THREE COMMON ISSUES ARISING IN SUPPLIER RELATIONSHIPS

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Most product liability lawsuits involve multiple defendants. Often these defendants represent the various parties in the chain of product distribution: retailer, distributor, product manufacturer, part supplier, etc. Consider the following hypothetical:

> *The Franklin Case* — Acme Vending Company is a Texas company in the business of manufacturing vending machines. The electrical system in each of its vending machines includes four lamp sockets. Acme acquires these lamp sockets from a French company, Beauchamps Manufacturing. On October 1, 2004, Bob Franklin, a repairman for Carbo-Cola Bottling Company of Wisconsin, is severely burned while trying to repair a jammed Acme vending machine, which Acme had sold to Carbo-Cola's parent company in Delaware, CC Distributing, Inc. After inspecting the machine, Carbo-Cola discovers that one of the lamp sockets in the vending machine had a broken filament that allowed electricity to pass to the face of the socket. Carbo-Cola also discovers Acme may have disconnected the ground wire from the electrical system. Franklin sues CC Distributing and Acme in Wisconsin state court. In turn, Acme sues Beauchamps in the same court for indemnity.

In a situation like the Franklin case, a manufacturer should not assume that a supplier such as Beauchamps will ultimately pay any damages award. Indeed, a manufacturer may face a variety of obstacles before it can recover indemnity from a supplier.

This paper discusses three common issues[1] that may arise in the relationship between a manufacturer and a supplier:

a. *Jurisdiction* — If the plaintiff does not name the supplier as a defendant, can a manufacturer bring a third-party action naming a foreign supplier as an additional defendant in a products liability action in an American court?

b. *The Component Supplier and Bulk Supplier Doctrines* — Even assuming that the manufacturer can add the supplier as a defendant, is the supplier liable for a component part that the manufacturer has incorporated into a larger integrated product?

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[1]The purpose of this paper is principally to alert readers to the existence of these issues. By design, this paper is not an exhaustive survey of these issues. Some jurisdictions will analyze these issues differently from other jurisdictions.

c. *Indemnity* — Under what circumstances is the supplier responsible for indemnifying the manufacturer?

To put it in slightly different terms, these issues raise the questions: Who will come to the party?, Who is responsible?, and Who pays?

A. Jurisdiction Over Foreign Suppliers: Who Will Come to the Party?

Even though a manufacturer does a significant amount of business with a foreign supplier, the manufacturer may not necessarily be able to join the supplier as a defendant in a products liability action arising from the supplier's product. Under the Due Process Clause of the United States Constitution, a court may exercise "jurisdiction" over a defendant only if that defendant has established minimum contacts with the state in which the action is pending. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475-76 (1985). Generally, the "minimum contacts" element of due process requires that the defendant have a legitimate reason to anticipate that it may be sued in the forum state. *Id.*

In a products liability context, a defendant (such as a foreign supplier) has a legitimate reason to anticipate that it may be sued in a state if it sells or delivers its products into the stream of commerce with the reasonable expectation that its products will enter that state. This is known as the "stream of commerce" doctrine. *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102, 110 (1987).[2] *Asahi* was a plurality opinion, with no clear majority emerging from two slightly different views. Justice Brennan concluded that a nonresident defendant may submit to the jurisdiction of a forum simply by placing a product into the stream of commerce. *Asahi,* 480 U.S. at 117 (Brennan, J.). Justice O'Connor disagreed, concluding that a nonresident defendant must express "an intent or purpose to serve the market in the forum." *Id.* at 111-12 (O'Connor, J.).

Since *Asahi,* the United States Supreme Court has not specifically chosen between Justice Brennan's view or Justice O'Connor's view. Some federal and state courts have adopted Justice Brennan's view of the stream of commerce doctrine. *See, e.g., Barone v. Rich Bros. Interstate Display Fireworks,* 25 F.3d 610 (8th Cir. 1994); *Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415, 419 (5th Cir. 1993); *Dehmlow v. Austin Fireworks,* 963 F.2d 941, 947 (7th Cir. 1992); *Kopke v. A. Hartrodt S.R.L.*, 245 Wis. 2d 396, 629 N.W.2d 662, 674 (2001).

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[2]There are two kinds of jurisdiction: specific and general. A court may exercise specific jurisdiction over a defendant when the plaintiff's cause of action arises from or is related to the defendant's contacts with the forum state. *Rudzewicz,* 471 U.S. at 476. The stream of commerce doctrine is a type of specific jurisdiction. By contrast, a court may exercise general jurisdiction over a defendant when the defendant has formed continuous and systematic contacts with the forum state. *Rudzewicz,* 471 U.S. at 476. This paper will not specifically address the elements of general jurisdiction.

Even under Justice Brennan's view, courts have required evidence that the supplier have actually directed a "stream" of products toward the forum state, and not merely a "trickle" or "dribble." *Bedrejo v. Triple E Canada, Ltd.*, 295 Mont. 430, 984 P.2d 739, 743 (1999); *CMMC v. Salinas*, 929 S.W.2d 435, 438 (Tex. 1996). *Cf. Hershey Pasta Group v. Vitelli-Elvea Co.*, 921 F. Supp. 1344, 1348-49 (M.D. Pa. 1996) (sales of more than 100,000 cases of pasta in Pennsylvania were sufficient); *Bridgestone Corp. v. Superior Court*, 99 Cal. App. 4th 767, 121 Cal. Rptr. 2d 673, 680 (2d Dist. 2002) (sales of 25,000 tires per month in California were sufficient). *But cf. KSTP-FM, LLC v. Specialized Communications, Inc.*, 602 N.W.2d 919, 924 (Minn. App. 1999) ("Personal jurisdiction does not generally exist when a nonresident defendant makes a single, isolated sale of its goods in the forum state, especially where the sale occurs through an intermediary distributor.").

Other courts have favored Justice O'Connor's stricter view of the doctrine. *See, e.g., Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 941 (4th Cir. 1994); *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 683 (1st Cir. 1992); *Boone v. Oy Partek AB*, 724 A.2d 1150, 1159 & n.4 (Del. Super. Ct. 1997). Under Justice O'Connor's view, a court may not exercise jurisdiction over a supplier simply because the supplier placed a product into the stream of commerce. To exercise jurisdiction over a nonresident or foreign supplier, a court must determine that the supplier has purposefully taken advantage of the market in the forum state, such as by "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Asahi*, 480 U.S. at 111-12 (O'Connor, J.). More specifically:

1. *Designing a Product for the Market in the Forum*

A supplier may purposefully take advantage of the market in a state by designing its product specifically for use in the market in that state. *See Mendelson v. Delaware River & Bay Auth.*, 56 F. Supp. 2d 436, 439 (D. Del. 1999) (holding that a Finnish company was subject to jurisdiction in Delaware where it manufactured a set of custom-made fire doors specifically for use in a Delaware ferry). However, "[m]erely providing standard sizes and colors according to a customer's request is insufficient to create an inference that the product is custom-made or designed for a specific market." *Dee-K Enters., Inc. v. Heveafil Sdn Bhd*, 982 F. Supp. 1138, 1147 (E.D. Va. 1997).

