

## RESOLUTION 05-16-06

### DIGEST

#### Products Liability: Liability of Non-Manufacturing Product Sellers

Adds Civil Code section 1714.46 to permit the dismissal of innocent retail sellers in certain products liability actions.

### RESOLUTIONS COMMITTEE RECOMMENDATION

#### DISAPPROVE

#### History:

No similar resolutions found.

#### Reasons:

This resolution adds Civil Code section 1714.46 to permit the dismissal of innocent retail sellers in certain products liability actions. This resolution should be disapproved because it detrimentally changes strict liability law for products liability in California.

The exception to strict liability for tobacco retailers and distributors provided in Civil Code section 1714.45 was the result of a process that presumably recognized, at least in part, that the sheer number of retailers and distributors of such products was astronomical. However, there is no showing that the problem addressed by this proposal is one that impacts any large number of sellers of products. No doubt the expense of defense of product liability claims is large by any measure, but the social policy in support of strict liability for injuries caused by defective products is one that rests the risk of loss on commercial interests rather than on the consumer.

In addition to the larger policy problems presented by the proposal, the resolution is facially confusing. It defines product seller to include one who, among other things, installs or assembles (§(a)(4).) It then excepts from dismissal a seller who creates the defect (§(c)(6).) Finally, it provides that installation and packaging in accordance with manufacturer specifications do not constitute sufficient control to impose liability (§(d).) This approach is confusing and unduly complex.

This resolution does not make clear that the problem it addresses is of such broad implication that a substantial change in the manner in which strict liability is adopted in California is either necessary or preferred. Further study of this area of concern is no doubt warranted. The assumption that there is an “innocent seller” appears inconsistent with the strict liability concept in products liability cases. The proposal does not consider the impact that the revision to the statutory scheme may have on the overall approach to strict liability in California litigation.

### TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to add Civil Code section 1714.46 to read as follows:

1 §1714.46.

2 a. As used in this act:

3 (1) "Product liability claim" means any civil claim or action brought for harm caused  
4 by a product, irrespective of the theory upon which the claim or action is brought. It  
5 includes, but is not limited to, claims or actions designated or previously designated as strict  
6 liability in tort; breach of express or implied warranty; negligence; or any other substantive  
7 legal theory.

8 (2) "Harm" means death; physical injury to the person; pain and suffering; mental  
9 anguish or emotional distress; loss of consortium or services; other losses deriving from  
10 these claims; and physical damage to property other than to the product itself. "Harm" is not  
11 "economic loss."

12 (3) "Economic loss" means direct, incidental, or consequential pecuniary loss to, or  
13 resulting from damage to, the product in question, and nonphysical damage to property other  
14 than that product. "Economic loss" is not "harm." Pecuniary loss caused by harm to the  
15 plaintiff's person, the person of another when harm to the other interferes with an interest of  
16 the plaintiff protected by tort law, or the plaintiff's property other than the product itself is  
17 not considered "economic loss" within the meaning of this statute.

18 (4) "Product seller" means a person or entity, including a retailer, wholesaler,  
19 distributor, or lessor, who, in the course of a business conducted for that purpose: sells;  
20 distributes; leases; installs; assembles pursuant to a manufacturer's instructions, plan,  
21 intention, design, or specifications; blends; packages; labels; markets; or otherwise is  
22 involved in placing a product into the stream of commerce. The term "product seller" does  
23 not include: (a) A manufacturer; (b) A seller of real property; (c) A provider of  
24 professional services in any case in which the sale or use of a product is incidental to the  
25 transaction and the essence of the transaction is the furnishing of judgment, skill or services;  
26 or (d) Any person who acts only in a financial capacity with respect to the sale or leasing of  
27 a product.

28 (5) "Manufacturer" means any person or entity who, in the course of a business  
29 conducted for that purpose: designs; produces; fabricates; assembles pursuant to its own  
30 instructions, plan, intention, design, or specifications; packages or labels to its own  
31 specifications; or remanufactures the relevant product or component part before its sale of  
32 that product or component part. This term does not include independent product designers  
33 whose services are contracted for by a manufacturer if such designers are not otherwise  
34 engaged in the business of selling products.

