IADC Committee Newsletter

PRODUCT LIABILITY

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The author provides tips to the defense practitioner on aggressively pressing legal and factual points to test plaintiff's proof of a reasonable alternative design in design defect claims.

No Other Alternative: Challenging Plaintiff's Proof of Reasonable Alternative Design

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In the majority of jurisdictions, to establish a claim for design defect in a product liability action, the plaintiff must present some proof of a "feasible alternative design" or "reasonable alternative design."[1] Depending on the jurisdiction, proof of a reasonable alternative design can be described as a requirement, an element, or a factor in establishing that a product is defective in design. Emerging case law, in adopting or interpreting traditional risk-utility analysis, has focused on this requirement. For example, courts from Kentucky and South Carolina have recently expanded or reinforced the principle that a reasonable alternative design must be established in a design defect case.[2] This article does not attempt to conduct a state-by-state survey of the applicable law,[3] but rather provides tips to the defense practitioner on aggressively pressing legal and factual points to test plaintiff's proof of a reasonable alternative design.

From experience, aggressive strategy to advance the legal significance of establishing a reasonable alternative design must be developed early in the case and can produce meaningful results not only in jurisdictions where the doctrine is well-established but also in jurisdictions where the legal standard for design defect cases may not be entrenched as to the reasonable alternative design requirement.[4] Legal arguments on reasonable alternative design should be included in *Daubert*[5] or other motions to exclude or limit the plaintiff's expert testimony, motions for summary judgment, motions *in limine* to challenge evidence of proposed design alternatives, and in oral and written motions for judgment as a matter of law at the close of plaintiff's case, at the completion of the defense case, and after any adverse verdict. Additionally, the defense position on reasonable alternative design should be articulated clearly in proposed requests to charge (or jury instructions). If necessary, "change the law" jury instructions should be pursued. As always, exceptions or objections to the court's jury charge on the issue should be clearly preserved on the record.

In challenging plaintiff's proof or evidence of a reasonable alternative design ("RAD"), the following factors and issues should be considered:

- Whether the RAD is being presented through expert testimony, and, if so, is the expert qualified to present reliable evidence of a design alternative?
- Is the design merely conceptual or theoretical in nature?

[1] Restatement (Third) of Torts: Prod. Liab. §2 cmt. d, reporters' note (1998).

[2] *See Hopkins v. Ford Motor Co.*, 2011 WL 5525454, at *3 (W.D. Ky. November 14, 2011) (expanding requirement of proving a feasible alternative design from crashworthiness cases to all design defect claims) (citing *Low v. Lowe's Home Centers, Inc.*, 771 F.Supp. 2d 739, 741 (E.D. Ky. 2011)); *Branham v. Ford Motor Co.*, 390 S.C. 203, 223-24, 701 S.E.2d 5, 16 (2010) (holding, "in a product liability design defect action, the plaintiff must present evidence of a reasonable alternative design") (other citations omitted).

[3] For a detailed survey of the state-by-state approach to reasonable alternative design, *see Burden of Proving Feasibility of Alternative Safe Design in Products Liability Action Based on Defective Design*, 78 A.L.R. 4th 154 (1990).

[4] *See Branham*, 390 S.C. at 224-25, 701 S.E.2d at 16 (adopting risk-utility test as sole test in design defect cases, rejecting consumer expectations test, and requiring proof of an reasonable alternative design with specificity); *Watson v. Ford Motor Co.*, 389 S.C. 434, 449-50, 699 S.E.2d 169, 177-78 (2010) (finding expert's proof of reasonable alternative design unreliable and inadequate as a matter of law).

[5] *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

- Has the design been reduced to scale drawings fully illustrating its dimensions, characteristics and mechanics?
- The existence of a prototype or model demonstrating or incorporating the proposed design.
- Is the alternative design subject to a U.S. or foreign patent – has the proponent or anyone else sought patent protection?
- Has the alternative design been the subject of peer-reviewed articles or treatises or otherwise reviewed in the scientific community?
- Has the proposed design ever been incorporated or utilized by another manufacturer in a real-world setting – while not a totally decisive factor, it is powerful to establish that which plaintiff proposes as an alternative design has never before been utilized in the particular industry.[6]
- If the plaintiff's alternative design concept has been utilized in a different product, field or application, focus on the distinctions and lack of similarity between that application and the subject product.[7]
- Has the proposed design been subjected to testing to measure its effectiveness, functionality, and performance?
- What is the effect of the RAD on the utility and functionality of the product – does the proposed design compromise or diminish the utility of the product – this is an overarching issue and should be fully explored.
- What analysis has been performed of the adverse or increased safety risks of the alternative design – does it potentially affect the relative safety of other components or the overall safety of the product – the proposed design should be scrutinized not just for its impact on a particular component or system but for its interaction and potential interference with other product components or systems, as well as the product as a whole.
- What cost analysis or economic impact of the alternative has been performed – this is a critical factor in most jurisdictions – consideration of costs should not be limited to bare physical cost of the alternative design feature but should include analysis of added manufacturing costs affiliated with production and re-tooling changes.
- What analysis or testing supports the durability of the proposed alternative – will it require additional maintenance and repair or affect product longevity?
- Is there an adverse effect on the aesthetics or potential desirability of the product caused by the alternative design?
- The effect of the alternative design on compliance with governmental regulations and standards.

[6] *See Holst v. KCI Konecranes Intern. Corp.*, 390 S.C. 29, 35, 699 S.E.2d 715, 719 (Ct. App. 2010) (finding proof of alternative design failed as a matter of law because not subjected to risk-utility analysis and, noting, among other things, proposed design alternative had never been utilized by another manufacturer).

[7] *See Watson*, 389 S.C. at 449-50, 699 S.E.2d at 177-78, (finding proposed alternative design of utilizing "twisted pair wiring" to prevent "electromagnetic interference" with vehicle speed control system was legally insufficient and unreliable despite manufacturer's utilization of twisted pair wiring in other vehicle systems).

- Would the alternative design have prevented the specific harm or injury which is the subject of the case?
- Was the technology supporting the alternative design readily available to the manufacturer at the time the subject product was designed or manufactured – this inquiry focuses on what was technologically known or available at the time the product "left the seller's hands" rather than hindsight opinions developed from after-acquired data and technology.

These factors are not exclusive, nor definitive, but provide critical ammunition to undercut the plaintiff's evidence of a reasonable alternative design.[8] The legal significance of the factors, collectively or singularly, in challenging the plaintiff's proof is important (and may vary from state to state) but the potential jury appeal should not be overlooked. Fundamentally, the alternative design requirement resonates with a basic human concept – "don't criticize the way I do things unless you can do it better" or "do not criticize my play-calling and execution, if you have never played the game."

When applied effectively, the factors set forth above can dismantle what, on the surface, may appear to be a reasonable alternative design theory and expose its failings and inadequacies in real world application. Effective use of the applicable criteria, whether in a summary judgment motion or a closing argument, can transform the notion of reasonable alternative design from an abstract legal concept to a tangible and powerful defensive weapon.

[8] For an exhaustive and informative examination of factors pertinent to rebut proof of a reasonable alternative design, as well as sample discovery forms on the subject, *see* Donald Patterson, *Defense of Product Liability Action: Infeasibility of Alternative Design Proposed by Plaintiff*, 1 Am. Jur. Proof of Facts 3d 363 (1988).

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