

# PUBLIC POLICY AND JUDICIAL REASONS FOR HOLDING SERVICES MARKETERS STRICTLY LIABLE

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## INTRODUCTION

Services sectors of many economies are growing at unprecedented rates, indicating the increased importance of services marketing. Concurrently, the U.S. service sector is facing much greater levels of liability exposure for harmful services (Time 1986; U.S. News & World Report 1986), leading to demands for liability reform.

Perhaps the most ominous trend in services law is the growing possibility that marketers of services could be held strictly liable when their output harms consumers. Services providers are generally held to a negligence standard, but a few courts have found ways to rationalize the imposition of strict liability when product-service combinations have injured people. Marketers should be aware of these legal developments so they can plan their services offerings accordingly.

## PUBLIC POLICY BASES FOR STRICT LIABILITY

Eight public policy reasons have been developed to justify the use strict liability for faulty goods. These reasons, from Lechuga v. Montgomery (1978), could also be applicable to services marketers:

1. expertise of manufacturer regarding its goods,
2. distribution of risk across customer base,
3. deterrence of the manufacture of faulty goods,
4. responsibility of manufacturer to bear costs of injuries due to its products,
5. responsibility of distributor to bear costs of injuries due to products it carries,
6. limited consumer knowledge relative to seller,
7. consumer reliance on marketing practices, and
8. complexity of manufacturing process today relative to many years ago;

Services marketers seem to be very similar to manufacturers with regard to 1-7. Services providers are generally presumed to be experts concerning their offerings (#1). In addition, they are more knowledgeable about their work than their customers (#6).

Services sellers can allocate the costs of customers' injuries, both damage claims and insurance premiums, to their customers (#2) through price increases. Marketers of services also appear to be in the best position to deter the selling of faulty services (#3).

Manufacturers (#4) and distributors (#5) are supposed to compensate injured consumers because of a societal notion of responsibility. If this concept holds, it also seems to apply to service marketers. And users of services seem to rely upon the claims of services marketers (#7).

The final reason for strict liability, product complexity (#8), may not apply to services. Users

of services often have clear knowledge of the service because they are often co-producers.

## THE JUDICIAL VIEW OF SERVICES

U.S. courts have heard hybrid cases, dealing with both products and service, for 72 years (Merrill v. Hedson 1914). The important case of Newmark v. Gimbels (1969) marked the beginning of the current trend to hold service defendants strictly liable.

The various principles operationalized by courts in product-service cases can be stated as follows:

1. the essence of the transaction being examined,
2. the benefits offered to the consumer,
3. professional versus commercial defendants,
4. the vulnerability of the plaintiff,
5. the consequences of the defendant's actions,
6. the importance of the defendant's activities to consumers, and
7. the position of the defendant in the distribution chain.

The transaction is treated as a service if its essence involves the rendering of a service (#1). Otherwise, the transaction is considered to be the sale of a product (Bonebrake v. Cox 1974).

Courts have been confused when trying to determine what benefits (#2) consumers are receiving in services-based transactions. Commercial defendants are more likely to be held strictly liable than professional defendants, who are considered to be practicing inexact sciences (#3).

If the consumer of a service is very dependent upon the provider (#4) or if the service can be quite harmful (#5), the services marketer is more likely to be held strictly liable. A defendant providing a vital service (#6) or occupying a prominent position in the distribution channel (#7) is also more likely to be held to a strict liability standard.

## REFERENCES

- Bonebrake v. Cox (1974), 499 F.2d 951 (8th Cir.).
- Lechuga, Inc. v. Montgomery (1970), 12 Ariz.App. 32, 467 P.2d 256.
- Merrill v. Hedson (1914), 91 A. 533 (Conn.).
- Newmark v. Gimbels, Inc. (1969), 54 N.J. 585, 258 A.2d 697.
- Time (1986), "Sorry, Your Policy is Canceled," (March 24), 16-20, 23-26.
- U.S. News & World Report (1986), "Sky-High Damage Suits," (January 17), 35-39, 42-43.