An earlier version appeared in *Fireworks Business*, No. 43 (1987).

Understanding Product Liability

Ken Kosanke

During the past couple years, in the course of assisting attorneys as an expert witness, I have come to learn a little about product liability. Because this subject is so important to our industry and because product liability laws are not well understood by many of us, I have decided to share with you what I have learned. However, it is important that you understand that I am not an attorney, that my experience in this area is not vast, and that product liability laws are state statutes which vary significantly from state to state. At best, the material presented in this article should only serve to provoke a thorough discussion of the subject with your attorney.

Until relatively recently, an injured party had only two avenues through which to seek compensation from a manufacturer. Those are Breech of Warrantee and Negligence. Breech of warrantee can involve either an expressed warrantee or warrantee of merchantability. An example of breech of an expressed warrantee would be if a manufacturer sold fountains that were marked "30-second Silver Fountain" and the fountains only burned for 15 seconds. In this instance the fountain fails to meet a stated specification. An example of breech of warrantee of merchantability would be if a manufacturer sold aerial shells which had no time fuse whatever installed. In this instance the aerial shells fail to contain a key component implicitly assumed to be there. While breech of warrantee is an avenue through which compensation can be sought: 1) judgments are generally relatively small; 2) this is an area that is fairly well understood by business people; and 3) most people would probably agree that compensation was appropriate (just or fair). For these reasons, breech of warrantee will not be discussed further.

The second avenue through which an injured party could seek compensation was negligence. In order for a manufacturer to lose such a product liability suit, he had to be proven negligent in one of five areas. Those areas were: failure of design, failure of materials, failure to test, failure to warn, and failure to direct. Thus if a manufacturer had conducted himself "responsibly", he was essentially certain of winning any product liability suit brought against his company. (By responsibly I mean that he was thorough and conscientious in his design of the product, that proper and high quality materials were used in the manufacture of the product, that the finished product was completely and repeatedly tested, that users were properly warned about known hazards associated with the use of the product, and that appropriate instructions were given for the safe use of the product. It is also meant that proper documentation of each of these functions was assembled and maintained.) If a manufacturer was negligent and that resulted in personal injury, few would argue that the injured party does not deserve to receive compensation from the manufacturer. For the most part, disagreements only arose over exactly what constitutes negligence (how much testing or how exhaustive a warning, etc. is required) and what dollar value of compensation is appropriate. While further discussion of this is appropriate, that will be deferred until later.

As you can imagine, it was not easy to win a product liability judgment against a manufacturer when negligence had to be demonstrated. Even when the manufacturer was negligent it was not an easy matter to assemble a case to prove that to a jury. Because it was so difficult (and costly) to win a product liability judgment, some felt the old laws were unfair to the consumer. In large part, this was the rationale for changing product liability laws to make it easier for plaintiffs to win their cases. Present product liability laws have added a third avenue through which compensation can be sought; that is Strict Product Liability. In order to win a case under strict product liability, in essence, only two questions need to be answered affirma-

tively. The first is, was the plaintiff injured by the product? The second is, did the product contain a defect at the time of the sale? The big difference is that with strict product liability it is no longer necessary that the manufacturer have acted negligently in order for an injured party to win compensation. A manufacturer could have literally done everything that is humanly possible as regards manufacturing a safe and effective product and still be liable for large product liability awards. This is true, even if the consumer contributed in a major way to causing the accident.

On the surface the second question above seems reasonable and may be felt by some to offer protection to a prudent manufacturer. However, it is important to consider some of the kinds of things that could constitute a product defect. It is true that the defect can be something that is obviously wrong with the product, but it could also be things such as:

- directions that are confusing because they contain too many big words or possibly were only too long to expect a consumer to take the time to read them;
- warnings that were not worded strongly enough such that a user did not take them seriously enough, such as only warning that a firework emits a shower of sparks and not specifically stating that serious personal injury is likely to result if ones body part is held over the item when it discharges;
- directions or warnings that do not sufficiently address all the possible ways in which a product might be used or misused, or, on the other hand, warnings that are too specific and thus plant ideas for possible misuse;
- packaging that offers insufficient protection such that, during rough handling by a consumer, the product may become damaged;
- a hazard that is unknown and unimaginable at the time of manufacture and only became evident many years later, such as asbestos caused cancer;
- a product design that does not sufficiently preclude modification by the consumer, such as safety guards that are merely bolted on a machine and thus could be removed by a careless user.

In large measure, in our courts today, if someone is injured while using a product, it is taken as prima facie evidence that the product was defective and unreasonably dangerous. Thus the second question above can become largely rhetorical in nature, and in many cases it is only the first question (was the plaintiff injured by the product) that must be answered in the affirmative.

Now, with strict product liability, it is almost trivially easy for an injured plaintiff to win a product liability suit. What is more, this seems to have been the clear intent of state legislators in revising their product liability laws. To most of us who have been brought up to believe that punishment is appropriate (fair or just) when someone has done something wrong, strict product liability laws seem inherently unfair and unjust. Advocates for strict product liability argue that we are looking at it all wrong. They argue that consumers were being injured and that too often there was no adequate means for their compensation for those injuries and resulting economic losses. They argue that the intent was to provide consumers with "product accident insurance". They argue that the appropriate provider of that insurance is the manufacturer who can simply add the cost of the insurance to the selling price of the product. I cannot say that I agree with this rationale, but at least now I understand how strict product liability has become the law of the land when on the surface it seems so blatantly unfair to manufacturers.

