E-Cigarettes - a New Frontier in Product Liability

I. Introduction

In today's world, just about everything we utilize involves technology. Laptops, cell phones, navigation systems, and artificial intelligence are changing the lives of Americans at record pace. The rapidly expanding use of the Electronic Nicotine Delivery System ("ENDS") products is no different.

Vaporizers, vape pens, hookah pens, electronic cigarettes ("E-cigs"), and e-pipes are among some of the most popular ENDS products (hereinafter collectively referred to as "E-cig" or "Vaping products") that are increasing in popularity with Americans. According to the United States Fire Administration, as of 2014 more than 2.5 million Americans reported using e-cigs. FEMA: U.S. FIRE ADMINISTRATION, ELECTRONIC CIGARETTE FIRES AND EXPLOSIONS (2014).

Providing fuel to ENDS products, and in particular, the e-cig, are lithium-ion batteries. Lithium-ion is the fastest growing and most promising battery chemistry on the market today. Lithium-ion batteries are so prevalent because they have many advantages over traditional batteries, including having a higher energy density, which allows the product it powers to operate longer between charges. This "distinct advantage," makes the battery favorable to not only the manufacturer and supplier, but the consumer as well.

As with all advancements in technology, however, there are risks involved with the use of lithium-ion batteries, which has led to a new area of litigation. This article will explore an intersection of technology and the law. In particular, the article will explore the contours of the e-cig (powered by lithium-ion batteries) and products liability law. This article will start with an overview of the current state of the law, and provide suggestions for retailers of ENDS products to help limit their liability exposure. In particular, the article will address the importance of

providing adequate warning labels, and the importance for retailers to keep track of all parties involved in the distribution chain.

II. Product Defect Law in General

Throughout America courts recognize that public policy favors holding the manufacturer of a defective product responsible for a design or manufacturing defect because the manufacturer is often best situated to inspect a product for defects, and make any necessary changes. Nevertheless, retailers/wholesalers (hereinafter "retailer") are also responsible for putting a defective product into the stream of commerce, even if they had no role in designing or manufacturing it, and thus often become the primary target of litigation. This article will address and assess the state of the law from the standpoint of the retailer.

There are several causes of action typically brought when a product that is allegedly defective injures a person. These claims are for: strict liability; negligence; and breach of warranty.

A. Strict Liability

In general, strict liability holds liable the supplier of a product sold in a defective condition that renders it unreasonably dangerous to the consumer. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965). The purpose of strict liability has been described as "ensuring that the cost of personal injuries or property damage resulting from a defective product is borne by those who put them into the channels of trade, rather than by injured persons ordinarily powerless to protect themselves. *West v. Caterpillar Tractor Co. Inc*., 336 So. 2d 80, 92 (Fla. 1976).

Strict liability is not limited to the manufacturer of a defective product. Rather, strict liability extends to any entity engaged in the business of selling a product or anyone in the "distribution chain." RESTATEMENT (SECOND) OF TORTS § 402A (1965). Typically, the

"distribution chain" begins with the manufacturer and ends with the entity that completes the sale to the consumer. *Mobley v. South Florida Beverage Corp.*, 500 So. 2d 1150 (Fla. 3d DCA 1984); and *Vandermark v. Ford Motor Co.,* 61 Cal.2d 265 (1964).

B. **Negligence**

Product defect claims brought under a negligence theory typically allege a design or manufacturing defect, or negligent failure to warn of the dangers associated with use of the product.

1. Negligent Design/Manufacture

Products must be reasonably safe for their intended use and for their reasonably foreseeable misuse. Retailers are not, however, required to sell a product that is accident proof; nor are they insurers of a product. *Perez v. Nat'l Presto Indus.,* 431 So.2d 667, 669 (Fla. 3d DCA 1983); and *Iron v. Sun Lighting, Inc*., No. M2002-00766-COA-R3-CV, 2004 WL 746823, at *5 (Tenn. Ct. App. Apr. 7, 2004).

