

***Go-Go Bananas:
Challenges of Product Liability and Indemnification
Up and Down the Stream of Commerce***



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Introduction



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2 Rules to Champion for a Successful Business



Overview of Presentation

- Review Concepts of Product Liability within the Stream of Commerce
- State Statutory Reforms – Overview, Application, and Comparisons
- Contractual Indemnity
- Challenges and High-Level Considerations



Overview of Theories of Product Defects: Design, Manufacturing, and Warning

Design Defect -- if the product fails to meet ordinary consumer expectations as to safety or the design is not as safe as it should be. This concept takes 2 basic paths:

1. Whether the product performed as safely as an ordinary consumer would expect when used in an intended and reasonably foreseeable manner, and
2. Whether on balance the benefits of the challenged design outweighed the risk of danger inherent in the design.



Overview of Theories of Product Defects: Design, Manufacturing, and Warning

Manufacturing defect - A product has a manufacturing defect if it differs from the manufacturer's intended result or from other ostensibly identical units of the same product line.



Overview of Theories of Product Defects: Design, Manufacturing, and Warning

Warning defect - When a manufacturer does not adequately warn the consumer of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution.



Former California Chief Justice Traynor on Product Liability:

“A bottling company is liable for the injury caused by a decomposing mouse found in its bottle. It is not liable for whatever harm results to the consumer's teeth from the sugar in its beverage. A knife manufacturer is not liable when the user cuts himself with one of its knives. When the injury is in no way attributable to a defect there is no basis for strict liability.”

Former Chief Justice of California (1964-1970) Roger Traynor,
The Ways and Meanings of Defective Products and Strict Liability, 32 TENN. L. REV. 363, 367 (1965).



Bottom Line...

When a product defect occurs (however it may occur), potential liability arises, and those in the product's stream – that is, those who have in any way “touched” the product -- may bear responsibility -- down and/or up the stream -- for their participation.



Overview of Product Liability for those in the Stream

“Products liability is the name currently given to the area of the law involving the liability of those who supply goods or products for the use of others to purchasers, users, and bystanders for losses of various kinds resulting from so-called defects in those products.”

Johnson v. United States Steel Corp., 240 Cal. App. 4th 22, 30, 192 Cal. Rptr. 3d 158, 164 (2015).



Common Law Product Liability – the Manufacturer

General Rule: A manufacturer is strictly liable in tort when an article the manufacturer 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.



Common Law Product Liability – the Retailer, Distributor, Supplier and Other

“Strict products liability was originally applied to manufacturers of consumer goods but has been extended to retailers, distributors, suppliers and other entities in the chain of distribution of a product that causes harm to a person or to property other than the product itself.”

Johnson v. United States Steel Corp., 240 Cal. App. 4th 22, 31 (2015).



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Suppliers and Sellers

“Sellers of all products are responsible for defects that exist in the product when it leaves the seller's control and is placed on the market. Thus, the seller of a completed product is strictly liable for any defect in the completed product, regardless of the “source” of the defect; “a manufacturer of a completed product cannot escape liability by tracing the defect to a component part supplied by another.””

Johnson, 240 Cal. App. 4th at 31.



Overriding Principles

- Strict product liability seeks to hold manufacturers (and others in the supply stream) accountable when there is “something wrong” with the product.
- The common law looks at the product, not necessarily what a manufacturer did or did not do, although conduct is also important as we will discuss.



Statutory Reform and Indemnity Considerations



Definitions

indemnity, *n.*

1. A duty to make good any loss, damage, or liability incurred by another.
2. The right of an injured party to claim reimbursement for its loss, damage, or liability from a person who has such a duty.
3. Reimbursement or compensation for loss, damage, or liability in tort; esp., the right of a party who is secondarily liable to recover from the party who is primarily liable for reimbursement of expenditures paid to a third party for injuries resulting from a violation of a common-law duty.

BLACK'S LAW DICTIONARY 772 (7th ed. 1999).



The Players and Other Terms

- **indemnitor** – one who indemnifies another.
- **indemnatee** – one who receives indemnity from another.
- **indemnification**, n. **1.** The action of compensating for loss or damage sustained. **2.** The compensation so made.
- **indemnity clause** – A contractual provision in which one party agrees to answer for any specified or unspecified liability or harm that the other party might incur.



State Legislation –

Allocating Liability and Indemnity Rights in the Stream of Commerce

- Evolution of Common Law - each party in the stream of a defective product could, theoretically (and sometimes, in reality) be held strictly liable.
- Distributors were essentially persuaded to ask those up the stream to take steps to ensure products were made or designed to eliminate defects.
- For practical purposes, this proved unworkable.
- As a result, let's legislate liability schemes and indemnity rights.



Common Law Indemnity

Section 22 of the Restatement (Third) of Torts:

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.**



States with Reform

- At least 24 states have adopted legislation that addresses (1) liability of those involved with in a product claim, (2) indemnification rights and obligations within the product stream, or (3) a blend of both.
- These include: Colorado; Delaware; Georgia; Idaho; Illinois; Indiana; Iowa; Kansas; Kentucky; Louisiana; Maryland; Michigan; Minnesota; Mississippi; Missouri; Nebraska; New Jersey; North Carolina; North Dakota; Ohio; South Dakota; Tennessee; Texas; Washington.



