Product Liability – Case Law Update 2011

Chip Adams
Ebanks Taylor Horne, LLP
Houston, Texas 77008
P: 713-333-4500

Chip Adams is an attorney with Ebanks Taylor Horne, LLP in Houston, Texas. His practice is litigation focused and includes products liability, premises liability, and matters of general liability. He is licensed to practice law in both Texas and Mississippi. Chip is a member of the Texas Association of Defense Counsel and is active in several DRI committees, currently serving as the Vice-Chair of Marketing for the DRI Products Liability Committee.

Angelyn Guanajuato
U-Haul International, Inc.
Phoenix, Arizona
P: 602-351-8928

Angelyn Guanajuato is an Assistant General Counsel with U-Haul International, Inc. Her practice is focused on product liability litigation, discovery and document retention.

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!

First Circuit

Suzanne Young
Zelle McDonough & Cohen LLP
101 Federal Street
14th Floor
Boston, MA 02110
syoung@zelmcd.com

Carole G. Rapoport
Zelle McDonough & Cohen, LLP
101 Federal Street
Boston, MA 02110
crapoport@zelmcd.com

Ramani Marakani
ramani.marakani@law.unh.edu

Second Circuit

Annmarie Giblin, Esq.
Goldberg Segalla LLP
200 Old Country Road / Suite 210
Mineola, NY 11501
agiblin@goldbergsegalla.com

James F. Gallagher
Gallagher & Faller
1050 Franklin Avenue
Suite 400
Garden City, New York, 11530
jfgallagher@jgrf-law.com

Natalie Flores Campbell
Herzfeld & Rubin, P.C.
125 Broad Street
New York, NY 10004
ncampbell@herzfeld-rubin.com

Third Circuit

Michael F. Schleigh, Esq., LLM
Deasey Mahoney Valentini & North, Ltd.
1601 Market Street, Suite 3400
Philadelphia, PA 19103
michaelschleighesq@verizon.net

Jaime N. Doherty, Esquire
Goehring Rutter & Boehm
437 Grant Street, 14th Street
Pittsburgh, PA 15219
jdoherty@grblaw.com

Christine M. Delaney
Littleton Joyce Ughetta Park & Kelly LLP
141 West Front Street, Suite 120
Red Bank, NJ 07701
Christine.Delaney@LittletonJoyce.com

Fourth Circuit

Angela M. Allen
Ragsdale Liggett PLLC
2840 Plaza Place, Suite 400
Raleigh, North Carolina 27612
aallen@rl-law.com

Ashley Huffstetler Campbell
Ragsdale Liggett PLLC
2840 Plaza Place, Suite 400
Raleigh, North Carolina 27612
acampbell@rl-law.com

Brian W. Casto
Miles & Stockbridge, P.C.
10 Light Street
Baltimore, Maryland 21202
bcasto@milesstockbridge.com

Matthew J. Rifino
McCarter & English, LLP
405 N. King Street, 8th Floor
Wilmington, Delaware 19801
mrifino@mccarter.com

Makenzie Windfelder
McCarter & English, LLP
405 N. King Street, 8th Floor
Wilmington, Delaware 19801
mwindfelder@mccarter.com

Fifth Circuit

Matt Tyrone
Watkins & Eager PLLC
The Emporium Building
400 East Capitol Street
Jackson, Mississippi 39201
mtyrone@watkinseager.com

Julie A. Brennan
Peabody & Arnold LLP
Federal Reserve Plaza
600 Atlantic Avenue
Boston, MA 02210
(617) 951-2068

Tianna H. Raby
200 South Lamar Street
Suite 100
Jackson, Mississippi 39201-4099
rabyth@fpwk.com

Sixth Circuit

Maureen A. Bickley
Frost Brown Todd LLC
2200 PNC Center, 201 East Fifth Street
Cincinnati, OH 45202-4182
mbickley@fbtlaw.com

John McCann
Burch, Porter & Johnson, PLLC
130 North Court Avenue
Memphis, TN 38103
jmccann@bpjlaw.com

Shannon L.H. Phillips
Dickinson Wright PLLC
500 Woodward Avenue Suite 4000
Detroit, MI 48226-3425
SLHPhillips@dickinson-wright.com

Seventh Circuit

Bryan J. Anderson
Dykema
10 South Wacker Drive, Suite 2300
Chicago, IL 60606
banderson@dykema.com

Richelle M. Harris
Frost Brown Todd LLC
201 North Illinois Street, Suite 1900
Indianapolis, IN 46244-0961
rharris@fbtlaw.com

Lindsay E. Dansdill
Grotefeld, Hoffmann, Schleiter, Gordon and Ochoa, LLP
311 South Wacker Drive, Suite 4500
Chicago, IL 60606
LDansdill@ghlaw-llp.com

Eighth Circuit

Mandi K. Ferguson
HeplerBroom, LLC
130 North Main Street
Edwardsville, IL 62025
Mandi.Ferguson@heplerbroom.com

Zachary E. Pelham
Pearce & Durick
314 East Thayer Avenue, Suite 400
Bismarck, ND 58502
zep@pearce-durick.com

Shanda K. Pearson
Bassford Remele, A Professional Association
33 South Sixth Street, Suite 3800
Minneapolis, MN 55402-3707
spearson@bassford.com

Michael Lee Wright
Barber Law Firm
2700 Regions Center
400 West Capitol Avenue
Little Rock, Arkansas 72201
michael.wright@barberlawfirm.com

Ninth Circuit

Melissa Lin
Righi Hernandez
2111 East Highland Ave., Suite B440
Phoenix, AZ 85016
melissa@rhfirm.com

Christopher Rusby
Lemons, Grundy & Eisenberg
6005 Plumas Street, Third Floor
Reno, Nevada 89519
cmr@lge.net

Joseph S. Gardner, Esq.
Lewis Brisbois Bisgaard & Smith LLP
701 B Street, 19th Floor
San Diego, CA 92101
jgardner@lbbslaw.com

Heather S. Hall, Esq.
Mandelbaum, Ellerton & McBride
2012 Hamilton Lane
Las Vegas, NV 89106
heather@memlaw.net

Tenth Circuit

Matthew S. Brahana
Crowley Fleck, PLLP
Transwestern Plaza II
490 North 31st St., Suite 500
Billings, MT 59101
mbrahana@crowleyfleck.com

Jarod Allen Morris
Pierce Couch Hendrickson Baysinger & Green, L.L.P.
1109 N. Francis
Oklahoma City, OK 73106
jmorris@piercecouch.com

Adam P. O'Brien, Esq.
Wells, Anderson & Race LLC
1700 Broadway, Suite 1020
Denver, CO 80290
aobrien@warllc.com

Eleventh Circuit

Brian J. Benoit
Wiedner & McAuliffe, Ltd.
One North Franklin, 19th Floor
Chicago, IL 60606
bjbenoit@wmlaw.com

David A. Lester
Balch & Bingham LLP
1901 Sixth Avenue North | Suite 1500
Birmingham, Alabama 35203
dlester@balch.com

Brantley C. Rowlen
Lewis Brisbois Bisgaard & Smith, LLP
1180 Peachtree Street, N.E.
Suite 2900
Atlanta, Georgia 30309
rowlen@lbbslaw.com

Canadian Rulings

Richard D. Butler
Fasken Martineau DuMoulin LLP
Barristers & Solicitors
333 Bay Street, Suite 2400
Bay Adelaide Centre, Box 20
Toronto, ON M5H 2T6
Canada
rbutler@fasken.com

Kimberly Potter
"Student at Law"
Fasken Martineau DuMoulin LLP
333 Bay Street, Suite 2400
Bay Adelaide Centre, Box 20
Toronto, ON M5H 2T6
Canada
kpotter@fasken.com

FIRST CIRCUIT

Class Action Fairness Act

In re Light Cigarettes Marketing Sales Practices Litigation, No. 1:09-md-02068-JAW, 2010 WL 4781036 (D.Me. Nov. 22, 2010)

On April 18, 2003, Loretta Lawson filed a complaint in Circuit Court, Pulaski County, Arkansas against Philip Morris Companies, Inc. and Philip Morris Incorporated. After a month, Ms. Lawson filed her First Amended Class Action Complaint, adding Lisa Watson as a named plaintiff and filed the First Amended Class Action Complaint along with Watson. On July 2, 2003, the Defendants removed the case to federal court. On August 1, 2003, the Plaintiffs moved to remand the case back to state court. For the next several years, the parties litigated this jurisdictional dispute in federal court. The underlying action was delayed or stayed until December 15, 2008.

After the effective date of Class Action Fairness Act (CAFA), second amended class complaint was filed against original corporate defendant's successor corporation in Arkansas state court. Defendants removed the actions based on CAFA. Plaintiffs filed motion to remand.

The Plaintiffs argue that CAFA, the sole ground upon which the Defendants base removal, does not apply. Citing CAFA, the Plaintiffs assert that it applies only to civil actions commenced on or after CAFA's enactment on February 18, 2005. They note that when they filed their Second Amended Class Action Complaint, they did not add a class representative to an already existing class action nor did they name a defendant they failed to previously serve. Accordingly, they contend that, in filing their Second Amended Class Action Complaint, they did not commence a new action.

The Defendants argue that federal courts have jurisdiction because CAFA applies. They contend that CAFA applies because the Second Amended Class Action Complaint commenced a new action against the Defendants after the effective date of CAFA, which allows "removal of an action originally filed before CAFA's effective date." They argue that the Second Amended Class Action Complaint commenced a new action for two reasons: first, because it named two new plaintiffs; and second, because it named a defendant that had not previously been served. *Id.* at 1-2.

The District Court held that adding plaintiffs to a class action in an amended class action complaint filed after CAFA's effective date, did not commence a new action for CAFA purposes, but rather, related back to the original complaint. The Court also held that adding successor corporation to a class action in an amended class action complaint did not commence a new action against successor for CAFA purposes where successor was not served with the second amended class action complaint. The Plaintiff's motion to remand was granted.
Mutual Real Estate Holdings, LLC, v. Houston Casualty Co., Civil No. 10-cv-236-LM., 2010 WL 3608043 (D.N.H. Sept. 13, 2010)

The plaintiffs, Desrosiers, dissatisfied homeowners, brought a law suit in Rockingham Superior Court against the defendants, the seller of the home, Joseph Owen, the real estate agent, Laurie Norton, and Ms. Norton's employer, RE/MAX.

RE/MAX and Ms. Norton filed a declaratory judgment action in Merrimack County Superior Court against the defendants, Houston and Lexington, seeking a declaration of coverage for the Homeowner Lawsuit. Houston removed the Declaratory Judgment Action to this court, and RE/MAX filed the instant motion to remand.

RE/MAX argues that remand is warranted because the amount in controversy in the Declaratory Judgment Action does not meet the jurisdictional minimum ($75,000) for federal court. The party seeking to invoke federal jurisdiction, such as a removal defendant, bears the burden of proving that the amount in controversy meets the jurisdictional minimum. The burden of proof is by a "reasonable probability." And according to the First Circuit, the phrase "reasonable probability" is "for all practical purposes identical to the preponderance standard.

The Court held that it does not focus on the probable success of underlying claim but rather on whether anyone familiar with the applicable law could objectively view the claim as worth the jurisdictional minimum. The court answered affirmatively that the Desrosiers' claims are worth the jurisdictional minimum and hence denied RE/MAX's motion to remand.

Preemption

Arcadian Health Plan, Inc., v. Mila Korfman, No. 1:10-CV-322-GZS., 2010 WL 5173624 (D.Me. Dec. 14, 2010)

The plaintiff, Arcadian Health Plan, Inc., holds a Maine health maintenance organization license issued by Mila Korfman. It provides health insurance plans under the federal Medicare Advantage (MA) program. The Centers for Medicare and Medicaid Services, an agency within the federal Department of Health and Human Services, administers the MA program and regulates the practices employed and the materials used in the marketing of MA plans. In June 2010, the Bureau's staff filed a petition for enforcement with the defendant superintendent of insurance, seeking the imposition of disciplinary sanctions on the plaintiff based on allegations that the materials and practices used by two of the plaintiff's agents to market its MA plans violate certain provisions of the Maine Insurance Code.

The plaintiff seeks a preliminary injunction against the defendant, contending that the administrative proceeding against it pending before the Bureau is preempted by federal law. The defendants seek dismissal of the action. Defendant's objection to the plaintiff's motion for a Preliminary Injunction and cross-motion to dismiss the complaint are based upon interpreting the doctrine of preemption; that is, the plaintiff contends that the state statutory and regulatory authority pursuant to which the defendants are investigating it are preempted by federal statute, and the defendants contend that they are not.

The Court concluded that, as to the first and "most important" of the four elements of entitlement to preliminary injunctive relief, the plaintiff has shown a likelihood of success on the merits.

The First Circuit recognized an exception to abstention where preemption is facially conclusive. The Court concluded in this case that no further factual inquiry is necessary and the claim of federal preemption is not merely substantial, but is conclusive, on the face of the statutes involved.

The defendants proposed that the opportunity to raise a federal constitutional due process challenge before a state administrative board mitigates a claim of irreparable harm. The Court found that the irreparable harm factor slightly favored the plaintiff.

The harm to the plaintiff if the state adjudicatory process proceeds, possibly followed by a state court review, includes unrecoverable costs and potential damage to its reputation, while the harm to the defendants from the delay imposed by a federal injunction, even if the defendants ultimately prevail, is minimal. This factor favors the plaintiff.

The defendants assert that the public has a strong interest in the enforcement of Maine's insurance laws, particularly those intended to protect consumers from deceptive marketing practices. The public also has a strong interest in ensuring that state laws and regulations preempted by federal law are not enforced, particularly at the expense of those regulated by the federal law in question. Where Congress has expressly preempted the state law at issue, Congress has already determined that it is the preempting federal law that serves the public interest.

Based on this analysis, the Court granted the Bureau's motion to dismiss, denied the superintendent's motion to dismiss, and granted the plaintiff's motion for preliminary injunction.

Canadian National Railway Co., v. Montreal, Maine & Atlantic Railway, Inc., No. CV-10-452-B-W., 2010 WL 4502001 (D.Me. Nov. 16, 2010.)

Canadian National, a Canadian corporation owns and operates a transcontinental railroad system in Canada and the United States. MMA, a Delaware corporation owns and operates a railroad system in Maine, New Hampshire, Vermont, New Brunswick, and Quebec. Twin Rivers owns and operates a paper mill in Madawaska, Maine and has been a customer of both Canadian National and MMA. In October, 2010, Canadian National filed a complaint against MMA, alleging that MMA is breaching a recorded easement over its tracks that allowed Canadian National to serve Twin Rivers. Case was removed based on federal subject matter jurisdiction. Plaintiffs moved to remand.

Canadian National argued that its claim is a matter of state law, since it depends upon the proper interpretation of the language of an easement. MMA explains that the Interstate Commerce Commission Termination Act (ICCTA) and Surface Transportation Board (STB)'s reach is so vast that ratification of the easement required STB oversight and had no force or effect-for purposes of allowing Canadian National to exercise any rights-until it was authorized by the STB.

The Court addressed two specific issues: first, whether the easement, and incorporated Junction Settlement Agreement (JSA) fall within the scope of the ICCTA such that Canadian

National's state claims are completely preempted; and, second, whether the ICCTA provides a cause of action-either in the STB or federal court-by which Canadian National could seek relief for breach of the JSA.

Considering the subject matter covered by the Trackage Rights Agreement (TRA) and the explicit statement of preemption in the statute, the Court concluded that the Defendant has sustained its burden to demonstrate complete preemption. Given the ICCTA's clear envelopment of the TRA, the Court further concluded that § 11704(c)(1) provided the requisite cause of action, and that jurisdiction is properly in federal court

The Court held that state law breach of recorded easement claim was completely pre-empted by ICCTA, and District Court had concurrent jurisdiction over action with STB. Hence the Court dismissed the motion.

In re Light Cigarettes Marketing Sales Practices Litigation, MDL No. 1-09-MD-2068, 2010 WL 3699985 (D.Me. Sept. 16, 2010)

Six Plaintiffs assert state consumer fraud and unjust enrichment claims, alleging that Philip Morris USA, Inc. (PM) misrepresented to consumers that light cigarettes were less harmful than regular cigarettes. To support their claims, the Plaintiffs testified that they started smoking light cigarettes in reliance on PM's alleged misrepresentations. The Plaintiffs also testified that they now know the health risks associated with smoking light cigarettes. Despite their actual knowledge of the health risks of light cigarettes, each Plaintiff admitted that he or she continued to smoke light cigarettes up to the date of their depositions. The Plaintiffs admit that they are currently addicted to nicotine.

PM makes a three-part argument for why as a matter of law the Plaintiffs' continued purchases of light cigarettes preclude their claims. First, PM asserts that because causation is an element of the Plaintiffs' state causes of action, they must show they relied on PM's misrepresentations. Second, PM describes how courts recognize that a plaintiff cannot establish the required causal link between the alleged misrepresentation or concealment and their injuries where they continued to purchase the product even after learning the truth. Third, PM concludes that these principles preclude the Plaintiffs' claims because deposition testimony establishes that all six Plaintiffs continued to choose to purchase and smoke light cigarettes after filing their lawsuits and after learning the truth about light cigarettes.

The Court concluded that whether the Plaintiffs' continued purchases of light cigarettes will undermine their ability at trial to prove reliance on PM's alleged misrepresentations is a question of fact. Since there existed a genuine issue of material fact, it precluded summary judgment.

Poulin v. Thomas Agency, 708 F. Supp. 2d 87 (D.Me. 2010)

Poulin contacted John Hills to provide an estimate for construction work on his home. Hills provided a verbal estimate for his services. Thereafter, Plaintiff decided to retain the services of a different contractor. Plaintiff never entered into a written contract with Hills. Later, Hills retained Defendant The Thomas Agency (“TA”) to collect funds from Plaintiff for breach

of contract. TA without performing any investigation sent Plaintiff a letter notifying him that he had thirty days to dispute the validity of the charges levied by Hills or TA would report the account to Plaintiff's credit reporting agencies. Plaintiff disputed the validity of the account. Despite receiving notice from Plaintiff, TA reported the account to Plaintiff's three major credit reporting agencies. Plaintiff's credit score was hurt by the negative notations. In August 2009, Plaintiff was denied Maine Education Services student loans due to the charge off reported by TA. Plaintiff brought claims against TA under the Fair Debt Collection Practices Act (Count I), the Maine Fair Debt Collection Practices Act (Count II), the Maine Unfair Credit Reporting Act (Count IV), and state law tort claims of interference with a prospective economic advantage (Count V) and invasion of privacy (Count VI). Plaintiff brings a single claim against Hills for violating the Maine Unfair Trade Practices Act (Count III).

Since sections 1322 and 1323 of Maine Fair Credit Reporting Act do not provide a private right of action for the violations alleged in Plaintiff's Complaint, the Court dismissed Count IV of Plaintiff's Complaint for failure to state a claim upon which relief can be granted. The Court held that Plaintiff's claim for interference with an economic advantage is preempted by the FCRA and hence dismissed Count V of Plaintiff's Complaint.

Since the Court has original jurisdiction over Count I, it found that the loose factual connection between the claims (Count I and Count III) is sufficient to allow the Court to exercise supplemental jurisdiction over Count III. Further, the Court found that convenience and judicial economy weighed in favor of having these counts litigated in the same court. The Court, hence denied Hills Motion to Dismiss.

Phillips v. Medtronic, Inc., No. 10-10305-NMG, 2010 WL 4939997 (D. Mass. Dec. 1, 2010)

Plaintiffs filed this product liability action against Medtronic, Inc., a Minnesota manufacturer of intrathecal pain pumps and The Brigham and Women's Hospital, a Massachusetts corporation, in state court alleging negligence, breach of express and implied warranties, and unfair and deceptive practices in violation of the Massachusetts Consumer Protection Act. Plaintiff had a Medtronic pump inserted at The Brigham and later developed complications due to the formation of granulomas. Medtronic informed clinicians worldwide of an increase in reported cases of the granulomas associated with its implantable pumps. The FDA later classified the letter as a Class I Recall. Plaintiff did not learn of the recall until a year later.

Defendants removed the case to federal court theorizing that the hospital was fraudulently included to defeat diversity and that the Medical Device Amendments (MDA) of the Federal Food, Drug and Cosmetic Act (FDCA) preempted the state claim. Plaintiffs moved to remand, arguing that the hospital was included because it may have a duty to warn patients of defects in medical devices or drugs. As support, the plaintiffs cited cases in which Massachusetts courts held that a pharmacy and a pharmacist had a duty to warn customers about side effects or known risks to a particular customer. *See Cottram v. CVS Pharmacy*, 436 Mass. 316 (2002); *Brienze v. Casserly*, No. 01-1655-C, 2003 WL 23018810 (Mass. Super. Ct. Dec. 19, 2003). The court found that upon considering the pharmacy cases and the fact that there was no definitive Massachusetts case law on the question, it was likely that the Massachusetts Supreme Judicial Court (SJC) would follow the few state courts holding that a hospital can be viewed as a seller or distributor of medical devices for the purposes of a product liability claim.

On the preemption claim under the MDA and FDCA, the court commented that the MDA does contain an express preemption clause forbidding any state from establishing or enforcing any requirement relating to the safety or effectiveness of a device. The FDCA also specifies that it does not provide for a private right of action, which could preempt the plaintiffs' claims. Since the plaintiffs' complaint only raises state law claims, complete preemption must exist to support removal. The court found that complete preemption did not exist where the plaintiffs' claims do not arise under federal law and the FDCA did not provide a private right of action to redress the same kind of injury alleged in the plaintiffs' state law claims. The plaintiffs' motion to remand was allowed due to the lack of diversity and federal question jurisdiction.

Tobacco

In re Light Cigarettes Marketing Sales Practices Litigation, No. 1:09-md-02068-JAW 2010 WL 4901785 (D.Me. Nov. 24, 2010)

The Plaintiffs have brought a putative class action on behalf of purchasers of light cigarettes manufactured by Philip Morris USA, Inc. and Altria Group, Inc. stemming from alleged misrepresentations as to health risks of "light" cigarettes. In the initial motion, the Plaintiffs seek certification for classes of smokers in the states of California, Illinois, and Maine as well as the District of Columbia. The Court held that numerosity requirement for certification, commonality requirement, typicality requirement, adequachy of representation requirement were satisfied but predominance requirement and superiority requirement were not satisfied. The Court thus concluded that common issues do not predominate and denied class certification for all four classes. The motion is denied.