Typically, a product is defective if it has a tendency for causing physical harm beyond that which would be contemplated by the ordinary user. While an injured consumer can bring a cause of action against a retailer for the sale of a negligently designed or manufactured product, courts have held that a retailer cannot be liable for negligent design, if that negligent design is latent, and the retailer has no actual or implied knowledge of the defect. *Carter v. Hector Supply Co.,* 128 So. 2d 390 (Fla. 1961); and *Malvaes v. Constellation Brands,* No. 14-21302-civ, 2015 WL 3874815, at *5 (S.D. Fla. June 23, 2015).

2. Negligent Failure to Warn

To succeed on a claim for negligent failure to warn, a plaintiff must prove that the defendant had the duty to warn the plaintiff, the defendant negligently breached this duty, and

the defendant's negligence was a proximate cause of the plaintiff's injuries. *Manion v. General Elec. Co*., No. 3:06cv9/MCR/MD, 2007 WL 2565979, at *2 (N.D. Fla. Aug. 31, 2007); and *Trejo v. Johnson & Johnson*, 13 Cal. App. 5th 110, 125 (2017).

Retailers involved in the distribution chain have a duty to provide sufficient warning of foreseeable risks associated with the use of a product, when those risks are known or should be known. *Advance Chemical Co. v. Harter*, 478 So.2d 444 (Fla. 1st DCA 1985); and *Vasallo v. Baxter Healthcare Corp.*, 696 N.E.2d 909, 923 (1998).

Those in the distribution chain can be held liable for either failing to provide a warning at all, or failing to provide an "adequate warning." AMERICAN LAW OF PRODUCTS LIABILITY 3d, §33:1 (Timothy E. Travers et al. eds. 1987).

Typically, the sufficiency of a warning is a question of fact for the jury. *Jackson v. Deft, Inc.,* 223 Cal. App. 3d 1305, 1320 (1990). However, in certain jurisdictions, courts may deem a warning adequate as a matter of law if it is, "accurate, clear, and unambiguous." *Thomas v. Bombardier Recreational Products*, Inc., 682 F. Supp. 2d 1297, 1300 (M.D. Fla. 2010); and *Banner v. Hoffman-La Roche Inc.,* 383 N.J. Super. 364, 382 (Super Ct. App. Div. 2006).

In deciding whether a warning is sufficient as a matter of law, courts look at whether the warning was communicated by means of positioning, lettering, coloring, and language that will convey to the typical user of average intelligence the information necessary to permit the user to avoid the risk and to use the product safely. *Manion v. General Elec Co*., No. 3:06cv9/MCR/MD, 2007 WL 2565979, at *2-4 (N.D. Fla. 2007). Legally sufficient warnings must also be unambiguous, and address the dangers from failing to use the product as intended. *Id.* Warnings are required to be "intense," so that the user appreciates the potential dangers from

use of the product. *Palvides v. Galveston Yacht Basin, Inc*., 727 F.2d 330 (5th Cir. 1984) (Tex. Law).

B. Warranty Claims

In a product liability context, plaintiffs typically bring causes of action for breach of an implied warranty of merchantability and breach of an implied warranty of fitness for a particular purpose. Generally, all warranty claims require evidence that: 1) the defendant sold the plaintiff the product; 2) the product was being used in the intended manner at the time of the injury; 3) the product was defective when transferred from the warrantor; 4) the defect caused the injury; and 5) that the buyer gave the seller notice of the defect.

1. Breach of Implied Warranty of Merchantability

In general, a "warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." *See* § 672.314, FLA. STAT.; NEV. REV. STAT. §104.2314 (2010); and OR. REV. STAT. §72.3140 (2015). Thus, within the sale of a product, the law implies an agreement that a merchant is responsible for damages caused by the product, in the event the product is not fit for its ordinary purpose, and for uses that are reasonably foreseeable. *Pulte Home Corporation, Inc. v. Ply Gem Industries, Inc.,* 804 F.Supp. 1471, 1486-88 (M.D.Fla. 1992).

2. Breach of Implied Warranty of Fitness for a Particular Purpose

At the time of sale, "when the seller has reason to know of a particular purpose for which the goods are required, and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless disclaimed, an implied warranty that the good shall be fit for such purpose." § 672.315, FLA. STAT (2017); and OR. REV. STAT. § 72.3150 (2015).

