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Update on California Civil Jury Instructions Concerning Products Liability Litigation

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As reported in our June 2011 Newsletter, the Judicial Council of California in 2011 proposed revisions to **California Civil Jury Instructions (known as CACI)** related to the element of the foreseeability and effect of product misuse. The proposed instructions contravened well-settled public policy and precedential limitations on manufacturer liability, including, importantly, an essential element of a plaintiff's products liability case—proof of reasonably foreseeable use. In our prior report, we explained that the proposed revisions, if adopted, would significantly impact litigation of product liability claims in California.

The Advisory Committee on Civil Jury Instructions (Advisory Committee) recommended approval of the proposed revisions in a report dated May 17, 2011.[1] Despite objections from at least a dozen commentators, including Drinker Biddle & Reath LLP, the proposed revisions were approved by the Judicial Council on June 24, 2011.[2]

The revisions include changes to four strict products liability instructions[3] by removing or minimizing the long-standing California requirement that the plaintiff prove he or she was injured while using or misusing the product in a reasonably foreseeable way.[4] For example, see revised CACI No. 1205 which lays out the essential elements of a strict liability-failure to warn claim.[5]

1205. Strict Liability—Failure to Warn—Essential Factual Elements

[Name of plaintiff] claims that the [product] lacked sufficient [instructions] [or] [warning of potential [risks/side effects/allergic reactions]]. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of defendants] [manufactured/distributed/sold] the [product];
2. That the [product] had potential [risks/side effects/allergic reactions] that were [known] [or] [knowable by the use of scientific knowledge available] at the time of [manufacture/distribution/sale];
3. That the potential [risks/side effects/allergic reactions] presented a substantial danger to ~~users of~~ persons using or misusing the [product] in an intended or reasonably foreseeable way;
4. That ordinary consumers would not have recognized the potential[risks/side effects/allergic reactions];
5. That [name of defendant] failed to adequately warn [or instruct] of the potential [risks/side effects/allergic reactions];
6. That [name of plaintiff] was harmed ~~while using the [product] in a reasonably foreseeable way~~; and
7. That the lack of sufficient [instructions] [or] [warnings] was a substantial factor in causing [name of plaintiff]'s harm.

In the documents posted on the Judicial Council website seeking comment on the proposed revisions, the Advisory Committee repeatedly cited Perez v. V.A.S., 188 Cal.App.4th 658 (2010), and this recent court of appeal case appeared to be the Advisory Committee's primary motivation for proposing changes. Indeed, those commenting on the proposed revisions focused their comments in large measure on Perez. In a May 17, 2011, Report to the Judicial Council, the Advisory Committee's stated rationale for proposing the changes was not limited to Perez but included a purported several-year-long struggle by the Committee with inconsistent cases that required both parties to prove or disprove misuse and a 2009 revision to CACI No. 1245 Affirmative Defense-

Product Misuse or Modification,[6] which required manufacturers in products cases to prove that there was misuse that was not reasonably foreseeable.[7] In the Report the Advisory Committee said:

> The committee recognizes that manufacturers are not insurers of their products; they are liable in tort only if a defect in the manufacture or design of its product causes injury while the product is being used or misused in a reasonably foreseeable way. (Soule v. General Motors Corp. (1994) 8 Cal.4th 548, 560, 568 fn. 5; see also Wright v. Stang Mfg. Co. (1997) 54 Cal.App.4th 1218, 1235 [a manufacturer must foresee some degree of misuse and abuse of its product, either by the user or by third parties, and must take reasonable precautions to minimize the harm that may result from misuse and abuse]). But the question of where the burden of proof falls on product misuse is one that the committee has been considering for several years. The committee now proposes modifying the instructions to place the burden on the defendant to prove that the plaintiff's injuries occurred while the product was being misused in an unforeseeable way.[8]

