



OADC OUTLOOK

A Publication of the Oklahoma Association of Defense Counsel

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Winter Meeting

Submissions should be sent to Skoshi Heron
at: Skoshi@GoBaker.com
Skoshi Heron
PO Box 5445
Edmond, OK 73083
Fax:: 405-415-7366

President's Message

by Jennifer R. Annis

As 2014 comes to a close, I would like to thank each and every one of you for giving me the opportunity to serve as the OADC President. I am confident that our President-elect, Angela Ailles-Bahm will do an outstanding job and will work tirelessly to continue to make OADC better than ever and even more relevant to your practice.

Last month Angela and I attended the DRI annual meeting in San Francisco. I am very pleased to report to you that OADC was recognized at the awards luncheon and OADC was given the 2014 Diversity Award. As Elizabeth Ann Lawless said, "Diversity creates dimension in the world." Over the last five years OADC leadership has made a concerted effort to recruit OADC members from a variety of geographic and practice areas, as well as women and those with different racial backgrounds. In doing so, OADC has more dimension, and our leadership has been able to provide new insight and suggestions for the betterment of the organization based on this array of perspectives. Many thanks to our DRI representative, Jeromy Brown, for nominating OADC for this award and providing a plethora of information to DRI in consideration of the nomination.

The Diversity Award was not the only recognition Oklahoma received at the annual meeting. A special tribute was given to OADC founder and long-time DRI member and past president, Burt Johnson. Additionally, this year the award for Outstanding DRI Representative was renamed as the Kevin Driskill Outstanding DRI Representative. With the help of OADC and others, Kevin's wife and sons were able to attend the awards luncheon at the DRI annual meeting, and presented the newly named award.

Please mark your calendars for the OADC Winter Meeting, which will take place at VAST in Oklahoma City on January 30, 2015.

Jennifer R. Annis

Codified Protections for Product Manufacturers, Sellers, & Distributors

by Jeremy K. Ward

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On April 28, 2014, Oklahoma House Bill Number OK547HB 3365 (“HB 3365”) passed. The new statute relates to product liability actions, will be codified at 76 O.S. § 57.2, and becomes effective November 1, 2014. The statute will likely be considered substantive and only apply to claims accruing after November 1, 2014.

The statute provides a rebuttable presumption the manufacturer, or seller, of a product is not liable for an injury if: (1) the product complied with or exceeded mandatory safety standards or regulations promulgated by a government agency; or (2) if the product underwent premarket licensing or approval by a government agency, and after full consideration of the product’s risks and benefits, the product was approved or licensed for sale. 76 O.S. § 57.2 (A) & (C). These new Oklahoma statutory provisions are modeled after *Tex. Civ. Prac. & Rem.* § 82.008(a)-(d) enacted September 1, 2003. The rebuttable presumption is created once the manufacturer or seller establishes the product’s formulation, labeling, or design complied with the mandatory safety standards, regulations, or received a premarket licensing approval. Consequently, the burden is on the manufacturer or seller to establish the rebuttable presumption is applicable.

Provisions are present in the new Oklahoma statute to rebut the evidentiary presumptions against liability. *See Id.* at (B)(1-2) & (C)(1-2). Claimants will first attempt to rebut the presumption by attacking the sufficiency of the governmental standard, regulation, testing, and approval process. Secondly, claimants will attempt to rebut the presumption through the manufacturer’s interaction with the applicable governmental agency.

There are exceptions to the rebuttable presumption rule, for instance, the rebuttable presumption only relates to claims stemming from the formulation, labeling, or design of a product. *Id.* at (D). The rebuttable presumption *does not* relate to claims stemming from manufacturing flaws or defects even though the product complied with quality control and manufacturing practices promulgated by a government agency. *Id.*

Section 57.2 also provides protections for product distributors and sellers. After November 1, 2014, no product liability action may be asserted against a product seller or distributor unless: (1) the seller or distributor exercised substantial control over aspects of the design, manufacturing, or warning stages, (2) the seller or distributor altered or modified the product and the seller’s or distributor’s alteration or modification was the substantial factor which caused the harm to the claimant, (3) the product seller or distributor provided an express warranty independent of any product warranties common to the product, (4) the claimant cannot, after conducting a good faith evaluation, determine the identity of the manufacturer, (5) the manufacturer is not subject to service of process under the laws of Oklahoma, or (6) the court determines the claimant could not enforce a judgment against the manufacturer. *Id.* at (E)(1-6). These statutory protections are modeled after *Tex. Civ. Prac. & Rem.* § 82.003(a) enacted September 1, 2003, amended on September 1, 2009.

The new statute has the potential to reduce lawsuits against sellers and distributors in garden-variety product liability actions; however, competent counsel can draft a petition to defeat a motion to dismiss. The statute offers exceptions for claims against sellers and distributors and also recognizes a product seller or distributor can be liable for independent negligence: (1) for failing to exercise reasonable care when assembling, inspecting, or maintaining a product, or (2) when passing on warnings or instructions relating to dangers and proper use. *Id.* at (G)(1-3). Essentially, the statute permits independent/active negligence claims against sellers and distributors; however, subsection (F) does limit initial discovery to determining whether an exception exists to permit a claim to proceed against a distributor or seller.

