

Question 2

Manufacturer designed and manufactured a “Cold Drink Blender,” which it sold through retail stores throughout the country. The Cold Drink Blender consists of three components: a base that houses the motor, a glass container for liquids with mixing blades inside on the bottom, and a removable cover for the container to prevent liquids from overflowing during mixing. A manufacturer’s brochure that came with the Cold Drink Blender states that it is “perfect for making all of your favorite cold drinks, like mixed fruit drinks and milk shakes, and it even crushes ice to make frozen drinks like daiquiris and piña coladas,” and cautioned, “Do not fill beyond 2 inches of the top.”

Retailer sold one of the Cold Drink Blenders to Consumer. One day, Consumer was following a recipe for vegetable soup that called for thickening the soup by liquefying the vegetables. After deciding to use her Cold Drink Blender for this purpose, Consumer filled the glass container to the top with hot soup, placed it on the base, put the cover on top, and turned the blender on the highest speed. The high speed rotation of the mixing blades forced the contents to the top of the container, pushed off the cover, and splashed hot soup all over Consumer, who was severely burned by the hot soup.

Consumer filed a lawsuit against Manufacturer and Retailer, pleading claims for strict products liability and negligence. In her complaint, Consumer stated that the Cold Drink Blender was not equipped with a cover that locked onto the top of the container in such a way as to prevent it from coming off during operation and that the failure to equip the blender with this safety feature was a cause of her injuries.

Manufacturer moved to dismiss the complaint against it on the following grounds:

- (1) Consumer’s injury was caused by her own misuse of the Cold Drink Blender which, as implied by its name, was intended for mixing only cold substances.
- (2) Consumer’s injury was caused by her own lack of care, as she overfilled the Cold Drink Blender and operated it at high speed.
- (3) The design of the Cold Drink Blender was not defective since It complied with design standards set forth in federal regulations promulgated by the federal Consumer Products Safety Commission, which do not require any locking mechanism.

Retailer moved to dismiss the complaint against it on the following ground:

- (4) Retailer played no part in the manufacture of the Cold Drink Blender and therefore should not be held responsible for a defect in its design.

How should the court rule on each ground of both motions to dismiss? Discuss.

Answer A to Question 2

Strict Liability Claim

A strict liability claim requires: (1) the defendant to be a merchant, (2) the product was not altered since leaving the defendant's control, (3) the product has a defect, (4) the plaintiff was making foreseeable use of the product, and (5) the defect caused the injuries and damages.

Merchant:

A defendant is a merchant if he is in the regular business of producing or selling the product sold.

In this case, the Manufacturer is in the business of producing and selling the blenders in question. The Retailer is in the business of selling the blenders. Thus, both the Manufacturer and the Retailer are merchants.

Not Altered:

There is no evidence to indicate that the blender was altered or tampered with since leaving either the Manufacturer's control or the Retailer's control.

Defect:

There are three types of defects: manufacturing defect, design defect, or failure to warn.

A manufacturing defect is a defect that makes the particular unit defective compared to all other produced units. In this case, there is no evidence that Consumer's unit is any different from other units.

A design defect is a defect that is inherent in the design of the product. It can be shown through the existence of an alternative design that can be implemented effectively to reduce the risk without adding too much cost to the product.

In this case, Consumer has shown that there is a design for a locking mechanism on the cover that can prevent the injuries here. Thus, unless the cost of producing the locking mechanism is prohibitively high, Consumer has established a design defect.

Failure to warn is a defect that occurs when a merchant knows of a defect, but fails to warn of it.

In this case, Manufacturer can argue that it has provided warning in the instructions to not fill the blender to within 2 inches of the top. However, Consumer can argue that the warning is not conspicuous such that a reasonable person would be able to see it. Further, the warning is not adequate to warn of the consequences of the action. Lastly,

while the manufacturer knows that the design is unsafe for hot content, it did not warn specifically against hot content. There, there is a good case for failure to warn also.

Foreseeable Use:

The plaintiff must be using the product in a foreseeable fashion, but need not be using the product in a manner as the producer intended to be used.

In this case, while Manufacturer intended to produce the blender for cold drinks only, Consumer can argue that it is entirely foreseeable that someone may use it for hot contents as well.

