Ohio's Alternative to the Contract-Specification Defense: Queen City Terminal and the OPLA "Manufacturer"/"Supplier" Two-Step

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The contract-specifications defense adopted by numerous jurisdictions and recognized in Comment (a) to Section 404 of the Restatement (Second) of Torts, exempts contract manufacturers from product liability when their customers provide the product design. It reflects the common-sense principle that a contractor should not be liable for following the material and design instructions of the product designer. *See Bloemer v. Art Welding Co.*, 884 S.W.2d 55, 59 (Mo. App. E.D. 1994) ("[T]o hold [a contractor] liable for defective design would amount to holding a non-designer liable for design defect. Logic forbids any such result."). Think of it like putting together a piece of furniture—Ikea is generally responsible for the product design and warnings, *not* the person who follows the instructions to build the dresser drawers, unless that person fails to follow the instructions.

Yet, despite adopting other aspects of the Second Restatement, Ohio's courts have yet to embrace the defense, instead opting for a narrower approach that exempts the makers of certain custom-made products from strict liability. *See Queen City Terminals v. Gen. Am. Transp. Corp.*, 653 N.E.2d 661 (Ohio 1995). One possible explanation: the Ohio Product Liability Act's (OPLA) competing liability regimes for "manufacturer[s]" and "supplier[s]." *See* O.R.C. §§ 2307.71(A)(9) & (15)(a), 2307.73 (manufacturer liability), 2307.78 (supplier liability).

Though full adoption of the contract-specifications defense likely will require legislative action, key OPLA provisions and some Ohio authority leave room to achieve some of the same results under the OPLA.

I. Overview: The Contract-Specifications Defense

"With a few exceptions, most jurisdictions apply the contract specifications defense regardless of the theory of liability." *Herrod v. Metal Powder Prod.*, 886 F. Supp. 2d 1271, 1275 (D. Utah 2012) (collecting authority from Indiana, Ohio, Massachusetts, and New York, and concluding that Utah would apply doctrine to bar strict product liability claims); *see also Hatch v. Trail King Indus., Inc.*, 656 F.3d 59, 69 (1st Cir.2011) (noting that a "growing majority of courts have [held] that even in strict liability a manufacturer who merely fabricates a product according to the purchaser's design is not responsible," such that "the soundness of a contract specifications defense . . . does not depend on the underlying theory of liability"). The defense recognizes the common-sense rule that a contractor "cannot be held liable for producing a product with specifications that are beyond its control." Am. Jur. Products Liability § 1385. In other words, a "contractor is not required to sit in judgment on the plans and specifications or the materials provided by his employer." Restatement (Second) of Torts § 404 cmt. a (1965).

Depending on the jurisdiction, the defense may bar both negligence and strict liability claims against contract manufacturers, *e.g.*, *Hopfer v. Neenah Foundry Co.*, 477 S.W.3d 116, 124 (Mo. App. 2015), and, "[i]n the absence of [a separate] duty to evaluate the adequacy or safety of customer-provided designs, it follows that [the contract manufacturer] likewise ha[s] no duty to warn of alleged defects," *Bloemer*, 884 S.W.2d at 60. *Cf. Herrod*, 886 F. Supp. 2d at 1278 (separately considering whether contract manufacturer had a continuing duty to warn the customer about the risks associated with the trailer wheel nuts the customer requested, but finding it "had no duty to undertake a more detailed investigation of a product it did not manufacture" and thus "no duty to warn").

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The defense, however, is not limitless. The contractor assumes liability when it proceeds with design specifications that "[are] so obviously bad that a competent contractor would realize that there was a grave chance that his product would be dangerously unsafe." Restatement (Second) of Torts § 404 cmt. a; *accord Bloemer*, 884 S.W.2d at 58–59; *Johnston v. United States*, 568 F. Supp. 351, 354 (D. Kan. 1983).

II. Ohio's Approach: Custom Products Under *Queen City Terminal*

At least one federal court has construed Ohio authority as supporting the contract specifications defense, *see Herrod*, 886 F. Supp. 2d at 1275, but the Ohio case it cites stands for a much narrower custom-products rule. In *Queen City Terminals*, the Ohio Supreme Court concluded that strict liability for defective seals and gaskets did not attach to Trinity, the company that manufactured custom-order "Tanktrain" train cars for the delivery of benzene. The court reasoned that Trinity's customer, GATX, controlled the product specifications, including the alleged design defect—the decision to include "washout" holes covered by gaskets that would make it easier to clean and reuse the specialty train cars. Such control over the specifications, the court explained, defeated the safety rationale for strict liability: "It does not promote product safety to hold manufacturers strictly liable for the decisions of their consumers." Further, the uniqueness of the product in Trinity's product line cut against the cost-shifting justification for strict liability. Because "Trinity fulfilled a specific, limited, custom-made order for one client," the court explained, there was "no opportunity to spread the costs throughout its many customers, because no other customers exist."

Though *Queen City Terminal* predated the OPLA, subsequent Ohio cases have viewed its holding through the lens of the OPLA's definition of "product," O.R.C. § 2307.71(A)(12). *E.g.*, *Lucio v. Edw. C. Levy Co.*, No. 15-cv-613, 2017 WL 2017 WL 1928058, at *4–5 (N.D. Ohio May 10, 2017); *Estep v. Rieter Auto. N. Am., Inc.*, 774 N.E.2d 323, 328–29 (Ohio Ct. App. 2002). Specifically, these cases look to the statutory definition's requirement that *products* be manufactured "for introduction into trade or commerce." O.R.C. § 2307.71(A)(12)(a)(ii). The *Queen City Terminal* rule, per the *Estep* court: "[a] product which is custom-made at the express request and design of the purchaser and which is not launched into the stream of commerce to consumers is not a 'product' for purposes of imposing strict liability upon the maker." 774 N.E.2d at 328.

