

Packaging and Product Liability

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A more appropriate term would be *packaged product liability*, because a packaged product consists of product + package, and either component (or both) can incur allegations of negligence, strict liability, and failure to warn.

What is a product? Most people can provide an intuitive response, perhaps along the lines of, something that's manufactured and sold. Asked what is a package, and those same respondents will likely say a container or wrapping. Such a definition, while true in a limited sense, is inadequate for understanding the package as a factor in product liability.

A package serves three primary functions: (1) protection, (2) communication, and (3) utility/convenience.

Protection should not only accrue to the product but to all persons coming into contact with the packaged product. Poor protection can result in a damaged product that becomes a dangerous product, especially when the damage and danger are not obvious. Even when the product is unscathed, people can be injured by an inadequately protective package.

Communication is performed by labeling, sure, but all aspects of the package--materials, shape, size, colors--communicate. From a product liability perspective, the package, as a medium, should communicate safety. Adequate warnings and instructions should be given as much analysis and development as promotional communications.

Utility/Convenience is the measure of the ease and safety with which a person can interact with the packaged product. Examples are features that affect opening and closing, dispensing, handling, storage, disposal, and reuse.

There is overlap among the three functions, so much so, that the same package feature can be said to fall under more than one. An example is a warning. It's a communication, but it also provides protection and utility/convenience.

Packaging: A Systems Concept

Packaging, a broader, more encompassing concept than the mere package, is a discipline that cuts across every major discipline in a company. Packaging, as a system, requires trade-offs among the competing demands of those disciplines. In illustration, what the marketing department wants embodied in the package can differ from the priorities of other departments, such as receiving, inventory control, manufacturing, warehousing, transportation, and yes, legal.

In furtherance of the systems concept, there are primary, secondary, tertiary, and unit load levels of packaging. **Primary** packaging contains one unit of the product: a tube of tooth paste. **Secondary** packaging contains (or combines) primary packaging: the tooth paste carton. **Tertiary** packaging combines secondary packaging: the shipping case. **Unit load** combines tertiary packaging: a pallet load of shipping cases. Each level should provide the proper combinations of protection, communication, and utility/convenience. Although explained here in hierarchical fashion, not every product utilizes each level, and the same package can function on more than one level; for example, some products are packed and shipped in one container.

Relevant to product liability, different parties come into contact with different levels of packaging, thereby encountering different exposures to injury. Injury from pallet loads, for example, are more common in industrial settings; however, in this era of retail warehouse stores and membership stores, end-consumers are injured as well.

Examples of Product Liability Cases Involving Packaging

Having been an expert in each of the following cases, I offer them as examples of the variety of the interface between packaging and product liability, citing Plaintiff's allegations, without comment as to which side retained me.

- A man dies after being given the wrong drug by an ambulance worker, a mistake caused by deceptively similar packaging.

- A child dies after inhaling baby oil. The package carried no warning of the lethality of the mineral oil ingredient.

- A man and woman die from carbon monoxide, after bringing a portable charcoal grill into their tent. The packaging carried no warnings.

- A woman tries out a shrink-wrapped step aerobic product in a store aisle and is injured when the product slips from under her. The packaging gave an appearance that invited such trial.

- A mother and daughter are burned when batter plops into hot oil, after the top of a squeeze plastic bottle flew off, the package being unreasonably dangerous for its intended use.

- A woman gets pregnant because her birth-control pills were arranged in the wrong sequence inside the calendar package, although there were ways to design against such mishaps.

- A woman is injured by a knife that had sawed through its package, the package being unreasonably dangerous for its intended use.

- A man unloading a railcar is injured by falling merchandise from improperly designed pallet loads.
- A child is disfigured after take-out pizza escapes from a poorly designed box and lands in her lap.
- A beer importer claims financial damages when a shipment arrives stale because of the type of bottle used.
- A man is injured at work by a grinding wheel that had hidden damage as a result of being shipped in a box not fit for its intended purpose.
- A worker is injured when a crated machine topples from a fork truck. The crate markings did not warn that the content weight was not evenly distributed nor that the load had a high center of gravity.

Enter the Expert

Any expert is expected to possess considerable expertise, knowledge, and experience; but, because packaging is not quite like any other discipline, the value of the packaging expert should be evaluated, additionally, against the following criteria:

Breadth and variety. With the exception of certain bulk commodities, all products---from consumer non-durables to industrial durables--are packaged to some degree; therefore, the expert with a background across this spectrum, is less myopic in his analysis, and more able to advise on possibilities beyond what might be common in a particular industry or product category. This can pay dividends in arguments involving state-of-the-art, feasibility, and costs vs. benefits, among others.

Projects. Package design and development is a complex process involving not only a multiplicity of in-house disciplines but suppliers and other externals; as such, the expert with a wealth of project involvement, including management, can better evaluate the path taken by a particular company. Such an expert can advise on what documentation should have resulted, valuable in such discovery efforts as interrogatories and requests to produce.

Regulations. Since packaging is among the most regulated of disciplines, the expert who knows what agencies regulate a particular product and which regulations apply, can be an asset to either side of the unreasonably-dangerous argument. Moreover, the expert should understand that compliance with regulations, or the nonexistence of regulations, is not necessarily determining for either side. Additionally, the expert should be able to advise on applicable industry standards, guidelines, and practices.

Theory & Practice. Packaging is a field of study with its own principles, and the expert who has a formal education in the discipline, combined with a diversified work

history, can make the distinction between theory and practice, thus being able to advise on the reasonableness of various claims, whether before or after a Complaint is filed.

Related Fields. Because packaging involves other disciplines, the expert who holds credentials in some of them, brings a more encompassing perspective to a litigation. The packaging expert who also knows marketing, manufacturing, and logistics is better suited to analyze discovery gathered from those areas, central in the determination of the source and classification of an alleged defect.

Communications: Packaging is characterized by complexities and nuances that test one's communication skills. The expert who has taught, made presentations, and been published is more capable in conveying himself in reports, conferences, depositions, and trials.

In conclusion, product variety is at least equaled by packaging variety, perhaps surpassed, since within a given product category, there is likely to be more than one type of packaging. By such calculations, there is high probability that a product liability suit will have packaging ramifications. Trends, such as, complex consumer devices, products sourced from overseas, products acquired on-line, and products marketed to aging baby-boomers, further challenge the role of packaging in product safety. Whether an attorney represents Plaintiff or Defendant, he/she will benefit from a basic understanding of packaging fundamentals as well as knowledge of what experts in the field are offering.