Causation:

Causation requires both factual causation and proximate cause.

There is factual causation for injuries based on the defects. Consumer can argue that “but-for” the lack of adequate warning or the lack of a hatch on the cover, Consumer would not be injured.

As for the proximate cause, Manufacturer can argue that the causation was not liable because Consumer was not making foreseeable use of the product. Therefore, Consumer’s own negligence is an unforeseeable intervening cause.

On the other hand, Consumer can argue that it is entirely foreseeable that a consumer may want to use the blender for hot contents, or that the consumer may fill the blender to near the top. Most other blenders on the market are designed for use with both hot and cold content, so it is foreseeable that someone would use it that way even if it was not intended to be used that way.

Because Consumer’s use is foreseeable, there is proximate causation also.

Damages:

Consumer showed that he has suffered damages in being severely burned.

Negligence:

Negligence requires: (1) duty, (2) breach of duty, (3) causation, and (4) damages.

Duty:

Under the majority Cardozo (“zone of danger”) theory, duty is owed to all who may be foreseeably injured. Under the minority Andrews theory, duty is owed to everyone in the world.

In this case, by producing the blender and selling the blender, it is foreseeable that a consumer could be injured. Therefore, Manufacturer and Retailer owe a duty to Consumer under either theory.

Breach:

The standard of care is that of a reasonably prudent person. In cases where a reasonable person has superior knowledge of a fact not known by others, that person is held to the standard of a reasonable prudent person with the superior knowledge.

In this case, Manufacturer has the knowledge that the blender may cause danger if filled too close to the top. Therefore, Manufacturer is held to the standard of a prudent person with this special knowledge.

Retailer is held to the standard of a reasonably prudent person, assuming that he has no special knowledge.

Causation and breach are similar to those above for strict liability and not repeated here.

Manufacturer's Motions:

Typically, for a motion to dismiss, the evidence is viewed in the light most favorable to the non-moving party. With this principle in mind, and the general elements for strict liability and negligence in mind, I will analyze each of Manufacturer's motions.

(1) Motion to dismiss because of the Consumer's misuse:

For the strict liability claim – as discussed above in the elements for the strict liability claim, strict liability is attached when the defendant is making foreseeable use of the product. As discussed above, Consumer's use of the blender – filling it to the top and using hot contents – is foreseeable even if it is not intended by Manufacturer. Since consumers of blenders typically use it for both hot and cold contents, and some models allow contents to be filled to the top, it should be foreseeable that Consumer would use it that way. Therefore, Consumer's misuse does not relieve Manufacturer of the strict liability claim.

For the negligence claim: Duty is owed to all those who may be injured. Therefore, Consumer's misuse of the product does not relieve Manufacturer for its duty towards Consumers. As discussed above, the injury was caused by the blender and the injury was foreseeable. Therefore, the causation element is satisfied as well. Hence, as discussed above, whether Manufacturer is liable depends on if breached its duty towards Consumer, judged by the reasonable person standard with similar specialized knowledge. Hence, Consumer's misuse by itself does not relieve of the negligence claim.

Defense of Contributory Negligence:

In jurisdictions following the contributory negligence rule, any negligence on the plaintiff's part relieves the defendant of liability. If the case is tried in such a jurisdiction, Manufacturer could argue that Consumer was negligent in using a blender for cold drinks, as implied by its name, for hot soup. Thus, if the jury finds the consumer to be negligent, this would relieve Manufacturer of liability.

It is noted that Manufacturer is moving for dismissal here. Hence, Consumer's contributory negligence is a question of fact to be tried. Consumer is not negligent per se for using a blender with a name implied for cold drinks for hot soup. Therefore, even if they are in a contributory negligence jurisdiction, Manufacturer is still not entitled to dismissal.

It is also noted that this is only a defense for the negligence claim. The strict liability claim is strict liability, thus is not open to contributory negligence defenses.

Assumption of Risk:

The manufacturer can argue that consumer assumed the risk by operating the blender in a dangerous fashion, in contrary to common sense and the instruction. Therefore, the consumer assumed the risk of injury, and this relieves Manufacturer of liability.

