Fall Back/Spring Ahead: A Review of the Most Pivotal Product Liability Decisions in the Last Year and a Preview of Issues and Cases to Watch

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"The law must be stable, but it must not stand still." – Roscoe Pound (1922)

If Roscoe Pound were alive today, it is likely that he would be amazed at just how fast the law changes in this day and age. It has been 361 days since the last IADC Product Liability Roundtable and since that time the landscape of product liability law continues to shift and move on an almost daily basis. The purpose of this presentation is simple – we intend to shed light on some of the most important decisions and case developments from the past year. In addition, we will highlight some of the new issues that we are predicting will shape the next 365 days. Not to state the obvious, the cases discussed are not a comprehensive list. It would literally be impossible to cover all 50 states and their attendant federal jurisdictions in 45 minutes. However, we believe that we have identified cases whose impact will expand beyond local interest.

- Mark, Tonya, Peter, and Katie

Preview of A Product Liability Case to Watch: *Gilead Tenofovir Cases*

The American Tort Reform Foundation has labeled California a perennial "Judicial Hellhole" and "a breeding ground for novel legal theories." The California Court of Appeal's recent decision in *Gilead Tenofovir Cases*, 98 Cal.App.5th 911 (2024), no doubt adds to that reputation. Indeed, the court overrode a century of common law to impose on manufacturers a novel duty that no court has recognized before. The *Gilead* court held that the manufacturer of a non-defective prescription medication has a duty to continue developing and to market without delay an alternative medication that it "knows" will be "safer" for "some" consumers. The case, which is on review before the California Supreme Court, threatens to upend product liability law in California and other jurisdictions.

The *Gilead* plaintiffs are 24,000 HIV-infected patients who claim to have suffered rare bone density and kidney side effects from Gilead Life Science's tenofovir disoproxil fumarate (TDF) medication, which is used to treat HIV. The plaintiffs do not contend that TDF is defective, however. Instead, they allege that their harm resulted from Gilead's decision to delay the commercialization of an alternative medication—tenofovir alafenamide fumarate (TAF)—that would have been safer for them. Based on the results of a single 14-day, 30-patient Phase I/II clinical trial that showed TDF and TAF had similar safety profiles, the plaintiffs contend that Gilead knew TAF was safer than TDF but delayed bringing the medication to market in a bid to maximize sales of TDF while using the later release of TAF to extend the patent coverage of tenofovir-related medications. Relying solely on those allegations, the Court of Appeal upheld the trial court's denial of Gilead's motion for summary judgment, holding that "a drug manufacturer, having invented what it knows is a safer, and at least equally effective, alternative to a prescription drug that it is currently selling and that is not shown to be defective, has a duty of reasonable care to users of the current drug when making decisions about the commercialization of the alternative drug." *Id.* at 922.

The Court of Appeal's decision poses a host of doctrinal problems that the California Supreme Court will need to work through. For decades, courts in California have conditioned a plaintiff's right to recover in negligence for injury caused by a product on proof of a product defect. Rather than follow those precedents, however, the *Gilead* court cast them aside in favor of a new rule

permitting recovery in negligence even when there is no showing that the injury resulted from a defect. The court justified that novel approach by characterizing the plaintiffs' product liability claim as a general negligence claim rather than a negligent design claim, which the court agreed requires proof of a defect. And in so doing, the court ensured that the jury will not need to engage in the traditional risk-benefit balancing applicable to any design claim, which requires consideration of whether the product's challenged design achieves reasonable safety under a multitude of varying conditions, and whether the alternative design poses a risk of injury in other situations. So long as the plaintiffs can prove that TAF would have been safer for *them* (a small subset of all TDF patients), a jury can find that Gilead acted unreasonably in delaying its commercialization—even though there is no dispute that the benefits of TDF exceed its risks (both for them and all other patients who took the medication), and regardless of whether TAF poses a risk of harm to *other patients*. By eliminating the need to weigh the competing considerations involved in designing prescription medications, the Court of Appeal effectively erased the risk-benefit test, which has governed strict liability design-defect and negligent design claims for decades, and replaced it with a new test that is tantamount to absolute liability whenever there is a safer alternative for some subset of patients.

