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Product Liability: Issues in Today's Global Economy

I. Product Liability Background

A plaintiff in a products liability case asserts that the manufacturer of a product should be liable for personal injury or property damage that results from either a defect in a product or from false representations made by the manufacturer of the product. The foundation of products liability law developed several centuries ago when English courts developed the doctrine of *caveat emptor*, i.e. "let the buyer beware." Essentially, a buyer was expected to protect himself/herself against both obvious and hidden defects in a product, and could not therefore recover from the manufacturer for damages caused by these defects. However, over time, English courts began to recognize a rule that a seller implicitly warrants that a product does not contain a hidden defect (i.e. an "implied warranty"). United States courts began to impose implied warranties in the late 1800s and, in so doing, required that a plaintiff have privity of contract with the defendant in order to recover damages pursuant to that warranty. In other words, the buyer had to purchase the product directly from the manufacturer in order to recover. At the time, this was not an issue, as manufacturers typically sold directly to consumers. However, as manufacturing grew in the United States, manufacturers began to rely more heavily on distributors and retailers to sell products. When buyers began purchasing from retailers, they lost privity of contract with manufacturers, and the right to recover for personal injury or property damage right along with it.

Modern products liability concepts (as we know them today) began to develop in the 1950s and 1960s in direct response to this dilemma. This process began allowing remote plaintiffs to recover against the manufacturers of defective products, even when they lacked privity of contract. Arguably the most influential development of this time was the promulgation of the concept of "strict liability." Most areas of law required some degree of fault – that a defendant should be liable only for its own wrongdoing. The concept of strict liability altered this approach and imposed liability on a defendant regardless of whether its conduct contributed to the injury. It was, and continues to be, premised on the notion that manufacturers are best-suited to ensure their own products are safe. This shifted the cost of product-related injuries from the consumer to the manufacturer. The result was improved overall product safety and compensation of injured consumers of those products. The California Supreme Court was the first to adopt the concept of strict tort liability for manufacturers of defective

products. See *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963). Two years later, The American Law Institute (ALI) included rules pertaining to products liability in the Restatement (Second) of Torts, which was officially promulgated in 1965.

II. Tender of Defense/Indemnity

Following the foregoing change in the law, individuals injured by an allegedly defective product began suing all of the entities in the chain of distribution. In many states, this became a problem for the innocent seller/distributor, which had no say in the design or manufacture of the product. Contracts, Vendor Agreements, and case law soon developed to remedy this foreseen problem. The concept of indemnity became ever more important, and continues to be, in the product liability arena. Simply put, "indemnification" is a promise by the another party ("indemnitor") to cover your client's ("indemnitee")~~'s~~ losses – including attorney's fees and other costs incurred in defending the claim – if they do something that causes your client harm, causes a third party to sue your client, or even if a third party sues your client from an incident arising out of the relationship or contract between the other party and your client. While the theory of indemnification is based in either statutory or common law depending on the jurisdiction (see below), the way in which it is obtained is often derived from an indemnification provision within an insurance policy or contractual agreement between the indemnitor and indemnitee.

The means by which your client may seek to enforce indemnification is laid out in a "tender letter." As soon as your client recognizes the potential for valid indemnification of a claim against it, your client should draft and send a letter outlining the bases for requesting defense of said claim to the indemnitor. The timing and content of the letter, as well as the method of sending, is discussed below.

Indemnity/tender issues are governed by the particular jurisdiction in which your claim/lawsuit arises. Some states are guided by common law, while others have statutory requirements and remedies.

Pennsylvania permits the remedies of indemnity and contribution "so that as among those in the chain of distribution liability may ultimately rest with, or be shared equally among, those who can best detect, control, or prevent the defect." 42 Pa.C.S. §§ 8321-8327; *Burbage v. Boiler Engineering & Supply Co.*, 249 A.2d 563 (1969); *Mixter v. Mack Trucks, Inc.*, 308 A.2d 139 (1973). Pennsylvania courts follow the general theme of the Restatement of Restitution, which states that a supplier's negligence in supplying a "dangerously defective" product imposes on said supplier a duty to indemnify those downstream for injuries caused by it. *Restatement of Restitution* § 93(1) (1936). In applying these standards, Pennsylvania courts examine all the relevant facts of the matter, including which party/parties had the "opportunity to discover or actual knowledge of the defective condition and on the relative burdens of correcting or preventing the defect." *Burch v. Sears, Roebuck & Co.*, 467 A.2d 615, 622 (1983). Pennsylvania courts also analyze the business relationship between the parties, trade custom, relative expertise, and practicality. *Verge v. Ford Motor Co.*, 581 F.2d 384 (3rd Cir.1978).

