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Torts – Product Liability: North Dakota Rejects the Apparent Manufacturer Doctrine

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TORTS – PRODUCT LIABILITY: NORTH DAKOTA REJECTS THE APPARENT MANUFACTURER DOCTRINE

Bornsen v. Pragotrade, LLC, 2011 ND 183, 804 N.W.2d 55

ABSTRACT

In *Bornsen v. Pragotrade, LLC*, the North Dakota Supreme Court rejected the application of the apparent manufacturer products liability doctrine. The doctrine imposes product liability on a seller for products manufactured by another, but for the original seller's purpose. Unless prevented by statute, most jurisdictions have incorporated the doctrine. This holding reversed *Reiss v. Komatsu America Corp.,* where the United States Federal District Court of North Dakota determined the state would accept the doctrine. The North Dakota Supreme Court found the North Dakota Legislative Assembly's adoption of tort reform law intended to restrict an individual's ability to file suit against a nonmanufacturing seller for injuries arising out of defective products. Key in this finding was the ability of nonmanufacturing sellers to shift liability to the original manufacturer under certain circumstances. The practical effect is an increased likelihood of federal product liability cases being filed in a jurisdiction outside of North Dakota. As a result, plaintiffs will need to consider not only the acceptance of this doctrine in other jurisdictions, but also the choice of law test established in the original filing jurisdiction.

I. FACTS

Nathan Bornsen purchased a Cabela's labeled meat grinder from a Cabela's retail store in East Grand Forks, Minnesota, for use in his venison processing business located in Larimore, North Dakota.[1] On November 21, 2007, while operating the grinder purchased by her husband, Ruth Bornsen's left hand was pulled into the grinder, resulting in four of her

1. Bornsen v. Pragotrade, LLC, 2011 ND 183, ¶ 2, 804 N.W.2d 55.

fingers being severed.[2] The Bornsens determined Pragotrade, Inc. and Pragotrade, LLC, as its successor, were the manufacturers of the grinder, and Cabela's was the seller.[3] The Bornsens filed suit in North Dakota state court against Pragotrade and Cabela's, claiming Pragotrade and Cabela's are liable for negligence, strict liability, and breach of warranty claims.[4] Cabela's filed a motion on July 20, 2010, removing the case to the United States Court for the District of North Dakota.[5]

Subsequent to the removal motion, Cabela's filed a motion to dismiss the Plaintiff's alleged product liability claim under North Dakota Century Code section 28-01.3-04, claiming Cabela's was a nonmanufacturing seller of the grinder.[6] The Bornsens alleged the grinder had a design defect due to large dimensions of the grinder opening, and Cabela's failed to properly warn the consumer of this defect.[7] In its motion, Cabela's claimed Pragotrade was the manufacturer; however, Pragotrade denied it was the manufacturer, but admitted assisting in designing and distributing the grinder.[8] The Bornsens alleged Cabela's was an apparent manufacturer of the product and should be liable.[9] Federal District Court Chief Judge Ralph Erickson considered the motion and rejected the Bornsens' argument, based on *Reiss v. Komatsu America Corp.*,[10] that the North Dakota Supreme Court would adopt the apparent manufacturing doctrine, and therefore, the federal court should use the doctrine.[11] Instead of ruling on the motion to dismiss, Chief Judge Erickson filed an Order of Certification, pursuant to North Dakota Rule of Appellate Procedure 47, requesting the North Dakota Supreme Court provide a determination of whether the apparent manufacturer doctrine is part of North Dakota law.[12]

II. LEGAL BACKGROUND

North Dakota products liability statutes establish distinct definitions for both a manufacturer and a seller.[13] A manufacturer is defined as "a person

2. Bornsen v. Pragotrade, LLC, 2011 ND 183, ¶ 5, 804 N.W.2d 55, 57; Brief for Appellants ¶ 1, Bornsen v. Pragotrade, LLC, 2011 ND 183, 804 N.W.2d 55 (No. 20110087).

3. *Bornsen*, ¶ 2, 804 N.W.2d at 56; Brief for Appellee at 4, Bornsen v. Pragotrade, LLC, 2011 ND 183, 804 N.W.2d 55 (No. 20110087).

4. *Bornsen*, ¶ 2; Brief for Appellee, *supra* note 3, at 4.

5. *Bornsen*, ¶ 2; Brief for Appellants, *supra* note 2, ¶ 3.

6. *Bornsen*, ¶ 3.

7. *Id.* ¶ 5, 804 N.W.2d at 57.

8. *Id.* ¶ 3, 804 N.W.2d at 56.

9. *Id.* ¶ 4, 804 N.W.2d at 57.

10. 735 F. Supp.2d 1125 (2010).

11. *Bornsen*, ¶ 5.

