Who's

Product liability litigation commonly involves multiple defendants, namely the product's manufacturer and the seller, and possibly others in the chain of distribution. Out of all the defendants, the manufacturer is generally the party with the ultimate responsibility in producing a reasonably safe product. Recognizing this, Arizona has an "indemnification" statute that shifts the cost of the defense of the lawsuit and the burden of paying the judgment away from the seller and to the manufacturer.[1]

At first blush, this indemnification statute appears straightforward in its application. Under most circumstances, the manufacturer has to pay for the defense of a product and any judgment. The exception would be when the seller has some blame—for instance, if it modified the product or knew about a defect but sold the product anyway.

Unfortunately, when applied to real-life litigation, the indemnification statute isn't always so straightforward. These ambiguities greatly complicate litigation and create uncertainty as to who will pay the costs and judgment. If the manufacturer does not accept the tender but the court ultimately decides it should have, the financial consequences can be devastating.

This article analyzes a specific recurring problem with modified products and offers an interpretation of the statute to eliminate it.

The Modified Product

One deeply confusing situation occurs when someone modifies the product or adds a component after it leaves the original manufacturer but before the ultimate seller receives it. This can easily happen when a seller deals in used products.

Assume the first owner of a car had new brakes installed, and then traded the car in to a dealership. The dealership then resold the used car with the modified brakes.

If the modified brakes become an issue in litigation involving the used-car dealer, there's a problem. Because the used-car dealer did not modify the brakes, or even know about it, the dealership gets to invoke the indemnification statute and wash its

Craig Logsdon is an associate in the Phoenix office of Snell & Wilmer, LLP. His practice includes product liability defense.

BY CRAIG LOGSDON

on Defense? Indemnifying Modified Products

hands of costs associated with the lawsuit.

But to whom can it tender its defense? The original car manufacturer? The mechanic who installed the defective brakes?

The indemnification statute does not address this type of wrinkle. Although the statute does reference instances in which products have undergone modification, it only contemplates the modifier being the seller. There is no instruction for what to do when someone other than the seller creates the modification at issue:

> In any product liability action where the manufacturer refuses to accept a tender of defense from the seller, the manufacturer shall indemnify the seller for any judgment rendered against the seller and shall also reimburse the seller for reasonable attorneys' fees and costs incurred by the seller in defending such action, unless either paragraph 1 or 2 applies:
>
> 1. The seller had knowledge of the defect in the product.
> 2. The seller altered, modified or installed the product, and such alteration, modification or installation was a substantial cause of the incident giving rise to the action, was not authorized or requested by the manufacturer and was not performed in compliance with the directions or specifications of the manufacturer.[2]

Neither of the two enumerated exceptions applies when the seller does not modify the product and does not know about the defective modification. Therefore, the only relevant part of the statute is the first paragraph. Specifically, who is the "manufacturer" that faces the choice of accepting the tender of defense or later paying the bills and judgment?

Trying to figure out who is this "manufacturer" resembles determining which of three undefeated college football teams belongs in the National Championship bowl game. You can make a compelling case for several different teams. It is difficult to create a logical, comprehensible method to satisfy that satisfies everyone.

Likewise, the indemnification statute and the case law interpreting it do not provide for a logical, comprehensible solution as to which "manufacturer" should indemnify the seller of a modified product. You can make a compelling case for several different manufacturers in the chain of distribution.

The seller of a used product will probably try to tender all the way back to the original manufacturer. In the case of a modified car, it will be much easier to get the big auto company to pick up the defense rather than figuring out who modified the vehicle and getting them to defend the case. However, fairness dictates that whomever is responsible for the modification or component at issue should pay to defend its work. Furthermore, the party that modified the product is in the best position to defend the part of the product at issue. Other manufacturers involved in the product should not be unnecessarily drawn into the litigation.

Therefore, a just, logical and comprehensible solution is to limit its reach to the manufacturer of the specific component or modification at issue. The other variations of how the indemnification statute could play out contain too many problems.

However, there is no shortage of possibilities in the application of the statute. Below is a list of potential interpretations.

POSSIBILITY 1:

The seller cannot invoke the indemnification statute because comparative fault removes the need for indemnification.

