

**PRODUCTS LIABILITY: AN UPDATE ON THE LAW
2006**

TEXAS TRIAL LAWYERS ASSOCIATION

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I. 2003 LEGISLATIVE CHANGES & INTERPRETATIVE CASE LAW.

House Bill 4 affected major changes in the products liability arena through: (1) the creation of presumptions of no liability in certain cases; (2) the creation of a 15 year statute-of-repose; and (3) the creation of immunity for passive sellers. These changes are codified in the Texas Civil Practice & Remedies Code at sections: 82.008 (creating a presumption of no design or marketing defects in certain instances); 82.007 (creating a presumption of no marketing defects in certain pharmaceutical cases); 16.012 (creating a 15 year statute-of-repose); and 82.003 (creating immunity for passive sellers). There were also two evidentiary changes favoring defendants—the first dealing with admissibility of seatbelt use/nonuse and the second restricting the admissibility of subsequent remedial measures. A detailed analysis of these legislative changes is set forth below.

A. **82.008: Presumption of No Liability for the Formulation, Labeling or Design of a Product when Mandatory Federal Regulations or Standards are Followed.**

Texas Civil and Practice and Remedies Code §82.008 creates a rebuttable presumption in favor of product manufacturers and sellers. The rebuttable presumption is created when the manufacturer or seller establishes that the product's formulation, labeling or design complied with mandatory safety standards or regulations adopted or promulgated by the federal government or an agency of the federal government.¹ Further, the seller and manufacturer must establish that those safety standards or regulations were applicable at the time of manufacturer and governed the risk that allegedly caused the harm.² Once the seller or manufacturer establishes compliance with the mandatory safety standards or regulations a rebuttable presumption is created that the manufacturer and seller is not liable for injury caused by "some aspect of the formulation, labeling or design of the product."³

Several important issues should be considered when reviewing §82.008(a). First, the burden is on the seller or manufacturer to establish the existence of the presumption. Second, the presumption is limited to formulation, labeling or design. An argument could be made that only marketing claims dealing with labeling are covered by this provision. A strict reading of this statute would disallow the creation of the presumption if the Plaintiff's claims were based on a marketing defect that involved a claim other than the product labeling. Finally, the mandatory safety standard or regulation must have been applicable at the time of manufacture and must have governed the risk that caused the harm.

While mandatory federal regulations may apply, a careful analysis of the risk sought to be protected against is essential to determining the existence of a presumption. For instance, Federal Motor Vehicle Safety Standard 207, deals with seat back strength. This standard was created to protect a passenger from injuries sustained when his or her own seat back fails. This regulation was not enacted to protect the back seat passengers who may be injured by a front passenger seat back failure. A careful and thoughtful analysis of §82.008(a) and a detailed analysis of the safety standard or regulation invoked by the Defendant is essential to determine whether it is appropriate to create the rebuttable presumption in the first place.

¹ See TEX. PRAC. & REM. CODE § 82.008(a), West 2004

² *Id.*

³ *Id.*

On a separate note, it is important to understand that section 82.008(d) expressly excludes manufacturing flaws or defects from the rebuttable presumption created by §82.008. This exclusion exists even if the manufacturing processes were mandated by a federal government or agency. Likewise, §82.008(e) excludes products covered by §82.007, or pharmaceuticals.

Once the presumption is properly established, the claimant may rebut the presumption by establishing that the standard or regulation was inadequate to protect the public from unreasonable risk of injury or damage.⁴ Alternatively, the presumption may be rebutted by showing that the manufacturer, before or after marketing the product, withheld or misrepresented information or material relevant to the federal government's determination of the adequacy of the safety standard or regulation.⁵

Thus, the claimant rebuts the presumption first by attacking the standard. Any attorney who has tried a products liability case involving a mandatory regulation knows that the defense touts compliance with the standard as the government's seal of approval. At the same time, plaintiffs' counsel generally points out that the standard is a minimum standard, and many times outdated and inadequate. The evidence Plaintiffs previously used to attack the standard from the persuasive standpoint will be, most times, the same evidence used to rebut the presumption. But, now it is critical to offer this evidence to defeat the presumption.

Second, the presumption is rebutted by attacking the manufacturer's interaction with the federal government regarding the government's determination of the adequacy of the standard. This second method for rebutting the presumption opens up a Pandora's Box of discovery. Section 82.008(b)(2) reads: "the manufacturer, before or after marketing the product, withheld or misrepresented information or material relevant to the federal government's or agency's determination of adequacy of the safety standards or regulations at issue in the action." The language: "the manufacturer . . . withheld or misrepresented information or material relevant to the . . . government's . . . determination of adequacy of the safety standards or regulations . . ." does not require a manufacturer to provide information relevant to the product or the products compliance with the standard, but rather information relevant to the standard itself. Are manufacturers now responsible for determining whether government standards are adequate as they apply to the manufacturer's product? Does the manufacturer now have a quasi-governmental role? These issues are further complicated by the time period imposed, "before or after" the manufacturer markets the product. Interestingly, under the wording of this bill, there is no exception for a manufacturer who does withhold relevant information about the product's performance under the standards or regulations. Presumably, plaintiffs now will be able to obtain all correspondence and interaction that the manufacturers would have with the federal government and its agencies and will be able to pursue discovery to determine whether any information was withheld or misrepresented, not only with respect to the particular product's performance, but as to the safety standard as a whole.

