

## Expert Analysis

### Protection For Retailers: Developments In Strict Product Liability And Indemnification

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Retailers and other non-manufacturing sellers and distributors of products have long been subject to strict liability for injuries sustained by consumers' use of allegedly defective products. Holding innocent sellers liable for product defects, however, essentially makes them the insurers of the products they sell, although they rarely have the means to prevent defects in the products.

In response to these inequities, in recent years, nearly half of all states have instituted some form of "innocent seller" protective law to shield sellers from strict liability. But without specific statutes addressing a right to indemnification from manufacturers, innocent sellers may still be on the hook.

#### GENESIS OF STRICT PRODUCT LIABILITY

California courts are the birthplace for the doctrine of strict product liability. Building on decades of multijurisdictional developments within the realms of warranty and negligence law,<sup>1</sup> in 1944, Justice Roger J. Traynor of the California Supreme Court advocated absolute liability for product manufacturers in his concurring opinion in *Escola v. Coca Cola Bottling Co.*<sup>2</sup> Nineteen years later, Justice Traynor constructed the doctrine of strict product liability when writing for the majority in the 1963 California Supreme Court decision *Greenman v. Yuba Power Products.*<sup>3</sup>

In *Greenman* the court found 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."<sup>4</sup> The court emphasized its desire to shift the cost of product-related injuries from consumers to manufacturers based on the implicit representation by the manufacturer that a product is safe for its intended use.<sup>5</sup>

A year later, the California Supreme Court expanded strict product liability to cover retailers of defective products in its landmark case *Vandermark v. Ford Motor Co.*<sup>6</sup> In *Vandermark* the court held both the retailer and manufacturer of a defective car strictly liable in tort for injuries suffered by the car's driver.<sup>7</sup> Justice Traynor again wrote the opinion for the court, basing the extension of strict liability as follows:

Retailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products [citing *Greenman*]. In some cases the retailer may be the only member of that enterprise reasonably available to the injured plaintiff. In other cases the retailer himself may play a substantial part in insuring that the product is safe or may be in a position to exert pressure on the manufacturer to that end; the retailer's strict liability thus serves as an added incentive to safety. Strict liability on the manufacturer and retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendants, for they can adjust the costs of such protection between them in the course of their continuing business relationship.<sup>8</sup>

Thus, the theory of "enterprise liability" was set forth to justify strict product liability. The goal was to shift the burden of product-related injury from the injured consumers to the entities that benefit from such products' sale (all those engaged in putting the product into the chain of distribution).<sup>9</sup>

As presented in *Vandermark*, further justifications for imposition of such liability on potentially "innocent" sellers were that:

- Such liability would motivate innocent sellers to pressure manufacturers into making their products safer.
- A seller could "adjust the costs" of strict liability by working such costs into its contracts or by attaining indemnification from the manufacturer.

In 1965, a year after the *Vandermark* decision, the American Law Institute published the Restatement (Second) of Torts; Section 402A of the Restatement holds retailers and manufacturers alike strictly liable in tort for product defects, even if that seller "has exercised all possible care in the preparation and sale of his product."<sup>10</sup> The Restatement specifically applies strict product liability "to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor, and to the operator of a restaurant."<sup>11</sup> Shortly after the ALI published the Restatement (Second), a vast majority of states adopted Section 402A or similar provisions.<sup>12</sup>

Thus, the common law of most states has held all members in the chain of distribution of an allegedly defective product strictly liable for resulting injuries, "even non-manufacturing sellers who know nothing about the design or manufacture of a product, have no way to identify the problem, and have no way of curing any defects that might exist."<sup>13</sup>

The Restatement (Third) of Torts: Products Liability, published in 1998, sadly reaffirms strict liability for non-manufacturers.<sup>14</sup> Notably, however, the ALI acknowledges in Section 1, Comment *e* that numerous states have enacted laws to partially immunize non-manufacturing sellers from strict liability, "premised on the belief that bringing nonmanufacturing sellers or distributors into product liability litigation generates wasteful legal costs."<sup>15</sup>

#### **LIMITATIONS ON STRICT LIABILITY FOR NON-MANUFACTURING SELLERS**

In 1979, the Federal Interagency Task Force on Product Liability, chaired by the Department of Commerce, published the Model Uniform Product Liability Act.<sup>16</sup> The Model Act was designed to help create uniformity and stability across jurisdictions in

order to set product liability insurance rates and provide clarity of consumers' rights and sellers' obligations.<sup>17</sup>

