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You have asked for my opinion regarding the legal liability of a seller of a non-ergonomic computer mouse for injuries suffered by a consumer—including the development of repetitive stress injuries and Carpal Tunnel Syndrome—where there is a safer design alternative. The opinions contained in this letter are based specifically on the facts and representations provided to me.

In brief, it is my opinion that where a consumer has developed injuries because of the use of a mouse that requires grip and strain in muscles, resulting in fatigue and injury, both the manufacturer and seller of the mouse may be subjected to strict tort liability, on the basis of both a design defect and a failure to warn the consumer. This is particularly true assuming there is a safer mouse available that would not cause these types of medical problems.

My opinion—and a summary of the law on which that opinion is based—is set forth below.

THE LAW

While laws may differ from state to state, most states have adopted various “product liability” laws to protect the consumer from unsafe products. Many of these states have imposed “strict liability” for injuries incurred by a user as a result of a product being “unreasonably dangerous.”

In Illinois, for example, to prevail in a lawsuit an injured party need only show that his “injury or damage resulted from a condition of the product, that the condition was an unreasonably dangerous one and that the condition existed at the time that it left the defendant’s control. (*Suvada v. White Motor Co.*, 32 Ill.2d 612, 210 N.E.2d 182).

In a traditional negligence claim, the focus is on the defendant’s actions: whether the defendant’s conduct was reasonable under the circumstances. In a strict liability claim, however, the focus is on the defendant’s product: whether the product in question was

unreasonably dangerous. Under strict liability, liability exists without fault. (*Malone v. BIC Corp.*, 789 F.Supp. 939, 942 (N.D. Ill. 1992); *Lundy v. Whiting Corp.*, 93 Ill.App.3d 244, 417 N.E.2d 154 (1st Dist. 1981).

Thus, in a strict liability action the plaintiff can recover even if the defendant exercised “all possible care in the preparation and sale of his product.” *Kerns v. Engelke*, 54 Ill.App.3d 323, 369 N.E.2d 1284 (5th Dist. 1977).

The “Restatement (Third) of Torts: Products Liability” was adopted by the American Law Institute in 1997, and many states have adopted its provisions. Significant provisions in the Restatement (Third) provide the definition of a product “defect”:

“A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings.”

A manufacturer is not under a duty to design a product incapable of causing injury. However, a product must be designed so as to avoid injuries from reasonably foreseeable use. Clearly, it would be significant if a plaintiff were able to show that there was a feasible way to design the product with less harmful consequences. (*Prosser & Keeton, Torts* §99(3), at 699 — 700 (5th ed. 1984).

Both manufacturers and sellers of products have been found legally liable for failing to discover a product flaw, failing to warn of a product’s dangerous condition, and failing to design a product without defects. (See: *Prosser and Keeton* §96 at pp. 685 — 689).

Under the doctrine of strict tort liability, states have imposed liability for injuries caused by product defects to all persons in the manufacturing and marketing chain of the product. (See, for example: *Court v. Grzelinski*, 72 Ill.2d 141, 379 N.E.2d 281 (1978); *Abel v. General Motors Corp.*, 155 Ill.App.3d 208, 507 N.E.2d 1369 (2d Dist. 1987); *Kramer v. Weedhopper of Utah, Inc.*, 141 Ill.App.3d 217, 490 N.E.2d 104 (1st Dist. 1986)).

Manufacturers, distributors and sellers all make a profit by placing a product in the stream of commerce. Such entities are in a position to prevent a defective product from entering the stream of commerce. Thus, under §402A, manufacturers, distributors, wholesalers, and retail sellers are strictly liable for injuries caused by their defective products. A seller who does not create a defect, but who puts the defective product into circulation, is still responsible in strict liability to an injured user.

Potential cases against sellers of non-ergonomic computer mice will mostly involve the design defect inherent in such mice. Section 2(b) of the Restatement (Third) provides that **a product is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design** by the seller or other distributor and the omission of the alternative design renders the product not reasonably safe.

Thus, one of the primary ways of showing a design defect is by presenting evidence of the availability and feasibility of alternate designs at the time of the product's manufacture, or showing that the design used did not conform with design standards of the industry or design criteria set by legislation or governmental regulation. (*Anderson v. Hyster Co.*, 74 Ill.2d 364, 385 N.E.2d 690, 692, 24 Ill.Dec. 549 (1979). Since state of the art is admissible as evidence to prove or disprove feasibility, compliance with governmental standards and regulations is admissible to establish that any danger is not "unreasonable" and is very persuasive on that point (*Hubbard v. McDonough Power Equipment, Inc.*, 83 Ill.App.3d 272, 404 N.E.2d 311, 38 Ill.Dec. 887 (5th Dist. 1980).

