Product Liability—Case Law Update 2012

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Introduction and Acknowledgement

This compilation would not have been possible without the help of our many authors, named below. A great many young-lawyer members of DRI assisted in assembling this exhaustive year in review of product liability cases. We suggested a number of topics for the authors to address, and they selected the most pertinent cases within their jurisdictions. A huge thank you to all of them—we could not have done this without you!

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I. First Circuit

A. Pharmaceuticals

Bartlett v. Mutual Pharmaceutical Co., Inc., 760 F. Supp. 2d 220 (D. N.H. 2011)

Plaintiff alleged that she developed Stevens-Johnson Syndrome and Toxic Epidermal Necrolysis – both serious and potentially fatal skin disorders – after taking Sulindac, a generic non-steroidal anti-inflammatory, to treat shoulder pain. She claimed that the drug caused her to develop severe burn-like reactions over much of her body. She brought product liability claims against Mutual Pharmaceutical Co., Inc. ("Mutual"), the manufacturer of the drug. Before trial, the Court granted summary judgment in favor of Mutual on all claims except plaintiff's design defect claim. At trial, the jury found in favor of the plaintiff, awarding $21.06 million in compensatory damages. Mutual moved for judgment as a matter of law on the grounds that plaintiff presented insufficient evidence to support her claim and that the claim was preempted by federal law. Alternatively, Mutual sought a new trial on the grounds that there were numerous errors during the course of the litigation and that the award was excessive. Mutual also argued that it had been prejudiced during the trial when the judge blew his nose and wiped his eyes during some emotional testimony by the plaintiff's sister.

The court rejected Mutual's arguments and upheld the judgment. It found that there was sufficient expert testimony to support that the drug was "unreasonably dangerous" because its risks outweighed its benefits. The court chastised the defendant for contending that plaintiff needed to prove that there was a "defect" other than being unreasonably dangerous, despite New Hampshire case law to the contrary: the defendant "seem[ed] to have forgotten . . . that this court ruled that [defendant] would 'avoid liability for defective design if it can prove, as an affirmative defense, that Sulindac is unavoidably unsafe and had an adequate safety warning.'" *Id.* at 242. Because Mutual withdrew this defense prior to trial, the court stated that the defendant was not "entitled to judgment as a matter of law on the ground that Sulindac is unavoidably safe, which . . . is an issue that [defendant] itself chose to remove from the case." *Id.* at 243.

The court also rejected the defendant's preemption arguments. Referring to the Supreme Court's decision in *Wyeth v. Levine*, 555 U.S. 555 (2009), it noted that the defendant had "not cited any cases, before or since *Wyeth*, that interpreted federal law as prohibiting juries from deeming an FDA-approved drug to be more risky than beneficial." *Bartlett*, 760 F. Supp. 2d at 247. In response to Mutual's argument that federal law prohibited it from unilaterally changing the design of a generic drug, the court noted that Mutual was "not held liable for failing to change Sulindac's design; it was held liable for selling an unreasonably dangerous product, with greater risks than benefits." *Id.* at 248. The defendant was not required by federal law to sell the drug, and state law didn't require it to stop selling or redesign the drug. Rather, state law required that manufacturers compensate consumers for damage sustained as a result of use of unreasonably dangerous products. *Id.*

Finally, the Court dismissed any suggestion that the judge's conduct in blowing his nose during the trial had prejudiced Mutual, stating that the court had explained the issue to the jury the next morning by saying "as a matter of fact I did not have an emotional reaction to that testimony. I was merely blowing my nose and dealing with a little allergic, itchy eye." *Id.* at 253.

Jenner v. CVS Pharmacy, Inc., et al., No. 10-cv-497-JL, 2011 WL 1085981 (D. R.I. Mar. 22, 2011)

Plaintiffs, Massachusetts citizens, filed suit in Rhode Island state court against various manufacturers and two pharmacies that dispensed the drug metoclopramide to plaintiff in Massachusetts, alleging failure to warn claims. The defendant manufacturers removed the case to federal court, arguing that plaintiffs had fraudulently joined the pharmacies to defeat federal diversity jurisdiction. One of the pharmacies, Stop & Shop Supermarket, was incorporated and thus a citizen of Massachusetts, while the other pharmacy, CVS, was a citizen of Rhode Island. The removing defendants argued that CVS's in-state citizenship should be ignored

for purposes of removal because a plaintiff cannot assert a viable product liability claim against a pharmacy under Massachusetts law. The parties stipulated that plaintiffs' claims were to be decided under Massachusetts law because the pharmacies allegedly dispensed the drug in Massachusetts. Plaintiffs moved to remand the case to Rhode Island state court.

The Court granted the plaintiffs' remand motion, finding that defendants did not meet their "heavy burden" of showing that there was (1) no possibility that the plaintiff could establish a cause of action against CVS in state court, or (2) that there had been fraud in plaintiff's pleading of the jurisdictional facts. The Court relied on *Cottam v. CVS Pharmacy*, 764 N.E.2d 814 (Mass. 2002), in which the Massachusetts Supreme Judicial Court held that although a pharmacy generally has no duty to warn its customers about a drug's side effects, it can voluntarily assume that duty by providing customers with its own warnings or literature listing a drug's side effects, and/or by discussing side effects with customers. While defendants recognized the applicability of *Cottam*, they argued that plaintiffs' complaint failed to state a claim because they did not allege that CVS did anything more than provide the manufacturer's package insert for the drug. *Jenner*, 2011 WL 1085981, at *2. The court noted, however, that in addition to the package inserts, the plaintiffs clearly alleged that "patient drug information forms, counseling, warnings, or literature, provided to the pharmacy defendants' customers, including plaintiff, by pharmacy defendants' were inaccurate and failed to fully apprise patients, like plaintiff, of the known or knowable risks associated with the use of" the drug. The court concluded that even though the drugs were dispensed in the manufacturer's original packaging, it was possible that the pharmacies provided additional, improper warnings. *Id.* at *3.

Finally, the court noted that its holding was "not to say that the plaintiffs' failure-to-warn claims against the pharmacies have a likelihood of succeeding on the merits in state court," and that plaintiffs have almost always been unsuccessful in bringing such claims. *Id.* Nevertheless, Massachusetts is one of only a handful of jurisdictions that have allowed such failure to warn claims against pharmacies, and therefore it was at least arguable that the plaintiffs could prevail on a failure to warn claim against a pharmacy under Massachusetts law. *Id.* at *3. The case was therefore remanded.

B. Toxic Tort

Milward v. Acuity Specialty Products Group, Inc., 639 F.3d 11 (1st Cir. 2011)

Plaintiffs brought negligence claims against defendant chemical companies, alleging that plaintiff Milward's leukemia was caused by his workplace exposure to benzene-containing products that had been manufactured or supplied by the defendants. The federal district court bifurcated the case into two phases: (1) whether plaintiff's expert opinion as to general causation was admissible under Federal Rule of Evidence 702; and (2) all other issues, including negligence, exposure, and specific causation of Mr. Milward's leukemia. The district court held that the expert's proffered causation testimony "lack[ed] sufficient demonstrated scientific reliability to warrant its admission under Rule 702." *Milward*, 639 F.3d at 13. Plaintiff's expert opinion was excluded and, therefore, the case never reached the second phase of the trial.

The plaintiffs appealed, arguing that their expert's opinion based on the "weight of the evidence" methodology was inherently reliable because it involved consideration of five types of evidence drawn from scientific literature on leukemia and benzene. By contrast, defendants argued that "regardless of its level of acceptance in the scientific community, a pure 'weight of the evidence' approach like that utilized by [plaintiff's expert] . . . is hardly the type of reliable scientific evidence contemplated by *Daubert*." *Id.* at 18.

The First Circuit Court of Appeals reversed, finding that the district court had "placed undue weight on the lack of general acceptance of [the expert's] conclusions and crossed the boundary between gatekeeper and trier of fact." *Id.* at 22. It held that the weight of the evidence approach is not inherently unreliable, and that the

admissibility of an expert's opinion is based on the particular facts of each case. *Id.* at 19. Here, the Court found that the expert reached his opinion by applying the methodology "with the same level of intellectual rigor" he used in his scientific practice. *Id*. Accordingly, the court reversed and remanded the case back to the district court.

Defendants filed a writ of certiorari to the U.S. Supreme Court in September 2011, presenting the issue in its petition as "whether a district court abuses its discretion in excluding expert testimony that draws an inference of potential causation from inconclusive data, merely because the expert asserts that, in his judgment, the weight of the evidence supports his opinion." The Supreme Court denied certiorari on January 9, 2011.

C. Tobacco

Evans v. Lorillard Tobacco Co., No. 2004-2830-B (Mass., Suffolk Co. Super. Sept. 1, 2011)

A Massachusetts state court judge ruled that Lorillard Tobacco Co.'s design, marketing, and distribution of Newport cigarettes violated Mass. Gen. Laws ch. 93A, the Massachusetts consumer protection statute, which provides for multiple damages and attorneys' fees. Decedent's son sued on behalf of his mother's estate, alleging that Lorillard had engaged in a campaign to target minors by distributing free samples of Newport cigarettes to his mother and other children in the housing project in which they lived. Plaintiff also alleged that despite years of research establishing that cigarettes were harmful, Lorillard failed to warn of the health risks associated with smoking. A jury had previously rendered a verdict on various products liability claims in favor of the plaintiff, awarding $51 million in compensatory damages to the decedent's estate, $21 million in compensatory damages to the decedent's son for loss of companionship, and $81 million in punitive damages. The court reserved plaintiff's 93A claim.

Plaintiff asserted that Lorillard violated c. 93A in three ways: (1) by breaching the implied warranty of merchantability; (2) by breaching a voluntarily assumed duty to research the health hazards of smoking and provide accurate information to the public; and (3) by failing to make a reasonable settlement offer upon the receipt of plaintiff's demand letter as required by the statute. Plaintiff also asserted collateral estoppel as an independent basis for c. 93A liability.

With respect to the implied warranty of merchantability, plaintiff contended that Lorillard was liable under c. 93A because it designed, manufactured, and sold a defective product. In response, Lorillard argued, among other things, that plaintiff failed to demonstrate that the cigarettes were unreasonably dangerous, or that they contained a unique design defect because all cigarettes contain nicotine and therefore the sale of all standard cigarettes would violate the implied warranty of merchantability.

The Court rejected Lorillard's arguments, relying on *Haglund v. Philip Morris*, *Inc.*, 446 Mass. 741 (2006), in which the Massachusetts Supreme Judicial Court specifically held that cigarette smoking is inherently dangerous, there was no such thing as a safe cigarette, and that there was no "non-unreasonable" use of cigarettes. It further stated that plaintiff's design defect claims were specific to Newport cigarettes because he had alleged that Newport cigarettes contained a design defect (nicotine) that harmed the decedent. The court held that Lorillard had violated ch. 93A for its breach of the implied warranty of merchantability because its actions had directly contributed to decedent's addiction to cigarettes and continuous smoking, which caused her lung cancer and death.

The Court also held that Lorillard had voluntarily assumed a duty to research the health hazards of smoking and provide accurate information concerning that research to the public when it signed the "Frank Statement," an advertisement signed by cigarette manufacturers in 1954, pledging to support the study of tobacco use. Despite Lorillard's knowledge regarding the health hazards of smoking, it continued to promote the use of cigarettes, thereby breaching the voluntarily assumed duty.

Notably, the Court applied the doctrine of collateral estoppel to its decision, specifically adopting findings of fact in two other cigarette/smoking cases – one from the Florida Supreme Court and the other from the United States Court of Appeals for the D.C. Circuit – upholding jury verdicts that Lorillard's misconduct caused harm to the plaintiffs in those cases.

Although the court found that Lorillard had violated c. 93A on a number of grounds, it held that in light of the high punitive damages awarded by the jury, any compensatory and multiple damages under c. 93A would be duplicative. The judge thus awarded reasonable attorneys' fees and costs under c. 93A only.

D. Other

1. As Installed Failure to Warn

Burns v. Architectural Doors and Windows, 19 A.3d 823 (Me. 2011)

Plaintiff brought a products liability action against the manufacturer and installer of a garage door after he was injured when the door struck him while it was closing. He alleged that the garage door was defective and unreasonably dangerous to consumers because it did not have a mechanism that would cause it to stop if it encountered an object. The door manufacturer moved for summary judgment, arguing that it was not liable for any of plaintiff's claims because it did not design or manufacture the door operator that had allegedly malfunctioned. Plaintiff argued in response that the garage door manufacturer and installer had a duty to warn that the door, "as installed," could be dangerous. The Court granted summary judgment on the design and manufacturing defect claims, and "generously" allowed the case to move forward as a failure to warn case only. *Burns*, 19 A.3d at 826. The manufacturer settled with plaintiff on the eve of trial, and the jury rendered a verdict in favor of the installer, finding that it had no duty to warn the plaintiff.

Plaintiff appealed on a variety of grounds, including that he should have been able to offer evidence and argument of a design defect because he alleged that the door was defective at the time it left the seller's hands. He argued that the lower court had wrongly excluded evidence of the design defect "as installed" and that he was entitled to a jury instruction that a seller has a duty to warn of a danger even if the danger was obvious and apparent to users "if it is foreseeable that users of the product will proceed to encounter that hazard out of necessity, lack of safe apparent alternative, or through momentary inadvertence." *Id.* at 827.

The appellate court rejected these arguments, holding that plaintiff had not alleged that the product left the seller's hands "in a condition not contemplated by the ultimate consumer," and therefore could not prevail on his design defect claim. *Id.* at 828. Plaintiff also offered no argument or evidence concerning any design defect in the door itself, instead focusing on the alleged defective condition of the door operators to which the door was connected and therefore casting his claim as a design defect "as installed." This late attempt to re-fashion his claims were rejected. *Id.* at 829. Further, the Supreme Court agreed with the trial court that even if a warning had been placed on the door it could not have prevented plaintiff's injury because the plaintiff had testified that he was aware of the danger for years and yet still entered while the garage door was closing. Thus, even if the installer had a duty to warn, it was still entitled to judgment on the matter because plaintiff had not established causation. *Id.* at 830-31.

2. Reasonable Alternative Designs

Osorio v. One World Technologies, Inc., 659 F.3d 81 (1st Cir. 2011)

Plaintiff sued saw manufacturer Ryobi Technologies, Inc. (subsequently One World Technologies, Inc.), alleging negligence and breach of the implied warranty of merchantability after suffering a hand injury while operating a benchtop table saw. The plaintiff argued that the saw was unreasonably dangerous because it

did not have a safety mechanism to prevent accidental injury when the saw came in contact with human flesh. The plaintiff proffered that "SawStop," a safety addition on mechanical saws that prevents accidental injury of the type he sustained, would have been a feasible alternative to the product.

At trial, the defendant offered evidence that this mechanism would unreasonably increase the weight, size, and price of the saw, and therefore was not a feasible alternative design. The jury disagreed and awarded plaintiff $1.5 million in damages. Defendant appealed on several grounds, including that the evidence was insufficient to hold it liable because the plaintiff had failed to offer a viable reasonable alternative to the saw and that plaintiff's claim was akin to "categorical liability" that would subject all similar saw manufacturers to liability for injuries suffered by victims of accidents using their products.

The First Circuit affirmed, holding that Massachusetts law does not require that plaintiff present evidence supporting the existence of a feasible alternative design. Instead, Massachusetts courts employ a multi-factorial test to evaluate the suitability of a product's design, one of which is the mechanical feasibility of a safer alternative design. Contrary to defendant's assertions, a plaintiff is not required to meet all factors. Instead, a jury must balance the competing factors to determine whether a safer alternative design was available. *Osorio*, 659 F.3d at 85-86. Here, the Court concluded that the jury had properly balanced the evidence concerning the increased weight, size, and cost of the proposed safer alternative design in determining that such an alternative was feasible. *Id.* at 86. The Court also rejected defendants' arguments of categorical liability, stating that the absence of an alternative design was critical to succeeding on a categorical liability theory. Here, the court found, "an alternative design was not only offered, but also discussed, examined, and debated." *Osorio*, 659 F.3d at 89.

3. Implied Warranty of Merchantability's Application to Non-Seller

Anunciacao, et al. v. Caterpillar, et al., No. 07-10904-JGD, 2011 WL 4899969 (D. Mass. Oct. 13, 2011)

Plaintiff was run over by a Caterpillar excavator and sustained severe and permanent injuries. Defendant Shin Caterpillar Mitsubishi ("SCM") manufactured and sold the product, which carried an identification plate bearing the name, address and trademark logo of defendant Caterpillar Inc. ("Caterpillar"). Caterpillar was involved in the design and testing of the machine, but not its sale. It therefore moved for summary judgment on the grounds that it could not be liable for breach of the implied warranty of merchantability under Massachusetts law because it did not sell or lease the product involved in the accident. Caterpillar acknowledged a 2010 Massachusetts Appeals Court case, *Lou v. Otis Elevator Co.*, 933 N.E.2d 140 (Mass. App. Ct. 2010), which for the first time held that in Massachusetts, non-seller trademark licensors can be held liable as apparent manufacturers when they participate substantially in the design or manufacture of a device. It argued, nevertheless, that the case was wrongly decided because it was inconsistent with Massachusetts warranty law, and that a different case, *Mason v. General Motors Corp.*, 397 Mass. 183 (1986), was more suited to the facts at hand.

The federal district court disagreed, denying summary judgment. It held that that the facts of the case at hand were "strikingly similar" to those in *Lou*, that Caterpillar failed to show that "the *Lou* court's decision was inconsistent with either the Supreme Judicial Court's directives in *Mason* or with the relevant case law," and that there was no basis for Caterpillar's argument that the case was wrongly decided. 2011 WL 4899969, at *3, *6.

II. Second Circuit

A. Pharmaceuticals

Brown v. Eli Lilly & Co., 654 F.3d 347 (2d Cir. 2011)

A wrongful death action was filed in the United States District Court for the Eastern District of New York arising out of plaintiff's treatment with the drug Zyprexa. The plaintiff appealed, *inter alia*, from a summary judgment entered in favor of defendant-manufacturer, Eli Lilly. Plaintiff's decedent suffered from various ailments, including depression with psychotic features, schizophrenia, and insulin-dependent diabetes mellitus. During the time period from 1999-2003, while she was under psychiatric care, she was prescribed Zyprexa. She died in 2005 from cardiac arrest. As against Eli Lilly, Plaintiff claimed it failed to warn of substantial risks in the use of Zyprexa, an antipsychotic drug said to be associated with "an increasing prevalence of hyperglycemia and diabetes-related illnesses." Additionally, plaintiff asserted claims for violations of various provisions of the Mississippi Products Liability Act and for gross negligence.

On appeal, the Court held "for a plaintiff in a prescription drug case, the statute requires the plaintiff to demonstrate that the injury would not have occurred had the drug not been administered." *Id.* at 358. Further the Court noted that the law in Mississippi requires expert medical testimony where causation is an issue in a *complicated case* because "such determinations are generally outside the scope of the average experiences and qualifications of most lay jurors. *Id*. The trial court had held that because "[n]o expert or evidence has connected [Ms. Brown's] cause of death or any medical problem to Zyprexa. Her claim cannot stand. . . . The evidence does not support any link to Zyprexa and an expert would not help." The plaintiff did not produce an expert report as required. In affirming the lower court, the Second Circuit Court of Appeals noted that plaintiffs in a prescription drug case must provide expert reports connecting the drug to the death, which plaintiff in this case failed to do. As a result, the plaintiff offered no evidence as to how Zyprexa proximately caused the death.

B. Other

1. Liability for Design Sold to Manufacturer

Emslie v. Borg-Warner Auto., Inc., 655 F.3d 123 (2d Cir. 2011)

The plaintiff was severely injured while riding in an ATV that overturned and alleged that the accident was caused, in part, by a defect in the ATV's transmission. The vehicle was manufactured and sold by Recreative Industries, Inc., and the transmission was manufactured by a subsidiary of Recreative, Skid Steer. Approximately 26 years prior to the manufacture and sale of this transmission, Recreative purchased all rights to the transmission design from Borg Wagner, which thereupon ceased production. Borg-Wagner had no subsequent involvement of any kind in Recreative's manufacture of transmissions. The trial court granted summary judgment in favor of Borg-Wagner, concluding that should not be viewed as having placed the transmission into the "stream of commerce."

