

PRODUCT LIABILITY

# Blackjack

## (21) Ways To Win, Bust or Fold!

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You got to know when to hold'em, know when to fold'em,  
Know when to walk away, and know when to run.  
You never count your money, when you're sitting at the table.  
There'll be time enough for counting, when the dealing's done.

- KENNY ROGERS, THE GAMBLER

Strategic thinking in prosecuting or defending product liability actions often mirrors the creativity, gut-check and fortitude to play the winning blackjack hand. As in blackjack, in the litigation game, it is often not how you start but how you finish that decides the winner. Though the cards often favor the house or your adversary, playing your cards to their maximum potential yet recognizing when it is necessary to fold, is vital to smartly beating the odds. Below is a practical checklist of 21 ways to win, bust or fold in your product liability game.

- 1. Statutes Of Limitation/Repose:** Statutes of limitation bar actions, unless brought within a specific time period after accrual. Similarly, a statute of repose time bars claims after lapse of a period of time, regardless of whether the claim has accrued. If the limitation or repose period expires prior to commencement of suit, defendant will move for dismissal. Plaintiff must creatively marshal facts to establish timely accrual or develop other valid bases, including laches, equitable estoppel, etc., or risk the "bust" of a time-bar defense.
- 2. Contributory Negligence:** Contributory negligence covers conduct amounting to the breach of a duty to exercise reasonable care for one's own safety. Contributory negligence is a hand generally asserted as an affirmative defense to product liability claims arising out of negligence and has also been played in strict liability and breach of warranty suits. Although most states follow comparative fault in product liability actions, contributory negligence may be a complete bar in states permitting the defense. Whether the end-user failed to exercise reasonable care, using the product will be the defense's strategic counter-attack. When prosecuting a product liability claim, it is vital that the end-user's conduct be capsuled in a sympathetic context, emphasizing the superior knowledge of the product manufacturer to foresee the end-user's actions, to design the product considering such foreseeable conditions and/or to provide appropriate instructions and warnings.
- 3. Comparative Fault:** Under comparative fault, damages that would normally be recoverable by plaintiff are reduced in proportion to the percentage of negligence attributable to plaintiff. Some states follow a "modified" comparative fault, where recovery is permitted if plaintiff's negligence was comparatively less than that of defendant. Other states adopt a "pure" form of comparative negligence, allowing plaintiff to recover, so long as plaintiff's proportion of fault is less than 100%. While comparative fault does not usually act as a complete bar to recovery, it can greatly diminish defendant's liability. Whose fault and to what degree is the table upon which the comparative-fault card game is played. This is a fact-intensive determination. Appreciating and developing the "right evidence" or "right hand," whichever set of cards you are playing, is the key.
- 4. Assumption Of Risk:** Assumption of the risk occurs when plaintiff voluntarily and unreasonably encounters a known danger in the use of a product. In some states, assumption of risk is a complete bar, while in others plaintiff's recovery may be diminished. Given that plaintiff must act in a voluntary, unreasonable and knowing manner, assumption of risk is a difficult defense to establish. A defendant may minimize the difficulty in establishing assumption of risk by introducing evidence that the danger was open and obvious, commonly known or apparent to the plaintiff as a knowledgeable user. Whether or not the end-user knowingly assumed the risk could be blackjack! >>