Section 82.008(c) creates another rebuttable presumption of no liability favoring manufacturers and sellers with respect to formulation, labeling and design if the products were subject to pre-market licensing or approval by the federal government (or a federal agency) and the manufacturer complied with the procedures and requirements with respect to pre-market licensing or approval and after full consideration of the product's risks and benefits the product was approved or

⁴ See TEX. CIV. PRAC. & REM CODE § 82.008(b)(1), West 2004.

⁵ See TEX. CIV. PRAC. & REM CODE § 82.008(b)(2), West 2004.

licensed for sale by the government or agency.

The section 82.008(c) presumption may be rebutted by showing that the standards and procedures used in the particular pre-market approval or licensing process were inadequate to protect the public from unreasonable risks of injury or damage.⁶ Alternatively, the presumption may be rebutted by showing that the manufacturer, before or after the pre-market approval or licensing, withheld from or misrepresented to the government information that was material and relevant to the performance of the product and was causally related to the claimant's injury.⁷ In the pre-market licensing or approval context the rebuttal rules are the same of the section 82.008(b) rules, except for two significant things. First, the withholding or misrepresenting of information must be relevant to the performance of the product.⁸ Second, the withholding or misrepresenting information must be causally related to the claimant's injury.⁹

Interestingly, the most important aspect of §82.008 has yet to be determined. More specifically, the issues of how the presumptions will be treated in the trial and in the court's charge are of enormous importance. Obviously, the defendant manufacturers and sellers would like an additional charge question or an instruction. I further suspect that the defendants will want to talk about this presumption during voir dire, opening and as many times as the judge will allow after that! The plaintiffs' bar would argue that the presumptions should not be addressed in the charge or the trial at all. While these issues remain to be flushed out by the courts, the consensus, the case law¹⁰ and the better reasoned approach is that the rebuttable presumptions should not be included in the charge at all.

B. 82:007: Presumption of No Marketing Defect When There is Compliance with FDA Requirements.

If a products case alleges that an injury was caused by a failure to provide adequate warnings or information about a pharmaceutical product, section 82.007 creates a rebuttable presumption that the defendants, including the health care provider, manufacturer, distributor, and prescriber, are not liable, if the warnings accompanying the product were those approved by the United States Food And Drug Administration (FDA).¹¹

The presumption of no liability in pharmaceutical marketing defect cases, can be rebutted by evidence that the defendant, before or after pre-market approval or licensing, withheld from or misrepresented to the FDA required information that was material and relevant to the performance

⁶ See TEX. CIV. PRAC. & REM. CODE § 82.008(c)(1), West 2004.

⁷ See TEX. CIV. PRAC. & REM. CODE § 82.008(c)(2), West 2004.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Texas A&M University v. Chambers*, 31 S.W.3d 780, 784 (Tex. App. – Austin 2000), pet. denied. “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.(Tex. Civ. App. – El Paso 1960, writ ref’d n.r.e.). 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. *Armstrong*, 339 S.W.2d at 74. *Texas A&M University v. Chambers*, 31 S.W.3d 780 at 794. 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).”

¹¹ See TEX. CIV. PRAC. & REM. CODE §82.007, West 2004.

of the product and was causally related to the claimant's injury.¹² Again, unlike 82.008(b)(2), rebutting the presumption in the pharmaceutical context requires that the withheld information be relevant and material and also be causally related to the claimants' injuries.¹³

*Next, the presumption can be rebutted by showing that the product was sold or prescribed after the effective date that the FDA ordered its removal from the market or the FDA withdrew its approval.*¹⁴ The presumption can also be rebutted by showing an "off label" use. Sometime, healthcare providers and pharmaceutical companies prescribe and promote a particular drug to treat a problem for which the FDA did not approve the drug's use. When there is an "off label" use, the defendant loses the presumption of no liability. The evidence needed to rebut the presumption under an "off label" theory is set forth as 82.007(b)(3) and 82.007(b)(4). Under this theory the claimant needs to show: (1) the defendant recommended, promoted, advertised or prescribed the off label use; (2) the product was used as recommended, promoted, advertised or prescribed; and (3) the claimant's injury was causally related to the recommended, promoted, advertised or prescribed use of the product. *Finally, the presumption can be rebutted by showing that the defendant, before or after pre-market approval or licensing of the product, engaged in conduct that would constitute a violation of 18 U.S.C. Section 201 and that conduct caused the warnings or instructions approved for the product by the FDA to be inadequate.*¹⁵

C. 16.012: 15 Year Statute-of-Repose.

Most of the 2003 legislative changes dealing with products liability chipped away at victims' rights through the creation of additional defenses and evidentiary obstacles. But, the newly created section 16.012 of the Texas Civil Practice & Remedies Code actually abolished many victims' rights. Section 16.012 is a new statute-of-repose. This section requires that a claimant in products liability case bring suit within 15 years after the defendant sold the product.¹⁶ This new statute-of-repose applies to all actions where a product defect is alleged, regardless of the cause-of-action asserted (negligence, breach of warranty, 402(a) etc.) and regardless of the damages sought (personal injury, economic loss or equitable relief.)¹⁷

The 16.012 statute-of-repose has a few narrow exceptions. The statute will not bar an express warranty claim—where the warranty is made in writing and where the defendant warranted that the product is safe beyond 15 years.¹⁸ Cases in which the claimant is exposed to a product within the 15 year time period, but does not manifest disease symptoms until after the 15 years, are not subject to the statute of repose.¹⁹ The statute-of-repose only applies to products that are sold, not those that are leased.²⁰ Finally, the statute of repose does not apply to aviation claims that are subject to the General Aviation Revitalization Act of 1994.²¹

¹² See TEX. CIV. PRAC. & REM. CODE §82.007(b)(1), West 2004.