The fact that a foreign supplier has designed a product specifically for use in the United States may reveal a specific intent to serve the market in each state in the United States. *See Tobin v. Astra Pharmaceutical Prods., Inc.*, 993 F.2d 528, 544 (6th Cir. 1993) (compliance with FDA requirements); *Kaplan v. DaimlerChrysler, A.G.*, 99 F. Supp. 2d 1348, 1352 (M.D. Fla. 2000) (compliance with US environmental regulations); *Ho Wah Genting Kintron Sdn Bhd v. Leviton Mfg. Co.*, 163 S.W.3d 120, 131 (Tex. App.—San Antonio 2005, no pet.) (compliance with UL electrical standards). *But see Brown v. Geha-*

Werke GmbH, 69 F. Supp. 2d 770, 777 (D.S.C. 1999) (ruling that the fact that a foreign supplier designed its product for use by American military agencies was "a far cry from designing a product for the South Carolina market").

2. *Advertising in the Forum*

A supplier may purposefully take advantage of the market in a state by advertising its products in that state. *See Chisholm v. UHP Projects, Inc.*, 1 F. Supp. 2d 581, 586 (E.D. Va. 1998) ("Marketing and advertising within the forum state may be examples of sufficient affirmative acts toward a state."); *Michiana Easy Livin' Country, Inc. v. Holten*, No. 04-0016, 2005 WL 1252268 (Tex. May 27, 2005) ("[A] nonresident that directs marketing efforts to Texas in the hope of soliciting sales is subject to suit here in disputes arising from that business."); *see also Jones v. Tread Rubber Corp.*, 199 F. Supp. 2d 539, 548 (S.D. Miss. 2002); *Kaplan*, 99 F. Supp. 2d at 1352. *But see Bedrejo*, 984 P.2d at 742 (holding that the mere fact that a supplier places advertisements in nationally circulated magazines does not establish that the supplier has formed minimum contacts with the forum state).

3. *Establishing Channels for Providing Advice*

A supplier may purposefully take advantage of the market in a state by establishing channels for providing regular advice to customers in the state. The activities that will support jurisdiction on this basis must be qualitatively significant. For example, a supplier that maintains an office in a state may have formed sufficient contacts to ensure that it is subject to jurisdiction in that state. *See Stroman Realty, Inc. v. Antt*, 20 F. Supp. 2d 1050, 1053 (S.D. Tex. 1998); *Ho Wah Genting Kintron Sdn Bhd*, 163 S.W.3d at 131-32. However, the mere fact that a supplier has a "1-800" telephone number in the United States is insufficient to show that it has purposefully taken advantage of the market in a state. *Unicomp, Inc. v. Harcros Pigments, Inc.*, 994 F. Supp. 24, 26 (D. Me. 1998).

If a supplier has frequently sent representatives on business trips to customers or potential customers in a state, the supplier may have formed sufficient contacts to ensure that it is subject to jurisdiction in that state. *See W.R. Grace & Co. v. CSR Ltd.*, 279 Ill. App. 3d 1043, 666 N.E.2d 8, 11 (3d Dist. 1996). However, a supplier does not subject itself to jurisdiction in a state simply by sending representatives to a trade conference in that state. *See Black & Decker, Inc. v. Shanghai Xing Te Hao Indus. Co.*, No. 02 C 4615, 2003 Wl 21383325, *2 (N.D. Ill. June 12, 2003); *Commonwealth v. TAP Pharmaceutical Prods., Inc.*, 868 A.2d 624, 630 (Pa. Commw. Ct. 2005).

An "interactive" website, such as a website in which customers may order goods or services directly from the supplier, may subject the supplier to jurisdiction in any state where customers may access the website. *See Carefirst of Md., Inc. v. Carefirst Pregnancy Cen., Inc.*, 334 F.3d 390, 399 (4th Cir. 2003); *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp.

1119, 1124 (W.D. Pa. 1997); *cf. ALS Scan., Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002) (holding that a court may exercise jurisdiction over a defendant that has directed electronic activity into a state with the specific intent to engage in business within that state).

However, a "passive" website that merely provides information about a supplier and its products is not a sufficient contact that will enable a court to exercise jurisdiction over the supplier. *See Jennings v. AC Hydraulic A/S*, 383 F.3d 546, 549-50 (7th Cir. 2004); *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336-67 (5th Cir. 1999); *Brown*, 69 F. Supp. 2d at 777; *Juelich v. Yamazaki Mazak Optonics Corp.*, 670 N.W.2d 11, 18 (Minn. App. 2003); *Bedrejo*, 984 P.2d at 743; *see also Exito Electronics Co. v. Trejo*, 166 S.W.3d 839, 857-58 (Tex. App.—Corpus Christi 2005, no pet.) ("At one end of the scale are websites clearly used for transacting business over the Internet, which may be sufficient to establish minimum contacts with a state. . . . On the other end of the spectrum are 'passive' websites that are used only for advertising over the Internet.").

4. *Marketing in the Forum*

A supplier may purposefully take advantage of the market in a state by shipping its products directly to retailers in the state. *See Fleming v. Standard Furniture Mfg.*, 769 So. 2d 643, 646 (La. App. 4th Cir. 2000); *Ho Wah Genting Kintron Sdn Bhd*, 163 S.W.3d at 131; *Kopke*, 629 N.W.2d at 675; *see also Cassiar Mining Corp. v. Superior Court*, 66 Cal. App. 4th 550, 78 Cal. Rptr. 2d 167, 170 n.1 (4th Dist. 1998) (noting that direct sales of product to the forum state will satisfy the requirements for jurisdiction under the stream of commerce doctrine).

Additionally, a supplier may purposefully take advantage of the market in a state by shipping its products to distributors whom it may reasonably expect to distribute its products within the state. *See Stanton v. St. Jude Med., Inc.*, 340 F.3d 690, 694 (8th Cir. 2003) ("Personal jurisdiction may be found where a seller uses a distribution network to deliver its products into the stream of commerce with the expectation that the products will be purchased by consumers in the forum state."); *Boone*, 724 A.2d at 1160 n.5 (noting that "a distributorship agreement between the defendant and the forum is sufficient to show the defendant had minimum contacts with the forum State."); *see also Clune v. Alimak AB*, 233 F.3d 538, 543 (8th Cir. 2000). *But see Carretti v. Italpast*, 101 Cal. App. 4th 1236, 125 Cal. Rptr. 2d 126, 138 (4th Dist. 2002) (holding that "random sales" to a "distributor who happens to have an office in California" do not establish an intent to serve the market in California); *Frankenfeld v. Crompton Corp.*, 697 N.W.2d 378, 386 (S.D. 2005) (holding that a supplier, which furnished raw materials to a manufacturer in Tennessee, had no reason to expect that the final integrated product would make its way to South Dakota).

