THE DESIGN DEFECT IN PRODUCTS LIABILITY LAWS: OVER-EXPOSURE OF NON-MANUFACTURER DESIGNERS

By Ryan Paukert

I. Introduction

Most states approach products liability claims with a preliminary qualification: the proper defendant must be either a manufacturer or a seller, which can typically be any entity along the chain of distribution – all of whom may find themselves added as parties to products liability litigation. While on the surface this may appear to be a straightforward litmus test for who can and cannot be sued in products liability, the reality is many other entities connected to a given product, such as non-manufacturer designers, could find themselves in court as well. This article discusses "design" language found throughout many states' products liability statutes and how these statutes could prove problematic for product designers long after their plans have been completed. Additionally, there will be a review of some states whose products liability laws provide a more thorough analysis of the various actors tied to any given product, beyond the general (and overinclusive) "manufacturer" and "seller" terms used by the majority, as well as states that have provided some protections to these designers through developments in case law. And lastly, a few methods are explored regarding how non-manufacturer designers can counter the overly broad statutes to which they may find themselves subjected over the life (and distribution) of their products.

II. What are "Non-Manufacturer Designers"?

A non-manufacturer designer is an individual or entity that designs or creates plans for a product, but which leaves the actual manufacture of the product to a separate entity or individual ("manufacturer"). Oftentimes, a single company will hold both roles of designer and manufacturer. But, later on, this company may choose to stop manufacturing the product, or it might instead turn over or sell the rights to manufacture the product to a third-party that will begin manufacturing the product. In these scenarios, the original company will no longer carry the title of "manufacturer" for future items, but it is l still the designer of the product. This subset of non-manufacturer designers must become, and remain, aware of the statutes to which they are subject.

III. Risks to Non-Manufacturer Designers

Problems can arise when designers release their plans, schematics, and other blueprints into the world, relinquishing the control they once had over these nascent products. While a manufacturer can cease manufacturing and a seller can stop selling, once a design has been created it cannot so easily be erased or removed from the public's knowledge and returned to the mind of its inventor.

The situation for non-manufacturer designers is even more precarious as many states' statutes define "manufacturer" to include one who "designs," without any apparent need for additional contribution to a given product. *See, e.g.*, Colo. Rev. Stat. § 13-21-401(1); Del. Code tit. 18, § 7001(a)(1)(a); Md. Code, Cts. & Jud. Proc. § 5-115(a)(3)(i); Mont. Code § 27-1-719(9)(b); N.J. Stat. § 2A:58C-8(1); N.C. Gen. Stat. § 99B-1(2); N.D. Cent. Code § 28-01.3-01(1); Ohio Rev. Code § 2307.71(A)(9); Tenn. Code § 29-28-102(4); Tex. Civ. Prac. & Rem. Code § 82.001(4). Many other states add another requirement, considering designers to be "manufacturers" if they are involved in both the design and sale of the products, even if they do not actually manufacture the products. Overall, a significant number of state laws make non-manufacturer designers as liable in products liability as the individuals or entities which manufacture the actual products. Notably, the manufacturer—not the non-manufacturer designer possesses the autonomy to end production of any dangerous or defective consumer goods.

To illustrate how this could be problematic, one only needs to look at some of the more famous products liability cases. One of the most famous products liability cases is *Grimshaw v. Ford Motor Co.*, where the placement of the gas tank in the 1972 Ford Pinto hatchback led to an increased rate of fires and explosions following low-speed, rear-end collisions. *See generally* 119 Cal. App. 3d 757, 771, 174 Cal. Rptr. 348, 358 (Ct. App. 1981). While the Ford Pinto's gas tank placement designs have long since been discontinued,

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these products liability laws create a troubling hypothetical: if a new car manufacturer were to begin producing a new fleet of vehicles based on the exact design specifications of the 1972 Ford Pinto and a bevy of new lawsuits arose due to the vehicle's design, could Ford be held liable as the original designer of this present-day iteration of its unsafe model? Although a scenario like this actually taking place is highly unlikely for various reasons (number one being a lack of eager buyers), it demonstrates the possibility of liability danger to designers of allegedly defective products: while a designer may wish to wash its hands and be free from any a particular design, a manufacturer might revive the product and, along with it, the original designer's tort exposure.

IV. Bright Spots: States that have well-built product liability laws

In contrast to the liability many states' laws have created for non-manufacturer designers who have little or no say regarding revisions to their creations or whether certain products ultimately need to be discontinued, a few states close off non-manufacturer designer liability.

