# CHAPTER 20: PRODUCT LIABILITY LAW

## STRICT LIABILITY

When a product is involved in an injury-causing event, the injured person can file a lawsuit based on a number of theories including negligence, breach of warranty and breach of contract. However, the strongest basis for a suit is strict liability. Unlike the typical negligence lawsuit, the burden of proof is much easier for a plaintiff in a strict products liability lawsuit. The plaintiff need only prove that the defendant manufactured the product and that it was defectively designed or manufactured when delivered to the plaintiff. Failure to provide proper instructions or warnings with the product may also form the basis for a product liability suit. Under strict liability, the manufacturer of a defective product may be liable notwithstanding its exercise of all possible care during the manufacturing process, even if the user/consumer did not buy the product from or enter into any contract with seller.

Arizona has codified the common law of products liability in A.R.S. §§ 12-681 to -689. In addition to Arizona's statutory scheme for products liability cases, there is also a very detailed Restatement covering products liability, The RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. (1998), which the courts are now interpreting. However, the applicability of the products liability Restatement is likely to be limited in Arizona because our courts generally look to the Restatement in the absence of controlling authority; and Arizona has a settled body of product liability law. *See, e.g.*, ***Antone v. Greater Ariz. Auto Auction***, 214 Ariz. 550, 555, 155 P.3d 1074, 1080 (Ct. App. 2007) (refusing to consider whether to adopt Restatement Third § 20 because outcome "rests on settled principles of Arizona law"); ***Gariby ex rel. Fleming v. Evenflo Co.***, 2012 WL 506742, at *3, n.4 (Ariz. Ct. App. Feb. 16, 2012) ("Gariby has not provided us with any authority suggesting Restatement § 13 has been adopted in Arizona or that Arizona otherwise recognizes liability for a successor's post-sale failure to warn.").

Arizona statutes provide definitions for use in products liability actions:

- "Manufacturer" means a person or entity that designs, assembles, fabricates, produces, constructs or otherwise prepares a product or component part of a product before its sale to a user or consumer. A.R.S. §12-681(3).
- "Product" means the individual product or any component part of the product that is the subject of a product liability action. A.R.S. §12-681(4).
- "Seller" means a person or entity, including a wholesaler, distributor, retailer or lessor, engaged in the business of leasing any product or selling any product for resale, use or consumption. Individuals such as auctioneers are not considered "sellers" for products liability purposes. A.R.S. §12-681(9).
- "State of the Art" means the technical, mechanical and scientific knowledge of manufacturing, designing, testing or labeling the same or similar products which was in existence and reasonably feasible for use at the time of manufacture. A.R.S. §12-681(10).

If the plaintiff can successfully prove a strict liability case, he is entitled to regular tort damages (including damage caused by the defective product to other property, lost wages, medical expenses, and pain and suffering). The plaintiff is not, however, entitled to recover for pure "economic loss," meaning lost profits and the cost of replacing the defective product itself. Damage or injury to a person need not necessarily occur in order to recover for damage to other property; plaintiff may recover if the defect is unreasonably dangerous to persons or other property. ***Salt River Project v. Westinghouse Elec. Corp.***, 143 Ariz. 368, 694 P.2d 198 (1984), *abrogated on unrelated grounds by* ***Phelps v. Firebird Raceway, Inc.***, 210 Ariz. 403, 111 P.3d 1003 (2005); ***Arrow Leasing Corp. v. Cummins Ariz. Diesel, Inc.***, 136 Ariz. 444, 666 P.2d 544 (Ct. App. 1983).

Punitive damages are recoverable only if plaintiff can show that the defendant acted with an "evil mind." Evidence that the defendant knew about previous accidents, or that the defendant's product was unreasonably dangerous, but continued to market it without correcting the defect(s), can show an evil mind warranting punitive damages. But continuing to market a product after several accidents occurred is not enough to show the evil mind necessary for punitive damages in a products liability action. ***Piper v. Bear Med. Sys., Inc.***, 180 Ariz. 170, 883 P.2d 407 (Ct. App. 1993), *superseded by statute on unrelated grounds as stated in* ***Watts v. Medicis Pharm. Corp.***, 236 Ariz. 511, 342 P.3d 847 (Ct. App. 2015), *vacated on other grounds*, 239 Ariz. 19 (2016).

