

2007 Products Liability Update

By: Andy Payne

Products Liability Update

- **Preemption & Presumptions**

- Asbestos Causation
- Charge Issues
- Indemnity
- Seatbelts
- Misc. Cases

Preemption & Presumption



Preemption & Presumption

- 82.007 -- Presumption of No Marketing Defect in Drug Cases When Complied with FDA Requirement

Preemption & Presumption

- REBUT 82.007
 - Withheld or Misrepresented Information to the FDA, Material & Relevant, Causally Related to Injuries
 - Sold After Recall
 - “Off Label” Marketing

Preemption & Presumption

- REBUT 82.007

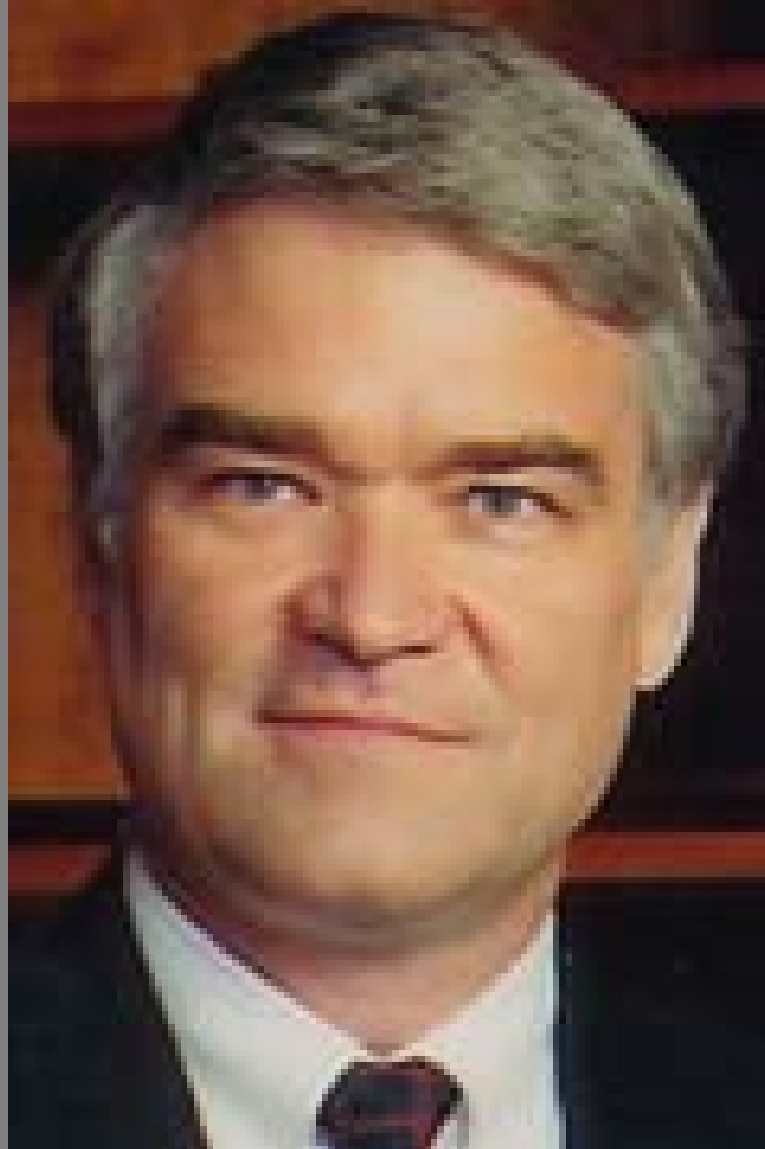
– Withheld or Misrepresented Information to the FDA, Material & Relevant, Causally Related to Injuries

- Sold After Recall
- “Off Label” Marketing

Preemption & Presumption

- *Ledbetter v. Merck*
 - Withheld Exception is Preempted
 - FDA exclusive responsibility to Police Fraud
 - Deluge Information to Defend State Claims
 - MSJ Against Pl. Marketing Claims
 - Expedited MDL Appeal

Preemption & Presumption



Preemption & Presumption

- *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85 (2d Cir. 2006)(Rejecting Preemption)
- *Garcia v. Wyeth-Ayerst Lab.*, 385 F.3d 961 (6th Cir. 2004)(Embracing Preemption)

Preemption & Presumption



Preemption & Presumption



Preemption & Presumption

- 82.008 -- Presumption of No Liability:
Formulation, Labeling or Design if Mandatory
Fed. Regs or Standards are Followed

