The Rebirth of the Sealed Container Defense for Retail Sellers in Alabama?

By: John Browning and John Harrelson

Your senior partner walks into your office one day and says, "I have a simple matter for you to handle. Our client is a small retail store who happens to sell a product called 'Widgets.' Widgets are manufactured, designed, and put into the stream of commerce by the World Wide Widget Company of America, Inc. The Widgets are placed in boxes and distributed to our client who in turn sells the Widgets in the same box to our client's customers. Now our client has been sued for a Widget that failed and hurt a child, and the plaintiff's attorney says our client breached the implied warranty of merchantability, which makes us, in effect, strictly liable. Our client wants out quickly if possible, and I've told them that the sealed container defense can get them out of this case. So, get to work on a motion for summary judgment citing this defense and have it ready for me to look at by the end of business today."

As you begin the task of putting together your motion, the first case you find is *Sparks v. Total Body Essential Nutrition, Inc.*[1] You realize your senior partner may have been very wrong about the sealed container defense's application to this case. While you learn retail seller/distributor cannot now use the sealed container defense when faced with an implied warranty for merchantability cause of action, with another few clicks of your mouse you discover that the Legislature has given new life to your retailer-client (and your senior partner!).

Historically, the sealed container doctrine has been a sound defense against product liability claims under the Alabama Extended Manufacturer's Liability Doctrine (AEMLD), which for years was presumed to have subsumed all possible causes of action and remedies

[1] 27 So. 3d 489 (Ala. 2009).

where the plaintiff claimed a product failed and as a result caused harm to an innocent party.[2] Unfortunately, this presumption came to an abrupt halt following *Spain v. Brown & Williamson Tobacco Corp*[3] when the Alabama Supreme Court held that the AEMLD did not subsume all possible causes of action. In light of *Spain* and Justice Lyons' opinion in *Sparks* issued just a few years later, businesses and defense lawyers alike were left wondering, "has Alabama now, in effect, adopted a position that a retailer is strictly liable under an implied warranty of merchantability theory if it sells a product it later discovers was defective, even if it was in a sealed container from the manufacturer when it was sold?" *In effect* this is what the Court had done.

In *Sparks,* a group of four consumers brought suit against a manufacturer and health-food retailer who sold "Total Body Formula," a dietary supplement, in state court, which was alleged to have caused serious injury after ingestion. Plaintiffs brought claims against the retailer under the AEMLD as well as claims for negligent failure to warn, negligent marketing, general negligence, breach of the implied warranty of merchantability, breach of the implied warranty of fitness for a particular purpose, and fraudulent representation/suppression of fact.

The manufacturer removed the action to the federal district court, asserting that diversity jurisdiction existed because the only Alabama defendant, the retailer, had been fraudulently joined.[4] They argued there was no possibility the plaintiffs could establish a cause of action against the retailer since the sealed container doctrine was an absolute bar to a product liability

[2] *See Shell v. Union Oil Co.*, 489 So. 2d 569 (Ala. 1986) (holding under Alabama products liability law that a plaintiff did not have standing to bring a breach of warranty claim where the complaint alleged an injury caused by an unreasonably dangerous product); *Veal v. Teleflex Inc.*, 586 So. 2d 188 (Ala. 1991) (holding that the plaintiff's claims of negligence and wantonness were subsumed by the AEMLD).

[3] 872 So. 2d 101 (Ala. 2003).

[4] Fraudulent joinder is established when there is no possibility that the plaintiff can prove a cause of action against the non-diverse defendant.

action in Alabama. The federal district court discovered that it was not entirely clear whether the sealed container doctrine was also a defense for breach of implied warranties of merchantability and fitness for a particular purpose, which are statutory creations of Alabama's Uniform Commercial Code (UCC).[5] The federal district court therefore certified that question to the Supreme Court of Alabama.

