



Litigation Defense for Retailers

(Session: Retailer Liability)

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I. Why Do Plaintiffs Sue Retailers?

II. Removal

Plaintiffs generally sue retailers to defeat diversity thereby preventing removal to federal court (prevent federal court expert challenges and less favorable jury pools).

28 U.S.C.A. § 1332. *Diversity of Citizenship; Amount in Controversy; Costs.*

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;...

(c) For the purposes of this section and section 1441 of this title . . .

(1) a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business,

28 U.S.C.A. § 1441. *Removal of Civil Actions.*

(a) Generally, except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Removal based on diversity of citizenship. (1) In determining whether a civil action is removable on the basis of the jurisdiction under section 1332(a) of this title, the citizenship of defendants sued under fictitious names shall be disregarded.

(2) A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

III. Retailer Is Sued

How does the case progress against the retailer?

- Retailer is sued and typically tenders to manufacturer.

IV. Basis for Tender to the Manufacturer

Retailers are served and tender the lawsuit to product manufacturers. Sources of Retailers' right to defense and indemnity:

- Contractual
- Statutory
- Equitable principles

A. Contractual

Continuing Commodity Guaranty Agreement (See **Exhibit A**, sample "Food and drug supplier's continuing commodity guaranty and indemnity agreement".)

B. Statutory

U.C.C. § 2-314. Implied Warranty: Merchantability; Usage of Trade.

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

U.C.C. § 2-315. Implied Warranty: Fitness for Particular Purpose.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

Duty of Manufacturer to Indemnify Innocent Seller Texas/

V.T.C.A. § 82.002. Manufacturer's Duty to Indemnify.

(a) A manufacturer shall indemnify and hold harmless a seller against loss arising out of a products liability action, except for any loss caused by the seller's negligence, intentional misconduct, or other act or omission, such as negligently modifying or altering the product, for which the seller is independently liable.

(b) For purposes of this section, "loss" includes court costs and other reasonable expenses, reasonable attorney fees, and any reasonable damages.

(c) Damages awarded by the trier of fact shall, on final judgment, be deemed reasonable for purposes of this section.

(d) For purposes of this section, a wholesale distributor or retail seller who completely or partially assembles a product in accordance with the manufacturer's instructions shall be considered a seller.

(e) The duty to indemnify under this section:

(1) applies without regard to the manner in which the action is concluded;
and

(2) is in addition to any duty to indemnify established by law, contract, or otherwise.

(f) A seller eligible for indemnification under this section shall give reasonable notice to the manufacturer of a product claimed in a petition or complaint to be defective, unless the manufacturer has been served as a party or otherwise has actual notice of the action.

(g) A seller is entitled to recover from the manufacturer court costs and other reasonable expenses, reasonable attorney fees, and any reasonable damages incurred by the seller to enforce the seller's right to indemnification under this section.

Restatement (Third) of Torts: Apportionment of Liab. §22 (2000).

§22. Indemnity

(a) When two or more persons are or may be liable for the same harm and one of them discharges the liability of another in whole or in part by settlement or discharge of judgment, the person discharging the liability is entitled to recover indemnity in the amount paid to the plaintiff, plus reasonable legal expenses, if:

- (1) the indemnitor has agreed by contract to indemnify the indemnitee, or
- (2) the indemnitee
 - (i) was not liable except vicariously for the tort of the indemnitor, or
 - (ii) was not liable except as a seller of a product supplied to the indemnitee by the indemnitor and the indemnitee was not independently culpable.

(b) A person who is otherwise entitled to recover indemnity pursuant to a contract may do so even if the party against whom indemnity is sought would not be liable to the plaintiff.

C. Equitable Principles.

- **Implied Equitable Indemnity**

V. Strict Liability.

In majority of jurisdictions (most popular with plaintiffs' bar; California, Illinois, New York, Massachusetts, Pennsylvania, Texas) there is no passive retailer defense and retailer is in the strict liability chain because they sold the good, even if they did not modify or alter product in any way.

Strict Liability of Retailer.

California

Price v. Shell Oil Co. (1970) 2 Cal.3d 245, 250.

The rule is now settled in California that 'A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.' (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 62). A retail dealer, being an 'integral part of the overall producing and marketing enterprise' (*Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d 256, 262), is similarly liable.

(See also *Elmore v. American Motors Corp.* (1969) 70 Cal.2d 578; *Prosser, Strict Liability to the Consumer in California* (1966) 18 Hastings L.J. 9.)

