

DEFENDING U.S. PRODUCT LIABILITY ACTIONS: A U.S./DANISH PERSPECTIVE

Danish American Business Forum

Copenhagen: February 2, 2011

Aarhus: February 3, 2011

Christopher G. Kelly
Holland & Knight LLP
Tel: (212) 513-3264
Email: christopher.kelly@hklaw.com

Jens Rostock-Jensen
Kromann Reumert
Tel: 45 38 77 44 50
Email: jrj@kromannreumert.com

Product Liability: Defined

Manufacturer who offers a product for sale owes a duty of care, not only to party who purchases the product, but anyone else who **MIGHT** come into contact with the product.

Christopher G. Kelly
Holland & Knight LLP
Tel: (212) 513-3264
Email: christopher.kelly@hkllaw.com

Jens Rostock-Jensen
Kromann Reumert
Tel: 45 38 77 44 50
Email: jrj@kromannreumert.com

U.S. Product Liability Law Sources for Manufactures, Distributors and Sellers

1. State

A. Common Law

B. Statutory

- i. Various State Product Liability Acts
- ii. Various State Consumer Fraud Acts
- iii. Uniform Commercial Code Warranties

2. Federal

A. Magnuson-Moss Act

B. Consumer Product Safety Act/ Consumer Product Safety Commission (CPSC)

Christopher G. Kelly
Holland & Knight LLP
Tel: (212) 513-3264
Email: christopher.kelly@hkllaw.com

Jens Rostock-Jensen
Kromann Reumert
Tel: 45 38 77 44 50
Email: jrj@kromannreumert.com

U.C.C. Warranties

A. Express Warranties

1. Contracts
2. Advertisements and brochures

B. Implied Warranties

1. Warranty of merchantability
2. Warranty of fitness for particular purpose
3. Waivers and limitations
4. Magnuson-Moss prohibitions

Christopher G. Kelly
Holland & Knight LLP
Tel: (212) 513-3264
Email: christopher.kelly@hkllaw.com

Jens Rostock-Jensen
Kromann Reumert
Tel: 45 38 77 44 50
Email: jrj@kromannreumert.com

Three Theories of Recovery in a U.S. Product Liability Lawsuit

1. Negligence: designer, manufacturer, or seller will not be liable for a defect if manufacturer took reasonable care to detect or prevent defect. Compensatory and punitive damages recoverable.
2. Product Liability (aka Strict Product Liability): Manufacturer liable if product is defective. Compensatory damages recoverable.
3. Breach of Warranty: Economic loss and consequential damages may be recoverable.

Christopher G. Kelly
Holland & Knight LLP
Tel: (212) 513-3264
Email: christopher.kelly@hkllaw.com

Jens Rostock-Jensen
Kromann Reumert
Tel: 45 38 77 44 50
Email: jrj@kromannreumert.com

Plaintiff's Burden of Proof

In a U.S. product liability action, the Plaintiff must prove that the product left the manufacturer's control with:

- A defect in the product's inherent design; or
- A defect in way product was manufactured; or
- Failure to warn about hazards not obvious in the product.

Christopher G. Kelly
Holland & Knight LLP
Tel: (212) 513-3264
Email: christopher.kelly@hkllaw.com

Jens Rostock-Jensen
Kromann Reumert
Tel: 45 38 77 44 50
Email: jrj@kromannreumert.com

A Claim is Made: Claim Investigation

- A. Determine if CPSC needs to be NOTIFIED
- B. Preservation of Evidence
 - i. Letter from adversary
 - ii. Document preservation communication to client
 - iii. Stipulated protective order
- C. Product History
 - i. Contracts
 - ii. Specifications, drawings, production
 - iii. Testing, quality control and shipping
- D. Purchase Documentation
 - i. Invoices, receipts and payments
 - ii. Instructions and warnings
 - iii. Past sale communications to dealers/purchasers.
- E. Identification and Interview of Witnesses: Fact and Expert
 - i. Review of other similar Incidents
 - ii. Site visit/Product inspection

Christopher G. Kelly
Holland & Knight LLP
Tel: (212) 513-3264
Email: christopher.kelly@hkllaw.com

Jens Rostock-Jensen
Kromann Reumert
Tel: 45 38 77 44 50
Email: jrj@kromannreumert.com