¹³ *Id.*

¹⁴ See TEX. CIV. PRAC. & REM. CODE § 82.008(b)(2), West 2004.

¹⁵ See TEX. CIV. PRAC. & REM. CODE § 82.007(b)(5), West 2004.

¹⁶ See TEX. CIV. PRAC. & REM. CODE § 16.012(b), West 2004.

¹⁷ See TEX. CIV. PRAC. & REM. CODE, §16.012(a)(2), West 2004.

¹⁸ See TEX. CIV. PRAC. & REM. CODE § 16.012(c), West 2004.

¹⁹ See TEX. CIV. PRAC. & REM. CODE §16.012(d), West 2004.

²⁰ See TEX. CIV. PRAC. & REM. CODE §16.012(e), West 2004.

²¹ See TEX. CIV. PRAC. & REM. CODE §16.012(g), West 2004.

Since 16.012 was enacted, there have been several cases applying this provision. In *Saporito v. Cincinnati Inc.* 2004 WL 234378 (Tex. App.–Houston [14th Dist.] 2004, no pet. h.) The 14th Court of Appeals affirmed a summary judgment in favor of Cincinnati Incorporated holding that the statute-of-repose barred the plaintiff’s cause-of-action. The product at issue was a press brake machine manufactured in 1953. The court rejected arguments founded upon continuing negligence, express warranty, and post-sale duties.

The holding in *Equistar Chemicals v. Dresser-Rand Co.*, 123 S.W.3d 584 (Tex. App.–Houston [14th Dist.] 2003, pet. granted), at footnotes 5 & 6, comments that pleading the statute-of-repose is not sufficient to reserve the point on appeal. Rather, the issue must be raised by a motion in the trial court in order to properly preserve the complaint. Note that petition for review has been granted in this case.

Finally, in *Zaragosa v. Chemetron Inv.*, 122 S.W.3d 341 (Tex. App.–Ft. Worth 2003, no pet. h.), a worker lost his hand in a commercial blender that was sold in 1978 by the Defendant to a third-party. Thereafter, the third-party sold the blender to the plaintiff’s employer. Plaintiffs argued that the statute-of-repose should not run from 1978, but from the date his employer purchased the blender from a third-party. The court rejected this argument under the plain language of the statute. The court also rejected constitutional challenges under the open court guarantees of the United States and Texas Constitutions.

D. 82.003: Passive Seller Immunity.

Section 82.003 of the Texas Civil Practice and Remedies Code is a newly created statute entitled, “Liability of Non-Manufacturing Sellers.” This statute sets forth an entirely new concept in products liability law: a passive seller of a defective product is generally not liable for harm caused by that product.²² Traditionally, most sellers or distributors in the chain of product distribution were subject to liability for defects in products they sold. The rationale for imposing liability on these passive sellers is that sellers should take responsibility to see that products they provide to the public are safe and defect free. A further rationale was that these passive sellers could (and still can) seek indemnity from the ultimate manufacturer for both defense costs and liability by way of either settlement or judgment.²³

Does the newly enacted §82.003 afford the non-manufacturing seller additional necessary protection beyond its indemnity rights? Not really. A non-manufacturing seller would have some minimal benefit in avoiding the hassle of defending an underlying products suit and then later seeking indemnity from the manufacturer. However, most often the manufacturer would, early on, step in the underlying suit and agree to defend and indemnify the non-manufacturing seller so as to avoid paying the defense bills of its own lawyers and those lawyers hired by the passive seller. When the manufacturer refuses to defend and indemnify, it is generally because the seller has some independent culpability; because the manufacturer is not subject to the jurisdiction of the Court; or because the manufacturer is insolvent. Significantly, the newly enacted §82.003 provides exceptions to a passive seller’s immunity under just these type circumstances. So, if the only real benefit created by the enactment of §82.003 is the elimination of some hassle to non-manufacturing sellers, why was this legislation enacted and how will it impact products liability litigation? The answer is

²² See TEX. CIV. PRAC. & REM. CODE §82.003(a), West 2004.

²³ See TEX. CIV. PRAC. & REM. CODE § 82.002, West 2004.

not really the substantive changes created by this new law; rather, the answer lies in the effect this statute will have on the location where products liability cases will now be litigated.

Even though Texas is a big state, most products are manufactured by companies who maintain their citizenship outside of Texas. For instance, none of the Big Three automobile manufacturers are Texas “citizens.” Thus, when a Texas resident sues a manufacturer without Texas “citizenship” – federal diversity jurisdiction exists under 28 U.S.C. 1332(a). Without a Texas “citizen” – such as a local non-manufacturing seller – added as a Defendant, the manufacturer will almost certainly remove the products liability action to Federal Court. Section 82.003 in most instances, prevents Plaintiffs from suing local non-manufacturing Defendants to destroy diversity jurisdiction and to maintain their cases in more favorable state courts. Section 82.003 was passed less as a substantive protection for local non-manufacturing sellers and more as a means to guide products liability cases to a generally more defense oriented arena – federal courts.

With an understanding of the underlying rationale and practical effect of §82.003, let’s now turn to an in-depth examination of the law. Section 82.003(a) provides that: “A seller that did not manufacture a product is not liable for harm caused to the claimant by that product unless the claimant proves...”one of seven exceptions.²⁴

Section 82.003(a)(1) provides an exception if the claimant can prove: “that the seller participated in the design of the product.” Significantly, the statute does not indicate what level of design participation triggers the threshold for liability. Moreover, this section does not require that the seller’s participation in the design results in the claimant’s harm.