## STRICT LIABILITY THEORIES

Arizona has adopted the view of the RESTATEMENT (SECOND) OF TORTS, § 402A that defendants are strictly liable for unreasonably dangerous products. To establish a *prima facie* case for strict liability, a plaintiff must prove that: (1) the defendant manufactured the product; (2) the product was sold in a defective condition; (3) the defective product created an unreasonable danger to plaintiff when used in a reasonably foreseeable manner; (4) the product reached plaintiff without substantial change in its condition; (5) plaintiff sustained damages; and (6) the defect in the product proximately caused the damage. *See* ***Jimenez v. Sears, Roebuck & Co.***, 183 Ariz. 399, 904 P.2d 861 (1995); ***Anderson v. Nissei ASB Mach. Co.***, 197 Ariz. 168, 3 P.3d 1088 (Ct. App. 1999).

### Defective Design

A product is defectively designed if the plaintiff can demonstrate that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. A product is also considered defective in design if the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove, in light of relative factors, that on balance the benefits of the challenged design outweigh the risk inherent in such a design. ***Moorer v. Clayton Mfg. Corp.***, 128 Ariz. 565, 627 P.2d 716 (Ct. App. 1981). If the plaintiff proves the product is defective, he need not prove fault on the part of the defendant in order to recover. He still must prove, however, that the defective design proximately caused his damages.

### Defective Manufacture

A plaintiff can recover for damages caused by a defectively manufactured product by proving that the product "is in a defective condition and unreasonably dangerous, the defective condition existed at the time the product left the defendant's control, and the defective condition is the proximate cause of the plaintiff's injury." ***Gosewisch v. Am. Honda Motor Co***., 153 Ariz. 400, 403 (1987), *superseded by statute on unrelated grounds*. As discussed above, under the theory of strict liability, a plaintiff does not need to prove the defendant's fault to recover.

### Failure to Warn

Manufacturers and sellers of products have a duty to warn of dangers inherent in the intended use of a product, as well as dangers that can be reasonably anticipated. ***Kavanaugh v. Kavanaugh***, 131 Ariz. 344, 641 P.2d 258 (Ct. App. 1981). In Arizona, inadequate instructions or warnings make a product defective when adequate instructions or warnings from the manufacturer could have reduced or avoided the foreseeable risks of harm posed by the product. ***Powers v. Taser Int'l, Inc.***, 217 Ariz. 398, 174 P.3d 777 (Ct. App. 2007). Not only must manufacturers provide adequate operating instructions, but they must also warn of the possible consequences resulting from the failure to follow the instructions. The court will consider the adequacy of the warning label, print size, color and conspicuousness, and the language of the warning. ***Brown v. Sears, Roebuck & Co.***, 136 Ariz. 556, 667 P.2d 750 (Ct. App. 1983); ***Shell Oil Co. v. Gutierrez***, 119 Ariz. 426, 581 P.2d 271 (Ct. App. 1978), *abrogated on unrelated grounds by* ***Conklin v. Medtronic, Inc.***, 245 Ariz. 501, 431 P.3d 571 (2018). Under the learned intermediary doctrine, "the manufacturer's duty to warn is ordinarily satisfied if a proper warning is given to the specialized class of people that may prescribe or administer the product." ***Watts v. Medicis Pharm. Corp.***, 239 Ariz. 19, 365 P.3d 944 (2016) (under learned intermediary doctrine, drug manufacturer discharged its duty to public to warn about dangerous propensities of drug if it properly warned administering physician of contraindications and possible side effects of the drug). In *Watts*, the Arizona Supreme Court held that the learned intermediary doctrine does not violate Arizona's anti-abrogation clause, Ariz. Const. art. 18, § 6, because the doctrine is a common law doctrine, not a statutory one, and it does not abrogate a right to recover for damages. It simply provides a means for a manufacturer to fulfill its duty to warn by warning the learned intermediary.

## PRODUCT LIABILITY DEFENSES

### Statutory Affirmative Defense

A.R.S. § 12-683 lists certain affirmative defenses available in a products liability action. A defendant is not liable if he can prove any of the following:

- The plans or designs for the product or the methods and techniques of manufacturing, inspecting, testing or labeling of the product conformed with the state-of-the-art at the time the product was first sold by the defendant. *See* statutory definition of "state of the art," above.

- The proximate cause of the incident was an alteration or modification of the product that was not reasonably foreseeable, made by a person other than the defendant and subsequent to the time the product was first sold by the defendant.
- The proximate cause of the incident was the use or consumption of the product that was for a purpose, in a manner or in an activity other than that which was reasonably foreseeable or was contrary to any express and adequate instructions or warnings appearing on or attached to the product or on its original container or wrapping, if the intended consumer knew or with the exercise of reasonable and diligent care should have known of such instructions or warnings.