In re Light Cigarettes Marketing Sales Practices Litigation, MDL Docket No. 1-09-MD-2068, 2010 WL 2977324 (D.Me. July 26, 2010)

This is a multi-district litigation where Philip Morris USA Inc. (PM) moved for judgment on the pleadings against the Plaintiffs' unjust enrichment claims on the ground that unjust enrichment sounds in equity and the Plaintiffs have adequate remedies at law. With regard to the Plaintiff's Mississippi claim, PM argued that it is entitled to judgment because the state of Mississippi does not recognize a stand-alone cause of action for unjust enrichment. The Court held that plaintiffs were allowed to assert multiple and duplicative legal and equitable claims, and money damages were not plaintiffs' exclusive remedy under states' consumer protection statutes. The Court denied PM's primary motion because it is premature and its Mississippi motion because it is wrong.

Evans v. Lorillard Tobacco Co., No. 04-2840A, 2007 WL 796175 (Mass. Sup. Ct. Feb. 7, 2007).

Updating this prior reported case, plaintiff, the estate executor, brought suit against Lorillard alleging that the company caused the death of his mother by marketing its cigarettes to teenagers, and negligently denying and distributing misinformation about the health risks of smoking. The complaint contained numerous claims including fraud and misrepresentation, voluntary undertaking of duty, breach of warranty, public nuisance, battery, negligence, wrongful death, and violations of Mass. Gen. Laws ch. 93A, § 9. The court denied defendants'

motions to dismiss for failure to state a claim, voluntary undertaking of a duty, breach of warranty, public nuisance, battery, and wrongful death. The court granted the motions to dismiss on the fraud and misrepresentation, consumer fraud, and negligence claims.

This year, in the first of two jury verdicts, Lorillard was ordered to pay $71 million in compensatory damages to the Evans estate and her son, William Evans, on December 14. The estate received $50 million while Mr. Evans received $21 million. On December 16, the jury decided to sanction Lorillard for its then marketing practice of distributing free cigarettes to urban teenagers by ordering it to pay $81 million in punitive damages to the estate.. The compensatory damages award is believed to be the largest award ever against a tobacco company in a wrongful death suit in the United States and is combined with one of the largest individual punitive damages awards in the nation.

Sarro v. Philip Morris USA, Inc., No. 08-10224-MLW, 2010 WL 1930442 (D. Mass. May 12, 2010)

Originally filed in Essex Superior Court, this case for wrongful death and property damage was removed to federal court by Philip Morris. Plaintiff administratrix claims that the defective design and manufacture of Philip Morris' Marlboro cigarettes caused the fire that killed Plaintiff's decedent and significantly damaged the building in which she died. Plaintiff filed a motion to reconsider this court's order dismissing counts III through VIII of the amended complaint alleging negligence, breach of implied warranty, and strict liability and to certify a question to the Supreme Judicial Court (SJC) of the Commonwealth of Massachusetts. Basically, the counts allege that Philip Morris is liable because its product design is unreasonably dangerous where an alternative cigarette design exists that reduces the likelihood of continued burning when cigarettes are left unattended.

Plaintiff argued that the SJC's holding in *Donovan v. Philip Morris USA, Inc.*, 455 Mass. 215 (2009) established an intervening change in the law regarding tort litigation. The court held that *Donovan* was inapplicable to the case at bar because *Donovan's* analysis involves the application of negligence principles to toxic torts while the *Sarro* case involves a product liability action containing allegations that Marlboro cigarettes burn for an excessive length of time. Additionally, the court found there was no justification in certifying a state law question to the SJC on whether plaintiff's complaint states viable claims on damages caused by fire as a result of using defendant's product. The court held that plaintiff's question had already been resolved through an abundance of case law with Massachusetts courts refusing to impose liability on manufacturers or sellers for "injuries resulting from common everyday products whose obvious dangers are known." The court found denying certification appropriate because the reason for certification is to determine what the state law is, not to give a party the opportunity to persuade the court to say something else.

Donovan v. Philip Morris USA, Inc., 268 F.R.D. 1 (D. Mass. 2010)

Smokers with no lung cancer symptoms brought this proposed class action lawsuit to require the defendant tobacco company, which allegedly designed, marketed, and sold cigarettes delivering excessive and dangerous levels of carcinogens, to pay medical monitoring expenses for all smokers in the class. The proposed class members are Massachusetts residents, age fifty

or older, who have smoked Marlboro cigarettes for at least twenty pack-years. The court addressed the class action issues after receiving guidance on three novel product liability issues presented by the complaint from the Massachusetts Supreme Judicial Court (SJC): (1) the unusual remedy sought of a supervised medical monitoring program, (2) the question of the plaintiffs' standing to bring the claims, and (3) the timing of the plaintiffs' claims and the related issue of claim preclusion. *See Donovan v. Philip Morris USA, Inc.*, 455 Mass. 215 (2009). The court granted plaintiffs' motion for class certification under both Rule 23(b)(2) and Rule 23(b)(3), but only as to the implied warranty and Mass. Gen. Laws ch. 93A claims.

Philip Morris argued that suits against tobacco companies are unsuitable for class treatment. To decide the issue in the context of the case at bar, the court first discussed the Rule 23 standard of ascertainability and then addressed the plaintiffs' claims "through the prism" of Rule 23(b). Qualifying for certification under 23(b)(2) involves a three-step inquiry actually set out in the Rule: that (1) the defendant has "acted . . . on grounds that apply generally to the class" (2) "so that final injunctive relief . . . is appropriate" (3) "respecting the class as a whole." Under 23(b)(3), (1) "questions of law or fact common to class members predominate over any questions affecting only individual member;" and (2) class treatment "is superior to other available methods for fairly and efficiently adjudicating the controversy." After determining that the case met all of the requirements presented by the Rule allowing certification under both 23(b)(2) and (3), the court discussed some of the things that made this case unique. "First, the SJC has singled out cigarettes as the only product whose nature absolutely forecloses reasonable use, making Massachusetts products liability law on cigarettes unlike that of any other product... and sharply curtailed the applicability of the unreasonable use defense." Lung cancer is different from other types of cancer because of its extremely high mortality rate and the lack of any form of acceptable screening until now. Because of the alleged bureaucracy of the health care industry, plaintiffs allege money damages will not satisfy their harm. Instead, plaintiffs assert that given the newness of the Low Dose Computed Tomography testing they seek, "only a court-supervised comprehensive monitoring program will provide them with relief." Plaintiffs still face a significant impediment in proving liability, but the court granted their motion to do so as a class.

Products Liability

Construction Services Workers' Compensation Group Self Insurance Trust v. Dennis Stevens, Docket No. Pen-09-236, 2010 WL 4263629 (Me. Oct. 26, 2010)

Dennis Stevens and Gilbert & Greif, P.A., appealed from a judgment of the Superior Court determining that the Construction Services Workers' Compensation Group Self Insurance Trust (the Trust) was entitled to a workers' compensation lien and that the Trust was not liable for its proportionate share of costs and attorney fees for suspended future workers' compensation payments until those benefits accrued. On appeal, Dennis raised several issues, primarily arguing that the Superior Court erred by failing to reduce the amount of the lien by the Trust's share of attorney fees and costs associated with the present value of the suspended future workers' compensation payments. The Court held that claimant's attorney was not qualified to render expert opinion, good cause did not exist for failure of parties to obtain decision on merits from Workers' Compensation Board, warranting vacatur of judgment, and joinder of claimant's wife was required. The Court vacated the judgment and remanded for further proceedings.

Tort Reform

R.I. Gen. Laws § 10-7-7.1

The Rhode Island Legislature passed an act, overriding the Governor's veto, allowing for recovery of punitive damages in a wrongful death lawsuit, effective January 5, 2010. The act states as follows: "In an action commenced under § 10-7-5, recovery may be had for punitive damages if such damages would have been recoverable had the decedent survived."

The Legislature passed this act despite the Governor's concerns that the "bill does not specify the level of culpability or limit what would be required when punitive damages would be imposed," and that "without any limitation or culpability requirement, increasing potential liability for wrongful death suits may serve to deter economic development in Rhode Island." Letter from Governor Carcieri to the Speaker of the House of Representatives regarding House Bill No.5738 SUB A, Nov. 9, 2009, *available at* http://www.governor.ri.gov/vetoes/.

Drug Litigation

Koch v. I-Flow Corp., 715 F. Supp. 2d 297 (D.R.I. 2010)

Plaintiff sued several pharmaceutical companies in connection with medical treatment she received after three arthroscopic shoulder surgeries, which entailed implanting a pump designed to bathe her shoulder joint with a local anesthetic. Plaintiff alleged that the treatment, which has not been approved by the FDA, resulted in serious permanent injury to her shoulder cartilage. Plaintiff sued I-Flow Corporation, the manufacturer of the pain-pump, and Hospira, Inc., APP Pharmeceuticals, Inc. and related entities, which are various manufacturers of bupivacaine, the generic name for the anesthetic. Plaintiffs alleged negligence and negligence per se, strict products liability, breach of express warranty, breach of implied warranties, fraudulent misrepresentation, fraudulent concealment, negligent misrepresentation, and fraud and deceit. The bupivacaine manufacturing defendants filed motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

Bupivacaine is marketed under the brand name "Marcaine" by only one manufacturer, but plaintiff asserted that Marcaine is frequently used generically by medical professionals for all brands of bupivacaine. According to the court, this was significant because plaintiff had not yet been able to conclusively identify the brand of bupivacaine that she received in her pain-pump. Defendants' argued that plaintiff's failure to identify the specific manufacturer that produced the bupivacaine used in her treatment was fatal to her claims. The court determined that product liability law requires product identification, but failure to do so is not fatal at the initial pleading stage. Plaintiff ultimately must identify which defendant manufactured the bupivacaine used in her treatment, but at this stage, plaintiff made out facially plausible claims against each defendant, and therefore the court dismissed defendants' motion to dismiss the counts for negligence and negligence per se, strict products liability, breach of express warranty, and breach of implied warranties.

Defendants also moved to dismiss plaintiff's claims for fraudulent misrepresentation, fraudulent concealment, and fraud and deceit because the allegations failed to meet the heightened pleading requirements of Fed. R. Civ. P. 9(b) that states, "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." The court determined that because plaintiff's allegations failed to set forth specific facts concerning defendants' alleged misrepresentations, they were insufficient to satisfy the requirements of Rule 9(b), and therefore dismissed these counts without prejudice. The court also dismissed plaintiff's count for negligent misrepresentation because it was unable to determine precisely what plaintiff was alleging.

In re Kugel Mesh Hernia Patch Products Liability Litigation

The United States Judicial Panel on Multidistrict Litigation transferred to the U.S. District Court for the District of Rhode Island the multidistrict litigation involving claims regarding the allegedly defective hernia repair patches designed and manufactured by defendants Davol, Inc., Bard Devices, Inc., and C.R. Bard, Inc. *In re Kugel Mesh Hernia Patch Products Liability Litigation*, MDL No. 1842, No. 07-MD-1842-ML (D.R.I.). The U.S. District Court for the District of Rhode Island is currently handling many procedural matters related to this litigation, some of which are detailed further below.

On August 23, 2010, a Rhode Island federal jury awarded $1.5 million to plaintiffs in the Kugel mesh hernia patch litigation. The jury awarded plaintiff $1.3 million in compensatory damages for severe abdominal injuries caused by broken hernia patch rings, and $200,000 to his wife for loss of consortium. Chief Judge Mary M. Lisi did not allow punitive damages. The jury found that Davol, a Rhode Island division of C.R. Bard, Inc., negligently designed the Composix Kugel Mesh hernia patch and failed to adequately warn about its risks, causing plaintiff's injuries. The Composix Kugel Hernia Patch, used to cover hernias, is an oval piece of surgical mesh held in place by a plastic "memory" ring and attached with sutures or tacks to keep it in place and prevent internal organs from squeezing through the hernia opening. Plaintiffs alleged that the hernia patch was defective because one of the two rings used to keep the shape of the patch broke, which caused the patch to fold and adhere to abdominal tissue. Plaintiffs' attorney, Donald A. Migliori, anticipates that the award will serve as a benchmark for about 20 percent of the 3,000 similar cases pending in Rhode Island federal and state courts.

Christina Pazzanese & Nora Tooher, *Federal jury in Rhode Island awards $1.5M in latest hernia patch lawsuit*, Rhode Island Lawyers Weekly, September 2, 2010, 2010 WLNR 17975501; Tom Moylan, *Plaintiff Awarded $1.5 Million in Second Bellwether Trial In Kugel Hernia Patch MDL*, LexisNexis Litigation Resource Community, August 23, 2010, www.lexisnexis.com.

Barrett v. Davol, Inc., C.A. No. 10-3426ML, 2010 WL 4156441 (D.R.I. Oct. 21, 2010)

Plaintiff received a Kugel Patch during emergency hernia repair surgery. She filed a complaint asserting claims of strict liability, negligence, and willful and wanton conduct. Defendants Davol and the Board of Trustees of the University of Illinois filed motions to dismiss. The Board of Trustees moved to dismiss on the ground that the Illinois Court of Claims has exclusive jurisdiction over all tort claims against the State of Illinois. Davol asserted that

plaintiff's claims were barred by the Illinois two-year statute of limitations for personal injury claims.

Plaintiff objected to the Board of Trustees' motion to dismiss on the grounds that the jurisdiction of the Court of Claims is limited to tort claims "when damages do not exceed $100,000." The Illinois Lawsuit Immunity Act states that the State of Illinois shall not be made a defendant or party in any court except in the Court of Claims. The court determined that the language of the Illinois Court of Claims Act does not indicate a distinction between claims for more or less than $100,000 in order to determine applicable jurisdiction and does not exempt tort cases from the exclusive jurisdiction of the Court of Claims based on the size of a damage award. The court held that plaintiff's "contention that her expected damage award exceeds the statutory cap of $100,000 does not deprive the Court of Claims of its exclusive jurisdiction over [plaintiff's] personal injury claim against the Board of Trustees" and granted the Board of Trustees' motion to dismiss.

In support of its motion to dismiss, Davol claimed that plaintiff learned of her injuries on or before November 27, 2006, but did not file her complaint until April 15, 2010, more than 16 months after the Illinois two-year limitations period expired. Plaintiff argued that she "did not discover nor could have reasonably discovered the cause of her injury until after she completely healed." The allegations in plaintiff's complaint indicated that she knew by November 27, 2006 that she had suffered an injury and was aware that her injury may have been the result of negligence, and therefore the court held that plaintiff's claims against Davol were barred by the Illinois statute of limitations.

Torrey v. Davol, Inc., Nos. 07-MD-1842-ML, 10-CV-3077-ML, 2010 WL 3666770 (D.R.I. Sept. 13, 2010)

Plaintiff filed a motion to amend the complaint to add a medical malpractice claim against her surgeon, Dr. Edward Eyring, who implanted a Large Coraposix Kugel Patch hernia mesh designed and manufactured by Davol. Plaintiffs claimed that they did not include Dr. Eyring in the original complaint because he was under the protection of bankruptcy proceedings and plaintiffs had not yet complied with certain administrative requirements of Utah's Medical Malpractice Act. Adding Dr. Eyring to the complaint would defeat diversity jurisdiction and plaintiffs anticipated that the case would be transferred back to Utah, where the suit was originally filed before being transferred to the United States Judicial Panel on Multidistrict Litigation.

The court determined that plaintiffs failed to submit evidence that they complied with the statutory requirements necessary to bring a medical malpractice suit against Dr. Eyring. Under the plain language of the Utah Health Care Malpractice Act, the statutory pre-litigation hearing proceedings are "compulsory as a condition precedent to commencing litigation." The court held that without any evidence that plaintiffs complied with the UHCMA's mandatory administrative requirements, plaintiffs could not add Dr. Eyring as a defendant.

In re Kugel Mesh Hernia Repair Patch Litig., MDL No. 07-1842ML, 2010 WL 1253566 (D.R.I. Mar. 24, 2010)

Plaintiffs filed two motions to compel discovery from defendants, which the defendants argued were untimely. Plaintiffs filed the requests for production of documents and responses to interrogatories at, or on the eve of, the discovery deadline. The court determined that filing these requests two days prior to the discovery deadline violated Chief Judge Lisi's Order requiring the *completion* of all discovery by the deadline. The court also discussed that plaintiff's counsel had adequate time to make the requests earlier and that plaintiff had not offered any compelling reason why the discovery was not completed earlier.

In re Kugel Mesh Hernia Repair Patch Litig., MDL No. 07-1842ML, 2010 WL 678092 (D.R.I. Feb. 24, 2010)

The court granted plaintiffs' motion to strike the errata sheets to the deposition testimony of Michael J. Lee and Karen P. Kane, management-level employees of defendants Bard and Davol. The court determined that the initial, timely errata sheets did not include reasons for the proffered changes, and determined that reading Rule 30(e) strictly, the errata sheets were deficient and should be stricken. The court "decline[d] defendants' invitation to read a 'no prejudice' exception into Rule 30(e) and to engage in subjective analysis of whether or not to hold a party to the plain requirements of the Rule."

Class Action Lawsuit Filed Against Three Rhode Island Medical Practices that Implanted Unapproved Intrauterine Devices in Hundreds of Women

On June 30, 2010, three plaintiffs filed a class action lawsuit against OB-GYN Associates, Bayside OG-BYN, and the Center for Obstetrics & Gynecology in Rhode Island Superior Court, alleging that they implanted unapproved birth-control devices in hundreds of women. The medical practices admitted to the Rhode Island Department of Health that they bought intrauterine devices from a foreign source, which were not approved by the FDA. Defendants claim that the unapproved IUDs were made by the same American company as the approved ones and had been licensed for the Canadian market. The lawsuit alleged that the plaintiffs were "placed in harm's way," sufferance inconvenience, embarrassment, and emotional distress. Plaintiffs also alleged battery on the grounds that an unapproved device was implanted in their bodies without their permission.

The Rhode Island Department of Health's investigation into the use of unapproved IUDs led to an FDA investigation and warning to doctors against purchasing IUDs not approved by the FDA. Most of the Rhode Island practices were using unapproved Mirena and another practice was using unapproved Mirena and ParaGard. The FDA issued a consumer warning and "Dear Colleague" letter to alert patients and physicians about the purchase, use, and distribution of unapproved intrauterine devices.

Felice J. Freyer, *Lawsuit is filed over unapproved IUDs*, Providence Journal, July 2, 2010, www.projo.com; Michele G. Sullivan, *FDA and R.I. investigate unapproved IUD use*, Ob. Gyn. News, September 1, 2010, 2010 WLNR 19977684.

Other

Sheehan v. N. Am. Mktg. Corp., 610 F.3d 144 (1st Cir. 2010)

Plaintiff appealed the district court's decision granting summary judgment to defendants seller, The North American Marketing Corp., and manufacturer, Delair Group, LLC, in a product liability action arising out of a swimming pool accident. Plaintiff broke her neck attempting to dive into a shallow, above-ground pool, rendering her quadriplegic. Plaintiff had been drinking prior to the accident. She sued the pool seller and manufacturer, alleging negligence, strict liability, breach of express warranty, and breach of implied warranty. The district court dismissed plaintiff's negligence and strict liability claims, holding that as a matter of law plaintiff assumed the risk of her injury when she decided to dive into the above-ground pool. On the breach of implied warranty claim, the court determined that plaintiff could not establish that the allegedly defective design of the pool was the proximate cause of her injury.

The First Circuit affirmed. The court discussed the five factors plaintiffs must prove in a products liability action under Rhode Island law: "(1) that there was a defect in the design or construction of the product; (2) that the defect existed at the time the product left the hands of the defendant; (3) that the defect rendered the product unreasonably dangerous; (4) that the product was being used in a way in which it was intended at the time of the accident; and (5) that the defect was the proximate cause of the accident and the plaintiff's injuries." The court determined that the proximate causation issue was very close, especially when considered with the "tempting invitation" theory. Rather than deciding this issue, the court determined that plaintiff's claim should be resolved on the grounds of assumption of the risk. The court held that plaintiff assumed the risk of diving into shallow water, and "protestations of ignorance from an adult are not deemed believable." According to the court, plaintiff's best argument was that she may have assumed the risk of diving, but never assumed the risk of falling from the allegedly defective coping, an aluminum piece covering the top perimeter of the pool. The court, however, determined that plaintiff "stood on the coping in order to dive, and the injury that occurred was the same one contemplated by the multiple warnings – including on the coping itself. . . . Under these circumstances, as a matter of law, [plaintiff] assumed the risk of diving, including the risk that she might fall from the coping into the pool while attempting to dive."

Rhode Island v. Lead Indus. Ass'n, C.A. No. PB 99-5226 (R.I. Super. Ct. May 25, 2010)

This case stems from the lead paint litigation in which a jury found that the cumulative presence of lead in paints and coatings on buildings throughout Rhode Island constituted a public nuisance for which the defendants were liable. *See State v. Lead Indus. Ass'n*, C.A. No. PC 99-5226, 2007 WL 711824 (R.I. Super. Ct. Feb. 26, 2007). The Rhode Island Supreme Court reversed the jury verdict and vacated the judgment. *See State v. Lead Indus. Ass'n*, 951 A.2d 428, 435 (R.I. 2008). After this reversal, the defendants seek an award of costs associated with the litigation.

Defendants claimed that they were entitled to costs under Rule 54(d) and R.I. Gen. Laws 1956 § 9-22-5. The court discussed that although there is a presumption in favor of awarding costs to the prevailing party, the court has ultimate discretion. The court held that each party should bear its own costs, noting that the State's claim was neither frivolous nor made in bad

faith. Additionally, the court considered that issuing costs under the circumstances would have an "unwarranted punitive effect" and that "the State, faced with a major public health concern, commenced litigation in good faith, and the awarding of costs could have a chilling effect on future suits by the public raising public health or environmental concerns." Finally, the court considered the substantial benefit the litigation provided to both parties as well as the public. The litigation brought significant attention to the harms of lead poisoning. The court considered the litigation "of significant future benefit to the prevailing defendants" because Maine, Ohio, Vermont, and 13 other states filed an amicus brief in support of the State during the defendants' appeal. According to the court, the Rhode Island litigation likely prevented several other states from filing similar lawsuits.

Sharp v. AFC-Holcroft, C.A. No. PC 08-6456 (R.I. Super. Ct. Sept. 16, 2010)

Defendant Kentile Floors, Inc. moved for summary judgment based on Rhode Island's immunity from Liability for Constructors of Improvements to Real Property. R.I. Gen. Laws 1956 § 9-1-29. The court held that as a matter of law § 9-1-29 does not provide immunity to defendant, a manufacturer of a product containing a hazardous substance. Plaintiffs alleged that the Kentile tiles contained asbestos, and as a result of plaintiff Alan Sharpe's exposure to the tiles, as well as exposure to other defendants' products, he developed "asbestos-related mesothelioma and/or other asbestos related pathologies."

