

## **PRODUCTS LIABILITY UPDATE 2010**

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## PRODUCTS LIABILITY UPDATE 2010

The past year Texas Courts were relatively quiet compared with recent years. But this maybe the quiet before the storm as the Texas Supreme Court has accepted petition in several products liability cases to address preemption and Chapter 33's interplay with the products liability doctrine. In 2009, the United States Supreme Court's decision in *Wyeth v Levine* struck down drug companies' preemption arguments. This decision has arguably left intact many state products liability claims. But the scope and reach of *Wyeth* will be debated for years. In Texas and elsewhere, several new cases followed the precedent set in *Wyeth v. Levine* and were decided in the plaintiffs' favor with regard to preemption. Later this year, the United States Supreme Court will decide if preemption by the Federal Motor Vehicle Safety Standards (FMVSS) applies to automotive seat belt design in *Williamson v. Mazda Motor Company*. The United States Supreme Court could further solidify its anti-preemption stance from *Wyeth* or back away from the *Wyeth* opinion. Either way, the U.S. Supreme Court opinion is likely to have a profound impact on product liability claims, which almost always are subject to a preemption argument.

Like the United States Supreme Court, the Texas Supreme Court has accepted an FMVSS preemption case, *MCI Sales & Service Inc. v. Hinton*. And the Texas Supremes will write another opinion in *Bic Pen v. Carter* to address the issue of whether plaintiff's manufacturing claims are preempted. A 2008 Texas Supreme Court previously held that Carter's design claims against Bic Pen design were preempted, but remanded the manufacturing claims. On remand the intermediate appellate court affirmed Plaintiff's manufacturing claims. So, not surprisingly the Texas Supreme Court has granted petition for a second time in the same case.

Although the political climate at the Texas Supreme Court is still decidedly pro-tort reform, a handful of decisions this year indicate that pro-plaintiff decisions are possible at the intermediate appellate court level. The Texas Supreme Court is more clearly out of step with logic, other states' opinions, the restatements, accepted jurisprudence and even conservative intermediate appellate courts. The Texas Supreme Court has furthered an agenda adverse to plaintiffs in products liability cases, among other personal injury and insurance matters, but decisions made following *Wyeth* will hopefully continue to challenge the Texas Supreme Court's perspective.

Litigants continue to sort out issues created in 2003, when the Texas Legislature passed House Bill 4,

which, among other things, created presumptions of no liability in favor of defendants and eliminated entire classes of claims. This paper first outlines and updates the case law interpreting the 2003 legislative changes. The paper then abstracts the most important appellate court opinions dealing with products liability over the past several years.

### 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.<sup>1</sup> Further, the seller and manufacturer must establish that those safety standards or regulations were applicable at the time of manufacture and governed the risk that allegedly caused the harm.<sup>2</sup> 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."<sup>3</sup>

Several important issues should be considered when reviewing §82.008(a). First, the burden is on the

<sup>1</sup> See TEX. PRAC. & REM. CODE § 82.008(a)

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

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.

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 a federal government or agency mandated the manufacturing processes. 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.<sup>4</sup> Alternatively, a showing that the manufacturer, before or after marketing the product, withheld or misrepresented information or material relevant the federal government's determination of the adequacy of the safety standard or regulation may also rebut the presumption.<sup>5</sup>

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 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

<sup>4</sup> See TEX. CIV. PRAC. & REM CODE § 82.008(b)(1)

<sup>5</sup> See TEX. CIV. PRAC. & REM CODE § 82.008(b)(2)

unreasonable risks of injury or damage.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> Second, the withholding or misrepresenting information must be causally related to the claimant's injury.<sup>9</sup>

**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).<sup>10</sup>

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 of the product and was causally related to the claimant's injury.<sup>11</sup> 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.<sup>12</sup>

Next, 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 can rebut the presumption.<sup>13</sup> Showing an "off label" use can also rebut the presumption. Sometimes, 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.<sup>14</sup>

As most pharmaceutical drug practitioners are aware, the state multi-district Vioxx litigation State District Judge, Wilson, granted a partial summary judgment in *Merek's* favor holding that Federal Preemption prevents plaintiffs from rebutting the presumption of no marketing defect by reliance on 82.008(b)(2) (the withheld relevant and material information exception) because determination of whether material information was withheld can not properly be the subject of a state court determination as that determination rests exclusively with the FDA. Since the plaintiffs relied exclusively on 82.007(b)(2) to rebut the presumption of no marketing defect, summary judgment was granted against the Vioxx plaintiffs' marketing claims.

There are different cases reaching opposite conclusions on the same issue, *compare Garcia v. Wyeth-Ayerst Laboratories*, 385 F.3d 961,966 (6<sup>th</sup> Cir. 2004) *with Garcia Desiano v. Warner-Lambert & Co.*, 467 F.3d 85 (2d Cir. 2006). These circuit decisions apply similar statutes as 82.007(b)(2), but reach opposite results. The arguments against preemption are that: (1) there is a presumption against preemption; (2) the *Buckman* decision relied upon by Judge Wilson was inapplicable in a products liability case as *Buckman* was a fraud on the FDA theory; (3) the proof under 82.007 is different from the proof required to prove fraud on the FDA; and (4) 82.007's own language allows proof by Plaintiff. The legislature could have written the exception to read, "there is no presumption when the FDA determines there is fraud." But the language of 82.007 is broader and allows the Plaintiff to make that proof.

Judge Wilson rejected these arguments and granted summary judgment as discussed above. This issue is unresolved and remains hotly contested.

<sup>6</sup> See TEX. CIV. PRAC. & REM. CODE § 82.008(c)(1)

<sup>7</sup> See TEX. CIV. PRAC. & REM. CODE § 82.008(c)(2)

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See TEX. CIV. PRAC. & REM. CODE §82.007

<sup>11</sup> See TEX. CIV. PRAC. & REM. CODE §82.007(b)(1)

<sup>12</sup> *Id.*

<sup>13</sup> See TEX. CIV. PRAC. & REM. CODE § 82.008(b)(2)

<sup>14</sup> See TEX. CIV. PRAC. & REM. CODE § 82.007(b)(5)

### c. How Should Presumptions Be Handled on the Charge?

One important aspect of §82.008 and §82.007 has yet to be determined. More specifically, the issue 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.

The Fifth Circuit faced, analyzed, but did not resolve this issue in *Wright v. Ford Motor Co.*, 508 F.3d 263 (5<sup>th</sup> Cir. 2007). Three year old Cade Wright went with his family to purchase snow cones at a local snow cone stand. In the parking lot, Cade was backed over and killed by a Ford Expedition XLT. The model Expedition in question had a "reverse/rear parking aide/assist or back up alarm" as an option, but this option was not installed on the subject Expedition. Cade's parents brought marketing and design defect claims against Ford relating to the "blind spot" experienced when driving an Expedition in reverse. The trial court granted summary judgment for Ford on the marketing defect claim. The design defect claim was tried to a defense verdict that was appealed by Plaintiffs.

The primary issue on appeal was whether the court erred in instructing the jury on Section 82.008 of the Texas Civil Practice & Remedies Code, which is the presumption of no design defect when there is compliance with a mandatory Federal Safety Standards. Specifically, the Court instructed the jury:

*"You are instructed that Ford Motor Company complied with a mandatory federal safety standard or regulation existing at the time of manufacture that was applicable to the product and the governed the product risk that allegedly caused harm, and therefore, is presumed not to be liable for the injuries to claimants. The claimants may rebut the presumption by establishing that the mandatory federal safety standard or regulations applicable to the product were inadequate to protect the public from unreasonable risks of injury or damage."*

Plaintiffs argued that FMVSS 111, the standard in question, did not apply to rear sensing systems. Plaintiffs also complained that the court should not instruct on the presumption once plaintiffs produce evidence to rebut the presumption. The court found

that FMVSS 111, although it dealt with rearview mirror placement, related to the same risk at issue in this suit and was therefore applicable. The court analysis broadly defines an applicable regulation as any regulation that addresses the same risk.

On the second issue, plaintiffs complain that the instruction should not have been given at all since they introduced rebutting evidence. Significantly, the Fifth Circuit points out that plaintiffs did not object to the instruction so reversal would only be appropriate if the error was "clear and obvious" and that "substantial rights were affected." The Court discussed that Texas has both: (1) "Thayer" presumptions that disappear once evidence is introduced sufficient to support a finding contrary to the presumed fact and (2) "Morgan" presumptions that do not disappear.

The Fifth Circuit held that because it is not "clear or obvious" that the 82.008 is a Thayer or Morgan presumption, it was not err to submit the instruction when the trial court did not have before it an appropriate objection.

While these issues remain to be flushed out by the courts, the consensus, the case law and the better reasoned approach is that the rebuttable presumptions should not be included in the charge at all.

In *Texas A&M University v. Chambers*, 31 S.W.3d 780, 784 (Tex. App. – Austin 2000, pet. denied) the court held that presumptions "may not properly be the subject of an instruction to the jury." See also *Armstrong v. West Tex. Rig Co.*, 339 S.W.2d 69, 74 (Tex. Civ. App.–El Paso 1960, writ ref'd n.r.e.); *Glover v. Henry*, 749 S.W.2d 502, 504 (Tex. App. – Eastland 1998, no pet.); *Sanders v. Davila*, 593 S.W.2d 127, 130 (Tex. Civ. App.–Amarillo 1979, writ ref'd n.r.e.); *General Motors Corp. v. Burry*, 203 S.W.3d 514, 549 (Tex. App – Fort Worth 2006, pet. denied). A presumption's inclusion in the charge 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).

Thus, when a presumption is rebutted, it should disappear entirely. See *Texas Natural Resource Conservation v. McDill*, 914 S.W.2d 718, 724 (Tex. App. – Austin 1996, no pet.). As noted by the Texas Supreme Court, a rebuttable presumption has no effect on the burden of persuasion. *General Motors Corp. v.*

*Saenz*, 873 S.W.2d 353, 359 (Tex. 1993). Commentators have also agreed by stating “presumptions may not properly be the subject of an instruction to the jury; its inclusion is improper because... including a presumption in the jury charge, which has been rebutted by controverting facts is an improper comment of the weight of the evidence.” 59 3d TEX. JUR. *Products Liability* §225 (1998); See also *McDonald & Carlson*, Texas Civil Practice, §22:12 (2005).

Finally, it should be noted that the legislature has mandated that a jury instruction regarding presumptions be included in the charge in some circumstances, but chose not to include such a directive in §82.008. Texas Civil Practice and Remedies Code §74.106 (a)(1) discusses a rebuttable presumption to physicians and health care providers for failing to disclose hazards involved in medical care and surgical procedures. This section of the Civil Practice and Remedies Code states that the presumption “shall be included in the charge to the jury” *see Id.* But, §82.008 contains no language instructing that the jury must be charged with the presumption. The fact that no legislative instruction was contained in §82.008 supports the proposition that the legislature did not intend to change preexisting common law which disallowed presumptions as impermissible comments on the weight of the evidence. *Compare* TEX. CIV. PRAC. & REM. CODE §74.106 (a) *with* §82.008. See also *Glover v. Henry*, 749 S.W.2d 502, 504 (Tex. App. – Eastland 1998, no pet.); *Sanders v. Davila*, 593 S.W.2d 127, 130 (Tex. Civ. App. – Amarillo 1979, writ ref’d n.r.e.); *General Motors Corp. v. Burry*, 203 S.W.3d 514, 549 (Tex. App. – Fort Worth 2006, pet. denied).

#### d. 16.012: 15 Year Statute-of-Limitation

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, section 16.012 of the Texas Civil Practice & Remedies Code actually abolished many victims’ rights. Section 16.012 is entitled a “statute-of-limitations,” but is effectively a “statute-of-repose.” This section requires that a claimant in products liability case bring suit within 15 years after the defendant sold the product.<sup>15</sup>

Section 16.012 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.)<sup>16</sup>

The 16.012 statute-of-repose also 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.<sup>17</sup> 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.<sup>18</sup> The statute-of-repose only applies to products that are sold, not those that are leased.<sup>19</sup> Finally, the statute of repose does not apply to aviation claims that are subject to the General Aviation Revitalization Act of 1994.<sup>20</sup>

Since 16.012 was enacted, there have been several cases applying this provision. In *Saporito v. Cincinnati Inc.* 2004 WL 234378 (Tex. App.–Houston [14<sup>th</sup> Dist.] 2004, no pet.) The 14<sup>th</sup> 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 [14<sup>th</sup> Dist.] 2003) 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.

The Texas Supreme Court, reversed judgment in this case, but did affirm the appellate court’s ruling on the statute of repose at 240 S.W.3d 864

In *Zaragosa v. Chemetron Inv.*, 122 S.W.3d 341 (Tex. App.–Ft. Worth 2003, no pet.), 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.

In *Heckel v. Allen Samuels Chevrolet*, 2008 WL 4308406 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2008, no pet.), a recalled GM vehicle airbag misfired when Ms. Heckel turned the ignition on in her car. Unfortunately, she did not file suit until 2 years after her injury. To preserve the products claim, Ms. Heckel

<sup>17</sup> See TEX. CIV. PRAC. & REM. CODE § 16.012(c)

<sup>18</sup> See TEX. CIV. PRAC. & REM. CODE §16.012(d)

<sup>19</sup> See TEX. CIV. PRAC. & REM. CODE §16.012(e)

<sup>20</sup> See TEX. CIV. PRAC. & REM. CODE §16.012(g)

<sup>15</sup> See TEX. CIV. PRAC. & REM. CODE § 16.012(b)

<sup>16</sup> See TEX. CIV. PRAC. & REM. CODE, §16.012(a)(2)

unsuccessfully argued that 16.012 created a 15 year statute-of-limitations in products liability claims. The court rejected the argument holding that Ms. Heckel must satisfy both the 2 year statute-of-limitation in 16.003 and the 15 year statute-of-repose in 16.012.

Finally, in *Burlington N. & Santa Fe Ry Co. v. Poole Chem., Co.*, 419 F.3d 355 (5<sup>th</sup> Cir. 2005), the issue was whether the 15-year statute-of-repose applied retroactively. According to *Burlington*, the plain language of section 16.012 confirms that the Texas legislature intended for the 15-year statute-of-repose to apply in such a way. In this case, Burlington performed an emergency clean up of its right-of-way following a chemical storage tank rupture. Burlington sued the owner of the tanks, who then sued the seller of the tanks alleging the tanks were defective. The court dismissed the owner's suit against the seller stating it was barred by the 15-year statute-of-repose because the date of the sale was on October 28, 1988 and the suit was filed on April 19, 2004. The owner claimed that section 16.012 could not be applied retroactively.

The court reasoned that because the legislature provided that the statute-of-repose applied to claims "filed" on or after July 1, 2003, as opposed to "accrued" on or after July 1, 2003, the legislature intended for it to apply retroactively.