The Court of Appeals differentiated this case from *Sage v. Fairchild-Swearingen Corp.*, 70 N.Y.2d 579 (1987), relied upon by Plaintiff. The court noted in *Sage*, the original manufacturer was held liable for the design defect, notwithstanding that the replacement part that caused the injury was fabricated by the owner and not by the original designer and manufacturer. The court emphasized that the theory in *Sage* was that the original manufacturer whose design was used for the fabrication of the replacement part that caused the injury was the "logical party in the position to discover the defect of the design and correct it to avoid injury to the public." *Id.* at 587. While in this instant matter, Borg-Wagner had sold all rights to the design. The appellate court determined that the defective design claim against the designer failed because imposing strict liability on the designer would not reasonably serve the "central rationale for strict liability" since, for twenty-six years, the designer had no ability to learn from experience whether its design was causing injuries, no ability to conduct safety tests, and no possibility of improving the design to diminish the risk of harm.

2. Deceptive Trade Practices

Verzani v. Costco Wholesale Corporation, 432 Fed. Appx. 29 (2d Cir. 2011)

Plaintiff, Verzani, sought a putative class action against Costco Wholesale Corporation, alleging violations of Washington state's consumer protection law, based on its labeling of a product, "Shrimp Tray with Cocktail Sauce." Plaintiff claimed that the labeling was deceptive in stating a net weight of "16 ounces" when the shrimp part of the tray itself was only "13 ½ ounces." The other few ounces were allegedly made up of cocktail sauce and lemon wedges.

The court dismissed the claim, and the Second Circuit Court of Appeals affirmed. There was no ambiguity about what appeared on the label of a "Shrimp Tray with Cocktail Sauce," and the language there visibly did not promise a purchaser sixteen ounces of shrimp. The court held that a *reasonable consumer* would not read the label as promising that the package contained sixteen ounces of shrimp.

Rather, a reasonable consumer, reading the label, seeing the "net weight" representation and looking through the clear plastic top, would assume that the net weight of the food contained inside the packaging--shrimp and cocktail sauce and lemon wedges taken together--weighed sixteen ounces. A reasonable consumer reading the tray's label would not pick out "shrimp" to the exclusion of all the information on the label (including the product's name and the listed ingredients) when assessing the net weight of the product. *Id.* at *7. The court stressed that the product's name alone, "Shrimp Tray with Cocktail Sauce," suggests that a consumer is purchasing shrimp and cocktail sauce. *Id.* The court found that the plaintiff's interpretation was "objectively unreasonable" because it should be clear that the "net weight" encompasses the weight of the shrimp and cocktail sauce. Accordingly, the dismissal was affirmed.

III. Third Circuit

A. Automobiles

Blumer v. Ford Motor Co., et al., 20 A.3d 1222 (Pa. Super. 2011)

The Defendants, a vehicle manufacturer and a dealership, sought review of a judgment entered in favor of the Plaintiff, arising from her husband's death from a tow truck. During the trial, the Plaintiff alleged that there was a defective design of the parking brake which caused the parking brake to disengage.

The Defendants contended on appeal that the trial court erred in admitting reports of prior incidents and in permitting the Plaintiff to submit evidence of design changes. The Defendants maintained that the reports of the prior incidents were not substantially similar to the accident at issue, and alternatively, that the trial court failed to provide a limiting instruction informing the jury that the prior incidents could only be used to establish notice because they constituted hearsay. In addition, the Defendants asserted that the trial court abused its discretion in allowing the Plaintiff to introduce evidence of design changes, contending that the design changes were inadmissible under Pa. R. Evid. 407, which prohibits evidence of subsequent remedial measures.

The Superior Court found that the introduction by the Plaintiff of design changes to the truck was proper under Pa. R. Evid. 407, as the changes were contemplated by the defendant-manufacturer prior to the decedent's accident. Consequently, they were not within the "subsequent remedial measures" prohibition. The Court also found that the admission of reports of prior incidents were proper where the incidents were substantially similar to the accident at issue, however reports that did not reflect substantially similar accidents should not have been admitted. The Court nevertheless upheld the trial court's decision as such error was harmless because the contents of the improperly admitted reports were cumulative in nature to the admissible

reports. Finally, the Superior Court held that the Defendants' hearsay objection was not preserved for appellate review under Pa. R. Evid. 103.

B. Medical Device

Pusey, et al. v. Decton Dickinson and Co., 794 F. Supp. 2d. 551 (E.D. Pa. 2011)

Plaintiffs' claims arose out of a left breast expansion procedure performed upon plaintiff-wife, using a syringe manufactured by the Defendant. Following the procedure, plaintiff-wife's breast became infected, necessitating the removal of her left breast expander. Around the same time, the Defendant recalled syringes produced between 2005 and 2007, as well as some produced in 2008, due to packaging issues, which included the syringe used in plaintiff-wife's procedure. Plaintiffs subsequently filed this action against the Defendant, alleging, among other things, strict liability.

The Defendant filed a Motion for Summary Judgment, arguing with respect to plaintiff's strict liability claims, that plaintiffs could point to no admissible evidence that the syringe was defective. The Defendant argued that the evidence of the recall of the syringe was neither admissible as a matter of law nor probative as a matter of fact. The Eastern District agreed with the Defendant, citing Federal Rule of Civil Procedure 407 which excludes evidence of remedial measures taken after the occurrence of harm caused by an event. The Court noted that while an expert could rely on inadmissible evidence, including subsequent remedial measures, in forming opinions, however, Plaintiffs failed to qualify plaintiff-wife's doctor as an expert in the case and therefore the doctor, as a lay witness, was unable to rely upon the recall, of which he had no first-hand knowledge.

Relying on *Vockie v. Gen. Motors Corp*., 66 F.R.D. 57 (E.D. Pa. 1975), the Defendant next argued that the Plaintiffs failed to prove that the specific syringe used on plaintiff-wife was defective because "the fact of a defect in a particular [product is] required to be proved by direct evidence," and evidence of a recall "has minimal probative value to the existence of a defect in a particular vehicle." The Court noted that as a plaintiff can only prove defectiveness by showing either a specific defect or a malfunction, a plaintiff must have some evidence regarding the particular product's defect or malfunction to demonstrate defectiveness. After reviewing the facts in the light most favorable to the Plaintiffs, the Court held that plaintiffs still have not adduced facts supported by the record that indicate a genuine dispute exists as to whether this particular product was defective. The Court found it important that that neither plaintiff-wife's doctor, nor any member of his staff observed a package seal failure in any syringe used to treat plaintiff-wife.

Wiggins v. Synthes, 29 A.2d 9 (Pa. Super. 2011)

The Plaintiff brought a products liability action against the Defendant alleging a defect in surgical screws that were used on the patient during a surgery. Following a jury trial in favor of the Plaintiff, the Defendant appealed. The Defendant challenged the sufficiency of the evidence supporting the jury's conclusion that the surgical screws were defective when they left the possession of the Defendant.

The Superior Court noted that the Plaintiff was not required to present testimony that the screws were defective under the malfunction theory as the jury could infer the existence of a defect through circumstantial evidence of a malfunction. The Court found that the testimony of the Plaintiff's doctor was sufficient evidence to infer that the screws were defective in failing to keep the patient's hip together. Further, the testimony of the Plaintiff and his mother that he did not engage in any abnormal activity during the healing time was sufficient to allow the jury to conclude that abnormal use did not cause the surgical screws to malfunction.

C. Toxic Tort

Collins v. Ashland, Inc., et al. 2011 Del. Super. LEXIS 450 (Oct. 21, 2011)

Plaintiff filed suit against the Defendant-manufacturers, alleging that her husband had contracted acute myelogenous leukemia (AML) as a proximate result of his exposure to products containing benzene produced by the manufacturers. The Defendants moved to exclude the widow's causation experts and for summary judgment. The Defendants argued that because the decedent was only exposed to their products for nine months, and the widow's experts relied on the decedent's entire career in concluding that benzene caused his AML, the experts' opinions were based on flawed information, and thus, their testimony was unreliable.

The Court found that neither of Plaintiff's experts distinguished the time period the decedent was exposed to the Defendants' products from the rest of his career as a painter. The Court reasoned that this failure to link the decedent's disease to the Defendants' products and the time period in which he was in fact exposed to these products was a fundamental flaw in the Plaintiff's experts' methodology which undermined the reliability of the Plaintiff's experts' conclusions as required by Del. R. Evid. 401, 402. Granting the Defendants' motion for summary judgment, the Court held that because the Plaintiff's experts did not make a prima facie showing of a causal nexus between exposure to the Defendants' products and the decedent's disease, the issue could not have been presented to a jury.

Nelson v. A.W. Chesteron Co., et al,. 2011 U.S. Dist. LEXIS 142970 (E.D. Pa. Oct. 27, 2011)

Plaintiff alleged that his asbestos-related injuries were caused by the inhalation of fibers emitted from products which were designed, manufactured, distributed, installed, and/or sold by various defendants. The defendant argued that Plaintiff's claims were time-barred due to the statute of limitations applicable to maritime injury claims, and because Plaintiff had sued other defendants for his non-malignant asbestosis in 1990, many years before finding out about his malignant mesothelioma in 2008 (which is the subject of this suit).

The Eastern District held that the Plaintiff's claims were not time-barred under 46 U.S.C.S. §30106. Under the separate disease rule, a plaintiff could bring suit for a nonmalignant asbestos-related disease without triggering the statute of limitations for any malignant asbestos-related diseases which might later develop. Here, plaintiff was diagnosed with his "second disease" of malignant mesothelioma in 2008. That he had filed a prior lawsuit in the early 1990s based on his diagnosis of non-malignant asbestosis did not affect the three-year statute of limitations on his present maritime claim.

D. Other

1. Consumer Product Safety Standard

Covell v. Bell Sports, 651 F.3d 357 (3d Cir. 2011)

Plaintiffs, guardians of their adult son, appealed from a jury's verdict for defendant manufacturer in their products liability action, contending that the U.S. District Court for the Eastern District of Pennsylvania erred in charging the jury pursuant to Restatement (Third) of Torts §§1-2 (1998), rather than Restatement (Second) of Torts §402A (1965), and in allowing into evidence a consumer product safety standard.

The Third Circuit followed its prior holding that federal courts sitting in diversity and applying Pennsylvania law to products liability cases should look to Restatement (Third) of Torts §§1-2 (1998). In doing so, it affirmed the lower court allowing into evidence the consumer product standard as relevant to the amount of care defendant exercised.

2. Hazardous Materials Transportation Preemption

Roth v. Norfalco LLC, 651 F.3d 367 (3rd Cir. 2011)

Plaintiff, David Roth, was attempting to unload a railway tank car filled with sulfuric acid when its chemical contents exploded, spraying acid material across his face and chest and inflicting severe burns.

Plaintiff brought suit, seeking damages for his personal injuries under Pennsylvania's common law, but the District Court held that his lawsuit was preempted by the Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C. §§5101-5128.

The Third Circuit upheld the District Court's decision, determining that the plaintiff's common law claims were expressly preempted under the plain meaning of 49 U.S.C.S. §5125(b)(1) because (1) his claims constituted "non-federal requirements" under the HMTA since he sought to impose a design requirement that, if successful, would require the supplier to install an additional safety valve and pressure gauge on each of its tank cars, (2) his design requirement fell squarely within the subject area set forth in §5125(b)(1)(E) since it concerned the design of a package, container, or packaging component that was qualified for use in transporting hazardous materials in commerce, and (3) his design requirement would impose conditions beyond those imposed by the Hazardous Materials Regulations.

3. Foreseeable Misuse

Leja v. Schmidt Manufacturing, Inc., *et al.* 2011 U.S. Dist. LEXIS 94051 (D. N.J. Aug. 22, 2011)

On May 4, 2000, the decedent suffered severe injuries when he attempted to open a bulk sandblasting unit manufactured by the Defendant while the machine was still pressurized. Mr. Leja died of an alcohol overdose on March 25, 2008. Alleging that the machine was defectively designed and that the accident caused his eventual overdose, his widow, the Plaintiff, filed suit against the Defendant, which included design defect allegations. The Plaintiff argued that the "camlock closure," the cover at the top of the machine, qualified as a "quick-opening or quick-actuating closure" under the 1995 edition of the American Society of Mechanical Engineers' Code, which required manufacturers of devices that utilized such closures to install a visible or audible warning device in order to warn users not to open the closure while the machine is pressurized. The Plaintiff maintained that the Defendant should have installed a pressure-indicating device at the top of the machine, such as a pressure gauge, that would have indicated to the decedent that the machine was pressurized before he attempted to open it. The Defendant argued that it was not required to install such a device on the machine because the camlock closure was not quick-actuating.

Prior to trial the Defendant filed a Motion for Reconsideration of the Court's April 6, 2011, ruling that the statements in the Defendant's expert report by its Human Factors Expert, regarding the decedent's conduct as the cause of the accident be redacted. The Defendant argued that under New Jersey products liability law, "a plaintiff's conduct may be relevant to the question of proximate cause in that the jury may find that plaintiff's conduct had been the sole cause of the accident."

The District Court found that there were multiple distinct instances of conduct at issue, some of which could be found to be foreseeable misuse, while others could be found to be unforeseeable misuse, or found not to be misuse at all. Given the diversity of the instances, the Court determined that to the extent the jury finds the machine defective due to the Defendant's failure to install a pressure-indicating device to prevent an instance of foreseeable misuse, it may not consider that instance in determining proximate cause—*i.e.* whether the decedent's conduct indicated that he would not have heeded a pressure-indicating device. However, the Court stated that to the extent the jury finds an instance of misuse to be unforeseeable, it may consider whether that instance indicates that the decedent would not have heeded a pressure-indicating device.

4. Duty of Distributor to Inspect Product

Facciponte v. Briggs & Stratton Corp., 2011 U.S. Dist. LEXIS 119293 (M.D. Pa. Oct. 17, 2011)

This case arose out of the death of four young men due to carbon monoxide poisoning after using a gasoline-powered portable generator inside to provide electricity in a home. Plaintiffs allege that failings in

the design of the generator and defendants' failure to warn them about dangers from the generator caused the men's deaths. These design failings allegedly caused the young men to be unaware of the dangers of running the generator in an enclosed space.

The Middle District held that evidence of the distributor's failure to inspect or test the generator was inadmissible under Fed. R. Evid. 401 and 402 because the distributor had no duty to inspect a product shipped in a sealed container, the generator was not per se dangerous, and the distributor could not be negligent for failing to inspect when it had no duty to do so. The Court further reasoned that evidence of the distributor's failure to inspect is irrelevant because the Plaintiff proffered that evidence to establish negligence, and, the distributor's failure to inspect is not a fact that is of consequence to the determination of the action.

5. Strict Liability's Application to Lessors

Banks, et al. v. Int'l Rental and Leasing Co., 2011 V.I. Supreme LEXIS 46 (Dec. 15, 2011)

The Third Circuit certified the question of whether under Virgin Islands law, including V.I. Code Ann. tit. 1, §4, a plaintiff could pursue a strict liability claim against a lessor for injuries resulting from a defective product. The Third Circuit noted that an apparent conflict existed between Restatement (Second) of Torts §§402A, 407, and 408 and Restatement (Third) of Torts: Product Liability §§1 and 20 in that the Third Restatement subjected a lessor of a defective product to strict liability, whereas several courts applying Virgin Islands law had interpreted the Second Restatement to hold a lessor liable only for negligence.

The Supreme Court held that although judicial precedents constituted local law for purposes of §4, the present court, as the highest local court in the Virgin Islands, was not bound by any of the decisions applying the Second Restatement, since none constituted binding precedent for the court. Moreover, since the Court had the inherent authority to shape Virgin Islands common law, it was not strictly bound by §4 to always apply the most recent Restatement provisions. The Court, noting that the majority of United States jurisdictions follow the Third Restatement, held that holding lessors strictly liable represented the sounder rule, in that a commercial lessor acted much like a retailer and manufacturer in placing products in the stream of commerce and would in most instances be in a better position than a consumer to prevent the circulation of defective products. The Supreme Court further held that the Virgin Islands local courts should apply sections 1 and 20 of the Third Restatement and allow lessors to be held strictly liable for injuries resulting from a defective product.

IV. Fourth Circuit

A. Automobiles

Peters-Martin v. Navistar Intern. Transp. Corp., 2011 WL 462657 (4th Cir. 2011)

This is a products liability case arising out of a multiple-vehicle collision in which the plaintiff's vehicle was struck by a Ryder truck. The plaintiff sued the manufacturer of the truck and the component part manufacturer of the truck's braking system alleging manufacturing and design defects in the components that provided power assistance to the truck's hydraulic braking system which caused the accident. The Plaintiff's expert engineer provided two reports which relied extensively on another expert engineer's previous investigation of the accident for a prior, separate lawsuit arising out of the accident. The expert concluded that components to the brake system created a high operating temperature that caused the grommet on the truck's pedal rod to fail and that the design was defective because failure can be sudden and without warning and the condition of the part cannot be determined.

The defendants moved to exclude Plaintiff's expert's report as unreliable under Rule 702. The defendants emphasized that although Plaintiff's expert obtained an exemplar part and brake cylinder in new, unused condition and disassembled and measured it, he "cited no tests, studies, or other scientific support for his conclusions, and cited no prior instances of such a problem occurring with the [part]" and also failed to provide "any factual or scientific data or support for his discussion of heat generation and transfer within the truck's braking system."

In excluding the expert report, the Maryland district court enumerated several deficiencies therein: (1) the district court noted that the theories were not based upon firsthand examination or testing of the truck's braking system, or even extensive testing of his exemplar braking system, but were instead largely extrapolated from another expert, previous inspection and report.

The Court of Appeals affirmed. While noting that Plaintiff's expert's failure to examine the truck's braking system himself did not, in and of itself, render his opinion inherently unreliable or automatically inadmissible, the Court found that the expert's methodology was "woefully deficient in its execution."

Branham v. Ford Motor Co., 390 S.C. 203; 701 S.E.2d 5 (2010)

This is a products liability case that arises out of a vehicle accident that occurred on June 17, 2001. Cheryl Hale ("Hale") was driving several children in a 1987 Ford Bronco II 4x2, including 12 year-old Jesse Branham. None of the vehicle occupants were wearing a seatbelt. When Hale turned around to the backseat to ask the children to quiet down, the vehicle veered off the road onto the right shoulder. Hale overcorrected back to the left. The vehicle proceeded to overturn and Branham was thrown from the vehicle and injured. Branham's father filed suit against Ford Motor Company ("Ford") and Hale in Hampton County, South Carolina. The Plaintiff's case against Ford was based on two product liability claims, one related to the seatbelt and the other was a handling and stability design claim. Both claims were based on negligence and strict liability theories. A jury awarded $16,000,000 in actual damages and $15,000,000 in punitive damages. The South Carolina Supreme Court affirmed in part, reversed in part and remanded the case for a new trial.

In sum, the Court held:

- **When an Element Common to Multiple Claims Is Not Established, All Related Claims Must Fail**

Plaintiff claimed Ford was negligent for failing to test the seatbelt sleeve, but did not challenge the seatbelt sleeve's design at trial. Plaintiff also brought a strict liability claim premised on the same theory. The trial court dismissed the strict liability claim and found that the seatbelt sleeve was not, as a matter of law, in a defective condition unreasonably dangerous to the user at the time of manufacture. On appeal, Ford argued that the companion negligence claim must also fail since it required Plaintiff to prove that the seatbelt sleeve was in a defective condition unreasonably dangerous to the user. The Court agreed and held that "[w]hen an element common to multiple claims is not established, all related claims must fail."

- **The Risk-Utility Test Is the Exclusive Test in a Products Liability Design Case with Its Requirement to Show a Feasible Alternative Design**

On appeal, Ford argued that South Carolina law requires a risk-utility test in design defect cases to the exclusion of the consumer expectations test. The State's Supreme Court agreed. In South Carolina, to successfully pursue a design defect claim, a plaintiff must show the design of the product caused it to be "unreasonably dangerous." Two tests have traditionally been applied to determine whether a product was unreasonably dangerous: the consumer expectations test and the risk-utility test. In South Carolina, "the exclusive test in a products liability design case is the risk-utility test with its requirement of showing a feasible alternative design." Under the risk-utility test, "a product is unreasonably dangerous and defective if the danger associated with the use of the product outweighs the utility of the product." The risk-utility test

requires the plaintiff to present evidence of a reasonable alternative design. "The plaintiff will be required to point to a design flaw in the product and show how his alternative design would have prevented the product from being unreasonably dangerous. This presentation of an alternative design must include consideration of the costs, safety and functionality associated with the alternative design."