The alleged inconsistency in the cases and the revised instructions are not well described in the Advisory Committee's May 17 Report. For example, the Report cites no cases which suggested a need to change the long-standing requirement that plaintiff's prima facie burden include proof of reasonably foreseeable use. Nor was there any discussion of any cases in which courts and parties struggled with jury instructions and the case law on foreseeable use and misuse. Indeed, the Report describes only the Advisory Committee's speculative concerns about the burdens of proof in products cases.[9] In summary, it's not clear why the Committee proposed that the burden of proof suddenly be placed on the defendant to prove unforeseeable misuse. Moreover, the Committee's recommendation is especially difficult to reconcile given long-standing, consistent California jurisprudence holding that plaintiff must plead and prove reasonably foreseeable use (or misuse) to proceed.[10]

As noted above, there were numerous objections to the proposed instructions and the changes to plaintiff's burden regarding foreseeable use or misuse. One that is particularly noteworthy is the California Judge's Association[11] comment on the proposed revisions to CACI 1201:[12]

> The legal basis for the change in these instructions appears to be based on an apparently incorrect reading of Perez v. VAS (2010) 188 Cal.App.4th 658 and Saller v. Crown (2010) 187 Cal.App.4th 1220. Neither case supports removal of the language: "while using the [product] in a reasonably foreseeable way." (Perez quotes Baker as requiring evidence "that the plaintiff was injured while using the product in an intended or reasonably foreseeable manner…" (Perez, supra, 188 Cal.App.4th at p. 678.) It should also be noted that Saller directed that CACI 1203 be given without comment that the instruction should be modified in any way. (Saller, supra, 187 Cal.App.4th at p. 1237.)
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> It appears that the confusion results from the idea that misuse of a product is an affirmative defense, which it is, and therefore the burden shifts to the defense once the plaintiff establishes a prima facie case. Such is the status of the law…13

In response to this comment, the Advisory Committee said "…[T]he plaintiff must establish a prima facie case to the court to avoid summary judgment or nonsuit. Once the case gets to the jury, misuse is an affirmative defense."[14]

The Advisory Committee's response to the comments of the Judge's Association is perplexing. Historically, plaintiffs have been required to demonstrate that the product was used properly or foreseeably as part of their burden, and only then was defendant required to prove the unforeseeable misuse defense. With the revised instructions, plaintiffs have to meet a very low standard to escape summary judgment and it appears defendants do not get to argue unforeseeable use or misuse until trial (and, as explained below, the revised instructions make use of those defenses questionable.) Defendants will now be put to the trouble and expense of trying a case that previously may have been appropriate for summary judgment. Worse yet, in a pretrial settlement context, the view will now be that defendants are potentially liable for a host of unimaginable injuries arising out of unforeseeable product misuse modification, because the new instructions, in particular CACI No. 1205, suggest plaintiff gets a trial if he or she presents evidence of nothing more than use of the defendant's product, a defect and a harm.

Conclusion

In summary, these revisions may well have a significant impact on products liability litigation in California from early law and motion practice through trial. As demonstrated in the table below relating to the failure to warn instruction concerning plaintiff's prima facie case, the burden of proof for plaintiffs and defendants is markedly different with the new instructions.

Caci No. 1205. Plaintiff's Prima Facie Case-Strict Liability-Failure to WarnEssential Factual Elements (2010)	Caci No. 1205. Plaintiff's Prima Facie Case-Strict Liability-Failure to WarnEssential Factual Elements (2011)
Defendant's Product;	Defendant's Product;
Potential dangers with use;	Potential dangers with use or misuse in an intended or reasonably foreseeable way;
Ordinary consumer would not recognize potential danger;	Ordinary consumer would not recognize potential danger;
Defendant failed to adequately warn of potential danger; and	Defendant failed to adequately warn of potential danger; and
Plaintiff injured while using the product in a reasonable foreseeable way.	Plaintiff injured while using the product.

The one piece of good news is that Perez and the revised instructions do not overrule the long line of California cases that require a plaintiff to prove proper use or foreseeable misuse as part of his or her case in chief,[15] and manufacturers should rely on these cases at every turn, including when submitting proposed instructions.

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1 Rule 2.1050 of the California Rules of Court requires the Advisory Committee to update, amend, and add topics to CACI on a regular basis and submit its recommendations to the Judicial Council for approval. In its May 17 report, the Judicial Council stated "the proposed new and revised [products liability] instructions are necessary to ensure that the [jury] instructions remain clear, accurate, and complete; therefore, the Advisory Committee did not consider any alternative actions."

