PUBLICATION

Are Salespeople Responsible for Their Customers' Injuries?

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If a customer is injured by a product you manufacture or is injured in a retail store you own, could your salesperson be legally responsible for those injuries? In some situations, the answer very well could be "yes."

Consider the real-life case of Harold James, who suffered third degree burns on over 90% of his body when his bathtub exploded. [i] Just before the explosion, he was cleaning his bathtub with an industrial-strength floor cleaner he had stolen earlier that day from his employer. His employer is a janitorial company that specializes in washing and waxing the floors of grocery stores, and James had used the cleaner on grocery store floors many times in the past.

The exact cause of the explosion was never discovered. But James' lawyers claimed that an electrical spark from the bathroom's ventilation fan ignited vapors from the cleaner. James' bathroom had no windows, and James was cleaning the bathtub with the bathroom door closed. The cleaner's label warned that the product was not to be used in enclosed areas without ventilation, but James either did not read the label or he chose to ignore it.

Amazingly James survived, but he endured numerous, extensive skin surgeries and incurred almost $4 million in medical bills. Six months after the accident, he sued (1) his employer for failing to train him on the proper method of using the cleaner and (2) the manufacturer of the cleaner for failing to adequately warn the employer on the dangers of the product. But in addition, he sued the manufacturer's salesperson who sold the cleaner to the employer in bulk. The allegations against the salesperson essentially were the same as those alleged against the manufacturer.

The salesperson was Jennifer Rachelle, a single mom who had been working for the manufacturer for two years. Rachelle had no college education, but she had done well working in sales. When Rachelle first took the job, she knew nothing about the cleaners she would be selling. But the manufacturer provided her with training, including information about products made by that company, hazard communication and the like. All of her customers were large janitorial companies that bought cleaners in bulk. Her job was to figure out what product would work best for each customer's needs, persuade the customer to buy that product, and then deliver the product and the manufacturer's written materials to customer.

Rachelle was shocked to hear that she was being sued. She had no role in formulating the cleaner that injured James, nor was she involved in writing the warnings on the cleaner's product label.

Still, James' lawyers claimed Rachelle was partly responsible for James' injuries. They claimed she was negligent for not recommending a less dangerous cleaner to James' employer. They claimed that at the very least, she was negligent in not thoroughly warning James' employer about the dangers of using the cleaner in an enclosed area.

Rachelle's lawyers filed a motion to dismiss her from the lawsuit, but were unsuccessful. In the meantime, James' lawyers have demanded $30 million from the three defendants to settle the case. So far, the case has not settled, and

Rachelle must simply wait to see whether the case goes to trial, and whether the jury will find her responsible for James' injuries.

Rachelle's situation is more common than you might think. There are many reasons why a customer's attorney might want to sue a salesperson in addition to the manufacturer of the product that caused the injury (or the owner of the store where the injury occurred). One of the biggest reasons is that by suing a local salesperson along with an out-of-state manufacturer in state court, the manufacturer and salesperson are almost always prevented from moving the case to federal court. Under the rules of procedure, when a customer sues in state court for more than $75,000 and none of the parties being sued are from the same state as that court, then the parties being sued have the option to move the case to the federal court system. But if at least one of the parties being sued resides in the state, has its principle place of business in the state or was incorporated in the state, then the case cannot be moved to federal court regardless of the amount of money at issue. [ii] Federal court usually benefits the parties being sued, so the party filing the suit has a big incentive to keep the case in state court, and therefore a big incentive to sue a local salesperson.

Generally, a salesperson is responsible for a customer's injuries if the salesperson contributed to the cause of those injuries. But is merely selling a manufacturer's product really contributing to the cause of those injuries? For certain types of salespeople, the answer to this question appears in most states to be "no."

In a 1941 Georgia case, [iii] a grocery store clerk sold a bottle of soda to a customer. The clerk took off the cap, and the customer began to drink the soda. But a poisonous spider had been hiding inside the bottle. When the customer became sick, he sued the manufacturer of the soda, the store owner, and the clerk. But the court threw out the case against the clerk, and ruled that a salesperson who merely hands merchandise to the customer and in return receives payment is not responsible for any defects in that merchandise.

