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Liability of Harmless Component Manufacturer to Third Party

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lowed,[27] a cause of action in favor of the depositor arises when unauthorized disclosure occurs. Moreover, the court's conception of the bank's disclosure as a breach of an implied contract follows what appears to be the most recently expounded judicial view.[28] Consequently, this case, along with the *Peterson* and *Tournier* decisions, may provide the nucleus of the beginning of the end of an era of uncertainty.

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LIABILITY OF HARMLESS COMPONENT MANUFACTURER TO THIRD PARTY

Plaintiff was injured by an explosion of a water repellent compound which contained two percent "Tyzor HS," a harmless component developed by the defendant, E.I. DuPont, and ninety-eight percent Shell Sol B. The compound was manufactured by a corporation not a party to this action. Plaintiff sought recovery based upon negligence and strict liability in tort. The jury found for the plaintiff only on the count alleging negligence. On appeal to the United States Court of Appeals for the Fifth Circuit, *held*, affirmed: The manufacturer of a harmless component is liable in negligence to a third party harmed by the end product containing such component, based upon the prominent location of the component manufacturer's trade-mark on the label and its active role in producing and advertising the product. *E.I. DuPont de Nemours and Co. v. McCain*, 414 F.2d 369 (5th Cir. 1969).

The landmark case of *MacPherson v. Buick Motor Co.*[1] signaled the close of an era in which the negligent manufacturer was protected from third-party liability by the absence of a contractual relationship. The Court of Appeals of New York, led by Justice Cardozo, replaced the burden of privity of contract imposed by *Winterbottom v. Wright*[2] with the more realistic test of foreseeable danger.[3] With the advent of

27. The difference in the theoretical basis of liability is not wholly academic, for damages recoverable in tort may be more comprehensive than those recoverable in contract. The contractual theory, in other words, may not compensate a depositor for his total loss; *see* 22 AM. JUR. 2d *Damages* § 18 (1965). The bank in the instant case asserted that if a breach of contract was stated, the complaint would nevertheless be insufficient for failure to allege recoverable damages. The court disposed of the argument by citing 25 C.J.S. *Damages* § 50(e) (1966), and the cases cited therein, which suggest that when a breach of contract results in the necessity to defend an action against third parties, recovery of attorney's fees incurred in the prior litigation should be allowed in the action for breach of contract.

28. Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, 367 P.2d 284 (1961); Tournier v. Nat'l Provincial & Union Bank, [1924] 1 K.B. 461.

1. 217 N.Y. 382, 111 N.E. 1050 (1916).

2. 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

3. The court stated:

If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made . . . [and] there is . . . knowledge that the thing will

the expanded scope of manufacturer's liability, however, came the dilemma of legally defining a manufacturer.

In an early 1900 case involving the sale of a poisonous drug where the vendor was not the manufacturer but made it so appear on the label, the court held that the mere representation of being the maker was sufficient to render the druggist liable to the injured buyer.[4] The reasoning of the court was that the seller assumes responsibility for the negligence of the actual manufacturer. This principle was later refined so that when the druggist labels the medicine as his own, even though he acknowledges that it was manufactured or prepared for him, he is still liable as the ostensible manufacturer.[5]

Food distributors came under this same rule of liability.[6] In *Burkhardt v. Armour & Co.*,[7] a distributor who labeled a food tin with the company name but not that of the manufacturer was held liable to the injured consumer for the packer's negligence. The court's rationale was that "the ordinary, reasonable person reading the label would have inferred that Armour & Co., the distributor, was the packer of the product,"[8] and would consequently have relied upon such assumption, thus invoking the principle of estoppel. Similarly, in *Swift & Co. v. Blackwell*,[9] the Fourth Circuit Court of Appeals stated that:

> even though the word "Distributors" appears on one side panel of the label, when compared with the word "Swifts" (the name of the distributor) elsewhere displayed, the advertisement as a whole emphasizes Swift's connection with the goods and suggests that the origin of the goods from such a source was a guaranty of high quality.[10]

The liability of the "apparent manufacturer" was not limited to the area of food and drugs. In 1915 the Supreme Court of Massachusetts held the vendor of an explosive oil stain liable for injury to the purchaser where the stain was put out as his own, although manufac-

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be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.