2 The minutes from the June 24, 2011 Judicial Council meeting suggest that the proposed revisions were not the subject of discussion and were simply approved based on the Committee's recommendation. See http://www.courts.ca.gov/jcmeetings.htm

3 (1) CACI No. 1201, Strict Liability—Manufacturing Defect—Essential Factual Elements; (2) No. 1203, Strict Liability—Design Defect—Consumer Expectation Test—Essential Factual Elements; (3) No. 1204, Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements—Shifting Burden of Proof; and (4) No. 1205, Strict Liability—Failure to Warn—Essential Factual Elements

4 *See generally* May 17, 2001 Civil Jury Instruction Advisory Committee Report to the California Judicial Council (herein Report), pgs. 18-48.

5 Revisions appear in redline font.

6 CACI No. 1245. Affirmative Defense—Product Misuse or Modification (2009 version) [*Name of defendant*] claims that [he/she/it] is not responsible for [*name of plaintiff*]'s claimed harm because the [*product*] was [misused/ [or] modified] after it left [name of defendant]'s possession. To succeed on this defense, [*name of defendant*] must prove that: 1. The [*product*] was [misused/ [or] modified] after it left [*name of defendant*]'s possession; 2. That the [*misuse*/ [or] modification] was not reasonably foreseeable to [*name of defendant*]; and 3. That the [misuse/ [or] modification] was the sole cause of [name of plaintiff]'s harm.

7 *See* Report, pg. 6.

8 Id. at pg. 5.

9 Id. at pgs. 6-7.

10 *See e.g., Soule*, 8 Cal.4th at 560 ("A manufacturer, distributor, or retailer is liable in tort if a defect in the manufacture or design of its product causes injury while the product is being used in a reasonably foreseeable way."); *Barker v. Lull Engineering Co.* (1978)

20 Cal.3d 413, at 426 n.9 ("In *Cronin*, we specifically held that the adequacy of a product must be determined in light of its reasonably foreseeable use, declaring that '[the] design and manufacture of products should not be carried out in an industrial vacuum but with recognition of the realities of their everyday use.'"); *Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1312 ("strict liability should not be imposed upon the manufacturer (or distributor) when injury results from the use of its product that is not reasonably foreseeable.").

11 The California Judges Association is the professional association representing the interests of the judiciary of the State of California. Members include judges of the Superior Courts and Courts of Appeal, Commissioners of State Courts and State Bar Court judges.

12 CACI No. 1201. Strict Liability—Manufacturing Defect—Essential Factual Elements (2011 Version) [Name of plaintiff] claims that the [product] contained a manufacturing defect. To establish this claim, [name of plaintiff] must prove all of the following: 1. That [name of defendant] [manufactured/distributed/sold] the [product]; 2. That the [product] contained a manufacturing defect when it left [name of defendant]'s possession; 3. That [name of plaintiff] was harmed ~~while using the [product] in a reasonably foreseeable way~~; and 4. That the [product]'s defect was a substantial factor in causing [name of plaintiff]'s harm.

13 See Report, pg. 26

14 Id.

15 *See e.g., Anderson v. Owens-Corning Fiberglas Corp.*, 53 Cal.3d 987, 994, (1991) ("Strict liability, however, was never intended to make the manufacturer or distributor of a product its insurer. From its inception, . . . strict liability has never been, and is not now, absolute liability. . . . [U]nder strict liability the manufacturer does not thereby become the insurer of the safety of the product's use") (alterations and emphasis in original); *Romito v. Red Plastic Co.*, 38 Cal.App.4th 59, 63 (1995) (" We conclude as a matter of policy that despite the means to build a safer product, a manufacturer owes no duty to prevent injuries resulting from unforeseeable and accidental product misuse"); *Mendoza v. Club Car*, 81 Cal.App.4th 287 (2000) (Jury finding that product was not being used in reasonably foreseeable way was inconsistent with liability verdict); *Johnson v. American Standard, Inc.*, 43 Cal.4th 56, 70 (2008) ("Although manufacturers are responsible for products that contain dangers of which the public is unaware, they are not insurers, even under strict liability, for the mistakes or carelessness of consumers who should know of the dangers involved").