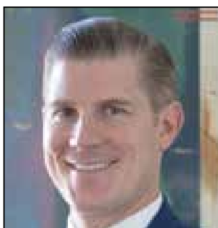
# Stuck in the Middle: The Case for a National Innocent Seller Defense to Protect Retailers and Distributors

By Michael J. Cahalane, Hayley Kornachuk, and Erica A. Dumore



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If there was an unsung hero of the last two years, it was America's retailers and their nearly 5 million employees,[1] whose work throughout the pandemic has allowed consumers to obtain daily necessities and the nation's economy to continue to hum along. Without retailers, suppliers, wholesalers, and distributors (hereafter collectively referred to as "retailers"), such as grocery stores, Americans would have been without food and other essentials. Had construction material suppliers, lumber yards, and supply houses been shuttered, the nation's tradespeople would have sat idle as construction grinded to a halt. If retail stores remained closed, manufacturing would have slowed and unemployment would have been far worse. The country has survived the pandemic, due in large part to retailers that allowed Americans to continue to live their lives.

Retailers stepped up during the pandemic, despite the inherently unfair product liability law in much of the country that holds innocent sellers—merely distributors in the chain of commerce—liable for products they never manufactured, designed, or installed. The American tort system blames retailers and distributors for the acts or omissions of manufacturers. Many of these retail defendants have no control over the manufacture of the products they sell, putting them in a precarious position to effectively defend a product liability case. Depending on the applicable state law, some defenses and other relief are available to innocent sellers, whether in the form of statutes or common laws. The protections vary by jurisdiction, however, and many states provide no safeguards at all. In the wake of the pandemic, which irrefutably illustrated the value of retailers and suppliers to our economy, it is time for Congress to enact a federal statute to immunize innocent sellers.

## Inherent Unfairness

"Sellers are often brought into litigation despite the fact that their conduct had nothing to do with the accident or transaction giving rise to the lawsuit."[2] Retailers are frequently held liable for damages caused by a defective product they merely sold but did not manufacture. In most cases, the retailer had no reason to believe the product was defective. There are many reasons why this is inherently unfair.

Retailers are not the designers or manufacturers of the injury-producing product, and therefore, are "ill-equipped to defend the product."[3] They likely lack essential product information available to manufacturers, such as ingredients or composition, testing data, warnings, labels and instructions, and research regarding alternative designs. The lack of such basic information can make defending a product liability action exceedingly difficult for a seller who took no part in the manufacturing, design, or installation of a product.

Similarly, it is unreasonable to require a retailer to litigate lawsuits on multiple fronts to resolve allegations regarding a product it distributed, as is often the case in litigation against sellers.[4] In a typical products liability case, the retailer is first required to defend a claim by the injured plaintiff.[5] Assuming the first lawsuit prevails against the retailer, in many states, a second lawsuit is necessary for retailers to seek indemnity from the manufacturer if the retailer does not want to be ultimately responsible for the damages to the consumer.[6] As articulated in proposed legislation designed to address such inequities, multiple lawsuits needlessly expose retailers to "unfair and disproportionate damage awards," "high liability cost," "unwarranted litigation costs," and "high costs in purchasing insurance."[7] All of these create undue expenses, which are likely passed to consumers in the form of increased prices.

Notwithstanding these considerations, not every retailer is "innocent," and, in some cases, there are legitimate public policy reasons for product liability cases to apply to certain sellers. For example, holding some retailers liable may promote "the public policy that an injured party not have to bear the cost of his in-

juries simply because the product manufacturer is out of reach."[8] This argument holds the most weight when the product manufacturer is bankrupt, cannot be identified, or is not subject to the court's jurisdiction or service of process.[9] The argument loses strength, however, when the plaintiff has an adequate remedy against the manufacturer[10] and the plaintiff is allowed to proceed against both the manufacturer and supplier. In this circumstance, the retailer is unfairly forced to defend the case.

Without an innocent seller defense, retailers are not only footing the bill for unavailable or insolvent manufacturers, but they are further disadvantaged because they are left bearing the costs of defending a product about which they know very little. A federal statute that provides a truly innocent seller with a pathway out of litigation while still acknowledging public policy concerns is imperative. A federal innocent seller statute should be enacted to ensure that all parties are protected and fairness is upheld.

## Current State Law Protections Available to Innocent Sellers

Approximately 28 states have adopted some version of an innocent seller statute that offers various levels of protection for retailers. While some innocent seller statutes provide remedies for retailers to navigate their way out of product liability actions, some only offer retailers protection against strict liability claims. Moreover, some state statutes shift the burden onto retailers to prove certain facts in order to avail themselves of the protections of the statute. Finally, some states only provide avenues for retailers to seek indemnification from the manufacturer, leaving retailers stuck defending product liability actions and forced to seek relief at the conclusion of the case.

