Product Liability

THE SUPREME COURT OF CALIFORNIA WAS SCHEDULED TO HEAR ORAL ARGUMENTS IN LATE May in *Coito v. Superior Court* (182 Cal.App.4th 758 (2010), rev. granted June 9, 2010 and pending as No. S181712) a case that will determine whether witness statements collected by attorneys are protected under California's work product privilege civil procedure code (CCP § 2018.030)—previous rulings have found that the statements are discoverable to the surprise of some. Our panel of experts from northern and southern California and Minnesota discusses the rulings' potential impact on product liability cases, as well as the consumer expectation test versus the risk benefit test, changing CACI instructions, and the difference between a negligent failure-to-warn claim and a strict liability failure-to-warn claim. They are Thomas D. Nielsen and Michael C. Osborne of Archer Norris; Jenny Covington and Brian Takahashi of Bowman and Brooke; Paul Rosenlund of Duane Morris; and William "Skip" O. Martin Jr. of Haight Brown & Bonesteel. The roundtable was moderated by *California Lawyer* and reported by Laurie Schmidt of Barkley Court Reporters.

EXECUTIVE SUMMARY

MODERATOR: What is the impact of the increasing number of class action filings asserting a Consumer Legal Remedy Act (CLRA)(Cal. Civ. Code §§ 1750–1784) violation for failing to disclose an alleged "safety" concern at time of sale?

TAKAHASHI: A fair number of CLRA class actions have been filed in the past few years alleging that manufacturers have failed to disclose the possibility of a safety defect occurring after the product's warranty has expired. The defects have ranged from front windshields cracking to computers overheating, all with the alleged remedy of restitution because consumers should have been told about these alleged defects at the time of sale. By merely labeling the defect as "safety related," plaintiffs counsel argue that no affirmative misrepresentation is necessary to assert a viable CLRA claim, because the failure to disclose a safety defect is an actionable material omission.

Most manufacturers file 12(b)(6) motions. Others have prevailed at the class certification stage. Some cases have settled. Harley Davidson just beat certification relying on *Daubert* to challenge plaintiffs' expert opinion regarding an alleged common defect. (*Bruce v. Harley-Davidson Motor Co.*, Inc., 2012 WL 769604 (C.D. Cal.).) Ford obtained summary judgment on a claim that its 2000–2001 Ford Focus vehicles had a substantial post-warranty failure rate for their ignition locks (*Smith v. Ford Motor Co.*, 749 F.Supp.2d 980 (N.D. Cal. 2010)). The Ninth Circuit affirmed *Smith* in an unpublished decision last year. (See 2011 WL 6322200 (9thCir.).) So CLRA safety nondisclosure cases are being decided at the district court level by different district judges applying different standards at the 12(b)(6), summary judgment, and class certification stages.

MARTIN: Sounds like the old Business and Professions Code lawsuits that were filed several years ago except that it's in a different context.

TAKAHASHI: The irony is that Honda obtained a good decision in *Daugherty v. American Honda Motor Co.*, Inc., (144 Cal.App.4th 824 (2006)). The court found that where a manufacturer makes no affirmative misrepresentation, all the consumer can reasonably expect is that the product will perform for the life of the warranty. Summary judgment was granted and the court of appeal affirmed. The court of appeal also mentioned there was no allegation of any safety defect in the *Daugherty* complaint. Ever since then, class action plaintiffs lawyers have jumped on this dicta to argue they don't need to prove affirmative misrepresentation of a product's characteristics where "safety" is involved. Instead, it's an actionable CLRA material omission if some component part arguably related to "safety" fortuitously fails after the warranty expires.

ROSENLUND: We see a growing number of lawsuits that involve claims for diminution in value or some other abstract loss, but where the product continues to perform as intended, and there is in reality no loss or damage. How can you compensate someone for a possible future loss that may or may not arise? The question is: What's the best way to get these claims in front of the courts in a uniform way? Until we get some more appellate guidance from these auto cases, it will be tough to tell our clients what to expect. There's not much case law other than basic holdings that a warranty is a warranty and, we should live by the manufacturer's promise.

