Kansas Product Liability Law

By Patrick A. Hamilton

This article provides a general summary of Kansas product liability law and highlights issues routinely encountered when prosecuting and defending product liability claims. As with any summary of the law, it is an oversimplification of a complex subject. For every general rule and principle discussed, you should assume there are exceptions that may be relevant to your particular case.

I. What Is Product Liability?

Adopted in 1981, the Kansas Product Liability Act (KPLA) applies to all Kansas product liability claims regardless of the substantive theory of recovery.[1] Under the Act, a "product liability claim" is a claim for "harm caused by the manufacture, production, making, construction, fabrication, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, storage or labeling of the relevant product."[2] "Harm" means damage to property, personal injuries, death, and mental anguish or emotional harm associated with personal injury or death.[3]

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II. What Is A Defective Product?

There are three ways in which a product may be defective: (1) a manufacturing defect, (2) a warning defect, and (3) a design defect.[4] A product seller has a duty to use reasonable care in designing, manufacturing and providing warnings and instructions for its products. A product is considered defective if it leaves the seller's hands in a condition "unreasonably dangerous" to the ordinary user.[5]

A. Manufacturing Defect. A manufacturing defect exists when the product does not conform to the seller's own design specifications or performance standards, or deviates in a material way from otherwise identical products. Examples of manufacturing defects include improper assembly, missing parts or use of defective materials to make the product.

B. Design Defect. Even if a product has been manufactured to perfection, it may nevertheless be defective because of its design. A product has a design defect when its design makes it unreasonably dangerous.[6] A three-legged chair is often cited as an example of a defectively designed product. Claims against farm equipment and power tool sellers for failing to include guards and other devices to prevent foreseeable injuries are examples of design defect claims.

Kansas uses the consumer expectations test to determine liability in design defect cases. The consumer expectations test defines an "unreasonably dangerous" product as one "which is 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."[7] Determining what is and is not a "defective design" has taxed the creative imaginations of judges, juries and commentators alike.

C. Warning Defect. Products designed and manufactured to perfection may still be defective if they lack proper warnings and instructions. A product seller has a duty to give adequate warnings and instructions for the safe use of its products. However, a seller's duty to warn against a hazard which could arise during use or misuse of a product, or a duty to properly instruct a consumer in the use of a product, does not extend to safeguards, precautions and actions "which a reasonable user or consumer of the product … should or was required to possess."[8]

Similarly, there is no duty to warn of "open or obvious" hazards, and no duty to warn about situations "where the safeguards, precautions and actions would or should have been taken by a reasonable user or consumer."[9]

A product seller has a post-sale duty to warn consumers who purchase its products who can be readily identified when a defect that originated at the time the product was manufactured is discovered to present a life-threatening hazard. Determining the nature of the duty to warn and the persons to whom the warning should be given involves a case-by-case analysis.[10]

Whether based on negligence or strict liability, failure to warn claims are measured by the whether the warnings and instructions (or lack thereof) were reasonable under the circumstances.[11]

III. Who Is Liable?

The KPLA defines "product seller" as any person engaged in the business of selling products, whether the sale is for resale or for use or consumption.[12] "Product seller" includes the manufacturer, wholesaler, distributor and retailer of the product. A product seller is not subject to liability if it can establish all of the following: (a) it had no knowledge of the defect, (b) it could not have discovered the defect exercising reasonable care, (c) it did not manufacture the product, (d) the manufacturer is subject to service of process in Kansas, and (e) any judgment against the manufacturer is "reasonably certain of being satisfied."[13]

IV. Theories of Liability

Product liability claims include actions based on strict liability, negligence and breach of express or implied warranty.[14]

A. Strict Liability. The doctrine of strict liability, adopted by the Kansas Supreme Court in 1976, is modeled after Section 402A of the Restatement (Second) of Torts.[15] In a strict liability claim, a plaintiff is not required to establish misconduct or negligence on the part of the manufacturer. Instead, the plaintiff "is required to impugn the product."[16]

To recover under strict liability, the plaintiff must establish three elements: (1) the injury resulted from a condition of the product, (2) the condition was unreasonably dangerous, and (3) the condition existed at the time it left the defendant's control.[17] Whether a product seller exercised all due care in designing, manufacturing and supplying warnings for the product is irrelevant in strict liability claims.

