

Products Liability

COMMENTARY

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When Do Indemnity Claims for Product Liability Accrue?

Avoiding Traps for the Unwary

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Oftentimes, when a person is injured by an allegedly defective product, he will bring an action against all entities within the product's chain of distribution that are known and subject to suit. Under product liability law, privity between the injured party and the defendant generally is not required. All foreseeable plaintiffs can sue any commercial supplier.

After a plaintiff sues one supplier, that supplier may seek indemnification or contribution from another party in the chain of product distribution. For instance, a retailer may seek indemnity from wholesalers or distributors, wholesalers or distributors may seek indemnity from suppliers, suppliers may seek indemnity from manufacturers, and so on "up the stream."

In most states, a statute offers definite answers and predictable results as to when a defendant in a product liability case must bring an indemnity claim. However, in some states, such as New Jersey, common law dictates when the limitations period for indemnity claims accrues.

The timing for bringing an indemnity claim in product liability cases requires a more complicated analysis in states where statutory law does not provide a clear answer. As discussed below, commercial suppliers of products face a number of potential pitfalls and traps for the unwary with regard to when indemnity claims accrue in common-law states like New Jersey.

General Rule for Indemnity Accrual

In the absence of an expressed contractual indemnification provision, indemnity claims generally accrue when a judgment is rendered against the indemnitee, and the

plaintiff has recovered payment. See, e.g., *Mettinger v. Globe Slicing Mach. Co.*, 709 A.2d 779, 786-87 (N.J. 1998) (holding that the two-year limitations period imposed on a plaintiff's claims for personal injuries did not preclude a defendant's claim for contribution or indemnification; rather, the claim for indemnity accrued when the plaintiff recovered a judgment).

As a general matter, it is not until an indemnitee has made a payment that any arguable right to indemnification may arise. *McNally v. Providence Wash. Ins. Co.*, 698 A.2d 543, 548 (N.J. Super. Ct. App. Div. 1997) (stating that "a cause of action for indemnification has traditionally been considered to accrue when an indemnitee becomes responsible to pay on a claim") (citing, e.g., *McGlone v. Corbi*, 279 A.2d 812, 816-17 [1971]).

In fact, indemnity claims usually are considered "unknown, unarisen or unaccrued at the time of the original action" and may be considered premature if they are brought before the indemnitee has incurred any liability to the injured person. *Harley Davidson Motor Co. v. Advance Die Casting*, 696 A.2d 666, 669 (N.J. 1997) (quoting *Mystic Isle Dev. Corp. v. Perskie & Nehmad*, 662 A.2d 523 [N.J. 1995]); see also *Hooksett Sch. Dist. v. W.R. Grace & Co.*, 617 F. Supp 126 (D.N.H. 1984) (applying New Hampshire law and finding that an action brought before an indemnitee has been found liable to any person is premature unless there is an express or implied contract for indemnity to be determined judicially).

It follows, then, that in most instances a party will not be barred from raising an indemnity claim in a subsequent proceeding. See *Harley Davidson*, 696 A.2d at 670. But — and this is an important point — there are some

significant exceptions to the general rule, particularly in the context of product liability cases.

The 'Entire Controversy' Doctrine Under New Jersey Common Law

One example of how the limitations analysis is complicated in a state where deadlines are set as a matter of common law involves the "entire controversy" doctrine, a common-law principle recognized in New Jersey. The doctrine establishes when the statute of limitations accrues for certain types of contribution and indemnity claims. The New Jersey Supreme Court has declared that the entire-controversy doctrine "requires parties to a controversy before a court to assert all claims known to them that stem from the same transactional facts, even those against different parties." *Id.* (quoting *Joel v. Morrocco*, 688 A.2d 1036 [N.J. 1997]).

