

Assessing Liability in Defective Product Cases — A Pro-Con Debate

PROTECTING THE INJURED CONSUMER

This article addresses the effect of the Uniform Contribution Among Tortfeasors' Act (UCATA) in a product liability action against the seller of a defective and unreasonably dangerous product, and the problem arising as a result of assessing separate percentages of fault against the seller and the manufacturer of the product. The financial consequences to an injured plaintiff can be devastating.

Two solutions to this problem are discussed:

1. The Arizona appellate courts should declare that the liability of the seller of a defective and unreasonably dangerous product is tanta-

mount to vicarious liability, and the seller of such a product is liable (at fault) for the sale of the product to the same extent as if it were the manufacturer of the product.¹

2. The Arizona legislature should clarify A.R.S. § 12-506 (comparative fault) insofar as determining the fault of the seller in a product liability case.

Historic Protections

In 1964, the Arizona Supreme Court in *Colvin v. Superior Equipment Co.*,² adopted the concept that a manufacturer is subject to strict liability with regard to its manufactured



SELLER AND MANUFACTURER PRODUCT LIABILITY

products. Four years later in 1968, the Arizona Supreme Court made the seller strictly liable for sale of the product when it adopted the RESTATEMENT (SECOND) OF TORTS § 402(A) (1965).³ In the case of *O.S. Stapley Co. v. Miller*,⁴ the court also held that contributory negligence by failure to discover the defect or to guard against it is not a defense under the product liability doctrine. No duty exists upon the ultimate consumer or user to search for, or guard against, the possibility of product defects.

In 1978, the Arizona Legislature enacted § 12-684, controlling product liability: “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 attorneys fees and costs incurred by the seller in defending such action, unless ... the seller had knowledge of the defect in the product [or] the seller altered, modified or installed the product.”

For public policy reasons, the legislature decided the seller should bear the fault of the manufacturer of a defective product. This statutory liability imposed upon the seller for the mere sale of the product is similar to imposing vicarious liability upon the seller for the conduct of the manufacturer. Under the statutory scheme, the plaintiff need only prove the product was defective and unrea-

sonably dangerous when sold by the seller.

Historically, Arizona cases have supported this position. In *Rocky Mountain Fire and Casualty Co. v. Biddulph Oldsmobile*,⁵ the Arizona Supreme Court made this clear:

Our legislature has embraced the concept of strict liability in tort. This Court has approved the doctrine as found in ... the RESTATEMENT. ... To establish a prima facie case of strict liability, the burden is upon the plaintiff to show the following: the product is defective and unreasonably dangerous; the defective condition existed at the time it left defendant's control; and the defective condition is the proximate cause of the plaintiff's injuries or property loss.

Expanding Liability

Strict liability in tort for the sale of a defective and dangerous product was later extended by the Arizona Supreme Court beyond the manufacturer or seller of the product. In *Torres v. Goodyear Tire and Rubber Company, Inc.*,⁶ the plaintiffs sought strict liability in tort against a defendant that was not the entity that had designed, manufactured or distributed the product (a Goodyear tire), but was the trademark licensor of the product. The question certified to the Court was “whether a trademark licensor is subject to strict product liability under § 402(A) of the RESTATEMENT (SECOND) OF TORTS.”

The Court declared, “This state long ago adopted the RESTATEMENT ... and recognized strict liability of manufacturers and sellers of defective products that were unreasonably dangerous and caused physical harm to the consumer or his property. ... Both the RESTATEMENT and our cases have used the terms ‘manufacturer’ and ‘seller’ almost interchangeably in applying the doctrine. ... The underlying objective of the doctrine was to place the risk of loss on those in the chain of defective, unreasonably dangerous goods.”⁷

Arizona case law and the RESTATEMENT have remained consistent. In 1997, the American Law Institute adopted the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY. The Arizona Supreme Court has not formally adopted that RESTATEMENT, but the position of the

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RESTATEMENT regarding the seller of a product is consistent with Arizona case law. In the Introduction, it states, “The major thrust of § 402(A) was to eliminate privity so that a user or consumer, without having to establish negligence, could bring an action against a manufacturer, as well as against any

other member of a distributive chain that had sold a product containing a manufacturing defect.”

Comment e makes clear that liability is broad: “Liability attaches even when such nonmanufacturing sellers or distributors do not themselves render the product defective

and regardless of whether they are in a position to prevent defects from occurring.”⁸

Prior to UCATA, a seller of a defective and unreasonably dangerous product would tender the defense of a product liability action to the manufacturer and, if a judgment was obtained against the seller, the

manufacturer was obligated to indemnify the seller under A.R.S. § 12-684.

