PRODUCTS LIABILITY: AN UPDATE ON THE LAW

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PRODUCTS LIABILITY: AN UPDATE ON THE LAW

I. INTRODUCTION
The past couple of years have seen the law of products liability remain relatively stagnant. There have been no significant changes either from the Courts or the Legislature. However, this year, as part of the tort reform package, a bill has been proposed that would substantially change the landscape of products liability law.

II. PROPOSED CHANGES IN PRODUCTS LIABILITY LEGISLATION
Article 5 of House Bill No. 4 (as amended May 30, 2003) is part of a tort reform bill that would greatly assist defendants in products liability cases. It would grant immunity to innocent sellers, provide numerous new defenses, and limit what evidence Plaintiffs can admit in support of their claims.

A. Immunity for Non-Manufacturing Sellers
House Bill No. 4 includes radical changes to the liability of sellers who were not involved in the manufacturing of a product that is the subject of a products liability suit. Under common law, sellers have been held liable in product liability claims, although manufacturers have the duty to indemnify innocent sellers. The Bill would give immunity to a non-manufacturing seller for harm caused to a claimant by a product, unless the claimant can prove:

(1) the seller participated in the design of the product;

(2) the seller altered or modified the product, and the claimant’s harm was caused by that alteration or modification;

(3) the seller installed the product, or had it installed on another product, and the claimant’s harm resulted from the installation or assembled product;

(4) the seller exercised substantial control over the content of the warnings or instructions, and those warnings or instructions were inadequate, that resulted in the claimant’s harm;

(5) the seller made an incorrect express representation regarding an aspect of the product that the claimant relied upon that representation, and, if the aspect of the product had been as represented, the claimant would not have been harmed or would not have suffered the same degree of harm;

(6) the seller actually knew of a defect in the product when sold that caused harm to the claimant; or

(7) the manufacturer of the product is either insolvent or not subject to the jurisdiction of the court.

House Bill No. 4 is designed to protect small businesses that sell products they did not manufacture. Often these small businesses are not in any better a position to absorb the cost of harm done by a product than a plaintiff. Now the sellers would only be liable if they have some culpability, such as altering the product, or if they actually knew the product was dangerous.

The greatest effect of granting immunity to non-manufacturing sellers from the defense perspective may be the effect on forum selection by plaintiffs. Often, plaintiffs assert a products liability cause of action against a local seller to defeat complete diversity, thereby preventing the other defendants from removing the case to Federal Court. With the passage of House Bill No. 4, a plaintiff would have to be able to show that a local defendant has some culpability other than merely putting the product in the stream of commerce. Even if local defendants are named, House Bill No. 4 would strengthen a defense argument for removal based on fraudulent joinder. See Tedford v. Warner-Lambert, 327 F.3d 423 (5th Cir. 2003) for discussion of a recent case addressing fraudulent joinder.

However, from the innocent seller’s viewpoint, a question arises as to exactly how helpful this section will be when viewed procedurally. If a Plaintiff pleads certain exceptions to the immunity, discovery may be requested before a court decides a motion to remand. For example, what acts constitute “participat[ing] in the design” of a product? If a seller has an idea for a new

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1 All references to “House Bill No. 4” or the “proposed legislation” refer to House Bill No. 4 as amended as of May 30, 2003.

2 Section 402A of the RESTATEMENT (SECOND) OF TORTS reads:

   1) one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

      a) the seller is engaged in the business of selling product, and

      b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

3 See TEX. CIV. PRAC. & REM. CODE §82.002.

4 The proposed section pertaining to the grant of immunity to sellers would not apply in a products liability action where the manufacturer’s or seller’s liability is governed by TEX. OCC. CODE ANN. § 2301 et seq. (Vernon Supp. 2003) (dealing with sale or lease of motor vehicles).
product and contacts a manufacturer that makes a similar product, has the seller now “participated” or must it do more, such as providing specifications? Likewise, when has a seller exercised “substantial control” over the content of warnings? Must a seller participate in the wording of the warnings or is simply approving the final version sufficient to meet the exception? Until the parameters of these terms are defined, a seller may still be in the litigation for a substantial period of time.

The same concern exists in a state court products liability case. Presumably, the seller asserts the immunity in its answer and files a motion for summary judgment immediately. In a traditional motion for summary judgment, the seller would attach an affidavit specifically denying the exceptions. Or, it could be filed as a no evidence motion for summary judgment since the Plaintiff has to prove one of the exceptions to negate the immunity. Either way, a Plaintiff may respond to the motion for summary judgment with a response that the Plaintiff needs more time to conduct discovery on certain issues, postponing the seller’s ultimate release from the case. The seller remains in the case, incurring legal fees, and eventually resorts to its traditional recourse, demanding indemnification from the manufacturer.

