



NATIONAL ASSOCIATION OF
ELECTRICAL DISTRIBUTORS

Smart Tools for Smart Distribution®



Appendix: Legal Analysis

SERVICE LIABILITY EXPOSURE:
Navigating the Legal Risks and Protections

Strict Product Liability

The law that governs NAED distributors' and wholesalers' liability for the sale of products is strict, focusing only on the product itself.¹ If a party injured by a product seeks recovery from the manufacturer, retailer, and wholesaler (i.e., anyone who creates or moves a product through the stream of commerce), the injured party need only prove that the product, which caused his injury, was defective or unreasonably dangerous.

“*Notably absent from this equation is whether the defendant manufacturer or distributor was negligent; in other words, whether the defendant did anything wrong.*”

Important policy considerations underlie the strict product liability framework. Chief among these is the opinion that the companies producing and distributing products are in the best position to make the products safe. According to this theory, these entities should correspondingly be held accountable for any injury resulting from their unsafe products. Courts that develop and apply the doctrine of strict products liability also view entities that are involved with bringing products to market as the entities best able to bear the cost of harm caused by dangerous or defective products.

In a sense, therefore, the law makes manufacturers, distributors, and wholesalers “insurers” for the products they make and sell. Thus, if their products are defective or unreasonably dangerous and cause harm, they can be held strictly liable for this harm. All of this changes, however, when the issue in question is not the manufacture or sale of a product, but the *provision of a service*.

Service Liability - Negligence

Courts consistently hold that service providers, unlike product manufacturers and distributors, cannot be held strictly liable for injuries that result from their provision of services. Instead, the principles of negligence law apply. Rather than focus on what is sold, negligence law, as applicable to service providers, focuses on the concept of *fault*.

The application of negligence principles in the rendering of services is generally governed by sections 323 and 324A of the Restatement (Second) of Torts. Section 323 addresses the negligent performance of a service; Section 324A deals with a defendant's liability to third persons for the negligent performance of a service.²

As mentioned above, the two concepts central to a negligence analysis are (a) duty and (b) breach. These are followed by an inquiry into whether a breach of duty was the (c) proximate cause of the injury or damage sustained, (d) whether damages were, in fact, incurred and if so, to what extent they were completely or partially related to the breach of duty.

The first of these questions – did the service provider have a duty – relates to relationships among individuals.³ Whether a duty exists – that is, whether the law imposes a requirement to act reasonably and prudently for another's benefit – is essentially an issue of fairness: Should courts impose an obligation on a particular defendant for the benefit of a particular plaintiff?⁴

The core questions in the negligence law framework that relate to the legal accountability of service providers are:

- >> Was the service provider legally required to act prudently (i.e., did he have a duty)?
- >> Was the service provider reasonably safe and prudent in the provision of services (i.e., did he breach that duty)?



Like strict liability, negligence law has been shaped by social policy, and several factors can guide courts in deciding whether a duty exists, including:

- >> Foreseeability of harm to the person injured
- >> Existence of a contractual relationship
- >> Nature of the risk attendant to the service provided
- >> Opportunity and ability of the service provider to exercise due care
- >> Public interest in imposing legal obligations on certain service providers
- >> Legislative and regulatory rules governing relationships among parties.

Generally, to impose a duty relating to the provision of services, courts require that either a defendant's performance of services increases the risk of harm to a plaintiff or causes a plaintiff to rely on the service performed.⁶ The absence of these two elements will generally preclude the imposition of a duty under sections 323 or 324A.⁷

NAED members, for example, may provide safety inspections for their customers. Whether a duty is created when such inspections are performed will generally depend on such questions as whether or not the distributor was aware that the customer would (or would not) take some action based on the results of the distributor's inspection, and whether a customer acted (or not) in reliance on the inspection results (e.g., decided to forgo maintenance).⁸

Another factor that courts examine when deciding whether to impose a duty relating to the provision of services is the existence of a contractual obligation to provide services. Although neither a contract nor the legal obligation to perform a service is a prerequisite for the imposition of liability resulting from the performance of services,⁹ a contractual obligation can help determine and limit the scope of work undertaken by the service provider for which a duty can be imposed.