In Mississippi, the Mississippi Products Liability Act ("MPLA") provides "the exclusive remedy in any action for damages caused by a product against a product manufacturer, designer, or seller." *Funches v. Progressive Tractor & Implement Co., L.L.C.*, 905 F.3d 846, 850 (5th Cir. 2018), *as revised* (Oct. 8, 2018) (quotation omitted). The MPLA distinguishes among manufacturers, designers, and sellers:

> in any action for damages caused by a product, including, but not limited to, any action based on a theory of strict liability in tort, negligence or breach of implied warranty, except for commercial damage to the product itself:
>
> (a) The *manufacturer, designer or seller* of the product shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer, designer or seller:
>
> (i) 1. The product was defective because it deviated in a material way from the manufacturer's or designer's specifications or from otherwise identical units manufactured to the same manufacturing specifications, or
>
> 2. The product was defective because it failed to contain adequate warnings or instructions, or
>
> 3. The product was designed in a defective manner, or
>
> 4. The product breached an express warranty or failed to conform to other express factual representations upon which the claimant justifiably relied in electing to use the product; and
>
> (ii) The defective condition rendered the product unreasonably dangerous to the user or consumer; and
>
> (iii) The defective and unreasonably dangerous condition of the product proximately caused the damages for which recovery is sought.

Miss. Code. § 11-1-63. In *Lawson v. Honeywell International, Inc.*, the plaintiff sued defendant Honeywell under the MPLA as a non-manufacturer designer, alleging it had defectively designed a seatbelt. 75 So. 3d 1024, 1026 (Miss. 2011). Plaintiff argued that the plain meaning of "manufacturer" indicated that the MPLA applied to non-manufacturer designers in addition to manufacturers and sellers. In its opinion, the court noted that where no specific definition of the word "manufacturer" is provided, the word must be given its meaning in the "common or popular sense." *Id.* at 1028. The court held that "[a] mere designer of a product does not fall under the definition of a 'manufacturer,' as that term is used in the MPLA. Accordingly, we affirm the trial court's grant of summary judgment to Honeywell with respect to Lawson's statutory claim of design defect." *Lawson v. Honeywell Int'l, Inc.*, 75 So. 3d at 1029. In this case, the Mississippi Supreme Court pointed out a common sense reality that most state legislatures ignore in their statutes: a designer can be, and often is, distinct from a manufacturer.

Texas also limits the liability exposure that non-manufacturer designers face. The Texas Court of Appeals explained in *Arceneaux v. Lykes Bros. S.S. Co.* that, "[a] defendant who designs a product as a conscious part of the overall development of that product may be subjected to strict product liability or liability for negligence, even though the designer never actually manufactures the product or holds title to it." 890 S.W.2d 191, 195 (Tex. App. 1994), *writ denied* (June 28, 1996). But the *Arceneaux* court refused to extend products liability to a non-manufacturer designer who did not design the specific product at issue, which a third party "cop[ied], mimic[ed] or plagiarize[d]" from the non-manufacturer designer's original product. *Id.* In *Firestone Steel Prod. Co. v. Barajas,* the Texas Supreme Court added further protection to non-manufacturer designers, holding that "[i]f the original designer of a system or prototype gives the design to another party, this action alone is not enough to impose liability under a strict products liability theory." 927 S.W.2d 608, 613 (Tex. 1996).

Missouri has also found non-manufacturer designers not liable in products liability cases where their original designs were appropriated without their knowledge or consent. In *Chem. Design, Inc. v. Am. Standard, Inc.*, the court observed that the defendant designer, American Standard, "had neither actual or [sic] constructive knowledge that its directive [not to transmit or disclose its designs] would be violated and that plaintiff . . . would misappropriate its plans and specifications." 847 S.W.2d 488, 490 (Mo. Ct. App. 1993). The court concluded, "American Standard undertook to assume exposure to liability for injury caused by use of the gas compressor it designed and manufactured. But no relationship upon which to base a duty exists between American Standard and persons injured by the use of a *different product copied by a third party* from American Standard's plans and specifications." *Id*. at 491 (emphasis added).

Although some states have added or included protections for non-manufacturer designers, either legislatively or judicially, the majority of states have not created any serious distinction between manufacturers and non-manufacturer designers. Therefore, these non-manufacturer designers should be proactive in negating these unreasonable and inequitable hazards with the

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means available to them.

V. How Designers Might Protect Themselves

For non-manufacturer designers, there are some remedies and, more importantly, protections that can be utilized to mitigate potential tort exposure after they have relinquished control of their designs.

Possibly the best solution for these designers is to incorporate indemnification language into their contracts with manufacturers, and possibly sellers, of their products. Placing an expiration date on the designer's contribution to litigation, particularly for design defect claims arising many years after the designer has exited the business, could reduce the aforementioned risks. However, this solution may be a sticking point in contract negotiations between designers and manufacturers. Discussing these issues early in negotiations may be useful in reaching an equitable agreement.

