Don’t Think You’re a Manufacturer?

You Might Be an *Apparent* Manufacturer:

A Look at the Apparent Manufacturer Doctrine

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What is the Apparent Manufacturer Doctrine (AMD)?

A nonmanufacturing entity (*e.g.*, retailer or distributor) can be held liable as a manufacturer of a product if it holds itself out as the manufacturer, such as through its labeling and advertising

Rationale for the Doctrine

- Estoppel
- Fairness

Rationale: Estoppel

- Nonmanufacturing retailer caused the consumer to believe, through its labeling or advertising, that it was the manufacturer of the product and the consumer relied on the retailer's reputation in purchasing the product

  - *"[W]here the vendor puts only its name upon the product without indicating that it is actually the product of another[,] then the public is induced by its reasonable belief that it is the product of the vendor to rely upon the skill of the vendor and not upon the skill of any other."*

(*Chevron*)

Rationale: Fairness

When a retailer *"puts out a product as its own, the purchaser has no means of ascertaining the identity of the true manufacturer, and it is thus fair to impose liability on the party whose actions effectively conceal the true manufacturer's identity."*

(*Hebel v. Sherman Equipment*)

Chevron USA Inc. v. Aker Maritime Inc. (2010)

- Nonmanufacturing distributor of bolts distributed defective bolts in boxes with its labels
- Packing slip read, "*Fasteners shipped on this sales order have been manufactured or distributed by LSS Lone Star—Houston in accordance with our documented quality system.*"
- Although the bolts had small markings of the actual manufacturer's initials, the 5th Circuit held that the distributor was the apparent manufacturer and thus liable
- *U.S. COA for 5th Circuit*: Distributor held itself out as the manufacturer, and the consumer was under the impression that the distributor made the bolts

Implications of the Doctrine

- Strict Liability vs. Common Law Negligence
  - Not every state's product liability laws include strict liability for everyone in the chain of distribution
  - Common law negligence (foreseeability)

- Ex: In ***Chevron***, "*not only were the bolts the wrong kind, they were also defective due to a defective manufacturing process, including failure to stress-relieve the bolts and to heat-treat them.*"
  - More difficult for Plaintiff to prove foreseeability for a latent defect

Products at Issue

- Any product with a latent defect that is packaged, marketed, or advertised that, if fails, can cause personal injury.

Examples

- Bike Pedal
- Bungee Cord
- Candy Bar
- Cement
- Chair
- Construction Bolt
- Floor Polisher
- Generic Medicine
- Gift Bag
- Grill
- Hyperbaric Chamber
- Paint
- Lamp
- Lawnmower
- Lighter
- Refrigerator
- Rifle
- Soda
- Stool
- Tire
- Tractor

History of the Doctrine

- Predates the strict product liability doctrine

- Originated in the early 20th century
  - Nonmanufacturing sellers were not generally subject to liability for the defective products they sold

- Courts first applied AMD to retailers and distributors who placed their own labels on products that had been manufactured by someone else

Willson v. Faxon, Williams & Faxon, 101 N.E. 799 (NY 1913)

- **Parties**
  - ***Defendant:*** Medicine retailer who purchased proprietary medicine from a manufacturer. Put a label on the product: "Faxon, Williams and Faxon, Mfg."
  - ***Plaintiff:*** Consumer who purchased medicine sold by Defendant, and became ill

- Retailer sought to shield itself from liability using exception in the Public Health Law, that every medicine retailer shall be held liable for the quality of the drugs he sells, ***except*** "*those sold in original packages of the manufacturer and those…known as patent or proprietary medicines*."

- ***Court:*** "*Is the benefit of this exception available to a retail druggist who* ***holds himself out*** *to a purchaser as the actual manufacturer of the medicine sold? I think not.*"

Willson v. Faxon, Williams & Faxon, 101 N.E. 799 (NY 1913)

- *"[W]hen the defendant represented to the plaintiff by means of the statement contained in the label on the box that Faxon, Williams Faxon were the manufacturers of the preparation it rendered itself just as liable to the purchaser as the actual manufacturers would have been if the purchase had been made from them."*

- *"[T]he defendant, by reason of this representation, became responsible to the plaintiff for the strength and quality of the preparation notwithstanding its patented or proprietary character."*

History of the Doctrine

- The AMD "*emerged as a means to impose a manufacturer's liability on certain nonmanufacturing sellers who held themselves out to the public as a product's manufacturer but were otherwise subject to more lenient liability rules than the actual manufacturer.*" (*Rublee v. Carrier Corp.*)

- Reflected in the *Restatements of Torts*

Restatement (First) of Torts

- 1934: AMD was first outlined in the *Restatement (First) of Torts*

- Section 400 of the Restatement (First) of Torts provides:

"One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer."

