

# Practical Aspects of Screening Products Liability Cases (with Valuation Checklist)

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*Can a plaintiff's contingency fee lawyer make a living taking products liability cases? Yes, but doing so requires taking a good hard look at the case in the evaluation stages—and then a second look, too.*

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**WHAT ARE THE** hallmarks of a “good case” from the perspective of the plaintiffs’ attorney? Traditionally, the attorney would evaluate how strong the case is on liability, damages, and financial responsibility. This is true whether the case involves a rear end collision, a slip and fall, or a dog bite. Are products liability cases any different? Yes and no. True, they have to be winners in terms of liability, damages, and financial responsibility. But there’s something more: They have to be winners in terms of cost.

In this regard, the process of evaluating whether to take the case is much more involved—and more important—in products liability cases. You have to consider how much of your personal time you will have to invest in successfully handling the case. You also have to consider what the case will cost you and your firm in terms of staff time. Most importantly, you will also have to consider the investment of money that must be made to investigate and prepare the case for a successful trial. This final consideration will often dramatically affect the “net” amount your client may receive out of any settlement. The client’s consideration of the “net” to be received can dramatically affect the ultimate possibility of settlement and increase the probability of trial of a marginal case.

So is there a way to systematically evaluate products liability cases that will weed out the costly losers? Yes, there is.

**WHY LAWYERS GO ASTRAY** • My mentor, Perry Nichols, used to tell us that he had “made” more money on cases he turned down than on cases he accepted. After 40 years of practice, I can verify the truth of the statement. Painfully, I am still from time to time in need of a reminder. When I consider the “costs” involved in cases I wish I had not taken, I know that more time spent at an early date doing a thorough evaluation would have freed me, my staff, and my savings account to engage in more profitable ventures. What happened? What were the causes of a failure to turn down what so clearly in hindsight, was a bad case? There are several:

- *Greed.* Lawyers see a case with a wealthy manufacturer as a defendant, a badly injured (or deceased) victim, and then make an instantaneous mental computation of the fee on some future verdict;
- *Ego.* Lawyers remember the successes of the past, often occurring in ways totally unexpected, in cases that seemingly transformed from “bad” to “good” overnight. What is forgotten is the part “luck,” as opposed to skill or planning, paid in the case transformation. They forget the last “bad” case that produced nothing but debt, or a small recovery for a huge amount of work, not to mention an angry client;
- *Overwork.* Lawyers “sign up” the case, and begin investigation. Other cases that are easier, more important, or more valuable, compete for attention. Full review is delayed. Partial reviews stimulate “some additional work” which gets ordered, but still delays the necessary intensive review;
- *Lack of information.* There “appears” to be a case, but the valuable information to make the case can “only be found through discovery.” The attorney takes a chance and files suit, because “something is bound to turn up”;
- *Lack of experience.* Some of us, armed with experience in settling cases with automobile liability insurance companies, charge into court convinced that persuasive arguments will bring a healthy settlement from the commercial liability company or the self-insured manufacturer. The problem is that almost the only way to avoid a bad experience is to experience a few bad experiences. Hopefully something in this article will let you learn from others bad experiences. Or, if you are already “experienced,” hopefully something here will remind you of things you can do to avoid more “bad” experiences.

**FIRST LOOK** • The client tells you the story. It is a complex one, but you have listened carefully to all the client knows. It has the appearance of a products liability case. This is your first chance to “turn the case down.” How do you do the analysis?

### **1. Listen Intently to the Client’s Full Story**

Saving time by assigning the job to others may really result in

substantial waste of your time and money in the future. Get all the information needed in the first interview, or at least enough that you can decide with reasonable certainty that you will “take the case” or “reject the case.” Now is the time to cross-examine the client rather than many months and dollars later when preparing for deposition or trial. If still uncertain, keep asking questions. A follow-up call to the client may take some time, but surprising and important new information might surface.

