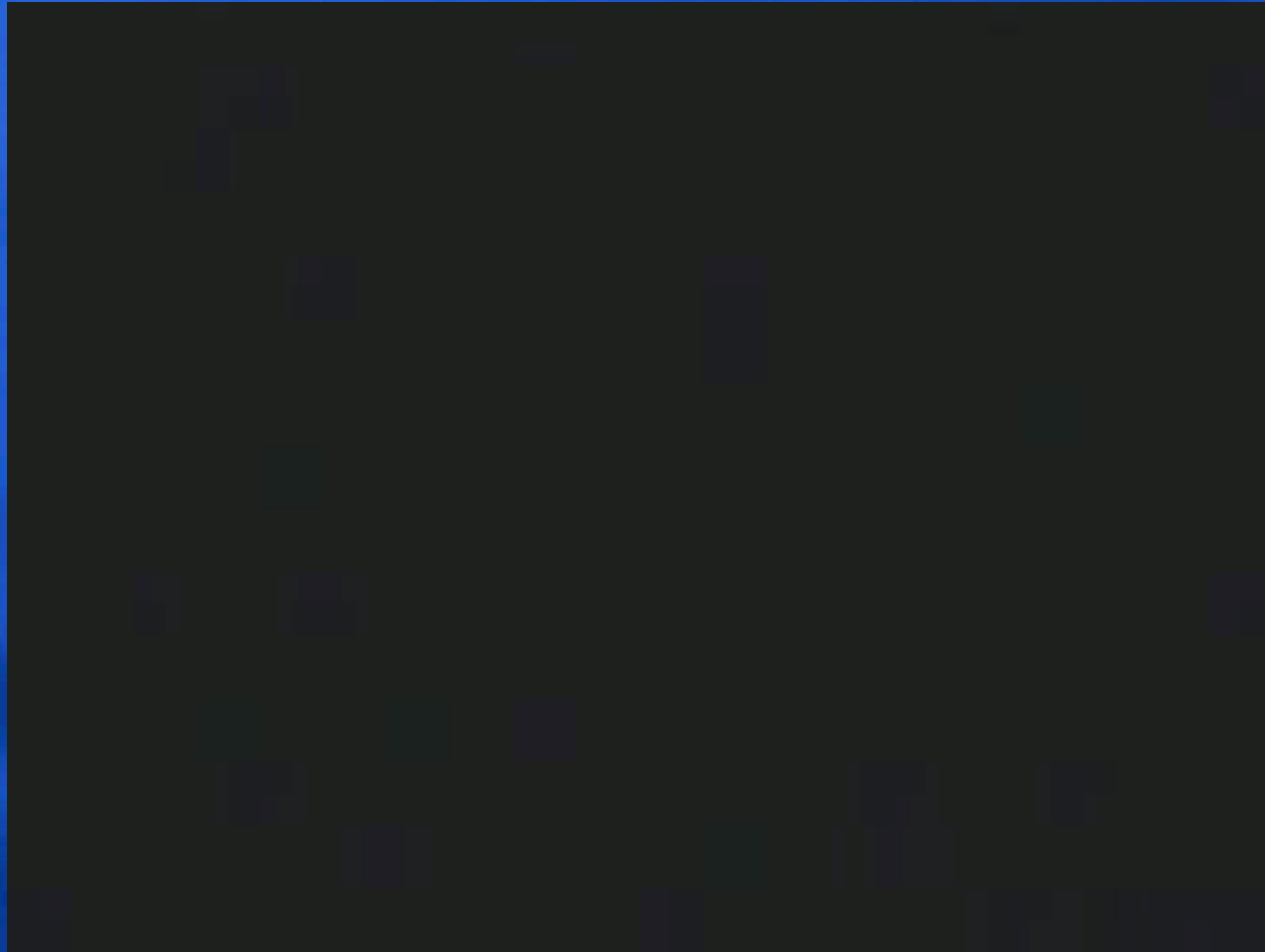


# Products Liability

Where are we now?

**Presented By:     Andy Payne**

# Products Liability Update



# Products Liability Update

- ▶ House Bill 4 Changes
- ▶ Recent Significant Cases

# New Products Liability Legislation House Bill No. 4

Signed into law on June 11, 2003

Effective date is July 1, 2003

# Key Products Liability Changes House Bill No. 4

Immunity for Passive Non-Manufacturing Defendants

Rebuttable Presumption: No Liability

Compliance with Government Safety Standards

Rebuttable Presumption: No Liability

Compliance with FDA warning / labeling requirements

Proposed amendment of Tex. R. Evid. 407(a)

Subsequent Remedial Measures

# Section 82.003

**Liability of  
Passive**

**Non-Manufacturing Sellers**

**Non-manufacturing  
sellers are not liable  
for passive  
involvement in chain  
of distribution**

# House Bill No. 4, Section 5.02

## Eight (8) key exceptions to immunity:



# Issues and Questions

## Non-Manufacturing Seller Immunity

**What is the definition of insolvency ?**  
**Does bankruptcy = insolvency ?**

**If the seller is involved in the design of the product, but the design is not at issue, is the seller liable ?**

# Effects on Forum Selection

- ▶ Often the local retailer is sued to defeat diversity jurisdiction and stay out of Federal Court
- ▶ Plead an exception to immunity and seek discovery to support the exception
- ▶ Expect a no-evidence motion for summary judgment
- ▶ Defendants still have a year to remove

# Hypothetical under Section 82.003

- ▶ Manufacturer offers product with optional component materials
  - Material A (Plastic)
  - Material B (Brass)
  - Material C (Copper)
- ▶ Dealer orders product with material A
- ▶ Is dealer involved in the design of the product so it loses protections under new statute ?
- ▶ What happens if the material selection is not involved in causing the alleged injury ?