Section 105 of the Model Act outlines standards of responsibility for non-manufacturing sellers specifically designed to address Justice Traynor's concerns outlined in *Vandermark*, while relieving non-manufacturers of the excessive burdens of defense costs and insurance premiums.<sup>18</sup> Therein, non-manufacturing sellers are exempted from strict liability unless the manufacturer cannot be reached for lack of jurisdiction or actual or imminent insolvency.<sup>19</sup> Absent one of these three exceptions, a non-manufacturing seller can only be held liable for its own negligence or breach of express warranty.<sup>20</sup>

Twenty-four states have since enacted some form of legislative protection from strict product liability for non-manufacturing sellers.<sup>21</sup> As explored below, the extent of such protection varies widely, though many statutes track provisions of the Model Act.<sup>22</sup>

Michigan, for example, has eliminated strict product liability through its statutory scheme.<sup>23</sup> With respect to non-manufacturing sellers in particular, Michigan Compiled Laws Section 600.2947(6) explicitly limits allowable product liability claims to negligence (where the seller "failed to exercise reasonable care") or breach of express warranty. Section 600.2947(6) states as follows:

In a product liability action, a seller other than a manufacturer is not liable for harm allegedly caused by the product unless either of the following is true:

(a) The seller failed to exercise reasonable care, including breach of any implied warranty, with respect to the product and that failure was a proximate cause of the person's injuries.

(b) The seller made an express warranty as to the product, the product failed to conform to the warranty, and the failure to conform to the warranty was a proximate cause of the person's harm.

Subsection (a) includes breach of the implied warranty of merchantability. Under common law, a plaintiff could establish a breach of the implied warranty of merchantability by showing a product was sold in defective condition and the defect caused the plaintiff's injury<sup>24</sup> — essentially the same standard for strict liability.<sup>25</sup>

Michigan's Supreme Court has clarified, however, that despite prior implied warranty common law, Section 2947(6)(a) requires a showing of fault in order to impose liability on a non-manufacturing seller.<sup>26</sup>

Washington and Ohio have statutes similar to Michigan's non-manufacturing seller provision. Both provide that, except under specific circumstances, a non-manufacturing seller can only be liable to a claimant for its own negligence or breach of an express warranty or representation.<sup>27</sup> Washington's statute further holds a seller liable for its intentional misrepresentation or concealment of information about the product.<sup>28</sup>

The exceptions include the standard "unreachable manufacturer" provisions (insolvency or lack of jurisdiction), as well as situations in which the seller provided plans and specifications to the manufacturer, marketed the product under its own brand name, or owned or was owned by the manufacturer.<sup>29</sup>

Georgia and Nebraska have passed absolute bars to imposing strict liability on non-manufacturing sellers.<sup>30</sup> Georgia's Section 51-1-11.1 defines a "product seller" as

a person who, in the course of a business conducted for the purpose, leases or sells and distributes; installs; prepares; blends; packages; labels; markets; or assembles pursuant to a manufacturer's plan, intention, design, specifications, or formulation; or repairs; maintains; or otherwise is involved in placing a product in the stream of commerce.<sup>31</sup>

Further, "[f]or purposes of a product liability action based in whole or in part on the doctrine of strict liability in tort, a product seller is not a manufacturer as provided in Code Section 51-1-11 and is not liable as such."<sup>32</sup> The Georgia statute does not make any exception for cases in which a manufacturer is unknown or unreachable.<sup>33</sup>

Delaware does not apply strict liability in tort to any action involving the sale of products.<sup>34</sup> Despite this, it still enacted a type of "innocent seller" statute dubbed the "sealed container" defense. Delaware Code title 18, Section 7001, immunizes a non-negligent, non-manufacturing seller who acquired and subsequently sold a product in an unaltered, sealed container from liability for any design or manufacturing defects<sup>35</sup> unless the manufacturer is unreachable.<sup>36</sup>

Significantly, the Delaware Supreme Court limited the statute to apply only to *sales that occurred* after the statute's 1987 enactment, rather than claims filed after 1987.<sup>37</sup> This effectively eliminates any potential protection the statute might provide to retailers or other sellers of asbestos-containing products.

North Carolina has statutorily abolished all strict product liability.<sup>38</sup> Like Delaware, the state further created a "sealed container" defense.<sup>39</sup>

The provision immunizes non-manufacturing sellers against *any* product liability action, other than for breach of express warranty, where the seller was not afforded a reasonable opportunity to inspect the product to reveal the alleged defect.<sup>40</sup> It does not apply in cases in which the manufacturer is unreachable for insolvency or lack of jurisdiction.<sup>41</sup>

Colorado and Indiana both limit application of strict product liability against non-manufacturing sellers except in cases where the court cannot obtain jurisdiction over the manufacturer.<sup>42</sup> Under the exception in each state, the "principal distributor or seller over whom" a court has jurisdiction may be held liable as a manufacturer.<sup>43</sup>