Illinois

Suvada v. White Motor Co. 32 Ill.2d 612 (1965).

In addition to the manufacturer, liability in tort for a defective product extends to a seller, (*Lindroth v. Walgreen Co.*, 407 Ill. 121,) a contractor, (*Paul Harris Furniture Co. v. Morse*, 10 Ill.2d 28,) and a supplier, (*Watts v. Bacon & Van Buskirk Glass Co.*, 18 Ill.2d 226,) one who holds himself out to be the manufacturer, (*Lill v. Murphy Door Bed Co.*, 290 Ill.App. 328,) the assembler of parts (*Rotche v. Buick Motor Co.*, 358 Ill. 507,) and the manufacturer of a component part. (*Gray v. American Radiator and Standard Sanitary Corp.*, 22 Ill.2d 432.) Lack of privity of contract not being a defense in a tort action against the manufacturer, it is not a defense in an action against any of these parties.

Massachusetts

No Strict Liability (but functional equivalent in breach of implied or express warranty claim).

Commonwealth v. Johnson Insulation, 425 Mass. 650, 653-654 (1997).

We have declined to allow claims for strict liability in tort for defective products, but we have recognized that, by eliminating most contractually-based defenses to the implied warranty of merchantability (such as the requirements of privity and of notice), the Legislature has imposed duties on merchants as a matter of social policy, and has expressed its intent that this warranty should establish liability as comprehensive as that to be found in other jurisdictions that have adopted the tort of strict product liability. *Back v. Wickes Corp.*, 375 Mass. 633, 639–640, 378 N.E.2d 964 (1978). *Swartz v. General Motors Corp.*, 375 Mass. 628, 629–631, 378 N.E.2d 61 (1978). Liability under this implied warranty is “congruent in nearly all respects with the principles expressed *654 in Restatement (Second) of Torts § 402A (1965).” *Back v. Wickes*, supra at 640. The Restatement of Torts, supra, takes the position that the seller of “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,” even though “the seller has exercised all possible care in the preparation and sale of his product.” *Id.* at § 402A (1), (2)(a). Thus, a

claim for breach of the implied warranty of merchantability should be considered in light of the requirements for warranties contained in G.L. c. 106, §§ 2–314 to 2–318, as well as the principles expressed in § 402A of the Restatement. *Back v. Wickes Corp.*, *supra*.

New York

Finerty v. Abex Corp. 27 N.Y.3d 236 (2016).

Strict liability may also be imposed on retailers and distributors of allegedly defective products because such sellers, due to their continuing relationship with the manufacturers, are usually “in a position to exert pressure for the improved safety of products and can recover increased costs within their commercial dealings, or through contribution or indemnification in litigation” (*Sukljan v Ross & Son Co.*, 69 NY2d 89, 95 (1986)). Sellers who engage in product sales in the ordinary course of their business are subject to strict liability because they “may be said to have assumed a special responsibility to the public, which has come to expect them to stand behind their goods” (*id.*; see Restatement [Second] of Torts § 402A, Comment c).

Pennsylvania

Webb v. Zern, 220 A.2d 853 (Pa. 1966).

The new Restatement of Torts reflects this modern attitude. Section 402A thereof states:

‘(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.

(2) The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.’ Restatement (Second) Torts s 402A (1965).

We hereby adopt the foregoing language as the law of Pennsylvania.

Texas

McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 788-789 (Supreme Court of Texas 1967).

Section 402A of the American Law Institute's Restatement of the Law of Torts (2d Ed.), hereinafter referred to as the Torts Restatement, reads as follows:

‘(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.

‘(2) The rule stated in Subsection (1) applies although

‘(a) the seller has exercised all possible care in the preparation and sale of his product, and

*789 (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.’

In Comment (a) under Section 402A of the Torts Restatement, it is said:

‘This Section states a special rule applicable to sellers of products. The rule is one of strict liability, making the seller subject to liability to the user or consumer even though he has exercised all possible care in the preparation and sale of the product. * * * The rule stated here is not exclusive, and does not preclude liability based upon the alternative ground of negligence of the seller, where such negligence can be proved.’

Restatement (Third) of Torts: Prod. Liab. § 1 (1998)

One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.

VI. Innocent Seller Statutes

In minority of jurisdictions (those not nearly as popular with plaintiffs’ bar; Missouri, Tennessee, Washington) there are innocent seller protection statutes or their functional equivalent.

No Strict Liability of Retailer

Missouri

Missouri Product Liability Innocent Seller Protection Statute.