The court considered the issue of whether Kentile was shielded by § 9-1-29, a statute of repose providing statutory "immunity of liability" for "constructors of improvements to real property." The court presumed that the asbestos-containing tiles were "deficient" under the statute, then turned to the issue of whether Kentile was protected as the manufacturer of tiles used in the real property improvements. The court discussed that Kentile did not play an affirmative role in selecting, fashioning, or installing the tiles and was "simply the brand of tiles that GE or their agents chose for their new floorings." According to the court, this contribution was not enough to fall under the protection of the statute as "materialmen who furnished materials for the construction of the improvement" or as a judicially-recognized "manufacturer." Therefore, the court held that because "Kentile is not a 'material man' who was directly involved in the installation of the tiles, nor was Kentile a judicially-recognized 'manufacturer' deserving of protection because there could have been some third party negligence related to the later maintenance of the tiles . . . Kentile falls outside the gambit of § 9-1-29 immunity as articulated by our Legislature and our Supreme Court." Because defendant was not immune under § 9-1-29, the Court did not need to decide the issues of whether the inclusion of asbestos is a "deficiency" pursuant to § 9-1-29 and whether breach of warranty contract claims are barred by § 9-1-29.

U.S. District Court Judge Ronald R. Lagueux Approves Station Nightclub Fire Settlement

On May 18, 2010, Judge Ronald R. Lagueux signed order approving a $176 million settlement for the victims of the Station nightclub fire that occurred on February 20, 2003. Sixty-five defendants were involved in the settlement. Major defendant contributors were WPRI-TV, $30 million; Home Depot/Polar Industries, $5 million; Sealed Air Corp., $25 million; JBL Manufacturing, $815,000; Town of Warwick, $10 million; State of Rhode Island, $10 million; Anheuser-Busch, $5 million; McLaughlin & Morin, $16 million; and the band "Great White," $1 million.

Approximately 550 people will receive settlement checks, including 205 primary plaintiffs and over 200 of their relatives. Settlements range from less than $3,000 to almost $3.5 million, depending on the severity of injury. The victims' attorneys, who expended over $1.2 million on the litigation, will receive almost $59 million.

Wayne Wickham, *MSCAd Featured Case: The Station Nightclub Fire*, Advisen, August 27, 2010; Tracy Breton, *Payment day arrives in RI Station nightclub fire settlement*, Providence Journal, May 19, 2010, www.projo.com.

Martin v. Mead Johnson Nutrition Co., No. 09-11609, 2010 WL 3928707 (D. Mass. Sep. 30, 2010)

Plaintiff filed a class action lawsuit alleging that Mead Johnson engaged in unlawful and deceptive advertising of its Enfamil LIPIL product. Defendant filed motions to strike and dismiss. Upon reviewing the report and recommendation of the magistrate judge, the court allowed the defendant's motion to dismiss the claims against Mead Johnson for lack of personal jurisdiction, for unjust enrichment, and for untrue and misleading advertising in violation of Mass. Gen. Laws ch. 266. The court denied defendant's motion to dismiss the Mass. Gen. Laws ch. 93A claim finding that the cases relied upon by the magistrate judge were distinguishable from the facts in the present case.

In the key cased relied upon by the magistrate judge, *Rule v. Fort Dodge Animal Health, Inc.*, 607 F.3d 250 (1st Cir. 2010), the First Circuit held that overpayment for a product that had undisclosed health or safety risks was not economically injurious unless the product had either physically injured the plaintiff or the plaintiff was still using the product and was exposed to the undisclosed risk. The plaintiff in the *Rule* case did not pay more for the product because of a special feature, instead she purchased and used the product on her dog, only to learn later that there was a safety or health risk, which could have harmed her dog but did not. In the case at bar, however, the plaintiff suffered an economic injury as required under ch. 93A because she made a conscious decision to pay more for the Mead Johnson product based on its specially advertised feature. The Massachusetts Supreme Judicial Court earlier held that overpayment was a recoverable injury under ch. 93A if the advertisement proved to be false in *Aspinall v. Philip Morris Cos., Inc.*, 442 Mass. 381 (2004), and *Aspinall* has not been overruled by *Rule.*

Pashamova v. New Balance Athletic Shoe, Inc., No. 1:11-cv-10001 (D. Mass. 2011)

A new class action lawsuit filed on January 3, 2011 against New Balance claims that the sneaker manufacturer falsely represented the toning benefits of its toning sneakers. The lawsuit also contains counts of breach of express warranty and unjust enrichment, and seeks damages in excess of $5 million dollars for a California consumer and others similarly situated. New Balance is one of several major sneaker companies facing class action lawsuits involving the toning sneakers. Toning sneakers are the fastest growing area of the footwear industry with sales expected to reach roughly $1.5 billion last year. Two other such lawsuits were filed against Reebok in November 2010: *Altieri v Reebok Int'l Ltd.*, No. 1:10-cv-11977 (D. Mass. 2010) (alleging untrue and misleading advertising) and *Schwartz v. Reebok Int'l Ltd.*, No. 1:10-cv-12018 (D. Mass. 2010) (alleging unfair and deceptive marketing and advertising).

Jenn Abelson, *New Balance Sued Over Toning-shoe Ads,* Boston Globe, Jan.5, 2011, available at 2011 WLNR 189979; Donna Goodison, *Lawyers: Tone It Down*, Boston Herald, Jan. 5, 2011, available at 2011 WLNR 255548.

SECOND CIRCUIT

Tort Reform

New York:

Proposed Senate Bill S1888 – The bill proposed a requirement for physicians to report any toy-related injury to the State Consumer Protection Board within 72 hours of treatment of the injury. This would effectively create a database of all toy related injuries.

Proposed Assembly Bill A625 – The bill proposes that in tort cases where one or more defendant(s) has settled with the plaintiff, that remaining defendant(s) must elect, prior to trial, whether to reduce liability by the amount of the settlement or by the amount of the equitable share of damages delegated to the settler in the verdict.

Proposed Assembly Bill A64 – The bill proposes that manufactures of Dressers, Bookcases, and/or other Similar Furniture Designed to Store, Display, Or Otherwise Place Items, which is 42 inches or More In Height; and/or Televisions 19 inches or more in length and televisions; and/or television stands; and any other product that the Consumer Protect Board deems appropriate for this section, must include a Tipping Warning with such product.

Proposed Assembly Bill A82 – The bill proposes that manufacturers of cigarettes and other tobacco products which are sold or distributed in New York State must disclose to the New York State Department of Health the additives and product design characteristics used in the manufacture of these products and to identify those substances and characteristics which have been determined to be toxic. The bill includes civil penalty provisions for violation of the law.

Proposed Assembly Bill A288 – The bill proposes to prohibit the sale of flavored tobacco products in New York State. The bills carries a provision that a violation by any person other than manufacturer will carry a of $100 for each individual package sold or offered for sale and a civil penalty of up to $50,000 for violations within a thirty day period for manufacturers.

Proposed Assembly Bill A668 – The bill proposes to ban the sale or distribution of sphygmomanometers, relays, sensors, thermometers, thermostats, except for mercury thermostats used by a blind or visually impaired person, if proven that a non-mercury alternative is cost-effective and available. The bill has a provision where the manufacturer can apply for a waiver.

Proposed Assembly Bill A894 – The bill proposes the labeling of retail products or packages containing a radio frequency identification tag to be labeled as such. The bill has a provision for injunctive relief and civil penalties.

Proposed Assembly Bill A1033/Proposed Senate Bill S1168 - The bill proposes to enact the "radio frequency identification right to know act", which requires among other things that retail mercantile establishments to disclose the use of RFID devices and gathered personal information; and prohibits the same of merchandise that is not properly labeled as containing a radio frequency identification tag. The bill has provision for injunctive relief and civil penalties.

Proposed Assembly Bill A1023 – The bill proposes to enacts a food allergen information toll-free number act and would require certain manufacturers, packers or distributors whose sales to consumers in New York State equal or exceed $500,000.00 to label their products with a toll-free telephone number that provides information to the consumer regarding the product's ingredients. The bill would also require manufacturers, packers, or distributors whose sales are less than $500,000.00 to label their products with an e-mail or mailing address.

Proposed Assembly Bill A1158 – The bill proposes that the sale of any novelty consumer product (such as toys and jewelry) that contains Cadmium in an amount equal to or in excess of .0075 per cent by weight be prohibited. It also requires that the manufacturers that produce or sell such products notify the retailers about the ban and how to properly dispose of the remaining inventory.

Proposed Assembly Bill A1396/Proposed Senate Bill S1481 – The bill proposes to prohibit the manufacture or sale of any product termed as a dietary supplement or nutritional supplement without branding or labeling the product with a statement that the product has or has not been tested by the United States Food and Drug Administration.

Proposed Assembly Bill A1775 – The bill proposes to require that written notification be given to patients where a pharmacist is substituting a generic version of a drug product by one manufacturer for a generic version of a drug product by another manufacturer.

Proposed Assembly Bill A2111/Proposed Senate Bill S785 – The bill proposes to establishes an affirmative defense for causes of actions related to violation of a patent, trademark or other intellectual property right on the grounds that a party possessed or used seeds or plants that contained genetically engineered or genetically modified organisms without entering into an agreement or paying fees to the manufacturer or licensed distributor of such products.

Proposed Assembly Bill A2215 – The bill proposes to require pleadings in actions arising from the conduct of a business that is required to be licensed by the state to set forth in the pleadings that the business was licensed at the time the cause of action arose.

Proposed Senate Bill S1834 – The bill proposes to prohibit the sale or distribution of any product containing a synthetic cannabinoid. The bill provides for civil penalties and creates a defense based on an over-the-counter drug's approval by the Federal Food and Drug Administration or lack of knowledge that the product contained a synthetic cannabinoid.

Propose Senate Bill S01349 – The bill proposes to make consumer electronics warranties meaningful to the extent that the duration of coverage on all parts are coterminous and that warrantors must prove negligence on the part of the consumer before denying coverage.

Connecticut:

Proposed Assembly Raised Bill 5538 – The bill proposed to amend both section 52-572m and section 52-572n of the general statutes to make commercial loss recoverable in a products liability suite between commercial parties.

Drug Litigation

Giordano v. Market America, Inc., 2010 Slip Op. 8323 (November 18, 2010) (dissenting op. at p. 18)

Plaintiff had brought a products liability suit against the manufacturer and distributor of a dietary supplement that he alleged caused him to suffer a series of strokes. The supplement allegedly contained Ephedra. At the time of his strokes, neither plaintiff nor his doctors knew that Ephedra was the cause. Plaintiff claimed that he learned about the link between strokes and Ephedra in February 2003. He filed suit on July 28, 2003, which was 4 years and 4 months after his strokes. The case was removed to federal court and consolidated with other pending Ephedra cases.

Defendants moved to dismiss based on the statute of limitations. Defendants relied on CPLR 214-c which imposes a three year statute of limitations. Plaintiff argued that the exception to the rule, specifically, CPLR 214-c(4) which allows the time limitation to by computed from the date of discovery or the date when the injury should have been discovered. The case went all the way to the United States Court of Appeals for the Second Circuit. The Second Circuit sent the case back down to the District Court to make a decision on an issue they did not reach. Following the District Court's ruling on that issue, the Second Circuit certified three questions to the Court of Appeals about CPLR 214-c.

Specifically, the three questions were: "1)whether CPLR 214-c(4) was limited to actions for injuries caused by the latent effects of exposure to a substance; 2) Whether an injury that occurred within 24 to 48 hours of exposure was considered 'latent' for these purposes; and 3) what standards were to be applied for CPLR 214-c(4) purposes." The Court of Appeals answered the first and second questions in the affirmative. With regards to the third question they held that "technical, scientific or medical knowledge and information" sufficient to ascertain the cause of plaintiff's injury is deemed discovered, identified or determined when "the existence of the causal relationship is generally accepted within the relevant technical, scientific or medical community."

Deutsch v. Novartis, 723 F. Supp. 2d 521 (E.D.N.Y. 2010)

In addition to their request for compensatory damages resulting to alleged injury from taking the drugs Aredia and Zometa, plaintiffs sought punitive damage for the alleged corporate misconduct of Defendant. The plaintiffs argued that New York Law should apply to the punitive damages since the lawsuits had strong ties to New York, the strongest being that both plaintiffs were residents of New York. Defendants argued that New Jersey law should apply to this issue because their corporate headquarters were located in New Jersey. Plaintiff's presented the testimony from an executive doctor employed by Defendants who testified that he ran the

oncology department of Novartis from Switzerland. The Court disregarded this testimony as not establishing the "broad" proposition that all of the corporate decisions were made in Switzerland. The Court also disregarded the fact that Novartis is incorporated in Delaware. The Court held that New Jersey law should apply because Novartis Corporate headquarters were located in New Jersey and that is where the corporate decisions at issue were made.

In Re: Zyprexa Products Liability Litigation; Carpentier v. Eli Lilly & Comp., 2010 U.S. Dist. LEXIS 73928 (E.D.N.Y. 2010)

This case was one of approximately 30,000 brought against defendants concerning the drug Zyprexa. In this action, plaintiff commenced a negligence action against defendant based on an alleged failure to warn of the dangers of the antipsychotic drug produced by the manufacturer. Plaintiff initially was diagnosed with diabetes. Defendant moved for Summary Judgment arguing that plaintiff's claim was time barred. Because the plaintiff's injury occurred in 2002, the prior version of Or. Rev. Stat. § 30.905 applied and mandated that date of injury run from the doctor diagnosed the condition in the plaintiff. The Court would not apply the subsequent discovery rule which would have made plaintiff's claim timely. Plaintiff argued that she contracted a second illness, pancreatitis, in either late 2005 or early 2006, which she also contributed to her Zyprexa use. The Court rejected this argument holding that "the fact that the injury later manifested as a new illness does not re-start the running of the statute of limitations."

Sorrentino v. Barr Laboratories, Inc., 2010 U.S. Dist. LEXIS 49870 (N.D.N.Y. 2010)

Plaintiff filed a suit alleging that a drug manufactured by defendant contributed or cause the death of his mother. Specifically, the son alleged that while under the influence of this drug, his father stabbed his mother killing her. Defendant moved to dismiss the case as time barred. The Court stated that even though at the time of his mothers death plaintiff son was an infant, his grandmother was appointed representative of his mothers estate and could have commenced this action during plaintiff's son's infancy. Accordingly, the Court held that the limitations period started to accrue on the date of his mother's death and expired well before plaintiff son brought suit.

In Re: Zyprexa Products Liability Litigation; Mulligan Law Firm v. Zyprexa MDL Plaintiffs' Steering Committee II, 594 F.3d 113 (2nd Cir. 2010)

Plaintiff law firm represented more than two thousand plaintiffs in this multi-district litigation. Plaintiff asserted that 61 of the cases that they represent plaintiffs in should be remanded back to the state court in which they originated in for lack of jurisdiction. While the remand motions were pending, the District Court instituted several attorney compensation protocols. These protocols included a cap on attorney's fees and the creation of a common benefit fund to compensation the steering committee. In a series of Orders, the MDL Court ruled that all of plaintiff Mulligan's cases were subject to these attorney compensation structures. Further, the MDL Court enjoined plaintiff Mulligan from making any disbursements from a fund that it maintained from settlements until an administrator had certified that the protocols had been complied with. Mulligan appealed these Orders arguing 1) lack of jurisdiction to place cap on these cases and 2) abuse of discretion.

The United States Court of Appeals Second Circuit held the appeals were interlocutory and thus, the Second Circuit lack jurisdiction over them pursuant to 28 U.S.C.S. §1292(a)(1). The Second Circuit determined that the injunction at issue did not give or aid in giving substantive relief in the lawsuits and thus was interlocutory. The Court noted that the fact that the injunction prevented distribution of settlement funds did not render the issues substantive. Further, the Court held that Mandamus was not warranted under 28 U.S.C.S. § 1651(a) because there was no basis for plaintiff's claims of abuse of discretion.

Tobacco

Caronia v. Philip Morris USA, Inc., 2010 U.S. Dist. LEXIS 12168 (E.D.N.Y. 2010)

Plaintiffs filed suit against cigarette manufacturer alleging defective design, negligent design and testing, and a breach of an implied warranty. The plaintiff's made a motion seeing class certification, or certification of an issues class, and a court-supervised medical monitoring program to provide Low Dose CT (LDCT) scans for the early detection of lung cancer to class members. All of the proposed class members consisted of smokers or former smokers who had not developed lung cancer. Defendants made a motion for Summary Judgment.

The Court granted Defendant's motion for Summary Judgment with regards to the strict liability and negligence claims as they knew or should have known as of 1996 that cigarettes caused an increased risk of cancer. The Court held that the last exposure rule did not apply in toxic tort cases and thus was inapplicable. The Court denied defendant's motion as to the breach of warranty of fitness for intended purposes claims based on an issue of fact. Further, the Court ordered further briefing on whether or not the smokers' awareness of the risks of cigarette smoking vitiated any implied warranty of merchantability. Additionally, the Court ordered further briefing as to whether or not New York recognized a claim for medical monitoring.

Fabiano v. Philip Morris Inc., 29 Misc. 3d 395 (Sup. Ct. NY Ctny 2010)

Plaintiffs were a husband and daughter of decedent who alleged negligent design and defective design against defendant manufacturer related to the cigarettes that they manufactured and decedent smoked. Plaintiffs argued that labeling their cigarettes as "light" caused smokers to think that they were a less dangerous alternative, when in fact they are not. Defendant moved for Summary Judgment which was initially denied. Defendant then made a motion to renew based on the Court of Appeals decision in *Adamo v Brown & Williamson Tobacco Corp.* 11 NY3d 545 (2008) which established the legal standard for defective design cigarette cases. Based on the *Adamo* decision, the Court granted the manufacturers motion and held that they met their burden to establish that there were no alternatives to the regular and light cigarettes they sold, as smokers would be unwilling to purchase the proposed alternatives. The Court further held that plaintiffs failed to show "a feasible, consumer-acceptable, alternative design to regular or light cigarettes."

Automobiles

George v. Ford Motor Co., 2010 U.S. App. LEXIS 6166 (2d Cir. N.Y. 2010)

In this case plaintiffs alleged defects in an automobile manufactured by defendant, Ford, and caused an accident in which they were injured and their family members were killed. Defendants moved to preclude admission of evidence of other incidents of allegedly "similar" sudden accelerations, which plaintiffs apparently sought to offer in several types of evidence. The court held,

> Deciding the admissibility of similar act evidence presents particularly acute problems for a trial court. The principal issue in this case will apparently be whether the sudden acceleration of the car causing the accident was the result of any defect in the vehicle manufactured by defendant or of plaintiffs' error. To determine whether another accident on some other occasion was truly similar would, under the best of circumstances, call for compounding the trial of this incident with what would be essentially parallel trials of the factors that did or did not lead to the acceleration of cars in other circumstances. Even if substantial similarity of circumstances could be established, it is questionable whether the probative value of a claim that some other accident was caused by a product defect could outweigh the confusion and waste of time caused by testimony about other episodes that are likely to be at least as controversial as the present case. Weighing the admissibility of such evidence would require detailed information about the extent to which the circumstances of the purported other accidents were or were not similar, and a careful assessment of the probative value of each episode.

The trial court granted Defendant's motion to exclude evidence of alleged similar incidents of sudden acceleration with respect to the testimony of other drivers or witnesses relating to such incidents. On appeal, plaintiffs argued that the district court erred in excluding evidence of "other incidents" in which Ford vehicles allegedly experienced acceleration or deceleration problems. Plaintiffs also argued on appeal that the district court improperly granted a directed verdict on plaintiffs' negligence, failure to warn, and punitive damages claims. The Court of Appeals found the plaintiffs argument without merit and the judgment of the district court was affirmed.

Class Action Fairness Act (CAFA)

Pelman v McDonald's Corp., No. 02-cv-07821, 2010 U.S. Dist. LEXIS 114247 (S.D.N.Y. Oct. 27, 2010)

Plaintiffs motion for class certification was denied. In this case, Plaintiffs failed to certify a class in a proposed class action against McDonald's in which they alleged exposure to and injury from "deceptive marketing scheme" from McDonalds. Plaintiffs, NY state consumers, alleged that McDonald's mislead customers to believing that they can eat fast food daily without any potential health consequences. Plaintiffs claimed that the effect of defendant's marketing – from 1985 until the filing of this case in 2002 – was to mislead consumers into falsely believing

that defendant's food products can be consumed on a daily basis without incurring any adverse health effects and as a result of this marketing scheme, class members suffered injury. Moreover, plaintiffs contended that defendant attempted to mislead the public "with misleading nutritional claims, in widespread advertising campaigns, promotions, brochures, press releases, 'consumer-oriented' statements, in various media and print outlets, that its certain foods were healthy, nutritious, of a beneficial nutritional nature, and/or were easily part of anyone's healthy daily diet, each and/or all claims being in contradiction to medically and nutritionally established acceptable guidelines." As a result, plaintiffs claimed they suffered injury, both financially and physically (i.e., obesity, elevated levels of cholesterol, increased factors in development of coronary heart disease, pediatric diabetes, high blood pressure, etc.)

Plaintiffs moved for class certification pursuant to FRCP 23(b)(3). The court found that plaintiffs failed to satisfy the element for certification and analyzes the class certification with consideration of the predominance requirement of Rule 23(b)(3). The court concluded that "establishment of the causation and injury elements of Plaintiffs' claims will necessitate extensive individualized inquiries; the court finds that the questions of law and fact which would be common to putative class members would not predominate over questions affecting only individual members." Id. For this reason, the court determined that class certification under Rule 23(b)(3) was not appropriate.

The court found plaintiffs had failed to establish a cause of action under GBL § 349, which they would need to show that the plaintiffs' injuries be "by reason of" defendant's conduct, the plaintiffs had be aware of the nutritional scheme they alleged to have been deceptive, and that the injuries that were suffered by each plaintiff by reason of defendant's alleged deceptive marketing." Id. However, allegations of "false beliefs and understandings" did not state a claim for actual injury under GBL § 349. Neither did allegations of pecuniary loss for the purchase of defendant's products. In view of that, the only injuries for which class members could claim damages under GBL § 349 were those related to the development of certain medical conditions; and the causal connection, if any, for those kinds of injuries depended heavily on a range of factors unique to each individual.