COVINGTON: Paul [Rosenlund] is right that manufacturers should be on the lookout, because we've seen at least one medical device case in this area. So it's not just auto manufacturers that are targeted.

TAKAHASHI: Appliance manufacturers and computer companies have also been on the receiving end of these types of lawsuits. The Ninth Circuit just affirmed a 12(b)(6) dismissal in *Wilson v. Hewlett-Packard Co.* (668 F.3d 1136 (9th Cir. 2012)), where plaintiffs alleged there was a safety issue with laptop power jacks. Most computers and appliances have up to a two-year warranty. These cases are just now being filed en masse to take advantage of this exception, and it's going to take further Ninth Circuit rulings to definitively decide where this is going to go.

OSBORNE: In the *Smith v. Ford Motor* case the definition of a safety concern is interesting. There were allegations that the ignition locking could be a security problem—the person might be stranded. The court distinguished it as a security issue versus a safety concern. I've used that in consumer warranty cases where plaintiffs have to prove a substantial impairment in the safety of the vehicle. We have cases where they argue that breaking down and being stranded is a safety issue, but we have used that opinion to distinguish between being secure, which is not the same thing as the vehicle being safe or not safe.

MODERATOR: Under design defects in product liability law, when is it proper to use the consumer expectation test versus the risk benefit test (See *Soule v. General Motors Corp.*, 8 Cal. 4th 548 (1994).)?

NIELSEN: In a trial last year we got into this distinction quite heavily because of the design defect aspects of the case. What is the proper use of the consumer expectation test versus the risk benefit test? It was our position that the consumer benefit test was not applicable, and we wanted the court to limit the evidence to the risk benefit test. However both tests can be problematic for a defendant.

We were successful in keeping the consumer expectation test out under *Soule*, but it creates an interesting issue: Is the plaintiff entitled to have both tests at the same time? Under what circumstances will the consumer expectation test not apply, and the risk benefit test would?

Our product was a wakeboard boat and the reasons for the failure involved issues of fluid dynamics, weight distributions, and so forth. The court determined that the consumer expectation test didn't apply, because of the complexity of the accident mechanics.

MARTIN: With the consumer expectation test you don't need expert testimony. The product responds or acts in a certain way that a reasonable consumer would not expect to happen. The consumer expectation test doesn't apply where the issues are so technical in nature that you need expert testimony.

In the Toyota case, where your car accelerates suddenly, does the consumer expectation test apply because you wouldn't expect the product to perform in that manner, or are the issues so technical in nature that you need expert testimony to explain why there was no defect? California is unique in both respects. In other states the consumer expectation test does require expert testimony, it requires proof of a defect, and that the defect rendered the product unreasonably dangerous or not reasonably safe.

COVINGTON: In the medical device arena it becomes even more complicated because the consumer may be a physician who has expertise beyond the jury's. Paired with that is a series of cases in California concerning medical devices that are very difficult to harmonize. For instance, in one case (*Morson v. Superior Court,* 90 Cal. App.4th 775 (2001)) the 4th District Court of Appeals talks about the allegedly harmful chemical properties of latex gloves being outside of the common experience of a consumer but then there's some dicta in *Hufft v. Horowitz* (4 Cal.App.4th 8 (1992)) from the same district about a cosmetic prosthesis, and they say that the end consumer might have a reasonable expectation about such a product.

ROSENLUND: I try to convey to clients early on, particularly smaller or midsize companies that may not have a lot of product liability litigation experience, that irrespective of the jury instructions, the fundamental obligation of a defendant in a product liability case is to demonstrate that they are the master of their product and that they can show what happened in the circumstances of this case. It's almost impossible to tell a client in advance whether the court will apply the risk benefit test, the consumer expectation test, or both. There are appellate level cases in California holding all up and down, whether you can apply one, both, or the other.

NIELSEN: Jurors expect product manufacturers to go through the process of designing and testing their products completely before putting them on the market. And if they haven't, it allows plaintiffs counsel to very effectively attack various manufacturing activities along the way.

TAKAHASHI: The jury instructions for the risk benefit test changed last year. The Judicial Council removed the plaintiff's burden of proving that the product was being used in a reasonably foreseeable manner. Now it's clearly the defendant's burden to prove misuse.