As another solution, non-manufacturer designers can include disclaimers regarding copying designs, as demonstrated in *Chem. Design, Inc. v. Am. Standard, Inc.* In that case, the defendant non-manufacturer designer created a gas condenser for the plaintiff and provided the plaintiff with the plans and specifications, but placed this notice on the face of the drawing:

THIS DOCUMENT CONTAINS MATERIAL AND/OR INFORMATION WHICH IS THE PROPERTY OF AMERICAN STANDARD, INC., (A DELAWARE CORPORATION) AND SUPPLIED ONLY ON CONFIDENTIAL BASIS, NO TRANSMITTAL OR DISCLOSURE SHALL BE MADE TO ANY PERSON, FIRM OR CORPORATION, WITHOUT PRIOR WRITTEN APPROVAL OF AMERICAN STANDARD, INC.

Chem. Design, Inc., 847 S.W.2d at 490. Several years later, the plaintiff hired a third party to create a replacement gas condenser according to the plans created by defendant. The replacement exploded, causing injuries to an employee, but the defendant designer avoided liability by showing it was unforeseeable that its plans and specifications would be misappropriated. Including a notice similar to the one used in *Chem. Design, Inc.*, may be an effective way for non-manufacturer designers to retain control of designs provided to manufacturers and shield designers from claims arising from unauthorized third-party duplicates.

Finally, while some entities may optimistically rely on statutes of limitations and statutes of repose, such a course of inaction may be unwise. Statutes of limitations periods nearly universally commence upon occurrence of the injury. For non-manufacturer designers, statutes of limitation do little to solve their liability exposure because injured parties can usually bring suit against them for recent injuries allegedly resulting from products designed far in the past.

Meanwhile, products liability statutes of repose typically create a deadline for bringing claims where the clock starts ticking upon the sale or delivery of the product. While statutes of repose are much more favorable to manufacturers, designers, and sellers, than statutes of limitations, these statutes, if they exist at all, are inconsistent and many have been found to be unconstitutional by state supreme courts. *See, e.g., Lankford v. Sullivan, Long & Hagerty,* 416 So. 2d 996 (Ala. 1982); *Hazine v. Montgomery Elevator Co.*, 861 P.2d 625 (1993); *Heath v. Sears, Roebuck & Co.*, 464 A.2d 288 (1983); *Dickie v. Farmers Union Oil Co. of LaMoure,* 611 N.W.2d 168 (N.D. 2000); *Kennedy v. Cumberland Eng'g Co.*, 471 A.2d 195 (R.I. 1984).

Some states combine their statutes of repose with Ia "useful safe life" provision. In Idaho, a product's "'useful safe life' begins at the time of delivery of the product and extends for the time during which the product would normally be likely to perform or be stored in a safe manner." Idaho Code § 6-1403(1)(a). There is a rebuttable presumption that an injury occurring more than ten years after delivery of the product occurs after expiration of the product's "useful safe life," after which point an action may not be commenced. Idaho Code § 6-1403(2)(a). Similarly, Kansas has a rebuttable presumption that a product's useful safe life expires ten years after delivery. Kan. Stat. Ann. § 60-3303(b)(1). And while Colorado does not use the term "useful safe life," it has codified a presumption of non-defectiveness ten years after the product is first sold for use or consumption. Colo. Rev. Stat. § 13-21-403(3).

Alternative approaches, such as the one used in Minnesota, to statutes of repose include an affirmative defense for injuries occurring after "the expiration of the ordinary useful life of the product," which is determined by a jury.. Minn. Stat. § 604.03, subd. 1. Finally, a few states have simple, definitive statutes of repose. *See* Conn. Gen. Stat. § 52-577a(a) (ten years from date party last had possession or control of the product); Ga. Code Ann. § 51-1-11(b)(2) (ten years from the date of first sale for use or consumption of the product.)

Due to the large array of states' approaches to statutes of limitation and repose, non-manufacturer designers' best option to limit products liability exposure is through contractual protections negotiated with the other parties in the chain of distribution.

Conclusion

While the issues surrounding non-manufacturer designers may be somewhat rare and narrow as designers and manufacturers are often one and the same, it is our job as attorneys to anticipate and help our clients address potential exposure that can crop up, regardless of the role held, and consider countermeasures proactively. Non-manufacturer designers, and the attorneys advising them, would do well to explore creative solutions to the problems presented by the "one size fits all approach" presented in many products liability statutes. While a few stopgaps have been suggested here, they are by no means an exhaustive list and attorneys should explore new avenues by which to support their non-manufacturer designer clients.