12. *Id.*

13. N.D. CENT. CODE § 28-01.3-01(1), (3) (2006).

or entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product prior to the sale of the product to a user or consumer."[14] Seller is defined as "any individual or entity, including a manufacturer, wholesaler, distributor, or retailer, who is engaged in the business of selling or leasing any product for resale, use, or consumption."[15] These definitions distinguish nonmanufacturing sellers and can prevent a products liability claim against the entity if it can: (1) correctly identify the actual manufacturer, (2) not exercise control over the design, manufacture or warning of the product, (3) had no knowledge of the design defect, (4) did not cause the defect, and (5) the plaintiff's claim is not barred against the identified manufacturer due to the appropriate statute of limitations.[16]

The apparent manufacturer doctrine creates the same liability imposed on a manufacturer of a defective product for any entity that sells a product for its own purposes, even though it was manufactured by another.[17] Pursuant to the certified question submitted to the North Dakota Supreme Court, it remained to be resolved whether the apparent manufacturer doctrine would be adopted by the North Dakota Supreme Court. This determination would be based on what the North Dakota Legislature intended when it adopted product liability reform legislation and whether that language was exclusive under the statute.[18]

A. HISTORY OF APPARENT MANUFACTURER DOCTRINE

The apparent manufacturer doctrine provides strict liability for a seller of a defective product, even though the seller did not manufacture the product, and is traced back to early common law decisions and the American Law Institute's (ALI's) published Restatement (First) of Torts.[19] While there has been controversy surrounding the overall development of strict liability as pertaining to manufactured products, the apparent manufacturer doctrine has remained in later publications of the ALI's views on torts.[20]

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14. *Id.* § 28-01.3-01(1).
15. *Id.* § 28-01.3-01(3).
16. *Id.* § 28-01.3-04(1)-(3).
17. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 14 (1998).
18. *See infra* Part II.A.3.
19. *See generally* RESTATEMENT (FIRST) OF TORTS § 400 (1934) (imposing liability on a vendor selling a product made by another).
20. RESTATEMENT (SECOND) OF TORTS § 400 (1965); RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 14 (1998). *See generally* Anita Bernstein, *How Can a Product be Liable?*, 45 DUKE L.J. 1, 3-4 (1995) (critizing the imposition of liability on a product); Marshall S. Shapo, *The*

The policy reason for adopting a doctrine of nonmanufacturing seller's product liability is based on establishing privity of the consumer harmed by the product with the end retailer or distributor from whom the product was purchased.[21] In addition, the doctrine prevents a vendor from advertising a product as its own and having consumers rely on the vendor's reputation, but subsequently allowing the vendor to deny it is the actual manufacturer should problems arise with the product.[22] The seller is estopped from denying it was the manufacturer when a buyer has no reasonable means to determine the true manufacturer, and the seller concealed that identity to the buyer.[23] While these reasons form the basis for adoption of the doctrine, other legal methods exist to identify the true manufacturer,[24] and plaintiffs have additional legal remedies for harm suffered from defective products.[25]

1. *Restatement Interpretation*

The most recent codified language of the apparent manufacturer doctrine treats any entity "engaged in the business of selling or otherwise distributing products who sells or distributes as its own a product manufactured by another is subject to the same liability as though the seller or distributor were the product's manufacturer."[26] This relatively recent change clarifies the prior rule requiring anyone "who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer."[27] The change reflects a reform of the prior strict liability rule for defective products incorporated under the Restatement (Second) of Torts section 402(A), which subsumed the prior mentioned section in regard to products liability.[28]

Two specific provisions of the rule stand out in this case. First, the ALI envisioned a situation where state statutes on products liability would treat nonmanufacturing sellers of a product more leniently than the true

Law of Products Liability: The ALI Restatement Project, 48 VAND. L. REV. 631, 646-51 (1995) (discussing state product liability doctrines at odds with the restatement version).

21. Robert A. Sachs, *Product Liability Reform and Seller Liability: A Proposal for Change*, 55 BAYLOR L. REV. 1031, 1034 (2003) (citing RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS § 9A, at 715 (7th ed. 2000)).

22. AM. L. PROD. LIAB. 3d § 6:2 (2005).

23. *Id.*

24. *See* N.D. CENT. CODE § 28-01.3-04(1) (2006) (imposing liability on nonmanufacturing seller unless certified identification of actual manufacturer).

25. Lana Steven, *Torts: Products Liability*, 75 DENV. U. L. REV. 1105, 1115 (1998). (discussing liability under agency, fraud, and misrepresentation claims).

26. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 14 (1998).