5. **Open And Obvious Danger:** Under the open and obvious danger rule, a manufacturer is under no duty to mitigate, eliminate or warn of dangers presented by a product that are open and obvious. Some courts shy away from allowing the open and obvious defense because it may not require evidence that plaintiff actually knew of, appreciated and voluntarily encountered a danger. Many states consider the open and obvious nature of a risk as a factor for the jury to consider. The defense remains viable, where defendant is asserting defenses of contributory negligence, comparative fault or assumption of the risk. Evidence of an open and obvious danger can be used to establish that plaintiff knew of the dangerous nature of a product. Like assumption of risk, were dangers, risks and hazards understood, yet disregarded in the face of such danger? Another potential blackjack, should the facts so develop.
6. **Product Misuse:** Misuse occurs when the product is used for a purpose that was not intended, reasonably anticipated or expected by the seller. Many jurisdictions place a burden on plaintiff to establish that his/her use of the product was foreseeable. Depending on the governing law, plaintiff's misuse of a product may absolve a manufacturer of liability or diminish the amount of damages recoverable. Defendants will argue that the user of a product exercise minimum precaution and there is no duty to warn against obvious product misuses. Plaintiff must call defendant's bluff that to the extent the end-user's conduct is viewed as "product misuse," then the product designer/manufacturer should have foreseen such misuse and implemented the appropriate design, protective shields or interlock devices or ensured effective instructions and warnings were issued.
7. **Product Alteration Or Modification:** A manufacturer is not liable for product related injuries due to an unforeseeable post-sale product modification or alteration. The defense of product alteration or modification can be asserted as a "shield" to completely bar plaintiff's claim or can be employed as a "sword" to shift liability to a third party responsible for the change in the product. Whether the defense is used as a sword or a shield, it must show that the alteration was substantial, not foreseeable, and occurred after the product left the defendant-manufactures possession. As plaintiff, counsel must show that even if the product was altered/modified, it was a nominal, immaterial change that did not cause the injury and was foreseeable to the product designer.
8. **Insolvency:** Every plaintiff needs a defendant with collectible assets or "lots of chips." Should the target defendant be insolvent, plaintiff must look to develop a vicarious liability claim by way of successor liability, parent control over a subsidiary, alter-ego or piercing the corporate veil or indemnity. Without a solvent target defendant, plaintiff's chase is merely a game of cards with no pay off!
9. **State Of The Art:** State of the art is common in most product liability actions, based upon design defect or a failure to warn. "State of the art" refers to a level of scientific and technical knowledge that could reasonably have been used in the design, manufacture and marketing of a product. Factors include technical possibility, as well as economic feasibility considerations for cost and marketing, competing safety considerations and ease of design, manufacture and marketing. For practical purposes, plaintiff should show that the design could have been safer (existence of a known danger) or an alternate "feasible" design. State of the art can be the defense's ace for beating plaintiff's claim that an alternate "feasible" design was available or warning necessary. Evidence of state of the art is admissible in both negligence and strict liability design or warning defect cases. Whichever hand you're playing, it is imperative to discover evidence of the historical state of art at the time of manufacture. You must uncover the relevant technical, scientific knowledge that was known and obtain industry testimony to tell the "state of the art" story.
10. **Custom & Practice/Industry Standards:** "Custom and practice," distinguishable from "state of the art," refers to those actions that were, or are, being performed in a particular industry by other similarly-situated manufacturers, relating to the design, manufacture or marketing of the type of product at issue. "Custom and practice," industry standards, and governmental rules, regulations, statutes, and the like, may serve as a pseudo-defense in a products liability case. "Industry standards" refers to the accepted standards, codes, guidelines or recommendations promulgated by an industry or trade group or other non-governmental entity, regarding the design, manufacture, and marketing of a particular product. "Governmental rules, regulations, statutes and the like" refers to minimum standards set for the design, manufacture, and marketing of a particular product and which may have the force and effect of law. In some cases, compliance with governmental standards may be a complete defense. Evidence of "custom and practice" can be presented in one of three ways: 1) plaintiff may use evidence of defendant's failure to comply to support its claim of negligence or product defect; 2) defendant may use it to attack plaintiff's proof of negligence or "product defect;" and 3) defendant may use a third party's failure to comply in order to shift liability for plaintiff's alleged damages to a third party. >>

11. **Preemption:** Preemption refers to the long standing position that the Constitution “requires that all conflicts between federal and state law be resolved in favor of the federal rule.” It may be based on either a federal statute or a regulation issued pursuant to such a statute. Preemption can be express or implied. For express, courts must first ascertain if the federal statute contains an express preemption provision and, second, if that provision contains a “reliable indicium of congressional intent.” If either component is missing, there can be no express preemption. The express preemption doctrine has been held not to apply, however, to state claims based upon failure of a product to conform to standards of the federal law itself. Implied preemption is found where either: 1) there is a direct and actual conflict between state and federal law; or 2) Congress has decided to preempt the entire field. It is important to note that federal preemption does not convert the state law claim into a federal question within the meaning of 28 U.S.C. § 1331 - with the one possible exception being where Congress has completely preempted a particular area such that any civil complaint in that select group of claims is necessarily federal in character (e.g., Federal Hazardous Substances Act). Recently, the Supreme Court ruled that a plaintiff may not sue under state law to challenge the safety or effectiveness of a medical device to which the FDA has given “premarket approval.” *Riegel v. Medtronic, Inc.*, 2008 WL 440744 (Feb. 20, 2008). This type of FDA approval, which reflects the agency’s determination that the product is reasonably safe and effective for human use, establishes certain federal requirements that preempt state law remedies, including common-law claims.
12. **Subrogation Waivers:** Waivers of subrogation can act to completely bar subrogation claims. Because a subrogating insurer steps into the shoes of the subrogor insured, the insured may defeat the insurer’s right of subrogation by settling and/or releasing all potential claims against the alleged tortfeasors - including by contract. This waiver must be an intentional relinquishment of a known right. Intent to waive a right, however, may be inferred from conduct. An agreement that releases a contracting party from liability for its own negligent acts may also defeat subrogation rights of the insurer. Such agreements often do not contravene public policy, are valid, and are enforceable.
13. **Real Party In Interest:** Under Federal Rule of Civil Procedure 17(a) “[e]very action shall be prosecuted in the name of the real party in interest.” The real party in interest is the one who actually possesses the substantive right being asserted and has a legal right to enforce the claim. The “real party in interest” must sue in his or her own name. Subrogating insurers frequently want to bring suit in the name of the insured to avoid the inflammatory prejudice against the insurance industry. A subrogating carrier, under Rule 17, should seek to “ratify” that the outcome of the proceeding “shall have the same effect” as if the action had been commenced in the insurer’s name. Conversely, defendants will aim to heighten such prejudice by forcing the subrogating insurer to be a named party-plaintiff.
14. **Forum Selection & Choice Of Law Clauses:** Contractual provisions may select the forum/venue where any disputes will be adjudicated. Venue considerations may be outcome determinative - given different jury pools and judiciary. The forum selection clause may also dictate whether the suit is brought in arbitration versus a judicial proceeding. Choice of law provisions determine the governing substantive law. Given the differences in one state’s law from another, the applicable law could make the difference between blackjack and bust!
15. **Government Contractor Defense:** The government contractor defense provides that a supplier of goods to the United States may avoid liability when the supplier’s goods conformed to government specifications. Generally, the “government contractor defense” stands for the proposition that “if a private party has contracted with the federal government to carry out a project on behalf of the government, the private party, like the federal government, is shielded from liability under the doctrine of sovereign immunity.” As one court has stated, “stripped to its essentials,” the government contractor defense is to claim that “[t]he Government made me do it.” However, government contractors may be held liable to third parties in various situations: 1) government contractor exceeded the authority given to it by the federal government (e.g., “abuse of power”); 2) federal government’s authority was not validly conferred; and 3) government contractor is charged with not following the reasonably precise federal government specifications.
16. **Liability Limitations & Disclaimers:** The viability of plaintiff’s recovery claim is often determined by the presence, or absence, of contractual liability limitations, waivers and exculpatory provisions. Irrespective of the underlying factual merits, contractual bars may warrant folding before you throw more chips on the table. Some jurisdictions preclude enforceability for gross negligence or intentional conduct. It is critical to research the governing law to determine enforceability of such provisions. >>

