

The trial judge's ruling requires our client to indemnify (1) the indirect seller, i.e., the party does not fall within the definition of "seller" in § 832.1(D); (2) for attorney fees and costs incurred when no product liability claim was even alleged against any defendant; and (3) for attorney fees and costs incurred by the indirect seller defending against active negligence and breach of contract claims. The judge's rationale being that the case was "really just a product liability case." Needless to say, we are appealing the decision and hope the appellate court provides clear precedent on the scope of indemnification.

Jeremy K. Ward is an Associate with the Tulsa, Oklahoma ALFA International firm of Feldman, Franden, Woodard & Farris where he focuses his practice on civil litigation with an emphasis on products liability, commercial litigation, and transportation defense. For questions concerning this article, Mr. Ward may be reached at (918) 583-7129 or jward@tulsalawyer.com.



ARIZONA

Bill Sowders
RENAUD COOK DRURY MESAROS, P.A.
Phoenix, Arizona

Every manufacturer or seller of a product should know that the Arizona legislature has created a statutory duty for manufacturers of products to defend and indemnify the seller in any product liability action. Product liability actions are defined very broadly by statute in Arizona. Product liability actions include "any action brought against the manufacturer or seller of a product for damages for bodily injury, death or property damage caused by or resulting from the manufacture, construction, design, formula, installation, preparation, assembly, testing, packing, labeling, sale, use or consumption of any product, the failure to warn or protect against a danger or hazard in the use or misuse of the product or the failure to provide proper instructions for the use or consumption any product." A.R.S. § 12-681. This definition of a product liability action is much broader than the general language in most "indemnity" and "duty to defend" provisions found in supply end contracts and sales agreements, for example.

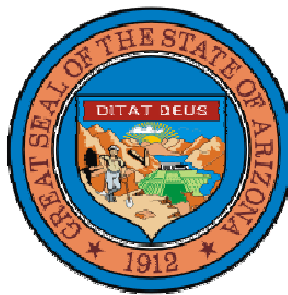
Arizona Revised Statutes § 12-684 ("the statute") creates an affirmative duty requiring that a manufacturer indemnify the downstream seller of the manufacturer's product in cases where the seller is required to defend itself against claims of product liability. The statute also requires that the manufacturer indemnify and defend the seller in cases where there are claims of independent negligence against the seller. The duty to defend and indemnify arises where any product liability claims have been made. "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 attorney's 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. A.R.S. § 12-684.

The exceptions to the statute are very narrow. As will be seen below, the manufacturer's duty to defend is not extinguished by claims made by a plaintiff that the seller was independently negligent. In fact, the manufacturer must indemnify the downstream seller even where there is no ultimate judgment rendered against the manufacturer. And if the manufacturer refuses to indemnify the seller, regardless of whether the manufacturer is found to be completely without fault, the manufacturer is required to reimburse the seller's defense costs. "The seller's right to reimbursement for the costs and attorney's fees does not depend upon the entry of a judgment in the plaintiff's favor." See *McIntyre Refrigeration, Inc. v. Mepco Electra* 799 P.2d 901, 904 (Ariz. App. 1990). It should be noted that the party seeking indemnity and a reimbursement of its attorney's fees is not entitled to a reimbursement of the attorneys' fees and costs incurred pursuing the indemnity claim against the manufacturer. See *Id.* at 906.

Most interestingly, the manufacturer's duty to defend and indemnify exists even where a conflict of interest would prevent the manufacturer's attorneys from taking over the defense of the seller. The conflict of interest does not negate the manufacturer's duty to take over the defense of the seller and indemnify the seller. "The statute does not include a 'conflict of interest' exception or defense. If the legislature had wanted to include such an exception, it could and presumably would have done so." See *Bridgestone/Firestone North America Tire, LLC v. A.P.S. Rent-A-Car and Leasing, Inc.*, 88 P.3d 572, 511 (Ariz. App. 2004) (quoting *State v. Fell*, 52 P.3d 218, 220-222, ¶¶ 9,13





(Ariz. App. 2002)). Where a conflict of interest exists, the manufacturer presumably could and would retain counsel of its choice to defend the seller. See *Bridgestone/Firestone*, 88 P.3d at 581.