Above I said that negligence on the part of the manufacturer is no longer necessary in order to win product liability verdicts. This is true, but it is still a very important consideration in establishing the amount of the judgment awarded plaintiffs, in particular, punitive damages. Obviously, when negligence can be demonstrated or at least is suspected by juries, awards often increase astronomically. This is an important area in which your efforts can significantly reduce your product liability losses in the event a suit is filed. Take actions to prove you have acted responsibly, document those actions and keep the records. Have your product designs reviewed (in writing) by an unbiased professional outside your organization. Establish written requirements or performance specifications for the raw materials you use. Perform docu-

mented tests of those materials either before they are used in your manufacturing or after they are part of a completed product and are tested by noting the performance of the product. Performance tests of products should demonstrate that specific acceptance limits are met (e.g., 3" shells all reach at least *x* feet in altitude, break no sooner than *y* seconds after launch and no later than *z* seconds, etc.). Also performance testing should include tests that stress the product greater than is expected during normal use (i.e. is there a sufficient safety margin?). Directions and warnings should be reviewed in writing for completeness and accuracy. Remember, doing all this may not keep you from losing a case under strict product liability, but it will certainly help to limit your losses.

What has been said up to this point is generally true in all states. However, there are a number of other points worth discussing that vary significantly from state to state.

Most states assign the responsibility for injuries resulting from a product to each of those who contributed to the product reaching the customer. The word product includes not only tangible items, like step ladders and fireworks, but also intangible items like an architect's design. Those who contribute to the product reaching the consumer include the manufacturer or importer, the wholesaler and the retailer, but also may be interpreted to include the supplier of raw materials to the manufacturer and on occasion even the delivery man. (Unless noted to the contrary, throughout this article, the word manufacturer is intended to include any of those persons or entities that participated in placing a product in the hands of the consumer.)

Most states subscribe to the notion of "comparative fault". That is to say, there is a recognition that the plaintiff may have acted in a manner that contributed to the accident or injury. If that is shown to be the case, the final judgment awarded is reduced in the same proportion as the plaintiff is responsible. Even if the plaintiff is found to be 90% at fault, the manufacturer will still lose the case, but the amount of the judgment is reduced by 90%. (Note that even 10% of a typical judgment might bankrupt a small uninsured manufacturer.)

Many states still subscribe to the notion of "joint and several liability". That is to say, each defendant can be held totally liable, independent of the extent to which they contributed to the accident or injury. This is the so-called "deep pockets" theory, don't sue the people most at fault, sue the ones with the best insurance and largest assets (the ones with the deepest pockets). Happily this is being changed in some states so that the judgment is passed to the defendants in proportion to the extent to which they contributed to the problem.

Some states limit liability to only the actual manufacturer (or importer of a foreign product) and to no one else (except under special limited circumstances). This is quite a relief to wholesalers, retailers and all others involved. It also eliminates secondary and tertiary law suits, where a sued retailer sues his wholesaler, who sues the manufacturer, each attempting to recoup their loss. When these additional law suits are eliminated, everyone is better off financially (except attorneys).

Most state statutes require that the product involved be "unreasonably dangerous" in order for a suit to be won. On the surface this sounds appropriate and might be interpreted by a manufacturer to offer some protection from claims because of his belief that his product was not unreasonably dangerous. However, in practice, there is essentially no protection whatever. For the most part, unless the product has a history of causing injuries, it is only that one specific device that caused the injury that need be found to be unreasonably dangerous. And, by practical definition in our courts *any* product that injures someone *is* unreasonably dangerous.

In very few states (if any) is there relief for a manufacturer who follows "industry standards" in making the product, and only a few states offer any protection to a manufacturer that either uses "state-of-the-art" techniques or meets federal (or the state's) codes or standards. In most states meeting industry standards, using state of the art techniques and following government codes and standards offer no protection whatever. The area where this often comes up is in labeling. Meeting the consumer product safety commission labeling requirements offers essentially no protection from a manufacturer being found negligent for failing to properly warn and instruct users of fireworks.

In some states, shelf life is considered. For example in Colorado if ten years have elapsed between the time of manufacture and the injury, the product is assumed not to have been defective at the time of manufacture and the manufacturer is free of responsibility.

Some states are moving to limit the amount of non-economic damages, such as "pain and suffering" and "loss of consort" (no longer having a loved one with whom to interact with in the manner prior to the accident). One limit being considered in some states is $250,000. That is still a lot of money if you are the one paying it, but it is a step in the right direction. However, remember that economic damages (medical costs and up to a lifetime of earnings) can still amount to millions.

As a manufacturer, if you check your state laws and find they are more friendly to manufacturers than most other states, don't for a minute think you are off the hook. You may have wholesalers in other states, who have retailers in still other states, who may in turn have customers in still other states, who may use the product in still other states. If there is a suit filed it can be in any of these various states and you can bet it will be filed in the state most advantageous to the plaintiff.

Product liability problems can put you out of business. I recommend that you seek legal advice from your attorney and talk with your insurance agent *before* you have a claim against you. There are at least a few things you can do, in advance, to limit your risks.

I would like to express my appreciation to attorney Kim Orwoll for his personal comments on this article.