

For Sale

Manufacturer Liability for Used Durable Medical Equipment

By David Brown and Gretchen Schuler

“Used wheelchair for sale – just like new. Barely been used. Still under warranty. Each piece of equipment is in good working order, cleaned and inspected by factory trained technicians.”

In today’s day and age, products and goods are freely and efficiently sold over the Internet. This obviously includes used medical devices. There are specific websites that are entirely devoted to the resale of used medical equipment including durable medical devices. Additionally, individuals also market and sell their used durable medical equipment to other individuals through various websites. The Centers for Medicare and Medicaid Services has defined durable medical equipment to include equipment that:

1. Can withstand repeated use;
2. Has a life expectancy of at least three years;
3. Is primarily and customarily used to serve medical purpose;
4. Generally is not useful to an individual in the absence of an illness or injury; and
5. Is appropriate for use in home.

Examples of durable medical equipment include oxygen equipment, hospital beds, wheelchairs, patient lifts, and walkers. These items are routinely rented, sold and resold in person and over the Internet. In fact, due to their durable nature (able to withstand wear, pressure, or damage) these devices are routinely resold to several different purchasers. Or in some instances the device may be passed on among family members or neighbors — particularly ambulatory items such as crutches, walkers, and manual wheelchairs that are often used for a temporary condition and then are kept in the garage or closet until another family member needs it or it is sold. Is there liability for the manufacturer of the device after it has been sold to a subsequent user? With an aging demographic and longer life expectancies, issues with liability for injuries related to the use of durable medical equipment will continue to remain prevalent.

Tort Law

Traditional tort rules apply even though the alleged defective product at issue was used and then resold. The majority of jurisdictions hold that product liability



principles and law apply to a manufacturer of a product even though the product has been resold by a subsequent purchaser. For example, if a state follows common law negligence principles, then the doctrine would be applicable to the subsequent resale of a durable medical device. Furthermore, many states have adopted a strict liability standard (liability not based upon an actual negligent act or intent to harm) as it pertains to products liability issues. Under that analysis, a durable medical equipment manufacturer can also be liable for a product that has been resold.

The important issues to evaluate here are the applicable defenses. The affirmative defense of product modification/alteration is a valid defense to a negligence or strict liability claim if the product is altered or modified between the time it left the manufacturer’s hands and the time of the Plaintiff’s injury. Importantly, the defense of

modification/alteration may be asserted regardless of whether the modification or alteration was done by a party to the litigation. As such, if the modification was done by an interim user of a device before it eventually reached the Plaintiff and the Plaintiff was injured; the defense would still be applicable given the multiple resales of items.

As with any equipment, proper service and maintenance is always required. In this context, it is always important to determine if the manufacturer's recommendation for service and maintenance have been followed. Was the owner's manual with those instructions provided to the subsequent purchaser? Where has the particular device been serviced? This defense is especially important given the multiple resales of a certain item. Also, it is very important to determine whether the equipment has been modified to fit an individual's particular situation. Many medical devices are generic in nature and not customized for a particular individual's specific needs.

Was the owner's manual with those instructions provided to the subsequent purchaser?

Furthermore, the defenses of product misuse (using a product in an abnormal manner) and assumption of the risk (a deliberate or voluntary choice to assent to the continuance of a dangerous situation which causes injury) are both still available. In the context of medical device litigation, there are myriad opportunities for a subsequent purchaser to improperly use medical equipment.

Breach of Warranty

Plaintiffs/claimants will pursue a claim for breach of express or implied warranty. An express warranty is a seller's promise or guarantee that a buyer relies upon when making a purchase. There are specific federal and state laws that govern express warranties. Generally, the enforcement of an express warranty is contingent upon the buyer-claimant being "in privity" with the medical device manufacturer at the time of the original purchase. However, some states recognize an exception to this requirement allowing a Plaintiff to recover a breach of an express warranty claim if the person is personally injured.

A majority of jurisdictions recognize as a right of action for breach of implied warranty of merchantability. In essence, the implied warranty of merchantability means that the device must reasonably conform to the ordinary buyer's expectations and that the product is what the manufacturer holds it out to be. Thus, subsequent or final purchasers of used products or

devices, though not "in privity" with the actual manufacturer of the medical device, may still recover against the manufacturer for breach of implied warranty of merchantability.

Some jurisdictions have even articulated that the goal of the implied warranty of merchantability is to free up subsequent purchasers from the privity requirement. As such, the majority of jurisdictions extend the implied warranty of merchantability to new and used goods. Furthermore, the implied warranty of merchantability would generally be more applicable in the context of used, durable medical devices. [LM](#)

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Practice Pointers

Items can be freely purchased in retail stores and over the Internet without instruction or an owner's manual, it is important to determine if these items are being used properly. Here are a few practice pointers to consider in dealing with claims involving used durable medical devices:

- Is the device being used in conjunction with treatment from a physical therapist, home health care aide or at the order of a physician? What were the specific instructions for the use that were provided by the healthcare provider? Is the device appropriate for the user's physical needs?
- Thoroughly investigate how the equipment was being used at the time of the alleged incident.
- Obtain all of the documentation regarding the service and maintenance history of the equipment. Were any after-market modifications made to the device?
- Interview/depose the previous owners of the equipment to determine how they used the equipment and whether it was ever serviced or had maintenance performed pursuant to the manufacturer's recommendation. When was the device first put into the stream of commerce? Does a statute of repose apply?
- Make sure that the equipment is properly preserved. See if it is possible to examine the location where the incident occurred to determine if there were any out side factors that may have played a part in the incident.