Next, §82.003(a)(2) provides an exception if the claimant can prove that the seller altered or modified the product, and the claimant’s harm resulted from that alteration or modification. Unlike the previously discussed exception, this exception requires that the seller’s alteration or modification result in the claimant’s harm. As an example, if a claimant was injured in a vehicle rollover and alleged that the vehicle’s stability was unreasonably dangerous, a non-manufacturing seller may be exposed to liability if they altered or modified the vehicle in a way that affected the vehicle’s stability. For instance, the seller could have placed larger tires on the vehicle, could have installed a lift kit to change the suspension system, or could have installed after-market components, all of which are changes that affect the vehicle’s stability.

When a claimant proves that “the seller installed the product, or had the product installed, on another product, and the claimant’s harm resulted from the product’s installation onto the assembled product” then there is an exception to the non-manufacturing seller’s immunity under §82.003(a)(3). Again, this will require some culpable action by the passive seller – improper installation – that is causally related to the harm.

The next exception deals with a seller’s involvement in the warnings and instructions on products. Section 82.003(a)(4) allows an exception to passive seller’s immunity when the seller exercised substantial control over the content of a warning or instruction; the warning or instruction was inadequate; and the claimant’s harm resulted from the inadequacy of the warning or instruction.

The final exception that involves culpable conduct on behalf of the passive seller relates to

²⁴ In addition to the seven exceptions, Occupation Code 2301 prevails over 82.003 in the limited circumstances.

express factual representations about the product. Section 82.003(a)(5) provides an exception to passive seller immunity when the seller makes an express factual representation about an aspect of the product; the representation is incorrect; the claimant relies on the representation in obtaining or using the product; and if the aspect of the product had been as represented, the Plaintiff would not have suffered harm or the same degree of harm.

As is apparent, the first five exceptions exist when the passive seller undertakes some action that makes it more than merely a “passive” participant in the distribution chain. Except for a participation in the design of the product, four of these five exceptions have a causal component included within the language of the statute.

The next exception to a passive seller’s immunity exists when the seller has actual knowledge of the injury causing defect at the time the product is sold. For instance, if a meat packing plant informs a local grocery store of an infected meat product, but the grocery store sells the defective meat product; the grocery store will be liable under the actual knowledge exception. Questions remain as to the proof necessary to show the seller had actual knowledge of a defect. For instance, if a seller views a news magazine piece regarding alleged defects with a certain product; receives correspondence from Plaintiff’s counsel regarding the existence of the defect; or was previously sued where the same defect allegations were made, will this constitute actual knowledge of a defect under 82.003(a)(b).

There has been one case interpreting the actual knowledge exception set forth in 82.003(a)(6), *Reynolds v. Ford Motor Co.*, 2004 WL 2870079 (N.D. Tex. 2004). *Reynolds v. Ford Motor Co.* case is a Federal District Court opinion on a motion to remand. As discussed above, the plaintiff’s counsel in an attempt to destroy diversity jurisdiction, sued the local retailer and pled the actual knowledge exception to the passive seller immunity statute. In turn, the defendant argued fraudulent joinder. The underlying lawsuit involved a single vehicle rollover accident involving a 1998 Ford Explorer. As a basis for the actual knowledge exception, the plaintiffs argued that the 1998 Ford Explorer Sport contained a warning on the vehicle’s sun visor and owner’s manual. Further, plaintiffs alleged that the dealer knew the National Highway Safety Administration had given only two stars to the Ford Explorer for rollover protection. This evidence was sufficient to defeat the fraudulent joinder argument and resulted in a remand. Obviously, it should be noted that this case does not speak to the ultimate merits of plaintiff’s “actual knowledge” argument, but is illustrative of the evidence necessary to get a case remanded.

The seventh and final exception will be the most important and perhaps most invoked exception. Section 82.003(a)(7) provides an exception to a passive seller’s immunity when the manufacturer of the product is insolvent or is not subject to the jurisdiction of the Court. This situation frequently arises when the manufacturer of products are located in places such as China or Taiwan. Companies in these locations make many of the products sold by large retailers throughout the United States. This important exception allows Plaintiffs to proceed with lawsuits against the passive retailers when they purchase products from manufacturers who are beyond the reach of the courts.

The enactment of §82.003 should have less of a substantive impact on how and what is involved in products liability litigation in Texas, and more of an impact on where product liability cases are litigated. In short, we will see you in Federal Court.

E. Evidentiary Changes Particularly Significant to Products Liability.

The 2003 Tort Reform Law, House Bill No. 4, made two changes to the law of evidence, both favoring defendants. First, the bill required the Texas Supreme Court to “as soon as practicable” amend TEX. R. EVID. 407(a)²⁵ to conform that rule to FED. R. EVID. 407.²⁶ This change eliminated the exception that previously existed under Texas evidence law, which allowed subsequent remedial measures to be admissible in products cases. Note, however, that subsequent remedial measures may still be admissible under other exceptions.

House Bill No. 4 also repealed TEX. TRANS. CODE ANN. §545.413(g) (Vernon Supp. 2003) that previously made the use or nonuse of a safety belt inadmissible in a civil trial.