When a supplier sells to nationwide retailers and distributors such as Wal-Mart or Sears, the supplier may reasonably expect that its products will reach every state in the United States. *See Tobin*, 993 F.2d at 542-44 (noting that a decision to market through national distributors evidences an intent to market in "each and every state"); *Unicomp, Inc.*, 994 F. Supp. at 27 ("By arranging to have a distributor, if not several of them, whose sales territory will include the forum state, a manufacturer evinces at the very least an *intent* to serve the market in the forum state.") (emphasis in original); *see also National Union Fire Ins. Co. v. Aerohawk Aviation, Inc.*, 259 F. Supp. 2d 1096, 1106 (D. Idaho 2003); *Andersen v. Sportmart, Inc.*, 57 F. Supp. 2d 651, 660 (N.D. Ind. 1999); *Estes v. Midwest Prods., Inc.*, 24 F. Supp. 2d 621, 630 (S.D.W.Va. 1998); *Wright v. American Home Prods.*, 768 A.2d 518, 532 (Del. Super. Ct. 2000); *Boone*, 724 A.2d at 1160; *A.O. Smith Corp. v. American Alternative Ins. Corp.*, 778 So. 2d 615, 619 (La. App. 4th Cir. 2000). *But see Ex parte Alloy Wheels Int'l, Ltd.*, 882 So. 2d 819, 827 (Ala. 2003) (holding that an intent to serve the entire American market does not in itself subject a foreign supplier to jurisdiction in Alabama).

Some suppliers have tried to shield themselves against liability in the United States by insisting that they will only sell their products under FOB shipping terms to a foreign port. Typically, however, the fact that a supplier sells its products FOB in a foreign port does not insulate the supplier from jurisdiction in an American court. *See A.V. Imports, Inc. v. Col de Fratta, S.p.A.*, 171 F. Supp. 2d 369, 373 (D.N.J. 2001); *Kaplan*, 99 F. Supp. 2d at 1352; *Byron Nelson Co. v. Orchard Mgmt. Corp.*, 95 Wash. App. 462, 975 P.2d 555, 558-59 (1999).

The test is not whether the supplier made direct sales or shipments into the forum state, but rather whether the defendant may reasonably expect that its products may form the basis for a lawsuit in the forum state. *See Renner v. Lanard Toys Ltd.*, 33 F.3d 277, 282 (3d Cir. 1994) (noting that "the absence of direct sales or shipments into the forum is not dispositive"); *see also Ho Wah Genting Kintron Sdn Bhd*, 163 S.W.3d at 131. *But cf. Smith v. Hobby Lobby Stores, Inc.*, 968 F. Supp. 1356, 1364 (W.D. Ark. 1997) (concluding that the mere fact that a foreign supplier sold to a national retailer such as Hobby Lobby was insufficient to confer jurisdiction in Arkansas where the retailer conveyed title to its products in Hong Kong and exercised no control over the locations to which Hobby Lobby shipped its products).

If a manufacturer like Acme desires to recover indemnity from its suppliers for any defects in their products, then the manufacturer may need to take affirmative steps to ensure that its suppliers are subject to jurisdiction in American courts. For example:

a. *It may wish to ask its suppliers to sign a contractual consent to jurisdiction.* The minimum contacts element of due process means that a defendant must have a legitimate reason to expect that it may be subject to suit in the forum state. If a supplier has signed a consent form confirming that he is subject to

suit in the United States, then the supplier cannot convincingly claim that it lacked a legitimate reason to expect that it may be subject to suit in the United States. Depending on the circumstances, such a consent might read: "Supplier recognizes that Manufacturer distributes its products in each and every state of the United States. Accordingly, Supplier expressly agrees that it is subject to jurisdiction in each and every federal and state court in the United States to indemnify and defend Manufacturer against any claims arising from or relating to Supplier's product." The manufacturer might include such a consent either (i) in the terms and conditions attached with its purchase orders or (ii) in the body of any written indemnity agreement with its suppliers.[3]

b. *Even if its suppliers are unwilling to sign a contractual consent to jurisdiction, the manufacturer should consider advising its suppliers of the extent of its distribution network.* A supplier is subject to suit in a state if it has reason to expect that its products will end up in that state. Thus, in purchase orders and shipping documents, a manufacturer may wish to include a statement like the following: "By signing and returning this document, Supplier is aware and acknowledges that Manufacturer will distribute and sell the products identified in this document (either in their unaltered form or as integrated into another product) in several states in the United States, including [names of states]."

c. *If commercially practicable, the manufacturer should insist on shipping terms in which it receives title to its suppliers' products in the United States, rather than in a foreign port.* Although a manufacturer may have other commercial reasons for agreeing to receive title FOB in a foreign port, a manufacturer may have a better case for jurisdiction over foreign suppliers if it can require its suppliers to ship their products (preferably CIF) directly into the United States.

d. *If commercially practicable, the manufacturer should solicit the active advice and assistance of its suppliers.* A manufacturer may want to consider (a) using custom materials that require the involvement of its suppliers in the design process, (b) asking its suppliers to arrange for representatives to travel to the United States to provide technical assistance at the manufacturer's facilities, (c) requesting that its suppliers add interactive features to their websites to permit customers to interact with the suppliers, and (d) maintaining a database

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[3]Some manufacturers insist that their suppliers agree to a formal choice of forum clause—*e.g.*, "Supplier agrees that the federal districts courts in Madison, Wisconsin, will have jurisdiction over any dispute arising from its relationship with Manufacturer, including but not limited to any claim by Manufacturer for indemnity." Such a choice of forum clause, however, may complicate a manufacturer's ability to join a supplier as a co-defendant in an ongoing lawsuit. For example, a supplier under the above clause may argue that the manufacturer can only sue the supplier in Madison and may not join the supplier as a co-defendant in any forum other than Madison.

to keep all correspondence describing the distribution of its suppliers' products within the United States.

