

For: LeClairRyan, Newark, N.J.  
From: Parness & Associates, Aberdeen, N.J.

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**RETAILERS ARE LIABLE WHEN THEY SELL DEFECTIVE GOODS, COURT REAFFIRMS**

*--Auto parts, hardware & other retailers should redouble efforts to become thoroughly aware of product defects in wake of N.J. District Court ruling, LeClairRyan attorney advises*

NEWARK (11/16/11) – In a case involving a car battery that exploded in a consumer’s hands, a federal court in New Jersey has reaffirmed the longstanding notion that retailers can be found strictly liable when they sell defective products. The Nov. 2 decision by U.S. District Court Judge Peter G. Sheridan potentially places a heavy burden on a gamut of retailers considered to be “experts” in their industries, including the likes of auto parts sellers, hardware stores, toy and other specialty retailers, noted LeClairRyan shareholder Thomas C. Regan. He added that supermarkets, discount department stores and other mass merchants could also be impacted.

“The implications of this ruling could be far-reaching,” said the veteran product liability litigator, who is based in the national law firm’s Newark office. “For example, it puts the onus on retailers to be thoroughly familiar with the products they sell and the packaging in which those products are delivered. Further, it is likely this opinion will be cited in other product liability actions, including failure-to-warn cases in which plaintiffs sue retailers because they were not told about product defects. It is imperative that retailers deal with these issues proactively in order to protect their consumers and themselves from liability.”

In the case (*DeGennaro v. Rally Manufacturing, 09-cv-443*), the plaintiff claimed injury after a lead-acid battery he had just bought at an Ocean Township Pep Boys exploded in his hand and against his body. He sued both the manufacturer and the retailer. Based upon the evidence, the judge ruled that Pep Boys’ management “knew or should have known” that the battery had the propensity to explode because of the heat sealed packaging. Pep Boys was therefore not allowed to take advantage of certain safe harbor provisions that can protect sellers from product liability, noted Regan, who was not involved in the case.

“The plaintiff’s bar successfully argued that the use of heat-sealed packaging was inappropriate because it failed to properly ventilate the batteries,” he explained. “Pep Boys filed a motion for summary judgment on the product liability claims, seeking to take advantage of the safe harbor provisions of the New Jersey Products Liability Act, but the court wouldn’t hear of it.”

The safe harbor provisions only protect product sellers under certain circumstances. “They have to be able to identify a manufacturer against whom relief may be obtained, and they cannot have created the defect in the product in the first place,” Regan explained. “If they knew or should have known of the product defect, they cannot seek safe harbor. Likewise, they cannot have controlled the product’s design, manufacture, packaging or labeling.”

In order to reduce their risk of being found liable in such cases, retailers should redouble their efforts to become thoroughly aware of any defects associated with the products they sell. But this is only the first step—they should also work with their legal counsel to determine the appropriate course of action once those defects or potential defects are uncovered, Regan advised. “When a conversation about potential defects in products being sold occurs, for instance, it is essential that the retailer ‘close the loop’ on such discussions,” he said. “This might include discussing the issue with outside counsel familiar with product liability issues.”

In *DeGennaro*, there was some evidence that Pep Boys knew of the propensity for explosion of the lead-acid batteries in question and yet continued to sell them anyway. “The message for retailers is clear—you are responsible for the products leaving your store, and it is therefore your legal responsibility to make sure they are safe,” Regan said.

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**Press Contacts:** At Parness & Associates Public Relations, Marty Gitlin, (631) 765-8519, [mgitlin@parnesspr.com](mailto:mgitlin@parnesspr.com), or Bill Parness, (732) 290-0121, [bparness@parnesspr.com](mailto:bparness@parnesspr.com).