

## THE PRODUCT LIABILITY OF WHOLESALERS

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### ABSTRACT

Wholesalers, even though they do not come in contact with final consumers, may still be held liable if a consumer is injured by a faulty product. In this paper the wholesaler's role in product liability litigation is discussed, and advice is offered regarding how wholesalers can reduce their vulnerability.

### INTRODUCTION

Wholesalers are generally described as those channel intermediaries whose activities link manufacturers with other resellers of products. Operating in such a position within the channel, the wholesaler does not deal directly with the final consumers or users of products. Instead, the wholesaler merely passes the product along, perhaps never removing it from its shipping carton. In some instances the wholesaler may arrange the transfer of the product from manufacturers to retailers without ever taking possession of the product.

Such a channel intermediary would seem to be quite insulated from liability for injuries suffered by users of faulty products or items unaccompanied by adequate warnings or instructions. Unfortunately for the wholesaler, it may well be found liable along with others in the distribution chain in the preceding situations in product liability suits. The primary reason for such liability is the widespread acceptance of the doctrine of strict liability in tort, though other legal theories have also been used to hold wholesalers liable.

The purpose of this paper is first to discuss the legal theories which have been applied to wholesalers in product liability litigation. Then the types of plaintiffs who might sue the wholesaler are briefly described. Last, suggestions are offered to wholesalers regarding how they might minimize their product liability exposure.

### THEORIES OF PRODUCT LIABILITY AFFECTING WHOLESALERS

Wholesalers can be liable for product related injuries under several legal theories. The most frequently used theories, strict liability and negligence, are based on the law of torts. Plaintiffs have also recovered under express and implied warranties found in the law of contracts.

#### Strict Liability

The widespread adoption of strict liability against product sellers within the past 20 years has dramatically changed the liability exposure of wholesalers. Strict liability for product-related injuries assumes that the manufacturer, the wholesaler, and the retailer are in better positions to bear the risk and cost of the injury than is the injured party. This reasoning was articulated in the landmark strict liability case, Greenman v. Yuba (1963).

Courts emphasize that strict liability focuses on compensating those injured and not on punishing those in the distribution channel (Prosser 1966). So strict

liability does not imply that the seller was careless or "at fault." Instead, strict liability is a statement about the product itself. Something about the product was technically defective (Weinstein, Twerski, Pihler, and Donaher 1978, p. 5).

The most commonly adopted source for the law of strict liability is the Restatement (Second) of Torts (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 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 and consumer has not bought the product from or entered into any contractual relation with the seller.

This section sets out three central requirements for liability:

1. The product is in a defective condition;
2. The product is unreasonably dangerous; and
3. The defect existed at the time the product left the defendant's hands (Traynor 1965).

Generally, a product which has in fact caused an injury is deemed to satisfy the "unreasonably dangerous" requirement of §402A (Glass v. Ford 1973). Several courts have explicitly rejected the unreasonably dangerous requirement as unnecessary and unwise and call only for proof of a "defect" (Cronin v. J.B.E. Olson 1972; Rheingold 1971).

The purpose of the third requirement, that the defect existed at the time the product left the hands of the party being sued, is to prevent liability from being imposed upon those at the start of the distribution channel where the defect was introduced by someone, including the plaintiff, later in the channel. This requirement would not, however, shield a wholesaler if someone later in the channel, such as a retailer, merely fails to detect and correct the originally existing defect (Dunham v. Vaughn & Bushnell 1969). Nor would this "existing defect" requirement protect a wholesaler where the product is perfect when made, but is known to become defective later, as when a product decomposes or cannot withstand repeated stresses (Dunn v. Ralston Purina 1954; Rheingold 1974).

Courts have not settled upon a standard definition of defect, but two general types of defective products have been recognized (Weinstein et al. 1978, p. 28-32):

1. Products defectively produced--those products which do not meet the manufacturer's own production standards

but which somehow slip through the quality control system.

2. Products defectively designed, labeled, or tested--those products which are made according to plan but which have a potential for harm inherent in the way they are made.