B. The Bulk Supplier and Component Supplier Doctrines: Who is Responsible?

Even assuming that a manufacturer is successful in securing jurisdiction over a supplier, the mere fact that a lawsuit arises from an alleged defect in a supplier's product does not necessarily mean that the supplier is responsible for a plaintiff's injuries. Most jurisdictions in the United States have adopted the "bulk supplier" and the "component supplier" doctrines. Generally, these doctrines hold that a supplier is responsible only for manufacturing defects, and not design or marketing defects, arising from raw materials or component parts that the supplier has furnished to a manufacturer for use in a larger integrated product.[4]

1. *The Bulk Supplier Doctrine*

The bulk supplier doctrine applies where a supplier sells a product in bulk to a purchaser that uses the bulk product to fabricate another product for sale to a consumer. *Adams v. Union Carbide Corp.*, 737 F.2d 1453 (6th Cir.), *cert. denied*, 469 U.S. 1062 (1984). The doctrine typically arises in cases involving raw materials, such as chemicals, sand or fibers, that a purchaser mixes with other materials to fabricate a product for sale. *See In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 887 F. Supp. 1463, 1466 (N.D. Ala. 1995); *White v. Weiner*, 386 Pa. Super. 111, 562 A.2d 378, 385 (1989); *Haase v. Badger Mining Corp.*, 266 Wis. 2d 970, 669 N.W.2d 737, 746 (Ct. App. 2003).

Under the bulk supplier doctrine, the supplier owes no duty to warn the ultimate consumer of any hazards that may result from integrating the bulk product or raw materials into an intermediate purchaser's product. *See House v. Armour of Am., Inc.*, 886 P.2d 542, 554-55 (Utah Ct. App. 1994) (holding that a "bulk supplier of raw materials which are not themselves inherently dangerous has no duty to warn ultimate users of the manufactured product"). This is true even if the supplier had knowledge of the intermediate purchaser's intended use and could have foreseen the risk. The doctrine is premised on the policy that imposing a duty on suppliers to foresee and warn against all uses of their product would be "crushingly burdensome." *Hoffman v. Houghton Chem. Corp.*, 434 Mass. 624, 751 N.E.2d 848, 857 (2001).

The fact that a bulk supplier may have reasonably foreseen the potential risks is irrelevant. Requiring the supplier to warn the ultimate consumer of all "foreseeable" risks

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[4]Although most jurisdictions treat them as separate and independent doctrines, the Restatement has incorporated the bulk supplier doctrine into its section on "component parts." RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5 cmt. a (2000).

resulting from the integration of bulk materials into a finished product would "force the supplier to retain an expert in every finished product manufacturer's line of business and second-guess the finished product manufacturer whenever any of its employees received any information about any potential problems." *Kealoha v. E.I. du Pont de Nemours & Co.*, 844 F. Supp. 590, 594 (D. Haw. 1994), *aff'd*, 82 F.3d 894 (9th Cir. 1996). *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5 cmt. c (2000) ("To impose a duty to warn would require the seller to develop expertise regarding a multitude of different end-products and to investigate the actual use of raw materials by manufacturers over whom the supplier has no control.").[5]

Indeed, the more basic the product, the more impossible it would be to require a supplier to warn the ultimate consumer. "Suppliers of versatile materials like chains, valves, sand gravel, etc., cannot be expected to become experts in the infinite number of finished products that might conceivably incorporate their multi-use raw materials or components." *In re TMJ Implants Prod. Liab. Litig.*, 97 F.3d 1050, 1057 (8th Cir. 1996). *See also Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 335 (5th Cir. 1998). Thus, courts have declined to impose duties on suppliers of various types of raw materials:

- A bulk supplier of raw fibers used in the manufacture of bullet-proof vests had no duty to warn the ultimate user about the level of protection provided by the vests, even though the supplier knew the fibers might be used for the purpose of manufacturing the vests. *House*, 886 P.2d at 554.

- A Teflon supplier had no duty to warn consumers of the dangers that may result from the use of Teflon in temperomandibular joint implants, as Teflon was not inherently dangerous and was made dangerous only by its incorporation into another's product. *Kealoha v. E.I. DuPont de Nemours & Co.*, 82 F.3d 894 (9th Cir. 1996).

- A silicone supplier had no duty to warn breast implant recipients against the hazards of using silicone in medical devices. *Artiglio v. General Elec. Co.*, 61 Cal. App. 4th 830, 71 Cal. Rptr. 2d 817 (1998).

Cases involving bulk or raw materials commonly raise only a marketing defect issue—*i.e.*, the issue whether the supplier failed to warn about any known hazards in the materials. Nonetheless, a bulk product supplier is usually no more liable to the ultimate consumer on a design defect claim than on a marketing defect claim. "[A] basic raw material

[5]Moreover, requiring the supplier to warn of any dangers arising from the integration of its bulk materials into another's product is impractical. The supplier typically "has no package on which to relate his warning." *Munoz v. Gulf Oil Co.*, 732 S.W.2d 62, 66 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

cannot be defectively designed." *Haase*, 669 N.W.2d at 746. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5 cmt. c (2000) ("Inappropriate decisions regarding the use of such materials are not attributable to the supplier of the raw materials but rather to the fabricator that puts them to improper use. . . . Accordingly, raw materials sellers are not subject to liability for harm caused by defective design of the end-product.").

Of course, there are exceptions to the general rule. First, a supplier may be liable to the ultimate consumer if the supplier exercised "control" over the design of the end-product. In the Restatement, the element of "control" is rephrased as "substantial participation." RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5(b) (2000). Thus, a supplier may be liable if it "substantially participates" in the integration of raw materials or bulk products into another product. *Cf. Walker v. Stauffer Chemical Corp.*, 19 Cal. App. 3d 669, 674, 96 Cal. Rptr. 803 (1971) (holding, in a case where the plaintiff was injured by an explosion of a can of drain cleaner which contained sulfuric acid, that the supplier did not have a duty to the plaintiff because, among other things, the supplier did not have "control over the subsequent compounding, packaging or marketing" of the drain cleaner); *see Buonanno v. Colmar Belting Co.*, 733 A.2d 712, 716 (R.I. 1999).

Second, a supplier remains liable to the ultimate consumer if its bulk product or raw material is "defective in itself." RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5(a) (2000). A defective product is *not* one that is inherently dangerous by nature, such as benzene; rather, it is a product that is rendered dangerous by a manufacturing defect—or in the case of raw materials, by spoilage or contamination. *See id.* § 5 cmt. b; *see also* RESTATEMENT (SECOND) OF TORTS § 402A cmt. p (1965) (supplier who sells raw beans contaminated with arsenic or some other poison should not be relieved of liability).

Third, with respect to inherently dangerous raw materials such as benzene, a supplier has a duty to warn of the known hazards in its inherently hazardous materials; however, it may satisfy its duty by providing warnings to the *intermediate* purchaser, who then has the responsibility of conveying the warnings to subsequent purchasers or the ultimate consumer. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5 cmt. b (2000) ("The component seller is required to provide instructions and warnings regarding risks associated with the use of the component product"); *see also Groll v. Shell Oil Co.*, 148 Cal. App.3d 444, 449, 196 Cal. Rptr. 52 (1983); *Perez v. Radar Realty*, 7 Misc. 3d 1015(A), 2005 WL 946710, *4 n.2 (N.Y. Sup. Ct. April 5, 2005); *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 172 (Tex. 2004).