B. Compliance with Governmental Standards (Proposed Section 82.008)

Another important aspect of House Bill No. 4 from the defense perspective provides that, in a products liability action, there is a rebuttable presumption that a product manufacturer or seller will not be liable for any injury caused by some aspect of the formulation, labeling, or design of a product if the defendant can prove by a preponderance of the evidence that the product’s formulation, labeling or design complied with mandatory safety standards or regulations adopted by the state or federal government, or any agency thereof, that were applicable to the product at the time it was manufactured and that governed the product risk that allegedly caused harm.

Such a presumption of non-liability is rebuttable if the plaintiff can establish that the safety standards applicable to the product were inadequate to protect the public from unreasonable risk of injury or damage or that the manufacturer withheld information relevant to the federal government’s determination or adequacy of the safety standards at issue and was causally related to the claimant’s injury.” In the bill analysis from the House version of the proposed legislation, this exception was designed to cover a situation in which a manufacturer withheld from or misrepresented to the agency material and relevant evidence that was related to the performance of the product and the claimant’s injury. However, this is not what the exception says, or implies.

The troubling language is “the manufacturer . . . withheld information or material relevant to the . . . government’s . . . determination of adequacy of the safety standards or regulations . . . .” This 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. Clearly, this is not what the legislature intended, but is how the bill reads. Interestingly, under the wording of this bill, there is no exception for a manufacturer who does withhold relevant information about the products performance under the standards or regulations.

Importantly, the proposed amendment expressly provides that the provision relating to compliance with government standards would not extend to manufacturing flaws or defects, even though the manufacturer had complied with all quality control and manufacturing practices mandated by the federal government. Further, the proposed amendment does not extend to products covered by Section 82.007 (medicines) of the proposed legislation.

This portion of House Bill No. 4 would effectively nullify the recent Texas Supreme Court decision in Great Dane Trailers, Inc. v. Wells, 52 S.W.3d 737 (Tex. 2001). In Great Dane, an eighteen-wheel tractor trailer manufactured by Great Dane Trailers jackknifed immediately in front of a motorist’s vehicle. The motorist was killed when he collided with the side of the trailer. Id. at 739. The plaintiff, the motorist’s surviving spouse, sued Great Dane, asserting manufacturing, design and marketing defects because the trailer was not equipped with “reasonable or necessary conspicuity devices” to alert drivers. Id. at 740. The trial court granted summary judgment for Great Dane, holding that the Safety Act and Standard 108 expressly and impliedly preempted the plaintiff’s common law conspicuity claims. Id. at that time, Standard 108 required a three-light, three reflector configuration on each side of the trailer. Id. at 739. The plaintiff conceded that the trailer was in compliance with Standard 108. Id. at 740.
While the appeal in *Great Dane* was pending, the United States Supreme Court held that the Safety Act did not expressly preempt state common law causes of action. *Grier v. American Honda Motor Co.*, 529 U.S. 861, 868 (2000). Therefore, the only issue before the Texas Supreme Court in *Great Dane* was whether the plaintiff’s state law claims were impliedly preempted by the Safety Act and Standard 108. *Great Dane*, 52 S.W.3d at 741.

The Court held that the Safety Act and Standard 108 do not impliedly preempt the plaintiff’s causes of action. *Id.* at 744.

Although the Court recognized that it seems counterintuitive that Great Dane could comply with Standard 108, but still be exposed to state tort claims, the preemption analysis dictated its decision. *Id.*

*Great Dane* would not be expressly overruled by the proposed legislation granting manufacturers a defense if they complied with federal or state mandatory safety standards or regulations. However, the case would become moot, because the issue of whether a plaintiff’s claims in such a situation were preempted would be of no consequence. If a manufacturer can prove that it complied with governmental safety standards in formulating, labeling, and designing a product, it would be entitled to the rebuttable presumption provided in Section 82.008 of the proposed legislation without regard to a preemption analysis.

C. Compliance with FDA requirements (Proposed Section 82.007)

House Bill No. 4 also proposes a defense in marketing defect cases involving pharmaceutical products. If a products case alleges that an injury was caused by a failure to provide adequate warnings or information about a pharmaceutical product, House Bill No. 4 would create 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 required by the United States Food And Drug Administration (FDA). The presumption could be rebutted by evidence that:

1. The defendant withheld from or misrepresented to the FDA required information that was relevant to the performance of the product, or that the defendant promoted off label uses of the product;

2. The product was sold or prescribed after the FDA ordered its removal from the market; or

3. The defendant promoted/prescribed the product for an indication not approved by the FDA which resulted in the claimant’s injury.

When faced with an assertion that this presumption is rebutted, a defendant may find protection in a recent United States Supreme Court decision which held that “fraud on the FDA” claims are preempted by the Federal Food, Drug and Cosmetic Act (“FDCA”), *Buckman Co. v. Plaintiff’s Legal Committee*, 531 U.S. 341 (2001).

