

OADC OUTLOOK

A Publication of the Oklahoma Association of Defense Counsel

July 2012

OADC Outlook

Page 1

President's Message

Page 2

Manufacturer's Duty to
Indemnify Seller in
Product's Liability Action

Page 3

Sponsors

Page 4

Officers and Directors

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 Nathan E. Clark

On behalf of OADC, we sincerely want to thank all of our member firms for making the 2012 OADC Summer Meeting such a success. With 78 lawyers able to join us at the Four Seasons at Las Colinas, the turnout was wonderful. A number of our members also contributed time and resources to presenting during the continuing legal education portion. We sincerely hope that everyone enjoyed the 2012 OADC Summer Meeting and is already making plans to attend the 2013 OADC Summer Meeting at Big Cedar Lodge in Branson, Missouri.

One of the more notable continuing legal education presentations was that of OADC's lobbyists, Brett Robinson and Dennis Adkins. Both made it clear that they stand ready and able to lobby on behalf of our membership which raises the important question: What types of legislation are favorable for our membership? To explore the subject of identifying favorable types of legislation and guarding against unfavorable legislation, OADC will be revitalizing its legislative committee as part of an effort to protect the unique interests of our members. If you have questions, comments, or concerns regarding OADC's lobbying efforts, please do not hesitate to contact my office. Once again, thanks again to all those involved for making OADC's 2012 Summer Meeting such a success.

OADC 2013 Summer Meeting
June 6 - 8, 2013
Big Cedar Lodge
Branson, Missouri

The Bottom line: Manufacturer's Duty to Indemnify Seller in Product's Liability Action

By Rachel Lee, Rhodes Hieronymus, Jones, Tucker & Gable, PLLC

Honeywell v. GADA Builders, Inc., 2012 OK CIV APP 11, 271 P.3d 88 (cert. denied 9-0), was the first opinion to interpret the statutory duties of a manufacturer to indemnify a seller in product's liability cases, as codified in 12 O.S. § 832.1. The opinion is particularly noteworthy as it represents a shift in the common wisdom regarding the duty to indemnify.

The first key holding in *Honeywell* is COCA's threshold determination of who qualifies as a "seller" under 12 O.S. § 832.1. In relevant part, the COCA held that a "builder of a house is a 'seller' of the products used in the construction of the house." *Id.* at 13. As a result, a manufacturer owes the duty to indemnify to *each* member of the distributive chain in a product's liability action, even in cases where the focus of the transaction is a service and not the product itself. Although this may seem to be a broad interpretation of the statutory language, the COCA correctly points out that "middlemen," such as contractors, can be subject to strict liability for installing defective products. *Id.* at 14. Thus, the duty to indemnify follows the product—not the seller—through the stream of commerce.

Second, the COCA held that a retailer or distributor does not have to make a formal demand for indemnity in order to trigger the manufacturer's duty to defend and indemnify. All that is required is that the manufacturer be put on notice of the action, and then it has the affirmative duty to defend the downstream seller. However, the COCA held that a negligence action against a seller cannot be transformed into a product's liability action via the seller's Third-Party Petition against the manufacturer. It is only the plaintiff's pleadings that create a product's liability action. In practice, though the seller does not have to make a demand to trigger the manufacturer's duty to indemnify, the seller also cannot trigger this duty *sua sponte* by bringing a product's liability claim against a manufacturer in a Third Party Petition.

The fourth holding is particularly important to note because it marks a change in generally-accepted practice. The COCA held that the manufacturer was liable for the seller's legal fees and expenses incurred from the date of the filing of the product's liability action, and not from the date of the seller's demand for indemnity or the manufacturer's acceptance of same. Additionally, if the product's liability claim does not arise until the petition is amended, the holding makes clear that the manufacturer is not responsible for retroactively indemnifying the seller's attorneys fees and costs generated in the interim.

The COCA further held that a manufacturer has the duty to indemnify a seller in a product's liability action even where there are claims of independent negligence against the seller. Essentially, the court treated the manufacturer's statutory duty as equivalent to an insurer's duty to defend its insured. According to the court, both are obligated to finance the indemnified party's defense, and the duty is triggered by facts gleaned from the plaintiff's pleadings. As long as the plaintiff states a claim of product's liability against the seller, the manufacturer's duty is triggered. This applies even if the claim against the seller is a negligence claim based on a defective product, or if there are claims of negligence in addition to a product's liability claim.

The exception to this duty is where the manufacturer proves that the seller's independent conduct caused the plaintiff's injuries, as provided in 12 O.S. § 832.1(A). This exception, however, is a fairly narrow one. Even if the plaintiff's pleadings are riddled with accusations of negligence on part of the seller, the manufacturer cannot simply rely on these pleadings as proof of the seller's negligence. Instead, the manufacturer must provide sufficient evidence of the seller's independent negligence of its own accord. If the manufacturer fails to do so—as was the case in *Honeywell*—then the manufacturer is required to indemnify the seller from the date the case becomes a product's liability action, notwithstanding the plaintiff's claims of negligence against the seller.

The bottom line is that the holding in *Honeywell* is important for both manufacturers and sellers to be aware of because it clarifies when the duty to indemnify is triggered, the broad set of mandates once the duty is triggered, and the related defenses available to a manufacturer.

OADC 2012 SPONSORS



Professional Reporters

Experience and service that sets the standard.



Jake Jones III, Mediator



Dodson Court Reporting & Legal Video

EXECUTIVE SHORTHAND REPORTERS OF OK

Ligistix LLC

Steve Meador & Associates, Inc.

2012 Officers & Directors

President Nathan E. Clark
President Elect Malinda Matlock
Immediate Past President G. Calvin Sharpe
Vice President Jennifer Annis
Treasurer Angela Ailles-Bahm
Secretary Erin Renegar
DRI State Representative Grady Parker
Executive Director Skoshi Heron

2012:

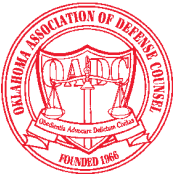
Board of Directors Carrie Palmer
Board of Directors Whitney Eschenheimer
Board of Directors Mike Carter

2013:

Board of Directors Jason Glass
Board of Directors Leslie Lynch
Board of Directors Pete Serrata III

2014:

Board of Directors W. Joseph Pickard
Board of Directors Lindsay McDowell
Board of Directors Eric Begin



Oklahoma Association of Defense Counsel
Post Office Box 5445
Edmond, OK 73083