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## PRODUCT LIABILITY & TOXIC TORTS

### The Innocent Retailer

Does New Jersey's Products Liability Act provide protection?

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Ten years ago, New Jersey enacted a sweeping reform package of bills collectively known as the Products Liability Act. This group of bills included a little utilized provision designed to protect innocent retailers. The Retailers Immunity Act of 1995 was intended to clarify liability in the chain of distribution and allow retailers or sellers who were not part of the manufacturing process to be dismissed early in a case.

To fully understand the Retailers Immunity Act, it is first necessary to understand who it applies to. The Products Liability Act defines "product seller" as any person or entity who sells, distributes, leases, installs, prepares or assembles a manufacturer's product according to the manufacturer's plan or specifications.

It should be noted that a seller can

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also be considered a manufacturer if it exercises "significant control" over the design, manufacturing, packaging or labeling process. However, the seller's significant control over the product must be related to the defect alleged by the plaintiff.

#### Statutory Defense for Retailers

The Retailers Immunity Act provides a new statutory defense for retailers. The act allows a seller to escape liability if it properly identifies the manufacturer of the allegedly defective product. This provision is a marked improvement over the case law which governed products liability cases prior to the 1995 act.

Under common law precedents prior to 1995, strict liability began with the manufacturer and extended to all entities in the chain of distribution, notwithstanding the fact that a retailer may have had absolutely nothing to do with the manufacturing process. The reasoning underlying these cases was a desire to ensure that someone was available to compensate an injured plaintiff if the manufacturer was bankrupt or somehow escaped liability.

The framers of the 1995 act recognized the inequity of keeping an innocent seller in the case merely because it distributed a product that it did not know was defective. Prior to the act, absent an express indemnification

agreement, manufacturers would not indemnify sellers. Since a seller was subject to strict liability, it might well be found liable at trial. The seller's only recourse was to make a claim against the manufacturer for indemnification. Needless to say, this strategy was expensive and often cost prohibitive. Sellers without liability often settled, rather than incur the legal fees associated with protracted litigation.

Under the Retailers Immunity Act, if the seller files an affidavit certifying the correct identity of the manufacturer, the seller is relieved of all strict liability claims by the plaintiff. New Jersey Statutes Annotated (N.J.S.A.) 2A:58C-9. The affidavit must be filed and provided to the plaintiff as soon as the identity of the manufacturer becomes known to the seller. If the plaintiff does not voluntarily dismiss the seller, a fairly simple and straight-forward motion for summary judgment should be granted so long as the requirements of the statute are strictly adhered to.

There are, however, some exceptions to this "escape hatch" for sellers. If the identity of the manufacturer is incorrect, the manufacturer has no known agents in the United States, or the manufacturer is bankrupt or has no attachable assets, the seller remains strictly liable. N.J.S.A. 2A:58C-9(c)(1)-(3). Additionally, if the seller exercised "significant control over the design, manufacturer, packaging or labeling of the product," and the control exercised was somehow related to the defect that caused plaintiff's injuries, the seller remains strictly liable. N.J.S.A.

2A:58C-9(d)(1). Finally, if the plaintiff can prove that the seller created the defect or “knew or should have known of the defect,” the seller will remain strictly liable. N.J.S.A. 2A:58C-9(d)(2)-(3). See also *Thomas v. Ford Motor Co.*, 70 F.Supp.2d 521 (D.N.J. 1999), motion granted in part, denied in part on other grounds, 111 F. Supp. 2d 529 (D.N.J. 2000), affirmed in part and reversed in part on other grounds, 137 F. Supp. 2d 575 (D.N.J. 2001).

The practical effect of all of these exceptions is to somewhat limit the relief the act grants to sellers. If all else fails, plaintiff’s attorneys are likely to focus on the last exception, i.e., the seller “knew or should have known of the defect.” N.J.S.A. 2A:58C-9(d)(2). However, if a seller’s attorney files a motion for summary judgment with an appropriate affidavit setting forth the limited role of the seller, the exception outlined in N.J.S.A. 2A:58C-9(d)(2) can be overcome and summary judgment can be granted.

#### Practice Tips

Attorneys representing retailers/sellers should make every effort to expeditiously file an affidavit certifying the correct identity of the manufacturer and seek dismissal of the complaint as against the seller. To do so, attorneys should:

1) Quickly serve discovery demands and subpoenas that will elicit the identity of the manufacturer or, if necessary, employ an investigator to determine the proper identity of the manufacturer.

2) Tailor discovery requests to the plaintiff to determine if any of the aforementioned exceptions to N.J.S.A.

2A:58C-9 applies (e.g., does the plaintiff have any information indicating that the seller “knew or should have known of the defect”).

3) Promptly file an affidavit with the court certifying the correct identity of the manufacturer with a cover letter citing N.J.S.A. 2A:58C-9. This should be done well in advance of the discovery end date. N.J.S.A. 2A:58C-9(b) specifically states that “[d]ue diligence shall be exercised in providing the plaintiff with the correct identity of the manufacturer or manufacturers.” This due diligence requirement was strictly construed in *Claypotch v. Heller, Inc.*, 360 N.J. Super. 472 (App. Div. 2003). *Claypotch* and *Thomas* (discussed above) are the only reported cases interpreting the Retailers Immunity Act. In *Claypotch*, the Appellate Division intimated that if a seller does not identify the manufacturer before the discovery end date, the plaintiff should be allowed to reopen discovery to explore defenses to dismissal under the act, including the exceptions to dismissal outlined above.

4) The affidavit should be based upon the affiant’s personal knowledge and must accurately state the identity of the manufacturer. In *Claypotch*, the court denied the seller’s motion for summary judgment because the seller’s affidavit used language such as “based upon information provided to me” and “to the best of my knowledge and belief.” *Claypotch*, 360 N.J. Super. at 487.

5) Send a Stipulation of Dismissal With Prejudice with the affidavit to plaintiff’s counsel and inform plaintiff’s counsel that if he does not sign the stipulation, a motion for summary judgment will be filed and attorney’s fees will be sought. Nevertheless, if the

plaintiff agrees to a dismissal, it may well be without prejudice. This is in keeping with the commentary in William A. Dreier, et al., *New Jersey Products Liability & Toxic Torts Law*, § 12:1-1 at 333 (2005 ed.). “Dismissal would have to be without prejudice, however, because manufacturers may become insolvent or otherwise unable to answer in damages at any time during the pendency of the action or afterwards, during the period of attempted execution on any judgment. Under N.J.S.A. 2A:58C-9(c) the seller would then be liable, and the plaintiff would have to be able to proceed against that party.” Dreier, § 12:1-1 at 333.

6) If the plaintiff does not agree to dismiss the seller from the case and summary judgment is not granted, immediately name the manufacturer as a third-party defendant and seek indemnification and contribution.

7) Keep in mind that the seller will have to continue to defend the case if plaintiff has pled other theories, such as negligence. Nevertheless, it makes sense to obtain an affidavit and seek dismissal of plaintiff’s strict liability claims given the limited defenses to such claims.

An attorney representing an innocent seller in a products liability action who determines the identity of the manufacturer can utilize the Retailers Immunity Act to achieve an early dismissal for his client, and thereby reduce the attorney’s fees incurred. Oftentimes, plaintiff’s counsel will file suit against a seller before the manufacturer is identified, or wrongly identify the manufacturer. Diligent investigation and discovery by the seller’s attorney can counter this and lead to a quick and cost-effective defense victory. ■