PRODUCTS LIABILITY UPDATE 2014

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CHAPTER 2

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PRODUCTS LIABILITY UPDATE 2014

During the past year, significant developments in products liability law occurred, running the gamut from jurisdictional and preemption issues to pretrial and trial issues, such as expert discovery disputes, peremptory challenges, and post-trial settlement credit disputes. 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 and in federal cases, including appeals at the Fifth Circuit 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.

Litigants also are continuing to sort out issues created over a decade ago in 2003, when the Texas Legislature passed House Bill 4. As a general matter, 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).

This paper contains a case law update that first outlines and reviews Texas Supreme Court opinions issued this year, including the *Kia Motors Corp. v. Ruiz* case, which addressed several products liability issues to include interpretation of the statutory presumption found in Texas Civil and Practice and Remedies Code §82.008. Section II of the paper then discusses recent federal decisions regarding preemption with respect to generic drug manufacturers in pharmaceutical litigation. Section III analyzes recent Fifth Circuit rulings in favor of injured consumers seeking redress for injuries from defective products manufactured by foreign entities. Section IV discusses a Fifth Circuit unpublished opinion dealing with statute of limitations and the discovery rule. In Section V, the paper summarizes two intermediate appellate court decisions that have been granted review by the Texas Supreme Court. Last, the paper reviews the most important state appellate court opinions and federal district court decisions dealing with products liability over the past year.

I. 2014 TEXAS SUPREME COURT OPINIONS

A. *Kia Motors Corp. v. Ruiz,* 57 Tex. Sup. Ct. J. 375 (Tex. 2014).

In March of this year, the Texas Supreme Court issued its opinion in ***Kia Motors Corp. v. Ruiz***, which ruled against the Plaintiffs, overturning a jury verdict and remanding the case for a new trial.

1. Background

On January 16, 2006, Andrea Ruiz and her daughter Suzanna were involved in a head-on collision with a pick-up truck driven by Harvey Tomlin. Andrea was driving a 2002 Kia Spectra that she and her husband owned, and Suzanna was riding in the front passenger seat. During the collision, Suzanna's air bag deployed, and she escaped with only minor injuries. Andrea's air bag, however, did not, and she died at the scene of the accident from two dislocated vertebrae in her neck. In an ominous first footnote of the opinion, the Texas Supreme Court noted that the air bag "warning light" had switched on nearly a week before the accident and remained on until the accident, but that the Ruizes had not serviced the vehicle before the accident.

The Ruizes filed suit against Kia Motors Corporation and Kia Motors America, Inc., asserting, in part, that the 2002 Spectra air-bag system was defectively designed and that this defect resulted in the failure of the driver's side air bag to deploy during the collision.[1] At the jury trial against Kia, the Ruizes asserted the negligent design claim[2] based on the premise that defective wiring connectors in the air-bag system produced an open circuit that caused the air bag to fail. Eight days before the accident, Lawrence Ruiz installed a new radio/CD player in the KIA. During trial, Kia contended the radio Lawrence had installed in the Kia may have caused the open circuit.

The jury found in favor of the Ruizes, concluding, in part, that Kia negligently designed the automobile's air bag system, which was a proximate cause of Andrea Ruiz's death and that Kia was grossly negligent. In addition, the jury determined that Tomlin's negligence was also a proximate cause of Andrea's injuries, but that Lawrence Ruiz's negligence, if any, was not a proximate cause of her

[1] The Ruizes also brought a negligence claim against the other driver, Mr. Tomlin, with whom they settled prior to trial.

[2] Although the Ruizes also originally asserted a strict-liability claim against Kia, the jury charge only included a negligence question.

injuries. The jury apportioned forty-five percent of responsibility for Andrea's injuries to Kia and fifty-five percent of responsibility to Tomlin and awarded the Ruizes $1, 972, 000 in compensatory damages and $2, 500, 000 in exemplary damages.

After the jury trial had concluded, the trial court denied Kia's motion for judgment notwithstanding the verdict. In addition and due to the fact that the jury was not unanimous in finding Kia negligent, the court disregarded the jury's gross negligence and punitive-damages findings, reducing the amount of actual damages recoverable from Kia by its percentage of responsibility to award the Ruizes $887,400 in damages, plus costs and pre and post judgment interest. The court of appeals affirmed. *See* 348 S.W.3d 465.

2. Statutory Presumption found in TEX. PRAC. & REM. CODE § 82.008

In its opinion, the Supreme Court first addressed Kia's argument that the trial court erred by refusing to apply the statutory presumption of nonliability found in Texas Civil Practice and Remedies Code § 82.008(a). This statute 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.[3] 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.[4] 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."[5] The claimant may rebut this presumption by proving that "the mandatory federal safety standards or regulations applicable to the produce were inadequate to protect the public from unreasonable risks of injury or damage."[6]

Kia argued that the trial court should have applied this presumption because the design of the 2002 Kia Spectra in question purportedly contained an air bag system in compliance with Federal Motor Vehicle Safety Standards ("FMVSS") 208, which was prescribed under the National Traffic and Motor Vehicle Act of 1966, as amended. FMVSS 208, requires that vehicles manufactured on or after September 1, 1997, have both a front driver's side and passenger's side air bags.[7] To comply with FMVSS 208, the manufacturer must meet certain measuring standards concerning various injury criteria and the protection provided by the air bags to dummy passengers of the vehicle during crash tests.[8]

The Supreme Court first noted that because there was no dispute that FMVSS 208 was applicable to the Spectra and its air-bag system at the time of manufacture, the Court would not address the second prong of the analysis. Accordingly, whether or not Kia would receive the nonliability presumption hinged on two issues:

a) did FMVSS208 qualify as a mandatory safety standard with which the product complied; and
b) did FMVSS208 govern the product risk that allegedly caused the harm.[9]

The Court then addressed each issue in turn.

a. Safety Standard

With respect to whether the Spectra's air bag system complied with a mandatory federal safety standard, the Court addressed the plaintiffs' two arguments that the first prong of this presumption was not satisfied. First, the Court agreed with the Court of Appeals that the testimony and exhibits at trial established that the 2002 Spectra's design complied with FMVSS 208. Second, the Court addressed the Ruizes' argument that compliance with the FMVSS 208 was immaterial because the regulation is a "performance" standard, not a "design" standard. The Court disagreed, finding that the plain language of section 82.008 supports Kia's interpretation because it states that the product's design must comply with federal "safety" standards or regulations. The Court then pointed out that the Federal Motor Vehicle *Safety* Standards are indeed "safety" standards, so whether the safety standard specified a design or not was immaterial. Thus, the Court concluded that Kia had satisfied the first prong of section 82.008 (a).

b. Product Risk that Allegedly Governed the Harm

The Court started out discussing two Fifth Circuit cases that have addressed the nonliability presumption: *Wright v. Ford Motor Co.,* 508 F.3d 263

[3] *See* TEX. PRAC. & REM. CODE § 82.008(a).

[4] *Id*.

[5] *Id.*

[6] *Id.* at § 82.008(b)(1).

[7] 49 C.F.R. § 571.208, S4.1.5.1(a)(1), S4.1.5.3.

[8] *Id.* § 571.208, S5.1, S6.

[9] TEX. PRAC. & REM. CODE § 82.008(a).

(5th Cir. 2007) and *Trenado v. Cooper Tire & Rubber Co.*, 465 F. App'x 375 (5th Cir. 2012). While both cases found against the plaintiffs on the issue of whether the particular safety standard governed the product risk that allegedly caused the harm, the Supreme Court agreed with the 5th Circuit's reasoning in both cases that section 82.008 demands that the safety standard at issue govern the product risk rather than the specific product defect, stating that such an analysis requires a *close* examination of both the product risk resulting from the purported design defect and the parameters of the regulation at issue. In the *Kia Motors* case, the Court noted, "the Ruizes alleged that the air bag's defectively designed wiring harness rendered it prone to open circuits and the air bag's corresponding failure to deploy when it should have."[10] The Court reasoned that FMVSS 208 concerns measurements of how well the vehicle's air bags and other restraint systems protect passengers. However, "the test *presumes* air bag deployment."[11] Thus, the test does not evaluate the air bag failure rate, which was the risk that was at issue in the case.

The Court observed Kia had conceded that FMVSS 208 does not test for reliable deployment, but instead had argued in its post-submission brief that to the extent the standard is inadequate to protect the public from the risk of injury, section 82.008(b)(1) provides the plaintiff with the chance to rebut the nonliability presumption. Disagreeing, the Court pointed out that there is a "significant difference…between an inadequate standard and a standard that simply does not contemplate the risk at issue."[12] Accordingly, the Court concluded FMVSS 208 did not govern the product risk (the failure of the air bag to deploy) that caused the harm.

This portion of the Court's holding is especially significant for Plaintiffs' attorneys because it demonstrates how critical the allegations and framing of the risk are in products liability cases in Texas. Indeed, 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. A careful and detailed analysis of the safety standard or regulation invoked by the Defendant is crucial to determine whether it is appropriate to create the rebuttable presumption in the first place.

3. Evidence of Negligent Design

Kia also argued that even if the statutory presumption did not apply, the evidence supporting the jury's finding on negligence was legally insufficient. During trial, the parties agreed the air-bag should have deployed and the reason the air bag did not deploy was that there was an "open circuit" in the wiring harness, or in other words, that a deficiency in the wiring "interrupted the flow of electricity through the harness."[13] The Ruizes' trial theory was that two defectively designed connectors within the wiring harness were the cause of the "open circuit."

On appeal, Kia contended the Ruizes' expert, Geoffrey Mahon, "failed to identify the specific defect that caused the open circuit and failed to rule out possible sources of the open circuit other than the two connectors."[14] With respect to the first of Kia's two contentions, the Court disagreed, pointing out that Mahon's testimony demonstrated his conclusion that the cause of the open circuit was the connector to either the air-bag module or the clock spring. Not only did Mahon identify several deficiencies in the designs of these two connectors by comparing them to alternative designs by Packard Electric and Volkswagen in model-year 2002 vehicles, but also Mahon eliminated other causes, such as the Airbag Diagnostic Unit ("ADU"), the clock spring, the module, and the wiring. Mahon also explained the deficiencies in how the Kia module connector locked into place with tabs on only one side, which allowed for a "'bit of motion that you can generate on [the other] side,' which can cause the connector to 'vibrate out' and cause a loss of electrical connectivity."[15] Mahon also disapproved of the Kia clock-spring connector in comparison to the Packard and Volkswagen clock spring connectors, which both had additional locking devices that the Kia's clock spring connector lacked. In addition, Mahon pointed out the Packard clock spring connector included a larger metal surface than the Kia connector did, which afforded a greater chance that good "metal-to metal contact" would exist.[16] Moreover, Mahon opined in his testimony that the "alternative designs were safer as well as technologically and economically feasible at the time the 2002 Spectra was designed, as they were in production in other vehicles."[17] If Kia had utilized either of these designs, Mahon concluded, then the risk of the open circuit that occurred during

[10] *Kia Motors Corp. v. Lawrence Ruiz, et al*, 57 Tex. S. Ct. J. 375, 380-381 (Tex. 2014).

[11] *Id.* at 381.

[12] *Id.*

[13] *Id.* at 382.

[14] *Id.* at 383.

[15] *Id.* at 383.

[16] *Id.*

[17] *Id.*

the Ruizes accident would have been significantly reduced.

The Court rebutted Kia's argument on appeal that the only evidence of a defect was product failure, discussing *Cooper Tire & Rubber Co. v. Mendez,* 204 S.W.3d 797, 807 (Tex. 2006), a tire manufacturing defect case in which the Court held that "Texas law does not generally recognize a product failure standing alone as proof of defect." The Court pointed out that the expert in *Cooper Tire,* as opposed to the expert in this case, had several deficiencies in his testimony, "including the novel nature of the theory that wax contamination is a cause of tread separation and the lack of general acceptance in the scientific community that theory….," among other things.[18] The Court similarly distinguished the Ruizes case from the *Ford Motor Co. v. Ridgway,* 135 S.W.3d 598 (Tex. 2004) case, pointing out that in that manufacturing defect case, the plaintiff's expert "'could say no more than that he 'suspects' the electrical system caused the fire'" in the truck while the plaintiff was driving it.[19] In the case against Kia, by contrast, the Court acknowledged Mahon's testimony "did not suffer from these types of shortfalls."[20]

The Court next addressed Kia's second argument: that Mahon's testimony was legally insufficient because he did not rule out a third connector, the "ADU" connector, or a manufacturing defect in the module or clock spring connector as possible culprits of the open circuit. The Court disagreed, explaining first that Mahon's testimony concerning the fact that he and Kia's consulting expert found nothing wrong with the driver's side circuit wires while they were attached to the connector along with the experts' "triggering the intermittent open circuit during testing that did not involve the ADU connector" together comprised some evidence that the ADU connector was not the cause of the open circuit that resulted in the failure of the air bag to deploy.[21] The Court also disagreed with Kia's assumption that the fact that the air bag failed to deploy was in and of itself evidence of a manufacturing defect the plaintiffs were called upon to disprove. Significantly, the Court pointed out it had "never held that a manufacturing defect must be ruled out in all design-defect cases, or vice versa."[22] Instead, the Court noted, it had merely determined an expert should rule out any other "*plausible* causes."[23] The Ruizes presented evidence that a design defect caused the open circuit. Thus, the Court refused to reverse the jury's finding based on any failure by the plaintiffs' expert to exclude a manufacturing defect as a possible cause of the open circuit.

