

Product Liability Risks for Distributors: The Basics

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Whereas

- *State laws vary widely and change frequently,*
- *Every case is different,*
- *I'm not your lawyer . .*

Disclaimer:

This Webinar discusses only general legal concepts and does not purport to provide a statement of the current law applicable in any State. Its purpose is to provide participants with information on a current legal topic of general interest and nothing herein shall be construed to create, offer or memorialize the existence of an attorney-client relationship. The content should not be considered legal advice or opinion, because it may not apply to the specific facts of a particular matter.

So, Why Are Distributors Who Didn't Make
the Supposedly Defective Product Liable
To Begin With??

A Brief History of Strict Liability . . . (bear with me)

Why Strict Liability?

Nineteenth-Century Philosophy:

Protect the Manufacturer

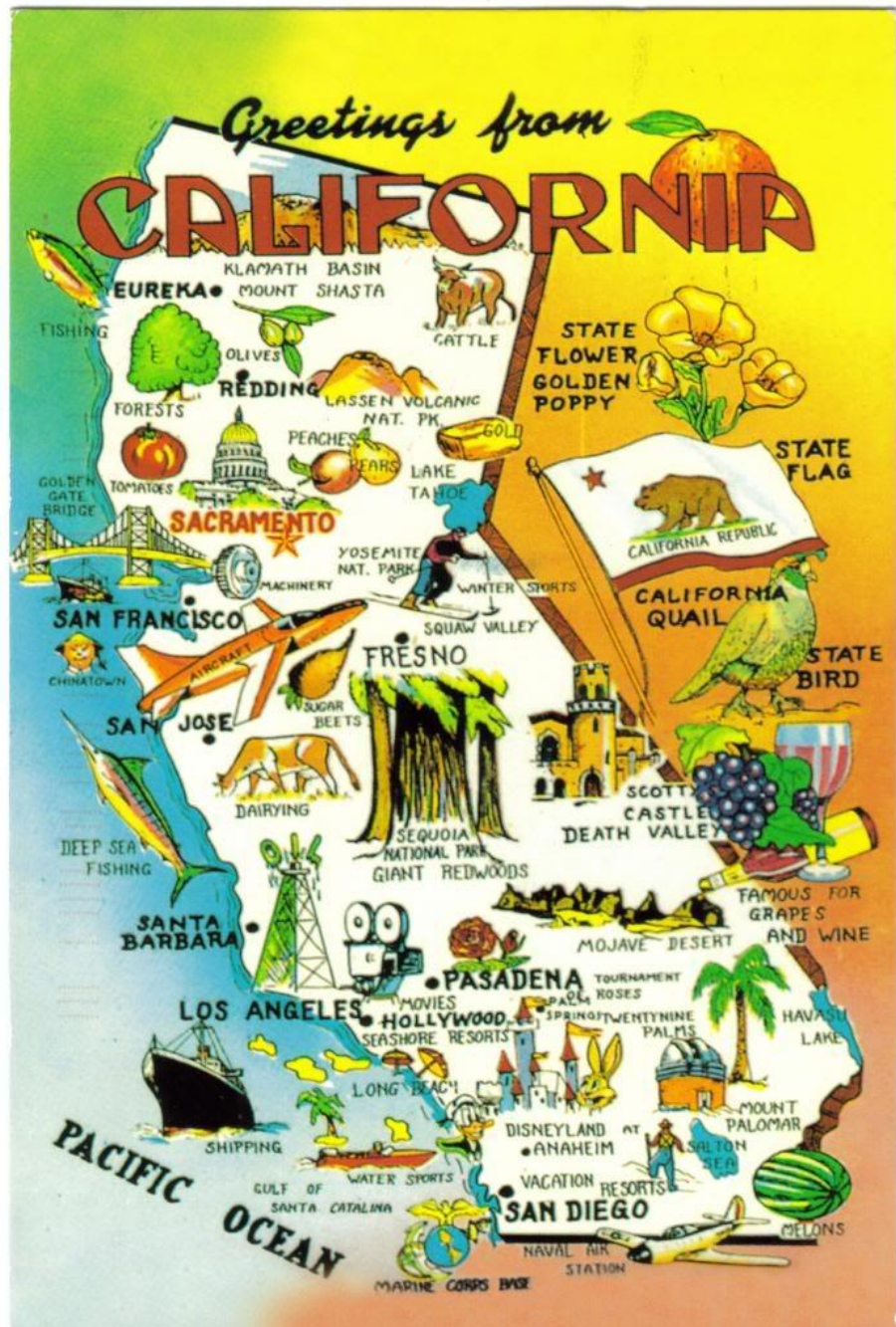
- “Privity of contract” limited warranty liability to remote buyers.
- Tort liability depended concept of fault.
- Better to leave a consumer without a remedy than impose too heavy costs on sellers.

