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Court Finds No Manufacturer Liability in Child's Death

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By Bryan M. Sims

In *Todd v. Societe BIC, S.A.*, 21 F.3d 1402 (7th Cir. 1994), the Seventh U.S. Circuit Court of Appeals held that a disposable lighter manufactured by Bic Corporation (Bic) was not unreasonably dangerous as to require imposing strict liability upon its manufacturer. It further held that for product liability analysis, Illinois law dictates the use of the consumer contemplation test, which examines the expectation of the "ordinary consumer." In so ruling, the court narrowed the scope of liability for a manufacturer by eliminating the use of the risk utility test in cases where the product design is simple and the danger obvious.

Fire claims a child's life

In March 1988, Cori Smith, age four, obtained a lighter belonging to one of the adult smokers in a home shared by the Smith and Todd families. Although Cori started a small fire in her parents' bedroom, the flames were extinguished before any damage was sustained.

Following this incident, the adults in the household warned Cori, as well as the other five children in the house, about the dangers of playing with matches and lighters. However, on the morning of March 27, 1988, Cori found a Bic lighter on a table in the living room. She set fire to some papers which were on the floor of the bedroom where twenty–two month old Tiffany Todd slept. The adults, who had been asleep, did not awaken in time to prevent the fire from spreading. Tiffany died in the blaze.

Rodney Todd, Sr., Tiffany's father and administrator of her estate, brought suit against Bic in a diversity action in the U.S. District Court for the Northern District of Illinois. In his complaint, Todd alleged that Bic was negligent and strictly liable for selling a defective product. He claimed that the lighter was unreasonably dangerous because it lacked a child–resistant feature and failed to provide adequate warning of potential dangers. The disputed warning read "KEEP OUT OF THE REACH OF CHILDREN."

The District Court granted summary judgment for Bic. It found that the lighter was not defective because it provided the small flame it was intended to provide. Moreover, the court held that the manufacturer's warning was adequate. It also dismissed Todd's public policy arguments for holding Bic strictly liable, stating that "public policy only requires holding manufacturers and sellers liable if their product is found to be defective or unreasonably dangerous." Todd subsequently appealed to the U.S. Circuit Court of Appeals.

On review, a divided appellate panel reversed the District Court's grant of summary judgment for the defendant. The full circuit court subsequently vacated that order, reheard the case *en banc*, and unanimously agreed that the warning on the lighter was adequate. Additionally, it also certified two questions of state law to the Illinois Supreme Court: (1) whether the court must consider the "foreseeable user" under the consumer contemplation test; and (2) whether the risk–utility test was applicable. However, the Illinois Supreme Court declined certification. In light of the Illinois court's silence, the Seventh Circuit looked to other persuasive authority to properly interpret Illinois law on these issues.

Lighters not too dangerous

On appeal, Todd first contended that Bic was strictly liable for damages because the lighter it manufactured was unreasonably dangerous under the consumer contemplation test. According to the consumer contemplation test, a product is unreasonably dangerous if it is dangerous beyond that which is contemplated by the ordinary consumer. If the product is used properly and it fails to perform in its expected manner, a manufacturer may be held strictly liable for the resulting injuries.

After its review, the Seventh Circuit held that the disputed lighter performed exactly as expected. The court noted that the ordinary consumer would anticipate that, when used correctly, the Bic lighter would produce a small flame. Additionally, the ordinary consumer would predict that when the small flame is placed in contact with a combustible material, such as paper, a larger flame would be produced. The court concluded that while a lighter may be dangerous because it can start a fire, it is not dangerous to the extent of being unreasonable. Therefore, the Circuit Court held that since the lighter performed in a manner consistent with the expectation of the ordinary consumer, it was not unreasonably dangerous and Bic was not strictly liable.

Todd next argued that the consumer contemplation test should consider the expectation of the foreseeable user, instead of only the ordinary consumer. For purposes of the appeal, Bic had conceded that children were foreseeable users of its lighter. Therefore, Todd contended that the court improperly granted summary judgment because it failed to include children in its consumer contemplation test analysis.

Turning to this issue, the Circuit Court declared that Illinois law clearly indicates that the applicable standard in the consumer contemplation test is the expectation of the ordinary consumer. The Seventh Circuit reasoned that children, unlike ordinary consumers, do not possess the knowledge common to the community, and as a result, their expectations are inappropriate for consideration in the consumer contemplation test. In addition, the court warned that allowing such a standard would result in absolute liability for manufacturers because children do not perceive the dangers that are inherent in every product. For these reasons, the court concluded that it is inappropriate to consider the expectations of the foreseeable user in the consumer contemplation test.

Test not always applicable

Todd then argued that the district court's failure to consider the risk–utility test, in addition to the consumer contemplation test, mandated reversal of the summary judgment. He insisted that the lighter might be unreasonably dangerous under either test. Under the risk–utility test, a product is unreasonably dangerous, even when it meets consumer expectations, if: (1) the defective design is excessively dangerous and preventable; and (2) the risk of danger in the design outweighs the benefits.

The Seventh Circuit observed that, in certain cases, the Illinois Supreme Court has adopted the risk–utility test. However, in such situations, the product in controversy was complex and the risk it presented was not obvious. In the case at hand, it found the lighter was a simple and obviously dangerous product. The Circuit Court held that the risk–utility test would not apply to a simple but obviously dangerous product because it was unlikely that the Illinois Supreme Court would apply the test to such a product.

