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MANAGING RISKS WHEN YOU DON'T MANAGE THE MANUFACTURING:

Recognizing and Avoiding the Potential Pitfalls of "White Labeled" Products and Component Parts from US and Foreign Vendors

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INTRODUCTION

Hundreds if not thousands of companies market and sell products as their own, even though they do not actually manufacture them in arrangements with product manufacturers that are often referred to as "White Labeling" agreements. Even more businesses rely on vendors for critical components that drive their products. Those AmazonBasics batteries you recently purchased? They were manufactured by Fujitsu in West Java, Indonesia, using alkaline material from a Fujitsu subsidiary called FDK in the West Javanese city of Bekasi.[1] Indeed, Amazon recently published a fifty-one page list of the suppliers who manufacture, distribute, and supply many of Amazon's "AmazonBasics" branded products, prominently populated by companies in China, Pakistan, India, Vietnam, Taiwan, and other overseas locations, some of which are beyond the jurisdiction of U.S. courts or, at best, are very difficult to bring before our courts.[2]

Amazon is not alone. For the fifty-two week period ended March 30, 2019, Walmart held a 48% share of all private label consumer packaged goods sole online.[3] According to *Forbes*, Costco's Kirkland Signature Private label brand was valued by UBS at $75 billion in 2019. Whole Foods' 365 Everyday Value, Meijer's Meijer Gold and Target's 36 private or "owned" labels such as Archer Farms and Simply Balanced are just a few of today's big brands. Trader Joe's, Publix, Wegman's, Walgreens, CVS, Rite Aid, Family Dollar, DG, Giant Eagle and Raley's all sell under their names.[4]

White labeling has become big business here in the U.S. and abroad. In 2019, one out of every four products sold in the United States were private label or store brands, according to the Private Label Manufacturers Association. The group says private label in 2018 grew 4.4 percent, adding $5.5 billion in sales to reach $129 billion and as high as $170 billion. A 2019 PLMA survey found two thirds of respondents agreed that "in general, store brand products I have bought are just as good if not better than the national brand version of the same product." More than 40 percent said they buy store brands frequently or always and 25 percent are buying more store brands than five years ago.[5] According to the *Harvard Business Review*, in 1994, the U.K.'s J. Sainsbury supermarket chain introduced Classic Cola, a private label made for Sainsbury's by Cott Corporation. Classic Cola was launched in April 1994 at a price 28% lower than Coca-Cola's. By 1996, the private label accounted for 65% of total cola sales through Sainsbury's and for 15% of the U.K. cola market.[6]

These facts are not meant as a criticism of the seller who engages in white labeling agreements. However, while these arrangements and the use of third-party components and the like can reduce a seller's capital investment in product research, development, and manufacturing, they can also present unique challenges. Companies that are not careful when negotiating and entering into such agreements can find themselves standing in the shoes of the manufacturer and, worse, liable for defects in products they did not manufacture. This paper will provide some of the basics of "private/white labeling"

[1] https://onezero.medium.com/unraveling-the-secret-supply-chain-behind-an-amazonbasics-battery-e7b9ead4d72e
[2] https://d39w7f4ix9f5s9.cloudfront.net/cb/19/77dfc5b441c892cd6e2be166ba70/final-amazon-supplier-list-2019-11-14-updated-1005am.pdf
[3] https://www.statista.com/statistics/1069864/walmart-s-sales-share-of-e-commerce-private-label-cpg/
[4] https://www.forbes.com/sites/louisbiscotti/2019/05/02/private-label-brands-roar-at-retail/?sh=5166b2298990
[5] *Id.*
[6] https://hbr.org/1996/01/brands-versus-private-labels-fighting-to-win

relationships, buy/sell agreements, and third-party component usage, and provide some strategies for managing risk if products borne of these relationships become the target of a lawsuit.