If the provider of services is under contract to perform only a narrow range of services, for example, courts may determine that the service provider is only responsible for the contracted scope of work and has a duty (for negligence purposes) only with respect to such limited services.¹⁰ Thus, if one company is hired to design and install a system, and another to perform the installation, the company performing the installation may not be liable for design defects in the system when its contractual duties were limited only to installation.¹¹

At times, courts streamline their analysis of duty by simply inquiring for whose benefit the service was performed. This kind of court action may have potential liability relevance for NAED itself, as distinct from NAED members, in terms of marketing and promotion.

For example, a trade association which performed marketing, promotion, and lobbying services for its members was found to have promoted the use of a certain product sold by its members. Plaintiffs injured by this product sued the trade association under section 324A. The court held that no liability existed for the trade association (as distinct from the particular member that employed the substance-causing injury) with respect to these plaintiffs, since the promotional services performed by the trade group were for the benefit of its members and not for the benefit of the plaintiff-consumer.¹²

If the law does not impose a duty on a particular defendant with respect to a particular plaintiff, the defendant cannot be held liable to that plaintiff for negligence or the negligent provision of services. If, however, a duty is found to exist, the law then looks to whether the defendant service provider exercised reasonable care for the benefit of the person to whom the duty was owed. If he did not, that defendant is said to have breached his duty and can be held liable for harm resulting from that breach.¹³ If the service provider did not breach the duty of care – if he was sufficiently careful and acted with the reasonable prudence and care that the law requires of him – then he cannot be held liable for harm alleged to result from his provision of services, just as in situations where no duty is found to exist.

If a defendant does nothing more than sell a product, he can be held liable only according to strict product liability law. If he performs a service that involves no sale of goods, only negligence law can apply. For most NAED members, however, issues of liability will relate to both product liability and negligence law.

“*The question for most distributors and wholesalers who provide services to their customers is whether negligence principles will apply in addition to strict liability for the sale of products, because most NAED members who provide services generally do so with products that they provide and sell.*”

A service provider can generally be considered a seller or distributor of products when, in a commercial transaction, the same entity both sells products *and* renders services. For example, if an electrical wholesaler changes all burned out lights in the customer’s warehouse, he will likely do so with bulbs that he also sells to the customer. Strict products liability can attach if any of the lights are defective or unreasonably dangerous and cause harm, just as would have been the case if no service had been provided. If any of the lights are negligently installed, however, the wholesaler could also be liable under negligence principles.

Independent Contractors

An important issue for NAED members to consider when providing services to their customers is the use of independent contractors or subcontractors, as distinct from the member’s own employees, to perform the services. The generally applicable legal principle – known as *respondet superior* – is that, in most circumstances, an employer is liable for acts of negligence performed

by its employees and agents. An entity is not liable, however, for the negligence of independent contractors.¹⁴ Whether an individual performing services is an employee or independent contractor is a fact-specific inquiry. Relevant factors include:

- Is the work done under the direction of the employer or without supervision?
- Does the entity or worker supply the tools and workplace?
- How long has the worker been associated with the entity?
- How is the worker paid for services?

The main issue courts consider when determining whether a worker is an employee or contractor is control: Where the entity can be found to control the behavior of the worker, the worker is likely to be deemed an employee.

Another important issue relevant to a distributor’s potential liability for services performed by subcontractors is whether the distributor’s duty to perform the service is non-delegable, as in situations where the duty is imposed by law or an express contractual agreement. In such cases, the use of a third-party contractor to perform the service will not absolve the distributor or wholesaler of responsibility for the negligent performance of that contractor.¹⁵ Clearly, then, delegation of work to persons not formally employed by an NAED member is unlikely to absolve the member of liability for others’ negligence.

Did you know?

Negligence and strict product liability are not the only legal paths by which an injured plaintiff can seek compensation from a distributor who provides services. Where performance of services is done pursuant to contract, the service provider can also be held liable under breach of contract and breach of warranty laws.



WARRANTY:

A warranty is an express or implied guarantee by one of the contracting parties.¹⁶ Express warranties are created when one party to a contract makes an overt guarantee to the other. An implied warranty is an obligation imposed by law under the circumstances surrounding a sale, absent any express representation or promise.