V.A.M.S. 537.762. Motion to dismiss, defendant whose only liability is as seller in stream of commerce requirements, procedure--order of dismissal to be interlocutory.

1. Defendant whose liability is based solely on his status as a seller in the stream of commerce may be dismissed from a products liability claim as provided in this section.

2. This section shall apply to any products liability claim in which another defendant, including the manufacturer, is properly before the court and from whom total recovery may be had for plaintiff's claim.

3. A defendant may move for dismissal under this section within the time for filing an answer or other responsive pleading unless permitted by the court at a later time for good cause shown. The motion shall be accompanied by an affidavit which shall be made under oath and shall state that the defendant is aware of no facts or circumstances upon which a verdict might be reached against him, other than his status as a seller in the stream of commerce.

4. The parties shall have sixty days in which to conduct discovery on the issues raised in the motion and affidavit. The court for good cause shown, may extend the time for discovery, and may enter a protective order pursuant to the rules of civil procedure regarding the scope of discovery on other issues.

5. Any party may move for a hearing on a motion to dismiss under this section. If the requirements of subsections 2 and 3 of this section are met, and no party comes forward at such a hearing with evidence of facts which would render the defendant seeking dismissal under this section liable on some basis other than his status as a seller in the stream of commerce, the court shall dismiss without prejudice the claim as to that defendant.

6. An order of dismissal under this section shall be interlocutory until final disposition of plaintiff's claim by settlement or judgment and may be set aside for good cause shown at anytime prior to such disposition.

Effective: August 28, 2019.

Tennessee

Tennessee Innocent Seller Statute.

T.C.A. § 29-28-106. Sellers

No product liability action, as defined in § 29-28-102, shall be commenced or maintained against any seller, other than the manufacturer, unless:

(1) The seller exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the alleged harm for which recovery of damages is sought;

(2) Altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought;

(3) The seller gave an express warranty as defined by title 47, chapter 2;

(4) The manufacturer or distributor of the product or part in question is not subject to service of process in this state and the long-arm statutes of Tennessee do not serve as the basis for obtaining service of process; or

(5) The manufacturer has been judicially declared insolvent.

Washington

Washington Innocent Seller Product Liability Exception Statute.

West's RCWA 7.72.040. Liability of product seller other than manufacturer—Exception.

(1) Except as provided in subsection (2) of this section, a product seller other than a manufacturer is liable to the claimant only if the claimant's harm was proximately caused by:

(a) The negligence of such product seller; or

(b) Breach of an express warranty made by such product seller; or

(c) The intentional misrepresentation of facts about the product by such product seller or the intentional concealment of information about the product by such product seller.

(2) A product seller, other than a manufacturer, shall have the liability of a manufacturer to the claimant if:

(a) No solvent manufacturer who would be liable to the claimant is subject to service of process under the laws of the claimant's domicile or the state of Washington; or

(b) The court determines that it is highly probable that the claimant would be unable to enforce a judgment against any manufacturer; or

(c) The product seller is a controlled subsidiary of a manufacturer, or the manufacturer is a controlled subsidiary of the product seller; or

(d) The product seller provided the plans or specifications for the manufacture or preparation of the product and such plans or specifications were a proximate cause of the defect in the product; or

(e) The product was marketed under a trade name or brand name of the product seller.

(3) Subsection (2) of this section does not apply to a pharmacist who dispenses a prescription product in the form manufactured by a commercial manufacturer pursuant to a prescription issued by a licensed practitioner if the pharmacist complies with recordkeeping requirements pursuant to chapters 18.64, 69.41, and 69.50 RCW, and related administrative rules.

Strict Liability plus Innocent Seller Escape?

New Jersey

Newmark v. Gimbel's, Inc. 54 N.J. 585, 600 (1969).

It has long been settled that retailers and those whose relationship with their patrons or consumers place them in that classification, are subject to a heavy burden of liability. The liability has been predicated upon breach of implied warranty of fitness or more recently in terms of strict liability in tort. *Henningsen v. Bloomfield Motors, Inc.*, *supra*, 32 N.J. at 406; *Higbee v. Giant Food Shopping Center, Inc.*, 106 F.Supp. 586 (D.C.Va.1952); *Vandermark v. Ford Motor Company*, 61 Cal.2d 256; *Graham v. Bottenfield's, Inc.*, 176 Kan. 68 (1954); *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex.Sup.1967); *Restatement (Second) of Torts* § 402A (1965), comment f, p. 350; Harper & Jones, *Torts*, s 28.30, p. 1600 (1956). As Chief Justice Traynor noted in *Vandermark*, *supra*, retailers are engaged in the distribution of goods to the public. They select the manufacturer whose products they wish to sell, and thus they become part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products. Moreover, from a practical standpoint the strict liability of the dealer may move him to put pressure on the manufacturer to make the products safe.