Restatement (Second) of Torts

- 1965: *Restatement (Second) of Torts* included **comment d** to Section 400, which clarified the application of the AMD

"[W]here it is clear that the actor's only connection with the chattel is that of a distributor of it (for example, as a wholesale or retail seller), he does not put it out as his own product and the rule stated in this section is inapplicable. Thus, one puts out a chattel as his own product when he ***puts it out under his name or affixes to it his trade name or trademark****. When such identification is referred to on the label as an indication of the quality or wholesomeness of the chattel, there is an added emphasis that the user can* ***rely upon the reputation*** *of the person so identified."*

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

- Second Restatement added Section 402A, entitled "*Special Liability of Seller of Product for Physical Harm to User or Consumer*"

- Section 402A extended the liability of sellers by including strict liability to those in the chain of distribution

Restatement (Second) of Torts

Section 402A provides, in relevant part, "*One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability" even when "the seller has exercised all possible care in the preparation and sale of his product.*"

Restatement (Third) of Torts

- 1998: *Restatement (Third) of Torts* questioned whether the AMD "remained relevant in the context of product liability."

Restatement (Third) of Torts

"*After inclusion of § 402A in the Restatement, Second, imposing strict liability on all commercial sellers of defective products for harm caused by product defects, it was questionable whether § 400 remained relevant in the context of products liability. Once § 402A imposed strict liability on all product sellers it made little, if any, difference whether the seller of a defective product was a retailer or a manufacturer.*"

(*Restatement (Third) of Torts: Products Liability, § 14, cmt. a (1998)*)

Application of the AMD

- **Majority of states** have adopted the AMD through:
  - Common Law, or
  - Statute

Application of the AMD: *State Product Liability Laws*

- **Some states** have statutes that prevent the application of the AMD by defining a manufacturer as an entity that designs and manufactures a product

- *Example*: Iowa statute immunizes those who "wholesales, retails, distributes, or otherwise sells a product" from various claims under certain circumstances

Iowa Code § 613.18

Limitation on products liability of nonmanufacturers

- “1. A person who is not the assembler, designer, or manufacturer, and who wholesales, retails, distributes, or otherwise sells a product is:
  - a. Immune from any suit based upon strict liability in tort or breach of implied warranty of merchantability which arises solely from an alleged defect in the original design or manufacture of the product.”

Iowa Code § 613.18

Limitation on products liability of nonmanufacturers

- Statute does not create an exception for nonmanufacturing sellers that hold themselves out as manufacturers of a product

- Some states with similar statutes have included such exceptions

Application of the AMD:
Merfeld v. Dometic Corp.
(2018)

- Court found "that the apparent manufacturer doctrine does not create an exception to § 613.18 and is not viable under Iowa law. As a matter of law, Dometic was not a 'manufacturer' of the refrigerator for purposes of the statute."

Application of the AMD: *State Product Liability Laws*

- In the states that have rejected the AMD (e.g., Iowa), it is because the doctrine conflicts with the state's product liability statutes

- In these states, courts generally hold that the plain language of the statute excludes apparent manufacturers

Statutes that Include Apparent Manufacturer in Definition

- **Idaho** Code Ann. § 6–1402
- **Kan.** Stat. Ann. § 60–3302
- **Wash.** Rev. Code Ann. § 7.72.040(2)(e)
- **La.** Rev. Stat. Ann. § 9:2800.53(1)(a)

    - The LPLA's definition of manufacturer is not limited, however, to those who actually manufacture a product; one "*who labels a product as his own or who otherwise holds himself out to be the manufacturer of the product*" is also considered a manufacturer of the product

Three Main Tests

- In states that apply the AMD, Courts generally employ 3 main tests to determine whether an entity is an apparent manufacturer:

1. Objective Reliance Test
2. Actual Reliance Test
3. Enterprise Liability Test

1. Objective Reliance Test

- This test looks at whether
  - a reasonable consumer would have believed that the entity manufactured the product based on the product's label or advertising, and
  - relied on the entity's reputation in purchasing the product
- Appellate decisions in early AMD cases either expressly or impliedly employed this test
- Test adopted by a majority of states

1. Objective Reliance Test

Bilenky v. Ryobi Technologies Inc.

