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What Do You Know About Apparent Manufacturer Liability?

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Companies should be prepared to consider an obscure concept—"apparent manufacturer" liability—if they have already acquired or plan to acquire another company that manufactures products.


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Tracing its origins to the early 1900s, the apparent manufacturer doctrine permits a tort plaintiff to recover from the successor of a manufacturer even if the successor had no role in manufacturing the product itself. More recently, decisions from the U.S. Court of Appeals for the Fourth and Fifth Circuits, as well as Alabama, Arkansas, Connecticut, Iowa, Massachusetts, Minnesota, Mississippi, New Jersey, Ohio, Texas and other jurisdictions, have all held non-manufacturing sellers of defective goods to the same duty of care as an actual manufacturer under the apparent manufacturer doctrine.

Three tests have evolved through the case law for making the determination of whether a company is an "apparent manufacturer": 1) the objective reliance test, 2) the actual reliance test, and 3) the enterprise liability test.

In Stein v. Pfizer Inc., 228 Md. App. 72 (2016), the Court of Special Appeals of Maryland recently applied these three tests and highlighted the potential risks of not considering apparent manufacturer liability. In Stein, the court held that a parent company could not be held liable as an apparent manufacturer where its subsidiary manufactured an allegedly hazardous product both before and after the parent acquired the subsidiary and where there was insufficient evidence that the parent held itself out to be a manufacturer of the product.

In 2012, Carl Stein died from mesothelioma that his family alleged was caused by his exposure to Quigley Inc.'s asbestos-containing Insulag cement while he worked as a bricklayer at Bethlehem Steel Sparrows Point steel mill in Baltimore, Maryland. Mr. Stein's family brought suit in the Circuit Court for Baltimore City against both Quigley and its parent company Pfizer Inc.

Pfizer acquired Quigley as a wholly-owned subsidiary in 1968. After Pfizer bought Quigley, Quigley continued its operation as a separate and distinct corporation, designing and manufacturing its products, and maintaining its own sales and distribution network. Pfizer did not participate in any of these activities. Quigley's marketing and promotional materials and invoices started to include the Pfizer name, logo and trademark, however.

Mr. Stein allegedly used Quigley's Insulag before and after Pfizer acquired the company. Pointing to the advertisements and other promotional materials for Insulag, as well as Insulag sales invoices distributed by Quigley, which displayed both Pfizer's and Quigley's trademarks and, some of which stated beneath the trademarks: "Manufacturers of Refractory Products," the Stein family argued that Pfizer should qualify as an apparent manufacturer, and specifically argued that the reference to "Manufacturers" applied to both Pfizer and Quigley, and that as a result, Pfizer had held itself out to consumers as a "manufacturer" of Insulag.

The family further relied on Pfizer's 1971 end-of-year sales report which stated sales prices and costs of Pfizer's annual product sales to the steel mill. Though the family reasoned that this report included sales of Insulag, the Circuit Court noted that the report itself contained no mention of Quigley or Insulag.

In its defense, Pfizer proffered testimonial statements and documents to demonstrate that it was not involved in Quigley's business and was, thus, not an apparent manufacturer. Taking into consideration all the evidence, the Circuit Court found in Pfizer's favor, granting its motion for summary judgment.

The Court of Special Appeals affirmed the Circuit Court, ruling that Pfizer could not be liable for Insulag. It reasoned that, under the objective reliance test, the steel mill where Mr. Stein worked was a sophisticated purchaser of products. Moreover, Insulag was not a consumer product. Accordingly, no one sitting in the steel mill's position would have mistaken that it was Quigley (and not Pfizer) that manufactured and sold Insulag to the steel mill.

The court stated further that the Stein family could not prove that Mr. Stein "actually relied" on anything Pfizer said about Insulag because there was no testimony in the record about any such reliance. Furthermore, from the purchaser's perspective, the family could provide no evidence to show that the steel mill relied on Pfizer's trademark, reputation or assurances of product quality in purchasing Insulag.

Finally, the court ruled that Pfizer could not be liable under the "enterprise" test because Pfizer played no role whatsoever in the design, manufacture or distribution of Insulag, despite its trademark appearing on Quigley's invoices.

The Court of Special Appeals' decision is a reminder to companies of the many considerations involved in the acquisition of manufacturing lines, and a guide on how those companies can structure relationships with their manufacturing subsidiaries to avoid apparent manufacturer liability. Decision makers need to be aware of the risks of overly participating in designing, manufacturing, distributing and marketing a subsidiary's products.

Oftentimes, successor liability may not be an issue, but with long-tail liability products like asbestos (from yesterday) or nanotubes (from perhaps tomorrow), pausing for a moment before putting that logo on the invoice because the company is so proud of the next best thing it just bought may save that same company from potential future liabilities.

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