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AMD Relevance

Defending and Managing Risks of the Apparent Manufacturer

By Kevin P. Curry, Melissa R. Stull, and George W. Soule

The Apparent Manufacturer Doctrine remains relevant for product liability defense attorneys. Sage practitioners will counsel clients accordingly.

The apparent manufacturer doctrine (AMD) provides that a nonmanufacturing entity that causes the public to believe it manufactured a product, through use of its labeling or advertising, cannot later deny that it is the manufacturer for purposes of liability. *Rublee v. Carrier Corp.*, 428 P.3d 1207, 1212 (Wash. 2018).

Although a majority of states have adopted the AMD (*see Long v. United States Brass Corp.*, 333 F. Supp. 2d 999, 1003 (D. Colo. 2004) (collecting cases)), in 1998, the authors of the *Restatement (Third) of Torts: Products Liability* questioned whether the apparent manufacturer doctrine "remained relevant in the context of products liability," noting the imposition of strict liability on all commercial sellers of defective products. Restatement (Third) of Torts: Products Liability, §14, comment (a) (1998). But well over half of the appellate cases addressing the apparent manufacturer doctrine have been decided since January 1, 1999. Thus, the answer to the question posed by the *Restatement* authors is yes, the apparent manufacturer doctrine remains relevant in the context of product liability lawsuits. Thus, defense counsel should be aware of the doctrine, its history, and application.

Who Is an Apparent Manufacturer?

AMD cases generally involve defendants with one of two roles: (1) a defendant that is in the chain of distribution, such as a seller, and (2) a defendant outside of the distribution chain, such as a trademark licensor.



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Chain of Distribution Apparent Manufacturer

In *Chevron USA, Inc. v. Aker Maritime, Inc.*, 604 F.3d 888, 898 (5th Cir. 2010), a vendor of bolts used in industrial applications distributed bolts in a box that had the vendor's label. The packing slip indicated the vendor possibly manufactured the bolts. Although the vendor did not manufacture the bolts, it did not tell the customer. Because the vendor held itself out as a manufacturer and the customer was left with the impression that the vendor made the bolts, the vendor was held liable as an apparent manufacturer for damage caused by the defective bolts. Similarly, in the early case *Thornhill v. Carpenter-Morton Co.*, 108 N.E. 474, 491 (Mass. 1915), a "paint dealer" was liable for damage caused by oil stain manufactured by another entity because the dealer used its own label and represented that it manufactured the stain.

Trademark Licensor Apparent Manufacturer

The other, more nuanced, line of cases involves trademark licensors. In most states, a licensor that is also in the chain of distribution can be held liable due to strict liability. But there is no consensus in the caselaw about whether a party that licenses its mark to a manufacturer *but is not in the chain of distribution* can be liable. Cases have generally fallen into three categories. *See Lou v. Otis Elevator Co.,* 933 N.E.2d 140, 147-149 (Mass. Ct. App. 2010) (collecting and categorizing cases).

First, some cases apply the AMD to the licensor because it exercised substantial control over production of the product. *E.g., Connelly v. Uniroyal, Inc.*, 389 N.E.2d 155, 161, 163 (Ill. 1979) (liability possible because the Uniroyal name was integral to marketing, Uniroyal provided "detailed information" to the manufacturer, and profited from its participation); *Lou v. Otis,* 933 N.E.2d at 148–49 (liability possible when a trademark licensor participated substantially in the design and manufacture of product, even if it wasn't in distribution chain). Second and conversely, there are decisions holding that a licensor is *not* subject to AMD liability if it had little or no participation in the design or manufacture of a product. *See Yoder v. Honeywell Inc.*, 104 F.3d 1215, 1224 (10th Cir. 1997) (limiting AMD liability to entities within the chain of distribution). Third, there is a handful of cases applying the AMD to a defendant that *only* licensed its trademark to an independent manufacturer, reasoning that buyers rely on the trademark as an indication of quality. *E.g., Brandimarti v. Caterpillar Tractor Co.*, 527 A.2d 134, 139 (Pa. Super. Ct. 1987) (liability possible when Caterpillar merely permitted its name to appear on a forklift, thus inducing consumer reliance based on Caterpillar's reputation), and *Carter v. Joseph Bancroft & Sons Co.*, 360 F. Supp. 1103, 1107 (E.D. Pa. 1973) (liability possible when the tag on a dress simply indicated it was made according to standards prescribed by defendants).