Moreover, if left in place, the new liability test adopted by the Court of Appeal almost certainly will apply outside the prescription medication context. The Court of Appeal ensured that outcome by emphasizing that the legal duty of any manufacturer can extend beyond the duty not to market a defective product, and by broadly pronouncing that a plaintiff may recover for harm caused by any product notwithstanding the plaintiff's inability to prove a product defect. For example, under the *Gilead* court's reasoning, an automaker that sells a non-defective car but failed to complete development of and bring to market a known alternative design that might be safer for some users under some circumstances would be subject to liability no matter which way the scale tips under a traditional risk-benefit balancing.

Finally, if allowed to stand, the novel duty recognized by the Court of Appeal risks damaging more than just legal doctrine. It is bound to disrupt the product-development process in ways that are harmful to consumers and manufacturers alike. Manufacturers must consider and balance a host of competing considerations when making design decisions. These considerations include budgetary constraints, consumer safety, product functionality, market demand, aesthetics, and pricing, to name but a few. Given the relative complexity of design decisions and the trade-offs that frequently are required in the adoption of alternative designs, manufacturers invariably must make tough choices when balancing these competing considerations. If juries can penalize manufacturers for delay in commercializing alternatives to non-defective products that may be safer for some subset of consumers, then manufacturers will change their behavior. The result of those behavioral changes, however, is unlikely to be safer products, as the *Gilead* court projects. Instead, the boundless duty recognized by the court is far more likely to stifle innovation, reduce choice, increase prices, compromise safety, and subject manufacturers across all industries to limitless liability for just about any decision made in the product-development process.

Briefing in the California Supreme Court on Gilead's petition for review is now complete. The Supreme Court has not yet scheduled oral argument. Once oral argument occurs and the case has been submitted, the California Supreme Court will have 90 days to file its written decision.

Preview of A Product Liability Case to Watch: *Deditch v. Uber Technologies, Inc., et al.*

The legal landscape regarding digital apps and product liability law is evolving. While traditionally product liability law has centered on tangible personal property, courts are increasingly recognizing that digital apps can be subject to product liability claims. One thing is certain amidst the uncertainty: the law will continue to evolve as courts grapple with how to apply the existing product liability legal framework to the unique characteristics of digital apps.

Whereas some states rely heavily on common law principles of negligence and strict liability for their product liability regime, other states have statutes that abrogate some or all common law claims sounding in product liability. For those states with product liability statues, some leave the term "product" undefined, while others adopt more restrictive definitions tied to "tangibility."

Ohio is a state that has codified its product liability regime. The Ohio Product Liability Act is expansive in that it abrogates all common law product liability claims or cause of actions, yet restrictive in that it only applies to "products" that constitute "tangible personal property." This begs the question: how does an Ohio plaintiff allege a product liability claim based on a digital app, given that the claim must be brought under the Act, but an app is not a product as defined in the Act?

The Northern District of Ohio was recently faced with this very question, and promptly certified it to the Ohio Supreme Court to answer on July 14, 2025.

The case of ***Deditch v. Uber Technologies, Inc., et al***., involves Plaintiff Edward Deditch, who in November 2019 was rear-ended on an Ohio highway by a driver who was switching between his Uber and Lyft apps to identify new passengers for pickup. 2025 WL 1928937, at *1 (N.D. Ohio, 2025). Plaintiff was injured in the accident and filed a lawsuit against Uber, Lyft, and two of Uber's subsidiaries for negligence, arguing the rideshare companies have a duty to ensure their apps do not cause distracted driving. *Id.* Lyft moved to dismiss the case, arguing that the Ohio Product Liability Act abrogates Plaintiff's claims. *Id.*

The Ohio Product Liability Act "abrogate[s] all common law product liability claims or causes of action." Ohio Rev. Code 2307.71(B). But the Act also ties abrogation of common-law claims to its defined term "product liability claim," which in turn depends on an allegation of a "product." Indeed, all available theories of liability under the Act involve a "product." Ohio Rev. Code § 2307.71(A)(13)(a) (defective design "of that product"); *id.* § 2307.71(A)(13)(b) (failure to warn "associated with that product"); *id.* § 2307.71(A)(13)(c) (failure "of the product" to conform to a representation). The Act defines a "product" as "any object, substance, mixture, or raw material that constitutes tangible personal property." *Id.* § 2307.71(A)(12)(a).