There are very few decided cases dealing with products that are defectively produced. Liability is so clear when, for example, there is glass in the hot dog or crystalized metal in the tie rod, that the insurers of the sellers consistently settle these cases before trial.

The real battle is being fought where a product is said to be defectively designed, labeled, or tested. Examples of products which are defective because of their design would be a punch press with controls that are difficult to operate, a hedge trimmer without a safety feature, or perhaps dynamite with an excessively short fuse (Ilnicki v. Montgomery Ward 1967; Crane v. Sears 1963).

Products which are defective because of their labeling generally fail to present the adequate or proper warning necessary for safe use. Strict liability could be imposed on a wholesaler of a machine delivered without proper installation directions or on a can of highly flammable cement with no warning to keep the product away from ignition sources (Canifax v. Hercules 1965; Anderson v. Klix 1970). Increasingly, courts have employed a "consumer expectation" test: Did the product perform as a reasonable consumer would have expected (Rheingold 1967)? If the product fails to meet this standard, it is defective.

Courts will also find a product defective when the seller could reasonably foresee a danger associated with the normal use of the product but failed to warn against it (Bohnest v. Kendall 1978). A wholesaler can be relieved from liability only when the warning is sufficiently specific to render the product safe for consumers (Morgan and Avrunin 1982, p. 49).

Strict liability means trouble for wholesalers. U.S. courts have found wholesalers liable for product-related injuries when the wholesaler had neither control of a defective product's development nor a realistic opportunity to discover its dangerousness. The wholesaler's liability rests simply on its distribution of the injury-causing defective product (Leete 1980).

In California, a wholesaler was found liable even though it never had possession of the product that caused the injury (Canifax v. Hercules 1965). A jobber, Dynamite Supply Company, ordered a dynamite fuse from a wholesaler, Hercules Powder Company. Hercules sent the order to the manufacturer, Coast Manufacturing, who shipped the fuse directly to Dynamite Supply. Hercules never possessed the fuse, but did pay the manufacturer's invoice and bill the jobber. The dynamite exploded prematurely killing nearby workers. Citing §402A of the Restatement (1965), the court allowed recovery against the wholesaler.

In Dunham v. Vaughn & Bushnell (1969), plaintiff was striking a piece of metal with a hammer when a chip from the hammer blinded his eye. The hammer was manufactured by Vaughn and shipped directly to the wholesaler, who never removed it from the box in which it was packaged, but simply shipped the box to the retailer. The Illinois Supreme Court upheld a \$50,000 jury verdict against the manufacturer, the wholesaler, and the retailer. The wholesaler was included through the application of §402A (Restatement 1965), even though the hammer was never unpacked during its stay with the wholesaler.

## Negligence

In the past courts often ruled that the buyer was required to make his own inspection, rely on his own judgment, and assume the risk of any defect in goods he had purchased. The rule was caveat emptor--let the buyer beware. Modern courts have shifted much of this burden to the seller. Sellers of goods must exercise the care of a reasonable person of ordinary prudence in protecting others from the harm that could foreseeably be caused by their products. Wholesalers, as other sellers, have the duty to use reasonable care to protect others from unreasonable risks of harm (Prosser 1971, p. 145).

Today, when negligent design is alleged, juries have weighed whether reasonable care has been exercised by considering the following (Rheingold 1974, p. 536):

- a. Whether an omitted safety feature would have prevented the accident;
- b. Whether there was a better, safer way to make the product;
- c. Whether the design had an unnecessary risk of injury; and
- d. Whether there was a dangerous feature which could have been omitted without affecting the product's function.

Defendants often complain that plaintiffs are employing hindsight to evaluate the product's design. Plaintiff's engineers initially examine the product to determine what could have been done to prevent the injury. These experts later testify that these alterations in the design should have been made.