If a supplier of inherently dangerous raw materials fails to provide adequate warnings to the intermediate purchaser, then the supplier may be liable to the ultimate consumer in a subsequent products liability action. *See Gray v. Badger Mining Corp.*, 676 N.W.2d 268, 280 (Minn. 2004) ("It would not be reasonable for a bulk supplier to rely on the employer to warn its employees where the bulk supplier has not provided an adequate warning to the

employer."); *cf. Union Carbide Corp. v. Kavanaugh*, 879 So. 2d 42, 45 (Fla. Ct. App. 2004) (holding that a bulk supplier was liable to the ultimate consumer where "it did not fully disclose [to its intermediate purchaser] the magnitude of the hazards then known to exist").[6]

In cases involving inherently dangerous raw materials, the bulk supplier may bear the burden of proving that the intermediate seller is "adequately trained and warned, familiar with the propensities of the product and its safe use, and capable of passing its knowledge on to users in a warning." *Alm v. Aluminum Co. of America*, 717 S.W.2d 588, 591-92 (Tex. 1986). *See Gray v. Derderian*, 365 F. Supp. 2d 218, 239 (D.R.I. 2005); *Hegna v. E.I. du Pont de Nemours & Co.*, 825 F. Supp. 880, 884 (D. Minn. 1993), *aff'd*, 27 F.3d 571 (8th Cir. 1994); *Jones v. Hittle Serv., Inc.*, 219 Kan. 627, 549 P.2d 1383 (1976); *Tilton v. Union Oil Co.*, 64 Mass. App. Ct. 115, 831 N.E.2d 391, 395 (2005); *see also Fisher v. Professional Compounding Centers of Am., Inc.*, 311 F. Supp. 2d 1008, 1020 (D. Nev. 2004) (holding that a supplier of inherently dangerous raw materials must "take reasonable affirmative steps" to ensure that it is selling to a sophisticated purchaser that is capable of passing appropriate warnings to end users).

If the hazards of a material are already known to the intermediate purchaser, then the supplier may not have a duty to warn about these known hazards. *See Ditto v. Monsanto Co.*, 867 F. Supp. 585 (N.D. Ohio 1993) (where employee of electric transformer servicing company allegedly contracted leukemia from exposure to PCB-containing fluids in electrical transformers, and employer was well aware of the hazards of PCBs, supplier of PCB dielectric fluids did not have a duty to warn worker of hazards of the PCBs); *see also Wood v. Phillips Petroleum Co.*, 119 S.W.3d 870, 874 (Tex. App.—Houston [14th Dist.] Sept. 9, 2003, pet. denied).

2. *Component Supplier Doctrine*

The component supplier doctrine is closely related to the bulk supplier doctrine. The Restatement defines the component supplier doctrine as follows:

> One engaged in the business of selling or otherwise distributing product components who sells or distributes a component is subject to liability for harm to persons or property caused by a product into which the component is integrated if: (a) the component is defective in itself, as defined in this

[6]Whether the supplier owes a duty to warn the intermediate purchaser may depend on whether the supplier knows, or should have known, of the inherently dangerous risks in its bulk product. *See, e.g., Stuckey v. Northern Propane Gas Co.*, 874 F.2d 1563, 1568 (11th Cir. 1989) (propane gas supplier had knowledge of ultimate consumer's use of gas, and therefore had a duty to warn that the odorant in its gas could fade); *Andrulonis v. U.S.*, 924 F.2d 1210 (2d Cir. 1991) (government that supplied sample rabies researcher knew that research would put the virus into aerosol form and should have known about the risk of aerosolizing the virus, so had a duty to give warnings about the hazard).

> Chapter, and the defect causes the harm; or (b)(1) the seller or distributor of the component substantially participates in the integration of the component into the design of the product; and (b)(2) the integration of the component causes the product to be defective, as defined in this Chapter; and (b)(3) the defect in the product causes the harm.

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5 (2000).

Under the component supplier doctrine, a component part supplier generally has no duty to warn of hazards that may arise from the integration of its part into a larger system or product. *See Bowman v. Parker Hannifin Corp.*, 2005 WL 1607302, *5 (D.N.J. July 6, 2005). Likewise, a component supplier generally has no liability for any design flaws arising from the integration of its component into a larger product. *See Bostrom Seating, Inc. v. Crane Carrier Co.*, 140 S.W.3d 681, 683 (Tex. 2004) ("It is not proper to extend the doctrine of strict liability to the supplier of a component part used in a product according to the design of a product's manufacturer when the injuries are caused by the design of the product itself, rather than by a defect in the component."); *Toshiba Int'l Corp. v. Henry*, 152 S.W.3d 774, 779 (Tex. App.—Texarkana 2004, no pet. h.) ("If the component part manufacturer does not take part in the design or assembly of the final system or product, it is not liable for defects in the final product if the component part itself is not defective.").[7]

The policy underlying the component supplier doctrine, as with the bulk supplier doctrine, is that a component supplier cannot be expected to have meaningful knowledge about the way in which its component part may be integrated into someone else's system or product. Requiring such knowledge would be prohibitively expensive, particularly if the component part—such as a switch or lamp socket—might be used in thousands of different applications. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5 cmt. a (2000). Products liability law cannot reasonably expect a component part supplier to hire personnel, including experts, to figure out all the different ways that purchasers might use its component parts—and to develop warnings against those uses. *See Frazier v. Materials Transp. Co.*, 609 F. Supp. 933, 935 (D.Pa.1985) ("Suppliers of component parts, no matter how small or insignificant, should not be held to inquire into their ultimate use and foresee all possible applications in order to satisfy a duty to warn of potential danger associated with the finished product."); *see also Searls v. Doe*, 505 N.E.2d 287, 289 (Ohio App. 1986).

Moreover, requiring component suppliers to give warnings about finished products would be unfair because it would make suppliers responsible for products that they had no

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[7]As a specific example, a component part supplier "is not liable for failing to incorporate a safety feature that is peculiar to the specific adaptation for which another utilizes the incomplete product. . . . A safety feature important for one adaptation may be wholly unnecessary or inappropriate for a different adaptation." *Toshiba Int'l Corp.,* 152 S.W.3d at 782.

role in developing and over which they have no control. *See, e.g., Crossfield v. Quality Control Equipment Co.*, 1 F.3d 701, 704 (8th Cir. 1993).