- **Post-Distribution Evidence Is Inadmissible When Evaluating Whether a Product Is Defectively Designed**

The Court reversed and remanded the finding of liability and award of actual damages for three reasons. First, the Court found that Ford was prejudiced by Branham's "unrelenting pursuit of post-distribution evidence on the issue of liability." "Post-distribution evidence is evidence of facts neither known nor available at the time of distribution." The Court held that such evidence is prejudicial, and thus inadmissible, in determining whether a product was defectively designed and in a defective condition unreasonably dangerous. In assessing a manufacturer's liability in a design defect claim, only evidence that was *known* or *reasonably attainable* at the time of manufacture should be considered.

- **Even if the Other Incidents Evidence Is Substantially Similar, the Evidence Is Inadmissible if It Is Post-Distribution Evidence Offered to Establish Liability**

The second evidentiary ground for reversing and remanding the finding of liability and award of actual damages is based on improperly admitted "other incidents" evidence. Evidence of other incidents is admissible in South Carolina where there is substantial similarity between the other incidents and the accident in dispute, tending to prove or disprove some fact in controversy. However, the Court found that the admission of post-manufacture evidence of purported similar incidents was error, even if the "substantially similar" threshold was met.

- **A Closing Argument Cannot Be Intended to Inflame the Jury's Passion and Preju**dice

The final basis for the Court's reversal and remand was that Plaintiff's counsel's closing argument was "designed to inflame and prejudice the jury." The Court provided that "[i]t is improper for counsel to make a 'closing argument to the jury . . . calculated to arouse passion or prejudice." In its Opinion, the Court cited excerpts from the Plaintiff's counsel's closing argument and noted that it relied heavily on inadmissible evidence.

- **A Jury May Not Rely on "Harm to Others" in Awarding Punitive Damages**

Although the issue of punitive damages was properly submitted to the jury, the Court agreed with Ford that the $15,000,000 punitive damages award was unconstitutional. In Plaintiff's pursuit of punitive damages, their counsel asked the jury to punish Ford for the harm caused to all Bronco II rollover victims. On appeal, the Court found that this argument violated the "harm to others" prohibition, as previously set forth by the South Carolina and United States Supreme Courts.

- **Trial Courts Have the Authority to Realign Parties at Any Stage of the Action**

At trial, Ford requested the court to realign the parties to have the driver-defendant as a plaintiff so that Ford would not have to share its allotment of peremptory jury strikes with her. Although the South Carolina Supreme Court found that the issue was not preserved for review, it addressed the issue in an effort to provide guidance to the bench and bar. The Court determined that the only *bona fide* defendant in the case was Ford. The Court held that, in addition to a court's inherent authority to manage and conduct a trial, Rule 21 of the South Carolina Rules of Civil Procedure, which is identical to Rule 21 of the Federal Rules of Civil Procedure, gives the trial court authority to realign parties at any stage of the action.

V. Fifth Circuit

A. Automobiles

Lawson v. Honeywell Int'l, Inc., No. 2010-CA-01924-SCT, 2011 Miss. LEXIS 506 (Miss. Oct. 20, 2011)

Plaintiff lost control of her vehicle and claimed that a defective seat belt buckle designed by Honeywell allowed her to be ejected during the resulting accident. She alleged strict liability under the Mississippi Products Liability Act ("MPLA"), negligence, and negligence per se. Honeywell moved for summary judgment, which the trial court granted. The court denied plaintiff's motion for reconsideration, then entered final judgment, dismissing Honeywell with prejudice. Plaintiff appealed.

The Supreme Court first examined whether a product "designer" is a "manufacturer" for purposes of the MPLA. Based on the plain meaning of "manufacturer" as described in two dictionaries and *Scordino v. Hopeman* Bros., Inc., 662 So. 2d 640, 645 (Miss. 1995), the court determined that the term does not encompass a mere designer of a product. Because Honeywell was no more than a designer (although it disputed even that), and the MPLA provides the exclusive remedy for strict liability claims against a manufacturer or seller only, plaintiff's strict liability claim against Honeywell was outside the scope of the MPLA. The Supreme Court affirmed the trial grant of summary judgment to Honeywell with respect to her strict liability claim.

However, using the same logic, the Supreme Court determined that an entity other than a manufacturer or seller is outside the scope of the MPLA, and thus may be liable under any available theory, including negligence. In other words, the court held that the MPLA does not preclude negligence claims against designers. The Supreme Court reversed the trial court's grant of summary judgment with respect to plaintiff's common law negligence claim against Honeywell as a designer.

Hyundai Motor America and Hyundai Motor Co. v. Applewhite, 53 So. 3d 749 (Miss. Feb. 10, 2011)

Applewhite and two friends were driving a 1993 Hyundai Excel on a Mississippi highway. Witnesses saw the vehicle swerve into oncoming traffic, where it collided with another vehicle. The Hyundai was torn in two and all three passengers died at the scene. Their families sued Hyundai in Mississippi state court, claiming the Excel was defectively designed and manufactured. A jury awarded the three families $1.5 million each.

Hyundai appealed, raising several issues, including that it was ambushed at trial when plaintiffs' expert accident reconstructionist changed his opinions, and that plaintiffs' design engineer used a computer simulation rather than a physical model to test his alternative design. Three experts testified for plaintiffs during the trial. Hyundai made a Daubert objection to one expert after he finished testifying at trial and another after the close of plaintiffs' case-in-chief. The court determined that these Daubert objections were untimely. Plaintiffs' third expert offered an alternative design for the pillar that connected the Excel's body and roof on either side of the windshield. Hyundai objected that he created the design using a computer simulation, rather than testing a real model.

The court decided that the expert's use of a computer model went to the weight and credibility of his evidence, not its admissibility. Hyundai also objected that one of plaintiffs' experts used the errata sheet of his deposition to change four variables used in calculating the "delta-v" of the Excel during the accident. Hyundai stated it first became aware of the changes at trial, while plaintiffs argued they forwarded the errata sheet to Hyundai, and furthermore, the expert's ultimate conclusions did not change.

The Supreme Court determined that even if plaintiffs did forward the errata sheet, they still had a duty to formally amend or supplement the expert's opinions because the variables were essential to the basis of those opinions. Stating that "neither these plaintiffs nor any other party litigant may rely on a witness's notations on a deposition errata sheet as a substitute for formal and timely supplementation," the Court found

that the trial court's refusal to strike the expert's new testimony was error warranting reversal and remand for a new trial.

B. Medical Device

Hughes v. Boston Scientific Corp., 631 F.3d 762 (5th Cir. Jan. 21, 2011)

Defendant Boston Scientific manufactures a device that ablates the uterine lining to improve the condition of excessive uterine bleeding. The device was approved under the FDA's premarketing approval ("PMA") process as a Class III device, receiving the highest level of FDA review. Boston Scientific was obligated to comply with FDA's Medical Device Reporting ("MDR") requirements for adverse events. Plaintiff suffered second-degree burns when her physician used the device for her ablation procedure. She filed suit alleging products liability, breach of warranty, and negligence.

As part of her negligence claim, plaintiff alleged that Boston Scientific failed to report adverse events as required by the FDA. The company had used an algorithm to select reportable adverse events, which the FDA later asked it to adjust so that more events would be reported. The trial court granted summary judgment to Boston Scientific on the basis that all of plaintiff's claims were expressly preempted by the MDA.

On Appeal, the Fifth Circuit looked to the two-prong test established in *Riegel* for determining whether a state law tort claim is preempted. The Court found that any Class III device receiving FDA approval automatically satisfies the first prong of the test. The second prong is whether "the state law at issue creates a requirement that is related to the device's safety or effectiveness and is 'different from or in addition to' a federal requirement."

The court stated that plaintiff's claims seeking to impose different or additional state law duties are expressly preempted. Specifically, her failure-to-warn claims that question the sufficiency of the FDA-approved warnings are preempted. However, the court stated that the failure-to-warn claim is not expressly preempted to the extent it is based on Boston Scientific's failure to comply with FDA regulations because such a state imposed duty would "parallel" the federal requirements. Boston Scientific argued that the FDA never made any formal findings that the company failed to comply with FDA regulations and therefore a jury should not be permitted to make such a finding.

The court stated it found no authority that an FDA finding was a necessary prerequisite to a "parallel" state suit. It further concluded that there was sufficient evidence for a jury to find that Boston Scientific's original algorithm for reporting adverse events to the FDA failed to satisfy MDR reporting requirements. The court noted that a state may impose remedies for violations of FDA regulations beyond those that the FDA imposes. The court affirmed the lower court's grant of summary judgment, except for her failure-to-warn claim, to the extent it was based on Boston Scientific's failure to comply with statutes and regulations regarding adverse event reporting.

C. Pharmaceuticals

Murthy v. Abbott Labs., No. 4:11-cv-105, 2011 U.S. Dist. LEXIS 129102 (S.D. Tex. Nov. 7, 2011)

Plaintiff participated in a clinical study for Abbot's FDA-approved drug Humira. Plaintiff's prescribing physician was paid by Abbott to run the study. Before participating, plaintiff signed an informed consent form that stated that lymphoma had occasionally been observed in patients receiving Humira. She also watched a video about Humira produced by Abbott. After using Humira for about a year, plaintiff developed lymphoma. She brought claims against Abbott for breach of the informed consent agreement, breach of warranty, strict products liability, and negligence.

Abbott filed a motion to dismiss on the basis of the learned intermediary doctrine and §82.007 of the Texas Civil Practice and Remedies Code (Medicines section of the Products Liability chapter of the code). The court found that because Abbott marketed directly to plaintiff with a video, and paid her physician, Abbott was not shielded by the learned intermediary doctrine from failure-to-warn based claims.

According to the court, the Texas Supreme Court has not addressed either the promotional video scenario or the physician compensation scenario in the learned intermediary context. The court therefore made an Erie guess. It determined that the video, which according to plaintiff fraudulently inflated Humira's efficacy, circumvented the doctor-patient relationship, negating the learned intermediary doctrine protection. The court further determined that the "Texas Supreme Court would surely not apply the learned intermediary doctrine when the physician's prescribing practice is compromised by a conflict of interest as overt as compensation by the defendant drug company." The court cited journal articles and position papers examining gifts to physicians, but almost no case law.

Abbott had also argued that plaintiff's claims should be dismissed under §82.007, which provides a rebuttable presumption that a drug's FDA-approved warning is adequate. Plaintiff presented five arguments in response, which the court addressed as follows. First, the court disagreed with plaintiff that §82.007 does not apply to a non-FDA approved indication. Second, the court disagreed with plaintiff that she could rebut the presumption by showing that the FDA later mandated stricter warnings. Third, the court disagreed that §82.007 could be rebutted if some part of the information provided to plaintiff about Humira was not FDA-approved. The court stated that plaintiff's fourth and fifth arguments required it to determine whether she must plead facts in her complaint sufficient to make it plausible that she could rebut the presumption, or she should be allowed to proceed with discovery in order to develop such facts. The court determined that "[u]ntil it receives guidance from the Fifth Circuit, the Court will not erect what could be an insurmountable barrier for many plaintiffs seeking to bring actions under §82.007… [Plaintiff] need not, in her Complaint, plead one of the enumerated ways to rebut the statutory presumptions outlined in §82.007."

Having determined that plaintiff's negligent failure-to-warn claims survived Abbott's motion to dismiss, the court addressed plaintiff's claims of strict liability, negligence, and breach of warranty. The court opined that because plaintiff had pleaded facts showing a failure to warn, her strict liability claim survived. Plaintiff's claim of negligence was based on a failure to test. Abbott did not explain why this claim should be dismissed, so the court did not dismiss it. Abbott's arguments against plaintiff's breach of warranty claim were based on the learned intermediary doctrine and §82.007, which the court had already concluded did not preclude plaintiff's claims. All three claims survived.

Finally, plaintiff's amended complaint included a new claim for breach of contract related to the informed consent form she had signed. Abbott argued that the statute of limitations had run. Plaintiff argued alternatively fraudulent concealment, the discovery rule, and the relation-back doctrine to protect her new claim. The court determined that plaintiff had not pled sufficient facts to show that Abbott had knowledge of a wrong and a fixed purpose to conceal it, so the doctrine of fraudulent concealment did not apply. The discovery rule did not toll the statute of limitations because plaintiff knew of her cancer diagnosis. In addition, she was told by her physician to stop using Humira at the time of her diagnosis, which suggests she had reason to suspect the drug's potential role in causing her cancer.

Instead, the court used the relation-back doctrine to allow the breach of contract claim to proceed, because it arose from the same occurrence as plaintiff's original pleading: her participation in the Abbott study and subsequent development of cancer. Thus, Abbott's motion to dismiss was denied in its entirety.

Merck & Co, Inc. v. Garza, et al., 347 S.W.3d 256 (Tex. Aug. 26, 2011)

Garza had a 20-year history of heart disease. Twenty-five days before his death he received one or two small prescriptions for Vioxx 25mg. Garza died of an apparent heart attack, probably related to his severe coronary artery disease. Garza's family sued Merck, the manufacturer of Vioxx, for products liability design and marketing defects. Merck challenged the scientific reliability of the evidence plaintiffs used to show Vioxx caused Garza's death but was overruled by the trial court. The jury awarded plaintiffs a substantial verdict. Merck appealed.

The appeals court held that plaintiffs could not recover on their design defect claim but accepted the marketing (inadequate warnings) claim. The appeals court agreed with plaintiffs that the Texas Supreme Court's decision in *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997), did not establish a bright-line test for causation but mandated that the totality of the evidence could suffice to establish causation. Plaintiffs had brought forth a study showing a doubling of the risk of cardiac adverse events in patients taking Vioxx for twelve weeks or less. The appeals court found this sufficient to establish general causation; however, the appeals court reversed and remanded the case for new trial on other grounds. Merck filed a petition for review.

Reviewing and clarifying its *Havner* opinion, the Texas Supreme Court stated that plaintiffs must meet a threshold requirement of producing two studies showing statistically significant doubling of the risk. This requirement is the court's attempt to "strike[] a balance between the needs of our legal system and the limits of science." The studies may be observational, as they were in *Havner*, or they may be clinical trials, as used by plaintiffs in this case.

Plaintiffs also were required to show that Garza's circumstances were "substantially similar" to those of the subjects in the studies they cited. The court rejected one study because the patients took Vioxx 50mg for a median of nine months, while Garza took Vioxx 25mg for a maximum of 25 days. The court rejected another study that did not reach statistical significance until 18 months of Vioxx use; again, much longer than Garza's use. The court rejected a meta-analysis combining the results of several different studies with different Vioxx dosages and durations. Plaintiffs thus could not produce the minimum two studies showing doubling of the risk in patients similarly situated to Garza.

The court further explained that even if plaintiffs had produced two studies that passed the primary reliability inquiry, a court must then test the soundness of the studies' findings by using the totality of the evidence test. This entails the court's considering all factors affecting the reliability of the studies and considering whether there is legally sufficient evidence to support a judgment. Thus, the court rejected plaintiffs' contention that the totality of the evidence test alone sufficed to show general causation. The court reiterated that the evidence "cannot prove general causation if it does not [first] meet the standards for scientific reliability established by *Havner*."

D. Other

1. Reasonably Anticipated Use Standard

Spears v. Cintas Sales Corp., et al., 414 Fed. Appx. 667 (5th Cir. Feb. 28, 2011) (unpublished opinion)

Plaintiff was a mechanic for Apeck. Apeck provided him with a uniform that it rented from Cintas. The rental agreement stated that the uniforms were not flame retardant. Plaintiff was severely burned when a dump truck backfired on him while he was wearing a Cintas polyester/cotton uniform that he alleged was unreasonably dangerous. He brought a products liability suit in Louisiana state court. Cintas removed the case, then filed a motion for summary judgment, arguing plaintiff could not prove that he was injured because the uniform was unreasonably dangerous, and could not prove that his injury arose from a reasonably antici-

pated use of the uniform. The district court granted summary judgment for Cintas, finding that plaintiff's use of the uniform was not reasonably anticipated.

On appeal, the plaintiff argued Cintas could not rely on its warning regarding flammability in the rental contract to show that his use of the uniform was not reasonably anticipated, because he never saw the rental contract. However, the Fifth Circuit has previously stated that even when a consumer is not aware of a warning, if the danger of a particular use is obvious, then it is not reasonably anticipated—unless the plaintiff can show that the manufacturer should have been aware that consumers were using the product in a way that contravened the warning. In this case, Cintas did not argue that plaintiff had seen the flammability warning. Instead, it provided testimony from plaintiff showing that he was aware that a polyester/cotton uniform would melt when exposed to flame.

Plaintiff countered that Cintas should have known that Apeck employees faced a risk of flames during their work. The Cintas representative saw welding equipment and blowtorches in the Apeck shop, and Cintas received uniforms for laundering that were smeared with flammable substances, such as grease and lubricants. The court disagreed, noting that Apeck had warranted in the rental agreement that none of its employees needed flame retardant uniforms and that Cintas had a right to rely on this assurance.

Matthews v. Remington Arms Co., 641 F.3d 635 (5th Cir. May 18, 2011)

Plaintiff's mother-in-law purchased a used rifle. Evidence showed that several persons had borrowed and fired the rifle. Plaintiff then borrowed the rifle to sight in a new scope. The rifle's bolt assembly pin was either defective or missing. As a result, when plaintiff fired the rifle, an uncontained explosion caused him serious injuries. He brought suit under the Louisiana Product Liability Act ("LPLA").

After a bench trial, the district court rendered judgment for a defense verdict. The court's key finding was that plaintiff had been injured, not because the pin was defective, but because it had been removed by an unknown third party. The court concluded that the manufacturer could not "reasonably anticipate" that the rifle would be fired without the pin, thus plaintiff failed to meet a threshold element under the LPLA.

On appeal, to the Fifth Circuit Court of Appeals, the Court first addressed whether the district court erred in finding that the bolt assembly pin was missing, rather than defective. Based on a review of the evidence, the Appeals Court could not say that this finding of fact was erroneous. That evidence included physical marks showing that the rifle had once contained the pin and testimony that the manufacturer test fires each rifle before it is sold.

The court also considered that numerous people had borrowed the rifle before plaintiff used it. Some of those people provided conflicting testimony. The Appeals Court applied a highly deferential standard in reviewing the district court's finding. The Appeals Court next considered the district court's conclusion of law and associated finding of fact that plaintiff's use of the rifle with the missing pin was not reasonably anticipated by the manufacturer. The scope of use could have been defined as either 1) firing the rifle or 2) firing the rifle without the pin. The Appeals Court noted that under the LPLA, the claimed damage is to arise "from a reasonably anticipated use of the product by the claimant or another person or entity." The district court had found that someone had disassembled the rifle and failed to reinstall the bolt assembly pin. The Appeals Court concluded that "use" included someone's removal and failure to reinstall the pin, because this is the use the manufacturer had to have "reasonably anticipated."

Having concluded that the scope of use was firing the rifle without the pin, the court then examined whether this was "reasonably anticipated" by the manufacturer. Whether a use is reasonably anticipated is an objective standard determined from the manufacturer's viewpoint at the time of manufacture. Plaintiff was unable to present any evidence showing that the manufacturer was aware of any misfire incidents similar to

plaintiff's. In fact, evidence showed that the ordinary rifle user would know to reassemble the rifle with all parts. The Court therefore concluded that the district court did not err when it found that the manufacturer should not expect its rifle to be fired without the bolt assembly pin.

Payne v. Gardner, 56 So. 3d 229 (La. Feb. 18, 2011) (per curiam)

A teenager climbed onto the pendulum of an oil well pump and attempted to "ride" it. His pants became caught in the pump and he was severely injured. His mother sued the pump manufacturer. The manufacturer asserted that it was not liable because it did not anticipate, when it designed and manufactured the pump in the 1950s, that the pump would be used for recreational purposes. Plaintiff countered that it was a foreseeable risk that children would attempt to play on pumps and cited several similar lawsuits.

