Connecticut Law Tribune
DECEMBER 8, 2008
VOL. 34, NO. 49 • $10.00
An incisivemedia publication
CTLAWTRIBUNE.COM

LOOKING FOR WAYS TO SHARE LIABILITY

Strategic decisions face retailers seeking to pursue third-party claims

By JASON M. PRICE

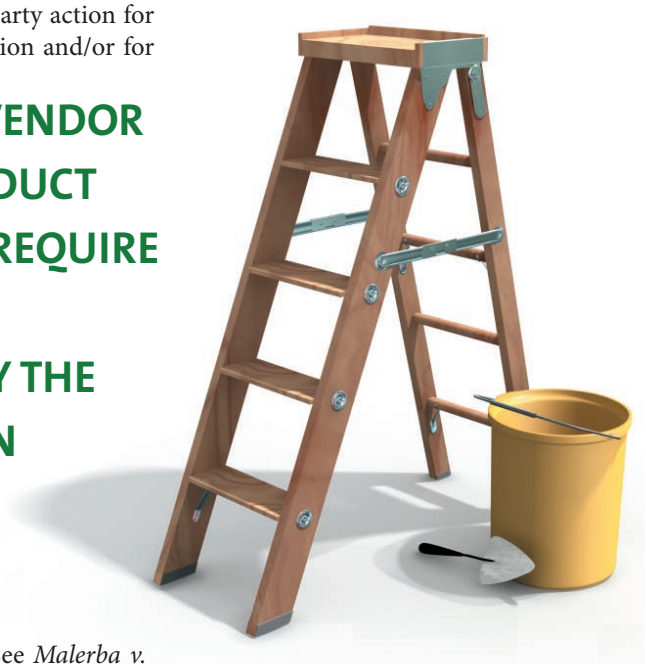
Attorneys who regularly defend motor vehicle and slip and fall cases appreciate the certainty of filing third-party apportionment claims pursuant to Connecticut General Statutes § 52-102b. Pursuant to that statute, a defendant sued under a negligence theory can serve a third party, who is or may be liable under a negligence theory for all or part of the plaintiff's damages, with an apportionment complaint within 120 days of the lawsuits' return date. The pursuit of third-party claims by a retailer or a property owner defendant against a product manufacturer can be more complex.

One important consideration in asserting such third-party claims is that a retailer/property owner defendant cannot file a § 52-102b apportionment claim against a product manufacturer. The procedure set forth in § 52-102b only applies if the third party may be liable for a negligence claim encompassed by CGS § 52-572h. The Products Liability Act, CGS § 52-572m *et seq.*, provides the exclusive remedy against a product manufacturer and hence a manufacturer cannot be liable under § 52-572h. Therefore, a retailer/property owner defendant cannot file a § 52-102b apportionment complaint against a manufacturer. *Paul v. McPhee Electrical Contractors,* 46 Conn. App. 18 (1997).

Strategic decisions about pursuing third-party claims against product manufacturers largely depend upon the nature of the plaintiff's claims. One situation is when the plaintiff alleges a valid product liability claim against a retailer, such as when a retailer sells a defective widget that caused the plaintiff's personal injuries. In such cases, the retailer can file a third-party action for CGS § 52-572o(e) contribution and/or for indemnification against the widget manufacturer pursuant to CGS § 52-577a(b). See *Malerba v. Cessna Aircraft Co.,* 210 Conn. 189 (1989).

MANY RETAILERS HAVE VENDOR AGREEMENTS WITH PRODUCT MANUFACTURERS THAT REQUIRE THE MANUFACTURER TO DEFEND AND INDEMNIFY THE RETAILER UNDER CERTAIN CIRCUMSTANCES.

Section 52-577a(b) allows product sellers to implead a manufacturer or other product seller by serving a third-party complaint within one year from the date the case was "returned to court." The statute's use of the term "returned" creates some confusion about whether the one-year period runs from the date the complaint was filed in court or from the return date. Superior Courts have reached different conclusions on this point. Accordingly, the best practice may be to serve the third-party complaint within one year of the date the complaint was filed.



Defective Step Ladder

If the plaintiff alleges a common law negligence claim against the retailer/property owner defendant, such as when a plaintiff is injured using a defective step ladder that is available for customer use but is not available for sale, third-party practice options are more complex. As discussed, a defendant cannot file a § 52-102b apportionment claim against a product seller.

Jason Price is counsel in the Hartford office of Shipman & Goodwin LLP and practices in the areas of torts, products liability, insurance coverage and commercial disputes. He can be reached at jprice@goodwin.com.

One option is to argue that, notwithstanding the plaintiff's identification of a claim as negligence, the plaintiff's claim is actually a products liability claim and the procedure established by § 52-577a(b) is applicable. The viability of this option obviously depends upon your specific circumstances.

A second option is to move pursuant to Conn. Gen. Stat. § 52-102a to implead the manufacturer. *e.g., Drew v. J.C. Penney*, No. 990367167S, 2000 Conn. Super. LEXIS 1283 (May 17, 2000). Section 52-102a allows a defendant in a civil action to move for permission to serve a third party complaint upon a person "who is or may be liable to him for all or part of the plaintiff's claim against him." There is no express time limitation in § 52-102a, but it is advisable to file such a motion as soon as possible because the court has discretion to deny the motion.

Indemnification Claim

It appears relatively clear that § 52-102a may be used to file indemnification claims against manufacturers. The most effective claim is a contractual indemnification claim. Many retailers have vendor agreements with product manufacturers that require the manufacturer to defend and indemnify the retailer under certain circumstances. If this is true in your case, you need only prove the validity and applicability of the provision and that the manufacturer breached that provision. If there is no such contractual provision, you may consider filing a common law indemnification claim. However, the evidentiary burden is more substantial. See *Skuzinski v. Bouchard Fuels,* 240 Conn. 694, 698 (1997).

Given the absence of controlling appellate authority on the issue, filing contribution claims against manufacturers pursuant to § 52-102a appears problematic. There is no common law cause of action for contribution in Connecticut. Further, contribution statutes like CGS § 52-572o(e) and § 52-572(g) and (h) do not apply when a non-product seller asserts a contribution claim against a product seller. Accordingly, it appears that a retailer/property owner defendant sued under a negligence theory may not have a viable contribution claim against a product manufacturer. However, the court apparently reached the opposite conclusion in *Gelormino v. J.C. Penney Co.,* No. 067840, 1997 Conn. Super. LEXIS 1375 (Connecticut Superior Court, May 1997).

Given these issues, it is important that you and your client develop an early strategy for asserting third-party claims against manufacturers. Additional discussion topics may include the effect of asserting third-party claims against a manufacturer upon the business relationship with your client, the possibility of informal resolution discussions and the desirability of pursuing claims pursuant to § 52-572o(e) and/or § 52-598a after the conclusion of the plaintiff's action. Taking these steps will go a long way in protecting your clients' interests. ■