Product Distributor Liability: Some Different Scenarios.

No doubt to the shock of some, the last article discussed how participation in the chain of distribution can, by itself, be sufficient to expose a company to liability when a defective product it distributed ends up injuring someone. And while, as a practical matter, lawsuits against a pass-through distributors are relatively uncommon—since there is usually someone better available to sue—that does not mean distributors should ignore or misunderstand the risk.

To better illustrate how the rule of strict liability works in the case of a distributor, and to show how application of the rule can vary depending on what state law applies, let us consider the following two factual scenarios:

> A distributor sells pre-cut and pre-washed romaine lettuce from a processor to a California restaurant that uses it to make salads. Several customers are injured as a result of eating salads made with the contaminated lettuce at the restaurant. The processor goes out of business as a result of the ensuing bad publicity.
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> A distributor sells imported frozen beef patties to a small, family-run restaurant in Seattle. The patties are contaminated with E. coli O157:H7, and the restaurant has a practice of cooking its burgers to medium rare unless the customer specifically asks otherwise. Several dozen customers of the restaurant are infected with E. coli O157:H7 after eating burgers there. The manufacturer of the frozen patties cannot be identified. The restaurant has no insurance and files for bankruptcy.

In neither of the scenarios is there any evidence of negligence on the part of the distributors. But in both cases the injured customer sues only the distributor. And so what happens?

<u>The Lettuce Scenario:</u>

In this scenario, the complexity and occasional vagary of California law does not allow a clear-cut answer. Like 24 others, California is a chain-of-distribution liability state. This means a consumer injured by a defective product can sue any business entity involved in the marketing of the product—from its manufacturer, down through the distributor and wholesaler, to the retailer. In cases where the injuries are caused solely by the defective product, the distributor cannot defend itself by trying to shift blame to other entities, even if they are arguably more at fault. As one court explained, "entities are liable for an injury caused by a defective product as a matter of policy, rather than as a result of any conduct of the entity." If a liable distributor feels that it paid more than its fair share, then its sole remedy is an indemnity action—that is, suing its upstream supplier to recover all or part of what it had to pay to the plaintiff in damages.

But in our scenario, an indemnity action is not possible because the processor went out of business, and the restaurant did nothing that would provide a basis for allocating fault to it. That means the distributor gets stuck with 100 percent of the liability.

Now, if we change our scenario and have both the restaurant and the distributor sued, and have the processor still in business, along with evidence that it was negligent in the processing of the lettuce, then something much different results. First, the restaurant and the distributor could point the finger at the processor, blaming its negligence for injuring the plaintiff. Second, the plaintiff would likely add the processor as a defendant in the lawsuit rather than risk the jury allocating a big portion of the fault to it without an accompanying award of damages. But note that even with these different results, the plaintiff is still entitled to sue everyone in the chain of distribution.

<u>The Frozen Beef Patties Scenario</u>:

In this scenario, the result is the same, but for different reasons. Under Washington law, a distributor is liable for product-related injuries only if there is proof of negligence. In general, strict liability applies only to product manufacturers, not to sellers. And even when there is proof of negligence, the seller is only liable for the percentage of fault attributable to its own conduct.

But then there are the exceptions. In Washington, if there is no solvent manufacturer that is available for the plaintiff to sue, an available seller can then be held strictly liable. That is why in our second scenario the distributor would be on the hook for all of the damages; the law forces it to step into the shoes of the manufacturer. This does not happen very often, however. And so, on the whole, product liability laws like those in Washington are quite favorable to distributors.

<u>A Few Final Words About Pass-Through Statutes</u>:

As mentioned in the last article, nine states have what are called “pass-through” statutes that protect non-manufacturing product sellers from strict liability. How the statute works varies from state-to-state, but Minnesota’s provides a good example. Under that statute, in any lawsuit based upon strict liability against a defendant other than the manufacturer, the defendant can file an affidavit with the court identifying the manufacturer. The plaintiff then sues the manufacturer; and once it appears to defend the lawsuit, the non-manufacturing defendant is dismissed from the case. The exceptions are when the plaintiff can “show the defendant exercised some significant control over the design or manufacture of the product, the defendant had actual knowledge of the defect, or the defendant caused the defect in the product.” Minn. Stat. § 544.41(3).

What pass-through statutes do—when they work as intended—is help the plaintiff to find out the identity of the manufacturer in situations where that information might otherwise be hard to learn. The statute also protects non-manufacturing defendants avoid the cost and disruption of litigation, or at least most of it. Because, even if a distributor is eventually found by a jury to be zero-percent at fault, like in our California law example above, the distributor would still have been forced to endure the hassle and expense of a lawsuit.