The trial court granted summary judgment for the manufacturer, finding that plaintiff had failed to show that the pump was unreasonably dangerous for its anticipated use, "pumping oil and not riding." Furthermore, a reasonable person would have known not to attempt to ride the pump. The appeals court reversed and remanded, finding that plaintiff's evidence could be sufficient for a juror to conclude that an ordinary person might ride the pump. The issue was appealed to the Louisiana Supreme Court.

This case was governed by the Louisiana Products Liability Act, which states that a manufacturer is liable for damage caused by an unreasonably dangerous product "when such damage arose from a reasonably anticipated use of the product by the claimant…" "Reasonably anticipated use" is defined by statute as a use that the manufacturer "should reasonably expect of an ordinary person in the same or similar circumstances." Reasonably anticipated use is ascertained from the point of view of the manufacturer at the time of manufacture. Case law directs that a manufacturer is not responsible for every possible foreseeable use and the fact-finder is discouraged from using hindsight. Furthermore, even if the manufacturer is aware of intentional abuse of its product, a reasonable-use fact question is not created.

Plaintiff, therefore, had to show that at the time of pump manufacture, the company should have expected an ordinary consumer to "ride" its pumps. The manufacturer produced testimony showing the pump was built only for the purpose of extracting oil from the ground. Furthermore, the various cases cited by plaintiff and relied upon by the appeals court stemmed from incidents that happened well after the pump was manufactured. The court concluded that reasonable persons could conclude only that riding the pump was not a reasonably anticipated use at the time it was manufactured; therefore, a trial was unnecessary.

2. Necessity of Producing Allegedly Defective Product

A.K.W. v. Easton-Bell Sports, Inc., et al., No. 11-60293, 2011 U.S. App. LEXIS 21108, (5th Cir. Oct. 18, 2011) (per curiam)

A.K.W. landed at the bottom of a tackle during a high school football scrimmage, hitting his head on the ground. He got up but collapsed a few minutes later. His coaches removed his helmet, which was subsequently lost. A.K.W. had suffered a carotid artery tear that rendered him partially paralyzed. A.K.W.'s mother filed suit on his behalf in Mississippi state court against defendant helmet manufacturers, alleging the helmet's liner and foam padding system was defectively designed.

Defendants removed the case and the federal district court dismissed the claims against most of the defendants. The remaining defendants moved for summary judgment, which the district court granted. A.K.W. appealed.

On appeal, the helmet manufacturer argued that A.K.W. could not prove the helmet was defectively designed because it was lost. A.K.W. countered that it did not matter because all of defendant's helmets using that particular lining and padding system were defective per se the moment they were manufactured. The

court noted that because A.K.W.'s expert's opinion was not based on A.K.W.'s actual helmet, but applied to every helmet, straight from the manufacturer, there was no need for the actual helmet to be produced and no need to grant summary judgment. The court also noted that A.K.W.'s expert provided evidence of a feasible alternative design of "continuous padding," which, had it been used, would have prevented or lessened A.K.W.'s injury. Accordingly, the summary judgment was reversed.

3. Failure to Produce Electronic Records Sanctions

Green v. Blitz U.S.A., Inc., No. 2:07-CV-372, 2011 U.S. Dist. LEXIS 20353 (E.D. Tex. Mar. 1, 2011)

The underlying lawsuit was a products liability claim involving whether a gas can should have a flame arrester. The decedent's widow ("Green") was one of numerous plaintiffs who brought suit against the manufacturer ("Blitz"). The parties reached a high-low settlement agreement during jury deliberations and the decedent's widow received a settlement figure at the low end of the agreement. While representing a plaintiff in a related case a year later, Green's counsel learned that Blitz had not produced certain documents in the earlier case. Green promptly filed a motion for sanctions, arguing that the documents related to the viability of a flame arrester would have impacted the jury's verdict so that she would have received a higher settlement figure.

Blitz had attempted to comply with its discovery obligations by having an employee search for and collect documents relevant to the gas can litigation. He did this by asking employees who might have relevant documents to pull those for him. He did not institute a litigation hold (in fact, employees were asked to routinely delete electronic documents and backup tapes were routinely overwritten), do any key word searches of emails, or talk with the company's IT department about electronic searches. Blitz failed to produce documents, including a letter from the company containing a "wish list" for Blitz gas cans, whose second point was: "Develop & introduce device to eliminate flashback from a flame source." Another document was an email with the subject line "FW: Flame Arrester." The email discussed flame arresters used in the marine industry and the possibility that Blitz could incorporate this technology.

The court stated that the "wish list," Flame Arrester email, and similar documents were "indisputably relevant," and Blitz's failure to disclose them constituted a willful violation of its discovery order. The court noted that even a minimal electronic discovery effort would have turned up relevant documents like the email and stated, "[t]hat Blitz put someone in charge of its discovery who knows nothing about computers does not help Blitz's effort to show that it was reasonable in its discovery obligations."

Having demonstrated Blitz's lack of effort, the court turned to the resulting prejudice to plaintiff. The documents would have been valuable to plaintiff in making her liability argument. Furthermore, because of Blitz's routine deletion of electronic documents, the court commented that "it will never be known how much prejudice against the plaintiff was actually caused by Blitz's failure to preserve documents." The court found "alarming" Blitz's "lack of appreciation of the discovery process in general." The court therefore held that sanctions were appropriate under both its inherent powers and pursuant to Federal Rule of Civil Procedure 37. The court awarded $250,000 to plaintiff—to be paid by Blitz and not its attorneys—finding that her settlement would have been at least that much higher had the documents been produced.

The court ordered an additional "purging" sanction of $500,000 to coerce Blitz to furnish a copy of the court's order to every plaintiff in every lawsuit pending currently and for the past two years against the company. The purging sanction was to be extinguished if Blitz complied within 30 days. To encourage compliance with future discovery orders, the court also ordered Blitz to file a copy of its order with its first filing in any lawsuit in which it participates for the next five years.

VI. Sixth Circuit

A. Specific Causation

Pluck v. BP Oil Pipeline Co., 640 F.3d 671 (6th Cir. May 12, 2011)

In *Pluck*, the Sixth Circuit Court of Appeals held that in order to prove specific causation in a toxic tort case, "the plaintiff must show that he was exposed to the toxic substance and that the level of exposure was sufficient to induce the complained-of medical condition." *Id*. at 677. In 1996, the Plucks purchased a house in close proximity to a site owned by BP. Between 1948 and 1962 the site experienced five gasoline spills resulting in seepage of gasoline into the surrounding soil and groundwater. As a result of the spills, BP began monitoring all nearby wells for contamination of benzene. The Plucks, whose well was monitored by BP, used the well on their property to drink, wash, shower, and irrigate their yard and garden. In October 1996, benzene was detected in the Pluck's well in the amount of 3.6 parts per billion (ppb). As a result, BP installed a new well on the Pluck's property in December 1996 and tested it quarterly for the presence of benzene. Between 1997 and May 2002, the new well tested negative for benzene 22 times. In May 2002, benzene was again detected in the Plucks' well. Therefore, in October 2003, BP installed a carbon filtration system to capture any containment in the well. In 2005, the plaintiffs moved.

In 2002, Mrs. Pluck was diagnosed with Non-Hodgkins lymphoma ("NHL") at the age of forty-eight. In 2008, the plaintiffs filed suit against BP alleging claims of strict liability for hazardous activity, negligence, and loss of consortium on behalf of Mr. Pluck. Prior to trial, BP moved to exclude the testimony of the Pluck's causation expert arguing that he failed to prove specific causation. Specifically, BP argued that the expert could not determine specific causation without evidence of the dose of benzene Mrs. Pluck was exposed to. The trial court agreed with BP and excluded the Pluck's causation expert, granting summary judgment in favor of BP. The trial court found that the expert's opinion was unreliable because he "formulated his opinion on dose without any exposure data, only having been told that Mrs. Pluck had been heavily exposed to benzene in her water; he relied upon a 'no safe dose' theory that had been discredited by other courts…; [and] he could not explain the 'scribbles' used to calculate Mrs. Pluck's dose of benzene." *Id*. at 675.

On appeal, the Plucks argued that the expert had applied a differential diagnosis to reach his conclusion and therefore his opinion is reliable. The Sixth Circuit ultimately agreed with the lower court's analysis and further held that the expert had not applied a differential diagnosis. Specifically, the expert failed to rule in benzene as the cause of Mrs. Pluck's NHL and rule out any other causes of NHL. First, the expert could not have ruled in benzene as the cause of Mrs. Pluck's NHL because he never ascertained Mrs. Pluck's level of benzene exposure and the Plucks well never exceeded the EPA's maximum permissible exposure level of 5 ppb. The Sixth Circuit held "the mere existence of a toxin in the environment is insufficient to establish causation without proof that the level of exposure could cause the plaintiff's symptoms." *Id*. at 679. Second, the expert failed to rule out other possible causes of Mrs. Pluck's NHL, such as her considerable smoking history.

B. Substantial Cause

Moeller v. Garlock Sealing Technologies, LLC, 660 F.3d 950 (6th Cir. Sept. 28, 2011)

Keeping in line with the *Pluck* decision, the Sixth Circuit Court of Appeals in *Moeller* reaffirmed that plaintiffs are required to prove the amount of the toxic substance that they were exposed to in order to prove causation. In *Moeller*, the plaintiff's family brought suit against his former employer, Garlock, alleging that the plaintiff's exposure to asbestos-containing gaskets manufactured by Garlock was a substantial factor in causing his injuries and ultimate death.

Pursuant to Kentucky law, a plaintiff must prove that a defendant's conduct was a substantial factor in bringing about the alleged injuries. The Sixth Circuit found that none of the plaintiff's expert witnesses testified that the plaintiff's exposure to Garlock's gaskets was a *substantial* factor in causing his injuries. The court relied on two facts to support its conclusion. First, the plaintiff failed to set forth any evidence quantifying his exposure to asbestos from Garlock's gaskets. Although the plaintiff testified prior to his death that he worked with Garlock's gaskets every day, he was only subject to asbestos exposure when he was removing the gaskets, not installing them. The plaintiff failed to produce any evidence on the number of gaskets removed or how frequently they were removed. Second, there was significant evidence that the plaintiff regularly tore out asbestos insulation during the relevant years and that this exposure would have been "thousands of times greater than his exposure from removing gaskets." *Id*. at 955.

Therefore, the Sixth Circuit found that "[w]hile [the plaintiff]'s exposure to Garlock gaskets may have contributed to his mesothelioma, the record simply does not support an inference that it was a *substantial* cause of his mesothelioma." *Id*. Based on *Pluck* and *Moeller*, the Sixth Circuit has established a clear precedent that a plaintiff needs to quantify their exposure to a defendant's product in order to establish that the product caused the injuries.

C. Economic Loss Rule

Giddings & Lewis, Inc. v. Industrial Risk Insurers, 348 S.W.3d 729 (Ky. June 16, 2011)

In *Giddings*, the Kentucky Supreme Court aligned itself with the majority of jurisdictions and officially adopted the economic loss doctrine to bar product liability claims for purely economic losses. Prior to the court's ruling in *Giddings*, the Kentucky Supreme Court had never ruled on the applicability of the economic loss doctrine. In *Giddings*, Ingersoll Rand purchased a Diffuser Cell System from Giddings & Lewis to use in its Mayfield, Kentucky plant. The Diffuser Cell System consisted of a vertical turning lathe, two vertical machining systems, and a material handling system. Under the terms of the contract, Giddings & Lewis provided Ingersoll Rand an express warranty on the Diffuser Cell System.

Approximately seven years after purchasing the Diffuser Cell System, and after the express warranty had expired, the clamp, pallet, and a large chuck of spinning metal flew off the vertical turning lathe and caused over $2.7M in damages to the machinery. Industrial Risk Insurers brought a subrogation claim against Giddings & Lewis alleging breach of implied warranty, breach of contract, negligence, strict liability, negligent misrepresentation, and fraud by omission. The Kentucky Supreme Court held that the economic loss doctrine barred the strict liability, negligence, and negligent misrepresentation claims. Because damages for repair or replacement of the product itself, lost profits, and similar economic losses are all available under contract theories, they are not recoverable under tort theories.

Further, the Kentucky Supreme Court refused to adopt the "calamitous event" exception to the economic loss doctrine. Under the "calamitous event" exception, product liability claims would survive if the product defect or malfunction *could have* produced serious injuries to people or property. The court rejected the "calamitous event" exception because it improperly focuses on what could have been rather than on what actually happened.

D. Discovery Rule

Willis v. Wal-Mart Stores, Inc., No. 1-09-0095, 2011 WL 4449647 (M.D. Tenn. Sept. 26, 2011)

In *Willis*, the Middle District of Tennessee held that the discovery rule does not apply to the identity of the manufacturer of the product absent fraudulent concealment or misrepresentation. Rather, the discov-

ery rule only applies to when the plaintiff discovers his *injury*. In *Willis*, the plaintiff was injured when a tree/deer stand broke causing him to fall. The plaintiff originally sued Wal-Mart and named the manufacturer of the stand as John Doe, Inc. Prior to filing suit, the plaintiffs issued discovery to Wal-Mart seeking the identity of the manufacturer but did not receive a response. The plaintiffs eventually filed an amended complaint naming Hunter's View, Ltd. as the manufacturer and/or supplier of the stand. Then through an internet search, the plaintiffs identified Ameristep Corporation as the actual manufacturer. Consequently, the plaintiffs filed a second amended complaint adding Ameristep and B & B Outdoors, Inc. as defendants. The plaintiffs later admitted that Hunter's View did not manufacture the stand.

Ameristep and B & B sought summary judgment under Tennessee's one year statute of limitations arguing that plaintiffs could have, through reasonable diligence, discovered the correct identity of the manufacturer within the one year statute of limitations. The plaintiffs argued that the discovery rule should apply not just to the injury but also to the identity of the manufacturer. The court noted a split in authority on whether the discovery rule applies to a plaintiff's knowledge of the identity of the defendants. In *Haynes v. Locks*, 771 F. Supp. 901, 903 (E.D. Tenn. 1989), the court held that the statute of limitations is not tolled while the plaintiff attempts to determine the proper identity of the defendant. On the other hand, the Tennessee Supreme Court, in *Foster v. Harris*, 633 S.W.2d 304 (Tenn. 1982), held that the statute of limitations did not begin to run until the plaintiff discovered both the cause of the injury and the identity of the proper defendant.

The court ultimately found the *Haynes* line of cases more persuasive and held that "[a]bsent fraudulent concealment or misrepresentation" the statute of limitations begins to run when the plaintiff discovers their injury, not the proper identity of the manufacturer. Regardless, even if the court applied the *Foster* line of cases, the court found that the plaintiff had a duty to investigate and discover pertinent facts by exercising reasonable care and due diligence. The court found that there was nothing preventing the plaintiff from conducting the internet search and discovering that Ameristep was the proper defendant.

E. Brand Liability Theory

Smith v. Wyeth, 657 F.3d 420 (6th Cir. 2011)

The Sixth Circuit Court of Appeals rejected brand-liability theory in *Smith v. Wyeth*. In *Smith*, the plaintiffs were originally prescribed Reglan, manufactured by Wyeth, Inc. and Schwarz Pharma, Inc., to treat gastroesophageal reflux. Under Kentucky law, a pharmacy is required to fill prescriptions with a lower-priced, therapeutically equivalent drug unless explicitly instructed otherwise. KY Rev. Stat. §217.822(1). Therefore, when the plaintiffs went to fill their Reglan prescription, the pharmacies used generic metoclopramide, the active ingredient in Reglan, manufactured and distributed by Pliva, Barr Pharmaceuticals, Actavis, Teva Pharmaceuticals, UDL Laboratories, and Morton Grove Pharmaceuticals. The plaintiffs eventually developed tradive dyskinesia, a severe neurological disorder that resembles Parkinson's disease, as a result of their long-term ingestion of metoclopramide.

The plaintiffs filed suit against both the generic brand manufacturers and the name-brand manufacturers of Reglan. The name-brand manufacturers moved for summary judgment arguing that the plaintiffs never ingested Reglan. The plaintiffs argued that due to the regulatory structure in Kentucky, it was foreseeable to the name-brand defendants that patients and their physicians will rely on the name-brand labels to use and prescribe generic drugs. The Sixth Circuit ultimately held that "[a] threshold requirement of any products-liability claim is that the plaintiff assert that the defendant's product caused the plaintiff's injury." *Id*. at 423. The only way that the name-brand defendants' product could have caused the plaintiffs' injuries is if they had actually ingested the name-brand defendants' product.

In reaching its decision, the Sixth Circuit joined the majority of other jurisdictions who have considered the brand-liability theory. *See Foster v. American home Products Corp.*, 29 F.3d 165 (4th Cir. 1994); *Colacicco v. Apotex, Inc.*, 432 F. Supp.2d 514, 540-41 (E.D. Pa. 2006), *rev'd on other grounds*, 521 F.3d 253 (3d Cir. 2008). The only court to date that has adopted brand-liability theory is California. *See Conte v. Wyeth, Inc.*, 168 Cal. App. 4th 89, 85 Cal. Rtpr.3d 299, 313 (2008).

F. Summary of Tennessee Civil Justice Act of 2011

On October 1, 2011, the Tennessee Civil Justice Act of 2011 (the "Tort Reform Act") went into effect. The Tort Reform Act was one of Governor Bill Haslam's legislative priorities when he took office in 2011. Two key provisions contained in the Tort Reform Act pertain to caps on non-economic damages and punitive damages.

In almost all civil cases, non-economic damages are capped at $750,000 per injured plaintiff. Non-economic damages are broadly defined as damages for "physical and emotional pain; suffering; inconvenience; physical impairment; disfigurement; mental anguish; emotional distress; loss of society, companionship, and consortium; injury to reputation; humiliation; non-economic effects of disability, including loss of enjoyment of normal activities, benefits and pleasures of life, and loss of mental or physical health, well-being or bodily functions; and any other non-pecuniary loss of any kind or nature." If a plaintiff has a catastrophic injury, the non-economic damages are capped at $1,000,000. Catastrophic injuries are limited to spinal cord injuries resulting in paraplegia or quadriplegia; amputation of two hands, two feet, or one of each; 3rd degree burns over 40 percent or more of the body as a whole or 3rd degree burns on 40 percent or more of the face; or the wrongful death of a parent leaving a surviving minor child or children for whom the deceased parent has custody.

Under the Tort Reform Act, punitive damages are capped at $500,000 or two times the amount of compensatory damages, whichever is greater. The cap on punitive damages does not apply in several situations, including if the defendant was under the influence of drugs or alcohol at the time the tort was committed.

This is Tennessee's first attempt at enacting statutory caps on non-economic and punitive damages. It is inevitable that the constitutionality of the Civil Justice Act will be challenged by plaintiff lawyers across the state.

VII. Seventh Circuit

A. Forum Non Conveniens

Otieno v. Rolls-Royce Corp., No. 49A04-1011-CT-679 (Ind. Ct. App. Aug. 24, 2011)

In *Otieno*, Defendants Rolls Royce Corporation, Honeywell International, Inc., and Bell Helicopter Textron, Inc. successfully obtained dismissal of the plaintiffs' complaint on the basis of forum non conveniens. The plaintiffs were the parents of a Kenyan citizen and a student in Cranbrook, British Columbia that was killed instantly when a helicopter stalled, fell to the ground, and instantly killed their son as he was mailing a letter to his parents back in Kenya.

The helicopter was manufactured in Texas by Bell. The helicopter engine was manufactured in Indiana by the Allison Division of General Motors, which was eventually bought by Rolls Royce. Engineers designed the engine components at Honeywell's facility in Indiana and manufactured them in North Carolina. The plaintiffs filed suit in Marion County, Indiana alleging strict liability and negligence.

The defendants moved to dismiss on forums non conveniens grounds arguing that British Columbia provided a more convenient forum because the accident and investigation occurred there, all physical evi-

dence and witnesses were located there, and a similar lawsuit filed by the pilot's and passengers' estates was pending there. The defendants also stipulated that they would submit to the personal jurisdiction of the British Columbia courts and waive any statute of limitations defenses.

