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"PRODUCT LIABILITY LAW--MANUFACTURER'S RESPONSIBILITY"

Today my role on this panel, as I envision it, is to outline the present status of the legal responsibility of manufacturers in certain areas of product liability. I will limit my remarks to the present status because the clear trend of the cases and statutory law is toward placing an ever higher standard on the manufacturer. I will also discuss only legal responsibility as opposed to moral or ethical considerations or how a jury would react to an issue placed before it. As to the latter point, I am sure you are well aware of the "deep pockets" rule which provides that those with the most dollars are target defendants and perennial payors.

In this context then, let us first consider the general legal principals involved.

A person who is injured in the process of using a product may look to the manufacturer of that product for damages under two main legal theories of tort liability--negligence or strict liability. These theories address themselves to two completely separate aspects of the manufacturer and his business. Obviously, of course, in most law suits two causes of action are always alleged, one in negligence and one in strict liability--because in fact the plaintiff will attempt to use the same conduct of the manufacturer to prove either tort. Generally speaking, a manufacturer will be liable for damages in negligence if his behavior falls short of a certain standard of reasonableness and the result of such behavior is the plaintiff's injury. Second a manufacturer will be liable for damages in strict liability if his product is defective and the result of the defect is the plaintiff's injury--without regard for the care with which the product may have been manufactured. A product is legally "defective" not only as a result of a failure in design or manufacture, but also if there is a failure on the part of the manufacturer to adequately warn of the hazards involved in using the product.

Because of time limitations, the remainder of my remarks will consider only this duty to warn.

There has been a great deal of controversy lately concerning the duty to warn. It arises primarily as a result of the decision in the Borel* case; the asbestos case. Although it is certain beyond all doubt that there is such a duty on the part of the manufacturer and that failure to adequately warn can give rise to a cause of action based upon either negligence or strict liability, the first question to consider is the extent of this duty. A review of the cases reveals that where the manufacturer's customer either changes the form of the product or repackages it prior to resale, the manufacturer may fulfill its duty to warn by providing adequate warnings and instructions only to the customer itself. In these situations, the manufacturer may rely on the customer to pass on the appropriate warnings to the latter's employees and customers.

On the other hand, many of the leading cases on this subject deal with manufacturers of machines and other items which reach the user in exactly the same form as they left the manufacturer's plant.

*Borel v. Fibreboard Paper Products Corp., et al., 493 F. 2d 1076 (5th Cir 1973), Cert. de., 419 US 869 (1974)

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In such instances, the courts have held that the duty to warn extends all the way to the ultimate user or consumer.

The Borel case does not change this rule. In Borel, the plaintiff was an industrial worker who had contracted asbestosis as a result of breathing asbestos dust. Recovery was allowed by the lower court on a strict liability theory and the Court of Appeals affirmed, holding that the asbestos insulation was rendered unreasonably dangerous by the manufacturer's failure to give adequate warning of the dangers involved in its use. Of the many points covered by the court, the most pertinent to our discussion in the court's treatment of the defendant's argument that it was a responsibility of the insulation contractors, not the manufacturers, to warn the insulation workers of the risk of harm. The court flatly rejected this argument saying:

"A seller may be liable to the ultimate consumer or user for failure to give adequate warnings. The seller's warnings must be reasonably calculated to reach such persons and the presence of an intermediate party will not in itself relieve the seller of its duty. In general, of course, a manufacturer is not liable for miscarriages in the communication process that are not attributable to his failure to warn or the adequacy of the warning. This may occur for example where some intermediate party is notified of the danger, or discovers it for himself, and proceeds deliberately to ignore it and to pass the product on without a warning." Id. at 1091, 92.

Thus, it is clear that in the situation where the product is changed in form or repackaged, the manufacturer can discharge its duty to the employees of its purchasers if it provides an adequate warning to that purchaser.

The question then remains--What is an "adequate warning" in this situation? Here again Borel is instructive.

The court in Borel indicates that in evaluating the adequacy of a warning, a manufacturer is held to the knowledge and skill of an expert in determining whether it knew or should have known of the danger involved and whether it was negligent in failing to communicate this superior knowledge. This status as an expert means that, at a minimum, the manufacturer must keep abreast of scientific knowledge, discoveries, and advances, and is presumed to know what is imparted by such, and he is under the further duty to test and inspect his product so that it will not be made available to the public without the disclosure of those dangers which the application of reasonable foresight would reveal. Id. at 1089, 90.

Further, in Borel, the court considered the factual question as to the adequacy of a particular warning. On a motion for rehearing, three of the defendants alleged that they had in fact provided the plaintiff with the warnings required by affixing certain labels to the packages of asbestos which were handled by Mr. Borel. The labels read essentially as follows:

"This product contains asbestos fiber. Inhalation of this asbestos in excessive quantities over long periods of time may be harmful.

"If dust is created when this product is handled, avoid breathing the dust.

"If adequate ventilation control is not possible, wear respirators approved by the U. S. Bureau of Mines."

The court had the following to say concerning the adequacy of this warning:

"It should be noted that none of these so-called 'cautions' intimated the gravity of the risk: The danger of a fatal illness caused by asbestosis and mesothelioma or other cancers. The mild suggestion that inhalation of asbestos in excessive quantities over a long period of time 'may be harmful' conveys no idea of the extent of the danger. The admonition that the workers should 'avoid breathing the dust' is black humor: There is no way for insulation workers to avoid breathing asbestos dust. As for wearing respirators if adequate ventilation control is not possible, Borel and other insulators never worked in any place where there was adequate ventilation and respirators were ineffective....." Id. at 1104.

Based upon these considerations and a general review of the cases, I suggest that the following guidelines may be established with regard to the responsibility of a manufacturer to employees of its customers (in addition to the responsibility not to act in a negligent manner and the responsibility to provide the customer with products which are free of defects in design or manufacture):

- (1) The purchaser of a product which is inherently hazardous should always be warned of the hazards.
- (2) The warning should contain two basic parts. First, it must identify with particularity the nature of the risk involved in its use so that the user will be able to determine whether he wants to take the risk, and, second, it must provide the user with the information needed to allow him to use the product in the safest manner reasonably possible. The warning must be specific; it cannot rely on inference.
- (3) The information in the warning must be based on the latest scientific knowledge, discoveries, and advances and must be based upon the manufacturers own tests and inspections.
- (4) The warning must be communicated to the purchaser.
- (5) The warning must continually be updated.