Increasingly, product liability cases are becoming battles of the experts. The plaintiff's engineers may testify that a part costing a few pennies or a safety device routinely employed by the defendant's competitors would have prevented the accident. In rebuttal, the defendant's engineers will testify that product cost, function, and the competition can dramatically narrow the feasible design alternatives. The defendant's experts continually emphasize the designer's difficult task of balancing an omitted feature's safety characteristics against the increased costs or hampered performance that could destroy the product's profitability or marketability. Defendant sellers sense that they are required, not simply to exercise due care, but to sell products that are foolproof (Rheingold 1974, p. 537).

The law of negligence also requires sellers to use "due care" both in giving reasonable warnings about the risks associated with a product's use and in giving directions as to how to avoid injury when using the product. Courts appear to have expanded the duty of the supplier to give a "full" warning as compared to a "reasonable" one (Weber v. Fidelity 1970; DePree v. Nutone 1970; Keeton 1970).

In Post v. American (1968) a label on a floor sander stated that the machine should be used on 115 volts AC or DC. The plaintiff was injured when he connected the machine to a 220 DC outlet and the machine exploded. The court allowed the case to go to the jury because there was sufficient evidence that the manufacturer knew the machine would be used in an industrial setting and the label did not explain the risk involved in deviating from 115 volt current.

In Murray v. Wilson (1973) a contact cement container warned about the risk of explosion and the need to extinguish all fires. When the plaintiff was injured in an explosion he claimed that the warning was inadequate as the cement was not labeled "extremely inflammable" and did not state the true degree of risk. The appellate court spoke of a complete and accurate warning and

stated that the trial judge erred when he withheld this evidence from the jury.

In every case it is up to the jury to decide whether or not the defendant's conduct was careless. What has really changed is that many courts allow in proofs to show the omission of a complete warning of every risk involved in using the product. In addition, these courts allow juries to hear proofs that the product user was not informed of the consequences of not following the warnings. Further, it now appears that as the likelihood and gravity of injury increase, the specificity of the warnings and directions must also increase (Rheingold 1974, p. 533).

Thus, any warning given by a seller will be subjected to a very detailed examination before the jury. Courts are increasingly adopting the position that a warning is simply a cheap alternative to making a safer product. For a warning to shield today's product seller from liability, it must fully warn the user of the risks that will be encountered.

#### Other Theories of Liability

The Uniform Commercial Code's implied warranties of "merchantability" (1977, §2-314)--that the goods are fit for their usual purpose--and "fitness for a particular purpose" (1977, §2-315)--that the goods are fit for a known, but unusual purpose--have largely been replaced by strict liability. However, the contract action based upon a breach of an express warranty retains much of its vitality and, at times, is the plaintiff's best route to recovery. The essential elements of an express warranty are an affirmation of fact about a product and the user's reliance upon that affirmation. A characteristic example of an express warranty action is a suit arising out of an allergic reaction to a cosmetic that was labeled as "nonallergenic" or "safe." Importantly, not every factual statement about a product will be considered an express warranty. Puffing or sales talk upon which a reasonable person would not rely cannot create an express warranty (Royal v. Loraine 1980).

The common law theories of fraud and misrepresentation are seldom used in modern product liability litigation. But wholesalers should be cautioned that they have been supplemented with a strict liability version of fraud in the Restatement (1965, §402B). Section 402B places liability upon the supplier where injury follows a user's reliance upon misrepresentations about a material fact pertaining to the character or quality of the product. The supplier can be liable even though the misrepresentations were not made negligently or fraudulently and even though there was no contractual relationship between the user and the supplier. Section 402B amounts to "no fault" fraud. Using this theory, a plaintiff successfully sued for injuries resulting from an attempt to use a tractor for a job that was mechanically beyond its ability. Even though the misrepresentation was entirely innocent, the seller was found liable for simply saying that the tractor was capable of doing something when it was not (Ford v. Lonon 1966).

#### WHO CAN SUE THE WHOLESALER?

An expanding group of plaintiffs have successfully sued wholesalers and all other sellers in the distribution channel. Purchasers suffering product-related injuries are not the only group that have recovered (Dunham v. Vaughn & Bushnell 1969). Users such as employees or those receiving a gift are specifically protected by the Restatement (1965, §402A(2)(b)).