B. Negligence. Negligence is the lack of ordinary care under the relevant circumstances. As applied in product liability claims, if a product seller fails to do something a reasonably careful seller would do, or does something a reasonable seller would not do, the seller is liable for injuries caused thereby.[18] To recover on a negligence theory, plaintiffs must establish that (1) the product seller owed the plaintiff a duty, (2) the seller breached the duty, (3) the plaintiff was injured, and (4) there is a causal connection between the duty breached and the injuries sustained.[19]

C. Implied Warranty of Merchantability. The implied warranty of merchantability arises by operation of law—not by agreement of the parties. Its purpose is to protect consumers from losses where products fail to meet normal commercial standards. It requires products to be "fit for the ordinary purposes for which such goods are used."[20] Every product sold in Kansas comes with an implied warranty of merchantability.[21]

To establish a breach of the implied warranty of merchantability, a plaintiff must show that (1) the product was defective, (2) that the defect was present when the product left the seller's control, and (3) that the defect caused the injury sustained by the plaintiff.[22]

V. Defenses To Liability

A. Statute of Limitation. Whether based on strict liability, negligence or breach of warranty, a product liability action must be brought within two years of the date of injury or the date such injury becomes reasonably ascertainable.[23]

B. Useful Safe Life. Even if a claim is timely filed, a product seller can avoid liability by proving that the alleged harm was caused after the product's "useful safe life" had expired.[24] Useful safe life begins when the product is "delivered" and "extends for the time during which the product would normally be likely to perform or be stored in a safe manner."[25] The KPLA cites several factors to consider in determining whether a product's useful safe life has expired, including the amount of wear and tear, deterioration from natural causes, and modifications or alterations to the product.[26]

A product seller is subject to liability after a product's useful safe life has expired if it expressly warrants the product for a longer period.[27]

In claims that involve harm caused more than 10 years after a product is delivered, a presumption arises that the harm was caused after the product's useful safe life expired, and this presumption may only be rebutted by "clear and convincing evidence."[28] However, the 10-year period of repose does not apply if the product seller intentionally misrepresents facts or fraudulently conceals information about its product and such conduct is a substantial cause of the alleged harm.[29]

C. Defect and Causation. Regardless of the theory upon which recovery is sought, proof that a defect in the product caused the alleged injury is a prerequisite to recovery.[30] It is not enough to demonstrate that an injury was caused by a product.[31] Kansas law requires plaintiffs to identify a specific defect and demonstrate a causal connection between the defect and the alleged harm.[32]

D. Comparative Fault. The comparative fault doctrine governs product liability cases based on negligence, strict liability and breach of implied warranty. Under Kansas comparative fault principles, recovery is prohibited if the plaintiff's fault is greater than the combined fault of all defendants.[33] The negligence of any person, whether joined as a party or not, may be compared if supported by the evidence, even if recovery against the person is barred.[34] Each defendant, however, is liable only for that percentage of the total damages attributed to it. There is no joint and several liability in Kansas.

E. Learned Intermediary Doctrine. Under the learned intermediary doctrine, pharmaceutical companies and medical device manufacturers discharge their duty to warn consumers of risks associated with their products if they adequately warn the consumer's prescribing physician of the risks.[35]

F. Government Standards and Regulations. When the injury-causing aspect of the product complied

with legislative or administrative safety standards at the time of manufacture, the product is deemed not defective unless the plaintiff proves that a reasonably prudent seller could and would have taken added precautions.[36] Conversely, when the injury-causing aspect of the product did not comply with existing safety standards, the product is deemed defective unless the seller proves its failure to comply was reasonable under the circumstances.[37]

VI. Special Evidentiary Issues

A. State of the Art and Subsequent Remedial Measures. The KPLA provides that evidence relating to technological advancements or changes made, learned or placed into common use after a product is designed, manufactured or sold is inadmissible unless the evidence is offered to impeach a witness who has denied the feasibility of such advancements.[38] This section of the KPLA is viewed as a "state of the art" statute. It is intended to "limit the rights of plaintiffs to recover in product liability suits generally and to judge a product for an alleged defect only when it was first sold."[39]

B. Other Similar Incidents. Kansas law permits the introduction of substantially similar accidents in product liability actions to demonstrate notice, the existence of a defect, or to refute testimony by a defense witness that the product was safely designed.[40] The party seeking to introduce the evidence must show that the circumstances surrounding the other accidents were substantially similar to the accident at issue.[41] Whether accidents are substantially similar depends largely upon the theory of the case.[42]

VII. CONCLUSION

I hope you find this article useful, whether prosecuting or defending Kansas product liability claims. Keep in mind there are exceptions to virtually every rule and principle discussed above, and other relevant topics such as preemption of claims, unavoidably unsafe products and expert testimony have been entirely omitted. ❖

