

# 14. Products Liability

“Happy Fun Ball! ... Get one today! Warning: Pregnant women, the elderly, and children under 10 should avoid prolonged exposure to Happy Fun Ball. Caution: Happy Fun Ball may suddenly accelerate to dangerous speeds. ... Do not taunt Happy Fun Ball.”

– *Saturday Night Live*, 1991

## Introduction

We live in a consumer society, where all of us are constantly bombarded with marketing aimed at getting us to buy more stuff. In America’s early days, what we now think of as “products” were rarities. Items used in the household were commonly handmade by a member of that household. People made their own clothing, canned their own fruit, and built their own furniture. Other items were made in one-off fashion by craftspeople – cobblers made shoes, coopers made barrels, blacksmiths made hardware. Mass manufacturing changed all that. In 1893, the first Sears Roebuck & Company catalog was distributed, offering for sale jewelry and watches, and by the next year, saddles, bicycles, baby carriages, firearms, clothing, and many other items.

Today, we are dependent in our modern lives on an uncountable multitude of commercial firms to provide us with the items we use minute by minute. And many of these products have the potential to hurt us. When things go wrong, doctrines of products liability determine who can be held liable.

## Multiple Theories of Recovery for Products Liability

There are multiple ways for a plaintiff to sue for damages stemming from a product. Three in particular are important: warranty, negligence, and strict products liability. A plaintiff might sue on all three theories in the same lawsuit.

The first important theory for recovery in products liability is a **warranty** theory. Warranties used as a basis for suit can be express or

implied. We will not discuss warranty actions at length in this book, but there are two important things you should know about warranty actions before we move on. First, and most importantly, *a warranty is not a particular kind of contract*. A warranty might be a provision in a contract, but a warranty is capable of its own legal existence outside of the context of a contract. So, in contrast to a breach-of-contract action, a warranty action does not require privity. That is, while a person generally must be a party to a contract to sue for breach of contract, there is no such requirement for warranty claims. Also, a warranty, to be enforceable through a legal action, does not require consideration or a mutuality of obligation. You might ask, how come a warranty doesn't need to be a contract to be enforceable? The fact is, various state and federal laws provide an independent form of action for breach of warranty. Put still another way, contract law is not required for warranties because warranties are enforceable under warranty law. Warranties are their own beast – neither contract, tort, nor property. The second thing you should know is that *warranties can provide a basis for suit even where there is no personal injury or property damage*. That is, a product breaking down and needing replacement could give rise to a breach of warranty action. A suit in negligence or strict liability, by contrast, requires a showing of personal injury or property damage.

The next theory that can be used for products liability is a **negligence** theory. For the most part, a negligence suit for products liability proceeds as any other negligence suit would – although some jurisdictions have different or additional requirements for a negligence action concerning products. As with other negligence actions, a products liability action in negligence requires showing a relevant duty of care and a breach of that duty. As a general matter, proving a negligence-based product liability claim tends to be more difficult than proving a parallel strict liability claim. Nonetheless, there are circumstances under which it makes sense for a plaintiff to pursue a products liability action in negligence. In some jurisdictions, the law may not make strict liability available for certain kinds of product injuries, in which case negligence is the required path to recovery. Moreover, negligence might be a tactical choice, since it

may allow for the introduction at trial of evidence of carelessness – evidence that, without the negligence action – might be deemed irrelevant and therefore inadmissible. As will be discussed below, strict products liability requires showing the existence of a defect, and negligence has no such requirement. So if proving a defect is problematic, a negligence action may allow recovery where strict products liability will not. Finally, negligence might reach some defendants that strict liability cannot reach.

The dominant theory of liability for injuries caused by products is **strict liability**, often called “strict products liability.” The key to proving a case for strict liability is showing the existence of a product *defect*. If the product can be shown to be defective, then, for eligible defendants, it will not matter whether all due care was taken or not. We will see, later on, that the determination of what counts as a “defect” in many ways is similar to the determination of whether the defendant has breached the duty of care. An important limitation on the doctrine is that only certain defendants can be sued under a strict liability theory for products: manufacturers, distributors, and commercial sellers.

For the remainder of the chapter, we will discuss strict products liability.

### **The Elements of Strict Products Liability**

The formulation of the elements of an action for strict liability differ somewhat among courts, as so much in the common law does. Here, however, is a solid formulation that captures the essentials:

A plaintiff can establish a prima facie case for **strict products liability** by showing: The defendant (1) was engaged in the business of selling or supplying the product at issue, whether as a manufacturer, distributor, or retailer, (2) the product was defective when sold or supplied, (3) the product reached the plaintiff in essentially unchanged condition, and the defect was (4) an actual cause and (5) a proximate cause of (6) an injury to the plaintiff’s person or physical property.

It is instructive to compare the elements of strict products liability to negligence:

A plaintiff can establish a prima facie case for **negligence** by showing: (1) the defendant owed the plaintiff a duty of due care, (2) the defendant breached that duty, and that breach was (3) an actual cause and (4) a proximate cause of (5) an injury to the plaintiff's person or physical property.

You can see that the requirement in negligence that the defendant owes the plaintiff a duty of care is replaced by the requirement in strict products liability with the commercial selling/supplying requirement. And the breach element is replaced by a requirement that the plaintiff show there was a defect. (We will see that what the plaintiff must do to prove a defect is in many ways similar to what a plaintiff must do to prove a breach of the duty of care.) Actual causation, proximate causation, and the injury requirement are the same, although it is possible to find some differences jurisdiction to jurisdiction.

Our focus in this chapter will be on elements 1 and 2, since they are the places where strict products liability departs from negligence.

### **Sale by a Commercial Manufacturer, Distributor, or Retailer**

Strict products liability is notable for its range of eligible defendants. Manufacturers, distributors, and retailers can all be held liable. To be liable, an entity merely needs to be in the business of supplying products of the kind at issue and must have supplied the particular product at issue in a defective state. It does not matter whether the defendant introduced the defect into the product.

This feature of strict products liability has tremendous practical importance for a plaintiff. Suppose you purchase a defective bottle of soda pop from a sidewalk vendor. (Bottled pop is a good example because it was the product at issue in many early cases.) The sidewalk vendor of a bottle of soda pop might be judgment proof – meaning that the vendor won't have enough money to pay a substantial

judgment. But the manufacturer and the distributor will likely have deep enough pockets to be useful defendants. Alternatively, suppose you go to a large retailer – something along the lines of Target or Walmart – and purchase an off-brand portable electric heater, which has a defect and starts a fire. The heater might have been made overseas by a company that does no direct business in the United States. Merely finding out the identity of such a manufacturer could be difficult, and serving a summons could be a practical impossibility. But there is no need to get the manufacturer into court, since you can sue the retailer.

It is also very important to notice that there is no requirement that the defendant sold the defective product *to the plaintiff*. The plaintiff need not be connected through any stream of transactional relationships to the defendant. The plaintiff could have received the defective product as a gift. The plaintiff could even be an injured bystander – one who never touched the product, much less purchased it.

Strict products liability applies to entities engaged in the business of supplying products. While generally this is discussed in terms of a “sale,” other forms of commercial transactions – such as leasing – will qualify as well. The supplier must, however, be *commercial*. If you hold an occasional garage sale, you will not be considered a commercial supplier for purposes of strict products liability.

It might seem unfair for the retailer to be on the hook for a defect that originated with a foreign manufacturer. But that is not necessarily what happens in reality. A goliath retailer like Walmart can easily shift that burden right back onto the foreign manufacturer. Smaller retailers – ones that do not deal directly with overseas manufacturers – can shift the burden back onto the larger distributors they deal with. Those distributors, in turn, can reach the manufacturer. The point is that instead of the injured person needing to figure out who is the truly responsible party, the injured person can sue whomever is most convenient, and the burden of laying blame among manufacturers, distributors, and retailers becomes a problem for those parties to sort out among themselves – normally in a separate lawsuit.

The way in which strict products liability works to draw lines of responsibility and liability among far-flung parties, and the rationale for doing so, is the subject of the next two cases.