217 N.Y. at 389, 111 N.E. at 1053.

4. Willson v. Faxon, Williams & Faxon, 208 N.Y. 108, 101 N.E. 799 (1913).

5. Tiedje v. Haney, 184 Minn. 569, 239 N.W. 611 (1931).

6. *See* Fleetwood v. Swift & Co., 27 Ga. App. 502, 108 S.E. 909 (1921); Armour & Co. v. Leasure, 177 Md. 393, 9 A.2d 572 (Ct. App. 1939); Swift & Co. v. Hawkins, 174 Miss. 253, 164 So. 231 (1935); Slavin v. Francis H. Leggett & Co., 114 N.J.L. 421, 177 A. 120 (Sup. Ct. 1935); Walker v. Great Atlantic & Pacific Tea Co., 131 Tex. 57, 112 S.W.2d 170 (1938) (recovery in this case was under breach of implied warranty). *But see* Degouveia v. H.D. Lee Mercantile Co., 231 Mo. App. 447, 100 S.W.2d 336 (1936), in which the court unrealistically held the dealer to be immune from liability where the term "packed for" appeared on the label even though the name of the manufacturer did not so appear.

7. 115 Conn. 249, 161 A. 385 (1932).

8. *Id.* at 264, 161 A. at 391.

9. 84 F.2d 130 (4th Cir. 1936).

10. *Id.* at 132.

tured by another.[11] Later related cases have imposed negligence liability upon distributors of a wide variety of items where the articles were sold under their own name.[12] A few jurisdictions have adopted the contrary view that the presence of the distributor's trade name on the label, absent any mention of the manufacturer, is insufficient to establish responsibility for the maker's negligence.[13] In *Cone v. Virginia-Carolina Chemical Corp.*,[14] the court, taking a compromise position between the two extremes of liability and nonliability, would not unconditionally absolve the retailer who sold a product as his own from all liability. It did refuse, however, to allow recovery for those articles to be taken internally, not constituting food, drink, or medicine, which were brought from a reputable manufacturer.[15]

The *Restatement of Torts*[16] is consistent with the trend of case law,[17] in that it declares that "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."[18] However, the *Restatement* differs in technique from the court-originated law. The ostensible manufacturer incurs an inherent duty to exercise reasonable care for the safety of the ultimate users of his misrepresented product under the *Restatement*,[19] while the courts use a vicarious liability theory whereby the distributor who labels a product under his brand name acquires responsibility for the negligent acts of the undisclosed maker.[20]

A more recent development in the area of the liability of the nonmanufacturer for the defectively manufactured product has been to confer a duty of care upon one who influences and participates in the

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11. Thornhill v. Carpenter-Morton Co., 220 Mass. 593, 108 N.E. 474 (1915). *But see* Hamson v. Standard Grocery Co., 328 Mass. 263, 103 N.E.2d 233 (1952), in which the same court did not impose liability on a wholesaler of a defective bottle where the label listed him as the distributor but omitted both his brand name and that of the manufacturer.

12. Carney v. Sears, Roebuck & Co., 309 F.2d 300 (4th Cir. 1962) (ladder); Green v. Equitable Powder Mfg. Co., 95 F. Supp. 127 (W.D. Ark. 1951) (dynamite caps); Lill v. Murphy Door Bed Co., 290 Ill. App. 328, 8 N.E.2d 714 (1937) (bed); Penn v. Inferno Mfg. Co., 199 So.2d 210 (La. App. 1967) (eye glasses); Gordy v. Pan American Petroleum Corp., 188 Miss. 313, 193 So. 29 (1940) (gasoline); Gittelson v. Gotham Pressed Steel Corp., 188 Misc. 313, 42 N.Y.S.2d 341 (Sup. Ct. 1943) (toy); Forry v. Gulf Oil Corp., 428 Pa. 334, 237 A.2d 593 (1968) (tire); S. Blickman, Inc. v. Chilton, 114 S.W.2d 646 (Tex. Civ. App. 1938) (stool).

13. Simmons v. Richardson Variety Stores, 51 Del. 80, 137 A.2d 747 (1957); Miller v. Steinfeld, 174 App. Div. 337, 160 N.Y.S. 800 (1916).

14. 178 Miss. 816, 174 So. 554 (1937).

15. *Id. But see* Dow Drug Co. v. Nieman, 57 Ohio App. 190, 13 N.E.2d 130 (1936) (exploding cigar).

16. RESTATEMENT (SECOND) OF TORTS § 400 (1965) (hereinafter cited as RESTATEMENT).

17. In fact, the following decisions have cited the RESTATEMENT as authority for holding the nonmanufacturer who sells a product as his own liable in negligence: Sears, Roebuck & Co. v. Morris, 273 Ala. 218, 136 So.2d 883 (1962); Chapman Chem. Co. v. Taylor, 215 Ark. 630, 222 S.W.2d 820 (1949); Forry v. Gulf Oil Corp., 428 Pa. 237 A.2d 593 (1968); Wojciuk v. United States Rubber Co., 13 Wis. 2d 173, 108 N.W.2d 149 (1961).

18. RESTATEMENT § 400.

19. *Id.* at comment c.

