PRODUCTS LIABILITY UPDATE 2006

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CHAPTER 22

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As with most areas of tort law in Texas, recent legislative and judicial tort reforms have significantly changed products liability. Beyond Texas, Federal laws continue to be passed that expressly preempt state created tort rights. Almost uniformly, State and Federal changes have eroded the rights of product defect victims. In 2003, the Texas Legislature passed House Bill 4, which, among other things, created presumptions of no liability favoring defendants and eliminated entire classes of claims. In addition to legislative tort reform, the Texas Supreme Court and some other appellate courts has authored several opinions since 2003, which have likewise restricted the rights of product defect victims. This paper first outlines the changes brought about by House Bill 4 and case law interpreting the same then, abstracts the most important appellate court opinions dealing with products liability over the past several years.

I. 2003 LEGISLATIVE CHANGES & INTERPRETATIVE CASE LAW

House Bill 4 affected major changes in the products liability arena through: (1) the creation of presumptions of no liability in certain cases; (2) the creation of a 15 year statute-of-repose; and (3) the creation of immunity for passive sellers. These changes are codified in the Texas Civil Practice & Remedies Code at sections: 82.008 (creating a presumption of no design or marketing defects in certain instances); 82.007 (creating a presumption of no marketing defects in certain pharmaceutical cases); 16.012 (creating a 15 year statute-of-repose); and 82.003 (creating immunity for passive sellers). There were also two evidentiary changes favoring defendants—the first dealing with admissibility of seatbelt use/nonuse and the second restricting the admissibility of subsequent remedial measures. A detailed analysis of these legislative changes is set forth below.

A. 82.008: Presumption of No Liability for the Formulation, Labeling or Design of a Product when Mandatory Federal Regulations or Standards are Followed.

Texas Civil and Practice and Remedies Code §82.008 creates a rebuttable presumption in favor of product manufacturers and sellers. The rebuttable presumption is created when the manufacturer or seller establishes that the product's formulation, labeling or design complied with mandatory safety standards or regulations adopted or promulgated by the federal government or an agency of the federal government.[1] Further, the seller and manufacturer must establish that those safety standards or regulations were applicable at the time of manufacturer and governed the risk that allegedly caused the harm.[2] 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."[3]

Several important issues should be considered when reviewing §82.008(a). First, the burden is on the seller or manufacturer to establish the existence of the presumption. Second, the presumption is limited to formulation, labeling or design. An argument could be made that only marketing claims dealing with labeling are covered by this provision. A strict reading of this statute would disallow the creation of the presumption if the Plaintiff's claims were based on a marketing defect that involved a claim other than the product labeling. Finally, the mandatory safety standard or regulation must have been applicable at the time of manufacture and must have governed the risk that caused the harm.

While mandatory federal regulations may apply, a careful analysis of the risk sought to be protected against is essential to determining the existence of a presumption. For instance, Federal Motor Vehicle Safety Standard 207, deals with seat back strength. This standard was created to protect a passenger from injuries sustained when his or her own seat back fails. This regulation was not enacted to protect the back seat passengers who may be injured by a front passenger seat back failure. A careful and thoughtful analysis of §82.008(a) and a detailed analysis of the safety standard or regulation invoked by the Defendant is essential to determine whether it is appropriate to create the rebuttable presumption in the first place.

On a separate note, it is important to understand that section 82.008(d) expressly excludes manufacturing flaws or defects from the rebuttable presumption created by §82.008. This exclusion exists even if the manufacturing processes were mandated by a federal government or agency. Likewise, §82.008(e) excludes products covered by §82.007, or pharmaceuticals.

Once the presumption is properly established, the claimant may rebut the presumption by establishing that the standard or regulation was inadequate to

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[1] *See* TEX. PRAC. & REM. CODE § 82.008(a), West 2004

[2] *Id.*

[3] *Id.*

protect the public from unreasonable risk of injury or damage.[4] Alternatively, the presumption may be rebutted by showing that the manufacturer, before or after marketing the product, withheld or misrepresented information or material relevant the federal government's determination of the adequacy of the safety standard or regulation.[5]

Thus, the claimant rebuts the presumption first by attacking the standard. Any attorney who has tried a products liability case involving a mandatory regulation knows that the defense touts compliance with the standard as the government's seal of approval. At the same time, plaintiffs' counsel generally points out that the standard is a minimum standard, and many times outdated and inadequate. The evidence Plaintiffs previously used to attack the standard from the persuasive standpoint will be, most times, the same evidence used to rebut the presumption. But, now it is critical to offer this evidence to defeat the presumption.

Second, the presumption is rebutted by attacking the manufacturer's interaction with the federal government regarding the government's determination of the adequacy of the standard. This second method for rebutting the presumption opens up a Pandora's Box of discovery. Section 82.008(b)(2) reads: "the manufacturer, before or after marketing the product, withheld or misrepresented information or material relevant to the federal government's or agency's determination of adequacy of the safety standards or regulations at issue in the action." The language: "the manufacturer . . . withheld or misrepresented information or material relevant to the . . . government's . . . determination of adequacy of the safety standards or regulations . . ." does not require a manufacturer to provide information relevant to the product or the products compliance with the standard, but rather information relevant to the standard itself. Are manufacturers now responsible for determining whether government standards are adequate as they apply to the manufacturer's product? Does the manufacturer now have a quasi-governmental role? These issues are further complicated by the time period imposed, "before or after" the manufacturer markets the product. Interestingly, under the wording of this bill, there is no exception for a manufacturer who does withhold relevant information about the product's performance under the standards or regulations. Presumably, plaintiffs now will be able to obtain all correspondence and interaction that the manufacturers would have with the federal government and its agencies and will be able to pursue discovery to determine whether any information was withheld or misrepresented, not only with respect to the particular product's performance, but as to the safety standard as a whole.

Section 82.008(c) creates another rebuttable presumption of no liability favoring manufacturers and sellers with respect to formulation, labeling and design if the products were subject to pre-market licensing or approval by the federal government (or a federal agency) and the manufacturer complied with the procedures and requirements with respect to pre-market licensing or approval and after full consideration of the product's risks and benefits the product was approved or licensed for sale by the government or agency.

