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PRODUCT LIABILITY

“Humpty Dumpty may have had a case against the king.”
–Anonymous

OVERVIEW

Essentially every product made is capable of causing, or at least being involved in, some form of personal injury or property damage. This means that companies that manufacture, wholesale, distribute and retail products have an exposure to claims for damages. Nowhere in business law is it more true that the best defense against such claims is a sound offense.

Product liability law consists of the unique set of rules covering the tort (non-contractual) claims associated with the manufacture and sale of products. For the most part, these rules apply uniformly to **everyone in the chain of distribution** of a product. For purposes of this chapter, these parties will be referred to collectively as *prod-*

uct sellers unless otherwise specified. Regardless of the number of tests conducted, precautions taken, or warnings given, product sellers have been and are the targets of injured parties seeking compensation for damages suffered.

There is little federal law that pertains to product liability. Most of the law that does exist is the result of state legislation and court decisions. Business people need to understand that the law relating to product liability varies widely from state to state. Moreover, the law relating to the preventive measures a product seller may take to avoid product liability also **varies widely from state to state**. And, in recent years, the courts and state legislatures have been revising the rules. Therefore, they are in flux. So, while the best defense against product liability claims is a sound offense, developing a sound offense and keeping it current is not a simple matter. In most companies, preventing product liability problems requires regular work with the employees and major systems of the enterprises.

THE LAW OF THE LAND

Typically the term, product liability, comes into play when personal injury or damage to property is caused by a defect in a product. Conversely, product liability generally does *not* cover those situations where a buyer of a product who has not suffered personal injuries or property damage seeks a refund or damages simply because the product did not meet expectations. This latter sort of claim is generally considered part of the law of sales rather than as part of the law of product liability. Most states have separate laws pertaining to sales; the laws are modeled after the Uniform Commercial Code (see Chapter 7 on Contracts).

There are three legal standards for recovery in the product liability law pertaining to personal injury or other damage:

Negligence by the product seller.

A product seller's breach of an express or implied warranty.
Strict liability.

Depending on the case, one or more of these legal standards will be used to determine the liability of a product seller whose defective product caused, or is alleged to have caused, injury.

Negligence of the Product Seller

To hold a product seller responsible for a defective product based on negligence, the injured party must prove that the product seller breached its **duty of care** to the injured party. This requires the injured party to show that the product seller or its employees did not exercise reasonable care for the safety of potential users of the product. For example, if an employee of a bicycle manufacturer fails to tightly secure the wheels on a particular bike, the manufacturer will be liable to the user who was subsequently injured when one or both of the wheels fell off. The manufacturer's **employee failed to exercise reasonable care**. There is no requirement that the injured party be the person who actually purchased the bicycle. It is sufficient that the injured person was a member of the reasonably foreseeable group of people who would use the product, in this case all potential riders of the bicycle.

Product Seller's Breach of Warranty

A breach of warranty claim arises when a product seller makes representations about what a product will do, but the product falls short on performance *and* causes injury. A warranty can either be

express or *implied*. An express warranty is the written warranty which typically accompanies a product when it is sold or which is contained in the contract for sale of the product. **An express warranty can also be created by representations made by the product seller to promote the product.** Such representations often show up in advertising or promotional materials. A product must live up to the representations made for it.

An *implied* warranty is different. It is not initiated by the product seller; it is a product of our legal system, a part of the law of the land. The most common type is the implied warranty of merchantability which covers all goods. It means that any given product is warranted to be of a quality equal to that generally acceptable among those who deal in similar goods, and that the product is generally fit for the ordinary purposes for which such product is used.

Many states have limited the use of the breach of warranty, express or implied, to claims involving contracts for the sale of goods in which the buyer has suffered commercial economic losses. This means an injured party can bring a claim for breach of warranty *only* if she or he had entered into a contract for the sale of goods with the product seller, the warranty associated with the contract was breached, and the buyer suffered commercial economic damage thereby.

A related rule adopted by a majority of states is that a buyer who suffers only economic damage as a result of a defective product may bring a claim against the product seller only if he or she purchased the defective product pursuant to a sales contract. In other words, the product cannot have been simply purchased off the shelf.

Strict Liability

Generally all an injured party must show to hold a product seller liable under the strict liability standard is (1) that the product was

defective at the time the product seller transferred the product, and (2) that the defect caused the injured party's injuries. A minority of states also require the injured party to demonstrate that an alternative design for the product existed which would have prevented his or her injuries.