#### e. 82.003: Passive Seller Immunity

Section 82.003 of the Texas Civil Practice and Remedies Code is 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.<sup>21</sup> 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.<sup>22</sup>

Does §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 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, companies who maintain their citizenship outside of Texas manufacture most products. 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.<sup>23</sup>

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

<sup>21</sup> See TEX. CIV. PRAC. & REM. CODE §82.003(a)

<sup>22</sup> See TEX. CIV. PRAC. & REM. CODE § 82.002

<sup>23</sup> In addition to the seven exceptions, Occupation Code 2301 prevails over 82.003 in the limited circumstances.

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 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).

One case interpreting the actual knowledge exception set forth in 82.003(a)(6) is *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 of 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.

***Dennis v. Giles Group, Inc.*, 2008 WL 183062 (Tex. App.—San Antonio 2008, no pet.)**

This case addresses the evidence necessary to avoid summary judgment granted pursuant to passive seller immunity created by §82.003 *et. seq.*

Plaintiff, Dennis, was injured when he sat on a stool in the retailer's store, and the stool collapsed. He sued the retailer, Giles Group. The manufacturer of the stool is Taiwanese. The defendant, Giles, asserted that it was a passive seller under Chapter 82. Dennis responded asserting an exception to passive seller immunity—namely that the manufacturer is beyond the jurisdiction of the court. The trial court granted summary judgment in favor of Giles. The San Antonio Court of Appeals held that the plaintiff had presented sufficient evidence to create a fact issue and remanded to the trial court.

Section 82.003(a)(7)(B) of the Texas Civil Practice and Remedies Code permits a claimant to sue a nonmanufacturing seller of a harmful product if the claimant proves that the manufacturer is not subject to the jurisdiction of the court. Some non-resident companies are subject to the jurisdiction of Texas courts, but it is due to the fact that “those entities had established sufficient minimum contacts with the state to overcome any fair play and substantial justice arguments.”<sup>24</sup> Other companies have been found to be outside the jurisdiction when there were insufficient contacts. The Taiwanese company sold the bar stool to a distributor in the state, but “the mere sale of a product to a Texas resident will not generally suffice to confer specific jurisdiction upon our courts.”<sup>25</sup> The facts must show that the seller intended to serve the Texas market.<sup>26</sup>

The court found that because the manufacturer was Taiwanese, was not registered in Texas, had no agent for service of process in Texas, and only sold the bar stool to a distributor in Texas, there was some evidence that the manufacturer is not subject to Texas jurisdiction.<sup>27</sup> The court reversed defendant's passive seller summary judgment.

#### f. 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)<sup>28</sup> to conform that rule to FED. R. EVID.

<sup>24</sup> *Pessina v. Rosson*, 77 S.W.3d 293, 299 (Tex. App.—Austin 2001, pet. denied).

<sup>25</sup> *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 577 (Tex. 2007).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> 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

407.<sup>29</sup> 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. However, a strong argument exists that the repeal only brought back the former common law, which essentially was the same as the now repealed §545.413(g). These issues were addressed in *Hodges v. Mack Trucks, Inc.*, 474 F.3d 188 (5<sup>th</sup> Cir. 2006).

In *Hodges*, James Hodges was rendered a paraplegic when he was ejected from the passenger side door of his Mack truck following a collision. Mr. Hodges originally sued the driver of the other vehicle involved in the collision, the seat belt manufacturer and Mack Trucks for a defective door latch. The claims against the other driver and the seat belt claims were resolved prior to trial leaving only the door latch claims remaining.

After a jury trial, the court signed a judgment awarding \$7.9 million dollars against Mack Truck. Mack Truck appealed complaining that the court had abused its discretion in denying *Daubert* motions seeking to strike Steve Syson, the plaintiff's design expert. The defendant also appealed complaining that the court improperly excluded evidence concerning the use or nonuse of Mr. Hodges' seat belt.

First as to the *Daubert* claims, this Fifth Circuit decision holds that the court did not abuse its discretion in denying the defendant's *Daubert* motions. Although beyond the scope of this paper, this decision discusses, in some detail, its decision to affirm the trial court's

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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.

<sup>29</sup> 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.

decision to allow Steve Syson's testimony and would be helpful citation material for plaintiffs facing *Daubert* motions.

The second issue addressed by the court was the admissibility of seat belt evidence. The case was filed prior to the Texas Legislature's repeal of §545.413(g) of the Texas Transportation Code, but it does contain a lengthy discussion of prior Texas Supreme Court cases dealing with the admissibility of seat belt evidence. The opinion points out that the original enactment of subsection "g" was ratification of a prior Supreme Court decision *Carnation Co. v. Wong*, 516 S.W.2d 116 (Tex. 1974), which held that "failure to wear a seatbelt is not any evidence of contributory negligence." This is important, as plaintiff's counsel will want to assert that the repeal of subsection "g" simply returns litigants to prior Texas decisions, which exclude seat belt evidence when it is offered solely as evidence of contributory negligence. However, this court held, that while seat belt evidence to show that the plaintiff was contributorily negligent was not inadmissible, in crashworthiness or "second collision" product liability actions seat belt evidence is admissible to show or rebut the essential element of causation. The Fifth Circuit Court of Appeals reversed and remanded the case based upon the trial court's exclusion of seat belt evidence.

## II. CASE LAW UPDATE

The following section highlights case law trends within the products liability arena by summarizing the most significant recent court decisions and trends in the law.

### a. Trend Toward Consolidation of Causes-of-Action

Before 1967, Texas citizens injured by defective products generally had to couch their claims in terms of negligence or breach-of-warranty claims. In 1967, the Texas Supreme Court, in a set of opinions, *McKisson v. Sales Affiliates* and *Shamrock Fuel & Oil Sales v. Tunks*, adopted strict products liability as set forth in the Restatement of Torts (Second), Section 402(a). Moving forward the scope and availability of causes-of-action in the products arena expanded. But over the past several years this trend has reversed. Recently, the courts have begun to consolidate claims by refusing to submit multiple causes-of-action in products liability charges. Now, the safest practice is to submit only one cause-of-action in a products liability case. The cases that deal with this trend toward consolidation are discussed below.

### *Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661 (Tex. 1999)

This is a roof crush case, in which the Plaintiff pled causes-of-action for negligence, 402(a) design defects and breach-of-implied warranty of merchantability. The trial court submitted the negligence and 402(a) design defect claims. But, the trial court refused to submit the breach-of-implied warranty of merchantability cause-of-action. The jury found no negligence and no design defect. The plaintiff appealed the trial court's refusal to submit the warranty claim. The Supreme Court, affirmed the judgment noting that the trial court was correct in not submitting both the implied warranty claim and the design defect claim as the elements are "functionally equivalent."

### *Tamez v. Mack Trucks, Inc.*, 100 S.W.3d 549 (Tex. App. – Corpus Christi, 2003) rev'd by *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572 (Tex. 2006)

This case involves a petroleum tanker truck that rolled and subsequently burst into flames. The plaintiff was the driver who was able to climb out of the cab, but suffered third-degree burns over ninety-six percent of his body. The plaintiffs alleged that a defect in the fuel system of the Mack Truck was the producing cause of the fire which injured Tamez.

The trial court granted no evidence motions for summary judgment after excluding two of the plaintiff's expert witnesses. One issue on appeal was whether the trial court erred in granting summary judgment on claims for negligence, manufacturing defect, and marketing defect due to an alleged misapplication of *Hyundai Motor Co. v. Rodriguez*. More specifically, Mack Trucks moved for summary judgment, in part, on the ground that *Hyundai v. Rodriguez* precludes a complainant from recovering for negligence, manufacturing defects, marketing defects, breach of implied warranty and misrepresentation. Mack Truck argued that all of the claims stem from a single complaint and the trial court should not confuse the jury by submitting differently worded questions that all call for the same factual finding. Ultimately, the appellate court held that "whether a plaintiff is precluded from bringing multiple theories of recovery at the pre-trial stage is an all together different issue than was before the Supreme Court in *Hyundai Motor Co. v. Rodriguez*." The Corpus Christi Court of Appeals refused to allow the defendants to use *Hyundai Motor Co. v. Rodriguez* to eliminate multiple theories of recovery at pre-trial stage. This case stands for the proposition that the plaintiff can develop multiple theories of recovery *before* the submission of

jury questions. The Texas Supreme Court reversed the Court of Appeals and held that the summary judgment was properly granted as the trial court had properly excluded plaintiff's experts. The Texas Supreme Court decision did not reach the issue of the viability of multiple theories of liability per the discussion above.

***Toshiba International Corp. v. Henry*, 152 S.W.3d 774 (Tex. App.--Texarkana 2004, no pet.)**

This case, which is, covered in more detail later holds that "before a negligence theory can be utilized in a products liability case, there must be proof of a defect in the product. Because there is no defect for which *Toshiba* is responsible, it necessarily follows that the negligence theory cannot be upheld."

The lesson to be learned from these three cases is it maybe all right to proceed with multiple theories of recovery prior to the charge submission, but once the case is sent to the jury, pick one theory of recovery in order to avoid conflicting answers and reversal. My recommendation is to only proceed on the strict liability claims and forgo the other theories.

## b. Charge Issues

### **New Definitions for Manufacturing Defect, Producing Cause and Proximate Cause**

***Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007)**

In *Ford v. Ledesma* the Texas Supreme Court rewrote the PJC definitions of: (1) manufacturing defect; (2) producing cause and (3) indirectly—proximate causation. *Ledesma* brought a manufacturing defect case against Ford when the axle assembly came apart on his new F-350 allowing the driveshaft to disengage from the transmission. It is undisputed that the above-described disengagement occurred. The issue litigated was whether the driveshaft disengagement caused the wreck, or whether the wreck caused the driveshaft disengagement.

Not unexpectedly, Ford challenged Plaintiff's expert testimony as unreliable. Perhaps more unexpectedly, the Court did not hold that the expert opinion was unreliable. But the court nevertheless reversed and remanded the judgment based upon error in the charge.

With respect to manufacturing defect, the Court used the PJC definition. However, the Texas Supreme Court held that the 2006 PJC definition of manufacturing defect failed to include the essential element of a "deviation from specifications or planned output in a manner that renders the product

unreasonable dangerous." Thus, the revised PJC definition that is included in the 2008 PJC revisions reads:

*A "manufacturing defect" means that 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.*

The Texas Supreme Court also took issue with the 2006 PJC definition of "Producing Cause." The Court held that the current PJC definition fails to include the requirement of "but for" causation. Specifically, the definition must include the language that cause must have been and substantial factor in bringing about the injury, and **without which the injury would not have occurred**. The bold language was not included in the 2006 PJC definition, and accordingly the court held that the PJC definition failed to appropriately instruct the jury on "but for" causation.

While the Texas Supreme Court did not address the definition of proximate causation, it is clear under the law that it also contains a "but for" element. So, the PCJ committee added a caveat advising litigants to also submit a revised version of the "proximate cause" definition. See Texas Pattern Jury Charges (Malpractice, Premises, Products) at page 172 (2008).<sup>31</sup>

### **Submit the Product or the Defendant?**

The Texas Pattern Jury Charge submits design, marketing, and manufacturing defect questions in terms of the product rather than the "defendant." For instance, PJC 71.4b asks

"Was there a manufacturing defect in the automobile at the time it left the possession of ABC Company that was a producing cause of the injury in question?"

<sup>31</sup> See also *Merrell v. Wal-Mart Stores*, 276 S.W.3d 137 (Tex. 2008) (stating that producing cause is a cause that is a substantial factor in bringing about an injury and without which the injury would not have occurred); *Williams v. Remington Arms Co.*, 2008 WL 222496 (N.D. Tex. 2008) (reinforcing that the concept of producing cause as outlined in *Ford Motor Co. v. Ledesma*

This charge question is an appropriate question under traditional products liability law in that the focus is on whether or not the product in question was defective; rather, than focusing on the defendant's actions. The defendant is included in the question only as an inquiry to determine whether or not the defect existed at the time it left the particular defendant's possession.

However, the charge submission becomes more complicated when reaching the proportionate responsibility question. Chapter 33 of the Texas Civil Practice and Remedies Code requires that the defendant, plaintiff, settling parties, and responsible third-parties be included in the proportionate responsibility questions. But, traditional product liability law holds that anyone in the chain of distribution is responsible, entirely, for any defects that exist in the product when they sold it.

The Pattern Jury Charge Committee deals with this issue by suggesting that the names of both the product and the product defendant be submitted jointly in the comparative question if the charge also submits a question about the defendant's negligence. *See* Texas Pattern Jury Charges, Products, 2003 Edition at page 187. Thus, it appears that if you have a negligence and products claim, the individual defendants and the products should be submitted. While the Pattern Jury Charge does not speak to cases in which strict products liability is pled alone, logic and traditional products liability law would dictate that only the product should be submitted. *See also, Dico Tire Inc. v. Cisneros*, 954 S.W.2d 776 (Tex. App.—Corpus Christi, 1997, pet. denied) (holding that submitting the product alone would be sufficient if there is only one defendant in a products liability case).

If, however, the court ultimately finds that the defendants and not the product should be submitted. Each defendant should be jointly and severally liable for the other defendants' percentage of responsibility if they each distributed the defective product. To allow otherwise, would gut the entire doctrine of strict products liability.

These complex issues were addressed in *Allied Signal, Inc. v. Moran*, 239 S.W.3d 16 (Tex. App.—Corpus Christi 2007, pet. granted but dismissed by agreement)(After petition was granted by the Texas Supreme Court the parties filed an agreed motion to dismiss the case and vacate this court of appeals opinion. The Supreme Court granted the motion to dismiss, but refused to vacate the court of appeals decision).<sup>32</sup> This is a seat belt case involving the rollover of a 1997 Dodge Caravan. In the rollover, the plaintiffs alleged that the seat belt inadvertently

released allowing Bart Moran to be ejected and fatally injured. The two defendants, Allied Signal and Chrysler, offered conflicting testimony as to which company was ultimately responsible for the final design of the seat belt buckle. The trial court submitted the charge to the jury in terms of the subject product, "the seat belt buckle" and not the individually named defendants. The jury placed ninety-nine percent responsibility on "the seat belt buckle" and one percent on the driver of Bart Moran's minivan.

Originally, a panel decision of the Corpus Christi Court of Appeals held that Chapter 33 required the submission of a question allocating percentage of responsibility for each defendant, and not submission of the product itself. This panel decision also held that both defendants cannot be jointly and severally responsible for the entire verdict because only one defendant may be jointly and severally liable under 33.013(b) of the Texas Civil Practice and Remedies Code. Rehearing was originally requested on this decision and denied by the panel. Subsequent to this decision, much amicus briefing was devoted to the decision, which would have had the effect of turning traditional products liability theory on its head. Ultimately, the Corpus Christi Court of Appeals granted rehearing *en banc* and withdrew their prior opinions and holdings. The following is a discussion of the *en banc* decision of the Corpus Christi Court of Appeals in *Allied Signal v. Moran*.

The *en banc* decision took a fresh look at the court's charge and reached a completely different result. The court focused on the design defect question, which reads as follows:

**Question No. 2:** "Was there a design defect in the seat belt buckle in the Moran's Dodge Caravan at the time it left the possession of Chrysler Corporation that was a producing cause of Bart Moran's death?"