4. Evidentiary challenge

Last, Kia challenged the admission into evidence at trial of an exhibit containing a spreadsheet describing all the 2002 warranty claims involving a short or open circuit in a frontal air bag in Spectra and similar Kia vehicles. This spreadsheet had been prepared by Kia in response to a discovery request made by the Ruizes. The spreadsheet summarized and listed 432 paid warranty claims, of which 67 warranty claims concerned the code 56 problem at issue in this case. The trial court admitted the evidence over Kia's objections on hearsay and relevancy grounds. The court of appeals held admission of the evidence did not constitute an abuse of discretion because:

a) the sections of the spreadsheet concerning the code 56 claims qualified as admission by party-opponent under Texas Rule of Evidence 801;
b) Kia had waived any error regarding the remaining portions of the spreadsheet by failing to request a limiting instruction; and
c) regardless, any error in admitting the spreadsheet was harmless.

The Texas Supreme Court disagreed with the court of appeals, attacking its decision from various angles. First, the Court criticized the court of appeals for "appear[ing] to hold that, if one portion of a document is admissible, and another portion is inadmissible, a party must request a limiting instruction to preserve error in the admission of the improper portion," a conclusion which the Court stated "mischaracterizes the nature of a limiting instruction…."[24] Second, the Court stated even if the code-56 warranty claims were not hearsay, Texas Rule of Evidence 402 still required such information be relevant, a requirement which the court of appeals failed to discuss in its opinion. Although Kia's corporate representative testified at trial about information contained in the code-56 claims portion of the spreadsheet, the Court held Kia did not waive its relevance complaint about the trial court's admission of the spreadsheet because Kia objected to admission of the evidence of the warranty claims multiple times.

[18] *Id.* at 384

[19] *Id.* (citing *Ridgway,* 135 S.W.3d at 600-01).

[20] 57 Tex. S. Ct. J. at 384.

[21] *Id.* at 384.

[22] *Id.* at 385.

[23] *Id.*

[24] *Id.* at 385.

Citing to *Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 138 (Tex. 2004), which held that evidence of other incidents concerning a product may be relevant if the incidents "occurred under reasonably similar (though not necessarily identical conditions)," the Court pointed out that even the plaintiffs "effectively" conceded in their briefing that the claims on the spreadsheet that did not involve the code 56 were not relevant. Instead, the Ruizes apparently argued only that any error in admitting such information was harmless. Thus, the Court noted, this "significant" concession meant it was undisputed that nearly eighty-five percent of the claims on the spreadsheet admitted into evidence were irrelevant.

With respect to the code 56 claims on the spreadsheet, the Court agreed with Kia that some (but not all) of even those claims were not sufficiently similar to the Ruizes' claims to be considered relevant. The Court stated: "[g]iven that the alleged defect here involves the design of the connectors at the clock spring and air-bag module, a particular code-56 warranty claim must at least implicate one of the connectors as the source of the open circuit."[25] The Court stated it did not matter what purpose the claims were offered to show– whether defect, Kia's notice of open circuits, or to rebut Kia's contention that Lawrence Ruiz's replacement of the radio caused the open circuit – the trial court erred in admitting the spreadsheet because the claims that did not involve a code 56 claim and the code-56 claims that did not concern the module connector or the clock-spring connector were all irrelevant.[26]

The Court then concluded that the trial court's admission of the spreadsheet was reversible error, primarily because "the record…demonstrates significant emphasis throughout trial on the overwhelming number of claims that were not relevant."[27] The Court considered the trial court's admission of the evidence to be harmful error despite the fact that, as the court of appeals pointed out and the Supreme Court *agreed*, the spreadsheet was not the only evidence of a defect. To support this unusual conclusion, the Court noted that: (1) whether a defect existed was hotly contested by the experts at trial; (2) the spreadsheet was an "oversized (18" by 24"), sixteen paged document" that was "one of the exhibits requested by the jury during deliberations"; and (3) the "sheer volume": of irrelevant and damaging information contained in the spreadsheet and the focus on it at trial made "it difficult to overlook the likely effect it had."[28] Based upon these considerations, the Court reversed and remanded the case for a new trial.

5. Conclusion

While the Court ruled in favor of the plaintiffs with respect to the first two issues, the upshot of the case is by and large unfortunate for consumers seeking recovery for their products liability injuries. As a practical matter, it appears the Court in *Kia Motors* went from an evidentiary standard requiring a showing that other incidents are "sufficiently similar" to a standard that, as a practical matter, requires the other incidents to be *nearly identical* in order for the past incidents to be considered relevant in products liability cases in Texas.

B. *In re Ford Motor Co.,* No. 12-1000, 2014 WL 1258265 (Tex. March 28, 2014) (Not Released for Publication).

In this design defect case[29] involving a writ of mandamus concerning a discovery dispute, the Texas Supreme Court appears to have limited the scope of permissible discovery with respect to Rule 195. In this case, the plaintiff was seeking to "to expose potential bias of the defendant's two testifying experts by inquiring at their depositions into the frequency with which they testified in favor of design-defect defendants."[30] In addition, plaintiff sought to depose a corporate representative from each expert's employer, arguing that the additional depositions were critical to demonstrate that each of the defendants' testifying experts had a bias in favor of Ford and other automobile manufacturers.

The Court stated that while Rule 192.3 permits parties to discover information about the bias of any expert witness, Rule 195 provides the avenues for obtaining this information, "limiting testifying expert discovery to that acquired through disclosures, expert

[25] *Id.* at 387.

[26] The Court went on to hold that given the claims were inadmissible for any purpose, Kia did not waive error by not requesting any limiting instructions under Rule 105.

[27] *Id.* at 390.

[28] *Id.*

[29] The facts are not significant to the disposition of the case. Plaintiff Morales was injured after a Ford vehicle ran over him. The plaintiff had been fleeing the police on foot after leaving his car when he was chased by police on the suspicion of drunk driving. In pursuit, one of the officers exited his 2004 Ford Crown Victoria to apprehend the plaintiff, which the officer successfully did. While the officer was attempting to handcuff the plaintiff, the police car began rolling backwards toward the pair, struck the officer, and then ran over and came to rest on top of Morales. Morales brought design-defect claims against Ford to recover for his injuries, alleging that the Ford had a defect in its design that permitted the officer to place the gear-shift between park and reverse, which then triggered the car to go into "idle power reverse." 2014 1258265 at *3.

[30] 2014 WL 1258265 at *2.

reports, and oral depositions of expert witnesses."[31] The Court criticized the plaintiff's deposition notices in this case, stating the notices underscored the risks involved with permitting overbroad discovery. The Court pointed out the notices sought information from the expert witnesses' employers concerning sensitive matters, such as financial records from 2000-2011 detailing the cases the companies had been involved in with Ford and any other automobile manufacturers. The Court further opined: "[s]uch a fishing expedition, seeking sensitive information covering twelve years, is just the type of overbroad discovery the rules are intended to prevent."[32] Accordingly, the Court held, the requested discovery was impermissible. In doing so, the Court stressed it was not unduly limiting discovery of an expert's bias, because this type of discovery is clearly allowed under the rules. Rather, the Court pointed out, plaintiffs will still be entitled to seek "the most probative information regarding the bias of a testifying expert…from the expert herself."[33]

The Court acknowledged Plaintiffs were correct in arguing the Court had previously permitted the deposition of an expert's employer in the case *Walker v. Packer*, 827 S.W.2d 833, 838-839 (Tex. 1992). However, the Court reasoned, *Walker* was decided prior to the adoption of Rule 195, which established "disclosures, expert reports, and oral depositions as the permissible methods for expert discovery…."[34] In addition, the Court pointed out *Walker* was distinguishable from the case at hand, because *Walker* dealt with a situation in which the expert testified at his deposition that his employer had no policy that prohibited or restricted the doctors it employed from testifying in favor of plaintiffs in medical malpractice cases. After the expert's deposition, though, the plaintiffs in *Walker* discovered evidence in an unrelated case that contradicted this assertion. Here, the Court noted, "neither expert's credibility has been impugned in this case…[a]nd Morales has not demonstrated any other circumstance to warrant deposing the witnesses' employers' corporate representative."[35]

What is interesting about this case is that rather than just relying on the clear distinguishing factors in *Walker* to reach its result—the Court first argued that *Walker* was decided prior to the adoption of Rule 195. This suggests the present Supreme Court might not have reached the same result in *Walker* had the case been brought today. Practitioners would be wise to keep in mind the fact that increasingly, the Court is limiting the scope of discovery, even discovery that appears to be specifically provided for by the Texas Rules of Civil Procedure.

II. PREEMPTION IN PHARMACEUTICAL CASES: A CATCH-22 FOR INJURED CONSUMERS.

A. Background of the United States Supreme Court's Opinions

On June 23, 2011, the Supreme Court changed the field of pharmaceutical litigation when it issued its opinion in *PLIVA, Inc. v. Mensing*, 131 S.Ct. 2567. 180 L.Ed.2d 580 (2011). In the 5-4 split decision, Justice Clarence Thomas, the author for the majority, concluded federal law preempts state failure-to-warn claims with respect to generic drug manufacturers on the grounds that these manufacturers are prohibited by federal law from changing the drug labels to comply with their state tort duties to alter the label to include an adequate warning. This result was surprising given that two years earlier in *Wyeth v. Levine*, 555 U.S. 555 (2009), the Supreme Court had concluded the mere fact that the Food and Administration had approved the label for the brand name drug Phenergan did not preempt the state court judgment in favor of the plaintiff against the drug manufacturer with respect to claimant's state law failure to warn claims. Despite the fact that *Levine* held state law failure-to warn claims were not preempted with respect to brand name drugs, the Court in *Mensing* came right back two years later and concluded the *same* failure to warn claims are preempted when the drug in question is a generic one.

Justice Thomas recognized "that from the perspective of Mensing and Demahy [the plaintiffs in the consolidated cases], finding pre-emption here but not in *Wyeth* makes little sense."[36] He reasoned, though, that pre-emption applied with respect to the generic brand manufacturer, who manufactured and sold the product the plaintiffs consumed, because federal regulations, as interpreted by the FDA, "prevented the [generic] Manufacturers from independently changing their generic drugs' safety labels."[37] Thus, the generic brand could not comply with its state law tort duty to alter the brand drug label to include a warning about the dangerous side effects of long-term use of the drug and at the same time comply with federal law, which required the label remain the same as the brand name drug label.

There are three types of preemption: express preemption; implied preemption where the Federal

[31] *Id.* at 3.

[32] *Id.* at *3.

[33] *Id.* at *4.

[34] *Id.*

[35] *Id.*

[36] *Mensing*, 131 S.Ct. at 1281.

[37] *Mensing*, 131 S.Ct. at 2577.

Regulations are so broad in scope so as to preclude any state law; and conflict preemption that prevents enforcement of state laws that conflict with the Federal Regulations or would frustrate their purpose. The Supreme Court used the third—conflict preemption—to destroy the defect claim. The practical effect of this decision was that consumers of nearly 75 percent of the prescription drugs dispensed in this country were suddenly left without any failure-to-warn state law tort remedies. The opinion also effectively undermined the purpose of the Hatch-Watchman Amendments, which was to boost utilization of less expensive generic drugs.

After *Mensing,* plaintiffs' attorneys theorized the decision did not preclude other state law claims against generic drug manufacturers, such as claims for negligence, breach of warranty, and design defect. Such hopes were dashed in the final week of the United States Supreme Court's 2012-2013 session, though, when the Court rejected the First Circuit's efforts to avoid the harsh effect of *Mensing* in generic drug cases by ruling in *Mutual Pharmaceutical Co. Inc., v. Bartlett* that design defect cases against generic drug manufacturers were not preempted. The Supreme Court overturned the First Circuit's decision in *Mutual Pharmaceutical Co. Inc., v. Bartlett,* 133 S.Ct. 2466 (2013), ruling that design defect cases are in fact preempted by federal law on the grounds that such cases effectively turn on whether the drug's warnings were adequate.