Justice Lyons wrote that the sealed container defense was not available to a retailer who is sued under the UCC given that the cause of action arises under a statutory scheme that does not include the defense. The AEMLD was a creation of the common law, and the UCC is statutory, meaning a derogation of the common law. The defenses applicable at common law, therefore, would not be applicable as part of the statutory scheme unless specifically stated within the statute. Perhaps recognizing the potential ramifications of its decision (a back door strict liability that was rejected by the court in dicta in previous decisions),[6] the Court noted that there was still a remedy for a retailer—to join the plaintiff in suing his seller (usually the manufacturer).[7]

Lawyers on both sides of the bar began to argue about the effect the decision had on pending product liability cases. Could, for example, a plaintiff amend to add all the retailers "up the chain" even after the statute of limitations had run on an AEMLD claim (2 years) suing them instead for breach of implied warranty (6 year statute of limitations)? Could defense lawyers use

[5] Ala. Code §§ 7-2-314 and 7-2-315 (1975).

[6] *See Atkins v. Am. Motors Corp.*, 335 So. 2d 134, 142 (Ala. 1976) (rejecting strict liability and instead finding retailers should only "be liable for the foreseeable harm proximately resulting from defective conditions in the products which make them unreasonably dangerous").

[7] Note the cautionary tale in Justice Bolin's dissent wherein he argued the effect of the sealed container doctrine's absence made any retailer strictly liable and the insurer of the goods that it sells. *Sparks*, 27 So. 3d at 503 (Bolin, J., dissenting).

the oft confused law of "proximate causation" to back themselves back into a sealed container defense, i.e., "the harm is so remote from my client's actions as to make it legally unreasonable to impose liability?" In the wake of the *Sparks* decision, retailers across Alabama were in for a rude awakening if our Courts were not going to give a clear and definitive answer to these very difficult questions in future decisions.

Luckily, the 2011 Legislature sought to protect retail business in Alabama from the uncertainty the *Sparks* decision caused (no matter how well reasoned the Court may have come to its conclusion).[8] Signed into law on June 9, 2011, the "Alabama Small Business Protection Act" first sought to redefine how Alabama will define "product liability action" by codifying the various traditional theories of liability:

> Any action brought by a natural person for personal injury, death, or property damage caused by the manufacture, construction, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, or labeling of a manufactured product when such action is based upon (a) negligence, (b) innocent or negligent misrepresentation, (c) the manufacturer's liability doctrine, (d) the Alabama extended manufacturer's liability doctrine, as it exists or is hereafter construed or modified, (e) breach of any implied warranty, or (f) breach of any oral express warranty and no other.[9]

Most notably for this discussion, the new statutory definition of a "product liability action" encompasses and references claims for breach of implied warranties under the UCC.

Secondly, the Act, now codified at Ala. Code §§ 6-5-501 and 6-5-521, sought to restrain actions against sellers (called "distributors" in the Act) to only those circumstances specifically detailed in the Act, which are:

> 1. The distributor is also the manufacturer or assembler of the final product and such act is causally related to the product's defective condition.

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[8] *See* Act Number 2011-627, amending Ala. Code §§ 6-5-501 and 6-5-521 (1975).

[9] Ala. Code § 6-5-501(2). *See also* Ala. Code § 6-5-521(a).

> 2. The distributor exercised substantial control over the design, testing, manufacture, packaging, or labeling of the product and such act is causally related to the product's condition.
>
> 3. The distributor 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.
>
> 4. It is the intent of this subsection to protect distributors who are merely conduits of a product. This subsection is not intended to protect distributors from independent acts unrelated to the product design or manufacture, such as independent acts of negligence, wantonness, warranty violations, or fraud.[10]

While the Act does not create a complete bar to a retailer's liability, at least it now provides the semblance of clarity with regard to what actions or activity can be actionable for a retailer to undertake. The Act also clarifies that only those distributors/sellers that are mere "conduits" of a product, like the Widget seller, above, are protected.