Courts have even come to differing conclusions concerning AMD liability in cases arising from essentially the same facts, due to consideration of who considered the message conveyed by the branding, i.e., the customer or user.

Both *Rublee v. Carrier*, 428 P.3d 1207 (Wash. 2018) and *Stein v. Pfizer Inc.*, 137 A.3d 279 (Md. Ct. App. 2016), were wrongful death cases in which industrial workers (shipyard worker and bricklayer, respectively) were exposed to asbestos and died of mesothelioma. At issue in both cases was whether the plaintiffs could proceed under the AMD against Pfizer, the corporate owner of the company that manufactured and sold the asbestos-containing cement. Invoices and marketing materials bore Pfizer's trademarks, and bag labels referenced Pfizer, but Pfizer was not in the distribution network. *Rublee* at 1210; *Stein* at 282. The *Rublee* court applied "an objective reliance test" that assessed apparent manufacturer liability by considering a defendant's representations in the advertising, distribution, and sale of the product from *the perspective of an ordinary, reasonable consumer. Rublee,* 428 P.3d at 1218. In so doing, the court denied Pfizer's summary judgment motion and determined that genuine issues of material fact remained as to whether a reasonable consumer could believe that Pfizer was the manufacturer of the cement. *Id.* at 1218. The *Stein* court, on the other hand, reasoned that because the cement was not a consumer product, but was instead purchased by sophisticated user Bethlehem Steel, reliance must be judged "*from the perspective of a reasonable purchaser in the position of the actual purchaser.*" *Stein*, 137 A.3d at 295. Applying this test, the court granted Pfizer's motion for summary judgment because purchaser Bethlehem Steel was "unquestionably" a sophisticated purchaser, and no reasonable fact finder could conclude that a reasonable person in the position of a Bethlehem Steel purchasing manager could have relied on Pfizer's reputation and assurances of quality when Bethlehem knew it was purchasing from the actual manufacturer, not Pfizer. *Id.* at 297.

AMD cases generally involve defendants with one of two roles: (1) a defendant that is in the chain of distribution, such as a seller, and (2) a defendant outside of the distribution chain, such as a trademark licensor.

Rationale Underlying the Apparent Manufacturer Doctrine

Courts and commentators have used various legal rationales to warrant application of the AMD. Both early and more recent cases have recognized the AMD as a doctrine based on estoppel. "By putting a chattel out as his own product [an apparent manufacturer] induces reliance upon his care in making it…. The principle of estoppel appears to afford the main basis and reason for the liability imposed upon a party putting out as his own product goods produced by another…." *Burkhardt v. Armour & Co.*, 161 A. 385, 391 (Conn. 1932); *Rublee v. Carrier,* 428 P.3d at 1212 (noting the AMD is primarily a "species of estoppel").

Some courts have indicated the AMD is a vehicle to hold an alleged wrongdoer accountable. In *Lou v. Otis Elevator Co.,* the Massachusetts court held that a trademark licensor that was not directly in the distribution chain, but that participated substantially in the design of the product, was liable "as a result of its own role in placing a dangerous product into the stream of commerce." *Lou v. Otis Elevator Co.,* 933 N.E.2d 140, 149 (Mass. Ct. App. 2010). Other courts have reasoned the AMD is a logical extension of strict liability, particularly in light of profits gained by a defendant. *E.g., Connelly v. Uniroyal,* 389 N.E. 2d 155, 161–63 (Ill. 1979) (noting a trademark licensor was integral to enterprise, profited from defective product, and presented "same public policy reasons for the applicability of strict liability" as wholesalers and retailers).

