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Recent decisions regarding so-called "quasi-producers" under the German Product Liability Act

INTRODUCTION

The interpretation of "quasi-producer", as defined by the German Product Liability Act ("ProdHaftG"),[1] needs to be examined in the wake of recent decisions of the Federal Court of Justice and Higher Regional Courts in Germany. These decisions highlight areas where the regulation and definition of quasi-producers could create issues for companies.

Multiple companies are often named in connection with a particular product. Where this happens, it is because these parties have been involved in producing, distributing and advertising that product, along with various sub-contractors and suppliers. All of these parties may qualify as quasi-producers, even though they did not actually manufacture the product.

This article will examine the conditions needed for an organisation to qualify as a quasi-producer under Sec. 4 Para. 1 Sentence 2 ProdHaftG. This is important because quasi-producers can also be held responsible for damages caused by a particular product, even if they were not involved in the production process. We will also consider the legal and practical impacts of the recent court decisions, as well as examining how parties can avoid qualifying as quasi-producers.

Legal basis and background

Sec. 4 Para. 1 ProdHaftG provides definitions of "producer" and "quasi-producer". According to Sec. 4 Para. 1 Sentence 1 ProdHaftG, a "producer" is someone who has manufactured a final product, a basic substance or a component part of a product. Sec. 4, Para. 1 Sentence 2 ProdHaftG extends the scope of the legislation to include "quasi-producers", which means any parties that, by attaching their name, trademark or other distinctive mark, create the impression of being a producer. Any party representing itself as a producer is potentially liable, even if it is not the producer of a specific product.

According to Sec. 1 Para. 1 ProdHaftG, the actual producer and the quasi-producer are jointly responsible for damage caused by a product. The responsibility of the quasi-producer is based on the idea that it has created the impression that it is responsible for the product.[2] The fact that the actual producer of the product is also liable under Sec. 4 Para. 1 Sentence 1 ProdHaftG does not exclude the quasi-producer's liability.[3] The quasi-producer cannot exonerate itself by identifying the actual producer.[4]

Recent decisions and main issues

The German Federal Court of Justice and Higher Regional Courts recently decided several cases that relate to possible quasi-producer status. Two questions arose that are highly relevant to day-to-day operations:

- Can a party be qualified as a quasi-producer, despite not being mentioned on the product itself?
- Can it be found liable as a quasi-producer, despite not having agreed to its name or trademark being mentioned on the product?

Can a party be qualified as quasi-producer, despite not being mentioned on the product itself?

In a recent case decided by a Higher Regional Court in Germany, the name of a product's distributor was mentioned in several documents that were provided with the product.[5] However, the name of the distributor was not imprinted on the product itself. The question was whether mention in the accompanying documentation was sufficient for the distributor to be qualified as a quasi-producer under Sec. 4 Para. 1 Sentence 2 ProdHaftG.

The Higher Regional Court did not entirely exclude the possibility of the distributor being regarded as a quasi-producer, although its name did not appear on the product itself. This interpretation raises the risk that parties mentioned in connection with a product could be held responsible for any damage it may cause.

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1 Sec. 4 Para. 1 Sentence 2, the German Product Liability Act (*Produkthaftungsgesetz*, *"ProdHaftG"*).

2 BGH, NJW 2005, 2695, 2696.

3 MüKo/Wagner, Sec. 4 ProdHaftG, recital 22, Palandt/Sprau, Sec. 4 ProdHaftG, recital 6.

4 MüKo/Wagner, Sec. 4 ProdHaftG, recital 22.

5 Decision of Higher Regional Court Koblenz of 24 July 2012 (case reference 5 U 299/12).

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Considering the overall picture

However, these risks can be minimised. The Higher Regional Court ruled that other aspects play a significant role, notwithstanding the fact that a company's name is mentioned together with a product. In particular, the “overall picture” that any party presents in relation to a product has to be considered.[6] In that regard, several aspects become relevant, including, for example, the style or size in which the name or the trademark is imprinted. It is therefore recommended that where a company was not the producer of a certain product, it takes steps to ensure that its presentation in connection with that product differs substantially from the actual producer’s presentation.

