

## An Attack on Plaintiffs' Use of Consumer Complaints

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In products liability actions, plaintiffs use prior consumer complaints as evidence that a defect existed or that the defendant ignored a known defect. Precluding these prior consumer complaints is important to the defense, because this evidence has significant potential to prejudice the jury and lead to the imposition of liability in cases where plaintiffs have failed to produce sufficient proof of a defect. For these reasons, defendants must challenge the admissibility of prior consumer complaints. Defendants should argue that the communications are not substantially similar to the facts, circumstances and defects claimed in the case at issue (and are, thus, not relevant), and are inadmissible hearsay.



It is well settled under the Pennsylvania Rules of Evidence that to establish the threshold relevance of each consumer complaint, it is the plaintiff's burden to demonstrate that the circumstances involved in the prior incident and the alleged defect are substantially similar to the facts, circumstances and defects presented in the given case, as in *Blumer v. Ford Motor*, 20 A.3d 1222 (Pa. Super. Ct. 2011), appeal denied, 2012 Pa. LEXIS 1743 (Pa. Aug. 8, 2012). The theory underlying the plaintiff's defect claim determines whether and to what extent the proffered consumer complaints involve substantially similar circumstances. This is accordingly a very fact-specific inquiry. For this reason, defendants should insist upon an evidentiary hearing where the court analyzes each consumer complaint individually and the plaintiff is required to prove the facts, circumstances and defects claimed in each individual consumer communication are substantially similar to those in the case at issue.

After reviewing each consumer complaint the plaintiff submits, the trial court must decide whether a reasonable juror could conclude that such prior incident bears a substantial similarity to the facts presented by the case at issue and did not arise out of idiosyncratic circumstances—i.e., that the consumer raises an issue that makes the existence of a fact in dispute more or less probable. This is particularly pertinent in situations in which a consumer merely raises disappointment with a product's performance, rather than an issue that implicates safety concerns related to that product. Unless the plaintiff can meet this burden, the consumer communication must be excluded.

Instructive to these points is the Pennsylvania Superior Court's review of the trial court's evidentiary rulings in *Blumer*. Prior to the trial court's admission of certain consumer communications into evidence at trial, the plaintiff presented the reports to the trial court in camera. The court, after hearing oral argument on the issue of their admissibility, concluded that 28 of the 41 consumer communications were substantially similar to the plaintiff's defect claim related to the braking system in the defendant's truck. The trial court admitted complaints involving the same model trucks that incorporated the same braking system design. Nevertheless, the Superior Court held that three of the admitted reports failed to meet the substantial similarity test. The Superior Court held that although these consumer reports documented brake failure, the reports also suggested that the failure may have been due to a defect in the hand-operated parking brake as opposed to the foot-operated parking brake, which was the "relevant system at issue." Therefore, it held the cause of the parking brake failure underlying these reports was not substantially similar to the plaintiff's claim of a malfunction in the parking brake mechanism, and, therefore, they were inadmissible.

Defendants may also challenge the testimony of a plaintiff's expert witness who relies on consumer communications as a basis for his or her opinion that the product is defective. When rendering an opinion that a product is defective based on information within these consumer complaints, the expert must analyze each prior incident to determine whether it is substantially similar to the facts, circumstances and defects of the plaintiff's claims. If the expert fails to adequately consider the similarity of each consumer complaint to the facts surrounding the plaintiff's case, these communications cannot form the necessary reliable foundation for the expert's opinion.

Further, even if some of the consumer communications are deemed relevant to the case at issue, the evidence may still be excluded if the court determines their probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by consideration of undue delay and waste of time. Defendants should insist the judge determine that there is minimal danger of unfairness, confusion and undue trial delay. In this regard, the trial court has discretion to exclude evidence of consumer complaints to avoid spending excessive time analyzing whether they are substantially similar to the case at issue or in having the plaintiff introduce evidence of each complaint for the jury to analyze whether the complaint is sufficiently similar to the facts, circumstances and defects of the claims at issue.

The consumer communications should also be excluded because they constitute inadmissible hearsay. Under Pennsylvania Rule of Evidence 801(c), hearsay is an oral or written out-of-court statement offered in evidence to prove the truth of the matter asserted. Plaintiffs, by offering consumer communications, invite the jury to infer that some product defect exists. As such, plaintiffs' intent is to offer the consumer communications for the truth of the matter asserted, and, thus, the complaints are hearsay.

Keep in mind, even if the trial court finds that the consumer complaints are substantially similar to the case at issue, the plaintiff must still be required to present the testimony or evidence in an otherwise admissible form. Hearsay is generally not admissible. Declarants who make statements published in the consumer complaints are not under oath. Indeed, if the complaint is introduced merely in documentary form, the defendant never has an opportunity to cross-examine them. Therefore, they lack the circumstantial guarantee of trustworthiness to qualify as a hearsay exception.

Most often, plaintiffs seek to admit the hearsay statements under the business record exception. This rule provides that hearsay documents compiled and kept "in the course of a regularly conducted business activity" may be admitted "unless the sources of information or other circumstances indicate lack of trustworthiness," per Pa. R. Evid. 803(6). In cases involving business records that document consumer statements, however, the source of the information is an outsider, not the employee of the defendant who is charged with keeping precise and accurate records in the scope of his or her employment. The consumer's statement does not hold the presumption of accuracy that inspires the business records exception and must fall within another hearsay exception before it may be admitted into evidence. The burden is again on the plaintiff to establish the circumstantial trustworthiness of the information on the consumer complaint to qualify as a business record or to establish that the statement is admissible under another hearsay exception.

Plaintiffs often attempt to circumvent the admissibility requirements by arguing that the consumer complaints are not being offered as evidence of a defect, but rather as evidence that the defendant had notice of a potentially dangerous condition and ignored it. Certain statements that are inadmissible for one purpose (as discussed above, to establish a defect) may be admitted for a nonhearsay purpose (to establish the defendant's state of mind, i.e., if it knew of a potentially unsafe condition). Regardless, even if offered to show notice, the plaintiff must be required to show that what the defendant was allegedly put on notice of was substantially similar to the defect at issue. Otherwise, these complaints should be deemed inadmissible.