Question 2 contained the associated PJC definitions. The Corpus Christi Court of Appeals correctly notes that the jury was not asked and did not determine whether Allied Signal sold the product in a defective condition because there was no question to determine whether the defect existed at the time it left Allied Signal's possession. Because no liability question was submitted as to Allied Signal, the *en banc* court reversed and rendered judgment as to Allied Signal. The *en banc* court then pointed out that without a predicate finding of liability and causation as to Allied Signal, there was no basis for asking the jury to apportion causation as between Chrysler and Allied Signal. Consistent with other holdings, the court also stated that it was not error for the trial court to submit "the seat belt buckle" instead of the named defendants.

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<sup>32</sup> *Allied Signal vs. Moran* also had holdings significant to areas other than the charge. Those holdings are discussed in other portions of this paper.

While the *en banc* court of appeals held that submission of a “seat belt buckle” was the correct submission, it did not have to address the underlying issue of how should the charge be submitted when there are two defendants, who both have predicate liability and causation findings.

From a practical standpoint, some consideration should be given to submission of only a strict products liability theory as to the most financially viable defendant in the chain of distribution. Going into a charge conference with negligence and strict liability theories with multiple defendants will almost certainly result in facing the still unanswered questions raised by the initial *Allied Signal* opinion.

### c. Manufacturer’s Duty to Indemnify

#### *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864 (Tex. 1999)

This is an indemnity action by an innocent seller against a manufacturer. In the underlying case, plaintiff’s counsel sued the seller (Fitzgerald) and the manufacturer (Advanced Spine Fixation Systems, Inc.) for alleged defects in a spinal fixation device. Fitzgerald was dismissed from the lawsuit after evidence proved that although he sold the allegedly defective spinal fixation device to other patients, he had not sold the spinal fixation device to the plaintiff in the underlying case. The Texas Supreme Court in response to a Fifth Circuit certified question, held that Fitzgerald was entitled to indemnity against Advanced Spine Fixation Systems because the plaintiff’s petition alleged that Fitzgerald sold the product that undisputedly was manufactured by Advanced Spine Fixation Systems.<sup>33</sup> The plaintiff’s allegation triggered the indemnity obligation regardless of the fact that Fitzgerald had never in fact sold a product to the plaintiff.

#### *Munters Corp. v Heatcraft, Inc.*, 2009 WL 531847 (W.D. Tex. 2009)

This is an indemnity action concerning the passive seller immunity statute. Munters makes commercial cooling units. These units incorporate coils manufactured by Luvata and compressors manufactured by Emerson. When the cooling units began to fail, Munters sued the coil manufacturer Luvata claiming that copper debris on the coils was lodging in the compressors causing the cooling units to

fail. Luvata, in turn, sued Emerson claiming that it was a “seller” under the Chapter 82, and therefore entitled to indemnity from Emerson. Judge Royal Furgeson pointed out two import problems with Luvata’s indemnity claim. First, Luvata never sold an Emerson product. And second, Munters’ lawsuit (which triggers the indemnity obligation) never made a claim that the Emerson compressors were defective. Because Luvata was not a “seller” of Emerson products, Emerson was not required to indemnify Luvata for Munters’ claims that Luvata’s coils were defective

#### *Meritor Automotive v. Ruan Leasing Co.*, 44 S.W. 3d 86 (Tex. 2001)

The truck at issue in this suit was designed for the operator to stand on the bumper and pull a handle to open the hood. The plaintiff pulled this handle, and it broke free causing the plaintiff to fall. The plaintiff filed suit against Freightliner Corporation, the manufacturer of the truck, Meritor Automotive, the hood manufacturer, and Ruan Leasing Co, the truck’s owner.

The manufacturers initially accepted an indemnity demand from Ruan until, months later; the plaintiff amended his petition to allege independent negligence allegations against Ruan for failing to maintain the hood. Thereafter, Ruan hired its own attorney to defend the negligence claim. Ruan then filed a cross claim against the manufacturers seeking indemnity under Chapter 82 of the Texas Civil Practice and Remedies Code.

Before trial, the Plaintiffs settled with the manufacturers and non-suited his claims against Ruan. The only remaining question became whether Ruan could obtain indemnity against the manufacturers for hiring attorneys to defend it after the independent negligence claims were made. The manufacturers argued that the products liability act did not intend to provide indemnity for sellers in defending their own negligence actions. The Texas Supreme Court held that the manufacturers’ duty to indemnify was invoked by the plaintiffs’ pleadings.<sup>34</sup> For the manufacturers to implicate the Section. 82.002(a) exception, it was incumbent upon the manufacturers to establish that the seller’s conduct “caused” the loss. Further, the court notes that a “products liability action, includes not only products liability claims but also other theories of

<sup>33</sup> *Id.* at 866. See also *Ames v. Ford Motor Co.*, 299 F. Supp.2d 678, 679 (S.D.Tex. 2003)(restating proposition that the term seller is defined broadly under Texas law).

<sup>34</sup> *Id.* See also *Toyota Indus. Equip. Mfg., Inc. v. Carruth-Doggett, Inc.*, 2010 WL 1241823 (Tex. App.—Hous.[1st Dist.] Apr. 1, 2010, no pet. h.) (finding that indemnification is triggered by the plaintiff’s pleadings and not by proof of the defect).

liability such as negligence.”<sup>35</sup> Accordingly, the court held that summary judgment was improperly granted in favor of the manufacturers because they had not established that *Ruan’s* independent negligence “caused” the loss.

***General Motor Corp. v. Hudiburg Chevrolet, Inc.*, 199 S.W.3d 249 (Tex. 2006)**

This case involves a one ton truck manufactured by GM and provided to a local dealer, Hudiburg Chevrolet. Hudiburg completed the vehicle by having a service bed installed on the chassis before the customer took possession. Rawson manufactured the service bed.

Later, this truck was involved in a collision that resulted in a fire severely injuring the plaintiffs. All defendants settled the claims, but the settlement preserved Hudiburg’s indemnity rights against General Motors and Rawson. General Motors thereafter moved for summary judgment alleging Hudiburg was not entitled to indemnity. The question became whether or not the seller’s independent conduct was a cause of plaintiff’s injuries. The trial court granted summary judgment in favor of General Motors and Rawson. The Dallas Court of Appeals reversed holding that General Motors, in order to be entitled to summary judgment, had to establish that Hudiburg’s negligence caused the underlying accident.

The *Hudiburg* case reaffirms *Meritor Automotive* in that the party seeking to defeat indemnity must show that the seller’s negligence was a proximate cause of the plaintiff’s underlying injuries.<sup>36</sup>

The more interesting question, which remains unanswered, is what if there is a determination that a retailer’s independent negligence was a proximate cause of the injury. Traditionally, indemnity has been an all or nothing proposition. Consistent with traditional indemnity law, a showing of even one percent negligence by the retailer would defeat indemnity. However, 82.002(a) uses the following language:

“A manufacturer shall indemnify and hold harmless a seller against the loss arising out of a products liability action, except for any loss caused by the seller’s negligence, intentional misconduct, or other act or omission, such as negligently modifying or altering the product, for which the seller is independently liable.”

Thus, if Hudiburg Chevrolet’s conduct was found to be a five percent proximate cause would General Motors and Rawson be responsible to reimburse Hudiburg for ninety-five percent of the defense and settlement costs or would the five percent holding eliminate Hudiburg’s indemnity rights entirely? Obviously, this unanswered question can have enormous impact on the relations between defendants and overall settlement negotiations.

At portions of the opinion, the Court seems to indicate that a seller’s independent culpability may defeat indemnity. *See* page \*3. Later, however, the court states that each defendant may owe the other indemnity, but “without further development of record, we decline to consider whether or under what circumstances a seller may obtain partial indemnity...” At best, this confusing opinion leaves the issue unresolved. As a practical matter, defendants should assert cross claims for indemnity against one another and develop evidence that the other’s actions were independently a proximate cause of plaintiff’s injuries.

Finally, the *Hudiburg* opinion informs defendants who want to seek indemnity from up stream component part manufacturers. Specifically, to be entitled to this indemnity, the plaintiff’s petition must “fairly allege a defect in the component itself.” The court suggests that a defendant seeking indemnity should use special exceptions, if they want greater clarity in the Plaintiff’s petition. In short, defendants need to work with plaintiff’s counsel to insure the petition is specific enough to preserve their indemnity rights.

***Freeman Financial Invest. Co v. Toyota Motor Corp.*, 109 S.W.3d 29 (Tex. App.—Dallas 2003, pet. denied)**

This case involves an interesting question regarding a manufacturer’s statutory duty to indemnify sellers. The Plaintiff brought a products liability cause of action against Freeman and Toyota for an alleged defect in the axle of a 1994 Toyota 4-Runner. Freeman responded that it was not the seller of the vehicle. During the case, Freeman filed a cross claim against Toyota seeking indemnification pursuant to TEX. CIV. PRAC. & REM. CODE §82.002.

<sup>35</sup> *Id.* *See also Toyota Indus. Equip. Mfg., Inc. v. Carruth-Doggett, Inc.*, 2010 WL 1241823 (Tex. App.—Hous.[1st Dist.] Apr. 1, 2010, no pet. h.) (finding that indemnification is triggered by the plaintiff’s pleadings and not by proof of the defect).

<sup>36</sup> *Id.* *See also Manchester Tank & Equip. Co. v. Engineered Controls Int’l, Inc.*, 2009 WL 5155570 (Tex.App.—Waco Dec. 30, 2009, no pet.h.) (concluding that if neither the component-product manufacturer nor the finished-product manufacturer is innocent, depending not on allegations but on proof, both indemnity claims under the statute will fail. If both are innocent, again depending on proof, the indemnity claims offset each other).

Section 82.002 provides that a manufacturer shall indemnify a seller for any loss arising out of a products liability claim, unless the seller also has some culpability, such as negligently altering the product. The duty to indemnify applies to other causes of action that may be asserted against the seller in addition to the products liability claims. *Meritor Auto., Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 91 (Tex. 2001).

Toyota filed a motion for summary judgment against Freeman's cross claim, asserting that it did not have a duty to indemnify Freeman because Freeman was not the seller of the vehicle. The trial court granted Toyota's motion. The Court of Appeals reversed; holding that whether Freeman actually sold the vehicle is not determinative of the duty to indemnify under Section 82.002. Therefore, neither Freeman's answer denying it sold the vehicle, nor any proof that they Freeman did not sell the vehicle, relieved Toyota of their its duty to indemnify Freeman. Rather the duty was invoked by the plaintiffs' pleadings.

***R.H. Tamlyn & Sons, L.P. v. Scholl Forest Ind.*, 208 S.W.3d 85 (Tex. App. — Houston [14<sup>th</sup> Dist.] 2006, no pet. )**

This is a post *Hudiburg* indemnity case. This case underscores a key holding in *Hudiburg* that in order for a manufacturer to seek indemnity from an upstream component part manufacturer, the plaintiff's petition must specifically allege a defect with the component.

In this case, Billingsley, a homeowner, sued Parex, Inc., a subcontractor who installed artificial stucco on the exterior of the Billingsley home. The artificial stucco was known as "exterior insulating and finishing system" (EIFS). A component of the EIFS is known as "window flashing" and is manufactured by Tamlyn. After Billingsley sued the subcontractor, Parex, Inc., Parex, Inc. sued Scholl Forest Ind., (SFI) the manufacturer of EIFS. In turn, SFI sued Tamlyn, the manufacturer of "window flashing" component part of EIFS.

The trial court granted summary judgment in favor of SFI on its indemnity claim. The 14<sup>th</sup> Court of Appeals reversed and rendered judgment in favor of *Tamlyn*. The basis for the reverse and render was that plaintiff's petition only contained a bare allegation that the product was defective and did not constitute an assertion that there was a defect in the component manufactured by Tamlyn. The court held that it was not enough to allege a defect in the EIFS alone.

The *Hudiburg* decision and the *Tamlyn* decisions are very important to defendant manufacturers who want to preserve potential indemnity claims against component part manufacturers. These defendant manufacturers should work with plaintiff attorneys to

be certain that the pleadings address the components with sufficient specificity.

***Owens & Minor, Inc. v. Ansell Healthcare Products, Inc.*, 251 S.W.3d 481, (Tex. 2008)**

This case came to the Texas Supreme Court by the following certified question from the Fifth Circuit:

*"When a distributor sued in a products liability action seeks indemnification from less than all of the manufacturers implicated in the case, does manufacturer fulfill its obligations under Texas Civil Practice and Remedies Section 82.002 by offering indemnification and defense concerning the sale or alleged sale of that specific manufacturer's product, or must the manufacturer indemnify and defend the distributor against all claims and then seek contribution from the remaining manufacturers?"*

The Texas Supreme Court answers by stating that the manufacturer does satisfy its obligation by offering to indemnify and defend for claims relating only to the sale or alleged sale of that specific manufacturer's product.

The facts underlying this case are a product liability case arising from a latex glove allergy. Owens & Minor was a distributor of latex gloves manufactured by numerous manufacturers. Ansell offered the limited indemnity described above. Owens & Minor rejected the limited indemnity and hired its own defense counsel. Subsequently, Plaintiff non-suited her claims, but this indemnity dispute remained alive. Although the court divided on the issue and there was a thoughtful dissent, the majority opinion favored limiting the indemnity obligation of manufacturers to only claims involving that manufacturer's products.

***Seelin Med., Inc. v. Invacare Corp.*, 203 S.W.3d 867 (Tex. App. — Eastland 2006, pet denied).**

This indemnity case addresses a manufacturer's duty to indemnify a seller for defense costs after the Plaintiff has non-suited claims against the manufacturer. In this case, the plaintiff sued a seller of a walker, a manufacturer of a walker, and a manufacturer of a platform attached to the walker. The walker manufacturer obtained a no-evidence motion for summary judgment. Subsequently, the plaintiff amended the pleadings asserting claims only against the seller and the walker platform manufacturer. Thus,

the question becomes, which pleading invokes the indemnity obligation and what is the extent of that indemnity obligation?

The court held that when the plaintiff abandoned his claim against the walker manufacturer that did not retroactively relieve the walker's manufacturer's duty of indemnification. The original allegations are sufficient to trigger the walker manufacturer's duty to indemnify. But, the court held that this indemnity obligation was not unlimited. The Eastland Court of Appeals held that the indemnity obligations seized to exist when plaintiff abandoned the claims against the walker manufacturer in his subsequent petitions. Thus, the walker manufacturer should indemnify and defend the seller until those claims are abandoned.

***Hadley v. Wyeth Labs., Inc.*, 287 S.W.3d 847 (Tex. App.—Houston [14<sup>th</sup> dist.] 2009, no pet.)**

This case questions whether a doctor may be classified as a seller under Chapter 82 of the Texas Civil Practice and Remedies Code, and therefore, entitled to statutory indemnity from the co-defendant drug manufacturer. A patient who suffered injuries from taking prescription diet drugs filed a personal injury action against the doctor who prescribed the drugs and against the drug's manufacturer, Wyeth. Summary judgment was entered against the patient, but the doctor filed a cross-claim against the manufacturer claiming that he was entitled to indemnity against the manufacturer as an innocent seller.

