If it is Broke, Fix it

By Reg P. Wydeven
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When I was 12, I got a Star Wars kite for my birthday. On a particularly blustery autumn day, I unfurled it and flew it in our yard. Because it was so windy, the kite took off like a rocket and the string abruptly snapped. It flew over the river and was never seen again.

As an aspiring lawyer, I claimed the kite string was defective and wanted to pursue a product liability claim.

Product liability involves holding the manufacturers or sellers responsible for placing defective products into the hands of consumers. While the U.S. Consumer Product Safety Commission develops safety standards for consumer products and tests those that receive complaints, there are no federal rules governing product liability – each state has its own set of laws.

Products are typically found to be defective in one of three ways: (a) by design (using thin thread to fly a huge kite); (b) by manufacture (the hose for the brake fluid in a car was never attached); or (c) marketing defects (improper labeling, insufficient instructions, or inadequate safety warnings).

If a product is found to be defective and causes an injury, any party in the product's chain of distribution could be held liable, including the manufacturer of the product or any of its individual components, the assembler, the wholesaler or the retailer.

A common defense in product liability cases is that the injured party altered the product, such as taking the guard off a chainsaw. Another defense is that the plaintiff failed to sufficiently identify the supplier of the product that allegedly caused the injury. For a cartoon example of this defense, Wile E. Coyote cannot sue all "anvil manufacturers" – he needs to sue ACME.

There's an exception to this rule, known as the "market share liability" exception, which applies in cases involving certain consumer products, including some cases involving defective medications. Here, if a plaintiff cannot identify which pharmaceutical company supplied a particular drug she took, each manufacturer will be held liable according to its percentage of sales in the area where the injury occurred. This exception is not recognized in Wisconsin, however.

While market share liability has also been rejected in Illinois, Wendy Dolin still prevailed in her lawsuit against the pharmaceutical company GlaxoSmithKline. The company makes Paxil, the name brand of the drug paroxetine. Her husband, Stewart, was prescribed a generic form of paroxetine for depression and anxiety. On July 15, 2010, the corporate attorney stepped in front of a train and died at the age of 57.

Claiming a marketing defect, Wendy originally sued the manufacturer of the generic drug and its distributor for negligence and wrongful death, claiming the label didn't adequately warn about the suicide risk for those over the age of 25. U.S. District Judge James Zagel, however, released them from the suit, claiming they had no control of the drug's label.

The jury ruled in favor of Wendy and awarded her a $3 million judgment against GlaxoSmithKline, holding that the company was responsible because the generic is identical to Paxil and has the same labeling.

In a statement, officials from the company indicated they plan to appeal, saying, "GSK maintains that because it did not manufacture or market the medicine ingested by Mr. Dolin, it should not be liable." The statement went on to say that, "additionally, the Paxil label provided complete and adequate warnings during the time period relevant to this lawsuit."

Ms. Dolin is hoping GSK does not kite her $3 million check.

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