These distributor and seller protections may not drastically affect a manufacturer’s indemnification obligations pursuant to 12 O.S. § 832.1 or whether a local distributor or seller are initially sued. However, the protections could affect whether a lawsuit is prosecuted in state or federal court. Many times product manufacturers are located outside of

Oklahoma and the distributor or seller are sued to simply destroy diversity to keep the case in state court. If a local distributor or seller is sued with a carefully worded petition, defense counsel can conduct discovery, and limit discovery, to timely determine if the claim of independent/active negligence against the local distributor or seller can withstand a dispositive motion, and if not, the case may be removed. Ultimately, more product liability actions may be decided in federal court.

The full text of the statute is below. Oklahoma courts will likely look for interpretation guidance from Texas case law concerning Texas' similar, earlier enacted, statutes.

76 O.S. § 57.2

A. In a product liability action brought against a product manufacturer or seller, there is a rebuttable presumption that the product manufacturer or seller is not liable for any injury to a claimant caused by some aspect of the formulation, labeling, or design of a product if the product manufacturer or seller establishes that the formula, labeling, or design for the product complied with or exceeded mandatory safety standards or regulations adopted, promulgated, and required by the federal government, or an agency of the federal government, that were applicable to the product at the time of manufacture and that governed the product risk that allegedly caused harm.

B. The claimant may rebut the presumption in subsection A of this section by establishing that:

1. The mandatory federal safety standards or regulations applicable to the product and asserted by the defendant as its basis for rebuttable presumption were inadequate to protect the public from unreasonable risks of injury or damage; or
2. The manufacturer, before or after marketing the product, withheld or misrepresented information or material relevant to the federal government's or agency's determination of adequacy of the safety standards or regulations at issue in the action.

C. In a product liability action brought against a product manufacturer or seller, there is a rebuttable presumption that the product manufacturer or seller is not liable for any injury to a claimant allegedly caused by some aspect of the formulation, labeling, or design of a product if the product manufacturer or seller establishes by a preponderance of the evidence that the product was subject to premarket licensing or approval by the

federal government, or an agency of the federal government, that the manufacturer complied with all of the government's or agency's procedures and requirements with respect to premarket licensing or approval, and that after full consideration of the product's risks and benefits the product was approved or licensed for sale by the government or agency. The claimant may rebut this presumption by establishing that:

1. The standards or procedures used in the particular premarket approval or licensing process were inadequate to protect the public from unreasonable risks of injury or damage; or
2. The manufacturer, before or after premarket approval or licensing of the product, withheld from or misrepresented to the government or agency information that was material and relevant to the performance of the product and was causally related to the claimant's injury.

D. This section does not extend to manufacturing flaws or defects even though the product manufacturer has complied with all quality control and manufacturing practices mandated by the federal government or an agency of the federal government, or if the product becomes the subject of a recall, or is no longer marketed, pursuant to any order, consent decree, or agreement between the manufacturer and any federal agency.

E. No product liability action may be asserted against a product seller other than the manufacturer, unless:

1. The product seller exercised substantial control over the aspect of the design, testing, manufacture, packaging, or labeling of the product that caused the alleged harm for which recovery of damages is sought; or
2. The product 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; or
3. The product seller made an express warranty as to such product independent of any express warranty made by a manufacturer as to such product, such product failed to conform to the product seller's warranty, and the failure of such product to conform to the warranty caused the harm complained of by the claimant; or

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4. The claimant is unable, despite a good-faith exercise of due diligence, to identify the manufacturer of the product; or
 5. The manufacturer is not subject to service of process under the laws of the state; or
 6. The court determines that the claimant would be unable to enforce a judgment against the manufacturer.
- F. In a claim against a seller in a product liability action, discovery shall initially be limited to issues related to subsection E of this section.
- G. A product seller other than a manufacturer is liable to a claimant on the basis of negligence if the claimant establishes that:
1. The product seller sold the product involved in such action;
 2. The product seller did not exercise reasonable care:
 - a. in assembling, inspecting, or maintaining such product, or
 - b. in passing on warnings or instructions from such product's manufacturer about the dangers and proper use of such product; and
 3. Such failure to exercise reasonable care was a proximate cause of the harm complained of by the claimant.

2014 Outstanding Defense Lawyer

Candidate has demonstrated an outstanding commitment to the work of OADC and during 2014 has obtained one or more substantial litigation wins (not necessarily a defense verdict).

Nominations must include:

1. Candidate
2. Candidate's Firm
3. Person Nominating
4. Reason for Nomination

Send all nominations to Jennifer Annis @ jannis@ahn-law.com by **January 1**.

2014 Outstanding Young Lawyer

Candidates for the award must have demonstrated outstanding commitment to the work of OADC and during the 2014 year have one or more of the following:

1. Published Articles
2. Pro Bono Work
3. Work with Law Students
4. Community Service

OADC Winter Meeting

January 30th, 2015

Vast Restaurant
50th Floor Devon Tower

6:30 Cocktails
7:30 Dinner

Details Coming Soon....