C. Typical Defenses Raised to Product Defect Claim

There are numerous defenses typically raised to product defect claims. The defenses most frequently advanced are discussed below.

1. Failure to Read a Warning/Product Misuse

If the consumer does not read the warning label, and subsequently *misuses* the product, an inadequate warning cannot be the proximate cause of the plaintiff's injuries. *Lopez v. Southern Coatings, Inc.*, 580 So. 2d 864, 865 (Fla. 3d DCA 1991); and *Nelson v. Ford Motor Co*., 150 F.3d 905, 907 (8th Cir. 1998) (applying Missouri law).

A plaintiff misuses a product when she used the product in a fashion other than that for which it is intended. Product misuse is usually not an absolute bar to a products liability claim. *Standard Havens Products, Inc. v. Benitez*, 648 So. 2d 1192, 1197 (Fla. 1994). Rather, in certain jurisdictions the product misuse is a defense that has merged into the defense of comparative fault. *Rudisaile v. Hawk Aviation, Inc.,* 592 P.2d 175 (N.M. 1979). Most jurisdictions have adopted comparative fault, where liability is assigned on a pro rata basis, however a minority of jurisdictions, such as Alabama, still use contributory negligence principles which bar a plaintiff from recovery if they have *any* percentage of fault. *McMahon v. Yamaha Motor Corp., U.S.A*., 95 So.3d 769 (Ala. 2012).

2. Substantial Modification

The defense of "substantial modification" is available to a retailer when the product is significantly or substantiality modified after it leaves the seller's control, and the substantial modification was the cause of the user's injury. RESTATEMENT (SECOND) OF TORTS § 402(A) (1965); and *Cacciola v. Selco Balers, Inc*., 127 F.Supp. 2d 175 (E.D. N.Y. Jan. 2, 2001).

3. Assumption of Risk

In general, the assumption of risk defense exists where a defendant can demonstrate that the plaintiff voluntarily and knowingly assumed the risks at issue. *See* RESTATEMENT (SECOND) OF TORTS: § 496(a) (1965).

To prevail on an assumption of risk defense, the defendant must prove that the plaintiff knew of the risk and encountered it regardless. RESTATEMENT (SECOND) OF TORTS: §496(b) (1965); and *Hammer v. Road America, Inc*., 614 F. Supp. 467, 471 (E.D. Wis. 1985). In order to assume a risk, it must be clear that the plaintiff knew or should have known that he or she was assuming the risk, and that the plaintiff voluntarily elected to expose himself to these risks. *Kaiser v. ODB Co*., No. 1:10-CV-01499, 2011 WL 3040085, at *3 (N.D. Ohio 2011); and *Jara v. Rexworks Inc.*, 718 A.2d 788, 795 (Pa. Super. Ct. 1998).

4. Disclaimers

Warranties imposed upon the seller of a product can be disclaimed. U.C.C. § 2-316. In order to disclaim a warranty for a particular purpose, the disclaimer must be in writing and conspicuous. U.C.C. § 2-316(2). If these two requirements are satisfied, general language may be used. A disclaimer of an implied warranty of merchantability does not have to be in writing; however, any disclaimer or modification must specifically mention the word "merchantability." U.C.C. § 2-316(2). If the disclaimer is in writing, it must be conspicuous. *Id.*

Typically, a seller may extricate himself from liability by including in the agreement for sale that the buyer takes the goods "as is," or "with all faults." U.C.C. § 2-316(3)(a). The seller may also include other language, which in common understanding calls the buyers attention to the exclusion of warranties and makes plain that there is no implied warranty. *Id.*

To be effective, a disclaimer must become the basis of the bargain. *Knipp v. Weinbaum*, 351 So. 2d 1081, 1085 (Fla. 3d DCA 1997). To become the basis of the bargain, a warranty must

be conveyed to the user at the time of sale. *Dorman v. International Harvester Co*., 46 Cal. App. 3d 11, 19 (2d Dist. 1975).

III. Suggested Practices for Retailers to Minimize Liability

It is unlikely that a retailer will have the means or time to inspect each product that it sells. However, because retailers can be liable for a defect in a product they sell even if the defect was unknown, retailers should consider the following steps as part of a comprehensive plan to help reduce their liability exposure.