In doing so, the Supreme Court threw out a $21 million verdict for a plaintiff who took Mutual's generic sulindac for shoulder pain and later developed Steven-Johnson's syndrome and toxic epidermal necrolysis, which rendered her permanently blind and disabled. Mrs. Bartlett's case evoked sympathy from all of the Justices (both majority and dissent alike), leading Justice Sotomayor to posit one particularly harsh criticism of the majority when she stated that although the majority "lamented" the plaintiffs' "tragic" condition, "responsibility for the fact that [the plaintiff] Karen Bartlett has been deprived of a remedy for her injuries rests with this Court."[38] Justice Sotomayor continued: "[i]f our established pre-emption principles were properly applied in this case, and if New Hampshire law were correctly construed, then federal law would pose no barrier to Ms. Bartlett's recovery."[39]

After *Bartlett*, some trial lawyers pointed out footnote 4 of the opinion, in which Justice Alito, the author of the majority opinion, stated that his opinion did not address state design defect claims that "parallel the federal misbranding statute," 21 U.S.C. § 352(j), because the jury was not asked "to find whether new evidence concerning sulindac [the drug in question] that had not been made available to the FDA rendered sulindac so dangerous as to be misbranded under the federal misbranding statute…."[40]

B. 2014 Fifth Circuit Cases and Preemption

Notwithstanding footnote 4 in *Bartlett* and the high hopes it might have once inspired, it appears that, at least in the 5th Circuit, until the FDA promulgates new regulations permitting generic drug manufacturers to change their labels, there is little recourse for consumers who are injured by generic drugs. This remains the case despite the fact that the consumers would have recourse if they had purchased the same drug under the brand name and despite the fact that most brand name drug sales cease once the brand becomes available in the generic form. Indeed, just this year, the Fifth Circuit affirmed both the dismissal of claims against generic manufacturers of prescription drug metoclopramide and the grant of summary judgment against brand name manufacturers of metoclopramide (Reglan) in consolidated cases from the district courts in Mississippi and Texas in *Lashley v. Pfizer, Inc.,* Nos. 12-60861 & 12-41148, 2014 WL 661058 (5th Cir. Feb. 21, 2014). *Lashley* was originally issued as an unpublished decision, but since its release, the panel has granted a motion to publish the opinion, which makes it binding precedent.

In the Mississippi case, Appellant Walter Lashley brought claims against the generic defendants based upon their sale and distribution of the drug to Lashley. Even though he had not ingested the brand name drug, Lashley's claims against the brand defendants, Pfizer, Inc., arose out of the allegedly false and misleading representations made by the brand defendants to the medical community. Similarly, in Texas, Appellant Maria Del Valle consumed generic metoclopramide from 2004 until 2011 and developed (like Appellant Lashley did) tardive dyskinesia and akathisia as a result of taking the drug. Her claims against both the generic defendant and the brand name defendant, Schwarz Pharma, Inc., mirrored those of Lashley, including allegations concerning negligence, gross negligence, strict liability, fraud, suppression of evidence, breach of warranty as to merchantability, breach of warranty as to fitness for a particular purpose, and misrepresentation.[41]

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[38] *Bartlett,* 133 S.Ct. 2483.

[39] *Id.*

[40] *Id.* at 2477, n.4.

[41] 2014 WL 661058 at * 4. In addition, Appellant Del Valle brought a claim against the generic brand defendant for deceptive trade practices.

The two cases were consolidated on appeal at the Fifth Circuit after the respective district courts dismissed the cases against the generic manufacturers, finding them to be preempted under *PLIVA, Inc. v. Mensing*, 131 S.Ct. 2567 (2011), and granted summary judgment in favor of the brand manufacturers on the grounds that neither Appellant had ever ingested the brand name product, Reglan. With respect to its decision that the claims against the generic brand defendants were preempted, the Court argued that "at their core, all Lashley and Del Valle's claims against the generic manufacturers turn on the adequacy of labeling and related information, and can thus be construed as failure-to-warn claims."[42] The plaintiffs also argued the generic manufacturers should be liable in this instance because they had failed to conform to the 2004 label change. The Fifth Circuit disagreed, pointing out such a claim would be a breach of federal labeling obligations, sounding exclusively in federal, rather than state law, and thus, would be preempted as well.

As for the plaintiffs non failure to warn claims (strict liability, breach of warranty, etc.), the Court, citing *Bartlett*, ruled those claims were preempted as well because "assuming distribution of the drug was acceptable in the first place, any useful action (or lack thereof) for which the companies could be held responsible would necessarily involve some form of warning."[43] The plaintiffs argued some of their claims based on state law against the generic drug manufacturers were "parallel to federal law claims, and thus, not preempted."[44] The Court disagreed, concluding the inquiry was not whether there are parallel claims, but whether the state law claim is "impliedly preempted."[45] Under such reasoning, it appears most, if not all, claims against generic drug makers would be precluded in the Fifth Circuit.

Similarly, the Fifth Circuit foreclosed all hope of recovery for plaintiffs in this situation under alternate theories in the second portion of the opinion when the Court affirmed the district courts' grant of summary judgment to the brand name manufacturers of the drug in question. The Court first pointed out that both states where Lashley (from Mississippi) and Del Valle (from Texas) filed their cases had products liability laws in place "which shield[ed] the companies from liability for products they did not create."[46] In Texas, for example,[47] the Court noted that a products liability action "is defined broadly as 'any action against a manufacturer or seller for recovery of damages arising out of personal injury'" that is purportedly caused by a defective product "'whether the action is based in strict tort liability, strict products liability, negligence, misrepresentation, breach of express or implied warranty or any other theory or combination of theories."[48]

The Texas Supreme Court has concluded that under this statute, entities qualify as "manufacturers" only as it concerns their own products. Accordingly, the Fifth Circuit concluded the brand defendants could not be held liable under Texas products liability law because Del Valle admitted she did not ingest their products. In addition, the Fifth Circuit stated that under the rebuttable presumption contained in Texas Civil Practice and Remedies Code § 82.007(a)(1), the brand manufacturer would have had no duty to warn because the FDA had approved the "warnings or information" accompanying the medication at the time Del Valle ingested it. Although Del Vall argued "the Schwarz brand defendants lost their presumption of non-liability because of fraud perpetrated on the FDA, the FDA has not made such a finding and, therefore any avenue for overturning" the presumption was barred to Del Valle.[49]

A few months later, a three judge panel of the Fifth Circuit confirmed just how difficult it is for injured consumers to obtain recovery for their injuries caused by generic brand drugs in *Eckhardt v. Qualitest Pharma., Inc., et. al.*, No. 13-40151, 2014 WL 1908651 (5th Cir. May 13, 2014). In that case, the plaintiff, Roy Eckhardt, developed a severe neurological disorder after his protracted use of the generic drug metoclopramide (brand name Reglan), which he used for gastrointestinal problems. Eckhardt, as other plaintiffs in this situation have done, sued both the brand name drug manufacturer, who developed and received FDA approval for the drug, as well as the generic drug manufacturer, who manufactured and sold the drug he consumed. The plaintiff took the drug from 2007-2009, during which time the drug label indicated patients should not use the drug over 12 weeks. In 2009, subsequent to the plaintiff's use of the product, the FDA "mandated a black box warning—the strongest warning the FDA can mandate on a drug—be added to metoclopramide making clear the risk of developing tardive

[42] *Lashley*, 2014 WL 661058 at *5.

[43] *Id.* at *6.

[44] *Id.*

[45] *Id.* at *6.

[46] *Id.*

[47] This paper will not discuss the Mississippi Products Liability Act.

[48] *Id.* at * 7 (citing TEX. CIV. PRAC. & REM. CODE § 82.001(2)).

[49] *Id.* at *7.

dyskinesia."[50] Eckhardt acknowledged he never used the brand name of the drug.

Eckhardt initially filed his complaint against the two generic manufacturers of the drug, asserting claims for negligence, strict liability, breach of implied warranties, misrepresentation, fraud and claims under the Texas Deceptive Trade Practices-Consumer Protection Act. Subsequently, he amended his complaint to add Wyeth and Schwarz Pharma, the brand name manufacturers, contending they made misrepresentations to the medical community in their capacity as the owners of the marketing application for Reglan. The district court granted both the generic defendants' motion to dismiss for failure to state a claim and the brand name defendants' motion for summary judgment.

The Fifth Circuit panel affirmed the district court's rulings. With respect to the 12(b)(6) dismissal against the generic defendants, the Fifth Circuit stated that although Eckhardt did not classify any of his claims against the generic defendants as failure-to warn claims, "his main claim against the Generic Defendants is a products liability claim for a failure to warn about the dangers of metoclopramide."[51] As such, the Fifth Circuit stated the claims were preempted under *Mensing.*

The Court also concluded Eckhardt's strict liability design defect claim against the generic defendants was preempted under *Bartlett*, even though Eckhardt pointed out that Texas law in this area is different from the applicable New Hampshire law (and thus, the result should not be the same). Indeed, in *Bartlett*, the Court held the New Hampshire strict liability claim was preempted because as an element of the claim, the fact-finder would end up needing to consider the product's labeling to perform the requisite risk/utility test.[52] Eckhardt argued that because Texas law does not require a cost-benefit analysis like the New Hampshire law does to prove a strict liability cause of action, *Bartlett* did not preclude his claims. The Fifth Circuit disagreed, reasoning that regardless of the cost-benefit analysis, Texas law requires that to prove a strict liability claim, the plaintiff must show a safer alternative design existed, and the fact finder must further conclude the generic brand manufacturers "breached their duty by failing to adopt that alternative design."[53] However, the generic brand manufacturers were precluded by federal law from altering the design of the drug. Accordingly, the Fifth Circuit argued, "*no* alternative design existed."[54] Thus, as in *Bartlett*, the state law claim against the generic manufacturers was preempted because it conflicted with federal law.

Interestingly, Eckhardt also alleged the generic manufacturers failed to provide either him or his physician with any of the FDA-approved warnings. The Fifth Circuit acknowledged that "failing to provide FDA-approved warnings would be a violation of both state and federal law," which constitutes a "parallel claim that is not preempted."[55] However, the Fifth Circuit believed the district court correctly dismissed these claims because:

1) Eckhardt failed to allege adequately that the generic defendants did not provide him with the FDA approved warnings; and
2) a review of the factual allegations in Eckhardt's own complaint reveals the untimely allegation was contradicted.

The Fifth Circuit also affirmed dismissal of his breach of warranty claims, finding that they were also preempted, as were his DTPA claims.

With respect to the brand name manufacturers, Eckhardt argued he was not asserting any products liability claims against them. The Fifth Circuit disagreed, stating that the "essence of Eckhardt's claim sounds in products liability."[56] To the extent Eckhardt raised products liability claims, the Court rejected those claims under the reasoning of *Lashley.* The Fifth Circuit also analyzed Eckhardt's fraud, negligence, and negligent misrepresentation claims as general tort claims, finding first that Eckhardt failed to allege sufficient facts for his fraud claim to survive under the heightened pleading standard of Rule 9. With respect to Eckhardt's negligence and negligent misrepresentation claims, the Fifth Circuit pointed out that "[e]very circuit court has held (under the laws of several different states) that a brand-name manufacturer does not owe a duty to consumers who use a generic version of the drug."[57] Citing to *Lashley*, the Court affirmed the district court's grant of summary judgment with respect to all of the brand name defendants' claims, holding that the brand name

[50] *Eckhardt*, 2014 WL 1908651 at *2.

[51] *Id.*

[52] *See Bartlett*, 133 S.Ct. at 2475 ("Given the impossibility of redesigning sulindac, the only way for Mutual to ameliorate the drug's 'risk-utility' profile—and thus to escape liability—was to strengthen "the presence and efficacy of [sulindac's] warning" in such a way that the warning "avoid[ed] an unreasonable risk of harm from hidden dangers or from foreseeable uses.").

[53] *Eckhardt*, 2014 WL 1908651 at *3,

[54] *Id.*

[55] *Id.* at *4.

[56] *Id.* at *5.

[57] *Id.* at *6.

defendants owed no duty to Eckhardt because he did not ingest their drugs.

Thus, this judicially created "Catch 22" for injured consumers appears to be nearly impenetrable in Texas, at least, for the time being.[58]

III. PERSONAL JURISDICTION OVER FOREIGN DEFENDANTS IN PRODUCTS LIABILITY CASES

Courts continue to struggle with how to conduct the personal jurisdiction minimum contacts analysis in the wake of the United States Supreme Court's plurality opinions in both *Asahi Metal Industry Co., Ltd. v. Superior Court of California,* 480 U.S. 102 (1987) and *J. McIntrye Machinery, Ltd. v. Nicastro,* 131 S.Ct. 2780 (2011). In *Asahi,* the Court split on the first prong of the personal jurisdiction inquiry—whether the foreign defendant had adequate minimum contacts with the plaintiff's chosen forum to meet the requirements of specific personal jurisdiction. 480 U.S. 102. The Court, however, agreed that in the circumstances of *Asahi*, exercising personal jurisdiction over the foreign defendant would be unfair and unreasonable and thus, would violate Due Process. *Id.* Justice Brennan wrote a concurring opinion, concluding that when a manufacturer puts a product in the stream of commerce that ultimately reaches the forum, then the manufacturer has "purposefully availed" itself of the forum if it was foreseeable the product would end up in the forum. *Id.* at 116. Writing for the plurality, Justice O' Connor held that an "additional contact" beyond only placing the product in the stream of commerce is required to exercise jurisdiction over a foreign defendant. *Id.* at 112. Justice Brennan's approach became known as the "stream of commerce" test, and Justice O'Connor's approach is called the "stream-of-commerce-plus" test.

