

## Defending Your Product Like a Pro: Understanding a Lawsuit from the Starting Gun to the Finish Line

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“I’ve been sued...now what?” “Lawsuits involve nonsensical ‘legalese’ and uses Latin – how am I supposed to understand it?” If either of these statements applies to you, read on to learn the basics of what to expect if your company is sued.

### The Beginning.

Product liability lawsuits begin well before a lawsuit is filed. They begin with a product and an injury. In 1967 the Arizona Court of Appeals decided a case, *Bailey v. Montgomery Ward*, 431 P.2d 108, 6 Ariz. App. 213 (Ariz. Ct. App. 1967), which involved a product liability lawsuit for personal injuries sustained by an eleven year old boy after using an allegedly defective pogo stick. He was using the brand new, just-out-of-the-box pogo stick on Christmas day when “the spring got loose or something” and a black rubber cap which fit on the top of the stick flew off and hit him in the eye, causing his injury.

### The Lawsuit.

*Then what?*

At some point, the parents of the injured boy, the Baileys, decided to initiate their suit. The lawsuit began when the Baileys hired a lawyer who went down to the courthouse (or in these days, fired up her computer) and filed a **complaint** against Montgomery Ward. The Baileys, as the party suing, were the **plaintiffs**. Montgomery Ward, the company being sued, was the **defendant**. The complaint is the document filed with the court explaining who the **parties** are, describing the nature of the lawsuit, and setting forth the legal theories that substantiate the plaintiffs’ claims. In product liability cases against manufacturing companies or retailers that sell products, defendants are usually sued under theories of **strict product liability, negligence, and/or breach of warranties**. Each one of these requires the plaintiffs prove different things.

When the Baileys filed their lawsuit, they also had to file a **summons**, a document sent to Montgomery Ward, notifying that it was being sued and explaining that it only had a certain amount of days, in Arizona typically 20 days, to

**answer** (respond) to the complaint. The complaint and summons were **served** (delivered) to Montgomery Ward or its registered agent, likely by a **process server**, but possibly by a sheriff’s deputy or by registered mail. In its answer, Montgomery Ward had to respond to each allegation in the complaint by: (1) admitting; (2) denying; or (3) stating that it did not have sufficient information to admit or deny that allegation. It also had to raise any defenses it had to the Baileys’ allegations. For example, Arizona and many other states allow an **affirmative defense** that the product in question was altered or modified between the time it left the manufacturer’s custody and control, and the time it injured the plaintiff. See A.R.S. § 12-683(2). In other words, Montgomery Ward, in its answer, could have asserted that the Baileys did something to the pogo stick after they bought it which led to their son’s injury.

### Discovery.

*So now I know I’m being sued – what’s next?*

After the complaint and answer were filed, the parties entered into a period of time called **discovery**. Discovery is when information is exchanged between the parties to learn the specific facts that support each side’s case. The discovery period requires each side to make certain **disclosures** such as:

- Witnesses with knowledge about the facts;
- Documents that are relevant to the product or the incident; and
- Any other knowledge important to the case.

The Baileys would have disclosed to Montgomery Ward their son’s medical records showing what injuries he sustained. Montgomery Ward, in turn, would have disclosed any documents relevant to the design of the pogo stick, its contract with the manufacturer, or knowledge of other injuries people had received while using the pogo stick. There are several ways both sides could have obtained information:

### Written discovery:

**Interrogatories** (written questions responded to by the other party under oath);

**Requests for Admission** (written statements the other party must admit or deny); or

**Requests for Production** (written requests to produce documents or tangible evidence).

Additionally, both parties likely took **Depositions** (questions asked of a party or witness under oath with attorneys for both sides and a court reporter present).

#### **Pre-trial motions.**

After the discovery phase, but before trial, one or both parties likely filed pre-trial motions such as **motions for summary judgment** (“MSJ”). An MSJ is a document filed with the court asking that the case be dismissed before trial. If the judge grants a party’s MSJ, the case might be dismissed without a trial, or the issues that will be tried may be narrowed down.

#### **Trial.**

Because the Baileys and Montgomery Ward did not **settle** the case, which could have happened at any stage of the litigation, the case proceeded to trial. A trial can be a **bench trial** (tried to a judge) or a **jury trial**. If a jury hears the case, jurors are selected through a process called *voir dire*, which is where the judge and attorneys ask the potential jurors questions to determine whether they can hear the case fairly and impartially. Each attorney is given a certain number of **peremptory challenges**, or “strikes” in which they can exclude potential jurors for almost any reason.

In the Bailey case, after the jury was **empaneled** the trial began and each attorney made her **opening statement**. An opening statement introduces the jury to the facts of the

case and what the attorney will try to prove during the trial. The plaintiffs then presented their witnesses through **direct examination**. After the Baileys’ attorney questioned each witness, the Montgomery Ward’s attorney conducted a **cross-examination**. After the plaintiffs called all their witnesses, they “**rested their case**” and then Montgomery Ward put on its witnesses. Before Montgomery Ward put on its witnesses, it likely asked the judge for a **directed verdict** – if the judge had granted the directed verdict motion the case would have been immediately dismissed on the grounds that the Baileys’ evidence was so weak that no reasonable person could find in their favor. In **civil** (non-criminal) cases, the plaintiffs have the **burden of proof**, and must prove their case by a **preponderance of the evidence**. In other words, the Baileys had to show that it was more *likely than not* that the pogo stick was the cause of their son’s injury.

After all the evidence was presented to the jury, the attorneys presented **closing arguments**, summarizing the evidence the jury heard and attempting to persuade the jury that their version of the case was correct. The judge then gave **jury instructions**, instructing the jury on the law, *i.e.*, what the jury had to decide during **jury deliberations** to determine whether the pogo stick was defective. When the decision was reached, the jury returned to the courtroom and announced its **verdict**.

#### **Conclusion.**

Sometimes litigation is unavoidable. Having a basic, working knowledge of what to expect, along with a trustworthy and experienced legal team, will help minimize the stress and aggravation that can accompany your lawsuit.



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