The plaintiffs originally brought suit in Indiana and opposed moving the case to British Columbia because (1) British Columbia did not have a strict liability cause of action and (2) under the British Columbia Family Compensation Act, only nominal damages would be available to the plaintiffs for the death of their son.

The Indiana Court of Appeals affirmed the trial court's dismissal because the law of British Columbia applied and the private and public interest factors weighed in favor of British Columbia. The private factors included: (1) all of the witnesses who can testify about the maintenance of the helicopter, the training of the pilot, and the investigation of the accident are in British Columbia; (2) all witnesses to the accident and damages are in British Columbia; (3) the trial can be aided by easy access to the crash site and wreckage; and (4) it would be fairer to all parties and less costly if the plaintiffs' claims were brought together in one action with the claims of the pilot's and passengers' estates. The public factors included: (1) it would be unfair to burden Indiana citizens with jury duty when Indiana has little to no connection to the accident; (2) British Columbia has a substantial interest in the outcome of the litigation; (3) the remedy provided by the British Columbia Family Compensation Act is not so clearly inadequate or unsatisfactory that there is no remedy at all.

B. Consumer Expectations Test

Show v. Ford Motor Co., 659 F.3d 584 (7th Cir. 2011), *reh'g denied*.

In *Show*, the Seventh Circuit held that expert evidence is required to support a design defect claim in Illinois, even when that claim is based on the consumer-expectations test.

David Show, the driver of a Ford Explorer, and his passenger Maria Federici were injured in a rollover accident. They sued Ford in state court in Illinois and claimed the Explorer was defective because its design made it unstable. The precise defect allegation is unclear from the opinion. After the case was removed, the district court granted Ford's motion for summary judgment, finding that plaintiffs could not proceed without expert testimony. *Id.* at 584-85.

In design defect cases in Illinois, plaintiffs may establish their claim using either the consumer-expectations test or the risk-utility (or risk-benefit) test. *Id.* at 585. Here, plaintiffs conceded that expert testimony is necessary to support liability under a risk-utility test, but claimed that expert testimony is not necessary to support the consumer-expectations test. Plaintiffs argued that because jurors are consumers, they have the requisite experience to find liability under a consumer-expectations test. *Id.* The Seventh Circuit disagreed.

The court spent some time wrestling with the side issue of whether the consumer-expectation test is a substantive element of a state law defect claim or whether it is a method of proof that should be governed by federal law. *Id.* at 585-86. While an interesting discussion, the court bypassed this issue and reached its holding through other channels.

Citing the Illinois Supreme Court's decision in *Mikolajczyk v. Ford Motor Co.*, 901 N.E.2d 329 (Ill. 2008), the Seventh Circuit concluded that the risk-utility and consumer-expectations tests are both simply a means to determine whether a product is unreasonably dangerous: "there is no sharp line between the risk-utility and consumer-expectations approaches." *Show*, 659 F.3d at 587. These two tests are simply factors in the determination of a product's defectiveness. Importantly, causation is still an element of a plaintiff's case under the consumer-expectations approach.

Causation in a vehicle rollover claim involves questions about physics, geometry, and algebra—subjects outside the province of jurors. *Id.* Indeed, "most people can't explain what makes a bicycle or a toilet

work." *Id.* Plaintiffs' lack of expert testimony meant essential questions would go unanswered: Did design decisions contribute to the rollover? Is it possible to reduce the rollover rate? Would a different design have averted this accident?

The Seventh Circuit determined that the question of what ordinary consumers expect is only one of many questions a plaintiff must answer and affirmed Ford's summary judgment. This case will help product manufacturers facing design defect suits in Illinois or under Illinois' product liability laws by forcing plaintiffs to retain experts, regardless of their theory of liability.

C. Class Action

In re: Aqua Dots Products Liability Litigation, 654 F.3d 748 (7th Cir. 2011), *reh'g and reh'g en banc denied*.

The Seventh Circuit upheld the denial of class certification for certain purchasers of Aqua Dots, a recalled toy, because the costs of identifying the class members and giving notice would exceed the price of the toys, leaving nothing to be distributed to the class. This result would not have protected the interests of the proposed class.

Aqua Dots are craft kits containing colorful beads that fuse into designs and shapes when sprayed with water. Spin Master distributed over four million units in early 2007. Late in 2007, Spin Master recalled all Aqua Dots products when it learned children were becoming ill after ingesting these beads. Spin Master discovered that its supplier substituted the specified adhesive for a different adhesive. This substitute adhesive metabolized into gamma-hydroxybutyric acid (GHB, commonly referred to as the date-rape drug). Children who ingested Aqua Dots became sick—two children went into comatose states and were hospitalized—prompting the recall.

The recall notice advised consumers to contact Spin Master to exchange their Aqua Dots for replacement kits or toys of similar price or to return the toy to retailers. The recall notice made no mention of refunds, but requests for refunds were honored by Spin Master and by retailers. Of the more than one million Aqua Dots sold, consumers returned over 600,000 in the recall campaign.

The plaintiffs in this case were purchasers of Aqua Dots whose children did not use the kits and were not harmed and who did not ask for a refund. They challenged the adequacy of the recall under breach of warranty theories and violation of consumer-protection statutes, and sought damages for the price of the toy and punitive damages under state law. In its opinion, the Seventh Circuit considered the district court's denial of plaintiffs' motion to certify a class.

First, the court confirmed that the plaintiffs had standing to sue. While they were not physically injured by the toy, they suffered financial loss because they overpaid for toys that posed a risk to children. This financial loss was enough to satisfy standing requirements. *Id.* at 750-51.

Next, the court analyzed the issue of certifying the class. The district court had focused on the text of Rule 23(b)(3), and asked the question: "whether a defendant administered refund program may be found superior to a class action." *Id.* at 751. The district court concluded that the lower transaction costs of the recall made it superior to the legal process. The Seventh Circuit called into question the means to this end.

The court noted that Rule 23 cannot be disregarded simply because a district court "has a better idea." *Id.* Rule 23(b)(3) requires a fair and efficient "adjudication" of the controversy, not simply a "policy approach" as the district court had undertaken. Rather, the district court should have looked to Rule 23(b)(4) to resolve this issue.

Rule 23(b)(4) permits a court to certify a class action only if the representative parties will protect the interests of the class. The court noted that more than 500,000 of the 600,000 consumers who returned Aqua

Dots received refunds, and the plaintiffs in this suit could still have these refunds today. Thus, the relief sought by these plaintiffs duplicates what most buyers have already received and what remains available to those who have not. The court concluded that these plaintiffs would be imposing "high transaction costs (notice and attorneys' fees)" at the class members' expense. In return, the plaintiffs would receive the same offer already on the table via the recall. This scenario would not protect the class members' interests.

The court reached the same result when considering the punitive damages claims of the plaintiffs. Because their state law punitive damages claims arise in various states with varying punitive damages laws, their claims would be difficult to manage. The class would also be difficult to manage because individual notice would be impossible—the identity of the purchasers is unknown. In the end, the court noted that the per-buyer costs of administering the class would likely exceed the purchase price of the toy, leaving nothing for the class members.

Even though the court dismissed the reasoning behind the district court's conclusion that the recall made more policy sense than a class action, the result was the same. Practitioners who counsel consumer product manufacturers should keep this case in mind when considering recalls.

D. Professionalism

Gonzalez-Servin v. Ford Motor Co., 662 F.3d 931 (7th Cir. 2011).

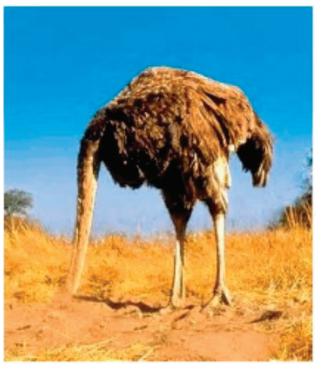
This recent consolidated appeal serves as a warning to anyone practicing in the Seventh Circuit. While it arises out of product liability claims, the holding is less important than the message delivered along the way: DO NOT IGNORE GOVERNING PRECEDENT. The cases were appeals of a district court's grant of *forum non conveniens*. In the end, the Seventh Circuit affirmed both decisions.

In the first action, *Gonzalez-Servin*, the district court effectively ordered the transfer of a case from the Southern District of Indiana to Mexico. This case involved alleged defects in Bridgestone/Firestone tires installed on Ford vehicles in Latin America. The plaintiffs (now appellants) did not cite a similar case in their appellate briefing: *Abad v. Bayer Corp.*, 563 F.3d 663 (7th Cir. 2009). In *Abad*, the Seventh Circuit affirmed the transfer of a case from the Southern District of Indiana to Argentina. Even after defendants cited *Abad* multiple times in their response brief—and noted it was "nearly identical"—the plaintiffs still did not mention it in their reply. *Gonzalez-Servin*, 662 F.3d at 933. This did not sit well with the Seventh Circuit.

The consolidated action, *Kerman*, mimicked these facts. There, the district court ordered the transfer of a case from the Southern District of Indiana to Israel. That case involved a suit against blood product manufacturers by Israeli citizens infected with HIV in Israel. The Seventh Circuit noted that the *Kerman* suit was an "offshoot" of the *Abad* litigation and was also controlled by *Chang v. Baxter Healthcare Corp.*, 599 F.3d 728 (7th Cir. 2010), which also arose from *Abad* and, more importantly, "presented an identical issue as this case." *Gonzalez-Servin*, 662 F.3d at 933-34. These appellants referenced *Abad* and *Chang* in their reply brief (those cases had not been issued when they filed their original brief), but, again, not enough to satisfy the Seventh Circuit.

This prompted the court to offer this reminder of the three options attorneys face when encountering relevant precedent: ask for it to be overruled, distinguish it, or reserve a challenge for a later petition for certiorari. *Id.* at 934. Ignoring precedent is not an option. The court punctuated this last point with memorable words and pictures, ones that appellate advocates before the Seventh Circuit should heed:

> The ostrich is a noble animal, but not a proper model for an appellate advocate. The "ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist is as unprofessional as it is pointless . . .



Id. (citations omitted; images in original).

E. Contribution

Owens v. American Cyanamid Co., 787 F. Supp. 2d 828 (E.D. Wis. 2011).

The court in Owens concluded that Wisconsin's risk contribution doctrine does not create retroactive liability and does not violate manufacturers' right to due process. This is the latest in a series of district court cases addressing the doctrine, all of which have been stayed while one appeal is considered by the Seventh Circuit. *See Gibson v. American Cyanamid Co.*, 719 F. Supp. 2d 1031 (E.D. Wis. 2010) (on appeal to Seventh Circuit, Case No. 10-3814); *Stokes v. American Cyanamid Co.*, 787 F. Supp. 2d 836 (E.D. Wis. 2011) (stayed pending appeal in *Gibson*); *Burton v. American Cyanamid Co.*, 775 F.Supp.2d 1093 (E.D. Wis. 2011) (stayed pending appeal in *Gibson*).

The minor plaintiff ingested paint containing white lead carbonate pigment and brought a negligence and strict product liability suit for his injuries. From 1990 to 1993, plaintiff spent time in an apartment containing paint with this toxic pigment. When the paint deteriorated and plaintiff ingested the flakes and dust, the toxins caused cognitive development problems. Many companies manufactured this pigment, which was once used in most residential paints. Plaintiff could not identify the particular manufacturer of the paint in this apartment. But, because Wisconsin law applied, plaintiff sued multiple manufacturers and relied on Wisconsin's risk contribution doctrine to prove liability.

Under this doctrine, plaintiff's burden of proof is modified, in that pinpointing the actual manufacturer is not required to establish liability. Specifically, "plaintiff may establish a prima facie case by showing that the defendant manufactured or marketed pigment at a time such that it could reasonably have produced the pigment that harmed him." *Id.* at 831. If plaintiff satisfies the requirements of the risk contribution doctrine, it creates a rebuttable presumption that the defendant produced the product in question.

The pigment manufacturers moved for summary judgment, claiming the doctrine's presumption of liability would create retroactive liability and would violate their right to due process. Regarding presump-

tions, the district court noted that due process challenges are ineffective unless the presumption is arbitrary or irrational or it denies a fair opportunity for rebuttal. Id. Ultimately, the court concluded this presumption did not create either of these problems.

First, the presumption was not arbitrary or irrational. Relying on the Wisconsin Supreme Court's reasoning in *Thomas v. Mallett*, 701 N.W.2d 523 (Wis. 2005), which applied the risk contribution doctrine specifically to the lead paint context, the district court concluded that the imbalance of information between plaintiffs and manufacturers in such cases justified the presumption. *Owens*, 787 F. Supp. 2d at 832.

Second, the district court noted that the presumption is rebuttable, giving the paint manufacturers the opportunity to show that plaintiff could have been harmed by lead from other sources or that it did not manufacture this paint at this time or in this market. *Id.* The court also noted that smaller manufacturers could present evidence that they are less culpable because they had smaller market shares.

As to the defendants' contention that the doctrine established retroactive liability, the court quickly dismissed this argument by noting that the doctrine does not establish liability at all—it simply modifies plaintiff's burden of proof. *Id.* at 833. The district court also found that the doctrine did not violate the Takings Clause because private property is not at issue and defendants offered no support for the concept of a "judicial taking." *Id.* at 834.

For all of these reasons, the district court denied the manufacturers' motion for summary judgment. However, at the parties' request, the court stayed all proceedings pending an appeal in *Gibson,* 719 F. Supp. 2d 1031. That appeal will be worth monitoring.

F. Comparative Fault

Green v. Ford Motor Co., 942 N.E.2d 791 (Ind. 2011), *reh'g denied*.

Green holds that Indiana's Product Liability Act is subject to Indiana's statutory comparative fault principles, requiring the jury to consider the plaintiff's fault in causing or contributing to the harm the plaintiff suffered. This case is a major weapon for defendants in product liability litigation in Indiana, especially in cases where plaintiffs have contributed to cause the underlying accident or incident that led to their injury.

In *Green* a motorist was driving a 1999 Ford Explorer when his vehicle left the road, hit a guardrail and rolled down an embankment. *Id.* at 793. The motorist sued Ford Motor Co. for damages under Indiana's Product Liability Act, alleging that the vehicle was defective and unreasonably dangerous, and that Ford was negligent in its design of the vehicle's restraint system. *Id.* The motorist tried to exclude evidence regarding his initial negligence, resulting in the vehicle leaving the road and hitting the guardrail. *Id.* The federal district court determined that "the question was not clearly answered by either legislation or case decision and that other jurisdictions have reached differing results." *Id.* On certification of the question to the Indiana Supreme Court, the Court revised and restated the question as,

> Whether, in a crashworthiness case alleging enhanced injuries under the [IPLA], the finder of fact shall apportion fault to the person suffering physical harm when the alleged fault *is a proximate* cause of the *harm for which damages are being sought*.

Id. at 796 (edits in original). The Supreme Court answered this affirmatively and concluded plaintiffs' negligence can be considered by the jury, but only if the jury also makes the determination that the negligence is a proximate cause of the claimed injuries. *Id.* at 795-96.

G. Post Sale Duty to Warn

Jablonski v. Ford Motor Co., 995 N.E.2d 1138 (Ill. 2011).

Jablonski confirms that Illinois does not recognize the post sale duty to warn articulated in the Restatement (Third) of Torts: Product Liability (1998). In *Jablonski* a woman with severe burn wounds and the administrator of her husband's estate brought suit after the married couple's Lincoln Town Car burst into flames. *See Jablonski*, 995 N.E.2d at 1142. Another car collided with the rear of the Town Car while it was at a complete stop, causing a large pipe wrench in the couple's trunk to puncture the back of the vehicle's fuel tank; this caused the Town Car to burst into flames. *Id.* at 1142. The husband died as a result of the accident and the woman was badly burned and disfigured.

Plaintiffs alleged "negligent design… and willful and wanton conduct, seeking punitive damages." *Id.* At trial the jury returned a verdict for Plaintiffs and awarded $28 million in compensatory damages and $15 million in punitive damages. *Id.* The defendants appealed and the Illinois Supreme Court reversed the jury's award, concluding Ford did not breach its duty of reasonable care, in part, because the accident was not foreseeable. *See id.* at 1159. The court explained "[Ford] complied with the industry standard for fuel system integrity, it exceeded that standard by its own heightened crash-testing standards, other manufacturers in the industry continued to produce vehicles with aft-of-axle fuel tanks, and despite the clear gravity of the injury, the risk was extremely remote." *Id*. The court also noted "there was no evidence of a feasible shield that would have prevented the injury in this case." *Id.*

The court also rejected Plaintiffs' theory that Ford owed a post-sale duty to warn consumers following Ford's upgrades and safety improvements to the Crown Victoria Police Interceptor, a vehicle with a similar fuel tank configuration. *See id.* at 1144, 1161-62. The court explained Illinois does not recognize the post sale duty to warn formulated in the Restatement (Third) of Torts. *Id.* at 1161. However, the court noted that it would not "foreclose the possibility that a post-sale duty to warn could be recognized in the future in Illinois." *Id.* at 1162. Still, it "decline[d] the invitation to expand the duty in this case under the particular facts and circumstances presented here." *Id.*

* * *

Alsteen v. Wauleco, Inc., 802 N.W.2d 212 (Wis. Ct. App. 2011) (petition for review pending).

Alsteen solidifies the fact that Wisconsin does not recognize a separate claim for future monitoring expenses. In *Alsteen* approximately 140 plaintiffs alleged damages after their exposure to hazardous chemicals released by a neighborhood window manufacturing factory. *Alsteen*, 802 N.W.2d at 214-15. For roughly 40 years operations at the factory released "Penta" into the surrounding area; Penta contains a mixture of hazardous chemicals and possible carcinogens. *Id.* at 214. The plaintiffs' claims comprised three groups: the first group claimed various health problems such as Hodgkin's lymphoma and thyroid cancer; the second group claimed property damages; and the third group claimed damages for "future expenses related to medical monitoring." *Id.*

On appeal, the court reviewed a woman's claim from the third group, in which she sought the recovery of medical monitoring expenses despite having no present health problems. The woman alleged she was "at an increased risk of developing cancer in the future" and cited various Wisconsin cases to support her claim. *See id.* at 215-19.

The court reviewed Wisconsin law and determined that "Wisconsin law requires actual injury before a plaintiff may recover in tort." *Id.* at 215. The court supported its holding with reference to various Wisconsin cases, holdings from other jurisdictions, and the U.S. Supreme Court's holding in *Metro–North Commuter Railroad Co. v. Buckley,* 521 U.S. 424 (1997), where the Court held "an asymptomatic railroad worker who had been exposed to asbestos could not recover medical monitoring expenses under the Federal Employees' Liability Act." *Alsteen*, 802 N.W.2d at 215; *see also id.* at 215-20 (discussing other Wisconsin cases), 221-23 (discussing holdings in other jurisdictions), 215 and 220-21 (discussing *Buckley*).

H. Statutory Changes in Wisconsin

Wisconsin modified its product liability and related statutes in January 2011. *See* 2011 Wis. Acts 2 (available at https://docs.legis.wisconsin.gov/2011/related/acts/2); *see, e.g.,* Wis. Stat. Ann. §§895.046, 895.047. This tort reform has resulted in several changes that benefit manufacturers of products. These changes affect all actions commenced after February 1, 2011, notwithstanding the date of injury. *See* 2011 Wis. Acts 2.

For example, the revisions create a 15-year statute of repose for manufacturers who do not make "a specific representation that the product will last for a period beyond 15 years." Wis. Stat. Ann. §895.047(5). The new law also increases the protection for companies who are merely sellers or distributors "if the seller or distributor receive[d] the product in a sealed container and ha[d] no reasonable opportunity to test or inspect the product." Wis. Stat. Ann. §895.047(3)(e). And the law makes it more difficult to prove a product defect in cases where the plaintiff cannot identify the manufacturer, affecting Wisconsin's risk contribution doctrine. *See* Wis. Stat. Ann. §895.046(4).

These changes also remodel Wisconsin's evidence rules relating to expert testimony. Wisconsin will now consider the guidelines announced in *Daubert* when considering the admissibility of expert testimony. Wis. Stat. Ann. §907.02.