The court agreed with Defendants in their argument that "whether or not plaintiffs' claims - that they ate McDonald's food because they believed it to be healthier than it was in fact –was in fact true for any particular person was an inquiry which also required individualized proof. Further, a person's choice to eat at McDonald's and what foods (and how much) he eats may depend on taste, past experience, habit, convenience, location, peer choices, other non-nutritional advertising, and cost, etc. *Id.* at * 41 Plaintiffs also argued for issue classes, asserting 1) existence; 2) consumer-orientation; and 3) materially misleading nature of the marketing scheme alleged by plaintiffs were each questions which could be settled upon a showing of objective evidence and legal argument. The court held, that because there were factual questions regarding the nutritional composition of food products consumed by each of the plaintiffs and as well as the physical activity of each plaintiff. In addition, the plaintiffs had not met the elements of the issue classes and also what the court considered was predominate and an essential element of Plaintiffs' cause of action. Accordingly, the court found the case was not appropriate for adjudication on a class-wide basis, and denied certification.

Greenwich Fin. Servs. Distressed Mortg. Fund 3 LLC v. Countrywide Fin. Corp., 603 F.3d 23 (2d. Cir. 2010)

Plaintiffs, Greenwich Financial Services Distressed Mortgage Fund 3 LLC and QED LLC, holders of mortgage backed securities certificates issued by a variety of trusts brought a putative class action against defendants-appellants, Countrywide Financial Corporation, and Home Loans in state court, alleging violations of TILA (Truth in Lending Act). Defendants removed the class action to federal court and argued that removal was proper under the Class Action Fairness Act of 2005 (CAFA), and further argued that the class action was removable "because plaintiffs' claims raise substantial, disputed federal questions under the Truth-in-Lending Act [(TILA)]," *Id.*, at 1. Plaintiffs moved to remand the class action to state court, and the district court granted plaintiffs motion to remand, and the district court held that neither CAFA nor TILA provided subject-matter jurisdiction over the dispute. Defendants-appellants appealed and the U.S. Court of Appeals for the Second Circuit concluded that the Court lacked jurisdiction to hear the appeal. This case involved an important statutory exception to federal jurisdiction under CAFA**.** The Second Circuit defined the scope of the exceptions to CAFA jurisdiction and CAFA appellate jurisdiction set out in 28 U.S.C. §§ 1332(d)(9)(C) and 1453(d)(3) for suits that relate to the rights, duties, and obligations relating to or created by or pursuant to any security. The court held, that even though the language in the statute would seem to exempt any claim that "relates to any security," the exception under 28 U.S.C.S. 1332(d)(9)(c) of the Class Action Fairness Act of 2005 (CAFA) could not have been intended to cover <u>all securities claims</u>, no matter their nature.

> Such an understanding of the provision would render superfluous the phrase "rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to," which plainly was intended to limit the scope of the exception. Additionally, it would render superfluous § 1332(d)(9)(A), which exempts from CAFA jurisdiction any class action that solely involves a claim concerning a security covered under the Securities Act of 1933.

The Appellate Court had to decide whether a provision of the Class Action Fairness Act barred appellate review of orders remanding securities class actions to state court. The district court first reviewed whether removal jurisdiction existed under CAFA. Plaintiffs argued that even though the requirements for removal had been met, this particular class action fell within an exception to the removal. The exception was that a class action that "solely involves a claim…that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security." *Id.* (quoting 28 U.S.C. § 1332(d)(9)(C)). Relying on the Second Circuit decision in *Estate of Barbara Pew v. Cardarelli*, 527 F.3d 25 (2d Cir. 2008), the district court held that the class action fell squarely within the scope of the exception to CAFA removal jurisdiction, and rejected Countrywide's arguments to the contrary. The district court rejected the argument that "federal law is a necessary element" of the plaintiffs' claims. The federal court noted that "[i]t is tempting to find federal jurisdiction every time a multi-billion dollar case with national implications arrives at the doorstep of a federal court," but that such jurisdiction did not here exist. *Id.*, at 21. As a result, the district court granted plaintiffs' motion to remand the class action to state court and the Second Circuit Court dismissed the Appeal from order remanding the class action to state court holding that CAFA exception precluded appellate review.

Preemption:

Schneider v. Word World, LLC, 2010 U.S. Dist. LEXIS 11085, 93 U.S.P.Q.2D (BNA) 1614 (S.D.N.Y. Feb. 9, 2010).

This breach of contract action involved the wrongful use and conversion of the plaintiff's intellectual property. The Court denied the plaintiff's remand motion on "complete preemption" grounds recognizing that a federal statutory scheme, the Copyright Act, entirely preempted the plaintiff's claims which were state law based. The Court recognized the "extraordinary" preemptive force of the Copyright Act's statutory scheme when holding that the plaintiff's complaint invoked rights covered by federal law that were sufficiently "substantial" to support the existence of subject matter jurisdiction. Notably, the Court found the claims concerning interference with the ownership of a patent and commercial use of a federally recognized trademark to be preempted because the plaintiff's right to relief may "necessarily depend" on resolution of a substantial question of federal law.

In re Bayer Corp. Combination Aspirin Prods. Mktg. & Sales Practices Litig., 701 F. Supp. 2d 356, 368 (E.D.N.Y. 2010).

This matter involved claims that Bayer Corp. ("Bayer") misrepresented the virtues of Bayer Women's Low Dose Aspirin + Calcium ("Bayer Calcium"), which combines low-dose aspirin with calcium, and Bayer Aspirin with Heart Advantage ("Heart Advantage"), which combines low-dose aspirin with phytosterols. Plaintiffs allege that Bayer marketed the combination products as if they had been approved by the Food and Drug Administration ("FDA"); as if they were appropriate for long-term use; and as if Bayer Calcium were a source of calcium and Heart Advantage provided cardiovascular benefits. Bayer sought dismissal of the Complaint arguing that the plaintiffs' claims about the defects of Heart Advantage and Bayer Calcium averred nothing more than a private violation of the Food, Drug, and Cosmetic Act ("FDCA"). The Court rejected Bayer's preemption argument that enforcement of the FDCA is the sole province of the Food and Drug Administration ("FDA") by recognizing that federal drug labeling regulations set only threshold requirements upon which the state laws can be erected to establish additional protections.

Minkoff v. Action Remediation, Inc., 29 Misc. 3d 1208A, 2010 NY Slip Op 51750U (N.Y. Sup. Ct., Nassau County 2010).

This matter involved claims that the defendant mold remediation company negligently mixed its disinfectant solution with a bleach solution that resulted in the formation of chemical and carcinogenic constituents and odors that permeated all porous surfaces and contaminated the plaintiffs' residence and its contents rendering it uninhabitable and in need of demolition. The defendant sought dismissal of the label defect claim arguing that such claims are preempted by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) of 1947. Relying upon FIFRA's "parallel reading" section regulating state preemption, the Court denied the defendant's dismissal motion because the defendant did not address whether plaintiffs' claims based on failure to warn were equivalent to FIFRA's requirements that a pesticide label not contain "false or misleading" statements, or inadequate instructions or warnings.

Gelber v. Stryker Corp., 2010 U.S. Dist. LEXIS 97692 (S.D.N.Y. Sept. 14, 2010).

This matter involved claims arising from the failed implantation of an artificial hip prosthesis known as the Trident hip replacement system. Upon the Court's analysis of the Medical Device Amendments of 1976 ("MDA") and recognizing the absence of Supreme Court guidance on whether the MDA preempts state requirements of general applicability that only incidentally regulate medical devices, the Court determined that the same preemption analysis applicable to general requirements that directly regulate medical devices would be applied. That is, only those state law claims that are parallel to federal requirements are permissible. In dismissing the claims, the Court pointed to the absence of factual allegations of device-specific violations of federal law or allegations concerning how those violations have a cognizable link to the claimed injuries.

Goodspeed Airport, LLC v. E. Haddam Inland Wetlands & Watercourses Comm'n, 681 F. Supp. 2d 182 (D. Conn. 2010).

In this matter, the airport owner/operator sought a declaration that two state law environmental laws were preempted by federal aviation law on the issue of the state statutes controlling whether the airport owner/operator was obligated to obtain a permit before removing certain trees located at the airport. The preemption claim argued that the trees, situated in a state law protected wetlands area, constituted "obstructions to air navigation" under Federal Aviation Administration (FAA) regulations, making them potential hazards to aeronautical safety that the airport owner/operator is obligated to remediate. The Court concluded that federal regulation of airport safety does not preempt state and local environmental laws on the particular facts presented. A significant factor in the Court's decision was the submission of a letter from the FAA which asserted that while "[t]he FAA has a strong interest in monitoring terrain growth on airport property as it relates to air safety," the Federal Aviation Act "does not facially preempt generally applicable state environmental laws," including the particular state laws at issue. In its decision rejecting the field preemption argument presented, the Court recognized that the Second Circuit has strongly implied that Congress intended to occupy the entire field of air safety, but that fell short of rendering that finding explicitly. The Court also rejected the express preemption argument premised on the Airline Deregulation Act ("ADA"). The facts presented in support of the ADA argument (i.e., by regulating the removal of obstructions at the airport (trees), the state laws have a sufficient "connection" to and have a "significant and adverse impact" on the "rates, routes, or services" of air carriers premised on the body of law expanding "indirect" effect on rates, routes, or services) were deemed speculative.

Dickerson v. Cheap Auto Rental, LLC, 2010 Conn. Super. LEXIS 1233 (Conn. Super. Ct. May 18, 2010).

The matter at issue involved whether the Graves Amendment limiting the vicarious liability of the owner of motor vehicles leased or rented to individuals involved in accidents during the lease/rental period resulting in third-party litigation preempted certain "financial responsibility" state laws. The argument against preemption on the facts presented maintains that the lessor-owner cannot be held liable to the same extent as an owner but the lessor will be held liable for such damages up to the amount of a state minimum mandatory security

provisions. Thus it was argued the federal statute abrogated liability imposed only insofar as there may be liability imposed on a lessor beyond the state's minimum mandatory liability insurance provisions. The preemption proponents argued that the state statute at issue provides that lessors can avoid vicarious liability by having the leased vehicle insured in a certain amount. Moreover, it was argued that the statute did not compel liability insurance in any amount and therefore it contained no liability insurance requirements under state law such that the state statute did not fit the description of laws exempt from preemption. Recognizing that the privilege of registering and operating a motor vehicle under state law is a consideration apart from issues of liability for accidents involving those motor vehicles when operated by lessees, the Court ruled in favor of preemption.

Market Share Liability And Other Theories Of Liability Recovery:

City of New York v. ExxonMobil Corp. (In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.), 2010 U.S. Dist. LEXIS 92744 (S.D.N.Y. Sept. 7, 2010).

This consolidated multi-district litigation concerns a request for relief from contamination, or threatened contamination, of groundwater from various defendants' use of the gasoline additive methyl tertiary butyl ether ("MTBE") and/or tertiary butyl alcohol, which is a product formed by the natural degradation of MTBE in water. Notably, the Court "developed" the commingled product theory of liability which provides that when a plaintiff can prove that certain gaseous or liquid products (*e.g.*, gasoline, liquid propane, alcohol) of many refiners and manufacturers were present in a completely commingled or blended state at the time and place that the harm or risk of harm occurred, and the commingled product caused plaintiff's injury, each refiner or manufacturer is deemed to have caused the harm. The Court opined that like market share liability, damages are apportioned according to each defendant's share of the market at the time of injury, and thus, liability is several, rather than joint and several. Unlike market share liability, however, a plaintiff must prove by a preponderance of the evidence that the defendant contributed-in-fact to the injury by showing that each defendant's product was part of the commingled mass that injured the plaintiff. In this respect, commingled product liability is similar to concurrent wrongdoing liability for it requires the plaintiff to prove that each defendant's gasoline was part of the commingled product, but relieves the plaintiff of the duty to prove that each individual defendant's contribution to that product, taken by itself, was sufficient to have caused an injury.

Altman v. Motion Water Sports, Inc., 722 F. Supp. 2d 234 (D. Conn. 2010).

This matter involved claims that an allegedly defective water ski manufactured by defendant's successor was sold to plaintiff before defendant purchased the successor's assets. Defendant argued that it was not a "product seller" under state law, but the statute did not, however, require that a particular seller sell a particular product that injured a particular claimant, and only required that a seller have "engaged in the business" of selling "such products," which defendant had done. Multiple theories of recovery were addressed. The Court analyzed arguments pertaining to the common law mere continuation theory, which directs that successor liability attaches where the plaintiff demonstrates the existence of a single corporation after the transfer of assets, with an identity of stock, stockholders, and directors. The "continuity-of-enterprise theory" of the mere-continuation exception and the "product line" exception to the rule

against successor liability were also addressed. The former theory applies where the successor maintains the same business, with the same employees doing the same jobs, under the same supervisors, working conditions, and production processes, and produces the same products for the same customers. The latter theory imposes liability on a successor corporation for defects in products that a predecessor manufactured if the asset purchaser continues to manufacture the same product. As to the viability of the liability recovery theories, the Court dismissed the mere-continuation theory, but permitted discovery as to the continuity-of-enterprise theory of the mere-continuation exception and the "product line" exception.

Other:

Romano v Steelcase Inc., 2010 NY Slip Op 20388, 1 (N.Y. Sup. Ct. 2010).

This matter arises from an incident wherein the plaintiff alleges to have suffered personal injuries attributable to her use of furniture manufactured by the defendant. This case is significant for being the first case in the State of New York to rule as to the discoverability of current and historical Facebook and MySpace pages and accounts, including all deleted pages and related information from a personal injury plaintiff. The Court held that it is reasonable to infer from the limited postings on plaintiff's public Facebook and MySpace profile pages that her private pages may contain materials and information that are relevant to her claims or that may lead to the disclosure of admissible evidence. In the context of New York's liberal discovery policies, the Court ruled that the defendant is entitled to access such sites and to hold otherwise would condone plaintiff's attempt to hide relevant information behind self-regulated privacy settings.

Snyman v. W.A. Baum, 360 Fed. Appx. 251 (2nd Cir. 2010)

Plaintiff medical professional sued Defendants who manufactured the Baumanometer that allegedly spilled mercury onto the floor of his medical office in 1999. Plaintiff commenced suit in April of 2004 and alleged breach of warranty, strict products liability and negligence. He claimed that he suffered from multiple injuries all arising out of mercury poisoning. After discovery the defendants moved for Summary Judgment on several grounds. The Court granted Summary Judgment to defendants on their argument that plaintiff's breach of warrant claim was time barred and the negligence and strict products liability claims should be dismissed as they relate to his claimed mercury poisoning. In his opposition papers, plaintiff alleged for the first time that he suffered from an additional ailment, specifically, multiple chemical sensitivity ("MCS"). He claimed that this injury was not discoverable until after April 8, 2001.

In light of his new allegations of injury, the District Court issued an Order to Show Cause why plaintiff's MCS claim should not be dismissed pursuant to a *Daubert* analysis and under Federal Rule of Evidence 702. Plaintiff failed to respond to the Court's Order to Show Cause on time and the Court dismissed the MCS claim. Two weeks after the dismissal, plaintiff moved to vacate the decision pursuant to Federal Rule of Civil Procedure 60(b). The District Court denied the motion holding that an attorney's negligence is not grounds for relief under Rule 60(b). Plaintiff made a second motion under 60(b) arguing that the District Court's decision was an abuse of discretion.

In upholding the lower court's opinion, the Second Circuit noted that the Order to Show Cause had been sent to two different attorneys who at the time both represented plaintiff. The Second Circuit affirmed that when a party fails to act with due diligence, "he will be unable to demonstrate that his conduct constituted excusable neglect.

THIRD CIRCUIT

Tort Reform

Nothing of significance to report

Preemption

Lisa M. Banner v. Cyberonics, Inc., 2010 U.S. Dist. LEXIS 9393 (Feb. 4, 2010)

In this case the plaintiff, Lisa Banner, suffered from treatment resistant depression and turned to the VNS Therapy System, manufactured by Defendant, Cyberonics, Inc. The VNS system is a Class III medical device approved by the FDA. The system is similar to a pacemaker in that it sends mild stimulation to the left vagus nerve. The VNS system was implanted in Ms. Banner for approximately a year; during which time she alleges that it malfunctioned and caused her sever pain in her chest, shoulder, neck and behind her ear. Cyberonics tested the device after removal and found that it was functioning as designed. Here, Cyberonics moves for summary judgment as plaintiffs' claims are preempted by the Medical Device Amendments (MDA) of 1976. The Court granted Cyberonics motion reasoning that in order to be a Class III device it must undergo pre-market approval and after approval the manufactures are subject to on-going reporting requirements. The only way that plaintiffs' claims hold up is if they allege that the device was not made pursuant to the federally-approved manufacturing process for the device. Here, they only allege that the device it self was defective, not that Cyberonics made the device out of specification. Additionally, they produced no evidence that the Cyberonics product was in fact defective. As such, the court granted summary judgment as plaintiffs' claims were preempted.

Indian Brand Farms, Inc., et al v. Novartis Crop Protection Inc., 617 F.3d 207 (3d. 2010)

A group of New Jersey blueberry farmers appeals the orders of the District Court for the District of New Jersey granting Defendant's motion for summary judgment. The main issue on appeal was whether the plaintiffs' claims of negligent misrepresentation/fraud violation of the New Jersey Consumer Fraud Act ("NJCFA") and failure to warn claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). This Court found that because the plaintiffs' claims were based on alleged misrepresentations oin Novartis' marketing brochure, and that brochure does not qualify as "labeling" under FIFRA, the negligent misrepresentation/fraud and NJCFA claims are not preempted.

Plaintiffs had for years used Novartis' pesticide, Diazion 50 WP and Diazion AG 500. In 1997 they changed to AG 600. Novartis distributed the AG600 with twenty-page label in addition to advertising literature stating that it was safer and more effective than its predecessors.

The literature was a seventeen (17) page full-color brochure. The brochure contained no instruction for use. Plaintiffs allege that AG600 was defective because of an inert surfactant which caused crop damage.

This Court in reversing the District Courts ruling that the brochure constituted labeling, relied on the FIFRA definition of labelin. First, they satted that the AG600 marketing brochure was not "on or attached to" AG600. The brochure is not referenced on the AG 600 label, and there is no other writing which references its. The only questions was whether the marketing brochure was "accompanying" the AG600. The court state that AG600's marketing brochure cannot be read as providing a supplement to the AG600 label. The brochure's main function was to show the benefits of the new product, not to instruct as to the use of AG600. Therefore, plaintiffs' claims of negligent misrepresentation/fraud and violation of the NJCFA based on this marketing brochure are not preempted by FIFRA.

Dooner v. DiDonato, *et. al*., 971 A.2d 1187 (Pa. 2009; on remand 2010).

Securities trader *Dooner* brought state law claims for intentional torts and negligence against securities trader *DiDonato* and the Philadelphia Stock Exchange in the Court of Common Pleas of Philadelphia County. After a jury award for Plaintiff, Defendant Philadelphia Stock Exchange appealed. Pennsylvania Superior Court reversed the jury verdict, holding that Plaintiff's claims against the Exchange were preempted by the Securities and Exchange Act of 1934, 15 U.S.C.S. §78a et seq. Plaintiff/Appellant sought review by the Pennsylvania Supreme Court which reversed and remanded the decision of the Superior Court, effective January 19, 2010.

There is a presumption against preemption. In this case, there was no express preemption. Defendant/Appellee the Philadelphia Stock Exchange ("PSX") argued that Plaintiff/Appellant's state law claims of negligent supervision and premises liability were preempted by inferred conflict preemption on the basis that the claims impacted the organization and operation of the trading floor which was governed by the Securities and Exchange Act and served as an obstacle to the accomplishment of the purposes and objectives of Congress in passing the Act.

In support of his position, Plaintiff/Appellant alleged that his claims of negligent supervision and premises liability were not preempted by the Securities and Exchange Act because the claims had nothing to do with the underlying purpose of the statute which was the regulation of investment and securities. The Supreme Court agreed with the Plaintiff Appellant, finding that Congress' purpose behind enacting the Securities and Exchange Act was to "protect interstate commerce, the public, and investors by prohibiting the manipulation of stock prices and stock transactions, and to ensure the maintenance of fair and honest markets in such transactions." Further, the expansive savings clause of the Act specifically contemplated and preserved state law rights and remedies. The "assault of one trader by another is not the main focus of PSX' Disciplinary Rules." The court held that the Plaintiff/Appellant's state law claims were not preempted by impossibility, nor were they an obstacle to effecting the purposes of the Securities and Exchange Act or Defendant's rules governing trader conduct. To reach any other conclusion would deprive Plaintiff/Appellant of a mechanism for damage recovery.

Collins v. Smithkline Beecham Corp., 2008 Phila. Ct. Com. Pl. LEXIS 57 (Phila. 2008; summary judgment granted and claim dismissed, 2010).

Plaintiffs initiated a product liability claim for inadequate labeling of the drug Paxil. Plaintiffs alleged that the Defendant drug company failed to adequately warn the Decedent of the association between the ingestion of Paxil and suicide. The Philadelphia County Court of Common Pleas denied Defendant drug company's Motion for Summary Judgment and found no preemption because Defendant drug company failed to point to any provision of the statute to support its position.

Defendants contended that the Food and Drug Administration ("FDA") had exclusive control over product labels by statute and any state law claim based upon a different labeling requirement was preempted. The Court held disagreed and held that Plaintiffs' wrongful death claims were not preempted where federal law unquestionably placed the duty to warn upon the drug manufacturer, yet did not preempt the State's ability to allow one of its citizens to inquire into whether the manufacturer breached that duty.

The Court noted the rebuttable presumption against preemption. The Court found that 21 U.S.C. §35(d) of the FDCA controls the labeling of products like Paxil and prohibits false and misleading statements in product labeling as part of the requirements for approval. Plaintiffs' state law claim of failure to warn was not preempted by the FDCA or its supporting regulations, particularly where, as here, Plaintiffs would have no federal forum to litigate their claims or any other remedy to compensate them for the damages suffered. No federal statute or regulation existed to allow recovery for such claims. The Court relied upon legislative history of the Act for further support of its position to show that when Congress enacted the FDCA, it specifically chose not to provide a federal remedy under the Act, given the availability of a state common law right of action. This Court declined to provide Defendants immunity from liability for their tortious conduct. Defendant's Motion for Summary Judgment based upon federal preemption was denied.

Market Share or Other Theories of Liability

Mark Morneo v. American Home Products, Inc., et al., 2010 N.J. Super. Unpub. LEXIS 1537 (App. Div. 2010)

Plaintiffs, Mark Moreno and his mother Eileen Grabinski, filed suit against three different manufactures alleging that the oral polio vaccine (OPV) given to Mark on three occasions between 1968 and 1970 were defective because they failed to screen for the Simian Virus 40 (SV40) which caused Mark to develop a brain tumor and permanent disabilities. After extensive discovery, plaintiffs were unable to indentify the manufacturer of the alleged defective vaccine. Defendants filed separate motions for summary judgment and the trial court granted them. Plaintiffs then appealed on the basis that they should be able to proceed based on several theories of collective liability.

