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Consumer Demand and Product Utility Weigh in Product Liability Action Based on Defective Product Theory

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tive if they are open to more than one reasonable interpretation, one of which is inaccurate.

In formulating and applying the standard, the courts have been careful to preserve the concept of reasonableness in the debtor's interpretation of a collection notice. By rejecting unreasonable interpretations, the courts have ensured that the "least sophisticated consumer" standard meets its dual purposes of ensuring the protection of all consumers, while also protecting debt collectors from unwarranted liabilities.

Jackson Challenges the Inaccuracies of the Collection Letters

In challenging the district court's finding that the collection letters violated FDCPA Section 1692e(3), Jackson initially argued that the letters' "overstatement" of the degree of his involvement in the collection process did not violate the subsection or any other provision of the statute because he was an attorney and the letters were actually from him. However, the Second Circuit rejected this argument by recognizing the broad scope of Section 1692e and noting the possibility of upholding the lower court's decision even if the facts of the case failed to establish a violation of a specific subsection of the statute. Consequently, the court found that the district court properly concluded that the collection notices specifically violated Section 1692e(3), as well as Section 1692e(10).

Initially, the court found that NCB's use of Jackson's letterhead and facsimile signature on the letters was sufficient to convince the "least sophisticated consumer" that she was in direct contact with an attorney, when actually she was not. Accordingly, the court found the letters to be false and misleading in violation of Section 1692e(3).

Furthermore, the court found the "least sophisticated consumer" would believe that Jackson was personally involved in her case because of the letter's language. Because Jackson was not involved in the daily operations of the debt collection process, the court held that he had violated Section

1692e(10) which prohibited "the use of any false representation or deceptive means to collect" a debt from a consumer.

Finally, despite recognizing the need for mass mailings in the debt collection industry, the Second Circuit reiterated the necessity for mass mailings to conform to FDCPA mandates. The court noted that most mass mailings containing facsimiles of an attorney's signature would violate Section 1692e if the attorney was not directly involved in the collection of an individual's debt.

Unintentional Acts, Good Faith, and the Award of "Additional Damages"

Jackson also objected to the lower court's award of \$1,000 of "additional damages" to Clomon by arguing that the award was an abuse of the district court's discretion. In support of his challenge, Jackson argued that his non-compliance with Section 1692e was unintentional and in "good faith." Moreover, Jackson contended that he approved of the collection letters in reliance upon the "authoritative interpretations" of the Federal Trade Commission (FTC) and the district court's decision in *Howe v. Reader's Digest Ass'n, Inc.*, 686 F. Supp. 461 (S.D.N.Y. 1988). However, the Second Circuit found Jackson's arguments unpersuasive.

Initially, the court rejected Jackson's "good faith" argument by pointing to the language of FDCPA Section 1692e which clearly banned the type of letter that Jackson had authorized for NCB's use. The court also found that the FTC's receipt of the letters without disapproving of their content was not evidence of the FTC's authoritative interpretation and approval of the letters. Despite acknowledging that Publishers sent copies of Jackson's letters to the FTC as part of an unrelated investigation of Publisher's compliance with the FDCPA, the court placed weight on Jackson's admission during a deposition that the FTC routinely received copies of collection letters without evaluating the lawfulness of those letters. Consequently, the court admon-

ished Jackson for his claimed ignorance of the well-established practices of the FTC.

Finally, the Second Circuit rejected Jackson's interpretation of *Howe*. Although the Second Circuit recognized the *Howe* court's holding that a debt collector could rely on creditor's records in determining whether to send collection letters, the court found that nothing in the *Howe* decision released an attorney from making a determination about a debtor's account prior to sending a collection letter bearing the attorney's signature. The Second Circuit concluded that *Howe* did not release any debt collector from the requirements of FDCPA Section 1692e. ♦

Brian K. Wydajewski

Consumer Demand and Product Utility Weigh In Product Liability Action Based On Defective Product Theory

In *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496 (8th Cir. 1993), the United States Court of Appeals for the Eighth Circuit held that in order for a plaintiff to recover punitive damages, he must show that a defendant's conduct was outrageous or indifferent to consumer safety. The court also found that in a strict liability case, the jury should make the ultimate determination as to whether a product is unreasonably dangerous. Furthermore, a defendant is entitled to a jury instruction on the defense of contributory fault if the defendant shows that the plaintiff had general knowledge that the product presented a risk of causing the injury in question. Finally, the court concluded that to admit evidence of other accidents at trial, the facts and circumstances of the other accidents must be substantially similar to the current case facts.

