

Restatement of the Law, Third, Torts: Products Liability  
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Chapter 1 - Liability of Commercial Product Sellers Based on Product Defects at Time of Sale

Topic 1 - Liability Rules Applicable to Products Generally

§ 1 Liability of Commercial Seller or Distributor for Harm Caused by Defective Products

One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.

§ 2 Categories of Product Defect

A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:

- (a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;
- (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;
- (c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

§ 3 Circumstantial Evidence Supporting Inference of Product Defect

It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff:

- (a) was of a kind that ordinarily occurs as a result of product defect; and
- (b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution.

§ 4 Noncompliance and Compliance with Product Safety Statutes or Regulations

In connection with liability for defective design or inadequate instructions or warnings:

- (a) a product's noncompliance with an applicable product safety statute or administrative regulation renders the product defective with respect to the risks sought to be reduced by the statute or regulation; and
- (b) a product's compliance with an applicable product safety statute or administrative regulation is properly considered in determining whether the product is defective with respect to the risks sought to be reduced by the statute or regulation, but such compliance does not preclude as a matter of law a finding of product defect.

## Topic 2 - Liability Rules Applicable to Special Products or Product Markets

### § 5 Liability of Commercial Seller or Distributor of Product Components for Harm Caused by Products Into Which Components Are Integrated

One engaged in the business of selling or otherwise distributing product components who sells or distributes a component is subject to liability for harm to persons or property caused by a product into which the component is integrated if:

- (a) the component is defective in itself, as defined in this Chapter, and the defect causes the harm; or
- (b)(1) the seller or distributor of the component substantially participates in the integration of the component into the design of the product; and
- (2) the integration of the component causes the product to be defective, as defined in this Chapter; and
- (3) the defect in the product causes the harm.

### § 6 Liability of Commercial Seller or Distributor for Harm Caused by Defective Prescription Drugs and Medical Devices

(a) A manufacturer of a prescription drug or medical device who sells or otherwise distributes a defective drug or medical device is subject to liability for harm to persons caused by the defect. A prescription drug or medical device is one that may be legally sold or otherwise distributed only pursuant to a health-care provider's prescription.

(b) For purposes of liability under Subsection (a), a prescription drug or medical device is defective if at the time of sale or other distribution the drug or medical device:

- (1) contains a manufacturing defect as defined in § 2(a); or
- (2) is not reasonably safe due to defective design as defined in Subsection (c); or
- (3) is not reasonably safe due to inadequate instructions or warnings as defined in Subsection (d).

(c) A prescription drug or medical device is not reasonably safe due to defective design if the foreseeable risks of harm posed by the drug or medical device are sufficiently great in relation to its foreseeable therapeutic benefits that reasonable health-care providers, knowing of such foreseeable risks and therapeutic benefits, would not prescribe the drug or medical device for any class of patients.

(d) A prescription drug or medical device is not reasonably safe due to inadequate instructions or warnings if reasonable instructions or warnings regarding foreseeable risks of harm are not provided to:

- (1) prescribing and other health-care providers who are in a position to reduce the risks of harm in accordance with the instructions or warnings; or
- (2) the patient when the manufacturer knows or has reason to know that health-care providers will not be in a position to reduce the risks of harm in accordance with the instructions or warnings.

(e) A retail seller or other distributor of a prescription drug or medical device is subject to liability for harm caused by the drug or device if:

- (1) at the time of sale or other distribution the drug or medical device contains a manufacturing defect as defined in § 2(a); or
- (2) at or before the time of sale or other distribution of the drug or medical device the retail seller or other distributor fails to exercise reasonable care and such failure causes harm to persons.

## § 7 Liability of Commercial Seller or Distributor for Harm Caused by Defective Food Products

One engaged in the business of selling or otherwise distributing food products who sells or distributes a food product that is defective under § 2, § 3, or § 4 is subject to liability for harm to persons or property caused by the defect. Under § 2(a), a harm-causing ingredient of the food product constitutes a defect if a reasonable consumer would not expect the food product to contain that ingredient.

## § 8 Liability of Commercial Seller or Distributor of Defective Used Products

One engaged in the business of selling or otherwise distributing used products who sells or distributes a defective used product is subject to liability for harm to persons or property caused by the defect if the defect:

- (a) arises from the seller's failure to exercise reasonable care; or
- (b) is a manufacturing defect under § 2(a) or a defect that may be inferred under § 3 and the seller's marketing of the product would cause a reasonable person in the position of the buyer to expect the used product to present no greater risk of defect than if the product were new; or
- (c) is a defect under § 2 or § 3 in a used product remanufactured by the seller or a predecessor in the commercial chain of distribution of the used product; or
- (d) arises from a used product's noncompliance under § 4 with a product safety statute or regulation applicable to the used product. A used product is a product that, prior to the time of sale or other distribution referred to in this Section, is commercially sold or otherwise distributed to a buyer not in the commercial chain of distribution and used for some period of time.

## Chapter 2 - Liability of Commercial Product Sellers Not Based on Product Defects at Time of Sale

### § 9 Liability of Commercial Product Seller or Distributor for Harm Caused by Misrepresentation

One engaged in the business of selling or otherwise distributing products who, in connection with the sale of a product, makes a fraudulent, negligent, or innocent misrepresentation of material fact concerning the product is subject to liability for harm to persons or property caused by the misrepresentation.

### § 10 Liability of Commercial Product Seller or Distributor for Harm Caused by Post-Sale Failure to Warn

- (a) One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to provide a warning after the time of sale or distribution of a product if a reasonable person in the seller's position would provide such a warning.
- (b) A reasonable person in the seller's position would provide a warning after the time of sale if:
  - (1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and
  - (2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and

- (3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and
- (4) the risk of harm is sufficiently great to justify the burden of providing a warning.

