

SHOP UNTIL YOU'RE DROPPED: FALLING MERCHANDISE LITIGATION AGAINST WAREHOUSE SUPERSTORES

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Introduction

Retailers have opened their warehouse and storage room doors for customers to "do it yourself." However, the lure of low prices and convenient shopping may be at the expense of customer safety.

The warehouse superstore is a combination of the traditional industrial -warehouse and the retail store. Often referred to as "big box retailers," "super-warehouses" and "superstores," they include stores such as Home Depot, Wal-Mart, K-Mart, Lowe's, Sam's Club, Builder's and Toys R Us.

Their business strategy has revolutionized the shopping industry. The concept is simple - it is more profitable to store as much merchandise as possible on the sales floor instead of having a large stock room or remote warehouse. As a result, retailers save millions of dollars by incorporating the two facilities while customers pay lower prices for the products. However, unwary customers entering these stores are being exposed to the same dangers inherent in industrial warehouses.

Falling Merchandise

High stacking and heavy machinery are trademarks of warehouse superstores. Unfortunately, however, unsecured merchandise and the negligent operation of heavy machinery are sometimes unintended consequences.

In the stores, merchandise is stacked and displayed in bulk on the same type of

steel racks used in industrial warehouses. The racks extend from the ground to the ceiling. Shelving is often as high as 15 to 20 feet from the floor. Sales merchandise is typically placed on shelves within a customer's reach while overstock is stored in the overhead racking. There is a wide variety of merchandise stocked on showroom floors including lumber, lawnmowers, doors, bathtubs, paint cans, toys, canned food, cement and televisions.

When merchandise is received at a store's loading dock, employees transport it on wooden pallets. The pallets are moved using heavy machinery such as forklifts, propane trucks, order pickers and electric pallet jacks. The merchandise is taken onto the sales floor to keep the display and overstock shelves constantly full. This is precisely the image that retailers want to portray to the customers. However, to maintain the overstocked appearance, employees must operate heavy machinery on the showroom floor during working hours and while customers are in the store.

Falling merchandise injuries may result from:

- Unstable or unsecured products on shelves or pallets,
- Pushing merchandise from one aisle through to an adjacent aisle,
- Stacking boxes unevenly,
- Stacking heavy merchandise on top of lighter merchandise, and
- Using wooden pallets and steel racking that are damaged or broken.

Safety Practices

- *Barricades.* Blocking off selected aisles can prevent injuries. Employees may cause merchandise to fall while they are operating heavy machinery or working on ladders. Employees should barricade the aisles to prevent customers from entering where they are working. They should also barricade adjacent aisles so that customers who may be shopping there will not risk injury from merchandise that may get pushed through from the working aisle.
- *Spotters.* The use of spotters - walkers surrounding a forklift to prevent customers from approaching - is an essential tool that is frequently overlooked when

forklifts and other powered trucks are being operated. Depending upon the situation, retailers should have an adequate number of spotters located in front, behind and on both sides of the machinery. In addition, spotters should also be placed on the adjacent aisles to ensure that customers do not attempt to walk down barricaded aisles. By wearing bright safety vests, spotters will be obvious to customers who are shopping in a crowded store. It is the responsibility of management to train all employees adequately to serve as spotters. The focus must be on incident prevention -that is, seeing that every employee fully understands that there is limited visibility for heavy machine operators - and constantly being alert to customer unpredictability in a working warehouse.

Although many superstores have operating procedures requiring the use of barricades, spotters and other precautionary measures, these procedures are not always enforced by management or followed by employees.

- *Use published standards.* There are published safety standards that warehouse superstores must follow when training employees to operate heavy machinery, such as forklifts, and stack merchandise. Some of these standards are set forth by organizations such as the Occupational Safety and Health Administration ("OSHA") and the American National Standards Institute ("ANSI"). Other applicable standards may be contained in a superstore's internal company policies and standard operating procedures. Some product manufacturers have recommended stacking, display and storage policies for their merchandise, which are available to retailers.

All of the safety procedures regarding the operation of heavy machinery and employee training in industrial warehouses also apply to warehouse superstores. However, these standards evolved from working in traditional industrial warehouse environments. They do not specifically account for interaction among the general shopping public, including children and the elderly. Thus, it is critical for retailers

to adhere not only to the existing safety standards of industrial warehouses but also to implement and follow additional safety measures to account for unwary retail shoppers.

Injuries/Death on the Rise

From a marketing standpoint, retailers have been successful in blending the concept of industrial warehouses with retail stores. However, retailers need to provide adequate safety measures to protect customers once they enter the superstores. In a traditional warehouse, workers

are provided with hard hats, gloves, steel-toed boots, protective eyewear, back restraints and other protective equipment. Workers also receive particular training as it relates to their job duties. However, in superstores, customers are expected to protect themselves without any training, protective equipment or adequate warnings of hazards.