In the *Bridgestone* case, the defendant seller not only failed to diligently defend against the product liability claims brought against it but affirmatively blamed the manufacturer for the defect and advanced a theory that the defect was the cause of the underlying accident. Even after the seller advanced a case adverse to the manufacturer, the manufacturer was still found to have improperly rejected the tender pursuant to the statute and required to pay for the defense which was undertaken and which affirmatively blamed the manufacturer. The seller pointed out on appeal "if a manufacturer declines a tender and leaves a seller to fend for itself, it gambles on its ability to later prove one of the statutory exceptions." The seller also argued that once the manufacturer rejected the seller's defense tender, the seller "had to make a tactical decision on whether to defend the tire or admit it was defective and defend the remaining allegations." *Id.* at 582. The Court of Appeals accepted the seller's arguments and found that even where tactical decisions were made to the detriment of the party to whom the tender was made, those tactical decisions would not negate the statutory duty to de-

fend. *Id.*

What is most important is that the manufacturer understands the penalty of not accepting the seller's tender. Generally, in practice it is assumed that when a manufacturer settles a case on behalf of the seller, the manufacturer expects, reasonably, that the seller will absorb the defense cost. The statute makes this assumption a bit more dangerous. Armed with the statute, sellers in Arizona are now demanding that the tender be accepted and even amending their answer to include a cross-claim for statutory indemnity against the manufacturer. This makes mediations and settlement conferences more tenuous between the manufacturer and seller and ultimately leaves the manufacturer and seller in an adverse position. Any manufacturer litigant in Arizona must understand the statute. The penalty for not accepting the tender of defense is significant and in drawn out product liability litigation, often very costly.

Bill Sowders is a Senior Associate at the ALFA International firm of Renaud Cook Drury Mesaros, P.A. where he primarily focuses his practice in the areas of product liability, medical/health care malpractice and catastrophic injury defense. Mr. Sowders can be reached to discuss this article at 602-256-3045 or wsowders@rcdmlaw.com.

Consumer Product Safety Improvement Act ("CPSIA") Update

The U.S. Consumer Product Safety Commission ("CPSC") issued a one-year enforcement stay of the new lead and phthalate testing and certification requirements for manufacturers and importers of regulated products that were imposed by the Consumer Product Safety Improvement Act ("CPSIA"). The stay is in effect until February 10, 2010, at which time the Commission will vote whether to terminate the stay. As indicated in a previous edition of *Perspectives*, the new lead and phthalate testing and certification requirements engendered considerable confusion and controversy due to a lack of CPSC guidance and the short implementation schedule, catching many manufacturers and retailers off guard.

These newly expanded CPSIA certification and testing provisions are generally intended to shift the burden of determining a product's compliance with all standards and bans from the CPSC to manufacturers and importers. The new certification procedures will require importers and manufacturers to conduct their own testing to support compliance certification. If the product is not properly certified, the CPSC may refuse importation on that basis alone – even without sampling or testing the product. The one-year stay primarily allows the CPSC more time to finalize several proposed rules, which should provide additional guidance and possibly relieve certain materials and products from testing and certification requirements (i.e. inventory).

On November 6, 2009, the CPSC released preliminary guidance entitled *Testing and Certification Requirements Under The Consumer Product Safety Improvement Act of 2008*. Basically, the document provides interim guidance pending the completion of the proposed regulations. Of particular significance to manufacturers is the guidance regarding the CPSC's position on a reasonable testing program and how to certify that a product complies with all rules, bans, standards, etc. applicable to a product.

Currently, the CPSC has not given any indication whether the stay will be lifted on February 10, 2010. However, additional guidance has been made available on test methods that will be used by the CPSC testing laboratory for the analysis of phthalate content in childcare items and toys. This Statement of Policy (with comments) was issued on October 27, 2009. Regulations for testing and certification of children's products containing lead are available for review and public comment until November 30, 2009.

Ryan Johnson
HALL & EVANS, LLC
Denver, Colorado