Whether or not implied warranties can be read into service performance contracts varies from jurisdiction to jurisdiction, but most states do not provide for implied warranties in service contracts as a matter of law.¹⁷ Where implied warranties are found to exist in services contracts, they can include the promise to perform in a workmanlike manner, the promise to exercise the needed diligence and skill, and the promise to have the needed qualifications to perform the work.¹⁸ Violation of express or implied warranties, like negligence and strict liability, is an additional means by which an injured party can seek compensation from a service provider alleged to have caused injury.

The legal theory under which an aggrieved services recipient can sue may also affect the damages that can be recovered. Liability pursuant to tort theories such as negligence and strict liability can include compensation for actual out-of-pocket costs, for pain and suffering, and, if a defendant's conduct is sufficiently egregious, punitive or exemplary damages intended to punish a defendant rather than compensate a plaintiff. Contract damages are generally more limited, focusing on the expectations and potential for injury contemplated by the contracting parties. Damages for breach of contract and breach of warranty generally do not include pain and suffering or punitive damages.¹⁹

Business interruption damages may depend on a plaintiff's theory of recovery. As a general rule, business interruption damages will be available, *in tort*, only where accompanied by physical damage to a person or property and, *in contract*, where such damages are within the contemplation of parties at the time they enter into the contract.²⁰ Another relevant legal doctrine is the "economic loss doctrine," which

excludes negligence as a theory of recovery where the alleged injury results solely in economic harm unaccompanied by physical injury or property damage.²¹

Hybrid Transactions

In many cases, it will be clear whether a potential defendant's liability is governed by negligence or strict products liability law. If a product is only sold, strict liability will generally govern; if a service is performed without any sale of products, only negligence law will apply. However, in instances where the transaction at issue does not consist solely of the sale of products or the provision of services, it can be difficult to determine where a particular commercial activity falls along the products-services spectrum.

To be sure, the relative ends of the products-services spectrum are clear. If a distributor sells a customer a case of light bulbs, the distributor's liability to that customer can be based on strict products liability alone. If the light bulbs are not defective or unreasonably dangerous, the distributor generally has no liability. Conversely, if a distributor installs light bulbs for a customer, negligence law will most likely govern. The distributor will have a duty to perform this service carefully and to properly install the light bulbs. If there is no breach of this duty, there can be no liability.

Many services provided by NAED members, however, combine the sale of products with the sale of services. In these kind of "hybrid" transactions, it is not clear at first glance which legal framework governing liability and/or potential recovery by a plaintiff will apply. Some basic rules have been developed by courts to aid in this products-versus-services analysis and determine whether a given case involving a mix of products and services will be governed by strict products liability law or negligence law.

First, courts look to the source of the harm and the nature of the plaintiff's injury. Was the injury caused by a malfunction in the product itself (which would suggest that products liability law should apply), or can it be traced to something the defendant did or did not do (which suggests negligence)? For example, many NAED members perform kitting services for their customers, grouping different

products together and selling them as one product for a customer's convenience. Clearly, the sale of products is involved in this kind of transaction, but the provision of a service is also involved. While it is true that the service may involve little more than putting different products, still in their original packaging, on one pallet for delivery to the customer, the question of liability can arise if one of the products causes harm and suit is filed. Will principles of negligence or strict products liability law govern?

If the source of the harm suffered was a defect in one of the products – if it explodes and causes injury, for example – the fact that this product was sold along with a service will likely be irrelevant. Courts will likely analyze the potential liability of the wholesaler in this context in the strict products liability framework, and the core inquiry will be whether the product that exploded was defective or unreasonably dangerous.

In contrast, if one of the products falls off the pallet and crushes a customer's employee's foot, the source of the harm will likely be viewed as having nothing to do with any defect or danger in the product itself (apart, arguably, from its weight) but rather as stemming from the care with which the distributor loaded the product onto the pallet. In that case, negligence principles will almost certainly apply.