Since the release of the *Asahi* opinion, the Circuit Courts of Appeals have taken varied approaches with respect to how to address the minimum contacts inquiry.[59] For example, the Fifth Circuit has adopted the stream of commerce test from Justice Brennan's concurrence in *Asahi,* while the Fourth Circuit utilizes the stream of commerce plus approach, which requires a stronger showing than the Fifth Circuit's stream of commerce test to establish the requisite minimum contacts over a foreign defendant. Such disparate approaches have the potential to result in different outcomes depending on the Circuit in which the parties find themselves.

A. *In re Chinese-Manufactured Drywall Products Liability Litigation,* 742 F.3d 576 (5th Cir. 2014).

This apparent Circuit conflict was analyzed in a recent case, *In re Chinese-Manufactured Drywall Products Liability Litigation,* 742 F.3d 576 (5th Cir. 2014), which was decided in January of this year. In that case, the Fifth Circuit was presented with the complicated task of determining how the Fourth Circuit would have ruled on the personal jurisdiction dispute in that case. *In re Chinese-Manufactured Drywall Products Liability Litigation* involved several cases in the Chinese Drywall multidistrict litigation. From 2005-2008 during a housing boom, Chinese companies manufactured large quantities of gypsum wallboard ("Chinese dryboard") that were sold to companies in the United States. After homeowners suffered property and other damages as a result of alleged defects in the drywall, these and other affected parties commenced actions against the entities that manufactured, sold, imported, and installed the Chinese drywall. When the cases multiplied, the Judicial Panel on Multidistrict Litigation transferred the drywall-related lawsuits to the Eastern District of Louisiana.

Four cases have reached the Fifth Circuit from the MDL: *Germano, Mitchell, Gross, and Wilz. Germano,* which is the case cited above and the first of the MDL cases to reach the Court of Appeals, is a class action that was originally filed by homeowners in Virginia in the United States Eastern District Court for the Eastern District of Virginia. In that case, the Defendant, Taishan Gypsum Co. Ltd. ("TG"), is a

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[58] This past year, medical device manufacturers have also found success with preemption arguments in federal court. *See, e.g., Schouest v. Medtronic, Inc.*, No. 3:13-CV-203, 2014 WL 123243 (S.D. Tex. 2014) (finding in the medical device context that plaintiff's failure to warn, negligence, and express warranty claims against the manufacturer of the medical device that caused injury were preempted but that her fraud claims against the manufacturer were not expressly preempted); *see also Muniz v. Medtronic, Inc.*, No. A-13-CA-451-SS, 2014 WL 1236314 (W.D. Tex. March 20, 2014).

[59] In *McIntyre,* the Supreme Court addressed the minimum contacts analysis again in a plurality opinion. 131 S.Ct. 2780. While the majority agreed that New Jersey did not have personal jurisdiction over the foreign defendant manufacturer who had neither marketed nor directly sold its products in that state, the Justices split once again on the minimum contacts assessment. *Id.* at 2785, 2791. Writing for the plurality, Justice Kennedy stated that the foreign defendant must purposefully avail itself of the forum and the foreseeability that the product would reach the forum was not sufficient to confer jurisdiction. *Id.* at 2788-89. Justice Breyer in his concurring opinion stated that resolving the case under the facts presented required nothing more than adhering to past precedent given that the Court had never found that "a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient." *Id.* at 2792.

Chinese company with its principal place of business in China that manufactures and sells drywall. For approximately two years, TG manufactured and sold drywall to Venture, a Virginia company that distributed the drywall to customers in multiple states.

The *Germano* Plaintiffs filed a putative class action on May 1, 2009, asserting claims against TG for negligence, negligence per se, breach of express and/or implied warranties, private nuisance, unjust enrichment, and violations of the Virginia Consumer Protection Act. In addition, they sought equitable and injunctive relief, as well as medical monitoring to prevent health issues resulting from their exposure to the drywall.

Plaintiffs served TG with the First Amended Complaint in Chinese in accordance with the Hague Convention on August 3, 2009, and TG, at the time of the appeal, did not dispute that it had been properly served with the First Amended Complaint. In October 2009, the *Germano* case was transferred to the MDL. Subsequently, on November 18, 2009, the district court for the Eastern District of Louisiana granted the original plaintiffs' motion to file a default judgment pursuant to Federal Rule of Civil Procedure 55 because TG had failed to appear or defend the action. A preliminary default judgment was issued, and on the same day, the district court granted the plaintiffs' motion to file a Second Amended Complaint, which did not assert any new claims, but merely expanded the plaintiff class to a nationwide class. In December 2009, the district court also granted the motion of seven couples who wished to intervene in the action.

In February 2010, the district court held a hearing that lasted two days regarding the damages that the plaintiffs had allegedly suffered. The Court issued a default judgment on May 11, 2010, awarding the plaintiffs and intervenors damages, pre-judgment interest, post-judgment interest, and costs. TG failed to file an appearance in this action until June 10, 2010. On that same day, TG also filed a notice of appeal, requesting to have the default judgment vacated for lack of personal jurisdiction and because the service of process was allegedly defective. After the court of appeals remanded the case to the district judge for the limited purpose of ruling on the motion to vacate the default judgment, the parties spent over a year and half involved in lengthy discovery regarding personal jurisdiction over TG.

The district court, applying Fifth Circuit precedent and the stream of commerce test, concluded it had specific jurisdiction over TG because TG had placed the drywall in the stream of commerce with knowledge that it would reach Virginia to be used in Virginia homes. The district court further concluded plaintiffs' claims related to or arose out of TG's contacts with Virginia and that "exercising jurisdiction over TG comported with 'traditional notions of fair play and substantial justice.'"[60] The district court further rejected TG's argument that the default judgment was invalid because it had not been properly served with Second Amended Complaint. As the district court explained in its Order & Reasons, TG was properly served with the First Amended Complaint, and the Second Amended Complaint did not add any new causes of action but rather merely expanded the class definition against TG to a national class and expanded the Virginia Consumer Protection claims to encompass the corresponding consumer protection claims for each new state involved.

On appeal to the Fifth Circuit, TG argued first that the district court erroneously applied the Fifth Circuit precedent to analyze the minimum contacts when it should have applied the more stringent Fourth Circuit precedent, which, T.G. further asserted, would have yielded the opposite result. The Fifth Circuit disagreed, stating that it need not determine which circuit's law should apply "because regardless of which circuit's approach we use, the outcome is the same."[61]

Analyzing TG's forum contacts under the tougher Fourth Circuit three-part test, the Fifth Circuit Court first pointed out the numerous facts supporting the conclusion that TG's contacts with Virginia were "neither random nor isolated,"[62] including, among other things, the fact that TG designed the product and packaging for Venture, a known Virginia resident; the fact that TG included the name of a Virginia company along with a phone number with a Virginia area code on its product; the fact that TG entered into two contracts with Venture to sell substantial quantities of drywall to a known Virginia resident; and the fact that TG attempted to expand its future drywall sales in the U.S. via Venture; etc. Thus, considering such facts, the Court concluded the first prong of the Fourth Circuit test was met because TG "purposefully availed itself of Virginia."[63]

Turning to the second prong of the Fourth Circuit test, the Fifth Circuit explained that this prong "looks at the relationship between the defendant's forum contacts and the plaintiff's claims."[64] This prong was easily satisfied because TG's contacts with the forum—selling the defective drywall to Venture—formed the genesis of the dispute. The third prong, constitutional reasonableness, was also satisfied because:

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[60] 742 F.3d at 584.

[61] *Id.* at 586.

[62] *Id.* at 589.

[63] *Id.* at 591.

[64] *Id.*

1) even though, as a foreign defendant TG would face some burdens if subjected to personal jurisdiction in Virginia, "this burden was somewhat offset by TG's size and the magnitude of TG's operations";
2) Virginia has a "great interest in its citizens being able to litigate against TG for the alleged damages caused to their homes…");
3) the plaintiffs also have a strong interest in obtaining appropriate recourse for their claims against TG; and
4) "the judicial system has a strong interest in resolving related, consolidated claims against TG in the MDL."[65]

After determining there was personal jurisdiction over TG, the Court considered TG's second argument—that the default judgment should be vacated because "TG was not properly served with the Second Amended Complaint or the motion to intervene."[66] The Fifth Circuit disagreed for several reasons. First, TG was already in default when the district court granted the motions to file the Second Amended Complaint and to intervene. Consequently, Federal Rule 5(a)(2), which does not require a defaulting party to be served with a pleading unless the pleading asserts a new claim for relief, governed the service requirements of the two pleadings. The Fifth Circuit agreed with the district court that neither the Second Amended Complaint nor the motion to intervene asserted any new claims. Rather, the Second Amended Complaint merely enlarged the class to include a nation-wide class and expanded the Virginia consumer claims to encompass the corresponding consumer claims for each state involved in the action. Therefore, the Court concluded, the default judgment was not void.

In addition, the Court determined TG had not demonstrated the district court abused its discretion by refusing to vacate the default judgment. Under Federal Rules of Civil Procedure 55(c) and 60(b), a district court may set aside a default judgment for "good cause," which requires a consideration of three factors:

a) whether the default was willful;
b) whether vacating the default judgment would prejudice the plaintiffs; and
c) whether the defendant has presented a meritorious defense.

While the district court declined to decide whether TG's failure to respond was willful, the Circuit Court pointed out that the district court "weighed several relevant factors, including the merit of TG's asserted defense, before determining the vacatur was unwarranted."[67]For example, TG waited close to a year after it was served with the First Amended Complaint to file any sort of response or notice of appearance. Although TG argued that it "promptly" hired attorneys in the United States once the default judgment was entered, the Court stated it would not consider how TG responded once the default judgment was entered, but rather its inquiry was "properly [focused] on whether TG willfully failed to respond to the First Amended Complaint within the allotted time period…."[68] The Circuit Court concluded TG had not met its burden to show its neglect was excusable.

This case represents a victory for consumers who are harmed by foreign manufacturers. A few notable footnotes bear mention. Practitioners participating in MDL should be aware that the Courts will look at the minimum contacts with the forum in which the case originated, not the forum of the MDL Court. Indeed, in footnote 8 of this case, the Court stated that the practitioners did not dispute—*and the Court agreed*—that the minimum contacts inquiry should properly be focused on the Chinese manufacturer's contacts with Virginia (where the case was first filed) and not with the Louisiana, the site of the MDL court where the case was ultimately transferred.

In footnote 11, the Court critiqued the plaintiffs' briefing for citing facts "regarding the nationwide contacts of TG and its wholly owned subsidiary, TTP, which plaintiffs collectively refer to as 'Taishan.'"[69] The Court noted that *McIntyre* requires the defendant to intend to serve a market in a specific forum state, rather than merely the United States market in general. Accordingly, the Court stated, the appropriate focus should be exclusively on the forum state specific contacts, rather than TG's nationwide contacts. Thus, practitioners should keep in mind that with these inquiries, the minimum contacts analysis will concern the state specific contacts, and that nationwide contacts will not carry much, if any, weight with the Court.

In addition, the Court noted in footnote 15 that the two contracts with Venture specified any disputes would be settled via arbitration in China. TG argued that it was unforeseeable for it to be subjected to suit in Virginia given the arbitration provision. The Circuit

[65] *Id.* at 592.

[66] *Id.* at 593.

[67] *Id.* at 595.

[68] *Id.* at 594.

[69] The district court refused to impute TTP's contacts onto TG and concluded that TTP did not have any contacts with Virginia during the pertinent time frame. The defendants did not contest these findings on appeal.

Court disagreed, stating that plaintiffs were homeowners in Virginia who were not parties to the two contracts between TG and Venture. Thus, their claims were not governed by the arbitration clauses. Moreover, it was not unreasonably foreseeable that TG would be hauled into a Virginia court given that TG knew Venture was a drywall distributor in Virginia and that its products would be sold to end-users, many of which were Virginia residents.

B. *In re Chinese-Manufactured Drywall Products Liability Litigation,* No. 12-31213, 2014 WL 211672 (5th Cir. May 20, 2014).