The plaintiffs in *Buckman* sued a company that assisted in getting bone screws approved by the FDA. *Id.* at 343. The screws were approved under an exception to the normal procedures that allowed approval of “predicate” devices, meaning devices that were on the market prior to the Medical Device Amendments (MDA) to the Federal Food, Drug, and Cosmetic Act. *Id.* at 345. The exception also applies to devices that are shown to be “substantially similar” to ones that were on the market. *Id.*

The defendants had unsuccessfully tried to have the screws approved by the FDA twice under the exception. *Id.* at 346. The screws were not approved until the defendants took out any reference to the screws being used in the spine. *Id.* The plaintiffs were injured by screws inserted in pedicles of their spines. *Id.* at 343. The plaintiffs asserted causes of action that essentially amounted to “fraud on the FDA” claims.

The issue for the Court was whether the FDA preempted the plaintiffs’ “fraud on the FDA” claims. The Court held that the plaintiffs’ claims conflicted with, and are therefore impliedly preempted by, federal law. *Id.* at 348. Among other things, a major factor in the Court’s decision was the fact that the FDA is empowered to investigate and punish fraud on the FDA. *Id.* at 349. The FDA can seek injunctive relief, civil penalties, seize the device and/or pursue criminal prosecution. *Id.* Therefore, the Court held that the plaintiffs’ claims were preempted. *Id.* at 353.

Similarly, the Fifth Circuit, citing *Buckman*, held that the plaintiffs’ state law claims against a manufacturer of a pacemaker are preempted. *Martin v. Medtronic*, 254 F.3d 573, 585 (5th. Cir. 2001). The pacemaker at issue did not go through the abbreviated FDA approval for “predicate” devices, but that did not change the Court’s determination that the plaintiffs’ claims were preempted.

Both *Buckman* and *Martin* deal with preemption of state law claims relating to medical devices, not pharmaceutical products. In fact, both courts held that the plaintiffs’ claims were preempted by the FDCA, as amended by the Medical Device Amendments. Therefore, defendants have no case directly on point that a plaintiff’s state law claim is preempted by the FDCA if the product at issue is a drug. Defendants may argue that the analysis would remain the same, thereby preempting a plaintiff’s “fraud on the FDA” claims.

Further, the amendment proposed in House Bill No. 4 only provides protection for defendants in marketing defect cases. Therefore, plaintiffs could still assert design or manufacturing defect cases against
manufacturers of pharmaceutical products, even if those products were approved by the FDA.

D. Practical Concerns regarding the Use of Sections 82.007 and 82.008 in Trial

Both proposed Sections 82.007 and 82.008 create a presumption in favor of the Defendant. However, the proposed bill is silent as to when the presumption instruction is given to the jury. A Defendant, who presumably wants to talk about the presumption early and often, could argue that it should be given at the beginning of the trial in order to adequately convey to the jury the differing burdens of proof. Under the bill, a manufacturer has to prove that it complied with the standard or regulation, and the Plaintiff then has the burden of proof to establish an exception. Presumably, both parties would want to voir dire and open explaining the presumption.

Another issue arises as to the presumption itself. If given in the jury charge as an instruction, a Plaintiff could argue that any such instruction is a comment on the weight of the evidence. Unlike a spoliation presumption which focuses on a specific piece of evidence, the presumptions in Sections 82.007 and 82.008 govern the liability of a Defendant.

E. Evidentiary Changes to Products Liability Law

House Bill No. 4 proposes two changes to the law of evidence, both favoring defendants. First, the bill requires the Texas Supreme Court to “as soon as practicable” amend TEX. R. EVID. 407(a) to conform that rule to FED. R. EVID. 407.⁵

⁵TEX. R. EVID. 407(a) reads:

Subsequent Remedial Measures. When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent remedial measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership, control or feasibility of precautionary measures, if controverted, or impeachment. Nothing in this rule shall preclude admissibility in products liability cases based on strict liability.

⁶FED. 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. Nothing in this rule shall preclude admissibility in products liability cases based on strict liability.

House Bill No. 4 also proposes to repeal TEX. TRANS. CODE ANN. §545.413(g) (Vernon Supp. 2003) that makes the use or nonuse of a safety belt inadmissible in a civil trial. This change could significantly reduce or bar a plaintiff’s recovery under Texas’ proportionate responsibility scheme.

III. RECENT CASES AFFECTING PRODUCTS LIABILITY LAW

Buckman and Great Dane both discussed in connection with proposed legislation, are two recent cases that have affected the law of products liability. In the last year, there have been other cases that may also have an impact on products liability law.

A. Manufacturer’s Duty to Indemnify

Freeman Financial Invest. Co v. Toyota Motor Corp., 2003 WL 21018967-- S.W.3d -- (Tex. App.—Dallas 2003, no pet.) 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 axel 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.

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 selling the vehicle, nor any proof that Freeman did not sell the vehicle, relieved Toyota of its duty to indemnify Freeman.