The nature of a transaction itself is another relevant factor in deciding whether products liability or negligence law will apply to hybrid transactions. What was the predominant

purpose of the transaction,²² or, put another way, what is the totality of the circumstances surrounding the transaction that took place?²³ The predominant purpose test focuses on whether a hybrid transaction can be viewed as taking place predominantly to sell a product or provide a service.²⁴

For example, many NAED members perform some type of inventory service for their customers. If a NAED member's employee who works full time at the customer site ordering and stocking the member's parts and managing all aspects of the customer's inventory fails to order needed parts which, in turn, causes the customer to suffer construction delays and resulting loss, a court may view the predominant purpose of that employee's presence at the customer site to be the provision of inventory management services. In contrast, if a NAED member or his employee stops by a customer's warehouse on an intermittent and infrequent basis, only for the purpose of providing the products the member sells, issues arising from the customer's insufficiently maintained inventory will not likely implicate the member in negligence liability.

The predominant purpose test is sometimes seen as inquiring whether the product provided is "incidental" to the more primary function of performing a service.²⁵ If the court finds that the product provided is incidental to the service, then negligence will most likely apply. Similarly, courts may ask whether the product is "inseparable" from the service. This iteration of the predominant purpose test

PRODUCT OR SERVICE?

Definitions of products and services employed in different legal contexts can also affect whether a certain transaction will be viewed as a product or a service. Under one common definition, a service is "generally custom-tailored to meet the needs of particular customers, where there is no mass production and distribution and no consumers needing protection from an unknown manufacturer or seller."²⁷

A product, in contrast, can be defined by legislation or by courts,²⁸ but it is usually identified as a tangible commodity that can be delivered through the stream of commerce.

applies to services that cannot be performed without a particular product, such as a hair salon that provides the service of dyeing hair, which necessarily involves the sale of the dye used. In such cases, negligence principles will likely apply.²⁶

One common law dictionary, for example, defines a product as “[s]omething that is distributed commercially for use or consumption and that is [usually] (1) tangible personal property, (2) the result of fabrication or processing, and (3) an item that has passed through a chain of commercial distribution before ultimate use or consumption.” A personal service, on the other hand, involves “[a] person or company whose business is to do useful things for others.”²⁹ Which definition a court chooses to apply in a particular context may affect the products-services calculation.

“ Courts also look at the production aspects of products used in hybrid transactions to determine if the product was mass-produced for a wide market or tailored for individual use. ”

If mass produced, courts are more likely to find that the hybrid transaction relates to a product subject to strict liability principles; if individually tailored for a particular customer’s needs, courts will more likely view the transaction as a service subject to negligence principles.³⁰ In determining individual tailoring of a product, courts attempt to determine whether the product underwent a substantial change or alteration before reaching the consumer or end-user.³¹

The way in which a distributor charges the customer for a hybrid transaction also affects the way in which courts determine the legal framework of liability. Did the distributor charge for the product alone, the service alone, or both together?³² If the purchaser unambiguously paid for the product used, the transaction will more likely be subject to strict liability principles.

In this context, a distributor being deemed a seller of goods and receiving payment for the sale of a product separate and apart from the services provided, should not be confused with a distributor being deemed a provider of expert or professional services. Where such services are rendered and the expertise of the service provider forms the value of the service, the transaction is generally considered to be a service rather than a product, and is thereby governed by negligence framework.

For example, while a builder can generally be held liable under strict products liability for harm resulting from products he sold to the customer and used in construction, an engineer or architect involved only with the design implemented by the builder would not likely be held liable under strict products liability. As one court has stated, “it is settled that those who sell their services for the guidance of others in their economic, financial, and personal affairs are not liable in the absence of negligence or intentional misconduct.”³³

This may be an important consideration for NAED members who provide their customers with expert consulting or engineering services, which are then implemented by others. Absent some other basis for the imposition of strict liability (such as the sale of component parts), strict liability will not likely apply where only expertise-based services are rendered.