Name on documentation not sufficient

German legal textbooks indicate that merely having the name or trademark imprinted on a bill or delivery note is not sufficient to identify that person or entity as the producer.[7] It is common for the distributor, rather than the producer, to be named on a delivery note or bill, but this does not create a sufficiently strong link to the product. Therefore, it cannot be assumed that the person named on the bill or delivery note is the producer of the product. In particular, these documents do not mean that the named party participated in the production process and therefore had an influence on the product’s quality and safety.

In light of the above, it is clear that determination of a party’s qualification as a "quasi-producer" will be decided on a case-by-case basis. It is therefore important for companies clearly to define their role with regard to a specific product and to avoid any scope for ambiguous interpretations.

Can a party be found liable as quasi-producer, despite not having agreed to its name or trademark being mentioned on the product?

In general, a party wishing to be associated with a certain product would attach its name or trademark to it. Additionally, it is common practice for that party not to attach its name or trademark itself, but instead to authorise a third party to do so on its behalf. In both cases, the party that is presented on the product would generally fulfil the requirements of Sec. 4 Para. 1 Sentence 2 ProdHaftG.

Name attached without permission

However, it is also possible to imagine cases where third parties attach the name or trademark of the party concerned with a product without having permission to do so. According to the jurisdiction of German Courts, parties that are not aware of being mentioned on, or in connection with, a product do not qualify as quasi-producers.[8] Therefore, the producer is not liable in cases of piracy or counterfeiting.[9]

Nevertheless, if the party concerned gives permission before or after the process of somebody else attaching its name or trademark, this person can be regarded as quasi-producer under Sec. 4 Para. 1 Sentence 2 ProdHaftG. Permission can be granted by an explicit approval or an action that implies approval.[10] It is therefore important that any party involved as, for example, distributor, sub-contractor or supplier of a certain product, should not take any action that could be interpreted as approval. As a precaution, they should not allow their name to be mentioned in connection with a product without first having seen the details and exact wording of its presentation.

Specific permission

In a recent judgment, the German Federal Court of Justice held that permission must be granted for a specific product.[11] Following this decision, it is not sufficient for a party to agree generally to its name or trademark being attached to a product, without this permission referring to a specific product. According to the German Federal Court of Justice, the liability of the quasi-producer arises from the fact that the party mentioned on or in connection with a product is drawing attention to its reputation and care for its quality and safety. Therefore, a party should only be liable in cases where it has clear influence on a specific product’s manufacturing process.

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6 Decision of Higher Regional Court Koblenz of 24 July 2012 (case reference 5 U 299/12); Judgment of Higher Regional Court Düsseldorf of 14 March 2012 (case reference I-15 U 122/10).

7 MüKo/Wagner, Sec. 4 ProdHaftG, recital 25.

8 Judgment of the German Federal Court of Justice of 21 June 2005 (case reference VI ZR 238/03); NJW 2005, 3179, 3181; Staudinger/Oechsler, Sec. 4 ProdHaftG, recital 57.

9 MüKo/Wagner, Sec. 4 ProdHaftG, recitals 24.

10 MüKo/Wagner, Sec. 4 ProdHaftG, recitals 24, 61.

11 Judgment of the German Federal Court of Justice of 21 June 2005 (case reference VI ZR 238/03).

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COMMENT

Case law regarding Sec. 4 Para. 1 Sentence 2 ProdHaftG does not always provide precise and predictable standards for quasi-producer status. In cases recently decided by German courts, determination of a party's liability as quasi-producer was decided on a case-by-case basis. Companies that create the impression of being a producer of a certain product, and assume responsibility for its quality and safety, risk being held liable. This situation should be carefully monitored by companies. As a first step, they should minimise their potential exposure by only allowing markings that are absolutely necessary.

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