As with the bulk supplier doctrine, there are several exceptions to the component part doctrine. The first major exception provides that a component part supplier may be liable to an ultimate consumer if the component part *itself* is defective. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5(a) (2000). In other words, if a supplier sells a component that itself contains an unreasonably dangerous manufacturing defect, and the component is incorporated into a product that injures a user, then the component part supplier may be liable for the injury resulting from its unreasonably dangerous component part. *See Burbage v. Boiler Eng'g & Supply Co.*, 249 A.2d 563 (Pa. 1969) (defective replacement valve in boiler); *Willowbrook Foods, Inc. v. Grinnell Corp.*, 147 S.W.3d 492, 505-06 (Tex. App.—San Antonio 2004, no pet. h.) (damaged wire bundles and copper sheathing in a turkey fryer).

This exception only applies when the component part is itself defective. A component part supplier owes no duty to the ultimate consumer when another party integrates a non-defective component part into another product in a way that makes the ultimate product unreasonably dangerous. *See Crossfield*, 1 F.3d at 704 ("[T]he dangerousness of this system came from the design of the machine, not from the chain alone. . . . [T]he primary duty was owed by the designer of the machine, not the supplier of only one component part, in itself a non-defective element."). As the Restatement explains: "[W]hen a sophisticated buyer integrates a component into another product, the component seller owes no duty to warn either the immediate buyer or ultimate consumers of dangers arising because the component is unsuited for the special purpose to which the buyer puts it." RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5 cmt. b (2000).

A second exception to the component supplier doctrine is the "substantial participation" rule. A component supplier who "substantially participates" in integrating a component part into another's product may be liable to the end user if the component causes the product to become defective in a way that injures the user. *Id.* § 5(b). This exception reflects case law holding that a component supplier is not liable for hazards resulting from the integration of its component into another's product unless the supplier exercised some "control" over the integration. *See, e.g., Trevino v. Yamaha Motor Corp.*, 882 F.2d 182, 184-86 (5th Cir. 1989) (supplier that lacked control over design of finished product was not liable); *see also Toshiba Int'l Corp.*, 152 S.W.3d at 779.[8]

[8]The integration of the component itself must be the cause of the harm: "[t]he mere fact that the component seller substantially participates in the integration of the component into the design of a product does not subject the seller to liability unless the integration causes the product to be defective and the resulting defect causes the plaintiff's harm." RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5 cmt. f (2000).

The Restatement attempts to describe what may constitute "substantial participation," stating that this may be shown if "[t]he manufacturer or assembler of the integrated product . . . invite[s] the component seller to design a component that will perform specifically as part of the integrated product or to assist in modifying the design of the integrated product to accept the seller's component," or if the seller plays "a substantial role in deciding which component best serves the requirements of the integrated product." RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5 cmt. e (2000). By comparison, the Restatement also describes the kind of conduct that does *not* constitute substantial participation:

> A component seller who simply designs a component to its buyer's specifications, and does not substantially participate in the integration of the component into the design of the product, is not liable . . . . Moreover, providing mechanical or technical services or advice concerning a component part does not, by itself, constitute substantial participation that would subject the component supplier to liability.

Id.

As the Restatement explains, recommendations and technical support are not substantial participation. The Restatement specifically illustrates the distinction between substantial participation and insubstantial participation:

> ABC Chemical Co. sells plastic resins in bulk. XYZ Hot Water Heater Manufacturing Co. informs ABC that XYZ wishes to purchase resin for use in making its hot-water heaters and specifies resin that can withstand heat up to 212º Fahrenheit. ABC recommends that XYZ use a certain type of resin which, in ABC's testing under specified laboratory conditions, including thickness of one-quarter inch or more, was shown to be capable of withstanding temperatures in excess of 212º Fahrenheit. ABC explains these conditions to XYZ. ABC also provides XYZ with technical support and general processing advice. XYZ purchases the recommended resin from ABC and decides upon design and processing parameters, molds the resin into a plastic part, and combines the part with other materials and parts to produce hot-water heaters. XYZ tests its hot-water heaters for safety and durability and formulates instructions and warnings to accompany them. An XYZ hot-water heater subsequently fails because the plastic walls specified by its design, one-eighth inch thick, are too thin to withstand the stress imposed by its normal operating temperatures, resulting in an injury to a homeowner. ABC is not liable to the homeowner. The resin sold by ABC was not in itself defective. ABC did not substantially participate in the design, manufacture or assembly of the hot-water heater.

Id. illustration 6.

Notwithstanding the component supplier doctrine, some courts will occasionally find a way to impose liability where the policies underlying the component supplier doctrine are not strongly implicated. For instance, a few courts have imposed liability on component part sellers—even in the absence of substantial participation—if the component part has only one conceivable use. *See, e.g., Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 117-19 (3d Cir. 1992) (finding a manufacturer of a replacement pool liner liable for failing to attach warning labels advising of the dangers of diving into a shallow pool because a pool liner has only a single use and the manufacturer could have foreseen the danger of failing to attach warning labels), *cert. denied*, 507 U.S. 1005 (1993).

In the Franklin Case, Beauchamps is a component supplier: its lamp sockets are components that Acme integrated into the design of its vending machines. In determining whether Beauchamps will owe any responsibility to Franklin, a court may consider:

a. *Did the lamp socket with the broken filament have a manufacturing or design defect?* If the broken filament existed in the lamp socket at the time that Acme acquired it from Beauchamps, or if an inherent weakness in the design of the filament made it unreasonably susceptible to breakage, then the lamp socket is itself defective and Beauchamps is potentially liable to Franklin for any injuries arising from the broken filament. But if the filament contained no design defect and broke after Beauchamps supplied the lamp socket to Acme, then Beauchamps likely would not owe any liability to Franklin unless it substantially participated in the design of the vending machine.

b. *Did Beauchamps substantially participate in the design of Acme's vending machines?* If Beauchamps played a substantial role in selecting appropriate lamp sockets for the electrical system of Acme's vending machines, then Beauchamps is potentially liable to Franklin for any marketing or design defect arising from the use of its lamp sockets in Acme's vending machines. But if Beauchamps merely supplied lamp sockets to Acme's specifications, then Beauchamps likely would not owe any liability for Franklin's injuries.

A manufacturer that wishes to ensure that its suppliers are potential co-defendants in any products liability cases may consider inviting its suppliers to participate in the design process—*e.g.*, by requesting that its suppliers select the best component for the particular application, by soliciting engineering and technical input from its suppliers, by requesting that its suppliers attend and participate in design testing, etc. Additionally, the manufacturer may also advising its suppliers that it is depending on their expertise: "We look to you as our component experts. You have substantially assisted us in the design of the application using your component, and we are relying on your judgment both as to the proper component for

this application and the absence of any unreasonable hazards that may arise from the use of the component in this application."

