

## **The Product Liability Landscape For Furniture Users, Manufacturers and Sellers**

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Homes are full of products, *i.e.*, furniture, that have been the subject of litigation, the focus of standards and the target of Consumer Product Safety Commission (CPSC) investigations. The focus on furniture safety and liability present special challenges for manufacturers and sellers.

### **Typical Claims in Furniture Product Liability Cases**

Nationwide, over the last 10 years, the most frequent accident scenario in reported product liability cases involving furniture concerned a chair breaking when the plaintiff sat down. In those cases, plaintiffs alleged that the chair was structurally unsound, contained a manufacturing defect, or was not assembled properly. Several such accidents occurred on the retailer's show floor. Other cases involved furniture that tipped on users when pulled or opened; glass in furniture that broke; furniture upholstery or stuffing that ignited; furniture that was coated with toxic material; furniture that collapsed when leaned on; and furniture casters that rolled on a user's foot.

Plaintiffs asserted a host of allegations in these cases: design defect, manufacturing defect, failure to warn or instruct (assembly or use), misrepresentation, negligent assembly, and premises liability. These cases raised a multitude of typical issues encountered in personal injury litigation, such as *Daubert* challenges, spoliation claims, and statute of limitations or repose issues.

### **The Effects of Product Misuse**

In some product liability cases, the accident occurs when the plaintiff uses the product in a manner not intended by the manufacturer. For example, the plaintiff might become injured while attempting to stand on a bar stool to change a light bulb. Whether the defendant may defeat recovery based on product misuse depends on whether the misuse was reasonably foreseeable by the manufacturer because the "failure to design a product to prevent a foreseeable misuse can be a design defect." *Welch Sand & Gravel v. O&K Trojan*, 668 N.E.2d 529, 533 (Ct. App. Ohio 1995).

However, typically, a "manufacturer will not be liable if an unforeseeable misuse of the product caused the injuries." *Uptain v. Huntington Lab, Inc.*, 723 P.2d 1322, 1325 (Colo. 1986), overruled in part on other grounds, 842 P.2d 198 (Colo. 1992). Some states make unforeseeable misuse a complete defense. *See, e.g.*, Ariz. Rev. Stat. § 12-683 (defendant shall not be liable if proximate cause was "a use ... of the product that was for a purpose, in a manner or in an activity other than that which was reasonably foreseeable"). Other states make misuse a factor to be considered in comparing the parties' fault. *See, e.g.*, Wis. Stat. § 895.047 (3)(c) (damages reduced by percentage of causal responsibility attributable to claimant's misuse).

### **Injuries to Children**

Furniture accidents involving use by and injuries to children are, unfortunately, common. The Consumer Product Safety Commission (CPSC) reports that "[a] child dies every two weeks and a child is injured every 24 minutes in the U.S. from furniture or TVs tipping over, according to CPSC data."

<http://1.usa.gov/1Ikctb9>. Accidents involving dressers tipping over on children, children pulling down televisions, and entanglement in window covering cords have been widely reported in recent years and sometimes result in action by the CPSC and/or lawsuits by the children's family.

Are manufacturers required to "child-proof" every piece of furniture that could be placed in a home where children are present? In some cases, the defendant may argue that the child was not an intended user of the product. This argument has met with mixed reception. For example, in *Stratos v. Super Sagless Corp.*, No. 93-6712, 1994 U.S. Dist. LEXIS 18074 (E.D. Penn. Dec. 21, 1994), the manufacturer of an electric hospital bed argued that it could not be held strictly liable for the death of a toddler because its product was not intended to be "played with" by children; rather, the bed was intended to be used as a home health care product for adults. *Id.* at \*6. The court found that the product was marketed for home use where children could be present, and was not explicitly limited to adult use; therefore it was up to a jury to decide whether the child was a "reasonably obvious unintended user of the bed." *Id.* at \*13-14.

