

# 2010 Products Liability Update

# Product Liability Update

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- Preemption
- Indemnity
- Learned Intermediary Doctrine
- “Open & Obvious” now a Design Defect Defense
- Experts

# Preemption

# Preemption: *Williamson v. Mazda Motor*

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- Implied Conflict Preemption Case From California
- Facts:
  - Frontal Collision in a 1993 Mazda MPV Minivan
  - Williamson Seated in Center Rear Seat
  - Center Seat Equipped with Lap-belt Only
  - Williamson Jackknifed & died of internal injuries
  - Occupants in Shoulder/Lap Belts Did Not Receive Fatal Injuries
- FMVSS 208 Allows In Center Rear:
  - Lap belt or Lap & Shoulder Belt

# Preemption: *Williamson v. Mazda Motor*

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- Plaintiff Claims Design Defect: Should Have Shoulder/Lap Belts in Center Position
- Defendant Argues Under *Geier*, Claim is preempted because it forecloses an option allowed by FMVSS 208
- Trial Court Granted Motion to Dismiss on Preemption
- California Appeals Court Affirmed Dismissal

# Preemption: *Williamson v. Mazda Motor*

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- United State Supreme Court Granted Cert.
- Elena Kagen (as Solicitor General) argued
  - Lower Court's Are Over-Reading *Geier*
  - Allowing Preemption Give No Effect to Saving Clauses
  - NHTSA Purpose if Not Defeated, But Served By Allowing State Actions
  - State Law Claims are not preempted
- USSC Will Hear Case 2010-2011 Term
- Kagen Will Disqualify Herself.

# Preemption: *Bic Pen II*

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- 5 Year Old Burned In Fire Started By Child Resistant Lighter that Complied with CPSC Regulations
- Plaintiff Brought Design & Manufacturing Claims:
  - The Standard is a Minimum
  - There is a Saving Clause

# Preemption: *Bic Pen II*

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- Texas Supreme Court Held Design Claims Preempted
  - Allowing State COA Design Would Frustrate Purposes of the Regulation
- Remanded Manufacturing Claims; COA affirmed judgment.
- Texas Supreme Court Granted Pet. on Manufacturing Claims

# Preemption: *MCI Sales & Service v. Hinton*

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- Bus Crash
- Plaintiff claims: install seatbelts & laminated glass
- Defendants Claim FMVSS 208 (belts) & 205 (glass) implied preempt state law products claims
- Waco Court of Appeals Rejected Preemption Arguments
- PETITION GRANTED BY TEXAS SUPREME COURT

# Preemption: *Brockert v. Wyeth* (14<sup>th</sup> COA)

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- Brockert Developed Breast Cancer While Taking Prempro
- Brockert Claimed that FDA Approved Warning About Breast Cancer Should Have Been Stronger
- Houston COA: Citing *Wyeth v. Levine* held Brockert's Claims Were Not Preempted

# Indemnity

# Indemnity: *Hadley v. Wyeth*

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- Hadley sued Dr. & Wyeth for injury from taking drugs
- Trial Court Granted MSJ Against Plaintiff
- Dr. sued Wyeth for Indemnity
- Issue: Is a Dr. a “seller” under Chapter 82 and entitled to indemnity

# Indemnity: *Hadley v. Wyeth*

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- Houston 14<sup>th</sup> COA Held: Doctor is not a “seller” entitled to indemnity
  - If the product is intimately and inseparable connected with providing medical services, then doctors are not sellers
  - Doctors are in the business of providing medical services, not selling drugs

# Indemnity: *K-2 Inc. v. Fresh Coat Paint*

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- Homeowners sued for defective stucco that allowed water damage
- Stucco made from components supplied by K-2
- Fresh Coat (Subcontractor) Installed Stucco
- Fresh Coat Settled
  - Homeowners
  - General Contractor