During discovery plaintiff was unable to remember when, where, or by whom the vaccine was administered. She did recall that one does was administered by squeezing liquid into Mark's mouth. Even though plaintiffs were unable to identify the manufacturer of the vaccine, they

allege that several theories of collective liability allow their claim to proceed. The court addresses each of the several theories of collective liability and dismisses each.

Specifically, they state that "concert of action" does not apply as plaintiffs have no evidence of joint cooperation by the defendants, a tacit understanding between them or conduct amounting to ratification of the acts of a wrongdoer. "Enterprise liability" does not apply here as the production of OPV was regulated by the government, not the manufacturers. "Alternative liability: which applies when there is evidence that more than one defendant was "negligent in respect of the plaintiff" and it is not possible to identify the one who caused the injury. Here, the court stated that there is no evidence that each defendant was negligent in respect of Mark. Proof of negligence by a defendant as to Mark requires some proof that OPV produced by the defendant was administered to Mark. The court next addressed "market share liability". The New Jersey Supreme Court has previously held that market share liability cannot be applied to relieve a plaintiff of the obligation of indemnifying the manufacturer of a childhood vaccine that causes damage. Further, the court held that the assessing collective liability on vaccines would have a regressive effect on the social policy of encouraging vaccine production and research. This Court ruled that the Supreme Court's opinion bars plaintiffs' reliance on this theory. As, the court addressed all theories of collective liability and dismissed them, the trial court's orders of summary judgment for the Defendants were affirmed.

Tobacco

Borough of Ellwood City v. Pennsylvania Labor Rel. Bd. 998 A.2d 589 (Pa. 2010).

Appellants the Pennsylvania Labor Relations Board ("PLRB") and a union challenged the Order of the Commonwealth Court which reversed PLRB's Order that Ellwood City Borough's ban on tobacco use was not subject to mandatory collective bargaining under the Pennsylvania Labor Relations Act 43 Pa. Stat. Ann. §§211.1-211.3 and the Collective Bargaining by Policemen and Firemen Act (Act 111), 43 Pa. Stat. Ann. §§217.1-217.10.

Prior to June, 2006, Ellwood City Borough permitted its police officers to smoke and use tobacco products in its buildings, vehicles and on its equipment. In August, 2006 the Borough council adopted an Ordinance which prohibited the use of all tobacco products on or in Borough-owned buildings, vehicles and equipment. Ellwood City Borough did not bargain with the union over the Ordinance before directing police officers to comply with it.

The Commonwealth Court held that the Clean Indoor Act of 1988, 35 Pa. Stat. Ann. §637.1 et. seq. preempted the Ordinance in that the enactment of the Ordinance was an exercise of the Borough's general police power. The Supreme Court disagreed and found that the ban on the use of tobacco products by members of the police force was a mandatory subject of bargaining and not inherent managerial prerogative. The Court held that Ellwood City Borough, as a municipal employer, was required to bargain with the union over the tobacco use ban.

The Supreme Court found that "employee tobacco use at his or her place of employment is germane to the employee's work environment; thus, it is properly described as a working condition." It is part of the environment in which tobacco users work and therefore, under the

Collective Bargaining by Policemen and Firemen Act, Act 111, an employer's restriction on employee tobacco use at work was subject to mandatory Collective Bargaining.

The Court specifically held that Act 111 of the Pennsylvania Labor Relations Act ("PLRA") does not interfere with Ellwood City Borough's authority to pass an Ordinance banning tobacco use in *public* places. However, an Ordinance which unilaterally bans all use of all tobacco in certain non-public areas like the police officer's non-public work areas, Borough vehicles and equipment impermissibly denies police officers their guaranteed Collective Bargaining rights to negotiate working conditions.

This was a matter of first impression in the Supreme Court. The Supreme Court's holding in this case was expressly limited to the use of smokeless tobacco in police officers' non-public work areas, Borough vehicles and equipment and smoking in vehicles not utilized for mass transit.

The Court acknowledges that no clear test has evolved for determining when an item is an "inherent managerial prerogative;" however, where a topic "straddles the boundary," if the topic is "rationally related to the terms and conditions of employment," the employer must inquire whether Collective Bargaining over the topic would unduly infringe upon the employer's essential managerial responsibilities. If not, the topic is subject to mandatory Collective Bargaining.

Ellwood City Borough could not, through enactment of an Ordinance, avoid its Collective Bargaining obligation. The police officers were entitled to bargain for the use of smokeless tobacco in non-public work areas. The Order of the Commonwealth Court was reversed, in part.

The Commonwealth of Pa v. Phillip Morris Inc., *et. al.,* 4 A3d 749 (Pa. Commw. 2010).

The Pennsylvania Commonwealth Court reversed the Order the Court of Common Pleas of Philadelphia County which found that Appellant tobacco company violated a master settlement agreement and was in contempt of court for violation of a consent decree. The Common Pleas Court awarded compensatory damages, counsel fees and costs of the Commonwealth. The tobacco company appealed.

Pennsylvania and other states entered into a Master Settlement Agreement ("MSA") and consent decree with the tobacco company which prohibited the company from using or causing to be used within Pennsylvania a cartoon in the advertising, promoting, packaging or labeling of tobacco products in order to recover medical expenses resulting from tobacco-related diseases and to eliminate the marketing of tobacco products to minors.

In this case, the Commonwealth alleged that R J Reynolds engaged in an advertising campaign known as the Camel Farm which promoted independent rock music and record labels in connection with Camel cigarettes. The campaign was included in Rolling Stone Magazine's 40th anniversary issue published on November 15, 2007. A Rolling Stone editorial accompanied the campaign. The Commonwealth argued that the campaign and editorial violated the Master Settlement Agreement and Consent Decree and sought to hold R J Reynolds liable under both.

The Commonwealth Court agreed with R J Reynolds that the campaign did not constitute a "cartoon" as that term was defined under the MSA. As to the Rolling Stone editorial, while the images contained within the editorial clearly met the definition of "cartoon" under the MSA, the Court found that R J Reynolds was not liable for the cartoons contained within the adjacent Rolling Stone editorial because it did not engage in any affirmative conduct to produce the editorial or pay for the editorial. The editorial was produced by a third party over whom Reynolds exercised no right or responsibility of control. Further, the imposition of counsel fees and sanctions is improper here where, as soon as Reynolds learned of the content of the editorial, it ceased its advertising campaign and shut down the website. Further, on prospective basis, Reynolds voluntarily added language to its advertising contracts which prohibited the placement of future ads near or adjacent to cartoons. The Court found a lack of evidence to justify the award of compensatory damages, civil contempt damages or sanctions. Further, the Court found no violation of either the MSA or the Consent Decree and reversed the Order of the trial court.

Automobiles

Tannenbaum v. Nationwide Ins. Co., 992 A.2d 859 (Pa. 2010).

This was a matter of first impression. The Superior Court affirmed the trial court's Order vacating an arbitration award in a UIM arbitration. The Supreme Court reversed the Superior Court's Order. Following an auto accident, Dr. Tannenbaum, Appellee received income-loss benefits under an employer group plan, as well as benefits under two personal disability policies. He subsequently recovered income-loss benefits under an underinsured motorist policy ("UIM"). The Supreme Court found that the benefits Dr. Tannenbaum received from his group plan and personal disability policies fell within the group/program/arrangement classification for purposes of 75 Pa. C.S. §1722 of the Motor Vehicle Financial Responsibility Law ("MVFRL") "Preclusion of Recovering Required Benefits". Dr. Tannenbaum argued that §1722 should be limited in scope to apply to health benefits only. The Supreme Court disagreed and determined that the income-loss benefits received by the insured through his group plan and two personal disability policies were subject to the specified statutory offset.

The legislative history of §1722 confirmed that the legislature intended to extend the statute's reach beyond health benefits to all benefits. The Court reasoned that to accept Dr. Tannenbaum's position would be to undermine the obvious broadening effect of the substantial modification reflected in the removal of restrictive term in the initial version of §1722. The legislative history of §1722 reflects the public policy and intent of the legislature to shift a substantial share of liability for injuries caused by uninsured and/or underinsured motorists away from automobile insurance carriers to collateral source providers with the intent to reduce motor vehicle insurance premiums.

Bernhardt v. Ford Motor Co., 2010 Del. Super. LEXIS 329 (Del. Super. Ct. 2010)

This case concerned a summary judgment motion regarding product identification issues relating to components containing asbestos in a ford automobile.

Ford, at one time, manufactured vehicles with components containing asbestos. These components -- brake linings, brake pads, and clutch facings -- required regular replacement and were replaced with parts not manufactured by Ford. Plaintiff Ernest L. Bernhardt regularly performed non-occupational automotive repairs with his father between 1947 and 1951. Bernhardt also replaced the brakes and clutch on a 1939 Mercury and may have conducted other repairs on a 1953 Ford Fairlane. Bernhardt brought suit claiming injury caused by asbestos exposure from these repairs. Ford moved for summary judgment and argued, in part, that Bernhardt could not specify the vehicles he worked on with his father nor could he identify the brake or clutch products removed or installed on either the Mercury or Fairlane. As a result, Ford argued that Bernhardt could not establish a product nexus sufficient to overcome summary judgment.

Bernhardt conceded that he could not identify whether the replaced brakes were original to the vehicles, but asserted liability based upon Ford's failure to warn consumers that replacement parts may contain asbestos. Bernhardt arguedthat liability may exist where a defendant fails to warn consumers about the foreseeable harm of a component product installed or manufactured by another. Bernhardt argued that because all automobile brake linings at the time period in question contained asbestos, Ford knew or should have known that any brake replacement would result in asbestos exposure.Ford countered that it was not liable for a failure to warn because Ford neither manufactured nor supplied after-market replacement parts. Ford argued that it had no control over how replacement parts were manufactured and did not authorize any such product. As a result, Ford argued that the asbestos-containing parts in question were component parts of Ford's final product and were not manufactured by Ford and here can be no duty to warn where replacement parts are manufactured by third parties.

The Court found that the manufacturer's duty to warn is dependent on whether it had knowledge of the hazards associated with its product. The duty to warn does not require that a manufacturer study and analyze the products of others and warn users of the risks associated with those products. The Court found that the duty to warn is based upon the characteristics of the manufacturer's own product. Because Ford did not manufacture asbestos-containing brakes or clutches, the Court did not hold Ford to an understanding of another manufacturer's asbestos-containing products. The Court found that foreseeability in this case was too attenuated, particularly when Bernhard failed to demonstrate a product nexus. The Court found that Wilkerson's use of the term "its products," referred to products manufactured by a defendant, not products supplied by the defendant.

Drug Litigation

Owens v. Wyeth f/k/a American Home Prod. Corp., 2010 Pa. Super. LEXIS 2095 (Pa. Super. 2010).

Patient Owens filed suit alleging that she developed primary pulmonary hypertension from ingesting Defendant manufacturer’s diet drug Pondimin. Plaintiff asserted claims of failure to warn, negligent marketing and negligent failure to withdraw Pondimin from the market against Defendant drug manufacturer. The Superior Court affirmed the judgment of the Philadelphia County Court of Common Pleas which granted summary judgment in favor of Appellee drug manufacturer and dismissed Plaintiff’s claims in their entirety.

On the failure to warn claim, Pennsylvania applies the "learned intermediary doctrine" which states that a manufacturer will be held liable only where it fails to exercise reasonable care to inform a physician of the facts which make a drug likely to be dangerous. The manufacturer discharges this duty where it informs the physician. There is no requirement that the manufacturer inform the patient. In the instant matter, based upon the deposition testimony of the prescribing physician, the Superior Court concurred with the trial court that there was no evidence that the prescribing physician was not aware of the potential dangers of the drug. To the contrary, the physician indicated awareness of the dangers of the drug and testified that, as to this particular Plaintiff, the benefits of such drug far outweighed the risks.

As to the negligent marketing claim, the Superior Court acknowledged that the claim is valid under Pennsylvania law, but also affirmed the trial court's grant of summary judgment on the claim because there was no averment in Plaintiff's Complaint that Defendant drug manufacturer marketed Pondimin in a manner that negated its warnings concerning the drug's risks or that the drug manufacturer over promoted the drug to such an extent that it nullified adequate warnings. The Superior Court agreed with the trial court that Plaintiff failed to state a claim upon which relief could be granted on a negligent warning claim.

Finally, the Superior Court affirmed the trial court's ruling with respect to the claim of negligent failure to withdraw a claim allegation. The Superior Court confirmed that no such cause of action exists under Pennsylvania law. The Order of the trial court granting summary judgment to Defendant drug manufacturer on all counts was affirmed in its entirety.

Hopkins v. Astrazeneca Pharms., LP, 2010 Del. Super. LEXIS 127 (Del. Super. Ct. Mar. 31, 2010)(Slights, J.)

This is another case in the Seroquel ® litigations. In this case reiterated that an expert may not rely upon temporal proximity alone as a basis to reach a specific causation opinion with respect to diabetes.

The defendants moved to exclude the testimony of Plaintiff's expert, Dr. Greene, on the basis that he did not perform a differential diagnosis sufficient to support his opinion for specific causation under the Daubert standard. Upon examination, Dr. Greene acknowledged that morbid obesity is a very significant risk factor for Type II diabetes. Indeed, when asked about the relative strength of risk factors for diabetes, Dr. Greene stated "family history is probably number 1 and obesity is probably number 2." Yet, notwithstanding her recognition that Ms. Hopkins was morbidly obese (chronically so), and that morbid obesity is among the greatest risk factors for Type II diabetes, Dr. Greene did nothing reliably to rule out morbid obesity as the cause of Ms. Hopkins' Type II diabetes. Dr. Greene attempted at deposition to bolster her methodology by making general references to her review of relevant data in the scientific and medical literature and in AZ's own clinical trials. However, Dr. Greene failed meaningfully to incorporate her review of the literature and scientific data into her analysis.

Based on the record, the Court concluded that Dr. Greene's vague references to supporting data were unavailing in the Daubert context, because is not enough for an expert simply to say she referred to medical literature and then to state generally that it supports her

conclusion. Daubert demands that she employ intellectual rigor in the consideration of scientific data, including in the evaluation and discounting of studies that are not supportive of her opinion. And it demands that she adequately explain that process. This has not occurred here. n98Nor has it occurred here. Consequently, Dr. Greene's reference to scientific and medical literature, and data from clinical trials, does not constitute a reliable methodology in itself, and does not transform her otherwise unreliable methodology into a reliable one.

The Court found that under substantive Ohio law, Plaintiff Hopkins must establish proximate causation as a prima facie element of each of her claims against AZ. Having determined that Dr. Greene's specific causation testimony must be stricken under Daubert, the Court found the record devoid of any competent evidence that Ms. Hopkins' exposure to Seroquel(R) proximately caused any injury to her. Consequently, in the absence of proof that would create a genuine issue of fact with regard to a prima facie element of plaintiff's claims, the Court granted AZ's motion for summary judgment.

Jones v. Astrazeneca LP, 2010 Del. Super. LEXIS 128, 35-36 (Del. Super. Ct. Mar. 31, 2010)(Slights, J.)

In this second Seroquel ® litigation opinion, the Court again examined sufficiency of plaintiff's proposed expert testimony. At oral argument on the Daubert motion, counsel for Ms. Jones explained Dr. Zweig's methodology at great length, including her systematic incorporation of the general causation literature, and her methodical review and exclusion of each of the known risk factors for Type I diabetes, leaving only Seroquel(R) as the sole cause of Ms. Jones' Type II diabetes. According to counsel, Dr. Zweig then addressed the mechanism by which Seroquel(R) caused diabetes in Ms. Jones. Notwithstanding Dr. Zweig's deposition testimony, in which she moved from her "weight gain" to a "direct metabolic effect" mechanism of injury theory, counsel maintained that Dr. Zweig has remained constant in her view that Seroquel(R) caused Ms. Jones to gain weight which, in turn, caused her to develop Type II diabetes.

The Court found, however, that the record did not support counsel's adaptation of Dr. Zweig's methodology. Dr. Zweig was asked over and over again to explain her methodology in sufficient detail to allow AZ to test it, and to allow the Court to exercise its gatekeeping responsibilities. Each time she declined to walk through her methods, and instead repeatedly intoned that she had reviewed all of the information she was supplied, applied her training and experience, and "put it all together." She specifically denied employing a "differential diagnosis" methodology and declined to characterize her approach beyond her abstruse "put it all together" explanation. n93 Apparently frustrated by the press for more specifics, Dr. Zweig ultimately exclaimed "[l]isten, I'm a double board certified physician. I don't need to, you know, justify how I make a decision." The Court noted that in order for plaintiff to carry her burden under Daubert, this is precisely what Dr. Zweig "needed" to do.

Burrell v. Astrazeneca LP & Astrazeneca Pharms. LP, 2010 Del. Super. LEXIS 393 (Del. Super. Ct. Sept. 20, 2010)

In this opinion, the Court considered whether the separate claims of three plaintiffs in the Seroquel(R) litigation must be dismissed with prejudice because they were filed beyond the applicable statute of limitations. Several hundred plaintiffs filed suit in Delaware against

Defendants, AstraZeneca Pharmaceuticals LP and AstraZeneca LP (collectively "AZ"), alleging that their ingestion of Seroquel(R), an atypical antipsychotic medication, has caused them to develop Type II diabetes. AZ has moved for summary judgment on the ground that the claims were time-barred by the Delaware statute of limitations for claims of personal injury.

The Court held that Delaware's borrowing statute required all of the claims to be subject to the shorter of a two year statute Delaware statute of limitations or the statute of limitations from whence the various plaintiffs resided. The Court further held that the proper method of tolling said statute of limitations is subject to a "time of discovery" exception, also known as the "inherently unknowable injury" doctrine, which provides that "when an inherently unknowable injury has been suffered by one blamelessly ignorant of the act or omission and injury complained of, and the harmful effect thereof develops gradually over a period of time, the injury is 'sustained' under § 8118 when the harmful effect first manifests itself and becomes physically ascertainable." "[T]olling ends where plaintiff discovers, or in the exercise of reasonable diligence should have discovered, his injury."

The record reflected that both medical and lay sources published information regarding the link between Seroquel(R) and diabetes as early as 2003. Moreover, by January, 2004, at the direction of the Food and Drug Administration, AZ had changed its label for Seroquel(R) to include a "WARNING! Hyperglycemia and Diabetes Mellitus" that "Hyperglycemia, in some cases there has been reported in patients treated with atypical antipsychotics, including Seroquel [E]pidemiologic studies suggest an increased risk of treatment-emergent hypreglycemia-related adverse events in patients treated with the atypical anti-psychotics studied." Also in January, 2004, AZ sent out a "Dear Doctor" letter in which it alerted the medical community of the new FDA label for Seroquel(R) and particularly noted the warning regarding potential hyperglycemia/diabetes risks associated with the ingestion of the drug. This warning was reiterated in a second "Dear Doctor" letter that AZ sent out in April, 2004. The Court also noted that the New York Times, Wall Street Journal, and National Public Radio had all reported on the connection. See Thomas Burton, FDA to Require Diabetes Warning On Class of Schizophrenia Drugs, Wall St. Journal, Sept. 18, 2003, AZ App. Ex. S; Erica Goode, Leading Drugs for Psychosis Come Under New Scrutiny, N.Y. Times, May 20, 2003; Number of Children With Mental Illness is Growing in the U.S. (National Public Radio (Morning Edition, Sept. 22, 2003). This label change was class-wide, meaning that it affected all atypical antipsychotic medications including, inter alia, Seroquel(R) and Zyprexa. The "warning" broadcast on Seroquel's label was in all capital letters and bold print.

The Court found that the latest date that any of the Plaintiffs was diagnosed with diabetes was February 2, 2004 (for plaintiff, Burrell). As of that date, not only had the scientific community discovered a possible link between Seroquel(R) and diabetes, AZ itself had specifically warned of the potential risk in its new label and in its "Dear Doctor" letters. Had Plaintiffs engaged in a reasonable investigation of publically available sources as of January 30, 2004, each of them would have discovered facts that would have provided "notice of a potential (as opposed to a guaranteed) tort claim" against AZ. This is when Plaintiffs are "chargeable" with knowledge of their claims.

Class Action Fairness Act (CAFA)

Farina v. Nokia, Inc., 625 F. 3d 97 (3d Cir. 2010).

Plaintiff consumer brought a class action lawsuit against Defendant Nokia a cell phone manufacturer and retailer in state court. Plaintiff consumer alleged injuries from the radio frequency emissions from the cell phone where the phones were used without headsets. The case was removed to federal court, and proceeded through two federal district courts and the Judicial Panel on Multidistrict Litigation. The Complaint was dismissed by the United States District Court for the Eastern District of Pennsylvania. The Court of Appeals affirmed the dismissal of the Complaint. The Court of Appeals agreed with the lower court that the claims were preempted by the FCC regulations promulgated under the Telecommunications Act of 1996. The Court opined that to allow such suits to continue in federal court would permit juries to "second guess" the FCC in its balance of "competing objectives". The FCC was in a better position to monitor and assess the science behind radio frequency radiation than juries in individual cases.

The issue with respect to the Class Action Fairness Act (CAFA) was the definition of "commencement" which determines whether CAFA applies to a given action. CAFA is not retroactively applicable and applies only to civil actions commenced on or after February 18, 2005. CAFA does not define "commencement" for purposes of the Act. This was an issue of first impression in the Third Circuit. The Third Circuit relied upon case law in its "sister circuits" to define "commencement." The Court determined that the circuit courts that have examined the issue "unanimously held that when a lawsuit is initially 'commenced' for purposes of CAFA is determined by state law." CAFA operates as an expansion of diversity jurisdiction. Where a case is initially brought in state court and is removed to federal court on the basis of a qualifying class action, state law governs when the case commences.

The Court examined three approaches in its sister circuits: the Ninth Circuit which held that no amendment to a complaint changes the commencement date; the Sixth, Eighth and Tenth Circuits apply ordinary relation-back rules to amendments, regardless of amendment type. If the amendment does not relate back to the pre-CAFA pleading, it constitutes commencement of a new case and CAFA applies ("Prime Care" approach); and relation-back rules treat certain changes to the complaint as the commencement of a new case ("*Braud* Approach") such as the addition of a new defendant or of a distinct claim.

The Third Circuit adopted the *Braud* Approach and agreed that the relation-back rules should apply to at least some amendments such as addition of a new Defendant or claim. State law should govern both the definition of commencement and the relation-back of amendments.

The Third Circuit notes that Pennsylvania law necessitates the same result under either the *Prime Care* or *Braud* approaches. Plaintiff consumer's claim was subject to CAFA because the second amended complaint constituted a "new case" and was filed after its enactment.