Strict liability offers many advantages to claimants over both the negligence and breach of warranty standards. Unlike the negligence standard, the injured party does not have to prove that the product seller or its employees acted without due care. Under the strict liability standard **it is no defense that the product seller exercises all possible care.** If the product was defective when delivered, the product seller is liable for any injuries caused, regardless of the precautions taken by the seller to prevent injury. And, unlike the breach of warranty standard, **it is no defense to a strict liability claim that there was no contractual relationship between the product seller and the injured party.** For example, in the case of the bicycle manufacturer mentioned earlier, suppose a person walking down the street is injured when a bicycle careens into him or her because it lost a wheel due to a defect. That person could sue the manufacturer even though no contractual relationship existed between the two.

In most states, all three standards for liability apply to all product sellers, i.e., once again, to everyone in the chain of distribution—manufacturers, wholesalers, distributors, and retailers. Because of the severity of the strict liability standard, however, a few states have limited its applicability to manufacturers only. In such states, retailers, for example, are only liable for negligence or breach of warranty claims.

TYPES OF DEFECTS

Before any of the above legal standards can be employed, an injured party must first prove that the product which caused her or his injuries was defective. There can be no valid product liability claim without proof of the presence of a defective product whether the action is based on negligence, breach of warranty, or strict liability. There are three common types of defects which can support a product liability claim: construction defects, design defects, and warning or instruction defects.

Construction Defects

A construction defect occurs when the product deviates in some material way from the design specifications or performance standards of the manufacturer. In other words, the product is different in some material way from otherwise identical units off the same production line. For example, suppose the automatic shut-off mechanism (to prevent over-heating) was missing on a laundry iron manufactured by Company A. The defective iron caused a fire. Upon investigation it turns out that the problem occurred because a person who was responsible for installing the shut-off device made a mistake. This is a construction defect. The iron is designed properly; it was put together with a defect. It did not contain the automatic shut-off device that the other irons coming off the production line possessed.

Design Defects

A design defect occurs when the product is not reasonably safe as designed. Here is a working definition of reasonably safe:

A product is not reasonably safe as designed...if the risk of harm plus the seriousness of the harm...is greater than the burden on the manufacturer of designing a product without the risk plus the adverse effect the new design would have on the product's performance.

This definition is virtually identical to that contained in the Model Uniform Product Liability Act published by the Department of Commerce for *voluntary* use by states. Said more simply: **A design defect results when the benefits of the design are outweighed by its risks!** The expectations of the ordinary consumer need to be taken into account when making this determination.

Here is an example. A manufacturer of automatic coffee makers could produce its coffee makers less expensively than it does if it used a lower grade of plastic to house the heating element. The risk, however, is that such plastic melts under certain conditions of use. Although a cheaper coffee maker might meet the expectations of many consumers, the harm potentially caused by such a product may outweigh the cost of using the higher grade of plastic and the added cost to the consumer. Many courts would say so. A coffee maker made with a low grade of plastic would be held to have a design defect.

Although a design defect closely resembles a negligence standard, most courts hold that a design defect is generally easier to prove than negligence.

Warning or Instruction Defects

A warning or instruction defect arises when the likelihood that a product will cause harm or injury, plus the seriousness thereof, render the warnings or instructions actually provided to be inadequate. Like a design defect, these defects resemble a negligence

standard. However, many courts have held that a product seller may be liable for inadequate warnings even though the hazard was not known at the time of manufacture. Moreover, some states require product sellers to issue warnings or instructions concerning dangers that are learned, or should be learned, after products are manufactured.

CASE C: In the early evening of September 22, 1996, 15-month old David Smith and his twin brother were playing in their parents' house. David entered a bedroom where he found an open purse belonging to his 13-year old sister, Laurie, on the floor. Inside the purse was an unmarked container that Laurie had filled with Company C's baby oil. David's mother unexpectedly came across David just as he began to drink the oil. In an immediate and concerned reaction, she yelled at David to stop, causing him to gasp and inhale some of the oil into his lungs. Had David simply drunk the oil, the only effect would have been diarrhea. Instead, the oil diffused throughout David's lungs, reducing their ability to deliver oxygen to his blood. As a result, David suffered irreparable brain damage. David's parents brought a product liability action against Company C based on a failure to warn of the danger of aspirating (inhaling) baby oil. At the trial, expert testimony established that no amount of medical attention would have prevented David's injuries. No similar incident had ever occurred in the past.

In Case C, the court held that the warnings provided on the original bottle were inadequate and therefore defective even though the hazard of aspirating baby oil was not known at the time of manufacture. Then the court held further that Company C was strictly liable for David's injuries. No showing of foreseeability was necessary because the strict liability standard was employed.