But whatever rationale underlies the AMD, the bottom line is that if your client allows its logos and trademarks to be placed on a product it did not manufacture, it almost certainly will be sued, and may be held liable, if defects in the product cause harm.

Continued Vitality of the AMD

The AMD remains important because most states have adopted some version of it via common law or statute. *E.g.,* Ohio Rev. Code §2307.78(7) (a product seller may be liable if it *marketed a product under its own label or trade name).* The AMD may provide an alternate cause of action in states that do not apply strict liability to non-manufacturers in the chain of distribution. Plaintiffs' counsel continue, with some degree of success, to use the AMD to bolster their claims against defendants that are associated with, but did not manufacture, an allegedly defective product. *See, e.g., Bilenky v. Ryobi Techs.*, 666 Fed. Appx. 271, 274 (4th Cir. 2016) (noting the plaintiff's $2.5 million wrongful death verdict was based, in part, on AMD when the defendant "put the tractor out as its own," with Ryobi printed on its side, Ryobi printed on top of the owner's manual, and the receipt was for Ryobi tractor).

As importantly, the AMD remains vital because in this era of global commerce, outsourced manufacturing, and direct-to-consumer sales via the internet and other outlets, consumers and users will continue to rely on brand names as an indicator of quality, trademark holders will continue to license their marks to independent manufacturers, and large, national retailers will continue to have other companies manufacture products that retailers then sell with in-house branding.

Application of the Apparent Manufacturer Doctrine

Although differing in their application of the AMD, courts are relatively consistent in the factors they consider when deciding whether to hold a trademark licensor liable for injuries caused by defective products. Courts always consider the placement and prominence of logos and names on the product. Additionally, courts look at the licensor's level of control over design and manufacture, and whether the licensor provided some or all of the following: capital, technical and design data, quality standards, production and testing methods, and technical support or supervision (i.e., personnel). *See Bilenky v. Ryobi*, 666 Fed. Appx. at 274; *Connelly v. Uniroyal,* 389 N.E.2d at 161; *Lou v. Otis Elevator Co.,* 933 N.E.2d at 143; *Torres v. Goodyear Tire & Rubber Co.*, 786 P.2d 939, 945 (Ariz. 1990).

The three relevant restatements and state product liability laws have influenced how courts apply the AMD.

The Restatement of Torts

Over time, the three Restatements of Torts have reflected the evolution of the AMD. The *Restatement (First) of Torts* (1934) §400 "Vendor Selling As His Own Product Chattel Made By Another" provided that "[o]ne who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer." Comment (c) explained the rationale: "By putting a chattel out as his own product," a seller "causes it to be used in reliance upon his care in making it" and is therefore liable as an apparent manufacturer if the product causes harm.

The *Restatement (Second) of Torts* (1965) §400 added a reference to trademarks. Comment (d) stated:

> 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.

The *Restatement (Third) of Torts* (1998), moved the AMD discussion to §14 and narrowed the circumstances under which a trademark licensor may be subject to AMD liability. Comment (d) states:

> The rule stated in this Section does not, by its terms, apply to the owner of a trademark who licenses a manufacturer to place the licensor's trademark or logo on the manufacturer's product and distribute it as though manufactured by the licensor… [T]he licensor, who does not sell or otherwise distribute products, is not liable under this Section of this Restatement.
>
> Trademark licensors are liable for harm caused by defective products distributed under the licensor's trademark or logo *when they participate substantially in the design, manufacture, or distribution of the licensee's products*. In these circumstances they are treated as sellers of the products bearing their trademarks. (Emphasis added).

Although this change to the *Restatement* is helpful for trademark licensors, defense counsel can expect continued litigation about what level of participation in product design and manufacture will subject a licensor to AMD liability, particularly when the licensor is not in the stream of distribution.

Effect of State Product Liability Laws

The apparent manufacturer doctrine predates state product liability statutes. When defending an AMD claim, consider any discrepancies or overlap between the common law AMD and relevant product liability statutes. In recent years, plaintiffs' counsel have tried to use the AMD to expand liability under product liability statutes, while defense counsel have tried to use the statutes to prevent AMD application.