Illinois, Minnesota and New Jersey all have "innocent seller" immunization statutes requiring the seller to file an affidavit correctly identifying the manufacturer in order to trigger limitations on a non-manufacturing seller's strict liability.<sup>44</sup> These provisions seek to "temper[] the harsh effect of strict liability as it applies to passive sellers, while ensuring that a person injured by a defective product can recover from a viable source."<sup>45</sup> Strict liability still applies where the manufacturer cannot be identified or cannot be reached for lack of jurisdiction or insolvency.<sup>46</sup>

### IS INDEMNITY STILL AN OPTION?

Common-law indemnity in many states tends to mirror the provisions set forth in Section 22 of the Restatement (Third) of Torts: Apportionment of Liability.<sup>47</sup> Section 22 states as follows:

(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 contract may do so even if the party against whom indemnity is sought would not be liable to the plaintiff.<sup>48</sup>

In practical terms, however, obtaining indemnification or contribution from a manufacturer or other entity higher up on the supply chain may not be feasible. First, a seller seldom secures a release on behalf of the manufacturer. Second, many states require a finding that a manufacturer be liable to the plaintiff in order for a seller to recover indemnity.<sup>49</sup>

Thus, a finding of no liability on behalf of any defendant would leave a non-liable seller without recourse to recoup its legal fees. Depending on the means by which the case is resolved and the prevailing party, a separate trial could be required on the manufacturer's liability, the reasonableness of each party's fees or settlement amount, or the seller's potential direct liability — all of which would further increase the seller's litigation costs.

Further, with the advent of comparative-fault principles, the ability of many entities to obtain indemnification from manufacturers has been called into question. Where the percentage of fault of all joint tortfeasors is to be considered and ruled upon under a statutory scheme, the common-law right to indemnification may be abrogated.<sup>50</sup>

## PERILS OF NO STATUTORY INDEMNIFICATION

### *California*

California provides a case in point. California Code of Civil Procedure Section 877.6(c) states that a joint tortfeasor is precluded from seeking "equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault" against a settling tortfeasor, provided the court finds the settlement was made in good faith.

In construing the provision, the California Supreme Court ruled that the provision bars fellow tortfeasors "from pursuing a claim for total equitable indemnity against a defendant who has entered into a good faith settlement."<sup>51</sup> In *Far West Financial v. D&S Co.*, the court ruled that the interests of defendants seeking total equitable indemnity — "like the interests of all other defendants who may potentially be harmed by a proposed settlement agreement — may be properly protected through the trial court's determination of whether the proposed settlement agreement satisfies the statutory 'good faith' requirement."<sup>52</sup>

Far West Financial was a real estate developer that contracted with D&S Co., a general contractor, to build a condominium project in Los Angeles County.<sup>53</sup> The homeowners association filed a construction defect claim against Far West, D&S and numerous subcontractors.

Far West settled with the plaintiff and sought equitable indemnity from D&S and its subcontractors, alleging that D&S exercised complete control over the premises and that any construction defects were directly attributable to it or its subcontractors.<sup>54</sup> D&S and the subcontractors later settled with the plaintiff, conditioning the agreement on dismissal of all cross-complaints against D&S.

The trial court found the D&S agreement was made in good faith and dismissed Far West's cross-complaints.

Far West contended that California Code of Civil Procedure Section 877.6, having not expressly barred total indemnity claims, "should not be interpreted to prohibit a nonsettling party, who may be only vicariously or derivatively liable for a plaintiff's injury, from pursuing a claim for total equitable indemnity against a directly or primarily responsible tortfeasor, even if a trial court has found that such a tortfeasor's settlement with the plaintiff satisfies the 'good faith' requirement of Section 877.6"<sup>55</sup>

The state Supreme Court disagreed. It ruled that California only maintains a single "comparative indemnity" doctrine permitting partial (or total) indemnification on a comparative fault basis.<sup>56</sup> Thus, Section 877.6(c) bars any claim for indemnity or contribution against a settling party whose settlement agreement has been deemed made in good faith.<sup>57</sup>

The court explained, however, that a trial court should consider at a good-faith hearing whether the amount paid in settlement "bears a reasonable relationship to ... the settlor's proportionate share of liability."<sup>58</sup> The high court added:

[N]othing in this opinion is intended to foreclose a trial court from concluding, on the facts of a particular case, that a proposed settlement agreement is not in good faith either because an allegedly vicariously liable tortfeasor has been improperly excluded from settlement negotiations or because such a tortfeasor has not been included within the settlement agreement. At the same time, we do reject the suggestion that a proposed settlement agreement may never be found to constitute a good-faith settlement unless it provides for the total dismissal of any cause of action as to which a nonsettling defendant claims to be only vicariously liable. We believe the trial court which presides over the good-faith settlement hearing is in the best position to determine, based on the circumstances of the particular case, whether the terms of a proposed settlement are unfair to a nonsettling defendant who claims that its liability is only vicarious in nature.<sup>59</sup>

