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Why the customer can't always be right in product liability litigation

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Even though the Third Restatement has rejected the consumer expectations test for proving strict liability design defect claims, a number of states still apply both that test and the risk-utility test. The former considers whether a product met the reasonable safety expectations of consumers; the latter inquires whether the benefits of the design outweigh the risks, relative to feasible alternative designs.

Courts retaining the consumer expectations test have expressed concern that the risk-utility test improperly considers manufacturer negligence — a concept at odds with the concept of strict liability.

But what happens when the nature of the alleged product failure is so complex that it is beyond the understanding of ordinary customers? Should liability turn on some vague understanding of a consumer expectation — likely to be little more than an assertion that the product would not cause an injury — or should the manufacturer have an opportunity to present evidence defending the product design under the risk-utility test?

A 2017 appellate decision out of California serves as a reminder that defense counsel for product manufacturers should, where permitted by the jurisdiction, attempt to limit application of the consumer expectations test whenever the design defect facts exceed general consumer knowledge.

CALIFORNIA: CONSUMER EXPECTATIONS TEST REQUIRES CONSUMER UNDERSTANDING

This summer, in *Trejo v. Johnson & Johnson*, a California appellate court reaffirmed the state's limit on the consumer expectations test in reversing a plaintiff's verdict against the manufacturer of an over-the-counter drug. 13 Cal. App. 5th 110 (2d Dist. 2017).

The court found reversible error in the trial court's jury instruction on the consumer expectation test, reasoning that ordinary consumers would not know the mechanism by which the commonly used drug (ibuprofen) in rare instances caused a skin disorder. *See id.* at 156–60.

The mere assertion that a consumer would not expect to contract a rare skin disorder from an over the counter drug would not suffice to establish a design defect, the court reasoned, because "[i]f th[at] were the end of the inquiry, the consumer expectation test always would apply and every product would be found to have a design defect." *Id.* at 159.

In reversing the verdict, *Trejo* invoked the California Supreme Court's guidance from *Soule v. General Motors Corp.*, 882 P.2d 298, 309 (Cal. 1994): "the consumer expectations test is reserved for cases in which the everyday experience of the product's users permits a conclusion that the product's design violated minimum safety assumptions."

Yet, that test presumes that the average consumer has a baseline understanding of the product's function and defect; "when the ultimate issue of design defect calls for a careful assessment of feasibility, practicality, risk, and benefit, the case should not be resolved simply on the basis of ordinary consumer expectations." *Id.* at 305.

What happens when the nature of an alleged product failure is so complex that it is beyond the understanding of ordinary customers?

The applicability of the consumer expectations test turns not on the complexity of the product, but on the "circumstances of its failure," and whether "ordinary consumers can form minimum safety expectations." *Trejo*, 13 Cal. App. 5th at 156 (citation omitted); *McCabe v. Am. Honda Motor Co.*, 100 Cal. App. 4th 1111, 1124 (2002).

Beneath these rules is a concern that parties will present, and juries will be persuaded by, expert testimony as to an issue of fact — i.e., ordinary consumers' expectations. *See Soule*, 882 P.2d at 308 (explaining that it "would invade the jury's function" to permit expert testimony as to "what an ordinary consumer would or should expect").

Indeed, the trial court in *Trejo* needed to give multiple warnings for counsel not to solicit such improper testimony — a sign to the appellate court that the risk-utility test would be necessary to ascertain the scientifically complex design defect theory. *See Trejo*, 13 Cal. App. at 159–60.

Beyond the pharmaceutical context, California courts have rejected the consumer expectations test in design defect cases involving complex car crashes and allergic reactions to medical safety equipment. *E.g., Soule*, 882 P.2d at 309–10 (reaction of car

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suspension and frame to crash dislodging left front wheel into driver's compartment); *Mansur v. Ford Motor Co.*, 197 Cal. App. 4th 1365, 1375–78 (2011) (collapse of car roof during vehicle rollover); *Morson v. Superior Court*, 90 Cal. App. 4th 775, 792 (2001) (allergic reaction to latex gloves); *Pruitt v. Gen. Motors Corp.*, 72 Cal. App. 4th 1480, 1483–84 (1999) (airbag deployment during low-speed collision).[1]

THE LIMITS OF CONSUMER EXPECTATIONS ELSEWHERE

Though differing in approach, courts in other jurisdictions have also expressed concerns about the limits of the consumer expectation test or taken steps to avoid the complex products problem.