Conversely, where an NAED member follows another’s plans properly and has no role in the design of a project, the member will generally not have a duty to third parties based on an allegedly negligent design. Instead, the member’s duties will likely be deemed discharged when it has successfully executed the specifications provided.³⁴ As a distributor or wholesaler becomes more involved in design, however, it will likely be unable to stave off liability where design defects are at issue.³⁵

One interesting example of a potentially hybrid transaction concerns the sale of electricity; is this transaction seen as the provision of a service or the sale of a product? This is a question not yet settled in law. Several jurisdictions, such as California, Colorado, and Wisconsin, view the distribution of electricity as a service, but electricity itself, in the contemplation of the ordinary user, as a

consumable product.³⁶ In these jurisdictions, electricity is considered a product whose harm can be subject to strict liability principles because it is a commodity which, like other goods, can be manufactured, transported, and sold.³⁷

Other jurisdictions, such as New York and Ohio, have held that electricity cannot be considered a product, but is instead a service governed by negligence principles, for two primary reasons. First, consumers pay for electricity by usage, for the length of time the electricity is flowing; therefore the consumer is seen as paying for the use of the electricity, not the electricity itself.³⁸ Second, courts note that electricity leaves the provider in a substantially different form from that which ultimately enters the consumer's home. This alteration in the product has been found to make strict products liability law inapplicable in this context.³⁹

Accompanying all these factors are the policy questions that courts often ask in deciding if a transaction is a product subject to strict liability or a service subject to negligence and the key concept of fault.

“*The most fundamental policy question to be asked is: Who should bear the cost of the harm that results from faulty products or negligently performed services – the provider or the consumer?*”

As discussed earlier, distributing the risk is the primary justification for imposing strict liability on sellers in the distributive chain, and many courts therefore view a strict liability framework as inappropriate in services-oriented contexts.⁴⁰

Risk distribution makes sense in the strict liability setting because the costs imposed on manufacturers and distributors are ultimately spread, in the form of higher prices, among everyone, including consumers. It is consumers

who ultimately benefit from receiving safer products. Risk distribution makes less sense when applied to the provision of services, because the typical service provider is usually less able to spread costs among his customers than a seller involved in the product distribution chain..

For example, if a manufacturer and distributor of a cleaning product is held strictly liable for a defective or unreasonably dangerous cleaning product, it can spread the cost of making this product safe among everyone in the stream of commerce, including the consumer. On the other hand, if someone who is harmed by this defective or dangerous cleaning product can hold the cleaning service who used it liable, this liability is likely to be borne solely by the cleaning service. From a policy standpoint, imposing strict liability on those who provide services could jeopardize the vitality of services provided, unfairly castigating those who generally perform custom work for their clients with no involvement in the mass production of the products used.

Assembly and Modification

Performing the service of assembling and/or modifying a product later sold for consumption can create additional liability for a distributor or wholesaler, whether in negligence or strict products liability⁴¹ A distributor who assembles a product or modifies it for his customers can be potentially liable for not performing this service with sufficient care.⁴² Moreover, assemblers of products are treated as manufacturers and held strictly liable for the products they assemble, even where an injury-causing defect results from a component part used in the assembly but manufactured by another.⁴³

As discussed above, products liability law places responsibility for defective and unreasonably dangerous products on manufacturers and distributors of completed products, and all those involved in processing and distributing a product can also be subject to strict liability under the law.⁴⁴ But when the cause of the consumer's injury is a fault in the product attributable to how it was assembled or modified, negligence can also apply.

Moreover, and importantly, the manufacturer of a product that is not dangerous when it

leaves the manufacturer may be shielded from liability in those cases where the danger is deemed to have been created by what a seller or distributor does to the product when assembling or modifying it. Think of a bicycle dealer who negligently assembles bicycles or substitutes inferior parts for those supplied by the manufacturer.


Where it is a wholesaler's or distributor's modification or alteration of a product that makes it dangerous and causes injury, the wholesaler or distributor may find itself the only entity from whom an injured plaintiff can turn to seek compensation.⁴⁵

Training

Many NAED members provide training to customers or third parties as an added or stand-alone service. In fact, over 80% of respondents to the NAED Service Liability Research Survey indicated that they provide some type of training to customers or third parties.