**Case: *Escola v. Coca-Cola***

The following case played a pivotal role in the history of strict products liability by laying out the intellectual foundation of the doctrine – albeit in a concurring opinion.

***Escola v. Coca-Cola***

Supreme Court of California

July 5, 1944

24 Cal.2d 453. GLADYS ESCOLA, Respondent, v. COCA COLA BOTTLING COMPANY OF FRESNO (a Corporation), Appellant. S. F. No. 16951. Gibson, C.J., wrote the opinion of the court in which Shenk, J., Curtis, J., Carter, J., and Schauer, J. joined. Traynor, J. wrote a separate concurring opinion.

**Chief Justice PHIL S. GIBSON:**

Plaintiff, a waitress in a restaurant, was injured when a bottle of Coca Cola broke in her hand. She alleged that defendant company, which had bottled and delivered the alleged defective bottle to her employer, was negligent in selling “bottles containing said beverage which on account of excessive pressure of gas or by reason of some defect in the bottle was dangerous ... and likely to explode.” This appeal is from a judgment upon a jury verdict in favor of plaintiff.

Defendant’s driver delivered several cases of Coca Cola to the restaurant, placing them on the floor, one on top of the other, under and behind the counter, where they remained at least thirty-six hours. Immediately before the accident, plaintiff picked up the top case and set it upon a near-by ice cream cabinet in front of and about three feet from the refrigerator. She then proceeded to take the bottles from the case with her right hand, one at a time, and put them into the refrigerator. Plaintiff testified that after she had placed three bottles in the refrigerator and had moved the fourth bottle about eighteen

inches from the case “it exploded in my hand.” The bottle broke into two jagged pieces and inflicted a deep five-inch cut, severing blood vessels, nerves and muscles of the thumb and palm of the hand. Plaintiff further testified that when the bottle exploded, “It made a sound similar to an electric light bulb that would have dropped. It made a loud pop.” Plaintiff’s employer testified, “I was about twenty feet from where it actually happened and I heard the explosion.” A fellow employee, on the opposite side of the counter, testified that plaintiff “had the bottle, I should judge, waist high, and I know that it didn’t bang either the case or the door or another bottle ... when it popped. It sounded just like a fruit jar would blow up. ...” The witness further testified that the contents of the bottle “flew all over herself and myself and the walls and one thing and another.”

The top portion of the bottle, with the cap, remained in plaintiff’s hand, and the lower portion fell to the floor but did not break. The broken bottle was not produced at the trial, the pieces having been thrown away by an employee of the restaurant shortly after the accident. Plaintiff, however, described the broken pieces, and a diagram of the bottle was made showing the location of the “fracture line” where the bottle broke in two.

One of defendant’s drivers, called as a witness by plaintiff, testified that he had seen other bottles of Coca Cola in the past explode and had found broken bottles in the warehouse when he took the cases out, but that he did not know what made them blow up.

Plaintiff then rested her case, having announced to the court that being unable to show any specific acts of negligence she relied completely on the doctrine of *res ipsa loquitur*.

The judgment is affirmed.

**Justice ROGER J. TRAYNOR, concurring:**

I concur in the judgment, but I believe the manufacturer’s negligence should no longer be singled out as the basis of a plaintiff’s right to recover in cases like the present one. In my opinion it should now be recognized that a manufacturer incurs

an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings. *McPherson v. Buick Motor Co.*, 217 N.Y. 382, established the principle, recognized by this court, that irrespective of privity of contract, the manufacturer is responsible for an injury caused by such an article to any person who comes in lawful contact with it. In these cases the source of the manufacturer's liability was his negligence in the manufacturing process or in the inspection of component parts supplied by others. Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.

The injury from a defective product does not become a matter of indifference because the defect arises from causes other than the negligence of the manufacturer, such as negligence of a submanufacturer of a component part whose defects could not be revealed by inspection, or unknown causes that even by the device of *res ipsa loquitur* cannot be classified as negligence of



the manufacturer. The inference of negligence may be dispelled by an affirmative showing of proper care. If the evidence against the fact inferred is “clear, positive, uncontradicted, and of such a nature that it cannot rationally be disbelieved, the court must instruct the jury that the nonexistence of the fact has been established as a matter of law.” (*Blank v. Coffin*, 20 Cal.2d 457, 461.) An injured person, however, is not ordinarily in a position to refute such evidence or identify the cause of the defect, for he can hardly be familiar with the manufacturing process as the manufacturer himself is. In leaving it to the jury to decide whether the inference has been dispelled, regardless of the evidence against it, the negligence rule approaches the rule of strict liability. It is needlessly circuitous to make negligence the basis of recovery and impose what is in reality liability without negligence. If public policy demands that a manufacturer of goods be responsible for their quality regardless of negligence there is no reason not to fix that responsibility openly.

In the case of foodstuffs, the public policy of the state is formulated in a criminal statute. Section 26510 of the Health and Safety Code prohibits the manufacturing, preparing, compounding, packing, selling, offering for sale, or keeping for sale, or advertising within the state, of any adulterated food. Section 26470 declares that food is adulterated when “it has been produced, prepared, packed, or held under insanitary conditions whereby it may have been rendered diseased, unwholesome or injurious to health.” The statute imposes criminal liability not only if the food is adulterated, but if its container, which may be a bottle (26451), has any deleterious substance (26470 (6)), or renders the product injurious to health. (26470 (4)). The criminal liability under the statute attaches without proof of fault, so that the manufacturer is under the duty of ascertaining whether an article manufactured by him is safe. (*People v. Schwartz*, 28 Cal.App.2d Supp. 775.) Statutes of this kind result in a strict liability of the manufacturer in tort to the member of the public injured. (See cases cited in Prosser, Torts, p. 693, note 69.)

The statute may well be applicable to a bottle whose defects cause it to explode. In any event it is significant that the statute

imposes criminal liability without fault, reflecting the public policy of protecting the public from dangerous products placed on the market, irrespective of negligence in their manufacture. While the Legislature imposes criminal liability only with regard to food products and their containers, there are many other sources of danger. It is to the public interest to prevent injury to the public from any defective goods by the imposition of civil liability generally.~

As handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer and consumer of a product has been altered. Manufacturing processes, frequently valuable secrets, are ordinarily either inaccessible to or beyond the ken of the general public. The consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trade-marks. Consumers no longer approach products warily but accept them on faith, relying on the reputation of the manufacturer or the trade mark. Manufacturers have sought to justify that faith by increasingly high standards of inspection and a readiness to make good on defective products by way of replacements and refunds. The manufacturer's obligation to the consumer must keep pace with the changing relationship between them; it cannot be escaped because the marketing of a product has become so complicated as to require one or more intermediaries. Certainly there is greater reason to impose liability on the manufacturer than on the retailer who is but a conduit of a product that he is not himself able to test.

The manufacturer's liability should, of course, be defined in terms of the safety of the product in normal and proper use, and should not extend to injuries that cannot be traced to the product as it reached the market.

#### **Case: *Greenman v. Yuba Power Products***

The *Greenman* case, coming nearly 20 years after *Escola v. Coca-Cola*, gave birth to strict products liability.

*Greenman v. Yuba Power Products*

Supreme Court of California

January 24, 1963

59 Cal.2d 57. WILLIAM B. GREENMAN, Plaintiff and Appellant, v. YUBA POWER PRODUCTS, INC., Defendant and Appellant; THE HAYSEED, Defendant and Respondent. L. A. No. 26976.

Traynor, J, wrote the opinion of the court, in which Gibson, C. J., Schauer, J., McComb, J., Peters, J., Tobriner, J., and Peek, J., joined.

**Justice ROGER J. TRAYNOR:**

Plaintiff brought this action for damages against the retailer and the manufacturer of a Shopsmith, a combination power tool that could be used as a saw, drill, and wood lathe. He saw a Shopsmith demonstrated by the retailer and studied a brochure prepared by the manufacturer. He decided he wanted a Shopsmith for his home workshop, and his wife bought and gave him one for Christmas in 1955. In 1957 he bought the necessary attachments to use the Shopsmith as a lathe for turning a large piece of wood he wished to make into a chalice. After he had worked on the piece of wood several times without difficulty, it suddenly flew out of the machine and struck him on the forehead, inflicting serious injuries. About 10 1/2 months later, he gave the retailer and the manufacturer written notice of claimed breaches of warranties and filed a complaint against them alleging such breaches and negligence.