For instance, Connecticut reconciled the problem of "complex products for which a consumer might not have informed safety expectations" by adopting a "modified consumer expectations test" that incorporates risk-utility factors as the default standard. *Izzarelli v. R.J. Reynolds Tobacco Co.*, 136 A.3d 1232, 1241 (Conn. 2016).

Under the "modified" test, the jury weighs the product's risks and utility to determine whether, in light of that evidence, a reasonable consumer would deem the product unreasonably dangerous. *Id*.

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Florida seemed to be taking a similar path with a complex-products limiting principle prior to 2015, following the guidance of *Force v. Ford Motor Co.*, 879 So. 2d 103, 110 (Fla. Ct. App. 2004) ("conclud[ing] that there may indeed be products that are too complex for a logical application of the consumer-expectation standard," but "leav[ing] the definition of those products to be sorted out by trial courts"). *Accord Tran v. Toyota Motor Corp.*, 420 F.3d 1310, 1314 (11th Cir. 2005).

For instance, federal courts applied a risk-utility standard instead of the consumer-expectations test to design defect claims against medical devices, because the cases "pertain[ed] to a complex medical device, accessible to the consumer only through a physician." *Tillman v. C.R. Bard, Inc.*, 96 F. Supp. 3d 1307, 1339 (M.D. Fla. 2015) (vein-filtration implant); *see also Rydzewski v. DePuy Orthopaedics, Inc.*, No. 11-80007-Civ., 2012 WL 7997961, at *3 (S.D. Fla. Aug. 14, 2012) (hip implant).

But Florida may be moving in a new direction after its supreme court's 2015 decision rejecting the Third Restatement's risk-utility standard. *See Aubin v. Union Carbide Corp.*, 177 So. 3d 489, 494–95, 511–12 (Fla. 2015).

Aubin did not disapprove of *Force* or the complex products distinction, but stated that the parties retained the option to offer evidence of safer alternatives — facts typically relevant to a risk-utility analysis. *Id.* at 511.

It remains to be seen whether Florida courts will persist with the complex-products distinction recognized in *Force*. *See, e.g., Dugas v. 3M Company*, No. 3:14-cv-1096-J-39JBT, 2016 WL 1271040, at *7 (M.D. Fla. Mar. 29, 2016) (citing *Aubin* and considering both the consumer-expectations and risk-utility tests).

Tennessee and Pennsylvania courts have sent conflicting signals, but also appear to permit limits on the consumer-expectations test.

In *Jackson v. General Motors Corp.*, the Tennessee Supreme Court seemingly rejected the complex products limitation on the consumer expectations test. 60 S.W.3d 800, 804 (Tenn. 2001) (clarifying prior decision, stating that "[o]ur intent ... was not to limit the application of either test, but to hold that, in order to be successful under the consumer expectation test, the plaintiff must present evidence that the ordinary consumer has an expectation regarding the safety of the product," and reaffirming that both the consumer expectations and risk-utility tests "may be applied in all cases where the product is alleged to be unreasonably dangerous").

Yet, the *Jackson* court also favorably cited *Soule*'s reversal of the consumer expectations jury instruction, and stressed that a plaintiff must "provide sufficient evidence to create a question of fact that the product was 'dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.'" *Id.* at 805 (citation omitted).

Following the latter guidance, federal courts in Tennessee have applied the state's prudent manufacturer variation on the risk-utility test to claims against complex products. *Brown v. Raymond Corp.*, 318 F. Supp. 2d 591, 597–98 (W.D. Tenn. 2004) (concluding that prudent manufacturer test applied to claims against forklifts and granting summary due to the lack of admissible expert testimony).

In Pennsylvania, the Supreme Court recently declared that the plaintiff, as "master of the claim," may pursue design defect claims under both the consumer expectations and risk-utility standards. *Tincher v. Omega Flex Inc.*, 104 A.3d 328, 406 (Penn. 2014).

At the same time, the *Tincher* court expressed concerns about *Soule*'s "simple/complex classifications," noting that the standard "begs — or shifts — the question of which designs are complex enough for application of the preferred test." *Id.* at 392.

Yet, the court nevertheless cited favorably *Soule*'s reversal of a consumer expectations jury instruction where the evidence did not support the theory, and reiterated that trial courts should "act in [their] ordinary gate-keeper role" in winnowing out unsubstantiated claims. *Id.* at 407 & n.29.