## **2. Look at the Referral Lawyer’s File**

If the information comes from a “Referral Lawyer,” be especially cautious. Another lawyer might have some reasons to get rid of the case, and thus an incentive to paint a rosier picture than you might see if you were the one who dealt with that client directly. If any doubt exists, insist on seeing the client yourself. Always insist on seeing “the file” rather than relying on a description of what the file contains. After all, if the case is a winner, why is the lawyer giving it away to you? (My partner was once asked by his young son, “What’s the best kind of lawyer be?” My partner’s answer: “A referral lawyer.”)

## **3. Assess Financial Responsibility**

Most product manufacturers or sellers are financially responsible, either because of their own resources and self-insurance, or because of high liability limits. There are exceptions. Be prepared to find the small seller of the product manufactured in the Far East to be thinly financed, and thinly insured. Spend a little time on the Internet to see whether “World Industrial Manufacturing, Inc.” is being operated out of somebody’s home or garage. Bankruptcy of a defendant can be a major problem. Mergers and liquidations may create other problems. Although not frequently a problem, a little checking may save much in time, costs, and investigation expenses.

## **4. Evaluate the Damages**

Are the damages sufficient? Will the client net an adequate recovery after your fee and costs have been deducted? If not, you may find that your client will insist on taking a chance to improve the potential recovery by insisting on a trial even in the face of a reasonable offer. Most products liability cases are going to require that you advance substantial sums of money to finance the investigation and pretrial discovery and preparation for trial. Seldom can settlements be reached without that financial commitment. Any situation in which the lawyer’s fees plus costs advanced leave the client with a marginal recovery presents many risks for the results of client dissatisfaction, even if the case is settled.

## **5. Consider the Costs**

Intertwined with the issue of damages is the issue of costs. A financial commitment to go forward may place a strain upon personal

or firm finances that can put a strain on partner relations, and limit the ability of the firm to handle other potentially profitable cases. A lawyer must recognize that such strains have led some lawyers to recommend—and even force—an unsatisfactory settlement. Don't risk putting yourself in the position of urging settlements dictated, intentionally or subconsciously, more by the needs and fears of the lawyer than by the needs of the client. Likewise, commitment of large amounts of lawyer or non-legal staff time can have the same damaging effects, but may be more difficult to assess.

### **6. What Is the Liability Theory?**

In many cases, what you hear from the client in the first thorough interview will be the “story” the jury will hear and take home from the first day of trial. If your immediate reaction is, “That shouldn't have happened,” your jury will probably react the same way, and you have a strong indication that a viable products liability case exists. If your reaction is “So what?” you are very likely heading for trouble by trying to create a products liability case. The reaction “I wonder why?” can be neutral, but it is a cautionary sign. You need to promise yourself that you will have some idea of the answer very soon, and warn the client that you may have to turn the case down in the future after more of the facts become known.

### **7. Do The Law and the Proof Help or Hurt?**

At this point, you should remind yourself of the requirements of proof to present a jury issue under the law of your state, and begin the first checklist of how that proof will be presented. Must you have the product? If it is unavailable, how does this damage the case? Must you test the product? Must you have an expert? How many? What kind? Has any vital evidence been destroyed or are vital witnesses dead or their whereabouts unknown? Remember, it is not what is true that counts; it is what you can prove.

### **8. What Is the Allocation of Contributory or Comparative Fault?**

You must evaluate your own client's (or the deceased's) contribution to the accident, (if any). The idea is to evaluate whether your client can be realistic in recognizing that a jury may place blame, at least partly, on the him, her, or the deceased. Unreasonable and unrelenting positions on this subject may make it impossible for the client to ever accept a reasonable settlement. Likewise, in half of the states, the fault of an employer, or other entities, may act to reduce the client's recovery through applications of modified versions of joint and several liability (or its complete abolition). Uninsured, partly insured, or immune “other parties” may reduce the net damages to your client. Joinder of marginal defendants can raise the expense of litigation, and reduce your credibility with the jury.