The section 82.008(c) presumption may be rebutted by showing that the standards and procedures used in the particular pre-market approval or licensing process were inadequate to protect the public from unreasonable risks of injury or damage.[6] Alternatively, the presumption maybe rebutted by showing that the manufacturer, before or after the pre-market approval or licensing, withheld from or misrepresented to the government information that was material and relevant to the performance of the product and was causally related to the claimant's injury.[7] In the pre-market licensing or approval context the rebuttal rules are the same of the section 82.008(b) rules, except for two significant things. First, the withholding or misrepresenting of information must be relevant to the performance of the product.[8] Second, the withholding or misrepresenting information must be causally related to the claimant's injury.[9]

Interestingly, the most important aspect of §82.008 has yet to be determined. More specifically, the issues of how the presumptions will be treated in the trial and in the court's charge are of enormous importance. Obviously, the defendant manufacturers and sellers would like an additional charge question or an instruction. I further suspect that the defendants will want to talk about this presumption during voir dire, opening and as many times as the judge will allow after that! The plaintiffs' bar would argue that the presumptions should not be addressed in the charge or

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[4] *See* TEX. CIV. PRAC. & REM CODE § 82.008(b)(1), West 2004.

[5] *See* TEX. CIV. PRAC. & REM CODE § 82.008(b)(2), West 2004.

[6] *See* TEX. CIV. PRAC. & REM. CODE § 82.008(c)(1), West 2004.

[7] *See* TEX. CIV. PRAC. & REM. CODE § 82.008(c)(2), West 2004.

[8] *Id.*

[9] *Id.*

the trial at all. While these issues remain to be flushed out by the courts, the consensus, the case law[10] and the better reasoned approach is that the rebuttable presumptions should not be included in the charge at all.

The Court of Appeals in Corpus Christi discussed the section 82.008 preemption issue in *Bic Pen Corp. v. Carther*.[11] This is a products liability case against Bic Pen Corp., the manufacturer of a child-resistant, disposable lighter. The mother of a six year old child brought this action after her five year old son caught his sister's dress on fire while playing with the lighter. The jury found for the plaintiffs, and Bic Pen filed an appeal.

One of Bic Pen's claims on appeal involved the sufficiency of evidence in proving that the lighter caused the injuries. The court held that the evidence was legally and factually sufficient. Section 82.008(b) of the Civil Practice and Remedies Code, creates a presumption of no design defect arising from compliance with federal standards. However, this is rebuttable by the plaintiffs through evidence of testing revealing the inadequacy of standards in preventing unreasonably dangerous products from reaching the marketplace. In this case, the tests results demonstrated that the child-resistant lighter could be virtually as unsafe as lighters which are not child-resistant, which the court held was sufficient evidence for Plaintiff to use in rebutting the presumption.

Another case dealing with section 82.008 is *Hernandez v. Ford Motor Co*.[12] Specifically, *Hernandez* addresses the federal preemption issue between section 82.008(b) of the Texas Civil Practice and Remedies Code and the Federal Motor Vehicle Safety Act. In this defective car roof case, plaintiffs allege that the Federal Motor Vehicle Safety Standard was inadequate to protect against unreasonable risks or injury due to a defective roof, and that Ford Motor withheld or misrepresented information or material relevant to the Nation Highway Traffic Safety Administration's (NHTSAS's) determination of adequacy of the safety standards or regulations at issue in this action. Thus, plaintiffs claim that Ford committed a fraud on the National Highway Traffic Safety Administration (NHTSA). Ford Motor argued that the fraud claim was preempted by federal law.

The court held that the Federal Motor Vehicle Safety Act does not preempt state law, basing its holding on the savings clause in the Act, which states "compliance with consumer product safety rules or other rules or orders under this chapter shall not relieve any person from liability at common law or under State statutory law to any other person." Accordingly, plaintiffs would be allowed to present evidence to rebut the presumption of compliance with federal safety standards.

B. 82:007: Presumption of No Marketing Defect When There is Compliance with FDA Requirements

If a products case alleges that an injury was caused by a failure to provide adequate warnings or information about a pharmaceutical product, section 82.007 creates a rebuttable presumption that the defendants, including the health care provider, manufacturer, distributor, and prescriber, are not liable, if the warnings accompanying the product were those approved by the United States Food And Drug Administration (FDA).[13]

The presumption of no liability in pharmaceutical marketing defect cases, can be rebutted by evidence that the defendant, before or after pre-market approval or licensing, withheld from or misrepresented to the FDA required information that was material and relevant to the performance of the product and was causally related to the claimant's injury.[14] Again, unlike 82.008(b)(2), rebutting the presumption in the pharmaceutical context requires that the withheld information be relevant and material and also be causally related to the claimants' injuries.[15]

Next, the presumption can be rebutted by showing that the product was sold or prescribed after the

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[10] *Texas A&M University v. Chambers*, 31 S.W.3d 780, 784 (Tex. App.—Austin 2000), pet. denied)."A presumption 'may not properly be the subject of an instruction to the jury.' *Armstrong v. West Tex. Rig Co*., 339 S.W. 2d 69, 74.*(*Tex. Civ. App. – El Paso 1960, writ ref'd n.r.e.). Its inclusion is improper because the sole effect of a presumption is to fix the burden of producing evidence. A presumption is nothing more than a rule for the guidance of the trial judge in locating the burden of proof of production at a particular time. *Armstrong*, 339 S.W.2d at 74. *Texas A&M University v. Chambers*, 31 S.W.3d 780 at 794. The Supreme Court explained '[A] presumption is an artificial thing, a mere house of cards, which one moment stands with sufficient force to determine an issue, but at the next, by reason of the slightest rebutting evidence, topples utterly out of consideration of the trier of facts.' *Combined Am. Ins. Co. v. Blanton*, 163 Tex. 225, 353 S.W. 2d 847, 849 (1962)."

[11] 171 S.W.3d 657 (Tex. App.—Corpus Christi 2005, pet filed).

[12] 2005 WL 1830660 (S.D. Tex. 2005).

[13] *See* TEX. CIV. PRAC. & REM. CODE §82.007, West 2004.