A wholesaler was found strictly liable to a pallbearer at a funeral. The pallbearer was injured when a handle on the side of the casket broke causing it to fall and injure the pallbearer. The court held that the pallbearer was an intended user of the handle of the casket and that the wholesaler was liable even though it had not made a contract with the plaintiff (Cotton v. McGuire 1970).

Bystanders (Embs v. Pepsi-Cola 1975) have recovered, as have rescuers drawn into danger by a defective product (Guarino v. Mine 1969). Spouses who have been deprived of the services of mates injured by defective products can also recover (Prosser 1971, p. 888).

Some state legislatures have limited the group that can sue under the contract theories of express and implied warranty to purchasers, their households, and their guests (UCC 1977, §2-318, alternative A). But even under the contract theories, many states allow recovery by anyone "who may reasonably be expected to use, consume, or be affected by the goods" (UCC 1977, §2-318, alternative C). Generally, the tort theories of strict liability and negligence allow recovery by any plaintiff whose injury could reasonably have been foreseen (Codling v. Paglia 1973).

#### MINIMIZING THE WHOLESALER'S LIABILITY

Persons who buy a product, receive it as a gift, use it at work, or foreseeably come in contact with it while others are using it can successfully sue the wholesaler. These persons may invoke some combination of several theories of recovery, primarily strict liability and negligence.

The wholesaler must therefore be diligent in its efforts to minimize its product liability exposure. The most prudent step would be for the wholesaler to inspect every product it passes along from a manufacturer to another channel member. Clearly this would be an expensive and time-consuming step, perhaps negating the usefulness of the wholesaler from the perspectives of manufacturers or retailers. In addition, wholesalers not legally taking title to goods may encounter difficulty obtaining manufacturers' permission to open cartons to inspect products. For those wholesalers not actually taking possession of products, the question of inspection becomes moot.

Even with timely inspections, wholesalers may be unable to detect faulty products. For example, if a drum of chemicals is accidentally contaminated during manufacture, how could the wholesaler, without conducting an exhaustive analysis of the drum's contents, detect the presence of the befouling substance? The wholesaler may be an expert regarding timely delivery and safe storage of products, but such expertise hardly extends to the manufacture and operation of every product the wholesaler handles.

Another avenue available to wholesalers is to operate only in those jurisdictions which seem to sympathize with their inability to detect product defects on a timely, economical basis. Some states allow strict liability actions to proceed against non-manufacturers such as wholesalers only if manufacturers are not amenable to suit there. Other states have excepted non-manufacturers from liability unless they have been negligent. Such selectivity on the part of a wholesaler would not, however, reflect the locations of either its markets or its suppliers.

71 Wholesalers could add their own warnings to products they regard as being particularly insidious. These

warnings could be affixed to the products or passed along verbally or in writing to retailers. Once again, problems arise regarding the wholesaler's effectiveness in limiting its liability, this time by providing warnings. Manufacturers may balk at additional warnings being attached to their products because they fear decreased sales. Warnings conveyed to retailers may not be given to consumers or may be downplayed to keep sales from dropping. As a non-manufacturer not dealing with the final users, the wholesaler is in a very weak position to provide adequate warnings.

The suggestions so far indicate the need for the wholesaler to maintain regular contact with both suppliers and customers about potentially faulty products. By doing so, the wholesaler will be informed regarding the latest product liability developments facing cohorts within the distribution channel. Further, should the wholesaler uncover any product defects, it will be able to warn other channel members to take corrective action.

Intrachannel communications, therefore, seem vital for the wholesaler interested in minimizing its product liability exposure. Even if the wholesaler is successful via an indemnity suit in shifting a judgment to the manufacturer of an injury-causing product, legal costs can still be burdensome because of insurance premiums and fees associated with defending a lawsuit and the indemnification action. Minimizing the likelihood of a product liability suit is going to be less expensive for the wholesaler and clearly better for final consumers.

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