In summary, for product liability there are three standards—negligence, breach of warranty, and strict liability. And there are

three types of defects—construction, design, and warning or instruction—that can set the stage for one of the standards to apply in a given situation.

HOW TO MINIMIZE YOUR LEGAL TROUBLES

The development of the strict liability standard makes it quite difficult for a product seller to defend itself successfully against a product liability claim. Nonetheless, a number of affirmative steps can be taken by a product seller to help minimize its exposure to product liability claims.



1. Take all necessary steps to prevent the shipment of defective products.

If there is no defective product, there can be no successful product liability claim!



2. Continuously test and update designs, quality measures, and warnings in order to anticipate product problems.

In many cases, lack of foreseeability (of a danger) is no longer a viable defense against a product liability claim. Therefore, it is imperative for a product seller to take the initiative to identify hazards before they harm someone or property. Once an injury occurs, it is too late.



3. Conduct training for employees.

A product seller should periodically discuss product liability exposure and its implications to the enterprise as part of an overall,

on-going effort to insure that people know how to do their jobs properly. Keep the issue of minimizing product liability exposure in the company philosophy, from design to manufacturing.



4. Maintain accurate records.

Product liability claims often arise years after a product was designed and delivered. It is not unusual for the people most knowledgeable about the details to be gone from the company. In such cases, written records become the primary source of evidence. Product sellers need to have a system for generating and retaining documents which are likely to be useful if there is ever a product liability claim.



5. Be careful what you say to promote your products.

Statements made in ads and other sales materials or in the selling process itself can be construed by a court as express warranties. For instance, an automobile salesperson who says to a potential customer, “mother nature can’t stir up a snow storm nasty enough to prevent this four-wheel drive vehicle from getting over the pass,” may be warranting the same. The seller could be held liable for the buyer’s injuries when he or she is subsequently involved in an accident while driving over a pass (testing the seller’s warranty). It is important to examine all promotional activities for inadvertent representations about what a product will or will not do.



6. Make disclaimers.

A product seller can explicitly disclaim or limit its liability for defects in the product. For example, the seller of a high-powered paint sprayer could disclaim any liability for damage caused to a buyer’s property by paint that is oversprayed. Such disclaimers must be conspicuously visible in writing, and in some states they must be

explicitly negotiated with buyers in the context of a sales agreement. Although **contractual disclaimers will not prevent a consumer from recovering for personal injuries**, they can act to bar claims for property damage and commercial loss. The requirements for creating a valid disclaimer are complex.



7. Specify the useful life of the product.

The useful life of a product should be specified somewhere on the product, its packaging, or in the contract of sale. As a general rule, a product seller cannot be subject to liability **if the harm caused by a product occurred after the product's, specified useful life**. A useful life extends from the time of delivery through the time during which the product would normally be likely to perform if put to productive use. "Time of delivery" refers to delivery to the end user, i.e., the first purchaser who is not engaged in the business of either re-selling the product or using it as a component part of another product to be sold. In many states, there is a presumption that after a period of years, ten, for example, any harm caused was after the useful safe life of the subject product.



8. Heed government mandates.

In many states, if at the time of manufacture a given product was in compliance with a specific mandatory government contract specification relating to the design or warnings, such compliance will be an absolute defense to liability. Similarly, the fact that a product was in compliance with industry customs and other regulatory standards may be taken into account positively in determining a product seller's liability.

The above eight steps constitute the basic elements of the sound offense advocated at the start of this chapter. The final step to mini-

mizing legal troubles occurs in connection with a claim that is threatened or has been filed.



9. Check your state's statute of limitations.

A claim may be barred by an applicable statute of limitations. Such statutes impose deadlines beyond which an injured party may not bring an action. The deadlines typically range from one to six years. For negligence and strict liability claims, the statute begins to run from the day a person is injured. In many states, however, the statute does not begin to run until the injured party discovers, or reasonably should have discovered, all the elements of her or his cause of action.

CONCLUSION

Product liability is a hot topic these days, and many business people warm up quickly when the subject is raised. Damage settlements with huge penalties against companies seem to regularly make the headlines. Laws and courts vary greatly from state to state. And there have been well-publicized attempts to modify tort law at the federal level in recent years. The bottom line, however, is that product sellers remain responsible for their products and what they do. The cost of losing a product liability suit can be more than just a cost of doing business. It can be the business itself. The essence of the action steps above are, for the most part, simply good management. Vigilance is required.