As in Tennessee, federal courts in Pennsylvania have interpreted the state supreme court's decision as a green light to apply the complex products distinction, and they have closely hued California's complex-product/complex-failure standard. *DeJesus v. Knight Indus. & Assocs., Inc.*, No. 10-07434, 2016 WL 4702113, at *7–9 & n.9 (E.D. Penn. Sept. 9, 2016) (following *Tincher* and *Soule*, and concluding that the consumer expectations test does not apply to defect claims alleging that a factory lift table needed additional safety features); *see also Capece v. Hess Maschinenfabrik, GmbH & Co. KG*, No. 12-cv-1542, 2015 WL 1291798, at *3 (M.D. Pa. Mar. 20, 2015) (noting parties' agreement that *Tincher*'s consumer expectations test did not apply to claims against a concrete block machine).

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Illinois, meanwhile, has resisted calls to abandon the consumer expectations test, but stresses that its consumer expectations test is a method of proving that a product is unreasonably dangerous, not a distinct theory of liability. *Mikolajczyk v. Ford Motor Co.*, 901 N.E.2d 329, 344–48 (Ill. 2008).

And in Illinois, the consumer expectations test is a "narrow," "single-factor test" that considers "whether the product is unsafe when put to a use that is reasonably foreseeable considering its nature and function." *Id.* at 352.

Notably, in Illinois, "[n]o evidence of ordinary consumer expectations is required, because the members of the jury may rely on their own experiences to determine what an ordinary consumer would expect," and the risk-utility test factors consumer expectations into the multi-factor analysis. *Id*.

While preserving the consumer expectations test, the Illinois Supreme Court held that each party has the right to present evidence under either the consumer expectations or risk-utility tests, and that the plaintiff's election of the former does not preclude defendants from seeking a risk-utility instruction. *Id.* at 352–53.

To this rule, the U.S. Court of Appeals for the Seventh Circuit held that, at least for cases heard in federal court, plaintiffs asserting that complex products suffered from design defects under the consumer expectations test must present expert testimony demonstrating that the product was unreasonably dangerous. *Show v. Ford Motor Co.*, 659 F.3d 584, 587 (7th Cir. 2011) (rejecting plaintiffs' argument that jurors' "expectations as consumers" were "all that matter[ed]" and concluding that expert testimony was necessary to show unreasonable dangerousness in vehicle rollover case).

The *Show* court resisted the plaintiffs' res ipsa loquitor theory that vehicles "'just don't roll over in low-speed collisions' unless defectively designed." *Id.* Without expert analysis of the crash, the court reasoned, "[h]ow do [plaintiffs] know that [the vehicle is defective]?" *Id*. The jurors would have to rely on speculation without expert testimony. *Id.; accord Hale v. Bayer Corp.*, No. 15-cv-00745, 2017 WL 1425944, at *10 (S.D. Ill. Apr. 21, 2017).

PRACTICE TIPS: THE RISK AND UTILITY OF LIMITING THE CONSUMER EXPECTATIONS TEST

Though states have various approaches to proving a strict-liability design defect claim, many are receptive to arguments that cases involving technical products and/or complex product-defect theories preclude or limit application of the consumer expectations test. Plaintiffs typically have a harder time proving their cases when forced to contend with the risk-benefit analysis.

Therefore, when it serves defense strategy, counsel would be wise to consider:

- Seeking admissions of plaintiffs' experts that the manner of the alleged product failure required some technical knowledge to understand;
- Objecting to expert testimony as to an ordinary consumer's expectations of product performance as foundation-less and unreliable;
- Filing a dispositive motion arguing that the complexity of the product defect theory requires expert testimony and seeking application of a risk-utility standard;
- Opposing a consumer expectations jury instruction whenever governing law permits a legal objection (i.e., inappropriate expert opinions regarding consumer expectations) or a fact-based objection (complexity of defect theory, not common knowledge); and
- In the event the court still gives a consumer expectation instruction, seeking in the alternative to build risk-utility factors into that instruction or the inclusion of a separate risk-utility test instruction.

NOTES

[1] The First Circuit, applying Puerto Rico law, followed California law forbidding the consumer expectations instruction where the defect theory requires an assessment of feasibility, practicality, and risk, and consumers' everyday experience sheds no light on a product design's minimum safety assumptions. *Quintana-Ruiz v. Hyundai Motor Corp.*, 2002 WL 19411486, 303 F.3d 62, 77 (1st Cir. 2002) (following *Barker v. Lull Eng'r Co.*, 573 P.2d 443 (Cal. 1978) and *Soule*).

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