In practice, therefore, even an innocent retailer that is sued in California for selling a sealed product alleged to be defective and tenders its defense to a solvent product manufacturer — which refuses or ignores the tender, excludes the seller from its settlement negotiations with the plaintiff, and then subsequently settles with the plaintiff — can only obtain redress against the manufacturer by convincing the trial court that the manufacturer's settlement agreement was made in bad faith.

Although a court should consider the manufacturer's refusal to defend, release or even include the seller in its negotiations as signs of bad faith, as well as determine whether the amount paid in settlement is in the realm of its proportionate share of fault, in practice, trial courts may not wish to find bad faith absent fraud or other tortious conduct by settling parties. Thus, in effect, the innocent seller may be without redress.

## Washington

Washington's "innocent seller" provision, like many others, allows for a non-manufacturing seller to be held liable as a manufacturer, and thus strictly liable for manufacturing defects, where the seller marketed the product under its own brand name.<sup>60</sup> In 2011 the Washington Court of Appeals construed this provision in conjunction with the state's contributory negligence provisions.<sup>61</sup>

In *Johnson v. REI Inc.* a consumer sued retailer REI for an alleged defect in a bicycle sold under REI's own brand name, Novara. REI sought either a finding that it was entitled to ask a jury to allocate fault between it and the actual manufacturer pursuant to Washington's comparative-fault system or leave to file a third-party complaint against the actual manufacturer.<sup>62</sup>

The plaintiff responded by filing for partial summary judgment that REI was strictly liable for her injuries. The appellate court affirmed the trial court's ruling that, notwithstanding contributory fault principles, the plaintiff could hold REI strictly liable regardless of the degree of the actual manufacturer's fault because state law specifically established that a seller could be held vicariously liable for manufacturing defects (not simply strictly liable) if it held itself out as the manufacturer.<sup>63</sup> REI was thus not entitled to a jury determination of the actual manufacturer's degree of fault.

The trial court allowed REI to file a third-party complaint against the actual manufacturer seeking contribution.<sup>64</sup> Such a complaint would be useless under Washington law, however, in light of the fact that the trial court ordered such a claim be bifurcated from the plaintiff's claim against REI.<sup>65</sup>

Washington law allows for contribution only among those found jointly and severally liable<sup>66</sup> pursuant to court judgment.<sup>67</sup> Thus, under the circumstances of the case, REI had no effective avenue to seek contribution from the actual manufacturer.

Despite the adverse effect on REI's contribution claim, the appellate court found that the trial court did not abuse its discretion in ordering bifurcation of REI's action against the actual manufacturer (to avoid delay and prejudice to the plaintiff).<sup>68</sup>

In construing the state's comparative-fault provisions, the Washington Supreme Court has held that a settling party has no right to seek contribution from another alleged tortfeasor because, no judgment being entered, joint and several liability did not arise.<sup>69</sup>

## STATUTORY INDEMNIFICATION

### Texas

In 1993 Texas enacted a law requiring manufacturers to indemnify sellers in product liability actions.<sup>70</sup> Section 82.002 of the Texas Civil Practice and Remedies Code mandates that a manufacturer indemnify a seller for any loss (including court costs, reasonable attorney fees and reasonable damages), other than that caused by the seller's own negligence or fault, regardless of how the action is concluded.<sup>71</sup>

Thus, unlike at common law, there is no requirement that a manufacturer be found liable to the plaintiff. The statute further allows for recovery of reasonable costs, expenses, damages and attorney fees incurred in seeking indemnification.<sup>72</sup> As the Texas Supreme Court explained, "The purpose of Section 82.002 is to protect innocent sellers who are drawn into product liability litigation solely because of the vicarious nature of that liability by assigning responsibility for the burden of the litigation to product manufacturers."<sup>73</sup>

In *Meritor Automotive v. Ruan Leasing Co.*,<sup>74</sup> the Texas Supreme Court addressed whether an innocent seller is entitled to litigation expenses incurred in defeating a claim alleging its own negligence.

In *Meritor*, the plaintiff was injured attempting to open the hood of his leased truck.<sup>75</sup> He brought a product liability suit against the truck manufacturer, the hood manufacturer and the truck owner, Ruan Leasing, which leased the truck to his employer. Ruan tendered its defense to the manufacturers, which agreed to defend against the suit.