So understood, *Queen City Terminal* is narrower that the Second Restatement's contract-specification defense; it seemingly would not exempt an independent contractor that manufactures to specification the entire supply of a customer's product line—*e.g.*, a powder blending factory that blends and packages the toothpaste product line for a brand name toothpaste company using the materials, specifications, packaging, and product warnings requested by that company. *Cf. Zuniga v. Norplas Indus. Inc.*, 974 N.E.2d 1252, 1260 (Ohio Ct. 2012) (describing *Queen City Terminal* as a "rare" exception for custom products, and that it did not exempt contract manufacturer of conveyor belt who had previously prepared such products for customers).

III. Enactment of the OPLA and the Manufacturer / Supplier Distinction

With the passage of the OPLA and subsequent amendments, the Ohio General Assembly abrogated and effectively replaced common law product liability claims with the statutory claims provided by the Act. O.R.C. § 2307.71(B); *Miles v. Raymond Corp.*, 612 F. Supp. 2d 913, 918–22 (N.D. Ohio 2009). Under this regime, there are product *manufacturers* and *suppliers*, and each is subject to distinct measures of liability. Whereas manufacturers are subject to a form of strict liability, *see* O.R.C. § 2307.73(A), suppliers typically are subject to only negligence claims and claims based on their own misrepresentations, *id.* § 2307.78(A)(1) & (2).

Though it provides separate definitions for the terms, the Act does not clearly delineate their contours. "Manufacturer" refers to "a person engaged in a business to design, formulate, produce, create, make, construct, assemble, or rebuild a product or a component of a product," O.R.C. § 2307.71(A)(9), "Supplier" identifies, *inter alia*, one who "sells, distributes, leases, prepares, blends, packages, labels, or otherwise participates in the placing of a product in the stream of commerce," *id.* § 2307.71(A)(15)(a)(i). Further, the Act provides that the two terms are mutually exclusive. O.R.C. § 2307.71(A)(15)(b)(i) (noting that a supplier cannot be a manufacturer).

But what about independent contractors whose customers design the product and provide detailed specifications for the product, the materials, the packaging, and the product warnings? The contract manufacturer for the brand name toothpaste? Such independent contractors arguably "produce, create, make, construct, [or] assemble" the product, per the

statutory definition of "manufacturer." But they also "prepare[], blend[], package[], [and] label[]" like a "supplier"; that is the extent of their participation "in the placing of a product in the stream of commerce." The statutory definitions leave one wondering whether the term "manufacturer" implicitly connotes a degree of creative discretion in the product manufacturing process—some contribution to the product or component design, some decision-making as to materials or warnings used, *etc.*

The Act itself provides some support for this interpretation. In the section concerning "supplier" liability, the Act states that suppliers will be subject to the same liability as manufacturers when the supplier, *inter alia*, "created or furnished a manufacturer with the design or formulation that was used to produce, create, make, construct, assemble, or rebuild that product or . . . component of that product" or "altered, modified, or failed to maintain th[e] product" in such a way as to "render[] it defective." O.R.C. § 2307.78(B)(5) & (6).

So do some cases involving fast-food franchises. For instance, in *Brown v. McDonald's Corp.*, both the parties and the court presumed that McDonald's Corporation and Keystone Food Corporation, the co-developer of a specific McDonald's sandwich, were "manufacturers." 655 N.E.2d 440, 442 (Ohio Ct. App. 1995). In rejecting the plaintiffs' argument that the two entities also qualified as suppliers, the court observed that the plaintiffs "correctly argue that, because both McDonald's and Keystone admit to participating in the development of the [sandwich], they meet the statutory definition of "manufacturer." *Id.* The court addressed the owner of the McDonald's franchise that made and served the sandwich, however, in terms of supplier liability, even though it *assembled* and *produced* the allegedly defective product. *Id.* at 444–46. Meanwhile, in the hot-coffee case *Nadel v. Burger King Corp.*, the court of appeals looked to the fact that the Burger King Corporation set coffee serving temperatures for its franchises in determining that it was a manufacturer. 695 N.E.2d 1185, 1192 (Ohio Ct. App. 1997), *overruled on other grounds*. While hardly definitive explications of the manufacturer/supplier dichotomy, these cases—like *Queen City Terminal* and its progeny—reflect that some courts and parties are distinguishing between entities that determine product materials, specifications, and packaging (manufacturers) and third-party companies that prepare, blend, package, or label those products according to those specifications (suppliers).

IV. Conclusion

Contrary to the court's statement in *Herrod*, it does not appear that Ohio has endorsed the contract-specification defense applied in other jurisdictions and adopted by the Second Restatement. Rather, *Queen City Terminal* and its progeny stand for a narrow rule exempting certain custom-made items from the OPLA definition of "product" and the scope of product liability actions altogether. Still, the OPLA product liability regime for "manufacturers" and "suppliers," and some cases interpreting these provisions, leave some room to argue that independent contractors must assert some discretion in product or component design, assembly, materials, packaging, or warnings in order to qualify as "manufacturers" subject to strict liability.

Strong policy reasons support the contract-specification defense, and the General Assembly would do well to consider legislation expressly adopting and the defense and clearly defining its limits in Ohio. Until that time, however, defense counsel for such contractors should consider the following options for minimizing their clients' potential liability:

- whether the customer controls all facets of product design, usage, and whether or not it enters the stream of commerce, under the *Queen City Terminal* custom-goods exception; or alternatively
- whether the independent contractor's role more closely resembles that of a "manufacturer" or "supplier," under the OPLA definitions of those terms and § 2307.78(B)'s standard for imputing "manufacturer" liability to "suppliers."

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