While not technically an affirmative defense, A.R.S. § 12-686 precludes the plaintiff from introducing evidence of any change in the design, methods or manufacturing, or methods of testing the product or any similar product subsequent to the defendant's date of sale, to prove the product was defective. The statute also prohibits the plaintiff from introducing evidence of advancements or changes in the state of the art after the product was first sold by the defendant. Such evidence may be admissible for other purposes, such as showing the feasibility of precautionary measures. *See* "Evidence of Subsequent Remedial Measures" below. The permissible constitutional scope of this statute was interpreted in ***Readenour v. Marion Power Shovel***, 149 Ariz. 442, 719 P.2d 1058 (1986), and must be examined in light of ***Dart v. Wiebe Mfg., Inc.***, 147 Ariz. 242, 709 P.2d 876 (1985), which adopted the "hindsight" test when determining whether a product is unreasonably dangerous. The "hindsight" test has been described as the "prudent manufacturer" test because the factfinder must evaluate the reasonableness of the manufacturer's conduct. A dangerously defective product would be one that a reasonable person would not put into the stream of commerce if he had knowledge of its harmful character. The test, therefore, focuses on the quality of the product and whether or not it was unreasonable for a manufacturer with knowledge of the product to have put the product on the market after considering all risk/benefit factors. *Dart*. *But see* ***Powers v. Taser Int'l, Inc.***, 217 Ariz. 398, 174 P.3d 777 (App. 2007) (refusing to extend hindsight test in failure to warn strict liability cases); ***Perez v. S. Pac. Transp. Co.***, 180 Ariz. 187, 883 P.2d 424 (Ct. App. 1993) (hindsight test does not apply to strict liability cases involving abnormally dangerous activities).

## Federal Preemption

In 2008, the United States Supreme Court ruled that a preemption clause in the Medical Device Amendments of 1976, shields medical device makers from state law product liability claims where the product has been approved by the FDA. ***Riegel v. Medtronic, Inc.***, 552 U.S. 312 (2008). Although this decision has been widely viewed as a victory for product manufacturers and business interests, it will likely be confined to the area of medical devices and have little impact on the vast majority of product liability cases.

More recently, in 2018, the Arizona Supreme Court ruled that federal law impliedly preempted a patient's failure to warn claim against medical device manufacturer. ***Conklin v. Medtronic, Inc.***, 245 Ariz. 501, 431 P.3d 571 (2018). The court explained that state law claims based solely on noncompliance with federal regulatory framework are impliedly preempted because Congress intended the federal regulations to be enforced by the federal government. The court further explained that the defendant has the burden of establishing preemption.

Last year, the Arizona Supreme Court held that federal law did not preempt a state tort law claim based on an auto manufacturer's alleged failure to install automatic emergency braking in a vehicle that collided with the plaintiff's stopped car, injuring her and killing her four-year-old daughter. ***Varela v. FCA US LLC***, 252 Ariz. 451, 505 P.3d 244 (2022). In so holding, the court overruled an earlier Arizona case, ***Dashi v. Nissan North America, Inc***., 247 Ariz. 56, 445 P.3d 13 (Ct. App. 2019), that had reached the opposite conclusion. The court reasoned in part that after *Dashi*, the National Highway Transportation Safety Administration had issued two notices of proposed rulemaking explicitly disavowing a preemptive intent. 505 P.3d at 261.

## COMMON LAW DEFENSES

### Causation

Causation is the most complex and uniquely challenging issue in most products liability cases. To recover in any products liability case, a plaintiff must prove that the product was the cause of the accident. In some cases, causation is easily established by the testimony of the plaintiff or eyewitnesses, and by the logical inferences readily drawn by a lay jury without reference to expert testimony. In other cases, however, proof of causation involves a host of issues and complex inferences, which require expert testimony.

Under Arizona law, a plaintiff must prove, by a preponderance of the evidence, that defendant's act or omission was the proximate cause of the accident. In ***Robertson v. Sixpence Inns of Am., Inc.***, 163 Ariz. 539, 546, 789 P.2d 1040, 1047 (1990), the Arizona Supreme Court reiterated the definition of causation:

> The proximate cause of an injury is that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces an injury, and without which the injury would not have occurred.