It is true that the Act gives relief to retailers faced with the prospect of strict liability imposed by the *Sparks* decision, but skilled practitioners are already beginning to expose some potentially unexpected land mines imbedded in the Act. Specifically, caveat language is included that warns retailers the Act will not exonerate "independent acts unrelated to the product design or manufacture, such as independent acts of negligence, wantonness, warranty violations, or fraud," which begs the obvious question—what are independent acts?

In *Lazenby v. ExMark Mfg. Co., Inc.*,[11] the district court for the Middle District of Alabama faced a fraudulent joinder question similar to the one seen in the *Sparks* decision. The plaintiff brought suit against the manufacturer and local distributor of a zero-turn radius lawnmower claiming negligence, wantonness, liability under AEMLD, and breach of warranty. The defendants sought to remove the case, arguing that there was complete diversity because the

[10] Ala. Code §§ 6-5-501(2)(a) and 6-5-521(b).

[11] 2012 WL 3231331 (M.D. Ala. Aug. 6, 2012)

local distributor had been fraudulently joined. Although the court recognized that the plaintiff's claims fell within the prohibition for products liability claims against mere distributors, the court nevertheless found that the plaintiff had stated a plausible claim and therefore, remanded the case to state court. The court reasoned that, at the very least, the plaintiff's wantonness claim could fall within the exception exempting "independent acts unrelated to the product design or manufacturer, such as independent acts of negligence, wantonness, warranty violations or fraud."

While the Middle District has pronounced there is at least a potential cause of action that gives rise under Alabama law, the Northern District of Alabama came to a different conclusion based on almost identical facts. In *Sewell v. Smith & Wesson Holding Corp.*,[12] the plaintiff filed suit against a manufacturer and local distributor of a rifle, claiming failure to warn, breach of warranty, negligence and wantonness. Once again, the defendants sought to remove the case to federal court citing fraudulent joinder of the local distributor. Addressing the same "independent acts" exception as the court in *Lazenby*, the *Sewell* court found that the plaintiff's claims *were not* exempted from the protection afforded by the Act. The court noted that the plaintiff "presented no evidence that [the local distributor] either expressly or impliedly warranted anything unrelated to the product's design or manufacture." The distinction between *Sewell* and *Lazenby* is not overtly clear, which may be a signal to the Alabama Supreme Court that another federal question will be heading their way very soon.

So, while your senior partner can be satisfied he was not completely wrong that your client could find itself quickly dismissed and/or summary judgment in its favor would be warranted, more questions may need to be asked of the client before a motion is too hastily filed. If, for instance, there are no facts plead (or evidence to substantiate) that the retailer contributed

[12] 2012 WL 2046830 (N.D. Ala. June 1, 2012)

to the defect or gave any personal guarantees or express warranties as to its fitness, the Act clearly advocates for the seller of the Widget to be discharged of potential liability. If, however, your client engaged in any of the specific activity discussed in the Act or has even arguably undertaken an obligation with regard to the product's ability to function as anticipated by the consumer, your client may be faced with a term of discovery to develop the facts such that summary judgment would be warranted down the road. Of course, our Court will need to answer the question authoritatively what an independent act means under the Act. Moreover, it must do so in such a manner as not to frustrate the ultimate purpose of the Legislature—to protect retail sellers/distributors of products who legitimately contributed nothing to an eventual harm related to the product's failures.

In summary, while the Legislature appears to be giving rebirth to the sealed container defense by codifying its objective to protect the innocent (or mere conduit) retailer, there are still issues for our Court to resolve. As the *Lazenby* court noted, they were dealing with "unsettled questions of law, which favor[ed] remanding [the] case for the Alabama state courts to interpret the law." Only time will tell whether your senior partner was ultimately correct and the Alabama Supreme Court once and for all pronounces whether the passage of this Act marks the rebirth of the sealed container defense as it has traditionally been known or whether the Act is a new creature all together.

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