C. Indemnity: Who Pays?

Even if it can successfully join a supplier as a co-defendant in a products liability action, a manufacturer may have to leap further hurdles before it can recover indemnity from the supplier. Where a manufacturer has a right of indemnity from one of its supplier, the supplier ("the indemnitor") must reimburse the manufacturer ("the indemnitee") for all of its costs, which in a products liability case may include attorney's fees and any potential damages or settlement amounts that the manufacturer may have to pay to the plaintiff. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 22 (2000).

Generally, as between parties in the chain of product distribution, indemnity rights may arise either (a) impliedly under the common law or (b) expressly under a contract between the parties. *See Hardy v. Gulf Oil Corp.*, 949 F.2d 826, 831 (5th Cir. 1992).[9] The Restatement explains these rights as follows:

> a. When two or more persons are or may be liable for the same harm and one of them discharges the liability of another in whole or in part by settlement or discharge of judgment, the person discharging the liability is entitled to recover indemnity in the amount paid to the plaintiff, plus reasonable legal expenses, if:
>
> 1. the indemnitor has agreed by contract to indemnify the indemnitee, or
> 2. the indemnitee
>
> i. was not liable except vicariously for the tort of the indemnitor, or
>
> ii. was not liable except as a seller of a product supplied to the indemnitee by the indemnitor and the indemnitee was not independently culpable.
>
> b. A person who is otherwise entitled to recover indemnity pursuant to contract may do so even if the party against whom indemnity is sought would not be liable to the plaintiff.

[9]Some states have enacted legislation that gives retailers and distributors statutory indemnity rights against upstream suppliers and manufacturers. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 82.002(a) (Vernon 2005) ("A manufacturer shall indemnify and hold harmless a seller against loss arising out of a products liability action, except for any loss caused by the seller's negligence, intentional misconduct, or other act or omission, such as negligently modifying or altering the product, for which the seller is independently liable."). Such legislation is beyond the scope of this paper.

RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 22 (2000). Some specific rules for common law and contractual indemnity:

1. *Common Law Rights of Indemnity*

Under the common law rules in most states, an indemnitee may recover indemnity from an indemnitor only if the indemnitee can show that it is not itself independently liable to the plaintiff. For instance, in a products liability context, a manufacturer may assert a right to common law indemnity from a supplier if it can show (a) that the supplier was the cause of the defect in the product that injured the plaintiff and (b) that the manufacturer has no independent liability to the plaintiff other than the vicarious liability arising from the fact that the manufacturer distributed the product within the stream of commerce. *See Burch v. Sears, Roebuck & Co.*, 467 A.2d 615, 623 (Pa. Super. Ct. 1983); *Herman v. General Irrigation Co.*, 247 N.W.2d 472, 476 (N.D. 1976); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 432 (Tex. 1984).

Typically, a manufacturer may not assert a right to common law indemnity from a supplier if it has done *any* negligent or malfeasant act that may cause the manufacturer itself to be liable to the plaintiff. *See Rowland Truck Equip., Inc. v. Everwear Prods., Inc.*, 468 So. 2d 393, 394 (Fla. App. 3d Dist. 1985) ("The law is well-settled that when a manufacturer of a finished product is held strictly liable for damages caused to a third person by a defective component part that was purchased from a supplier and integrated into the finished product, the said manufacturer is entitled to recover indemnity from the party supplying the defective component part, *provided the manufacturer was not himself negligent in either creating or failing to discover the defect.*") (emphasis in original); *cf. Ross Laboratories v. Pay 'N Save Corp.*, 725 P.2d 1076, 1081 (Alaska 1986) ("[I]f the retailer and manufacturer are concurrently negligent, no claim for indemnity will lie.").[10] Examples:

[10]A small minority of states suggest that an indemnitee may assert a right to indemnity if the indemnitor was "actively" negligent and the indemnitee was only "passively" negligent. *See Western Cas. & Sur. Co. v. Shell Oil Co.*, 413 S.W.2d 550, 556 (Mo. App. 1967); *see also City of Des Moines v. Barnes*, 238 Iowa 1192, 30 N.W.2d 170, 173-74 (1947) (suggesting that an indemnitee may recover indemnity where it is only secondarily liable to the plaintiff, not primarily liable). If the distinction between active negligence and passive negligence is still valid in these states, an indemnitee in these states may arguably be able to recover common law indemnity even if it is itself independently liable to the plaintiff. The distinction between active and passive negligence, however, is inconsistent with the modern doctrine of comparative responsibility. The trend in more recent indemnity cases is to hold that a manufacturer may not recover indemnity if it may itself have any independently liability to the plaintiff; instead, the jury must consider the fractional share of responsibility that the manufacturer and supplier may separately owe to the plaintiff. *See Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362, 367 (Minn. 1977); *see also Cella Barr Assoc., Inc. v. Cohen*, 177 Ariz. 480, 868 P.2d 1063, 1068-69 (1994); *Brochner v. Western Ins. Co.*, 724 P.2d 1293, 1298 (Colo. 1986).

- The manufacturer misinstalled a component that it received from its supplier. *See Rowland Truck Equip.*, 468 So. 2d at 394; *Thomas v. Kaiser Agricultural Chems.*, 81 Ill. 2d 206, 407 N.E.2d 32, 37 (1980); *Fairburn v. Montgomery Ward & Co.*, 349 So. 2d 1280, 1282 (La. App. 1st Cir. 1977); *Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362, 367 (Minn. 1977).

- The manufacturer altered a product or component that it received from its supplier. *See Westphal v. E.I. du Pont de Nemours & Co.*, 192 Wis. 2d 347, 531 N.W.2d 386, 389 (App. 1995) ("[W]e shift responsibility from the component supplier to the manufacturer who has substantially altered a product."); *see also Holt v. Utility Trailers Mfg. Co.*, 494 F. Supp. 510, 513 (E.D. Tenn. 1980). *But cf. Herman*, 247 N.W.2d at 480 (holding that even though a dealer added 300 parts to a engine, the dealer did not alter the basic engine unit itself and "[i]f a seller does not active wrong and does not alter the product before it is sold, he is entitled to indemnity").

- The manufacturer used the product or component in a larger integrated product that itself contained a design or manufacturing defect that contributed to the injuries of the plaintiff. *See Rowland Truck Equip.*, 468 So. 2d at 394

- The manufacturer did not properly store a product or component that it received from its supplier, creating a defective condition in the product or component. *See Ross Laboratories*, 725 P.2d at 1081; *MacDonald v. Najjar*, 362 Mass. 119, 284 N.E.2d 254, 256 (1972).