When provided as a stand-alone service, and not in conjunction with the sale of any product, the provision of training would likely be viewed by courts as a service subject to negligence principles under section 324A of the Restatement (Second) of Torts, which, as discussed, addresses a defendant's liability to third persons for the negligent performance of services.⁴⁶ As one secondary source has observed, where a product manufacturer or distributor "undertakes to direct or recommend the manner in which the product is to be used" – even where that product "is either harmless or beneficial, but which, when improperly used, will cause, or is likely to cause, material injury" – the manufacturer or distributor "owes a duty to exercise reasonable care commensurate with the dangers involved in giving such directions and in the making of such recommendations."⁴⁷

As with many of the hybrid services addressed here, however, where training is related to the sale of a product, liability alleged to result from such training can be governed by strict liability principles. For example, a supplier of tires has been held subject to strict products liability



The bottom line for providers of training services is that they must undertake to perform training with the appropriate degree of prudence and care.

law when sued by a plaintiff claiming that his accident occurred as a result of following the procedures depicted in a safety-training film furnished by the supplier.⁴⁸ The tire supplier, of course, provided the customer with both a product (the tires) and a service (training on how to remove these tires from certain equipment).

When sued for harm alleged to result from following the training advice provided by the distributor, the court viewed this harm as resulting from a defective product and not from a negligently performed service. It noted that the training film was "an integral part of [the distributor's] role as supplier and seller of" tires; and, while "the showing of the film might be generically characterized as a form of service," what was key was that "this service was only performed in connection with distribution and sale of" the product and thus "was only incidentally related to the sale itself."⁴⁹

Courts are likely to consider the relationship between the provision of training services and the sale of a product when seeking to determine whether training should be viewed as a product or service for tort liability purposes.

