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Products Liability and Your Business

Many businesses think of products liability as an issue for the large manufacturers. Broadly speaking, products liability implies a defect, such as design, at the time of manufacture, so that the product was unreasonably dangerous when made. There is a deficit that causes injury when the product is used carefully and as intended. By law, however, this liability runs down through the chain of commerce. So if you sell the product, wholesale or retail, you are, in law, just as responsible as the manufacturer.

Peculiar nuances often erupt from this joint liability of both the manufacturer and the seller. I have a case right now where I represent a car dealership where there was a claim of defect in design of the car causing an accident. The plaintiff's attorneys decided to abandon their case against the major automobile manufacturer because they were not up for the fight, the onslaught of litigation, thinking the car dealership would be less likely to put up a fight. Often times retailers will presume that they will have the backing and support of the manufacturer in any litigation. Such feelings of comradery, being on the same team, quickly vaporize when it comes to litigation. Indeed, the first avenue of defense of a manufacturer, if they have the opportunity, will be arguments that vendor installed its product improperly for the end user or altered it in some way. For example, I was involved in a products liability case with a major drug manufacturer and their first line of defense was that there was nothing wrong with the drug and everything wrong with the way the doctor, a co-defendant, prescribed it. In another case, there was nothing wrong

with the oven and everything wrong with the way my client, a discount appliance retailer, installed it. Yet another case I had years ago, the manufacturer simply denied that it was its product, a helmet which failed to protect against brain injury, leaving me, representing the retailer, to do a nationwide search until I finally identified a retired engineer who designed the helmet. He turned out to be a former employee of the manufacturer.

The pitfalls of products liability for the retailer are such that many retailers simply will not sell certain products that are dangerous if misused – simply to avoid liability exposure. A great example is gas lanterns that burn white gasoline – becoming very hard to come by in the retail arena. People do silly if not stupid things with products hence the explosion of “idiot” warnings of the last twenty years or so: “Do not put hand in mower!” Does anyone really need a warning not to do that? The reason those labels are there is because, over the years, their absence has been a fertile ground for attorneys to argue that very minimal expenditures (the pennies it would cost for a label), can make a difference in added deterrence. While lawyers are often the subject of scorn for bringing frivolous lawsuits, and there certainly are no shortage of cases, another perspective would be to consider that pushing the envelope of guarding and protecting against even the most illogical misuses of a product has, on the whole, made the products which we use everyday eminently more safe for the last twenty or thirty years.

As a retailer you need to keep an eye

out for imported products which might not always comport with U.S. standards of safety. Dyes and toxic components are very typical examples of problems that have brought retailers into the litigation forum, often alone as the manufacturer is out of business or it is simply too difficult for the plaintiff's attorney to secure jurisdiction and bring an action against a foreign company. In this regard, a little investigation into the product, looking for certifications, ANSI, UL, and the like may be worthwhile. Of course, the best protection is to make sure that you have sufficient insurance coverage under your business owner's policy, carefully running through the exclusions of the policy. Also, communications with the manufacturer about safety regulation compliance and knowing their approach to keeping track of customers in the event a safety bulletin or recall must be done, can prove very valuable in certain instances. In law, if there is a finding that a product is defective after it gets out into the marketplace, there is a duty to notify all endusers of the defect. This could include warnings, instructions, adding guarding, or even a recall. I perceive most U.S. manufacturers are very responsible along these lines in making sure that ultimate end users become aware of any post-sale issues. Other manufacturers could care less. In this regard the reputation and aptitudes of the manufacturer for whom you are assuming responsibility for selling their product is something you probably want to consider.

Finally, if you are buying a company and its inventory, be careful about what liabilities you may be assuming and the contractual language in this regard.