Five months later in May of this year, three other cases in the MDL reached the Fifth Circuit as well. These cases, which the Fifth Circuit named *Mitchell, Gross,* and *Wilz,* originated in district courts in Florida (*Mitchell*) and Louisiana (*Gross* and *Wilz*). The two defendants in most of these cases were T.G., once again, and Tai'an Taishan Plasterboard Company Limited ("TTP")[70], which was also a Chinese company that manufactured and sold drywall.[71]

In the Florida case, *Mitchell*, like *Germano*, the district court granted a default motion against TG after it failed to appear. The district court denied TG's motions to vacate the preliminary default under Rule 55(c) and to dismiss the case for lack of personal jurisdiction, determining instead that personal jurisdiction was appropriate over TG in Florida. The district court also concluded "that TTP's contacts could be imputed to TG for the purposes of personal jurisdiction."[72] Subsequently, the district court certified the case for an interlocutory appeal.

On appeal, TG first argued that TTP's contacts should not be imputed to TG for the purpose of determining jurisdiction. TG asserted the district court mistakenly applied Florida law, rather than Chinese law, with respect to the question of whether or not to impute TTP's Florida contacts to TG. In its briefing, however, TG acknowledged there was not much of a material difference between Chinese law and Florida law on this issue and that the outcome would be the same under either. Due to this fact, the Fifth Circuit Court applied Florida law, which recognizes "that an agent's contacts with Florida can be imputed to its principal for jurisdictional purposes…."[73] To determine whether an agency relationship exists, the following three requirements must exist:

> "(1) acknowledgement by the principal that the agent will act for him, (2) the agent's acceptance of the undertaking, and (3) control by the principal over the actions of the agent."[74]

Furthermore, control is a central issue that must be considered.

The Court concluded an agency relationship existed. TTP was created in 2006 by TG as wholly owned subsidiary for the purpose of executing certain sales without VAT invoices so that the company could still enjoy the exemption from the VAT tax in China.[75] Moreover, TG's own employees sat on the Board of Directors for TTP, which only met sporadically and appeared to report directly to TG. In addition, TG infused TP with capital contributions, sold TTP its equipment, and rented a factory to the subsidiary. Once TTP ceased operating, TG bought back its equipment, factory, and offices, but the financial records do not reveal the amounts of these "buy back" purchases. The offices were in close proximity to one another—only 1,000 meters apart. TTP managed all of the export sales that TG had previously conducted. TTP was authorized to utilize the "Taishan" brand and trademark.

Moreover, the majority of TTP's employees were TG employees who went back to work for TG when TTP ceased operating. During their employment with TTP, these employees continued to use TG email addresses, phone numbers, business cards, and email signature when communicating with customers. TTP employees further directed regular and potential customers to the TG website, and the TTP salespeople introduced their company as TG and did not mention TTP at all when they were giving introductions. The Court also found that TTP regularly held itself out to be the same entity as TG.

Accordingly, the Court agreed with the district court that under such facts, imputation of TTP's contacts for the purposes of jurisdiction is appropriate. TTP allowed TG to act on its behalf. Conversely, TTP did not act on its own behalf. Second, the companies held themselves out to be the same entity to customers as described above. Last, TTP was created to fulfill a narrow purpose for TG and acted only to provide these services to TG. Accordingly, these factors establish that TG controlled TTP.

Next, the Court "overlay[ed]" TTP and TG's contacts with Florida to analyze their sufficiency

[70] TTP was a wholly owned subsidiary of TG that was only operating during the years 2006-2008.

[71] Only TG is a defendant in *Germano* and *Wilz.*

[72] 2014 WL 211672 at *3.

[73] 2014 WL 211672 at * 5.

[74] *Id.*

[75] The Court also pointed out that the district court based its agency determination for imputation purposes on nearly two years of jurisdictional discovery, multiple briefing rounds, as well as a hearing on the matter.

under the Florida long arm statute. Throughout its opinion, the Court refers to the combined entities as "Taishan." Similar to *Germano*, these contacts were quite extensive, including, among other things, entering into a sole agency agreement with OTC—a Florida company. In addition, Taishan sold drywall to two other Florida companies and conducted other business in Florida in connection with its drywall manufacturing. Such contacts demonstrated a general course of business in Florida for financial benefit, which is a requirement of the long arm statute. The contacts also met the requirement that the cause of action arise from Taishan's acts because the type of Chinese drywall that injured the homeowners and caused the damages was available for purchase in Florida. Indeed, in the *Mitchell* case, the Court stated the "arise-from requirement is met because Mitchell's complaint alleges that the homebuilders incurred costs because they installed Taishan's drywall, the profile forms submitted by the parties demonstrate that the drywall at issue in *Mitchell* is traceable to Taishan," and testimony from a Florida homebuilder specified around 400 homes that contain Taishan drywall.[76]

Last, Taishan argued the district court should have applied the more stringent Eleventh Circuit due process requirements rather than the Fifth Circuit approach. Just as in *Germano*, the Fifth Circuit concluded that regardless of which Circuit's test was utilized, the results would be the same. Analyzing the contacts under the Eleventh Circuit's more demanding test, the Court concluded aishan had the requisite contacts in Florida to support a finding of personal jurisdiction consistent with due process. Practitioners should note the Court stated in footnote 19 of the opinion that even though some of Taishan's shipments were marked "FOB," this did not destroy its other contracts with Florida because Taishan arranged for the drywall to be shipped to Florida regardless of the FOB notation.

The Court rejected Taishan's argument that the Court should read the complaint narrowly and require the Mitchell plaintiffs to prove that the drywall they installed could be traced directly to its activities in Florida. The Court stated that at this stage in the litigation, all Mitchell had to prove to establish personal jurisdiction by a preponderance of the evidence was that "it is more likely than not that Taishan drywall connected from the Devon transaction ended up in Mitchell's hands and forms the basis of this action."[77] The Court concluded it was reasonably foreseeable to Taishan that it would be defending a lawsuit in Florida given its numerous contacts and connections with the forum. Analyzing the case under the five part fairness test explained above, the Court also concluded it did not offend notions of fair play and substantial justice and that jurisdiction was proper over TG in Florida. Using the same rationale as it did in *Germano*, the Court further concluded the district court did not abuse its discretion in refusing to vacate the default judgment.

The Fifth Circuit similarly held that with respect to the *Gross* and *White* cases, TG and TTP were alter egos under Louisiana law and that TTP's contacts could be imputed to TG. Moreover, even though Taishan lacked direct physical contact with Louisiana,[78] the contacts were substantial. Taishan sold "at least 45,756 sheets of drywall that ended up in Louisiana."[79] Taishan informed its customers it was interested in selling its drywall to Louisiana and provided shipping rates and other information for shipping drywall to New Orleans. Taishan shipped drywall to New Orleans for a Louisiana company, GD Distributors. Invoices showed other shipments, such as a shipment of drywall from Taishan to a company in California, with the final destination being New Orleans, Louisiana.

Significantly, the Fifth Circuit stated that with respect to minimum contacts, the test requires "mere foreseeability or awareness" that the product would end up in the forum state.[80] This awareness is a constitutionally sufficient basis for personal jurisdiction "if the defendant's products made its way into the forum state while still in the stream of commerce, but [t]he defendant's contacts must be more than random, fortuitous, or attenuated, or of the unilateral activity of another party or third person."[81] Here, the Court concluded the test was "more than satisfied" because the owner of GD Distributors testified that Taishan "absolutely" understood the drywall was being sent to New Orleans, Louisiana.[82]

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[76] 2014 WL 2111672 at * 13.

[77] *Id.* at *17. Earlier in the opinion, the Court explained that a Pennsylvania company, Devon International, purchased 485, 044 sheets of drywall from TG, but that in the course of the transit to Pensacola, Florida the drywall was damaged. North Pacific only purchased a fraction of what it had ordered from Devon, so Devon sold the remainder to distributors, wholesalers, and individuals. Devon sold some drywall to Emerald Coast Building Supply, who sold 840 boards of drywall to Rightway Drywall, who, in turn, sold the drywall in question to Mitchell, the named plaintiff. *Id.* at *11.

[78] Notably, the Court acknowledged that TTP and/or TG had "never manufactured drywall, advertised, or performed services in Louisiana." *Id.* at * 20.

[79] *Id.* at *20.

[80] *Id.* at *21.

[81] *Id.*

[82] *Id.*

The Court also concluded plaintiffs satisfied their burden of showing their claims "ar[o]se from or relate[d] to" Taishan's Louisiana contacts. Significantly for practitioners, the *Gross* plaintiffs were asserting a market-share liability claim arising from Taishan's Louisiana contacts. Although Taishan attacked the validity of this theory, the Court stated that its "inquiry is whether '*the plaintiff's cause of action*…arise[s] out of or result[s] from the defendant's forum-related contacts,' whatever the claims' ultimate merits."[83] Given that the plaintiffs' claims all rest on allegedly defective Taishan drywall installed in their homes, the plaintiffs satisfied their burden of showing by a preponderance of the evidence that jurisdiction is appropriate in Louisiana. Similarly, the Court concluded jurisdiction is fair and reasonable over Taishan in Louisiana.

Both Fifth Circuit opinions in the *In re Chinese-Manufactured Drywall Products Liability Litigation* represent tremendous victories for consumers seeking compensation for injuries caused by foreign entities. Notably, the Fifth Circuit's less stringent "stream of commerce" test has been interpreted to apply only to cases that cause damage in the forum state from allegedly defective products, but not to cases, for instance, that involve a breach of contract concerning the defective packaging of product.[84] Practitioners should note that with respect to personal jurisdiction, the Fifth Circuit has adopted a less stringent test than some of the other Circuits in the wake of the plurality opinions in *Asahi* and *McIntrye.*

IV. STATUTE OF LIMITATIONS AND THE DISCOVERY RULE

In *Milton v. Stryker Corp.*, 551 Fed. Appx. 125 (5th Cir. 2014) (unpublished opinion), the Court ruled in favor of the plaintiff bringing a personal injury action asserting negligence and strict liability claims against the manufacturer of a pain pump when the Court vacated a district court's grant of summary judgment in favor of the manufacturer and remanded the case for further proceedings. In that case, the plaintiff, Mark Milton ("Milton"), was allegedly injured after he underwent surgery on his right shoulder on October 25, 2004. After the operation, a "pain pump," manufactured by Stryker Corporation ("Stryker"), was utilized to inject anesthetics directly into his shoulder joint. Four weeks later, Milton complained of shoulder pain to his doctor, who informed him that such pain was customary. Although Milton continued to have problems with his shoulder, he did not attempt to obtain medical advice about it again until May 27, 2009, when his doctor diagnosed him with having a complete loss of articular cartilage in his shoulder.

On May 23, 2011, almost two years after this diagnosis and nearly seven years after his surgery, Milton filed suit against Stryker, asserting negligence and product liability claims. In his initial complaint, Milton asserted the discovery rule applied to his claims. Stryker filed a motion to dismiss on statute of limitations grounds, which the district court *sua sponte* converted to a motion for summary judgment. Although Milton argued that summary judgment would be premature due to a lack of discovery (and although he later filed motions to that effect), the district court did not allow discovery and granted Stryker's motion for summary judgment.

On appeal, the Court first noted that in this diversity action, Texas substantive law controls. In Texas, the statute of limitations for personal injury claims is two years, and the cause of action accrues on the date of the injury even if the party is unaware of it. Under this law, Milton's claims, filed six and one half years after the injury, would be barred unless the discovery rule applies. The discovery rule is applied categorically, and not on a case by case basis. It applies only when the following two prongs are met: (1) the condition is objectively verifiable; and (2) the nature of the injury is inherently undiscoverable.

Here, both parties agreed that the injury—chondrolysis—is an objectively verifiable condition. The Court then turned to whether Milton's injury was inherently undiscoverable. Citing to the Fifth Circuit's unpublished opinion in *Brandon v. Howmedica Osteonics Corp.*, 439 Fed. Appx. 317, 322 (5th Cir. 2011), Milton argued that injuries caused by surgical implants are inherently undiscoverable. Stryker rebutted this argument by asserting that the pain pump was not a surgically implanted device within the scope of *Brandon.*

The Court, however, stated that it did not have enough evidence in the record to determine "what, if any, device remained inside Milton's shoulder following surgery, and if it remained, how long it remained."[85] Given the inconclusive nature of the record, the Court concluded that it was unable to determine whether Milton exercised reasonable diligence when he waited four and half years before seeking medical attention. Accordingly, the Court vacated the district court's order granting summary judgment and remanded the case for further proceedings.

Although this case was a temporary victory for the plaintiff, the Court noted in its opinion that on

[83] *Id.* at *22.

[84] *See Sunday Riley Modern Skin Care, L.L.C. v. Maesa*, No. H-12-1650, 2013 WL 5231860 at * 11-12 (S.D. Tex. Sept. 12, 2013).