The issue in the case centers on the definition of seller in Chapter 82 of the Civil Practice and Remedies Code and whether a doctor falls under this definition. Courts have routinely held that doctors are engaged in the practice of providing medical services and even if they use products or prescribed drugs as part of this process, the essential nature of the relationship is still a medical one.<sup>37</sup> As long as the use of the product is intimately and inseparably connected with the provision of medical services, a doctor cannot be liable for products liability.<sup>38</sup> Simply, a doctor is not in the business of distributing products, but in the business of providing medical care.

Here, the doctor used medical judgment to prescribe medicine during a provision of medical services and was, therefore, not a "seller" and not entitled to indemnity under section 82.003(a).

***K-2, Inc. v Fresh Coat Paint*, 253 S.W.3d 386 (Tex. App.—Beaumont 2008, pet. granted)**

The Texas Supreme Court has heard arguments in *K-2 v. Fresh Coat Paint*. Its decision could have a significant impact on products liability litigation in the construction industry. The primary issue in the case is whether the manufacturer of defective stucco-like product must indemnify a subcontractor for the subcontractor's settlement with a homebuilder.

A group of homeowners in The Woodlands filed the underlying lawsuit. The homes in question had a stucco-like substance on the exteriors known as "Exterior Insulation and Finish System" (EIFS). The homeowners alleged that EIFS was defective because it allowed water to penetrate the stucco creating rotten wood and termite infestations. The EIFS is a synthetic stucco cladding made from components supplied by K-2 and others. Life Form Homes Inc. was a builder who contracted with the homeowners to have EIFS installed on their homes. Life Form Homes subcontracted with Fresh Coat to do the installation work. As a subcontractor, Fresh Coat contractually agreed to indemnify Life Form Homes. The underlying lawsuit with the homeowners settled with all defendants paying money. What remained were indemnity claims among the defendants. After a jury verdict, the trial court entered judgment in favor of both Life Form Homes' and Fresh Coat's indemnity claims against K-2. Fresh Coat settled with Life Form Homes pursuant to its contractual indemnity obligation. Life Form settled with K-2 after appeal of the judgment.

On appeal to the Beaumont Court of Appeals, the issue was whether Fresh Coat was entitled to indemnity under Chapter 82 of the Texas Civil Practice and Remedies Code for payments made to the homeowners; for payments made to Life Form Homes pursuant to its contractual indemnity obligation; and for attorneys' fees.

The defendant argued that EIFS was not a "product" because it was incorporated into real property. Second, K-2 argued that Fresh Coat was not a "seller" under Chapter 82, but a service provider. Finally, K-2 argued that it own Fresh Coat no indemnity for its contractual obligations to Life Form Homes. The Beaumont Court rejected the first two arguments but accepted the third. Thus, the appeals court modified the judgment to exclude payments Fresh Coat made to Life Form Home under contract, but it affirmed the judgment against K-2 for the other amounts.

The Court determined that not all products in construction of a house necessarily results in the product's ceasing to be a product. EIFS is a synthetic stucco system made of component parts manufactured by K-2. The component parts are tangible personal

<sup>37</sup> *Id.* at 849

<sup>38</sup> *Id.*

property sold and distributed commercially by K-2 to be assembled into a finished material.

As such, the Court concluded that K-2 EIFS is a product within the meaning of the Texas Products Liability Act. Further, the Beaumont Court held that the subcontractor was a “seller” under Chapter 82.

The Texas Supreme Court has granted petition and heard oral argument. The Supreme Court’s decision could have vast effect beyond just indemnity claims. If the court holds that products incorporated on realty are not “products” under product liability law, a whole area of products claims could be foreclosed.

#### **d. Circumstantial Evidence to Prove Products Cases—Not!**

##### ***Ford Motor Co. v. Ridgway*, 135 S.W.3d 598 (Tex. 2004)**

In *Ridgway*, the trial court granted Ford’s no-evidence MSJ based on Ridgway’s expert’s inability to identify a specific defect or eliminate other potential causes. The court of appeals reversed in Ridgway’s favor. The Texas Supreme Court reversed and rendered in Ford’s favor.

Ridgway was driving down the road in his Ford F-150 when it burst into flames. He suffered 2<sup>nd</sup> degree burns over 20% of his body. He later filed a products liability claim relying on the Restatement [Third] of Torts § 3, which provides:

It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff:

- (a) was of a kind that ordinarily occurs as a result of product defect; and,
- (b) was not, in the particular case, solely the result of causes other than the product defect existing at the time of sale or distribution

The Court noted that Texas has not adopted the Restatement [Third] of Torts but generally noted that even if it were adopted it would not apply to Ridgway’s claim because the vehicle was not new or nearly new. The Court reasoned that the inference should not apply unless the product involved is new because it is less likely that the alleged defect was in existence at the time the product was sold versus a result of later wear and tear or misuse.

The *Ridgway* opinion further emphasizes the need to have experts evaluate, discuss, and exclude other potential causes of a particular event to survive the Texas Supreme Court’s scrutiny. Moreover, *Ridgway* continues a trend in the Court to restrict application of the Restatement [Third] of Torts in Texas.

##### ***AlliedSignal, Inc. v. Moran*, 231 S.W.3d 16 (Tex. App.—Corpus Christi 2007, pet. granted, but dismissed by agrmt).**

In *Allied Signal Inc. v. Moran*, plaintiff alleged that the decedent was ejected when a seat belt buckle inadvertently unlatched. The allegation was that the Generation III buckle did not properly guard the release button so that an occupant would not be ejected when an object or body part inadvertently contacted the release button. The defendants complained that the plaintiff had not specifically proved what caused the release of the buckle, for instance, through evidence that the decedent’s hand contacted the buckle. The Corpus Christi Court of Appeals held that “a reasonable and fair minded juror” could infer causation based on the circumstances of the accident and the existence of a design defect that rendered the seat belt buckle unreasonably susceptible to inadvertently release. It was unnecessary for the plaintiff to specifically prove how that release occurred.

##### ***Shaun T. Mian Corp. v. Hewlett-Packard Co.*, 237 S.W.3d 851 (Tex. App.—Dallas 2007, no pet.)**

The manufacturing defect case involves a fire that started with a Hewlett-Packard printer and damaged the plaintiffs’ office and property. The trial court granted summary judgment against the plaintiff. The Dallas Court of Appeals conducted a through analysis of the *Ridgway* decision and the use of circumstantial evidence to prove product defect cases ultimately concluding that the trial court improperly granted summary judgment.<sup>41</sup>

#### **e. Admissibility of Other Similar Incidents— Not!**

##### ***Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131 (Tex. 2004)**

<sup>41</sup> See also *C&M Air Cooled Engine v. Cub Cadet LLC*, 348 Fed. Appx. 968 (5th Cir. 2009) (not selected for publication and stating that an inference of a product defect may be warranted from the malfunction of a relatively new or sealed product but when the evidence is purely speculative, more evidence is needed).

Armstrong was injured when her 1986 Nissan 300 ZX experienced alleged unintentional acceleration as she backed out of a parking space. Six months later the same issue occurred with a family friend driving the vehicle. Armstrong sued Nissan under both products liability and negligence theories alleging the vehicle's throttle cable was defective. The jury found for the plaintiff. The court of appeals affirmed.

The Texas Supreme Court considered the allegedly erroneous admission of hundreds of reports regarding other similar incidents. During the plaintiff's case in chief she presented 16 NHTSA consumer complaints, hundred of consumer complaints from Nissan's own database, and live testimony from four witnesses who claimed to have experienced unintended acceleration in a 300ZX.

The Court noted that other similar instances may be admissible, but the following restrictions apply: (1) the other incident must have occurred under reasonably similar circumstances; (2) the evidence of similar incident is inadmissible if it creates undue prejudice, confusion or delay; and (3) the relevance of the similar incidents will depend upon the purpose for offering them.

Justice Brister, writing for the majority, noted the various limitations placed on admissibility of other reasonably similar incidents and the different purposes for which this evidence can be offered. He then noted that trial courts must carefully consider the bounds of similarity, prejudice, confusion, and sequence before admitting evidence of other accidents involving a product.

Justice Brister further noted consumer complaints from Nissan's files are hearsay within hearsay. While the business records exception would eliminate the first hearsay issue, the reports themselves would still be hearsay if offered for the truth of the matter asserted. Ultimately, the Court held without proof that a hearsay exception applies or that any of the reported incidents were due to a defect similar to those alleged, the trial court erred in admitting the database of complaints.

The Court extended this reasoning to the NHTSA database complaints and found that they would also be inadmissible hearsay. Finally, the Court noted that the four consumers that testified could not precisely identify the alleged defect in their vehicle and; therefore, there was no evidence that it was a defect similar to that alleged by Plaintiff. Thus, the Court held the live witnesses should have been excluded. In the final blow, Judge Brister noted that the other similar incidents could not be offered to show notice because such an offer would necessarily require an argument that the information asserted in the complaints is true and implicate the hearsay rule.

***Allied Signal, Inc. v. Moran*, 231 S.W.3d (Tex. App.—Corpus Christi 2007, pet granted, but dismissed by agrmt)**

One issue in the *Allied Signal* case was whether plaintiff's proffered evidence of customer complaints about the same product were inadmissible. The defendants contended that the complaints were inadmissible hearsay, were not relevant, and were unfairly prejudicial. The Corpus Christi Court of Appeals overruled defendants' objections noting that "a successful challenge to an evidentiary ruling usually requires the complaining party to show that the judgment turns on the particular evidence excluded or admitted." The Corpus Christi Court of Appeals held that the defendant failed to show that the error, if any, was anything more than harmless.

**f. Liability of Component Part Manufacturers—Not!**

***Bostrom Seating, Inc. v. Crane Carrier Co.*, 140 S.W.3d 681 (Tex. 2004)**

Plaintiff was injured in a rollover accident while driving a garbage truck. Plaintiff sued the truck manufacturer who later brought third-party indemnification actions against the seat and seat belt manufacturers. The trial court granted a directed verdict for the seat manufacturer, Bostrom. Crane appealed and the court of appeals reversed, finding there was legally sufficient evidence against Bostrom.

The Texas Supreme Court held that if there is no evidence that a component part was defective, the component part manufacturer is relieved of liability for a design or manufacturing defect in the final product. The court agreed with Restatement [Third] of Torts § 5 that strict liability should not be extended to a component part supplier when the injury is caused by the design of the product rather than a defective component.

The Court examined the evidence and noted that the only possible defect involved the incorporation of the particular seat in the garbage truck's design and that Crane had complete control over the design. Because there was no evidence that the seat itself was defective, Bostrom could not be liable.

***Toshiba International Corp. v. Henry*, 152 S.W.3d 774 (Tex. App.—Texarkana 2004, no pet.)**

Shannon Henry sued Toshiba on products liability and negligence theories for personal injuries sustained on the job at Alcoa, an aluminum industrial plant. Toshiba manufactured and sold to Alcoa an inverter or

controller that Alcoa integrated into a larger system. The inverter itself functioned as it was designed. The jury found for the plaintiff and awarded \$430,610.

Toshiba played no role in the ultimate design and use of the electrical system at Alcoa that incorporated its controller. The alleged defect resulted from the installation of the controller in a manner so that it would operate the machine involved on high speed instead of slow. The Court noted that for a component part manufacturer to be responsible for the integration of its product into a larger system, which is found to be defective, it must have substantially participated in the integration of the component into the final product.

#### g. Marketing Cases

##### ***Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170 (Tex. 2004)**

A former abrasive blasting worker diagnosed with silicosis brought products liability and negligence action against supplier of silica flint that was the source of silica dust inhaled by the worker. The jury returned a verdict in the plaintiff's favor, which was affirmed on appeal by the Texarkana Court of Appeals. The Texas Supreme Court reversed and remanded.

Justice Hecht, writing for the majority, noted that the issue is whether a supplier of flint used for abrasive blasting had a duty to warn its customers' employees that inhalation of silica dust can be fatal and that they should wear air-supplied protective hoods, given the customers' knowledge of those dangers.

The majority then focused its attention on whether a warning would have been heeded if provided:

While the parties here no longer dispute that such a warning by the defendant supplier would have prevented the plaintiff's injury, missing from this record is any evidence that, in general, warnings by flint suppliers could effectively reach their customers' employees actually engaged in abrasive blasting.

Thus, the Court concluded that without such evidence it could not determine whether there is a duty to warn. Consequently, we reverse the judgment of the court of appeals and, in the interest of justice, remand the case to the trial court for a new trial.

##### ***Ackermann v. Wyeth Pharmaceuticals*, 526 F.3d 203 (5<sup>th</sup> Cir. 2008)**

The Fifth Circuit upholds a summary judgment against plaintiff when the learned intermediary testifies that a stronger warning by the drug manufacturer

would not have prevented his prescribing the drug to the plaintiff.

Martin Ackermann committed suicide just after stopping use of the drug Effexor, which was prescribed to him by Dr. Sonn. Ackermann's widow brought suit against the drug's manufacturer Wyeth asserting marketing defects, specifically that the warning failed to warn of the risk of suicide or alternatively the warning given was inaccurate or misleading because the rate of suicide stated in the warning label was significantly different than the actual rate of suicide known by Wyeth at the time. Subsequently, Wyeth changed its warnings.

Despite these facts, the Fifth Circuit upheld summary judgment based upon a producing cause analysis. Dr. Sonn testified that even if he had been given the stronger, more accurate warning, he still would have prescribed Effexor. Dr. Sonn also testified that he would not have passed along the stronger warning to Ackermann, but would have treated and monitored him just the same.

The Fifth Circuit restates the learned intermediary doctrine: "a warning to an intermediary fulfills a supplier's duty to warn consumers." *Id* at \*2. Significantly, the Fifth Circuit holds that this doctrine is not an affirmative defense, but only delineates to whom a defendant owes a duty to warn. *Id* at \*3. The opinion provides very little analysis of why it concludes this doctrine is not an affirmative defense, but by so concluding, it placed the burden on plaintiff to show two things. First, the plaintiff must show that the warning was defective. *Id*. And second, the plaintiff must prove that the failure to warn was a producing cause of the injury. *Id*. Based upon Dr. Sonn's testimony, the Court concludes that the plaintiff failed to prove producing cause as a matter of law and upholds summary judgment.

In a final attempt to prove causation, the plaintiff points out that Texas has a rebuttable presumption in marketing defect cases that if an adequate warning were given it would have been "read and heeded" by product user. However, the Fifth Circuit held that the "read and heed" presumption does not apply to learned intermediaries and, even if it did apply, Dr. Sonn's testimony was sufficient to conclusively rebut the presumption.

##### ***Centocor, Inc. v. Hamilton*, 2010 WL 744212 (Tex. App.-Corpus Christi March, 4, 2010, no pet.)**

This case addresses the learned intermediary doctrine. The Texas Court of Appeals expanded an exception to the learned intermediary doctrine by recognizing that when a drug manufacturer engages in direct-to-consumer advertising that fraudulently touts

the drug's effectiveness while failing to warn of the risks, the manufacturer is liable for the harm.<sup>43</sup>

Patricia Hamilton and her husband sued Centocor, Inc. for fraud, negligence, gross negligence and misrepresentation for a drug-induced lupus-like syndrome caused by her use of Remicade, a drug Centocor manufactured.

