

## **PASSIVE SELLER IMMUNITY FROM PRODUCT LIABILITY ACTIONS**

House Bill 4 significantly impacted most areas of Texas Tort Law. In the traditional products liability arena, tort reform affected three major changes: (1) the creation of a presumption of no liability in design defect cases when there is compliance with a mandatory governmental standard; (2) the creation of a 15 year statute of repose; and (3) immunity provided to passive sellers. This article focuses on the third major change—immunity provided to passive sellers of products. Going forward, this article will first focus on the rationale and practical impact this new law will have on the Texas Products Liability Practice. Then, the article will provide an in-depth analysis of the new rule and its many exceptions.

Section 82.003 of the Texas Civil Practice and Remedies Code is a newly created statute entitled, “Liability of Non-Manufacturing Sellers.” This statute sets forth an entirely new concept in products liability law: A passive seller of a defective product is generally not liable for harm caused by that product.<sup>1</sup> Traditionally, most sellers or distributors in the chain of product distribution were subject to liability for defects in products they sold. The rationale for imposing liability on these passive sellers is that sellers should take responsibility to see that products they provide to the public are safe and defect free. Further, the passive sellers could and still can seek indemnity from the ultimate manufacturer for both defense cost and liability by way of either settlement or judgment.<sup>2</sup>

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<sup>1</sup> Texas Civil Practice & Remedies Code, §82.003(a), West 2004.

<sup>2</sup> Texas Civil Practice & Remedies Code, § 82.002, West 2004.

Does the newly enacted §82.003 afford the non-manufacturing seller additional necessary protection beyond its indemnity rights? Not really. A non-manufacturing seller would have some minimal benefit in avoiding the hassle of defending an underlying products suit and then later seeking indemnity from the manufacturer. However, most often the manufacturer would step in the underlying suit and agree to defend and indemnify the non-manufacturing seller so as to avoid paying the defense bills of its own lawyers and those lawyers hired by the seller. When the manufacturer refuses to defend and indemnify, it is generally because the seller has some independent culpability; because the manufacturer is not subject to the jurisdiction of the Court; or because the manufacturer is insolvent. Significantly, the newly enacted §82.003 provides exceptions to a passive seller's immunity under just these type circumstances. So, if the only real benefit created by the enactment of §82.003 is the elimination of some hassle to non-manufacturing sellers, why was this legislation enacted and how will it impact products liability litigation? The answer is not really the substantive changes created by this new law; rather, the answer lies in the effect this statute will have on the location where products liability cases will now be litigated.

Even though Texas is a big state, most products are manufactured by companies who maintain their citizenship outside of Texas. For instance, none of the Big Three automobile manufacturers are Texas "citizens." Thus, when a Texas resident sues a manufacturer without Texas "citizenship" – federal diversity jurisdiction exists under 28 U.S.C. 1332(a). Without a Texas "citizen" – such as a local non-manufacturing seller – added as a Defendant, the manufacturer will almost certainly remove the products liability action to Federal Court. Section 82.003 in most instances, prevents Plaintiffs

from suing local non-manufacturing Defendants to destroy diversity jurisdiction and to maintain their cases in more favorable state courts. Section 82.003 was passed less as a substantive protection for local non-manufacturing sellers and more as a means to guide products liability cases to a generally more defense oriented arena—federal courts.

With an understanding of the underlying rationale and practical effect of §82.003, let's now turn to an in-depth examination of the law. Section 82.003(a) provides that: “A seller that did not manufacture a product is not liable for harm caused to the claimant by that product unless the claimant proves...”one of seven exceptions.<sup>3</sup>

Section 82.003(a)(1) provides an exception if the claimant can prove: “that the seller participated in the design of the product.” Significantly, the statute does not indicate what level of design participation triggers the threshold for liability. Moreover, this section does not require that the seller's participation in the design results in the claimant's harm.

Next, §82.003(a)(2) provides an exception if the claimant can prove that the seller altered or modified the product, and the claimant's harm resulted from that alteration or modification. Unlike the previously discussed exception, this exception requires that the seller's alteration or modification result in the claimant's harm. As an example, if a claimant was injured in a vehicle rollover and alleged that the vehicle's stability was unreasonably dangerous, a non-manufacturing seller may be exposed to liability if they altered or modified the vehicle in a way that affected the vehicle's stability. For instance, the seller could have placed larger tires on the vehicle, could have installed a lift kit to

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<sup>3</sup> In addition to the seven exceptions, Occupation Code 2301 prevails over 82.003 in the limited circumstances.

change the suspension system, or could have installed after-market components, all of which are changes that affect the vehicle's stability.

When a claimant proves that “the seller installed the product, or had the product installed, on another product, and the claimant's harm resulted from the product's installation onto the assembled product” then there is an exception to the non-manufacturing seller's immunity under §82.003(a)(3). Again, this will require some culpable action by the passive seller – improper installation – that is causally related to the harm.

The next exception deals with a seller's involvement in the warnings and instructions on products. Section 82.003(a)(4) allows an exception to passive seller's immunity when the seller exercised substantial control over the content of a warning or instruction; the warning or instruction was inadequate; and the claimant's harm resulted from the inadequacy of the warning or instruction.

The final exception that involves culpable conduct on behalf of the passive seller relates to express factual representations about the product. Section 82.003(a)(5) provides an exception to passive seller immunity when the seller makes an express factual representation about an aspect of the product; the representation is incorrect; the claimant relies on the representation in obtaining or using the product; and if the aspect of the product had been as represented, the Plaintiff would not have suffered harm or the same degree of harm.

As is apparent, the first five exceptions exist when the passive seller undertakes some action that makes it more than merely a “passive” participant in the distribution

chain. Except for a participation in the design of the product, four of these five exceptions have a causal component included within the language of the statute.

The next exception to a passive seller's immunity exists when the seller has actual knowledge of the injury causing defect at the time the product is sold. For instance, if a meat packing plant informs a local grocery store of an infected meat product, but the grocery store sells the defective meat product; the grocery store will be liable under the actual knowledge exception. Questions remain as to the proof necessary to show the seller had actual knowledge of a defect. For instance, if a seller views a news magazine piece regarding alleged defects with a certain product; receives correspondence from Plaintiff's counsel regarding the existence of the defect; or was previously sued where the same defect allegations were made, will this constitute actual knowledge of a defect under 82.003?

The seventh and final exception will be the most important and perhaps most invoked exception. Section 82.003(a)(7) provides an exception to a passive seller's immunity when the manufacturer of the product is insolvent or is not subject to the jurisdiction of the Court. This situation frequently arises when the manufacturer of products are located in places such as China or Taiwan. Companies in these locations make many of the products sold by large retailers throughout the United States. This important exception allows Plaintiffs to proceed with lawsuits against the passive retailers when they purchase products from manufacturers who are beyond the reach of the courts.

The enactment of §82.003 should have less of a substantive impact on how and what is involved in products liability litigation in Texas, and more of an impact on where product liability cases are litigated. In short, we will see you in Federal Court.

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