Lewis v. Ford Motor Co., 685 F.Supp. 2d 557 (W.D.Pa. 2010).

Plaintiff purchasers filed an action in state court against defendants, a manufacturer and two distributors, seeking to certify a class of purchasers forced to sell defective vehicles. The manufacturer removed the matter pursuant to CAFA. The District Court denied class certification. Plaintiffs filed a Motion for Remand to state court. The Motion for Remand was denied. The Court held that CAFA does not list class certification as a prerequisite to federal jurisdiction. Under CAFA, a federal court's jurisdiction over the matter is proper, regardless of whether a class has been certified. CAFA provides jurisdiction in federal court before the court can even consider class certification, based solely on the allegations of the Plaintiff or, in the case of removal, the evidence put forth by Defendants to show that the basic criteria of CAFA are met.

Other

***Boyd v. John & Johnson Consumer Companies Inc.*, 2010 U.S. Dist. LEXIS 53684**

Here plaintiffs individually and on behalf of all class purchasers, brought suit against J&J Baby Shampoo and/or Aveeno baby Wash and Shampoo manufactured by Defendant. They allege that these products were contaminated with toxic chemicals lined to increased cancer risk, adverse skin reactions, and other serious health problems. Defendant moved to dismiss plaintiffs' claims under Fed. Civ. P. 12(b)(6) for failure to state a claim. Plaintiffs allege that the heart of the mater is the economic harm caused by Defendant's misrepresentations, omissions and breaches of warranty and that their claims do not constitute a failure to warn cause of action pursuant to the Products Liability Act (PLA). The New Jersey Supreme Court in *Sincliar* determined, the PLA subsumes all claims for "harm caused by a product irrespective of the theory underlying the claim. Consistent with the *Sinclar* holding, this Court held that the PLA subsumed all of plaintiffs' claims, including all claims under the Consumer Fraud Act. In that plaintiffs' have conceded that their injury is purely economic, the claims cannot survive.

***Betz v. Pneumo Abex, LLC, et al.,* 998 A.2d 962 (Pa. Super. 2010).**

The Pennsylvania Supreme Court granted asbestos Defendants' appeal from the judgment of the Pennsylvania Superior Court which reversed and remanded the trial court's grant of a *Frye* challenge in favor of defendants. The trial court prohibited Plaintiff's use of expert testimony that "each and every fiber" of asbestos exposure a Plaintiff sustains contributes to development of an asbestos-related disease. The trial court held: that Plaintiff's expert Dr. Maddox's use of extrapolation as one of the prongs of his overall methodology was a novel scientific theory; and that Dr. Maddox's methodology lacked general acceptance in the scientific community.

The Superior Court reversed and remanded, holding that the proper inquiry for the trial court was whether Plaintiff's expert's contention that "each and every fiber counts" as it relates to exposure to asbestos of all types over the course of Plaintiff's lifetime was truly novel under the *Frye* definition. Secondly, the Superior Court called into question the trial court's *sua sponte* decision that such a theory by Plaintiff's expert was not generally accepted in the scientific community where that particular argument was not raised by Defendant in the *Frye* Motion. Defendants raised the argument that epidemiological studies were the appropriate basis in

support of an expert's position as to whether a particular exposure was causative of Plaintiff's injuries. The trial court erred as a matter of law, according to the Superior Court, when it failed to render its decision in accordance with the challenge raised by Defendant.

The Supreme Court accepted the appeal. The matter is presently pending. This case is significant in toxic tort litigation in Pennsylvania as the position adopted by Plaintiff's expert Dr. Maddox, that "each and every fiber counts," is a commonly shared theory among Plaintiffs' experts in this litigation.

FOURTH CIRCUIT

Tort Reform

A bill to end North Carolina's contributory negligence scheme and to replace it with a comparative fault system died in the North Carolina legislature after the Senate declined to bring up the bill during the 2010 short session. House Bill 813, which passed in the House on May 13, 2009, sought to replace the state's contributory negligence defense with a modified comparative fault system.

The likelihood that the bill will come back up during the 2011-2012 session is slim since the Republicans now control both Houses for the first time since the 1800's.

Lockshin v. Semsker, 412 Md. 257, 987 A.2d 18 (2010).

Although it did not occur in a products case, the Court of Appeals of Maryland once again struck down a challenge to Maryland's cap on non-economic damages. In this case, the Plaintiffs attempted to capitalize on vague language in the medical malpractice claims statute, which was somewhat unclear whether medical malpractice claims pursued in circuit court, as opposed to a state-run arbitration system, were subject to the cap. The Court of Appeals affirmed the application of the cap to all medical malpractice claims regardless of the forum in which they are pursued.

Hoilett v. Goodyear Tire & Rubber Co., et al., C.A. No. 09/00630-V04, 2010 VA. Cir. LEXIS 107 (Va. Cir. Sept. 13, 2010)

In this wrongful death action, the deceased's survivors brought suit against an automobile manufacturer, a tire manufacturer and an automotive dealership for the death of their family member and resulting damages. The death was related to an automobile accident, near Hagerstown, Maryland, in which the decedent was a passenger in a 2001 Ford Explorer that drove off of the roadway. While the automobile accident occurred in the State of Maryland, the plaintiffs filed suit in Virginia state court.

The principal issue before the court concerned whether the Maryland limitation on noneconomic damages in wrongful death actions should be applied in a Virginian wrongful death suit. While Virginia courts follow the *lex loci* rule in its choice of law analysis, which would require the application of Maryland law, "[t]he conflict occurs in discerning the degree to which the law of Maryland applies," specifically whether the Maryland cap on noneconomic

damages constituted substantive or procedural law. The court applied Virginia choice of law principles in deciding that the Maryland cap was substantive in nature. The court explained that a wrongful death claim was a legislative creation; accordingly, the court was unwilling to "separate the Maryland cause of action for death by fault from its legislatively defined, through limited, allowable damages[,]" and ruled that "[a]bsent the Maryland statute, the plaintiff's decedent would have no cause of action for wrongful death, and it is the statute which created both the right and the referenced damages." Finally, the court found that while the Maryland cap on noneconomic damages in wrongful death suits was inconsistent with Virginia law, the Maryland statute was not so repugnant to Virginia public policy as to be unenforceable.

Automobiles

Durkee v. C.H. Robinson Worldwide, Inc., 2010 WL 3069842 (W.D.N.C.)

Plaintiffs were seriously injured after their car was struck by a tractor trailer truck equipped with a communications system that allowed the truck driver to receive text messages while he was operating his vehicle. When the driver looked away from the road to view a message, he struck the Plaintiffs whose car had slowed in traffic. Plaintiffs contend that Defendant negligently designed the product because it could be used while the truck was in motion and that Defendant should have anticipated that the product would distract drivers, causing harm to others.

The court found that a cause of action would not lie for products liability negligence against a manufacturer for harm caused to others "by an end user's misuse or poor judgment in the use of a product." The court stated that it could find no support in the law for a rule that would require a manufacturer to anticipate the misuse of its product and to then design the product to prevent the misuse. The court concluded that, "[i]f such a legal duty to anticipate misuse were to be imposed on manufactures, no vehicle would be capable of traveling above the speed limit, car ignitions would all be equipped with ignition interlock devices, and guns would not be sold to persons with poor judgment."

Lloyd v. General Motors Corp., 266 F.R.D. 98 (2010)

In a case that has been ongoing since 1999, the USDC for the District of Maryland recently returned another decision in favor of the automobile-manufacturer defendants. This latest victory saw the defeat of Plaintiffs' attempt to certify a class of all Maryland residents of certain vehicles that they allege have defective seats. Specifically, Plaintiffs argue that the seats in the class vehicles are defective because they can deform during moderate speed rear-impact collisions. According to Plaintiffs' experts, any seat that cannot withstand 20,000 inch-pounds of torque is defective and the seats in the class vehicles do not meet this standard. Although the Plaintiffs proposed that a trial on the liability issues presented in their case would be relatively straightforward, the Court was persuaded by Defendants' arguments that the sheer number of seating arrangements, the differences between the vehicles' seating systems, and the number of different accident scenarios possible made a class action impracticable. Moreover, the Court was concerned, in light of a finding that a particular seat configuration was defective, with the difficulty of determining whether a retrofit was possible to eliminate the hazard. Accordingly,

the Court held that the Plaintiffs had failed to satisfy the "predominance and manageability" requirements of the class certification test, denied their motion to certify, and granted them leave to reformulate a narrower class.

Watson v. Ford Motor Co., 699 S.E.2d 169 (S.C. Sup. Ct. 2010)

The Supreme Court of South Carolina reversed an $18 million jury verdict against Ford holding that the trial court erred in admitting certain expert testimony and evidence of past incidents.

In the initial action, plaintiffs filed a products liability action against Ford alleging design defect of the driver's Explorer. Specifically, plaintiffs claimed the vehicle's cruise control system was defective, and that the car improperly accelerated due to electromagnetic interference (EMI), which caused the driver to lose control of the vehicle and crash, killing one of the three passengers and rendering the driver a quadriplegic.

At trial, plaintiffs presented expert testimony of Bill Williams and Dr. Anthony Anderson. On appeal, the court held that the trial court erred in qualifying Williams as an expert on cruise control diagnosis as he had no professional experience working on cruise control systems prior to the litigation; he had not conducted any comparison of the Explorer's cruise control system to any other system; and that he had never taught or published papers on cruise control systems.

Similarly, the court held that the trial court abused its discretion in allowing the testimony of Dr. Anderson, because the three requirements of S.C.R.E. 702 - regarding subject matter, expert qualifications, and reliability - were not met. The court held that Dr. Anderson was not qualified in the particular area of expertise as his experience was in working with large generators with different electrical wiring systems and voltage levels. Dr. Anderson had no experience in the automotive industry, had never studied a cruise control system, and never designed any component of such a system. The court also held that there was not sufficient evidence to support the reliability of Dr. Anderson's alternative feasible design, its economic feasibility, or how it could be incorporated into a cruise control system.

The court also held that Dr. Anderson was not qualified to testify about EMI and its effect on the cruise control system. Dr. Anderson admitted that his theory had not been peer reviewed, he had never published papers on his theory, and he had never tested his theory. He also admitted that he would not be able to determine exactly where the EMI malfunction originated or what part of the system it affected. Dr. Anderson further testified that it would not be possible to replicate the alleged EMI malfunction of a cruise control system in a testing environment. The only document Dr. Anderson offered to support his theory was a 1975 National Highway Safety Administration report, which had been superseded by a 1989 report, and specifically rejected his EMI theory.

With respect to evidence, the court held that the trial court erred in admitting evidence of similar incidents involving sudden acceleration in Explorers, and that this evidence was highly prejudicial against Ford. In determining whether evidence of similar incidents was admissible, the court relied on a District of North Carolina case, *Buckman v. Bombardier Corp.,* 893 F. Supp.

547, 552 (E.D. N.C. 1995), in which the court set forth factors that should be considered when admitting evidence of other incidents to support a claim that the present accident was caused by the same defect: (1) the products are similar; (2) the alleged defect is similar; (3) causation related to the defect in the other incidents; and (4) exclusion of all reasonable secondary explanations for the cause of the other incidents. Applying the factors to the case before them, the court held that plaintiffs failed to show that the incidents were substantially similar and failed to establish a special relation between the other incidents and plaintiffs' accident.

The court concluded that Ford was entitled to a judgment as a matter of law.

Branham v. Ford Motor Company, 701 S.E.2d 5 (S.C. Sup. Ct. 2010)

Plaintiff passenger filed a product liability action claiming negligence and strict liability against Ford after he was thrown from a vehicle manufactured by the defendant when the vehicle rolled over. Plaintiff claimed there were defects in the vehicle's seatbelt sleeve as well as defects in the vehicle's suspension and handling system that added to the vehicle's rollover propensity. The jury awarded the plaintiff $16 million in actual damages and $15 million in punitive damages. Ford appealed the verdict to the state's Supreme Court pursuant to Rule 204(b) of the South Carolina Appellate Court Rules.

The South Carolina Supreme Court's 26 page opinion garnered national attention when it ruled that "the exclusive test in a product liability design case is the risk-utility test with its requirement of showing a feasible alternative design." The court stated "In sum, in a product liability design defect action, the plaintiff must 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."

The court provided a lengthy and thorough analysis regarding application of the risk-utility test and consumer expectation test to design defect claims. Ultimately the court concluded that "the consumer expectations test and its focus on the consumer ill-suited to determine whether a product's design is unreasonably dangerous," reserving the consumer expectations test for cases alleging manufacturing defect.

In adopting the risk-utility test, the court analyzed cases from the 46 jurisdictions that recognize strict products liability claims, concluding "35 of the 46 states that recognize strict product liability utilize some form of risk-utility analysis in their approach to determine whether a product is defectively designed." The court also acknowledged that while the Restatement (Second) included the consumer expectation test, the newer Restatement (Third) of Torts: Product Liability, rejected it in favor of the risk-utility test for design defect claims.

With respect to evidence offered at trial, the court held that the trial court erred in admitting highly prejudicial post-manufacture evidence and evidence of similar events of Ford's knowledge of the vehicle's rollover propensity.

The Supreme Court also held that plaintiffs' closing argument denied Ford a fair trial. Not only was the argument designed to inflame and prejudice the jury, but it invited the jury to

base its verdict on passion rather than reason. Further, the closing relied heavily on highly prejudicial, inadmissible evidence including Ford's net worth and compensation figures of Ford executives.

The court reversed the $31 million verdict against Ford, and remanded the case for a new trial.

Drug Litigation

In re Digitek® Product Liability Litigation, 264 F.R. D. 249 (S.D.W.Va. 2010).

The multi-district litigation involved in this case arose from plaintiffs' use of Digitek®, brand-name of cardiac glycoside, a compound affecting the myocardium of the heart. The FDA approved the use of Digitek® in certain approved quantities only because there is a small margin between the effective dose and a does that can result in toxicity causing serious health problems and death. After a recall based on potentially double-dosing tablets, plaintiffs filed lawsuits across the country, eventually joined into an MDL proceeding in the Southern District of West Virginia. The master complaint alleged 19 causes of action. Defendants requested a "limited" *Lone Pine* order, which would require that plaintiffs produce an affidavit of a medical expert identifying case-specific evidence of digoxin toxicity.

Despite an FDA finding that there was a small likelihood of any injury being caused by the recalled tablets, the Southern District denied defendants' request for a *Lone Pine* order. The Court noted that the purpose of a *Lone Pine* order is to identify and cull meritless claims and to otherwise streamline complex litigation. However, it found in this case that because the case had not proceeded to the point in discovery where other cases have permitted entry of a *Lone Pine* order, because the Court had previously required the filing of a master complaint that had withstood 12(b)(6) scrutiny, and because the Court preferred the safeguards of more traditional case management authority, a *Lone Pine* order was not merited at this time.

Vitatoe v. Mylan Pharmaceuticals, Inc., 696 F.Supp.2d 599 (N.D.W.Va. 2010)

Mother, whose child developed severe skin reaction (Stevens-Johnson Syndrome and Toxic Epidermal Necrolysis) after ingesting Phenytoin, an anti-epileptic drug, to control his seizure disorder, brought action against manufacturer of the drug. Defendants moved for summary judgment claiming that because injury occurred in Louisiana, Louisiana Products Liability Act ("LPLA") applied and that federal preemption precluded claim of inadequate warning.

The Court, sitting in diversity jurisdiction, found that the LPLA did apply to the facts of the case, but that West Virginia's rule of *lex loci delicti* prevented the Court from applying the LPLA's "learned intermediary doctrine" because it violated the public policy of West Virginia. The Court stated that since the injuries occurred in Louisiana, it was constrained to apply the LPLA and granted defendants' summary judgment motion to that extent. However, defendants' contention that Louisiana's learned intermediary doctrine barred the plaintiff's inadequate labeling/warnings claim because the doctrine was rejected by the West Virginia Supreme Court of Appeals as largely antiquated in the age of direct-to-consumer advertising. The Court denied

defendant's summary judgment motions on that issue and on defendants' federal preemption arguments, relying in large part on the Supreme Court's reasoning in *Wyeth v. Levine, 129 S.Ct. 1187 (2009).*

In re Panacryl Sutures Products Liability Cases, 2010 WL 3062811 (E.D.N.C.)

In this case, the court was called upon to interpret the provisions of 21 C.F.R. § 20.63(f), which prohibits manufacturers from disclosing certain confidential information as it relates to the reporting of adverse events involving drug or medical device products. Defendants moved to modify a subpoena duces tecum served on Dr. Leo Gibney, Jr., which requested that Gibney produce a list of physicians who voluntarily reported adverse events involving Panacryl sutures to Defendant. Plaintiffs contended that Gibney was not a manufacturer entitled to the protection of the statute, but rather a consultant hired by the manufacturer to perform a survey of physicians using the sutures. (It is implied but not stated in the decision that the physicians had previously reported adverse events to the manufacturer. The manufacturer then appears to have given the list of reporting physicians to Gibney to perform a follow up survey). The court concluded that the policy encouraging voluntary reporting compels the conclusion that the names, addresses, and phone numbers of physicians and institutions who voluntarily reported an adverse event involving Panacryl sutures to Defendant shall not be disclosed to Plaintiffs.

Fussman v. Novartis Pharmaceuticals Corp., 2010 WL 4104707 (M.D.N.C.)

Plaintiff alleged that Defendant failed to properly warn Plaintiff and her medical provider of the risk of Osteonecrosis of the Jaw ("ONJ") associated with two of its drugs, Aredia and Zometa. Defendant moved for summary judgment alleging that Plaintiff's medical provider independently learned that the drugs carried an increased risk of ONJ but failed to warn the Plaintiff, thereby cutting off Defendant's liability.

The court rejected Defendant's contention that North Carolina law requires that proximate cause be established through the treating physician. Rather, the court reiterated a prior opinion of the North Carolina Court of Appeals, affirmed by the Supreme Court, which held that proximate cause may be based on the drug maker's failure to warn the medical provider *and* other foreseeable treating physicians. *Holley v. Burroughs Wellcome Co*., 74 N.C. App. 736, 746, 330 S.E.2d 228, 235 (2985), *aff'd*, 318 N.C. 352, 360-61, 348 S.E.2d 772, 776-77 (1986).

Couick v. Wyeth, Inc., 691 F.Supp.2d 643 (W.D.N.C. 2010)

Plaintiff sued name brand drug manufacturers ("Defendants"), alleging that the manufacturers failed to warn Plaintiff's doctor of the risks of the drug metoclopramide. Defendants manufactured the drug under the name Reglan. Defendants moved for summary judgment, on the basis that Plaintiff only used a generic version of the drug, not Reglan, and that a name-brand drug manufacturer is not liable for injuries caused by a generic competitor's drug under North Carolina law.

The court agreed, citing to a 2009 opinion from the Eastern District of North Carolina with almost identical facts, which concluded that "under North Carolina law a manufacturer of a brand name pharmaceutical may not be held liable for injuries stemming from the use of another

manufacturer's generic bioequivalent." *Stoddard v. Wyeth, Inc*., 630 F.Supp.2d 631, 634 (E.D.N.C. 2009). The court noted that the 4th Circuit had reached a similar conclusion in a case applying Maryland law. *Foster v. American Home Products Corp*. 29 F.3d 165 (4th Cir. 1994).

Fisher v. Pelstring, 2010 U.S. Dist. LEXIS 76979 (D. S.C. July 28, 2010)

The issue before the court was whether plaintiffs can maintain an action under South Carolina law against the name-brand manufacturer of a medication for injuries allegedly caused by a generic form of the medication manufactured by another company.

In this product liability action, plaintiffs asserted fifteen causes of action against three drug manufacturers for injuries he allegedly sustained as a result of his use of the prescription medication metoclopramide. (Plaintiffs' complaint also included a medical malpractice action against his treating physician). Defendants Wyeth and Schwarz moved for summary judgment as to all claims asserted against them on the ground that neither defendant manufactured nor distributed the medication responsible for the plaintiff's alleged injuries.

In January 2003, plaintiff was prescribed metoclopramide, known by the brand name Reglan, to treat his acid reflux disease. In May 2005 plaintiff was diagnosed with drug-induced tardive dyskinesia related to his long-term use of metoclopramide. The record showed that plaintiff never took any form of metoclopramide manufactured or distributed by defendants Wyeth or Schwarz; however, plaintiffs contend that its action was a "failure to warn case," and that although Wyeth and Schwarz did not manufacture the medication plaintiff actually ingested, they should remain liable under claims of negligence, fraud, and misrepresentation as they relate to the defendants' failure-to-warn.

A comprehensive analysis of opinions hailing from within the state, the Forth Circuit, and its district courts led the court to conclude that the "courts of South Carolina would apparently not allow a tort recovery against a defendant for injuries caused by a product manufactured, distributed, and sold by a third party to which the plaintiff has no connection." The court went on to note that it was bound by the Fourth Circuit's holding in *Foster v. American Home Products Corp.,* 29 F.3d 165 (4th Cir. 1994), in which the appellate court held there was "no legal precedent for using a name brand manufacturer's statements about its own product as a basis for liability for injuries caused by other manufacturers' products, over whose production the name brand manufacturer had no control."

Plaintiffs implored the court to consider the reasoning of the court in *Conte v. Wyeth, Inc.,* 85 Cal. Rptr. 3d 299 (Ct. App. 2009). As in *Fisher*, the plaintiff in *Conte* alleged she developed tardive dyskinesia as a result of ingesting the generic form of metoclopramidethe. The California Court of Appeals had considered and expressly rejected the Fourth Circuit's analysis in *Foster*, holding "the fact that the name-brand manufacturer did not manufacture or sell the product that the plaintiff ingested would not relieve the name-brand manufacturer from 'its general duty to use due care in disseminating product information to those it knows or should know are likely to be harmed as a result of their physician's reliance on that information.'" The court ultimately concluded that California law supported plaintiff's argument that the name brand manufacturer "'owes a duty of care to those people it should reasonably foresee are likely to ingest metoclopramide in either the name-brand or generic version when it is prescribed by their physicians in reliance on [the name-brand manufacturer's] representations.'"

The *Fisher* court declined to follow the *Conte* opinion, noting its conflict with the binding laws of South Carolina and the Fourth Circuit, which "compels dismissal of defendants Wyeth and Schwarz." Citing the Eighth Circuit's decision in *Mensing v. Wyeth, Inc.,* 588 F.3d 603 (8th Cir. 2009), and a multitude of other cases, the court pointedly noted that *Conte* is in direct conflict with the weight of authority in courts that have addressed the issue.

Defendants' motion for summary judgment was granted.