In *Merfeld v. Dometic Corp.*, 940 F.3d 1017 (8th Cir. 2019), defendant Dometic sold, but did not manufacture or design, a refrigerator that allegedly caused an RV fire. As such, Dometic was immune from liability under Iowa Code §613.18, which protects wholesalers, distributors, and retailers from strict liability. But the plaintiffs argued this statutory immunity would not apply if a jury were to find Dometic was the apparent manufacturer of the refrigerator. The appellate court found that plaintiffs failed to provide sufficient evidence to support this claim. More importantly, both the district and appellate courts indicated that the AMD is likely no longer valid in Iowa because the plain meaning of the word "manufacturer" in Iowa Code §613.18 "does not encompass a non-manufacturer that holds itself out as being the manufacturer." *Id.* at 1020.

In *Bornsen v. Pragotrade, LLC*, 804 N.W.2d 55 (N.D. 2011), the North Dakota Supreme Court rejected the AMD, reasoning that the AMD conflicted with the North Dakota Legislative Assembly's adoption of a product liability statute intended to restrict a plaintiff's ability to file suit against a nonmanufacturing seller for injuries arising out of defective products. *Id.* at 59–62.

In *McAllister-Lewis v. Goodyear Dunlop Tires N. Am., Ltd.*, CIV 14-4103, 2017 U.S. Dist. LEXIS 117816; 2017 WL 3207730 (D.S.D. July 27, 2017), the district court found that South Dakota statute SDCL 20-9-9 precluded strict liability claims against the middlemen defendants (and distributors, dealers, and wholesalers generally). Plaintiffs urged the adoption of the AMD. The federal court found that "SDCL 20-9-9 is with regard to strict liability contrary to the apparent manufacturer doctrine and thus the apparent manufacturer doctrine with regard to strict liability would likely not be adopted if and when that issue is presented to the South Dakota Supreme Court." *Id.* at *5.

Choice of Law

The above cases illustrate why defense counsel should consider choice of law. All other things being equal, the defense will want to apply the law of a state that does not recognize the AMD. Generally, the law of the state in which the relationship between client and manufacturer was formed is most significant in ordering their responsibilities and thus should govern their liability to third parties. Another argument is that the law of the state in which the client appeared to be the manufacturer in the eyes of the product user (most often, probably the state in which the accident occurred) should govern because it is that appearance that underlies the doctrine.

The vast majority of appellate cases analyzing AMD liability do not discuss choice of law. Almost all simply apply the law of the state where the accident happened. In *Bornsen*, *McAllister*, and *Merfeld*, the alleged apparent manufacturer's activities occurred in one state and the subject accident happened in a second state, where each case was heard. In each case, without analysis, the court applied the law of the state where the accident happened, and the case was heard.

In *Yoder v. Honeywell*, the plaintiff was injured in Denver. 104 F.3d at 1220. The court applied New York choice of law rules because venue originated in New York, but ultimately applied substantive Colorado law for its AMD analysis ("Colorado, as plaintiffs' domiciliary and the place where [plaintiff] received the injury, would seem to have the greatest interest in the outcome."). *Id. Lou v. Otis Elevator Co.* is unique because the accident happened in China, the defendant was a New Jersey or Connecticut corporation, and the plaintiff lived in Massachusetts. 933 N.E.2d at 144. Both parties asked the trial judge to instruct the jury under Chinese law. The trial judge was unable to determine applicable Chinese law and instructed the jury under Massachusetts law. Neither party appealed that choice as related to the AMD. *Id.* at fn. 8.

When defending an AMD claim, consider any discrepancies or overlap between the common law AMD and relevant product liability statutes. In recent years, plaintiffs' counsel have tried to use the AMD to expand liability under product liability statutes, while defense counsel have tried to use the statutes to prevent AMD application.