Thus, contrary to the general rule, a party in certain cases must join all causes, claims and defenses that "arise[] from a core set of related factual circumstances" in a single action. *DiTrollo v. Antiles*, 662 A.2d 494 (N.J. 1995). Otherwise, the failure to join a required claim or party results in claim preclusion. *Oliver v. Ambrose*, 705 A.2d 742 (N.J. 1998) (quoting *Cogdell v. Hosp. Ctr. at Orange*, 560 A.2d 1169 [N.J. 1989]). By avoiding fragmented, duplicative litigation, the doctrine serves to promote comprehensive and conclusive determinations, achieve fairness, and enhance judicial economy and efficiency. *Harley Davidson*, 696 A.2d at 670.

Common-Law Indemnity Claims in Product Liability Actions

Contrary to the general rule that any arguable right to indemnification arises only after an indemnitee has made a payment, New Jersey applies the entire-controversy doctrine to contribution and indemnification claims in product liability cases. The state Supreme Court has ruled that claims for common-law indemnification should "ordinarily be joined in the original action because of related issues of contribution." *Id.* at 673. Further, the *Harley Davidson* court identified "upstream" claims, which shift the risk up the distribution chain from vicariously liable parties to the primarily liable tortfeasor for common-law indemnification in product liability actions, as presumably subject to the entire-controversy doctrine. *Id.*; see also *McNally*, 698 A.2d at 548-49.

How the Entire-Controversy Doctrine Applies

In *Harley Davidson* a rider who was injured in motorcycle accident brought a product liability action against the manufacturer, alleging that the motorcycle's chain housing cover was defectively designed and manufactured.

Harley Davidson, 696 A.2d at 668. The court said the entire-controversy doctrine applies when:

- The parties to be joined have a "material interest" in the judicial outcome of the controversy, with "material interest" defined as "one that can affect or be affected by the judicial outcome of legal controversy";
- A jury in the second action would have to retry the same basic facts of the prior action, thereby requiring two trials where one would suffice; and
- The indemnitee knew of its claim at the time of the underlying action and provided adequate notice to the indemnitor before trial to immediately assume the defense and indemnity.

Id. at 671-72.

Applying these factors, the court first found that the indemnitor had a "material interest" in the outcome of the first trial because Harley Davidson alleged that it manufactured the cover involved in that action and that Harley was a third-party beneficiary of the liability insurance policy. *Id.* at 671. Second, a jury in the second action would have had to retry the same basic facts, namely, the cause of the plaintiff's accident. *Id.* Finally, the third party was given ample and repeated notice of the underlying tort claim. *Id.* at 672. Thus, the court found that the entire-controversy doctrine applied to the indemnity claim.

In another lawsuit a New Jersey appeals court ruled that the doctrine barred the manufacturer's indemnity claim against the supplier. See *Buck v. MacDonald*, 692 A.2d 108 (N.J. Super. Ct. App. Div. 1997) (holding that *under the entire-controversy doctrine, the first developer was barred from bringing an indemnification claim against the second developer by the first developer's failure to bring cross-claim against the second developer for indemnification in prior action against them where the first developer's current indemnity claim was based on the precise facts underlying original action*).

'Vouching-In' Procedure

Notably, the *Harley Davidson* court found that the manufacturer's indemnity claim satisfied the *entire-controversy doctrine* even though the manufacturer did not formally join the supplier as a party to the underlying product liability action. *Harley Davidson*, 696 A.2d at 672. Instead, prior to settlement and during the pendency of the first action, Harley Davidson used a "vouching-in" procedure to notify the supplier of its indemnity claim.

"Vouching-in" is a means by which one entity in the chain of distribution, usually the seller, notifies another entity,

usually the manufacturer, via correspondence (instead of formal pleadings and service of process) that the second party is obligated to assume the defense of and indemnify the first party against any judgment. The manufacturer is deemed to be bound by any determination of fact common to both the underlying action and the prospective action for indemnity regardless of whether it accepts the invitation to defend. See Cause of Action to Obtain Indemnity From Manufacturer or Supplier for Injury or Loss Caused by Defective Product, 8 COA2d 507, § 8 (2007).

