Schnader
ATTORNEYS AT LAW

Schnader Harrison Segal & Lewis LLP

NEW YORK PENNSYLVANIA CALIFORNIA WASHINGTON, DC NEW JERSEY DELAWARE

Product Liability
ALERT

APRIL
2009

New York Court of Appeals Re-affirms its Casual Seller Doctrine

In a decision couched largely in terms of sound public policy, the New York State Court of Appeals refused to extend strict liability to a casual seller of used industrial equipment. The case, *Jaramillo v. Weyerhaeuser Company*, 2009 N.Y. Slip Op. 02444, 2009 WL 812965, was decided on March 31, 2009. In no uncertain language, the Court once again refused to extend "the onerous burden of strict liability" to all but "certain sellers", especially where the goods in question were sold "at irregularly-scheduled 'as-is, where is' surplus sales." *Id.* at 8.

The Court reiterated all of its points from the seminal case *Sukljian v. Ross & Son Co.*, 69 N.Y.2d 89 (1986) and its progeny, including *Stiles v. Batavia Atomic Horseshoes, Inc.*, 81 N.Y.2d 950 (1993). And, like those cases, it refused to squeeze the facts at hand into the exception to the casual seller doctrine articulated by the Fifth Circuit Court of Appeals in *Galindo v. Precision American Corp.*, 754 F.2d 1212 (5th Cir. 1985). All in all, *Jaramillo* was the Court's opportunity to reiterate that because of the powerful public policy considerations, it remains loathe to extend strict liability to any party that fits even loosely into the definition of a casual seller.

This is good news for all companies who look to off-load used or out-of-date equipment onto buyers searching for discounts. The Court recognized this reality of the marketplace: "Indeed, the most likely effect [of imposing liability on casual sellers] would be exactly what the District Court predicted: Weyerhaeuser would stop selling its used machinery, thus depriving small businesses of the ability to purchase otherwise unaffordable equipment." *Jaramillo* at 8-9. While this is by no means an implication that the Court will turn a blind eye to the reckless distribution of old, dangerous equipment, so long as a seller does indeed remain casual the rule will remain that no strict liability will attach to such sales.

A review of the facts of *Jaramillo* is instructive. Plaintiff Jaramillo sustained a serious injury to his right hand when it was caught between two rollers of an industrial Flexo Folder Gluer machine (FFG) that he was operating for his employer, Glenwood Universal Packaging Products Corporation. Glenwood is a manufacturer of corrugated containers. Jaramillo had worked for them for about five years and had used the FFG before without incident. *Id.* at 2.

Glenwood had purchased the FFG used from defendant Weyerhaeuser. As a part of its business, Weyerhaeuser operates plants that in part use FFGs to manufacture cardboard boxes from corrugated cardboard sheets. A division of Weyerhaeuser, the Investment Recovery Business (IRB), coordinates disposal of obsolete or unnecessary equipment, including the FFG at issue. The Court recognized that the IRB distributes quarterly catalogs of items for sale, advertises in trade journals, telemarkets, and conducts market research on potential buyers and dealers of used equipment. The IRB grossed "somewhere between $7.5 and $8.5 million in 1986", accounting for "approximately 0.15 percent of Weyerhaeuser's net sales of about $5.65 billion for that year." *Id.* at 2.

(continued on page 2)

(continued from page 1)

The IRB marketed the FFG that was sold to Glenwood. The Court found it quite important to mention that "there was no genuine dispute of fact that the FFG was sold to Glenwood in "as-is, where is" condition". *Id.* This FFG was originally manufactured in about 1964 by S&S Manufacturing, then sold new to General Foods Company. Weyerhaeuser bought it from General Foods in 1971.

The Court of Appeals discussed its *Sukljian* and *Stiles* decisions to support its finding that on the facts above, Weyerhaeuser was a casual seller and it would not extend strict liability to the sale of the FFG to Glenwood. "The policy considerations that have been advanced to justify the imposition of strict liability on manufacturers and sellers in the normal course of business obviously lack applicability in the case of a party who is not engaged in the sale of the product in issue as a regular part of its business. The casual or occasional seller of a product does not undertake the special responsibility of public safety assumed by those in the business of regularly supplying those products, nor is there the corollary element of forced reliance on that undertaking by purchasers of such goods." *Id.* at 5-6, quoting *Sukljian*, 69 N.Y.2d at 95-96.

The two policy points were parsed out further for *Jaramillo*. First was that the "onerous burden of strict liability" should only attach to those "certain sellers" who have a "continuing relationship with manufacturers." Second was the "special responsibility" to a buying public that relies on the seller's representations should not apply to occasional sellers who specifically sell used products "as-is, where is." *Id.* at 8.

At the heart of the *Jaramillo* decision is a policy that makes practical sense. As pointed out before, the Court made a point to articulate that in today's industrial marketplace, there is a need to allow larger businesses to sell used machinery to smaller businesses who, in normal circumstances, might be unable to purchase the otherwise unaffordable equipment. The larger business should be allowed to do so without the fear of the "onerous burden" of strict liability constraining these sales. While there was no direct reference to the current struggling state of manufacturing in the State of New York and the rest of the country, the relief to the second-hand marketplace for all manners of equipment should not go unnoticed.

Businesses seeking to unload used equipment onto the second-hand marketplace should not consider the *Jaramillo* decision a blank check, however. Weyerhaeuser had a separate division set up for disposing of obsolete or unnecessary equipment, and advertised and marketed the equipment. These facts standing alone could lead an observer – or a potential purchaser – to think that perhaps Weyerhaeuser was not simply a casual seller. However, second-hand sales by Weyerhaeuser only accounted for some 0.15 percent of net sales, and most importantly, the FFG was sold in "as-is, where is" condition. The Court drove these distinguishing points home. It emphasized that Weyerhaeuser's sales of second-hand goods were "irregularly-scheduled", and repeatedly stated that as with the FFG sale, all "surplus sales" were "**as-is, where is**" – shedding light on two ways hopeful "casual sellers" can safeguard themselves.

With these cautions in mind, businesses should still take comfort in the Court of Appeals' reliance on the driving power of public policy interests to not extend strict liability to casual sellers in a similar position to Weyerhaeuser. ◆

For more information about Schnader's Product Liability Practice Group, or to request to speak with a member of the group at a particular Schnader office location, please contact the authors:

Saul Wilensky
(212) 973-8044
swilensky@schnader.com

Matthew J. Kelly, Jr.
(212) 973-8095
mjkelly@schnader.com

* * *