F. Product Design

1. Identify persons responsible for design
2. Documentation regarding design
3. Relevant Alternative Designs considered, but rejected; determine rationale
4. Redesign of Product: Post-Accident
 - a) Determine Relevance
 - b) Explanation
5. Industry Standards, U.S. and EU: Identify and Review

Christopher G. Kelly
Holland & Knight LLP
Tel: (212) 513-3264
Email: christopher.kelly@hkllaw.com

Jens Rostock-Jensen
Kromann Reumert
Tel: 45 38 77 44 50
Email: jrj@kromannreumert.com

G. Warnings

1. Identify and preserve warnings
2. Identify rationale and development of warnings
3. Identify government requirements and practice in the industry

Christopher G. Kelly
Holland & Knight LLP
Tel: (212) 513-3264
Email: christopher.kelly@hkllaw.com

Jens Rostock-Jensen
Kromann Reumert
Tel: 45 38 77 44 50
Email: jrj@kromannreumert.com

Pleadings

1. Complaint

- a) Negligence
- b) Strict Liability
- c) Punitive Damages?

2. Pre-Answer Motions

- a) Jurisdiction
- b) Failure to state a claim on which relief can be granted
- c) Statute of Limitations

Christopher G. Kelly
Holland & Knight LLP
Tel: (212) 513-3264
Email: christopher.kelly@hkllaw.com

Jens Rostock-Jensen
Kromann Reumert
Tel: 45 38 77 44 50
Email: jrj@kromannreumert.com

3. Answer & Defenses

- a) Admit, deny, or deny knowledge and information sufficient to form a belief as to the truth of a statement
- b) Typical Defenses

- FAILURE TO STATE OF A CLAIM
- STATUTE OF LIMITATIONS
- LACHES
- ASSUMPTION OF RISK
- OPEN AND OBVIOUS DANGER
- FAILURE TO JOIN
INDISPENSABLE PARTIES
- MANDATORY SPECIFICATIONS
- NO RIGHT OF CONTROL
- INTERVENING CAUSES
- SUPERSEDING CAUSES
- SETOFF
- CONTRIBUTORY NEGLIGENCE

- COMPARATIVE NEGLIGENCE
- FAILURE TO MAINTAIN
- ALTERATION OF PRODUCT
- MISUSE OF PRODUCT
- UNFORESEEABILITY
- IDIOSYNCRATIC CONDITION
- PRE-EXISTING CONDITION
- PREEMPTION
- STATE OF THE ART
- PRODUCT WAS FIT FOR USE
- FAILURE TO ALLEGE A DEFECT
- CONFORMITY WITH STATUTES

- SOPHISTICATED USER
- LEARNED INTERMEDIARY
- DISCHARGE OF DUTY TO WARN
- BULK SUPPLIER DOCTRINE
- FAILURE TO MITIGATE
- NO WARRANTIES
- NO PRIVACY
- FAILURE TO GIVE NOTICE
(BREACH OF WARRANTY)
- FAILURE OF EVIDENCE
- NO JUSTIFIABLE RELIANCE
- GOOD FAITH
- FAILURE TO PRESERVE
EVIDENCE

Christopher G. Kelly
Holland & Knight LLP
Tel: (212) 513-3264
Email: christopher.kelly@hkllaw.com

Jens Rostock-Jensen
Kromann Reumert
Tel: 45 38 77 44 50
Email: jrj@kromannreumert.com

Investigation of Plaintiff

1. Privacy law concerns
2. Personal Background
3. Past injury and medical claims history/Workers' Compensation claims/ Litigation history
4. Employment history/Earnings
5. Education

Christopher G. Kelly
Holland & Knight LLP
Tel: (212) 513-3264
Email: christopher.kelly@hkllaw.com

Jens Rostock-Jensen
Kromann Reumert
Tel: 45 38 77 44 50
Email: jrj@kromannreumert.com

Discovery Plan, Rule 16, or Other Pre-Trial Conferences

A. Identify Likely Deponents

1. Adversaries & Co-Defendants

1. Parties
2. Experts
3. Other

2. Non-party/Uncooperative Witnesses

3. Government Personnel

4. Medical or Other Witnesses to Victim's Pre and Post Accident Activities

Christopher G. Kelly
Holland & Knight LLP
Tel: (212) 513-3264
Email: christopher.kelly@hkllaw.com

Jens Rostock-Jensen
Kromann Reumert
Tel: 45 38 77 44 50
Email: jrj@kromannreumert.com

