IADC Committee Newsletter

PRODUCT LIABILITY

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In this newsletter the authors compare two cases in which courts reach different conclusions as to whether providing clothing is a good or service for purposes of products liability actions. They also comment on the best way to focus the court's attention depending on the desired outcome in a hybrid case involving a good and a service.

The Shirt Off My Back: Using the Relationship Between a Product and a Service to Your Advantage

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ABOUT THE COMMITTEE

The Product Liability Committee serves all members who defend manufacturers, product sellers and product designers. Committee members publish newsletters and *Journal* articles and present educational seminars for the IADC membership at large and mini-seminars for the committee membership. Opportunities for networking and business referral are plentiful. With one listserv message post, members can obtain information on experts from the entire Committee membership.

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I. Introduction

Products liability statutes generally require that a plaintiff prove she was harmed by a defective or unreasonably dangerous product that was put into the stream of commerce by a defendant, typically the manufacturer or seller of the product. Determining which cases fall within the scope of strict products liability, however, is anything but simple: courts have long struggled with hybrid fact scenarios that involve both a product and a service. Moreover, because state products liability laws tend to be restrictive, finding a way to avoid them—or to fall within their purview, depending on the client—is an important threshold question for attorneys litigating products liability cases.

Take the case of a piece of clothing: supplying defective clothing and thereby causing a customer to be harmed may seem like a cut-and-dry case within the strict products liability scheme. However, just weeks ago a federal judge in Indiana issued an opinion that demonstrates how fluid—and unpredictable—products liability law can be. This article summarizes the holding of the recent Indiana case and compares it to an older, conflicting case from the Texas Court of Appeals. When read together, these cases demonstrate the different tactics attorneys can use to advocate for their clients, depending on whether strict products liability works for or against them.

II. The Law

In 1981 the Texas Court of Appeals decided *Thomas v. St. Joseph Hospital et al.*, 618 S.W.2d 791 (Tex. Ct. App. 1981). The plaintiff in *Thomas* was the surviving spouse of Burrell Thomas, who died after suffering burns over a substantial portion of his body when he dropped a lighted match and ignited his hospital gown. *Id.* at 793. The trial judge refused to submit to the jury the plaintiff's strict liability theory as to the hospital, and the plaintiff appealed. *Id.* The hospital contended that it was not liable under the doctrine of strict products liability because its business was the provision of health care, not the sale of hospital gowns. *Id.* at 795. The plaintiff argued, however, that her case fell under products liability law, as her specific complaint was a defective hospital gown, not the provision of medical services, and because "the supplying of the gown is not necessarily involved in or related to the professional services rendered by the hospital." *Id.* at 796.

The court noted that the hospital furnished the gown to Mr. Thomas; the cost of the gown was considered in determining overhead expenses; and some overhead expenses were reflected in the room bill, but it was not clear which items were included in the room rate. *Id.* The court observed, however, that hospitals are not ordinarily engaged in selling the products or equipment used in its primary function: the provision of medical services. *Id.* Despite this fact, the court held that where a hospital "apparently supplies a product unrelated to the essential professional relationship . . . it cannot be said that as a matter of law the hospital did not introduce the harmful product into the stream of commerce." *Id.* at 796-97.

On October 11, 2012, the United States District Court for the Northern District of Indiana reached the opposite conclusion in *Hathaway v. Cintas Corporate Services, Inc.*, 2012 WL 4857828, at *1 (N.D. Ind. Oct. 11, 2012). The plaintiff, Rex Hathaway ("Hathaway"), was employed as a welder/plasma torch operator for a company known as Quik Cut, Inc. ("Quick Cut"). *Id.* at *1. Quik Cut had a uniform rental agreement

with defendant Cintas Corporate Services, Inc. ("Cintas"), under which Cintas would provide Quik Cut employees with work clothes as well as laundering and repair services for those work clothes. *Id.* On February 12, 2009, Hathaway was operating a plasma cutter that emitted sparks when used to cut metal; Hathaway was wearing a 100% cotton shirt provided to Quik Cut by Cintas. *Id.* While Hathaway was using the plasma cutter, sparks from the plasma cutter caused Hathaway's shirt to catch fire, resulting in "serious burns to a substantial portion of his body." *Id.*