Further, the reform places a cap on punitive damages in all but a few cases: "Punitive damages received by the plaintiff may not exceed twice the amount of any compensatory damages recovered by the plaintiff or $200,000, whichever is greater." Wis. Stat. Ann. §895.043(6).

Not surprisingly, many pieces of proposed legislation have been introduced that, if enacted, would repeal or revise these new laws. *See, e.g.,* 2011 Wis. Assembly Bill 459 (proposed legislation that would repeal punitive damages cap) (available at https://docs.legis.wisconsin.gov/2011/related/proposals/ab459.pdf).

VIII. Eighth Circuit

A. Fraudulent Joinder

Block v. Toyota Motor Corporation, ___ F.3d ___, 2011 WL 6306689 (8th Cir. Dec. 19, 2011)

Plaintiff was the mother of children who were killed or seriously injured in a collision with a Toyota Camry that allegedly experienced sudden acceleration. Plaintiff filed her product liability suit in Minnesota state court against Toyota, the manufacturer, its affiliates, and the automobile dealership that had originally sold the car ten years earlier. Defendants removed the case to federal court, and Plaintiff moved to remand, arguing that removal was improper because the dealership was a citizen of Minnesota. The district court concluded that because Plaintiff had no reasonable basis for recovery against the dealership, the dealership had been fraudulently joined. The court denied the motion to remand and dismissed with prejudice all claims against the dealership. Plaintiff appealed.

In denying the motion to remand and dismissing the claims against the dealership, the district court concluded that Minnesota's "seller's exception statute" applied to Plaintiff's strict liability claims. The statute mandates dismissal of strict liability claims against non-manufacturers where the non-manufacturer provides the identity of the manufacturer, unless the plaintiff shows that the non-manufacturer falls into one of three exceptions: (1) that the defendant has exercised some significant control over the design or manufacture of the product; (2) that the defendant had actual knowledge of the defect in the product which caused the injury; or (3) that the defendant created the defect in the product which caused the injury. If no exception applies, dismissal is mandatory, but the plaintiff may move to vacate the order of dismissal and reinstate the defendant

if it can show an inability to recover against the manufacturer. In this case, the district court found that none of the three exceptions applied, and that "[w]hile a remote chance exists that a catastrophic global economic event will bankrupt all the Toyota [d]efendants, that extremely unlikely possibility does not rise above the level of the hypothetical" and thus Plaintiff was unlikely to need to reinstate the dealership as a defendant.

The Eighth Circuit Court of Appeals upheld the district court's decision. The court agreed with the district court's analysis, and rejected Plaintiff's argument that three complaints regarding 1996 Toyota Camrys would have put the dealership on notice of the alleged defect. The court also noted that Minnesota law does not impose a general post-sale duty to warn. The court concluded that it was proper for the district court to dismiss the dealership before discovery, because the "fraudulent joinder doctrine anticipates resolution of jurisdictional issues at an early stage after removal so that the case can be properly remanded to state court if there is no jurisdiction." With no reasonable basis for Plaintiff's claims against the dealership, the district court's dismissal of those claims was proper.

B. Apparent Manufacturer Doctrine

Bornsen v. Pragotrade, LLC, 804 N.W.2d 55, 2011 ND 183 (N.D. 2011)

Plaintiffs brought a product liability action against the manufacturer and seller of a meat grinder for injuries sustained from the use of the product, asserting claims of negligence, strict liability, and breach of warranty. After removal to federal court, the U.S. District Court for the District of North Dakota certified the question to the North Dakota Supreme Court of whether North Dakota had adopted the "apparent manufacturer" doctrine.

The North Dakota Supreme Court accepted the request to answer the certified question, and answered in the negative, holding that North Dakota did not adopt the "apparent manufacturer" doctrine under the Restatement (Third) of Torts: Products Liability §14. The doctrine provides that "[o]ne engaged in the business of selling or otherwise distributing products who sells or distributes as its own a product manufactured by another is subject to the same liability as though the seller or distributor were the product's manufacturer." In analyzing the question, the Supreme Court considered the North Dakota Product Liability Act, N.D.C.C. ch. 28-01.3, and concluded that the Act " indicates to us the clear message that [the legislature] intended to restrict, rather than expand, the availability of product liability actions." The Court held that one method by which the legislature restricted such actions was to define who is a "manufacturer" and who is a "seller," and then "sharply curtail liability of a 'nonmanufacturing seller.'" Accordingly, the Supreme Court found that to expand the definition of manufacturer by adopting the "apparent manufacturer" doctrine would be to violate the legislature's intent to treat nonmanufacturing sellers "more leniently" than did the common law rule. Accordingly, the Supreme Court held that North Dakota has not adopted the "apparent manufacturer" doctrine.

C. Economic Loss Doctrine

Dobrovolny v. Ford Motor Co., 793 N.W.2d 445, 281 Neb. 86 (Neb. 2011)

Plaintiff filed suit against the manufacturer of his 2005 Ford F-350 pickup truck for negligence, breach of the warranty of merchantability, and strict liability, after the truck caught fire in his driveway while the engine was shut off. There were no injuries, and no property other than the truck itself was damaged. Plaintiff sought to recover only the cost of the truck. Ford filed a motion to dismiss, which the district court granted.

The district court found that the economic loss doctrine as set out in *National Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 332 N.W.2d 39 (1983), prohibited Plaintiff from recovering on either his neg-

ligence or his strict liability claim, because Plaintiff did not allege any damage other than to the truck itself. Under the economic loss doctrine, Plaintiff would be confined to a breach a contract claim. But the district court also found that any breach of contract suit would have had to be filed within four years of the date of purchase; Plaintiff's suit was filed more than four years after purchase. Thus, the district court found that any such breach of contract claim by Plaintiff would be time-barred.

Plaintiff appealed, and the Court of Appeals reversed the decision of the district court. The appellate court distinguished Plaintiff's case from *National Crane Corp.*, and citing *Arabian Agri. Servs. Co. v. Chief Indus., Inc.*, 309 F.3d 479 (8th Cir. 2002), found that the failure and the "sudden, violent event" could be one and the same. The appeals court found that Plaintiff had presented enough evidence of a "sudden, violent event" to overcome the motion to dismiss. Ford appealed to the Nebraska Supreme Court.

The Supreme Court reversed the decision of the Court of Appeals. In doing so, the Supreme Court reviewed its own precedent, including *National Crane Corp.*, as well as decisions by the U.S. Supreme Court and in other jurisdictions. The court found that there was no need to impose tort liability when the law of contracts could address the dispute between the purchaser and the seller, and explicitly adopted "the rule that disallows recovery in tort when the damages are to the product alone."

D. Statute of Limitations

Gazal v. Boehringer Ingelheim Pharmaceuticals, Inc., 647 F.3d 833 (8th Cir. 2011) (applying Texas law)

Plaintiff filed suit in Texas state court against pharmaceutical companies, asserting products liability, negligence, breach of warranty and fraud claims, all arising from Plaintiff's gambling disorder allegedly caused by the drug Mirapex, which had been prescribed to treat his Parkinson's disease. The case was removed and transferred as part of multidistrict litigation to the U.S. District Court for the District of Minnesota, which granted the pharmaceutical companies summary judgment on the basis of the statute of limitations. Plaintiff appealed; following Plaintiff's death, his widow was appointed to prosecute the appeal.

Plaintiff was initially diagnosed with Parkinson's disease in 2002, and prescribed the drug Mirapex as part of his treatment. Shortly after beginning treatment, Plaintiff began to gamble much more than he had previously, and his losses increased ten-fold. Plaintiff first mentioned his increased gambling in February 2005 and first reported it to his doctor in April 2005. In July 2005, the Mayo Clinic published a study suggesting a link between compulsive gambling and Mirapex. In late 2005, Plaintiff was hospitalized and stopped taking Mirapex, but restarted the drug after being released. Plaintiff admitted he became aware at some point in late 2005 that Mirapex was linked to compulsive gambling. In 2006, Plaintiff wrote to two casinos requesting they refuse his business, and asked the same of several acquaintances with whom he played cards. He continued to gamble, however, and in 2007, he reported to his doctors that he had lost millions of dollars and was experiencing family problems. His doctors renewed his prescription, and he continued to gamble. In June 2008, the first large-scale study of Mirapex and impulse control disorders was published; the study linked Mirapex and gambling disorders. A few months after the study was published, Plaintiff tried to wean himself off Mirapex, but restarted it again. Finally in May 2009, Plaintiff successfully stopped using Mirapex, and a month later, filed suit against the pharmaceutical companies.

The pharmaceutical companies moved for summary judgment, contending that Plaintiff's claims had accrued more than two years before he filed suit and were therefore time-barred. The district court found that Plaintiff became aware of his gambling problem no later than 2003 and of the link between Mirapex and gambling no later than 2005. Applying Texas law, the district court found that Plaintiff's claims were time-barred, and granted summary judgment in favor of Defendants.

The Eighth Circuit Court of Appeals upheld the district court's decision. The Eighth Circuit considered several possible bases for tolling the Texas statute of limitations, including the continuing tort doctrine, the open courts provision, and the ripeness doctrine. The court found because Plaintiff became aware of the effect of Mirapex more than two years before he filed suit, the continuing tort doctrine did not save his claims. Likewise, the open courts provision—which provides that "[a]ll courts shall be open" and that every person "shall have a remedy by due course of law"—did not save Plaintiff's claims, because it is "designed to protect a plaintiff who has yet to discover or become aware of his putative injury." Even though Plaintiff may have had difficulty proving his claims (without conclusive studies showing the link between Mirapex and gambling), Plaintiff still had knowledge of the claims. Similarly, the ripeness doctrine could not save Plaintiff's claim, as he was aware of the injury more than two years before filing suit. Ultimately, whatever issues Plaintiff had in proving his claims were separate from Plaintiff's knowledge of those claims, and thus the claims were time-barred.

E. Failure to Warn

Kowalski v. Rose Drugs of Dardanelle, Inc., ___ S.W.3d ___, 2011 Ark. 44, 2011 WL 478601 (Ark. Feb. 9, 2011)

Plaintiff, individually and as administratrix of the estate of Kevin Curry, filed suit alleging wrongful death against Dr. Mann, the physician who prescribed a number of medications to Curry, and the pharmacy, Rose Drugs, that filled the prescriptions. Curry died from "mixed drug intoxication" combined with alcohol; several days before Curry's death, Dr. Mann prescribed Curry several medications, including Norflex, Zoloft, Valium, Oxycontin, Percocet, Lorazepam, Methadone, Propoxyphene, and Doxepin. Curry had the prescriptions filled at the pharmacy. Plaintiff asserted that Dr. Mann failed to properly treat Curry and was negligent in prescribing numerous medications, and that the pharmacy failed to properly monitor the prescriptions and was negligent in filling those numerous prescriptions.

The pharmacy filed a motion for summary judgment. In the motion, the pharmacy asserted that Plaintiff sought to impose on pharmacists a general duty to warn customers of the risks associated with prescription drugs they purchase—a duty not recognized under Arkansas law. The circuit court agreed, and found there was "no duty other than to fill the prescription as prescribed and properly label it," and, accordingly, granted summary judgment to the pharmacy. Plaintiff appealed to the Supreme Court of Arkansas.

The Supreme Court upheld the district court's decision, and found that pharmacists have no duty to warn customers of potentially dangerous drug interactions. In doing so, it considered both federal and state statutes governing pharmacists, and found that none imposed a general duty to warn. Further, the court found that the learned-intermediary doctrine places the duty to warn with the physician, not the pharmacist. The court observed that the "doctrine provides an exception to the general rule that a manufacturer has a duty to warn the ultimate user of the risks of its products." The court reaffirmed the learned-intermediary doctrine set out in its prior decision in *West v. Searle & Co.*, in which it stated: "This doctrine provides that a drug manufacturer may rely on the prescribing physician to warn the ultimate consumer of the risks of a prescription drug. The physician acts as the 'learned intermediary' between the manufacturer and the consumer." 305 Ark. 33, 42, 806 S.W.2d 608, 613 (1991). The Supreme Court stated that its decision follows "the more reasoned analysis … followed by the majority of jurisdictions that there is no general duty to warn, counsel, or refuse to fill prescriptions."

F. Statute of Limitations—Escape Clause

Vicknair v. Phelps Dodge Industries, Inc., 794 N.W.2d 746, 2011 ND 39 (N.D. 2011)

Plaintiffs filed an asbestos-related products liability suit in North Dakota district court against manufacturers, distributors, and sellers of asbestos products from various states, including North Dakota. Plaintiffs

were all residents of states other than North Dakota, and did not claim that their exposures occurred in North Dakota. Initially, the district court granted Defendants' motion to dismiss on forum non conveniens grounds; when plaintiffs appealed, the North Dakota Supreme Court reversed and remanded. *See* 767 N.W.2d 171.

On remand, Defendants moved for summary judgment, arguing that all the applicable statutes of limitations had run on all Plaintiffs' claims. Plaintiffs conceded that the applicable statutes of limitations, which ranged from one to four years, in all other potential jurisdictions had run on their claims. But they argued that the district court should apply the "escape clause" of the Uniform Conflict of Laws—Limitations Act, N.D.C.C. §28-01.2-04, and apply North Dakota's longer six-year statute of limitations. Alternatively, Plaintiffs argued for more time to conduct discovery before ruling on the motion for summary judgment. The district court granted summary judgment in favor of the Defendants, holding that the escape clause did not apply and that Plaintiffs' claims were barred by the statutes of limitations.

The North Dakota Supreme Court affirmed the district court decision, primarily focusing on the Uniform Conflict of Laws—Limitations Act, N.D.C.C. ch. 28-01.2. Under the Act, statutes of limitations are treated as substantive rather than procedural, and ordinarily courts are to apply the statute of limitations of the state whose laws govern the substantive issues in the case. An exception—the escape clause—applies "[i]f the court determines that the limitation period of another state… is substantially different from the limitation period of this state and has not afforded a fair opportunity to sue upon, or imposes an unfair burden in defending against, the claim." N.D.C.C. §28-01.2-04.

In this case, there was no question that the substantive law of North Dakota did not apply to any of Plaintiffs' claims. Thus, only the escape clause could save Plaintiffs' claims from being barred by the statute of limitations. At the district court level, Plaintiffs asserted that failure to apply the escape clause was unfair; they failed to present any evidence supporting this assertion. The Supreme Court held, however, that the burden of establishing that the escape clause's exception applied fell to Plaintiffs. Without evidence supporting their contention that applying another state's statute of limitations was unfair, Plaintiffs' argument failed. Additionally, the Supreme Court found that the district court's denial of additional time for discovery was not an abuse of discretion, as the case had been pending for nearly seven years and Plaintiffs had more than a full and fair opportunity to conduct discovery.

G. Experts—Class Certification

In re Zurn PEX Plumbing Products Liability Litigation, 644 F.3d 604 (8th Cir. 2011)

Homeowner Plaintiffs brought a putative class action in Minnesota state court against the manufacturer of cross-linked polyethylene (PEX) plumbing systems and the manufacturer's parent company, alleging that the defective brass fittings used in the manufacturer's systems were inherently defective. Defendants removed the case and related actions were also transferred to the District of Minnesota for coordinated or consolidated pretrial proceedings. The U.S. District Court for the District of Minnesota denied Defendants' motion to strike expert testimony and granted Plaintiffs' requests for class certification on warranty and negligence claims, but denied certification as to consumer protection claims. Defendants appealed.

The district court had bifurcated discovery, and ordered that the first phase of discovery address the limited question of class certification. At the end of the first phase, Plaintiffs moved for class certification, and Defendants opposed it, also seeking to strike expert testimony from two of Plaintiffs' experts who testified regarding PEX system failures, including projected failures. While Defendants sought a full *Daubert* analysis of Plaintiffs' experts, the district court instead applied a "focused *Daubert* inquiry to assess whether the opinions of [Plaintiffs' experts], based on their areas of expertise and the reliability of their analyses of the available evidence, should be considered in deciding the issues relating to class certification." The court found that

while the experts' testimony may not have been ultimately admissible, it was sufficient for class certification purposes. After conducting this inquiry, the district court denied Defendants' motion to strike, and certified the breach of warranty class and the negligence class, but denied certification as to the consumer protection claims.

The Eighth Circuit Court of Appeals upheld the district court decision. In its decision, the court considered Defendants' proposed new rule, "requiring a district court to determine conclusively at an early stage, not just whether or not expert evidence is sufficient to support class certification under Rule 23, but also whether that evidence will ultimately be admissible at trial." Essentially, Defendants urged the court to apply a full *Daubert* analysis at the early, class certification stage. The appellate court declined to require such, however, noting that Eighth Circuit precedent does not favor such an approach, and that the "main purpose of *Daubert* exclusion is to protect juries from being swayed by dubious scientific testimony"—a concern not present at the class certification stage where the judge is the decision maker. The court concluded that the district court did not commit legal error or abuse its discretion.

IX. Ninth Circuit

A. Defective Condition

Adams v. United States, 2011 WL 3934314 (9th Cir. Idaho)

The Ninth Circuit Court of Appeals upheld the ruling of the United States District Court for the District of Idaho granting in part and denying in part manufacturer/defendant E.I. Du Pont De Nemours and Company's motion for judgment as a matter of law and a new trial. Plaintiff Adams and several grower groups brought suit against the United States of America and E.I. Du Pont Nemours and Company ("Du Pont") alleging the application of Oust, a herbicide manufactured by Du Pont, to their land by the Bureau of Land Management ("BLM") damaged their land due to the long-lasting effects of the herbicide. Du Pont first argued that the District Court should have granted its Rule 50(b) motion (motion for a new trial) because a plaintiff cannot prevail on a product liability claim when the defect alleged is that the product does too well what it was designed and intended to do.

The Ninth Circuit dismissed Du Pont's contention, recognizing that a product liability claim may be supported by direct or circumstantial evidence of a malfunction of the product and the absence of evidence of abnormal use or secondary causes that would eliminate the liability of the defendant. The Court noted that a defective condition exists if the product is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer." *Adams,* 2011 WL 3934314, at *1 (quoting *Farmer v. Int'l Harvester Co.,* 97 Idaho 742, 553 P.2d 1306, 1311 (1976)). The evidence Plaintiffs presented supporting their claims that Oust was erodible by the wind and susceptible to being carried long distances, and that Oust did actually erode and persisted for several growing seasons in the growers' fields, damaging crops constituted circumstantial evidence that Oust was unreasonably dangerous.

The Ninth Circuit Court of Appeals further held that the United States District Court did not err in refusing to instruct the jury on the learned intermediary and sophisticated purchaser doctrines. The Ninth Circuit recognized that, under Idaho law, "in some circumstances a supplier positioned on the commercial chain remote from the ultimate consumer may fulfill its duty to warn by adequately warning a learned intermediary." *Id.* at *3 (quoting *Sliman v. Alum Co. of Am.*, 112 Idaho 277, 731 P.2d 1267, 1270-71 (1986)). The Court held, however, that the learned intermediary doctrine does not apply when the Plaintiff is not a voluntary purchaser of the product. *Id.*

B. Consumer Expectation Test

St. Clair v. Nellcor Puritan Bennett LLC, 2011 WL 5331674 (D. Ariz.)

The United States District Court for the District of Arizona ruled that under the consumer expectation test, the Arizona Supreme Court would likely find that as to medically-related products, the ordinary consumer is the physician who uses the device.

Lisa St. Clair and Richard Poulin brought suit against Nellcor Puritan Bennett, LLC ("Nellcor"), which manufactured an allegedly defective resuscitator bag, after the couple's daughter, who was born with a complex congenital heart disease, suffered severe and permanent neurological injuries after resuscitation with the allegedly defective bag failed. The District Court noted that a design defect claim can be proven by demonstrating that the product is in a defective condition and unreasonably dangerous and that the product fails to perform as safely as an ordinary consumer would expect when used in an intended manner (the consumer expectation test). *St. Clair*, 2011 WL 5331674 at *5.