Shrinking Protections

In 1984, the Arizona Legislature enacted UCATA, which indicates that “in an action for personal injury, property damage or wrongful death, the liability of each defendant for damages is several only and is not joint Each defendant is liable only for the amount of damages allocated to that defendant in direct proportion to that defendant’s percentage of fault, and a separate judgment shall be entered against the defendant for that amount.”⁹

If the seller is at fault solely on the basis that it sold a product that was in a defective and unreasonably dangerous condition at the time of sale, why should the jury severally decide the fault of the manufacturer separate and apart from that of the seller, especially if the product was defective and unreasonably dangerous from the manufacturing process? The finding of fault against the manufacturer who manufactured the defective and unreasonably dangerous product should not be used by the seller to escape liability before the injured plaintiff is made whole. Yet, A.R.S. § 12-2506 can be read and understood in a way that allows only separate judgment amounts against the manufacturer and the seller.

How do we reconcile separate findings of fault with the legislative scheme that was created before UCATA under the product liability statute (A.R.S. § 12-284) that provided for indemnity to the seller? If UCATA is in conflict with A.R.S. § 12-284, it should be harmonized.

Consumer Beware

Finding the several fault of the manufacturer and the seller can have a disastrous result for a party injured by the defective product if the final judgment is based on separate percentages of fault.

What does the injured plaintiff do if col-

lection of the judgment cannot be made against the manufacturer? Traditionally, the seller paid the judgment and would then seek indemnity from the manufacturer. The seller should not be allowed to come out of a trial with a judgment entered against it based on a reduced dollar amount simply because the manufacturer was also assessed a percentage of the fault.

Unfortunately, some of the judges in Maricopa County are of this mindset. They believe there is no vicarious liability to be imposed upon the seller of the product under UCATA because the seller is an independent party to the manufacturer and all fault must be determined severally. Therefore, final judgment must be entered in conformity to the percentages of fault determined by the trier of fact.

A Shift in Stance

We can understand why judges take this position when we read A.R.S. § 12-2506(A)—and the case of *Zuern v. Ford Motor Company*.¹⁰ That case determined that UCATA not only modified the holding of *Cota v. Harley Davidson*,¹¹ but declared that the trier of fact must consider the fault of all persons who contributed to the alleged injury—a defendant is liable for damages only in direct proportion to that defendant’s fault.

Notwithstanding *Zuern*, our Supreme Court in *Wiggs v. City of Phoenix*¹² attempted to clarify fault in a circumstance not specifically referenced in A.R.S. § 12-2506, in reference to the issue of non-delegable duty. In *Wiggs*, the Court held that the City of Phoenix had a non-delegable duty to maintain its highways in a reasonably safe condition:

Joint liability and vicarious liability are related but separate doctrines. The joint liability that was abolished by A.R.S. § 12-2506(D) was limited to that class of joint tortfeasors whose independent negligence coalesced to form a single injury. In contrast to those whose liability was vicarious only, each was personally at fault to some degree, though each was wholly liable for full damages. ... But § 12-2506(D) preserves joint liability for both true joint

tortfeasors (those “acting in concert”) and those vicariously liable for the fault of others. Those whose liability is only vicarious have no fault to allocate.¹³

The Key: Vicarious Liability

If vicarious liability is imposed upon the seller of a product, there would be no need to modify A.R.S. § 12-2506 (degrees of fault) or A.R.S. § 12-684 (indemnity). Finding the seller vicariously liable for the sale of the product is consistent with existing language in A.R.S. § 12-2506(D): “Liability of each defendant is several only and is not joint except that ... a party is responsible for the fault of another person.”

Because no conduct of the seller is involved other than the sale and delivery of the product itself, the seller should bear the liability burden of the manufacturer and be vicariously liable for the defective and unreasonably dangerous product. As in other vicarious liability circumstances, it is by public policy that this liability is imposed upon the seller of the product. There are a few cases around the country that acknowledge that the liability of the seller of a product is really a form of vicarious liability and the remedy for a seller of the product is to pursue indemnity from the manufacturer.¹⁴

A case that appropriately resolved this issue is *Owens v. Truck Stops of America*.¹⁵ There, the Tennessee Supreme Court noted, “This case is the ‘appropriate controversy’ to address the ‘advisability of retaining joint and several liability’ for defendants in the chain of distribution of a product who are liable upon a theory of strict liability and tort”¹⁶:

When the manufacturer is not amenable to service of process or is insolvent, an injured consumer can assert liability against that “faultless” seller. If, under these circumstances, the seller were not held to be jointly liable for the manufacturer’s damages, then, contrary to the products liability statute, the injured consumer would be left with no remedy. ... Consequently,

joint and several liability against parties in the chain of distribution of a product is essential to the theory of strict products liability.