[85] 551 Fed. Appx. at 128.

remand, the plaintiff would bear the burden of showing both that he exercised reasonable diligence by waiting four and half years before seeking medical attention and that chondrolysis is the sort of injury that is inherently undiscoverable during the two year limitation period. In addition, Milton would have the burden of showing that he could not "exercising reasonable diligence, have discovered that he had chondrolysis earlier than two years before he filed suit."[86] Thus, even on remand, the plaintiff faces significant hurdles in a personal injury case such as this one, in which the plaintiff waited for a lengthy period before seeking a diagnosis and filing suit.

V. CASES TO WATCH

The following section summarizes the most significant recent state court decisions for which review has been granted by the Texas Supreme Court.

A. *Genie Industries, Inc. v. Matak*, No. 13-11-0050-CV, 2012 WL 6061779 (Tex. App.—Corpus Christi Dec. 6, 2012, pet. granted)

In *Genie*, the manufacturer was appealing an adverse jury verdict in favor of the plaintiffs, who sued Genie Industries, Inc. ("Genie"), among others, after 24 year old Walter Pete Logan Matak ("Logan") died shortly after plunging to the floor from a 40-foot, fully-extended, AWP-40S single-bucket aerial work platform manufactured by Genie. At the time, Logan, an apprentice electrician, was installing audiovisual equipment to a church's 30-foot high ceiling using a Genie AWP-40S aerial lift. The lift had removable outriggers that were used for stability. When Logan needed to reposition himself, a church employee and Logan's coworker removed the outriggers and began moving the lift while Logan was still on the platform extended 30 feet in the air. Unfortunately, the lift tipped over, and Logan died a couple hours later at the hospital from massive craniocerebral injuries suffered in the fall.

Logan's sister and parents sued Genie, among others, alleging that the lift was defectively designed because it permitted the outriggers to be removed while the lift was extended.[87] The jury awarded just under $1.31 million. On appeal, Genie presented three issues:

1) a legal sufficiency challenge to the evidence establishing that the lift in question had a defective design;
2) the trial court erred in granting two of the plaintiffs' Batson/Edmonson challenges; and
3) the trial court erred by not giving Genie the correct settlement credit on the final judgment.

1. Design Defect

The Court first addressed Genie's legal sufficiency challenge, noting that TEX. CIV. PRAC. AND REM. CODE § 82.005(a) requires a plaintiff to prove the following by a preponderance of the evidence in order to prevail on a products liability claim alleging design defect:

a) that the product was defectively designed as to be unreasonably dangerous;
b) that a safer alternative design existed; and
c) that the defect was the producing cause of the damages.

With respect to the first prong, the Court applied the risk-utility analysis used by Texas courts to determine if a product is unreasonably dangerous.

The appellees asserted the defect in the design of the Genie lift was the design's failure to account for foreseeable misuses of the product, such as the fact that the lift's outriggers could be taken off and the base could then be moved to other locations while a person was elevated inside the lift's basket. Genie responded that there was a warning label cautioning against this hazard and that the utility of the lift outweighed the risk of injury, assuming the product was used properly. The warning instructed users not to reposition the lift while the aerial platform was elevated because misuse could result in the lift tipping over, which is what happened. However, the Court pointed out, Genie admitted the use of the AWP-40S when Logan was fatally injured was indeed a "foreseeable misuse" of the lift. Under the risk utility test utilizing five factors,[88] the Court concluded that given its "complete review of the evidence," there was sufficient evidence "to support the jury's conclusion

[86] *Id.*

[87] The plaintiffs also sued the church and Gulf Coast Electric. The church and Gulf Coast Electric settled with the Mataks before trial.

[88] The five factors include: (1) weighing the utility of the product to both the user and the public against the gravity and probability of injury from using the product; (2) whether a substitute product that meets the same need and is not unsafe or unreasonably expensive was available; (3) the ability of the manufacturer to eliminate the unsafe nature of the product without critically altering its utility or significantly increasing its costs; (4) the consumer's expected awareness of the dangerous nature of the product and how to avoid the dangers due to general public awareness of the obvious condition of the product, or the existence of appropriate warnings and/or instructions; and (5) the "expectations of the ordinary consumer." 2012 WL 6061779 at * 3.

that the AWP-40S was unreasonably dangerous because numerous disputed facts were presented for the jury to consider."[89]

The Court then addressed whether plaintiffs offered legally sufficient evidence of a "safer alternative design" pursuant TEX. CIV. PRAC. & REM. CODE § 82.005 (b) (1)-(2). This provision requires the plaintiff prove by a preponderance of the evidence that a "safer alternative design" existed that: (1) in all probability would have would have prevented or significantly decreased the danger of injury, property damage, or death without substantially weakening the product's utility; and (2) was both economically and technologically feasible. The Court disagreed the plaintiffs did not prove a safer alternative design, pointing out that plaintiffs had proposed four alternative designs, all of which "constituted more than a mere scintilla of evidence upon which the jury could have determined that a safer alternative design existed."[90]

2. *Batson/Edmonson* Challenges

Genie also argued the trial court erred when it granted plaintiffs *Batson/Edmonson* motions with respect to two jurors. In civil trials, it is a violation of a juror's equal protection rights to exclude that juror from the venire on account of race. A court must engage in a three step analysis when presented with a *Batson/Edmonson* objection:

a) the opposing party to the peremptory challenge must demonstrate a prima facie case of discrimination;
b) once that has been established, the burden shifts to the party who made the strike to provide a race neutral explanation; and
c) at that point, the trial court must determine whether the party opposing the strike has established that purposeful discrimination was implicated.

A trial court's ruling on a *Batson/Edmunson* challenge is reviewed for an abuse of discretion.

In this case, Genie peremptorily struck six jurors, all whom were black. Appellees challenged all of Genie's strikes initially, but the trial court sustained their objections with respect to only two of the jurors, Ms. Sharp and Ms. Lawrence. Genie contended that race neutral grounds supported its strikes against both jurors. With respect to Ms. Sharp, Genie asserted that she and plaintiffs' counsel were acquaintances via church circles, but, the Court pointed out, that when asked on the record two times whether her acquaintance with Mr. Payne would affect her ability to serve impartially as a juror, Ms. Sharp answered that it would not. Genie further contended that because Ms. Sharp was married to a church pastor, she would find it difficult to attribute any fault to a church. However, once again, when questioned by Genie's counsel about this matter, Ms. Sharp answered that she would not have any issue with holding a church liable for negligence. With respect to Ms. Lawrence, Genie stated that she displayed "positive responses and reactions" to the plaintiffs' counsel during voir dire.[91] To the contrary, the Court noted, the only time Ms. Lawrence spoke during voir dire was when she agreed with a white juror on the panel "whose statement supported Genie's position."[92]

Significantly, the Court noted, all six of Genie's strikes were utilized to exclude potential black jurors, but only 11 of the 27 prospective jurors were black. Thus, 41% of the panel was black and of that 41%, Genie struck 55% of the total black veniremembers. The Court stated that "this statistical disparity was pointed out to the trial court and within the trial court's discretion to consider in its ruling."[93] Thus, practitioners should always consider the statistical implications of any peremptory strikes and not be afraid to utilize those statistics if they run in their client's favor.

In addition to pointing out the statistical disparity, the plaintiffs also argued for a comparative analysis of the potential jurors. For example, while Genie argued that Ms. Sharp's affiliation with a church might affect her ability to hold the church liable, Genie did not strike a white juror who was a former employee of the very church, Cathedral in the Pines, that was at issue in this case. Moreover, Ms. Lawrence, who agreed with another juror on the panel who spoke in support of Genie's position was struck by Genie, but the white juror who made the statement was not struck. Accordingly, the Court concluded that the trial court did not abuse its discretion when it sustained the two *Batson/Edmonson* challenges.

3. Settlement Credit

The last issue before the Court—whether the trial court erred when it entered judgment without giving Genie total credit for the plaintiffs' pretrial settlement with the church—concerns TEX. CIV. PRAC. REM. CODE § 33.002(a)(1). That provision requires a "trial court to reduce the amount of recovery if the claimant has settled with one or more persons with respect to the cause of action by the sum of the dollar amounts

[89] 2012 WL 6061779 at * 3

[90] *Id.* at *7.

[91] *Id.* at *8.

[92] *Id.*

[93] *Id.*

of all settlements."[94] The defendant has the burden of proving its right to such a credit, which can be accomplished through submitting the settlement agreement or other evidence of the settlement amount in the record. Once that is done, the burden shifts to the settling party, "who must tender a valid settlement agreement allocating between actual and punitive damages to the trial court before judgment is entered."[95]

Genie met its initial burden by placing the amount of plaintiffs' settlement with the church into the record on two separate occasions. The dispute centered around the allocation of the settlement amount. Genie claimed that the entire settlement amount constituted actual damages, while the plaintiffs argued that the settlement amount included actual and exemplary damages. Plaintiffs argued that the total settlement was in excess of the statutory damages cap provided to non-hospital charitable organizations pursuant to TEX. CIV. PRAC. AND REM. CODE § 84.006. Plaintiffs' trial counsel asserted that the $500, 000 statutory cap for liability damages was considered during the negotiations with the church, but that the amount increased when the church's counsel was informed that plaintiffs were seeking exemplary damages in addition to the actual damages. The Court declined to address this "intriguing" argument because case law instructs the Court to consider only the terms expressly stated in the settlement agreement and to ignore such extrinsic evidence with respect to the allocation of damages.[96]

The settlement agreement did not contain an express allocation between the actual and exemplary damages. To the contrary, the agreement explicitly stated that no part of the damages represented exemplary damages. Accordingly, the Court held that the trial court abused its discretion "by not factoring the full settlement credit entitled to Genie."[97] The Court therefore reversed the trial court's judgment only on the issues of damages and remanded it for a recalculation of damages in accordance with its opinion. The takeaway for practitioners is to consider carefully the terms of any settlement agreements and the effect it could have on later settlement credits in litigation involving multiple defendants. On March 21, 2014, the Texas Supreme Court granted review of this case.

B. *Nabors Wells Services, Ltd. v. Romero,* 408 S.W.3d 39 (Tex. App.—El Paso, pet. granted)

Although this case is not a products liability case, it is interesting to see the difference between the way courts treat evidence detrimental to plaintiffs in pure negligence cases versus products liability cases. In this motor vehicle accident case, a motorist and his passengers were injured, and some killed, when a tractor trailer owned by defendant Nabors Wells Services, Ltd. ("Nabors") collided with the suburban that was passing the tractor trailer after the tractor trailer attempted to left off the highway. The motorists bought a negligence action against the tractor trailer and driver and employer of the driver. The jury awarded actual damages to the plaintiffs in excess of $2.3 million. On appeal, Nabors brought one issue: whether the trial court abused its discretion by excluding expert and lay testimony with respect to the use or non-use of seat belts in rollover automobile accidents.

The Court first discussed the history of Texas jurisprudence concerning the inadmissibility of evidence of seat belt usage or non-usage, as well as the statutory bar to such evidence, which was repealed in 2003 as part of House Bill 4. Since the repeal of that statutory bar, the Court noted, "[s]urprisingly few opinions have addressed the seat-belt defense in light of the legislature's amendments."[98] Those that have, though, have concluded that alleged failure to wear a seat belt, which didn't contribute to the accident, should not be used to reduce or mitigate damages. The Court pointed out that "[f]or more than thirty years, Texas law has recognized that the use (or non-use) of a seat-belt does not make a collision more or less likely and therefore does not constitute contributory negligence."[99] Similarly, such a failure does not represent a failure to mitigate damages because the usage or non-usage of a seat belt does "not intervene between the defendant's negligence and the claimant's damages."[100]

Moreover, the Court pointed out, although the Texas legislature in 2003 repealed the statutory bar to the admissibility of evidence regarding seat belt non-usage, the Legislature had the chance to require admissibility of such evidence, but instead chose to remain silent on the issue. Accordingly, absent a "specific legislative mandate affirmatively authorizing the admission of such evidence, or legislative history specifically advising the courts of appeals in Texas that long established court precedent is being overruled, the courts should not guess at legislative

[94] 2012 WL 6061779 at *9.

[95] *Id.*

[96] *Id.* at *10.

[97] *Id.*

[98] 408 S.W.3d at 43.

[99] *Id.* at 44.

[100] *Id.*

intent."[101] Thus, the Court found there was no error in excluding the evidence and affirmed the judgment of the court. The Supreme Court has granted review of this issue.