Arguably, the most comprehensive innocent seller statute is Colorado's, which provides that "[n]o product liability action shall be commenced or maintained against any seller of a product unless said seller is also the manufacturer of said product or the manufacturer of the part thereof giving rise to the product liability action."[11] However, the Colorado statute also includes a carve-out to address public policy concerns regarding an injured party having no recourse:

> [i]f jurisdiction cannot be obtained over a particular manufacturer of a product or a part of a product alleged to be defective, then that manufacturer's principal distributor or seller over whom jurisdiction can be obtained shall be deemed, for the purposes of this section, the manufacturer of the product.[12]

As such, the retailer does not escape liability when jurisdiction cannot be established over the manufacturer itself.

Another example, although less comprehensive as it only relates to strict liability causes of action, is Indiana's innocent seller statute, which provides:

> [a] product liability action based on the doctrine of strict liability in tort may not be commenced or maintained against a seller of a product that is alleged to contain or possess a defective condition unreasonably dangerous to the user or consumer unless the seller is a manufacturer of the product or of the part of the product alleged to be defective.[13]

But similar to Colorado, "[i]f a court is unable to hold jurisdiction over a particular manufacturer of a product or part of a product alleged to be defective, then that manufacturer's principal distributor or seller over whom a court may hold jurisdiction shall be considered, for the purposes of this chapter, the manufacturer of the product."[14]

Unlike the previous examples, some states, such as New Jersey, place the burden on the defendant seller to identify the product manufacturer in order to establish that it is solvent and subject to the court's jurisdiction. Under the New Jersey Product Liability Act (NJPLA), a product seller seeking immunity bears the burden of demonstrating that it is not subject to liability under any statutory exceptions.[15] A product seller is relieved from liability only if it is truly innocent of responsibility for the alleged defective product and the injured party retains a viable claim against the manufacturer.[16] The statute states, in pertinent part:

> (a) In any product liability action against a product seller, the product seller may file an affidavit certifying the correct identity of the manufacturer of the product which allegedly caused the injury, death or damage.
>
> (b) Upon filing the affidavit pursuant to subsection (a) of this section, the product seller shall be relieved of all strict liability claims, subject to the provisions set forth in subsection (d) of this section. Due diligence shall be exercised in providing the plaintiff with the correct identity of the manufacturer or manufacturers.[17]

There are exceptions to the NJPLA under section (d) of the act when (1) the retailer has exercised some significant control over the design, manufacture, packaging, or labeling of the product; (2) the retailer knew, should have known, or was in possession of facts from which a reasonable person would conclude that the product was defective; or (3) the retailer created the defect in the product, and any of the three caused the injury, death, or damage.[18] In any of these circumstances, the seller cannot claim to be "innocent."

Arizona has adopted an indemnity statute that offers some protection to innocent sellers.[19] In pertinent part, the statute states:

> A. 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 either paragraph 1 or 2 applies:
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> 1. The seller had knowledge of the defect in the product.
>
> 2. The seller altered, modified, or installed the product, and such alteration, modification, or installation was a substantial cause of the incident giving rise to the action, was not authorized or requested by the manufacturer, and was not performed in compliance with the directions or specifications of the manufacturer.[20]

In Arizona and other states with similar statutes, the innocent seller is afforded a right of indemnification from the manufacturer and the right to fees associated with defending the product liability action if the manufacturer fails to accept tender of the defense. Like

New Jersey, Arizona expressly excludes sellers who possess knowledge of, or caused, the defects.

Although the innocent seller and indemnity statutes differ, all offer some form of protection for retailers to allow them to avoid liability for products they did not make. However, these protections are not absolute. The patchwork of varying state laws governing seller liability also creates uncertainty for retailers who operate in multiple jurisdictions.

## History of Proposed Innocent Sellers Fairness Act

Although many states have implemented seller protection statutes, a federal statute has still not been enacted despite repeated efforts.[21] The Innocent Sellers Fairness Act has been introduced in the House of Representatives on six separate occasions from 2006 to 2017. All six times, the act failed to receive a vote by the House. The Innocent Sellers Fairness Act was first introduced to Congress in 2006.[22] The identical act was reintroduced in 2007 and 2009.[23] The original proposed act read as follows:

> (a) In General – No seller of any product shall be liable for personal injury, monetary loss, or damage to property arising out of an accident or transaction involving such product, unless the claimant proves one or more of the following non-sale activities by the seller:
>
> 1. The seller was the manufacturer of the product.
> 2. The seller participated in the design of the product.
> 3. The seller participated in the installation of the product.
> 4. The seller altered, modified, or expressly warranted the product in a manner not authorized by the manufacturer.
>
> (b) Liability for Non-Sale Activities – If the claimant proves one or more of the non-sale activities described under subsection (a) and such non-sale activity was negligent, the seller's liability shall be limited to the personal injury, monetary loss, or damage to property directly caused by such non-sale activity.[24]

