



The Voice

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This Week's Feature

Product Liability Is the Most Interesting Area of Law

by Kenneth Ross, Of Counsel, Bowman and Brooke LLP, Minneapolis, MN

For over 20 years, I have taught product liability to law students. As part of my class, I ask the students to bring in what I call “product liability news of the week.” The purpose is to talk about recent developments in product liability related activities and also to show them that there is always something going on in society that directly or indirectly deals with the product liability theories we will discuss in class.

I tell the students that product liability impacts the products we buy, the products we can't buy, the cost of the products we buy, and how easy or hard it is to use them. No other area of law has such an effect on our daily lives.

We discuss the role of the government in enhancing the safety and cost of products, the role of lawyers in advising their clients on how to comply with the law and how to make their products more defensible in the event of litigation, the role of litigation in fairly and efficiently resolving disputes with people injured by the use of products, and the proper responsibility of consumers and product users in ensuring their safety and the safety of others during product use.

Product liability matters can also involve engineering, psychology, human factors, economics, business ethics, personal behavior in the U.S. and around the world, U.S. and foreign business practices, and sometimes even foreign diplomacy. And, many times, other areas of law become a part of a product liability matter. Over the years, in advising on product liability matters, I've also dealt with employment and labor law, antitrust law, intellectual property law, advertising law, administrative law, corporate and securities law, environmental law, and, of course, contracts and sales law.

What continually amazes me is how the “news of the week” succeeds every year in achieving my goals. There is so much going on almost every day that it sometimes overwhelms class time. I'm convinced that even those students who don't practice product liability law in their careers will think differently about the products they buy, the warning labels they see, and the products they own that are recalled. They will wonder whether some of this is necessary or fair and why some manufacturer didn't do a better job. And they will wonder why the government is doing something or should not be doing something to affect the safety of products we use.

To illustrate these points, I wanted to describe some recent product

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liability news that raise interesting and important questions.

- ¿ Over the years, I have been fascinated by questions of the effect of safety on behavior. For example, what products or product features encourage or discourage safety. Do some safety features encourage unsafe behavior because product users think that the product is safer than it really is? In other words, are consumers lulled into a false sense of security?

In addition, are some users like children unable to identify and evaluate product risk because their parents watch over them continually and only allow them to use products that are so safe that it is impossible for them to be hurt? This issue recently was raised in New Zealand where a playground researcher argued that designers shouldn't "dumb down" playgrounds to eliminate risk because children will instead use the equipment in risky ways. The researcher said that this risky behavior was encouraged because children were bored by the standard and "safe" use of the equipment. Other research in the U.S. supports this view.

Given this behavior, how does the designer, who wants to avoid injuries and subsequent claims and litigation, design a product where kids don't get bored and that allows them to encounter some risk but not enough risk to get hurt? And should it be the designer's responsibility to teach kids about risk and risk avoidance? Interesting questions with no clear answers.

- ¿ Warnings have been one of the most frustrating and difficult issues to deal with. Is it reasonably foreseeable that people will ignore warnings and not read instructions? Of course it is. In that case, what if anything does a manufacturer have to do about it? Not sell the product, redesign it so it is safer, or just rely on the warnings as a defense to the inevitable lawsuits?

As we know, the law prefers that manufacturers design out hazards rather than rely on warnings. But the law recognizes that if a product is reasonably safe and there is not a "reasonable alternative design," they can then rely on warnings to make the product safe. In that case, they have to rely on the user reading and following the warnings. And if they don't, they defend the case based on the user's failure to do so.

Of course, if users continue to disregard warnings and accidents occur, the manufacturer is in a difficult spot. Recently, the Consumer Product Safety Commission sued a manufacturer to force it to stop selling its products, where the warnings did not appear to be preventing accidents. *The New York Times* described the situation involving powerful magnets used as desk accessories, stating "Buckyballs are made from rare-earth elements, which makes them much more powerful than most magnets—and potentially more dangerous when ingested. Though the product is marketed to adults and festooned with warning labels, regulators have moved to stop sales because children keep swallowing Buckyballs and similar products made by others."

So, the question is whether this is an overreaction by the government and whether there is anything more that the manufacturer could or should do to minimize future risk? Or is the future of this product dependent on careless adults who allow their children access to potentially dangerous adult products? And, does this product's risk outweigh its utility and therefore should not be sold in any form?

- ¿ As I mentioned, product liability can go well beyond just personal injury or property damage. There are many cases involving

product problems that also result in actions involving breach of contract, securities law violations and deceptive trade practices. A recent series of cases illustrate the point.

Lately, there has been a flurry of legal activity involving “toning” shoes. These are exercise shoes that allegedly tone you or firm up your body when you walk or run in them. There have been three kinds of legal actions: (1) claims by individuals alleging that the shoes caused them injury; (2) claims by individuals alleging that the shoe manufacturer defrauded them by improper advertising that caused them to buy these products; and (3) a lawsuit by the U.S. government suing for violation of federal laws concerning deceptive advertising.

Recently, the two largest manufacturers, Reebok and Skechers, settled their deceptive advertising cases with the U.S. government’s Federal Trade Commission. Reebok settled for \$25 million and Skechers settled for \$45 million. The Reebok and Skechers complaints are part of a general FTC effort to enforce federal law that says that ads must be truthful, not misleading, and, when appropriate, backed by scientific evidence.

Consumers then filed class actions against Reebok, alleging claims of unjust enrichment, untrue and misleading advertising and that consumers overpaid for shoes that did not perform as advertised.

In addition, in Baltimore, a consumer fraud class action lawsuit has been filed on behalf of consumers who allege misleading advertising influenced their decision to buy Skechers “Shape-Ups” toning shoes. The lawsuit seeks money damages for consumers who paid a “premium price” for Skechers “Shape-Ups” based on TV, print and Internet ads that touted the toning shoes’ health benefits.

In reality, the complaint alleges, the shoes provide no additional health benefits. Instead, they pose a risk of injury due to their pronounced rocker bottom sole, according to the complaint. The lawsuit seeks money damages and an order that would stop Skechers from “deceptive and unlawful advertising.”

Lastly, injured consumers have filed individual and class action lawsuits against Reebok and Skechers alleging that these toning shoes are defective in both design and warnings and that these defects caused them injury.

These cases show how some product liability problems can turn into much larger legal issues with complex intertwining legal theories.

Product liability provides a cornucopia of legal and nonlegal issues that I think make it a candidate for the most expansive and interesting area in the law. I have been fortunate to be able to devote my career to product liability and have enjoyed every minute of it.

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