
Lessons From Calif.'s Split On Strict Liability Evidence

Law360, New York (March 15, 2016, 2:32 PM ET) -- Industry custom and practice evidence can play a vital role in product liability cases. But there has been a split of authority among the California district courts of appeal on whether industry custom and practice evidence is admissible in a strict product liability case alleging the product is defective under the risk-benefit test. As recently described, some appellate courts have held that such evidence is always admissible, while others have held it is never admissible. Recently, the California Court of Appeal for the Second District, in *Kim v. Toyota Motor Corp.*, 2016 No. B247672, added to this split by taking the middle ground that such evidence may be admissible depending on the context. Both defense and plaintiff counsel in a strict product liability case must be familiar with this split and the lessons and challenges the split presents.



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Three Different Approaches to Admissibility

The plaintiff in *Kim* was seriously injured when he lost control of his 2005 Toyota Tundra truck trying to avoid another vehicle. He sued Toyota under a theory of strict product liability (among other theories), alleging that his truck was designed defectively because it did not have electronic stability control technology as standard equipment. Before trial, the plaintiff unsuccessfully moved the court to exclude Toyota's evidence that other truck manufacturers similarly did not include electronic stability control as standard equipment on their trucks. The jury returned a verdict in favor of Toyota, which the Second District Court of Appeal affirmed.

The primary issue on appeal was whether the trial court correctly allowed Toyota to present evidence to the jury that other truck manufacturers did not include electronic stability control as standard equipment. At the outset, the court reviewed California's "two alternative tests for identifying a design defect in a strict products liability action, the consumer expectation test and the risk-benefit test." *Id.* at 8. The consumer expectation test, as its name implies, considers whether a product performs as safely as an ordinary consumer would expect.

The risk-benefit test weighs the risks of danger inherent in a design against the benefits of the design, and is relied upon in cases involving complex products. When applying the risk-benefit test, the jury may consider the following factors: (1) "the gravity of the danger posed by the challenged design," (2) "the likelihood that such danger would occur," (3) "the mechanical feasibility of a safer alternative design," (4) the financial cost of an improved design," and (5) "the adverse consequences to the producer and to the consumer that would result from an alternative design." *Id.* at 8. The *Kim* court determined that only the risk-

benefit test was applicable. *Id.* at 32.

The court then considered prior case law on the central question of “whether the trier of fact may consider evidence of industry custom and practice in the risk-benefit analysis.” *Id.* at 9. The *Kim* court summarized what it viewed as a split of authority among the California district courts of appeal on this issue: (1) a line of cases holding that evidence of industry custom and practice is always inadmissible, reasoning, in part, that custom and practice is not a listed factor in the risk-benefit test and explaining such evidence would inject negligence principles into the strict liability analysis; and (2) a more recent line of authority holding that evidence of industry custom and practice is admissible, reasoning, in part, that such evidence should be considered in the expert analysis of whether the product is defective. *Id.* at 9-13.

The Second District rejected both of these approaches and instead adopted a “middle ground.” *Id.* at 13. The court held that “evidence of industry custom and practice may be relevant and, in the discretion of the trial court, admissible in a strict products liability action, depending on the nature of the evidence and the purpose for which the party seeking its admission offers the evidence.” *Id.* As the court explained, industry custom and practice evidence may “tend to show that a product is unsafe for its foreseeable uses” or inform the jury as to the feasibility or consequences that would result from an alternative design. *Id.* at 14.

The Second District then provided guidance on the different contexts in which industry custom and practice evidence may be admissible under the risk-benefit test for strict liability. For example, the court found that evidence that a competitor’s alternative design made the product less efficient or desirable to the consumer would be relevant to the adverse consequences factor. Conversely, the court held that evidence that competitors were not using electronic stability control, and that including this technology on its Tundra would have put Toyota at a competitive disadvantage, was not an adverse consequence under the risk-benefit test.

Lessons for Practitioners

The *Kim* decision has several lessons for lawyers litigating strict product liability cases in California, lessons that counsel should consider pre-filing and while trying the case.

The split among *Kim* and the other California appellate decisions may increase the importance of where the strict product liability case is tried. Normally, a California court of appeal decision is binding on all superior courts, regardless of what district or division issued the decision. *Auto Equity Sales Inc. v. Super. Ct.*, 57 Cal. 2d 450, 455 (1962). But this rule does not apply where there are conflicting appellate court decisions on the issue. When confronted with conflicting appellate decisions, the superior court “can and must make a choice between the conflicting decisions.” *Id.* at 456. Despite this theoretical choice, in practice “a superior court ordinarily will follow an appellate opinion emanating from its own district even though it is not bound to do so.” *McCallum v. McCallum*, 190 Cal. App. 3d 308, 315, n.4 (1987).

Any tendency of superior courts to follow decisions of the appellate court in their districts, rather than conflicting out-of-district authority, may cause both plaintiff and defense counsel to take strategic steps with respect to venue if the industry custom and practice evidence is particularly compelling. Plaintiffs’ counsel may consider the appellate split on the admissibility of such evidence — along with considerations like the judges in the district, juror demographics in the district, and other factors — and if the evidence favors the plaintiff, may decide to file in a plaintiff-friendly district (if the venue is proper in multiple districts) in the hope that the trial court will follow the favorable appellate decisions. Conversely, defense counsel may consider the split in challenging the chosen venue in favor of a more advantageous venue.

Further uncertainty may result if the case is filed in a district in which the appellate court has yet to decide the issue because a “decision of a court of appeal is not binding in the courts of appeal. One district may refuse to follow a prior decision of a different district or division, for the same reasons that influence the federal courts of appeals of the various circuits to make independent decisions ... ” McCallum, 190 Cal. App. 3d at 315, fn. 4. Therefore, those appellate districts that have not decided whether industry custom and practice is admissible in a strict product liability case may present even more unpredictability to the parties and litigants. These strategic venue considerations will be moot if and when the California Supreme Court resolves the conflict (Supreme Court review has been sought in Kim) or the Legislature acts.

The Kim decision also summarizes certain circumstances when custom and practice evidence in a strict product liability case may be admissible. The Kim court found such evidence may be admissible “depending on the nature of the evidence and the purpose for which it is offered.” Id. at 17. In addition to the adverse consequence analysis mentioned above, the court explained that “evidence that a manufacturer’s competitors tried to produce a safer alternative design for the product, but the alternative design malfunctioned or functions only at an unsustainable cost, would be relevant to the mechanical feasibility factors, as would evidence that such a design by a competitor was functional and cost-effective.” Id. At 18. The court also rejected Toyota’s argument that evidence that Toyota’s competitors did not include electronic stability as standard equipment was relevant to the “likelihood that danger would occur” risk benefit factor because all manufacturers may be producing an unsafe product. Id. at 19.

Counsel litigating whether a product is defective under the risk-benefit test must understand how the appellate split may factor into the decision over where to litigate and how it may affect their trial presentation. The appellate conflict makes it important for parties who want to use custom and practice evidence to offer it, and if denied, to make a proffer to preserve the record for appeal, particularly in those districts that have not yet ruled on the issue and those districts that have rejected such evidence. As the Kim case demonstrates, the admissibility of custom and practice evidence depends on the particular facts and circumstances of the case and the purposes for which the evidence is being offered, which provides opportunity for counsel to offer creative arguments for the admissibility or inadmissibility of such evidence in future cases.

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