27. RESTATEMENT (SECOND) OF TORTS § 400 (1965).

28. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 14 cmt. a (1998). *See generally* 2 AM. LAW INST., REPORTER'S STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY (1991).

manufacturer, and to the extent a statute alters liability, the statute supersedes the common law.[29] Second, when a nonmanufacturing seller represents a product as its own, the seller is liable as if it manufactured the product based on the buyer's reliance on the seller's reputation to assure the quality of the product.[30]

2. *Acceptance by Other Jurisdictions*

At least twenty-three states have adopted some form of strict liability for defective products on any retailer of a product manufactured by another.[31] Prior to this decision, and the restructuring of the apparent manufacturer doctrine rule under the Restatement, both Michigan and Georgia specifically rejected the doctrine.[32] Michigan's rejection of the doctrine was based upon findings of additional theories of tort doctrine imposing liability on a seller of defective products, including the ability of the plaintiff to impose liability through laws on agency, fraud and misrepresentation, as well as piercing the corporate veil on a successor entity.[33] The Michigan Supreme Court found existing protections for consumers to pursue defective product claims were sufficient, and refused to accept the apparent manufacturer doctrine as other available remedies were available and adoption of the doctrine would be redundant.[34]

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29. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 14 cmt. b (1998).

30. *Id.* cmt. c.

31. *See generally* Laaperi v. Sears, Roebuck & Co., Inc., 787 F.2d 726 (1st Cir. 1986) (applying Massachusetts law); Brock v. Baxter Healthcare Corp., 96 F. Supp. 2d 1352 (S.D. Ala. 2000) (applying Alabama law); Davis v. United States Gauge, 844 F. Supp. 1443 (D. Kan. 1994) (applying Kansas law); Carter v. Joseph Bancroft & Sons Co., 360 F. Supp. 1103 (E.D. Pa. 1973) (applying Pennsylvania Law); Dildine v. Clark Equip. Co., 666 S.W.2d 692 (Ark. 1984); Cravens, Dargan & Co. v. Pac. Indem. Co. Inc., 29 Cal. App. 3d. 594 (1973); Burkhardt v. Armour & Co., 161 A. 385 (Conn. 1932), *overruled in part on other grounds by* Porpora v. City of New Haven, 187 A. 668 (Conn. 1936), *and overruled on other grounds by* Perlstein v. Westport Sanitarium Co., 11 Conn. Supp. 117, 1942 WL 859 (Super. Ct. 1942); Hebel v. Sherman Equip., 442 N.E.2d 199 (Ill. 1982); Dudley Sports Co. v. Schmitt, 279 N.E.2d 266 (Ind. Ct. App. 1972); Wagner v. Larson, 136 N.W.2d 312 (Iowa 1965); Chappuis v. Sears Roebuck & Co., 358 So.2d 926 (La. 1978); Armour & Co. v. Leasure, 9 A.2d 572 (Md. 1939); Seasword v. Hilti, Inc., 537 N.W.2d 221 (Mich. 1995); Tiedje v. Haney, 239 N.W. 611 (Minn. 1931); Coca Cola Bottling Co., Inc. of Vicksburg v. Reeves, 486 So. 2d 374 (Miss. 1986); Swindler v. Butler Mfg. Co., 426 S.W.2d 78 (Mo. 1968); Slavin v. Francis H. Leggett & Co., 177 A. 120 (N.J. Sup. Ct. 1935); Willson v. Faxon, Williams & Faxon, 101 N.E. 799 (N.Y. 1913); Rulane Gas Co. v. Montgomery Ward & Co., 56 S.E.2d 689 (N.C. 1949); Saum v. Venick, 293 N.E.2d 313 (Ohio Ct. App. 1972); Benford v. Berkeley Heating Co., 188 S.E.2d 841 (S.C. 1972); First Am. Nat'l Bank v. Evans, 417 S.W.2d 778 (Tenn. 1967); S. Blickman, Inc. v. Chilton, 114 S.W.2d 646 (Tex. Civ. App. Austin 1938); Zamora v. Mobil Corp., 704 P.2d 584 (Wash. 1985); AM. L. PROD. LIAB., *supra* note 22, § 6:2 n.1.

32. *Seasword*, 537 N.W.2d at 222; Freeman v. United Cities Propane Gas of Ga., Inc., 807 F. Supp. 1533, 1539-40 (M.D. Ga. 1992).

33. *Seasword*, 537 N.W.2d at 224.

34. *Id.*

Similarly, the Georgia Supreme Court affirmed partial summary judgment dismissing strict liability claims for two retailers alleged to be manufacturers selling defective propane cylinders, which resulted in an explosion injuring a homeowner.[35] The Georgia Supreme Court interpreted the state statutory scheme on products liability to apply only to actual manufacturers based on the language of the Georgia Tort Reform Act of 1987, which eliminated product liability claims on "a broad category of entities that had no real role in the creation of products."[36] The North Dakota Supreme Court made a similar determination in this case, relying on the statutory scheme to reject adoption of the doctrine.