After a trial before a jury, the court ruled that there was no evidence that the retailer was negligent or had breached any express warranty and that the manufacturer was not liable for the breach of any implied warranty. Accordingly, it submitted to the jury only the cause of action alleging breach of implied warranties against the retailer and the causes of action alleging negligence and breach of express warranties against the manufacturer. The jury returned a verdict for the retailer against plaintiff and for plaintiff against the manufacturer in the amount of \$65,000. The trial court denied the manufacturer's motion for

a new trial and entered judgment on the verdict. The manufacturer and plaintiff appeal. Plaintiff seeks a reversal of the part of the judgment in favor of the retailer, however, only in the event that the part of the judgment against the manufacturer is reversed.

Plaintiff introduced substantial evidence that his injuries were caused by defective design and construction of the Shopsmith. His expert witnesses testified that inadequate set screws were used to hold parts of the machine together so that normal vibration caused the tailstock of the lathe to move away from the piece of wood being turned permitting it to fly out of the lathe. They also testified that there were other more positive ways of fastening the parts of the machine together, the use of which would have prevented the accident. The jury could therefore reasonably have concluded that the manufacturer negligently constructed the Shopsmith. The jury could also reasonably have concluded that statements in the manufacturer's brochure were untrue, that they constituted express warranties, and that plaintiff's injuries were caused by their breach.<sup>5</sup> In this respect the trial court limited the jury to a consideration of two statements in the manufacturer's brochure. (1) "When Shopsmith Is in Horizontal Position--Rugged construction of frame provides rigid support from end to end. Heavy centerless-ground steel tubing insures perfect alignment of components." (2) "Shopsmith maintains its accuracy because every component has positive locks that hold adjustments through rough or precision work."<sup>7</sup>

The manufacturer contends, however, that plaintiff did not give it notice of breach of warranty within a reasonable time and that therefore his cause of action for breach of warranty is barred by section 1769 of the Civil Code.<sup>6</sup> The notice requirement of section 1769, however, is not an appropriate one for the court to adopt in actions by injured consumers against manufacturers with whom they have not dealt. "As between the immediate parties to the sale [the notice requirement] is a sound commercial rule, designed to protect the seller against unduly delayed claims for damages. As applied to personal injuries, and

notice to a remote seller, it becomes a booby-trap for the unwary. The injured consumer is seldom 'steeped in the business practice which justifies the rule,' and at least until he has had legal advice it will not occur to him to give notice to one with whom he has had no dealings." (Prosser, *Strict Liability to the Consumer*, 69 *Yale L. J.* 1099, 1130, footnotes omitted.)~

Moreover, to impose strict liability on the manufacturer under the circumstances of this case, it was not necessary for plaintiff to establish an express warranty as defined in section 1732 of the Civil Code. A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. Recognized first in the case of unwholesome food products, such liability has now been extended to a variety of other products that create as great or greater hazards if defective.

Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law, and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort. Accordingly, rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by its defective products unless those rules also serve the purposes for which such liability is imposed.~

The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves. Sales warranties serve this purpose fitfully at best. In the present case, for example, plaintiff was able to plead and prove an express warranty only because he read and relied on the

representations of the Shopsmith's ruggedness contained in the manufacturer's brochure. Implicit in the machine's presence on the market, however, was a representation that it would safely do the jobs for which it was built. Under these circumstances, it should not be controlling whether plaintiff selected the machine because of the statements in the brochure, or because of the machine's own appearance of excellence that belied the defect lurking beneath the surface, or because he merely assumed that it would safely do the jobs it was built to do. It should not be controlling whether the details of the sales from manufacturer to retailer and from retailer to plaintiff's wife were such that one or more of the implied warranties of the sales act arose. "The remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales." To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use.~

The judgment is affirmed.

### **What Constitutes a Product**

Strict products liability applies only to damages caused by a *product*. In general, a product is a tangible item that is created by humans to be sold or otherwise commercially distributed.

There is a trend in business to call everything a "product" – even services. A bank might advertise, "Talk to us about our full range of investment products." Business-marketing jargon aside, however, banking and investment services are not really products. And products liability does not extend to services, activities, or conditions.

On the other hand, commercially prepared foods *are* products. This is true even though it a restaurateur might blanch at the idea of offering a menu of "appetizer products."

Thinking of restaurant food is also a good reminder that products come in many shapes, sizes, and price ranges. When talking about strict products liability, it is common think in terms of a factory

model, where an assembly line churns out “widgets” of some sort. This model makes for good examples, and, indeed, it was factory production and attenuated chains of distribution that spurred the development of strict products liability doctrine. But contemporary products liability can extend to everything from a handmade refrigerator magnet purchased through Etsy to a multi-million-dollar jumbo jet.

Although products are generally tangible, movable items, some authorities have extended the definition of products in order to expand the scope of strict products liability. Some authorities include real property as a product in certain contexts, such as when houses are produced in a way that is analogous to the mass manufacturing of more traditional products. Some authorities even consider electric-utility services to implicate strict products liability. In doing so, they call electricity a product, even though with AC power, nothing tangible actually flows from the power plant to the customer. Of course, the motivation for expanding the definition of products in these ways comes from an understanding of the underlying policy rationale of strict products liability. That’s one reason it’s helpful to see the roots of that rationale in the *Escola* and *Greenman* cases, above.

### **What Constitutes a Defect**

Not every product-caused injury implicates products liability. The injury must have been caused by a *defect* in the product. Every car accident, for instance, involves a product – the car, namely. But only a relatively few car accidents happen because of an automobile defect.

The question of whether a particular product is defective is where most of the action is in a products-liability dispute. Questions of commercial sale and whether something is a product are usually straightforward. But whether or not something counts as a defect will almost always be hotly contested in litigation, and it is the issue for which products liability has the most developed doctrine.

Courts have helpfully divided the universe of potential product defects into **three categories: manufacturing defects, design**

**defects, and warning defects.** This typology is useful, because each category has its own unique set of issues that must be considered.

### **Manufacturing Defects**

Manufacturing defects result when something goes wrong in the manufacturing process causing a product to differ from its intended design. A bad weld or a missing bolt are examples.

Strict liability for manufacturing defects is very much like strict liability for ultrahazardous activities, which we discussed in Chapter 13. Carefulness is irrelevant. The focus is on the kind of danger the product presents.

The archetypal birthplace of a manufacturing defect is on the factory floor. The person whose actions are most closely connected with the genesis of a manufacturing defect is likely a worker earning an hourly wage.

Some commentators describe a manufacturing defect as occurring when one individual item coming off the assembly line is different from all the other items. This can be a helpful way to think of the concept of a manufacturing defect, just keep in mind that multiple items or even entire lots could share the same manufacturing defect. Mold contamination, for instance, could cause millions of units of processed food to be defective.

Of course, not every variation on the manufacturing line will render a product defective for purposes of strict products liability. Under the influential § 402A of the Restatement (Second) of Torts, a product is defective where it is “unreasonably dangerous to the user or consumer or to his property.” So some things that are defects from the perspective of a quality inspector at the factory are not defects for the purpose of tort law. A blue car that comes off the assembly line with one red door would be rejected by the quality-control team. And a blemish in the finish on a fender might be called a “paint defect.” But for something to be a defect in the tort sense, it must render the product unreasonably dangerous. A red door or fender blemish might be annoying to look at, but it doesn’t make a car more dangerous.



The § 402A definition is useful in pairing down the universe of potential defects by specifying that a defect, to count, must make the product unreasonably dangerous. But the definition leave unanswered the question of what it means to be unreasonably dangerous.

