have repeatedly held that, with the consent type of assumption of risk, the danger must be subjectively understood by the plaintiff who 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 does not constitute voluntarily assuming the risk. Consequently, an employee who is aware of a risk but is required by his employer to use a dangerous product cannot be deemed to have “voluntarily” accepted this risk.

A special situation arises when a plaintiff negligently agrees to encounter a known risk. Restatement (2d) of Torts §496A. Negligence in accepting the risk is typically inadmissible in a product liability case and the defense should never be considered by a jury. Unfortunately, courts have confused this issue and allowed juries to evaluate a plaintiff’s negligence in encountering the risk to create yet another way for a defendant to argue the issue of a plaintiff’s comparative negligence to a jury.

#### C. Intended User Defense

Although Restatement (2d) of Torts §402A provides that manufacturers/sellers of defective products can be liable to the “user or consumer”, some courts also require a plaintiff to be an “intended user of the product.” Essentially, the defense asserts that an unintended user of a product cannot recover for injuries caused by defects in the product even though the product was being used in a reasonably foreseeable manner when the injury occurred.

#### D. Substantial Change Defense

The substantial change defense is a causation defense. The defense asserts that injury or damage was caused by a modification to the product and not by an inherent defect in the product. Manufacturers and/or other entities in a chain of product distribution are not liable for damages caused by modifications or alterations to products that are not reasonably foreseeable to the product manufacturer.

Section 402A of the Restatement 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 §402A (1)(b) Restatement (2d) of Torts. By its very terms, §402A indicates that only unexpected changes will absolve a product seller from liability for injuries caused by changes to the product. The test in such a situation is whether the product manufacturer could have reasonably expected or foreseen the modification. Accordingly, in order for this defense to bar recovery, there must be an “unforeseeable”

substantial change that is a superseding cause of the accident. If a modification to the product should have been “reasonably anticipated” by the seller, the changes would bar liability within the meaning of 402A only if the modification was negligently or improperly implemented.

#### E. Technical Defenses Based on the Law

In certain limited situations, a defendant can argue that a product liability claim is barred by a federal statute governing the manufacture and distribution of the product. The United States Supreme Court has held that federal preemption of state law occurs when (1) Congress explicitly preempts the state law; (2) a state law actually conflicts with federal law; and (3) 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 the federal preemption defense may be available to a product manufacturer:

1. Automobiles – The National Traffic and Motor Vehicle Safety Act of 1996, is an expansive law dealing with uniform regulations for motor vehicle safety. 49 U.S.C. §30101, *et. seq.*
2. Drug Labeling – The duties of drug manufacturers, packers and distributors regarding the labeling of prescription drugs is governed by 21 U.S.C. §352 and accompanying regulations.
3. Medical Devices – The Medical Device Amendments of 1976 (MDA), 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.” 21 U.S.C. §360c, *et. seq.*
4. Certain Chemicals – The Federal Insecticide, Fungicide and Rodenticide Act provides regulations regarding certain chemicals and related devices. This federal statute can be found at 7 U.S.C. §136v.

Essentially, defendants raise the federal preemption defense under acts of Congress and claim that 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, product liability claims are barred and expressly preempted by federal law.

Manufacturers of products are equipped with an arsenal of defenses, both common law and statutory, that can be raised in product liability claims. The product liability doctrine does not render manufacturers to be the defenseless, deep-pocket insurers of their products as they would like supporters of tort reform to believe. Rather, courts applying the doctrine merely required manufacturers to produce a product that is free of defects when it leaves the manufacturer’s control.

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