“Vouching-in” is recognized at common law. See RESTATEMENT (SECOND) OF JUDGMENTS § 57. The Uniform Commercial Code also confers upon sellers of goods this procedure allowing the seller of an allegedly defective product to give notice to manufacturers of a pending tort action and call upon them to assume the defense. See U.C.C. § 2-607(5)(a); 8 COA2d 507, § 8 (2007). Additionally, some states have enacted product liability statutes that include a vouching-in provision. See, e.g., N.J. Stat. Ann. § 12A:2-607(5)(a); Ariz. Rev. Stat. § 12-684.

For instance, in New Jersey the *Harley Davidson* court found that vouching-in is a satisfactory substitute for party-joinder if the indemnitee gives the required notice pursuant to Section 12A:2-607(5)(a). *Harley Davidson* at 672. That statute provides:

(5) Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over:

(a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after reasonable receipt of the notice does come in and defend he is so bound.

The court then found that “Harley’s use of the ‘vouching-in’ procedure and notice to both courts satisfied the fairness requirements of the entire-controversy doctrine.” *Id.* at 673. Crucial to the court’s finding was that Harley gave sufficient, detailed notice of its indemnity claim and explicitly demanded that the supplier immediately assume the defense. *Id.* at 672.

Other courts also have addressed the entire-controversy doctrine and likewise have emphasized that if an indemnitee opts to “vouch-in” an indemnitor, notice must be timely, sufficiently detail the nature of the indemnitor’s obligation and offer to let the indemnitor take charge of the defense. *Litton Sys. v. Shaw’s Sales & Serv.*, 579 P.2d 48, 52 (Ariz. Ct. App. 1978) (stating that notice must “contain full and fair information concerning the pending

action and an unequivocal, certain and explicit demand to undertake the defense thereof”); but see *Whittle v. Timesavers Inc.*, 572 F. Supp 584 (W.D. Va. 1983), *rev’d on other grounds*, 749 F.2d 1103 (4th Cir. 1984), *on remand*, 614 F. Supp. 115 (W.D. Va. 1985) (finding under Virginia law the indemnitor had ample notice, even though indemnitee never formally demanded that indemnitor assume the indemnitee’s defense of the lawsuit, where indemnitor was not only defendant in cross-action for indemnity but also original defendant in injured plaintiff’s suit, and therefore was fully aware of all proceedings in the case); see also 8 COA2d 507, § 8 (2007).

Conclusion

Commercial suppliers need to be aware that accruals of indemnification or contribution claims vary from state to state. If a supplier is sued in New Jersey and believes that it has a right to indemnity or contribution, it must bring the claim immediately after it has been sued. Otherwise, if it waits until after a judgment is rendered against it, an indemnification or contribution claim will likely be barred by the entire-controversy doctrine.

Likewise, commercial suppliers should be mindful of whether the states in which they do business have enacted product liability laws with “vouching-in” provisions. States such as Arizona and New Jersey have statutorily recognized the validity of such procedures as a means of notifying a commercial supplier of an indemnity or contribution claim against it. If an indemnitee in those jurisdictions chooses to exercise such an option, it must make sure that it gives the indemnitor proper notice, sufficiently informs the indemnitor of its obligation and, to be safe, unequivocally demands that the indemnitor assume the defense. Otherwise, a court may find that its use of a “vouching-in” procedure was not a sufficient substitute for a third-party joinder, and the indemnity claim may be forever barred.

A commercial supplier must recognize the possibility that it may be liable even though it is not formally named as a party to the suit. Moreover, upon notification, an indemnitor must assume the defense of the suit as it may be bound by the issues litigated regardless of whether it chooses to defend itself. All these potential pitfalls and risks of exposure merit careful attention to the particular jurisdiction’s laws.

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