Managing Risks for the Apparent Manufacturer

Apparent manufacturers should mitigate their risks by determining the appropriate level of involvement in product design, manufacturing, and/or review, drafting contracts with an eye toward potential litigation, ensuring the product in question adheres to relevant regulations, maintaining clear procedures for communication between parties, and establishing that any marketing materials distributed shall meet their standards.

Involvement in Design, Manufacture, or Review

How can a company that places its label on products manufactured by another party mitigate its risks? The fact that a product will carry the client label increases the risk that an injured plaintiff will sue the client—even if the product was designed and manufactured by an independent manufacturer. If the client substantially participates in the design, manufacture, or distribution of a product, it faces exposure to AMD liability and/or strict liability. The conundrum, as framed by the *Restatement (Third) of Torts* (1998) §14, comment (d), is that if your client is an expert in its field, its "substantial involvement" in design or manufacture may result in both a safer and more popular product, but such involvement may increase the client's liability under the AMD.

Ultimately, if the client intends to enter an agreement where it only licenses its trademark and does not distribute the product, the client must decide whether it is better served by simply licensing the product and collecting its profits, or engaging in product design and manufacture.

The client should keep in mind that no other entity will protect the client's reputation, brand, and finances better than the client. Therefore, substantial involvement, particularly in design and manufacture, is generally better than partial involvement. Indeed, partial involvement may be the worst of both worlds because it may subject the client to AMD liability and may also result in the production of products that do not meet the client's standards. A client best ensures the production of reasonably safe products and protection of its own interests by controlling, or at least significantly participating in, the design, manufacture, marketing, and distribution of the product (as well as its warnings and instructions), and ensuring the manufacturer meets applicable standards.

Additionally, in some states, if a client's product safety engineers review and approve some aspect of the product's design, they could be seen to have assumed a duty that otherwise belonged to the manufacturer, and therefore the client could be liable if the engineers' actions were negligent. *See* Restatement (Second) of Torts §324A (governing liability after negligent performance of an undertaking).

Ultimately, if the client intends to enter an agreement where it only licenses its trademark and does not distribute the product, the client must decide whether it is better served by simply licensing the product and collecting its profits, or engaging in product design and manufacture. Clients should consider the following questions.

1. Beyond product liability risks, what other risks to reputation or finances does the client face when entering into an agreement in which another party produces client-branded products over which the client has limited or no control?
2. A trademark owner/licensor has an obligation under the Lanham Act to preserve the quality of the mark. Does licensing the mark, but leaving design, manufacture, and quality control in the manufacturer/licensee's hands, raise potential Lanham Act issues?
3. Beyond product design and manufacture, will the client or manufacturer be responsible for the content of operator's manuals and product warning and instructional decals?
4. The product will identify the client. Will it also clearly identify the manufacturer? Will the product disclaim client involvement in design and manufacture?
5. Will a review process involving client engineers make the product and its accompanying warnings safer?
6. Does the client trust the manufacturer?
7. If the client wants to suggest (or demand) new features or changes to the product at some later date, can it be done?

Analysis of these factors will help the client assess the appropriate level of involvement in design or manufacture to facilitate production of reasonably safe products.

Considerations When Drafting Contracts

Any agreement between a client and a manufacturer must be drafted with an eye not only on a successful venture, but contingencies in case of a lawsuit by an injured user. The agreement should address various safety-related issues to minimize risk exposure for the client. While the division of responsibility between client and manufacturer will be specific to every agreement, agreements should, at a minimum, address the following issues, designating the party with primary responsibility and addressing the other party's right of review and/or veto: who is responsible for product design, who is responsible for product manufacture, what specific standards and regulations apply, who is responsible for the content of manuals and on-product warning and instructional decals, specifically how logos will be used, who bears responsibility for post-sale duties (recalls, customer support, warranty issues, and litigation), who is responsible for marketing materials, and who is responsible for sourcing and branding spare and replacement parts?

In many states, the client will be entitled to common law or statutory indemnity from the manufacturer if the defect originated with the manufacturer. But the agreement should expressly state that the manufacturer agrees to defend the client in all actions alleging product liability for the product at issue (including claims of negligence against the client) and indemnify the client for any judgments in such cases.