N.J.S.A. 2A:58C-9. Identification of manufacturer; strict liability of product supplier.

a. In any product liability action against a product seller, the product seller may file an affidavit certifying the correct identity of the manufacturer of the product which allegedly caused the injury, death or damage.

b. Upon filing the affidavit pursuant to subsection a. of this section, the product seller shall be relieved of all strict liability claims, subject to the provisions set forth in subsection d. of this section. Due diligence shall be exercised in providing the plaintiff with the correct identity of the manufacturer or manufacturers.

c. The product seller shall be subject to strict liability if:

(1) The identity of the manufacturer given to the plaintiff by the product seller was incorrect. Once the correct identity of the manufacturer has been provided, the product seller shall again be relieved of all strict liability claims, subject to subsection d. of this section; or

(2) The manufacturer has no known agents, facility, or other presence within the United States; or

(3) The manufacturer has no attachable assets or has been adjudicated bankrupt and a judgment is not otherwise recoverable from the assets of the bankruptcy estate.

d. A product seller shall be liable if:

(1) The product seller has exercised some significant control over the design, manufacture, packaging or labeling of the product relative to the alleged defect in the product which caused the injury, death or damage; or

(2) The product seller knew or should have known of the defect in the product which caused the injury, death or damage or the plaintiff can affirmatively demonstrate that the product seller was in possession of facts from which a reasonable person would conclude that the product seller had or should have had knowledge of the alleged defect in the product which caused the injury, death or damage; or

(3) The product seller created the defect in the product which caused the injury, death or damage.

e. The commencement of a product liability action based in whole or in part on the doctrine of strict liability against a product seller shall toll the applicable statute of limitations with respect to manufacturers who have been identified pursuant to the provisions of subsection a. of this section.

VII. Fraudulent Joinder?

Plaintiffs typically can defeat any motion that retailers are a sham defendant because plaintiff or product identification witness provides testimony that the

product or products in questions were magically purchased from an in-state retailer.

But perhaps not always.

If a non-diverse defendant is joined for the sole purpose of defeating diversity jurisdiction, the district court may ignore the presence of that defendant for the purpose of establishing diversity, and the action may be removed.

District Court to which case is removed decides if non-diverse defendant has been fraudulently joined.

Standards for determining whether joinder is fraudulent vary.

Some courts look to entire record and any means available.

Some courts review plaintiff's pleadings at time of removal supplemented by affidavits and deposition transcripts.

Some courts make determination based on plaintiff's pleadings and don't examine underlying facts.

VIII. Retailers' Posture in the Litigation

There are largely two schools of thoughts on how the retailers can react at this point.

- Lay low and hope a dismissal is forthcoming when the time to remove runs out or consider some nuisance value settlement on eve of trial;
- Manufacturers and retailers work together to make Plaintiffs question why they are suing retailers.

IX. Mutual Interests of Defendants

How can retailers and manufacturers work together?

X. Geographic Defense

If possible, determine if the product supposedly purchased from the retailer in question during the time period at issue has any bearing in reality; benefits both parties and impacts plaintiff's credibility. The functional equivalent of a geographic defense.

Example 1:

Boyd-Bostic (2018) South Carolina –The plaintiffs’ mother wasn’t sure which of the retailer’s stores she purchased baby powder from, in fact it turns out the store identified did not even exist at the time of the purchase. Retailer filed a motion to dismiss, made a motion for DV but had to go to verdict. Defense verdict for retailer, hung jury for manufacturer.

XI. Statistics Showing Purchases Probably/Not Probably Contaminated

These are cases based on contamination. If plaintiffs’ expert concedes that not every bottle was contaminated what are the odds the specific bottles purchased from the retailer in question were contaminated?

Example 2:

Nosse (2016) Los Angeles/California-Retailer argued at close there was no evidence of any contamination from any product purchased from their store. Retailer and product manufacturer obtain defense verdict.

Alfaro (2016) Los Angeles/California – Retailer obtains summary judgment based on the same attenuated contamination theory.

XII. Conclusion

Retailers and manufacturers working together to serve discovery and dispositive motions and co-retain experts works better then praying for a dismissal.