Conversely, in *Beaver v. Howard Miller Clock Co.*, 852 F. Supp. 631 (W.D. Mich. 1994), a manufacturer of a grandfather clock that tipped over on a small child was found not to have a duty to make its clock — a product not intended for use by children — "child-resistant." *Id.* at 638. The risk of a clock tipping over should be obvious to the typical user, *i.e.*, the children's parents, regardless of what the children involved in the accident may have known. *Id.* However, the risk of televisions tipping over and injuring a child has been found not to be an open and obvious hazard to the average consumer. *Simmons v. Philips Elecs. N. Am. Corp.*, No. 2:12-CV-39-TLS, 2015 U.S. Dist. LEXIS 39184, \*22-23 (N.D. Ind. March 27, 2015).

### **Reaching the Seller and Manufacturer**

In cases involving generic products, the plaintiff may have difficulty in proving the identity of the seller or manufacturer. Many cases involve overseas manufacturers, particularly from China, complicating identification of the manufacturer, service of process, and establishment of personal jurisdiction.

When a plaintiff fails to name all potential parties, the named defendants may need to bring a third-party claim against the seller or manufacturer. The defendant, however, might also wish to consider the effect that doing so may have on its business relationship with the potential third-party defendant.

### **The Seller's Responsibility**

In some cases, plaintiff can assert an independent negligence claim against the seller. The seller may be liable in negligence, for example, for its activities in assembling the product or in staging the product in the show room. A retailer may have a duty to inspect the product before offering it to customers. *See Biniek v. Marmaxx Operating Corp.*, No. 3:14-1154, 2015 U.S. LEXIS 131889, \*36 (M.D. Pa. Sept. 30, 2015) (retailer had duty "to inspect the chairs after removing them from their boxes and before openly displaying them in its store"). The seller may be responsible as "apparent manufacturer" when it labels the product with its identification and holds itself out as the manufacturer. *See Vita v. Rooms To Go La. Corp.*, No. 13-6208, 2014 U.S. Dist. LEXIS 168010, \*8 (E.D. La. Dec. 3, 2014).

In other cases, sellers defend against product liability claims, such as design defect, manufacturing defect, and failure to warn that are more properly the responsibility of the manufacturer. Many states have enacted statutes to govern the liability of sellers in product liability actions. Under such statutes, sellers may be liable when they exercise control over the design, manufacture or labeling of the product; or if they modified the product, had knowledge of the defect or made separate misrepresentations about the product. *See, e.g.*, Wis. Stat. § 895.047 (2); Ohio Rev. Code § 2307.78. If the seller did not engage in such activity, it may seek dismissal. *See, e.g.*, *Garcia v. Premier Home Furnishing*, No. 2:12cv167-KS-MTP,

2013 U.S. Dist. LEXIS 110527, \*18 (S.D. Miss. Aug. 6, 2013) (dismissing action under Mississippi's "innocent seller" statute).

Even an "innocent" seller, however, may be liable for strict liability under these statutes when the plaintiff cannot recover from the manufacturer. If the manufacturer is not subject to service of process, or the plaintiff would not be able to enforce a judgment against the manufacturer, the seller may be liable if a defective product caused a plaintiff harm.

### **Indemnification from the Manufacturer**

An innocent retailer may seek indemnification from the product manufacturer in a case where the claims are based on the product's design, manufacture or warnings. Indemnity may be provided by common law, contract or statute. *See, e.g.*, Ariz. Rev. Stat. § 12-684(A) (manufacturer shall indemnify seller unless seller had knowledge of the defect or altered, modified or installed the product and such activity was a substantial cause of the incident).

The more difficult issue arises, however, when the seller negotiates or imposes a broad indemnification provision on the manufacturer, making it responsible for all claims arising from the product. Big box retailers have significant market power over manufacturers, importers and distributors, and may exact such a provision as a condition to selling the product. When the fault for the accident properly lies with the retailer (*e.g.*, because of improper assembly), such broad indemnification provisions are enforceable only when the parties' intent is expressed in clear, unequivocal terms. If the agreement is ambiguous, the courts will not impose indemnity in favor of a negligent party. *See, e.g.*, *Hegwood v. Ross Stores*, No. 3:04-CV-2674-BH(G), 2007 U.S. Dist. LEXIS 54969, \*30 (N.D. Tex. July 28, 2007) (purchase order did not make importer liable for retailer's negligence when contract did not clearly establish parties' intent that indemnity provision covered damages caused by the retailer's negligence).

