

Chain of Distribution Liability: Tag, You're It.

In the over 150 year history of law relating to liability for product related injury, we have gone from being able to sue only manufacturers for breach of a contract to which we are a party, to being able to hold manufacturers liable for the damages caused by a defective product even if there is no evidence of negligence. That is, as you will recall, the rule of strict liability.

After first being adopted by the Supreme Court of California, this rule was soon set forth in the Restatement (Second) of Torts, a multi-volume work intended to summarize common law as it relates to torts. (Common law is the body of rules and principles shaped over time by court, in contrast to statutory or legislatively created law.) Found at Section 402A, the rule was stated as follows:

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

This rule was said to apply “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.”

What is notable about this Rule, if you noticed, is that it makes no distinction between the manufacturer of a defective product and one who just happens to sell it. This meant that the rule of strict liability had been extended to the entire chain of distribution. All that was necessary for liability, in addition to the product being defective and causing injury, was that you had sold it. And because this was liability without the need to show negligence, the seller's knowledge of the defect was irrelevant.

While publication of this rule in the Restatement did not make it law, courts across the country quickly adopted the rule, giving it the effect of law in state after state. The policy considerations that had convinced courts to apply strict liability to manufacturers were used to extend liability to distributors and retailers. As one court wrote, in a case called *Vandermark v. Ford Motor Company*: “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.” Thus, even though mere “middlemen” and retailers were not held to have created the defective condition of the product, they had still participated in its movement within the stream of commerce, and reaped monetary benefits from their actions. So it was deemed fair to give consumers the maximum of protection and leave it to the seller to argue out with the manufacturer as to their respective liability.

Now free to sue anyone in the chain of a product's distribution, it should come as no surprise that injured people most often chose to sue the retailer. There was typically no real issue

of where the product had been purchased. And why make the effort of searching out the identity of the manufacturer, which might be based in another state, or even another country, when a full recovery could be had from the retailer. It was then up to the retailer to join the manufacturer in the lawsuit, if possible, or to later seek reimbursement of what damages had ended up being paid by filing what is called an indemnity action.

As retailers became the primary target of product liability lawsuits the protests from the business community grew increasingly louder. Insurance rates were skyrocketing, they said, and Mom-and-Pop businesses were being driven out of business. Some of this was true, while other of it was exaggeration. But, in the end, many states did enact tort-reform legislation that granted greater legal protection to non-manufacturing sellers.

Today, twenty-five states plus Washington DC apply the rule of strict liability to all in the chain of distribution. Nine states have so-called “pass-through” statutes that protect sellers from liability where they had no knowledge of the defect, and had no reason to suspect it was there. Another thirteen states require proof of negligence to hold a non-manufacturing seller liable, that is, unless the manufacturer is insolvent or beyond the reach of a lawsuit. Finally, there are three states that do not follow the rule of strict liability and require proof of negligence.

In sum, if you had a role in the distribution of a defective product that ends up causing an injury, in half of the states you can be sued and held liable, even if you were nothing more than a conduit that moved an unopened box from Point-A to Point-B.