Months later, the plaintiff amended his complaint, adding an allegation that Ruan itself was negligent in its maintenance of the hood. This forced Ruan to hire its own attorney to defend it in the suit, and the attorney filed a counterclaim against the manufacturers for indemnification for all damages and expenses. The plaintiff settled with both manufacturers on the eve of trial and non-suited his claims against Ruan.<sup>76</sup>

Both sides sought summary judgment on Ruan's indemnity suit. The manufacturers asserted that the Texas indemnity statute did not allow for indemnification for costs incurred defending against allegations of the seller's negligence.<sup>77</sup>

The Texas court held, however, that Ruan was entitled to indemnity for its costs in defending and prevailing against the plaintiff's negligence action and in enforcing its indemnity rights based on the plain language of the statute.<sup>78</sup> The statute specifically calls for indemnification against loss arising from a product liability action except those losses caused by the seller.

In *Meritor*, the seller/lessor did not suffer loss caused by its own negligence because it was not negligent. Rather, it suffered loss caused by the plaintiff's allegation of its negligence. Such loss was part and parcel of the product liability action and thus recoverable.

Although the existence of such a strong indemnification statute provides tremendous aid to otherwise "innocent" sellers, it still does not immunize a seller from years of potential litigation over indemnity. In *Ansell Healthcare Products v. United Medical*,<sup>79</sup> a woman brought a product liability suit against numerous defendants for her daughter's allergic reaction to latex gloves.

United Medical sold such gloves to the hospital that treated the plaintiff's daughter. United filed a cross-claim for indemnity against Ansell Healthcare Products, which made the gloves it sold the hospital. Though the plaintiff non-suited United and United won partial summary judgment against Ansell, establishing its right to indemnification by Ansell, Ansell and United litigated the scope of Ansell's duty to indemnify United for eight years.<sup>80</sup>

### **Arizona**

Arizona does not have an "innocent seller" statute like those discussed above, but does have a statutory indemnification provision for non-manufacturing sellers. Arizona Revised Statutes § 12-684 allows for indemnification for any seller for a product liability judgment, including reasonable costs and attorney fees, where the manufacturer refused to accept tender of a defense from the seller. This is only if the seller lacked actual knowledge of the defect and did not alter or install the product contrary to the manufacturer's specifications in a way giving rise to the suit.<sup>81</sup> It further calls for a prevailing plaintiff to turn first to a manufacturer to satisfy a judgment where a seller has been granted indemnity.<sup>82</sup>

While the Arizona provision can be useful to sellers, its breadth is quite limited in practical terms. The statute is limited to indemnity for *judgment* rendered and accompanying defense fees and costs. It does not authorize indemnification or reimbursement for a seller's settlement payment to a plaintiff.<sup>83</sup>

## NOTES

<sup>1</sup> See generally DAVID G. OWEN ET AL., MADDEN & OWEN ON PRODUCTS LIABILITY § 5:2 (3d ed. 2000) (discussing the path to strict liability in tort).

<sup>2</sup> *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring) ("I believe the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover in cases like the present one. In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings.").

<sup>3</sup> *Greenman v. Yuba Power Prods.*, 377 P.2d 897 (Cal. 1963).

<sup>4</sup> *Id.* at 900.

<sup>5</sup> *Id.* at 901.

<sup>6</sup> *Vandermark v. Ford Motor Co.*, 391 P.2d 168 (Cal. 1964).

<sup>7</sup> *Id.* at 171-172. The plaintiff was injured after the car's brakes failed, causing plaintiff to crash into a pole. *Id.* at 169.

<sup>8</sup> *Id.* at 171-172.

<sup>9</sup> The Florida Supreme Court has since explained that "[t]he underlying basis for the doctrine of strict liability is that those entities within a product's distributive chain 'who profit from the sale or distribution of [the product] to the public, rather than the innocent person injured by it, should bear the financial burden of even an undetectable product defect.'" *Samuel Friedland Family Enters. v. Amoroso*, 630 So. 2d 1067, 1068 (Fla. 1994) (citation omitted).

<sup>10</sup> Restatement (Second) of Torts § 402A (1965). Section 402A states that anyone who "sells" a product in "a defective condition unreasonably dangerous" is liable for harm caused thereby, provided the seller is in the business of selling such a product, and the product reaches the consumer without substantial change. *Id.*

<sup>11</sup> *Id.* at comment f.

<sup>12</sup> See, e.g., Owen at 345-46 & n.72; Antonio J. Senagore, The Benefits of Limiting Strict Liability for Used-Product Sellers, 30 N. ILL. U.L. REV. 349, 356 (2010); Frank J. Cavico Jr., The Strict Tort Liability of Retailers, Wholesalers, and Distributors of Defective Products, 12 NOVA L. REV. 213, 217-18 (1987).