One way the courts have conceptualized whether a product is unreasonably dangerous is the **consumer-expectations test**. This test asks whether a reasonable consumer would expect the danger alleged to have developed into the plaintiff's injury. Under this view, a kitchen knife is not unreasonably dangerous on account of it being sharp enough to cut deeply into flesh. Why not? The reasonable consumer expects a kitchen knife to be sharp enough to cut flesh.

On the other hand, suppose a kitchen knife is prone to suddenly splintering when pressed on a cutting board, or has a tendency for the blade to disengage from the hilt and careen upward in the direction from which pressure is applied. Consumers would not expect this kind of behavior from a kitchen knife; thus, these things would indicate that the product is defective.

So, using the consumer-expectations test, an actionable manufacturing defect occurs when both: (a) the product differs in its manufacturing from its intended design and, (b) that difference renders the product “unreasonably dangerous” so that a reasonable consumer would not have expected to be harmed by it.

### **Design Defects**

A design defect is a problem with how the product was designed. A decision by managers to save money by gluing parts rather than welding them, for instance, could be an example of a design defect. A mistake by an engineer in composing lines of software code to be used in a controller unit might be another example of a design defect.

In contrast to manufacturing defects, the archetypal birthplace of a design defect is not on the factory floor but up in the office tower. And instead of being a one-off bad unit that makes it past inspectors, the archetypal design defect can be found in all units coming off the assembly line that share the same design.

A design defect could reflect fine choices made in the blueprints for a product. Examples could include making a strut too thin or placing two moving components too close to one another. But the defect could also result from the natural properties of materials. Asbestos, for instance, which is a naturally occurring mineral, may be found to make asbestos insulation defective on account of its friability and capacity to interact pathogenically with lung tissue. The design defect could also be the failure to install a safety feature. That is, the defect might not be what the product has, but what the product lacks, such as an electrical failsafe, a mechanical interlock, or a flame arrestor.

While the cause of action for design defects is correctly called “strict products liability,” it works in practice less like strict liability for ultrahazardous activities, and more like negligence. That is because determining what counts as a design defect involves an inquiry that is similar to deciding whether a defendant has breached the duty of due care.

A design defect might result from a company lagging behind others in the industry when it comes to adopting a safer technology, rendering its products more dangerous than those of competitors. On the other hand, an entire industry’s products could prove defective so long as there was a feasible safer design that could have been adopted and would have prevented the plaintiff’s injury.

In deciding whether an aspect of a product’s design has rendered it unreasonably dangerous, courts sometimes employ the consumer-expectations test. That test, however, can lead to some strange results in design defects cases. Take portable gasoline containers, which went through an industry-wide re-design a few years ago. Suppose that consumers are aware that the re-designed containers are prone to spills and sprays of gasoline. Because of this knowledge, consumers might expect the modern gasoline containers to be unsafe, and thus a court might hold that an injured plaintiff fails the consumer-expectation test, even if there was an easy fix to the design that could have prevented all injuries.

This sort of argument has been successful in court. For instance, in *Orfield v. International Harvester Co.*, 535 F.2d 959 (6th Cir 1976), the

Sixth Circuit held that where a bulldozer lacked a canopy or cage and, therefore, obviously left the operator vulnerable to being crushed by falling trees, the operator could not succeed with a design defect claim for failure to pass the consumer-expectations test.

On the other hand, the consumer-expectations test could also lead to pro-consumer results that seem incongruous. Suppose an important product is designed with state-of-the-art technology and no safer alternative exists, yet it injures a plaintiff in a way that no consumer would expect. A broad application of the consumer-expectation test might allow recovery in such a situation, even though it would seem to run counter to the spirit of the doctrine.

An alternative to the consumer-expectations test, preferred by many authorities for alleged design defects, is the **risk-utility test**, which is also called the “risk-benefit test.” This test balances the risk of the product and cost of a design change on the one hand, against the benefits of a safer design on the other hand.

The risk-utility test bears strong similarities to negligence. In fact, the risk-utility test is really the same as the Hand Formula for negligence, in which there is liability if the burden of undertaking a precaution is outweighed by the probability of a loss multiplied by the magnitude of the loss. (See the section titled “The Negligence Calculus,” in Chapter 6 of Volume One.) The Hand Formula, however, is explicitly invoked in negligence cases only infrequently, with far more attention heaped on it by scholars than judges. By contrast, the risk-utility test is bread-and-butter doctrine for products liability.

### **Warning Defects**

A warning defect arises where the problem is not with the product as such, but instead with the instructions or information provided with the product. A weak, easily deformed carabiner keyring that, by its appearance, looks like it could be used to support the weight of a rock climber, might be defective if it does not clearly indicate that it is not to be used for climbing. (Check a nearby carabiner – you may find exactly this warning.)

Warning defects can be thought of as a particular category of design defects, where the “design” comprises the instructions written on the product and in the accompanying documentation.

***Case: In re Toyota Motor Corp. Unintended Acceleration***

This case considers claims of manufacturing defect, design defect, and warning defect, and it analyzes those claims under the heightened pleading requirements set forth in the recent “*Twiqbal*” decisions of the U.S. Supreme Court interpreting the Federal Rules of Civil Procedure.

***In re Toyota Motor Corp. Unintended Acceleration  
Marketing, Sales Practices and Products Liability  
Litigation***

United States District Court for the Central District of California  
December 9, 2010

754 F.Supp.2d 1208. Case No. 8:10ML 02151 JVS (FMOx).

**Judge JAMES V. SELNA:**

This multi-district litigation arises out of Plaintiffs’ purchase of vehicles designed, manufactured, distributed, marketed and sold by Defendants Toyota Motor Corporation dba Toyota Motor North America, Inc. (“TMC”), and its subsidiary, Toyota Motor Sales, U.S.A., Inc. (“TMS”) (collectively, “Toyota” or “Defendants”). Presently before the Court are Toyota’s Motions to Dismiss claims asserted by Plaintiffs claiming personal injury and/or wrongful death as a result of events of sudden, unintended acceleration (“SUA”) of Toyota vehicles.

This ruling applies to all of Toyota’s Motions to Dismiss, unless otherwise noted.~

*I. Factual Allegations*

In support of its Motions to Dismiss certain personal injury/wrongful death complaints, Toyota cites to four exemplar complaints. The complaints collectively raise the following claims under California law: (1) negligence, (2) products liability, (3) breach of express and implied warranties, and (4) fraudulent concealment.~ As it must pursuant to the relevant legal standard,

for the purposes of Toyota's Motions to Dismiss, the Court accepts as true all well-pled factual allegations set forth in the complaints.

*A. Roberts*

Plaintiff Omar Roberts ("Roberts") is a resident of Brooklyn, New York. Roberts was the owner of a 2009 Toyota Camry. On October 7, 2008, Roberts was driving his Toyota Camry at a safe rate of speed when the vehicle "suddenly accelerated at a high rate of speed and he was unable to stop the vehicle by braking." Roberts' car struck the car in front of him, and as a result of the collision, Roberts suffered numerous traumatic injuries, including broken legs and torn tendons. Residual effects of the accident continue to impact Roberts' daily life, including his mobility. At all relevant times, Roberts was unaware of his vehicle's hidden defects.

*B. Scott*

Plaintiffs Sandra Hill Scott ("Mrs. Scott") and Raleigh Scott ("Mr. Scott"), husband and wife, reside in Lee County, Florida. On April 12, 2010, while Mrs. Scott was driving her 2004 Toyota Prius in Miami Gardens, Florida, the Prius suddenly and unexpectedly accelerated. Mrs. Scott attempted to control the sudden acceleration by stepping on the brake pedal. However, the vehicle would not stop and instead accelerated through four lanes of traffic, and collided with a fence and a tree. The Florida Traffic Crash Report associated with the incident read, "Driver 1 stated the accelerator of the vehicle got stuck and she could not control the vehicle." The crash resulted in injury and damage to Mrs. Scott. Toyota never provided a warning to Mrs. Scott regarding the dangerous propensities of her vehicle.