A similar case came out of Louisiana in 1988[iv] when a group of customers sued three salespeople who worked for a medication manufacturer. The salespeople were responsible for delivering the medication to doctors, providing the doctors with package inserts for the medication, and for communicating the warnings in those inserts to the doctors. Some of the patients who ultimately received the medicine claimed it stained their teeth. The trial court found the salespeople were responsible for the stained teeth, but the appeals court reversed that decision. The appeals court ruled that a salesperson cannot be responsible for a customer's injuries simply by performing administrative tasks such as these.

However, when a salesperson's job entails anything more than simply exchanging merchandise for money, courts are less willing to dismiss a case against a salesperson. For example, in a 1981 Florida case, a customer was injured at a skateboard park.[v] The injured customer sued the corporation who owned the park as well as the corporation's sales manager who ran the park. The customer alleged the manager (1) rented defective equipment to the customer and (2) failed to take precautions against the customer becoming injured at the park. The trial court dismissed the case against the manager, finding that he could not be responsible for the injuries merely because he was a manager employed by the corporation. But the appellate court reversed, and ruled that the sales manager could be responsible for the injuries because he personally participated not only in renting the faulty equipment, but also in running the park in an allegedly unsafe manner.

More recently, a 2005 Florida case dealt with this same issue. In that case, a customer was injured when she slipped and fell in a Wal-Mart store. [vi] The customer sued Wal-Mart, as well as the store's sales manager. The trial court dismissed the case against the manager, but the appellate court reversed. The appellate court noted that the manager was allegedly responsible for carrying out certain safety policies established by Wal-Mart, and that the

manager negligently failed to do so. The court reasoned that because the sales manager was personally and directly involved in the alleged negligence, the case against the manager should not have been dismissed.

Generally, judges are very reluctant to dismiss cases. As a practical matter, this means that most salespeople (or their lawyers) will not be able to convince a court to dismiss the case against them. But even if the case is not thrown out early, this does not mean the salesperson will be found responsible for the customer's injuries at trial. Companies and their salespeople can take the following proactive, common-sense approach to decrease the chance of a salesperson being held responsible for customers' injuries.

Product Sales

1. If a product has a Materials Safety Data Sheet (MSDS), the salesperson should provide it to the customer upon the first order before the product is delivered, and should encourage the customer to read and understand it.

2. The salesperson should encourage the customer to explain the manufacturer's written warnings to everyone who may end up working with the product down the line.

3. The salesperson should ask the customer whether he or she has any questions not answered by the manufacturer's written materials, and put the customer in touch with someone from the manufacturer to answer those questions if necessary.

Retail Stores

1. The salesperson should pay careful attention to safety training given by the employer, and adhere to that training as strictly as possible.

2. If in a managerial position, the salesperson should make sure a practical, workable system has been set in place for subordinates to execute the safety standards established by the employer.

3. The salesperson should relay all pertinent safety information to the customer accurately, quickly and in writing (whenever possible). This could be as simple as looking out for spills on the floor and posting "warning" cones around a spill immediately upon its discovery.

There is no way for a salesperson to guarantee he or she will not be held responsible for a customer's injuries. But by following the steps outlined above, a salesperson can greatly increase the chances of winning at trial.

[vi] Although the names of the parties and other factual specifics have been changed to protect the privacy of the parties, the factual scenario set forth in this article is based on an actual lawsuit filed in Florida in 2004.

[ii] 28 U.S.C. § 1332

[iii] *Crosby v. Calaway*, 16 S.E. 2d 155 (Ga. Ct. App. 1941).

[iv] *Wallace v. Upjohn Co.*, 535 So. 2d 1110 (La. 1st Ct. App. 1988).

[v] *Orlovsky v. Solid Surf, Inc.*, 405 So. 2d 1363 (Fla. 4th DCA 1981).

[vi] *White v. Wal-Mart Stores, Inc.*, 918 So. 2d 357 (Fla. 1st DCA 2005).

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