3. *North Dakota Statutory Changes to Products Liability Law*

North Dakota, like Georgia, enacted tort reform legislation in the 1980s to address product liability suits.[37] North Dakota amended products liability law under North Dakota Century Code section 28-01.3-01 to -04, which prevents nonmanufacturing seller liability in defective product claims.[38] One of the initial committee meetings on the reform bill indicated the express desire of the legislative members to reduce insurance premiums for businesses within the state, promote economic growth, and prevent large financial claims against retailers.[39] However, no discussion was made as to whether this protection was intended to shield out-of-state companies from liability.[40]

B. *REISS V. KOMATSU AMERICA CORP.*

In a prior decision, a federal district court in North Dakota decided North Dakota would likely recognize the apparent manufacturer doctrine.[41] In a case before Judge Daniel Hovland, authoring the opinion, the court considered a product liability claim on the sale of construction equipment without a rollover protection structure.[42] The immediate seller, Diesel Machinery, leased a heavy construction vehicle to Mariner Construction.[43]

35. *Freeman*, 807 F. Supp. at 1539-40.
36. *Id.*; GA. CODE ANN. § 51-1-11.1 (2000).
37. 1987 N.D. Laws 954.
38. 1993 N.D. Laws 1120.
39. *Hearing on S.B. 2351 Before the S. Judiciary Comm*, N.D. Leg. Assemb. (1993) (statements of S. Harvey Tallackson, R. Doug Payne, S. Jim Dotzenrod, & S. Joe Keller).
40. *See generally id.*
41. Reiss v. Komatsu Am. Corp., 735 F. Supp. 2d 1125, 1133 (D.N.D. 2010).
42. *Id.* at 1138.
43. *Id.* at 1129.

Diesel Machinery acquired the vehicle from the Galion Division of Dress Industries, Inc., which was the precursor company of Komatsu.[44]

Henry Reiss was an employee of Mariner Construction and died as a result of a rollover on the equipment.[45] Pearl Reiss filed a wrongful death suit in North Dakota state court against Mariner Construction and Komatsu.[46] Defendants filed a motion to remove the action to federal court and subsequently filed a motion for summary judgment denying liability based on its status under North Dakota Century Code section 28-01.3-04 as a nonmanufacturing seller.[47] In complying with North Dakota Century Code section 28-01.3-04, Diesel Machinery filed an affidavit stating Komatsu, as successor to Dress Industries, was the actual manufacturer, with Komatsu asserting the true manufacturer was Tema Terra Maquinaria Ltda., a Brazilian company.[48]

The court rejected Komatsu's claim of protection under section 28-01.3-04, citing extensive non-North Dakota case law in which other jurisdictions adopted the apparent manufacturer doctrine.[49] The court found Komatsu was the equipment's manufacturer based on the vehicle's decals, operator's manual, warranty materials, and sales brochure all indicating the manufacturer was Dresser Industries/Komatsu, and this representation to the public under the apparent manufacturer doctrine imposed liability on Komatsu.[50] In making the determination, the court determined the statutory language was not a bar against adoption of the apparent manufacturer doctrine,[51] as the North Dakota Supreme Court had previously adopted other Restatement sections on strict liability in products liability actions, and had not yet considered a case where the doctrine was accepted.[52] Based on this reasoning, the court accepted the doctrine under North Dakota law and believed that the North Dakota Supreme Court would do likewise if presented with an opportunity to consider the matter.[53]

III. ANALYSIS

In answering the certified question, the North Dakota Supreme Court considered two separate issues. First, whether the question from the United

44. *Id*.
45. *Id*. at 1130.
46. *Id*.
47. *Id*. at 1130-32.
48. *Id*. at 1133.
49. *Id*. at 1133-34.
50. *Id*. at 1134.
51. *Id.* at 1133.
52. *Id*. at 1132.
53. *Id.* at 1133.

States District Court of North Dakota was properly certified pursuant to the North Dakota Rules of Appellate Procedure.[54] Second, whether the court would adopt the apparent manufacturer products liability doctrine.[55] Writing for the majority, Justice Crothers, with Chief Justice VandeWalle and Justice Sandstrom concurring, determined the question was properly certified from the United States District Court, and that the apparent manufacture doctrine is not supported under North Dakota law.[56]

A. MAJORITY OPINION

The North Dakota Supreme Court's opinion centered on the intent of the North Dakota Legislature in amending products liability law. Based on this intent, the court ultimately rejected the doctrine. The current law allowing a nonmanufacturing entity to escape liability precluded adoption of the doctrine and would counter the intent of the legislature in limiting the ability of individuals to file product liability claims.