[14] *See* TEX. CIV. PRAC. & REM. CODE §82.007(b)(1), West 2004.

[15] *Id.*

effective date that the FDA ordered its removal from the market or the FDA withdrew its approval.[16] The presumption can also be rebutted by showing an "off label" use. Sometime, healthcare providers and pharmaceutical companies prescribe and promote a particular drug to treat a problem for which the FDA did not approve the drug's use. When there is an "off label" use, the defendant looses the presumption of no liability. The evidence needed to rebut the presumption under an "off label" theory is set forth as 82.007(b)(3) and 82.007(b)(4). Under this theory the claimant needs to show: (1) the defendant recommended, promoted, advertised or prescribed the off label use; (2) the product was used as recommended, promoted, advertised or prescribed; and (3) the claimant's injury was causally related to the recommended, promoted, advertised or prescribed use of the product. Finally, the presumption can be rebutted by showing that the defendant, before or after pre-market approval or licensing of the product, engaged in conduct that would constitute a violation of 18 U.S.C. Section 201 and that conduct caused the warnings or instructions approved for the product by the FDA to be inadequate.[17]

C. 16.012: 15 Year Statute-of-Repose

Most of the 2003 legislative changes dealing with products liability chipped away at victims' rights through the creation of additional defenses and evidentiary obstacles. But, the newly created section 16.012 of the Texas Civil Practice & Remedies Code actually abolished many victims' rights. Section 16.012 is a new statute-of-repose. This section requires that a claimant in products liability case bring suit within 15 years after the defendant sold the product.[18] This new statute–of-repose applies to all actions where a product defect is alleged, regardless of the cause-of-action asserted (negligence, breach of warranty, 402(a) etc.) and regardless of the damages sought (personal injury, economic loss or equitable relief.)[19]

The 16.012 statute-of-repose has a few narrow exceptions. The statute will not bar an express warranty claim—where the warranty is made in writing and where the defendant warranted that the product is safe beyond 15 years.[20] Cases in which the claimant is exposed to a product within the 15 year time period, but does not manifest disease symptoms until after the 15 years, are not subject to the statute of repose.[21] The statute-of-repose only applies to products that are sold, not those that are leased.[22] Finally, the statute of repose does not apply to aviation claims that are subject to the General Aviation Revitalization Act of 1994.[23]

Since 16.012 was enacted, there have been several cases applying this provision. In *Saporito v. Cincinnati Inc.* 2004 WL 234378 (Tex. App.–Houston [14th Dist.] 2004, no pet. h.) The 14th Court of Appeals affirmed a summary judgment in favor of Cincinnati Incorporated holding that the statute-of-repose barred the plaintiff's cause-of-action. The product at issue was a press brake machine manufactured in 1953. The court rejected arguments founded upon continuing negligence, express warranty, and post-sale duties.

The holding in *Equistar Chemicals v. Dresser-Rand Co*., 123 S.W.3d 584 (Tex. App.–Houston [14th Dist.] 2003, pet. granted), at footnotes 5 & 6, comments that pleading the statute-of-repose is not sufficient to reserve the point on appeal. Rather, the issue must be raised by a motion in the trial court in order to properly preserve the complaint. Note that petition for review has been granted in this case.

In *Zaragosa v. Chemetron Inv*., 122 S.W.3d 341 (Tex. App.--Ft. Worth 2003, no pet. h.), a worker lost his hand in a commercial blender that was sold in 1978 by the Defendant to a third-party. Thereafter, the third-party sold the blender to the plaintiff's employer. Plaintiffs argued that the statute-of-repose should not run from 1978, but from the date his employer purchased the blender from a third-party. The court rejected this argument under the plain language of the statute. The court also rejected constitutional challenges under the open court guarantees of the United States and Texas Constitutions.

Finally in *Burlington N. & Santa Fe Ry Co. v. Poole Chem.*, Co., 419 F.3d 355 (5th Cir. 2005), the issue was whether the 15-year statute-of-repose applied

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[16] *See* TEX. CIV. PRAC. & REM. CODE § 82.008(b)(2), West 2004.

[17] *See.* TEX. CIV. PRAC. & REM. CODE § 82.007(b)(5), West 2004.

[18] *See* TEX. CIV. PRAC. & REM. CODE § 16.012(b), West 2004.

[19] *See* TEX. CIV. PRAC. & REM. CODE, §16.012(a)(2), West 2004.

[20] *See* TEX. CIV. PRAC. & REM. CODE § 16.012(c),West 2004.

[21] *See* TEX. CIV. PRAC. & REM. CODE §16.012(d), West 2004.

[22] *See* TEX. CIV. PRAC. & REM. CODE §16.012(e), West 2004.

[23] *See* TEX. CIV. PRAC. & REM. CODE §16.012(g), West 2004.

retroactively. According to *Burlington*, the plain language of section 16.012 confirms that the Texas legislature intended for the 15-year statute-of-repose to apply in such a way. In this case, Burlington performed an emergency clean-up of its right-of-way following a chemical storage tank rupture. Burlington sued the owner of the tanks, who then sued the seller of the tanks alleging the tanks were defective. The court dismissed the owner's suit against the seller stating it was barred by the 15-year statue of repose because the date of the sale was on October 28, 1988 and the suit was filed on April 19, 2004. The owner claimed that section 16.012 could not be applied retroactively.

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

D. 82.003: Passive Seller Immunity

Section 82.003 of the Texas Civil Practice and Remedies Code is a newly created statute entitled, "Liability of Non-Manufacturing Sellers." This statute sets forth an entirely new concept in products liability law: a passive seller of a defective product is generally not liable for harm caused by that product.[24] Traditionally, most sellers or distributors in the chain of product distribution were subject to liability for defects in products they sold. The rationale for imposing liability on these passive sellers is that sellers should take responsibility to see that products they provide to the public are safe and defect free. A further rationale was that these passive sellers could (and still can) seek indemnity from the ultimate manufacturer for both defense costs and liability by way of either settlement or judgment.[25]

Does the newly enacted §82.003 afford the non-manufacturing seller additional necessary protection beyond its indemnity rights? Not really. A non-manufacturing seller would have some minimal benefit in avoiding the hassle of defending an underlying products suit and then later seeking indemnity from the manufacturer. However, most often the manufacturer would, early on, step in the underlying suit and agree to defend and indemnify the non-manufacturing seller so as to avoid paying the defense bills of its own lawyers and those lawyers hired by the passive seller. When the manufacturer refuses to defend and indemnify, it is generally because the seller has some independent culpability; because the manufacturer is not subject to the jurisdiction of the Court; or because the manufacturer is insolvent. Significantly, the newly enacted §82.003 provides exceptions to a passive seller's immunity under just these type circumstances. So, if the only real benefit created by the enactment of §82.003 is the elimination of some hassle to non-manufacturing sellers, why was this legislation enacted and how will it impact products liability litigation? The answer is not really the substantive changes created by this new law; rather, the answer lies in the effect this statute will have on the location where products liability cases will now be litigated.