Nellcor argued the consumer expectation test did not apply because the "consumer" would not know what to expect from a sophisticated medical device and would have no idea how safe the product could be made. *Id.* Citing the Arizona Court of Appeals rulings in *Brethauer v. General Motors Corporation,* 221 Ariz. 192, 199, 211 P.3d 1176, 1183 (Ct. App. 2009) (stating "if the consumer expectation test was applicable only when a consumer could form an expectation as to the product's actual design, the test would almost never apply…") and *Boy v. I.T.T. Grinnell Corp.*, 150 Ariz. 526, 724 P.2d 612 (Ct. App. 1986) (applying consumer expectation test where product was a case iron pipe fitting known as a concentric reducer), the Arizona District Court concluded that the Arizona Supreme Court would follow the State of Washington and likely find that as to medically related products, the ordinary consumer under the consumer expectation test is the physician that uses the device. *See Terhune v. A. H. Robins Co.*, 90 Wash.2d 9, 577 P.2d 975, 978 (Wash. 1978) (Washington Supreme Court held physician who prescribed the spinal plate was the "ordinary consumer" of the product).

C. Discovery

Pham v. Wal-Mart, 2011 WL 5508832 (D. Nev.)

The United States District Court for the District of Nevada ruled that Plaintiff's discovery request, which sought documents and information relating to any incidents in which a person was allegedly injured by a device (similar to the one that injured the Plaintiff) at a Wal-Mart or Sam's Club store in the United States during the five-year period prior to plaintiff's injury, was not overly broad. The information sought was relevant, was clearly calculated to lead to discovery of admissible evidence, and was reasonably limited in subject matter as to not be unduly burdensome, notwithstanding that the territorial scope of the request was nationwide. Esperanza Pham brought a product liability suit against Wal-Mart d/b/a Sam's Club after she was injured when she sat down on a floor model mattress which was resting on a bed frame with fixed casters and the apparatus receded underneath a metal shelf causing her head to crash against the metal shelf resulting in severe and debilitating mental and physical injuries. Defendant Wal-Mart contended that the request was unduly burdensome because Wal-Mart categorizes its incident claims into defined categories and a claim such as Plaintiff's does not fit into one category, thus necessitating a search through all claims (19,469 for Wal-Mart and Sam's Clubs; 673 when restricted just to Sam's Club). The Court rejected Wal-Mart's contention and denied the protective order sought reasoning that the burdens imposed on Wal-Mart in responding to the request are, in substantial part, due to the deficiencies in its accident reporting and record keeping system.

D. Warnings

State Farm Fire and Casualty Company v. Electrolux North America, 2011 WL 6753140 (W.D. Wash)

The United States District Court for the Western District of Washington held that expert testimony regarding warnings was relevant and admissible, despite Plaintiffs' testimony that they did not read any of the warnings on the dryer or in the product literature. Mr. and Mrs. Oien's insurer, State Farm Fire and Casualty Company ("State Farm") brought a subrogation action against Electrolux North America ("Electrolux") after the Oien's home was damaged by fire that originated from the Electrolux clothes dryer in the Oien's home.

Electrolux argued that Mr. and Mrs. Oien's testimony that they did not read any of the warning attached to the dryer or the product literature negated the causation element of a claim under the Washington Product Liability Act because it demonstrated that an adequate warning would not, in any event, have changed the Oien's behavior or prevented the loss. The Court disagreed, stating that the Oien's testimony that there was no warning on the dryer made it no surprise that the Oien's did not, therefore, read one. While Electrolux's argument may well suffice to defeat State Farm's claim at trial, it did not, as Electrolux contended, resolve as a matter of law, State Farm's failure to warn claim.

E. Proximate Cause

Roberts v. Albertson's LLC, 2011 WL 6807608 (9th Cir.)

The Ninth Circuit Court of Appeals affirmed the United States District Court for the District of Nevada's grant of summary judgment on Plaintiff's product liability claim brought against Albertson's LLC ("Albertson's") and manufacturing defendant Samsung America, Inc. ("Samsung"). Plaintiff suffered a stroke after he decided to stop taking his prescribed blood pressure medication after receiving what he alleged were inaccurately low blood pressure readings from a home blood pressure monitor sold by Albertson's.

The Court upheld the grant of summary judgment on the basis that Plaintiff failed to establish causation in that he did not introduce evidence showing that the alleged defect was a "substantial factor" in causing his injury. In order to constitute a "substantial factor" for proximate cause, the nature and extent of the injury must be foreseeable. Plaintiff Roberts did not introduce any evidence to support a claim that it was foreseeable that he would stop taking his prescribed blood pressure medication, in contradiction to doctor's orders, based on the readings received from the home blood pressure monitor.

F. Waivers of Liability

Wallace v. Busch Entertainment Corporation, 3011 WL 3607232 (S.D. Cal.)

Plaintiff John Wallace was a patron of SeaWorld San Diego. He purchased a ticket to use the bungee trampoline at the Xtreme Zone of the park. Before being outfitted with a harness, which was attached to two bungee cords, Plaintiff executed a liability waiver. Plaintiff received instruction from the park attendee on how to jump and flip. When Plaintiff went to flip, he held on to the bungee cords and, as a result, suffered a tendon tear in his left bicep. Plaintiff brought claims of negligent products liability (design defect and failure to warn) and strict product liability (design defect and failure to warn). The District Court granted summary judgment in favor of Busch Entertainment Corporation ("Busch") on all products liability claims.

With respect to the negligence claims, the Court held that they were barred by Plaintiff's execution of the liability waiver, which the Court held was clear, unambiguous, explicit, and not against public policy. With respect to the strict liability claims, the Court held that the doctrine of strict liability did not apply because the Busch defendant was not a manufacturer, retailer, or other party involved in the vertical distribution of consumer goods. The Court found Busch was not providing a transaction the primary purpose of which was to

purchase or use a product, but was instead, a provider of service. Likening the bungee trampoline to a white water rafting trip or fitness club membership, the Court found that Busch intended to provide Plaintiff a "guided experience."

G. What Is a Product / Mortgages

Radford v. Wells Fargo Bank, 2011 WL 1833020 (D. Hawaii)

They may cause emotional distress and injury, but a mortgage is not a "product"; accordingly, regardless of how defective it may be, a products liability suit cannot be brought with respect to a mortgage. Plaintiff Richard Radford brought suit against Wells Fargo Bank ("Wells Fargo") and other defendants seeking damages and rescission of his mortgage contract alleging, *inter alia*, an intentional or negligent failure to warn of a defective product. Radford alleged that he was enticed into purchasing a defective product (*i.e.*, his mortgage loan) from the defendants.

The Court held that a mortgage loan is not a "product" subject to products liability claims. "Products liability covers products that are reasonably certain to place life and limb in peril and may cause bodily harm if defective. The language of products liability law reflects its focus on tangible items." *Radford*, 2011 WL 1833020 at *16. The Restatement (Second) of Torts provides a list of examples of items that are covered and a mortgage loan is not on the list. Further, there is no precedent in Hawaii law supporting Plaintiff's contention that a loan is a product.

H. Pharmaceuticals

In re Zicam Cold Remedy Marketing Sales Practices, and Products Liability Litigation, 797 F. Supp.2d 940 (D. Ariz. 2011)

Judge Fredrick Martone of the United States District Court for the District of Arizona held that a plaintiff does not have to prove toxic dosage of medication in order to prevail on a product liability claim. The question, as framed by Judge Martone, was whether the toxic dose showing required in environmental exposure actions is applicable to products liability claims for allegedly toxic drugs.

The Court considered, and then rejected, the lengthy list of cases cited by Defendants because only two involved medicine: *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litigation*, 524 F.Supp.2d 1166 (N.D. Cal. 2007) and *McClain v. Metabolife Intern., Inc.,* 401 F.3d 1233 (11th Cir. 2005).

The Arizona District Court held these cases were unique and did not weigh evenly against the numerous product liability cases to consider the issue and conclude that evidence of a toxic dose is not required. *See, e.g., McClellan v. I–Flow Corp.,* 710 F.Supp.2d 1092, 1111 (D.Or.2010) ("While plaintiffs' experts cannot identify the precise threshold dose of bupivacaine or the length of exposure that triggers irreparable chondrocyte damage, ' Daubert does not require that every aspect of a theory of medical causation be supported by research on the identical point.' " *(quoting Domingo, 289 F.3d at 607)); In re Avandia Marketing, Sales Practices and Products Liability Litigation,* 2011 WL 13576 (E.D.Pa.2011) (denying motion to exclude plaintiffs' general causation experts' opinion about causal connection between Avandia and myocardial infarction without discussion of toxic dose); *Bartlett v. Mutual Pharmaceutical Company, Inc.,* 760 F.Supp.2d 220 (D.N.H.2011) (denying motion for judgment as a matter of law because plaintiff presented sufficient evidence that drug's risks outweighed its benefits without discussion of toxic dose); *In re Fosamax Products Liability Litigation,* 645 F.Supp.2d 164 (S.D.N.Y.2009) (denying motion to exclude plaintiffs' general causation experts' opinion that drug can cause osteonecrosis of the jaw without requiring demonstration of toxic dose); *In re Neurontin Marketing, Sales Practices, and Products Liability Litigation,* 612 F.Supp.2d 116 (D.Mass.2009) (denying motion

to exclude plaintiffs' general causation experts' opinion that Neurontin can increase risk of suicide without determination of dose-response relationship). The Court, therefore, concluded that "to establish general causation, plaintiffs need not prove a toxic dosage of Zicam. Instead, plaintiff must demonstrate Zicam 'is toxic to humans given substantial exposure.'" 797 F. Supp.2d 940 at 946.

X. Tenth Circuit

A. Used Products

Gaumer v. Rossville Truck & Tractor Company, 257 P.3d 292 (Kan. 2011)

In *Gaumer*, Gaumer's father purchased a used baler "as is" from Defendant Rossville Truck and Tractor Company, Inc. The baler was missing a safety shield on its side which would have been present when the baler was originally manufactured and sold. Shortly after the purchase, the baler malfunctioned while Gaumer was operating it. Gaumer left the baler running and went back to check on the baler. Gaumer slipped and his arm went into a hole in the baler which was left open due to the absent safety shield. Gaumer's arm was amputated from his elbow down. Gaumer sued Rossville for negligence alleging Rossville failed to warn about the potentially dangerous condition of the baler without a safety shield, negligently failing to inspect the baler before sale, and for strict liability for selling a product in an unreasonably dangerous condition.

The district court granted summary judgment for Rossville on the negligence and strict liability claims. The court cited two cases from the United States District Court for the District of Kansas that predicted the Supreme Court of Kansas would not apply strict liability to sellers of used products. The Kansas Supreme Court affirmed the summary judgment on the negligence claim but reversed on the strict liability claim. The court relied on language from Kansas' pattern jury instructions regarding strict liability claims and the Restatement of Torts §402A—neither of which makes a distinction between sellers of new and used goods.

According to the Court, the Kansas Products Liability Act (KPLA) includes sellers of used goods as a "product seller" but does not state what liabilities and responsibilities accompany that title, leaving the court to look to Kansas' common law.

The Court adopted the Restatement's approach to strict liability in *Brooks v. Dietz*, 218 Kan. 698, 545 P.2d 1104 (1976), which makes no distinction between sellers of new and used goods. The court also noted that a seller of used products fits into the language in the Restatement for strict liability as "one who sells any product" and the purchaser of a used product qualifies as "the ultimate user or consumer."

In reaching its decision, the court discussed the three policy considerations of strict liability—achieve maximum protection for the injured party, discourage defective products that are a menace to the public, and protect consumer expectations—all of which favor extending strict products liability to sellers of used goods.

B. Fire Arms

Shirley v. Glass, 241 P.3d 134, 44 Kan. Ct. App. 688 (2010).

This case involved a wrongful death action. The plaintiff's 8-year-old son, Zeus, died in September of 2003 after being shot by his father, Russell. After shooting Zeus, Russell fatally shot himself. Russell was a convicted felon and was prohibited from purchasing a firearm. Russell shot Zeus with a shotgun and ammunition purchased by Russell's mother, Imogene, from Baxter Springs Gun & Pawn Shop through an alleged straw-person sale. Russell was present at the shop when Imogene made her purchase.

Plaintiff, mother of Zeus, sued Imogene, Baxter Springs Gun & Pawn Shop, and the pawn shop's owners, Joe and Patsy George. Plaintiff alleged that defendants were negligent in selling a firearm to a party knowing it was intended for another and failing to do a background check on the intended owner. The plaintiff contended, among other theories, that Baxter was negligent by failing to meet their duty to exercise the "highest degree of care" to safeguard their gun. The trial court granted summary judgment for the defendants on all of Plaintiff's claims.

On appeal, Plaintiff based her argument on the cases *Long v. Turk*, 265 Kan. 855, 962 P.2d 1093 (1998) and *Wood v. Groh*, 269 Kan. 420, 7 P.3d 1163 (2000). The court held that Baxter did not have a duty to exercise the "highest degree of care" to safeguard their gun. The Kansas Court of Appeals noted that in *Long v. Turk*, *supra*, the defendant's son took a firearm and shot and killed a passenger in a vehicle. The Kansas Supreme Court held that a fact question existed as to whether the defendant exercised the "highest degree of care" in keeping a firearm out of a minor's possession. The court stated that a handgun is a dangerous instrument and that the highest degree of care is required in safeguarding it. However, this court distinguished *Long* from this case in that it involved keeping a firearm from a minor which was not present here.

The plaintiff also argued that *Wood v. Groh* applied. That case involved a minor who broke into his father's gun case and stole a gun along with ammunition. The son then took the gun to parties. The gun accidentally went off at a party, wounding another individual. The court held that the trial court erred in instructing the jury on the "reasonable care" standard rather than the "highest degree of care" standard which governed the father's duty. The court distinguished this case as well as it also involved an adult's duty to safeguard handguns from minors.

The court declined to extend the duty to exercise the "highest degree of care" found in these cases to the facts present in *Shirley*. To do so would create an impossible burden on sellers of firearms and open up dealers to extreme liability.

C. Class Certification

Jackson v. Unocal Corp., 262 P.3d 874 (Colo. 2011).

In *Jackson*, Defendant Unocal was the owner of a pipeline that was buried under sixty-nine miles of easements in Logan and Weld Counties in Colorado. The buried pipe contained a layer of asbestos wrap. Between the years 1996 and 1998, defendant hired a contractor to remove the pipeline. During the excavation, small pieces of the pipe's asbestos wrap were left on the easement properties.

Plaintiff land owners brought a land damages class action asserting claims for nuisance, negligence, trespass, respondeat superior, and unjust enrichment. Plaintiffs moved for class certification under C.R.C.P. 23 on the basis that common issues of liability and damages predominated over individual issues. Plaintiffs sought to certify two classes: (1) an Easement Property Class that includes owners of properties containing the pipeline easement and (2) a Contiguous Property Class that includes owners of properties that are contiguous to those containing the easement. The trial court certified the classes. The Court of Appeals then reversed, holding that a trial court must apply a preponderance of the evidence standard to a review of the proof supporting each class action requirement.

On appeal to the Colorado Supreme Court, the Court held that plaintiffs did not need to establish the requirements of C.R.C.P. 23 by a preponderance of the evidence to obtain class certification. While the burden is on the class action advocate to demonstrate that each C.R.C.P. 23 requirement is met, it should be liberally construed in light of its policy favoring the maintenance of class actions. C.R.C.P. 23 requires a trial court to "rigorously analyze the evidence" and make findings that each of its requirements are met. It is a case man-

agement tool and neither the rule nor Colorado case law imposes a specific burden of proof on the trial court's certification decision.

D. Loss of Consortium

Wachocki v. Bernalillo County Sheriff's Department, No. 32,131, 2011 WL 5617763 (N.M. Oct. 11, 2011).

In this case Jason Wachocki was killed in an automobile accident when Jason's vehicle was struck by a speeding van driven by a corrections officer at the Metropolitan Detention Center. Bill, Jason's brother, brought a loss-of-consortium claim against the Bernalillo County Sheriff's Department (BCSD).

The trial court denied the loss-of-consortium claim and Bill appealed. The Court of Appeals held that Bill had not shown that BCSD owed him a duty of care, one of two elements of a loss-of-consortium claim, because it was not foreseeable that an injury to Jason would harm Bill's relational interest. And, even if BCSD owed Bill a duty, Bill failed to establish the second element—that Bill had a "sufficiently close relationship" with Jason. On appeal, the Supreme Court held that a brother may generally bring a loss of consortium claim.

Nevertheless, in this case, Bill failed to establish an element of a loss-of-consortium claim—that the claimant and the injured party shared a sufficiently close relationship. The factors enunciated in *Lozoya v. Sanchez*, 133 N.M. 579, 66 P.3d 948(2003), are applicable to all loss-of-consortium claims regardless of the relationship of the plaintiff and the decedent. Of these factors, mutual dependence was of principal importance.

The Court noted the limited nature of a loss-of-consortium claim and that many jurisdictions have rejected recovery by siblings. The Court declined to adopt different factors to apply when a sibling brings a loss-of-consortium claim, instead holding that a plaintiff-sibling must satisfy the same factors as a plaintiff-spouse would need to establish.

E. Sale of a Product

Stephenson v. Honeywell International, Inc., 703 F. Supp. 2d 1250 (D. Kan. 2010).

In *Stephenson*, four passengers and a pilot were killed in an airplane crash. Before the crash, the left engine was sent to the defendant for repair and was returned to service as airworthy. Plaintiffs, as heirs of the deceased, brought wrongful death claims against the defendant based on among others theories, strict liability.

Plaintiffs brought wrongful death claims based on negligent repair of the left engine, strict product liability, and breach of implied warranty. The case was removed to federal court based on diversity jurisdiction. Defendant filed a motion for summary judgment on plaintiffs' strict liability claim. The Court granted the motion and held that a plaintiff cannot bring a strict product liability claim based on defective repairs without an accompanying sale of the product.

Kansas adopted Section 402A of the Second Restatement of Torts for strict liability for the sale of a dangerously defective product. The language is clear that one may only be liable under a strict liability theory when one *sells* a defective product.

Plaintiffs argued that the repairs were so substantial and comprehensive to amount to a complete overhaul of the engine. The court was not persuaded, stating that there was no evidence that the title did not remain with the owner throughout the repair or that the airplane was re-sold by defendant following the repairs.

F. Negligence Per Se

Howard v. Sulzer Orthopedics, Inc., 796 F.Supp.2d 1305 (N.D. Okla. 2011).

In *Howard*, Defendants were manufacturers the Sulzer Natural Knee II Tibial Baseplate (NK-II), a prosthetic knee. Plaintiff underwent surgery to have the NK-II implanted. Plaintiff alleged after the surgery that the NK-II had a machine oil residue on it that should have been removed, but was still present because Sulzer had revised the manufacturing process which was used for the NK-II. He alleged that the residue prevented the "tibial baseplate" from bonding with his bone which triggered a painful inflammatory response. Plaintiff underwent surgery to replace the implant after which he suffered from skin complications.

Plaintiff sued Sulzer Orthopedics, alleging design and manufacturing defect, negligence, breach of warranty, failure to warn, deceit by concealment and negligence per se for violating Food and Drug Administration (FDA) regulations in the manufacturing of the NK-II. The case was transferred to the Northern District of Ohio for proceedings.

After identifying which implants were manufactured with the new process, a settlement agreement was reached. Plaintiff was not included in this settlement agreement because he was not included in the "affected lot."

Plaintiff alleged that his device was affected in much the same way as the "affected lot." Defendant moved for summary judgment. All of the claims were dismissed as being barred by an express preemption clause in the Medical Device Amendments, 21 U.S.C. §360c, to the Federal Food, Drug, and Cosmetic Act (FDCA). This clause bars state law liability claims that would impose restrictions on the manufacture of medical devices that are different or in addition to those mandated by the FDA.

Plaintiff appealed to the Circuit Court of Appeals which reversed the negligence per se decision, finding that plaintiff's negligence per se claim was not preempted by federal law, and remanded the case to the Northern District of Oklahoma because the Ohio-based multi-district litigation had been closed by that time. Defendants moved for summary judgment on the negligence per se claim arguing that negligence per se is not recognized by Oklahoma law. The Court granted summary judgment and held that under Oklahoma law, a violation of the FDA does not constitute negligence per se.

According to the Court, Federal courts should not expand Oklahoma law to allow negligence per se claims based on FDA regulations because state legislators had not done so themselves. The FDA was intended to protect the public at large and not individuals. Because plaintiff was not a member of the class meant to be protected by the statute, there is no negligence per se claim upon which he can proceed.