<sup>13</sup> Steven B. Hantler et al., Is the "Crisis" in the Civil Justice System Real or Imagined?, 38 LOY. L.A. L. REV. 11211145 (2005).

<sup>14</sup> Comment e to § 1 of the Restatement (Third) of Torts: Products Liability states as follows:

Nonmanufacturing sellers or other distributors of products. The rule stated in this section provides that all commercial sellers and distributors of products, including nonmanufacturing sellers and distributors such as wholesalers and retailers, are subject to liability for selling products that are defective. Liability attaches even when such nonmanufacturing sellers or distributors do not themselves render the products defective and regardless of whether they are in a position to prevent defects from occurring.

<sup>15</sup> Restatement (Third) of Torts: Products Liability § 1, cmt. e (1998).

<sup>16</sup> Model Unif. Prod. Liab. Act, 44 Fed. Reg. 62,714 (Oct. 31, 1979).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 62,726-27. "The section addresses the problem of excessive product liability costs for parties other than manufacturers in the distribution chain in a way that does not compromise incentives for loss prevention. It also leaves the claimant with a viable defendant whenever a defective product has caused harm." *Id.* at 62,726.

<sup>19</sup> *Id.* at 62,726. Section 105(C) of the Model Act states as follows:

A product seller, other than a manufacturer, is also subject to the liability of a manufacturer under Section 104 if:

The manufacturer is not subject to service of process under the laws of the claimant's domicile; or  
The manufacturer has been judicially declared insolvent in that the manufacturer is unable to pay its debts as they become due in the ordinary course of business; or  
The court determines that it is highly probable that the claimant would be unable to enforce a judgment against the product manufacturer.

<sup>20</sup> *Id.*

<sup>21</sup> See Colo. Rev. Stat. § 13-21-402; Del. Code tit. 187, § 7001; Ga. Code § 51-1-11.1; Idaho Code § 6-1407; 735 Ill. Comp. Stat. 5/2-621 (prior to the 1995 amendments made by P.A. 89-7 found unconstitutional in *Best v. Taylor Mach. Works*, 689 N.E. 2d 1057 (Ill. 1997)); Ind. Code §§ 34-20-2-3, 34-20-2-4; Iowa Code § 613.18; Kan. Stat. § 60-3306; Ky. Rev. Stat. § 411.340; La. Rev. Stat. § 9:2800.52-.53; Md. Code, Cts. & Jud. Proc. § 5-405; Mich. Comp. Laws § 600.2947(6); Minn. Stat. § 544.41; Miss. Code § 11-1-63; Mo. Stat. § 537.762; Neb. Rev. Stat. § 25-21,181; N.J. Stat. § 2A:58C-9; N.C. Gen. stat. § 99B-2; N.D. Cent. Code § 28-01.3-04, 05; Ohio Rev. Code § 2307.78;