*C. Akamike*

Plaintiff Romanus Akamike ("Akamike") is a resident of Texas. Akamike purchased a 2007 Toyota Camry, alleging that at the time of purchase, he thought "he was investing in a safe and reliable vehicle" and that he was "unaware of the vehicle's concealed and potentially lethal defects of which Toyota was or should have been aware." On December 15, 2009, Akamike was

driving his Toyota Camry when his car “suddenly accelerated, causing the car to flip several times before coming to a stop.” Akamike suffered general bruising over his entire body, left shoulder pain, and a large subdural hematoma. The day after the accident, Akamike “was found unresponsive” and transported by ambulance to a nearby medical center, where he was diagnosed as having a head injury. He was taken by helicopter to a different facility, where he had brain surgery and was discharged on December 19, 2009. Since the accident, Akamike alleges that he has undergone brain surgery and physical therapy as a result of his injuries.

#### D. *Riegel Breit*

Plaintiff Suzanne Riegel Breit (“Riegel Breit”) is a resident of Virginia and is the administrator for the estate of Decedent Wava Joy Riegel (“Riegel”). On September 24, 2009, Riegel was driving her 2010 Toyota Camry in an intended and foreseeable manner when it suddenly and unexpectedly accelerated. The vehicle collided with a tree, resulting in fatal injuries to Riegel. Riegel Breit alleges that at no time prior to September 24, 2009 was Riegel warned of the dangerous propensities within Riegel’s Camry.

#### II. *Legal Standard*

To survive a motion to dismiss under Fed.R.Civ.P. 12(b)(6), a plaintiff must state “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

#### III. *Plaintiffs’ Products Liability Claims*

Toyota argues that Plaintiffs’ products liability and negligence claims are deficient under *Twombly* and *Iqbal* because they fail to offer specific allegations of an actual defect in Toyota’s electronic throttle control system (“ETCS” or “ETCS-i”). According to Toyota, Plaintiffs do not identify or describe any alleged defect in the ETCS-i, or sufficiently allege that the ETCS-i defect was a substantial factor in causing any of the accidents that led to Plaintiffs’ injuries. Instead, Plaintiffs rely on conclusory allegations regarding past incidents of SUA events

compiled from media reports, NHTSA databases, and third party complaints. In Toyota's view, because products liability and negligence claims must be plausible, Plaintiffs' failure to identify "what specific defect, if any, is causing the alleged [SUA] events" renders their allegations insufficient. Thus, Toyota reasons, Plaintiffs' products liability and negligence claims should be dismissed because Plaintiffs have "concluded, not shown, that the subject accidents were caused by a specific defect in the ETCS-i." Toyota concludes, therefore, that "[i]f the holdings of *Iqbal* and *Twombly* have any purpose, it is that the Toyota Defendants do not have to guess or speculate as to Plaintiffs' allegation of the cause of the alleged acceleration events."

Plaintiffs respond that they properly allege that their Toyota vehicles are defective because they suddenly accelerate on their own and lack a brake override system to prevent, mitigate, or stop an SUA event. Plaintiffs allege that their vehicles failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, and Plaintiffs argue that they are not required to plead, let alone prove at trial, a more specific "defect" to prevail under California design defect law. Moreover, under *Twombly* and *Iqbal*, Plaintiffs contend that their claims suffice because " 'the very nature of a products liability action' makes it difficult 'to know with specificity before discovery what was the likely source of the defect,' or 'to pinpoint a specific source of a defect.'" Thus, Plaintiffs argue that by "detailing the product's problem, the consequences of that problem," alleging that Plaintiffs "used the product," and the "consequences that occurred[,]" their allegations "are more than sufficient" under *Iqbal* to "nudge claims across the line from conceivable to plausible." Plaintiffs describe in detail the SUA problem with Toyota vehicles, the alleged causes of SUA, Plaintiffs' use of the products in an ordinary and reasonably foreseeable manner, and the adverse consequences of that use. For these reasons, Plaintiffs argue that Toyota's motion should be denied.

#### A. *Products Liability Claims*

“A manufacturer may be held strictly liable for placing a defective product on the market if the plaintiff’s injury results from a reasonably foreseeable use of the product.” *Saller v. Crown Cork & Seal Co., Inc.*, 187 Cal.App.4th 1220, 1231 (2010). California recognizes strict liability for three types of products liability claims: design defects, manufacturing defects, and warning defects.

Here, each exemplar complaint asserts products liability claims for design and warning defects. It appears that the *Scott* and *Riegel Breit* complaints also assert claims for manufacturing defects. The Court addresses the sufficiency of the pleadings under each theory of liability.

#### 1. *Design Defects*

“Defective design may be established under two theories: (1) the consumer expectations test, which asks whether the product performed as safely as an ordinary consumer would expect when used in an intended and reasonably foreseeable manner; or (2) the risk/benefit test, which asks whether the benefits of the challenged design outweigh the risk of danger inherent in the design.” The consumer expectations test is used when “the product is one within the common experience of ordinary consumers.” If the facts do not “permit an inference that the product’s performance did not meet minimum safety expectations of its ordinary users,” the design defect must be analyzed under the risk-benefit test.

To meet the strictures of *Twombly* and *Iqbal*, Plaintiffs should identify which design defect theory is being utilized and allege facts to support that theory. For example, under the “consumer expectations test,” plaintiff “should *describe how* the [product] failed to meet the minimum safety expectations of an ordinary consumer” of that product. Similarly, under the “risk-benefit test,” a plaintiff “should allege that the risks of the design outweigh the benefits, and then “explain how the particular design of the [product] caused [plaintiff] harm”.” A bare allegation that the product “suffered from a ‘design defect’ is an insufficient legal conclusion” under *Twombly* and *Iqbal*.



Here, the Court finds that the exemplar complaints allege sufficient facts under both the consumer expectations and risk-benefit tests. For example, the *Roberts* complaint alleges that Plaintiff was “driving at a safe rate of speed” when the “vehicle suddenly accelerated at a high rate of speed.” Plaintiff was “unable to stop the vehicle by braking” and consequently “struck the car ahead of him,” resulting in numerous injuries including “broken legs and torn tendons.” Plaintiff further alleges that Toyota vehicles with “the electronic throttle control system ... contain design defects that cause sudden and uncontrolled acceleration to speeds of up to 100 miles per hour or more,” and that these vehicles are defective because they experience SUA events and “lack a mechanism, such as a brake override system, to prevent, mitigate, or stop [an SUA] event. Plaintiff identifies three design defects that cause or contribute to SUA events, including: (1) an inadequate fault detection system, (2) an ETCS system that is “highly susceptible to malfunction caused by various electronic failures, including ... short circuits, software glitches, and electromagnetic interference from outside sources,” and (3) the absence of a brake override system. According to Plaintiff, “[t]hese defects alone, or in combination, render certain Toyota vehicles unreasonably dangerous and unable to perform as an ordinary consumer would expect.” By 2007, Toyota was aware that a brake override system could prevent the SUA defect and “could have easily implemented a brake override system,” but instead “hid the problem and proposed inadequate and misleading solutions” that led to “numerous fatalities and injuries, including those suffered by Plaintiff.” Based on the foregoing, Plaintiff brings claims for design defects under the consumer expectations test and risk-benefit test.

The Court has no trouble discerning sufficient facts in the *Roberts* complaint that support a design-defect claim under the consumer expectations test and the risk-benefit test. Under the consumer expectations test, Toyota vehicles do not meet consumer expectations because they suddenly and unexpectedly accelerate and cannot be stopped upon proper application of the brake pedal, which happened to Plaintiff Roberts and caused his

crash and injuries. Similarly, under the risk-benefit test, the ETCS-i system is defective because it causes SUA events owing to an inadequate fault detection system, electronic failures, and the absence of a brake override system, and the risks of SUA are not outweighed by any purported benefits.

Toyota argues that Plaintiffs “fail to identify a defective cause of the alleged acceleration incidents” and, as an issue of “fair notice,” Plaintiffs must state “what is allegedly wrong with the vehicles other than conjecture that a brake override system could prevent an occurrence.” Toyota demands a level of specificity that is not required at the pleadings stage. The defect is identified: Plaintiffs’ cars suddenly and unexpectedly accelerate and do not stop upon proper application of the brake pedal. Causes of the defect are identified: an inadequate fault detection system and electronic failures. An alternative design (that allegedly would have prevented the defect from injuring Plaintiffs) is identified: a brake override system. These allegations do more than merely recite the elements required for design defect claims under California law, and plausibly give rise to an entitlement to relief.