In Federal Petroleum Co. v Gas Equipment Co., the defendant, Gas Equipment Company (GEC) procured the product manufactured by Fratelli Pettinaroli, S.P.A., and supplied the same to Federal Petroleum Company (FPC), which in turn sold and installed the product. In the course of a product liability lawsuit, FPC brought suit against GEC, alleging defects in the equipment, and GEC brought a cross-action against FPC for contribution. The trial court entered judgment in favor of FPC. The court found FPC could not recover from GEC because FPC had not complied with the terms of the cross-action.

2003 WL 1923507 (Tex. App.—Corpus Christi, April 24, 2003, no pet. h.).
litigation arising out of a gas explosion, FPC settled with the claimants and filed a cross claim against GEC (the supplier) seeking statutory indemnity under TEX. CIV. PRAC. & REM. CODE §82.002. FPC also alleged that, as an innocent retailer, it was entitled to common law indemnity from GEC as an “upstream supplier.” The trial court granted a summary judgment to GEC on the issue of indemnity. FPC appealed.

FPC did not raise the issue of statutory indemnity under §82.002 on appeal, but focused on its claim for common law indemnity against GEC as an “upstream supplier.” While upholding the trial court’s order in dismissing FPC’s common law indemnity claims, Justice Castillo held that “[U]nder Texas law, the availability of common-law indemnity is extremely limited.” The court went on to hold that “Texas abolished the doctrine of common-law indemnity in negligence cases by adopting a statutory scheme of comparative negligence,” and that:

We decline Federal’s invitation to establish an indemnity right, never before recognized in Texas, that few jurisdictions have embraced. We hold that the trial court’s rulings on the parties’ summary judgment motions can be sustained on the ground that Texas law does not recognize a right of common-law indemnity between a retailer and a supplier who did not also produce a defectively designed or manufactured product.

While common law indemnity against an “upstream supplier” was not recognized in Federal Petroleum, Crane Carrier Co. v. Bostrom Seating., Inc., the Corpus Christi Court of Appeals gave the term “manufacturer” a broad meaning under the Products Liability Act.

In Crane, a garbage truck driver injured in a rollover sued the manufacturer of the truck and the manufacturer in turn brought third party action for statutory indemnity under Section 82.002 against the manufacturer of the driver’s seat and seat belt.

The trial court granted directed verdicts on the issue of indemnity against Crane against which Crane appealed. Bostrom contended that Crane was not entitled to statutory indemnity because Crane is a manufacturer, not a seller and as a manufacturer, Crane cannot seek indemnity from a component parts supplier. In support of its contention, Bostrom relied upon the definition of the term “seller” and “manufacturer,” the rule of “ejusdem generis” and the legislative history of the Product Liability Act. Upholding Cranes’ contention that it is entitled to be indemnified by its component parts supplier, the court observed:

Under the express terms of the Act, Crane qualifies as a seller because it placed the product, the vehicle, in the stream of commerce, and Bostrom qualifies as a manufacturer because it manufactured a component part thereof. There is nothing in

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582.002. Manufacturer’s Duty to Indemnify

(a) A manufacturer shall indemnify and hold harmless a seller against 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.

(b) For purposes of this section, "loss" includes court costs and other reasonable expenses, reasonable attorney fees, and any reasonable damages.

(c) Damages awarded by the trier of fact shall, on final judgment, be deemed reasonable for purposes of this section.

(d) For purposes of this section, a wholesale distributor or retail seller who completely or partially assembles a product in accordance with the manufacturer’s instructions shall be considered a seller.

(e) The duty to indemnify under this section:

(1) applies without regard to the manner in which the action is concluded; and

(2) is in addition to any duty to indemnify established by law, contract, or otherwise.

(f) A seller eligible for indemnification under this section shall give reasonable notice to the manufacturer of a product claimed in a petition or complaint to be defective, unless the manufacturer has been served as a party or otherwise has actual notice of the action.

(g) A seller is entitled to recover from the manufacturer court costs and other reasonable expenses, reasonable attorney fees, and any reasonable damages incurred by the seller to enforce the seller’s right to indemnification under this section.

92003 WL 1923507 – * 3 II IV.

10Id. II 5 (relying on Cypress Creek Util. Serv. Co., Inc. v. Muller, 640 S.W.2d 860, 862 (Tex. 1982)).

11Id. (quoting B&B Auto Supply, Sand Pit, & Trucking Co. v. Central Freight Lines, Inc., 603 S.W.2d 814, 817 (Tex. 1980)).

12Id. at * 4 II 7 (relying on Bradley v. State ex rel. White, 990 S.W. 2d 245, 247 (Tex. 1999) and Weakly v. East, 900 S.W.2d 755, 758 (Tex. App.—Corpus Christi 1995, writ denied)).

1389 S.W.3d 153 (Tex. App.—Corpus Christi, 2002, no pet. h.).

14§ 82.001 (3) “Seller” means a person who is engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component part thereof....