B. Document Discovery

1. E-Discovery and Paper Discovery
 - a) Defendant
 - b) Plaintiff
2. Document Review Protocols
3. Confidentiality Agreements

Christopher G. Kelly
Holland & Knight LLP
Tel: (212) 513-3264
Email: christopher.kelly@hkllaw.com

Jens Rostock-Jensen
Kromann Reumert
Tel: 45 38 77 44 50
Email: jrj@kromannreumert.com

C. Medical Discovery

1. Authorizations and Necessary Subpoenas for Prior History and Current Treatment
2. Identify Appropriate Specialists to Conduct Examinations
3. Schedule Examinations

Christopher G. Kelly
Holland & Knight LLP
Tel: (212) 513-3264
Email: christopher.kelly@hkllaw.com

Jens Rostock-Jensen
Kromann Reumert
Tel: 45 38 77 44 50
Email: jrj@kromannreumert.com

D. Physical Inspections

1. Site
2. Product

Christopher G. Kelly
Holland & Knight LLP
Tel: (212) 513-3264
Email: christopher.kelly@hkllaw.com

Jens Rostock-Jensen
Kromann Reumert
Tel: 45 38 77 44 50
Email: jrj@kromannreumert.com

E. Protocols on Testing

1. Timing
2. Locale
3. Destructive/Nondestructive

Christopher G. Kelly
Holland & Knight LLP
Tel: (212) 513-3264
Email: christopher.kelly@hkllaw.com

Jens Rostock-Jensen
Kromann Reumert
Tel: 45 38 77 44 50
Email: jrj@kromannreumert.com

F. Daubert and Evidence from Experts

1. Educate Court on Gate Keeping Function
2. Schedule Reports, Depositions, *Daubert* Motions And Hearings Well In Advance Of Trial
3. Examine And Challenge Qualifications And Methodology Of Adverse Experts
4. Prepare Defense Experts On Qualifications And Methodology

Christopher G. Kelly
Holland & Knight LLP
Tel: (212) 513-3264
Email: christopher.kelly@hkllaw.com

Jens Rostock-Jensen
Kromann Reumert
Tel: 45 38 77 44 50
Email: jrj@kromannreumert.com

Pre-Trial Motions

- A. *Daubert* Motion Should Be Made in Conjunction With a Summary Judgment Motion, where Appropriate, *e.g.*, Causation
- B. Other Potential Summary Judgment Motions Depending on Evidence, *e.g.* Product Identification
- C. *In Limine* Motions to Preclude Evidence or Inappropriate Argument

Christopher G. Kelly
Holland & Knight LLP
Tel: (212) 513-3264
Email: christopher.kelly@hkllaw.com

Jens Rostock-Jensen
Kromann Reumert
Tel: 45 38 77 44 50
Email: jrj@kromannreumert.com

Trial

- A. Liability v. Damages: Bifurcation
- B. Claims Procedures in Mass Tort cases
- C. Attorneys' Fees

Christopher G. Kelly
Holland & Knight LLP
Tel: (212) 513-3264
Email: christopher.kelly@hkllaw.com

Jens Rostock-Jensen
Kromann Reumert
Tel: 45 38 77 44 50
Email: jrj@kromannreumert.com

Settlement/Mediation

A. Settlement - Voluntary

B. Mediation

1. Voluntary
2. Court Ordered

Christopher G. Kelly
Holland & Knight LLP
Tel: (212) 513-3264
Email: christopher.kelly@hkllaw.com

Jens Rostock-Jensen
Kromann Reumert
Tel: 45 38 77 44 50
Email: jrj@kromannreumert.com

Lessons Learned: General Risk Reduction Techniques

- Proper business structure planning
 - Limit Liability by the right structure
- Select business partners carefully
- Avoid successor corporation liability
- Allocate risk properly
 - Indemnities
 - Insurance

Christopher G. Kelly
Holland & Knight LLP
Tel: (212) 513-3264
Email: christopher.kelly@hkllaw.com

Jens Rostock-Jensen
Kromann Reumert
Tel: 45 38 77 44 50
Email: jrj@kromannreumert.com

Five Practical Steps to Avoid Product Liability Claims

- Clearly assign responsibility for product safety in your organization.
- Comply with any and all U.S. and EU governmental requirements for the manufacture and sale of your product.
- Fully document all product testing.
- Develop SOPs (Standard Operating Procedures) to document how warnings, labels, and instructions are developed.
- Assume every email you write will be read by ten people you do not know - and that nine will not be your friends.