The plaintiff has the burden of proving causation. ***Purcell v. Zimbelman***, 18 Ariz. App. 75, 500 P.2d 335 (1972). Causation must be shown to be probable and not merely possible. ***Kreisman v. Thomas***, 12 Ariz. App. 215, 469 P.2d 107 (1970); ***Salt River Valley Water Users' Ass'n v. Blake***, 53 Ariz. 498, 90 P.2d 1004 (1939). To establish causation, a plaintiff need not show that a defendant's actions were a "large" or "abundant" cause of the plaintiff's injuries, but plaintiff must demonstrate that the result would not have occurred without the defendant's conduct. *Robertson*, 163 Ariz. at 546, 789 P.2d at 1047. Importantly, there may be more than one proximate cause depending on the circumstances. *See* **Brand v. J. H. Rose Trucking Co**., 102 Ariz. 201, 205, 427 P.2d 519, 523 (1967).

### Comparative Fault

Although Arizona abolished joint and several liability in 1987, it was not until 2007 that the Supreme Court held that the three exceptions to the abolition of joint and several liability (acting in concert; agency; and duties created by the Federal Employer's Liability Act) do not apply to strict products liability cases. ***State Farm Ins. Cos. v. Premier Manufactured Sys., Inc.***, 217 Ariz. 222, 172 P.3d 410 (2007). The distribution chain does not establish a principal-agent relationship

between manufacturers and sellers. Furthermore, each entity in a chain of distribution of a defective product has committed its own "actionable breach of legal duty." Each entity is liable for its own actions because it distributed a defective product; it is not liable because of its relationship to others. Thus, comparative fault principles apply even in strict products liability cases. But this does not mean that indemnification rights between sellers and manufacturers are not available. Those rights are discussed next.

## Indemnification/Contribution

A.R.S. § 12-684 provides for indemnification and tender of defense in a products liability context. In any product liability action where a manufacturer refuses to accept a tender of defense from the seller, the manufacturer shall indemnify the seller for any judgment rendered against the seller and shall also reimburse the seller for reasonable attorney's fees and costs incurred by the seller in defending such action.

The manufacturer is entitled to indemnity from the seller unless the seller had knowledge of the defect, or unless the seller modified the product, the modification was a substantial cause of the accident, and the modification was not authorized or requested by the manufacturer. A.R.S. § 12-684; ***McIntyre Refrigeration, Inc. v. Mepco Electra***, 165 Ariz. 560, 799 P.2d 901 (Ct. App. 1990). Arizona also recognizes common law indemnity rights. ***Foremost-McKesson Corp. v. Allied Chem. Co.***, 140 Ariz. 108, 680 P.2d 818 (Ct. App. 1983).

As is noted above and in earlier chapters, Arizona has abolished joint and several liability for the most part. In ***Watts v. Medicis Pharm. Corp.***, *supra*, the Arizona Supreme Court ruled that the learned intermediary doctrine (which allows manufacturers to discharge their duty to warn by warning a learned intermediary) is not incompatible with Arizona's comparative fault scheme. However, there are statutorily defined circumstances where joint and several liability still exists. *See* A.R.S. § 12-2506(D). If a defendant is found jointly and severally liable, that defendant may seek contribution from a joint tortfeasor. *See* A.R.S. § 12-2501, *et. seq.*

## Misuse by the Plaintiff/Contributory Fault

In Arizona, contributory negligence is not applicable to strict liability cases because consumers have no duty to guard against product defects when using a product properly. However, a plaintiff may be comparatively at fault by misusing the product, which can diminish plaintiff's recovery. ***Jimenez v. Sears, Roebuck & Co.***, 183 Ariz. 399, 904 P.2d 861 (1995). Misuse can be a defense if the plaintiff's use of the product in a manner other than that which was reasonably foreseeable caused the incident. Such misuse may be characterized as unanticipated, unforeseeable or unintended. The "misuse of product" defense also applies if the use was contrary to any express and adequate instructions or warnings appearing on or attached to the product or its original container or wrapping, of which the injured person knew or with the exercise of reasonable and diligence should have known. A.R.S. § 12-683(3); ***Gosewisch v. Am. Honda Motor Co.***, 153 Ariz. 400, 405–07, 737 P.2d 376, 381–83 (1987), *superseded by statute as stated in Jimenez*, 183 Ariz. 339, 904 P.2d 861 (1995).