MARTIN: What about the article your firm wrote in 2006, which criticized the new California Civil Jury Instructions for Judges and Attorneys (CACI) because it omitted the term "defect" under a risk benefit analysis test. That instruction is just wrong.

It's one thing to say that if you prove these facts, it constitutes a defect, but there's a psychological aspect where a jury has to say it's defective. Why is California the only state in which the burden in a risk benefit analysis test shifts to the defendant? Most plaintiffs attorneys don't take advantage of that. They come up with their own alternative design because it's more persuasive. But think about how little evidence a plaintiffs attorney needs to get to the jury—plaintiff was hurt by the design, now it's up to the defendant to prove that the benefits outweigh the risk.

COVINGTON: We've had success in getting some special jury instruc-

tions to help clarify and supplement the CACIs because it is so important that the jury gets a clear and accurate statement of the law. The CACIs, as they are now, are not that.

But back to consumer expectation and the risk benefit test. Having those two instructions presented in the same case does muddy the waters and unfortunately for defense counsel it also gives the jury two bites at the apple. It is very important to limit what jury instructions can be submitted, and to keep it as simple and clean as possible so that the jury's task is not overly difficult or confusing.

NIELSEN: Maybe the simpler test would be a determination of whether the product was defective and/or misused, without a lot of written instructions. Ultimately that's what the jury looks at, and was the person injured as a result of the defect. If the product is determined to be defective the jury looks at the misuse, which often is our best defense. Even though there is a defect, that's not what caused the incident, or that it was so grossly misused under the circumstances, the manufacturer couldn't have foreseen it. It's way too complicated now given the volume of instructions that are presented to a jury.

OSBORNE: I tried an asbestos case last year where the exposure was in the 1960s. The consumer expectation test is based on what a reasonable consumer knew *at the time of use*. That used to be included in CACI, and the amendment removed it. But in that trial I was able to argue that the reasonable consumer in the 1960s thought asbestos in a product was a good thing, and, in fact, we were able to use the plaintiffs' experts to support that. Even in our products cases we want to reinforce that the consumer expectation is to be evaluated at the time of the product's use.

TAKAHASHI: I have an appellate court citation, *Bowman v. Wyatt* (86 Cal.App.4th 286 (2010)) where the Court of Appeal reversed jury verdict because the CACI instruction was "not a correct statement of the law." You shouldn't just assume that the CACIs are right because the Judicial Council came up with it.

ROSENLUND: There are cases finding error in pattern instructions going back pre-CACI to the Book of Approved Jury Instructions days. Nobody should accept pattern instructions as the law, because it's not. It is a committee majority's best-reasoned estimate as to what the law is, or in some cases what the majority believes what the

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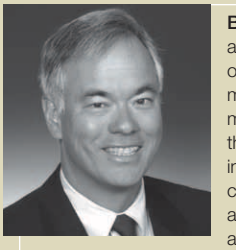

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law ought to be. In order to preserve the appellate record and protect the client in trial, it is essential that alternative instructions be offered with a correct statement of the instruction.

MODERATOR: What will be the significance of the Califonia Supreme Court's anticipated ruling this summer in the *Coito* case?

TAKAHASHI: Looking at the decision and the amicus briefs, it looks like the government agencies and insurance companies want to preserve the protection of their recorded statements. They go out most often and get recorded statements. From a cost perspective, especially when there are a lot of claims, it's really easy to simply ask one's investigator to take a recorded statement. Such recorded statements should be protected because it's the industriousness of the attorney gathering facts, which will be lost if all the other side has to do is ask for the recorded statement and get it.

MARTIN: What's the difference between someone taking photographs or a statement? Some attorneys try to protect photographs by saying it's work product because the angle of the photograph will demonstrate their theories. But the problem isn't usually with the statement, it is with who takes it. The interviewer asks questions that probably don't yield information relevant to the issues of the case.