Torkie-Tork v. Wyeth, No. 1:04-cv-945, 2010 U.S. Dist. LEXIS 106819 (E.D. Va. Oct. 4, 2010), discussed *supra*.

Torkie-Tork v. Wyeth, No. 1:04-cv-945, 2010 U.S. Dist. LEXIS 133179 (E.D. Va. Dec. 15, 2010)

In this action, as discussed in greater detail above, the plaintiff filed suit against a pharmaceutical manufacturer for injuries she allegedly suffered as a result of her use of the defendant manufacturer's prescription medicine, Prempro. At trial, it became apparent to the trial judge that the plaintiff, despite her attorneys' previous representations, sought to advance the argument that the defendant possessed a duty to conduct additional studies (in addition to those required by the FDA), and its failure to do so constituted negligence. The trial court sought to address the plaintiff's ability to pursue this strategy under Virginia law.

The trial court reaffirmed the well-accepted proposition that "products liability actions may take one of three forms" under Virginia law. Quoting *Morgen Indust., Inc. v. Vaughan*, 371 S.E.2d 489 (Va. 1996), the court noted that "[A] product may be 'unreasonabl[y] dangerous' for the purposes of a products liability action 'if it is [i] defective in assembly or manufacture, [ii] unreasonably dangerous in design, or [iii] unaccompanied by adequate warnings concerning its hazardous properties." The trial court then relied upon Justice Hassell's opinion, in *Owens-Corning Fiberglas Corp. v. Watson*, 413 S.E.2d 630 (Va. 1992), in explaining that "in the context of pharmaceutical drugs … [the] imposition of the reason to know standard is particularly sensible given the FDA already requires testing of any drug as a qualification for approval," finding that "the appropriate standard in Virginia is whether a manufacturer has reason to know, not whether the manufacturer should know of a product's dangerous propensities." Such ruling was found to have struck a balance between the costs associated with additional studies against the public benefit in bringing a drug to market based on the knowledge of existing dangers.

In re Subpoenas, 692 F. Supp. 2d 602 (W.D. Va. Mar. 10, 2010)

The United States sought to compel Abbott Laboratories' compliance with two subpoenas pursuant to Title 18, Section 3486 of the United States Code which authorizes the government "to issue subpoenas 'in any investigation relating to any act or activity involving a federal health care offense." Abbott refused to comply with the subpoenas, arguing that the subpoenas were unreasonable and unduly burdensome. The United States subsequently agreed to limit the scope of the subpoenas to the electronic mail messages of three custodians relating to off-label marketing of Depakote and several FDA approved drugs. The court found that the subpoenas, given the limitations, were "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome."

The principal area of contention concerned the cost of compliance, which in turn required the court to determine whether the subpoena satisfied the reasonableness standard under the Fourth Amendment to the United States' Constitution. Quoting *In re Subpoena Duces Tecum*, 228 F.3d 341, 349 (4th Cir. 2000), the reasonableness standard required proof that the subpoena was (1) authorized for a legitimate governmental purpose; (2) limited in scope to reasonably relate to and further its purpose; (3) sufficiently specific; and (4) not overly broad so as to be oppressive. The court found that Abbott had already been required to retain the requested documents for other litigation. While Abbott contended that retrieval of such documents would be difficult, the court responded that "if retrieving the e-mails the government requests is as difficult as Abbott conveys, then the fault lies not so much with an overly broad government request as it does with Abbott's policy or practice of retaining documents." The court subsequently ordered Abbott to comply with the subpoenas in their limited scope.

Preemption

Priester v. Cromer, et al., 697 S.E.2d 567 (S.C. 2010)

Appellant driver filed a state products liability claim against respondent, Ford, premised on the manufacturer's choice of tempered glass for a vehicle's side windows. The driver, intoxicated and driving at excessive speed, drove off the road and rolled the truck several times. His son, who was sitting in the back seat and not wearing a seat belt was ejected from the truck and died. Appellant alleged that Ford "breached said warranty by using inappropriate glazing materials which would retain occupants inside the vehicle, and which would not shatter on impact."

Ford moved for summary judgment, arguing that *49 C.F.R. § 571.205 (1971)* (Regulation 205), which mandates that "[g]lazing materials for use in motor vehicles ... shall conform" to the American National Standard Institute ("ANS") "safety code for safety glazing materials," preempted appellant's claim. The ANS provides that manufacturers may use laminated or tempered glass on the side windows of motor vehicles, so long as the glass meets certain testing requirements.

Whether tempered or laminated glass is safer depends on whether the occupants are wearing seatbelts, thereby reducing the risk of ejection. While tempered glass consists of a single sheet of specially treated glass, which immediately shatters into small pieces when broken, laminated glass consist of two or more sheets of glass held together by layers of plastic. As such, tempered glass is safer for occupants wearing seatbelts, where risk of passenger ejection is reduced, because it minimizes the risk of additional injuries. Conversely, laminated glass is safer for unbelted passengers, where there is greater risk of ejection, because it is likely to keep a passenger inside the vehicle. Plaintiff contended that Ford breached its warranty by choosing tempered glass for the side windows in the vehicle.

While the court acknowledged a Fifth Circuit decision that held Regulation 205 did not preempt a state law claim, it ultimately agreed with recent opinions by the West Virginia Supreme Court and Court of Appeals of Tennessee, and held that Regulation 205 preempted appellant's suit, stating "the purpose of [Regulation 205] was to provide an automobile manufacturer with a range of choices among different types of glazing materials, as opposed to providing a minimum standard." The court further commented that to allow the suit to proceed

"would stand as an obstacle to achieving the purposes and objectives of Regulation 205." The court affirmed the trial court's grant of summary judgment in favor of Ford.

Torkie-Tork v. Wyeth, No. 1:04-cv-945, 2010 U.S. Dist. LEXIS 106819 (E.D. Va. Oct. 4, 2010)

In this product liability action, plaintiff sued defendant drug manufacturer for injuries suffered as a result of the plaintiff's use of the defendant's prescription drug, Prempro. The plaintiff asserted causes of action rooted in strict liability, negligence, fraud and warranty law. The case was subsequently removed from Virginia state court and transferred to the multidistrict litigation proceedings in the Eastern District of Arkansas. Upon its return from the MDL and close of fact discovery, the defendant filed its motion for summary judgment as to each of the plaintiff's claims. The court denied the defendant's motion in part.

Under Virginia law, a plaintiff must establish that the product contained "a defect which rendered it unreasonably dangerous for ordinary or foreseeable use" to recover under a negligent design defect claim. Relying on the Fourth Circuit's decision in *Alevromagiros v. Hechinger Co.*, 993 F.2d 417, 420 (4th Cir. 1993), the court noted that while it will consider government safety standards in determining which defects may be unreasonably dangerous, such standards are not "conclusive."

The defendant contended that the negligent design claim failed for two reasons: (1) the drug was 'safe and effective' on account of the FDA's approval of the drug; and (2) the plaintiff failed to show that an alternate design would have prevented her injury. The court found that "FDA approval of a drug does not preempt an action for defective design." It further explained that "because 'FDA regulations are generally minimal standards of conduct[,]'" such regulations will not preempt state law absent clear congressional intent. Notwithstanding this finding, the government agency's continued approval of the prescription drug was "strong evidence of reasonableness" in its design which may allow a jury to conclude that the product's design was not defective. The court found that the defendant's second argument presented a question of material fact that must be resolved by a jury.

Class Action Fairness Act (CAFA)

Ferrell v. Express Check Advance of SC LLC, 591 F.3d 698 (4th Cir. 2010)

Plaintiff filed suit against multiple defendants in the Richland County Court of Common Pleas in South Carolina alleging unfair and deceptive trade practices. Plaintiff, a South Carolina citizen, purported to represent a class of other South Carolina citizens. All of the named defendants, except Express Check Advance of SC LLC ("Express Check"), were also citizens of South Carolina.

Express Check is a Tennessee limited liability company, which is owned and controlled by a Missouri corporation. Based on these facts, Express Check removed the case under 28 U.S.C. §1453(b), arguing that the minimal diversity requirement set forth in 28 U.S.C. §1332(d)(2)(A) was satisfied. Plaintiff's motion for remand was granted by the district court and the appeal followed.

On appeal, Express Check argued that it citizenship should be determined by the citizenship of its members. Plaintiff responded that, under CAFA, an LLC is an "unincorporated association," which is deemed to be a citizen of the State where it has its principal place of business and the State under which it is organized. Agreeing with Plaintiff, the Fourth Circuit held that the phrase "unincorporated association" in 28 U.S.C. § 1332(d)(10) "refers to all non-corporate business entities," including limited liability companies. Because Express Check was found to have its principal place of business in South Carolina, the order remanding the case to state court was affirmed.

Other

Barbour v. International Union, 594 F.3d 315 (4th Cir. 2010).

HBCU Pro Football, LLC v. New Vision Sports Properties, LLC, 2010 WL 2813459 (July 14, 2010 D. Md.).

These two cases address procedural questions related to removal under 28 U.S.C. §1446.

In Barbour, the Fourth Circuit expressly adopted the "last-served defendant" rule in determining the time period for removal. In doing so, the court found an earlier decision, which adopted a "middle ground" position between the "first-served" and "last-served" rules to be mere dicta and not binding on the decision in the instant matter. Accordingly, under *Barbour*, in cases involving multiple defendants, each defendant has thirty days from the time of service to file a notice of removal. Defendants served earlier than subsequently-served defendants may join in the notice of removal even if they failed to remove the case within 30 days from the time they were served. This holding, the court found, was consistent with the Supreme Court's ruling in *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999), maintained the requirement that all **served** defendants in an action must consent to removal, and eliminated the potential prejudice to later-served defendants who might be foreclosed from removing a case by the actions of their co-defendants during a time period when the later-served defendant was not a party to the matter.

In *HBCU*, one of the three defendants (who had been served prior to service being completed on the other two defendants) removed the case to federal court. Plaintiff moved to remand the case on the basis that the removing Defendant failed to obtain the consent of its co-defendants. Plaintiff's motion made the implicit argument that the *Barbour* holding's support for the rule that removal must have the unanimous consent of all defendants required the non-removing Defendants in this case to have filed their own notices of removal or consent to the removing Defendant's removal within 30 days of service. The district court rejected this interpretation of *Barbour* and, finding no other support for Plaintiff's proposition, denied Plaintiff's motion to remand. Quoting *Gee v. Lucky Realty Homes, Inc.*, 210 F. Supp. 2d 732 (D. Md. 2002), the court noted that all un-served defendants at the time of removal may be served in accordance with the federal rules and they have the option to file their own motion to remand if they choose.

Bradshaw v. HILCO Receivables, LLC, 725 F. Supp. 2d 532 (2010).

In this Fair Debt Collection Practices Act case, Plaintiff sought to strike certain affirmative defenses included in Defendant's Answer based upon the Supreme Court's plausibility standard for pleadings set forth in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009) ("*Iqbal*") and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007) ("*Twombly*"). As an initial matter, the court joined the majority of district courts in concluding that the plausibility standard for pleadings applied equally to both complaints and affirmative defenses. The court noted that "boilerplate" defenses lacking any factual basis did little to ensure that an opposing party received fair notice of the defense. It is imperitive, in the court's view, that defenses include factual allegations supporting the legal conclusions asserted. Turning to the specific defenses challenged in this action, the court held that those representing nothing more than conclusory statements such as "Plaintiff lacks standing" and "At all times Defendant acted in good faith" failed to pass the threshold set forth by *Iqbal* and *Twombly*. Accordingly, the defenses were stricken, but the Defendant was granted 30 days to amend.

Sanders v. Norfolk Southern Corp., *2010 U.S. Dist. LEXIS 4270* (D. S.C. January 20, 2010)

The issue before the court was defendant, Norfolk Southern's ("Norfolk") motion to dismiss for platintiffs' failure to state a claim. On January 6, 2005, one of Norfolk's trains derailed in Graniteville, South Carolina. As a result of the derailment, a tanker car ruptured, emitting chlorine gas into the surrounding area. Plaintiffs claimed they received evacuation, shelter-in-place, and curfew messages from the media, safety officers, and/or the reverse-911 emergency notification system. Governmental authorities imposed a one-mile mandatory direct evaluation order and two-mile curfew. Plaintiffs believed they were in the path of the chlorine gas and claimed that they were unaware that the mandatory evacuation and curfew zone encompassed only a one and two mile radius respectively. Plaintiffs' alleged that defendants' conduct caused "chaos, fear, evacuation, chemical exposure and other damages," and as a direct result of their perceived risk of chemical exposure, they evacuated their residences. Plaintiffs filed causes of action for nuisance, negligence, and strict liability.

The court dismissed plaintiffs' nuisance claim because plaintiffs failed to allege a plausible claim of public or private nuisance. The court held that plaintiffs could not prevail in a private cause of action for a public nuisance, because there was no injury to plaintiffs' real or personal property, which is required to maintain the cause of action. The court further held that plaintiffs' could not sustain a cause of action for private nuisance, which generally implies continuity of the offending action over a period of time or a continuing result of a single offense. Plaintiffs failed to demonstrate a substantial interference with their use and enjoyment of their property from the single act of the derailment and resulting release of gas as the threat of chlorine exposure impacted Plaintiffs for a limited number of hours.

The court dismissed plaintiffs' negligence claim on the basis that defendants owed no duty to plaintiffs, which is required to prevail on a claim for negligence. The court opined that at the time of the derailment, Defendants owed a duty to those persons "who resided, worked, or possessed property within the area encroached upon by chlorine gas." While plaintiffs resided in Graniteville, they lived too far away and were not in the "zone of danger" created by Defendants' acts.

Finally, the court dismissed plaintiffs' strict liability claim as the claim was preempted by the Hazardous Materials Transportation Act and Federal Railroad Safety Act.

The court granted defendants motion to dismiss.

In re: Chinese Drywall Cases, 2010 Va. Cir. LEXIS 43 (Va. Cir. Mar. 29, 2010)

Plaintiff homeowners sued certain builders and suppliers arising from their participation in the importation, sale and installation of defective Chinese drywall. Plaintiffs brought causes of action alleging negligence, negligence *per se*, private nuisance, breach of express warranties, breach of implied warranties and unjust enrichment. The defendants raised demurrers as to a number of these claims.

The defendants first sought to dispose of the negligence claims under the economic loss rule. Virginia courts have held that "when a plaintiff alleges and proves nothing more than disappointed economic expectations, the law of contracts, not the law of torts, provides the remedy for such economic losses." Notwithstanding this well-accepted rule, the court turned to a recent opinion from the United State District Court for the Eastern District of Louisiana for guidance. The opinion addressed the same argument involving Chinese drywall, in which the court concluded that the economic loss rule did not apply on account of the unreasonable risk of harm that the product posed. The Virginia state court adopted this explanation in finding that the drywall presented the potential for personal injury and related damages.

Defendants also argued that any duty owed to the plaintiffs was rooted in contract alone. The court did not find the argument to be persuasive; rather, it found that there was a general duty "to exercise reasonable care in how one acts to avoid physical harm to persons and tangible things." Accordingly, "the duty to avoid creating an unsafe condition within Plaintiffs' homes and to avoid injuring Plaintiffs are duties imposed by law and not dependant upon the terms of their contracts with Plaintiffs."

Of note, the defendants prevented plaintiffs from seeking to recover damages under a private nuisance claim. The court was unable to identify decisional authority from a Virginia court which "extend[ed] Virginia private nuisance law to impose liability on defendants who sold or installed a dangerous product but who no longer exercise ownership or control over it." Consequently, it turned to other jurisdictions for assistance in refusing "to extend Virginia private nuisance law to impose liability on defendants who sold or installed a dangerous product but who no longer exercise ownership or control over it[,]" explaining that "nuisance is not a viable action against defendants who have no further control of the contaminated materials."

Mavity v. MTD Products, Inc., 714 F. Supp. 2d 577 (W.D. Va. June 1, 2000).

In this action, plaintiff filed suit against the manufacturer of a lawnmower for injuries allegedly sustained as a result of the lawnmower overturning and landing up-side down. The plaintiff claimed that the defendant was negligent in its design of the lawnmower; failed to warn him of the lawnmower's dangerous condition; and that it violated certain implied warranties of merchantability. The defendant manufacturer moved for summary judgment on all claims.

Citing *Alevromagiros v. Hechinger Co.*, 993 F.2d 417 (4th Cir. 1993), the court stated that a products liability case requires proof "that the product in question contained a defect that rendered it unreasonably dangerous for ordinary or foreseeable use." Quoting *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066 (4th Cir. 1974), where the allegations of wrongdoing concern the product's design, liability "is imposed only when an unreasonable danger is created [and] [w]hether or not this has occurred should be determined by general negligence principles, which involve a balancing of the likelihood of harm, and the gravity of harm if it happens against the burden of the precautions which would be effective to avoid the harm." Similarly, a manufacturer fails to honor its duty to warn if the manufacturer has reason to know that the product is dangerous in its intended use; has no reason to believe that the user will appreciate the danger; and fails to exercise reasonable care to inform consumers of the danger.

The manufacturer raised several arguments on its behalf, including points that the plaintiff failed to establish that the lawnmower was defective and that the plaintiff substantially modified the product and/or engaged in an unforeseeable use of the product. The court did not find these arguments to be persuasive, as the record contained questions of fact that should be decided by a jury at trial. The defendant also argued that Virginia law did not allow for recovery in a product liability case for lack of crashworthiness. While recognizing precedent established in *Slone v. Gen. Motors Corp.*, 457 S.E.2d 51 (Va. 1995), the court distinguished the present case such that if the product "was unreasonably dangerous for operation on slopes to begin with, the failure to protect the operator from such dangerousness falls within the traditional principles governing product liability."

FIFTH CIRCUIT

Tort Reform

Proposed Legislation

Louisiana HB 317-Venue for Latent Exposure/Disease Cases-Forum Non Conveniens: This proposed law provides that actions involving latent diseases, including asbestos and silica, shall be brought in the parish in which the plaintiff alleges substantial exposure or where the plaintiff is domiciled. In fact, the proposed law prohibits the transfer of a suit brought in the domicile of the plaintiff and in a court of competent jurisdiction and proper venue. The proposed law also provides that if exposure is alleged in more than one parish, the court shall determine which parish has the most significant contacts based on the amount and length of exposure and may transfer the action to that parish. The proposed law also provides that when two or more venue articles conflict, the proposed law will govern the venue exclusively.

Louisiana HB 358-Provides Disclosure Procedures for Asbestos and Silica Claims: This proposed law requires the plaintiff or person whose exposure is alleged to be the cause of the claim to provide to all parties a statement of any existing or potential claims involving asbestos or silica against any trust created in accordance with Title 11 of the U.S. code or any fund established for the benefit of asbestos or silica claimants within 30 days of commencing an action or at least 180 days before a trial. The proposed law also requires the plaintiff to attest, and his attorney to sign, that a good faith investigation of all potential claims has been conducted. The statement must include information regarding when all claims were or may be

filed and whether any deferrals, delays, suspensions, or tolling of the claims process have been requested.

Louisiana HB 572-Provides for the Inclusion of Information in Certain Petitions: This proposed law provides procedures regarding the form of civil petitions, including requirements as to the names of the parties, concise statements of all causes of action, the transaction or occurrence that is the subject matter of the litigation, and an address for receipt of service. The proposed law retains present law and additionally requires petitions involving latent diseases to include as to each plaintiff and for each defendant, the time period, location, and types of products for each alleged exposure. The law also provides that if a party is 70 years old or older, or if he has a medical condition and is not expected to live beyond six months, he shall be considered to have exigent circumstances.

Louisiana HB 175-Provides for the Medical Malpractice Cap.: Increases the medical malpractice cap to $750,000 (from $500,000), exclusive of economic losses, loss of earnings, and loss of earning capacity and provides that the cap shall be adjusted annually. Increases the health care provider liability to $150,000 (from $100,000). (See below the discussion of *Oliver v. Magnolia Clinic*, in which the Louisiana Court of Appeals ruled that the state's limits on malpractice damages violate the constitution).

Oliver v. Magnolia Clinic, 2010 WL 4703880, 2009-439 (La. App. 3 Cir. 2010).

The plaintiffs sued a registered nurse practitioner for failing to diagnose their daughter's cancer. During the first 14 months of life, their daughter experienced repeated infections, persistent abdominal pain, vomiting, and anemia. She was seen exclusively by the nurse practitioner 32 times in the first year of her life. Although she had a statutory duty to consult with a physician when needed, the nurse practitioner did not do so. Ultimately the parents took the child for the first time to another provider who diagnosed her with cancer. Although she lived, the daughter's quality of life was severely diminished.

The matter was tried before a jury, which returned a verdict in favor of the plaintiffs for $6 million in general damages, $629,728 in past medical expenses, and $3,358,828 in future medical expenses. The jury also awarded the mother and father $33,000 and $200,000 respectively for loss of consortium. In an effort to avoid a remittitur of the jury award to $500,000, which is the statutory cap imposed by the Louisiana Medical Malpractice Act ("MMA"), plaintiffs filed a Petition for Declaratory Relief asserting that the MMA is unconstitutional on several grounds: (1) it establishes an inadequate remedy in violation of the child's right (2) that it precludes remedy for the parents (3) it violates the separation of powers provision in the Louisiana constitution in that it constitutes a prejudgment of the compensation award in medical malpractice cases, which is in the province of a district court; (4) it creates an immunity in favor of health care providers in violation of Art III of the Louisiana constitution; (5)it denies equal protection to severely injured patients. Initially the trial court declared the cap constitutional in all respects except its inclusion of nurse practitioners as qualified providers who are contemplated by the MMA. However, ultimately, because the plaintiffs did not plead this specific basis for unconstitutionality, the trial court reduced the jury's $6 million award to conform to the limitation on general damage recovery of the MMA.

The appellate court found that the plaintiffs' petition, which was a general attack on the constitutionality of the MMA, was procedurally sufficient. The court held that the record failed to show that the cap on damages, as it applies to nurse practitioners, is rationally related to the objectives set forth by the legislature. Therefore, the court held that the cap, to the extent it includes nurse practitioners, violates the equal protection guarantees of the Louisiana constitution.

Double Quick, Inc. v. Lymas, 2010 WL 3706443 (Miss. Sept. 23, 2010).

Plaintiff was attacked and shot several times while on the premises of a Double Quick convenience store. As a result, plaintiff sustained severe injuries and filed suit against Double Quick. A jury awarded the plaintiff the sum of $4,179,350 in actual and non-economic damages. The trial court granted the defendant's motion to amend the judgment and imposed the $1 million limitation in Miss. Code Ann. § 11-1-60(2), which caps non-economic damages at $1 million. The defendant appealed the jury's verdict on liability and damages grounds. The plaintiff unsuccessfully challenged the amended judgment and then filed a cross-appeal arguing that the reduction of damages was unconstitutional.