II. CASE LAW UPDATE.

A. Texas Supreme Court Cases.

1. *General Motors v. Iracheta*, 161 S.W.3d 462, 469-70 (Tex.2005)

- Background: Estates of passengers brought products liability action against vehicle manufacturer, alleging that defectively designed fuel system of vehicle in which passengers were riding caused post-collision fuel-fed fire which burned passengers to death. The 49th Judicial District Court, Webb County, Manuel R. Flores, J., rendered judgment on jury's verdict finding that design defect existed which caused one passenger's death. Manufacturer appealed. The San Antonio Court of Appeals, 90 S.W.3d 725, affirmed. Review was granted.
- Holdings: The Supreme Court, Nathan L. Hecht, J., held that: (1) one of estates' expert witnesses was not qualified to offer opinion that gasoline was siphoned from ruptured return fuel line at rear of car, as purported design defect; (2) another expert witness could not “defer” to the opinion which first expert gave without proper qualification; and (3) manufacturer's objection that passengers' grandmother personally thanked the jury was timely.

²⁵ TEX. R. EVID. 407 (a) reads:

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 the subsequent remedial measures is not admissible to prove negligence or culpable conduct in connection 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.

²⁶ FED. R. EVID. 407 reads:

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 the subsequent remedial measures is not admissible to prove negligence or culpable conduct in connection 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.

- Effect: Where experts for the same party present irreconcilably conflicting causation testimony, the party cannot borrow pieces of opinion from each expert that seem to match, tie them together in an ill-fitting theory, and argue that it is some evidence to support the verdict. Inconsistent theories cannot be manipulated in this way to form a hybrid for which no expert can offer support. The court expressed serious concerns in a case in which the plaintiff's experts offered conflicting testimony.

The Supreme Court in *Iracheta* also addressed the necessary expert witness testimony in product liability cases. In *Iracheta*, the plaintiffs' two experts were unable to offer definitive testimony as to what caused the accident but offered opinions that they had eliminated all other possibilities. The Court indicated that eliminating all other possibilities may not be sufficient to support a verdict in a product liability case.

Finally, and perhaps more troubling, the court held that a party can attack the reliability of an expert witness at any time, even after cross examination. The Supreme Court held that a party is not required to object to the unreliable nature of an expert's testimony until such time as the nature of the testimony becomes apparent. In *Iracheta*, the court held that the unreliability of the experts' opinion was not apparent during the discovery process but arose during the trial. This keeps the door wide open for late Daubert/Robinson motions even up until the time the experts complete their trial testimony.

2. *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 910 (Tex.2004).

- Background: Negligence action was brought against manufacturer of motorist's vehicle by administrator of estate of driver whose car was struck by motorist and next friend of driver's passenger. After unanimous jury verdict in favor of manufacturer, the 93rd District Court, Hidalgo County, Fernando G. Mancias, J., granted new trial. On retrial, the District Court entered judgment on jury's verdict in favor of plaintiffs, and manufacturer appealed. The Court of Appeals, 79 S.W.3d 113 affirmed.
- Holdings: On manufacturer's petition for review, the Supreme Court, Wainwright, J., held that: (1) accident reconstructionist's opinion testimony as to causation was unreliable; (2) unidentified eyewitness's videotaped statement did not come within excited

utterance exception to rule against hearsay; (3) manufacturer did not waive challenge to admissibility of eyewitness's videotaped statement; (4) Supreme Court was not precluded from considering challenge to metallurgical expert's opinion on causation; and (5) metallurgical expert's opinion was insufficient to establish causation. Reversed and rendered.

- Effect: Expert's theory based on "laws of physics" alone is unreliable and not competent evidence to establish proximate cause where expert conducts no tests, cites no tests and presents no publications or studies to corroborate his theory.

In *Ramirez*, the plaintiff sought to base her case upon accident reconstruction theories unsupported by any testing or literature. The plaintiff's position was that this type of accident reconstruction testimony did not require testing or literature under the Supreme Court *Gammill* decision and was based upon the "laws of physics." The Supreme Court indicated that accident reconstruction testimony may not necessarily fall within the Supreme Court's rule set forth in *Gammill v. Jack Williams Chevrolet*, 972 S.W.2d 713 (Tex. 1998) which holds that some expert opinions may be based on experience without testing or literature. The Supreme Court overturned the plaintiff's verdict based upon the fact that the plaintiff's expert witness did not have any testing or publications to support the accident reconstruction opinions. The only saving grace in this case may be that the accident reconstruction theory offered by the plaintiff was extremely complicated and somewhat novel. I would argue that *Gammill* does apply to accident reconstruction theories when they involve more basic theories of accident reconstruction. Nevertheless, any reconstruction issue that involves any level of complexity or any novel concepts should be supported with testing and/or literature.

3. *General Motors Corp. v. Hudiburg Chevrolet, Inc.*, 2006 WL 741552 (Tex. 2006).

- Truck dealer brought action against truck chassis manufacturer and truck service body manufacturer, seeking indemnity for damages awarded plaintiffs in settlement of underlying products liability action resulting from collision involving truck. The 191st Judicial District Court, Dallas County, Catharina Haynes, J., granted summary judgment for manufacturers, and truck dealer appealed. The Court of Appeals reversed and remanded, 114 S.W.3d 680, and dealer petitioned for review.
- Holdings: The Supreme Court, Hecht, J., held that: (1) plaintiffs' pleadings did not claim that service body was defective such that truck dealer had a statutory right of indemnity against service body manufacturer; (2) genuine issue of material fact as to whether truck

dealer's independent liability precluded it from obtaining indemnity, including whether fire would have occurred if truck's fuel filler line had been connected differently and service body fastened to chassis frame more securely, precluded summary judgment for manufacturers; (3) truck dealer's mere act of selling truck which allegedly was assembled incorrectly did not impose independent liability on dealer such that it lacked right of indemnity; (4) assembler's status as independent contractor hired by truck dealer to assemble truck did not impact manufacturers' duty to indemnify dealer; and (5) chassis manufacturer did not have a statutory duty to indemnify truck dealer based on allegations that the truck, as distinct from chassis, was defective. Affirmed as modified; remanded.