VI. LOWER COURT DECISIONS

A. No "Self-Critical Analysis" Privilege or Selective Waiver Doctrine in Texas—at Least for Now.

In re Fisher & Paykel Appliances, Inc., 420 S.W.3d 842 (Tex. App.—Dallas 2014) concerns a case brought by consumers against Fisher & Paykel ("Fisher") alleging that a defectively designed and unreasonably dangerous laundry dryer started a fire that destroyed the plaintiffs' home and led to the death of Rosemary Webb. During discovery, the plaintiffs requested production of documents concerning "'all correspondence from Fisher & Paykel or anyone on its behalf to any governmental agency regarding this occurrence.'"[102] The term "occurrence" was not defined in the requests for production. Fisher objected to the request on the grounds that such correspondence is privileged and protected from discovery under the "self-critical analysis" privilege and because the documents were confidential, privileged, proprietary, trade secrets, and were protected "under Texas and federal common law, Texas state law, and under authority in Section 6 CPSA, the Trade Secrets Act, and the Freedom of Information Act."[103]

The plaintiffs filed a motion to compel, and Fisher responded by identifying three responsive reports it claimed were covered by its objection. These reports had all been filed with the United States Consumer Products Safety Commission ("CPSC") and concerned other incidents involving the safety of its clothes dryer. Fisher argued in its brief that these documents were protected by the self-critical analysis privilege, the trade secret privilege, attorney work product privilege and Texas Rule of Evidence 502. While Fisher filed a supporting affidavit with its brief, it did not file a withholding statement or a privilege log at the time.

Upon conclusion of the hearing on the motion to compel, the trial court ordered Fisher to tender all of the responsive documents for *in camera* review. Fisher tendered the three reports for review and at the same time filed a withholding statement, a privilege log, and motion for reconsideration in which Fisher argued for the first time that the documents were not responsive to the request for production. Subsequently, the trial court ordered Fisher to produce the documents to the plaintiffs. Fisher sought mandamus review.

On appeal, Fisher first argued that only thirteen lines of the 413 pages of produced reports was responsive to the request for production and that accordingly, the trial court's order requiring that it produce all of the reports was overbroad. The appellate Court refused to consider this argument because it stated that Fisher had waived it by failing to assert it in a timely manner. To support this conclusion, the Court explained Fisher had raised the non-responsiveness argument for the first time in supplemental briefing before the trial court following the court's order for Fisher to produce the responsive documents for *in camera* inspection. Moreover, Fisher did not object initially to the plaintiffs' request for production on grounds that the request was overly broad, nor did it object that the evidence was irrelevant or inadmissible. Fisher also did not oppose the motion to compel on the grounds that the request was overly broad. Rather, Fisher produced the three reports for *in camera* inspection when the trial court ordered it to product all *responsive* documents. The Court further noted the request for production was narrowly tailored—not overly broad—because it merely sought all correspondence with any government agency concerning the occurrence at issue in the lawsuit.

Fisher's second argument was that the documents were protected from discovery by the self-critical analysis privilege. The Court noted that although the Consumer Protection Safety Act, 15 U.S.C. § 2051, mandates the protection of a reporting entity's trade secrets and precludes the CPSC from disseminating the information contained in the reports required under the Act, there is still "no statutory provision creating a general privilege for reports mandated under the statute."[104] In the absence of a statutory a self- critical analysis privilege, the Court stated that Rule 502 of the Texas Rules of Civil Procedure is inapplicable. Last, the Court refused to recognize self-critical analysis privilege under the common law, noting that it was not the "role of intermediate courts of appeals to declare new common law discovery privileges."[105]

The Court then addressed Fisher's claims that the documents were protected by the attorney work product privilege. Although the Court acknowledged that Fisher's assertion of this privilege was somewhat late due to the facts that its privilege arguments before the trial court had "evolved," the Court concluded that its evolving focus on the attorney work product

[101] *Id.* at 45.

[102] 420 S.W.3d at 845.

[103] *Id.*

[104] *Id.* at 847.

[105] *Id.* at 848.

privilege did not constitute a waiver of that argument. The Court then easily determined the trial court did not abuse its discretion in overruling the attorney work product privilege by ordering production of the documents.

Last, the Court addressed Fisher's argument that the trial court "abused its discretion to the extent it ruled that Fisher & Paykel had waived attorney work product protection of the documents disclosed to the CPSC."[106] The Court noted that although Fisher failed to identify the doctrine by name, it appeared Fisher was arguing for the recognition of the selective waiver doctrine in Texas. The doctrine, which has its genesis in a 1977 Eighth Circuit case, evolved when that Court, sitting en banc, concluded that the production of certain attorney-client privileged documents to the Securities and Exchange Commission pursuant to a subpoena did not constitute a waiver of the privilege. The Court noted that since that case, the majority of courts to address the issue have rejected the Eighth Circuit's approach. Accordingly, the Court concluded that "the weight of authority does not favor recognition in Texas of a doctrine of selective waiver of privilege, as more recent federal opinions have pointed out."[107] In addition, the Court noted that the mere fact the attorneys had compiled materials in response to regulatory inquiry did not transform those materials into work products. Accordingly, the Court held the trial court did not abuse its discretion in ordering production of the documents.

On February 20, 2014, after its motion for rehearing was overruled, the defendants filed an application for mandamus with the Supreme Court. If the Texas Supreme Court decides to hear this case, it is anyone's guess as to whether the Supreme Court will recognize either the selective waiver doctrine or the self-critical analysis privilege in Texas. Given the Supreme Court's reluctance to require any business defendant to produce documents concerning other similar incidents, it should be an interesting case to watch.

B. Design and Manufacturing Defect Cases

As noted above, a product may be unreasonably dangerous as a result of a defect in manufacturing, marketing or design. In Texas, the Restatement (Second) of Torts section 402A has traditionally governed strict products liability claims. With respect to cases for design defect, the plaintiff must be able to prove by a preponderance of the evidence that (1) the product was defectively designed such that it is unreasonably dangerous; (2) a safer alternative design existed; and (3) the defect was the "producing cause" of the injury for which the plaintiff is attempting to obtain recovery.

1. *Carpenter v. Campbell Hausfeld Co.*, No. 01-13-00075-CV, 2014 WL 1267008 (Tex. App.—Houston [1st Dist.] March 27, 2014)

Dwayne Carpenter ("Carpenter") brought this lawsuit to recover from injuries he received after attempting to load an air compressor at Lowe's into his shopping cart. While doing so, the strap on the box broke, causing the box to tumble on him and knock him down. Carpenter asserted a strict products liability claim against Campbell-Hausfeld, the manufacturer of the air compressor, asserting that the strap on the box was defectively designed and caused the product to be unreasonably dangerous. Campbell-Hausfeld filed a no-evidence motion for summary judgment, contending Carpenter had not provided any evidence of a defect in the product or any legitimate argument for liability against the defendant. Moreover, Campbell-Hausfeld asserted Carpenter could not produce any evidence of a safer alternative design, or that Campbell-Hausfeld's actions were the producing cause of his injury, or any evidence of damages.

Carpenter responded that he had evidence that Campbell-Hausfeld's product was shipped without the correct number of safety straps and that the other air compressors in the store had two straps rather than one strap. The only evidence Carpenter attached to support his summary judgment response were his medical records and the unverified transcript of a telephone conversation between Carpenter and a gentleman who was named, but not otherwise identified, concerning the fact that the box Carpenter picked up had one strap, while the other boxes in the store had two straps.

The Court noted that Carpenter failed to attach any pictures of the box in question, any other evidence concerning the way the box was packaged, any evidence concerning the manner in which Campbell-Hausfeld typically packages its compressors, or any evidence to demonstrate the air compressor was defectively packaged at the time it left Campbell-Hausfeld's facility. After the defendant had moved for summary judgment but prior to the trial court's ruling on the motion, Carpenter filed an amended complaint in which he added a negligence claim against Campbell-Hausfeld.[108]

The trial court rendered summary judgment on Carpenter's claims, and Carpenter appealed. Given the deficiencies in Carpenter's summary judgment

[106] 420 S.W.3d at 849.

[107] *Id.* at 851.

[108] Carpenter also sued Lowe's for premises liability, but settled with Lowe's prior to these proceedings.

proof and his failure to produce any evidence concerning the condition of the box at any time, but especially at the time it left the Campbell-Hausfeld facility, the Court affirmed the trial court's grant of summary judgment with respect to Carpenter's strict products liability claim.[109]

The Court then addressed Carpenter's argument that the "rendition of summary judgment in favor of Campbell Hausfeld necessarily imposes a requirement of expert testimony to survive summary judgment."[110] The trial court did not specify the grounds on which it granted summary judgment, so Carpenter argued on the appeal that summary judgment grant was due to the fact that Carpenter only provided his lay opinion. The Court did not agree the trial court's grant of summary judgment yields the conclusion that an expert opinion is required to raise a fact issue in design defect cases. Rather, the Court reasoned the trial court could have determined that Carpenter presented no evidence—not even lay testimony—that the box left the Campbell-Hausfeld facility in a defective condition. In addition, the Court noted the trial court could have also determined Carpenter presented no evidence that a safer alternative design exists.

The Court analyzed Carpenter's negligence claim, agreeing with Campbell-Hausfeld that the negligence claims was "encompassed by [Carpenter's] strict products liability claim" and that accordingly, Campbell-Hausfeld's motion for summary judgment addressing the strict products liability claims also sufficiently addressed the negligence claim. The Court further stated that where—as here—a plaintiff alleges no negligence other than the fact that the product was unreasonably dangerous at the time of sale, the negligence claim is incorporated in the products liability theory.

The Court affirmed the trial court's grant of summary judgment. This case highlights the importance of summary judgment proof for plaintiffs in products liability actions.

2. *Ortega v. National Oilwell Varco, L.P.*, No. 07-13-00140-CV, 2014 WL 1691496 (Tex. App.—Amarillo April 24, 2014)

Edgar Ortega and Bituminous Insurance Company (collectively, "Ortega") sued National Oilwell Varco, L.P. (NOV), asserting negligence and products liability claims in connection with injuries Mr. Ortega received while he was working on an oil rig that NOV manufactured. NOV moved for summary judgment, and Ortega responded, attaching only an affidavit from an engineer who opined that NOV was liable. The trial court granted summary, and Ortega appealed. The appellate Court affirmed the summary judgment. The Court stated the expert's opinions and statements in the affidavit were conclusory and as such were insufficient raise a fact issue to defeat the motion for summary judgment. Once again, this case represents a lesson regarding the stringency required of parties in summary judgment proceedings. Although the plaintiffs hired an expert and attached his affidavit, this was still insufficient to defeat summary judgment absent very specific details and findings in the affidavit addressing the elements of the products liability and negligence claims at issue.

3. *Travelers Lloyds Insurance Company v. All-Glass Aquarium*, No. 3:12-CV-3635, 2014 WL 222356 (N.D. Tex. Jan. 17, 2014).

Travelers Lloyds Insurance Company ("Travelers"), as the real party in interest and subrogee of its insured Mannatech, Inc. ("Mannatech") filed a complaint on September 6, 2012, asserting products liability claims against All-Glass Aquarium ("AllGlass") seeking subrogation damages for property loss sustained by its insured at is business place when an allegedly defective fluorescent light component ("AFLC") manufactured by AllGlass caught fire. One year later, AllGlass moved for summary judgment, asserting that Travelers had no evidence to support any of its claims based on manufacturing defects, design defects, marketing defects, and negligence.

In response, Travelers conceded it did not have sufficient summary judgment evidence to demonstrate the AFLC was defectively designed or marketed and agreed that AllGlass was entitled to summary judgment on those claims.[111] Travelers, however argued there was sufficient evidence of defective manufacturing of the AFLC to survive summary judgment. The Court concluded the evidence was insufficient to raise a genuine issue of material fact with respect to all of the elements of Travelers' manufacturing defect claim, and thus granted AllGlass's motion for summary judgment in its entirety.

The Court reasoned that the expert Travelers used could not pinpoint the initial source of the fire due to the damage to the AFLC, but rather stated, in a conclusory fashion, that "'absent a product defect, a fire should not occur within an aquarium light.'"[112] The Court noted that such unsupported conclusory

[109] Carpenter also failed to present any evidence that a safer alternative design exists.

[110] 2014 WL 1267008 at *6.

[111] Travelers also conceded that its negligence claim was "subsumed" in the defective product theories.

[112] 2014 WL 222356 at *4.

assertions are not competent summary judgment evidence. Moreover, Travelers attempted to rely on expert evidence to eliminate other causes for the product failure, but such evidence is insufficient to establish a manufacturing defect. Travelers was unable to eliminate the possibility of a design defect—even though it had no evidence of a design defect. Travelers also failed to provide any other evidence, such as service records regarding the maintenance of the aquarium from 2006 when it was installed. In addition, the Court noted the age of AFLC, while relevant, did not constitute evidence that the AFLC was defective when it left the manufacturer. Indeed, the aquarium was donated to the insured, and Travelers could not show that the aquarium and the AFLC were purchased "new" or otherwise verify the age of the aquarium and AFLC. Furthermore, the aquarium had been in use at the insured's office for over 5 years before the fire occurred. Thus, no product defect could be inferred from the product's age. Last, there was no indication the AFLC deviated from the manufacturer's specifications in a manner that made it unreasonably dangerous.