Any licensing or distributorship agreement should require the manufacturer to carry adequate insurance; serious injury claims can easily reach the multi-million-dollar level. If the manufacturer is or becomes insolvent, bankrupt, or otherwise judgment proof, the client, especially if it acted as a distributor, could be required to pay for an injury that was

caused by the manufacturer. Trademark licensors should endeavor to address these scenarios in the agreement, or better, only partner with reliable manufacturers with long-term viability.

These concerns are even more acute when the manufacturer is a foreign company. As both a legal and practical matter, it is often easier for an injured plaintiff to recover from a domestic company than a foreign company. A plaintiff may not be motivated or able to serve process or enforce a judgment against a foreign manufacturer. Thus, your domestic client may be vulnerable to a product liability lawsuit and judgment, based on the foreign manufacturer's activities. If your client enters into a manufacturing and/or distribution contract with a foreign manufacturer, make sure the relevant contract has a well-drafted forum selection clause, choice of law clause, contribution/indemnity clause, and requires adequate U.S.-based insurance. Look for foreign partners with a domestic presence or substantial connections to the United States, so they are more susceptible to suit here. Finally, make sure the foreign manufacturer is subject to service under The Hague Convention.

Other Considerations When Entering Agreements

Apparent manufacturer clients should make sure that other considerations such as compliance with regulations and standards, communication with the manufacturer, and developing appropriate marketing materials are taken into account.

Adherence to Regulations and Standards

"Trust but verify" is sound advice to give apparent manufacturer clients when reviewing a product for safety and adherence to regulations and standards. At the outset, the client should make sure that both client and manufacturer agree on the relevant regulations and standards. The client should consider establishing a process to ensure that the manufacturer implements and complies with the relevant regulations and standards. This process should begin as early as possible during the product design stage and continue through delivery of the product. Upon receipt of the product, the client should inspect the completed product for quality control, proper operation, and compliance with the relevant regulations and standards. The process, inspections, and results should be documented.

Communication with the Manufacturer

If product safety issues arise, how should a client communicate its concerns to the manufacturer? A client should document all product safety related communication efforts. In the event of a later product liability claim, these documented efforts will help the client dispute liability. A formalized written process is best. If the manufacturer does not follow this process, the client should endeavor to make sure that any unresolved issues are appropriately addressed and finalized. One way to close the loop is to send a final letter or other written communication to the manufacturer, setting forth prior discussions and agreements concerning all outstanding issues and identifying which party is responsible for resolving any safety issues.

Marketing Materials

A client should not publish or allow the manufacturer to publish marketing materials that do not meet client standards. Such materials could encourage unsafe behavior by users. Also, in the event of a lawsuit, plaintiffs' lawyers will find and use these materials against the client. Marketing materials showing product users failing to use proper protective equipment or using a product in an unsafe manner that mirrors the plaintiff's accident scenario will be Plaintiff's Exhibit A.

Conclusion

Because the apparent manufacturer doctrine exists at the juncture of product liability and trademark law, and because its parameters vary from state to state, counsel are advised to explore possible defenses to an AMD claim fully when advising clients. The *Third Restatement of Torts* §14 and state product liability statutes may provide ammunition to defeat such claims.

In the risk management realm, both counsel and clients must consider whether a client licensing its trademark is better served by substantial involvement in the design, manufacture, or distribution of a product or by simply licensing its trademark and allowing the manufacturer to take on these responsibilities. Drafting well-thought out contracts with manufacturers is also vital. Counsel should include language that will give some measure of protection to the client if an injured party sues the client and manufacturer.

More than twenty years after the authors of the *Restatement (Third) of Torts: Products Liability* questioned the relevance of the apparent manufacturer doctrine, it is clear the doctrine remains relevant in product liability law. As long as companies continue to outsource product manufacturing, plaintiffs will continue to bring AMD claims. Clients and counsel should be aware of the apparent manufacturer doctrine's general outlines, history, and application to assess how best to mitigate risk exposure and defend against lawsuits. FD