- Effect: In order for a component-product manufacturer to be subject to a duty to indemnify a seller under section 82.002, the claimant's pleadings must fairly allege a defect in the component itself, not merely a defect in the seller's product of which the component was part.

4. *U.S. Silica Co. v. Tompkins*, 156 S.W.3d 578 (Tex. 2005).

- Background: Beneficiaries of employee's estate brought wrongful death and survival action against flint supplier, alleging that employee contracted silicosis from using flint product during abrasive blasting. The 60th District Court, Jefferson County, Gary Sanderson, J., entered judgment in favor of employee's estate, and the Court of Appeals, 92 S.W.3d 605, affirmed.
- Holding: On petition for review, the Supreme Court held that: (1) whether flint supplier owed duty to warn purchaser's employees of dangers associated with flint in abrasive blasting depended on whether such warning could effectively reach employee, and (2) CT scan taken of employee was relevant to proving extent of employee's impairment from silicosis. Petition for review granted; reversed and remanded.
- Effect: Whether a flint supplier owes a duty to warn its customers' employees of the dangers of using its product in abrasive blasting depends on whether such warnings can effectively reach the employees.

B. Court of Appeals Cases.

1. *Ford Motor Co. v. Ledesma*, 173 S.W.3d 78 (Tex. App. – Austin 2005, pet. filed).

- Background: Consumer brought action against pick-up truck manufacturer in connection with collision between truck and two parked cars. The 335th Judicial District Court, Bastrop County, Terry L. Flenniken J., entered judgment in favor of consumer. Manufacturer appealed.
 - Holding: The Court of Appeals, W. Kenneth Law, C.J., held that: (1) manufacturer failed to show that expert testimony was insufficiently reliable to be admitted at trial; (2) witness for manufacturer was not qualified to give expert opinion that truck's axle displacement was caused by collision; (3) any error in jury instructions was harmless; and (4) evidence supported jury verdict. Affirmed.
 - Effect: (1) To prove a manufacturing defect, a plaintiff only needs to prove a flawed product, not a flawed manufacturing process. This may be accomplished through circumstantial or direct evidence of a manufacturing defect, but it must provide more than mere suspicion. (2) Definition of “defect” in jury question regarding manufacturing defect, does not require the language “physical departure from the intended design.” Ford and many defendants want to change the definition in product cases from a “condition” to “physical departure.” This is the second court of appeals that has denied this request.
2. *Bic Pen Corp. v. Carther*, 171 S.W.3d 657 (Tex.App –Corpus Christi 2005, pet. filed).
- Background: Mother, as next friend of daughter who was a burn victim, brought products liability action against manufacturer of child resistant disposable lighter. The 130th District Court, Matagorda County, Juan Velasquez, III, J., entered judgment on a jury verdict for mother, and manufacturer appealed.
 - Holdings: The Court of Appeals, Garza, J., held that: (1) mother's claim was not implicitly preempted by Consumer Product Safety Commission standards regulating child resistance of disposable lighters; (2) evidence was sufficient to establish that presumption of no design defect, arising from disposable lighter's compliance with federal regulations, was rebutted; (3) evidence was sufficient to establish that there was a safer alternative design for the lighter; (4) evidence was sufficient to establish that lighter was a producing cause of daughter's injuries; (5) evidence was sufficient to establish that manufacturer acted with malice when it produced and sold lighter; and (6) bills amending statute on pre-judgment and post-judgment interest rates did not govern interest rates on judgment. Affirmed.

- Effect: Design defect claim which is not an obstacle to the accomplishment and execution of any federal objectives regarding the product, is not implicitly preempted by federal law. In this case, the court analyzed the effect of consumer product safety rules on the pre-emption of state common law. The court stated that since the design defect claim offered by the plaintiffs in that case would not interfere with the federal standard's objectives but would compliment and reinforce them, then common law was not pre-empted by federal law. The court acknowledged the United States Supreme Law of pre-emption when the federal statute implicitly overrides state law or when the state law is in actual conflict with federal law. The court specifically held that any rule of law created by a claim that would be in harmony with existing federal standards and further the federal objectives, would not be pre-empted by federal law. The court further held that compliance with a federal minimum standard does not automatically leave a manufacturer from common law liability.

This case also addressed the method in which a plaintiff can rebut the federal standard immunity presumption contained in §82.008(b) of the Civil Practice & Remedies Code. The court recognized that mandatory federal standards or regulations can be inadequate to protect the public from unreasonable risks of injury or death and can be rebutted with evidence of testing which shows the inadequacy of federally mandated standards to prevent unreasonably dangerous products from reaching the marketplace. This case supports the proposition that testing is a viable means of rebutting the federal safety standard immunity presumption.

3. *Daimlerchrysler Corp. v. Hillhouse*, 161 S.W.3d 541, 552 (Tex.App.-San Antonio 2006, pet. granted, judgment vacated by agreement).

- Background: Parents of minor child who was injured when an air bag deployed following an automobile collision brought action against automobile manufacturer, asserting design defect and marketing defect claims. The 224th Judicial District Court, Bexar County, David Peoples, J., entered judgment on jury verdict for parents. Manufacturer appealed.
- Holdings: On reconsideration en banc, the Court of Appeals, Sandee Bryan Marion, J., held that: (1) evidence supported finding of foreseeability of harm from deploying air bag; (2) evidence supported finding that manufacturer's warnings were inadequate; (3) evidence supported finding that inadequate warnings caused injury; (4) parents failed to establish that alternative design, a de-powered air bag, would have prevented or significantly reduced risk of child's injuries; (5)

testimony of parents' medical forensic expert was unreliable; (6) parents failed to establish that a de-powered air bag would not have substantially impaired the air bag's utility; and (7) evidence was sufficient to support award of \$400,000 for future medical expenses. Affirmed.