15§ 82.001 (4) “Manufacturer” means a person who is a designer, formulator, constructor, rebuilder, fabricator, producer, compounding, processor, or assembler of any product or any component part thereof and who places the product or any component part thereof in the stream of commerce.
the act that provides that an entity must qualify as either a seller or a manufacturer, but not both. Such a proposition is fundamentally untenable. Manufacturers sell their products. Sellers may or may not be manufacturers, as for example, a car dealership would qualify as a seller but not a manufacturer.\footnote{Crane, 89 SW.3d 153 at 158.}

Relying upon the definition of the term “manufacturer,” the court further refused to apply the doctrine of \textit{ejusdem generis}, holding that it would “not apply statutory rules of interpretation to clear and unambiguous language.”\footnote{Id. (relying on State v. Hodges, 92 S.W.3d 489, 494 (Tex. 2002)).} Accordingly, the court reversed the trial court’s order and sustained Crane’s appeal on the issue of statutory indemnification.

\textit{ASI Technologies, Inc. v. Johnson Equipment Co.}\footnote{75 S.W.3d 545 (Tex. App.—San Antonio, 2002, pet. denied).} involved an interesting situation where the seller and manufacturer of the defective product entered into an agreement to share the damages assessed against them in a products liability case, regardless of their respective liabilities. The jury awarded damages to the claimants, but found no liability on the part of the seller. Seeking to avoid its share of damages under the agreement with the manufacturer, the seller cross claimed for statutory indemnity against the manufacturer. The trial court found that the seller was entitled to indemnity. The manufacturer appealed.

On appeal, the manufacturer contended that the seller had waived its statutory indemnity rights by executing a settlement agreement. The court reversed the trial court’s judgment in favor of the seller.

The court held that the seller waived its statutory right to indemnity from the manufacturer by signing the agreement with the manufacturer whereby the seller committed itself to paying part of the damages regardless of its liability. Even though the agreement did not expressly address waiver, the seller had knowledge of its statutory right to indemnity when it drafted and entered into the agreement, and by the very act of signing the agreement, the seller took clear and decisive action indicating its intent to relinquish its right to indemnity. However, the court noted that:

The duty to indemnify under Section 82.002 applies regardless of how the action is concluded. \ldots\; Presumably, this section contemplates settlement agreements between the plaintiff and defendants.\footnote{Id. at 548.}

\section{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:

\begin{enumerate}
  \item there existed a safer alternative design for the defective product; and,
  \item the defect was a producing cause of the injuries claimed.
\end{enumerate}

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 \textit{American Tobacco Co. v. Grinnell}, 951 S.W.2d 420 (Tex. 1997). In \textit{Grinnell}, the Texas Supreme Court enunciated the following factors relevant to the analysis of whether a product is unreasonably dangerous:

\begin{enumerate}
  \item [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;
  \item 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.
\end{enumerate}

951 S.W.2d at 432.


In \textit{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. 2003 WL 253595, at *1-2. 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. Id. at *1.

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. Id. at *2. 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. Id. 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. Id. at *3. 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. Id. at *4. 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. Id. at *4-6.

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. Id. at *5. It also noted that technological feasibility was shown by the very fact that the hip lever release design was in use in Toyota vehicles. Id. 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. Id.

In support of this somewhat puzzling holding, the court cited *Jaimes v. Fiesta Mart*, 21 S.W.3d 301, 306 (Tex. App.—Houston [1st 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. 21 S.W.3d at 306. 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. Id. The record also showed it was not economically feasible due to the dramatic difference in price between latex and mylar. Id. 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. 2003 WL 253595, at *5 (citing *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 337 (Tex. 1998)). 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 the belt, a safety advantage that would be lost with the hip lever design. Id. at *5-6. 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. Id. at *6-7.

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 is not enough to establish economic feasibility, counter-intuitive as the proposition may be. Plaintiffs will be forced to retain, in addition to technical experts, highly sophisticated economics or financial experts who can rigorously prove, through a difficult subjective analysis of the defendant’s financial capabilities, that an alternative design is economically feasible for the defendant.

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. filed). The crux of the claim was that the lighter was defective in design because it was not childproof. Id. Summary judgment was granted to Kroger, and the plaintiffs appealed. Id. 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. Id. at 645-46. 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.

Id. at 646. 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. Id. 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. Id. at 647.

In Lattrell v. Chrysler Corp., the court conducted a fairly routine evaluation of whether summary judgment against the plaintiff was proper on her claim 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. Id. 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. Id. at 148-49.

C. Evidence in Products Liability Cases

A recent case out of Houston’s 14th Court of Appeals may assist defendants in obtaining summary judgments in toxic exposure cases. In Frias v. Atlantic Richfield Co., the plaintiffs, surviving family members of Jesus Frias, brought suit claiming that Jesus Frias died of aplastic anemia caused by exposure to benzene during his employment at a refinery. Frias v. Atlantic Richfield Co., 2003 WL 21087121 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). The defendants filed a motion for summary judgment, arguing that there is no evidence that the levels of benzene to which Frias was exposed were sufficient to cause his death from aplastic anemia.