WHY THIS POSSIBILITY FAILS:

The indemnification statute gives the seller an even better deal than comparative fault.

Although the Arizona Supreme Court has yet to weight in, the First Division of the Court of Appeals recently held that the Uniform Contribution Among Tortfeasors Act[3] did away with joint and several liability in product liability actions, and everything is now comparative fault.[4] Under the *State Farm v. Premier Manufactured Systems* case, the defendants in the chain of distribution may allocate fault among themselves.

But from the perspective of the seller who has been sued, the indemnification statute gives it a more attractive option than relying on "comparative fault." The indemnification statute allows the seller complete indemnification from the upstream manufacturer for all costs in defending the case plus the entire amount of any judgment.

So, regardless of Arizona's comparative fault principles, the used-car dealer will choose the indemnification statute to extinguish its liability as soon as possible.

POSSIBILITY 2:

The seller cannot invoke the indemnification statute because a modification caused the incident.

WHY THIS POSSIBILITY FAILS:

The seller is still entitled to indemnification because it did not make the modification.

The "modification exception" to a seller's right to indemnification only comes into play when the seller actually is responsible for the modification.[5] And that is the way it should be, because the seller should be responsible if it caused the defect—but not if someone else is to blame.

So indemnification should be available, but against whom?

POSSIBILITY 3:

The indemnification statute always reaches the original manufacturer regardless of the nature of the alleged defect.

WHY THIS POSSIBILITY FAILS:

The original manufacturer's work may not be at issue.

The indemnifications statute says, "*The* manufacturer shall indemnify the seller for any judgment rendered against the seller … ."

The statute does not specify *which* manufacturer must indemnify the seller. And it does not exclude manufacturers whose involvement is not at issue, such as, in the case of a modified car, the automaker.

To help it reach the original manufacturer, the seller will rely on a series of Arizona cases that one could interpret to require the original manufacturer to fund the litigation.[6] These cases hold that despite the fact that an element of a product liability claim is that a defect must exist when a product leaves the hands of a manufacturer, a seller still has a right to indemnification even if the original product is ultimately found not to be defective. Therefore, it seems that the original manufacturer has to indemnify and reimburse the seller regardless of whether the original manufacturer's work is at issue.

But that's not exactly what these cases say. They only say that a manufacturer has to pay for defending allegations made against that manufacturer's product, regardless of whether the jury ultimately determines that the product is defective. These cases do not say a manufacturer is financially responsible for defending a modification or a component.

For example, in *Desert Golf Cars v. Yamaha*, which involved a modified golf cart, the jury found that the cart, as originally designed and manufactured, was not defective. Nevertheless, the court held that the original manufacturer of the golf cart, and not the seller who modified it, had to pay the costs of defending the original product. The Court of Appeals did not say that the original manufacturer had to pay for the defense of the modifications to the golf cart. Although the original manufacturer has to pay for the defense of the original product regardless of whether the jury determines it to be defective, there is no authority that says the original manufacturer has to pay for the defense of after-market components or modifications.

Another case also skirted this issue.[7] In *Bridgestone/Firestone v. A.P.S. Rent-a-Car*, the tire manufacturer did not accept the tender of defense of the seller for several reasons. One reason is the manufacturer thought it did not have to accept the tender of a seller if the manufacturer would end up apportioning fault to a downstream seller for its own negligence. Bridgestone/Firestone thought this created a conflict of interest.

The Court of Appeals held that the indemnification statute reached the original manufacturer even if the original manufacturer was going to claim a downstream seller was partially or fully at fault.[8] Although unclear under this holding, the defendant manufacturer presumably would be responsible for defending any allegation against the original product, but not for allegations based on subsequent modifications. In any event, the decision does not say (at least explicitly) that the original manufacturer has to pay for the defense of a claim against a downstream manufacturer or seller that modified the product.

Even though case law does not plainly give the seller permission to pursue an indemnification claim against the original manufacturer, case law also does not rule it out. And, because the seller should be entitled to indemnification, shouldn't the seller receive indemnity from the original manufacturer, and let the various manufacturers work out who is ultimately responsible for the defense of the case and any judgment?

POSSIBILITY 4:

The indemnification statute reaches all manufacturers, who may then seek indemnification from each other depending on whose component actually caused the accident.