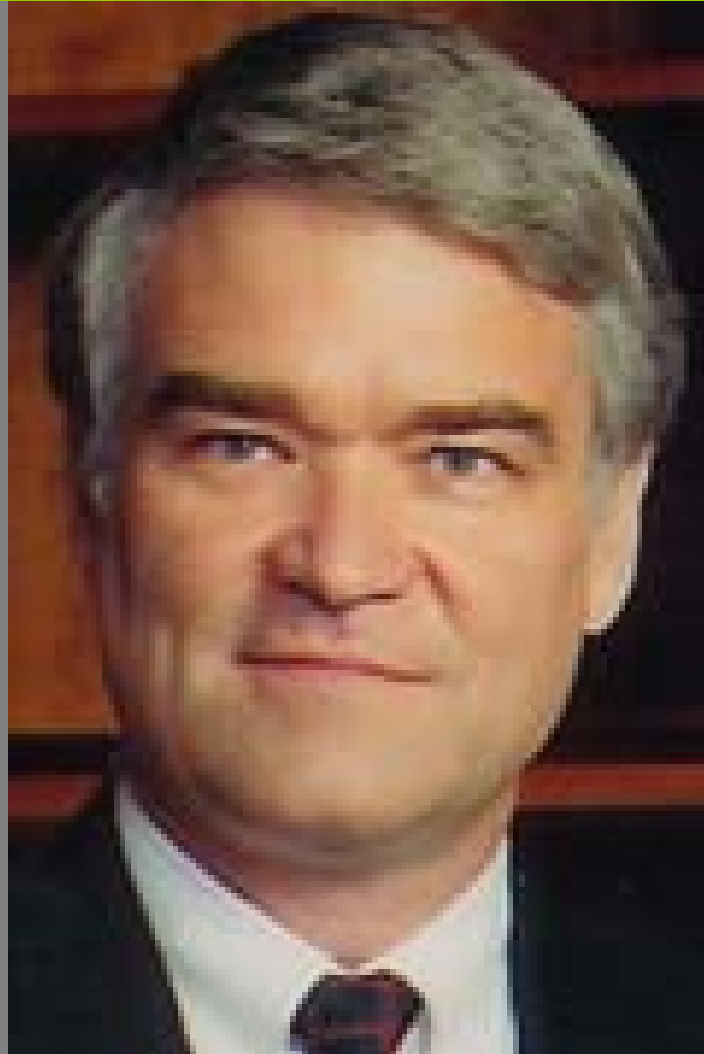
Rebutting the 82.008(a)(c) Presumption

Safety Standard
Inadequate to Protect;
Unreasonable Risk

Bic Pen v. Carther

- Pre 82.008, but Defendant argued common law creates similar presumption
- Held that CPSC standards were minimum standards & did not preempt common law claims
- Evidence was sufficient to overcome presumption
- Petition is Granted!!!

Bic Pen v. Carther



Rebutting the 82.008(a)(c) Presumption

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

Hernandez v. Ford (p. 3)

- Roof Crush Case (FMVSS 216 Standard) creates 82.008 (a) presumption of no liability
- Plaintiff rebut under 82.008(b)(2)—fraud on gov't. The defendant withheld information relevant to the adequacy of the standard.
- Defendant argues Preemption
- **Held: No preemption because of saving clause in the FMVSS standards**