The Court noted that causation in toxic tort cases requires both general and specific causation. Id. at *2.
General causation is whether a substance is capable of causing a particular injury, while specific causation is whether the substance actually caused a particular individual’s injury. In this regard, an unsupported expert opinion, based only on credentials and subjective opinion, will not suffice to prove causation.

*Id.* The plaintiffs’ evidence consisted of two affidavits, one from a licensed physician who is a board certified internist, and the other from an industrial hygienist. As evidence of general causation, the physician cited studies showing a correlation between benzene exposure and aplastic anemia. The Court held that it was not apparent from the affidavit, or the attached studies, that the relative risk figure calculated in the studies had a confidence level of 95% as required by *Havner.* *Id.* at *4. Therefore, the affidavit was not scientifically reliable evidence of general causation.

The Court went on to hold that the plaintiffs had not presented any evidence of specific causation. The affidavits state Jesus Frias had “frequent contact” with and “regular use” of benzene containing products, “significant vapor hazard,” and “dangerously high” levels of benzene exposure. A portion of the industrial hygienist’s affidavit stated the Frias “was consistently exposed to benzene levels in the 10 to 20 ppm range … and that he had regular exposures above 100 ppm … [with] occasional peak exposures … approaching 1000 ppm.” *Id.* at *4. The Court held that terms like “consistently,” “regular” and “occasional” are too speculative and vague to be considered evidence of specific causation. *Id.* at *4. Therefore, the Court affirmed the summary judgment granted for Defendants.

In another case, in which petition for review has been granted, the Court of Appeals held that plaintiffs’ eye witness affidavit was enough evidence of a manufacturing defect to survive a no evidence motion for summary judgment. *Ridgeway v. Ford Motor Co.,* 82 S.W.3d 26 (Tex. App.—San Antonio 2002, pet granted). Plaintiff Jack Ridgeway was injured when his 1995 Ford F-150 burst into flames while he was driving it. *Id.* at 28. Ridgeway and his wife sued Ford, asserting a manufacturing defect claim. *Id.*

The Court noted that eye witness testimony alone has been held sufficient to raise a fact issue in a manufacturing defect case. *Id.* at 30 (citing *Sipes v. General Motors*, 946 S.W.2d 143, 156 (Tex. App.—Texarkana 1997, writ denied)). The plaintiffs submitted an affidavit by Jack Ridgeway in which he averred that he saw flames in his rear view mirror curling around the cab of the truck. *Id.* at 30. The Court, applying *Sipes*, held a fact issue may be found on Ridgeway’s testimony alone. The Court went on to note that the plaintiffs “ventured a step further than *Sipes*” and substantiated Ridgeway’s account with expert testimony.

If presented with similar facts, defendants may still argue that an eyewitness affidavit alone is not enough to prove a manufacturing defect, or to even survive a no evidence summary judgment, because the Court in *Ridgeway* also relied on the expert affidavit submitted by the plaintiffs in its holding that plaintiffs had more than a scintilla of evidence of a manufacturing defect. *Id.* at 31.

**D. Marketing Defect Cases**

1. **Plaintiff’s Perspective**

Two recent cases demonstrate from a plaintiff’s perspective the principle that, when a warning is absent on a product in which there was a duty to warn, there is a rebuttable presumption that a plaintiff would have heeded the warning had it been present.


Tompkins was a sandblaster for an 18-year period spanning the 1960’s through the 1980’s, and was deceased at the time of this appeal. *Id.* at 607. At these jobs, Tompkins used bags of sand supplied by U.S. Silica (or its predecessor corporations). *Id.* at 608. During the 1960’s and 1970’s, there were no warnings of lung silicosis placed on those bags. *Id.* During the late 1970’s and 1980’s, warnings began to be placed on bags, such as this one: “Use only with government approved face mask. Warning: Contains free silica. Do not breathe dust. May cause delayed lung injury silicosis.” *Id.*

The court laid out the principle that when a warning is absent, there is a rebuttable presumption that plaintiff would have heeded such warning if present. *Id.* (citing *American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 431 (Tex. 1997)). Defendant may rebut by showing that plaintiff disregarded whatever warnings were present, and therefore would likely not have heeded the proposed warning. *Id.* U.S. Silica argued that because Tompkins “did not notice” the warnings on the bags in the 1980’s, he likely would not have heeded such warnings had they been on the bags in the 1960’s and 1970’s. *Id.* However, the court was unconvinced that the 1980’s warnings were objectively noticeable, based on one witness’ testimony that the warnings were in very small print on very large bags and could hardly be seen. *Id.* at 609. Based on this, the court found the evidence legally and factually sufficient to support the jury award. *Id.*

U.S. Silica had also contended that the plaintiffs had failed to rule out smoking as a cause of the injury and death of Tompkins, thus failing to prove that the silica was a producing cause of the injury. *Id.* at 611. The court decided that a cause need not be the sole cause in order to be a producing or proximate cause, and that there was sufficient evidence from expert testimony that smoking alone could not have caused the lung damage; there was a combination of both emphysema
and silicosis, and the lung could not have deteriorated so rapidly if it was exposed to smoking alone. Id. at 611-12. Judgment for the plaintiffs was affirmed.