## Alteration of Product (by Anyone)

A defendant can avoid liability by proving that the product was altered in a manner not reasonably foreseeable, by a person other than the defendant, after the defendant first sold the product. This defense was codified in A.R.S. § 12-683(2). The alteration constitutes a complete bar to recovery only if the alteration was the sole proximate cause of the injury. If it was only a contributing cause, the jury should determine the relative degree of fault attributable to the alterations. *See* ***Jimenez v. Sears, Roebuck & Co.***, 183 Ariz. 399, 904 P.2d 861 (1995); ***Gosewisch v. Am. Honda Motor Co.***, 153 Ariz. 400, 407, 737 P.2d 376, 383 (1987), *superseded by statute as stated in Jimenez*; *see also* A.R.S. § 12-2506(F)(2).

## Statute of Repose

Originally, A.R.S. § 12-551 precluded product liability actions commenced twelve years after the product was first sold for use or consumption. The Arizona Supreme Court, however, ruled A.R.S. § 12-551 unconstitutional as in conflict with Ariz. Const. article 18, § 6. ***Perez v. S. Pac. Transp. Co.***, 180 Ariz. 187, 883 P.2d 424 (Ct. App. 1993) (discussing ***Hazine v. Montgomery Elevator Co.***, 176 Ariz. 340, 861 P.2d 625 (1993)).

## Other Defenses

Compliance with industry or company standards when the product was manufactured is not an affirmative defense, but it may be relevant to show that such standards represent the "state of the art." *See* ***Hohlenkamp v. Rheem Mfg. Co.***, 134 Ariz. 208, 655 P.2d 32 (Ct. App. 1982); ***Anderson v. Nissei ASB Mach Co.***, 197 Ariz. 168, 3 P.3d 1088 (1999); ***Dart v. Wiebe Mfg., Inc.***, 147 Ariz. 242, 709 P.2d 876 (1985). *See* "State of the Art" defense, discussed above.

Disclaimers of tort liability are generally not recognized in Arizona. A waiver of contractual liability will be given effect only if the would-be plaintiff is found to have intentionally relinquished a known right. ***Salt River Project v. Westinghouse Elec. Corp.***, 143 Ariz. 368, 694 P.2d 198 (1984), *abrogated on unrelated grounds by* ***Phelps v. Firebird Raceway, Inc.***, 210 Ariz. 403, 111 P.3d 1003 (2005). In all probability, disclaimer releases and/or waivers will not bar a product liability action.

Privity of contract is not required between the parties. Thus, it almost always fails as a defense. *See* ***Vineyard v. Empire Mach. Co.***, 119 Ariz. 502, 581 P.2d 1152 (Ct. App. 1978).

# COMMON PROBLEMS FOR PRODUCT LIABILITY DEFENDANTS

## Subsequent Remedial Measures

Evidence that a manufacturer has changed the design of its product since the date of the accident, especially if the new design makes the product safer, can be detrimental to the defense. A jury is inclined to wonder why such measures were not taken before the accident, and could conclude that the accident would not have occurred had such measures been previously taken. Courts and legislatures have recognized that the jury can misconstrue the mere fact that a defendant has improved its product as an admission of liability. Therefore, Arizona has enacted several statutes addressing this concern. Arizona Rule of Evidence 407 bars evidence of subsequent remedial measures in all lawsuits, not just product liability suits. However, its

rationale certainly extends to product suits:

> When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence; culpable conduct; a defect in a product or its design; or a need for a warning or instruction. But the court may admit this evidence for another purpose, such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures.

The exception that arises most often in the product scenario is "feasibility of precautionary measures." This often becomes intertwined with the state of the art defense. When the defendant attempts to prove that the product was state of the art at the time it was manufactured, the plaintiff may attempt to show that other safety measures were available at the time and were subsequently instituted, thereby defeating the state of the art defense. The defendant must show such improvements were not feasible. This generally means technological and economic feasibility rather than whether it was physically possible to provide a safer product. *See* ***Readenour v. Marion Power Shovel***, 149 Ariz. 442, 719 P.2d 1058 (1986).

A.R.S. § 12-686, addressed earlier, provides that evidence of advancements or changes in the state of the art after the product was first sold is inadmissible to prove a defective design. Plaintiff also cannot prove the design is defective by introducing evidence of subsequent changes in the product's design or manufacturing/testing methods. ***Johnson v. State***, 224 Ariz. 554, 233 P.3d 1133 (2010). This type of evidence may, however, be used for other purposes, specifically, to rebut the state of the art defense (if raised by the defendant).