A. Importance of Warning Labels

Warning labels tell a user what to do, and what not to do. Therefore, in a products defect case, they are the first line of defense.

Typically, a manufacturer is tasked with creating an adequate warning label. However, due to the fact that a retailer can be held similarly liable for injury caused by a defective product, a prudent retailer should ensure that each of the e-cig products it sells contain adequate warnings of the product's potential dangers, and the proper way to use the product.

In order for a product's warning to be considered adequate, it must covey to those who might use the product a "fair and adequate warning of its dangerous potentialities to the end that the user, by the exercise of reasonable care on his own, shall have a fair and adequate notice of the possible consequences of use, or even misuse." *Manion v. General Elec. Co.*, No. 3:06cv0/MCR/MD., 2007 WL 2565979, at *2 (N.D. Fla. Aug. 31, 2007). There are no universally applicable warnings used for e-cigs. Nevertheless, when attempting to prepare an adequate warning a retailer must consider: the location of the warning; and the content and presentation of the warning.

1. Location of Warnings

Typically, to be effective, warnings should be located on the actual product, and in close proximity to the area the user is being warned about. David G. Owen, PRODUCTS LIABILITY LAW 580 (Thomson West, 2d ed. 2008). Therefore, to the extent *feasible*, the warning label should be placed on the product itself. *Id.* However, some devices, such as the e-cig, and its lithium-ion battery, are too small to have an effective warning placed directly on the product. When a product is too small to have a warning placed directly on it, a retailer can sufficiently warn by conspicuously placing the warning in documents or items accompanying the product, such as, in the products manual or pamphlet, or on the products carton. *See e.g., Broussard v. Continental Oil Co*., 433 So. 2d 354 (La. App. 1983).

For example, in *Broussard v. Continental Oil Co*., 433 So. 2d 354 (La. App. 1983), the manufacturer of a power drill was not at fault for failure to adequately warn where the manufacturer, through a general caution label on the drill, directed users to consult the owner's manual for the necessary warning instructions. Contrary to the plaintiff's argument that the warning label should have been on the product itself, the court held that because the size of the drill and the number of warnings required, the manufacturer did the most practical and effective thing it could do by placing a label on the product directing the user to the warning labels within the manual that was in the product's packaging. *Broussard,* 433 So.2d at 358.

Similarly, in *Manion v. General Elec. Co*., No. 3:06cv9/MCR/MD, 2007 WL 2565979, at *2-5 (N.D. Fla. 2007), the court found that placing the warnings in documents accompanying the product, such as in the instruction pamphlet and the owners manual, was adequate as a matter of law. *Manion,* 2007 WL 2565979 at *5; *see also Pinchiant v. Graco Chidren's Products, Inc.,* 390 F. Supp. 2d 1141, 1147 (M.D. Fla. Apr. 7, 2005)(Defendant was entitled to summary

judgment, where in part, the warnings in the owner's manual were "prominently placed at the beginning of the owner's manual.").

Therefore, as the case law suggests, a retailer can still meet its conspicuity requirement by placing the requisite warning labels on an item other than the e-cig, or the lithium-ion battery.

2. Context and Presentation of Warning

Equally important to determining the best and most practical location to place warning labels is the content and presentation of the warning given. In order for a warning to be effective as a matter of law it must be "clear, accurate, and unambiguous." *Thomas v. Bombardier Recreational Products, Inc*., 682 F. Supp. 2d 179, 1300 (M.D. Fla. 2010); and *Banner v. Hoffman-La Roche Inc.,* 383 N.J. Super. 364, 382 (Super Ct. App. Div. 2006). Accordingly, the warning should clearly, and unambiguously identify the nature of the product's particular hazards, instruct as to the product's proper use and how to avoid the hazard, and convey the consequences resulting from failing to follow the warnings given. *Manion v. General Elec. Co*., No. 3:06cv9/MCR/MD, 2007 WL 2565979, at *3 (N.D. Fla. 2007); and *Miles v. Kohli & Kaliher Assocs.*, 917 F.2d 235, 256 n. 11 (6th Cir. 1990).

The most common product defect claim arising from use of an e-cig is that the battery suddenly and unexpectedly exploded. Lithium-ion batteries can explode for many reasons; therefore, it can be difficult for a retailer to know what warnings to give to consumers.