#### § 11 Liability of Commercial Product Seller or Distributor for Harm Caused by Post-Sale Failure to Recall Product

One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to recall a product after the time of sale or distribution if:

- (a)
  - (1) a governmental directive issued pursuant to a statute or administrative regulation specifically requires the seller or distributor to recall the product; or
  - (2) the seller or distributor, in the absence of a recall requirement under Subsection (a)(1), undertakes to recall the product; and
- (b) the seller or distributor fails to act as a reasonable person in recalling the product.

### Chapter 3 - Liability of Successors and Apparent Manufacturers

#### § 12 Liability of Successor for Harm Caused by Defective Products Sold Commercially by Predecessor

A successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity is subject to liability for harm to persons or property caused by a defective product sold or otherwise distributed commercially by the predecessor if the acquisition:

- (a) is accompanied by an agreement for the successor to assume such liability; or
- (b) results from a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor; or
- (c) constitutes a consolidation or merger with the predecessor; or
- (d) results in the successor becoming a continuation of the predecessor.

#### § 13 Liability of Successor for Harm Caused by Successor's Own Post-Sale Failure to Warn

(a) A successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity, whether or not liable under the rule stated in § 12, is subject to liability for harm to persons or property caused by the successor's failure to warn of a risk created by a product sold or distributed by the predecessor if:

- (1) the successor undertakes or agrees to provide services for maintenance or repair of the product or enters into a similar relationship with purchasers of the predecessor's products giving rise to actual or potential economic advantage to the successor, and
  - (2) a reasonable person in the position of the successor would provide a warning.
- (b) A reasonable person in the position of the successor would provide a warning if:
- (1) the successor knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and
  - (2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and
  - (3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and
  - (4) the risk of harm is sufficiently great to justify the burden of providing a warning.

## § 14 Selling or Distributing as One's Own a Product Manufactured by Another

One engaged in the business of selling or otherwise distributing products who sells or distributes as its own a product manufactured by another is subject to the same liability as though the seller or distributor were the product's manufacturer.

### Chapter 4 - Provisions of General Applicability

#### Topic 1 - Causation

## § 15 General Rule Governing Causal Connection Between Product Defect and Harm

Whether a product defect caused harm to persons or property is determined by the prevailing rules and principles governing causation in tort.?

## § 16 Increased Harm Due to Product Defect

(a) When a product is defective at the time of commercial sale or other distribution and the defect is a substantial factor in increasing the plaintiff's harm beyond that which would have resulted from other causes, the product seller is subject to liability for the increased harm.

(b) If proof supports a determination of the harm that would have resulted from other causes in the absence of the product defect, the product seller's liability is limited to the increased harm attributable solely to the product defect.

(c) If proof does not support a determination under Subsection (b) of the harm that would have resulted in the absence of the product defect, the product seller is liable for all of the plaintiff's harm attributable to the defect and other causes.

(d) A seller of a defective product that is held liable for part of the harm suffered by the plaintiff under Subsection (b), or all of the harm suffered by the plaintiff under Subsection (c), is jointly and severally liable or severally liable with other parties who bear legal responsibility for causing the harm, determined by applicable rules of joint and several liability.

#### Topic 2 - Affirmative Defenses

## § 17 Apportionment of Responsibility Between or Among Plaintiff, Sellers and Distributors of Defective Products, and Others

(a) A plaintiff's recovery of damages for harm caused by a product defect may be reduced if the conduct of the plaintiff combines with the product defect to cause the harm and the plaintiff's conduct fails to conform to generally applicable rules establishing appropriate standards of care.

(b) The manner and extent of the reduction under Subsection (a) and the apportionment of plaintiff's recovery among multiple defendants are governed by generally applicable rules apportioning responsibility.

## § 18 Disclaimers, Limitations, Waivers, and Other Contractual Exculpations as Defenses to Products Liability Claims for Harm to Persons

Disclaimers and limitations of remedies by product sellers or other distributors, waivers by product purchasers, and other similar contractual exculpations, oral or written, do not bar or

reduce otherwise valid products liability claims against sellers or other distributors of new products for harm to persons.

### Topic 3 - Definitions

#### § 19 Definition of "Product"

For purposes of this Restatement:

- (a) A product is tangible personal property distributed commercially for use or consumption. Other items, such as real property and electricity, are products when the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property that it is appropriate to apply the rules stated in this Restatement.
- (b) Services, even when provided commercially, are not products.
- (c) Human blood and human tissue, even when provided commercially, are not subject to the rules of this Restatement.

#### § 20 Definition of "One Who Sells or Otherwise Distributes"

For purposes of this Restatement:

- (a) One sells a product when, in a commercial context, one transfers ownership thereto either for use or consumption or for resale leading to ultimate use or consumption. Commercial product sellers include, but are not limited to, manufacturers, wholesalers, and retailers.
- (b) One otherwise distributes a product when, in a commercial transaction other than a sale, one provides the product to another either for use or consumption or as a preliminary step leading to ultimate use or consumption. Commercial nonsale product distributors include, but are not limited to, lessors, bailors, and those who provide products to others as a means of promoting either the use or consumption of such products or some other commercial activity.
- (c) One also sells or otherwise distributes a product when, in a commercial transaction, one provides a combination of products and services and either the transaction taken as a whole, or the product component thereof, satisfies the criteria in Subsection (a) or (b).

#### § 21 Definition of "Harm to Persons or Property": Recovery for Economic Loss

For purposes of this Restatement, harm to persons or property includes economic loss if caused by harm to:

- (a) the plaintiff's person; or
- (b) the person of another when harm to the other interferes with an interest of the plaintiff protected by tort law; or
- (c) the plaintiff's property other than the defective product itself.