- Effect: One of the most troubling aspects of the *Hillhouse* opinion is the dissent by Justice Paul Green, now one of the Supreme Court justices. In *Hillhouse*, the court upheld the plaintiffs' marketing defect claim based upon inadequate warnings, holding that the jury was free to determine that the warnings were inadequate and confusing to the plaintiff. Justice Green, in his dissent, substituted his own belief that the warnings were not confusing and would not agree with the majority. The majority in *Hillhouse* stated that Justice Green's dissent constitutes an improper substitution of his conclusion for that of the jury's. This is precisely the type of factual sufficiency second-guessing the Supreme Court has shown a penchant for in the last few years.

The *Hillhouse* opinion also addressed the need for testing in design defect product liability cases. The court overturned the plaintiffs' design defect claim in *Hillhouse* based upon the subjective nature of the experts' opinions. The court's ruling was based primarily upon the fact that the expert did not conduct or review a single test result to support his opinions. This ruling is consistent with the movement by product liability defendants and the Supreme Court to require extensive testing of all product liability design defect theories.

4. *A.O. Smith Corp. v. Settlement Inv. Management*, 2006 WL 176815 (Tex. App. –Fort Worth 2006, no pet. h.)

- Background: This products liability case concerns a commercial water heater that overheated and set fire to an apartment building. Appellants complained that the trial court erred by denying their motion for judgment notwithstanding the verdict because there no evidence that the alternative designs proposed by Appellee were economically feasible, and no evidence that the alternative designs would not pose an equal or greater risk of harm under other circumstances.
- Holding: In its Memorandum Opinion, the Court of Appeals, Anne Gardner, J., held that: (1) Appellee was not required to present evidence of the cost implementing its alternative designs into the manufacturing process; (2) expert testimony of ceramics engineer and a forensic mechanical engineer rose into the zone of "some evidence" that the proposed alternative designs were economically feasible; and

(2) expert testimony constituted some evidence that the proposed alternative design would have been safer and by inference, would not have imposed equal or greater risks of harm under other circumstances. Affirmed.

- Effect: In a design defect case, the plaintiff is required to present some evidence that the alternative design is economically feasible, but is not required to prove the actual manufacturing cost of the alternative design. Further, a plaintiff can show the alternative design utility/risk characteristics by inference as opposed to direct evidence.

5. *Gomez de Hernandez v. New Texas Auto Auction Services, L.P.*, 2006 WL 871010 (Tex.App.-Corpus Christi, 2006, no pet. h.).

- Background: Widow, individually, as personal representative of decedent's estate, and as next friend of her children, brought products liability action against tire company, automobile manufacturer, automobile auction house, and others following fatal rollover accident. The 332nd District Court, Hidalgo County, granted auction house's motion for summary judgment, and widow appealed.

- Holdings: The Court of Appeals, Rodriguez, J., held that: (1) genuine issue of material fact as to whether auction house introduced vehicle and tire into the stream of commerce and thus was a “seller” precluded summary judgment for auction house on strict liability theory; (2) genuine issue of material fact as to whether auction house had duty with respect to selling vehicles with defects precluded summary judgment for auction house on negligence theory; (3) genuine issue of material fact as to whether automobile auction house breached duty of care for auctioneers when it sold vehicle in “as is” condition precluded summary judgment for auction house on negligence theory; (4) expert testimony was not necessary to establish standard of care and duty which automobile auction house owed regarding sale of used vehicle and tire; and (5) genuine issue of material fact as to whether defects in tire and vehicle were known to foreseeable product users at time auction house sold vehicle precluded summary judgment for auction house on negligence theory. Reversed and remanded.

- Effect: Auction house which places a product into the stream of commerce is a “seller” within meaning of product liability law (subject to the limitation of liability placed on a non-manufacturing seller by Tex. Civ. Prac. & Rem.Code Ann. § 82.003, in cases filed after September 1, 2003).

6. *Benavides v. Cushman, Inc.*, 2006 WL 193901 (Tex.App.-Houston [1 Dist.] 2006 WL 193901 2006, no pet. h.).

- Background: Golf course groundskeeper sued manufacturer of sand trap rake for injuries he sustained when a sand trap rake, which was a three-wheeled vehicle, overturned while he was driving it. The 280th District Court, Harris County, Tony Lindsay, J., entered judgment for manufacturer, and groundskeeper appealed.
- Holdings: The Court of Appeals, Jane Bland, J., held that: (1) any error by trial court in excluding testimony by groundskeeper's expert about previous rollover accidents was harmless; and (2) groundskeeper's expert's testimony which was directed at proving the elements of a marketing defect cause of action was not admissible. Affirmed.
- Effect: Plaintiff must specifically plead a marketing defect cause of action in order to present evidence of inadequate warnings or failure to warn. A marketing defect claim and a design defect claim are distinct and separable and "failure to warn" is not a subpart of strict liability.

7. *Everett v. TK-Taito, LLC*, 178 S.W.3d 844 (Tex. App. – Fort Worth 2005, no pet.)