C. Is It a Products Liability Action or Not?

1. *Randol Mill Pharmacy, et. al v. Miller*, 413 S.W.3d 844 (Tex. App.—Fort Worth 2013)

Whether a lawsuit is a healthcare liability claim or a products liability claim can have a tremendous impact on the viability of the lawsuit. In *Randol Mill Pharmacy*, Stacey Miller, who was diagnosed with Hepatitis C, began receiving weekly injections of the antioxidant supplement lipoic acid by her physician. As a result of the administration of these injections, she was ultimately rendered blind in both eyes. She brought claims against the compounding pharmacists from whom her physician obtained the lipoic acid, claiming the pharmacists manufactured, distributed and sold a defective product and breached certain warranties with respect to the product. During the course of the litigation, she did not file an expert report as required by the Texas Medical Liability Act ("TMLA") in health care liability lawsuits.[113]

The defendants filed a motion to dismiss alleging that the Millers' suit was a health care liability claim governed by the TMLA and that accordingly, the failure to provide an expert report in compliance with the TMLA was fatal to the case. In response, the Millers provided numerous documents created by the Texas Department of State Health Services regarding the defendants' manufacture of the injectable lipoic acid that caused Stacey's injuries. The trial court overruled the motion to dismiss, and the defendants appealed.

In 2003, the Texas legislature amended the medical liability statutes in Texas and codified them in chapter 74 of the Civil Practice and Remedies Code as the TMLA. The TMLA requires that a health care liability claim possess three elements:

a) the defendant must be a health care provider or physician;
b) the claimant's cause of action must concern treatment, lack of treatment, or other claimed deviations from accepted standards of care related to health care; and
c) the defendant's alleged departure from these standards of care must have proximately caused the claimant's injury or death.

According to the Court, the first element was at issue in this case. The Court noted that under the TMLA, a pharmacist must, among other things, dispense a prescription medicine which results in a health care liability claim to be covered by the act. Here, however, Stacey's physician, Dr. Tan, did not complete or call in a prescription, but rather called in a "bulk" telephone order.

Accordingly, the appellants did not dispense or fill a prescription in connection with these injuries. Instead, the pharmacy distributed the lipoic acid without a prescription drug order and thus, fell under the Texas, Food, Drug, Cosmetic Act § 431.4014-a. In these circumstances, then, the compounding pharmacists could be liable as a manufacturer of a new prescription drug, which lacked evidence of approval from the FDA.

Furthermore, the appellants "did not compound the injectable lipoic acid for delivery to an ultimate user, i.e., for delivery to Stacey Miller or any other specific person," but rather filled a bulk order to a physician for office use to be injected in unknown persons.[114] Thus, the Court concluded that the appellants in this case did not fall within the TMLA's "limited definition of 'pharmacist'" and were excluded from the TMLA's list of healthcare providers.[115] The Millers were not required to file an expert under the TMLA, and the trial court did not err in denying the motion to dismiss.

The Supreme Court has not yet ruled on the petition for review, but already several pharmacy and compounding pharmacy special interest groups have filed a Brief of Amicus Curiae urging the Supreme Court to overrule this decision.

[113] *See* TEX. CIV. PRAC. & REM. CODE § 74.351(a).

[114] 413 S.W.3d at 849.

[115] *Id.*

2. *Grizzly Mountain Aviation, Inc., v. Honeywell International, Inc.*, No. 13-11-00676-CV, 2013 WL 5676069 (Tex. App.—Corpus Christi Oct. 17, 2013)

Grizzly Mountain Aviation, Inc. ("Grizzly") brought a products liability lawsuit against Honeywell International, Inc. ("Honeywell") seeking property damages for a helicopter crash that occurred in Oregon. Grizzly asserted products liability and warranty claims against Honeywell, alleging that an engine manufactured by Honeywell caused the helicopter to lose power and to crash. Grizzly had purchased two helicopters and just prior to the crash, Grizzly transferred the Honeywell-manufactured engine to the accident helicopter. Grizzly filed a motion with the court asking the Court to apply Connecticut law in light of the fact that the engine and its component parts were manufactured in that state. Honeywell filed a motion for summary judgment, which the trial court granted without specifying the grounds on which it granted the motion. The trial court also denied Grizzly's motion to apply Connecticut law. Grizzly appealed.

The appellate Court first overruled Grizzly's argument that Connecticut law should have applied. The Court pointed out that Grizzly failed to demonstrate a conflict exists between Texas law and Connecticut law. Rather, the Court reasoned, Grizzly merely showed that under Connecticut law, the economic loss rule defines "other property" more broadly than the comparable Texas rule does. Grizzly could not demonstrate it was entitled to damages under the Connecticut rule or that the rule otherwise conflicted with the Texas rule. Accordingly, the Court found that with no conflict between the two states' laws, the trial court properly denied its motion.

Second, the Court addressed Grizzly's argument that the summary judgment grant was improper because its claims are not barred under Texas's economic loss rule. Under the economic loss rule, if damage occurs only to a product, the claim a party has is for economic loss and must be brought on the parties' contract. If there is some physical injury to persons or "other property," then the claims may be brought as tort claims. Grizzly argued the engine—which had been moved from one helicopter to another—caused damage to "other property," i.e. the accident helicopter. The Court disagreed, stating there was no authority to support the conclusion that "when a party purchases a finished product and then replaces a component part with a part from another finished product, that party may escape application of the economic loss rule and prevail in strict liability."[116] Accordingly, the Court concluded Grizzly's claim was not properly brought as a products liability claim, but rather should have been brought under the UCC. The Court affirmed the summary judgment.

3. *Fresh Coat, Inc. v. Parexlahabra, Inc.* No. 09-13-00067-CV, 2014 WL 64441 (Tex. App.—Beaumont Feb. 20, 2014)

This statutory indemnity action brought by a company that installed an allegedly defective exterior insulation and finishing system ("EIFS") against the manufacturer of that system concerns the Products Liability Act of 1993 ("PLA").[117] That Act provides that a manufacturer is only required to indemnify a seller for losses "arising out of a *products liability action*."[118] In this case, the installer failed to demonstrate its damages were related to settlements or other expenses incurred as a result of certain homeowners filing lawsuits against it and alleging that the EIFS defendant supplied was defective and caused damages to their homes. Rather, the only "evidence" the plaintiff supplied to the trial court in response to the defendant's no evidence motion for summary judgment were letters voicing general complaints about the presence of EIFS in the homeowners' houses; release agreements between the homebuilder that hired the plaintiff installers and five homeowners; inventory material sheets for various installation sites identifying defendant as the supplier of EIFS to those sites; and an affidavit signed by the plaintiff's former president stating that the EIFS supplied by the defendant was utilized on several of the homes that were the basis for the indemnity claim.

To determine whether the trial court properly granted the motion for summary judgment, the appellate Court looked at whether the term "action" in the PLA is equivalent to the term "suit." Plaintiff argued that the letters it attached to its response to the no evidence motion for summary judgment constituted some evidence that its claim for indemnity relates to a "products liability" action. The defendant countered that the letters merely represented general complaints and could not be used to "define what actions the homeowners might have chosen to pursue had they filed suit."[119] Moreover, defendant argued that by limiting the indemnity obligation to a "products liability action," the Legislature intended to confine claims to causes of action that were specified by pleadings.

The Court agreed with the defendant, concluding that the filing of an underlying lawsuit concerning the defective product, and not general complaint letters, is

[116] 2013 WL 5676069 at * 6.

[117] *See generally* TEX. CIV. PRAC. & REM. CODE § 82.002.

[118] *Id.* (emphasis added).

[119] 2014 WL 64441 at *5.

required to bring statutory indemnity claim. In addition, the Court decided the releases attached to the plaintiff's response were "also no evidence proving that [plaintiff] settled a 'products liability action.'"[120] Likewise, the affidavit and product inventory sheets did not constitute competent summary judgment proof that plaintiff incurred any damages resulting from a "products liability action." The trial court's summary judgment grant was accordingly affirmed.[121]

D. Responsible Third Parties

In *Hernandez v. Bumbo, Ltd.*, No. 3:12-cv-1213-M, 2014 WL 924238 (N.D. Tex. 2014), the District Court for the Northern District of Texas recently was faced with a disputed motion for leave to designate a named plaintiff and parental guardian as a responsible third party. Defendants, Bumbo, Ltd. ("Bumnbo") sought to designate Waikiki Hernandez, the mother of an infant injured on the Bumbo seat, as a responsible third party because Bumbo claimed that Mrs. Herndandez's "use of the Bumbo seat on a raised surface was an improper use of the product, and contrary to warnings that accompanied the product."[122] Plaintiffs argued the motion should be denied because:

> "(1)the applicable statute of limitations has expired; (2) the doctrine of parental immunity bars Mrs. Hernandez being designated as a responsible third party; and (3) Mrs. Hernandez cannot be designated a responsible third party because she is already a party to this lawsuit."[123]

The Court addressed each argument in turn.

1. Statute of Limitations Argument

Plaintiffs asserted that Bumbo's motion, which was filed on November 25, 2013, was untimely because the statute of limitations on Mrs. Hernandez's individual bystander claim had already terminated on November 24, 2013. The Court disagreed for multiple reasons. Analyzing Section 33.004(d) of the CPRC, the Court pointed out that Plaintiffs had failed to allege the Defendant did not comply with its obligations to disclose in a timely manner that it was planning to designate Mrs. Hernandez as a responsible third party as the statute requires. In addition, the statute mandates that the relevant limitations period concern the "claimant's cause of action"—Mrs. Hernandez's minor son—and thus her bystander claim would be irrelevant.[124] Last, the Court stated that in any event, the motion was timely because November 24, 2013 was a Sunday and thus the time to file would have been extended to Monday, November 25, 2013, on which day the motion was filed.

2. Parental Immunity Argument

Plaintiffs contended the doctrine of parental immunity precluded designation of C.H.'s mother as responsible third party with respect to the claims of C.H. under Chapter 33 of the CPRC. The Court disagreed, noting first that Plaintiffs' "cited authority does not concern parental immunity in the context of responsible third party designations made after the 2003 amendments to Chapter 33."[125] Prior to 2003, Chapter 33 required that parties could only designate persons who were not immune from suit. However, the 2003 amendments liberalized these designations, permitting designations of parties who are not subject to the court's jurisdiction, immune from suit, or even who are unknown. Thus, the parental immunity defense does not protect a person from being designated as a responsible third party.

3. Already a Party Argument

Finally, Plaintiffs argued that because Mrs. Hernandez was already a party to the action Bumbo could not designate her as a responsible third party. Defendant countered that although Mrs. Hernandez is a party to the lawsuit with respect to her individual bystander claims, she was not a party to the lawsuit with regard to the claims of minor plaintiff C.H. It is for these claims that Bumbo asserted it wished to designate Mrs. Hernandez as a responsible third party. The Court disagreed with this approach, noting that under Chapter 33, Mrs. Hernandez was still classified as a "claimant." The Court went on to note that there is a dearth of authority with respect to whether a claimant, especially a guardian, may still be named as a responsible third party.

The Court ultimately ruled in favor of Bumbo on this issue. In reaching its decision, the Court noted that: the CPRC post-2003 explicitly defined a responsible third party as "any person" without limitation; the purpose of the 2003 amendments was

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[120] *Id.* at *7.

[121] Another recent statutory indemnification case that has not been released for publication yet and is subject to revision or withdrawal is *PS Investments, L.P. v. Southern Instrument and Valve Co., Inc.*, No. 01-12-01016-CV, 2014 2014 WL 1226241 (Tex. App.—Houston [1st Dist.] March 25, 2014) (affirming grant of summary judgment because PLA does not provide indemnity for breach of service contract claims, but rather only for products liability actions).

[122] 2014 WL 924238 at *1.

[123] *Id.*

[124] *Id.* at * 2.

[125] *Id.*

to "liberalize who may be designated"; and thus, in furtherance of that aim, the Court should permit Mrs. Hernandez, who because of parental immunity would be not be liable for contribution, to be designated as a responsible third party.[126] The Court concluded that designating her as a responsible third party would not be "superfluous" or "redundant" because it was the only mechanism through which her fault could be considered. Accordingly, the Court granted Bumbo's motion and designated Mrs. Hernandez as a responsible third party.

VII. CONCLUSION

While the past year has been eventful, the months to come will likely be just as exciting. With the General Motors' products liability lawsuits dominating the news, it will be interesting to see how courts respond to public opinion with respect to these cases. In addition, it appears that great strides have been made to close the generic drug loophole discussed in Section II of this paper. Indeed, the FDA has apparently proposed a new rule that would permit the generic drug manufacturers to modify and update their labels with new safety warnings without prior FDA approval. Such a rule would place the generic drug manufacturers in the same position as the brand name drug manufacturers and would restore balance to this area.

[126] *Id.* at *4-5.