Hathaway brought suit against Cintas for breach of warranty and products liability. *Id.* However, Hathaway also brought suit for negligence, arguing that even if his products liability claims should not survive, "the case should move forward because the [Indiana Products Liability Act] does not govern [the] negligence claim, as that claim is not subsumed by the IPLA because the relationship between Cintas and Quik Cut was primarily a service relationship, with goods only incidentally involved." *Id.* at *8. Cintas moved for summary judgment on all three counts, and the district court considered the motion. *Id.* at *1. On the negligence count, the issue before the court was whether the relationship between Quik Cut and Cintas was primarily about providing a product or a service. *Id.* at *8.

Cintas argued that "the relationship was clearly for the provision of a product," as the laundering service was something the customers could use if they desired, but were not required to use. *Id.* at *10. The court observed, however, that the evidence did not indicate that employees of Quik Cut could launder their own clothes. *Id.* In fact, the rental agreement between Quik Cut and Cintas provided that "All garments will be cleaned and maintained by Company." *Id.* The court found the evidence persuasive that Cintas used an "extensive process" after Quik Cut returned the clothes each week. The court held that Cintas was not entitled to summary judgment on the negligence count, finding that "the service aspect of the relationship between Quik Cut and Cintas was not incidental. It made up a substantial portion of the relationship." *Id.*

III. Using the Cases: Focus on the Relationship

The *Thomas* and *Hathaway* cases provide two different routes for litigating potential products liability cases, and there are many reasons why a plaintiff or defendant might want to fall within or avoid the products liability statutory scheme. On one hand, strict liability is liability without fault: plaintiffs have to prove the product is defective and unreasonably dangerous, but there is no burden of proving fault on the part of the manufacturer or seller. On the other hand, depending on the circumstances, it might be easier for a plaintiff to prove a defendant breached the duty of reasonable care with regard to its behavior than it is to provide expert testimony about the defective nature of a product. In negligence actions, sellers and manufacturers may have the advantage of certain defenses not available in products liability, such as contributory negligence. Also, products liability statutes often carry different damages caps and statutes of limitations, depending on the state.

Depending on which scheme is more favorable to your client, the *Thomas* and *Hathaway* cases provide unique ways to take advantage of or avoid products liability statutes. For example, it seems counterintuitive to argue that a hospital is in the business of providing anything but medical services. In fact, medical providers are most often ruled to be providers of

services, not products. *See, e.g.*, *In re Breast Implant Prod. Liab. Litig.*, 503 S.E.2d 445 (S.C. 1998) (health care providers who use products in the course of treatment are providing services for purposes of products liability); *San Diego Hosp. Ass'n v. Superior Court*, 30 Cal. App. 4th 8 (Cal. Ct. App. 1994) (holding hospital rendered service to physicians and patients and was not in the business of selling products). However, the plaintiff in *Thomas* distinguished her case by arguing that her claim had nothing to do with the professional services provided by the hospital, and that the hospital gown in question was not necessarily involved or related to the provision of medical care. This in conjunction with the fact that the hospital gown was considered in determining the amount of overhead was enough to convince the court to submit the question of products liability to a jury. In contrast, while the provision of a product—clothing—in *Hathaway* would appear to be the primary nature of the transaction, the court was convinced the service aspect of the relationship (the laundering of the clothing) was so intertwined with the provision of a product that a jury was entitled to hear the plaintiff's negligence claim.

Bottom line? In hybrid cases, whether you are looking to avoid products liability entirely or ensure your case stays within the statutory scheme, focus on the relationship between the product and service in question.

IV. Conclusion

The recently-decided *Hathaway v. Cintas Corporate Services* case provides a unique way for litigants to avoid products liability statutes and signals a departure from previously-decided cases, such as *Thomas v. St. Joseph Hospital et al.* Both cases, however, demonstrate how litigants can use the relationship between products and services to circumvent or take advantage of products liability law.

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