# Hypothetical

- ▶ Seller is a truly passive seller ... does nothing to alter or change the product
- ▶ Seller has been selling same product for several years
- ▶ 60 Minutes broadcasts a segment identifying a potential product defect; newspapers pick up story
- ▶ Does seller have “actual knowledge” of a defect so that it loses the protections under Section 82.003 ?
  - Seller saw broadcast or read news coverage
  - Seller claims to have not seen broadcast or news coverage

## House Bill No. 4 Non-Manufacturer Liability

- ▶ **BAD:** public policy relating to the protection of the public has changed; sellers are more sophisticated and are in a better position to know the risks of a product
- ▶ **BAD:** a passive seller can sell its products with impunity unless it has actual knowledge
- ▶ **BAD:** the law undercuts the public policy of keeping defective products out of the marketplace; under the new law, sellers are encouraged to refrain from scrutinizing the safety of the products they sell

# Section 82.008

**Compliance  
with  
Government Standards**

**Rebuttable  
Presumption**

**No Liability**

**Pre-Market  
Compliance**

**Mandatory**

**Gov't Safety  
Standards**

# Practical impact of HB # 4

## Compliance with Government Standards

### Scope

- ▶ Applies to warnings claims
- ▶ Applies to design claims
- ▶ Does not apply to manufacturing claims
- ▶ Does not apply to products (drugs / medical devices) covered by Section 82.007

### Beneficiaries

- ▶ All product manufacturers
- ▶ All product sellers
- ▶ Possible Exclusion: drug and medical device sellers and manufacturers

## 82.008: Presumption of No Defect

- ▶ Defendant has burden of proof
- ▶ Compliance with mandatory standard
- ▶ Federal or State government (or agency)
- ▶ Applicable at the time of manufacture
- ▶ Standard governed the product risk that caused the harm

# Compliance with Federal Government Safety Standards (formula, labeling or design)

**Does not apply**  
**Products under**  
**Section 82.007**

**~~Rebuttable~~**  
**~~Presumption~~**

**Does not apply**  
**Manufacturing**  
**Defects**

**Rebuttal:**  
**Safety**  
**Standards**  
**Inadequate**

**Rebuttal:**  
**Material Withholding**  
**Pre or post approval**

**Rebuttal:**  
**Material**  
**Misrepresentations**  
**Pre or post approval**

## **Potential Application of Presumption**

**Federal Motor Vehicle Safety Standards  
(FMVSS)**

**Consumer Product Safety Standards**

# Key Issues

**If a manufacturer has received notice of proposed rulemaking and does not submit information - - remains a passive bystander - - is it guilty of withholding information ?**

**Does House Bill No. 4 impinge on a manufacturer's constitutionally protected right to lobby the government under the 1<sup>st</sup> Amendment ?**

## Hypothetical under Section 82.008

- ▶ A auto manufacturer has notice of NHTSA proposed rule making for a new FMVSS and NHTSA invites public comment.
- ▶ The auto manufacturer elects to not participate in the comment stage before the implementation of the new FMVSS.
- ▶ Discovery shows that the manufacturer possessed internal documents expressing a view that the FMVSS was not effective.
- ▶ Does the auto manufacturer loose the rebuttable presumption available under Section 82.008 ?

# House Bill No. 4

## Section 82.008

- ▶ **GOOD:** Does not apply to pharmaceutical cases
- ▶ **BAD:** extra burden to challenge the appropriateness of the safety standards
- ▶ **BAD:** extra burden to challenge the submissions of the product manufacturer to the regulatory agency

## Texas A&M University v. Chambers, 31 S.W.3d 780, 784 (Tex. App. – Austin 2000)

*"A presumption 'may not properly be the subject of an instruction to the jury' Armstrong v. West Tex. Rig Co., 339 S.W.2d 69, 74 ... Its inclusion is improper because the sole effect of a presumption is to fix the burden of producing evidence. United Founders Life Ins. Co. v. Carey, 347 S.W.2d 295, 307 ... 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. United Founders, 347 S.W.2d at 307; Armstrong, 339 S.W.2d at 74". (Emphasis added)*

## Texas A&M University v. Chambers, 31 S.W.3d 780, 784 (Tex. App. – Austin 2000)

“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)”

# Subsequent Remedial Measures

# Rule of Evidence 407 (a)

**Subsequent Remedial Measures.** When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of this subsequent remedial measure is not admissible to prove negligence or culpable conduct in connect with the event. This rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership, control or feasibility of precautionary measures, if controverted, or impeachment. **NOTHING IN THIS RULE SHALL PRECLUDE ADMISSIBILITY IN PRODUCTS LIABILITY CASES BASED ON STRICT LIABILITY.**

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# Recent Cases

## Recent Cases: Manufacturer's Duty to Indemnify

Manufacturer can qualify as "seller" for purposes of seller indemnity from component parts manufacturer under Sec. 82.002 (Crane, 89 S.W.3d 153, Corpus Christi)

Non-seller has a right to indemnity under Section 82.02 if plaintiff alleges that it was a seller; plaintiff's pleadings control. Freeman Financial Investment Co. v. Toyota Motor Corp.

No common law indemnity between retailer and supplier who did not produce defectively designed or manufactured product (Federal Petroleum Co., 2003 WL 1923507, Corpus Christi)

# Recent Cases: Safer Alternative Design

Existence of competitor's design in marketplace may establish technological feasibility, but is insufficient to establish economic feasibility.  
(Norman, 2003 WL 253595, Houston [1<sup>st</sup> Dist.] )

## Recent Cases: Removal

Equitable exception to one year limitation on removals where plaintiff's conduct amounts to "a pattern of forum manipulation" (Tedford, 327 F.3d 423)

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