In some states, a plaintiff need not even present evidence of a feasible alternative design. It is obviously a much stronger case, however, when a safer design alternative was readily available.

Medical studies exist to establish the link between the use of a conventional mouse and destructive repetitive stress injuries. It is my understanding, however, that the AirO2bic™ mouse is designed in such a way to eliminate or sharply reduce these medical maladies since it can be used with minimal force and effort, there is no need for a "pinch grip," and the user is not required to twist the wrist. The existence of this safer design would be particularly relevant in establishing liability against a seller who chose to sell a conventional mouse that lacked the ergonomic design of the AirO2bic™ mouse to prevent or lessen the likelihood of injury to the user.

Moreover, the AirO2bic™ mouse is apparently the only conventional mouse that is asserted by its manufacturer as being compliant with Section 508 of the Federal Rehabilitation Act (29 U.S.C. 794d) and is listed on the government's Section 508 website. The failure of other mice to comply with the governmental regulations of Section 508 could also be effective evidence of safer design alternatives in such a lawsuit.

A product may also be unreasonably dangerous because of a defect in marketing. A defendant's failure to warn of a product's potential dangers when warnings are required is a type of marketing defect. A manufacturer has a duty to warn if it knows or should know of the potential harm to a user because of the nature of its product (*Bartley v. Euclid, Inc., et al.*, 158 F.3d 261, 1998)

Under the law, therefore, a product can even perform as intended yet subject its seller to strict liability if the seller fails to warn of a danger known to the seller but unanticipated by the consumer. (*Hammond v. North American Asbestos Corp.*, 97 Ill.2d 195, 454 N.E.2d 210 (1983); *Woodill v. Parke Davis & Co.*, 79 Ill.2d 26, 402 N.E.2d 194 (1980); *Venus v. O'Hara*, 127 Ill.App.3d 19, 468 N.E.2d (1st Dist. 1984).

Section 2(c) of the Restatement (Third) of Torts provides that a product is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable

instructions or warnings by the seller or other distributor, or by a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

Although there is an absolute duty to warn of dangers, questions may arise concerning the adequacy of the warnings that are given. Warnings may be inadequate if they: (1) do not specify the risk presented by the product; (2) are inconsistent with how a product would be used; (3) do not provide the reason for the warnings; or (4) do not reach foreseeable users. (*Collins v. Sunnyside Corp.*, 146 Ill.App.3d 78, 496 N.E.2d 1155, 1157, 100 Ill.Dec. 90(1st Dist. 1986).

“Generally, a duty to warn exists where there is unequal knowledge, actual or constructive, and defendant, possessed of such knowledge, knows or should know that harm might or could occur if no warning is given.” *Miller v. Dvornik*, 149 Ill.App.3d 883, 501 N.E.2d 160, 164, 103 Ill.Dec. 139 (1st Dist. 1986).

In the present context, where other mice have been shown to cause Carpal Tunnel stress and similar injuries, there would be a duty to warn the consumer of such dangers. No such warnings would be needed for a mouse which has been proven to not cause such problems.

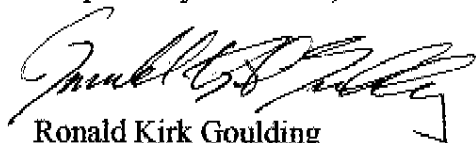
Defendants in the distributive chain (manufacturers, distributors, sellers, etc.) are charged with knowledge of the latest safety developments applicable to its product. (*Anderson v. Hyster Co.*, 74 Ill.2d 364, 385 N.E.2d 690). Evidence of safety devices on similar products or safer methods in the design of other products is not only admissible, but persuasive. (*Kerns v. Engelke*, 76 Ill.2d 154, 390 N.E.2d 859 (1979).

CONCLUSION

Simply stated, a product is unreasonably dangerous when the evidence establishes that a safer design for the product was practical and effective and could have been provided without hindering the product's function or materially increasing its price.

If a conventional mouse has a tendency to cause repetitive stress injuries, parties in the distributive chain—manufacturers, distributors and sellers—could be held liable for injuries resulting from their sale of the conventional mouse, since a safer design alternative may now exist with the AirO2bic™ mouse, which continues to show a reduction in the likelihood of such injuries.

Respectfully submitted,



Ronald Kirk Goulding

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