35 (6) "Upstream distributor of the product" means a product seller who is closer in the  
36 chain of distribution to the manufacturer than is another product seller.

37 b. A party whose sole relationship to a claim is as a product seller may move for a  
38 dismissal without prejudice of any product liability claim against it, which motion shall be  
39 supported by an affidavit setting forth, under oath, the following information: [1] the correct  
40 identity and address of the manufacturer of the product allegedly causing harm or, if  
41 unknown, the correct identity and address of an upstream distributor of the product; [2] that  
42 the moving party's sole relationship to the claim is as a product seller within the definition of  
43 paragraph a(4); and [3] that the affiant is not aware of any facts or circumstances under  
44 which a verdict might be reached against the product seller as a result of any of the

45 exceptions to this statute set forth in subsection c below. Such motion shall be filed with due  
46 diligence.

47 c. Unless the affidavit mentioned in the preceding subsection is contradicted by  
48 credible evidence, the court shall grant the product seller's motion and the product seller  
49 shall thereafter be relieved of all product liability claims, except in the following instances:  
50 (1) The manufacturer cannot be identified or located through reasonable efforts; (2) The  
51 manufacturer is not subject to the court's jurisdiction or, despite due diligence, cannot be  
52 served with process; (3) The manufacturer has no known facility, agents, or other presence  
53 within the United States; (4) Neither the manufacturer nor an insurer providing liability  
54 coverage to the manufacturer is likely to be able to satisfy a judgment that may be entered;  
55 (5) If subsection c (1), (2), (3), or (4) applies because of the status of the manufacturer but  
56 there is an upstream distributor of the product to whom it does not apply, that subsection  
57 shall not be a bar to the securing of a dismissal by a product seller who is not the upstream  
58 distributor; (6) The product seller, through an affirmative act, created the product defect,  
59 inadequate warnings or instructions, or other defective condition that proximately caused the  
60 harm alleged, or exercised significant control over the creation of the defect, inadequate  
61 warnings or instructions, or defective condition that proximately caused the harm alleged;  
62 (7) The defect was introduced while the product was in the custody or control of the product  
63 seller; (8) The product seller misrepresented a material fact concerning the product and this  
64 misrepresentation proximately caused the harm alleged; (9) The product seller sold the  
65 product to a person or in a manner contrary to a statutory requirement and such sale  
66 proximately caused the harm alleged; (10) The manufacturer had a post-sale obligation to  
67 warn or recall; the manufacturer had no knowledge of the names and addresses of the  
68 product seller's immediate customers or current owners of the products in question that were  
69 sold by the product seller, but the product seller had such knowledge; the manufacturer  
70 furnished post-sale warning information or post-sale recall information to the product seller  
71 and requested that the product seller provide this information to its immediate customers and  
72 known current owners; the product seller could reasonably furnish this information to its  
73 immediate customers or known current owners but failed to do so; and the claimant's harm  
74 was proximately caused by this inaction of the product seller; (11) a product recall but  
75 unreasonably failed to do so and the claimant's harm was proximately caused by this failure;  
76 or (12) The product seller issued an express warranty, the breach of which proximately  
77 caused the harm alleged. For purposes of this section, the product seller's distribution of an  
78 express warranty of the manufacturer or upstream distributor shall not constitute an issuing  
79 of that warranty by the product seller.

80 d. Assembly, construction, installation, packaging, or labeling of a product by a  
81 seller in accordance with the manufacturer's design, specifications, plan, intention,  
82 formulation or instructions shall not constitute the creation, or exercise of significant control  
83 over the creation of a product defect, inadequate warnings or instructions, or defective  
84 condition within the meaning of subsection c (6) above.

85 e. If the claimant does not know or have reason to know the identity of the  
86 manufacturer or upstream distributor, the commencement of a product liability action  
87 against the product seller shall toll the applicable statute of limitations against the  
88 manufacturer or upstream distributor until such time as the claimant shall have received  
89 notice of the identity of the manufacturer or upstream distributor.

