



Investigating a juvenile-product defect case

Be prepared: the defense will always place the focus on the conduct of the parents, not the product

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Pick up a newspaper almost any day and you will see that the Consumer Product Safety Commission has announced yet another recall on a defective juvenile product that had caused injury or even death. The U.S. juvenile product industry is a \$17.8 billion industry which is lightly regulated by the federal government and which has one of the most powerful industry lobbying groups in the nation. It largely regulates itself and heavily influences the so-called industry safety standards passed by ASTM International, formerly known as the American Society for Testing and Materials (ASTM). The combination of this light regulation and the barrage of cheap, foreign-made products coming into our country unfortunately ensures that there will be an ever-increasing number of injuries and deaths of infants and children by these products. As consumer attorneys, we must play a major role in counteracting this unacceptable trend by effectively representing parents of injured children.

Prosecuting a juvenile-product case provides not only the opportunity to help an individual client but also the opportunity to educate all consumers about the dangers and risks of these products and how they can make better and safer choices in what they buy and how they use these products. In some cases, your work may change an entire industry. As in every potential case, conducting a proper and thorough evaluation before beginning your representation is imperative to a successful resolution for your clients.

Prior to litigation there are a number of steps that should be taken to ensure effective representation for your clients.

Keep the legal basics in mind

Before taking a juvenile-products case, you must understand the basics of California product-liability law and the facts necessary to prove your case. Generally, there are three basic strict liability product theories applicable: design defect, manufacturing defect, and failure to warn.

The manufacturing-defect theory applies when the product differs from the design or manufacturing specifications of the manufacturer because of a divergence from the usual manufacturing processes or from other typical product units. (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 429.)

The design-defect theory applies when some aspect of the design is defective, making the product unsafe. In most juvenile-product cases, the design-defective theory can be proved by establishing that the manufacturer's design did not meet ordinary consumer expectations of safety. (*Barker v. Lull Engineering Co.*, *supra*, at 418.)

The failure-to-warn theory applies when the product did not come with adequate instructions or warnings of risks or dangers that were known or knowable to the manufacturer. (*Anderson v. Owens-Corning Fiberglass Corp.* (1991) 53 Cal.3d 987.)

The design-defect and failure-to-warn theories are by far the more common theories against a juvenile-product manufacturer. Under either the design-defect or failure-to-warn theory, there are several common elements of proof and as discussed more fully below, these elements will guide your investigation.

First, you must show that the product at the time of injury was in "substantially similar" condition as when it left the hands of the manufacturer. Thus, it is important to secure the product from your client and determine whether the client altered the product in any manner. Second, you must determine whether the client used or misused the product in a "reasonably foreseeable" manner. In other words, did the client follow instructions for use or otherwise use the product in a common-sense manner? A client's misuse of the product is not a bar if the misuse was foreseeable to the manufacturer. Third, did the defect actually cause the injury? It is vital to learn how the injury occurred and whether it could have been avoided with a better design, instructions or warnings. Finally, did the manufacturer know or should it have known about the defect?

Secure and research the product

When a prospective client calls, confirm that the subject product has not been given away or destroyed and will not be. Oftentimes, clients want to rid themselves of the product immediately. Arrange to pick it up. It is also possible that police or child protection services have taken the product. If so, immediately notify the entity in possession of the product, in writing, that they should preserve the product for litigation. Also ensure that the prospective client has kept the box and all written literature that came with the product. It is extremely important – though perhaps not absolutely necessary – to have the product and its accompanying materials to litigate the case.



Before I meet my prospective clients in person, I always do my homework by thoroughly familiarizing myself with the subject product. Start with Internet research: Search for information about the product, how it is marketed, and what consumer-oriented sites have to say about it. Search sites like parent.com, product recall sites, consumerreports.org, and the Web site of the Consumer Product Safety Commission, cpsc.gov. These Web sites may inform you of the risks and dangers identified with the product, whether the product is being investigated by the CPSC, and/or whether the CPSC has published warnings or bulletins about the product. This basic research will allow you to determine if any risks or dangers have been associated with the product.

Next, go to your local Wal-Mart or Target and buy the product. Review the labeling, instructions for use, and warnings. Assemble the product if necessary. Take photographs.

By familiarizing yourself with the product and its history, you will be in a much better position to make the most out of your first meeting with your clients.

Meet and get to know your clients

Always meet your prospective clients at their home. The injury or death of a child is the most devastating thing that can happen to a parent. Meeting the parents at their home gives them a sense of comfort and security that your law office cannot offer, and it conveys to them that you understand and relate to their situation.

Meeting the parents at their home also allows you to observe the environment of their home and what their relationship with each other and their other children is like. This is extremely important because almost every juvenile-product case involves allegations of negligent supervision by the parents. Encourage your clients to invite their closest relatives or friends to this meeting. This is an exception to the usual first meeting with clients

where you would not want to necessarily meet others. However, close relatives or friends will often be witnesses as to the assembly of the product, the clients' use of the product, and the clients' care of the child, and the clients' damages. Meeting individuals who will "vouch" for your clients is an important consideration when you evaluate the merits of a juvenile-product case. Of course, take care to protect the attorney-client privilege by limiting your initial discussions with relatives and friends and by talking with your clients in private regarding matters that you and the clients wish to keep privileged.

When you meet your prospective clients at their home, be sure to discuss the following main points:

- Why did you buy this product?
- At the time you bought the product were you aware of any dangers with it?
- Do you have a receipt or evidence of where purchased?
- Who assembled it?
- Were the assembly instructions followed?
- Did anyone witness assembly?
- Did you have any problems with assembly – i.e., were all the components and hardware present?
- What tools did you use? Were they provided with the product, or did you use your own tools? If you owned your own tools, do you use them regularly?
- Did you modify product in any way? If so, in what way?
- Once the product was assembled, did you follow the instructions for using it?
- Did you experience any problems using the product before the injury?

If the product is available at the parents' house, take photographs and secure it. Ask the parents to demonstrate how they used the product and how their child was injured.

Final steps of the investigation

When you return to your office obtain any police report, Child Protection Services Report and any first-responders' report. Prepare a Freedom of Information

Act request for the Consumer Product Safety Commission and obtain any "Epidemiologic Investigation Reports" prepared by the Commission on the product. EIRs, as they are called, are reports of Commission investigations into consumer products after a consumer has lodged a complaint with the commission and there is injury or death. The EIRs are important to show knowledge by or notice to the manufacturer of the danger and risk of the product.

Reach out to other attorneys who have litigated the product. In every juvenile-product case, I have worked with other attorneys sharing experts and legal theories.

You should also reach out to potential experts. Oftentimes, experts will be happy to discuss a prospective case briefly. Potential experts can be found in newspaper articles, peer-review journals, or jury verdicts. Experts in juvenile-product cases usually stay abreast of trends and developments with product safety and while the expert might not have experience with your specific product, she may have knowledge about the product or product category more generally and can point you in the right direction.

Finally, reach out to juvenile-product, consumer-advocacy groups, such as Consumers Union. These groups monitor product safety and can have valuable information about safety issues, experts, and industry knowledge and practices.

Take a critical eye to the case

After you have met your clients and completed your investigation, carefully evaluate the facts. Did the parents alter or modify the product to such an extent that you cannot prove that the product was "substantially similar" as when it left the manufacturer's hands? Did they use the product in a reasonably foreseeable manner? Did they follow the instructions for use and heed the warnings?

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Knowing the answers to these questions, will not only allow you to prove your case, but will allow you to head-off defense claims that it was the parents' conduct and not the product defect that caused the injuries.

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