STRICT LIABILITY AND THE PRODUCT FRANCHISOR

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INTRODUCTION

Since the case of Henningsen v. Bloomfield Motors (1960) popularized the application of strict tort liability, marketers have been increasingly held responsible for injuries caused by their products. Strict liability has been invoked by plaintiffs harmed by new as well as used products (Turner v. International Harvestor (1975). Strict liability has also been applied in situations involving nonmanufacturing members of the distribution channel (Cintrone v. Hertz 1965; Chappius v. Sears 1977).

In 1979 strict liability was extended to include a franchisor which had neither manufactured nor designed a product which harmed the franchisee's customer (Kosters v. Seven-Up 1979). This extension of strict liability to franchisors is important for marketers to understand because of the growth of franchising (Lummanick 1980, p. 113).

STRICT LIABILITY DEVELOPMENTS

Products manufactured by or under the direction of the franchisor are directly covered by the present strict liability rule in the Restatement (1965, §402A):

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for the physical harm thereby caused to the ultimate user or consumer, or to his property, if
 (a) the seller is engaged in the business of selling such a product, and
 (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although
 (a) the seller has exercised all possible care in the preparation and sale of his product, and
 (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Franchisors who manufacture their products are thus considered the same as producers who do not license the use of their names. The manufacturer of a defective product will be found strictly liable whether or not its trademark is attached to the product.

Strict liability for nonmanufacturing licensors is a serious extension of product liability principles. For example, in Kasel v. Remington (1972) the defendant was found strictly liable when a defective shotgun shell injured a hunter. The court stated that the royalties received by the defendant and its right to inspect the shells were factors leading to its liability. Remington also had an ownership interest in the manufacturing firm.

The Kasel reasoning was advanced a step further in Carter v. Joseph Bancroft (1973). Here the defendant licensed the use of its trademark, which was placed on a garment which ignited and burned the plaintiff. Section 402A of the Restatement (1965) was used to determine liability.

The arguments in Kasel and Carter were offered in City of Hartford v. Associated Construction (1978) and Connelly v. Uniroyal (1979) to hold the defendants strictly liable. Neither of these latter defendants maintained an active role in the design or production of the faulty goods. Each did, however, allow its trademark to be placed on the harmful items (Behringer and Otte 1981, p. 121).

Lastly, in Kosters v. Seven-Up (1979), the defendant was found strictly liable for breach of implied warranty. Seven-Up reserved the right to inspect cartons but apparently did not actively oversee the production of cartons.

REFERENCES

Behringer, John W. and Monica A. Otte (1981), "Liability and Trademark Licensor: Advice for the Franchisor of Goods or Services," American Business Law Journal, 19, 109-152.

Carter v. Joseph Bancroft & Sons, Co. (1973), 360 F.Supp. 1103 (E.D. Pa.).

Chappius v. Sears, Roebuck & Co. (1977), 349 So.2d 963 (La.App. 1st Cir.).

Cintrone v. Hertz Truck Leasing & Rental Service (1965), 45 N.J. 434, 212 A.2d 769.

City of Hartford v. Associated Construction Co. (1978), 34 Conn.Super. 204, 384 A.2d 390.

Connelly v. Uniroyal, Inc. (1979), 370 N.E.2d 1189 (Ill.App. 1977), 75 Ill.2d 393, 389 N.E.2d 155.

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Kasel v. Remington Arms Co. (1972), 24 Cal.App.3d 711, 101 Cal.Rptr. 314.

Kosters v. Seven-Up Co. (1979), 595 F.2d 347 (6th Cir.).

Lummanick, James F. (1980), "Trademark--Strict Liability in Warranty of a Franchisor--Consumer Reliance on Trade Names--Kosters v. Seven-Up Co. 595 F.2d 347 (6th Cir. 1979)," Northern Kentucky Law Review, 7, 113-124.

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Turner v. International Harvestor Co. (1975), 133 N.J.Super. 277, 336 A.2d 62.