### **Regulation by the CPSC**

In addition to defending lawsuits, furniture manufacturers must navigate CPSC investigations when products are involved in accidents or do not perform as intended. The CPSC is "charged with protecting the public from unreasonable risks of injury or death associated with the use of the thousands of types of consumer products under the agency's jurisdiction." <http://1.usa.gov/1lqkBMs>. The commission investigates incidents, injuries and complaints regarding a variety of consumer products, including furniture, and makes determinations whether a product should be recalled or otherwise be subjected to corrective action. Recently, for example, CPSC Chairman Elliot Kaye called on the entire furniture industry to make more stable products. *Jayne O'Donnell, Ikea Recalls 27 Million Chests, Dressers After Two Deaths, USA Today*, July 23, 2015.

The CPSC initiates investigations independently and based on information provided from consumers, manufacturers or retailers. A manufacturer must file a Section 15(b) Report if a product fails to comply with an applicable rule, regulation, or standard found in the Consumer Product Safety Act or if the product "contains a defect which could create a substantial product hazard" or "creates an unreasonable risk of serious injury or death." 15 U.S.C. § 2064. The statute requires disclosure of information relating to the product and claims of injury or incidents as a result of the product's use. Failure to report can subject the manufacturer to fines.

If the CPSC determines corrective action is necessary, the manufacturer and/or retailer will oftentimes agree to a voluntary course of action. If the CPSC and manufacturer cannot come to an agreement, the CPSC may bring legal action to seek a mandatory recall.

Involvement by the CPSC can be linked to product liability litigation. A recall can generate publicity and litigation when product users learn about the recall. Those plaintiffs may try to use evidence of the recall at trial, the admission of which is likely to be heavily contested. Conversely, a product liability lawsuit may come first and prompt action by the CPSC. While it is unlikely a lawsuit alone is grounds for mandatory reporting to the CPSC, a lawsuit can notify the CPSC of a potential issue. Even without a recall, a report to or an investigation by the CPSC creates documents and communication that can be discoverable and possibly admissible in litigation.

### **The Role of Standards**

There are many standards that apply to furniture products. Some are imposed by regulating bodies such as the American Society for Testing and Materials (ASTM), as in the case of hinge performance testing, and the American National Standards Institute (ANSI), as in the case of stability tests; while other standards may be required by the retailer in a sales contract. Often, multiple standards are applicable to the product, especially if the product is sold internationally, and will require the manufacturer to determine what standards apply and to reconcile any conflicts.

Most states have statutes or court decisions governing the effect of compliance or noncompliance with standards in a product liability case. Generally, evidence of a product's compliance with a government or industry standard is admissible to prove the product is not defective — but such evidence is not dispositive. *See, e.g., Gentry v. Volkswagen of Am.*, 521 S.E.2d 13, 16 (Ga. Ct. App. 1999). Likewise, evidence of noncompliance is admissible, but not conclusive, to prove that the product is defective. *See, e.g., Rice v. James Hanrahan & Sons*, 482 N.E.2d 833, 836 (Mass. App. Ct. 1985) (violation of safety standards adopted by government agencies or industry associations or testing organizations admissible as evidence of failure to use reasonable care, proof that the defendant knew or should have known of the defect, feasibility to remedy a defect, or reflective of industry custom and practice).

Some states have given the manufacturer an additional advantage in trial if the product complies with standards adopted or approved by a law or government agency. These states have adopted statutes creating a rebuttable presumption that the product is not defective if it complies with a government standard. *See, e.g., Tex. Civ. Prac. & Rem. Code § 82.008; Colo. Rev. Stat. § 13-21-403.*

### **Conclusion**

Product liability cases involving furniture raise a number of common issues. Litigants and counsel need to analyze these issues in light of the laws of the state in which the suit is brought. These issues also bear pre-suit consideration by furniture manufacturers and sellers — in establishing a product safety program, designing and manufacturing the product, performing risk assessments, developing warnings and instructions, negotiating sales contracts, and monitoring post-sale product performance.

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