A. The "White Labeling" Agreement

Investopedia, a New York based financial website, defines the white label products as those sold by retailers with their own branding and logo, but the products themselves are manufactured by a third-party. The name derives from the image of a white label on the packaging that can be filled in with the marketer's trade dress. The "white labeling" occurs when the manufacturer of an item uses the branding requested by the purchaser, or marketer, instead of its own, resulting in an end product that appears as though it was produced by the retailer.[7] "The advantage is that a single company does not have to go through the entire process of creating and selling a product. One firm can concentrate on producing the product; another on marketing it; and another can focus on selling it, each according to its expertise and preference. The major benefits of white label branding are that it saves companies time, energy, and money in terms of production and marketing costs."[8]

There are clear advantages for the company that engages in white label branding and sales. Properly implements, it can save companies time, energy, and money in terms of production and marketing costs, research and development, manpower, and so on. However, white labeling is not without peril for the seller. Consider the circumstance of a retailer that purchases a consumer product manufactured in China by a Chinese company, and then labels it as its own and sells it to the consuming public. If the product proves defective and causes injury to consumers, will that Chinese manufacturer be amenable to suit in a U.S. court so as to prevent the retail seller from being placed in the manufacturer's shoes for purposes of liability? Will the retail seller or white labeler be held accountable for fines and penalties that may be leveled by the Consumer Product Safety Commission (CPSC)? In states allowing contribution among joint tortfeasors, will the retail seller be able to bring the Chinese manufacturer into a U.S. personal injury lawsuit as a culpable defendant?

In our example, it is significant to note that China is a fairly recent signatory to the Hague Convention. Also, U.S. courts have held that a Chinese manufacturer that had sufficient contacts with the State of Michigan due to its contracts with a distributor and automotive manufacturer in that state so as to subject it to the jurisdiction of that state's courts in an action arising when plaintiff was injured by the Chinese manufacturer's glass prior to its final assembly. *McFadden v. Fuyao N. Am. Inc.*, 10-CV-14457, 2012 WL 1230046 (E.D. Mich. 2012). Nevertheless, the road to bringing a foreign manufacturer to a U.S. court can be a long one. A retailer that desires to become a white label seller of another's product will be best served by assuring that its agreements with foreign manufacturers contain valid, enforceable insuring, defense and indemnity provisions, secured with insurance issued by a highly rated U.S. insurer to avoid being left holding the bag for a defect in a product manufactured by another company.

[7] https://www.investopedia.com/terms/w/white-label-product.asp
[8] *Id.*

B. The Apparent Manufacturer Doctrine

The flip side of the "innocent seller" doctrine described above, is the "apparent manufacturer doctrine," whereby a seller, or apropos of this discussion, a relabeler, can be held liable for a product defect, even if the relabeler played no role in the design or manufacturing of the subject product. Indeed, the apparent manufacturer doctrine developed in the early 1900's, before "white labeling" was a common phrase, but the activity was in common usage by "house-branders" or "house-labelers" who either put their own label on goods that had been especially made for them, or who bought a common batch of goods, not necessarily manufactured for them, but labeled them as their own.[9] The apparent manufacturer doctrine grew out of common law and was codified in section 400 of the Restatement (Second) of Torts, which states: "one who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer."[10]

Not all states have adopted the apparent manufacturer doctrine. Some states have enacted statutes that prevent the application of the doctrine by expressly, and exclusively defining a manufacturer to be an entity that designs and manufactures a product; and some courts (both state and federal) have declined to apply the doctrine – unless it can be shown that the relabeler had some involvement in the design or manufacturing of the product. Thus, the crucial inquiry for understanding whether a white labeler will be held liable for a product defect is if the particular jurisdiction has adopted the apparent manufacture doctrine.

Here are some recent examples:

Colorado – *Long v. United States Brass Corp.*, 333 F.Supp.2d 999 (D. Colo. 2004). Granting partial summary judgment for plaintiff declaring defendant U.S. Brass to be the "apparent manufacturer" of an allegedly defective pipe that was used to transport propane, even though a second defendant, Dormont Manufacturing Company, was the actual manufacturer. U.S. Brass had packaged and sold the subject pipe with its own name, and no other, displayed on it. With Dormont also present in the case, U.S. Brass opposed summary judgment arguing that it was an "innocent seller." The court disagreed, and quoted dicta in *Yoder v. Honeywell, Inc*., 104 F.3d 1215 (10th Cir. 1997), *cert. denied*, 522 U.S. 812 (1997) stating that "by negative implication [Colo.Rev.Stat. § 13-21-401(1)] allows a seller who places a private label on a product without disclosing the actual manufacturer to be held liable as a manufacturer." *Long* at 1002 (citing *Yoder*, 104 F.3d at 1223).[11]

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[9] David J. Franklyn, *The Apparent Manufacturer Doctrine, Trademark Licensors and the Third Restatement of Torts*, 49 Case W. Rsrv. L. Rev. 671, 698 (1999).

[10] Restatement (Second) of Torts § 400 (1965).

