



2006 Products Liability Update

By: Andy Payne

PayneLawGroup

Products Liability Update

- Case Law Interpreting Tort Reform Leg.
- Upcoming Trends and Case Law Updates
- Not Review Recent Old Law

2003 Legislative Changes

- Presumptions-No Liability (82.007 & 82.008)
- 15 Year Statute-of-Repose (16.012)
- Passive Seller Immunity (82.003)
- Evidentiary Changes (SRM & Seat Belts)
- Forum Non Conveniens (71.051)

Interpreting Case Law

- Presumptions-No Liability (82.007 & 82.008)
- 15 Year Statute-of-Repouse (16.012)
- Passive Seller Immunity (82.003)
- Evidentiary Changes (SRM & Seat Belts)
- Forum Non Conveniens (71.051)

82.008(a) Presumption

- Presumption of No Liability if Defendant shows:
 - Formulation, Design or Labeling
 - Complied with Mandatory Standard
 - Federal Government or Federal Agency
 - Applicable at time of Manufacture
 - Governed the Risk Caused by the Harm

Rebutting the 82.008(a)(c) Presumption

Safety Standard
Inadequate to Protect;
Unreasonable Risk

82.008(c): Standard or Procedure

Bic Pen v. Carther (p. 3)

- Brother 6 sets sister 5 on fire with Bic Lighter
- Pre 82.008, but Defendant argued common law creates similar presumption
- CA Holds: design specs & test results showing this child resistant lighter performed the same as non-child-resistant lighters rebutted “any no defect presumption” (Pet Filed)

Burry v. GM, 2006 WL 1791711

- Side Airbag Case—FMVSS Standard
- Pre 82.008, but Defendant argued common law creates similar presumption *Harper v. GM, 61 SW3d 118* (holding compliance provides presumption of no defect)
- Held Compliance is strong, but not conclusive evidence

Rebutting the 82.008(a)(c) Presumption

**Pre/Post Marketing
Misrepresented Information or
Material Relevant; Adequacy
of the Standard**

82.008(c): Information Material & Relevant to Performance of the Product and Causally Related to the Injury

Hernandez v. Ford (p. 3)

- Roof Crush Case (FMVSS 216 Standard) creates 82.008 (a) presumption of no liability
- Plaintiff rebut under 82.008(b)(2)—fraud on gov't. The defendant withheld information relevant to the adequacy of the standard.
- Defendant argues Preemption
- **Held: No preemption because of saving clause in the FMVSS standards**

16.012: Statute-of-Repose

A blurred photograph of a red SUV, possibly a Jeep, parked in a field. A large orange 'X' is drawn over the image, crossing out the text 'Great Case?' which is overlaid in large, bold, green letters.

~~Great
Case?~~

16.012: Statute-of-Repose



Bring Suit Within 15 years from
time Defendant Sold Product

16.012: Statute-of-Repose

Exceptions:

- Written Express
Warranty
- Leased Products
- Delayed Injury
Manifestation
- Airplanes

16.012: Statute-of-Rest

Saporita v. Cincinnati Inc. (p. 4)

- 1953 Product
- Post Sale Duty Doesn't Work
- Continuing Negligence Doesn't Work

16.012: Statute-of-Rest

Zaragosa v. Chemetron (p.4)

- 1978 Product Sold 3d Party
- 3d Party Sells to PI Employer within 15 years
- PI Argument Did Not Work
- Court Held SOR

Constitutional

16.012: Statute-of-Repose

Burlington RR v. Poole (p.4-5)

- Tanks manu 10/28/88
- 10/28/03—15 years
- Tanks Rupture 1/29/03
- Suit filed 3/4/04

Held: 16.012 Applies Retroactively

82.003: Passive Seller Immunity

- Seller that did not manufacture is not liable
- Unless:
 - Seller participated in design (no causation)
 - Seller Altered or Modified and Caused Injury
 - Seller Installed and Installation Caused Injury
 - Seller substantial control over warnings; warnings inadequate; inadequate warning caused harm
 - Express incorrect representation; relied upon; caused harm