Preemption & Presumption



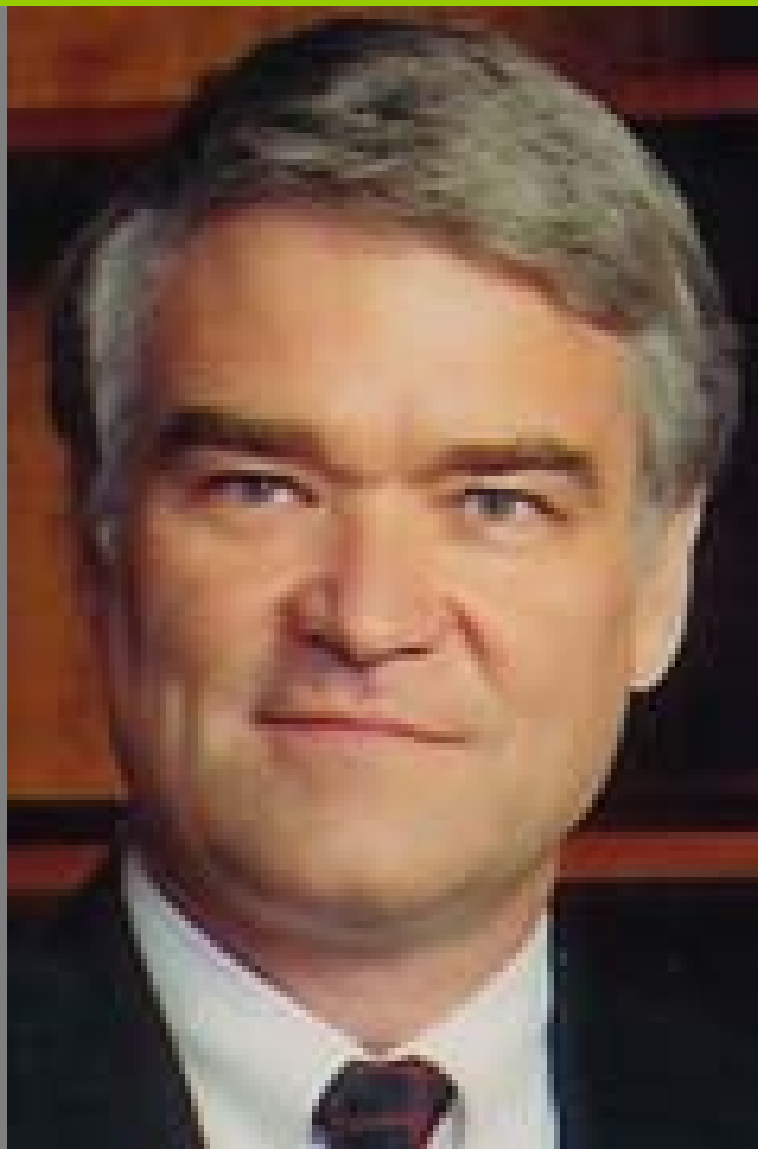
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Asbestos Causation

- *Borg-Warner Corp. v. Flores*, 50 Tex. Sup. Ct. J. 851 (Tex. 2007)
 - Installed Defendant's Brake Pads from 1972-1975
 - 5-7 times per week
 - Pads made 28% asbestos fibers
 - Job was to grind pads, which caused dust in the small room he worked in
 - Inhaled the Dust
 - Verdict, Judgment PI, Affirmed Ct Appeals

Asbestos Causation



Asbestos Causation

- *Borg-Warner Corp. v. Flores*, 50 Tex. Sup. Ct. J. 851 (Tex. 2007)
 - Tx Supreme Ct Reversed & Rendered
 - No Evidence of “Dose” of Asbestos Fibers
 - Thus, Insufficient Evidence of Causation

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- Asbestos Causation
- **Charge Issues**
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Charge Issues:

- How are the Chapter 82 Presumptions Treated in the Charge?
- Submit the Product or the Defendant?
- Is Something Missing from Manufacturing Defect Instruction?

Charge Issue: Presumptions

- *Texas A&M v. Chambers*, (Austin pet. denied)
 - A presumption ‘may not properly be the subject of an instruction to the jury’
 - Its inclusion is improper because the sole effect of a presumption is to fix the burden of producing evidence.
 - A presumption is nothing more than a rule for the guidance of the trial judge in locating the burden of proof of production at a particular time.

Charge Issue: Presumptions

- *Texas A&M v. Chambers*, (Austin, pet. denied)
 - The supreme court explained: “[A] presumption is an artificial thing, a mere house of cards, which one moment stands with sufficient force to determine an issue, but at the next, by reason of the slightest rebutting evidence, topples utterly out of consideration of the trier of facts’
Combined Am. Ins. Co. v. Blanton, 163 Tex. 225, 353 S.W.2d 847, 849 (1962)”

Charge Issue: Presumptions (p.6)

- Section I, c --- Page 6
- Section 74.106(a)(1) States that a presumption in medical malpractice context “shall be included in the charge to the jury”
- Chp 82 Presumptions have no such mandate
- Trial Judges on Both Sides
- No Appellate Decisions Addressing Issue

Charge: Submit Product or Defendant

- PJC:
 - Submit “product” and “defendant” if there is also a negligence question regarding the defendant’s conduct
- Chp 33:
 - claimants, defendants, settlers & RTP
- Restatement
 - Parties in the chain-of-distribution are liable

Charge: Submit Product or Defendant

- *Allied Signal, Inc. v. Moran* (Corpus)
 - Seatbelt Case
 - Two Defendants (Chrysler & Allied Signal) argued the other one was responsible
 - Trial Court Submitted “the seat belt buckle”
 - Defendants Complained
 - Chapter 33 requires all defendants to be submitted in the charge.