1. *Rejection of Apparent Manufacturer Doctrine Under Common Law*

The North Dakota Supreme Court looked to the statute in question to determine whether the North Dakota Legislature precluded adoption of the apparent manufacturer doctrine.[57] The majority cited the text of North Dakota Century Code section 28-01.3-01 indicating separate definitions for "manufacturer" and "seller."[58] The court also looked to North Dakota Century Code section 28-01.3-04, which provides a separate liability section for nonmanufacturing sellers.[59] The court found these two provisions indicated the legislature's intent to restrict product liability actions as a remedy for harm caused by defective products.[60] The court considered the statutory scheme so comprehensive that adoption of the apparent manufacturer doctrine could not be recognized without contravening the legislative intent in adopting the statute.[61] The court cited the specific conflict between common law and statutory language

54. Bornsen v. Pragotrade, LLC, 2011 ND 183, ¶ 10, 804 N.W.2d 55, 59.
55. *Id.* ¶¶ 1, 10-11, 804 N.W.2d at 56, 59.
56. *Id.* ¶¶ 10, 19, 804 N.W.2d at 59, 62.
57. *See infra* Part III.B on discussion of proper certification of the question considered by the North Dakota Supreme Court.
58. *Bornsen*, ¶ 13, 804 N.W.2d at 59.
59. *Id.* at 59-60.
60. *Id.* ¶ 17, 804 N.W.2d at 61.
61. *Id.*; *see infra* Part III.A.2 for discussion on the legislative intent findings.

anticipated by the drafters under the Restatement.[62] The ALI indicated that statutory provisions differentiating retail sellers from manufacturers, where enacted in a relevant jurisdiction, would override common law doctrine imposing liability.[63]

1. *Interpretation of North Dakota Century Code Based on Statutory Language and Legislative Intent*

In reaching its decision on the rejection of the apparent manufacturer doctrine, the North Dakota Supreme Court cited state law and precedent to interpret legislative intent.[64] This indication by the Legislature requires "the law of [North Dakota] respecting the subjects to which it relates, and its provisions and all proceedings under it are to be construed liberally, with a view to effecting its objects and to promoting justice."[65] Additionally, North Dakota law requires no common law consideration may be made in a case where the law has been declared by statute.[66]

In interpreting North Dakota's products liability statutes, the court has stated "it is for the legislature to determine policy, not the courts"[67] and "noted that '[i]t must be presumed that the legislature intended all that it said, and that it said all that it intended to say.'"[68] The Bornsens argued that prior legislative action in 1979 to preempt private labelers from liability later removed in 1987, demonstrated intent on the part of the legislature to allow for adoption of the apparent manufacturer doctrine.[69] The argument was premised on North Dakota precedent requiring courts to find legislative purpose in all revisions and changes to prior statutes, and this repeal suggested private labelers could be found liable.[70] However, the court looked specifically to the legislative findings within the statute to determine the North Dakota Legislature sought to establish "clear and predictable" rules.[71] These clear and predictable rules would preclude the adoption of

62. *Bornsen*, ¶ 18, 804 N.W.2d at 62 (citing RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 14 (1998)).

63. *Id*. ¶ 18; RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 14 cmt. b (1998).

64. *Bornsen*, ¶¶ 14-16, 804 N.W.2d at 60-61.

65. N.D. CENT. CODE § 1-02-01 (2008).

66. *Id.* § 1-01-06.

67. *Bornsen*, ¶ 14, 804 N.W.2d at 60 (quoting Treiber v. Citizens State Bank, 1999 ND 130, ¶ 16, 598 N.W.2d 96, 100).

68. *Id.* (quoting City of Dickinson v. Thress, 290 N.W. 653, 657 (1940)).

69. *Bornsen*, ¶ 11, 804 N.W.2d at 59; Briefs of Appellants, *supra* note 2, ¶ 14; Reply Brief for Appellants ¶¶ 24-25, Bornsen v. Pragotrade, 2011 ND 183, 804 N.W.2d 55 (No. 20110087).

70. *Bornsen*, ¶ 11, 804 N.W.2d at 59; Brief for Appellants, *supra* note 2, ¶¶ 14-15, Reply Brief for Appellants, *supra* note 69, ¶¶ 24-25.