Prior to receiving an infusion of Remicade, Patricia was shown a video that she alleged over-emphasized the benefits of the drug but intentionally omitted warnings about the adverse side effects she suffered.

Centocor argued that there was no evidence that a different warning would have prevented Patricia's injuries and that the allegedly fraudulent statements in the video did not cause Patricia to take Remicade. Patricia testified that after watching the video, she did not believe she had to do any further research or ask any more questions. If she had been warned of lupus-like syndrome, she would have asked more questions. Had she been adequately warned, she would not have been under the impression that Remicade was the best remedy for her joint pain.

A drug manufacturer has a duty to warn the ultimate consumers of its products about dangers associated with its products, and the "learned intermediary" doctrine is merely a means of showing that the drug company complied with its duty.<sup>44</sup>

The Court goes through a lengthy analysis of the learned intermediary doctrine and identified that in situations where the "learned intermediary" doctrine has been recognized, courts have focused on (1) the extent to which the doctor is involved in the decision-making process and the selection of the drug itself; and (2) whether there is a reasonable likelihood that warnings will be adequately conveyed to the patient.<sup>45</sup>

The Court recognized that when the "learned intermediary" doctrine was first developed, drug manufacturers did not advertise to the general public. Although a doctor must still write a prescription for drugs, it is clear that many doctors are not spending the amount of time necessary to pass along warnings by pharmaceutical companies.<sup>46</sup> Second, drug manufacturers who directly market their products to consumers are hard-pressed to argue that only a physician would understand the propensities and dangers involved in the drug's use and that they lack effective means to communicate directly with consumers.<sup>47</sup> Third, it is illogical that requiring manufacturers to provide direct warnings to a

consumer will undermine the patient-physician relationship when, by its very nature, consumer-directed advertising encroaches on that relationship by encouraging consumers to ask for advertised products by name.<sup>48</sup>

The Court held that the situation presented was more similar to the recognized exceptions to the doctrine, where courts considering the issue have found it was unreasonable for a manufacturer to rely on an intermediary to convey a warning, given that direct advertising and changes in the provision of health care impact the doctor's role and promote more active involvement by the patient. Under these circumstances, the Court held that when a pharmaceutical company directly markets to a patient there is an exception to the learned intermediary doctrine.

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

This is a silicosis case involving flint products used in abrasive blasting. The Texas State Supreme Court reversed and remanded a plaintiff's verdict stating that whether a flint supplier owed a duty to warn customer and employees "depended on whether such warnings could effectively reach the employees."

***Chandler v. Gene Messer Ford, Inc.*, 81 S.W.3d 493 (Tex. App.—Eastland 2002, pet. denied).**

Plaintiffs sued on behalf of their minor son, who received severe head injuries due to an airbag deployment.<sup>49</sup> The plaintiffs claimed, among many other causes of action, that there was a marketing defect because the Ford dealer failed to adequately warn of the dangers of a child riding in the front passenger seat.<sup>50</sup> There existed some evidence that the danger from an air bag to a child sitting in the front seat was foreseeable, based on Ford sending letters to Ford owners, including the plaintiffs, two years after the plaintiffs' accident, that death or serious injury could occur to young children sitting in the front seat due to the air bag.<sup>51</sup> As to lack of warnings before the accident, the defendants argued that it was not necessary to do so when the danger is common knowledge.<sup>52</sup> However, the court found conflicting evidence as to whether the danger of airbags to

<sup>43</sup> *Id.* at 1.

<sup>44</sup> *Id.* at 20.

<sup>45</sup> *Id.* at 28.

<sup>46</sup> *Id.* at 29.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 31.

<sup>49</sup> *Id.* at 497.

<sup>50</sup> *Id.* at 503-04.

<sup>51</sup> *Id.* at 504.

<sup>52</sup> *Id.*

children in the front seat was common knowledge in 1994.<sup>53</sup>

The court also noted that, when trying to show that a failure to warn was a producing cause of injury, a rebuttable presumption arises for the plaintiff that he would have heeded the warnings had they been given.<sup>54</sup> The defendants countered that the plaintiffs did not follow even the allegedly inadequate warning, and thus the presumption should be rebutted.<sup>55</sup> The court found that whether the small and terse warning on the visor, “An inflating air bag can seriously injury small children,” was adequate or not was a fact issue, because many parents may not consider a child of seven years to be “small.”<sup>56</sup> Indeed, the evidence showed that Ford itself considered “small” to refer to children four years of age or less, as demonstrated by its owner’s manual stating that small children, i.e., children less than or equal to four years or forty pounds, should be placed in child safety seats.<sup>57</sup> The court reversed the summary judgment granted to defendants, and remanded for trial.<sup>58</sup>

***Coleman v. Cintas Sales Corp.*, 100 S.W.3d 384 (Tex. App.—San Antonio 2002, pet. denied.)**

In this case, Coleman was a groundskeeper at a golf course, who was wearing a standard uniform supplied by a company to his employer.<sup>59</sup> While operating a barbecue, his non-flame retardant uniform caught fire, and despite his attempts to smother it by rolling on the ground, the uniform continued to reignite and burn until a supervisor smothered him with other clothes and extinguished the flames.<sup>60</sup> Coleman brought suit under both design defect and marketing defect theories, but the case before the appeals court involved only whether granting of summary judgment to the company that supplied the uniform on the marketing defect claim was proper.<sup>61</sup>

The court began with the basic principles of marketing defect theory: manufacturers and suppliers have a duty to warn consumers of risks and dangers associated with their products; the exception to this rule is when a particular risk is common knowledge to the consuming public.<sup>62</sup> It then quickly disposed of the issue by holding that although all characteristics of

synthetic mass-produced clothing, such as the uniform in question, may not be known to the average consumer, it is still common knowledge that non-flame retardant clothing can quickly catch fire, especially when in contact with barbecue coals.<sup>63</sup> As such, the defendant had no duty to warn Coleman as a matter of law, and summary judgment was affirmed for the defendant.<sup>64</sup>

***Brocken v. Cooper Power Sys. Inc.*, 197 S.W.3d 429 (Tex. App.—Beaumont 2006, no pet.)**

This is a marketing defect case. Mr. Brocken was an employee of an independent contractor, NHP, hired to move live electric distribution wires to new utility poles. During this work, Mr. Brocken was injured when an electrical fault was created energizing a bucket truck used by the electrical crew. Mr. Brocken sued the “recloser” manufacturer.

A recloser is similar to a circuit breaker in that it opens the circuit and prevents electrical flow down the lines if there is some electrical fault such as the amps exceeding a specified limit. The claim was that the recloser should have warned that it would not open and that dangerous electric currents could still be transmitted under certain circumstances.

The Beaumont Court of Appeals affirmed a summary judgment in favor of Cooper, holding that a component part manufacturer does not have a duty to warn the immediate or ultimate consumer of dangers arising because the component is unsuited for a special purpose to which the buyer puts it to use. The court also held that there was no duty to warn of the products’ risks when those risks would be obvious to the ultimate users. The court goes on to note that the “obviousness of the risk” is judged not from the average person, but from the average user’s standpoint. Thus, the user’s special training as electrical lineman and the utility company’s special training in the industry negated the duty to warn.

***Ethicon Endo-Surgery Inc. v. Meyer*, 249 S.W.3d 513 (Tex. App.—Fort Worth, 2007, no pet.)**

Meyer sued the manufacturer of a surgical cutter/stapler for failing to warn of the possibility that the staple seals can fail even if the equipment is operated correctly and the staples are checked. The Fort Worth Court of Appeals reversed and rendered a jury verdict against the manufacturer under a producing cause analysis. The doctor performing the surgery testified that he was aware of the risk and a

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 505.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 506.

<sup>59</sup> *Id.* at 385.

<sup>60</sup> *Id.* at 385-86.

<sup>61</sup> *Id.* at 386.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 387.

stronger warning would not have changed his treatment. Thus, a failure to warn was not a cause of the injury. The dissent notes that the testimony of the doctor was in conflict and the appeals court should not have substituted its judgment for that of the jury. The dissent was not, however, critical of the legal analysis used to reach the conclusion.

#### **h. Manufacturing Cases**

***Benavides v. Cushman, Inc.*, 189 S.W.3d 875 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2006, no pet.)**

Benavides worked as a grounds keeper for Battleground Golf Course in Deer Park, Texas, where in June of 2000 he sustained injuries while grooming the course's sand traps in a Cushman designed sand trap rake. The Cushman sand trap rake is a three-wheeled vehicle used to groom golf course sand traps. As Benavides was leaving a sand trap he noticed he needed to go back to smooth out a furrow in the sand. While traveling downhill, he attempted to reverse his course back to the sand trap. The left wheel kicked upward, overturning the vehicle. The sand rake landed on Benavides before he had a chance to jump out.

Benavides sued claiming design defect, manufacturing defect, and negligence. The jury returned a verdict, finding no defects in the sand rake manufactured by Cushman. Additionally, it found that Cushman was not negligent and that Benavides was 100% responsible for the accident. Benavides appealed, arguing, among other things, that the trial court erred in excluding expert testimony regarding failure to warn. The court of appeals held that Benavides could not complain of an exclusion of expert testimony regarding a failure to warn because the marketing defect claim was not raised by the pleadings and was not consented to by the parties.

***Goodyear Tire & Rubber Co. v. Rios*, 143 S.W.3d 107 (Tex. App.—San Antonio 2004, pet. denied)**

Rios was killed when a used tire he purchased failed due to tread separation. Rios' wife and father filed suit against Goodyear alleging defective manufacturing and marketing theories. The jury found the manufacturing and marketing defects were a producing cause of Rios' death and awarded \$40 million. Goodyear appealed on factual and legally insufficiency grounds.

Rios' wife settled while the appeal was pending. On appeal, Rios' father asserted that he established a manufacturing defect because the belt separation in the middle of the tire's life was itself circumstantial

evidence of a defect. The parties agreed on appeal that the issue was not whether the tire separated; instead, the issue was what caused the separation a manufacturing defect or the wear and tear on the tire since it was manufactured in 1991. The tire had previous repaired punctures, bead damage and was operated in an underinflated condition.

The San Antonio Court of Appeals reiterated the Texas common law applicable to manufacturing defect claims, noting that a plaintiff has a manufacturing defect claim when a finished product deviates from the planned output in a manner that is unreasonably dangerous. Strict liability does not require a specific showing of how a product became defective and a plaintiff need not identify a specific engineering or structural cause of the defect. The Court further noted that if a plaintiff does not have specific evidence of a defect he may offer evidence of the product's malfunction as circumstantial proof of the product's defect but the age and condition of the product may defeat the circumstantial weight of the malfunction.

Rios contended that he established a manufacturing defect based on the circumstantial evidence that the tire tread failed in the middle of the tire's useful life. Goodyear countered that there was no evidence of any manufacturing flaw or that the tire involved deviated from 1991 manufacturing specifications. The only witness to the circumstances of the crash was a following truck driver who could not see the entire accident sequence. The Court held that because no witness could testify to the actual circumstances of the accident, and the tire was somewhat worn and had been repaired multiple times, the circumstantial inference of defect would have no weight. Thus, the Court held that Rios' case rested entirely on his experts.

Plaintiffs offered the testimony of two experts, Robert Ochs and John Crate. Regarding Ochs, the Court noted that his visual and tactile testing of the tire itself were a reliable basis for expert testimony and rejected Goodyear's challenge in this regard. However, the Court found that Ochs' methodology to determine a manufacturing defect exists (visually inspecting the tire parts and finding steel wires with little or no rubber) was not accepted in the scientific community. The Court noted that Ochs did not refer to any articles or scientific publication to supports his methodology. For these reasons, the Court found his testimony was not reliable. Regarding Crate, the Court noted his vast experience in polymer science and adhesion of materials. However, because Crate did not have any specific experience regarding adhesion of tire materials, the Court found he was not qualified. Left with no circumstantial evidence and no reliable expert

testimony, the San Antonio Court reversed and rendered a take nothing judgment.<sup>65</sup>

***Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797 (Tex. 2006).**

This tire detread case involved only allegations of a manufacturing defect. The jury found a manufacturing defect and awarded \$11 million dollars in damages. Among other things, Cooper Tire complained that the jury charge did not contain a “flaw” element – in other words – a finding that there was a departure from the intended design. Additionally, Cooper Tire complained that Plaintiff’s expert testimony amounted to “no evidence” because it was not reliable. The El Paso Court of Appeals rejected these arguments and affirmed. By doing so, the El Paso Court joins the Corpus Christi Court in rejecting the “flaw element” submission of a manufacturing defect charge. Obviously, *Ford v. Ledesma* has now overruled these holdings.

The Texas Supreme Court opinion does not address the proper submission of a manufacturing defect. Rather, the Court focuses on the scientific evidence offered to support the verdict. Ultimately, the court reverses and renders judgment for Cooper Tire by holding that Plaintiffs’ experts’ testimony was unreliable and therefore constituted “no evidence.”

A discussion of the *Robinson* analysis is better left to the evidence/experts sections of the program. However, one portion of the opinion may arguably be interpreted as a change in Texas law. The court notes that: “Plaintiff failed to prove through direct evidence that occurrence of such contamination [the alleged manufacturing defect] or a plausible basis for inferring that such...contamination occurred.” Traditionally, a plaintiff did not need to prove how the manufacturing defect occurred —only that the defect existed. But in *Cooper* and as a part of reliability analysis, the court seems to indicate that this very evidence may be necessary to establish the reliability of the expert’s defect theories. Plaintiff should certainly argue that this evidence is only one of many things to consider in weighing the reliability of an expert’s opinion. Defendants will almost certainly argue that this evidence is a necessary to a valid manufacturing defect finding.

<sup>65</sup> See also *Merck & Co. v. Garza*, 277 S.W.3d. 430 (Tex. 2008) (clarifying that in cases of prescription drugs, the manufacturer is excused from warning each patient who receives the drug if the manufacturer properly warns the prescribing physician of the dangerous propensities of the product).

***Walker v. Thomasson Lumbar Co.*, 203 S.W.3d 470 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2006, no pet.)**

In this case, the Appellate court affirmed the trial court’s granting a motion for summary judgment in favor of the defendants in a manufacturing defect case. The court held that the plaintiff was not entitled to a spoliation instruction because the defendant never had possession or control of the product in question – a utility pole. Further, the appellate court held that summary judgment was properly granted in the defendants’ favor when plaintiff’s expert had never seen or inspected the product in question and testified that the only two scientifically recognized methods for determining a manufacturing defect involved actual inspection of the product. The court noted that the expert did not know the product specifications and could not testify as to any deviation from specifications. Plaintiff’s expert also did not eliminate other potential causes for the injury or accident. For these reasons, the court affirmed summary judgment in favor of the defendants on this manufacturing defect case.

**i. Defective Design Cases**

The issue of whether a product is unreasonably dangerous as to be defective in design involves the analysis of a number of different factors.