Even though Texas is a big state, most products are manufactured by companies who maintain their citizenship outside of Texas. For instance, none of the Big Three automobile manufacturers are Texas "citizens." Thus, when a Texas resident sues a manufacturer without Texas "citizenship" – federal diversity jurisdiction exists under 28 U.S.C. 1332(a). Without a Texas "citizen"–such as a local non-manufacturing seller– added as a Defendant, the manufacturer will almost certainly remove the products liability action to Federal Court. Section 82.003 in most instances, prevents Plaintiffs from suing local non-manufacturing Defendants to destroy diversity jurisdiction and to maintain their cases in more favorable state courts. Section 82.003 was passed less as a substantive protection for local non-manufacturing sellers and more as a means to guide products liability cases to a generally more defense oriented arena– federal courts.

With an understanding of the underlying rationale and practical effect of §82.003, let's now turn to an in-depth examination of the law. Section 82.003(a) provides that: "A seller that did not manufacture a product is not liable for harm caused to the claimant by that product unless the claimant proves…"one of seven exceptions.[26]

Section 82.003(a)(1) provides an exception if the claimant can prove: "that the seller participated in the design of the product." Significantly, the statute does not indicate what level of design participation triggers the threshold for liability. Moreover, this section does not require that the seller's participation in the design results in the claimant's harm.

Next, §82.003(a)(2) provides an exception if the claimant can prove that the seller altered or modified the product, and the claimant's harm resulted from that alteration or modification. Unlike the previously discussed exception, this exception requires that the seller's alteration or modification result in the claimant's harm. As an example, if a claimant was

[24] *See* TEX. CIV. PRAC. & REM. CODE §82.003(a), West 2004.

[25] *See* TEX. CIV. PRAC. & REM. CODE § 82.002, West 2004.

[26] In addition to the seven exceptions, Occupation Code 2301 prevails over 82.003 in limited circumstances.

injured in a vehicle rollover and alleged that the vehicle's stability was unreasonably dangerous, a non-manufacturing seller may be exposed to liability if they altered or modified the vehicle in a way that affected the vehicle's stability. For instance, the seller could have placed larger tires on the vehicle, could have installed a lift kit to change the suspension system, or could have installed after-market components, all of which are changes that affect the vehicle's stability.

When a claimant proves that "the seller installed the product, or had the product installed, on another product, and the claimant's harm resulted from the product's installation onto the assembled product" then there is an exception to the non-manufacturing seller's immunity under §82.003(a)(3). Again, this will require some culpable action by the passive seller – improper installation – that is causally related to the harm.

The next exception deals with a seller's involvement in the warnings and instructions on products. Section 82.003(a)(4) allows an exception to passive seller's immunity when the seller exercised substantial control over the content of a warning or instruction; the warning or instruction was inadequate; and the claimant's harm resulted from the inadequacy of the warning or instruction.

The final exception that involves culpable conduct on behalf of the passive seller relates to express factual representations about the product. Section 82.003(a)(5) provides an exception to passive seller immunity when the seller makes an express factual representation about an aspect of the product; the representation is incorrect; the claimant relies on the representation in obtaining or using the product; and if the aspect of the product had been as represented, the Plaintiff would not have suffered harm or the same degree of harm.

As is apparent, the first five exceptions exist when the passive seller undertakes some action that makes it more than merely a "passive" participant in the distribution chain. Except for a participation in the design of the product, four of these five exceptions have a causal component included within the language of the statute.

The next exception to a passive seller's immunity exists when the seller has actual knowledge of the injury causing defect at the time the product is sold. For instance, if a meat packing plant informs a local grocery store of an infected meat product, but the grocery store sells the defective meat product; the grocery store will be liable under the actual knowledge exception. Questions remain as to the proof necessary to show the seller had actual knowledge of a defect. For instance, if a seller views a news magazine piece regarding alleged defects with a certain product; receives correspondence from Plaintiff's counsel regarding the existence of the defect; or was previously sued where the same defect allegations were made, will this constitute actual knowledge of a defect under 82.003(a)(b).

There has been one case interpreting the actual knowledge exception set forth in 82.003(a)(6), *Reynolds v. Ford Motor Co.*, 2004 WL 2870079 (N.D. Tex. 2004). *Reynolds v. Ford Motor Co.* case is a Federal District Court opinion on a motion to remand. As discussed above, the plaintiff's counsel in an attempt to destroy diversity jurisdiction, sued the local retailer and pled the actual knowledge exception to the passive seller immunity statute. In turn, the defendant argued fraudulent joinder. The underlying lawsuit involved a single vehicle rollover accident involving a 1998 Ford Explorer. As a basis for the actual knowledge exception, the plaintiffs argued that the 1998 Ford Explorer Sport contained a warning on the vehicle's sun visor and owner's manual. Further, plaintiffs alleged that the dealer knew the National Highway Safety Administration had given only two stars to the Ford Explorer for rollover protection. This evidence was sufficient to defeat the fraudulent joinder argument and resulted in a remand. Obviously, it should be noted that this case does not speak to the ultimate merits of plaintiff's "actual knowledge" argument, but is illustrative of the evidence necessary to get a case remanded.

