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The Motion for Partial Summary Judgment: The Litigator's Often Forgotten Tool

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The discovery phase in your products liability lawsuit has been completed and it's time to decide the next course of action before proceeding to trial. One possibility, of course, is to move for summary judgment to knock out the entire case pending against your client. However, you have concluded that, despite the strengths of your case, there are enough "issues of fact" to make the exercise probably useless.

Have you considered instead a Motion for *Partial* Summary Judgment? Perhaps you should.

The first step is to determine whether your jurisdiction permits motions for partial summary judgment to be filed. Rule 56 of The Federal Rules of Civil Procedure specifically calls for "Partial" summary judgments in its very title. In my home state, New York's CPLR 3212(e) reads, *"In any other action summary judgment may be granted as to one or more causes of action, or part thereof, in favor of any one or more parties, to the extent warranted, on such terms as may be just."* Thus, there is little doubt that under the right reading of the law and facts, a partial summary judgment might be allowed.

Let's take a look at a fictitious, but typical, products liability case: Plaintiff suffered a serious injury when his hand was caught among the moving parts of your client's widget-making machine. Plaintiff asserts causes of action for negligence, breach of warranty and "failure to warn" due to alleged design defects and manufacturing defects in the machine.

What are some of the subject areas that could be the focus of a motion for partial summary judgement? Of course, it all depends on the law in your jurisdiction and the facts uncovered through discovery, but here are some ideas:

Failure to Warn

Defendant may be able to knock out the warnings argument by simply arguing that the hazards associated with the moving parts of the widget-making machine are so "open and obvious" that no warning is necessary. On the other hand, the Defendant might argue that discovery – specifically, the Plaintiff's deposition – established that the Plaintiff was fully aware of those risks and hazards (even if they were not "open and obvious") and therefore, the additional warning(s) would not provide any information to the Plaintiff that he already subjectively had. Lastly, the Defendant might be able to show that the "failure to warn" argument is not worthy of trial because comprehensive warnings were, in fact, provided by the Defendant in the form of the widget-making machine's Operator's Manual and/or its warning labels.

If the Plaintiff is specifically raising an argument that the Operator's Manual contained insufficient warnings, an Order dismissing "all claims for failure to warn in Plaintiff's Complaint based on an allegedly defective or insufficient Operator's Manual" may be warranted if, in fact, the Plaintiff admitted to *never having read the manual.*

Breach of Implied Warranty

Many states recognize "breach of warranty" as a separate and independent cause of action and yet another vehicle by which a jury can decide that a product was "defective." Check to see whether your jurisdiction has a separate statute of limitations for breach of implied warranty claims. In New York, for example, a breach of warranty claim must be brought within four years of the product's sale; so, under the scenario of our hypothetical case, if the product involved is a fairly old widget-making machine, and Plaintiff did not start his lawsuit within four years of the date of its last sale, the breach of warranty claim should be dismissed before trial.

Even if an implied warranty claim survives the statute of limitations analysis, an implied warranty's survival may depend on whether it was disclaimed by the manufacturer's express warranty – allowed under the laws of many states.

Breach of Express Warranty

Let's assume that the widget machine manufacturer's Operator's Manual contains a written warranty – something along the lines of being "free of defects and in good working order for two years" after its purchase. Inexperience may cause the litigator to conclude that she is stuck with the language and that the "express warranty" claim will survive. However, the explicit language of the express warranty should be checked carefully. In our case, was the claim brought within the designated time period of two years?

What is the remedy given in the express warranty? Typically, it may be nothing more than a free repair or a refund of the purchase price. Arguably, under such terms, the express warranty should not then serve as the basis for a products liability lawsuit seeking damages for personal injuries, and a motion for partial summary judgment might be in order.

Design Defect versus Manufacturing Defect

In a case clearly premised on alleged defects in the product's design, consider a motion for summary judgement "as to all claims in plaintiff's Complaint premised on manufacturing defects" (or, perhaps, vice-versa). This might be of great help, depending on your jurisdiction's evidentiary rules. In New York, for example, evidence of subsequent design changes are more likely to come into evidence in manufacturing defect cases, so knocking out all such claims via a summary judgment motion will provide a good basis for a later motion *in limine* as you approach trial.

Negligence Claims

If you are representing a distributor or retail seller of the widget-making machine, consider a motion to knock out claims based on "negligence," assuming the evidence clearly shows that the distributor/seller played no role whatsoever in the widget machine's design, manufacturing, testing, certification, etc. Strict liability claims most likely will remain, but at least part of the Plaintiff's claim against the distributor/seller may be gone.

"Misdirected" Claims

A Plaintiff's Complaint may be a hodgepodge of claims and causes of action, some of which could not possibly be directed to your client. Let's assume our fictitious Plaintiff was hurt by the widget-making machine at a construction site. Chances are that the Plaintiff also sued the general contractor, sub-contractor, building site owner and others not involved in the machine's design and manufacturing. He raises claims related to labor law and "safe work site" against them based on a bunch of OSHA violations. These claims should clearly be dismissed as they relate to the manufacturer and seller of the widget-making machine.

Damages

Don't overlook damages in any planned motion for partial summary judgment. The Plaintiff may have conceded the lack of any lost wages during discovery, for example. A claim for punitive damages also could be addressed early with a carefully planned dispositive motion.

Summary

Even if your adversary's case can't be dismissed in its entirety by a conventional summary judgment motion, there may be enough merit in getting portions of it thrown out – even if it is just one or more causes of action or certain theories of liability and/or elements of damages. Doing so might streamline the case and your upcoming trial preparation, avoid the need for certain witnesses (fact and expert) to be called at trial and ultimately give the jury one less theory upon which to assess liability against your client. If nothing else, it will show your adversary that you mean business and will help educate the court about the problems in your adversary's case as significant portions of it are whittled away.

Don’t overlook the opportunity.

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