71. *Bornsen*, ¶¶ 16-17, 804 N.W.2d at 61.

the common law apparent manufacturer doctrine in product liability claims.[72]

B. DISSENT ON ACCEPTANCE OF CERTIFICATION ORDER

Under the North Dakota Rules of Appellate Procedure, the North Dakota Supreme Court may answer certified questions from, among others, a federal district court involving questions of state law that may be determinative in a proceeding where it appears no controlling precedent has occurred in the decisions of the North Dakota Supreme Court.[73] Justice Kapsner, dissenting from this part of the majority's analysis, did not feel the court should take up the question in this case.[74] This is based on the findings from the United States District Court of North Dakota that indicated the decision of the North Dakota Supreme Court would be determinative as to the claim made by the Bornsens.[75]

Justice Crothers, writing for the majority, touched on this controversy by detailing the different standards applicable to North Dakota state courts compared to other courts seeking a certified answer to a question of North Dakota law.[76] Under North Dakota Rule of Appellate Procedure 47.1, applicable to North Dakota state courts, the certified question of law must determine the outcome of the case.[77] Under Rule 47, applicable to other state appellate courts and federal courts, the certified question of law need not be determinative.[78] The public policy purpose for a higher standard requiring the question be determinative for North Dakota courts as opposed to foreign courts is due to the ability of either party to appeal any decision to the North Dakota Supreme Court on questions of law, while a party to a foreign court has no such remedy.[79] In this instance, the certifying court was based on a foreign jurisdiction, but certified the question as "being determinative" which exceeded the standard required under the North Dakota Rules of Appellate Procedure.[80] The question did not provide sufficient facts as to why the question would be determinative, outside of the inference made by Chief Judge Erickson's opinion that the apparent manufacturer doctrine would not be adopted.[81]

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72. *Id.*
73. N.D. R. APP. P. 47(a).
74. *Bornsen*, ¶¶ 21-28, 802 N.W.2d at 62 (Kapsner, J., dissenting).
75. *Id*. ¶ 8, 804 N.W.2d at 58 (majority opinion).
76. *Id*. ¶ 7 (citing N.D. R. APP. P. 47.1(a)(1)(A)).
77. *Id.*
78. *Id.*
79. *Id*. (citing McKenzie County v. Hodel, 467 N.W.2d 701, 704 (N.D. 1991)).
80. *Id.* ¶ 10, 804 N.W.2d at 59.
81. *Id.*

Justice Crothers did not address the issue due to the importance of the question involved to state tort doctrine and the clear division within the United States District Court of North Dakota.[82] Justice Kapsner disagreed with the acceptance of the certification order, citing case law originating from the model rule,[83] upon which North Dakota's rule is based, and explaining the North Dakota Supreme Court has discretionary authority to reject the certification order.[84] Along with the discretionary nature granted to the court, Justice Kapsner indicated the lack of all relevant facts to make an informed decision does not meet the standard required to allow acceptance of the certified order, and she believed the order should have been denied.[85]

IV. IMPACT ON NORTH DAKOTA PRACTITIONERS

The results of this case require practitioners to consider two important issues before pursuing or defending any claim. First, do the circumstances of the case implicate an apparent manufacturer will automatically be a defendant? Second, if an apparent manufacturer is implicated, can the suit be filed in a jurisdiction outside North Dakota? Conversely, in regards to a defendant, can a suit outside of North Dakota either be transferred back within the state or have a choice of law analysis apply North Dakota law? As part of this consideration, a practitioner must consider the original jurisdiction's choice of law analysis regardless of any possible transfer.

A. REJECTION OF DOCTRINE

The practical consideration for practitioners within North Dakota is the inability of the apparent manufacturer doctrine to be used as a cause of action within the state, or alternatively, whether North Dakota Century Code section 28-0.13-04 serves as a defense against liability for suit filed against one's client.[86] With the rejection of the apparent manufacturer doctrine, North Dakota retailers selling a product with a trademark or brand of the seller may deny it is a manufacturer.[87] Estoppel against a retailer denying the manufacture of the product is limited in North Dakota under

82. *Id.*

83. UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT § 1, 12 U.L.A. 66 (1967).

84. *Bornsen*, ¶ 23-24, 804 N.W.2d at 62-63 (Kapsner, J., dissenting) (citing Atlas Life Ins. Co. v. W.I.S., Inc., 306 U.S. 563, 566 (1939); NLRB v. White Swan Co., 313 U.S. 23, 24 (1941)).

85. *Id*. ¶ 27, 804 N.W.2d at 64.

86. *See supra* Part III.A.

87. *See supra* note 16 and accompanying text.

this ruling,[88] but does require the nonmanufacturing seller to correctly identify the true manufacturer.[89]

For retailers conducting business in North Dakota, the decision will reduce the likelihood of a successful product liability action for any defective product sold. This applies so long as the retailer is in compliance with provisions of North Dakota Century Code section 28-01.3-04 requiring the accurate identification of the actual manufacturer. The seller must also assert it did not create the defect, did not control the design or manufacturing of the product, and had no actual knowledge of the defect.[90] The opinion also does not bar additional claims made by a plaintiff as indicated in other jurisdictions that have similarly rejected the apparent manufacturer doctrine.[91]

B. CHOICE OF LAW CONSIDERATIONS

North Dakota has become an outlier in not adopting the apparent manufacturer doctrine compared to most other states.[92] This creates an important decision for practitioners choosing an appropriate venue and choice of law when filing suit or defending a products liability claim involving nonmanufacturing sellers. With federal law establishing criteria as to the applicability of a state's choice of law analysis, this initial decision will ultimately decide the success of the case.