In Florida, the underlying basis for the doctrine of strict liability is that those entities within a product's distributive chain "who profit from the sale or distribution of [the product] to the public, rather than an innocent person injured by it, should bear the financial burden of even an undetectable product defect." *North Miami General Hosp., Inc. v. Goldberg*, 520 So.2d 650, 651 (Fla. 3d DCA 1988). Those entities are in a better position to ensure the safety of – and protect the consumer against defects in – the products they market and to spread the cost of any injuries resulting from a defect. *Samuel Friedland Family Enterprises v. Amoroso*, 630 So. 2d 1067, 1068 (Fla. 1994).

In the seminal case of *West v. Caterpillar Tractor Co.*, 336 So.2d 80 (Fla.1976), the Florida Supreme Court noted that a manufacturer which "places a potentially dangerous product on the market and encourages its use, undertakes a special responsibility toward members of the public who may be injured by the product." *Id*. at 86. Since *West*, Florida courts have expanded the doctrine of strict liability to others in the distributive chain including retailers, wholesalers, and distributors. *Mobley v. South Florida Beverage Corp.*, 500 So.2d 292 (Fla. 3d DCA 1986) (retailers); *Visnoski v. J.C. Penney Co.*, 477 So.2d 29 (Fla. 2d DCA 1985) (distributors); *Adobe Bldg. Centers, Inc. v. Reynolds*, 403 So.2d 1033 (Fla. 4th DCA) (retailers and wholesalers).

The Product Liability Act governs New Jersey claims/cases. In New Jersey, the applicable statutes are N.J.S.A. 2A:58C-2 and N.J.S.A. 2A:58C-9. The former is New Jersey's general products liability statute. The latter establishes that, upon a filing of a products liability claim against it, the product seller may file an affidavit to certify the product manufacturer, which relieves the product seller of all strict liability claims. The product seller is still subject to strict liability if the identity of the product manufacturer given to plaintiff is wrong, the manufacturer is not in the U.S., or the manufacturer is bankrupt. N.J.S.A. 2A:58C-9(c). The product seller is also still liable if it exercised "some significant control" over the product, "knew or should have known of the defect," or "created the defect in the product" which caused the injury. N.J.S.A. 2A:58C-9(d).

In Texas, it is the Texas Civil Practice & Remedies Code (Tex. Civ. Prac. & Rem. Code §§ 82.002 and 82.003) which governs products liability matters. A product manufacturer must defend and indemnify the product seller in products liability actions, except for any loss caused by the seller's negligence, intentional misconduct, or other acts of omissions for which the seller may be independently liable, such as negligently modifying or altering the product. § 82.002(a). In order to be eligible for indemnification, a seller must "give reasonable notice to the manufacturer of the product" and is able to recover court costs, attorney's fees and any other "reasonable damages." § 82.002(g). Liability still attaches to a "nonmanufacturing seller" when said sellers participated in the product's design, altered, modified, or installed the product, exercised substantial control over the product, etc. § 82.003. The Texas Supreme Court has clarified that the manufacturer's statutory duty to defend and indemnify is triggered by a pleadings which alleges a product defect; no proof of a defect is required. On the other hand, pleadings alone alleging negligence or other fault on the part of the seller are insufficient to relieve the manufacturer of the duty to defend and indemnify. Instead, that duty continues until there is an actual finding of fault on the part of the seller. *See Meritor Automotive, Inc. v. Ruan Leasing* Co., 44 S.W.3d 86, 90–91 (Tex. 2001).

What you include in a tender letter is critical. A tender letter triggers indemnification – it can be ~~is~~ the start of when you are entitled to recover fees and costs. The last thing you want is to have an incomplete tender letter that results in a rejection and requires you to start from scratch. By that point, months, if not years, have passed, while your client/insurer continues to incur significant costs in defending the underlying claim. In some cases, ~~S~~starting anew could ~~be~~ mean losing your ability to recover those costs.

Tender letters are also not standard form letters that can be copy and pasted from case to case. Each has to be drafted an analyzed under the specific facts of the case and the product at hand. Fundamentally, your tender letter should include most, if not all, of the following: the defense and indemnity requirements for the applicable jurisdiction, whether based in statutory or common law (as noted above); all pertinent contractual indemnity and defense contract provisions that support your request, including any relevant vendor and service agreements; product identification, including make, model, serial number, purchase date, and history of alterations; a demand for copy of the manufacturer's insurance policy; analysis of additional insured or named insured status (whether your client is named as an insured under the manufacturer's policy); pertinent pleadings and/or correspondence with counsel; and a time limit for a response, with a specific action you intent to undertake if a response is not received.

Depending on the location of the manufacturer, the tender letter should be translated into the appropriate language, with that both that version and the English version sent, via first class mail, email and certified mail. Consideration should also be to sending the tender letters directly to the manufacturer's insurance carrier, especially if it has a United States presence or address. Proof, if obtainable, that the manufacturer and/or its insurer actually received the letter will be immensely important in deciding your next steps if and when your request goes unanswered, as well as in actually recovering fees and costs dating back to the time the tender was made.

