



2005 Products Liability Update

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Products Liability: Erosion of Rights

- Legislative Changes
- Case Law Trends

Legislative Changes

- Presumptions of No Liability
- 15 Year Statute-of-Repose
- Passive Seller Immunity
- Evidentiary Changes
- Forum Non Conveniens

Presumptions of No Liability

- 82.008(a)
 - Formulation, Labeling and Design
 - Mandatory Federal Safety Standards
- 82.008(c)
 - Formulation, Labeling and Design
 - Pre-market Licensing or Approval by the Federal
- 82.007

82.008(a) Presumption

- Defendant's Burden to Show
 - 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

82.008(a) Presumption

- Defendant's Burden to Show
 - Formulation, Design or Labeling
 - Complied with Mandatory Standard
 - Federal Government or Federal Agency
 - Applicable at time of Manufacture
 - Governed the Risk That Caused the Harm

82.008(c) Presumption

- Defendant's Burden to Show
 - Formulation, Design or Labeling
 - Subject to Pre-Licensing or Approval by Fed. Gov't.
 - Complied with Procedures and Requirements
 - Full Consideration of Product's Risks/Benefits
 - Approved or Licensed For Sale by Fed. Gov't.

Avoiding the 82.008(a)(c) Presumption

Does Not Apply
To Products
Covered by
82.007

Avoiding the 82.008(a)(c) Presumption

Does Not Apply to
Manufacturing
Defects

Rebutting the 82.008(a)(c) Presumption

Safety Standard
Inadequate to Protect;
Unreasonable Risk

82.008(c): Standard or Procedure

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

Rebutting the 82.008(a)(c) Presumption

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

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

82.007 Presumption

- Defendant's Burden to Show
 - Failure to Give Adequate Warning or Information About a Pharmaceutical Product
 - Warning or Information Approved by FDA
 - Presumption Favors
 - Health Care Providers
 - Manufacturers
 - Distributors
 - Prescribers

Rebutting the 82.007 Presumption

**Pre/Post Pre-Marketing Approval
or Licensing; Misrepresented
Required Information; Material &
Relevant to Performance of
Product; Causally Related**

Rebutting the 82.007 Presumption

**Sold/Prescribed by Defendant;
After Recall or Approval
Withdrawn**

Rebutting the 82.007 Presumption

**Off-Label Marketing by
Defendant; Used as Marketed;
Injury Caused by Off-Label
Use**

Rebutting the 82.007 Presumption

**Off-Label Marketing/Prescription
by Defendant; Used as Marketed;
Injury Caused by Off-Label Use**

Rebutting the 82.007 Presumption

**Pre/Post Pre-Marketing Approval
or Licensing; Violation 18 U.S.C.
201; Conduct Caused the
Approved Warning to be
Inadequate**

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-Repouse



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-Repose

Saporita v. Cincinnati Inc.

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

16.012: Statute-of-Repose

Equistar Chem. v. Dresser-Rand

-- Defendant Pled SOR,
But Did Not Raise in Motion
to Trial

-- 14th Ct—Doesn't
Preserve Appeal

-- Supreme Court Granted

Pet.

16.012: Statute-of-Repose

Zaragosa v. Chemetron

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

Constitutional

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
 - 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

Evidentiary Changes

- Texas Rule Evidence 407
 - Eliminated Products Subsequent Remedial Measures Exception
- Repealed Texas Trans. Code 545.413
 - Seatbelt Use/Nonuse is now admissible

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?

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

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* (Dallas, pet. granted)
 - 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.
 - Dallas Court Appeals reverse GM's MSJ because need for proof of causation
- Remaining Question:
 - 1% on Hudiburg
 - Hudiburg get 99% indemnity or Nothing?

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

Admissibility of OSI

- *Nissan Motor Co. v. Armstrong* (Tex. 2004)
 - 300 ZX “Unintended Acceleration” Case
 - OSI Evidence Admitted
 - 16 NHTSA Consumer Complaints
 - 757 of Nissan Consumer Database Complaints
 - 4 Live Witnesses
 - Verdict For Plaintiff; Affirmed By COA
 - Reversed by the Texas Supreme Court

Admissibility of OSI

- *Nissan Motor Co. v. Armstrong* (Tex. 2004)
 - Restrictions on Admissibility of OSI
 - (1) Reasonably Similar Circumstances
 - (2) No Undue Prejudice, Confusion or Delay
 - (3) Relevance depends on the purpose the OSI are offered for.
 - 16 NHTSA Consumer Complaints
 - Hearsay
 - 757 Nissan Consumer Complaints
 - Hearsay
 - (Offer for “Notice” Assumes they are true—hearsay)

Admissibility of OSI

- *Nissan Motor Co. v. Armstrong* (Tex. 2004)
 - 4 Live Witnesses
 - Could Not Specifically Identify the Defect
 - Inadmissible
- Suggestions
 - Talk to the OSI Victims and Identify Specific Defect
 - Experts Review the OSI and comment on Similarity
 - Offer for Other Purposes

Component Part Manufacturer

- *Bostrom Seating v. Crane Carrier* (Tex. 2004)
 - Component Part Manufacturer is not liable unless its defective component causes the harm
- *Toshiba Int. Corp. v. Henry*
 - Component Part Manufacturer is not liable for integration into a defective product, unless it “substantially participated in integration.”

Marketing Cases

- *Humble Sand & Gravel v. Gomez* (Tex. 2004)
 - Gomez gets lung disease from silica while working as a sandblaster
 - Sand supplied by Humble with an inadequate warning:
 - “Warning! May be Injurious to Health if Proper Protective Equipment Not Used”
 - Humble provided MSDS and Tech data sheets

Marketing Cases

- *Humble Sand & Gravel v. Gomez* (Tex. 2004)
 - Gomez gets lung disease from silica while working as a sandblaster
 - Sand supplied to Gomez's Employer by Humble with an inadequate warning
 - Danger Silica common knowledge?
 - Industry--Yes
 - Workers—No
 - Objectively could warnings given to flint suppliers effectively reach the workers?

Marketing Cases

- *Humble Sand & Gravel v. Gomez* (Tex. 2004)
 - Factors to Decide if Intermediary Relieves the Duty to Warn
 - The likelihood of serious injury from a supplier's failure to warn
 - The burden on the supplier of giving a warning
 - The feasibility and effectiveness of a supplier's warning
 - The reliability of operators to warn their own employees
 - The existence and efficacy of other protections
 - Social utility of requiring or not requiring supplier to warn
 - Reversed & Remanded

Miscellaneous Cases

- *FFE Transportation v. Fulgram* (Tex. 2004)
 - Trucking company that supplied a trailer to an independent driver was not subject to S/L
 - Did not place the trailer in the Stream-of-Comm
- *GM v. Iracheta* (Tex. 2005)
 - Expert case—two experts disagreement on location of fuel line breach was fatal
 - Don't have to object if the Plaintiff says thanks to the jury in the closing.



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