In this case, while the Manufacturer implied that the blender is good for cold drinks by naming it the "Cold Drink Blender" and specifying that it is "perfect for cold drinks", Manufacturer has not warned that the blender could cause injuries if used for hot drinks. Further, while Manufacturer said it is perfect for cold drinks, it did not specify it cannot be used for hot drinks.

Therefore, Consumer can argue that since there is no warning of the risk while using the blender for hot drinks, and the warning is not apparent to a reasonable person, Consumer has not assumed the risk by using the blender for hot soup.

Defenses of Comparative Negligence:

In a comparative negligence regime, the liability of the defendant is reduced through the relative negligence of the plaintiff.

In this case, even if the plaintiff is negligent, this would only amount to a reduction of damages. This defense does not entitle Manufacturer to dismiss the claim.

(2) Motion to dismiss because of the Consumer lack of care:

Consumer's lack of care would amount to evidences used to establish that Consumer was negligent in operating the Blender.

For the strict liability claim: Under the strict liability claim, Manufacturer is strictly liable if all the elements are proven. (See elements above). Thus, Consumer's own lack of care, amounting to negligence on the consumer's part, is irrelevant to Manufacturer's liability under the strict liability theory. The assumption of risk doctrine is applicable, but fails here. (See discussion above.)

For the negligence claim: See discussion above for contributory negligence, comparative negligence, and assumption of risk. As discussed above, none of these theories allow Manufacturer to dismiss the claim.

(3) Motion to dismiss because there is no defect:

For the strict liability claim: As discussed above in the elements for strict liability, there is evidence that could lead a jury to believe there is a design defect or a failure to warn defect.

In this case, while evidence that Manufacturer's design complied with regulations could be evidence towards proving there are no defects in the locking mechanism, it does not establish conclusively there is no defect. Further, this does not resolve the question over the failure to warn defect (whether the warning was conspicuous enough).

As discussed above, in a motion to dismiss, the evidence is viewed in light most favorable to the non-moving party. Thus, because there is some evidence of defect, and the evidence of compliance with regulation is not conclusive on the question of defect, the motion to dismiss should be denied.

For the negligence claim: As discussed above, the standard of care is measured by a reasonably prudent person with similar specialized knowledge. Therefore, compliance with regulation does not relieve Manufacturer of either the duty or the standard of care.

It is noted that if the regulation is violated, Manufacturer could be held as negligent per se. However, the inverse is not true. Therefore, motion to dismiss for the negligence claim should be denied also.

(4) Retailer's Claim:

For strict liability: As discussed above (see above), the claim of strict liability just requires Retailer to be a merchant that put the article in the stream of commerce. There is no requirement for the Retailer to take part in designing or manufacturing. Thus, the motion to dismiss should be denied.

It is noted that Retailer could get indemnification from Manufacturer if they are held jointly liable, and Manufacturer is the negligent party.

For negligence: As discussed above, the standard of care for Retailer is that of a reasonably prudent person. Thus, under this standard, whether or not Retailer took part

in the design, whether it is negligent or not depends on what other reasonably prudent persons would have done (such as inspection and testing). Thus, the fact that Retailer took no part in the design or manufacturing does not relieve it of its negligence claim. Therefore, motion to dismiss should be denied also.

Answer B to Question 2

Strict Products Liability

Consumer's lawsuit against Manufacturer seeks to recover on a strict products liability theory. In order to establish such a claim, the consumer must demonstrate that (1) the defendant is a merchant, (2) there was either a design or manufacturing defect in the product, (3) the product was not altered after leaving the merchant, (4) the product caused the plaintiff's injury, and (5) the customer was using the product in a foreseeable manner.

In this case, the Manufacturer was a merchant because it was the company that designed and manufactured the product at issue. It then sold this product to retail stores. The Retailer was also a merchant because it presumably made its business by selling these types of appliances to consumers. There is nothing in the facts that indicate that the retailer was not a merchant of similar products in the course of its business.