1. *Choice of Venue Options for the Bornsens*

In this case, the Bornsens had possible venues outside of North Dakota in which to bring a products liability claim, including the location of sale (Minnesota), and the location of the seller's headquarters (Nebraska).[93] Minnesota has a statute similar to North Dakota providing nonmanufacturing retailers a defense from products liability action.[94] As in North Dakota, Minnesota allows a seller to escape liability if the true manufacturer is identified and the seller has no significant control over the design or manufacture of the product, had no actual knowledge of the defect, and did not create the defect.[95] However, Minnesota allows a

88. *See* discussion *supra* Part II.A.

89. *See supra* note 16 and accompanying text.

90. *See supra* note 16 and accompanying text

91. *See supra* note 33 and accompanying text.

92. *See supra* Part II.A.2.

93. *See* Brief for Appellants, *supra* note 2, ¶ 1; Cabela's Retail Inc. is headquartered in Sidney, Nebraska. *Investor's Relations Company Overview*, CABELA'S, http://phx.corporate-ir.net/phoenix.zhtml?c=177739&p=irol-irhome (last visited Dec. 7, 2012).

94. MINN. STAT. § 544.41 (2010).

95. *Id.* § 544.41 subdiv. (3).

plaintiff to return to the nonmanufacturing seller if the true manufacturer cannot satisfy a reasonable settlement or judgment as determined by the court.[96] This has provided plaintiffs an avenue to pursue a claim against a nonmanufacturing seller that would otherwise be denied.[97] However, nothing in the *Bornsen* record indicates an exception to the Minnesota statute imposing liability on Cabela's.

Nebraska's statutory scheme appears to prohibit adoption of the apparent manufacturer doctrine, as product liability actions are prohibited "against any seller or lessor of a product which is alleged to contain or possess a defective condition" unless the seller has manufactured the product or defective part.[98] However, both the Nebraska Supreme Court and United States District Court of Nebraska have declined to consider whether this statute specifically precludes adoption of the doctrine.[99] As such, a filing by the Bornsens in Nebraska would not necessarily change the result of the suit.

2. *Importance of the Original Venue in Choice of Law Analysis*

With precedent set by the rejection of the apparent manufacturer doctrine in North Dakota, practitioners considering filing a products liability action may consider a forum outside of North Dakota as a venue for the claim. If the action is made in federal district court based on diversity jurisdiction, or removed from a state court, the law applicable in the original forum will follow even if the venue is transferred.[100] This includes the choice of law analysis of the original forum state.[101]

For example, if a claim is made in the United States Federal District Court of Minnesota, and subsequently transferred to North Dakota, the North Dakota Federal District Court is required to use the Minnesota choice of law analysis.[102] For Minnesota, this is the significant contacts test requiring an analysis of five choice-influencing factors including: "(1) Predictability of results; (2) Maintenance of interstate and international order; (3) Simplification of the judicial task, (4) Advancement of the

96. *Id.* § 544.41 subdiv. (2)(e).

97. Finke v. Hunter's View, Ltd., 596 F. Supp. 2d 1254, 1270-71 (D. Minn. 2009).

98. NEB. REV. STAT. § 25-21, 181 (2008).

99. Sherman v. Sunsong Am., Inc., 485 F. Supp. 2d 1070, 1079-80 (D. Neb. 2007); Stones v. Sears, Roebuck & Co., 558 N.W.2d 540, 545 (Neb. 1997).

100. Ferens v. John Deere Co., 494 U.S. 516, 523 (1990).

101. *Id.*; Eggleton v. Plasser & Theurer Export Von Bahnbaumaschinen Gesellschaft, MBH, 495 F.3d 582, 585-86 (8th Cir. 2007).

