# Strict Products Liability

*by Sophia*

WHAT'S COVERED

In this lesson, you will learn about another tort theory for products. Specifically, this lesson will cover:

## 1. Formulation of Strict Liability

The warranties grounded in the Uniform Commercial Code (UCC) are often ineffective in assuring recovery for a plaintiff's injuries. The notice requirements and the ability of a seller to disclaim the warranties remain bothersome problems, as does the **privity** requirement in those states that continue to adhere to it.

Negligence as a products-liability theory removes any privity problems, but negligence comes with a number of familiar defenses and with the problems of preemption.

To overcome these obstacles, judges have gone beyond the commercial statutes and the ancient concepts of negligence. They have fashioned a tort theory of products liability based on the principle of **strict products liability**.

The formulation of strict liability that most courts use is **Section 402A of the Restatement of Torts (Second)**, set out here in full:

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. This rule applies even though
   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.

Section 402A of the Restatement avoids the warranty booby traps. It states a rule of law not governed by the UCC, so limitations and exclusions in warranties will not apply to a suit based on the Restatement theory, and the consumer is under no obligation to give notice to the seller within a reasonable time of any injuries. Privity is not a requirement; the language of the Restatement says it applies to "the user or consumer," but courts have readily found that bystanders in various situations are entitled to bring actions under

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Restatement, Section 402A as well. The formulation of strict liability, though, is limited to physical harm. Many courts have held that a person who suffers economic loss must resort to warranty law.

Strict liability avoids some negligence traps, too. No proof of negligence is required:

| | Warranty | Strict Liability |
|---|---|---|
| Notice of defect from buyer to seller required? | Yes | No |
| Disclaimer possible? | Yes | No |
| Privity required? | Sometimes | No |

TERMS TO KNOW

**Privity of Contract**

The relationship that exists between two parties to a contract. The privity requirement prevents a non-party to a contract to sue on the contract in the absence of privity.

**Strict Products Liability**

Strict liability that results from manufacture and sale of products that are unreasonably dangerous, such as a car that has a defect that causes it to catch on fire.

**Section 402A of the Restatement of Torts (Second)**

A section of the Restatement of Torts (Second) that sets forth the law of strict products liability for unreasonably dangerous products.

# 2. Section 402A Elements

We will now look at the various elements of Section 402A that specify how strict liability can be applied.

## 2a. Products in a Defective Condition

Sales of goods - but not sales of services - are covered under the Restatement, Section 402A. Furthermore, the plaintiff will not prevail if the product was safe for normal handling and consumption when sold.

> EXAMPLE A glass soda bottle that is properly capped is not in a defective condition merely because it can be broken if the consumer should happen to drop it, making the jagged glass dangerous.

> EXAMPLE Chocolate candy bars are not defective merely because you can become ill by eating too many of them at once. On the other hand, a seller would be liable for a product defectively packaged, so that it could explode or deteriorate and change its chemical composition.

A product can also be in a defective condition if there is danger that could come from an anticipated wrongful use, such as a drug that is safe only when taken in limited doses. Under those circumstances, failure to place an adequate dosage warning on the container makes the product defective.

The plaintiff bears the burden of proving that the product is in a defective condition, and this burden can be difficult to meet. Many products are the result of complex feats of engineering. Expert witnesses are necessary to prove that the products were defectively manufactured, and these are not always easy to come by.

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This difficulty of proof is one reason why many cases raise the failure to warn as the issue at hand, since in the right case that issue is far easier to prove.

## 2b. Unreasonably Dangerous

The product must be not merely dangerous but unreasonably dangerous. Most products have characteristics that make them dangerous in certain circumstances.

Under Section 402A, "the article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."

Even high risks of danger are not necessarily unreasonable. Some products are unavoidably unsafe.

> ↱ EXAMPLE Rabies vaccines can cause dreadful side effects. But the disease itself, almost always fatal, is worse.

A product is unavoidably unsafe when it cannot be made safe for its intended purpose given the present state of human knowledge. Because important benefits may flow from the product's use, its producer or seller ought not to be held liable for its danger.

However, the failure to warn a potential user of possible hazards can make a product defective under Restatement, Section 402A, whether unreasonably dangerous or even unavoidably unsafe.