Consumer must also assert that this product had a defect. A design defect is a flaw in the design of a product that makes it unreasonably unsafe. If there is a way to reasonably make the product more safe without lessening the utility of the product or prohibitively raising costs, then it may have a design defect. Additionally, the presence of the design defect must be the cause of the plaintiff's injury. Here, Consumer argues that there was a design defect because the blender did not include a locking cover. The absence of this safety feature was the cause of her injury, because if it had been in place, the top would not have come off and she would not have been burned by the hot soup. Consumer must demonstrate that installing such a lock would have been reasonably feasible, and would not impinge on the utility or costs of the blender. She could point to other blenders that have similar safety devices or the development of such devices in similar small appliances. Since installing a small lock would not be unduly costly and is generally available on blenders, then the product was defective because it lacked this reasonable safety feature. Additionally, the causation element is met because but for the omission of this feature on the blender, Consumer would not have been injured in this way. The lock would have prevented her injury.

Consumer must also demonstrate that the product was not altered once it reached her in the chain of commerce. There is nothing in the facts to indicate that upon leaving the manufacturer or the retailer, the blender was changed in any way, thereby satisfying this element.

Consumer will have the most difficulty in proving that she was using the product in a foreseeable manner. A plaintiff may recover if she can demonstrate that her use was foreseeable, even if it was not the use intended by the manufacturer. The defendants in this case will argue that they should not be liable because Consumer's use of liquefying vegetables for a hot soup was not foreseeable. The product was clearly called the "Cold Drink Blender" and marketed itself as a tool for making cold drinks and crushing ice. Consumer will counter this by pointing out that although the regular use of all blenders may be to crush ice or make daiquiris, it is certainly foreseeable that a person may also

decide to make other uses of the blender. There is no reason why a person would think that the blender was not fit to handle hot soups, and so she should not then be deemed to be using the product outside of its foreseeable use.

Under the above analysis, the Consumer can properly allege a prima facie case of strict products liability against both the Manufacturer and Retailer. The specific items in each motion to dismiss will be further discussed below.

Negligence

Under a negligence action based on products liability, a plaintiff must allege that there was a (1) duty of care, (2) that was breached, (3) the breach was the actual and proximate cause, of (4) harm suffered.

The standard duty of care is that of a reasonably prudent person in similar circumstances. Under the majority view, a person or entity owes a duty of care to those foreseeably harmed by their actions. Consumer will argue that the defendants breached this duty because it was unreasonable to manufacture and then sell a blender that did not have a locking feature. She will try to point out that a reasonably prudent manufacturer would not create a blender that did not have a lock, relying on evidence of commonly-held expectations of the marketplace when people make, sell, and buy blenders.

In order to show actual cause, the Consumer must show that but for the defendants' breach of duty, she would not have suffered her injury. She will argue that if they had not breached their duty and had included a lock, she would not have been burned. Additionally, she must show that the breach was the proximate cause of her injury. A breach is the proximate cause of an injury when a person is in the zone of danger created by the breach. It was foreseeable to the manufacturer or retailer that upon buying a blender without a safety lock, the top could fly off and a person could be injured. Consumer was in the zone of danger since it was foreseeable that her injury would be caused in this manner due to the lack of the safety device.

Finally, Consumer must show that she suffered damages as a result of the defendants' negligent act. Here, Consumer was severely burned by the hot soup. She suffered a personal injury.

Under the above analysis, the Consumer can likely establish a prima facie case of negligence. Specific defenses and the issues of each motion to dismiss are addressed below.

Manufacturer's Motion to Dismiss

1. Consumer's Injury Caused by Her Own Misuse

The manufacturer argues that it should not be liable because the Consumer herself misused the product. This argument goes to the prong of strict products liability requiring that a consumer's use be foreseeable. Under the above discussion, it was

foreseeable that a person who buys a blender would use it for many different blending purposes, not solely mixing cold drinks. Simply because you purchase an item that is labeled as a cold drink blender would not make a reasonable person believe that they could only use the product to blend cold items. Blenders are multi-purpose appliances and generally used to mix and blend a variety of products, including vegetables for a hot soup. Accordingly, it would be foreseeable that the Consumer would use the product in this way, and so the Manufacturer cannot rely on her misuse to avoid liability. Under the same analysis, the manufacturer would not prevail if it claimed that its breach was not the proximate cause of her injury because the injury was unforeseeable. It would be foreseeable that a person would use this blender for hot and cold products, so a person being burned by the contents leaking out when the top flies off would not be so unforeseeable as to defeat a finding of proximate cause.