20. *E.g.*, Slavin v. Francis H. Leggett & Co., 114 N.J.L. 421, 177 A. 120 (Sup. Ct. 1935).

creation of such goods. In *Bathory v. Procter & Gamble Distrib. Co.*,[21] liability was extended to the distributor who was not the maker of the dangerous item where the functions of manufacturing and selling were part of one integrated operation. The distributor took an active interest in the chain of production and could not avoid responsibility by asserting that he was unaware of the manufacturing stage.[22] The principle of law, as expressed in *Carter v. Yardley & Co.*,[23] is that:

> One who controls a thing that is dangerous in its nature or is in a dangerous condition, either to his knowledge or as a result of his want of reasonable care in manufacture or inspection, who deals with or disposes of that thing in a way that he foresees or in the exercise of reasonable care ought to foresee will probably carry that thing into contact with some person who will probably be ignorant of the danger owes a legal duty to every such person to use reasonable care to prevent injury to him.[24]

The decision reached in the instant case is not as unusual as the method used to arrive at that result. The law was subtly reshaped to fit the situation facing the court. The liability of one who represented a product as his own was extended to the manufacturer of a harmless component, whereas prior to the case at bar liability had only been found with regard to distributors and retailers of the finished product.[25] A further deviation from precedent is the fact that the name of the true manufacturer was included on the label, although it was not as readily identifiable as the word "DuPont."[26]

The court did adopt the fundamental rule established in earlier cases that the total perspective of the label was to be examined to determine if the casual purchaser would reasonably believe the chemical compound to be DuPont's.[27] The court did not take the next logical step, however, and impute the manufacturer's negligence to DuPont, the component supplier; instead, it held that DuPont owed a duty to test the product, to determine the adequacy of the label warning, and to evaluate the product's safety, irrespective of the maker's negligent acts.[28]

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21. 306 F.2d 22 (6th Cir. 1962).

22. *Id.* at 28, 29. The court also based recovery upon misrepresentation as defined in RESTATEMENT § 400.

23. 319 Mass. 92, 64 N.E.2d 693 (1946). The liability of the distributor who represents a good as his own was not the main issue in the case.

24. *Id.* at 96, 64 N.E.2d at 696.

25. *See* note 12 *supra* and accompanying text.

26. The court pointed out that the word "DuPont" stood out broadly in "large black letters against a clear yellow background at the center of the container" while "Wilmington Chemical Corporation" tended to blend into the beige background. E.I. DuPont de Nemours & Co. v. McCain, 414 F.2d 369, 371, 372 (5th Cir. 1969).

27. *See* Swift & Co. v. Blackwell, 84 F.2d 130 (4th Cir. 1936); Burkhardt v. Armour & Co., 115 Conn. 249, 161 A. 385 (1932).

28. Ironically, the court has indirectly accepted the view professed in RESTATEMENT § 400 at comment c, which it had earlier dogmatically excluded from consideration as irrelevant, since it only applied to strict liability cases. E.I. DuPont de Nemours & Co. v. McCain, 414 F.2d 369, 372 n.1 (5th Cir. 1969). A thorough examination of prior law on

Although the main emphasis of the opinion in *DuPont* focused on the impression conveyed by the design of the label, the underlying justification for the court's conclusion lies in the defendant's active role in the development and distribution of the end product.

> It [the defendant] counseled and advised [Wilmington Chemical Corp.] concerning the proper formula to be used in the compound; it contacted the other component supplier. . . . It conducted quality control tests on the end product. It retained the right to make the ultimate decision as to the label on the product, and it dictated the appropriate advertising methods.[29]

DuPont maintained control over the product beyond the routine act of supplying the component—control to such an extent that it was indefensible to disclaim a duty of care by proposing ignorance of the dangerous condition of the repellent.[30] Unfortunately, the court gave only secondary importance to this theory of liability.

In the opinion of this writer, the court was presented with an opportunity to clarify and delineate the law of negligence as it relates to the component manufacturer, but, in the end, it succeeded only in confusing the issues. The critical question of whether liability is dependent upon both deceptive labeling and control over the total product picture or just one of them was left unresolved. Nor did the court indicate the amount of participation, if liability was based on the control factor alone, necessary to impose a duty on the manufacturer of the component. One redeeming facet of this legal ambiguity, however, is that component suppliers will share the uncertainty of the future application of the court's decision and require more stringent and definitive assurances of the safety of a finished product that acknowledges their contribution on the label.

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point would have revealed the prominent role which RESTATEMENT § 400 has taken in negligence actions. *See* note 17 *supra*.

29. E.I. DuPont de Nemours & Co. v. McCain, 414 F.2d 369, 373 (5th Cir. 1969).

30. *See* Bathory v. Procter & Gamble Distrib. Co., 306 F.2d 22 (6th Cir. 1962); Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693 (1946).