Recent Cases

The Bostitch Contact Trip Pneumatic Nailer

The pneumatic nailer manufactured by Stanley-Bostitch, Inc. (Bostitch) is a hand-held tool that operates by using the force of compressed air to drive nails into material. The contact trip is a spring-like part of the device located at the tip of the instrument which discharges a nail when pressed upon a surface. A contact trip pneumatic nailer releases a nail only if the trigger is pulled and the trip comes into contact with another surface. It does not matter which one of these two actions takes place first.

The contact trip nailer allows users to drive nails into a surface by "bump-firing," a technique which allows for insertion of several nails in a row. However, bump-firing creates the risk that a nail will discharge if the user inadvertently presses the contact trip part of the device on a surface while the trigger is pulled. The nailer may also be used for "placement firing," a process in which the user first places the tip of the nailer on the precise location for the nail, and then pulls the trigger.

Improvements for Consumer Safety

After first marketing the nailer in 1970, Bostitch became aware of injuries sustained by users when they carried the nailer with the trigger depressed and accidentally bumped another person or themselves. In order to minimize this problem, Bostitch redesigned the nailer. First, Bostitch enlarged the handle of the nailer so that the user could grip it without having to touch the trigger. Later, Bostitch changed the nailer from a contact trip to a "sequential trip" nailer operating by placement firing only. The redesigned nailer eliminated a user's ability to bump-fire and, as a result, decreased the risk that an inattentive user would accidentally release a nail.

After discontinuing sales of the contact trip nailer, Bostitch became aware that numerous consumers were modifying the sequential trip to make it a contact trip. Bostitch then marketed a conversion kit to ensure that injuries

would not result from improper consumer modification. After realizing that conversion kit sales were higher than sales of sequential trip nailers, Bostitch resumed selling the contact trip nailer in addition to the sequential trip nailer.

Injury Results From Use of a Bostitch Contact Trip Nailer

In May 1987, Leonard Drabik and Charles Daniels were constructing a shed. Drabik's head accidentally bumped the tip of the Bostitch contact trip pneumatic nailer held by Daniels. The impact caused the nailer to discharge, driving a nail into Drabik's brain.

Drabik sued Bostitch in the United States District Court for the Western District of Missouri in a products liability diversity action. A jury awarded Drabik \$1.5 million in actual damages and \$7.5 million in punitive damages. Bostitch appealed this decision to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit vacated the jury's award and remanded the case for a new trial on the issues of liability and compensatory damages.

Punitive Damages Require Finding of Indifference To Safety

On appeal, Bostitch contended that it was entitled to a judgment as a matter of law on the issue of punitive damages. The Eighth Circuit agreed, concluding that a punitive damage award against Bostitch was unwarranted. The court stated that to receive punitive damages under Missouri law, a plaintiff must prove the following: (1) the defendant knowingly placed an unreasonable product in commerce; (2) the defendant showed complete indifference to the safety of others; and (3) the defendant acted outrageously or wantonly.

The Eighth Circuit held that Bostitch's actions in relation to the contact trip nailer were not indifferent or outrageous. The court relied on evidence showing that Bostitch, upon receiving information about the problems with the contact trip nailers, immediately took steps to make the tool safer for consumers. These steps included

redesigning the nailer and providing specific warnings in the operation manual and on the product itself.

The court also considered Bostitch's analysis of the risks associated with the contact trip nailer compared to the utility and advantages of the product. Bostitch's investigations showed that accidental discharges of nails were rare compared to the consumer demand for a nailer with "bump-firing" capability.

Furthermore, the contact trip design remained the industry standard for pneumatic nailers during the time *Drabik* was litigated. Bostitch's compliance with this standard served to negate the element of conscious disregard. The court noted that consumer demand cannot make a dangerous product safe, but determined that an award of damages requires complete indifference to the safety of others. Absent a finding of indifference and in light of Bostitch's efforts to improve product safety, the Eighth Circuit found that Bostitch was entitled to a judgment as a matter of law on the issue of punitive damages.

Jury Determines What Is Unreasonably Dangerous In Products Liability Case

In order to sustain a strict liability claim against a manufacturer, a plaintiff must show that the manufacturer sold a product in a defective condition which was unreasonably dangerous to the user or consumer. Bostitch argued that the court should adopt the consumer expectation test set forth in Section 402A of the Restatement (Second) of the Law of Torts to define what is unreasonably dangerous in a strict liability case.