Plaintiffs sued on behalf of their minor son, who received severe head injuries during a car collision, when he flew into the passenger side air bag. Id. at 497. 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. Id. at 503-04. 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. Id. at 504. 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. Id. However, the court found conflicting evidence as to whether the danger of airbags to children in the front seat was common knowledge in 1994. Id.

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. Id. at 505. The defendants countered that the plaintiffs did not follow even the allegedly inadequate warning, and thus the presumption should be rebutted. Id. The court found that whether the small and terse warning on the visor, “An inflating air bag can seriously injure small children,” was adequate or not was a fact issue, because many parents may not consider a child of seven years to be “small.” Id. 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. Id. The court reversed the summary judgment granted to defendants, and remanded for trial on this point. Id. at 506.

2. Defense Perspective

There appears to be only one recent case of note demonstrating the duty to warn theory of products liability from the defense perspective. See Coleman v. Cintas Sales Corp., 100 S.W.3d 384 (Tex. App.—San Antonio 2002, no pet. h.).

In this case, Coleman was a groundskeeper at a golf course, who was wearing a standard uniform supplied by a company to his employer. Id. at 385. 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 re-ignite and burn until a supervisor smothered him with other clothes and extinguished the flames. Id. at 385-86. 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. Id. at 386.

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. Id. 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, and be difficult to put out. Id. As such, the defendant had no duty to warn Coleman as a matter of law, and summary judgment was affirmed for the defendant. Id. at 387.

E. Assorted Technical and Procedural Issues in Products Liability Cases

1. Economic Loss Doctrine

In Murray v. Ford Motor Co., 97 S.W.3d 888 (Tex. App.—Dallas 2003, no pet.), the court considered an appellant’s claim that damage to his personal property under a strict liability theory was not barred by the economic loss doctrine. Murray was the owner of a Ford truck, which burst into flames, destroying not only the truck but also over $400 of personal property inside the truck. Id. at 890. On appeal from summary judgment granted to Ford, the court affirmed that the economic loss rule precludes recovery in tort for purely economic damages, or else every breach of warranty or contract claim could be transformed into a negligence or strict liability action. Id. at 891. As such, Murray could not recover for the value of the truck by alleging products liability based on defective electrical wiring design. The court reversed as to the damage to the other personal property, however, and remanded on the grounds that Murray had amended his claim to include the loss of the personal property after Ford filed its summary judgment motion, and thus summary judgment on all claims was improper. Id. at 892.

2. Forum Non Conveniens

The Fifth Circuit upheld the district court’s refusal to exercise jurisdiction in two separate yet similar cases involving Mexican plaintiffs, on the ground of forum non conveniens. Gonzalez v. Chrysler Corp., 301 F.3d 377 (5th Cir. 2002) and Vasquez v. Bridgestone/Firestone, Inc., 325 F.3d 665 (5th Cir. 2003).
In *Gonzalez*, the plaintiff brought about a product liability suit against Chrysler Corp., an automobile manufacturer and the designers of the air bag fitted in the car. The car was involved in a collision which resulted in the air bag deploying, the force of which killed the plaintiff’s three year old son. Neither was the car nor the air bag module designed in Texas. The car was purchased in Mexico, the accident involved Mexican citizens and the accident occurred in Mexico. The plaintiff asserted Texas federal jurisdiction claiming that he was lured by several advertisements for the car while in Houston, Texas, in 1995. After shopping for the car in Houston, the plaintiff purchased one in Mexico. The district court granted the defendants’ motion for dismissal on the grounds of forum non conveniens against which the plaintiff appealed.

The Fifth Circuit reviewed the four considerations for an action involving forum non conveniens.

First the district court must assess whether an alternative forum is available...Second, the district court must decide if the alternative forum is adequate.

The court further observed that if an alternate forum is both available and adequate, it must consider private interest factors, and if the private interest factors favor against dismissal, the court must consider “numerous public interest factors. . . . If these factors weigh in the moving party’s favor, the district court may dismiss the case.”

On appeal, Gonzalez contended that Mexican law did not permit strict liability in tort actions involving product liability and further Mexican law imposed severe limitations on recovery of tort damages which would not make it economically viable to pursue the action in Mexico. Therefore, the alternative forum was inadequate.

The court negated Gonzalez’s first contention that Mexican jurisdiction was inadequate because it did not recognize strict liability in tort actions involving product liability. The court relied on the decision in *Piper Aircraft Co. v. Reyno*, where the Supreme Court held that “Scotland’s failure to recognize strict liability did not render Scotland an inadequate alternative forum”.