The Manufacturer will also argue that the misuse of the product was negligent by the consumer. Under the traditional rule, contributory negligence could serve as an absolute bar to recovery on a negligence of products liability action. If the plaintiff herself was even slightly negligent, then all recovery could be barred. Under the modern rule of comparative negligence, recovery can be reduced proportionally according to the amount of negligence on the part of each party. If it was negligent for Consumer to use the product with hot soup, then Consumer's recovery may be limited. It will point out that even if it is foreseeable to use the blender for things other than cold drinks, pouring in hot soup that had the ability to severely burn a person was itself an unreasonable act.

Under the modern rule, this argument could successfully limit the amount of damages recovered by Consumer. However, the court should deny the motion to dismiss based on this ground because it does not negate the elements of strict products liability, negligence, or serve as an affirmative complete defense.

2. Consumer's Injury Caused by Her Own Lack of Care

The Manufacturer also asserts that consumer was negligent in that she overfilled the blender and then operated it at a high speed. The blender came with a warning cautioning a user not to fill beyond two inches of the top. The manufacturer will argue that by failing to observe this warning, the consumer was herself not making a foreseeable use of the product and was herself negligent.

A warning on a product cannot completely shield a manufacturer from a products liability claim. It would be foreseeable that despite this warning, a user would fill a blender close beyond two inches from the top, and then use it at the highest speed set on the machine. Such a use is likely common, and therefore should have been foreseen by the manufacturer. Accordingly, the Manufacturer cannot discharge all of its liability by claiming that the warning shielded it from an injury caused by this use. It was foreseeable that a consumer would use the product in this way, meaning that this use does not discharge the elements of a products liability or negligence action.

Again, the Consumer's lack of care may limit the amount of damages recovered on a

comparative negligence theory. Under the discussion above, since it was likely unreasonable for the Consumer to fill the blender to the brink with hot soup, then under the modern rule, her recovery should be proportionately reduced due to her negligent actions. The court should deny a motion to dismiss on this ground.

3. Design Not Defective

The Manufacturer finally asserts that the design was not defective since it complied with federal regulations. Compliance with government regulations is evidence of lack of a defect, but it is not conclusive. A manufacturer may still be liable for a design defect or negligence even if it comports with regulations. Even though the Consumer Products Safety Commission may not at this point require any locking mechanism, it may be unreasonable for the Manufacturer not to include the lock, on the basis of the current knowledge in the industry. A manufacturer cannot hide behind official regulations to avoid liability. If it was minimally costly to include the lock and did not effect the utility, then the lack of a lock can be deemed a design defect. Also, if it was a breach of duty to consumers not to include the lock, then its failure to provide one may be a negligent act by the Manufacturer.

Accordingly, the court should deny a motion to dismiss on this ground.

Retailer's Motion to Dismiss – No Part in Manufacture

The Retailer asserts that it should not be liable to the Consumer because it was not the party who manufactured the blender. In a strict products liability action, any link in the distribution chain may be liable. The fact that the Retailer did not design or make the blender will not shield it in this action. The Consumer need only establish the elements of a strict products liability are met and the Retailer may be held equally as liable as the Manufacturer.

Here, the Retailer was a merchant because it regularly dealt in the sale of these kinds of goods. The design was defective, under the analysis above. The machine was not altered once it left the Retailer's premises. Finally, the Consumer's use of the product was foreseeable. Accordingly, the court should not dismiss the strict products liability suit against the Retailer.

If the Retailer is held liable in the strict liability suit, it may seek indemnification from the Manufacturer. Indemnification is available when a party is held liable for injuries suffered by a plaintiff, but another party's actions are actually the cause of the injury. Since the Retailer was not responsible for the design defect and the Manufacturer was responsible, the Retailer should be able to recover any amount of damages it owes to the Consumer from the Manufacturer.

Retailer must also argue that it was not negligent, so that claim should be dismissed. Consumer may argue that Retailer breached its duty by not inspecting the item and discovering its defect, that failure to inspect was unreasonable, and that it caused her injuries. This is a more attenuated theory than the negligence action against the

Manufacturer. A Retailer should not be held responsible for inspecting every product that is properly packaged and labeled for sale in its own store. Although it may be held liable on a strict liability theory, there was likely no actionable negligence by the Retailer. Accordingly, the claim of negligence against the Retailer should be dismissed.