Accordingly, Toyota’s motion is denied as it pertains to Plaintiffs’ allegations of design defects.

## 2. *Warning Defect*

Under a “warning defect” theory, “a product may be defective even though it is manufactured or designed flawlessly.” *Saller*, 187 Cal.App.4th at 1238. Liability under this theory “requires that the manufacturer knows, or should have known, of the danger of the product at the time it is sold or distributed,” and that “the plaintiff prove that defendant ‘did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of the manufacture and distribution.’”

Here, the Court finds that the exemplar complaints allege sufficient facts to establish a claim for a “warning defect.” For example, the *Roberts* complaint alleges the danger of SUA, and

that “Toyota was aware of the defective nature of the acceleration control and throttle system in its vehicles since at least 2002, but failed to adequately and accurately disclose these facts to Plaintiff, the public, and NHTSA.” Paragraphs 49 through 78 contain allegations about Toyota’s knowledge of the alleged defects, including numerous consumer complaints and investigations by NHTSA. Paragraphs 105 through 125 contain allegations that Toyota concealed the danger of these defects from the public, including hiding reports of SUA and denying that SUA existed. Paragraphs 126 through 129 contain allegations that Toyota tried to cover up the alleged ETCS-i defects by focusing on mechanical problems with the floor mats and sticky pedals. Plaintiff also alleges that he did not know of the dangers of SUA.

Taken together, these allegations are sufficient to support a claim under a warning defect theory of liability: the particular risk allegedly known by Toyota was SUA, and that risk was not disclosed to Plaintiff. To the extent that Toyota argues more specificity is required, the Court disagrees.

Accordingly, Toyota’s motion is denied as it pertains to Plaintiffs’ allegations of warning defects.

### 3. *Manufacturing Defects*

Under a “manufacturing defect” theory, “a defective product is one that differs from the manufacturer’s intended result or from other ostensibly identical units of the same product line.” *Lucas*, 726 F.Supp.2d at 1154. The “manufacturing defect” theory posits that “a suitable design is in place, but that the manufacturing process has in some way deviated from that design.” *In re Coordinated Latex Glove Litig.*, 99 Cal.App.4th 594, 613 (2002). To satisfy *Twombly* and *Iqbal*, plaintiffs should “*identify/explain how* the [product] either deviated from [defendant’s] intended result/design or *how* the [product] deviated from other seemingly identical [product] models.”~

Here, the Court finds that the *Scott* and *Riegel Breit* complaints do not adequately assert claims for manufacturing defects under *Twombly* and *Iqbal*. For example, the *Scott* complaint alleges that

the “ETCS systems and their various components were defectively designed *and manufactured* in that they were highly susceptible to malfunction caused by various electronic failures, including but not limited to short circuits and electromagnetic interference from electromagnetic sources outside the vehicle.” (italics added). Plaintiff further alleges that “the Subject Prius, which was being used in a reasonably foreseeable manner, failed to perform as an ordinary consumer would have expected, *failed to conform with its manufacturing specifications*, failed to contain adequate warnings, and its design was a substantial factor in causing injuries.” (italics added). Taken together, these two allegations seemingly allege a manufacturing defect. However, the *Scott* complaint does not offer any allegations of how the vehicle deviated from Toyota’s intended design or other product models. *See Lucas*, 726 F.Supp.2d at 1155. Instead, the *Scott* complaint offers bare allegations of a manufacturing defect, and thus dismissal is warranted.

Accordingly, Toyota’s motion is granted as it pertains to Scott and Riegel Breit’s allegations of manufacturing defects. The dismissal is without prejudice.~ Leave to amend should be granted when amendment would not be futile. Because it is conceivable that Plaintiffs could allege facts sufficient to support a claim under a manufacturing defects theory of liability, the Court grants leave to amend.~

With respect to Plaintiffs’ design and warning defect claims, Toyota cannot credibly claim that it does not comprehend Plaintiffs’ theory from the pleadings, nor that it is handicapped in responding to the Complaint.~

IT IS SO ORDERED

***Note on In re Toyota Motor Corp. Unintended  
Acceleration***

Although the plaintiffs in *In re Toyota* contended that Toyota hid information about unintended acceleration events, the car company trumpeted its openness and denied that defects were to blame for the plaintiffs’ injuries. In November 2013, Carly Schaffner, spokesperson for Toyota Motor Sales U.S.A., was quoted as saying in an e-mail

about the litigation before Judge Selna, “Despite nearly three years of litigating this case and unprecedented access to Toyota’s source code, plaintiff’s counsel have never replicated unintended acceleration in a Toyota vehicle and have failed to demonstrate that any alleged defect actually caused the accident at issue in this case.”

About a month later, however, Judge Selna announced that Toyota was asking for a temporary halt to the litigation to begin an “intensive settlement process.”

Something had changed, causing Toyota’s sudden move to resolve the tort cases against it.

One factor seems to have been a parallel criminal prosecution being pursued against Toyota. The U.S. Department of Justice charged Toyota with committing criminal wire fraud in the course of covering up safety problems. Wire fraud, under 18 U.S.C. §1343, requires a scheme to intentionally deceive someone in order get money from them, plus the use of interstate wire communications (such as telephone or internet) to accomplish this.

The DOJ action ended in March 2014 when Toyota agreed to pay a record fine of \$1.2 billion and to submit to independent monitoring as part of a deferred prosecution agreement. Toyota also signed a statement saying, “Toyota admits that it misled U.S. consumers by concealing and making deceptive statements about two safety issues affecting its vehicles ...”

The Toyota episode suggests how criminal law and administrative regulations can interact with tort liability in the defective products area.

**Reading: *DOJ Press Release on Toyota Unintended Acceleration***

The U.S. Department of Justice issued a press release following its deferred prosecution agreement with Toyota. The document provides a fuller account of the facts leading up to Toyota’s decision to start settling the cases against it.

*Justice Department Announces Criminal Charge  
Against Toyota Motor Corporation and Deferred  
Prosecution Agreement with \$1.2 Billion Financial  
Penalty*

United States Department of Justice Office of Public Affairs  
March 19, 2014

~In the fall of 2009, Toyota deceived consumers and its U.S. regulator, the National Highway Traffic Safety Administration (“NHTSA”), by claiming that it had “addressed” the “root cause” of unintended acceleration in its vehicles through a limited safety recall of eight models for floor-mat entrapment, a dangerous condition in which an improperly secured or incompatible all-weather floor mat can “trap” a depressed gas pedal causing the car to accelerate to a high speed. Such public assurances deceived customers and NHTSA in two ways: First, at the time the statements were made, Toyota knew that it had not recalled some cars with design features that made them just as susceptible to floor-mat entrapment as some of the recalled cars. Second, only weeks before these statements were made, Toyota had taken steps to hide from NHTSA another type of unintended acceleration in its vehicles, separate and apart from floor-mat entrapment: a problem with accelerators getting stuck at partially depressed levels, known as “sticky pedal.”

*Floor-Mat Entrapment: A Fatal Problem*

Toyota issued its misleading statements, and undertook its acts of concealment, against the backdrop of intense public concern and scrutiny over the safety of its vehicles following a widely publicized Aug. 28, 2009 accident in San Diego, Calif., that killed a family of four. A Lexus dealer had improperly installed an incompatible all-weather floor mat into the Lexus ES350 in which the family was traveling, and that mat entrapped the accelerator at full throttle. A 911 emergency call made from the out-of-control vehicle, which was speeding at over 100 miles per hour, reported, “We’re in a Lexus ... and we’re going north on 125 and our accelerator is stuck ... there’s no brakes ... we’re approaching the intersection ... Hold on ... hold on and pray ...

pray.” The call ended with the sound of the crash that killed everyone in the vehicle.