Endnotes

- 1 See Restatement (Second) of Torts § 402A (providing that “(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.”). See also, NAED’s White Paper: [Product Liability Exposure: How to Manage and Mitigate the Risks in Today’s Global Market](#), NAED Education and Research Foundation – Channel Advantage Partnership, 2008.
- 2 Section 323 provides that “[o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other’s person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other’s reliance upon the undertaking.” Section 324A provides that “[o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.”
- 3 1 Modern Tort Law: Liability and Litig. § 3:3 (2d ed. 2008).
- 4 57A Am. Jur. 2d Negl. § 79 (2008).
- 5 *Id.*; 1 Modern Tort Law: Liability and Litig. § 3:3 (2d ed. 2008).
- 6 See, e.g., *Evans v. Liberty Mut. Ins. Co.*, 398 F.2d 665, 667 (3d Cir. 1968).
- 7 *Friedman v. F.E. Myers Co.*, 706 F. Supp. 376, 383 (E.D. Pa. 1989).
- 8 *Evans*, 398 F.2d at 666-67.
- 9 See *Gritzner v. Michael R.*, 611 N.W.2d 906, 920 (Wis. 2000).
- 10 See *Morgan v. Metropolitan Fuels, Inc.*, 334 A.2d 553, 556 (Md. Ct. Spec. App. 1975).
- 11 *Id.*
- 12 See *Friedman v. F.E. Myers Co.*, 706 F. Supp. 376, 382-83 (E.D. Pa. 1989)
- 13 Also required to recover for another’s negligence are a showing of causation – that the alleged breach of duty caused the harm at issue – and resulting damages.
- 14 See, e.g., *Wiggs v. City of Phoenix*, 10 P.3d 625, 627 (Ariz. 2000).
- 15 *Fuller v. Tractor & Equipment Company*, 545 So. 2d 757 (Ala. Sup. Ct. 1989); *Maristany v. Patient Support Services, Inc.*, 264 A.D.2d 302, 302-03 (N.Y. App. Div. 1999).
- 16 *Black’s Law Dictionary* (8th ed. 2004) (emphasis added).
- 17 See, e.g., *Milau Assoc. v. North Avenue Dev.*, 368 N.E.2d 1247 (N.Y. 1977). States that do not imply warranties into services contracts include New York, Colorado, Illinois, Indiana, and Michigan.
- 18 *Leonard & Harral Packing Co. v. Ward*, 883 S.W.2d 337 (Tex. App. Ct, 1994), *rev’d on other grounds*, 937 S.W.2d 425 (Tex. 1996).
- 19 See generally 25 C.J.S. Damages § 100; 22 Am. Jur. 2d Damages § 574.
- 20 See generally 65 A.L.R.4th 1126.
- 21 *Adams v. Copper Beach Townhome Communities, L.P.*, 816 A.2d 301 (Pa. Super. Ct. 2003).
- 22 See, e.g., *ACandS, Inc. v. Abate*, 710 A.2d 944, 999, 1001-02 (Md. Ct. Spec. App. 1998).
- 23 63A Am. Jur. 2d Prod. Liab. § 1301 (2008).
- 24 63A Am. Jur. 2d Prod. Liab. § 1301 (2008); Restatement of Torts (Third) § 20(c).
- 25 See *Podrat v. Codman-Shurtleff, Inc.*, 558 A.2d 895, 898 (Pa. Super. Ct. 1989).
- 26 See *Cobb v. Dallas Fort Worth Med. Ctr.-Grand Prairie*, 48 S.W.3d 820, 826 (Tex. App. 2001).
- 27 Am L. Prod. Liab. 3d § 37:1.
- 28 For example, in Louisiana, the provision of blood (such as that used in a transfusion) is defined as a service, not a product; as a result, a plaintiff injured by the blood used in a transfusion could not recover against the supplier of the blood for strict products liability – only negligence principles applied. *Heirs of Ude C. Fruge v. Blood Services*, 506 F.2d 841, 843, 846 (5th Cir. 1975). No such legislative definitions are generally applicable to what NAED members provide to their customers, however.
- 29 *Black’s Law Dictionary* (8th ed. 2004).
- 30 See *Saloomy v. Jeppesen*, 707 F.2d 671, 676 (2d Cir. 1983).
- 31 *K-Mart Corp. v. Midcon Realty Group of Conn., LTD*, 489 F. Supp. 813, 817 (D. Conn. 1980).
- 32 See *Walla v. U.S.*, 432 F. Supp. 618, 620 (E.D. Wis. 1977).
- 33 See *Del Mar Beach Club Owners Ass’n, Inc. v. Imperial Contracting Co.*, 176 Cal. Rptr. 886, 914 (Cal. Ct. App. 1981).
- 34 *Hannah v. Gregg Bland & Berry*, 840 So.2d 839, 847 (Ala. 2002). An important exception to this rule is where the contractor reasonably should be aware that executing with plans would create an unreasonably dangerous situation.
- 35 *Nygaard v. United Parcel Service General Services Co.*, 1 F. Supp. 2d 1173 (D. Or. 1998).
- 36 *Ransome v. Wis. Elec. Power Co.*, 275 N.W.2d 641, 643 (Wis. 1969); *Pierce v. Pacific Gas and Elec. Co.*, 212 Cal. Rptr. 283, 291 (Cal. Ct. App. 1985); *Smith v. Home Light and Power Co.*, 695 P.2d 788, 789 (Colo. App. 1985).
- 37 *Pierce*, 212 Cal. Rptr. at 290.
- 38 *Bowen v. Niagara Mohawk Power Corp.*, 183 A.D.2d 293, 297 (N.Y. App. Div. 1992).
- 39 *Otte v. Dayton Power & Light Co.*, 523 N.E.2d 835, 839 (Ohio 1988).
- 40 Am L. Prod. Liab. 3d § 37:1.
- 41 *Merrill v. Navegar, Inc.*, 28 P.3d 116 (Ca. 2001).
- 42 *Crews v. W.A. Brown & Son, Inc.*, 416 S.E.2d 924 (N.C. App. Ct. 1992).
- 43 72A C.J.S. Products Liability § 63.
- 44 *CSX Transp., Inc. v. Matweld, Inc.*, 828 So. 2d 910 (Ala. 2002).
- 45 *In re TMJ Implants Prods. Liab. Litig.*, 97 F.3d 1050 (8th Cir. 1996); *Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzer Co.*, 129 Cal.App.4th 577 (Ct. App. 2004).
- 46 *Cooper v. Aspen Skiing Co.*, 48 P.3d 1229 (Colo. 2002) (overruled on other grounds by statute).
- 47 63A Am. Jur. 2d Products Liability § 1137.
- 48 *Persichini v. Brad Ragan, Inc.*, 735 P.2d 168 (Colo. 1987).
- 49 *Id.* at 174.



Service Liability Exposure:

Navigating the Legal Risks and Protections

This white paper raises issues and presents suggestions and general guidance of inquiries electrical distributors should undertake in order to protect themselves fully from service liability and other exposures associated with the provision of value-added services. For further advice, the reader is encouraged to seek the counsel of his or her attorneys, insurance agents, and brokers and risk managers.

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