Why Strict Liability?

*Twentieth-Century Philosophy:
Protect the Consumer*

- How should society apportion cost of harm caused by products?
- Even if no negligence, fairer to impose cost on product-maker, not consumer .

The Usual Suspect . . .



Strict Liability—The Beginning

- *Greenman v. Yuba Power Products, Inc.* (California Supreme Court 1963).
- "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."

The Economic Philosophy of Strict Liability

- "The purpose of such liability is to insure that the *costs of injuries resulting from defective products are borne by the manufacturers* that put such products on the market rather than by the injured persons who are powerless to protect themselves."
- "Even if there is no negligence . . . *public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health* inherent in defective products that reach the market."

What Does Strict Liability Mean?

- Liability to remote buyers - no need for privity of contract.
- Manufacturer can't limit liability through contract.
- No need to prove manufacturer did something wrong as long as product defective.

Three Types of Product Defect

- Design
- Manufacturing
- Warnings

But What About Sellers Who
Didn't Make the Supposedly
Defective Product?

Key Concept Is *No More Negligence*

- Strict Liability = No-Fault Liability.
- Focus on the product, not the behavior of the product-maker.
- Rationale is to fairly apportion costs, not make wrongdoers pay.

Which Means . . .

- Same policy reasons for imposing costs on manufacturers apply to distributors and retailers.
- "Retailers . . . are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products." *Vandermark v. Ford Motor Co.* (California Supreme Court 1964).

Arguments For Strict Liability of Distributors—Part I

- Are part of and benefit from the "marketing chain."
- Can adjust costs upstream through ongoing business relationship with manufacturer.
- Can pass costs downstream to next player in the marketing chain.

Arguments For Strict Liability of Distributors—Part II

- Provides deterrence to the sale of defective products by giving distributors an incentive to exert pressure on manufacturers.
- Distributors are protected because they can seek indemnity from the manufacturer.

Restatement (Second) of Torts § 402A (1965)

(adopted in some form by most states)

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:

- *The seller is engaged in the business of selling* such a product, and
- It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

Restatement (Second) of Torts § 402A

Strict Liability applies *even if* :

- The seller has exercised all possible care in the preparation and sale of his product, and
- The user or consumer has not bought the product from or entered into any contractual relation with the seller.

The Dissent

Arguments Against Strict Liability for Distributors—Part I

- Although literally "sellers" of goods, no real control over quality of goods.
- Contribute nothing to the danger.
- Naïve to think they can put pressure on manufacturers.

Arguments Against Strict Liability for Distributors—Part II

- Indemnity is expensive—
 - Two lawsuits – one to defend against plaintiff and one to recover from manufacturer.
- Indemnity is not a sure thing—
 - Downstream seller must prove defect when product left manufacturer.

Tort Reform For Distributors and Retailers

At One End of the Spectrum Georgia

- *Only* product manufacturers can be strictly liable.
- Manufacturer = one who "sells a product and has input or is actively involved in the design, concept, or specifications of the product.