Texas courts continue to employ a two-step process for deciding cases brought under the design defect theory. First, a plaintiff must meet the threshold requirements of TEX. CIV. PRAC. & REM. CODE §82.005. Specifically, the plaintiff must show by a preponderance of the evidence that:

- (1) here existed a safer alternative design for the defective product; and,
- (2) the defect was a producing cause of the injuries claimed. Second, once these criteria have been met, the courts look to a common law risk-utility analysis, which takes into account a number of factors in determining whether the product is unreasonably dangerous.

One case often cited for a representative, though perhaps not exhaustive, listing of these criteria is *American Tobacco Co. v. Grinnell*, 951 S.W.2d 420 (Tex. 1997). In *Grinnell*, the Texas Supreme Court enunciated the following factors relevant to the analysis of whether a product is unreasonably dangerous:

(1) [T]he utility of the product to the user and to the public as a whole weighed against the gravity and likelihood of injury from its use; (2) the availability of a substitute product which would meet the same need and not be unsafe or unreasonably expensive; (3) the manufacturer's ability to eliminate the unsafe character of the product without seriously impairing its usefulness or significantly increasing its costs; (4) the user's anticipated awareness of the dangers inherent in the product and their avoidability because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions; and (5) the expectations of the ordinary consumer.<sup>66</sup>

Texas courts have continued to use this two-pronged analysis in recent decisions. *See, e.g., Honda of America Mfg., Inc. v. Norman*, 104 S.W.3d 600 (Tex. App.—Houston [1<sup>st</sup> Dist.] Feb 6, 2003, pet. denied); *Robins v. Kroger Co.*, 80 S.W.3d 641 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2002, pet. filed); *Lattrell v. Chrysler Corp.*, 79 S.W.3d 141 (Tex. App.—Texarkana 2002, pet. denied).

In *Norman*, the parents of the deceased brought suit against Honda, alleging that the defective design of the automatic seat belt caused it to become stuck when she tried to open the door. As a result, the decedent became trapped in the car while it sank to the bottom of the bay waters she had mistakenly backed into.

The design defect theory was based on the allegation that the emergency locking action of the seat belt, coupled with the mechanical seat belt's ability to move to the open position while the belt was locked, created a foreseeable and dangerous situation in which an occupant could be pinned to the seat because the mechanism would stall from trying to fight against the locking force. In addition, the plaintiffs contended that the emergency release button, which could disengage the entire seat belt, was improperly located at the top of the belt mechanism and not conveniently accessible in the event of just such an emergency. After the plaintiffs obtained a substantial jury award, Honda appealed on the grounds that the plaintiffs failed to satisfy the threshold test of showing a safer alternative design.

The appeals court began by laying out the statutory provisions in Section 82.005 regarding proof of a safer alternative design. Namely, the plaintiffs had to show a safer alternative design that would have significantly reduced or prevented the risk of harm without substantially destroying the product's utility,

and that was both technologically and economically workable at the time. At trial the plaintiffs introduced testimony, via their expert witnesses, relating to three potentially safer alternative designs: a timer on the seat belt mechanism; an emergency release lever near the right hip of the driver, as used in Toyota vehicles at the time, rather than a button above the left shoulder; and, two possible release buttons, combining the Honda and Toyota designs. As to the first and third proposed safer alternative designs, the appeals court sustained Honda's no evidence appeal, citing the plaintiffs' expert witnesses as having offered no testimony on the schematics or technological feasibility of a mechanism timer or a dual-button belt release system.

As to the second alternative design, the hip release lever used in Toyota automobiles, the court used some interesting reasoning. First, it noted that one of the plaintiffs' experts pointed to the Toyota emergency lever release design as an alternative in this case. It also noted that technological feasibility was shown by the very fact that the hip lever release design was in use in Toyota vehicles. The court held, however, that while existence of a certain design in the marketplace, such as in a competitor's product, established technological feasibility, it was not sufficient to establish economic feasibility.

In support of this somewhat puzzling holding, the court cited *Jaimes v. Fiesta Mart*, 21 S.W.3d 301, 306 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1999, pet. denied). However, the *Jaimes* case involved a toddler who choked on a latex balloon, prompting the mother to sue for defective design and introduce expert testimony that the balloon could have been alternatively made of another substance such as mylar. The record showed that latex was the only product available on the market for expandable balloons of this type, and that use of mylar would destroy the product's utility. The record also showed it was not economically feasible due to the dramatic difference in price between latex and mylar. Thus, *Jaimes* presents a situation where neither technological nor economic feasibility existed. It is odd that the court in *Norman* would attempt to apply the *Jaimes* holding to a case in which technological feasibility clearly did exist (the hip lever emergency release was in full market use in Toyota automobiles).

The court in *Norman* then went on to render the discussion of economic feasibility a moot point, by holding that even if the hip lever design was feasible on both counts for the Honda automobile, the plaintiffs were unable to establish that an equal or even greater risk of harm would not have resulted from adopting the alternative design. Indeed, one of the reasons Honda placed the emergency release button on the top of the belt mechanism, above the driver's left shoulder, was because it would be easier for emergency rescue personnel to reach just inside the window to disengage

<sup>66</sup> 951 S.W.2d at 432.

the belt, a safety advantage that would be lost with the hip lever design. As a result, the court found that the plaintiffs were unable to produce any evidence that there was a safer alternative design to the Honda emergency release button, and therefore reversed and rendered judgment for Honda.

Upon close inspection, it would appear that *Norman* arrived at the right result, but along the way used some superfluous and faulty reasoning. Because the court found that the alternative hip lever release design was not truly a safer alternative design, in the sense that it would make a third party's efforts to rescue a trapped driver more difficult, it was not necessary for the court to comment on whether the existence of the hip lever design in Toyota vehicles satisfied the requirement of showing economic feasibility along with technological feasibility. By holding that the existence of the Toyota hip lever release design demonstrated technological but not economic feasibility, and then citing an inapposite case such as *Jaimes* in support thereof, the court may have created potentially dangerous precedent from a plaintiff's perspective.

It is troublesome to plaintiffs, for example, that the *Norman* decision implies that economic feasibility must be determined from a subjective viewpoint. It is already accepted under Texas law that technological feasibility is determined by an objective standard. *See, e.g., General Motors Corp. v. Sanchez*, 997 S.W.2d 584, 592 (Tex. 1999) (holding that in order to prove a safer alternative design, it is not necessary that plaintiffs show its existence, build it, or test it; it is enough that the design is proven capable of being developed). In *Norman*, technological feasibility was in fact both objectively and subjectively demonstrated; it was subjectively proven, since Toyota was actually using the hip lever release design, and this showed that it was obviously objectively feasible as well. However, by holding that this did not establish economic feasibility, the court seems to suggest that even though it was objectively the case that the hip lever release design could be implemented and mass produced in vehicles (because Toyota had done so), it may not subjectively have been the case for Honda to be able to do so. This subjective standard increases the burden of evidence and testimony for plaintiffs in products liability cases. Plaintiffs and their counsel are now on notice that while the existence of an alternative design in a similarly situated competitor's product is enough to establish that the design was technologically feasible for the defendant, it may not be enough to establish economic feasibility, counter-intuitive as the proposition may be.

In *Robins v. Kroger Co.*, parents of a toddler sued the distributor of a disposable cigarette lighter for severe burns the child suffered while playing with the

lighter and setting fire to a pile of clothes. 80 S.W.3d 641, 643 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). The crux of the claim was that the lighter was defective in design because it was not childproof.<sup>67</sup> Summary judgment was granted to Kroger, and the plaintiffs appealed.<sup>68</sup> In deciding whether summary judgment was proper, the court made mention of the five risk-utility factors set out in *Grinnell, supra* (the accident in question occurred in 1989, well before the codification of the threshold test of Section 82.005).

In conducting the risk-utility analysis in this case, the court relied to a great extent on statistics from the Federal Register, cited by the plaintiffs in their response to Kroger's summary judgment motion. Specifically, the court noted the following facts: estimated costs of fires started by children playing with lighters were \$300-375 million over a five-year period; the number of annual injuries from these incidents was 1,100, and the number of annual deaths was 150; childproof lighters would save 80-105 lives each year; manufacturing costs for childproof lighters were in the range of \$50 million, thus saving upwards of \$200 million in fire damage costs; and, there would be just a one to five-cent increase in per unit production costs.<sup>69</sup> The court also dismissed Kroger's argument that the parents were aware of the risks and dangers to a child, and that the product was safe for its intended use, i.e., by adults:

Kroger presents no arguments as to why an alternative childproof lighter would not effectively meet the needs of adult users and at the same time protect against the risk that a lighter might come into a child's hands. Kroger also presents no evidence concerning the utility of a lighter without a childproof mechanism.

<sup>70</sup>Also relevant to the court's analysis was that while permanent lighters were manufactured childproof, disposable lighters of the type bought by the plaintiffs were simply not available childproof until several years after the accident.<sup>71</sup> Based on the foregoing analysis, the court found that fact issues existed as to the risk-utility analysis, and it reversed summary judgment and remanded for trial.<sup>72</sup>

In *Lattrell v. Chrysler Corp.*, the court conducted a fairly routine evaluation of whether summary judgment against the plaintiff was proper on her claim

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 645-46

<sup>70</sup> *Id.* at 646

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 647

that the air bag failed to deploy in an accident because it was defectively designed. The plaintiff attempted to rely on a common law risk-utility analysis, without submitting any evidence in the form of affidavits or reports concerning a safer alternative design. 79 S.W.3d 141, 148 (Tex. App.—Texarkana 2002, pet. denied). The court noted that the provisions of Section 82.005 became effective in 1993, while the plaintiff's collision occurred in 1995; as a result, her claim was governed by the threshold requirement provisions of 82.005. Because her affidavits (her only evidence) contained no mention of a safer alternative design, and thus one essential element of her claim had no evidence in support thereof, the court affirmed summary judgment against her.

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

Hillhouse sued DaimlerChrysler asserting design defect and marketing defect claims after her minor child was injured when the front passenger air bag deployed following an automobile collision. On reconsideration, the court of appeals, sitting *en banc*, held that there was sufficient evidence indicating that DaimlerChrysler knew, should have known, or should have reasonably anticipated the risk of injury from a deploying air bag to an occupant in the front passenger seat. Additionally, the court upheld the lower court decision that there was sufficient evidence to support the jury finding that the warning was inadequate. Finally, the court sustained DaimlerChrysler's assertion that the evidence was legally insufficient to support a jury verdict on plaintiff's design defect claim because Plaintiff's expert testimony was based on conjecture and too speculative. He only performed one test, using a surrogate, and it was based on speculations: "where the front seat was positioned, whether [the minor child] was restrained by [the] seat belt, how and to what degree the seat belt locked her in upon deceleration, and her position when she impacted with the airbag."

This opinion addressed the need for testing in design defect product liability cases. The case established that scientific evidence used in expert testimony must be grounded "in the methods and procedures of science" or it is nothing more than "subjective belief or unsupported speculation." Here, the design defect claim was overturned, primarily because the expert witness only performed one test which was based on speculation. This ruling is consistent with the movement by product liability defendants to require extensive testing on all product liability design defect theories.

***DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299 (Tex. 2008)**

This is a class action lawsuit. The allegation is that Chrysler vehicles in question contain defective Gen-3 buckles, which unlatch too easily. To support this allegation, plaintiff offered proof that Gen-3 buckles had unlatched in two NHTSA crash tests and in crash tests conducted by Transport Canada and DaimlerChrysler itself. In addition, plaintiff offered evidence that DaimlerChrysler had received over 100 complaints documenting buckle releases with the gen-3 buckles. The gen-3 buckles also fail in accepted industry "ball" test.

The class plaintiffs all owned vehicles with gen-3 buckles. The lawsuit sought the cost to replace the buckles and loss of use of their vehicles during the replacement. None of the three class plaintiffs had been injured due to a buckle release. But they owned cars (like other members of the class) that utilize arguable defective restraints. The defendant's argued that Plaintiffs' fear of possible injury from an accidental release is so remote that it is not enough of an "injury" to give the plaintiffs standing to sue. Without standing, the trial court has no subject matter jurisdiction, and the trial court must dismiss outright.

The Texas Supreme Court, in yet one more death nail in Texas class action law, bought defendant's standing argument and swallowed the hook. The court reasoned that the Texas Constitution provides access to courts only for a "person for an injury done him." The court continues: "a plaintiff must be personally aggrieved; his alleged injury must be concrete and particularized, actual or imminent, not hypothetical." According to this Texas Supreme Court, these plaintiffs did not have an "injury" sufficient to even create standing to file a lawsuit. The Texas Supreme Court used the Open Court's provision to close the door to the courthouse. So if you buy a defective product in Texas, apparently you are stuck with less than you bargained for until it injures or kills. The Texas Supreme Court dismissed the case for lack of subject matter jurisdiction.

***A.O. Smith Corp. v. Settlement Investment Mgmt.*, 2006 WL 176815 (Tex. App.—Fort Worth 2006, no pet.)**

This products liability case discusses the plaintiff's burden in regards to proposed alternative designs. The relevant facts are that a commercial water heater overheated and set fire to an apartment building. On appeal, A.O. Smith complained that the trial court erred in not granting its judgment N.O.V. because there was no evidence that the alternative designs proposed by Settlement Investment were

economically feasible, and no evidence that the alternative designs would not pose an equal or greater risk under other circumstances.

The court of appeals held that there was more than a scintilla of evidence showing the economic feasibility of the alternative designs and further that in a design defect case, the plaintiff is not required to prove the actual manufacturing cost of an alternative design. The court of appeals also held that there was at least some evidence that the alternative designs would have been safer and likewise would not have imposed equal or greater risks under other circumstances.

***Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306 (Tex. 2009)**

The saying goes—bad facts make bad law. Unfortunately, the saying holds true in *Timpte v. Gish*. Gish worked as a truck driver. On the day of his injury he was attempting to load fertilizer into a “Super Hopper” trailer that is an open-top twin hopper trailer, which is loaded from above and is emptied through two openings on its bottom. Often times, the trailer is loaded at plants that use downspouts. The fertilizer plant where Gish was loading had a rope tied to the downspout so it could be lowered to the trailer to prevent granulated fertilizer from blowing away. But Gish could not get the downspout to lower by use of the rope. Instead, Gish used a ladder affixed to the end of the trailer to climb on top of the trailer. He then walked across a side rail that is approximately 5 inches wide, is made of slick extruded aluminum, and slopes inward toward the trailer. His purpose was to lower the downspout by hand from his perch on the rail. Not surprisingly, Gish falls breaking legs, ankles and rupturing his Achilles tendon.

Gish brought product liability claims against Timpte, the manufacturer of the trailer. The product claims were both marketing and design defect claims. The trial court granted a no evidence summary judgment in favor of Timpte on all claims. The Amarillo Court of Appeals affirmed the summary judgment on the marketing claims, correctly concluding that there is no duty to warn of open and obvious dangers. But the Amarillo Court reversed with regard to the design defect claims.