Endnotes

1 K.S.A. §§ 60-3301 to 60-3307 (Supp. 2006); *Messer v. Amway Corp.*, 210 F. Supp.2d 1217, 1227 (D. Kan. 2002).
2 K.S.A. § 60-3302(c) (Supp. 2006).
3 *Id.* at § (d).
4 *Savina v. Sterling Drug, Inc.*, 247 Kan. 105, 114 , 795 P.2d 915, 923 (1990).
5 *Id.*
6 *Garst v. General Motors Corp.*, 207 Kan. 2, 484 P.2d 47 (1971).
7 *Delaney v. Deer & Co.*, 268 Kan. 769, 786, 999 P.2d 930, 945 (2000).
8 K.S.A. § 60-3305(a) (Supp. 2006).
9 *Id.* at § (b).
10 Patton v. Hutchison Wil-Rich Mfg. Co., 253 Kan. 741, 767, 861 P.2d 1299, 1314-15 (1993).
11 *Richter v. Limax Intern.*, 822 F. Supp. 1519, 1521 (D. Kan. 1993).
12 K.S.A. § 60-3302(a) (Supp. 2006).
13 K.S.A. § 60-3306 (Supp. 2006).
14 K.S.A. § 60-3302(c) (Supp. 2006).
15 *Savina v. Sterling Drug, Inc.*, 247 Kan. 105, 114 , 795 P.2d 915, 923 (1990); *Brooks v. Dietz*, 218 Kan. 698, 702, 545 P.2d 1104, 1108 (1976).
16 *Savina*, 247 Kan. at 114, 795 P.2d at 923.
17 *Jenkins v. Amchem Prod., Inc.*, 256 Kan. 602, Syl. ¶ 8, 886 P.2d 869, 871 (1994); *McCoy v. Whirlpool Corp.*, 379 F. Supp.2d 1187, 1196 (D. Kan. 2005).
18 *Timsah v. General Motors Corp.*, 225 Kan. 305, 313-14, 591 P.2d 154, 162 (1979).
19 *Miller v. Lee Apparel Co., Inc.*, 19 Kan. App.2d 1015, 1023, 881 P.2d 576, 583 (1994).
20 K.S.A. § 84-2-314(2)(c) (Supp. 2006).
21 *Id.*; *see Corral v. Rollins Protective Serv. Co.*, 240 Kan. 678, 685, 732 P.2d 1260 (1987).
22 *Dieker v. Case Corp.*, 276 Kan. 141, Syl. ¶ 4, 73 P.3d 133, 141 (2003).
23 K.S.A. § 60-513 (Supp. 2006); *Fennesy v. LBI Mgmt., Inc.*, 18 Kan.App.2d 61, 847 P.2d 1350 (1993).
24 K.S.A. § 60-3303(a) (Supp. 2006).
25 *Id.*
26 *Id.*
27 *Id.* at (a)(2).
28 *Id.* at (b)(1).
29 *Id.* at (b)(2)(B).
30 *Wilcheck v. Doonan Truck Equip., Inc.*, 220 Kan. 230, 235, 552 P.2d 938, 942 (1976).
31 *Butterfield v. Pepsi-Cola Bottling Co. of Wichita, Inc.*, 210 Kan. 123, 127, 499 P.2d 539, 541 (1972).
32 *Messer v. Amway Corp.*, 210 F. Supp.2d 1217, 1236-37 (D. Kan. 2002).
33 K.S.A. § 60-258a (Supp. 2006).
34 *Id.* at (d); *Cerretti v. Flint Hills Rural Elec. Co-op Ass'n.*, 251 Kan. 347, 371, 837 P.2d 330, 347 (1992).
35 *Humes v. Clinton*, 246 Kan. 590, Syl. ¶ 5, 792 P.2d 1032 (1990); *Samarah v. Danek Med., Inc.*, 70 F.Supp.2d 1196, 1204 (D. Kan. 1999); *Nichols v. Central Merch. Inc.*, 16 Kan. App.2d 65, 67, 817 P.2d 1131, 1133 (1991).
36 K.S.A. § 60-3304(a) (Supp. 2006).
37 *Id.* at (b).
38 K.S.A. § 60-3307 (Supp. 2006).
39 *Patton v. Hutchison Wil-Rich Mfg.*, 253 Kan. 741, 752, 861 P.2d 1299 (1993).
40 *Ponder v. Warren Tool Corp.*, 834 F.2d 1553, 1560 (10th Cir.1987).
41 *Rexrode v. American Laundry Press Co.*, 674 F.2d 826, 829 n. 9 (10th Cir.), *cert. denied*, 459 U.S. 862 (1982); *Julander v. Ford Motor Co.*, 488 F.2d 839, 846-47 (10th Cir.1973).
42 *Kinser v. Gehl Co.*, 184 F.3d 1259, 1273 (10th Cir. 1999), *cert. denied*, 528 U.S. 1139 (2000); *Wheeler v. John Deere*, 862 F.2d 1404, 1407 (10th Cir. 1988).

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