90           f. If, during the pendency of an action and after dismissal of the seller pursuant to  
91 this statute, a subsequent showing is made to the court that: (1) there has been a change in  
92 any condition that was a basis of the dismissal; (2) the party making that showing has acted  
93 in a reasonable manner; and (3) the change in condition reveals either a basis for  
94 independent liability on the part of the product seller or the likelihood that there will be an  
95 inability of the claimant to secure satisfaction from the manufacturer, an upstream  
96 distributor, or one of their insurers of a judgment that may be entered, the court shall  
97 reinstate the claims previously made against the product seller and those claims shall not be  
98 barred by the passage of time.  
99 g. In the event the court finds, at any time, that the affidavit mentioned in subsection b above  
100 was filed in bad faith, the court shall impose sanctions against the offending party, including  
101 any resultant costs and attorney fees incurred as a result of the dismissal of the claim against  
102 the product seller.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: San Diego County Bar Association

#### STATEMENT OF REASONS

Existing Law: Currently, all sellers in the chain of distribution of a product are liable for defects found in that product, *Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d 256, 262-263 (except for non-manufacturing sellers of tobacco products; Civ. Code, §1714.45(b)). It does not matter if the seller is a wholesaler or retailer who had no part in the creation of the defect, no control over the product's manufacture or design, or no reason to believe that the product was defective. Liability of everyone in the chain of distribution exists even where a plaintiff has a ready source of recovery from a solvent manufacturer if liability is proven. At least 23 other states have enacted statutes that contain some protection for innocent product sellers. These statutes and problems with existing common and statutory law are described in detail in Sachs, *Product Liability Reform and Seller Liability: A Proposal for Change* (2003) 55 *Baylor L.Rev.* 1031.

This Resolution: Would allow the dismissal of an innocent non-manufacturing product seller from a lawsuit when a plaintiff has a satisfactory means of recovery against the product manufacturer, an upstream distributor, or the insurer of either; would retain the seller as a defendant where the plaintiff does not have such a means of recovery, where the seller created the condition that caused the harm alleged, or where the defect was introduced while the product was in the control of the seller.

The Problem: Product liability cases are extremely expensive to litigate. All defendants in the chain of distribution are usually impleaded, and discovery and other costs are multiplied as a result. When an injured plaintiff has a satisfactory avenue of recovery from the product manufacturer or its insurer (or, in the absence of such an avenue, from a party upstream in the chain of distribution or the upstream party's insurer), and when the non-manufacturing seller did not create the accident-causing condition, this multiplication is completely unnecessary. Removing non-manufacturing sellers as defendants will increase efficiency, eliminate substantial

legal and other expenses to the sellers in defending litigation, and eliminate further potentially substantial expenses and circuity of action from claims for indemnification against manufacturers. Cost reduction to sellers will also help control product costs to the ultimate consumer. The Legislature implicitly recognized these problems when it exempted non-manufacturing tobacco sellers from liability in Civil Code section 1745.45. It should eliminate these problems by enacting this proposed legislation, which will nevertheless preserve a plaintiff's ability to recover a judgment against a responsible party.

#### **IMPACT STATEMENT**

This resolution does not affect any other law, statute, or rule.

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**RESPONSIBLE FLOOR DELEGATE:** Robert A. Sachs

#### **COUNTERARGUMENT**

##### **SANTA CLARA COUNTY BAR ASSOCIATION**

This resolution seeks to change the way products liability is handled in California. Currently, we are a strict liability state. Thus, any party involved in the sale of a defective product is liable under the law. While this may "catch" unknowing or innocent businesses and individuals, it is something that one must accept if they choose to do business in the state. Moreover, since a party always has the ability to seek indemnification from a manufacturer, distributor, etc., an innocent seller is not penalized. In addition, given that the proposed resolution already comes with a multitude of exceptions when it will not apply, the end result is more legislation that will, ultimately, have little to no effect. This is an unnecessary change to California law and should be rejected.