The seventh and final exception will be the most important and perhaps most invoked exception. Section 82.003(a)(7) provides an exception to a passive seller's immunity when the manufacturer of the product is insolvent or is not subject to the jurisdiction of the Court. This situation frequently arises when the manufacturer of products are located in places such as China or Taiwan. Companies in these locations make many of the products sold by large retailers throughout the United States. This important exception allows Plaintiffs to proceed with lawsuits against the passive retailers when they purchase products from manufacturers who are beyond the reach of the courts.

The enactment of §82.003 should have less of a substantive impact on how and what is involved in products liability litigation in Texas, and more of an impact on where product liability cases are litigated. In short, we will see you in Federal Court.

E. Evidentiary Changes Particularly Significant to Products Liability

The 2003 Tort Reform Law, House Bill No. 4, made two changes to the law of evidence, both favoring defendants. First, the bill required the Texas Supreme Court to "as soon as practicable" amend TEX. R. EVID. 407(a)[27] to conform that rule to FED. R. EVID.

[27] TEX. R. EVID. 407 (a) reads:

407.[28] This change eliminated the exception that previously existed under Texas evidence law, which allowed subsequent remedial measures to be admissible in products cases. Note, however, that subsequent remedial measures may still be admissible under other exceptions.

House Bill No. 4 also repealed TEX. TRANS. CODE ANN. §545.413(g) (Vernon Supp. 2003) that previously made the use or nonuse of a safety belt inadmissible in a civil trial.

II. CASE LAW UPDATE

The Texas Legislature is not alone in it attack on products liability cases. Texas Courts, in particular the Texas Supreme Court, have joined in the attack upon victims' rights. The following section highlights case law trends within the products liability arena by summarizing the most significant recent common law decisions.

A. Trend Toward Consolidation of Causes-of-Action

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

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

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

***Tamez v. Mack Trucks, Inc.*, 100 S.W.3d 549 (Tex. App.—Corpus Christi, 2003, pet. granted**).

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

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

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

[28] FED. R. EVID. 407 reads:

> **Subsequent Remedial Measures.** When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent remedial measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership, control or feasibility of precautionary measures, if controverted, or impeachment.

than was before the Supreme Court in *Hyundai Motor Co. v. Rodriguez*." The Corpus Christi Court of Appeals refused to allow the defendants to use *Hyundai Motor Co. v. Rodriguez* to eliminate multiple theories of recovery at pre-trial stage. This case stands for the proposition that the plaintiff can develop multiple theories of recovery *before* the submission of jury questions. Not surprisingly, the Texas Supreme Court granted petition to review this decision.

***Ford Motor Co. v. Miles*, 141 S.W.3d 309 (Tex. App.—Dallas 2004, pet. denied).**

Miles involved a 14-year boy who was a passenger in a 1988 Ford pickup and rendered a quadriplegic when the seat belt system allegedly allowed too much slack to develop during the collision sequence.

In this case, the court submitted design and marketing defect questions along with negligence claims. The jury answered "no" to the various defect theories, but answered "yes" to the negligence questions. The Dallas Court of Appeals held that the jury's answers were in conflict because a defendant cannot be negligent for a product design unless the product itself is defective. Accordingly, the Dallas Court of Appeals reversed and remanded.

***Toshiba International Corp. v. Henry*, 152 S.W.3d 774 (Tex. App.—Texarkana 2004, reh'd overruled).**

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

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

B. Charge Issues: Submit the Product or the Defendant?

The Texas Pattern Jury Charge 2003 Edition submits design, marketing, and manufacturing defect questions in terms of the product rather than the "defendant." For instance, PJC 71.4b asks

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

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

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

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

If, however, the court ultimately finds that the defendants and not the product should be submitted. Each defendant should be jointly and severally liable for the other defendants' percentage of responsibility if they each distributed the defective product. To allow otherwise, would gut the entire doctrine of strict products liability. This joint liability could be accomplished in the same manner as set forth in *F.F.P. Operating Partners v. Duenez*, 2004 WL 1966008 (Tex. 2004) (rehearing granted in part). In the *Duenez* case, the Supreme Court held that the drunk and dram shop should both be submitted on the charge under Chapter 33, but that the Dram Shop Act requires that the dram shop be responsible for the drunk's portion of liability as found in the proportionate responsibility question.

In the products liability context, the same result could be accomplished if you submit component part manufacturers, assemblers, and retailers separately. Regardless of how the percentages are allocated in the proportionate responsibility question, if the jury finds that the defect existed when it left the hands of the defendants, they would be responsible for the entire judgment. Unfortunately, in a highly unusual move,

the Texas Supreme Court has recently granted rehearing in the *FFP Operating Partners v. Duenez.*

These complex issues were addressed in ***Allied Signal, Inc. v. Moran***, 2003 WL 22014805 (Tex. App.—Corpus Christi 2003, no pet.). This is a seat belt case involving the rollover of a 1997 Dodge Caravan. In the rollover, the plaintiffs alleged that the seat belt inadvertently released allowing Bart Moran to be ejected and fatally injured. The two defendants, Allied Signal and Chrysler, offered conflicting testimony as to which company was ultimately responsible for the final design of the seat belt buckle. The trial court submitted the charge to the jury in terms of the subject product, "the seat belt buckle" and not the individually named defendants. The jury placed ninety-nine percent responsibility on "the seat belt buckle" and one percent on the driver of Bart Moran's minivan.

The Defendants complained that the trial court erred in the submission of its charge by failing to submit each individual defendant's percentage of responsibility. In this case, the Corpus Christi Court of Appeals held that where there are disputes regarding responsibility of multiple defendants for the design of a product, compliance with Chapter 33 requires submission of separate percentages of responsibility for each defendant, not submission of the product itself. Further, the court holds that both defendants cannot be jointly and severally responsible for the entire verdict because only one defendant may be jointly and severally liable under 33.013(b) of the Texas Civil Practice and Remedies Code. For these reasons, the Corpus Christi Court of Appeals initially ordered a reverse and remand.

Much amicus briefing has been devoted to this decision. The Corpus Christi Court of Appeals has yet to rule on a motion for rehearing. If, however, the analysis set forth in this opinion is correct, it would be turn traditional products liability theory on its head.