A.R.S. § 12-687 provides that if the defendant conducts a product safety analysis or review and takes remedial measures as a result, the plaintiff may not use the analysis to prove negligence or other culpable conduct or that the product was defective. The plaintiff may, however, use the analysis for other purposes, such as to prove the feasibility of precautionary measures or for impeachment. This type of safety analysis also cannot be used against the defendant to prove punitive damages, unless the plaintiff can show that the study was undertaken in bad faith and for the purpose of affecting the litigation. This statute further provides that such safety analyses are generally discoverable unless they qualify as a trade secret. A.R.S. § 44-401(4) defines a trade secret as the following:

> Information, including a formula, pattern, compilation, program, device, method, technique or process, that both derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use [and] [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

## Other Accidents

Plaintiffs often try to show a product is defective by pointing to other accidents. Other accident evidence might be relevant to show the defendant knew the product was defective but took no steps to cure the defect, thereby posing the issue of punitive damages to the jury. *See* ***Piper v. Bear Med. Sys., Inc.***, 180 Ariz. 170, 883 P.2d 407, 417 (Ct. App. 1993), *superseded by statute on unrelated grounds as stated in* ***Watts v. Medicis Pharm. Corp.***, 236 Ariz. 511, 342 P.3d 847 (Ct. App. 2015), *vacated on other grounds*, 239 Ariz. 19 (2016).

Defendants should object to the admissibility of other accident evidence as irrelevant and prejudicial under Rule 403. Product liability actions are complex enough, and delving into the causation and technical evidence surrounding other accidents could cause a tremendous waste of time and distract from the true issues central to the case. This is especially true when the other accidents are not substantially similar to the accident in question. As the circumstances and conditions of the other accidents become less similar to the accident in question, the probative force of the evidence decreases. *See* ***Vegodsky v. City of Tucson***, 1 Ariz. App. 102, 399 P.2d 723 (1965).

### Recalls

Plaintiffs also can seek to admit evidence of product recalls, arguing that they constitute an admission by the company that the product was defective. *See, e.g*., ***Farner v. Paccar, Inc.***, 562 F.2d 518 (8th Cir. 1977). A recall can be either voluntary or involuntary (government-mandated). In either event, defendant could argue that the policy underlying the "subsequent remedial measure" statutes should prevent admission of the evidence. That is, public policy supports encouraging companies to keep their products as safe as possible, and to keep potentially harmful products out of the hands of the consumer. ***Johnson v. State***, 224 Ariz. 554, 233 P.3d 1133 (2010). *But see* ***Farner***, 562 F.2d at 527 (admitting recall notices; the exclusionary rule governing subsequent remedial measures is inapplicable in a strict liability case because it serves no deterrent function). Defendant can also argue the recall is irrelevant unless it is for the exact same product at issue and relates to the same geographical area to which the recall was directed. *See, e.g.,* ***Brethauer v. Gen. Motors Corp***., 221 Ariz. 192, 197, 211 P.3d 1176, 1181 (Ct. App. 2009) (affirming trial court's refusal to admit recall evidence as irrelevant and prejudicial). Finally, the defendant can try a hearsay objection, though that will not succeed if the court deems the recall to be an admission of a party opponent. *Farner*.

If admitted, the recall notices are admissible only against the issuer (usually the manufacturer), not the distributors or retailers who may also be named in the suit.

If evidence of the recall is admitted, the defendant can argue the plaintiff was at fault if she ignored the recall and was injured. Additionally, the recall might have been issued due to an intervening cause, such as problems with shipping. In these cases, a portion of fault can be assessed against the party actually causing the defect. The defendant can also argue that the recall is not an admission of a defect *per se*; but is a sincere effort to place public safety above financial concerns.

## Foreign Defendants

In our global economy, representation of foreign defendants is increasing. This is a larger problem for plaintiffs than defendants (generally speaking), as plaintiffs need to establish jurisdiction and properly serve foreign defendants, which can be a daunting task. In this respect, when representing a foreign defendant, the first thing defense counsel should do is closely examine jurisdiction and service to ensure it was properly effectuated in accordance with the laws of both Arizona as well as the foreign country.

If jurisdiction and service were proper, defense counsel might consider a motion to dismiss based on the doctrine of *forum non conveniens.* If granted, the plaintiff might abandon the case rather than be forced to litigate in a foreign country. The statute of limitations might bar a subsequent action as well. The foreign jurisdiction's laws could protect its corporations and disfavor American tort litigants.

## CONCLUSION

The topics discussed in this chapter address only some of the varied issues that can and do arise in a strict product liability suit. A firm understanding of the basic issues that often arise is necessary before embarking on the more complex issues involving discovery and the use of expert witnesses that eventually present themselves in a product liability suit.

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