To recover indemnity from a supplier, the manufacturer must also establish that the supplier is liable to the plaintiff. Absent statutory or contractual rights to the contrary, a manufacturer may not assert any rights to indemnity from a supplier that did not do anything that would cause any liability to the plaintiff. *See D.G. Shelter Prods. Co. v. Moduline Indus., Inc.*, 684 P.2d 839, 841 (Alaska 1984); *Carpetland of N.W. Ark., Inc. v. Howard*, 304 Ark. 420, 803 S.W.2d 512, 513 (1991); *Kemp v. Miller*, 154 Wis. 2d 538, 453 N.W.2d 872, 879 (1990); *see also* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 22 cmt. c (2000) ("Except as provided . . . with contractual indemnity, an indemnitee must prove that the indemnitor would have been liable to the plaintiff in an amount equal to or greater than the amount the indemnitee seeks.").[11]

[11]For this reason, if a supplier is immune from liability to the plaintiff under the component supplier defense, the supplier is likewise immune from liability to a manufacturer for common law indemnity.

2. *Contractual Indemnity*

Courts generally will enforce the terms of an indemnity agreement between a manufacturer and a supplier. *See Hardy*, 949 F.2d at 831 ("An agreement which states that one party will indemnify another is binding and effective."). Consequently, even where a manufacturer would not necessarily be entitled to recover common law indemnity, the manufacturer may be able to recover contractual indemnity under the terms of a specific agreement. *See Promaulayko v. Johns Manville Sales Corp.*, 116 N.J. 505, 562 A.2d 202, 207 (1989) ("[W]e recognize that parties in a distributive chain may contract for a different allocation of the risk of loss."). "[C]ontractual indemnity is determined by the terms of the contract." RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 22 cmt. f (2000).

The most common issue that arises in litigation involving contractual indemnity is whether the indemnitee may recover indemnity even where it may arguably be independently liable to the plaintiff. Most states recognize that parties of relatively equal bargaining power may, if they wish, enter into an enforceable indemnity agreement that requires one of the parties to indemnify the other even for the consequences of the indemnitee's negligence. *See Dykstra v. Arthur G. McKee & Co.*, 100 Wis. 2d 120, 301 N.W.2d 201, 204 (1981) (noting that a contract agreeing to indemnify a party against its own negligence does not violate public policy, but the courts will nonetheless review it carefully to ensure that the parties plainly intended to produce such a result); *see also Post v. Belmont Country Club, Inc.*, 60 Mass. App. Ct. 645, 805 N.E.2d 63, 70 (2004).

Where the states disagree, they tend to disagree only about the nature of the language necessary to create such a contractual indemnity. Some states impose specific requirements. *See Westinghouse Elec. Corp. v. Williams*, 183 Ga. App. 845, 360 S.E.2d 411, 413 (1987) (holding that indemnity agreements are "construed strictly against the indemnity" and must contain "explicit language" to require that an indemnitor indemnify the indemnitee against the indemnitee's own negligence); *Morella v. Board of Commissioners*, 888 So. 2d 321, 328 (La. App. 4th Cir. 2004) (holding that "an indemnitor is not obligated to indemnify an indemnitee against the indemnitee's own fault absent a clear, unequivocal statement to that effect in the indemnity agreement); *Storage & Processors, Inc. v. Reyes*, 134 S.W.3d 190, 192 (Tex. 2004) (holding that an indemnity agreement will not protect the indemnitee from the consequences of its own negligence unless the obligation is obligation is both expressed in unequivocal terms and is conspicuous "by appearing in larger type, contrasting colors or otherwise calling attention to itself").

Other states use a strict standard of construction but do not require any particular form or language. *See Arkansas Kraft Corp. v. Boyed Sanders Const. Co.*, 298 Ark. 36, 764 S.W.2d 452, 453 (1989) ("While no particular words are required, the liability of an indemnitor for the negligence of an indemnitee is an extraordinary obligation to assume, and

we will not impose it unless the purpose to do so is spelled out in unmistakable terms."); *Washington Elementary School Dist. No. 6 v. Baglino Corp.*, 169 Ariz. 58, 817 P.2d 3, 6 (1991); *Oddo v. Speedway Scaffold Co.*, 233 Neb. 1, 443 N.W.2d 596, 602 (1989); *see also* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 22 cmt. f (2000) ("An indemnitee can recover contractual indemnity for his or her own legally culpable conduct only if the contract is clear on this point. If the contract is otherwise clear, it need not contain specific words, such as 'negligence' or 'fault.'").

Still other states use a more liberal standard, simply seeking to ascertain and carry out the intent of the parties. *See Bartlett v. Davis Corp.*, 219 Kan. 148, 547 P.2d 800, 808 (1976) ("[I]t is not necessary that the agreement contain specific or express language covering the [indemnitee's] negligence, if the intention to afford such protection clearly appears from the contract, the surrounding circumstances and the purposes and objects of the parties."); *Stern v. Larocca*, 49 N.J. Super. 496, 140 A.2d 403 (1958) ("[S]omething less than an express reference in the contract to losses from the indemnitee's negligence as indemnifiable will suffice to make them so if the intent otherwise sufficiently appears from language and circumstances.").

In the Franklin case, Acme may have a difficult time proving a right of common law indemnity from Beauchamps. Even if Acme were successful in adding Beauchamps as a defendant in the case, Beauchamps would presumably claim that Acme was independently liable to Franklin for its negligence in disconnecting the ground wire from the electrical system of the vending machine. If Acme cannot conclusively show that it was merely an innocent link in the chain of distribution, then in most states it will not be able to recover common law indemnity from Beauchamps. To the extent that it may recover any kind of indemnity, it will only be able to recover contractual indemnity—and even then only if it has an adequate indemnity agreement with Beauchamps.

If at all possible, a manufacturer such as Acme should seek an indemnity agreement from its suppliers. As long as its suppliers confirm their assent to the terms of the agreement, the indemnity agreement need not be a separate contract and may appear as one of the terms of a purchase order or shipping agreement. Nonetheless, in light of the differing rules of construction from state to state, a manufacturer should draft the terms of the agreement as plainly and as conspicuously as its commercial relationship with its suppliers will allow—*e.g.*, "Supplier agrees to INDEMNIFY AND HOLD HARMLESS Manufacturer from any and all lawsuits, demands or claims, whether in strict liability or tort, that may arise from or relate to a design or manufacturing defect in Supplier's product, including but not limited to any lawsuits, demands or claims alleging that Manufacturer was independently negligent or otherwise liable to Supplier."

Conclusion

A manufacturer may easily fall into the trap of thinking that it has no potential exposure in any products liability action arising from a component part that it has received from a supplier. Indeed, the manufacturer may find, much to its surprise, that it will remain on the hook for any problem with the component, while its supplier may escape any liability whatsoever. To avoid this result, the manufacturer should carefully craft its relationships with its suppliers to limit its own exposure: specifically, it should take steps to ensure that it can secure jurisdiction over its suppliers in the United States, that it can avoid the effects of the bulk supplier and component supplier doctrines, and that it can recover indemnity from its suppliers.