Retail management and employees should follow safety policies and procedures at all times. Unfortunately, sometimes even basic safety principles are not being followed. As a result, customers and employees are being seriously injured and killed by falling merchandise. These injuries result from improper stacking, unsafe displays, negligent forklift operation, damaged or faulty racks, inadequate employee training, insufficient safety devices and defective pallets.

For example, a Home Depot company official testified in 1998 that the company was receiving 185 injury claims per week, many involving falling merchandise. There is no agency that keeps statistics concerning falling merchandise. However, the following illustrate just a few of examples of injuries and deaths caused by falling merchandise in various warehouse superstores:

- Death of 3-year-old in Twin Falls, Idaho (falling countertops) - 2000
- Death of Connecticut man (falling 2,000-pound pallet of landscaping timbers) - 2000
- Death of woman in Los Angeles (falling lumber) - 1999
- Death of 3-year-old girl in Virginia Beach, Virginia, (falling 100-lb. television cabinet) - 1997
- Death of 3-year-old in Abilene, Texas (falling bookcase) - 1996
- Death of woman in Edmonds, Washington (falling 3,000-lb. pallet of tiles)- 1994
- Death of 3-year-old girl in San Diego (falling door) - 1992

Falling Merchandise Litigation

The number of incidents involving injuries and deaths from falling merchandise is increasing. Since warehouse

stores appeared more than a decade ago, thousands of people have been hurt or killed while shopping. This trend will continue at an alarming rate as retailers rush to open additional stores to maximize profits over customer safety.

Retailers must be aware of the dangers that exist, but there are problems with ensuring safety. The superstore concept is to portray a friendly, convenient, discount store in which families shop. Hard hats, warning signs, empty shelves, barricaded aisles and safety signals simply do not portray this image.

In a lawsuit for injury or death caused by falling merchandise, liability against the store is often clear as unsuspecting shoppers are being struck with little or no warning. Nevertheless, retailers attempt to defend the suit by placing blame on customers. Some retailers have alleged customer negligence based on:

- Not asking for assistance,
- Reaching for merchandise that is too high and
- Entering aisles where employees are obviously stocking or retrieving merchandise.

The stores take the position that customers have a duty to be aware of the potential for merchandise to fall from high shelves. In addition, merchants rely on Newton's Law of Physics - nothing falls on its own.

Customers primarily sustain injuries to the head, neck and back. Thus, the potential for damages in these cases can be significant, e.g., traumatic head injuries, cervical and lumbar injuries, and even death.

As discussed above, many of these injuries could be avoided if merchants and their employees followed applicable guidelines. Some of these standards are provided in retailers' internal safety policies, forklift operating procedures, OSHA and ANSI standards, fire codes, and product manufacturers' guidelines for stacking, storage and displays. Merchants must realize that customers, including children and the elderly, are not trained or equipped

Recommended Safety Guidelines

1. Provide warning signs of the potential for falling merchandise;
2. Completely barricade working aisles and adjacent aisles;
3. Continually provide employees and management with safety training and re-training;
4. Do not operate heavy machinery on the showroom floor when stores are open;
5. Do not re-stock the overhead shelves when stores are open;
6. Restrain merchandise with safety devices such as retainer bars, rails, banding, shrink-wrap, fencing, wiring and similar restraints;
7. Use an adequate number of spotters in working aisles and adjacent aisles;
8. Use metal dividers on racking to prevent items from pushing through to adjacent aisles;
9. Provide hard hats and other protective wear for employees;
10. Limit the height of stacked merchandise on shelves.

to protect themselves in these working environments.

Unfortunately, falling merchandise injuries are not isolated occurrences. The number of nationwide claims and lawsuits against retailers for falling merchandise cases is alarming. Recent media coverage on programs such as *Good Morning America*, *20/20*, *Inside Edition* and local affiliates nationwide highlight the commonplace dangers of trailing merchandise. These trends do not bode well for retailers who appear before juries. Thus, retailers continue to face egregious liability and the

very real potential for exemplary damage awards meant to deter similar conduct in the future.

Prevention

Prevention of customer and employee injuries should be the first priority of warehouse superstores. These incidents are occurring all too frequently. Many of them can be easily prevented, however, by installing safety devices such as retainer bars, netting, safety straps, rails, wiring, rack dividers, extended shelf lips and additional shrink-wrap.

Warehouse superstores must be made safer for customers. In doing so, management and employees must always follow basic safety principles.

Customers should not face the risk of significant injuries at the expense of convenient shopping and discount prices. A word for the superstore retailer: Do not wait until the cost of injuries outweighs the cost of doing business. Institute and follow safety measures now.

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