The issue in this case is whether and when an “open and obvious danger” should foreclose a design defect claim as a matter-of-law. Long standing Texas precedent as held that liability for design defects may attach even if the defect is apparent. *Turner v. General Motors Corp.*, 584 S.W.2d 844, 850 (Tex. 1979). This notion has been reaffirmed in the Restatement Third and several subsequent Texas Supreme Court decisions. See *Hernandez v. Tokia*, 2 S.W.3d 251 (Tex. 1999). Rather than being the bar to a design

defect case, the “open and obviousness” of the danger was a factor to be considered in the risk-utility analysis used to determine whether the product was unreasonably dangerous. Despite this long standing precedent, the Texas Supreme Court says “but in an appropriate case design defect may be determined as a matter-of-law.”

The Texas Supreme Court weighed the risk-utility factors as follows. Looking at the ordinary knowledge common to the community, the Court concluded that the risk of falling while trying to balance on a 5 inch wide strip of extruded aluminum ten feet off the ground is an obvious risk. In addition, Timpte warned users to always maintain three-point contact with the trailer, which is impossible for a user standing on the top rail. Had Gish adhered to this, the accident would not have occurred. Additionally, increasing the top rail into a safe walkway would have increased the cost and weight of the trailer while decreasing its utility. Finally, the top row of rungs on the ladder are necessary to maintain the structure and stability of the ladder when the side rails are under pressure; without them, the ladder could twist or bend.

Based on this analysis of the risk utility factors the Court concluded as a matter-of-law that there was no design defect. The trial court’s summary judgment was affirmed and the Amarillo Court of Appeals was reversed.

**j. Federal Preemption**

***Wyeth v. Levine*, 129 S. Ct. 1187 (2009)**

Diana Levine sued drug manufacturer Wyeth in Vermont state court.<sup>75</sup> A physician’s assistant improperly injected Phenergan, a drug made by Wyeth, into an artery in Levine’s arm. The drug designed to prevent nausea then led to a severe reaction and ultimately to the amputation of Diana Levine’s arm. Before this tragedy, Ms. Levine was a professional guitarist.

Levine’s lawsuit asserts that Wyeth failed to include a warning label describing the possible arterial injuries that could occur from improper injection of the drug.<sup>76</sup> Wyeth argued that because its warning label had been deemed acceptable by the FDA, any state tort claim making the label insufficient must be preempted by the federal approval.

The Supreme Court of Vermont held that the FDA requirements merely provide a floor, not a ceiling, for state law requirements. Therefore, states are free to

<sup>75</sup> *Id* at 1188.

<sup>76</sup> *Id.* at 1189.

create more stringent labeling requirements than federal law provides.<sup>77</sup>

The Supreme Court granted certiorari to determine whether federal law preempts state law in a personal injury action against a drug manufacturer for failing to include an appropriate warning label where the drug in question met the labeling requirements of the Food and Drug Administration.<sup>78</sup>

The Supreme Court affirmed the Supreme Court of Vermont holding that federal law did not preempt Ms. Levine's state-law claim that Wyeth's labeling of Phergan failed to warn of the dangers of intravenous administration.<sup>79</sup> With Justice Stevens writing for the majority and joined by Justices Kennedy, Souter, Ginsburg, and Breyer, the Court first rejected Wyeth's argument that by "unilaterally changing its labeling of Phenergan, it would have violated federal labeling regulations."<sup>80</sup> Rather, the Court asserted that the manufacturer bears ultimate responsibility for the content of its labels at all times.<sup>81</sup> The Court then rejected Wyeth's argument that requiring it to comply with the state-law duty to provide a stronger warning would interfere with Congress' purpose of entrusting the FDA with drug labeling decisions.<sup>82</sup> Rather the Court reasoned that Congress did not intend to preempt state-law failure to warn actions when it created the Food, Drug, and Cosmetic Act.

In 2006, the Food and Drug Administration changed its policy and adopted rules that said the agency's approval of a drug shielded drugmakers from state lawsuits. But Justice Stevens, writing for the majority, said there was "powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness."<sup>83</sup> The ruling leaves juries in every state "rather than the FDA...ultimately responsible for regulating warning labels for prescription drugs."<sup>84</sup>

Justice Breyer wrote a separate concurring opinion concluding that the FDA may create regulations that preempt state tort law claims, but such a regulation was not at issue in Ms. Levine's case.<sup>85</sup> Justice Alito dissented and was joined by Chief Justice Roberts and Justice Scalia. He disagreed with the Court's holding that a jury rather than the FDA is ultimately responsible for regulating warning labels for

prescription drugs.<sup>86</sup> He argued this is incompatible with the Court's precedent in *Geier v. American Honda Motor Co.*, which established the principles of implied conflict preemption.<sup>87</sup>

Although this case will no doubt aid pharmaceutical plaintiffs in alleging that their prescription drugs were accompanied by inadequate warnings, in Texas, the Texas Civil Practice and Remedies Code may continue to serve as an obstacle to plaintiffs under 82.007. In 2009 following the *Wyeth* decision, the Houston Court of Appeals followed the Supreme Court precedent when deciding a pharmaceutical preemption case. The federal circuit courts have used the same reasoning set out in *Wyeth* for cases that have followed this year .

***Brockert v. Wyeth Pharmaceuticals, Inc.*, 287 S.W.3d 760 (Tex. App.—Houston [14th Dist.] 2009, no pet.)**

Brockert sue Wyeth alleging that she was injured by a hormone-replacement therapy (HRT) claiming a failure to warn, among other claims.<sup>88</sup>

Susan Brockert contended that she developed breast cancer as a result of taking Prempro, an HRT drug manufactured, marketed and sold by Wyeth, containing both estrogen and progesterin. The FDA carefully reviewed Wyeth's proposed warning and withheld approval unless Wyeth complied with their request to include information on the increased risk of breast cancer. Brockert argued that the labels and inserts should have included even stronger warnings.

The Court went through a lengthy analysis of the FDA preamble, regulations, and the holding in *Wyeth v. Levine* cited above. Due to the recent holding in *Wyeth v. Levine*, the court agreed with Brockert and stated federal law did not preempt consumers' failure-to-warn claims against the manufacturer. The Houston Court of Appeals reversed summary judgment granted in favor of Wyeth on the failure to warn claims.

***Williamson v. Mazda Motor Co. of Am.*, 167 Cal. Ct. App. 4th 905 (2008)**

The United States Supreme Court will again rule on preemption in a different context. On May 24, 2010, the Supreme Court granted certiorari in an

<sup>77</sup> *Id.* at 1211.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 1212.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Wyeth v. Levine*, 129 S. Ct. 1187, 1188 (2009).

<sup>85</sup> *Id.* at 1213.

<sup>86</sup> *Id.* at 1240.

<sup>87</sup> *Id.* at 1249.

<sup>88</sup> See also *In Re Prempro Products Liability Litigation v. Wyeth*, 586 F.3d 547 (8th Cir. 2009) (following the *Wyeth v. Levine* reasoning that consumer's state law claim for failure to warn were not preempted by federal law and the issue of whether the drug caused the injury was an issue for the jury).

automotive products liability case. At issue is whether the FMVSS regulations preempt a common law tort action against a manufacturer for not choosing the option to install a lap/shoulder belt at the middle seating position.

In the underlying case, Plaintiffs sued defendants Mazda Motor Company of America, Inc. and Mazda Motor Corporation for strict products liability for a death arising from injuries suffered in a front-end collision while in their 1993 Mazda MPV Minivan. Plaintiffs claimed defendants were liable because they designed, manufactured, marketed, and sold a minivan that, among other things, “was equipped with inferior two-point lap belts in the middle seating positions, when it should reasonably have been equipped with three-point seat belts as were the vehicle’s remaining seats, and that defendants knew of the dangers of two-point lap belts but failed to warn consumers of such dangers.”<sup>90</sup>

The question presented before the California Court of Appeals was whether FMVSS 208 preempts the present lawsuit because a common law action seeking to hold defendants liable for installing a lap-only seatbelt at rear inboard passenger seat arguably conflicts with the safety standard. The Safety Act contains a preemption clause declaring “When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle, only if the standard is identical to the standard prescribed under this chapter.”<sup>91</sup> But the statute also contains a savings clause that states “[c]ompliance with motor vehicle safety standard prescribed under this chapter does not except a person from liability at common law.”<sup>92</sup>

The California Court analyzed the Supreme Court’s decision in *Geier v. American Honda Motor Co.*, 569 U.S. 861 (2000). In *Geier*, the Supreme Court rejected the defendant’s express preemption claim by reconciling the preemption and savings clause provisions and finding that the savings clauses leaves adequate room for state tort law to operate where federal law creates only a minimum safety standard.<sup>93</sup> But in the conflict implied preemption arena, *Geier* concluded that “nothing in the language of the savings clause suggests an intent to save state-law tort actions that conflict with federal regulations.” Also, a common-law “no airbag” action like the one before the *Geier* Court actually conflicts with FMVSS 208. The claim was preempted.

The Plaintiffs cited *Sprietsma v. Mercury Marine*<sup>94</sup> in support of their position. In *Sprietsma*, a woman fell off a boat and was struck by the blades of the boat’s outboard motor. Her husband sued the motor’s manufacturer, alleging the product was unreasonably dangerous because it lacked a propeller guard.<sup>95</sup> The defendant argued that the claim was preempted under the Federal Boat Safety Act of 1971.<sup>96</sup> The Supreme Court held that the Coast Guard’s decision not to impose a propeller guard requirement presents a sharp contrast to the decision of the Secretary of Transportation that was given preemptive effect in *Geier*.<sup>97</sup> The Plaintiffs’ claim was not preempted. In *Sprietsma*, there was an absence of regulatory action which explains the different result.

The California Court of Appeals found the *Geier* case to be binding and held that FMVSS 208 preempts common law, and the Plaintiffs’ claim is barred by the version of FMVSS 208 in effect when defendants manufactured the minivan. Yet, the Plaintiffs appealed and argued that these claims should not be preempted.

During the 2010 term, the United States Supreme Court will revisit their 2000 decision in *Geier*. The opinion will, no doubt, be important to products liability litigation throughout the country.

***Merck & Co. v. Garza*, 277 S.W.3d 430 (Tex. App.-San Antonio 2008, not pet.)**

Relatives of a patient who died of a heart attack brought suit against a drug manufacturer on design defect and marketing defect strict liability claims based upon allegations Vioxx caused the patient’s heart attack and death.<sup>98</sup>

The case was reversed and remanded based on a finding of jury misconduct. But the court did address legal issues in its opinion. The court held that there was legally sufficient evidence (more than scintilla) regarding both general and specific causation. The court also addressed the preemption argument. Merck claimed that the marketing claims were impliedly preempted because of the complete and pervasive federal regulations dealing with prescription drug labeling. The San Antonio court of appeals rejected this argument relying on other court analysis that the preamble statements were not a clear enough manifestation of the federal government’s attempt to preempt.

Finally, the court did hold that the plaintiff

<sup>90</sup> *Id.*

<sup>91</sup> 49 U.S.C. Sec. 30103(b)(1)

<sup>92</sup> 49 U.S.C. Sec. 30103(3).

<sup>93</sup> *Id.*

<sup>94</sup> 537 U.S. 51 (2002).

<sup>95</sup> *Id.*

<sup>96</sup> 46 U.S.C. Sec. 4301 et seq.

<sup>97</sup> 537 U.S. at 67.

<sup>98</sup> *Merck*, 277 S.W.3d at 438.

had not presented evidence of a safer alternative design. Therefore, the court held the plaintiff's design defect claim failed as a matter-of-law.

***Bic Pen Corp. v. Carter*, 251 S.W.3d 500 (Tex. 2008)**

There should be no doubt—preemption is tort reform for products liability. And, it is a tort reform embraced by a unanimous Texas Supreme Court. While there are many decisions written by the Texas Supreme Court in the last 5 year that erode products liability law, *Bic Pen* has done more damage than any other by starting down the slippery slope of using preemption to wholly eliminate product liability claims even in the face of “savings” clauses that purport to preserve common law claims.

In this case a 5 year old child (using what was supposed to be a child resistant lighter), set fire to his 6 year old sister's dress. She suffered severe burns. In response to claims of design and manufacturing defects, the jury awarded 3 million in actual damages and 2 million in punitive damages. This result was upheld by the court of appeals. The central issue considered by the Texas Supreme Court was whether Federal Regulations dealing with child resistant lighters preempted the design defect claims.

There are three types of preemption: express preemption; implied preemption where the Federal Regulations are so broad in scope so as to preclude any state law; and implied conflict preemption that prevents enforcement of State laws that conflict with the Federal Regulations or would frustrate their purpose. The Texas Supreme Court used the third—implied conflict preemption—to destroy the design defect claim.

The Consumer Products Safety Administration whose purpose is to prevent product related injury regulates child resistant lighters. The regulation that governs child-resistant lighters contains a savings clause:

*“Compliance with consumer product safety rules or other rules or orders under this chapter shall not relieve any person from liability at common law or under State statutory law to any other person.”*

Amazingly, despite this savings clause, the Texas Supreme Court concluded that upholding a design defect claim would conflict with the Federal Regulation and the purpose of the CPSA.

To understand the Courts weak analysis, requires an understanding of the regulation. The regulation in question does not require a specific design, but only that the final product meet a certain performance result.

Specifically, the standard requires that no more than 15% of children in a test panel be able to engage a child-resistant lighter after two 5 minute attempts. The court notes the CPSC did not want to make the performance rate more difficult because it would mean a lighter that was harder and more expensive to produce and it may be so difficult to operate that even adults would abandoned it in favor of unprotected ignition sources such as matches. The court reasons that allowing a common law design defect claim would conflict with the balanced CPSA determination of the performance standard. Thus, the Texas Supreme Court concludes that conflict preemption eliminates the state product liability design defect claim.

The Court fails to note that the plaintiff did not assert that the performance standard should be raised. Indeed, the plaintiff only asserted that the product was defective even though it complied with the Federal Standard and that more effective child resistant features that also passed the same standard were safer alternatives. Plaintiff did not suggest a change to performance level of the standard—but that mischaracterization was necessary for the court to reach its conclusion.

Allowing a design defect claim would certainly support, not conflict, with the CPSA's purpose of injury prevention. Courts can always narrowly define issues and twist logic to eliminate claims and steal determinations of fairness from juries. This result oriented decision takes a leap down a dangerous and slippery slope, which, if not reversed, will eventually result in the elimination of most design defect claims.

***Bic Pen Corp. v. Carter*, 2008 WL 5090757 (Tex. App.—Corpus Christi 2008, pet. granted)**

As discussed above, the Texas Supreme Court held that Plaintiff's design defect claims were preempted. But the Texas Supreme Court remanded to the Corpus Christi Court of Appeals the issue of whether the manufacturing defect claims were also preempted because the Supreme Court “lacked jurisdiction to review the factual sufficiency of the evidence.” On remand, the Corpus Christi Court of Appeals affirmed the plaintiffs' judgment on manufacturing defect. But guess what? The Texas Supreme Court has granted petition for review.