ROSENLUND: This is being billed by the plaintiff's side as a battle by the little guy against big government and corporate interests, but the same rules apply to both sides. I've tried to seek statements from plaintiffs counsel and was met with fierce opposition. It's important to remember, however, that the *Coito* case does not address the attorney-client privilege. Statements taken from management employees, and in most cases from all employees, by corporate counsel, in-house counsel, or in other circumstances that would give rise to the attorney-client privilege, are covered by the absolute protection of the attorney-client privilege. The *Coito* ruling does not disturb that. The big middle ground is what to do with independent witnesses. Parties need guidance from the court on how to answer the Judicial Council Form Interrogatories, because 12.3 on witness statements has been a thorn in everyone's side for a long time.

COVINGTON: As it stands now you don't have to disclose the names of the people you interview. Those are protected. And after this, if you have notes from an interview, but you don't have a verbatim statement, do you still have to let the other side know who you interviewed, even if you don't have to produce the notes themselves? I would think that the answer would still be no.

NIELSEN: *Coito* is an extension of a line of cases that keep opening the door to more discovery of what the defendants have learned. Most of the time it is the insurance companies who get statements. So it now comes down to do whether or not we want to have verbatim statements, or rough note statements, and then assessing their value for such things as impeachment. The law is pretty open, and courts seem to want to allow discovery of statements. I don't expect any great changes to the discovery laws from the Supreme Court ruling on this case.

OSBORNE: Whether interviews should be recorded or just noted, it's important to evaluate the intended purpose of the interview. Are you trying to gather information to help your client evaluate the exposure and the issues, and to create strategies down the road, or are you actually looking to lock people into their statements?

Often the insurance company or the corporation has not identified its purpose for taking these interviews. Notes of the attorney aren't going to help you from an impeachment standpoint, but they are going to help you early on to evaluate and develop issues, witnesses, and strategies. No matter which way the courts go, lawyers should counsel their clients as to why are we taking a statement, what is the anticipated purpose.

MODERATOR: Is there, and should there be, a difference between a negligent failure-to-warn claim and a strict liability failure-to-warn claim?

MARTIN: There's a difference in the negligent instruction for failure to warn and in the strict liability instruction. The negligence instruction is what was known or reasonably should have been known, while strict liability focuses on the product and whether there were defects that were known or knowable. I've always had a problem with what is knowable and why the reasonableness standard appears to have been eliminated. California courts have talked in a strict liability setting about something being knowable and whether it is the application of reasonable developed human skill and foresight (See *Anderson v. Owens-Corning Fiberglas Corp.*, 53 Cal 3d 987 (1991); *Carlin v. Superior Court* 13 Cal 4th 1104 (1996).)

Both instructions require that the failure to warn be a substantial factor in causing the plaintiff's injury. You never see plaintiff's testimony on that particular issue, yet some testimony must demonstrate that a warning would have altered the plaintiff's conduct.

Texas, Indiana, and New Jersey have adopted the heeding presumption in order to help the plaintiffs establish causation. If the plaintiff cannot say what he or she would have done and if the expert witness has done nothing to investigate whether a warning would have altered the plaintiff's conduct, then at least in federal court we've been able to get some summary judgment entered on the warning issue. California has not addressed that particular issue.

In the 2006 case of *Bolia-Schutt v. Cedar Fair, LP* (2006 WL 401306 (Cal. Ct. App.) a young girl suffered a brain injury on Montezuma's Revenge. Her brothers who took her on the ride said that had there been a proper warning, they would not have let her go. The trial court said that their testimony was self-serving and speculative, and struck it on a summary judgment motion. But the opinion is unpublished and all the appellate court really did was to recognize the trial court's ruling without saying whether it was appropriate or not.

I've never found a California case that says the plaintiffs must establish that the warning would have altered the conduct. It would be one thing if a plaintiff read the manual, looked for instructions for help, and then to consider that person's conduct, as opposed to

what the plaintiff says he or she would have done.

COVINGTON: There's some good language in the *Carlin* case (cited above, 13 Cal.4th 1104 (1996)) that discusses examples of how the two tests might be applied. What if a manufacturer is being tried under the negligence standard, and that manufacturer knows of some research or studies that show a risk associated with its product, but its own studies have shown that there is no risk, and so it decides not to warn.