17. **Lack Of Proper UCC Notice:** Plaintiff's claim may be barred where plaintiff has not provided reasonable notice of the alleged breach and defendant proves prejudice. Notice requirements may be strictly applied.
18. **Economic Loss Doctrine:** Under this doctrine, a purchaser cannot recover in negligence or strict liability for purely economic loss. As a general rule, negligent tortfeasors are not responsible for "economic loss," such as lost profits or cost of repairs without injury to persons or property other than the product itself. However, this rule is full of exceptions (i.e., does not apply to intentional conduct/fraud). Some jurisdictions place great weight on whether the product simply did not meet expectations or whether it resulted in some catastrophic loss. The economic loss doctrine is a pivotal battle in the game of blackjack, requiring strategic thinking and the right set of "cards" to maintain your tort-based hand.
19. **Proximate/Intervening Cause:** Proximate cause is the legally culpable cause of harm. The doctrine of proximate cause is riddled with wrinkles and notoriously confusing. There are many competing theories of proximate cause, including foreseeability, direct causation, risk enhancement/causal link and harm within the risk. Proximate cause can be difficult to discern in cases involving multiple, concurrent or intervening causes. In matters involving multiple causes or an intervening cause(s), plaintiff must generally show that defendant's conduct substantially caused the alleged injury. Defendants will frequently use intervening cause in an effort to find a winning hand, even in the face of overwhelming liability evidence.
20. **Empty Chair:** The "empty chair" strategy is well known to trial lawyers as a defendant's "21" and a plaintiff's face card and "6" -- it allows defendant to point the finger at an empty chair, where a settled defendant or un-sued individual or entity figuratively sits, and to argue that this figure was the sole proximate cause of the injury (in essence, arguing that plaintiff sued the wrong party). Defendants are entitled to assert that the sole proximate cause of plaintiff's injury was the negligence of some person or entity not before the court - the "empty chair." There is nothing inherently improper in the use of this strategy, nor is there anything improper in the attempt to avoid the strategy. The burden of proving causation always rests with the plaintiff; thus, a defendant need not assert lack of proximate cause as an affirmative defense. Rather, the defense may be raised if the defendant has denied in its answer that its negligence was even partly a proximate cause of plaintiffs' injuries.
21. **Spoliation:** Destruction, alteration, or loss of evidence could result in you losing your bet or a resultant "push." Many factors come into play: resulting prejudice; ability to cure prejudice; alternative opportunities for evidence; and bad faith conduct. There are a wide range of sanctions available, from an adverse inference to dismissal of claims or defenses. Courts often balance prejudice to the opposing party against the quantum of the spoliator's culpable conduct. Certain jurisdictions recognize an independent tort for spoliation of evidence. It is vital that appropriate prophylactic precautions be planned and implemented, such as notice to all interested parties, opportunity to inspect artifacts and the scene, and preservation of evidence.

Recognizing and strategizing the foregoing 21 litigation "hands" that often come into play is crucial to knowing when to double down or fold for another day. Ultimately, as the Chinese Proverb says, *If you must play, decide upon three things at the start: the rules of the game, the stakes and the quitting time.*

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