Under the consumer expectation test, a product is unreasonably dangerous if it is in a condition not contemplated by the consumer, or if it is unreasonably dangerous to an extent not expected by the ordinary consumer with ordinary knowledge. Bostitch argued that it was entitled to a judgment as a matter of law on this issue because Drabik and Daniels were well aware of the risk of accidental discharge and the product was not unreasonably dangerous beyond their contemplation.

The Eighth Circuit concluded, however, that the consumer expectation test is not the clear standard for determining what is unreasonably dangerous under Missouri law. The court followed the precedent of the Missouri Supreme Court which has been reluctant to establish a strict definition for the term "unreasonably dangerous." Noting that the instruction which was given to the jury contained a broadly worded definition of unreasonably dangerous, the court concluded that the instruction was fair to both sides. The court found, therefore, that the jury was properly allowed to make the ultimate determination of whether the contact trip nailer was unreasonably dangerous.

Contributory Fault Defense Requires a Plaintiff's General Knowledge

Bostitch further argued that it should have received its requested jury instruction on the contributory fault defense. Contributory fault is a complete defense to a strict product liability action in Missouri. In order to assert such a defense, the defendant is required to prove that the plaintiff knew of the danger associated with his actions, and voluntarily and unreasonably exposed himself to a known risk. The defendant must also show that the plaintiff's conduct caused or contributed to the damage sustained. Bostitch maintained that it proved these elements based on the testimony and circumstances of the accident.

The Eighth Circuit held that Bostitch should have received the benefit of the contributory fault instruction. The court did not agree with the trial court's conclusion that Drabik had to have specific knowledge that his head was in the precise range of the nailer. Instead, the court found that a showing of Drabik's general knowledge that the product posed a significant risk of causing the accident in question was sufficient to warrant the instruction. The court found that Bostitch proved Drabik had general knowledge of the risk of accidental discharge when using a contact trip nailer. The court concluded that testi-

mony concerning Drabik's knowledge of the product created a jury question as to whether Drabik voluntarily and unreasonably accepted the risk which resulted from his actions.

Evidence of Other Injuries Must Be Substantially Similar To Evidence In Case On Trial

Finally, Bostitch contended that it was unduly prejudiced by the admission of evidence involving other injuries allegedly caused by pneumatic nailers. Drabik, however, maintained that the evidence of other injuries presented at trial was substantially similar to the accident in question and properly admitted.

The Eighth Circuit concluded that the trial court abused its discretion by admitting extensive evidence of injuries that were not substantially similar to Drabik's. This evidence prejudiced Bostitch and discredited its expert witness in the eyes of the jury. The court held that the admission of other accident evidence is limited to those events which are substantially similar to the events in the case at trial. The court determined that this limitation would ensure that trials remain focused on the accident which forms the basis of the case. ♦

Nicole Rudman

Supreme Court Strikes Ban On In-Person Solicitation By CPAs

In *Edenfield v. Fane*, 113 S.Ct. 1792 (1993), the United States Supreme Court held that a Florida ban on in-person solicitation of prospective clients by certified public accountants (CPA), Fla. Admin. Code Ann. r. 21A-24.002(2)(c)(1992), violated the First Amendment where the solicitation was for a lawful commercial transaction with truthful, non-deceptive information. The Court found that the ban did not

directly serve the state's legitimate interests of protecting consumers and maintaining CPA independence.

Building a Client Base

Respondent Scott Fane, a CPA, moved to Florida from New Jersey where in-person solicitation by CPAs was legal. Unable to effectively build a new practice using other methods of solicitation, he sued the Florida Board of Accountancy (Board), challenging the constitutionality of the state's ban on in-person solicitation. Fane asserted that the ban presented a serious obstacle to a CPA attempting to gain new clients because most businesses would be willing to rely on the CPAs already serving them.

The District Court for the Northern District of Florida granted summary judgment to Fane, enjoining enforcement of the ban as applied to CPAs soliciting clients in the business context, and the Eleventh Circuit Court of Appeals affirmed. The United States Supreme Court granted *certiorari* and affirmed the Eleventh Circuit's decision.

Court Finds State's Interests Substantial

The Court first established that in-person solicitation by CPAs constitutes commercial expression which is protected by the First Amendment. The purpose of the First Amendment in the commercial context is to safeguard broad access to complete and accurate information and to allow both the solicitor and the prospective client to openly discuss their potential relationship. The Court noted, however, that unlike private speech, commercial speech is linked inextricably with the commercial arrangement that it proposes.

Because the state's interest in the underlying transaction gave it a legitimate interest in the expression itself, the Board was required to meet only an intermediate standard of review to survive First Amendment scrutiny. The Court followed the *Central Hudson* test which required the Board to prove: 1)