From a practical standpoint, I believe that it is best to submit only a strict products liability theory so as to avoid complication of the apportionment of responsibility between negligence and strict products claims. Some thought may also be given to singling out the most financial viable defendant in the chain of distribution and later amending if that defendant, third-parties or names as responsible third-parties other defendants in the chain of distribution.

C. Manufacturer's Duty to Indemnity

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

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

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

Before trial, the Plaintiffs settled with the manufacturers and non-suited his claims against Ruan. The only remaining question became whether Ruan could obtain indemnity against the manufacturers for hiring attorneys to defend it after the independent negligence claims were made. The manufacturers argued that the products liability act did not intend to provide indemnity for sellers in defending their own negligence actions. The Texas Supreme Court held that the manufacturers' duty to indemnify was invoked by the plaintiffs' pleadings. For the manufacturers to implicate the Section. 82.002(a) exception, it was incumbent upon the manufacturers to establish that the seller's conduct "caused" the loss. Further, the court notes that a "products liability action, includes not only products liability claims but also other theories of liability such as negligence." Accordingly, the court held that summary judgment was improperly granted in favor of the manufacturers because they had not established that *Ruan's* independent negligence caused "caused" the loss.

***General Motors Corp. v. Hudiburg Chevrolet, Inc.*, 2006 WL 741552 (Tex. 2006).**

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

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

entitled to summary judgment, had to establish that Hudiburg's negligence caused the underlying accident.

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

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

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

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

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

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

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

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

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

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

D. Circumstantial Evidence to Prove Products Cases—Not!

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

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

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

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

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

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

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

***Ford Motor Co. v. Ledesma*, 173 S.W.3d 78 (Tex. App.—Austin 2005, pet. filed).**

In this case, Ledesma brought a suit against the pick-up truck manufacturer, Ford, in connection with a collision between his truck and two parked cars. The trial court entered judgment in favor of Ledesma, holding that the truck's axle dislodged and caused the truck to hit the two parked cars, rather than the axle becoming dislodged as a result of the collisions. Ford appealed, contending, among other things, that the evidence was legally insufficient to support the verdict. In particular, Ford argued that Ledesma's expert testimony was unreliable and provided no evidence of a manufacturing defect.

The court held that Ledesma's testimony provided some evidence to support his theory of manufacturing defect. In its explanation, the curt stated that evidence of a malfunction can provide circumstantial evidence of a manufacturing defect. However, the circumstantial evidence used to prove the defect must provide more than mere suspicion.

In this case, there was evidence that the driveshaft disengaged and that it happened suddenly while the truck was driving down a clear street. Also, Ledesma's expert testified that a u-bolt that did not meet manufacturing specifications was the cause. Other facts that militated in Ledesma's favor were that Ledesma was the sole owner, the truck had only been driven 4,100 miles in the three months of ownership, and the truck had not been repaired or modified. The court ultimately held that the record contained more than a scintilla of evidence to prove the manufacturing defect.

E. Admissibility of Other Similar Incidents—Not!

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

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

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

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

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

Justice Brister further noted consumer complaints from Nissan's files are hearsay within hearsay. While the business records exception would eliminate the first hearsay issue, the reports themselves would still be hearsay if offered for the truth of the matter asserted. Ultimately, the Court held "[w]ithout proof that a hearsay exception applies or that any of the reported incidents were due to a defect similar to those alleged, the trial court erred in admitting the database of complaints." The Court extended this reasoning to the NHTSA database complaints and found that they would also be inadmissible hearsay. Finally, the Court noted that the four consumers that testified could not precisely identify the alleged defect in their vehicle and; therefore, there was no evidence that it was a defect similar to that alleged by Plaintiff. Thus, the Court held the live witnesses should have been excluded. In the final blow, Judge Brister noted that

the other similar incidents could not be offered to show notice because such an offer would necessarily require an argument that the information asserted in the complaints is true and implicate the hearsay rule.

F. Liability of Component Part Manufacturers—Not!

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

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

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

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

***Toshiba International Corp. v. Henry*, 152 S.W.3d 774 (Tex. App.—Texarkana 2004, reh'd overruled).**

Shannon Henry sued Toshiba on products liability and negligence theories for personal injuries sustained on the job at Alcoa, an aluminum industrial plant. Toshiba manufactured and sold to Alcoa an inverter or controller that Alcoa integrated into a larger system. The inverter itself functioned as it was designed. The jury found for the plaintiff and awarded $430,610.

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

G. Marketing Cases

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

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

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

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

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

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

***U.S. Silica Co. v. Tompkins*, 156 S.W.3d, 178 (Tex. 2005).**

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

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

Plaintiffs sued on behalf of their minor son, who received severe head injuries due to an airbag deployment.[29] The plaintiffs claimed, among many other causes of action, that there was a marketing defect because the Ford dealer failed to adequately

[29] *Id.* at 497

warn of the dangers of a child riding in the front passenger seat.[30] There existed some evidence that the danger from an air bag to a child sitting in the front seat was foreseeable, based on Ford sending letters to Ford owners, including the plaintiffs, two years after the plaintiffs' accident, that death or serious injury could occur to young children sitting in the front seat due to the air bag.[31] As to lack of warnings before the accident, the defendants argued that it was not necessary to do so when the danger is common knowledge.[32] However, the court found conflicting evidence as to whether the danger of airbags to children in the front seat was common knowledge in 1994.[33]

The court also noted that, when trying to show that a failure to warn was a producing cause of injury, a rebuttable presumption arises for the plaintiff that he would have heeded the warnings had they been given.[34] The defendants countered that the plaintiffs did not follow even the allegedly inadequate warning, and thus the presumption should be rebutted.[35] The court found that whether the small and terse warning on the visor, "An inflating air bag can seriously injury small children," was adequate or not was a fact issue, because many parents may not consider a child of seven years to be "small."[36] Indeed, the evidence showed that Ford itself considered "small" to refer to children four years of age or less, as demonstrated by its owner's manual stating that small children, i.e., children less than or equal to four years or forty pounds, should be placed in child safety seats.[37] The court reversed the summary judgment granted to defendants, and remanded for trial.[38]

[30] *Id*. at 503-04

[31] *Id.* at 504

[32] *Id.*

[33] *Id*.

[34] *Id.* at 505.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id*. at 506.