The San Diego accident was not the first time that Toyota had faced a problem with floor-mat entrapment. In 2007, following a series of reports alleging unintended acceleration in Toyota and Lexus vehicles, NHTSA opened a defect investigation into the Lexus ES350 model (the vehicle involved in the 2009 San Diego accident), and identified several other Toyota and Lexus models it believed might likewise be defective. Toyota, while denying to NHTSA the need to recall any of its vehicles, conducted an internal investigation in 2007 which revealed that certain Toyota and Lexus models, including most of the ones that NHTSA had identified as potentially problematic, had design features rendering entrapment of the gas pedal by an all-weather floor mat more likely. Toyota did not share these results with NHTSA. In the end, the Company negotiated a limited recall of 55,000 mats (no vehicles) – a result that Toyota employees touted internally as a major victory: “had the agency ... pushed for recall of the throttle pedal assembly (for instance), we would be looking at upwards of \$100 million + in unnecessary costs.”

Shortly after Toyota announced its 2007 mat recall, company engineers revised internal design guidelines to provide for, among other things, a minimum clearance of 10 millimeters between a fully depressed gas pedal and the floor. But Toyota decided those revised guidelines would only apply where a model was receiving a “full model redesign” – something each Toyota and Lexus model underwent only about once every three to five years. As a result, even after the revised guidelines had been adopted internally, many new vehicles produced and sold by Toyota – including the Lexus ES350 involved in the 2009 San Diego accident – did not comply with Toyota’s 2007 guidelines.

After the fatal and highly publicized San Diego accident, Toyota agreed to recall eight of its models, including the ES350, for floor-mat entrapment susceptibility. Thereafter, as part of an effort to defend its brand image, Toyota began issuing public

statements assuring customers that this limited recall had “addressed the root cause of unintended acceleration” in its U.S.-sold vehicles.

As Toyota knew from internal testing it had completed by the time these statements were made, the eight-model recall had not in fact “addressed the root cause” of even the floor-mat entrapment problem. Models not recalled – and therefore still on the road – bore design features rendering them just as susceptible to floor-mat entrapment as those within the recall population. One engineer working at a Toyota facility in California had concluded that the Corolla, a top-selling car that had not been recalled, was among the three “worse” vehicles for floor-mat entrapment. In October 2009, Toyota engineers in Japan circulated a chart showing that the Corolla had the lowest rating for floor-mat entrapment under their analysis. None of these findings or this data were shared with NHTSA at the time.

#### *The Sticky Pedal Problem*

What is more misleading, at the same time it was assuring the public that the “root cause” of unintended acceleration had been “addressed” by the 2009 eight-model floor-mat entrapment recall, Toyota was hiding from NHTSA a second cause of unintended acceleration in its vehicles: the sticky pedal. Sticky pedal, a phenomenon affecting pedals manufactured by a U.S. company (“A-Pedal Company”) and installed in many Toyota brand vehicles in North America as well as Europe, resulted from the use of a plastic material inside the pedals that could cause the accelerator pedal to become mechanically stuck in a partially depressed position. The pedals incorporating this plastic were installed in, among other models, the Camry, the Matrix, the Corolla, and the Avalon sold in the United States.

The sticky pedal problem surfaced in Europe in 2008. There, reports reflected instances of “uncontrolled acceleration” and unintended acceleration to “maximum RPM,” and customer concern that the condition was “extremely dangerous.”

In early 2009, Toyota circulated to European Toyota distributors information about the sticky pedal problem and



instructions for addressing the problem if it presented itself in a customer's vehicle. These instructions identified the issue as "Sudden RPM increase/vehicle acceleration due to accelerator pedal sticking," and stated that should a customer complain of pedal sticking, the pedal should be replaced with pedals manufactured by a company other than A-Pedal Company. Contemporaneous internal Toyota documents described the sticky pedal problem as a "defect" that was "[i]mportant in terms of safety because of the possibility of accidents."

Toyota did not then inform its U.S. regulators of the sticky pedal problem or conduct a recall. Instead, beginning in the spring of 2009, Toyota quietly directed A-Pedal Company to change the pedals in new productions of affected models in Europe, and to plan for the same design changes to be rolled out in the United States (where the same problematic pedals were being used) beginning in the fall of 2009. The design change was to substitute the plastic used in the affected pedal models with another material and to change the length of the friction lever in the pedal.

Meanwhile, the sticky pedal problem was manifesting itself in U.S. vehicles. On or about the same day the San Diego floor-mat entrapment accident occurred, staff at a U.S. Toyota subsidiary in California sent a memorandum to staff at Toyota in Japan identifying as "critical" an "unintended acceleration" issue separate and apart from floor-mat entrapment that had been identified in an accelerator pedal of a Toyota Matrix vehicle in Arizona. The problem identified, and then reproduced during testing of the pedal on Sept. 17, 2009, was the sticky pedal problem. Also in August, the sticky pedal problem cropped up in a U.S. Camry.

On Sept. 9, 2009, an employee of a U.S. Toyota subsidiary who was concerned about the sticky pedal problem in the United States and believed that Toyota should address the problem prepared a "Market Impact Summary" listing (in addition to the August 2009 Matrix and Camry) 39 warranty cases that he believed involved potential manifestations of the sticky pedal problem. This document, which was circulated to Toyota

engineers and, later, to staff in charge of recall decisions in Japan, designated the sticky pedal problem as priority level “A,” the highest level.

By no later than September 2009, Toyota recognized internally that the sticky pedal problem posed a risk of a type of unintended acceleration – or “overrun,” as Toyota sometimes called it – in many of its U.S. vehicles. A September 2009 presentation made by a manager at a U.S. Toyota subsidiary to Toyota executives gave a “current summary of O/R [overrun] types in NA [North American] market” that listed the three confirmed types as: “mat interference” (i.e., floor-mat entrapment), “material issue” (described as “pedal stuck and ... pedal slow return/deformed”) and “simultaneous pedal press” by the consumer. The presentation further listed the models affected by the “material issue” as including “Camry, Corolla, Matrix, Avalon.”

*Hiding Sticky Pedal from NHTSA and the Public*

As noted, Toyota had by this time developed internal plans to implement design changes for all A-Pedal-Company-manufactured pedals in U.S. Toyota models to address, on a going-forward basis, the still-undisclosed sticky pedal problem that had already been resolved for new vehicles in Europe. On Oct. 5, 2009, Toyota engineers issued to A-Pedal Company the first of the design change instructions intended to prevent sticky pedal in the U.S. market. This was described internally as an “urgent” measure to be implemented on an “express” basis, as a “major” change – meaning that the part number of the subject pedal was to change, and that all inventory units with the old pedal number should be scrapped.

On Oct. 21, 2009, however, in the wake of the San Diego floor-mat entrapment accident, and in the midst of Toyota’s discussions with NHTSA about its eight-model entrapment recall, engineers at Toyota and the leadership of Toyota’s recall decision group decided to cancel the design change instruction that had already been issued and to suspend all remaining design changes planned for A-Pedal Company pedals in U.S. models. U.S. Toyota subsidiary employees who had been preparing for

implementation of the changes were instructed, orally, to alert the manufacturing plants of the cancellation. They were also instructed not to put anything about the cancellation in writing. A-Pedal Company itself would receive no written cancellation at this time; instead, contrary to Toyota's own standard procedures, the cancellation was to be effected without a paper trail.

Toyota decided to suspend the pedal design changes in the United States, and to avoid memorializing that suspension, in order to prevent NHTSA from learning about the sticky pedal problem.

In early November 2009, Toyota and the leadership of a U.S. Toyota subsidiary became aware of three instances of sticky pedal in U.S. Corollas. Shortly thereafter, the leadership of the recall decision group within Toyota discussed a plan to finally disclose the sticky pedal problem to NHTSA. The recall decision group was aware at this time not only of the problems in the three Corollas in the United States but also of the problems that had surfaced in a Matrix and a Camry in August 2009 and been reproduced through testing in September 2009. The group was also familiar with the sticky pedal problem in Europe, the design changes that had been implemented there, and the cancellation and suspension of similar planned design changes in the United States. Knowing all of this, the group's leadership decided that (a) it would not disclose the September 2009 Market Impact Summary to NHTSA; (b) if any disclosure were to be made to NHTSA, it would be limited to a disclosure that there were some reports of unintended acceleration apparently unrelated to floor-mat entrapment; and (c) NHTSA should be told that Toyota had made no findings with respect to the sticky pedal problem reflected in the reports concerning the three U.S. Corollas, and that the investigation of the problem had just begun.