Charge: Submit Product or Defendant

- *Allied Signal, Inc. v. Moran* (Corpus)
 - Corpus Christi Court Appeals:
 - Reversed and Remanded
 - Must submit the defendant not the product
 - Only one defendant can be J&S under 33.013(b)
 - Acknowledged this guts Products Law
 - Rehearing Requested

Charge: Submit Product or Defendant

- *Allied Signal, Inc. v. Moran* (Corpus)(*en banc*)
 - “Was there a design defect in the seatbelt buckle...at the time it left the possession of Chrysler that was a producing cause of Moran’s death.”

Charge: Submit Product or Defendant

- *Allied Signal, Inc. v. Moran* (Corpus)(*en banc*)
 - “Was there a design defect in the seatbelt buckle... **at the time it left the possession of Chrysler** that was a producing cause of Moran’s death.”
 - No predicate liability finding as to Allied signal
 - Reversed & Rendered as to Allied
 - Affirmed as to Chrysler
 - Did Not Answer What if Both Had Predicate Liability Findings
 - Allocate?
 - J&S Rules?

Definition of Manufacturing Defect

- **PJC 71.3**
- Was there a manufacturing defect in the automobile at the time it left the possession of ABC that was a producing cause of the injury?
- A “defect” means a condition of the product that renders it “unreasonable 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 products characteristics.

Definition of Manufacturing Defect

- **Defendants Argue:**
- **Defect should include defect element of:**
 - “a physical departure from the product’s intended design that renders it unreasonably dangerous”

Definition of Manufacturing Defect

- Support PJC

- *Ford v. Ledesma*, 173 S.W.3d 78 (Austin—pet. ??????????)

Definition of Manufacturing Defect



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Duty to Indemnify

- **To Defeat Indemnity Must Show the Party Seeking Indemnity had Independent Actions that Caused Harm**
- **Is There Partial Indemnity?**
- **To Seek Indemnity From Component Part Manufacturer—Plaintiff Petition Must Identify a Defect in the Component**

Duty to Indemnify

- *Hudiburg Chevrolet v. GM* (Tex. 2006)
 - Hudiburg, local retailer, installed a service bed on a GM Chassis.
 - Hudiburg settles case.
 - Hudiburg sought Indemnity from GM
 - GM filed MSJ saying Hudiburg is not entitled to indemnity because its own actions.
- **Holding:**
 - A party seeking to defeat indemnity (GM) must show seller's negligence (Hudiburg) was cause

Duty to Indemnify

- Remaining Question:
 - 1% on Hudiburg
 - Hudiburg get 99% Indemnity or Nothing?
- “Without further development of the record, we decline to consider whether or under what circumstances a seller may obtain partial indemnity.”

Duty to Indemnify

- To Seek Indemnity From Component Part Manufacturer—Plaintiff Petition Must Identify to a Defect in the Component

– *R.H. Tamlyn v. School Forest* (p. 15)

Duty to Indemnify

- *Ansell & Burden* (p. 15)
 - Certified Question—Is it good enough to say you will defend for only claims related to your product?
- *Seelin* (p. 15)
 - Manufacture still owes indemnity until the plaintiff abandoned the claims related to the manufacturer's product.

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Seatbelts

- *Hodge v. Mack Truck* (5th Cir)
 - Door Latch Case
 - Court Excluded Seatbelt Evidence
 - Filed Prior to Repeal of 545.413(g)
 - Points out 545 was ratification of prior law
 - Seatbelt evidence not admissible to show contrib.
 - Seatbelt Evid. Admissible in Crashworthiness Case to Rebut Causation