- Background: Motor vehicle purchasers brought class action against manufacturers, seeking economic damages in connection with defective seat belt buckles that had a propensity to only partially latch and were not recalled when alleged design defect was discovered. The 30th District Court of Wichita County dismissed purchasers' action for lack of standing, and purchasers appealed.
- Holding: The Court of Appeals, Sue Walker, J., held that: (1) purchasers did not suffer an injury redressable on a breach of implied warranty of merchantability claim; (2) purchasers did not suffer either an "out-of-pocket" or "benefit-of-the-bargain" economic injury compensable under the Deceptive Trade Practices Act (DTPA); (3) injuries alleged by purchasers were not the type of equitable injuries that were redressable in an equitable action for a constructive trust; and (4) injuries alleged by purchasers were not recoverable on a money had and received claim. Affirmed.

- Effect: Economic harm from an unmanifested product defect is not an “injury” conferring standing under most theories of recovery and is not proper for class action status. Some Texas courts have approved economic benefit-of-the-bargain or cost-of-replacement damages based on an unmanifested product defect.
8. *Baker v. St. Jude Med., S.C., Inc.*, 178 S.W.3d 127 (Tex. App. – Houston [1st Dist.] 2005, pet. filed).
- Background: Patient's heirs brought state-law causes of action for negligence, products liability, breach of warranty under Texas Deceptive Trade Practices Act (DTPA), malice, and fraud against manufacturer of mechanical heart valve device. The Probate Court Number One, Harris County, Russell Austin, J., granted summary judgment to defendant, based on federal preemption. Plaintiffs appealed.
 - Holding: The Court of Appeals, Sherry Radack, C.J., held that: (1) state-tort claims can impose state "requirements" which are preempted by federal Medical Device Amendments; (2) process for federal Food and Drug Administration's issuance of supplemental premarket approval for the device imposed federal requirements; (3) negligence claim was expressly preempted; (4) products liability claim was expressly preempted; (5) Deceptive Trade Practices Act claim was expressly preempted; and (6) fraud and malice claims were impliedly preempted. Affirmed.
 - Effect: Negligence, products liability, and DTPA claims which would require a finding that a medical device was unsafe in direct contradiction to prior FDA approval, are preempted because a jury finding could potentially set a standard of care above what the FDA has determined is necessary to produce a safe product.

C. Federal Cases.

1. *Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co.*, 419 F.3d 355 (5th Cir. 2005).
- Background: Railroad that conducted emergency clean-up and restoration of its right-of-way following rupture of above-ground chemical storage tanks brought action against owner of tanks. Owner filed third-party products liability claim against seller of tanks and others, alleging that tanks were defective. Seller moved for summary judgment. The United States District Court for the Northern District of Texas, Sam R. Cummings, J., 2004 WL 1926322 granted summary judgment in favor of seller. Owner appealed.

- Holdings: The Court of Appeals, Prado, Circuit Judge, held that: (1) Texas statute of repose for products liability claims applied retroactively; (2) retroactive application of Texas statute of repose for products liability claims did not violate Texas constitution's general prohibition against retroactive laws; (3) retroactive application of Texas statute of repose for products liability claims did not violate the Texas open courts policy; and (4) provision of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) did not preempt the Texas statute of repose for products liability claims. Affirmed.
- Effect: Texas statute of repose requiring that a products liability claim be brought before the end of 15 years after the date of sale, applies retroactively to actions filed on or after July 1, 2003. Retroactive application does not violate the Texas constitution's open courts provision.

2. *Hernandez v. Ford Motor Co.*, 2005 WL 1830660 (S.D.Tex. 2005).

- Background: In this defective roof case against Ford Motor, the auto manufacturer brought summary judgment asserting that Plaintiffs' "fraud on NHTSA" claim brought under Tex. Civ. Prac. & Rem. Code § 82.008(b), was preempted by the Federal Motor Vehicle Safety Act. Plaintiffs contended that they were merely pleading the language required by §82.008, which creates a rebuttable presumption in a product liability case that a manufacturer is not liable if it has complied with federal standards.
- Holdings: In its Memorandum Opinion and Order, the Southern District of Texas, Head, Chief J., held that: (1) the Federal Motor Vehicle Safety Act does not preempt Tex. Civ. Prac. & Rem. Code § 82.008(b); and (2) Plaintiffs are allowed to present evidence to rebut the presumption of immunity for compliance with federal safety standards under Tex. Civ. Prac. & Rem. Code § 82.008. Motion denied.
- Effect: A "fraud on NHTSA" claim brought to rebut the assumption of immunity under Tex. Civ. Prac. & Rem. Code § 82.008(b), is not preempted by the Federal Motor Vehicle Safety Act.

In this case, the court was analyzing the effect of § 82.008(b) of the Texas Civil Practice & Remedies Code in terms of what evidence the plaintiffs are allowed to present to rebut the presumption of product liability immunity for compliance with federal safety standards. One of the ways to get around the federal safety standard presumption is the "fraud on NHTSA" claim in which a plaintiff proves that a defendant did not supply proper information to the federal

government or withheld information relevant to the federal government's determination of the adequacy of the safety standards at issue. In *Hernandez*, Ford claimed that the "fraud on NHTSA" claim was improper and would allow the federal standards scheme to be second-guessed by 50 different state tort regimes and would frustrate the federal framework for insuring compliance with Federal Motor Vehicle Safety standards. However, the Federal Motor Vehicle Safety Act contains a savings clause which states that compliance with consumer products safety rules shall not relieve any person from liability at common law or under a state statute. The *Hernandez* Court specifically held that the "fraud on NHTSA" claim is available to plaintiffs in products liability cases in Texas to circumvent the immunity presumption of Tex. Civ. Prac. & Rem. Code § 82.008.