On Nov. 17, 2009, before Toyota had negotiated with NHTSA a final set of remedies for the eight models encompassed by the floor-mat entrapment recall, Toyota informed NHTSA of the three Corolla reports and several other reports of unintended

acceleration in Toyota model vehicles equipped with pedals manufactured by A-Pedal Company. In Toyota's disclosure to NHTSA, Toyota did not reveal its understanding of the sticky pedal problem as a type of unintended acceleration, nor did it reveal the problem's manifestation and the subsequent design changes in Europe, the planned, cancelled, and suspended design changes in the United States, the August 2009 Camry and Matrix vehicles that had suffered sticky pedal, or the September 2009 Market Impact Summary.

#### *Toyota's Misleading Statements*

After the August 2009 fatal floor-mat entrapment accident in San Diego, several articles critical of Toyota appeared in U.S. newspapers. The articles reported instances of Toyota customers allegedly experiencing unintended acceleration and the authors accused Toyota of, among other things, hiding defects related to unintended acceleration.

On Nov. 25, 2009, Toyota, through a U.S. subsidiary, announced its floor-mat entrapment resolution with NHTSA. In a press release that had been approved by Toyota, the U.S. subsidiary assured customers: "The safety of our owners and the public is our utmost concern and Toyota has and will continue to thoroughly investigate and take appropriate measures to address any defect trends that are identified." A spokesperson for the subsidiary stated during a press conference the same day, "We're very, very confident that we have addressed this issue."

In truth, the issue of unintended acceleration had not been "addressed" by the remedies announced. A-Pedal Company pedals which could experience stickiness were still on the road and still, in fact, being installed in newly-produced vehicles. And the best-selling Corolla, the Highlander, and the Venza – which had design features similar to models that had been included in the earlier floor-mat entrapment recall – were not being "addressed" at all.

Again, on Dec. 23, 2009, Toyota responded to media accusations that it was continuing to hide defects in its vehicles by authorizing a U.S. Toyota subsidiary to publish the following

misleading statements on the subsidiary's website: "Toyota has absolutely not minimized public awareness of any defect or issue with respect to its vehicles. Any suggestion to the contrary is wrong and borders on irresponsibility. We are confident that the measures we are taking address the root cause and will reduce the risk of pedal entrapment." In fact, Toyota had "minimized public awareness of" both sticky pedal and floor-mat entrapment. Further, the measures Toyota had taken did not "address the root cause" of unintended acceleration, because Toyota had not yet issued a sticky pedal recall and had not yet recalled the Corolla, the Venza, or the Highlander for floor-mat entrapment.

#### *Toyota's False Timeline*

When, in early 2010, Toyota finally conducted safety recalls to address the unintended acceleration issues it had concealed throughout the fall of 2009, Toyota provided to the American public, NHTSA and the United States Congress an inaccurate timeline of events that made it appear as if Toyota had learned of the sticky pedal in the United States in "October 2009," and then acted promptly to remedy the problem within 90 days of discovering it. In fact, Toyota had begun its investigation of sticky pedal in the United States no later than August 2009, had already reproduced the problem in a U.S. pedal by no later than September 2009, and had taken active steps in the months following that testing to hide the problem from NHTSA and the public.

#### **Questions to Ponder About *In re Toyota Motor Corp.***

- A.** Three spheres of law played a part in the Toyota unintended acceleration controversy: federal regulation, federal criminal law, and tort law. Are all three necessary? Do you think the full story would have come to light if legal action occurred in only one sphere or two?
- B.** Do you agree with the Judge Selna's opinion that the plaintiffs' allegations are sufficient under modern pleading requirements? Should they be? What is to be made of Toyota's argument that it lacked "fair notice" of what was allegedly wrong with the vehicles.

C. If Toyota had continued to vigorously defend the civil lawsuits against it following the announcement of the deferred prosecution agreement, what do you think would have been the result? If you were advising Toyota on how to proceed, what factors would you take into account? What are the pros and cons of continuing a hardline defensive posture versus openly soliciting settlements?

**Problem: *Hot Water***

Tomorrow Temp, a manufacturer, is the exclusive supplier of water heaters to Home Hangar, a retail chain of do-it-yourself stores. Tomorrow Temp's XH-70 model has a temperature-control adjustment knob near the bottom of the unit. The knob is set to the off position when the black line on the face of the knob points straight down – 6 o'clock if it were a clockface. Directly below the knob, on the control-unit faceplate, is the word OFF. The knob can be turned clockwise until it reaches the 5 o'clock position, where the faceplate has the word HIGHEST. The only other indications on the faceplate are 10 regularly spaced black dots arranged in a circle around the knob between OFF and HIGHEST.

Three customers – Alexis, Burton, and Charlie – bought the XH-70 at Home Hangar and installed it themselves. Alexis's unit was manufactured first, followed by Burton's and then Charlie's. Another person, Dinara, didn't buy an XH-70, but she stayed in a house where one was installed.

Alexis likes hot water, so she set the temperature control to the 3 o'clock position. For her first shower, she turned the faucet lever to the hottest setting and let the water run for a couple of minutes. She then walked under the spray of water. The water was so hot that she received third-degree burns. She required weeks of hospitalization and extensive skin grafts.

Burton set the temperature control to the 12 o'clock position. Burton's shower has separate hot and cold knobs. He turned both on for a mixture and let the shower warm up. He then walked under the stream of water and received second and third degree burns. His injuries required emergency room treatment and follow-up outpatient care. Unlike Alexis's unit, Burton's later-manufactured unit has a

sticker above the temperature control unit that states **“WARNING: EXTREMELY HOT WATER CAN BURN.”** Tomorrow Temp began adding the sticker to all new XH-70 units after receiving various customer complaints.

Charlie set the temperature control to the 10 o’clock position. His bathtub has separate hot and cold taps. He made a bath using only the hot tap, and then he waited 10 minutes before getting in. The water was so hot that he received second- and third-degree burns over most of his body. Like Burton’s unit, Charlie’s unit shipped with the warning sticker above the control knob. In addition, Charlie’s unit included an updated 67-page instruction manual. Thanks to complaints from the likes of Alexis and Burton, the manual that shipped with Charlie’s unit contains the following statement on page 59: **“Tomorrow Temp water heaters are powerful because our customers have told us they want to be able to fill a bathtub, leave the house for two hours, and come back to a bath that is still steamy hot. If you do not need this capability – perhaps because you take showers or because you use the bathtub relatively soon after filling it – then you should turn the temperature control knob to the 8 o’clock position or lower. Otherwise, you run the risk of having uncomfortably hot or even scalding water.”**

Dinara was housesitting at a home where an XH-70 had been installed by a professional contractor. The water heater – an older unit without either the warning sticker or the updated instructional manual – had not been adjusted since it was installed by the contractor. When Dinara arrived at the house, one of the first things she did was look at the water heater. Always thoughtful of others, Dinara wanted to keep utility usage down during her stay. Plus, she was concerned about safety – after all, she had recently seen something on the television news about burns from super-heated tap water. Seeing that the temperature control had been set to a position between the 4 o’clock dot and the HIGHEST setting, Dinara decided to turn the knob down to below the 7 o’clock dot. Unfortunately for Dinara, in this particular water heater, the temperature control

assembly underneath the faceplate was inserted backward at the factory. Because of this, “turning down” the temperature actually caused the water temperature to go up. When Dinara took a shower, she received extensive third degree burns requiring skin grafts and months of hospitalization.

- A.** Analyze Alexis’s case for products liability.
- B.** Analyze Burton’s case for products liability.
- C.** Analyze Charlie’s case for products liability.
- D.** Analyze Dinara’s case for products liability.