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

In this case, Coleman was a groundskeeper at a golf course, who was wearing a standard uniform supplied by a company to his employer.[39] .While operating a barbecue, his non-flame retardant uniform caught fire, and despite his attempts to smother it by rolling on the ground, the uniform continued to re-ignite and burn until a supervisor smothered him with other clothes and extinguished the flames.[40]. Coleman brought suit under both design defect and marketing defect theories, but the case before the appeals court involved only whether granting of summary judgment to the company that supplied the uniform on the marketing defect claim was proper.[41]

The court began with the basic principles of marketing defect theory: manufacturers and suppliers have a duty to warn consumers of risks and dangers associated with their products; the exception to this rule is when a particular risk is common knowledge to the consuming public.[42] It then quickly disposed of the issue by holding that although all characteristics of synthetic mass-produced clothing, such as the uniform in question, may not be known to the average consumer, it is still common knowledge that non-flame retardant clothing can quickly catch fire, especially when in contact with barbecue coals.[43] As such, the defendant had no duty to warn Coleman as a matter of law, and summary judgment was affirmed for the defendant.[44]

H. Manufacturing Cases

***Benavides v. Cushman, Inc.*, 2006 WL 193901 (Tex. App.—Houston [1st Dist.] 2006, no pet. h.).**

Benavides worked as a grounds keeper for Battleground Golf Course in Deer Park, Texas, where in June of 2000 he sustained injuries while grooming the course's sand traps in a Cushman designed sand trap rake. The Cushman sand trap rake is a three-wheeled vehicle used to groom golf course sand traps.

[39] *Id.* at 385.

[40] *Id* at 385-86.

[41] *Id* at 386.

[42] *Id.*

[43] *Id*.

[44] *Id* at 387.

As Benavides was leaving a sand trap he noticed he need to go back to smooth out a furrow in the sand. While traveling downhill, the attempted to reverse his course back to the sand trap. The left wheel kicked upward, overturning the vehicle. The sand rake landed on Benavides before he had a chance to jump out.

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

***Ford Motor Co. v. Ledesma*, 173 S.W.3d 78 (Tex. App.—Austin 2005, pet. filed).**

Ledesma, as first discussed on page 14, also held that the definition of "defect" in jury charges regarding manufacturing defects does not require the more specific language "physical departure from the intended design." The court found the jury charge using the phrase "condition of the product" would suffice and was therefore not erroneous. Ford, among other defendants, has suggested this change, and this is the second court of appeals to deny this request. Moreover, this case held that a plaintiff does not need to prove a flaw in the manufacturing process, just a defect in the product.

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

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

Rios' wife settled while the appeal was pending. On appeal, Rios' father asserted that he established a manufacturing defect because the belt separation in the middle of the tire's life was itself circumstantial evidence of a defect. The parties agreed on appeal that the issue was not whether the tire separated; instead, the issue was what cause the separation– a manufacturing defect or the wear and tear on the tire since it was manufactured in 1991. The tire had previous repaired punctures, bead damage and was operated in an underinflated condition.

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

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

Plaintiffs offered the testimony of two experts, Robert Ochs and John Crate. Regarding Ochs, the Court noted that his visual and tactile testing of the tire itself were a reliable basis for expert testimony and rejected Goodyear's challenge in this regard. However, the Court found that Ochs methodology to determine a manufacturing defect exists (visually inspecting the tire parts and finding steel wires with little or no rubber) was not accepted in the scientific community. The Court noted that Ochs did not refer to any articles or scientific publication to supports his methodology. For these reasons, the Court found his testimony was not reliable. Regarding Crate, the Court noted his vast experience in polymer science and adhesion of materials. However, because Crate did not have any specific experience regarding adhesion of tire materials, the Court found he was not qualified. Left with no circumstantial evidence and no reliable expert testimony, the San Antonio Court reversed and rendered a take nothing judgment.

***Cooper Tire & Rubber Co. v. Mendez*, 49 Tex. Sup. Ct. J. 751 (Tex. 2006)**

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

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

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

I. Defective Design Cases

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

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

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

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

> (1) [T]he utility of the product to the user and to the public as a whole weighed against the gravity and likelihood of injury from its use; (2) the availability of a substitute product which would meet the same need and not be unsafe or unreasonably expensive; (3) the manufacturer's ability to eliminate the unsafe character of the product without seriously impairing its usefulness or significantly increasing its costs; (4) the user's anticipated awareness of the dangers inherent in the product and their avoidability because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions; and (5) the expectations of the ordinary consumer.[45]

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

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

The design defect theory was based on the allegation that the emergency locking action of the seat belt, coupled with the mechanical seat belt's ability to move to the open position while the belt was locked, created a foreseeable and dangerous situation in which

[45] 951 S.W.2d at 432.

an occupant could be pinned to the seat because the mechanism would stall from trying to fight against the locking force. In addition, the plaintiffs contended that the emergency release button, which could disengage the entire seat belt, was improperly located at the top of the belt mechanism and not conveniently accessible in the event of just such an emergency. After the plaintiffs obtained a substantial jury award, Honda appealed on the grounds that the plaintiffs failed to satisfy the threshold test of showing a safer alternative design.

The appeals court began by laying out the statutory provisions in Section 82.005 regarding proof of a safer alternative design. Namely, the plaintiffs had to show a safer alternative design that would have significantly reduced or prevented the risk of harm without substantially destroying the product's utility, and that was both technologically and economically workable at the time. At trial the plaintiffs introduced testimony, via their expert witnesses, relating to three potentially safer alternative designs: a timer on the seat belt mechanism; an emergency release lever near the right hip of the driver, as used in Toyota vehicles at the time, rather than a button above the left shoulder; and, two possible release buttons, combining the Honda and Toyota designs. As to the first and third proposed safer alternative designs, the appeals court sustained Honda's no evidence appeal, citing the plaintiffs' expert witnesses as having offered no testimony on the schematics or technological feasibility of a mechanism timer or a dual-button belt release system.