82.003: Passive Seller Immunity

- Seller that did not manufacture is not liable
- Unless:
 - Actual Knowledge Injury Causing Defect
 - Manufacturer Is Not Solvent
 - Manufacturer Is Not Subject to Jurisdiction of the Court

82.003: Passive Seller Immunity

- *Reynolds v. Ford Motor Co.*, 2004 WL 2870079 (p. 6)
 - Case was filed in State Court – Explorer
 - Ford Removes—Dealer was Fraudulently joined because passive seller 82.003
 - Ct Remand Based on Actual Knowledge Exception
 - Evidence in Support
 - The visor warning
 - 2 stars on the NHTSA Rollover Ratings

82.003: Passive Seller Immunity

- *Garcia v. Nissan, 2006 WL 86994*
 - Motion to Remand a Removal Based Upon Improper Joinder of Local Dealer
 - PI alleged dealer knew safer with ESC & Side Curtain Airbags
 - **Held: Knowledge of Safer Products Does Not Equal Knowledge of Defect. Motion to Remand Denied**

82.003: Passive Seller Immunity

- **Motion to Remand Granted**

- Reynolds v. Ford, 2004 WL 2870079
- Shields v. Bridgestone, 2005 WL 3115463
- Salazar v. Merck, 2005 WL 2875332
- Rape v. Medtronic, 2005 WL 1189826
- Alonso v. Maytag, 356 F. Supp.2d 757 (DTPA Claims)
- Brewer v. Porsche, 2005 WL 292417 (DTPA Claims)
- Skinner v. Cooper Tire, 2004 WL 1171201 (DTPA Claims)

- **Motion to Remand Denied**

- Garcia v. Nissan, 2006 WL 869944
- Lott v. Dutchman, 422 F. Supp.2d 750
- Rubin v. DaimlerChrysler, 2005 WL 1214605

Case Law Update



Trend Toward Consolidation

- *Hyundai v. Rodriguez* (Tex. 1999)
 - Facts
 - Roof crush case: Imp. Merchant., Neg'l & Design
 - Trial Judge only submits Neg'l & Design; Jury answers no
 - CA: remand because didn't submit warranty
 - Holding
 - SC affirmed trial court.
 - In PI case they are “functionally identical”
 - Cites Restatement 3d

Trend Toward Consolidation

- *Tamez v. Mack Truck* (Corpus, pet. granted)
 - Facts
 - Tanker truck rolls over and bursts into flames
 - Claims: Neg'l, S/L, Misrep, Implied Warranty
 - TC grants MSJ on multiple theories because they all call for same factual finding
 - Holding
 - Reversed the TC. Can have multiple theories pre-trial

Trend Toward Consolidation

- *Miles v. Ford Motor Co.* (Dallas, pet. filed)
 - Jury said No to Products Theories
 - Jury said Yes to the Negligence Theory
 - Dallas Court of Appeals Held:
 - Can't be negligent for selling a product that is not defective

Charge Issues:

- How are the Chapter 82 Presumptions Treated in the Charge?
- Submit the Product or the Defendant?
- Is Something Missing from Manufacturing Defect Instruction?

Charge Issue: Presumptions

- *Texas A&M v. Chambers*, (Austin pet. denied)
 - A presumption ‘may not properly be the subject of an instruction to the jury’
 - Its inclusion is improper because the sole effect of a presumption is to fix the burden of producing evidence.
 - A presumption is nothing more than a rule for the guidance of the trial judge in locating the burden of proof of production at a particular time.