***Carden v. General Motors Corp.*, 509 F.3d 227 (5<sup>th</sup> Cir. 2007)**

The Fifth Circuit upheld a summary judgment favoring General Motors on the basis of conflict implied preemption. Alexa Wilson was seated in the rear center seat of her 1999 Pontiac Grand Am wearing a lap only seat belt with a manual adjusting device

when involved in a wreck that caused her serious injury and ultimately led to her death. Plaintiff alleged that the vehicle was defective because it did not have a lap/shoulder belt with an automatic retractor. Federal Motor Vehicle Safety Standard (FMVSS) 208 dictates that manufactures install either a lap/shoulder belt or lap-only seat belt system in the rear center seat. The Fifth Circuit held that a product liability suit alleging the lap-only system was defective in favor of a lap-shoulder system conflicts with FMVSS 208 because it effectively forecloses a design option allowed by the Federal Regulation. The court, with little analysis, also held that marketing claims tied to the design defect claims were also preempted.

***Riegel v. Medtronic, Inc.*, 128 S.Ct. 999 (2008)**

Riegel underwent coronary angioplasty when a Medtronic balloon catheter ruptured requiring an emergency bypass. Riegel sued under products liability theories. Medtronic claimed preemption with the Medical Device Amendments of 1976 to the Food, Drug and Cosmetics Act for Class III medical devices given premarket approval by the Food and Drug Administration.

Premarket approval of Class III medical devices requires a product specific Federal Safety review; requires that once approved its design specifications not be changed; and requires that the product be subject to ongoing monitoring and be subject to FDA recall authority.

The applicable act contains express preemption provisions that prohibit a state requirement “which is different from, or in addition to....” However, there is also a savings clause that notes compliance with certain FDA orders “shall not relieve any person from liability under Federal or State law.”

The United State Supreme Court held that state law tort claims did create a requirement in addition to the applicable regulation and are therefore preempted.

***MCI Sales & Service Inc. v. Hinton*, 272 S.W.3d 17 (Tex. App.—Waco 2008, pet. granted)**

This case focuses largely on preemption issues. The underlying facts involve a tragic bus crash, which resulted in 5 deaths and multiple injuries. Among other things, Plaintiffs’ complained that the bus should have used laminated safety glass to prevent ejections and should have had passenger seat belts. The defendants’ claimed that Federal Regulations preempted any state common law duty in tort, which would require safety glass or seatbelts. The Waco Court of Appeals, in a very thorough decision, rejected the preemption arguments. The Texas Supreme Court has granted petition. In granting the petition, the

Supreme Court framed the “issues presented” in a very pro-preemption manner.

***Baker v. St. Jude Med., S.C., Inc.*, 178 S.W.3d 127 (Tex. App.—Houston [1st Dist.] 2005, pet. denied)**

In a wrongful death action, Baker sued the manufacturer of a mechanical heart valve device for negligence, products liability, breach of warranty under Texas Deceptive Trade Practices Act (DTPA), and fraud. St. Jude developed the heart valve which was approved by the FDA through a pre-market approval (PMA) application. The subsequent changes that St. Jude made to the valve were also approved through a supplemental PMA process.

St. Jude filed a motion for summary judgment, arguing that Baker’s state court claims were preempted based on the FDA’s federal regulation over the valves. Its argument was based on an express preemption provision in the Medical Device Amendments (MDA), which gave the FDA the power to regulate medical devices, stating “[n]o State . . . may establish or continue in effect with respect to a device intended for human use any *requirement* which is different from, or in addition to, any *requirements* applicable under this [Act] to the device . . . .” The court of appeals held that state court tort claims imposed *requirements* that were expressly prohibited by the MDA because the jury could possibly impose higher standards than those used by the FDA.

Baker also argued that the PMA supplemental process was too abbreviated to have imposed any “federal requirements.” The court responded by holding that there was no distinction between approval by an initial PMA application and a subsequent PMA supplement, and that when determining federal regulation, the two should be considered as a whole. According to the above reasoning, all of Baker’s causes of action were expressly preempted.

***Monroe v. Cessna Aircraft, Co.*, 417 F.Supp.2d 824 (E.D. Tex. 2006).**

This is a products liability case where occupants of a small Cessna aircraft were killed after their airplane was damaged during a bird strike. The defendants moved for summary judgment alleging that FAA regulation preempted state law tort claims for all aviation cases. The defendant also asserted that FAA bird strike regulations impliedly preempted claims based upon crashes resulting from bird strikes. The court held that there was no implied preemption of all aviation cases, nor was there implied preemption of bird strike cases.

### k. Miscellaneous Cases

***JCW Electronics, Inc. v. Garza*, 257 S.W.3d 701 (Tex. 2008)**

This case questioned whether Chapter 33 of the Texas Remedies Code, which apportions responsibility among those responsible for damages in an action based on tort apply in a claim for breach of implied warranty under Article 2 of the Texas Uniform Commercial Code.<sup>99</sup>

The plaintiff's family sued the manufacturer of a telephone cord used in a prison suicide for breach of implied warranty of fitness for a particular purpose, negligence and misrepresentation.

The court found that a party who seeks damages for death or personal injury under breach of implied warranty claim and seeks damages in tort is subject to Chapter 33.

***FFE Transportation Services, Inc. v. Fulgham*, 154 S.W.3d 84 (Tex. 2004)**

In this case the plaintiff was a long haul truck driver acting as an independent contractor for FFE. The plaintiff supplied the tractor unit and FFE supplied the trailer. In turn, the plaintiff received a percentage of the load as pay.

The plaintiff was injured when a coupling assembly between the tractor and trailer allowed the trailer to disconnect from the tractor resulting in both the tractor and trailer rolling over. Mr. Fulgham then sued FFE alleging products liability and negligence claims. With respect to the products liability claims, the Texas Supreme Court held that FFE had not leased the trailer to the plaintiff, did not anticipate the future sale of the trailer to the plaintiff, was not in the business of leasing trailers. Accordingly, the court held that FFE had not placed the trailer into the stream of commerce and could not be liable under a theory of strict products liability.

With respect to the negligence claims, the Supreme Court held that expert testimony was necessary in order to establish the standard of care associated with the proper inspection and maintenance of the coupler system. This case again underscores the significance of retaining experts to support the judgment.

***General Motors Corp. v. Iracheta*, 161 S.W.3d 462 (Tex. 2005).**

This is a products liability case involving a defectively designed fuel system. The issues in this

case dealt with the adequacy of plaintiff's experts' testimony on the fuel system defect. The court, after a lengthy critique of the experts' opinions, found that they were improper and reversed and rendered judgment. The details of this holding are beyond the scope of this paper and will almost certainly be covered in the *Daubert/Robinson* area.

On a separate note, the Supreme Court said that it was unnecessary for defense counsel to object during the closing argument when the plaintiff stood during final arguments and personally thanked the jury.

***SSP Partners v. Gladstrong Inv. Corp.*, 275 S.W.3d 444 (Tex. 2008)**

The parents of a five year-old boy killed in a house fire claimed that a disposable butane lighter started the fire because of a defective child resistant mechanism.<sup>100</sup> The CPSC had recalled the lighter because of this ineffective child resistant feature. Gladstrong USA sent out the recall notice. The parents sued the distributor SSP and Gladstrong USA, alleging these entities manufactured the lighter. The parents settled their claims against both Gladstrong USA and SSP for 1.6 million each. This Texas Supreme Court Opinion deals with SSP's indemnity claim against Gladstrong USA.

Even though the Plaintiffs alleged the Gladstrong USA was the manufacturer, the lighter was actually manufactured in Hong Kong by a company called Tianjin Sico Lighters Company. Gladstrong Hong Kong did design some components of the lighter and did represent itself as the manufacturer. Both of these companies are Chinese companies. Gladstrong Hong Kong owns Gladstrong USA, which imports and distributes the lighters. Gladstrong USA is a California corporation.

The questions presented in the case are whether Gladstrong USA as an upstream seller (but not manufacturer) has an indemnity obligation. Alternatively, can Gladstrong USA be liable under the apparent manufacturer or single business enterprise doctrines.

First, Gladstrong USA does not owe indemnity as an upstream seller. Pursuant to Chapter 82, only a "manufacturer" (as opposed to a "seller") has an indemnity obligation. Since Gladstrong USA was a seller but not a manufacturer, it had no statutory indemnity obligation. Likewise, under common law indemnity, an upstream seller has no indemnity obligation without proof that it was responsible for the defective condition of the product. It is not enough to facilitate entry of a defective product into this country.

<sup>99</sup> *Id.* at 703.

<sup>100</sup> *Id.*

SSP also attempted to hold Gladstrong USA liable by arguing that it was a “Single Business Enterprise” with Gladstrong Hong Kong. The “single business enterprise” doctrine was set forth in a court of appeals opinion, *Paramount Petroleum*. The doctrine allows one corporation to be liable for the acts of another by showing: a coordinated effort between the corporations; coordinated resources; and in the pursuit of the same business purpose. This theory allows for a more liberal imposition of liability, than other traditional theories such as alter ego, piercing the corporate veil, or joint enterprise. Not surprisingly, the Texas Supreme Court rejected the “Single Business Enterprise” doctrine claiming that the courts who previously used it did so without “sound jurisprudential footing.”

Finally, the Texas Supreme Court considered and rejected an “apparent manufacturer doctrine” as a basis for an indemnity obligation under Chapter 82. The apparent manufacturer doctrine has as its basis Section 400 of the Restatement (Second) of Torts: Products Liability § 14, which states: “One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer.” The parties claimed that Gladstrong USA was the apparent manufacturer of the lighter. Unfortunately, SSP limited their apparent manufacturer argument to statutory indemnity under Chapter 82. The Supreme Court held that the statutory definition of “manufacturer” does not encompass apparent manufacturers. However, the opinion leaves for another day whether a plaintiff or one seeking common law indemnity could use the apparent manufacturer doctrine as a basis for imposing liability.

***Muth v. Ford Motor Co.*, 461 F.3d 557 (5<sup>th</sup> Cir. 2006).**

This is an automotive products liability case in which Barry William Muth was rendered a paraplegic after the 1996 Crown Victoria in which he was a passenger rolled over. The plaintiff went to trial on negligence and design defect claims relating to both roof crush and inadequacy of the seat belt restraint system. At the close of evidence, the plaintiff withdrew his negligence claim. The court submitted a general design defect question to which the jury answered “yes” and awarded \$9 million dollars. The trial court entered a judgment for this amount.

The Fifth Circuit Court of Appeals found that there was no evidence of a safer alternative design as it relates to the restraint system. The defendants contended because there was no basis for a liability finding on the restraint system and because the question submitted to the jury covered the design defect generally, the court must reverse as the jury

could have reached its verdict on the restraint rather than roof crush claims. The Fifth Circuit rejected the defendant’s arguments noting that the entire trial focused almost exclusively on the roof crush claims. Plaintiff’s counsel talked only about roof crush claims during opening and closing. The court found that it is reasonably certain the “yes” answer to design defect was based on the roof crush claims; therefore, the Fifth Circuit refused to reverse.

The Court also stated that it was not part of plaintiff’s burden of proof to show that a replaced windshield was in the same or similar condition as when it left Ford’s possession because the wind shield was not the focus of the defect theory.

Finally, the Fifth Circuit stated that the court did not err in excluding photographs and video of the Malibu and CRS rollover testing which Ford would use to show that occupants dive towards the roof and this diving caused the injury rather than the roof crushing.

***Borg –Warner Corp. v. Flores*, 232 S.W.3d 765 (Tex. 2007).**

This is an asbestos related products liability action against a brake pad manufacturer. Mr. Flores was a brake mechanic who from 1966 to 2001 handled brake pads for many manufacturers, including Borg-Warner. Mr. Flores used the Borg-Warner pads from 1972 – 1975 approximately 5-7 times per week. These brake pads contained asbestos fibers that compromised 28% of the brake pad’s weight. Mr. Flores’ job involved grinding the pads so that they would not squeal. The grinding process generated clouds of dust that Flores inhaled while working in a small room. Mr. Flores contracted asbestosis and sued Borg-Warner among others. There are many causes of asbestosis, including smoking. Mr. Flores admitted to smoking from the time he was twenty-five until three weeks prior to trial.

After a jury trial, the trial court entered a judgment favoring Mr. Flores. The court of appeals affirmed holding that there was legally sufficient evidence. The defendant appealed, arguing that the plaintiff who alleges injury by asbestos containing products must meet the same causation standards as other plaintiffs in product liability actions. The Texas Supreme Court reversed and rendered holding that there was no evidence of the “dose” of asbestos fibers, to which Mr. Flores was exposed. Because this proof was unavailable, the plaintiffs could not meet their burden of showing that the defendant’s product was a substantial factor in causation.

***New Texas Auto Auction v. Hernandez*, 249 S.W.3d 400 (Tex. 2008)**

The Texas Supreme Court adopts the Restatement Third by holding that auctioneers only facilitate sells but do not place products in the stream-of-commerce, and therefore are not liable under strict products liability.

***Merck & Co. v. Ernst*, 2008 WL 2201769 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2008, no pet. h)**

This is the appellate court decision reversing and rendering Mark Lanier's verdict against Merck on the highly publicized Vioxx trial. Plaintiff contended that Mr. Ernest died of a heart attack triggered by a blood clot. The evidence introduced by the plaintiff was that Vioxx increases blood clots due to an imbalance the medication creates in the blood. This increased tendency of clotting is what led to two separate studies showing a statistically significant increase in cardiac events when a patient is taking Vioxx.

The Court focused on the direct evidence used to prove that a blood clot caused Ernst's death. While there was no evidence of a blood clot or heart attack on autopsy, the plaintiff offered evidence of why that evidence would not exist. Specifically, evidence of heart attack on autopsy would not be present unless the individual lived 6 to 18 hours after suffering the heart attack; this was not the case with Mr. Ernst so there medically would not be evidence of a heart attack. Plaintiff offered several explanations of why the clot was not found on autopsy; the defendants offered competing explanations of why the clot should have been found. Plaintiff also introduced evidence that eliminated other potential causes of heart attack.

Despite the competing evidence admitted, the 14<sup>th</sup> Court of Appeals, substituted its own judgment for that of the jury's by holding that there was legal insufficient evidence of causation. By this court's standard, only direct evidence of a blood clot on autopsy would suffice.

***Whirlpool Corp. v. Camacho*, 298 S.W.3d 631 (Tex. 2009)**

This is a product liability case involving a clothes dryer that caused a house fire, injuries and death. The trial court entered judgment for plaintiffs and the judgment was affirmed by the Court of Appeals. The Texas Supreme Court held that Plaintiff's expert's testimony was unreliable under *Robinson*. Because the expert's opinion testimony was essential to establish Plaintiff claim, the Supreme Court reversed and rendered in favor of Defendant's on a no-evidence basis.

**I. Forum Non Conveniens.**

The 2005 Legislative session resulted in changes to Texas' Forum Non Conveniens law. A discussion of Forum Non Conveniens is beyond the scope of this paper, although practitioners should be aware of these changes as they affect many products liability cases. Also see a recent Texas Supreme Court case granting mandamus and dismissing a case on FNC grounds, *In Re Pirelli Tires L.L.C.*, 247 S.W.3d 670 (Tex. 2007).