- S.D. Codified Laws § 20-9-9; Tenn. Code § 29-28-106; Tex. Civ. Prac. & Rem. Code § 82.003; Wash. Rev. Code § 7.72.040.
- <sup>22</sup> For a brief overview of 23 of the 24 statutes and their limitations, see Robert A. Sachs, *Product Liability Reform and Seller Liability: A Proposal for Change*, 55 BAYLOR L. REV. 1031, 1121-36 (2003).
- <sup>23</sup> Mich. Comp. Laws §§ 600.2947, 600.2948.
- <sup>24</sup> *Curry v. Meijer Inc.*, 780 N.W.2d 603, 606 (Mich. 2009) (citing *Piercefield v. Remington Arms Co.*, 133 N.W.2d 129 (Mich. 1965)).
- <sup>25</sup> See *Johnson v. Chrysler Corp.*, 254 N.W.2d 569, 571 (Mich. Ct. App. 1977) (“the proofs that would be presented under a strict liability theory would overlap with the proofs that would be presented under an implied warranty theory”).
- <sup>26</sup> *Curry*, 780 N.W.2d at 608, 610.
- <sup>27</sup> Ohio Rev. Code § 2307.78; Wash. Rev. Code § 7.72.040.
- <sup>28</sup> Wash. Rev. Code § 7.72.040(1)(c).
- <sup>29</sup> Ohio Rev. Code § 2307.78(B)(1), (2), (3), (4), (5), (7); Wash. Rev. Code § 7.72.040(2).
- <sup>30</sup> Ga. Code § 51-1-11.1; Neb. Rev. Stat. § 25-21,181.
- <sup>31</sup> Ga. Code § 51-1-11.1(a).
- <sup>32</sup> Ga. Code § 51-1-11.1(b).
- <sup>33</sup> Similarly, the Nebraska provision contains no such exceptions. Nebraska Revised Statutes § 23-21,181 provides, “No product liability action based on the doctrine of strict liability in tort shall be commenced or maintained against any seller or lessor of a product which is alleged to contain or possess a defective condition unreasonably dangerous to the buyer, user, or consumer unless the seller or lessor is also the manufacturer of the product or the part thereof claimed to be defective.” Further, Section 25-224(4) governing limitations for suits alleging injuries caused by asbestos exposure states that “[n]o action commenced under this subsection based on the doctrine of strict liability in tort shall be commenced or maintained against any seller of a product which is alleged to contain or possess a defective condition unreasonably dangerous to the buyer, user, or consumer unless such seller is also the manufacturer of such product or the manufacturer of the part thereof claimed to be defective.”
- <sup>34</sup> See *Cline v. Prowler Indus. of Md.*, 418 A.2d 968, 978 (Del. 1980) (finding that the doctrine of strict liability in tort for product sales was preempted by Delaware’s adoption of the Uniform Commercial Code). The court did note, however, that breach-of-implied-warranty claims under the UCC “parallel those of the doctrine of strict tort liability.” *Id.* at 973.
- <sup>35</sup> Del. Code title 18, § 7001(b) provides that:  
It shall be a defense to an action against a seller of a product for property damage or personal injury allegedly caused by the defective design or manufacture of a product if the seller establishes that:
- (1) The product was acquired and then sold or leased by the seller in a sealed container and in an unaltered form;
  - (2) The seller had no knowledge of the defect;
  - (3) In the performance of the duties the seller performed or while the product was in the seller’s possession could not have discovered the defect while exercising reasonable care;
  - (4) The seller did not manufacture, produce, design or designate the specifications for the product, which conduct was the proximate and substantial cause of the claimant’s injury;
  - (5) The seller did not alter, modify, assemble or mishandle the product while in the seller’s possession in a manner which was the proximate and substantial cause of the claimant’s injury; and
  - (6) The seller had not received notice of the defect from purchasers of similar products.
- <sup>36</sup> Del. Code tit. 18, § 7001(c) (disallowing the defense where the manufacturer cannot be identified, the manufacturer is insolvent or not subject to jurisdiction, or where the seller breached an express warranty).
- <sup>37</sup> *In re Asbestos Litig.*, 832 A.2d 705, 713 (Del. 2003).
- <sup>38</sup> “There shall be no strict liability in tort for product liability actions.” N.C. Gen. Stat. § 99B-1.1
- <sup>39</sup> N.C. Gen. Stat. § 99B-2.
- <sup>40</sup> N.C. Gen. Stat. § 99B-2(a).
- <sup>41</sup> *Id.*
- <sup>42</sup> Colo. Rev. Stat. § 13-21-402; Ind. Code §§ 34-20-2-3, 34-20-2-4.
- <sup>43</sup> Colo. Rev. Stat. § 13-21-402(2); Ind. Code § 34-20-2-4.
- <sup>44</sup> 735 Ill. Comp. Stat. 5/2-621 (prior to the 1995 amendments made by P.A. 89-7 found unconstitutional in *Best v. Taylor Mach. Works*, 689 N.E. 2d 1057 (Ill. 1997)); Minn. Stat. § 544.41; N.J. Stat. § 2A:58C-9. These statutes call for dismissal of all strict liability claims against an innocent seller provided the manufacturer is correctly identified and the court can reach the manufacturer (*i.e.*, there is jurisdiction over a solvent entity). The Minnesota and Illinois provisions differ from the New Jersey statute in that, rather than providing exceptions for an unreachable manufacturer, they do not provide for dismissal of strict liability claims against the seller unless and until a plaintiff files a complaint against the manufacturer.
- <sup>45</sup> *In re Shigellosis Litig.*, 647 N.W.2d 1, 6 (Minn. Ct. App. 2002) (construing Minn. Stat. § 544.41). See also, *Brobbeey v. Enter. Leasing Co. of Chicago*, 935 N.E.2d 1084, 1092 (Ill. App. Ct. 2010) (“[T]he purpose of [735 Ill. Comp. Stat. 5/2-621] is to allow a nonmanufacturing defendant, who has