- 2015: U.S. District Court for Eastern District of Virginia held that Ryobi Technologies was the apparent manufacturer of a tractor manufactured by Husqvarna because of Ryobi's involvement with the product
  - Tractor itself and owner's manual were printed with Ryobi's name
  - Sales receipt specified that the buyer bought a Ryobi tractor
  - Therefore, a reasonable consumer would conclude that it was a Ryobi tractor

1. Objective Reliance Test

Martin v. Pham Le Brothers LLC

- 2021: COA of Louisiana held that the wholesale seller of disposable lighters was not an apparent manufacturer because the seller did not hold itself out as the manufacturer to a reasonable consumer
  - Lighters had the name of the manufacturer, not the seller
  - Seller was therefore not liable to the buyer for the defective product

2. Actual Reliance Test

- This test looks at whether the consumer (1) actually and (2) reasonably relied on the entity's reputation or assurances of product quality in purchasing the product

3. Enterprise Liability Test

- This test looks at whether the nonmanufacturing entity substantially participated in the design, manufacture, or distribution of the product
- No proof of reliance on labeling or advertising is required
- Test usually used in trademark licensor cases

Recent Caselaw: *Sparks v. Oxy-Health, LLC* (2015)

- "Defendant distributed the Vitaeris 320 in boxes labeled as its own. Inside the box, the chamber was packaged with an 'operating and reference' manual that is rife with examples insinuating that defendant was the chamber's manufacturer."

- "[D]efendant made a number of statements in videos provided on its website that may lead reasonable people to believe defendant hand selected the materials from which the chamber was made."

- "Based on this evidence, there are genuine issues of material fact about whether defendant was the chamber's 'apparent manufacturer.'"

- "In light of defendant's marketing, as discussed above, a reasonable juror could conclude defendant was the Chamber's apparent manufacturer."

Joseph Bayer v. Boehringer Ingelheim Pharmaceuticals Inc.

(2021)

- Walgreens sold generic version of Zantac under its own brand name, "Wal-Zan"

- Walgreens moved for preemption on the basis that it is a generic product

- To overcome preemption, Plaintiffs argued Walgreens should be considered manufacturer based on its claims on labels
  - *E.g.*, *"[I]t seeks to make its store-brand OTC products 'slightly better than the national brand' by tinkering with the 'product format,'" and that it implements its "own higher standards," that are "stricter * * * than some regulatory bodies."*

Tips for Managing Risks:
Pre-Litigation

- Retailers must be aware of the AMD to mitigate their risk of being held liable for products that they do not manufacture
  - Contracts
  - Labeling
  - Advertisement

Tips for Managing Risks: *Contracts*

- Contract between manufacturer and nonmanufacturing entity should address such issues as indemnity, manufacturing responsibility, logos, etc.

Tips for Managing Risks: *Labeling*

- Retailers can attempt to use fine print to shield from liability
  - *E.g.*, "Manufactured by X for Y"

- ***Sandlin v. Bell Sports, Inc. (2022)***
  - "Made in China"
    - Creates issue of whether the product was manufactured in China *by* Y or Manufactured in China *for* Y
- ***Chevron:*** *The only "fine print" that might avoid the AMD is an express statement that someone else manufactured the product*
  - *In Rutherford and Peterson, there were explicit statements that someone else—not the distributor—manufactured the products. An "OF" on the bolts' heads, standing alone, is not as clear an indication that someone other than Lone Star manufactured the bolts as was present in those cases."*

Tips for Managing Risks: *Advertisement*

- Retailers should make sure marketing materials meet their standards

Tips for Managing Risks:
After Litigation

1. Are you in a state with **common law**?
   a. Yes→ Is there SL? If so, the AMD may provide a cause of action.
      a. Yes→ Per caselaw, what test applies?
      b. No→ Go to Step 2

2. Are you in state with **product liability statute**?
   a. Does the statute protect non-manufacturing seller as manufacturer? (*Look at how statute defines a manufacturer*)
      a. Yes→ AMD does not apply
      b. No→ Per caselaw, what test applies?

Tips for Managing Risks:
After Litigation

- While the AMD can be used *defensively*, remember it can also be used *offensively*

Conclusion

- AMD remains relevant in product liability law
- Therefore, it is important to be aware of the background and application of the doctrine

Questions

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