In 2013, the Innocent Sellers Fairness Act was modified prior to being reintroduced to the House.[25] The modified version was reintroduced in 2015 and 2017.[26] The modification stripped the proposal of the term "non-sale" in reference to activities and included four additional ways a claimant could prove and hold a seller liable.[27] The additional activities were:

> 5. The seller had actual knowledge of the defect in the product as a result of a recall from the manufacturer or governmental entity authorized to make such recall or actual inspection at the time the seller sold the product to the claimant.
> 6. The seller had actual knowledge of the defect in the product at the time the seller supplied the product.
> 7. The seller intentionally altered or modified a product warranty, warning, or instruction from the manufacturer in a way not authorized by the manufacturer.
> 8. The seller knowingly made a false representation about an aspect of the product not authorized by the manufacturer. [28]

Each time it was introduced, the Innocent Sellers Fairness Act went through the House Judiciary and was sent to the House Energy and Commerce Subcommittee on Commerce, Trade, and Consumer Protection, where it consistently stalled. Since the act was first proposed to Congress in 2006, the number of co-sponsors has significantly decreased. When the act was last introduced before Congress in 2017, it only had six co-sponsors, whereas the act proposed in 2006 and in 2007 had 23 and 63 co-sponsors, respectively.[29] While momentum for the Innocent Sellers Fairness Act gradually waned from 2006 to 2017, the events of 2020 and 2021 should justify another close look at providing innocent retailers with federal liability protection.

## The Time Has Come for Federal Protections for Innocent Sellers

Retailers met the challenge presented by the pandemic by keeping their doors open and allowing the rest of society to function. Without retailers and their employees, the American economy would have screeched to a halt, and families would have struggled to buy food and other necessities. Notwithstanding the sacrifices made by retailers and their employees and the resulting benefits to society, the tort system continues to unjustly punish innocent sellers for products over which they yield little, if any, control. Is it reasonable to hold a grocery store liable for injuries caused by cleaning products it sells or a hardware store for damages caused by defective nails that it carries? When the retailer is acting as a mere distributor in the chain of commerce, without involvement in manufacture, design, or installation, certainly not. Such liabilities unfairly burden sellers and require them to defend lawsuits regarding unfamiliar products, hire lawyers, and buy insurance, all of which impose high economic costs.

While some states have enacted protections for innocent sellers, many states offer no such safeguards, and others shift the burden to the retailer to demonstrate its innocence and prove that the statute applies. Even then, an innocent seller in some states can still be stuck bearing liability if the manufacturer is not subject to the jurisdiction of the court. The resultant patchwork of statutes yields vastly different results among jurisdictions and can be confusing and cumbersome for retailers operating in multiple states.

The solution is one easily understandable, nationally applicable protection for retailers. Until a Federal Innocent Sellers Fairness Act is enacted, retailers will continue to face inherently unfair litigation, and the future of their business will always be in jeopardy. It is time for Congress to finally acknowledge the service that the retail sector has done for the country and to enact a federal innocent seller defense. ⊙

## Endnotes

[1]Bureau of Labor Statistics, Occupational Outlook Handbook, Retail Sales Workers (Sept. 8, 2021), https://www.bls.gov/ooh/sales/retail-sales-workers.htm.

[2]Innocent Sellers Fairness Act, H.R. 989, 110th Cong. (2007).

[3]*See* Frank J. Cavico, Jr., *The Strict Tort Liability of Retailers, Wholesalers, and Distributors of Defective Products,* 12 Nova. L. Rev. 213, 227-28 (1987).

[4]*See* Adam Feeney, Note, *In Search of a remedy: Do State Laws Exempting Sellers from Strict Product Liability Adequately Protect Consumers Harmed by Defective Chinese Manufactured Products?* 34 J. Corp. L. 567, 571 (2009); *See also* Frank J. Cavico Jr., *The Strict Tort Liability of Retailers, Wholesalers, and Distributors of Defective*

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## Endnotes

[1]Codified in 28 U.S.C. § 1608(a)(3), Rule 4(j)(1) allows for service of process on a foreign state. In addition, § 1608(a)(3) states that service of process be made "by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail required a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. § 1608(a)(3).

[2]*See* Fed. R. Civ. P. 4(b).

[3]A Notice of Suit is prepared in accordance with 22 C.F.R. § 93.2.

[4]Since 2014, Italian has been the official language of the State of the Vatican City. *See Pope ditches Latin as official language of Vatican synod,* Reuters (Oct. 6, 2014), https://www.reuters.com/article/us-pope-latin/pope-ditches-latin-as-official-language-of-vatican-synod-idUSKCN0HV1O220141006. Before this move by the Pope, Latin had been the official language of the State of the Vatican City.