Carlin says that might not be negligence. But if that same manufacturer is judged under the strict liability standard, it knows these studies exist, and it still may be strictly liable for not warning of information that was available. When you look at how *Carlin* talks about those two things, the court is still talking about reasonable conduct. The court isn't saying the manufacturer needs to conduct all conceivable testing. It's saying based on the state of the art, evidence that's available, what a reasonably prudent manufacturer might do, what did it do, and if it had done something different would it have even shown that there was a risk at that time.

ROSENLUND: If you take the term "knowable" to its logical extreme, you end up with an absurd result that was never intended. It is implied and it should be expressed that a risk must be reasonably knowable in order to meet the "knowable" requirement. If you set CACI instructions 1205 and 1222 side by side, most nonlawyers would ask you "Aren't they saying the same thing?" If you try to dissect them word-for-word, no, you'll see some differences, but they only serve to create confusion. Why we have two different instructions on that point baffles me.

NIELSEN: In the boating case, the plaintiffs threw everything at us, including the warning issue. However, they never had to define the warning. They just said the manufacturer had a duty to warn. There was no evidence from the plaintiff that said, "If you would have had a warning that said X, then this accident would not have happened." The defense warnings expert testified that given the behavior of the boat's operator, a warning wouldn't have changed his behavior in any way because he failed to follow so many other warnings that were given.

Often as defendants we're arguing nuances in jury instructions and trying to fit the facts of the case to the law, but juries don't get hung up on technicalities if they want to get to a certain result. They're going to get there regardless of what the instructions say.

MARTIN: I've had success with getting the court to eliminate the causation issue because there is no evidence to support causation. It's raised more with a motion in limine or summary judgment or summary adjudication as opposed to argument to the jury.

COVINGTON: There's an interesting federal summary judgment case (*Phillippi v. Stryker Corp.*, 2010 WL 2650596 (E.D. Cal.)) just affirmed by the Ninth Circuit in March (2012 WL 759390 (9th Cir.) that interprets California law regarding causation on a failure-to-warn claim in the context of a medical device case. It does a good job of parsing out issues of causation on warnings and warnings claims supported by allegations of failure to test. It talks about the speculative nature of failure-to-test allegations and the important role of physician judgment in medical device cases.

OSBORNE: The cases make it clear that it's not the product that's defective, but that the defect is the failure to warn. There's a distinction between negligence and strict liability when we talk about whether they were reasonably acting versus whether it was knowable, which all sounds like a constructive knowledge. In a failure-to-warn claim, the lack of a warning is the defect. Unfortunately, that allows the jury to find a defect, even if it's a nondefective product. If you have an injured party maybe they can't prove that the product itself was defective, but they're going to try and come in on failure to warn saying that the lack of a warning was the issue

TAKAHASHI: Most times the failure to warn is because plaintiffs otherwise have a difficult time proving a defect. They want to say that the manufacturer should have warned against foreseeable misuse.

When we take depositions, plaintiffs almost inevitably testify: "I never read the owners manual or the instructions," which is good for the defendants because then you can seek a motion in limine or summary judgment. There will be no causation for failure to warn when a plaintiff didn't read the owner's manual in the first place.

NIELSEN: The warning issue can be a catchall. If plaintiffs have difficulty in proving a specific product defect, they can still rely on this. Plaintiffs get the advantage of hindsight and saying, "If you had warned, this wouldn't have happened." In warning cases it is extremely important for the defense to have a good warnings expert to testify that even if there was such a warning, the behavior at issue wouldn't have been altered, or that the plaintiff wouldn't have heeded it anyway. This area often involves testing, and depending on the industry and their level of sophistication, products need to be tested, results documented, and warnings evaluated.

ROSENLUND: By the time a failure-to-warn case hits trial, the defendants are typically confronted with the plaintiff's story of, "if only I had been told A, B, C, I would have done this differently, or not at all." This argument has emotional appeal, but proving it with admissible evidence is very, very tough. More often than not it involves pure speculation that neither a lay witness nor an expert can overcome; it can't meet the test of scientific proof, and the claim falls apart. ■