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

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

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

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

It is troublesome to plaintiffs for example, that the *Norman* decision implies that economic feasibility must be determined from a subjective viewpoint. It is already accepted under Texas law that technological feasibility is determined by an objective standard. *See, e.g.*, *General Motors Corp. v. Sanchez*, 997 S.W.2d 584, 592 (Tex. 1999) (holding that in order to prove a safer alternative design, it is not necessary that plaintiffs show its existence, build it, or test it; it is enough that the design is proven capable of being developed). In *Norman*, technological feasibility was in fact both objectively and subjectively demonstrated; it was subjectively proven, since Toyota was actually using the hip lever release design, and this showed that it was obviously objectively feasible as well. However, by holding that this did not establish economic feasibility, the court seems to suggest that even though it was objectively the case that the hip

lever release design could be implemented and mass produced in vehicles (because Toyota had done so), it may not subjectively have been the case for Honda to be able to do so. This subjective standard increases the burden of evidence and testimony for plaintiffs in products liability cases. Plaintiffs and their counsel are now on notice that while the existence of an alternative design in a similarly situated competitor's product is enough to establish that the design was technologically feasible for the defendant, it may not be enough to establish economic feasibility, counter-intuitive as the proposition may be.

In ***Robins v. Kroger Co***., parents of a toddler sued the distributor of a disposable cigarette lighter for severe burns the child suffered while playing with the lighter and setting fire to a pile of clothes. 80 S.W.3d 641, 643 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). The crux of the claim was that the lighter was defective in design because it was not childproof.[46] Summary judgment was granted to Kroger, and the plaintiffs appealed.[47] In deciding whether summary judgment was proper, the court made mention of the five risk-utility factors set out in *Grinnell*, *supra* (the accident in question occurred in 1989, well before the codification of the threshold test of Section 82.005.

In conducting the risk-utility analysis in this case, the court relied to a great extent on statistics from the Federal Register, cited by the plaintiffs in their response to Kroger's summary judgment motion. Specifically, the court noted the following facts: estimated costs of fires started by children playing with lighters were $300-375 million over a five-year period; the number of annual injuries from these incidents was 1,100, and the number of annual deaths was 150; childproof lighters would save 80-105 lives each year; manufacturing costs for childproof lighters were in the range of $50 million, thus saving upwards of $200 million in fire damage costs; and, there would be just a one to five-cent increase in per unit production costs.[48] The court also dismissed Kroger's argument that the parents were aware of the risks and dangers to a child, and that the product was safe for its intended use, i.e., by adults:

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

[49]Also relevant to the court's analysis was that while permanent lighters were manufactured childproof, disposable lighters of the type bought by the plaintiffs were simply not available childproof until several years after the accident.[50] Based on the foregoing analysis, the court found that fact issues existed as to the risk-utility analysis, and it reversed summary judgment and remanded for trial.[51]

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

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

Hillhouse sued DaimlerChrysler asserting design defect and marketing defect claims after her minor child was injured when the front passenger air bag deployed following an automobile collision. On reconsideration, the court of appeals, sitting en banc, held that there was sufficient evidence indicating that DaimlerChrysler knew, should have known, or should have reasonably anticipated the risk of injury from a deploying air bag to an occupant in the front passenger seat. Additionally, the court upheld the lower court decision that there was sufficient evidence to support the jury finding that the warning was inadequate. Finally, the court sustained DaimlerChrysler's assertion that the evidence was legally insufficient to

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[46] *Id.*

[47] *Id.*

[48] *Id.* at 645-46

[49] *Id.* at 646

[50] *Id.*

[51] *Id.* at 647

support a jury verdict on plaintiff's design defect claim because Plaintiff's expert testimony was based on conjecture and too speculative. He only performed one test, using a surrogate, and it was based on speculations: "where the front seat was positioned, whether [the minor child] was restrained by [the] seat belt, how and to what degree the seat belt locked her in upon deceleration, and her position when she impacted with the airbag."

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

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

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

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

J. Federal Preemption

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

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

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

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

***Bic Pen Corp. v. Carther*, 171 S.W.3d 657 (Tex. App.–Corpus Christi 2005, pet. filed).**

In *Bic Pen*, as first discussed on page 5, the court of appeals held that the mother's claim was not implicitly preempted by Consumer Product Safety Commission standards regulating child resistance of disposable lighters. As long as the design-defect claim does not obstruct the "accomplishment and execution of any federal objectives," then it will not be implicitly preempted by federal law. Therefore, any rule of law created by a claim that is in harmony with existing federal standards is not preempted by federal law. For example, in this case, the Consumer Product Safety regulation was merely a "mandatory minimum standard with which all manufacturers must comply," but compliance with the minimum standard would not serve to relieve manufacturers from state common law liability.

K. Miscellaneous Cases

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

In this case the plaintiff was a long haul truck driver acting as an independent contractor for FFE. The plaintiff supplied the tractor unit and FFE supplied

the trailer. In turn, the plaintiff received a percentage of the load as pay.

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

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

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

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

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

***SSP Partners v. Gladstrong Invs. (USA) Corp.*, 169 S.W.3d 27 (Tex. App.—Corpus Christi 2005, pet. filed).**

Plaintiffs brought a products liability action after a defective lighter caused a fire, injuring two children and killing a third. The retailer SSP brought an indemnity claim against Metro Novelties (Metro), as the supplier of the lighter, and they both brought an indemnity claim against the alleged manufacturer, Gladstrong, USA. The actual manufacturer however was Gladstrong, Hong Kong.

Metro and SSP argued that Gladstrong, USA was an apparent manufacturer of the lighter. Under the apparent manufacturer doctrine, "one who puts out, as its own product, chattel manufactured by another is subject to the same liability as though it were the manufacturer." The court stated that there are two ways an actor can put out chattel as his own product: "(1) by appearing to be the manufacturer, and (2) where the chattel appears to have been made specifically for the actor." The court held that there was at least a scintilla of evidence to suggest that although Gladstrong, USA never put its name on the product, it was closely involved in the importation, marketing, and distribution of the product. This was enough evidence to defeat the no-evidence summary judgment.

L. Forum Non Conveniens.

The 2005 Legislative session resulted in changes to Texas' Forum Non Conveniens law. A discussion of Forum Non Conveniens is beyond the scope of this paper, although practitioners should be aware of these changes as they affect many products liability cases.