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very now and then, catastrophic events occur that involve rental products. Just this year, a rental stove tipped over, scalding a young child with a pot of boiling water. In another case, a rental computer's cord mysteriously caught fire and burned down a house, killing two young children. Though rare, these kinds of events haunt every merchant. When things go badly wrong, injured parties generally sue everyone who is even remotely connected to the incident. If rental property is involved, the rental company will almost certainly be sued as will the rental company's supplier, the manufacturer of the product, the manufacturers of the component parts and possibly others—property owners, homebuilders, electricians, etc. ¶ This article provides a brief summary of one of the legal theories that plaintiffs use in such cases and what rental dealers can do to be as prepared as possible for bad things when they happen.

LIABILITY

WHEN GOOD RENT-TO-OWN PRODUCTS GO BAD, RENTAL DEALERS ARE OFTEN TARGETED AS LIABLE. ED WINN III OFFERS A PRIMER ON PROTECTING YOUR BUSINESS

Strict liability in tort is a legal theory that allows a plaintiff to recover damages without having to prove that the defendant did anything wrong. The legal theory was created in the California and New Jersey state courts in the second half of the 20th century and since the 1960s has been adopted as a valid legal theory almost everywhere. Prior to adopting the theory, an injured plaintiff had to prove that the defendant had been negligent in the manufacture or sale of the product that caused the damage or had breached an express or implied warranty that existed on the product.

The economic and social justification for doing away with the need to prove that the defendant is at fault before taking money out of his pocket is this: The plaintiff has suffered some grievous loss. The defendant, usually the manufacturer or the seller (or lessor) of the product, or both, has the ability to pay for the loss and then spread the cost of compensating the plaintiff for the loss among all of the other users of the product—by raising prices to all of the other users. Compensating the plaintiff for his loss by taking a little money from all of the other users of the product lowers the overall cost of the catastrophe to society. The choice is to let the harm lie where it falls—an unfortunate but unavoidable accident that the injured plaintiff must now live with, which was the law until the 1960s, or spread the cost of compensating for the harm by making the defendant pay for the loss, which is the law today.

The notion of spreading the cost of the injury and thereby lessening the cost only works if the marketplace allows the merchants involved to raise prices, which in reality is not always the case. Courts in Massachusetts, North Carolina, Virginia and Michigan have recognized the economic realities of strict liability doctrine and have been slow to adopt this legal theory.

It may not always be possible to know which manufacturer made a specific product or which seller (or lessor) handled it. Think of pipes, or wires or other component parts of a product that are destroyed in an accident or a generic drug that is made by several manufacturers over time. Some courts have been willing to extend the doctrine of strict liability to all manufacturers of the product and make them jointly and severally liable, so that any one company can be made to pay for all of the plaintiff's damages and then seek pro-rata contributions from the competitors. This is what happened in the asbestos litigation.

Strict liability is generally applied to the sale (or lease) of products, as opposed to services, and has been applied to used products as well as new. The product must be "defective" for strict liability to apply. "Defective" does not mean broken under this legal theory. Rather, it means, "in a condition not contemplated by the ultimate consumer." A defective condition can be found in the design, manufacture, installation, delivery or from failure to give adequate warnings or

instructions about the dangers involved in the normal use of the product.

High diving boards have virtually ceased to exist in the country because manufacturers and swimming pool sellers are held strictly liable for any injuries that occur in or around such boards. There is no way to design or install a high dive or adequately warn of its dangers and escape liability.

The tobacco industry has been under attack on strict liability grounds for decades. It has been able to remain in business by making a multi-billion dollar settlement with state attorneys general, who agreed to take the money on behalf of citizen smokers in exchange for the industry's agreement to beef up warnings on cigarette packaging, quit marketing to children and make other changes in business practices.

The gun and alcohol industries are currently under attack in courts around the country on strict liability grounds. Plaintiffs are arguing that these products are inherently dangerous, i.e., "defective," and that the manufacturers and sellers of these products should pay for all damages that are caused as a result of their use.

Plaintiffs must still prove causation in a strict liability lawsuit. Did the "defective" product legally cause the plaintiff's injury or did something else cause it?

Manufacturers and sellers (and lessors) of products are not quite in the position of guaranteeing that their products will never cause any harm, although the law is moving steadily and insistently in that direction. Manufacturers and sellers (and lessors) are not generally held liable upon proof that the plaintiff's injury was the result of some abnormal, unforeseeable misuse of the product. However, manufacturers and sellers (and lessors) are regularly held liable when a court determines that the way the plaintiff misused a product was foreseeable by the defendant.

This means that the plaintiff's own negligence—the misuse of the product, e.g., using a dryer with the door open to heat a house for an extended period of time, which resulted in a fire—is not a bar to the plaintiff's recovery on strict liability grounds. Some states do recognize comparative negligence principles in strict liability cases so that a plaintiff's misuse may reduce the recovery by the percentage of the plaintiff's fault as determined by the jury, but it will not bar recovery altogether.

So, what is a rental dealer to do? If there is no way to escape exposure for having handled a product that ultimately causes serious injury to some consumer, the only practical answer is to insure, insure, insure. Rental dealers want to carry as much products liability insurance as they can afford.

This movement in the law, such as no-fault insurance and no-fault divorce, is part of the trend to destroy all sense of personal responsibility. In the meantime, as rental dealers trying to provide a service, we must do what we can against the onslaught of this redistributive legal doctrine. ■

Ed Winn III is APRO's general counsel. His e-mail address is edwinn@mwwmlaw.com.

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