This conclusion is supported by portions of the Uniform Contribution Among Tort Feasors Act ... which provide, "If equity requires, the collective liability of some as a group shall constitute a single share" and "the principles of equity applicable to contribution generally shall apply."¹⁷

Confusion in the Courts

Another problem arising from finding separate fault of the seller and of the manufacturer is speculation by the fact finder:

- By what standard would the jury be able to fix a percentage of fault against a seller

for the mere "sale" of the product when also considering the separate fault of the manufacturer, who designs and produces the product?

- Would the jury not be forced to speculate in arriving at a determination of fault for a mere "sale"?

Under current jury instructions, every jury considering a product liability case is told, "You should not speculate or guess about any fact."¹⁸

In a product liability action against the seller of the product, if the jury is allowed to separately determine the fault of the manufacturer who may be a non-party defendant or bankrupt, how can the plaintiff be compensated if the jury finds 100 percent of the fault against such a manufacturer?

This result obviates the law of strict liability in tort against a seller of a defective and unreasonably dangerous product. The loser in this situation is clearly the injured plaintiff.

Conclusion

We submit that the Arizona legislature never intended this result. Certainly the Arizona Supreme Court recognized in *Wiggs* that fault in the nature of vicarious liability can be imposed against parties who should be deemed at fault notwithstanding they are not expressly referenced in A.R.S. § 12-2506.

It is time to affirm public policy and harmonize the statutes pertaining to product liability and comparative fault. It should be declared that the seller of the product is vicariously liable for the conduct of the manufacturer of a defective and unreasonably dangerous product. ▀

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endnotes

1. The seller of the product considered herein means a seller that merely conducts a sale of the product. This article is not concerned with instances of failure to inspect or as stated in A.R.S. § 12-683 1 and 2, testing, labeling, misuse or use not reasonably foreseeable.
2. 392 P.2d 778, 782 (Ariz. 1964).
3. RESTATEMENT (SECOND) OF TORTS § 402 A (1065). Special Liability of Seller of Product for Physical Harm to User or Consumer, provides as follows:
 - (1) 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.
 - (2) The rule stated in Subsection (1) applies although
 - (a) the seller has exercised all possible care in the preparation and sale of his product, and,
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.
4. 447 P.2d 248, 253 (Ariz. 1968).
5. 640 P.2d 851, 854 (Ariz. 1982).
6. 786 P.2d 939, 940 (Ariz. 1990).
7. *Id.* at 942.
8. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, p. 8.
9. A.R.S. § 12-2506. Fault by "products liability" was included in the original A.R.S. § 12-2506. In 1987, this statute was modified to virtually eliminate joint liability except as provided. We could find no evidence that the legislature considered the effect of the 1987 amendments on indemnification of the seller by the manufacturer as stated in A.R.S. § 12-684.
10. 937 P.2d 676 (Ariz. Ct. App. 1997), *review denied*, 1998.
11. 684 P.2d 888 (Ariz. Ct. App. 1984) (prohibited evidence that the plaintiff motorcyclist had been drinking prior to the accident in a product liability claim).
12. 10 P.3d 625 (Ariz. 2000).
13. *Id.* at 628, 629 (emphasis added).
14. *Braden v. Hendricks*, 695 P.2d 1343 (Okla. 1985), discussed the concept of vicarious liability in a product liability case brought against the automobile manufacturer and the dealer. There, the court stated, "Where, as here, defect is said to be attributable solely to the manufacturing process rather than to some conduct in the distribution system, a distributor's liability may be termed vicarious." *Schneider National, Inc. v. Holland Hitch Company*, 843 P.2d 561, 583 (Wyo. 1992), is informative: "It is logically consistent to permit indemnity actions under strict liability to shift 100 percent of the liability as 'the cheapest cost of avoider.' The policy choice allocates the risk of loss to the actor 'in the best position to either insure against the loss or spread the loss among all the consumers of the product.'" *Id.*
15. 915 S.W.2d 420 (Tenn. 1999).
16. *Id.* at 430.
17. *Id.* at 431, 432.
18. RAJI Civil, Standard 1. We submit that RAJI Instructions, Product Liability, 1, 3, 5 and 6, strongly suggest a seller is totally (100 percent) at fault for the sale of a defective and unreasonably dangerous product.