# Indemnity: *K-2 Inc. v. Fresh Coat Paint*

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- Fresh Coat seeks Indemnity From K-2
- K-2 Argues:
  - Stucco is not a “product” because it is incorporated into Realty
  - Fresh Coat was not a “seller,” but a service Provider
- Beaumont COA Held:
  - Stucco was personal property and did not cease to be a “product” when incorporated into realty
  - Fresh Coat was a “seller”
- Texas Supreme Court GRANTED PETITION

# Learned Intermediary Doctrine

# Learned Intermediary Doctrine: *Centocor Inc. v. Hamilton*

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- Hamilton contracts drug-induced lupus after taking Remicade
- Before Taking Drug Shown a Video by Manufacturer
- Drug Company argued “Learned Intermediary” Doctrine satisfied their duty to warn

# Learned Intermediary Doctrine: *Centocor Inc. v. Hamilton*

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- Exception to Learned Intermediary Doctrine
  - When Drug Companies Engage in Direct to Consumer Advertising
  - Fraudulently Touts Benefits; Fails to Warn of Risk
- Rationale
  - Manufacturer Historically Did Not Market Direct to Consumers
  - Drs Don't Take Time to Pass Along Warnings
  - There Is An Effective Way to Communicate to Consumer
  - Consumers Can Understand Risk, Not Just the Drs.

# **“Open & Obvious” Now A Design Defect Defense**

# Open & Obvious: *Timpte Inc. v. Gish*

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- Gish fell off a side rail on the top of his Hopper Trailer
- Gish brought design and marketing claims
- Trial Court Granted Summary Judgment Against Plaintiff
- Amarillo COA
  - Affirmed on marketing say there is no duty to warn of open & obvious dangers
  - Reversed design because “open & obvious” is not a defense to design defect claims

# Open & Obvious: *Timpte Inc. v. Gish*

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- *Grinnell v. American Tobacco*:
- “American’s attempt to invoke the common knowledge defense is actually an attempt to invoke the “open & obvious defense” or “patent danger rule,” which this court has rejected in design defect cases. Liability for a design defect may attach even if the defect is apparent.”
- Obviousness of the danger is only a factor in the Risk/Utility Analysis

# Open & Obvious: *Timpte Inc. v. Gish*

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- Texas Supreme Court Held:
  - “In an appropriate case, design defect maybe determined as a matter-of-law”
  - Court conducted its own Risk/Utility Analysis and based on warnings and the obviousness of the danger determined there was no design defect as a matter-of-law.

# Experts

# Experts: *Whirlpool v. Camacho*

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- Facts:
  - Camacho starts dryer & falls asleep
  - She opens dryer door and lays down
  - Awakes to fire coming from rear and inside the dryer
  - Fire burned house killing teenage son
- Claim
  - Design defect.
  - Corrugated Tube Clogs & Can Cause Lint to Blow Across Heating Element Igniting Link, Which Ignites Clothes

# Experts: *Whirlpool v. Camacho*

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- Trial Court: Judgment for Plaintiff After Jury Verdict
- Appellate Court Affirms
  - Applies “Abuse of Discretion Standard” to trial court decision to admit expert testimony
  - Applies “analytical gap” rather than Robinson factors

# Experts: *Whirlpool v. Camacho*

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- Texas Supreme Court Reverses & Renders
  - Should Apply No Evidence (*City of Keller*) review
  - Should Apply Both Robinson Factors & Analytical Gap
- Plaintiff Evidence
  - C/O Places Origin at Fire & Eliminated Other Causes
  - CPSC Test Shows Link Can Cause Clothes Fire
  - Exemplar Shows Corrugated Tube Clogs
  - Burns to Clothes in the dryer

# Experts: *Whirlpool v. Camacho*

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- Texas Supreme Court Reverses & Renders
  - No tests show link captures in corrugated tube
  - No evidence of burnt link
  - No proof of type, size or weight of the lint (to match CPSC report)
  - Whether link can ignite tumbling clothes
  - Whether link can ignite in this dryer.
  - Theory Developed for Litigation
  - Not Published.