WHY THIS POSSIBILITY FAILS:

It needlessly adds parties and litigation costs.

Under the indemnification statute, you can use this approach of allowing the manufacturers to sort it out amongst themselves. Manufacturers are also generally "sellers" of the products they make, and as "sellers" they may qualify for indemnification if there is another "manufacturer" out there that made the product defective.

So you can plug all of these manufacturers and sellers into the indemnification statute, and fix it so ultimately the party that caused the accident is the party that has to pay.

But, in operation, this approach would waste an enormous amount of resources and probably isn't the way the legislature intended for the statute to work. The Court of Appeals has stated "the intended operation of section 684" is that it "entitles the *downstream* seller/modifier to compensation from the *upstream* manufacturer."[9] The indemnification statute, therefore, does not exist so that a seller can tender to a downstream manufacturer.

Indemnification law is confusing enough already. There's a tidier way to clean all of this up and make the person responsible for the accident pay the judgment without standing the indemnification statute on its head.

POSSIBILITY 5:

The indemnification statute only reaches the manufacturer of the modification or component alleged to have caused the incident.

WHY THIS POSSIBILITY ACTUALLY WORKS:

It is the most just result, and is consistent with the text of the statute and case law.

The indemnification statute should put the burden of defending the lawsuit on the manufacturer of the modification or component that is at issue. The easiest and most direct way to get the modifier is to read a more precise definition of "manufacturer" into the statute than the text actually provides. Instead of simply reading the word "manufacturer" in the first sentence of the statute, we should read something to the effect of "the manufacturer *of the product or component at issue* shall indemnify the seller for any judgment rendered against the seller and shall also reimburse the seller for reasonable attorneys' fees and costs incurred by the seller in defending such action."

Policies

This limited definition is the only way for the indemnification statute to do what it is supposed to do. The reason behind Arizona's indemnification law is "to place the burden and costs of defending products on their manufacturers" because the manufacturer "is best situated to detect, control, or prevent the putative defect."[10]

When a modification is at issue, the "burden and costs" of defending the lawsuit should fall on the manufacturer of the modification, not any other manufacturer associated with the overall product. It is not fair to ask one manufacturer to pay to defend the work of another. Likewise, a manufacturer other than the modifier is not in the best position to "detect, control, or prevent the putative defect."

Desert Golf Cars also recognized that when a seller modifies a product, it "steps into the shoes of the manufacturer as being the one best situated to detect, control or prevent the putative defect."[11] Here, the "seller" that is taking over responsibility for the product is not the ultimate seller, but

the seller of the modification.

Without a narrow definition of "manufacturer," the used-car dealer could bring in dozens of manufacturers that, although involved in the manufacture of the automobile, had nothing to do with the portion of the product at issue in the lawsuit. Nobody would argue with a straight face that the manufacturer of the nuts and bolts, paint, seatbelts, or stereo that went into the original car should have to indemnify the seller. But without limiting the definition of the word "manufacturer," anyone who had anything to do with making any part of the car, regardless of how minor its role, could be on the hook for someone else's defective modification.

Authority

Although statutory and case law do not provide us with this narrow definition of "manufacturer," the narrow definition is nevertheless consistent with authority.

The statutes do define "manufacturer" as a "person or entity who designs, assembles, fabricates, produces, constructs or otherwise prepares a product or component part."[12] But this definition does not say to whom of all of the manufacturers in the world the indemnification statute applies.

To find authority for limiting which "manufacturers" a seller can reach, we can turn to a footnote tucked away in one of the Arizona cases interpreting the indemnification statute. In *McIntyre Refrigeration v. Mepco Electra*, the Court of Appeals stated in dictum that "a single component manufacturer which presents unopposed evidence that its component was either not defective or not a cause of the plaintiff's injury is entitled to a final partial summary judgment."[13]

This footnote supports the proposition that when there are multiple manufacturers of a product, the ultimate seller has no right to indemnification from a manufacturer whose involvement in the product is not at issue. Accordingly, if the original product is not at issue because the alleged defect is in a modification, the indemnification statute should not be used to bring the original manufacturer into the lawsuit.