More Commonly, Distributor
Liability is Limited, not Eliminated



E.g., Texas Statute Governing Liability of Nonmanufacturing Sellers (2003)

Nonmanufacturing seller not liable to user unless it —

- Participated in the design of product,
- Altered or modified design of product,
- Installed the product and harm resulted from installation,
- Exercised substantial control over content of inadequate warning that caused harm,
- Made an incorrect, express factual representation on which consumer relied,
- Actually knew of a defect that caused harm, or
- Manufacturer is (i) insolvent; or (ii) not subject to jurisdiction in Texas.

Another Example: Idaho

- Nonmanufacturing seller not liable if no warranty or opportunity to inspect, unless:
 - Knew of defect
 - Seller's alteration caused injury
 - Seller's design caused injury
 - Seller a wholly-owned subsidiary of manufacturer or vice versa
 - Product sold after manufacturer's expiration date.
- But if manufacturer is insolvent or outside court's jurisdiction, seller still liable.

Texas Statute Requiring Indemnity By Manufacturers (1993)

"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 omissions, such as negligently modifying or altering the product, for which the seller is independently liable."

Two More Important Potential Limitations on Liability

Comparative Fault

- Jury assigns a percentage to each potentially liable party, including plaintiff.
- Where distributor is a mere "conduit" and was not negligent, percentage could be low or none.

Joint and Several Liability

- Traditional View: all defendants are liable for full amount of damages.
 - Risk of insolvency of a defendant borne by other defendants.
- Modern View: limits on joint and several liability; e.g. only applies to a defendant more than 50% at fault.

I've Been Sued As a Distributor What Now?

(Finally, some practical advice.)

Why Were You Sued?

- Manufacturer outside court's jurisdiction.
- Manufacturer insolvent (or likely to be).
- Sue first and ask questions later.
- Negligence apart from strict liability as seller.

Are You A Jurisdictional Pawn?

- Federal law may allow a defendant to remove a case from state to federal court if its citizenship is different from the plaintiffs'.
- Distributors frequently chosen based on same citizenship as at least one plaintiff to prevent removal.
- Affects distributor's strategy for getting out of case.

Discuss With Your Counsel:

- Should you cooperate with the manufacturer to remove the case based on fraudulent joinder?
 - *E.g.*, if a Texas-style statute, can you provide an affidavit negating liability?
- If the manufacturer will agree not to remove, will the plaintiff dismiss you?

What Are Your Defenses As a Nonmanufacturing Seller?

- Which state's law applies is critical.
- Applicable law may not be that of the state where you were sued.
- Determine early on if choice-of-law will be an issue and what choices are.

Early Exit Strategy

- Did plaintiff plead proper elements of distributor liability under applicable law?
 - Motion to dismiss
- Can you readily negate bases of liability with an affidavit? (*e.g.*, no participation in design)
 - Motion for Summary Judgment

What are your indemnity rights and obligations?

- Statutory indemnity
- Common law indemnity.
- Contractual indemnity

Indemnity Issues to Consider

- Provide timely notice
- Tender defense
- Separate counsel
- Recoverability of costs of defense
 - What if you did not distribute product?

Potential Defenses Unique to Life Sciences Products

- Learned Intermediary Doctrine
- Federal Preemption
- State Statutes Limiting Liability for FDA-Approved Products
- Restatement (Third) § 6(c) Standard for Design Defect

Minimizing Litigation Risk

Who Is Your Manufacturer?

- Foreign (outside jurisdiction)
 - Recent recalls of Chinese pet food, drugs, other consumer goods.
- Financial Health
- History of Lawsuits

Can You Inspect for Defects?

- Sealed Container Doctrine
- Negligent Inspection
- Contamination or other manufacturing defects

Can You Contract Away Some Risk?

- Applicable Law
- Indemnity
- Costs of Defense
 - If wrongfully sued
 - If settlement but no verdict on separate negligence claims
- Agree to Jurisdiction

Thank you.

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