Charge Issue: Presumptions

- *Texas A&M v. Chambers*, (Austin, pet. denied)
 - The supreme court explained: ‘[A] presumption is an artificial thing, a mere house of cards, which one moment stands with sufficient force to determine an issue, but at the next, by reason of the slightest rebutting evidence, topples utterly out of consideration of the trier of facts’
Combined Am. Ins. Co. v. Blanton, 163 Tex. 225, 353 S.W.2d 847, 849 (1962)”

Charge: Submit Product or Defendant

- PJC:
 - Submit “product” and “defendant” if there is also a negligence question regarding the defendant’s conduct
- Chp 33:
 - claimants, defendants, settlers & RTP
- Restatement
 - Parties in the chain-of-distribution are liable

Charge: Submit Product or Defendant

- *Allied Signal, Inc. v. Moran* (Corpus)
 - Seatbelt Case
 - Two Defendants (Chrysler & Allied Signal) argued the other one was responsible
 - Trial Court Submitted “the seat belt buckle”
 - Defendants Complained
 - Chapter 33 requires all defendants to be submitted in the charge.

Charge: Submit Product or Defendant

- *Allied Signal, Inc. v. Moran* (Corpus)
 - Corpus Christi Court Appeals:
 - Reversed and Remanded
 - Must submit the defendant not the product
 - Only one defendant can be J&S under 33.013(b)
 - Acknowledged this guts Products Law
 - Rehearing Request Pending
 - Solution: *FFP Operating Partner v. Duenez*
 - Problem Supreme Court Granted Rehearing

Definition of Manufacturing Defect

- **PJC 71.3**
- Was there a manufacturing defect in the automobile at the time it left the possession of ABC that was a producing cause of the injury?
- A “defect” means a condition of the product that renders it “unreasonable dangerous.” An “unreasonably dangerous” product is one that is dangerous to an extent beyond that which would be contemplated by the ordinary user of the product, with the ordinary knowledge common to the community as to the products characteristics.

Definition of Manufacturing Defect

- **Defendants Argue:**
- **Defect should include defect element of:**
 - “a physical departure from the product’s intended design that renders it unreasonably dangerous”

Definition of Manufacturing Defect

- Support PJC
 - *Cooper Tire v. Mendez*, 155 S.W.3d 382 (El Paso—rev'd on other ground)
 - *Ford v. Ledesma*, 173 S.W.3d 78 (Austin—pet. filed)

Duty to Indemnify

- *Meritor v. Ruan Leasing Co.* (Tex. 2001)
 - Paul was opening the hood to trunk and fell when the handle broke free
 - Paul Sued Manufacturer (Freightliner & Meritor) who agreed to indemnify Ruan
 - Plaintiff then adds “Ruan Neg’l in Maintaining hood.” Ruan hires lawyers
 - Paul settles with manufacturers and non-suits Ruan
 - Ruan seeks indemnity against Manufacturers.

Duty to Indemnify

- *Meritor v. Ruan Leasing Co.* (Tex. 2001)
 - Ruan gets indemnity
 - Pleading establish duty to indemnify
 - Manufacturer must show independent cupability caused the harm to avoid indemnity

Duty to Indemnify

- *Freeman Fina Inv. Co. v. Toyota Motor Corp.*
(Dallas, pet. denied)
 - PI sued Freeman (dealer) and Toyota on a 4-Runner Rollover Case
 - Freeman did not sell the truck
 - Freeman sought Indemnity from Toyota
 - Toyota moved for MSJ saying Freeman was not a “seller” of the vehicle
 - **HELD:** Pleadings Dictate the Indemnity Duty; To defeat Toyota would have to show “independently culpable”

Duty to Indemnify

- *Hudiburg Chevrolet v. GM* (Tex. 2006) (p. 9-10)
 - Hudiburg installed a service bed on a GM Chassis.
 - Hudiburg sought Indemnity
 - GM filed MSJ saying Hudiburg is not entitled to indemnity because its own actions.
- **Holding:**
 - Reaffirms Meritor—party seeking indemnity must show seller negligence was cause
 - To get indemnity from comp. part. manu. PI Petition must allege defect in comp.