[5]In other words, the court sends the package directly to the Holy See, asking the judicial entity there to help in serving the country itself.

[6]William A. Barton, Recovering for Psychological Injuries 525 (3rd ed. 2010).

[7]When serving the Holy See through letters rogatory fails, the FSIA provides for service of process via diplomatic channels. *See* 28 U.S.C. § 1608(a)(4). A litigant may serve the Holy See under § 1608(a)(4): "[I]f service cannot be made within 30 days under [§ 1608(a)(3)], by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted."

[8]This letter must specify that that request is under 28 U.S.C. § 1608(a)(4), and include any other details, exhibits, or explanations as a basis for the request.

[9]In this case, proof that the Holy See rejected a DHL package with the documents mentioned would suffice.

[10]*See* U.S. District Court for the District of Columbia, Attorney Manual for Service of Process on a Foreign Defendant (July 2018), https://www.dcd.uscourts.gov/sites/dcd/files/AttyForeignMlg2018wAttach.pdf.

[11]*See id.*

[12]*See, e.g.*, U.S. Department of State Letter of Transmittal, *D.M. v. Holy See, et al.,* No. 1:19-cv-0030 (District of Guam).

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**In-House Insight** *continued from page 16*

*Products,* 12 Nova. L. Rev. 213, 229 (1987).

[5]*See id.*

[6]*See id.*

[7]H.R. 989, 110th Cong. (2007).

[8]*Dunn v. Kanawha City. Bd. Of Educ.,* 459 S.E.2d 151, 157 (W. Va. 1995).

[9]Robert A. Sachs, *Product Liability Reform and Seller Liability: A Proposal for Change*, 55 Baylor L. Rev. 1031, 1037 (2003).

[10]*See id.*

[11]Colo. Rev. Stat. Ann. § 13-21-402(1).

[12]Colo. Rev. Stat. Ann. § 13-21-402(2).

[13]Ind. Code Ann. § 34-20-2-3.

[14]Ind. Code Ann. § 34-20-2-4.

[15]*See* N.J. Stat. Ann. 2A:58C-9; s*ee also Fidelity and Guar. Ins. Underwriters, Inc. v. Omega Flex, Inc.*, 936 F. Supp. 2d 441 (D.N.J. 2013).

[16]*See Fidelity and Guar. Ins. Underwriters, Inc. v. Omega Flex, Inc.*, 936 F. Supp. 2d 441 (D.N.J. 2013).

[17]N.J. Stat. Ann. 2A:58C-9

[18]N.J. Stat. Ann. § 2A:58C-9(d).

[19]Similarly, in New York, manufacturers and retailers have some indemnity protections through common law. "New York courts have consistently held that common-law indemnification lies only against those who are actually at fault." *Nourse v. Fulton Cnty. Cmty. Heritage Corp.*, 2 A.D.3d 1121, 1122 (2003); *see Colyer v. K Mart Corp.*, 273 A.D.2d 809, 810 (2000), *Trustees of Columbia Univ. v. Mitchell/Giurgola Assoc.*, 109 A.D.2d 449, 451 (1985). In the products liability context, a manufacturer is held accountable as a "wrongdoer" when it releases a defective product into the stream of commerce, *see Rosado v. Proctor & Schwartz,* 66 N.Y.2d 21, 25-26 (1985), and "innocent" sellers who merely distribute the defective product are entitled to indemnification from the at-fault manufacturer. *See Godoy v. Abamaster of Miami,* 302 A.D.2d 57, 62 (2001).

[20]Ariz. Rev. Stat. Ann. § 12-684.

[21]Rachel S. Nevarez, *How to Take Advantage of "Seller's Exception" Statutes*, American Bar Association (2016), https://www.americanbar.org/groups/litigation/committees/products-liability/practice/2016/how-to-take-advantage-sellers-exception-statutes/.

[22]Innocent Sellers Fairness Act, H.R. 5500, 109th Cong. (2006).

[23]Innocent Sellers Fairness Act, *supra* note 7; H.R. 2518, 111th Cong. (2009).

[24]Innocent Sellers Fairness Act, *supra* note 22.

[25]Innocent Sellers Fairness Act, H.R. 2746, 113th Cong. (2013).

[26]Innocent Sellers Fairness Act, H.R. 1199, 114th Cong. (2015); H.R. 1118, 115th Cong. (2017).

[27]*See* H.R. 1118, 115th Cong. (2017).

[28]Innocent Sellers Fairness Act, *supra* note 25.

[29]*See* Innocent Sellers Fairness Act, H.R. 5500, 109th Cong. (2006); H.R. 989, 110th Cong. (2007); H.R. 1118, 115th Cong. (2017).