Tennessee Litigation Update: Tennessee and the Sealed Container Doctrine

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A Plaintiff may sue both a manufacturer and a seller of a product alleged to have caused Plaintiff's injury. Tenn. Code Ann. § 29-28-103(a). The accrual of a products liability action occurs when the Plaintiff is aware of an injury, and when, by utilizing reasonable care, Plaintiff discovers the manufacturer of the product and identifies the particular product. See, e.g., Pivnick, Lawrence A., Tennessee Circuit Court Practice sec. 1.2, p. 28 (2011-2012 ed.), citing, e.g., *Craig v. R.R. Street & Co., Inc.*, 794 S.W.2d 351 (Tenn. Ct. App., 1990).

In terms of the sealed container doctrine, courts held traditionally that a seller does not have a duty to inspect because most sellers "have little or no knowledge of or control over whether the products they sell may be dangerously defective" and generally "have no practical way to test products to discover hidden dangers." 2 M. Stuart Madden et al., *Madden & Owen on Products Liability,* § 19.1 (3d ed.2000), *available at* MOPL 19:1 (Westlaw). The Tennessee Products Liability Act of 1978 ("TPLA"), prior to 2011, codified the common law sealed container doctrine. It provided that if the product was acquired and sold by a seller in a sealed container and/or the seller had no "reasonable" opportunity to inspect the product, then a products liability action may be brought against a seller, among other things, *only* when the manufacturer of the product *is not* subject to service of process in Tennessee and service cannot be secured by the long-arm statute of Tennessee. *See* Tenn. Code Ann. § 29-28-106(a)(2) (2010) (emphasis added); *See also, e.g. Lind v. Beaman Dodge, Inc.*, 356 S.W.3d 889, 899 (Tenn. 2011). In such case, a seller is a proper party to a products liability action only when these criteria were met. *Shoemaker v. Omniquip Intern., Inc.*, 152 S.W.3d 567, 572 (Tenn. Ct. App. 2003).

The earlier statute sets forth that "[n]o products liability action… shall be commenced or maintained against any seller when the product is acquired and sold by the seller in a sealed container and/or when the product is acquired and sold by the seller under circumstances in which the seller is afforded no reasonable opportunity to inspect the product in such a manner which would or should, in the exercise of reasonable care, reveal the existence of the defective condition." Tenn. Code Ann. § 29-28-106(a). In 2011, the General Assembly amended the TPLA. Notably, in T.C.A. sec. 29-28-106, the language codifying the sealed contained doctrine was left out. Moreover, since 2011, T.C.A. sec. 29-28-102 (7) defines a "seller" to include "…a retailer, wholesaler, or distributor, and means any individual or entity engaged in the business of selling a product, whether such sale is for resale, or for use or consumption. 'Seller' also includes a lessor or bailor engaged in the business of leasing or bailment of a product…" (emphasis added). Since 2011, in Tennessee, a "products liability action" may not be commenced or maintained against a "seller" of a product unless:

1. the seller exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the alleged harm for which recovery of damages is sought;
2. the seller altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought;
3. the seller gave an express warranty as defined by Title 47, Chapter 2;
4. the manufacturer or distributor of the product or part in question is not subject to service of process in this state and the long-arm statutes of Tennessee do not serve as the basis for obtaining service of process; or,
5. the manufacturer has been judicially declared insolvent. T.C.A. sec. 29-28-106.

The 2011 amendment is more favorable to sellers. The older sealed container doctrine applied a "reasonableness" (negligence) standard. The statute now requires that the "seller" must exercise substantial "control" over not only labeling of the product, but packaging as well. T.C.A. sec. 29-28-105(b) does not sync well with sec. 106. It provides, among other things, in determining whether a product is defective or unreasonably dangerous at the time it left control of the manufacturer or seller, consideration should be given "…to the customary designs, methods, standards and techniques of manufacturing, inspecting and testing by other manufacturers or sellers of similar products." Taken together with sec. 106, should "inspecting" in sec. 105 be viewed under the "substantial control" standard of sec. 106 (which specifically mentions "testing" but not "inspecting")? A strict construction of the language may indicate otherwise, so the sealed container doctrine may not be down for the count if there is, for instance, proof of "customary" inspections on the part of sellers of similar products.

The earlier codification of the sealed container doctrine, and the "apparent" repeal of it in 2011, indicates the legislature strengthened the protections of those persons and entities down the chain by repealing a negligence standard (reasonable opportunity for an inspection) as a threshold matter, but it may not prevent the analysis in situations where the general course of business conduct is otherwise. The consideration is more apparent taken in tandem with T.C.A. sec. 29-28-104 regarding compliance with governmental standards. As in all things, it may very well depend on the factual situation.

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