- not been shown to have created or contributed to the alleged defect, to defer liability upstream to the ultimate wrongdoer, the manufacturer.") (quoting *Saieva v. Budget Rent-A-Car of Rockford*, 591 N.E.2d 507, 511 (Ill. App. Ct. 1992)).
- <sup>46</sup> 735 Ill. Comp. Stat. 5/2-621; Minn. Stat. § 544.41; N.J. Stat. § 2A:58C-9.
- <sup>47</sup> See Sachs, *supra* note 22, at 1048.
- <sup>48</sup> Restatement (Third) of Torts: Apportionment of Liab. § 22 (2000).
- <sup>49</sup> See Sachs, *supra* note 22, at 1051-57.
- <sup>50</sup> See, e.g., Owen, *supra* note 1, at 705-707. See also, *infra*, discussion of California claims for indemnity or contribution against settling defendants and Washington statutory contribution claims.
- <sup>51</sup> *Far West Fin. Corp. v. D&S Co.*, 760 P.2d 399, 401 (Cal. 1988).
- <sup>52</sup> *Id.*
- <sup>53</sup> *Id.*
- <sup>54</sup> *Id.* at 402.
- <sup>55</sup> *Id.* at 403-04.
- <sup>56</sup> *Id.* at 407.
- <sup>57</sup> *Id.* at 408.
- <sup>58</sup> *Id.* at 411 (citing *Tech-Bilt Inc. v. Woodward-Clyde & Assocs.*, 698 P.2d 159 (Cal. 1985)).
- <sup>59</sup> *Id.* at 412 n.15.
- <sup>60</sup> Wash. Rev. Code § 7.72.040(2)(e); see also Wash. Rev. Code § 7.72.030 (outlining manufacturers' liability).
- <sup>61</sup> See *Johnson v. Recreational Equip. Inc.*, 247 P.3d 18 (Wash. Ct. App. 2011).
- <sup>62</sup> *Id.* at 20. The provision governing comparative fault in Washington is Section 4.22.040.
- <sup>63</sup> *Id.* at 21, 25-26.
- <sup>64</sup> *Id.* at 21.
- <sup>65</sup> *Id.* at 27.
- <sup>66</sup> Wash. Rev. Code § 4.22.040; see also, *Johnson*, 247 P.3d at 27.
- <sup>67</sup> "REI and ... [the actual manufacturer] cannot be jointly and severally liable for ... [the plaintiff's] injuries, as required to establish a statutory right to contribution, unless a judgment is entered against both parties in ... [the] suit." *Id.* (citing Wash. Rev. Code §§ 4.22.040, 4.22.070(1)(b)).
- <sup>68</sup> *Id.* at 945, 959.
- <sup>69</sup> See *Kottler v. State*, 963 P.2d 834, 836 (Wash. 1998).
- <sup>70</sup> Tex. Civ. Prac. & Rem. Code § 82.002. Texas later enacted Section 82.003 insulating an "innocent," non-manufacturing seller from liability provided the manufacturer is reachable (solvent and subject to jurisdiction). Tex. Civ. Prac. & Rem. Code § 82.003(a), effective Sept. 1, 2003; see also, *Wilson v. Home Depot U.S.A.*, 369 F. Supp. 2d 887, 892 n.2 (W.D. Tex. 2005) (applying Texas law).
- <sup>71</sup> Tex. Civ. Prac. & Rem. Code § 82.002.
- <sup>72</sup> Tex. Civ. Prac. & Rem. Code § 82.002(g).
- <sup>73</sup> *Gen. Motors Corp. v. Hudiburg Chevrolet*, 199 S.W. 249, 262 (Tex. 2006).
- <sup>74</sup> *Meritor Auto. v. Ruan Leasing Co.*, 44 S.W.3d 86 (Tex. 2001).
- <sup>75</sup> *Id.* at 87.
- <sup>76</sup> *Id.*
- <sup>77</sup> *Id.* at 87-88.
- <sup>78</sup> *Id.* at 90-91.
- <sup>79</sup> *Ansell Healthcare Prods. v. United Med.*, 355 S.W.3d 736 (Tex. App. 2011).
- <sup>80</sup> *Id.* at 739.
- <sup>81</sup> The statute, Ariz. Rev. Stat. § 12-684.A, states in pertinent part:
- A. In any product liability action where the manufacturer refuses to accept a tender of defense from the seller, the manufacturer shall indemnify the seller for any judgment rendered against the seller and shall also reimburse the seller for reasonable attorney's fees and costs incurred by the seller in defending such action, unless either paragraph 1 or 2 applies:
- The seller had knowledge of the defect in the product.
- The seller altered, modified or installed the product, and such alteration, modification or installation was a substantial cause of the incident giving rise to the action, was not authorized or requested by the manufacturer and was not performed in compliance with the directions or specifications of the manufacturer.
- <sup>82</sup> Ariz. Rev. Stat. § 12-684.B.
- <sup>83</sup> *Heatec Inc. v. R.W. Beckett Corp.*, 197 P.3d 754, 756, 758 (Ariz. Ct. App. 2008).

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