II. Problems and Practical Resolutions

Once you have tendered your claim properly, the wait begins. In many situations, your tender request may go unanswered or simply pushed to the back burner, with little attention paid to it or your follow-up communications. You are then left to make a decision. Do you let it go and continue to wait? Or do you aggressively push the issue? As business relationships often effect your decision in this regard, checking with the client is often the best next step. After all, deciding to pursue legal action against your client/insured's best and biggest client may actually negatively impact the client/insured's business. Checking with the client/insured not only helps to address these issues and make sure the claim moves forward with the client's consent, but your client/insured may have a contact at the manufacturer/company to which the tender was sent who may be able to push the issue through; or at least give you guidance as to why there has not been a response.

If your tender is denied, or is ignored for a significant period of time, consideration should be given to filing a Third Party Complaint/Joinder Complaint or a Declaratory Judgment Action. This is not

an easy decision, in large part due to the business relationships at play (as discussed above). Any such action should be thoroughly discussed with and agreed to by the client/insured. If there is consent to move forward, the next question should be "is it worth it?" Are you dealing with a significant claim or exposure that would warrant this type of action? Is it a small claim not worth the expense of pursuing future legal action? Each case is different and only your insurer and client can decide. Perhaps you have an "innocent seller" statute available to you, which provides for early motion practice, and therefore either an early voluntary dismissal or an order dismissing your client from the case. Assessing your client's business considerations against the costs sought to recover and your other available remedies will allow you and your client to make a complete and informed decision.

Becoming/remaining cognizant of your jurisdictional limitations is also key in deciding whether to pursue legal action. Do you need a judgment to collect or can you settle the underlying claim and pursue your tender issue? Traditionally, and as is the case in many jurisdictions, collection via indemnification requires jury verdict/judgment. Some states have changed this concept and allowed indemnity in the context of settled claims. Under Florida law, the indemnitor can be bound by a settlement agreement, but only if said indemnitor was given notice and an opportunity to review, and then either pass or participate in the settlement. *GAB Bus. Servs., Inc. v. Syndicate 627*, 809 F.2d 755, (11th Cir. 1987). If the indemnitor is provided with the preceding, then the indemnitee can only recover the part of the settlement that relates to the indemnitor's breach of duty and only if the settlement amount was reasonable. *Id*. at 760–61. Similarly, in *Geraczynski v. National Railroad Passenger Corp.* (September 21, 2015, Chesler, S.), the U.S. District Court for the District of New Jersey affirmed a downstream distributor's right to indemnity from the manufacturer, following the manufacturer's settlement with the plaintiff. The product manufacturer argued that the downstream distributor was only entitled to indemnification after definitive proof that the product had, in fact, been made with a manufacturing defect, i.e. a jury verdict. The Court disagreed, noting that the manufacturer failed to explain how the downstream distributor could be responsible under the New Jersey Product liability act when the distributor was an "innocent seller," having no role in the design of the product or the creation of the defect at issue.

Another consideration to whether you pursue legal action is whether you can actually get jurisdiction on the foreign entity. The first step in securing jurisdiction over a foreign entity is obtaining proper service upon it. There are three basic ways by which an American entity can accomplish this task. First, a local agent or "general manager" of a foreign corporation's American subsidiary may be served with initial process on American soil. In *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988), the U.S. Supreme Court held that service upon an American subsidiary of a foreign corporation is valid as long as it passes muster of relevant state law. Second, the foreign corporation may be served overseas if its country of domicile is a signatory to the Hague Service Convention, under which each contracting state is required to designate a central authority to accept incoming requests for service. Any officer who may serve process in the state of origin may send service to a central authority in the receiving state. The central authority then effectuates service in the foreign country. The third method of achieving proper service upon a foreign corporation (for companies headquartered in countries which are not privy to the Hague Service Convention) is the use of diplomatic channels. This is

generally achieved through a letter rogatory, which is a service of process request from an American court to a foreign court.

Following proper service, the court before which the case sits must be able to exercise jurisdiction over the defendant. A court may exercise personal jurisdiction over an out-of-state defendant if the defendant has "certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (U.S. 2011) (quoting *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945)). *International Shoe* established what is now known as "specific jurisdiction" – that is, the jurisdiction that a court exercises over a defendant when the suit "aris [es] out of or relate[s] to the defendant's contacts with the forum." *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014) (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, n. 8, (1984)). In addition to the federal requirement, any court's exercise of jurisdiction must comport with the state's long-arm statute. The language of many states' long-arm statutes mirrors that of *International Shoe* and its progeny, so satisfying one necessarily satisfies the other. For example, under the Pennsylvania long-arm statute, Pa.C.S. § 5322, a PA court may exercise jurisdiction when the person or entity transacts business in PA by realizing financial benefit, shipping merchandise in or out of PA, engaging in business in PA, or owning or leasing any property in PA.

In short, taking a look at these issues, i.e. service and jurisdiction, will assist you in deciding your next step. If it is unlikely you will get jurisdiction over a foreign manufacturer, you would want to know this before undertaking an expensive legal battle over indemnity. Assessing these issues early will steer you to the path desired.