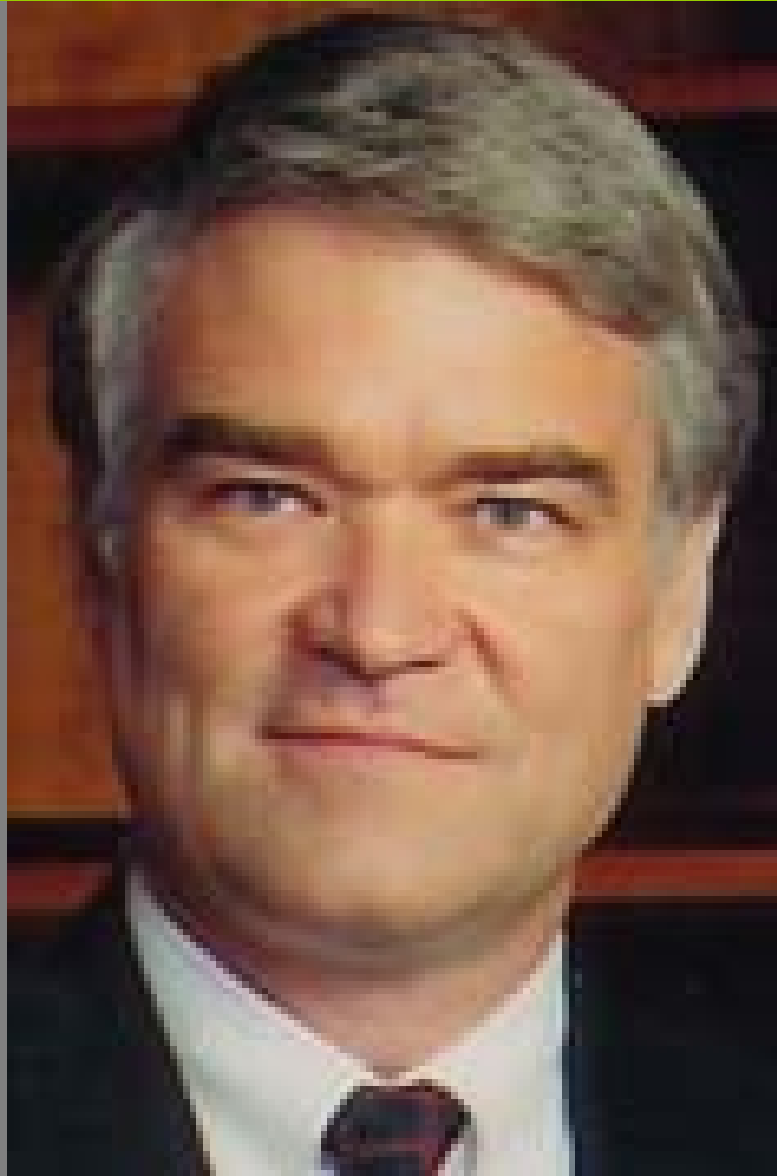
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Apparent Manufacturer Doctrine

- *SSP Partners v. Gladstrong USA*, (p.19)
 - Indemnity Claims against Gladstrong USA
 - Actual Manufacturer was Gladstrong Hong Kong
 - Held:
 - “One who puts out, as its own product, chattel manufactured by another is liable”
 - Appearing to be the manufacturer
 - Where chattel was made specifically for the actor
- Pet. ????????

Apparent Manufacturer Doctrine



82.003: Passive Seller Immunity

- Seller that did not manufacture is not liable
- Unless:
 - Seller participated in design (no causation)
 - Seller Altered or Modified and Caused Injury
 - Seller Installed and Installation Caused Injury
 - Seller substantial control over warnings; warnings inadequate; inadequate warning caused harm
 - Express incorrect representation; relied upon; caused harm

82.003: Passive Seller Immunity

- Seller that did not manufacture is not liable
- Unless:
 - Actual Knowledge Injury Causing Defect
 - Manufacturer Is Not Solvent
 - Manufacturer Is Not Subject to Jurisdiction of the Court

82.003: Passive Seller Immunity

- **Motion to Remand Granted**

- Reynolds v. Ford, 2004 WL 2870079
- Shields v. Bridgestone, 2005 WL 3115463
- Salazar v. Merck, 2005 WL 2875332
- Rape v. Medtronic, 2005 WL 1189826
- Alonso v. Maytag, 356 F. Supp.2d 757 (DTPA Claims)
- Brewer v. Porsche, 2005 WL 292417 (DTPA Claims)
- Skinner v. Cooper Tire, 2004 WL 1171201 (DTPA Claims)

- **Motion to Remand Denied**

- Garcia v. Nissan, 2006 WL 869944
- Lott v. Dutchman, 422 F. Supp.2d 750
- Rubin v. DaimlerChrysler, 2005 WL 1214605

Component Part Marketing Defect

- *Ranger Conveying* (p. 18)
 - Negl, Design & Marketing Claims Conveyor Co.
 - Jury No Design, No Negligence
 - Found Marketing Defect
 - 1st Court Appeals Held:
 - Component Part Manu Must Subst. Participated in Integration OR
 - Component Must Be Defect
 - Neither so Reverse & Render
 - Wrong (Can be defective in Marketing without a Design Defect)

Federal Charge

- *Muth v. Ford* (p. 27)
 - Claims for Roof Crush & Restraint
 - Trial Focused Solely on Roof Crush
 - No Evidence of SAD regarding Restraint
 - General Design Defect Question
 - 5th Cir Affirmed “reasonable certain the ‘yes’ was based upon roof crush claims.”
 - PI does not have to show “same or similar” condition of product if it is not component at issue
 - Not Error to Exclude Photos of CRS & Malibu Testing.



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