G. Cell Phones

Estate of Doyle v. Sprint/Nextel Corp., 248 P.3d 947 (Okla. Civ. App. 2010).

In *Doyle,* Chris Hill was driving his automobile when he ran a red light and collided with a car driven by Linda Doyle. Doyle was killed in the accident. Plaintiffs, the estate of Doyle, brought suit against Sprint/Nextel Corp. alleging that Hill was talking on his cell phone when he ran a red light and that Sprint was negligent by failing to properly warn him of the hazard of cell phone use while driving. Defendants filed a motion to dismiss arguing that they owed no duty to Doyle and that their actions or inactions did not cause the accident. The trial court granted the motion and dismissed plaintiff's claim. The Court of Appeals affirmed the trial court and held that cell phone companies do not have a duty to non-customer automobile drivers to warn their cell-phone customers of the dangers of using a cell phone while driving.

The court looked to a similar claim against a cell-phone company in the case *Williams v. Cingular Wireless*, 809 N.E.2d 473 (Ind. Ct. App. 2004). There, the court looked at the relationship of the parties, the foreseeability of the harm and public policy concerns of imposing a duty on cell-phone companies to warn their customers of the dangers of talking on their phone while driving. The *Williams* court found no relation-

ship existed between the defendant and plaintiff because there was no contract between them, the accident did not involve an employee of the defendant, and it did not occur on defendant's property.

The court also found that the sale of a cell phone resulting in an automobile accident was not foreseeable. The use of a cell phone is not what causes wrecks but rather the driver's inattentiveness while using the phone. Cellular phones are used in many situations aside from driving and many people use their cell phone while driving and are not involved in accidents.

Finally, public policy weighed in favor of not imposing a duty on cell-phone companies for automobile accidents. Cell phones encourage drivers to report accidents, dangerous road conditions, and other similar threats which help keep the road safer.

XI. Eleventh Circuit

A. Discovery of Substantially Similar Products

Alvarez v. Cooper Tire & Rubber Co., No. 4D08–3498, 2011 WL 5964329 (Fla.App. 4 Dist., November 30, 2011)

Plaintiff, representing the estate of a pick-up truck passenger killed in an accident allegedly resulting from separation of tire tread on a truck's rear wheel, filed suit against Cooper Tire. Prior to trial, the trial court issued an order restricting Plaintiff's discovery, and following a jury trial, rendered judgment in favor of the defendant. Plaintiff appealed arguing that the trial court abused its discretion in limiting document discovery from the defendant-manufacturer to those documents involving tires with the same or similar specifications.

Specifically, Plaintiff's relative was killed after the vehicle he was a passenger in rolled. Plaintiff alleged the tread of the vehicle's tired separated from the tire and thus the tire was defective in design and manufacture. During discovery, Plaintiff sought information and documents regarding all light truck tires manufactured by the defendant.

Defendant objected based upon trade secret, burdensomeness, and argued that the plaintiff was entitled to discovery only for those tires which were substantially similar to the tire which was the subject of the lawsuit. Plaintiff sought documents to show that the defendant had notice of a tread separation problem involving different tires it manufactured and sought to have such documents admitted for purposes of his claim for punitive damages. Plaintiff moved to compel.

After a hearing, the court limited discovery to the subject tire and a limited number of substantially similar tires. Defendant produced 1500 documents accordingly. Despite the court's ruling, Plaintiff filed a second motion to compel, seeking additional documents of the defendant which had been produced in a separate lawsuit in California. The California litigation documents concerned many of the defendant's tires, though none of the tires at issue in this case. These documents were designated as trade secrets by the California judge. The trial court again held a hearing on production of the California litigation documents, and ultimately concluded Plaintiff had not shown a reasonable necessity to require their production.

The case was assigned to a new judge, and Plaintiff again moved to compel production of the documents, on the grounds that the documents were produced in a case pending in Arizona. The court again denied production because the documents produced in Arizona did not pertain to the tires in the instant case.

After a two week trial, the jury returned its verdict with a special interrogatory finding that the defendant did not place the subject tire on the market with a defect which was the legal cause of the death of the decedent. Plaintiff filed a Motion for Rehearing, arguing again the discovery limitation was error. The court denied the Motion, and Plaintiff appealed.

Plaintiff argued on appeal that the trial court's limitation of discovery to the subject tire and substantially similar tires was too narrow and deprived him of relevant discovery. The Court of Appeals held that whether another product is "substantially similar" is a question for the trial court based upon all of the proofs presented. In this case, the two trial judges reviewed many documents and held multiple hearings, and each came to the same conclusion—that discovery was properly limited to a handful of tires which were "substantially similar."

B. Assumption of Risk

Yamaha Motor Corp., U.S.A. et al. v. McTaggart, et al., No. A11A1022, 2011 WL 5529843 (Ga. App. Nov. 15, 2011)

Roger McTaggart and Glenda McTaggert brought suit against Yamaha after to recover for injuries sustained when a Yamaha Rhino ran over Roger's leg. The jury returned a verdict in favor of Plaintiffs for $317,002. Yamaha moved for a new trial, and the trial court denied the Motion.

On appeal to the, the Court held that the trial court erred by denying Yamaha's Motions for Directed Verdict and Judgment Notwithstanding the Verdict because the evidence demonstrated that Plaintiff, without coercion of circumstances, chose a course of action with full knowledge of its danger and while exercising a free choice as to whether to engage in the act or not. In other words, that he assumed the risk of his injuries.

Arriving at its decision, the Court of Appeals noted a number of facts demonstrating an assumption of risk. Most notably that the Yamaha Rhino, a four-wheeled, off-road vehicle with two seats, is "open air" in that it has no doors or windows but has various guards to help keep arms and legs inside the vehicle. It also contains a warning sticker inside the vehicle which warns users that they could be severely injured or die if they attempt to stop a rollover using an arm or a leg, and it instructs the occupants to keep their arms and legs inside the vehicle.

When Plaintiff purchased his Rhino, the dealership offered to install a flexible plastic, aftermarket, weather enclosure for the vehicle, but Plaintiff explicitly declined because he preferred open access to allow for easy ingress and egress. A year after purchase and after much use, Plaintiff tipped the Rhino while making a turn, and the Rhino landed on his leg, causing a severe laceration.

Two months after the accident, Yamaha added sculpted doors on new Rhinos and offered to install them on pre-owned vehicles after learning of lower extremity injuries that occurred when drivers extended their legs outside the vehicle during rollovers. Plaintiff's sole claim at trial was that the Rhino was defective because it lacked a door.

After the jury returned a verdict for Plaintiffs at trial, Yamaha appealed, arguing the trial court erred by denying its motions for a directed verdict and judgment notwithstanding the verdict because the undisputed evidence at trial required a finding that Plaintiff assumed the risk of his injuries. The Plaintiff argued that he, unlike Yamaha, did not know or appreciate that he might involuntarily put his foot out of the vehicle in the event of a rollover to avoid an injury.

However, the plaintiff agreed at trial that the Rhino was useful to him specifically "because it had no door" and he specifically chose the Rhino as opposed to another model because it was easier for him to get in and out of. At trial, the plaintiff testified he understood the warnings and instructions posted on the vehicle, which directed occupants to keep their limbs inside the vehicle at all times, and that he read the operator's manual. He further testified that the sales person explained the warnings to him and he understood them.

Therefore, because the evidence established that plaintiff was clearly aware of the potential danger of injury to his limbs during a rollover in the Rhino and deliberately chose to operate the vehicle despite the

risk of injury, the Court of Appeals determined that he did prove Yamaha had actual and subjective knowledge of the specific danger associated with the doorless design of the Rhino. The Court of Appeals held that Plaintiff fully appreciated the risks associated with the Rhino and that he voluntarily exposed himself to those risks. Therefore, despite the jury's finding that the Rhino's defective design proximately caused his injuries, the Court of Appeals held the Plaintiff's assumption of the risks barred his recovery and reversed the trial court's decision and remanded the case to the trial court with instructions to enter a directed verdict.

C. Testimony of Treating Physician

Eberhart v. Novartis Pharmaceuticals Corp., No. 1:08–cv–2542–WSD, 2011 WL 5289372 (N.D.Ga. October 31, 2011)

Plaintiff suffered from breast cancer and was prescribed two drugs manufactured by Defendant as part of her treatment. Unrelated to her cancer or Defendant's drugs, Plaintiff also suffered from periodontal disease.

Plaintiff sued Defendant, claiming she was injured by Defendant's failure to warn about a purported increased risk of osteonecrosis of the jaw (ONJ) associated with Defendant's drugs. Specifically, Plaintiff claims that had she been warned of her increased risk of ONJ, she would have undergone endodontic treatment for her periodontal disease, rather than having her teeth extracted as treatment; teeth extractions further heightened her risk of ONJ and Plaintiff ultimately developed ONJ.

Defendant's Renewed Motion for Summary judgment was based on a declaration by one of Plaintiff's treating physicians that, in his professional opinion, endodontic treatment was not a viable option for Plaintiff's periodontal disease; the only viable option for treatment was extractions. Therefore, according to Defendant, Plaintiff's claim she would have sought endodontic treatment rather than extractions has no basis, and her failure to warn claim must fail. The only evidence Defendant had in support of this point was Plaintiff's treating physician's declaration and Defendant classified the treating physician as a fact witness.

Plaintiff claimed in response Defendant attempted to use her treating physician as an expert, and should not be permitted to do so because Defendant failed to timely designate the treating physician as an expert. Plaintiff moved to strike the treating physician's declaration.

The Court followed Eleventh Circuit precedent that treating physicians who are not designated as experts may offer "lay" testimony that implicates their specialized experience as a physician if the testimony is (1) an account of their observations during the course of treatment or (2) offered for the purpose of explaining the physician's decision-making process or the treatment involved. The Court admitted the treating physician's declaration and held that as a "lay witness," he could testify about his examination of the Plaintiff and what treatment options he was willing or not willing to provide.

Further, because the Court permitted the treating physician's declaration for those purposes, when evaluating Defendant's Renewed Motion for Summary Judgment, it took as undisputed the fact that endodontic treatment was not an option, and thus determined there was no causal link between Defendant's alleged failure to warn and Plaintiff's injuries. Put another way, in order for Plaintiff to show had she been warned about the risk of ONJ, she would not have undergone tooth extractions that ultimately caused her ONJ, she would have to present some evidence that she had an alternative therapy for her periodontal disease other than extractions.

D. Automobiles

Campbell v. Altec Indus., Inc., 635 F.3d 1212 (11th Cir. 2011).

Campbell sought damages for the injuries he received while operating a bucket truck. The bucket truck's lower boom lift cylinder failed and caused the upper and lower booms to drop, which sent the bucket and Campbell to the ground. The bucket truck was manufactured and sold to Georgia Power by Altec. The defective component - the lift cylinder - was manufactured by THI. The lift cylinder was first tested on January 14, 1998; it was installed on the truck in March 1998; and the completed truck was delivered to Georgia Power in April 1998. Campbell and his wife brought the product liability action under O.C.G.A. §51-1-11(b)(1).

Altec and THI moved for summary based on Georgia's ten year statute of repose, which requires the claim be brought within "ten years from the date of the first sale for use or consumption of the personal property causing or otherwise bringing about the injury." *See* O.C.G.A. §51-1-11(b)(2). The three relevant dates in this case were: January 1998 (first tested); March 1998 (installed); and April 1998 (delivered to Georgia Power). The district court granted the motion for summary judgment finding that the statute's ten year time limit began to run in January 1998 when the product was first tested. The issue of when the statute begins to run is determinative in this case. If the statute of repose was determined to run from either of the latter two dates, the Campbell's action would not be time barred.

On appeal from the district court's entry of summary judgment, the Eleventh Circuit certified the question to the Georgia Supreme Court, which found that the statute of repose begins to run when a finished product is sold as new to the intended consumer who is to receive the product, in this case, Georgia Power. The Eleventh Circuit, in light of the Georgia Supreme Court's answer, found the statute of repose did not begin to run until April 1998 and the lawsuit was, thus, timely filed. The district court's judgment was vacated and the case was remanded for further proceedings.

Andrews v. Ford Motor Co., 310 Ga. App. 449, 713 S.E.2d 474 (Ga. App. 2011).

Andrews sued the Ford companies in the Superior Court of Lowndes County for property damages and for punitive damages as a result of her 2002 Ford Expedition catching fire in her garage. The Ford Companies filed a motion for summary judgment arguing that Andrews is not entitled to recover from the Ford companies for damages to her car, home, and home's contents to the extent that she previously received compensation for those damages from her insurers. The trial court granted summary judgment in part to the Ford companies, noting that if Andrews received a verdict in her favor at trial that exceeds the amount already covered by her insurer, the court will reduce the jury's verdict by the amount of compensation already paid by the insurer. The trial court denied the Ford companies motion for summary judgment as to punitive damages.

Andrews appealed, arguing that the trial court erred in granting partial summary judgment because the trial court should have applied the collateral source rule to prevent the introduction of any evidence of insurance payments she received from State Farm. The Ford companies also appealed, arguing that the trial court erred in ruling that, despite its grant of summary judgment denying Andrews the right to recover from the Ford companies those property damage amount paid by her insurer, Andrews could still introduce evidence at trial related to damages.

The Georgia Court of Appeals affirmed the grant of summary judgment and remanded the case for clarification. The Court found that the collateral source rule does bar the Ford companies from presenting evidence at trial that Andrews received compensation from her insurers; however, the trial court's ruling was not due to be reversed as a result. The collateral source rule does not provide that a plaintiff is entitled to collect from both his or her insurer and from the defendant tortfeasor for the same item of damage. The trial court's ruling that in the event of a favorable ruling for Andrews, she will not be allowed to collect from the Ford companies for her property damages to the extent she has already received compensation for those damages from State Farm, was correct. Furthermore, the Court found that the trial court's judgment was not a determination of liability as a matter of law. Thus, punitive damages were allowed to proceed.

E. Medical Device

Wolicki-Gables v. Arrow Int'l, Inc., 634 F.3d 1296 (11th Cir. 2011).

Linda Wolicki-Gables was implanted with an Arrow pump system in her back to manage pain. The pump system works by allowing the continuous delivery of pain medication into the intraspinal space to eliminate the peaks and valleys experienced during oral drug therapy. The pump system has three components, a pump, a catheter, and a metal connector that links the pump catheter to the intrathecal catheter. The pump system is a Class III medical device approved by the FDA in a process called premarket approval.

Ms. Wolicki-Gables requested that her doctor perform a dye injection test to determine if her pump was working properly. Dr. James performed the test and observed the dye spreading appropriately in the intraspinal space and saw no leaks in the system. Later, a second test was performed and Dr. James found that the dye was not spreading appropriately. Dr. James hypothesized that the bolus feature of the pump was malfunctioning. Dr. James then removed the pump and tested the device, which operated properly. Dr. James replaced the device because it was determined to be working properly and he concluded in his post-operative report that the catheter had crimped.

A couple weeks later, Ms. Wolicki-Gables was taken to the hospital due to paralysis in her legs. She was diagnosed with transverse myelitis (the irritation or inflammation of the spinal cord). The entire pump system was later removed. Since then, Ms. Wolicki-Gables has lost her ability to walk and is a partial paraplegic. She then filed suit and the case was ultimately determined in the Middle District of Florida. The District Court found all claims preempted by the MDA and that the Gableses had not presented sufficient evidence to overcome summary judgment.

The Eleventh Circuit reviewed the District Court's summary judgment ruling de novo. The Eleventh Circuit cited *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008) for the test to determine whether state claims are preempted. First, a court must determine whether the Federal Government has established requirements applicable to the device. If so, the court must then determine whether the plaintiff's common law claims are based upon state law requirements with respect to the device that are different from, or in addition to the federal ones, and that relate to safety and effectiveness.

Here, the District Court determined that each of the Gableses claims under Florida law imposed requirements that were different from, or in addition to the federal requirements for the pump. The Eleventh Circuit agreed, finding that "[b]ecause the Gableses have failed to allege facts in their complaint demonstrating the presence of the elements of a parallel claim, we are persuaded that the District Court did not err in concluding that their state common law claims were preempted. *Id.* at 1302.

Sumner v. Biomet, Inc., 434 F. App'x 834 (11th Cir. 2011).

Sumner had hip replacement surgery and a hip prosthesis manufactured by Biomet installed. After being discharged from the hospital, Mrs. Sumner returned for post-operative appointments where x-rays determined that the prosthesis was in the proper position, but particulate debris was floating free in the area of the prosthesis. Subsequently, Mrs. Sumner began complaining of severe pain. Two additional surgeries were performed, eventually removing and replacing the prosthesis.

Sumner filed this action in the Middle District of Georgia based on diversity jurisdiction. She alleged claims under Georgia law for strict liability, negligence, and breach of warranty. Plaintiff had retained Dr. McLellan, a metallurgist, as a testifying expert. Dr. McLellan provided an expert report and deposition.

At his deposition, Dr. McLellan opined that the hip prosthesis failed due to the introduction of particulate debris into the area of the prosthesis which caused scratches and gouges in its surface. However, Dr. McLellan had no explanation for how metal could have been ejected from areas of inhomogeneity in the pros-

thesis. Dr. McLellan also admitted he had never heard of the phenomenon he described occurring in a metal prosthesis, had never heard of anyone studying it, had never read any literature supporting his theory, could not find any literature supporting his theory, and has never consulted on or testified in a case involving a metal-on-metal hip prosthesis.

Biomet filed a motion for summary judgment arguing that Dr. McLellan's testimony should be excluded as unreliable under *Daubert* and Rule 702 and that it was due summary judgment. The district court granted Biomet's motion to exclude finding Plaintiff failed to prove Dr. McLellan employed a reliable methodology to reach his conclusions. The district court determined that Dr. McLellan's theory of defect in the prosthesis was not reliable because it had not been tested, peer reviewed, published, or validated in any way, and because it had been developed expressly for the purposes of the litigation. The district court granted summary judgment in favor of Biomet. On appeal, the Eleventh Circuit determined that the district court did not abuse its discretion in excluding Dr. McLellan's testimony and granting summary judgment.

F. Alcoholic Caffeinated Beverages

Cook v. MillerCoors, LLC, et. al., No. 8:11–cv–1488–T–33EAJ, 2011 WL 5359713 (M.D.Fla. Oct. 28, 2011)

Plaintiff Heather Cook was the passenger on a motorcycle involved in an accident. The driver of the motorcycle was killed. Plaintiff was injured. Prior to the accident, the motorcycle driver consumed several caffeinated alcoholic "Sparks" beverages. Plaintiff brought suit against the beverage manufacturer, MillerCoors, arguing that the beverages were "uniquely dangerous" because of their appeal to younger drinkers and because the addition of caffeine enables one to drink more alcohol without feeling as intoxicated as one normally would. Plaintiff asserted that because the caffeine does not reduce alcohol's negative effects on motor skills and visual reaction times, the consumers of the beverages are more likely to "engage in dangerous behavior such as driving." Plaintiff alleged that after consuming the beverages, the driver neither felt nor looked impaired, despite toxicology reports showing he had a high blood alcohol level.

Plaintiff's Complaint contained three counts: failure to warn the driver of the inherent danger of alcohol and stimulants; design defect in the addition of stimulants to alcohol; and negligent manufacture in that MillerCoors knew the beverage was unreasonably dangerous and that drinkers would be likely to drink to excess due to the stimulants. MillerCoors argued in its Motion to Dismiss that there is no cause of action against a manufacturer of alcoholic beverages for injuries resulting from their consumption because the effects of alcohol consumption are well-known. Plaintiff argued that premise applied only to conventional alcoholic beverages, not alcoholic beverages mixed with stimulants designed to suppress the consumer's awareness of alcohol's effects.

The trial court ultimately granted MillerCoors's Motion to Dismiss. As to Plaintiff's failure to warn claim, the court determined that the driver knew he was drinking alcohol and thus assumed he had knowledge of its effects, and noted there is no duty to warn of the risks of alcohol due to the universal recognition of all potential dangers associated with alcohol. As to Plaintiff's design defect claim, the court found that the beverage was not "unreasonably dangerous." As to Plaintiff's negligence claim, the court found MillerCoors had no legal duty to protect Plaintiff from the harm caused by the driver's intoxication.