The Court summarily concluded a digital app is not tangible personal property. *Deditch* at *2. Indeed, Lyft concedes that its app is not a "product" under this definition. *Id*. The plain text of the statute therefore does *not* appear to abrogate a common-law negligence claim based on an app, because an app is not a "product" within the meaning of the Act.

Yet Ohio law makes clear that the Act abrogates *all* common-law claims sounding in product liability. *Id.* at *4. And to date, all cases brought under the Act have involved "products" within the meaning of the Act, so no Ohio court has addressed this question in the context of software, computer code, a website, or an app. *Id.* Consequently, the U.S. District Court for the Northern District of Ohio certified this question to the Ohio Supreme Court on July 14, 2025: Does the Ohio Product Liability Act abrogate common-law claims alleging personal injuries from the use of a digital app, which is not a "product" within the meaning of the Act? *Id.*

Deditch is an important case to watch, as it will not only answer this question under the Ohio Product Liability Act, but it will also set important precedent for the many others states that have enacted product liability statutes.

An Overview of a Products Liability Case to Watch: *Video Game Addiction*

The issue of addiction to video games is nothing new. In fact, it has been debated and studied since the 1970s, with games like Space Invaders and video arcades. Researchers studied whether exposure to violent video games caused young players to become aggressive or violent, for example. Most recently, plaintiffs have asserted products liability, consumer protection, tort, and fraud-based claims against video game creators, alleging that they intentionally created addictive video games.

Plaintiffs in these cases generally assert the same types of theories:

- **The Designs:** Plaintiffs contend that developers are intentionally developing and designing the games to addict children, using feedback loops, reward systems, and other measures developed with the assistance of psychologists that will ensure that the users continue playing the game. These features can be broken into two broad categories of design – gameplay design and monetization design.
- **Targeting Minors:** Plaintiffs contend that the features are specifically targeting minors, who are more susceptible to fraud and manipulation.
- **Emotional and Physical Harm**: Plaintiffs claim that as a result of their addiction to video games, the minor plaintiffs have suffered symptoms such as reduced social interaction, trouble focusing, lying, dropping grades, poor hygiene, ADHD, and withdrawal symptoms.

We have seen trends develop in a handful of recent rulings, which we will highlight here.

No Consolidation

Plaintiffs in five actions sought to centralize video game addiction cases. The movants argued that the cases had broad similarities in terms of defendants' alleged conduct in designing, selling, marketing, and facilitating the use of video games that allegedly caused "prolonged, compulsive game play and, ultimately, addiction through the use of similar features like feedback loops, reward systems, pay-to-win options and artificial intelligence mechanisms." *In re Video Game Addiction Prods. Liab. Litig.*, 737 F. Supp. 3d 1353, 1354 (J.P.M.L. 2024). The court rejected the argument, noting the substantial distinctions between the actions, including the range of games

and defendants, only some of which overlapped and, in some instances, in only one or two matters. For the same reason, the court rejected Plaintiffs' argument that the defendants are linked by virtue of an alleged conspiracy to addict young video game players. *Id*. And Plaintiffs' final argument – that there would be another 10,000 actions filed – fared no better. The case was not consolidated.

Arbitration

Most, if not all, of the video game defendants assert that the claims are subject to mandatory arbitration based on their terms of use or end-user license agreements. *E.g., Antonetti v. Activision Blizzard, Inc.*, 764 F. Supp. 3d 1309, 1314 (N.D. Ga. Jan 31, 2025). For the most part, courts are granting motions to compel arbitration, reasoning that the "clickwrap" or "scrollwrap" agreements can be enforced, so long as the applicable elements of contract formation are satisfied. *Id*. at 1319. Further, the games generally cannot be played without first agreeing to the terms requiring arbitration. *Id*. Courts are rejecting the argument that the plaintiffs were minors at the time of contracting, making the agreements voidable, reasoning that their minority is a defense to enforceability rather than to formation. *E.g., Orellana v. Roblox Corp.*, 769 F. Supp. 3d 1273, 1284 (M.D. Fla. 2025).

