

# When Do Manufacturers Need to Anticipate Misuses - and Abuses - of Their Products?



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Manufacturers start with good intentions. They endeavor to create and develop safe products, advertise them accurately, and equip consumers with sufficient warnings and instructions to enable safe and proper use of their products. But despite these efforts, consumers will occasionally find ways to misuse or abuse products in ways that the manufacturer neither intended nor, in some cases, even contemplated.

The misuse or abuse of a product by a consumer is nothing new. People have long sought to use products in unique ways or for uses other than those intended by the manufacturer. But today, certain product misuses are attracting significant attention, largely as a result of consumers seeking “viral” internet fame. Recent months, for example, have seen video “challenges” posted to the internet encouraging people to [consume laundry detergent](#), to [swallow a spoonful of cinnamon](#), and, curiously, to use a [rubber eraser on your skin while reciting the alphabet](#).

Obviously, certain product misuses are more common than others. The question remains, however, as to when manufacturers can be held liable for injuries resulting from a misuse of their product. Courts vary in their approach to this issue, but generally speaking, the answer depends on whether the misuse of the product was

“reasonably foreseeable” to the manufacturer. Although manufacturers are not required to anticipate and take precautions against every conceivable use or abuse of their product, they may have certain duties with respect to uses of their product that, although not intended, are nonetheless reasonably foreseeable.

Companies should therefore evaluate the potential uses to which their products may be put and decide whether and when they need to take action with respect to any such “misuses.”

## **Reasonably Foreseeable Misuse**

Under a reasonable foreseeability standard, a manufacturer generally may be held liable for injuries caused by a product even when a consumer failed to use the product as intended. In these circumstances, the consumer would need to show that the risk was caused by a reasonably foreseeable misuse that rendered the product defective and was known or should have been known to the manufacturer when it sold the product.

In some jurisdictions, the inquiry about whether a manufacturer knew or should have known about a potential misuse scenario extends beyond the time the product was sold. In those jurisdictions that impose post-sale duties, a manufacturer may be held liable for a misuse that, although it was unknown when the product was sold, became known at some later point before the accident in question. The more often a certain type of misuse occurs – and the more widely it is publicized – the more likely a court is to determine that the misuse was reasonably foreseeable to the manufacturer by the time of the accident.

Unfortunately, courts have not always provided clear or predictable guidance on this issue to manufacturers. Instead, they have varied wildly in their determinations of whether a misuse of a product was reasonably foreseeable. For instance, although an Indiana court determined that it was not reasonably foreseeable that a driver would reach 115 miles per hour, lose control of the vehicle, and injure a third party, a Louisiana court essentially concluded the opposite: that it was foreseeable that tires meant for speeds up to 100 miles per hour would be installed on a car driven at those speeds and blow out. In another instance, an Alabama court determined that it was not reasonably foreseeable that a teen would try to shake a vending machine to get a soda without paying, but courts in North Carolina and New Jersey reached the opposite conclusion when deciding similar cases involving a vending machine and a change machine, respectively.

The lesson for manufacturers is that they should explore the potential uses to which their products may be put – including those different from the uses originally intended by the manufacturer – and consider providing warnings or instructions with respect to certain potential misuses. If a manufacturer learns about a misuse that may cause injury after a product is on the market, it may also be prudent to consider whether updating the original warnings or instructions is appropriate to adequately advise consumers against the potential risks associated with that misuse. Under Federal Rule of Evidence 407 and many corresponding state rules of evidence, when companies improve on product warnings, evidence of those subsequent measures is not admissible to prove defective design or warning, so changing warnings,

instructions, or design after learning of a misuse should not be considered an admission that the original warnings were inadequate or that the product was unsafe as originally sold.

## Unreasonable Misuse or Abuse

Not all injuries arising from the misuse of a product may trigger potential liability on behalf of a manufacturer. Where the injuries arise from an abuse or misuse of product that was not reasonably foreseeable, the law does not hold manufacturers responsible in tort. Though it can be difficult to determine what misuses are reasonably foreseeable and which are not, the law generally puts some of the burden of proper use and skill on the consumer. No manufacturer is required to create a fool-proof product. For that reason, manufacturers need not panic when they see that their product features in the newest, craziest internet “challenge.”

One classic example of a type of misuse that is not reasonably foreseeable is that of throwing kitchen knives. While it is *foreseeable* that someone might throw a kitchen knife, it is not a *reasonable* misuse of the product. Similarly, one court found that throwing a beer bottle at a utility pole was not a reasonably foreseeable misuse of that beer bottle. Under those standards, it seems unlikely that a court would find consumption of laundry detergent to be a reasonably foreseeable misuse, especially where a manufacturer has already warned of the risks of doing so and has made deliberate attempts to make the [product less appetizing](#).

In cases of blatant, extreme misuse, manufacturers may not need change their product or their warnings to avoid liability. Some may see a benefit to addressing the misuse by interacting with consumers through public statements, advertisements, or social media platforms, but that response could be driven by a reputational or publicity need, rather than a legal one. And in some cases, a manufacturer that sees misuse of its product online or elsewhere might determine that the most prudent course of action is to take no action at all and instead simply wait for the next internet fad to supplant whatever “challenge” brought its product into the limelight.

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