Regarding Gonzalez’s second contention that as Mexican law limits the damages recoverable, it would not be viable to pursue litigation in Mexico, W. Eugene Davis, Circuit Judge observed:

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20*Gonzalez*, 301 F.3d 377 at 379 relying on *Alpine View Co. Ltd. v. Atlas Copco* AB, 205 F.3d 208, 221 (5th Cir. 2000).
21*Id.* (relying on *Alpine View*, 205 F.3d at 221).
22*Id.* at 380.
23*Id.* at 380-381.
25*Id.* at 255.
26Mexico, as a sovereign nation, has made a deliberate choice in providing a specific remedy for this tort cause of action. In making this policy, the Mexican government has resolved a trade-off among the competing objectives and costs of tort law, involving interests of victims, of consumers, of manufacturers, and of various other economic and cultural values. In resolving this trade-off, the Mexican people, through their duly-elected lawmakers, have decided to limit tort damages with respect to a child’s death. It would be inappropriate --even patronizing-- for us to denounce this legitimate policy choice by holding that Mexico provides an inadequate forum for Mexican tort victims.

The Fifth Circuit proceeded to uphold the district court’s determination that “there are no public or private interest factors that would suggest that Texas is the appropriate forum” for the trial of the case.

The case in *Vasquez* presented similar facts, where survivors of car accident victims sued the tire manufacturer in the Texas courts. The car involved in the accident and the tires were manufactured, purchased and maintained in Mexico. The accident involved Mexican citizens and took place in Mexico. The district court dismissed the action on grounds of forum non conveniens, holding that Mexican law would govern.

On appeal, the plaintiffs contended that the documents relating to the design and manufacture of the vehicle tires were located in the United States, warranting U.S. jurisdiction, and thus the district court erred in dismissing the suit on grounds of forum non conveniens.

Refusing to accept the plaintiffs’ contention, the Fifth Circuit observed:

The linchpin of plaintiffs’ argument --the alleged wrongful act was the original design of the vehicle and tires-- reaches back too far in the accident’s causal chain. Identifying the situs of the wrongful conduct as an American designer’s drawing board ignores the production, sale, and alleged failure of the product, which all occurred in Mexico. If accepted, plaintiffs’ argument would curtail the rights of foreign governments to regulate their internal economies and threaten to engulf American courts with foreign claims[.]
The court negated the plaintiffs’ choice of law argument, observing:

A federal court sitting in diversity applies the conflict-of-laws rules of the state in which it sits. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed.1477 (1941). Texas applies the ‘most significant relationship’ test, *Gutierrez v. Collins*, 583 S.W.2d 312, 318-19 (Tex. 1979), which considers various contracts, the place where the injury occurred, the place where the injury causing conduct occurred, the parties’ residence, and the place where the relationship, if any, between the parties is centered.29

Relying on *Gonzalez*, the court went on to hold that “uniformity, predictability, and accommodation of the competing policies of the two nations favor applying Mexican law.”30 The court concluded by vacating the forum non conveniens dismissal and remanding the case with an instruction to add a “return jurisdiction clause” to the judgment, and enjoining the plaintiffs from re-litigating the court’s choice of law determination.31

3. **Equity Considerations in Removal and Remand Decisions**

While House Bill No. 4, may largely resolve the issue of forum selection by plaintiffs through joinder of non-diverse local defendants, one recent case out of the Fifth Circuit is another weapon in defense against such joinder.

Section 1446(b) of Title 28 provides that a case may not be removed under diversity jurisdiction more than one year after commencement of the action. In *Tedford v. Warner-Lambert*, a plaintiff who had joined a local physician as a defendant agreed to nonsuit the defendant prior to the expiration of one year, but post-dated the nonsuit and did not notify the defendant until after the one year anniversary. 327 F.3d 423, 425 (5th Cir. 2003).

Soon after learning of the nonsuit, and ten days after the one year anniversary, Warner-Lambert again sought to remove the action to federal court. The plaintiff moved to remand, claiming that the one year limitation in Section 1446(b) barre[d] the removal. The defendants argued that the plaintiff’s “pattern of forum manipulation—particularly her eleventh-hour joinder and then nonsuit of Dr. DeLuca—justified application of an equitable exception to the one-year limit on removal.”

*Id.* at 428 [footnote deleted].

The Fifth Circuit, in holding that the plaintiff was estopped by equity considerations from seeking remand on the basis of Section 1446’s one year limitation, noted that:

Tedford’s forum manipulation justifies application of an equitable exception in the form of estoppel. In enacting § 1446(b), Congress intended to “reduc[e] opportunity for removal after substantial progress has been made in state court.” Congress may have intended to limit diversity jurisdiction, but it did not intend to allow plaintiffs to circumvent it altogether. Strict application of the one-year limit would encourage plaintiffs to join non-diverse defendants for 366 days simply to avoid federal court, thereby undermining the very purpose of diversity jurisdiction.

*Id.* at 428 [footnote deleted].

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29 *Id.*
30 *Id.* at 675.
31 *Id.* at 681.