Duty to Indemnify

- Remaining Question:
 - 1% on Hudiburg
 - Hudiburg get 99% Indemnity or Nothing?
- **“Without further development of the record, we decline to consider whether or under what circumstances a seller may obtain partial indemnity.”**

Circumstantial Evidence

- Rstmt Third
 - May infer defect at time of sale without proof of specific defect when:
 - Harm was the kind that ordinarily occurs with product defect AND
 - Harm was not solely result of causes other than product defect
 - Comment—product must fail to perform its manifestly intended function
- Examples
 - Wings fall off new plane

Circumstantial Evidence

- *Ford Motor Co. v. Ridgway* (Tex. 2004)
 - Facts
 - Truck 54k miles bursts into flames
 - 3 prior repairs to fuel system
 - PI brings manufacturing claim for “unspecified defect” in fuel system or electrical system
 - PI testifies—driving and it catches fire
 - Greenless testified fire starts in engine block due to electrical malfunction (maybe fuel system)
 - TC grants no evidence MSJ
 - Holding
 - AC reverses and remand
 - Plaintiff’s testimony is enough

Circumstantial Evidence

- *Ford Motor Co. v. Ridgway* (Tex. 2004)
 - Supreme Court
 - No direct evidence of manu defect
 - Circumstantial evidence is not a scintilla
 - Plaintiff only establishes fire occurred
 - Greenlee doesn't rule out fuel system and only suspects electrical system
 - Doesn't take a stance on Section 3 of RSTMT other than to say it applies to new products.
 - Hecht & Owen say Rstmt is not Texas Law

Manufacturing Defects

- *Ford Motor Co. v. Ledesma, (pet. filed)(p. 11)*
 - Truck hits parked cars
 - Did Broken Axle Cause Collision or Did Collision Break the Axle
 - **Austin Court Affirmed Jury Verdict on Manu. Defect**
 - Expert testified u bolt did not meet manu specs
 - 4100 miles on truck
 - No repairs or modifications
 - Plaintiff was sole owner
 - Facts of wreck consist with Defect

Manufacturing Defects

- *Cooper Tire v. Mendez, (Tex 2006) (p.15)*
 - Tire detread case asserting manu. defect
 - No Design Defect Submitted
 - Theory: skim stock was contaminated at plant by hydrocarbon wax
 - In support:
 - Inspection and physical evidence on the tire —”polishing “
 - Tread separation did not originate at nail puncture
 - Expert testimony on the process of wax contamination

Manufacturing Defects

- *Cooper Tire v. Mendez, (Tex 2006) (p.15)*
- **Holding**
 - Struck experts and said “no evidence”
 - No direct evidence of contamination or plausible basis
 - No testing to show how much or if wax can cause detread
 - Need to prove manufacturing defect can cause
 - Need to go to plant and establish basis
 - Need to show deviation from plans
 - Need to prove negligence, not S/L
 - Need to submit design defects

Design Defect: SAD

- *A.O. Smith v. Settlemt Inv. Corp.* (p 18)
 - Waterheater burned an apartment complex
 - Issue: Evidence Required to Prove Economic Feasibility
 - **HELD**
 - **Do not need to prove actual manufacturing cost**
 - **9000 water heater**
 - **Pl. expert testimony that cost is 5, 20 or 200 is sufficient**

Preemption

- No Implied Preemption
 - Hernandez v. Ford (p. 3)
 - Bic Pen v. Carther (p.18)
- Express Preemption (p. 19)
 - Baker v. St Jude
 - Express preemption under the Medical Device Amendments

Apparent Manufacturer Doctrine

- *SSP Partners v. Gladstrong USA*, (p.19)
 - Indemnity Claims against Gladstrong USA
 - Actual Manufacturer was Gladstone Hong Kong
 - Held:
 - “One who puts out, as its own product, chattel manufactured by another is liable”
 - Appearing to be the manufacturer
 - Where chattel was made specifically for the actor
- Pet. Filed



www.PayneLawGroup.com

PayneLawGroup