Exhibit A

Food and drug supplier's continuing Commodity guaranty and indemnity agreement.

1. In consideration of the purchase, from time to time, of articles of food, drugs, or other commodities from [*name of seller*] (Seller), by [*name of buyer*], a State of [*name of state*] corporation, and/or any other corporation which is now or

hereafter becomes affiliated with or a subsidiary of [*name of buyer*], a State of [*name of state*] corporation (Buyer), or the order of such commodities by Buyer for and on behalf of its shareholders as their purchasing agent, the Seller:

(a) Does hereby guarantee that, as of the date of shipment or delivery, each and every article of food, drugs or other commodity included in any shipment or other delivery hereafter made by Seller to, or on the order of Buyer, is, on such date, (i) not adulterated or misbranded within the meaning of the Federal Food, Drug, and Cosmetic Act; (ii) not an article which may not, under the provisions of Section 404 or 505 of the Act, be introduced into interstate commerce; and (iii) not adulterated or misbranded within the meaning of or in violation of any disclosure or warning required under the pure food and drug or health, safety or environmental laws, regulations or ordinances of any state or other government authority which are applicable to such shipment or delivery;

(b) Does hereby agree to indemnify, defend and hold the Buyer harmless from and against any and all charges, actions and proceedings brought against the article and/or Buyer for or on account of any alleged adulteration, misbranding of or other law violations pertaining to such article referred to in paragraph (1)(a) hereof for which Seller is responsible hereunder, including the loss and reasonable expenses (including, without limitation, attorney's fees and costs), if any, incurred by Buyer as a result thereof; and

(c) Does hereby agree to indemnify, defend and hold the Buyer harmless from and against any and all claims, demands, actions and causes of action which are hereafter made or brought against the Buyer by any person for the recovery of damages for the injury, illness and/or death of any person or animal which is caused or alleged to have been caused by the handling, delivery, consumption or use by such person or animal of any article of food, drugs or other commodity shipped or delivered by Seller to Buyer, including, but without limitation, any judgment rendered against or settlement paid by or on behalf of Buyer in any such action and the reasonable attorneys' fees and costs, if any, incurred by or on behalf of Buyer in connection therewith.

2. This guaranty is executed by Seller upon and subject to the following conditions:

(a) With respect to paragraphs (1)(a) and (1)(b) hereof, Seller does not guarantee against any such article becoming adulterated or misbranded within the meaning of the Act or any of the laws or ordinances after shipment or delivery to Buyer, by reason of causes beyond Seller's control (provided that any adulteration or misbranding which is found to exist after such shipment or delivery and which is caused by any defect in the processing or packing of such article by the processor or packer thereof or by the defective condition of any raw materials used in the processing or packing of such article or by any defect in the container in

which the article is packed shall be regarded as having existed at the time of such shipment or delivery for the purposes of paragraph (1)(a) hereof), and in those cases in which an article is shipped under Buyer's brand labels Seller's responsibility for misbranding shall be limited only to that resulting from the failure of the article to conform to the purchase specifications or label furnished by Buyer, provided that Seller shall not be responsible for such misbranding if Buyer insists upon the use of Buyer's brand label after Seller has notified Buyer, in writing, of the defects of the label giving rise to any such liability;

(b) With respect to paragraphs (1)(b) and (1)(c) hereof, the indemnity provisions therein contained shall be operative only if Seller receives reasonable notice of the seizure of such article or the service upon Buyer of the process in such proceeding or action, as the case may be; and

(c) With respect to paragraph (1)(c) hereof, the indemnity provisions therein contained shall not be applicable to any claim, demand, action or cause of action which is founded upon the alleged injury, illness and/or death of any person or animal if it is established that such alleged injury, illness and/or death resulted, solely and independently of all other means, from the negligence of Buyer.

Any guaranty heretofore given by Seller to Buyer which relates to the subject matter hereof is hereby revoked and this guaranty shall not be deemed to be modified or otherwise affected by any agreement hereafter entered into by Seller and Buyer unless specific reference to this guaranty is therein made. This guaranty shall continue in effect with respect to all articles of food, drugs, and other commodities purchased or ordered by Buyer from Seller prior to the receipt of written notice of its revocation by [*name of corporation*] at its office at [*address of corporation*], or such other address as may be designated in writing by [*name of corporation*] to Seller. Notice of the acceptance of this guaranty is hereby waived by Seller.

Dated: [*date of execution*]

[*NAME OF SELLER*]

By:

[*Name of authorized representative*]

[*Title of authorized representative*]