[11] The statutory language being referenced provided as follows:

> *A seller not otherwise a manufacturer shall not be deemed to be a manufacturer merely because he places or has placed a private label on a product if he did not otherwise specify how the product shall be produced or control, in some manner, the manufacturing process of the product* ***and the seller discloses who the actual manufacturer is****. (Emphasis added)*

Virginia – *Bilenky v. Ryobi Technologies, Inc*. 666 Fed. App'x 271, 274 (4th Cir. 2016). Affirming a finding of strict liability against Ryobi, even though the lawn tractor at issue – while bearing the trade name Ryobi® – was actually manufactured by Husqvarna. The Fourth Circuit, applying Virginia law, held that Virginia had adopted the apparent manufacturer doctrine, stating:

> In Virginia, a plaintiff can impose liability on a manufacturer or seller of a defective product if the product is unreasonably dangerous for its ordinary or reasonably foreseeable use and the unreasonably dangerous condition existed when the product "left the defendant's hand." [citations omitted] Pursuant to the apparent manufacturer doctrine, an entity holding itself out as the manufacturer may be subject to the same liability as the actual manufacturer.[12]

Louisiana – *Chevron USA, Inc. v. Aker Maritime, Inc*. 604 F.3d 888, 895 (5th Cir. 2020). In a case involving failure of bolts on an offshore oil rig, the Fifth Circuit affirmed a judgment against the "apparent manufacturer" of the bolts (a company called Lone Star) whose name appeared on the boxes in which the bolts were shipped and on a packing slip, which noted that the bolts were either "manufactured or distributed" by Lone Star. While Lone Star did not actually manufacture the bolts, the Louisiana Products Liability Act's definition of a manufacturer includes one "who labels a product as his own or who otherwise holds himself out to be the manufacturer of the product." La.Rev.Stat. § 2800.53(1)(a).

In a case even more chilling and on point for the present discussion, *Pablovich v. Rooms to Go Louisiana Corp*., No. 20-617, 2021 WL 1401759 (E.D. La., Apr. 14, 2021), the Eastern District of Louisiana denied a defendant's motion for summary judgment in a case where plaintiff was injured after a chair he was sitting on in defendant's showroom collapsed. A label on the bottom of the chair said: "Made in China" and another label said: "Sold By R.T.G. 15540 Highway 92 East Seffner, Florida 33584." The court quoted the *Chevron* case in holding that "Generally it takes very little under Louisiana law to present a jury issue if a product does not bear the actual manufacturer's mark … when the distributor's actions give the buying public a basis to assume that it may be the manufacturer of a product it distributes, a jury will usually be within its province to conclude that the distributor held itself out as the product's manufacturer, even though the indications may be less than clear and the ambiguity as to the actual manufacturer may subsequently be clarified." *Pablovich* at *3 (quoting *Chevron*, 604 F.3d at 896, 897).

C. Defense, Indemnity, and Insurance Provisions in White Label Manufacturing Agreements

The discussion above illustrates the greatest risk to the company that relabels a product manufactured by another: that the relabeler will be compelled to stand in the shoes of the foreign manufacturer in the event the product is found to be defective and unreasonably dangerous when the foreign manufacturer is either beyond the reach of U.S. jurisdiction or actively takes steps to

[12] Although there seemed to be some question over whether Virginia had, indeed, adopted the apparent manufacturer doctrine, that question was answered in the affirmative as recently as 2019 in *Whitaker v. Hyundai Motor Company*, No. 7:17-cv-00055, 2019 WL 8348887, (W.D. Va. Feb. 5, 2019) (citing *Bilenky*) (granting plaintiff's motion in limine to preclude defendant from referring to their own claim that they could not be held liable because they were not the manufacturer or distributor of the subject vehicle on the date of plaintiff's accident).

insulate itself from jurisdiction and liability exposure through sham subsidiary entities, distribution agreements with third parties, or other corporate artifices of which the relabeler is unaware. To avoid being left in that uncomfortable spot, the relabeler must exercise extreme diligence in the drafting of its agreement with the foreign manufacturer.[13]

One way that the relabeler can protect itself from exposure to product liability litigation in which it is cast as the manufacturer is through carefully drafted defense, indemnification, and insuring agreements with the foreign manufacturer. The relabeler must also be cognizant of the laws of individual states relative to product liability. For example, Illinois has what is commonly referred to as an "innocent seller" statute that, with important exceptions, prevents the mere seller or distributor from being sued in strict product liability (but not negligence). It provides:

> Sec. 2-621. Product liability actions.
>
> (a) In any product liability action based in whole or in part on the doctrine of strict liability in tort commenced or maintained against a defendant or defendants *other than the manufacturer*, that party shall upon answering or otherwise pleading file an affidavit certifying the correct identity of the manufacturer of the product allegedly causing injury, death or damage. The commencement of a product liability action based in whole or in part on the doctrine of strict liability in tort against such defendant or defendants shall toll the applicable statute of limitation and statute of repose relative to the defendant or defendants for purposes of asserting a strict liability in tort cause of action.
>
> (b) Once the plaintiff has filed a complaint against the manufacturer or manufacturers, and the manufacturer or manufacturers have or are required to have answered or otherwise pleaded, the court shall order the dismissal of a strict liability in tort claim against the certifying defendant or defendants, provided the certifying defendant or defendants are not within the categories set forth in subsection (c) of this Section. Due diligence shall be exercised by the certifying defendant or defendants in providing the plaintiff with the correct identity of the manufacturer or manufacturers, and due diligence shall be exercised by the plaintiff in filing an action and obtaining jurisdiction over the manufacturer or manufacturers.
>
> The plaintiff may at any time subsequent to the dismissal move to vacate the order of dismissal and reinstate the certifying defendant or defendants, provided plaintiff can show one or more of the following:

[13] The reader is cautioned that there is no "one-size-fits-all" approach to this issue. For example, the differences in regulatory schemes for medical devices in the U.S. and the E.U. may call for differing strategies to protect the product relabeler. Any company embarking on a plan to relabel products manufactured by another as its own should consult competent counsel for guidance.

(1) That the applicable period of statute of limitation or statute of repose bars the assertion of a strict liability in tort cause of action against the manufacturer or manufacturers of the product allegedly causing the injury, death or damage; or

(2) That the identity of the manufacturer given to the plaintiff by the certifying defendant or defendants was incorrect. Once the correct identity of the manufacturer has been given by the certifying defendant or defendants the court shall again dismiss the certifying defendant or defendants; or

(3) That the manufacturer no longer exists, cannot be subject to the jurisdiction of the courts of this State, or, despite due diligence, the manufacturer is not amenable to service of process; or

(4) That the manufacturer is unable to satisfy any judgment as determined by the court; or

(5) That the court determines that the manufacturer would be unable to satisfy a reasonable settlement or other agreement with plaintiff.

(c) A court shall not enter a dismissal order relative to any certifying defendant or defendants other than the manufacturer even though full compliance with subsection (a) of this Section has been made where the plaintiff can show one or more of the following:

(1) That the defendant has exercised some significant control over the design or manufacture of the product, or has provided instructions or warnings to the manufacturer relative to the alleged defect in the product which caused the injury, death or damage; or

(2) That the defendant had actual knowledge of the defect in the product which caused the injury, death or damage; or

(3) That the defendant created the defect in the product which caused the injury, death or damage.

(d) Nothing contained in this Section shall be construed to grant a cause of action in strict liability in tort or any other legal theory, or to affect the right of any person to seek and obtain indemnity or contribution.
735 ILCS 5/2-621.

Pursuant to this Illinois statute, any seller sued in strict product liability is entitled to dismissal of the strict product liability claims upon certification of the identity of the actual manufacturer. However, if the manufacturer is not amenable to jurisdiction, is defunct, or is unable to satisfy a

judgment or settlement, the seller will be held to stand in the manufacturer's shoes and will find itself defending a product liability claim against a product it neither designed nor manufactured.[14]

The white label relabeler can at least attempt to secure protection against this dilemma by incorporating specific language into its agreements with foreign and other manufacturers. Consider the following language, adapted from an agreement whereby a multi-national holding company sought to acquire a product line from a foreign manufacturer in order to relabel it as its own:

> *INDEMNITY*
>
> 4.1 [Manufacturer] shall provide a defense and indemnification for [Relabeler] in the event of any claims, demands, suits, causes of action, proceedings, awards, judgments and liabilities (including without limitation attorneys' fees) in which damages were sustained or arose from [Manufacturer]'s failure to meet its obligations under this Agreement, or for injury, death or property damage (including but not limited to Product recall claims) wherein it is alleged that any or all of the Products are in any way defective, including, without limitation, claims that any of the Products (a) failed to meet any specifications, including but not limited to those provided by [Relabeler]; (b) were defective in their manufacture or material; and (c) failed to comply with any applicable laws. [Manufacturer] further agrees to indemnify [Relabeler] against and save and hold [Relabeler] harmless from any and all damages, losses or expenses suffered or paid as a result of any such claims, demands, suits, causes of action, proceedings, awards, judgments and liabilities (including without limitation attorneys' fees). "Claims" shall include, but are not limited to, litigation or arbitration. [Relabeler] shall, at all times, have the duty and obligation to render such cooperation and assistance to [Manufacturer] in the defense of any and all such claims as is reasonably necessary, and at [Manufacturer]'s expense.

The prudent relabeler will also include an obligation for the manufacturer to provide insurance to assure performance of these terms, as follows:

> *INSURANCE*
>
> (a) To ensure [Manufacturer]'s obligations under the Agreement, including but not limited to its obligations under Section 4, Indemnity, [Manufacturer] shall at all times maintain in full force and effect, for the benefit of itself and [Relabeler], general liability insurance coverage on its operations, including broad form vendor's coverage and product liability insurance. Such insurance shall be in an amount of not less than One Million ($1,000,000.00) Dollars for each occurrence, with a company which has a rating of not less than "A - VIII" in the Best Insurance Guide and which shall be satisfactory to [Relabeler]. At the inception of this Agreement and annually thereafter, [Manufacturer] shall furnish [Relabeler] with a

[14] See the 2019 ALFA International Product Liability & Complex Torts PG Product Liability Quick Reference Guide for, among other things, a checklist of those states with and without innocent seller statutes.

certificate of insurance evidencing that it has such insurance coverage in force, and further evidencing that [Relabeler] is an additional insured on said policy under the terms of a "Designated Person or Organization" endorsement. Such insurance policy shall provide that the insurance will not be canceled or materially modified except upon thirty (30) days' prior written notice to [Relabeler].

White label sellers should also be mindful of claims of patent infringement whereby another manufacturer may claim that the relabeled product infringes on that manufacturer's patent or intellectual property. A defense, indemnity and insuring agreement can address that as well, as follows:

PATENT INFRINGEMENTS

[Manufacturer] shall indemnify and hold [Relabeler] and its vendees harmless from and against all claims that the Products, or any part thereof, infringe any United States, or other, patent; provided, however, that [Relabeler] and its vendees shall give [Manufacturer] prompt written notice of any such claim, shall not settle such claim without [Manufacturer]'s prior written consent, and shall cooperate with [Manufacturer] in its defense or settlement thereof. If, in any such suit, an injunction is issued against the further use of said Products, or any part thereof, [Manufacturer] will, at its own expense, either (i) procure for [Relabeler] or its vendees the right to continue using the Product; (ii) replace the same with a non-infringing Product; (iii) modify the Product so that it becomes non-infringing, or (iv) accept the return of the Product and refund the price paid to [Manufacturer] for such Product(s).

In addition, and perhaps most importantly, the agreement should also require the manufacturer to waive any defenses based on jurisdiction relative to its enforcement.

Careful drafting of white label agreements with foreign and other manufacturers, which include defense, indemnification, and insuring agreements as above, can offer some protection to the relabeler should litigation arise wherein claims are made that the product is defective and unreasonably dangerous and caused injury to person or property.

D. Other Considerations in White Label Agreements

Particularly where a relabeler is entering into an agreement to relabel and sell as its own an established product or product line, it should undertake significant pre-agreement due diligence relative to the product's design history and the like, such as:

- Litigation history of product;
- Claims experience relative to the product;
- Regulatory involvement, i.e., CPSC if consumer product, NHTSA if transportation product, and so on; and,
- Insurance experience/history with product, such as historic premium experience, claims experience, and so on.

The due diligence process itself may reveal risks that the potential relabeler may rather avoid altogether.

Finally, consider also whether or not to include self-executing dispute resolution mechanisms in the white label agreement, such as requirement of arbitration as a means of perhaps avoiding costly and lengthy litigation over its terms.

E. Conclusion

White label agreements certainly provide opportunities for product sellers to profit by avoiding the overhead expenses of product design, development, and manufacturing. However, the seller contemplating entering into such an arrangement should take care to conduct due diligence before entering into any agreement and should assure that any such agreement includes ironclad defense, indemnity, and insurance provisions in order to assure that the expected profit does not become a financial nightmare.