**IN CONTEXT**

The dairy farmer need not warn those with common allergies to eggs, because it will be presumed that the person with an allergic reaction to common foodstuffs will be aware of this allergy. But when the product contains an ingredient that could cause toxic effects in a substantial number of people and its danger is not widely known (or, if known, is not an ingredient that would commonly be present in the product), the lack of a warning could make the product unreasonably dangerous within the meaning of Restatement, Section 402A.

Many of the suits brought by asbestos workers charged exactly this point: *"The utility of an insulation product containing asbestos may outweigh the known or foreseeable risk to the insulation workers and thus justify its marketing. The product could still be unreasonably dangerous, however, if unaccompanied by adequate warnings. An insulation worker, no less than any other product user, has a right to decide whether to expose himself to the risk."*

*Borel v. Fibreboard Paper Products Corp., 493 F.Zd 1076 (5th Cir. 1973).*

## 2c. Engaged in the Business of Selling

Restatement, Section 402A(1)(a), limits liability to sellers "engaged in the business of selling such a product." The rule is intended to apply to people and entities engaged in business, not to casual one-time sellers.

Additionally, the business does not need to be solely related to the defective product.

> ↱ EXAMPLE A movie theater that sells popcorn with a razor blade inside is no less liable than a grocery store that does so. But strict liability under this rule does not attach to a private individual who

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sells his own automobile.

In this sense, Restatement, Section 402A, is analogous to the UCC's limitation of the warranty of merchantability to the merchant.

The requirement that the defendant be in the business of selling gets to the rationale for the whole concept of strict products liability: Businesses should shoulder the cost of injuries because they are in the best position to spread the risk and distribute the expense among the public.

## 2d. Reaches the User without Change in Condition

Restatement, Section 402A(1)(b), limits strict liability to those defective products that are expected to and do reach the user or consumer without substantial change in the condition in which the products are sold.

A product that is safe when delivered cannot subject the seller to liability if it is subsequently mishandled or changed.

The seller, however, must anticipate in appropriate cases that the product will be stored; faulty packaging or sterilization may be the grounds for liability if the product deteriorates before being used.

## 2e. Liability Despite Exercise of All Due Care

Strict liability applies under the Restatement rule even though "the seller has exercised all possible care in the preparation and sale of his product." This is the crux of strict liability and distinguishes it from the conventional theory of negligence.

It does not matter how reasonably the seller acted or how exemplary a manufacturer's quality control system is— what matters is whether the product was defective and the user injured as a result.

**IN CONTEXT**

Suppose an automated bottle factory manufactures 1,000 bottles per hour under exacting standards, with a rigorous and costly quality-control program designed to weed out any bottles showing even an infinitesimal amount of stress. The plant is "state of the art," and its computerized quality-control operation is the best in the world. It regularly detects the one out of every 10,000 bottles that analysis has shown will be defective.

Despite this intense effort, it proves impossible to weed out every defective bottle; one out of one million, say, will still escape detection. Assume that a bottle, filled with soda, finds its way into a consumer's home, explodes when handled, sends glass shards into his eye, and blinds him. Under negligence, the bottler has no liability; under strict liability, the bottler will be liable to the consumer.

## 2f. Liability without Contractual Relation

Under Restatement, Section 402A(2)(b), strict liability applies even though the user has not purchased the product from the seller nor has the user entered into any contractual relation with the seller.

In short, privity is abolished and the injured user may use the theory of strict liability against manufacturers and wholesalers as well as retailers.

Here, however, the courts have varied in their approaches; the trend has been to allow bystanders recovery.

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The Restatement explicitly leaves open the question of the bystander's right to recover under strict liability.

## SUMMARY

In this lesson, you learned that because the doctrines of breach of warranty and negligence did not provide adequate relief to those suffering damages or injuries in products-liability cases, courts **formulated a strict products liability** tort theory, restated in Section 402A of the Restatement of Torts (Second). The **elements of Section 402A** stipulate that for strict liability to apply, **products must be in a defective condition** and **unreasonably dangerous**. Defendants must be **engaged in the business of selling**, and defective products must **reach the user without a change in condition**.

Section 402A also specifies that liability may still exist **despite the exercise of all due care** and in **the absence of a contractual relationship**. In sum, the doctrine of strict products liability says that if goods sold are unreasonably dangerous or defective, the merchant-seller will be liable for the immediate property loss and personal injuries caused by them.

Best of luck in your learning!

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