Danish product liability in a nutshell

1. Sources

A. Product Liability Directive 85/374 implemented into Danish law: Consolidated Act no 261 of 20 March 2007 on Product Liability

- personal injury
- damage to consumer goods

B. Case law

- personal injury
- damage to consumer and non-consumer goods

C. Danish Sale of Goods Act (in the future)

D. EU-Product Safety Directive

Christopher G. Kelly
Holland & Knight LLP
Tel: (212) 513-3264
Email: christopher.kelly@hkllaw.com

Jens Rostock-Jensen
Kromann Reumert
Tel: 45 38 77 44 50
Email: jrj@kromannreumert.com

Danish product liability in a nutshell

2. Liability

A. EU Directive / Danish Act on Product Liability – Claimant must prove

- defect
- causation
- loss

B. Case law

- negligence

C. Defences

- The manufacturer did not supply the defective product
- The defect was not discoverable given the state of scientific and technical knowledge at the time of supply
- Open and obvious danger (“systemskade”)

Christopher G. Kelly
Holland & Knight LLP
Tel: (212) 513-3264
Email: christopher.kelly@hkllaw.com

Jens Rostock-Jensen
Kromann Reumert
Tel: 45 38 77 44 50
Email: jrj@kromannreumert.com

Danish product liability in a nutshell

3. Discovery

- Danish Administration of Justice Act, Chapter 28
- Procedural request – legal consequence
- “Edition” – legal consequence
- Expert evidence

4. Costs

Christopher G. Kelly
Holland & Knight LLP
Tel: (212) 513-3264
Email: christopher.kelly@hkllaw.com

Jens Rostock-Jensen
Kromann Reumert
Tel: 45 38 77 44 50
Email: jrj@kromannreumert.com

Notable differences seen from a Danish perspective

“Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question”

Alexis de Toqueville, Democracy in America

- The role of the judiciary
- Court fees
- Costs
- Jury
- Discovery
- Deposition

Christopher G. Kelly
Holland & Knight LLP
Tel: (212) 513-3264
Email: christopher.kelly@hkllaw.com

Jens Rostock-Jensen
Kromann Reumert
Tel: 45 38 77 44 50
Email: jrj@kromannreumert.com

Advice seen from a Danish perspective

- Act swiftly
- Decision as to involvement / Service
- Contact to the right lawyer
- Initial meeting with counsel
- Budget
- Insurance
- ADR
- Judgment enforcement
- Role of the Danish lawyer

Christopher G. Kelly
Holland & Knight LLP
Tel: (212) 513-3264
Email: christopher.kelly@hkllaw.com

Jens Rostock-Jensen
Kromann Reumert
Tel: 45 38 77 44 50
Email: jrj@kromannreumert.com

About the presenters

Christopher G. Kelly **Holland & Knight Partner**

t: 212-513-3264

e: christopher.kelly@hklaw.com

- Litigation Practice Group Leader for the 30-member Litigation Group in New York.
- Focuses primarily on the defense of mass torts, toxic torts, federal and state court class actions (consumer, labor and privacy), contracts, product liability and insurance coverage disputes.
- Has represented aviation clients including BAE, Air France, Varig and JetBlue Airways.
- Has represented numerous Scandinavian manufacturing clients in product liability lawsuits and class actions across the United States.
- Has represented clients across the country as lead and trial counsel in class actions in state and federal courts, stemming from West Nile virus spraying, Medfly control and overtime wage claims.
- He regularly speaks at conferences overseas for European insurers and their insureds on product liability litigation in the United States.

About the presenters

Jens Rostock-Jensen

Kromann Reumert Partner

t: + 45 38 77 44 50

e: jrj@kromannreumert.com

- Specializes in insurance and tort law, notably product liability and coverage.
- Deals with insurance and has advised and represented both ceding companies and re-insurers in legal proceedings.
- Advises on aviation law, including liability, insurance and concession.
- Represents clients in court and arbitration proceedings, both in Denmark and abroad, acts as an arbitrator in commercial disputes, and has also conducted cases before the European Court of Justice.
- Has assisted in preparing a report for the European Commission concerning the product liability directive.
- Teaches at the Danish Insurance Academy and regularly gives lectures in various connections.