102. Prudential Ins. Co. of Am. v. Kamrath, 475 F.3d 920, 924 (8th Cir. 2007).

forum's governmental interest; and (5) Application of the better rule of law."[103]

Predictability of results relates to the ideal outcome that a claim with the same facts will be decided the same regardless of the forum.[104] This is less likely in personal injury cases, due to the unpredictability of accidents and harm.[105] For maintenance of interstate order, the concern is that application of an outside forum's law would infringe on the sovereignty of the home forum.[106] In a case of differing application of products liability law, this factor typically favors the state with the most significant contacts with the facts relevant to the litigation.[107] The Minnesota Supreme Court has typically not given much weight to simplification of the judicial task outside of an absence of precedent indicating a true conflict exists between the laws, and have not traditionally followed the fifth factor of the better rule of law.[108] The fourth factor identifies which law advances a significant interest of the forum.[109] For product liability claims in Minnesota, the analysis will consider whether a direct and relevant connection occurs between a state and the facts underlying the litigation.[110] However, if no factor favors either state, the state where the accident occurred will maintain the strongest governmental interest.[111]

If Minnesota is the original venue and the application of the law is in conflict with North Dakota law and would be determinative, the North Dakota court is required to apply Minnesota's choice of law analysis to determine which law will apply.[112] Should the claim be filed in North Dakota, but one or more parties assert an outside jurisdiction's case law applies, the relevant choice of law analysis for North Dakota requires a two-pronged test.[113] The first test is a significant contacts test where "all of the relevant contacts which might logically influence the decision of which law to apply" are considered by the court.[114] In consideration of torts cases, the relevant contacts are "the place where the injury occurred; the place where

103. Nodak Mut. Ins. Co. v. Am. Family Mut. Ins. Co., 604 N.W.2d 91, 94 (Minn. 2000).

104. *Id.*

105. *Id.*

106. *Id.* at 95.

107. Hughes v. Wal-Mart Stores, Inc., 250 F.3d 618, 620-21 (8th Cir. 2001).

108. *Nodak Mut. Ins. Co.*, 604 N.W.2d at 96-97.

109. *Id.* at 95.

110. Nelson v. Delta Int'l Mach. Corp., No. 06-63 (DSD/JJG), 2006 WL 1283896, at *4 (D. Minn. May 9, 2006).

111. *Id.*; *Nodak Mut. Ins. Co.*, 604 N.W.2d at 92.

112. Prudential Ins. Co. of Am. v. Kamrath, 475 F.3d 920, 924 (8th Cir. 2007).

113. Issendorf v. Olson, 194 N.W.2d 750, 756 (N.D. 1972).

114. Daley v. Am. States Preferred Ins. Co., 1998 ND 225, ¶ 12, 587 N.W.2d 159, 162 (citing Issendorf v. Olson, 194 N.W.2d 750, 755 (N.D. 1972)).

the conduct causing the injury occurred; the domicile, nationality, residence, place of business, or place of incorporation of the parties; and the place where the relationship, if any, between the parties is centered."[115]

The second prong centers on a choice-influencing test.[116] Those factors are the same as the Minnesota test cited above.[117] In cases of tort claims, including product liability claims, "the fourth and fifth factors are the most significant."[118] As strict liability of defective products falls into the tort category, those two prongs can weigh significantly on North Dakota choice of law, especially where litigation is based on an injury to a North Dakota plaintiff and occurred within the state of North Dakota.[119] This likelihood may prevent litigation from originating in North Dakota. Practitioners filing suit should consider an alternative venue if the claim and recovery of damages depend on including a nonmanufacturing entity. Alternatively, retailers defending such a suit may consider the significant contacts of the case, relying on the domicile of the plaintiff and the location where the injury occurred, if it favors application of North Dakota law.

V. CONCLUSION

The North Dakota Supreme Court's rejection of the apparent manufacturer doctrine in *Bornsen v. Pragotrade, LLC*[120] resolves the split within the United States District Court of North Dakota established by the precedent set in *Reiss*. The opinion firmly removes North Dakota from most other jurisdictions in imposing strict liability for defective products on nonmanufacturing sellers. As a result, practitioners for both plaintiffs and defendants in product liability actions will need to consider closely which forum they choose in filing a claim based on the state's applicable product liability statutory scheme, as well as what choice of law rules would apply. Moving for a change in venue as a defendant back to North Dakota may not relieve the defendant of liability. However, North Dakota's consideration of significant contacts within the state strongly favor applying the law of

115. *Id.* ¶ 14 n.3.

116. Polensky v. Cont'l Cas. Co., 397 F. Supp. 2d 1164, 1169 (D.N.D. 2005) (citing Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 282 (1966)).

117. *Polensky*, 397 F. Supp. 2d at 1169.

118. *Id.* at 1170 (citing DeRemer v. Pac. Intermountain Express Co., 353 N.W.2d 694, 697 (Minn. App. 1984); Brown v. Church of the Holy Name of Jesus, 252 A.2d 176, 180-81 (R.I. 1969); Hataway v. McKinley, 830 S.W.2d 53, 58 (Tenn. 1992)).

119. *Polensky*, 397 F. Supp. 2d at 1171.

120. 2011 ND 183, 804 N.W.2d 55.

the state where the accident occurred, and may give similar importance if the original venue's choice of law analysis mirrors North Dakota's rules.

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