While the Food and Drug Administration ("FDA") does not yet regulate the safety of e-cig components, its website contains safety prevention tips for e-cigs that are helpful when considering the necessary content for e-cig warnings.

The FDA suggests the following as ways to properly use e-cig components:

- "Keep loose batteries in a case to prevent contact with metal objects. Don't let batteries come in contact with coins, keys, or other metals in your pocket."
- "Never charge your vape device with a phone or tablet charger. Always use the charger that came with it."
- "Do not charge your vape device overnight or leave it charging unattended."
- "Replace the batteries if they get damaged or wet. If your vape device gets damages and the batteries are not replicable, contact the manufacturer." FDA: TIPS TO HELP AVOID "VAPE" BATTERY EXPLOSIONS (2017).

The FDA's safety tips are suggestive of the types of misuses that have been reported with the use of the e-cigs, and its lithium-ion batteries. Thus, in the very least, a retailer should pay particular attention and take advantage of the reported risks with e-cig usage, and prepare warning labels that address each of these possible misuses as presenting potential dangers to users.

Further, a retailer should consult industry standards, like the American National Standard Institute ("ANSI"), when considering the necessary warnings to give with e-cig, and lithium-ion batteries. In particular, ANSI cautions that a warning label must contain: (1) an identification of the hazard; (2) the degree or level of hazard seriousness; (3) identification of a means to avoid the hazard; and (4) the consequences of not avoiding the hazard. ANSI Z535: American National Standards Institute Safety Alerting Standards.

To convey the message of potential hazards and risks, ANSI encourages the use of a signal word, such as "DANGER," "WARNING," and "CAUTION." ASNI Z535.4-2007: American National Standard for Product Safety Signs and Labels; and ANSI Z.535.6-2011: American National Standard for Product Safety Information in Product Manuals, Instructions and Other Collateral Materials (hereinafter collectively referred to as "ANSI Z.535: Safety Standards"). ANSI further indicates when to use which signal word. For example, "DANGER," indicates a hazardous situation, which if not avoided, will result in death or serious harm and should be limited to the most extreme situations. ANSI Z.535: Safety Standards. "WARNING," indicates a hazardous situation, which, if not avoided, could result in death or serious injury. *Id.* And, "CAUTION," indicates a hazardous situation, which, if not avoided, could result in minor or moderate injury. *Id.*

ANSI also encourages a message pertaining to ways to avoid the hazard, and a pictorial, giving an example of the consequence of not following the instruction to avoid the hazard. *Id.* Additionally, ANSI gives guidance as to particular colors to use on the warning label to maximize its effectiveness at capturing the consumer's attention. In particular, ANSI suggests putting the word "DANGER," in safety white letters on a safety red background, "WARNING," in safety black letters on a safety orange background, and "CAUTION," in safety black letters on a safety yellow background. *Id.*

Notably, court decisions mirror the suggested ANSI requirements in that courts look to the usage of bright colors, pictorials, and cautionary language in determining whether a warning is sufficient. *Manion v. General Elec. Co*., No. 3:06cv9/MCR/MD, 2007 WL 2565979, at *6 (N.D. Fla. Aug. 31, 2007). The court in *Manion v. General Elec. Co*., No. 3:06cv9/MCR/MD, 2007 WL 2565979, at *6 (N.D. Fla. Aug. 31, 2007), found that the presentation of the warnings

were adequate to attract the users attention. In coming to its conclusion, the court emphasized that "[e]ach warning had "Warning" printed in large, bold type next to a caution sign and contained prominent pictures depicting the particular risks and what would happen as a result." *Manion,* 2007 WL 2565979 at *6. Further, the court also pointed out that some of the warnings used color, and contrast to attract attention. *Id.* Specifically, the pamphlet had a bright red front cover, and the warning label was bright orange with black lettering. *Id; see also Blythe v. Bumbo Intern. Trust,* 634 Fed. Appx 944, 948 (5th Cir. 2015) *(*red warnings on the yellow baby seat were adequate as a matter of law).

