Alert

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COZEN O'CONNOR

The Sixth Circuit Tackles *Twombly, Iqbal* and the Malfunction Theory

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Most states have adopted a version of what is typically referred to as the "Malfunction Theory" that permits circumstantial proof of a product defect in a product liability action. The Malfunction Theory largely corresponds to the doctrine of *res ipsa loquitur* in negligence cases. Generally, the concept is that if a product fails in a fashion that most likely would not have occurred if it were not defective, and reasonable alternative explanations can be ruled out, the jury is permitted to conclude that the product was defective, even absent specific proof of a defect. The Malfunction Theory is adopted at Section 3 of the *Restatement (Third) of Torts: Products Liability* that provides as follows:

> It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff:
>
> (a) was of a kind that ordinarily occurs as a result of product defect; and
>
> (b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution.

The Malfunction Theory is particularly useful in fire cases. When a product failure causes a fire, there may not be enough left of the product to reveal evidence of the specific defect. Some jurisdictions actually require the plaintiff to plead that the product was destroyed in order to rely upon the Malfunction Theory. *See, e.g. Leonard v. General Motors*, 220 WL 702, 4906,*14 (D. Conn 2020).

By definition, in a product liability lawsuit proceeding upon the Malfunction Theory or *res ipsa loquitur*, it will not be possible to allege a specific defect in the complaint. If the lawsuit is filed in federal court, this could potentially implicate a doctrine that emerged from two U.S. Supreme Court decisions: *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The gist of the *Twombly/Iqbal* doctrine is that even the seemingly liberal "notice pleading" standard under Rule 8(a) of the Federal Rules of Civil Procedure requires a complaint to contain more than a recitation of bare legal conclusions or the elements of a cause of action. *Twombly/Iqbal* require federal courts to disregard conclusory allegations and determine whether the complaint alleges sufficient *facts* to establish a "plausible" claim for relief.

So what happens when a product liability claim based upon the Malfunction Theory runs up against a defense motion to dismiss based upon *Twombly/Iqbal*? Since a product liability claim necessarily depends upon proof of a defect, it is at least superficially logical for a product manufacturer to point to *Twombly/Iqbal* and argue that the complaint should be required to state, specifically, what "defect" existed in the accused product. In a recent Sixth Circuit decision, *Genaw v. Garage Equipment Supply Co.*, 2021 WL 1383246, 2021 U.S. App. LEXIS 10750 (April 13, 2021), the court held that, so long as the complaint set forth the facts required to prove a defect under the relevant state's version of the Malfunction Theory, the failure to allege a specific defect did not render the complaint subject to dismissal.

Genaw is the first reported federal appellate decision to reach this conclusion. However, many federal district courts have reached the same conclusion: *See, e.g., Leonard v. General Motors,* 2020 WL 7024906,*14 (D. Conn.2020); *Smith v. Howmedics Osteonics Corp.,* 251 F.Supp. 3rd 844, 851-852, (E.D. Pa. 2017); *Volkmann v. Intertek York Building Products and Building Services,* 2019 WL 2477514 (M.D. Pa. 2019); *Cole v. NIBCO, Inc.,* 2016 WL 1053602 *15-17 (D.N.J. 2016); *Travelers Property Casualty Co. v. Liebert Corp.,* 2018 WL 4604292 (S.D. Ohio 2018); *Richards v. Johnson &*

Johnson, 2018 WL 2976002 *16 (N.D.N.Y. 2018); *Acadia Insurance Co. v. Fluid Management, Inc.,* 2015 WL 3869696 *5 (D. Me. 2015); *Houtz v. Encore Medical Corp.,* 2014 WL 6982767 *7 (M.D. Pa. 2014); *Adkins v. Nestle Purina PetCare Co.,* 973 F. Supp. 2nd 905, 915-16 (N.D. Ill. 2013); *Mazur v. Milo's Kitchen, LLC*, 2013 WL 3245203, *5 (W.D. Pa. 2013). These cases recognize that a plaintiff is not required to *plead* specific facts that they are not required to *prove* under applicable state law.

As noted in *Travelers Property Casualty v. Liebert*, "technical details as to why or how Defendants' products malfunctioned may be unattainable without discovery", 2018 WL 460429 *20. The *Twombly* decision itself noted that its "plausibility" standard only required "enough fact to raise a reasonable expectation that discovery will reveal evidence" supporting the claim. 550 U.S. at 556.