LAW360

Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

When A Nonmanufacturer Is The 'Apparent Manufacturer'

By **Christopher Carton and Jasmine Owens** (June 23, 2022, 6:35 PM EDT)

Christopher Carton

Jasmine Owens

Recently, in Roemmich v. 3M Co., the Court of Appeals of the State of Washington addressed a consumer's reasonable expectations with respect to a manufacturer's advertisements.[1]

Today, with the popularity of internet sales and outsource manufacturing, it is common for nonmanufacturing retailers to simply place their label on a product. However, there are implications to retailers putting their name on a product that they do not manufacture.

Under the apparent manufacturer doctrine, a nonmanufacturing retailer can be held liable for a product if it holds itself out as the manufacturer, such as through its labeling and advertising.[2] This doctrine treats the nonmanufacturing retailer as the actual manufacturer of the product and thus allows a tort plaintiff to recover from the retailer.

For example, in Chevron USA Inc. v. Aker Maritime Inc. in 2010, a nonmanufacturing distributor of bolts distributed defective bolts in boxes with its labels, and was deemed the "apparent manufacturer."[3] The packing slip stated that the bolts were either "manufactured or distributed" by the distributor.[4]

The U.S. Court of Appeals for the Fifth Circuit noted that the distributor held itself out as the manufacturer, and the consumer was under the impression that the distributor made the bolts. Although the bolts had small markings of the actual manufacturer's initials, the Fifth Circuit held that the distributor was the apparent manufacturer and thus liable.[5]

Like the distributor in Chevron, a nonmanufacturing retailer may be held liable as the manufacturer for a product that they do not manufacture. Therefore, it is important to understand the workings of this doctrine.

History of the Apparent Manufacturer Doctrine

The apparent manufacturer doctrine, which predates the strict product liability doctrine,[6] originated in the early 20th century.[7] The doctrine is reflected in the three Restatements of Torts.

In 1934, it 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."[8]

In 1965, the Restatement (Second) of Torts included comment d to Section 400, which clarified the application of the apparent manufacturer doctrine. Comment d states, in relevant part:

> [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.[9]

In 1998, the Restatement (Third) of Torts questioned whether the apparent manufacturer doctrine "remained relevant in the context of product liability";[10] however, the doctrine remains relevant today.

Rationale of the Apparent Manufacturer Doctrine

The primary rationale for imposing liability on the apparent manufacturer is estoppel — the 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.[11] As noted by the Fifth Circuit in Chevron, quoting from previous case law:

> [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.[12]

The retailer is therefore considered the apparent manufacturer and estopped from denying liability.

Another rationale for the apparent manufacturer doctrine, which was expressed by the Supreme Court of Illinois in Hebel v. Sherman Equipment in 1982, is 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."[13] The apparent manufacturer is thus subject to the same liability as the actual manufacturer.

Application of the Apparent Manufacturer Doctrine

A majority of states have adopted the apparent manufacturer doctrine.[14] In the states that have rejected the doctrine, it is because the doctrine conflicts with the state's product liability statutes.[15] Therefore, plaintiffs counsel use the apparent manufacturer doctrine to expand a defendant distributor or retailer's liability under state product liability statutes.

Courts generally apply three main tests to determine whether an entity is an apparent manufacturer: (1) the objective reliance test, (2) the actual reliance test, and (3) the enterprise liability test.

1. Objective Reliance Test

The appellate decisions in early apparent manufacturer doctrine cases employed the objective reliance

test, which 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.[16] This test continues to be the one adopted by a majority of states.

For example, in Martin v. Pham Le Brothers LLC last year, the Court of Appeal 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.[17] The lighters had the name of the manufacturer, not the seller.[18] The seller did place its initials on the set of lighters in a catalog, but there was no evidence that the buyer saw the catalog.[19] The seller was therefore not liable to the buyer for the defective product.

Conversely, in Bilenky v. Ryobi Technologies Inc. in 2015, the U.S. District Court for the 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.[20] The tractor itself and the owner's manual were printed with Ryobi's name, and the sales receipt specified that the buyer bought a Ryobi tractor.[21] Therefore, a reasonable consumer would conclude that it was a Ryobi tractor.[22]

2. Actual Reliance Test

While the previous test looks at the reasonable expectations of ordinary consumers, this test looks at whether the consumer actually and 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 entity substantially participated in the design, manufacture or distribution of the product. Under this test, no proof of reliance on labeling or advertising is required. This test is usually used in trademark licensor cases.

Takeaway

Retailers must be aware of the apparent manufacturer doctrine to mitigate their risk of being held liable for products that they do not manufacture. As stated by the Fifth Circuit in Chevron, a nonmanufacturing retailer must be careful because when its

> actions give the buying public a basis to assume that it may be the manufacturer of a product it distributes, a jury [may] ... conclude that the distributor held itself out as the product's manufacturer, even though the indications may be less than clear and the ambiguity as to the actual manufacturer may subsequently be clarified.[23]

Additionally, a nonmanufacturing retailer that is involved in the marketing and distribution of a product must be aware of product labeling and advertising. Simply placing one's label on an outsourced product can expose the nonmanufacturing retailer to the risk of being treated as an apparent manufacturer.

Christopher Carton is a managing partner and Jasmine Owens is an associate at Bowman and Brooke LLP.

clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Roemmich v. 3M Co., 509 P.3d 306, 318 (Wash. Ct. App. 2022).

[2] Chevron USA, Inc. v. Aker Mar., Inc., 604 F.3d 888, 895 (5th Cir. 2010).

[3] Id. at 898.

[4] Id. at 898., n. 8.

[5] Id. at 898-99.

[6] Merfeld v. Dometic Corp., 940 F.3d 1017, 1019 (8th Cir. 2019).

[7] Rublee v. Carrier Corp., 192 Wash. 2d 190, 199, 428 P.3d 1207, 1212 (2018).

[8] Restatement (First) of Torts § 400 (1934).

[9] Restatement (Second) of Torts § 400, comment d (1965).

[10] Restatement (Third) of Torts: Prod. Liab. § 14 (1998), comment a (1998).

[11] Hebel v. Sherman Equip., 92 Ill. 2d 368, 371, 442 N.E.2d 199, 201 (1982).

[12] Chevron USA, Inc., 604 F.3d at 895 (quoting Penn v. Inferno Mfg. Corp., 199 So. 2d 210, 214-15 (La. App. 1st Cir. 1967)).

[13] Hebel, 92 Ill. 2d at 372.

[14] Rublee, 192 Wash. 2d at 194.

[15] Id. at 202-03.

[16] Stein v. Pfizer Inc., 228 Md. App. 72, 77, 137 A.3d 279 (2016). See also Rublee, 192 Wash. 2d at 204.

[17] Martin v. Pham Le Bros., LLC, 21-159 (La. App. 5 Cir. 9/22/21), 330 So. 3d 346, 348.

[18] Id. at 358.

[19] Id.

[20] Bilenky v. Ryobi Technologies, Inc., 115 F. Supp. 3d 661, 671 (E.D. Va. 2015).

[21] Id.

[22] Id.

[23] Chevron USA, Inc., 604 F.3d at 897.