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TOP VERDICTS

Having their cake and eating it too

The admissible scope of expert testimony in consumer expectations cases

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"You can't have your cake, and eat it too."

This popular common saying aptly describes a situation that is becoming ever-more common in design defect cases litigated in California: The plaintiff seeks to prove the alleged defect under the "consumer expectations" test — which involves a lower evidentiary standard than the alternative "risk-benefits" test — while at the same time reaping the benefit derived from presenting expert testimony that serves to bolster the plaintiff's theory of design defect. The admission of expert testimony on design defect in consumer expectations is, except in certain clearly defined circumstances, inconsistent with the origins of, and theory underlying, the consumer expectations test.

As originally conceived, the consumer expectations test was intended to apply in cases where the plaintiff's theory of defect is straightforward, and the plaintiff's injuries are — to borrow a phrase used by multiple courts — "res ipsa-like." Increasingly, however, a trend has emerged where, rather than engaging in an evaluation of whether the plaintiff's overall theory of defect is one that engages the minimum safety assumptions formed by ordinary consumers, trial courts have tended to focus upon whether the product at bar is in common use as being determinative of whether the consumer expectations test is appropriate. Thus, it is important in such cases to define the admissible scope of expert testimony under the consumer expectations test through pre-trial motion practice, and, if necessary, through motion practice at trial.

The California Supreme Court has established two alternative tests for determining whether a product is defectively designed, each test appropriate to its own circumstances: the "risk-benefits" test, and the "consumer expectations" test. Both tests require different degrees of evidentiary proof, and the determination of which test applies in a particular case is not always straightforward. Resolution of this issue requires the trial court to evaluate the plaintiff's overall theory of defect, and particularly, the scope of the evidence required to prove that theory. Under the risk-benefits test, the jury must decide whether the dangers inherent in a product's design outweigh the benefits. On the other hand, the consumer expectations test asks whether a product's design failed to perform as safely as an ordinary consumer would expect, when used in an intended or reasonably foreseeable manner.

In theory, the consumer expectations test is intended for cases which involve extreme product failures, under non-extreme conditions. The theory is, thus, that in cases involving such failures, expert testimony is unnecessary. An ordinary consumer should, in the paradigmatic case, be able to infer the design defect from the circumstances of the product's failure. Indeed, any expert testimony on design is rarely relevant for any other purpose than to bolster the plaintiff's theory of defective design, which is inconsistent with the evidentiary theory underlying the consumer expectations test. In making this point, it is important to distinguish between expert testimony on design defect, the admissible scope of which should be very limited or completely excluded, in contrast with expert testimony on causation, which is generally admissible in consumer expectations cases (for example, in cases involving disputed issues as to whether the force of a collision, and not the alleged defect, caused the plaintiff's injuries). Additionally, in certain rare circumstances where a product is only common to a niche class of skilled consumers (e.g., operators of heavy machinery), limited expert testimony on the product's ordinary use has been permitted.

Notwithstanding the above argument, the argument for effectively unlimited expert testimony in consumer expectations cases draws upon the California Supreme Court's decision in Soule v. General Motors Corp., where the court refused to categorically exclude expert testimony on design defect in consumer expectations cases. Thus, under this interpretation of Soule, expert testimony on design defect is admissible in consumer expectations cases, except to the extent that an expert cannot testify as to an "ordinary consumer's" expectations.

Defining the admissible scope of such testimony, however, requires analysis of what that phrase, "an ordinary consumer's expectations," means — what do ordinary consumers form expectations about? If the theory of relevance for technical expert testimony is that the testimony is required to help the jury understand the alleged defect (put another way, to help them decide what an ordinary consumer expects), doesn't such testimony go to

the ultimate determination (i.e., "an ordinary consumer's expectations")? These are questions that counsel should be prepared to address in consumer expectations cases in order to aid the court in reaching its related determinations on the issues of (1) whether the case is one for the consumer e x p e c t a t i o n s test or, rather, the risk-benefits test, and (2) if the court determines that the plaintiffs can proceed under a consumer expectations theory, the admissible scope of an expert's testimony under the consumer expectations test.

To summarize: In cases where plaintiffs seek to proceed under a consumer expectations theory, while also introducing expert testimony, effective pre-trial motion practice can help to ensure that the scope of an expert's testimony is limited to what is in the admissible scope under the consumer expectations test, or conversely, to flesh out and demonstrate to the court why the plaintiff's theory of defect is not within the scope of the consumer expectations test.

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