In addition, part of the *Bridgestone/Firestone* holding supports this narrow definition of "manufacturer."[14] In that case, the Court of Appeals ruled that the original manufacturer—which had refused the tender of defense and sat out the case—had to pay for the percentage of fault that the jury apportioned the tire as originally manufactured. However, the original manufacturer did not have to pay the percentage of fault that the jury allocated to the downstream seller for failing to inspect the tires before selling them. Likewise, in a case involving a modified product, the original manufacturer should not have to pay for the defense of the modification, because the modification occurred downstream after the product left the manufacturer's control.

In other words, if the product at issue—defective or not—is the original product, then the original manufacturer is obligated to indemnify and reimburse the seller. If the product at issue is a component or modification, then the manufacturer of the component or modification is the proper target of the indemnification statute.

Contrary Authority

Remember that once this issue makes sense in our minds, we're probably just overlooking something? The *Bridgestone/Firestone* decision provides ammunition to shoot down the argument that the indemnification statute only reaches the manufacturer of the component actually at issue.

One of the issues in *Bridgestone/Firestone* was whether the indemnification statute applied to a tire manufacturer that was going to apportion fault to the seller of the product. In addressing that issue, the opinion seems to assume that a seller could always tender to the product's original manufacturer unless one of the two explicit exceptions written into the statute applied. The court rejected the tire manufacturer's contention that in order to have the benefits of the indemnification statute, the seller had to show that the alleged defect existed at the time the product left the manufacturer's control.

Even though common law product liability principles require that a defect exists when it leaves the manufacturer's custody and control, the indemnification statute has no such requirement. Thus, the opinion suggests that the original manufacturer is responsible under the indemnification statute when the issue is a modification or post factory component.

Nevertheless, this *Bridgestone/Firestone* language can still be harmonized with the narrow definition of "manufacturer" set forth in this article. The plaintiff controls the allegation of defect:

- If the plaintiff alleges that the original product is defective, then the indemnification statute reaches the original manufacturer no matter how many times the product was modified.
- If the plaintiff alleges that the defect in the product is a modification, then the product liability statute reaches the manufacturer of the modification or post-factory component, but not the original manufacturer.
- If the plaintiff alleges defects in both the original product and the modification, then both manufacturers are responsible under the indemnification statute for their own role.

The question is what part of the final product the plaintiffs allege to be defective—not whether it is actually defective.

Conclusion

The indemnification statute and case law are sufficiently ambiguous for any defendant in the chain of distribution of a modified product to be a target, but also argue the statute reaches someone else. Despite this ambiguity, limiting the reach of the indemnification statute to the manufacturers whose work is actually at issue is the most equitable application of the statute. In the case of a modified product, the party responsible for paying the defense of the lawsuit and any judgment should be limited to the party that made the modification or component at issue.

endnotes

1. A.R.S. § 12-684(A).
2. *Id.* § 12-684(A)(1)-(2).
3. *Id.* § 12-2506 *et. seq.*
4. *State Farm Ins. Co. v. Premier Manufactured Systems, Inc.*, 142 P.3d 1232 (2006); *See also* Ann Larimer Robertson, *When Worlds Collide: Strict Liability and Comparative Fault*, ARIZ. ATT'Y, April 2002, at 38.
5. A.R.S. § 12-684.
6. *Desert Golf Cars v. Yamaha Motor Co.*, 7 P.3d 112 (Ariz. Ct. App. 2000); *McIntyre Refrigeration, Inc. v. Mepco Electra*, 799 P.2d 901 (Ariz. Ct. App. 1990); *Hellebrant v. Kelley Co.*, 737 P.2d 405 (Ariz. Ct. App. 1987).
7. *Bridgestone/Firestone North American Tire, LLC, v. A.P.S. Rent-A-Car Leasing, Inc.*, 88 P. 3d 572 (Ariz. Ct. App. 2004).
8. *Id.* at 580-81.
9. *Desert Golf Cars*, 7 P.3d at 116 (emphasis original).
10. *Id.* at 115, *citing* 13 *American Law of Products Liability 3d* § 52:98, at 52-137 (1987).
11. *Id.*
12. A.R.S. § 12-681(3).
13. 799 P.2d at 905 n.1.
14. 88 P.3d at 582-93.