Comparison of Select State Statutory Schemes

Texas, Ch. 82, Civil Practices and Remedies Code

- “A manufacturer shall indemnify and hold harmless a **seller** against loss arising out of a products liability action[.]” See TEX. CIV. PRAC. & REM. CODE § 82.002(a).
- However, a manufacturer’s obligation to indemnify a seller does not exist where the loss is “caused by the seller’s negligence, intentional misconduct, or other act or omission, such as negligently modifying ... the product, for which the seller is independently liable.” *Id.*



Definitions are Critical

- "**Products liability action**" means any action against a manufacturer or seller for recovery of damages arising out of injury or damage allegedly caused by a defective product.
- "**Claimant**" means a party seeking relief.
- "**Seller**" means a person who is engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce a product or any component part thereof.
- "**Manufacturer**" means a person who is a designer, formulator, constructor, rebuilder, fabricator, producer, compounder, processor, or assembler of any product or any component part thereof and who places the product or any component part thereof in the stream of commerce.

TEX. CIV. PRAC. & REM. CODE § 82.001(1)-(4).



Texas' Exceptions for those Not-So-Innocent...

- A seller that did not manufacture a product is not liable for harm caused to the claimant by that product **unless**:
 - the seller participated in the design of the product
 - the seller altered the product and the harm resulted
 - the seller installed the product, or had the product installed, and harm resulted
 - the seller exercised substantial control over the content of a warning or instruction, the warning or instruction was inadequate, and harm resulted
 - the seller made an express factual representation about an aspect of the product which proved to be incorrect but was relied upon by the claimant to its detriment
 - the seller actually knew of a defect and harm resulted from the defect;
 - **the manufacturer of the product is: (i) insolvent; or (ii) not subject to the jurisdiction of the court.**



Comparison of Select State Statutory Schemes, cont'd

Michigan's Compiled Laws § 600.2947

- A manufacturer or seller is not liable for harm caused by an alteration of the product unless the alteration was reasonably foreseeable.
- A manufacturer or seller is not liable for harm caused by misuse of a product unless the misuse was reasonably foreseeable.
- A manufacturer or seller is not liable if the user of the product was aware that use of the product created an unreasonable risk of personal injury and voluntarily exposed himself or herself to that risk.
- A manufacturer or seller is not liable if the alleged harm was caused by an inherent characteristic of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability, and that is recognized by a person with the ordinary knowledge common to the community.



Comparison of Select State Statutory Schemes, cont'd

Michigan's Compiled Laws § 600.2947, Cont'd

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:

- 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.
- 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.



Overriding Concept to Gain from State Schemes

- Parties in the stream are wise to understand (or at least be aware of) the scope and application of the law of the states in which business is transacted, or perhaps primarily transacted.
- In the global market, it may be difficult to know which state's law, if any, may apply in a particular transaction or claim.
- The rules of liability allocation or indemnity are many times swallowed by numerous exceptions.



Indemnity by Contract

“[I]n the commercial setting, where there is potential for multi-party liability based on multi-party participation in an overall transactional chain, the parties in that chain are free to allocate among themselves, as a matter of business convenience or necessity, the overall insurance burden in respect of coverage for claims of third parties arising out of the transaction as a whole. The technique for such allocation is, of course, indemnification agreements, and such indemnification may, provided the parties so agree, indemnify one in respect of his own negligence.”

Berry v. V. Ponte & Sons, 400 A.2d 114, 116 (Superior Court N.J. App. Div. 1979)



An Example...

- Distributor agrees to indemnify the Supplier/Manufacturer from liability "arising from injury or damage to property or person, caused in any manner by the possession, use, or operation" of the product.
- Product causes injury to an end-user, and the Distributor is held liable for the injury. Distributor seeks indemnity from the upstream Supplier for the defective design and for the amount paid to the user.
- Result?



No Way to Address All Possible Arrangements

- There is no “one provision fits all” arrangement.
- The breadth and scope of an indemnity agreement depends on many factors, not the least of which are the positions of the parties, considerations of the particular product, the relationship between the parties, and risk tolerance.
- As good neighbors good fences make, good indemnification arrangements can make for good business partners within the supply chain.



Indemnity Challenges and Considerations

- Obtaining indemnification or contribution from a manufacturer or other player up the stream of commerce many times is a challenge.
- Parties should consider whether a pre-claim release or indemnity agreement is in order from an upstream supplier or manufacturer.
- Can we agree how and/or where we might determine scope of responsibility/indemnity?
- Are you ready for a trial, or multiple trials? Subsequent appeals?
- Satisfaction of a right to indemnification - - a judgment for indemnity is a piece of paper; enforcing the words on that paper is another matter.



Insurance

- All parties in the supply chain should consider a robust products liability / commercial liability insurance program.
- Commercial General Liability “CGL” Policies with applicable product liability coverage should insure the possibility that products or work of the insured may cause personal injury or property damage.
- Build a relationship with an insurance broker or agent.
- Understand what is covered. Understand what is not. Manage the business accordingly.



A Closing Tale...

Once upon a time . . . in my former life . . .



Resources

- PPAI: www.ppai.org
- PPAI Product Responsibility: <http://www.ppai.org/inside-ppai/corporate-responsibility/product-responsibility/>
- Consumer Product Safety Commission: www.cpsc.gov , www.recalls.gov
- UL: www.ul.com
- Questions? AnneS@ppai.org



On behalf of PPAI, I thank you for your participation.

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