B. Importance of Retailers to Keep Track of the Products "Distribution Chain."

All members in the distribution chain play a significant role in moving defective products to consumers. Thus, a retailer needs to keep track of all those involved in the distribution chain because, typically, each entity in possession of a product may have liability attributed or apportioned to it.

Although it varies, in particular jurisdictions, a retailer can pursue a cause of action of indemnity against all those higher up in the product's chain of distribution. *Promaulayko v. Johns Manville Sales Corp*., 562 A.2d 202, 208 (N.J. 1989). In *Promaulayko v. Johns Manville Sales Corp*., 562 A.2d 202, 204-08 (N.J. 1989), the New Jersey Supreme Court focusing on "distributing the risk to the party best able to bear it," held that the right of the downstream distributor to indemnification from the upstream distributor existed as a matter of law. In reaching this conclusion, the court pointed out, "the manufacturer to whom the cost is shifted can distribute that costs among all purchasers of a product. Similarly, a wholesaler distributor can generally pass the risk among a greater number of potential users than a distributor farther down the chain." *Promaulayko,* 562 A.2d at 206. Thus, it follows that, a retailer, typically the member

furthest down in the distribution chain and probably the least equipped to bear the burden of litigation, can indemnify itself by passing liability to a member higher in the chain.

In other jurisdictions, a retailer can pursue a common law indemnity cause of action against manufacturers and other intermediate members in the distribution chain who are shown to be a fault for the defective product. *Costco Wholesale Corp. v. Tampa Wholesale liquor Co., Inc.*, 573 So.2d 347 (Fla. 2d DCA 1990). In *Costco Wholesale Corp. v. Tampa Wholesale liquor Co., Inc.*, 573 So.2d 347 (Fla. 2d DCA 1990), the court held "a party without fault against whom such a recovery is had has a cause of action for common law indemnity only against those other parties in the chain of manufacture and distribution who were at fault." *Costco,* 573 So. 2d at 348.

When the alleged defect is a lithium-ion battery that catches fire, fault is not limited to those members involved with the distribution of the lithium-ion battery or the e-cig itself, but may extend to those involved in the distribution of any component part that caused or contributed to the defect that is allegedly attributed to an injury. This concept is embodied in Restatement (Third) of Torts: Product Liability, Section 5 (1998). In particular, Section 5 of the Restatement states:

> One engaged in the business of selling or otherwise distributing product components is subject to liability for harm to persons or property caused by a product into which the component is integrated if:
>
> (a) the component is defective in itself, as defined in this Chapter, and the defect causes the harm; or
>
> (1) the seller or distributor of the component substantially participates in the integration of the component into the design of the product; and
>
> (2) the integration of the component causes the product to be defective, as defined in this Chapter; and
>
> (3) the defect in the product causes the harm.

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5 (1998). Thus, in a complex product, such as an e-cig, there are many component parts, including, but not limited to, mods, atomizers, adapters, and chargers, that may have caused, or contributed to the incident at issue. Each party responsible for the faulty part may be a valid co-defendant to whom liability may also be assigned, thereby also limiting the retailers overall liability exposure. The availability of component part liability emphasizes the importance for a retailer to keep track of the e-cig's life, and in particular the role each member played in the creation of the product.

III. CONCLUSION

As the e-cig usage continues to grow in popularity, and the public becomes increasingly aware of the risks associated with the e-cig and in particular, its lithium-ion battery, those within the supply chain, particularly, the retailer, the most accessible target to a consumer, must take the necessary precautions mentioned throughout the article at the forefront. As stated, a retailer should keep apprised of the potential hazards and risks; always consult the available industry standards for warning labels; and due to the size of the e-cig, explore placing the necessary warning labels on an item other than the product itself, such as on the carton, or as emphasized in the article, in the products manual, or instructional pamphlet. Further, it is imperative for the retailer to keep an inventory the e-cigs chain of distribution from its infancy. In particular, starting from the individual manufacturer of the e-cig's many component parts, the manufacturer of the integrated product, and any intermediate sellers or distributors. Following these steps, the retailer can increase its chances of avoiding or limiting liability, and avail itself of the many defenses

available. Although taking these precautions upfront may be time consuming and expensive, being proactive can shield against the even more costly whirlwind of personal liability.

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