Substantive Arguments

The recent decision of the *Angellili* court granting Roblox Corp.'s motion to dismiss provides a good analysis of the plaintiffs' claims and the substantive arguments against them. *Angellili v. Activision Blizzard, Inc.*, --- F. Supp. 3d ---, 2025 WL 1184274 (N.D. Ill. Apr. 23, 2025). Plaintiff and her minor son asserted claims against several developers of video games, gaming consoles and online platforms. Plaintiff alleged that her minor son began playing video games when he was six years old, became addicted, and that the addiction caused emotional distress, loss of friends, problems at school and withdrawal symptoms. *Id*. at *1. Plaintiffs asserted claims for:

- Products liability for design defect, failure to warn and failure to instruct;
- Negligence;
- Intentional and negligent infliction of emotional distress;
- Violations of the Illinois Consumer Fraud and Deceptive Business Practices Act;
- Violations of the Illinois Uniform Deceptive Trade Practices Act;
- Fraudulent or negligent misrepresentation;
- Fraudulent inducement; and
- Civil conspiracy and in-concert liability claims.

Id. at *2.

The Court dismissed nearly all of the claims based on Section 230 of the Communications Decency Act (the "CDA") and the First Amendment. Section 230 of the CDA provides that "no provider … of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." *Id*. at *3 (quoting 47 U.S.C. § 230(c)). The parties did not dispute that Roblox Corp. is a provider of an interactive computer service. The Court concluded that Plaintiffs' claims were based on Roblox Corp.'s publishing of

third-party content, reasoning that Plaintiffs allege that Roblox's "addictive properties are the constant variety, social aspects, and numerous characters, skins, and other content available for purchase," including the content that the users themselves create. *Id*. The court also rejected Plaintiffs' argument that the social aspect of the game contributed to its addictiveness and precluded a Section 230 defense. *Id*. at *4.

The Court also dismissed Plaintiffs' claims that were based upon Roblox Corp.'s own content (as opposed to its third-party content discussed above), reasoning that it is expression protected by the First Amendment. *Id*. at *5. In fact, the court rejected Plaintiffs' attempt to avoid the First Amendment by characterizing the content as "addictive":

… [T]his just seems like another way of saying that Roblox's interactive features make it engaging and effective at drawing players into its world, and First Amendment protections do not disappear simply because expression is impactful. To the contrary, that is when First Amendment Protection should be at its zenith.

Id. at *5 (citations omitted). The Court likewise rejected Plaintiffs' attempt to frame the video games and features as conduct rather than content, or to couch them as commercial speech (which is entitled to less protection). *Id*. at *5-7.

The court readily dispensed with remaining claims. The negligence *per se* claims premised on violations of statutes could not stand where the statutes did not impose strict liability and therefore could not sustain a negligence *per se* claim. *Id*. at *7. Plaintiffs also failed to meet the heightened pleading standard necessary to sustain a fraud claim, particularly when the allegedly fraudulent statements – that "Roblox provides a fun, supportive and educational space where your child's imagination can thrive" amounted to puffery. *Id*. at *8. The Court dismissed the negligence misrepresentation claim for the same reason. *Id*.

What's Next?

A quick search makes it clear that the video game addiction cases are not going away, and we can expect that plaintiffs will continue to assert creative theories of liability. As they do so, defense counsel should be nimble, relying on the arguments that have worked in the past, but also thinking critically and creatively about how to use the policies underlying products liability law to their advantage.

OTHER CASES TO BE DISCUSSED:

- Talc MDL Litigation
- Zantac Litigation
- Berkoski v. Honda, 480 N.J. Super. 379 (2025) (does lack of most up to date technology render a design defective?)
- PFAS Litigation Settlements
- Caranci v. Monsanto, __ A.3d __, 2025 PA Super 101, 2025 WL 1340970 (Pa. Super. May 8, 2025
- The latest in Nuclear Verdicts.