



2008 Products Liability Update

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Products Liability Update

- **Preemption**
- Charge Issues
- Marketing
- Proper Defendants
- Indemnity
- Vioxx
- FNC

Bic Pen v. Carther

- 5 year old lights 6 year old sister on fire with a “child resistant” lighter
- 5 million jury verdict
- Issue: Did Fed Regs Dealing with Child Resistant Lighter Preempt Products Claims

Bic Pen v. Carther

- Regulation
 - Purpose is to Promote Safety
 - Contained Saving Clause “compliance shall not relieve liability at common law”
 - Performance Standard
 - No more 15%, In 2 5 minute tries
 - 15% balanced number
 - Alleged SAD that met standard

Bic Pen v. Carther

- HELD: IMPLIED PREEMPTION
 - C/L Liability is in Conflict with Fed Reg and would frustrate its purpose

Carden v. GM

- Rear Center Seat with Lap Belt & Manual Adjusting Device
- Claim—put Lap/Shoulder & Auto Retractor
- FMVSS 208 say must install lap only or Lap/shoulder

Carden v. GM

- Held:
 - Allowing a Product Claim would eliminate an Option Allowed by FMVSS 207
 - Marketing Claims Tied to Design Claims are also preempted

Riegel v. Medtronic

- Ruptured Balloon Catheter
- Preemption Because Class III device with Premarket Approval

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Charge Issues:

- How are the Chapter 82 Presumptions Treated in the Charge?
- Proximate & Producing Cause?
- Is Something Missing from Manufacturing Defect Instruction?

Wright v. Ford

- Ford Expedition XLT backed over & killed 3 year old
- Back Up Alarm Was an Option, But Not On Expedition in Question
- Design Claims—Include Back up Alarm Because Large Blind Spot

Wright v. Ford

- Court Instructed Jury: (p. 3-4)
 - Ford Complied Standard
 - Presumed Not Liable
 - Plaintiff Can Rebut If Standard Inadequate to Protect Public
- Held:
 - Not “Clear & Obvious” Error b/c no objection Charge
 - Not Clear if Thayer Presumption (disappears) or Morgan Presumption (does not disappear)

Ford v. Ledesma (p. 9-10)

- Changed “But For” Causation Definition in Producing Cause. (Same Result in Proximate Cause)
- Now includes “a cause that was a substantial factor in bringing about the injury **and without which the injury would not have occurred.**”

Ford v. Ledesma (p. 9-10)

- Changed Definition Manufacturing Defect
 - Now Includes : “**the product deviated in its construction or quality from its specifications or planned output in a manner that renders it unreasonably 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 product’s characteristics.”

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Ackermann v. Wyeth

- Ackermann Committed Suicide After Stopping Effexor Prescribed by Dr. Sonn
- Rated of Suicide Listed on Label Was Significantly Lower than Actual Rate Known by Wyeth
- Sonn
 - Still Would Have Prescribed
 - Still Would Have Treated Same Way
 - Would Not Have Passed Warning to Ackermann

Ackermann v. Wyeth

- Upheld Summary Judgment Because No Duty to Warn Use If Warned Learned Intermediary
- No Producing Cause Because Learned Intermediary Would Have Treated Same
- Read & Heed Presumption Doesn't Apply & Rebutted Regardless.

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New Texas Auto Auction

- Texas Supreme Court Adopts Restatement Third Holding Auctioneers Facilitate Sells, But Do Not Place Products In Stream-of-Commerce

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Owens & Minor v. Ansell Healthcare

- Latex Glove Cases
- Distributor Refused Indemnity Limited to That Manufacturer's Products
- Held: Limited Indemnity Satisfies Manufacturer's Indemnity Obligations

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Products Liability Update

- Merck v. Ernst
 - Vioxx Increase Risk of Clotting
 - No Direct Evidence Clot on Autopsy
 - Competing Explanations Re: Whether it Should be there
 - Elimination of Other Potential Causes of Heart Attack
 - HELD: NO CAUSATION AS MOL

Products Liability Update

- Merck v. Davis
 - Vioxx Increase Risk of Clotting
 - Two Clots Found On Autopsy
 - But Other Risk Factors Present So Did not Eliminate Other Causes of Heart Attack

 - HELD: NO CAUSATION AS MOL

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Forum Non Conveniens

In Re Pirelle Tires, p. 26



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