The Circuit Court then addressed two final issues: (1) whether the warning was adequate; and (2) whether the manufacturer was negligent. It affirmed the District Court's holding that the warning was adequate. The court also found that Bic was not negligent because the product was not unreasonably dangerous. Therefore, Bic did not breach its duty to produce a reasonably safe product. In so finding, the Circuit Court concluded that an ordinary disposable cigarette lighter is not unreasonably dangerous so as to warrant holding its manufacturer negligent or strictly liable.

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Fair Debt Collection Practices Act awards limited

By Judith Gorske

In *Wright v. Finance Serv. of Norwalk, Inc.*, 22 F.3d 647 (6th Cir. 1994), the Sixth U.S. Circuit Court of Appeals held that the executor of a decedent's estate had standing to sue a debt collection agency under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692 to 1692*o*, for violations involving letters sent by the agency to the decedent. The court also held that Section 1692k(a)(2)(A) of the FDCPA limits additional damages to $1,000 per proceeding.

Gladys Finch died in October,1989. After her death, Finance Service of Norwalk (Finance Service), a debt–collection agency, sent Finch 14 letters attempting to collect $112 for an allegedly overdue medical bill. Betty Wright, acting as executor for the estate, notified Finance Service of Finch's death. The agency then discontinued its correspondence.

Wright then filed a complaint against Finance Service in the U.S. District Court for the Northern District of Ohio, alleging a total of 30 FDCPA violations contained within the 14 letters Finance Service had sent Finch. Subsequently, both parties moved for partial summary judgment. Wright sought partial summary judgment on the issue of the 30 alleged FDCPA violations. Finance Service moved for partial summary judgment on the issue of Wright's standing to bring suit on Finch's behalf. In addition, Finance Service sought a ruling *in limine* limiting Wright's recovery to $1,000 for damages in excess of actual losses, costs, and fees.

In ruling on the motions, the District Court partially granted Wright's motion for summary judgment, finding Finance Service liable for 14 FDCPA violations. It denied Finance Service's motion for summary judgment on the issue of Wright's standing, allowing her to bring suit on behalf of Finch's estate. Finally, the court granted Finance Service's motion *in limine*, and limited additional damages to $1,000 per proceeding.

Wright appealed the District Court's decision limiting her damages to the Sixth U.S. Circuit Court of Appeals, contending that she was entitled to collect $1,000 for each separate FDCPA violation. Finance Service, in turn, cross–appealed the district court's determination that Wright had standing to bring the suit. A divided panel of the appellate court affirmed Wright's standing to bring suit on behalf of the decedent's estate, but reversed the lower court's decision limiting additional damages. The panel's decision was vacated and a rehearing *en banc* was granted by order.

Executor may sue debt collection agency

The Sixth Circuit initially addressed the issue of whether Wright had standing to bring suit on behalf of Finch's estate. In its analysis, the court turned to the statutory language in question. Specifically, it focused on 15 U.S.C. § 1692k(a), which provides that "any debt collector who fails to comply with any provision...with respect to any person is liable to such person." The Circuit Court determined that the phrase "with respect to any person" included persons such as Wright, who "stand in the shoes of the debtor." Moreover, the court noted that 15 U.S.C. § 1692k(e) prohibited a debt collector from using "any false, deceptive, or misleading misrepresentation...in connection with the collection of any debt." It recognized that this provision could be violated even if a debt collection practice did not offend the alleged debtor herself. Taking the plain language of the FDCPA, together with its stated purpose and legislative history, the Sixth Circuit affirmed the District Court's ruling on the issue of standing. In so doing, it held that Wright, as the executor of the estate, was entitled to bring suit for the FDCPA violations.

Additional damages limited to $1,000

The Circuit Court then turned its attention to the issue of whether additional damages should be limited to $1,000 per proceeding rather than per violation. It first examined the language of 15 U.S.C. §1692k(a)(2)(A), which states that additional damages may not exceed $1,000 "in the case of any action by any individual." The court found nothing in the plain statutory language, legislative history, or other sections of the FDCPA to suggest that Congress intended to limit additional damages to $1,000 per violation rather than per proceeding.

Furthermore, the Sixth Circuit noted that Section 1692k(a)(2)(A) required the court to consider the frequency and persistence of noncompliance in any action. According to the court, this requirement reflected Congress' anticipation of repeated violations as the subject of a single action or proceeding. The Circuit Court also found support for this statutory interpretation in Section 1692k(a)(2)(B), which limits the amount of additional damages in class actions to "the lesser of $500,000 or 1 per centum of the net worth of the debt collector." In conclusion, the court declared that it would be incongruous to provide a limitation on class actions without a corresponding cap on individual recovery of damages. The discrepancy would permit an individual plaintiff to "recover more in damages than a similarly situated plaintiff representing a class of claimants."

Although limiting a plaintiff's additional damages to $1,000 per proceeding, rather than per violation, appears to minimize the statute's deterrent value in preventing debt collection abuses, the court observed that other provisions in the statute acted as sufficient deterrence. For example, provisions such as Sections 1692(a)(1) and 1692(a)(3)allow a plaintiff to recover actual damages, court costs, and attorney's fees in their entirety. Accordingly, the Sixth Circuit held that Wright's recovery for additional damages was limited to $1,000 per proceeding, rather than $1,000 per violation.

Disagreement over entitlement to sue

Judge Kennedy delivered a separate opinion. While he concurred with the decision limiting recovery for