This case was the first challenge to a statutory cap on damages raised before the Mississippi Supreme Court. In fact, in addition to the governor and the Mississippi Attorney General, various organizations with interests on both sides of the argument, filed amicus briefs on this issue. Ultimately, however, the court did not address the constitutionality of Miss. Code Ann § 11-1-60(2). The court found that the plaintiff failed to meet his burden of proof on liability because plaintiff's experts' testimony was speculative and insufficient to establish proximate cause and did not consider and dismissed plaintiff's cross-appeal as moot.

THI of Tex. at Lubbock I, LLC. V. Perea, 2010 WL 2952149 (Tex. App.-Amarillo-July 28, 2010).

A family of a deceased patient brought a medical malpractice action against a skilled nursing facility for prescribing a drug to which the patient was allergic. The family sought wrongful death and survival damages. The jury found the nursing facility liable and awarded the family a total of $1,696,895-$159,718 damages for pain and mental anguish, medical expenses, and funeral and burial expenses, $400,000 for past and future loss of companionship and society, and past and future mental anguish, and $1.2 million in punitive damages. The trial court denied the facility's motion for judgment notwithstanding the verdict, remittitur and to modify, correct, or reform the judgment and its motion for reconsideration. On appeal, the facility argued, in addition to other issues, that the trial court abused its discretion by failing to apply statutory damage caps in §§ 74.301(b) and 41.008(b) of the Texas Civil Practice and Remedies Code.

Section 74.301(b) limits recovery for noneconomic damages in health care liability claims to me limited to $250,000. In response to the facility's argument that this section should have been applied to the jury award, the family argued that §74.303, which provides a $500,000 cap to wrongful death or survival actions applied. The appellate court noted that because the action involved a health care liability claim for conduct which proximately caused a death, both statutes could be given effect. The court further noted that the statutes did not conflict on their face. Therefore, the court held that both statutes should be given effect and found that the trial

court should have limited the facility's civil liability for noneconomic damages to $250,000. The court also held that contrary to the family's argument, the facility did not waive protection of the statutory caps because although they were not specifically pled, statutory damage caps are not affirmative defenses.

The facility also argued that the trial court should have applied §41.008(b), which places a cap on punitive damages, to the jury award. Again, the family argued that the facility waived protection of this statute by failing to affirmatively plead it. Using the same reasoning applied previously, the court first held that the punitive damages cap is not an affirmative defense, but must be applied as a matter of law. The court then held that the punitive damage cap did not conflict with the other limitations and should also be applied to the punitive damage award.

Rio Grande Reg'l Hospital, Inc. v. Villarreal, 2010 WL 3810019 (Tex.App-Corpus Christi, Sept. 30, 2010).

Survivors of a patient who committed suicide while in a hospital's care filed suit against the hospital asserting medical malpractice and wrongful death claims. The appellate court, citing the opinion in *Perea* above, likewise held that both §74.301(b), the non-economic damages cap and §74.303, the wrongful death and survival damages cap, applied to calculate the survivors' damages.

Angle v. Koppers, Inc., 42 So. 3d 1 (Miss. 2010).

A plaintiff filed suit on March 16, 2006 against various defendants including Koppers, a wood-treatment plant, for injuries suffered as a result of harmful exposure to toxic chemicals from 1984 through 2001. The defendants successfully moved for summary judgment based on §15-1-49 of the Miss. Code and its three-year statute of limitations. The plaintiff appealed. The record showed that the plaintiff's last injury occurred in 2001, five years before she filed the complaint. However, Plaintiff argued that the statute of limitation began to run when she knew that she had an injury and the *cause* of her injury. The court found, however, that the cause of action accrued upon discovery of a latent injury, not discovery of the injury and its cause. Therefore, the court held that plaintiff's claims were time-barred.

Lincoln Elec. Co. v. McLemore, 2010 WL 4983147 (Miss. Dec. 9, 2010).

Plaintiff welder brought product liability action against manufacturers of welding rods in November 2005, alleging that his exposure to harmful welding fumes from rods resulted in his eventual diagnosis of manganism, a neurological disease caused by high exposure to manganese. The defendants filed a motion for summary judgment on statute of limitations grounds because the plaintiff and at trial, the jury awarded $1.85 million. The manufacturer appealed arguing that plaintiff's claims were time barred.

The issue on appeal was whether the plaintiff's cause of action accrued when he discovered that he had Parkinsonism (September 2002) or when he had a diagnosis of manganism specifically tied to his exposure to manganese (2005). Following the analysis in *Angle v. Koppers*, the court found that §15-1-49 of the Miss. Code does not require a plaintiff to know the cause of the injury before the accrual of the cause of action. Rather, the cause of action

accrues when a plaintiff knows, or should know that he has an injury. Accordingly, the court found that the plaintiff's claim was time-barred.

Drug Litigation

U.S. ex rel. Steury v. Cardinal Health, Inc., 625 F.3d 262 (5th Cir. 2010).

Steury, on behalf of the U.S., claimed that the Cardinal defendants, successors to her former employer, Alaris Medical Systems, sold the United States Department of Veterans Affairs defective medical equipment in violation of the False Claims Act (FCA). The district court dismissed Steury's complaint for failure to state a claim under Federal Rules of Civil Procedure 9(b) and 12(b)(6). The Fifth Circuit affirmed the district court's decision with respect to failure to state a claim, but vacated the final judgment and remanded to allow Steury to file an amended complaint.

Steury formerly worked for Alaris Medical Systems as an account consultant who marketed medical devices. Steury alleged that one of these devices, an electronic pump that regulates the rate at which intravenous fluids flow into patients, had a dangerous defect because it allowed air bubbles to accumulate and release into a patient's intravenous line, potentially resulting in serious injury or death. Steury alleged that Cardinal sold the pumps to the VA from 2997 until August, 2006. In addressing the merits of Steury's claims, the court framed the argument as whether Cardinal *impliedly*, and falsely, certified compliance with the warranty of merchantability simply by requesting payment for the pumps. The court noted that the theory of implied-certification has not yet been recognized and held that Cardinal did not make an implied certification that the pumps complied with the warranty of merchantability. The court cautioned, however, that it was not holding that that a knowing delivery of defective goods to the Government will never implicate the FCA. Further, the court held that although Steury had failed to allege her FCA claim with particularity, she would be allowed to amend her complaint as the court could not say that the defects were incurable or that amendment would be futile.

Wells v. Smithkline Beecham Corporaton, 601 F.3d 375 (5th Cir. 2010).

The 5th Circuit affirmed the district court's order of summary judgment for the defendant holding that Plaintiff's experts failed to satisfy Daubert's admissibility requirements.
Plaintiff, who suffered from Parkinson's disease, routinely took the drug Requip to help alleviate his painful symptoms. Although the plaintiff had historically gambled regularly, he claimed that he had been able to control his losses. Plaintiff alleged that after taking Requip for less than a year and a half, he had gambled away more than $10 million due to a compulsion which was a side effect of Requip.

Plaintiff sued the manufactured of Requip alleging the manufacturer had failed to warn that the drug would make him gamble away millions. In support of his case, Plaintiff offered testimony from three experts who opined that Requip could cause pathological gambling in the general population. However, each of the experts conceded that no scientifically reliable evidence of a cause-and-effect relationship between Requip and gambling exists. Consequently, the court held that "the bases for the experts' conclusions pass none of the applicable Daubert tests. It was not generally accepted that Requip caused gambling problems, the experts'

conclusions had not been subject to peer review and publication, and were not backed by studies meeting requisite scientific standards. Therefore, the court entered judgment for the defendant.

Demahy v. Activis, Inc. 593 F.3d 428 (5th Cir. 2010)

See discussion in preemption section.

In re Vioxx, MDL No. 1657, 2010 WL 2649513 (E.D. La. June 29, 2010).

The Louisiana Attorney General, Caldwell, brought suit against Merck in state court seeking injunctive relief and damages regarding its product Vioxx. Plaintiff sought relief on behalf of behalf of the state, its citizens, and the Louisiana Department of Health and Hospitals. The case was removed and transferred to the MDL proceedings. The issue before the court was the State's claim for redhibition. Redhibition is a civil action available under Louisiana law against the seller and/or manufacturer of a product in which the buyer demands a full refund or a reduction of the purchase price due to a hidden defect of the product.

In order to establish a claim in redhibition, the plaintiff must show (1) that the thing sold is absolutely useless for its intended purposes or that he would not have bought it and had the defect been known, (2) the defect existed at the time of purchase, but was not known, (3) that the seller was given the opportunity to repair the defect. The State claimed that had it known that Vioxx presented cardiovascular risks, which were supported by studies, it would not have approved reimbursement under the State's Medicaid program. The court noted, however, that this claim was not supported by the weight of the evidence. Accordingly, the court held that the State's claim failed because it did not prove causation. Specifically, the court found that the State failed to establish at trial that had it known of the risks, it could and would have taken steps to exclude the drug from its Medicaid program.

Whitener v. Pliva, Inc., 2010 WL 3021866 (E.D. La. July 29, 2010).

The plaintiff mother was prescribed metoclopramide, the generic form of the drug Reglan, to treat nausea and morning sickness while she was pregnant. Her son was born with severe developmental disabilities as a result of the medication. Plaintiff claims that the drug was not approved by the FDA for prescription to pregnant women. Plaintiff further alleged that the defendants know or should have known of the risk of birth defects, that they failed to warn of that risk and actively concealed it and marketed it for off-label prescription to pregnant women. The plaintiff filed suit against the manufacturers of the drug under the Louisiana Products Liability Act ("LPLA") and also lodged misrepresentation and fraudulent concealment claims. This matter was before the court on one of the defendant's motion to dismiss the plaintiff's non LPLA claims.

The court recognized that the LPLA provides the exclusive theories of recovery against manufacturers of a product for damages caused by their product and that cause of action such as negligence, strict liability, or breach of express warranty are not available against a manufacturer. However, the court noted, the LPLA does not govern claims against a non manufacturing seller of a product. Under Louisiana law, a non-manufacturing seller is liable for damages caused by a product sold if it knows or should have known that the product sold was

defective and failed to declare it. Because the plaintiff pled in the alternative that the defendant was either a manufacturer or a seller, plaintiff was allowed to proceed with both the LPLA claim and the non-manufacturing seller theory.

Ridgeway v. Pfizer, Inc., 2010 WL 1729187 (E.D. La. 2010).

Plaintiffs, husband and wife, brought suit against defendant alleging that the drug Viagra produced by the defendant caused the husband to suffer a stroke. The husband had taken Viagra for approximately ten years prior to suffering the stroke. Defendant moved for summary judgment contending that the plaintiffs lacked medical evidence that Viagra was a cause of the husband's stroke. Plaintiffs argued that the doctrine of *res ipsa loquitur* is sufficient to defeat summary judgment.

Noting that the Louisiana Products Liability Act ("LPLA") governed the claim, the court further recognized proximate causation for the alleged injury is a necessary element of the LPLA. In evaluating the testimony of plaintiff's treating physicians, the court noted that none of the physicians testified that there is any indication that Viagra causes strokes. The court held that although the doctrine of *res ispa* allows an implication of negligence to arise from the circumstances, the doctrine does not dispense with the rule that negligence must be proved. Further, were not able to exclude all possible causes of the husband's injury that are equally or more reasonable than defendant's fault. Consequently, the court found that the defendant was entitled to summary judgment.

Hood v. Astrazeneca Pharm, LP., 2010 WL 3951906 (N.D. Miss. Oct. 7, 2010).

Finnicum v. Wyeth, Inc., 708 F. Supp. 2d 616 (E.D. Tex. 2010).

The plaintiff consumer, brought a products liability action against the manufacturers of the brand name drug used to treat gastric reflux symptoms, alleging a failure to warn claim based on her ingestion of the generic version of the drug, which was manufactured by another company. The plaintiff took the generic heartburn drug for about four years when she began exhibiting symptoms of tardive dyskinesia, a neurological disorder characterized by involuntary movements, especially of the lower face. Defendants moved for summary judgment contending that they cannot be held liable for the plaintiff's condition because the plaintiff never ingested any form of the drug that they manufactured or distributed. The plaintiff argues, however, that generic drug manufacturers are required by federal law to use brand-name warnings and likewise physicians prescribing the generic drugs rely on brand-name warnings. She argued, therefore, that the defendants should be held liable for failure to provide adequate warnings of the long-term effects of the use of the drug.

The district court noted that although the Texas Supreme Court had not yet addressed this issue, it was well settled Texas law that a manufacturer generally does not have a duty to war or instruct about another manufacturer's products, even though a third party might use those products in connection with the manufacturer's own products. The court thus found a brand-name manufacturer does not owe a duty to warn users of the risks related to another manufacturer's product and that the defendants were entitled to summary judgment.

Tobacco

A brief background of the Tobacco Master Settlement Agreement is required for the two cases that appear below:

In the 1990s, 52 governmental entities filed suit against the nation's four largest cigarette manufacturers: Philip Morris, R.J. Reynolds, Lorillard, and Brown & Williams. In 1998, these manufactures entered into the Master Settlement Agreement ("MSA") with these entities ("Settling States"), including Louisiana, which released these manufacturers from several types of past, present, and future tobacco-related claims. In exchange for this release, the joining manufacturers were required to make annual contributions (which were based on national market share) to the MSA fund and relinquish certain rights to lobby and advertise.

After execution of the MSA, all other cigarette manufacturers were invited to join the MSA. To "encourage" these other manufacturers to join the MSA, many states enacted Escrow Statutes, which require manufacturers selling tobacco within the particular state to either (1) join the MSA, or (2) make an annual deposit into a qualified escrow account based on the amount of in-state cigarettes sold the previous year. The yearly deposit formula is virtually identical to that governing MSA manufacturers' payments. In the event a state obtains a judgment in the future against the non-MSA manufacturer, the funds deposited in escrow would be used satisfy that judgment. If twenty-five years pass without a judgment, the principal held in escrow would be returned to the non-MSA manufacturer. A non-MSA manufacturer's failure to comply with the Escrow Statute could result in civil and criminal penalties.

S&M Brands, Inc. v. Caldwell, 614 F.3d 172 (5th Cir. 2010).

Plaintiffs in *S&M Brands* – a cigarette manufacturer not participating in the MSA, a cigarette dealer, and a smoker – filed suit in the Western District of Louisiana against the Louisiana Attorney General ("AG") seeking to invalidate the tobacco MSA and Louisiana's Escrow Statute on the grounds that they each violated (1) the Compact Clause, (2) the Sherman Act, (3) the Commerce and Due Process Clauses, and (4) First Amendment. The trial court granted the AG's motion for summary judgment on all claims, and plaintiffs appealed.

On appeal plaintiffs asserted that the MSA violated the Compact Clause, arguing that the MSA constitutes an agreement between all participating states that could potentially interfere with plaintiffs' constitutional rights. The traditional test for whether a Compact Clause violation exists is "whether the Compact enhances the state power quoad the National Government." *Id.* at 176 (internal quotations omitted). Since the MSA only increased the Settling States' bargaining power over tobacco manufacturers (and not the federal government), the Fifth Circuit found that the MSA did not violate the Compact Clause.

Plaintiffs also contended that the MSA and Escrow Statute were "per se violations of the Sherman Act" inasmuch as the MSA created a "national cigarette cartel" designed to increase the original four manufacturers' prices while at the same time protecting their market share. Plaintiffs' theory was that the MSA and Escrow Statute encouraged the settling manufacturers to increase their prices so their market share stayed level (and they could avoid making additional contributions to the MSA fund), while the non-settling manufacturers were unable to undercut

the settling manufacturers prices (if their market share increased, they would be subject to a greater fee under the Escrow Statute). The Fifth Circuit found that any anticompetitive behavior at issue was not caused by the MSA and/or Escrow Statute; rather, the complained of behavior was a decision of the manufacturers. Therefore, plaintiffs' antitrust claims failed.

Similarly, plaintiffs claimed that the MSA and Escrow Statute violated the Commerce and Due Process Clauses because they created "extraterritorial price increases." *Id.* at 177. The appellate court held that since the MSA and Escrow Statute "only allow Louisiana to regulate and collect escrow payments based on the sale of cigarettes within Louisiana's jurisdiction . . . there is no violation of the Due Process or Commerce Clause." *Id.* at 178.

Finally, the Fifth Circuit held that plaintiffs' First Amendment and Federal Cigarette Labeling and Advertising Act ("FCLAA") claims failed. Specifically, plaintiffs alleged that the MSA and Escrow Statute created a direct restraint on speech by prohibiting and restricting manufacturers lobbying activities and advertisements. The court held that since plaintiffs' were not MSA members and were not compelled to join the MSA, the MSA and Escrow Statute did not abridge their First Amendment rights. Likewise, since plaintiffs' were not members of the MSA and the Escrow Statute had no "connection whatsoever with cigarette packaging, advertising, or promotion," their FCLAA were meritless. *Id.*

Xcaliber Int'l Ltd. v. Caldwell, 612 F.3d 368 (5th Cir. 2010)

The original iteration of the Louisiana Escrow Statute provided that non-MSA manufacturers would receive a refund of any escrowed funds if the manufacturer deposited more money "than the state's allocable share . . . that such manufacturer would have been required to make . . . under the [MSA]." La. Rev. Stat. § 13.5063(C)(2)(b). Since the MSA manufacturer's yearly payments were tied to a national level of sales, and the Escrow Statute's refund provision allowed Louisiana to only retain what its percentage share of the funds would be under the MSA, non-MSA manufacturers could focus on having fewer sales but at a higher profit margin.

In 2003, Louisiana revoked the "allocable share" language from the Escrow Statute. In other words, a non-MSA manufacturer can now only receive a refund if it can show that "the amount it was required to place into escrow . . . was greater than the [MSA] payments . . . that [it] would have been required to make [if it joined the MSA]." Xcaliber is a regional tobacco manufacturer that sells cigarettes in only a few states. Therefore, under the former statute, Xcaliber regularly received a refund, but under the amendment, it did not.

Xcaliber sued the Louisiana Attorney General, arguing that the Allocable Share Revocation ("ASR") violated the Sherman Act, the Equal Protection Clause, and the Due Process Clause. The trial court granted Louisiana's summary judgment motion as to all claims, and Xcaliber appealed.

Plaintiff argued that the Sherman Act preempted the ASR. The Fifth Circuit disagreed. Specifically, the Court found that the ASR did not require any change in cigarettes' prices, where they were sold, or how they were sold; instead, it merely changed non-MSA manufacturers' refund scale. Therefore, the ASR did not "mandate or authorize" any antitrust violation, nor did it impose "irresistible pressure" on non-MSA manufacturers to violate antitrust laws. Further,

the ASR did not constitute a "hybrid restraint" on trade, such as if Louisiana had given regulatory authority to private parties. Lastly with regard to plaintiff's Sherman Act argument, the court found that there was insufficient evidence to show that "Louisiana acted entirely at the behest of the [MSA manufacturers]" in passing the ASR. *Id.* at 377.

Plaintiff also argued that the ASR violated the Equal Protection Clause because it served to coerce non-MSA manufacturers into joining the MSA and relinquishing various First Amendment rights. The Fifth Circuit held that Louisiana had valid reasons for implementing the ASR (such as smoking cessation and the attendant health care costs saved) to survive rational-basis review. Accordingly, the court found that plaintiff's Equal Protection arguments lacked merit.

Finally, plaintiff claimed that the ASR violated the Due Process Clause because it allegedly deprived plaintiff of property based on a "future, hypothetical finding of judicial liability," and the required payments amounted to "an adjudicative deprivation" without due process. The court held that plaintiff's argument hinged on whether the ASR was truly a legislative action or adjudicative in nature. Since the escrow payments applied to all non-MSA manufacturers and served as security for any potential liability to Louisiana, the Fifth Circuit held that the ASR was a "legislative precondition for the privilege of engaging in future cigarette sales" and not an adjudicative pre-deprivation of property. Since the ASR was legislature in nature, plaintiff's Due Process arguments failed.

Automotive

McCabe v. Ford Motor Co., No. 1:10-cv-98, 2010 U.S. Dist. LEXIS 61032 (E.D. Tex. June 21, 2010).

On June 22, 2009, plaintiff filed suit in Texas state court against Ford Motor Company and other defendants alleging design and manufacturing defect claims which caused plaintiff "severe injuries, which ultimately resulted in her death." Pursuant to Texas rules, plaintiff's complaint did not include an *ad damnum* clause. In state court, defendants served various amount-in-controversy requests for admissions. On January 23, 2010, plaintiff affirmatively responded that she intended to seek greater than $75,000. Defendants removed the case on February 22, 2010, and plaintiff filed a motion to remand arguing that the removal was untimely.

The district court granted plaintiff's motion to remand. The court held, "[g]iven the severity of [decedent's] injuries, the nature of the damages alleged, and a review of cases involving similar or less severe injuries, recovery in excess of $75,000.00 could reasonable be expected in this case." *Id.* at *18 (collecting citations). Since plaintiff's complaint affirmatively revealed on its face that she was seeking more than $75,000, defendants' removal was untimely.

Anderson v. ALPS Auto, Inc., No. 2009-IA-00987, 2010 Miss. LEXIS 603 (Miss. Nov. 18, 2010).

The wrongful death decedent was killed when his airbag failed to deploy in a front-end collision. Plaintiff-beneficiary filed suit against General Motors Corporation and various fictitious defendants alleging defective design and manufacture of the airbag. During discovery

testing of the airbag, a defective component part (*i.e.*, a clockspring) manufactured by ALPS Automotive, Inc. (a non-defendant) was discovered. An ALPS employee present during the testing confirmed to plaintiff's counsel that ALPS manufactured the clockspring. Nevertheless, plaintiff's counsel failed to file an amended complaint for an additional nine months.

Shortly after ALPS was substituted for a fictitious defendant, it moved for summary judgment. ALPS argued that since plaintiff failed to exercise reasonable diligence in timely joining it to the litigation, the amended complaint would not relate back to plaintiff's initial complaint and was therefore time barred. The trial court granted ALPS motion for summary judgment, and plaintiff filed an interlocutory appeal. The Mississippi Supreme Court affirmed, holding that Mississippi Rule of Civil Procedure 9(h) requires plaintiffs to amend their complaints "in a reasonably diligent manner" once they learn the true identity of fictitious parties. A delay of nine months was unreasonable.

Other

The Lincoln Electric Company v. McLemore, No. 2009-cv-320, 2010 Miss. LEXIS 639 (Miss. Dec. 8, 2010).

Plaintiff filed suit against various welding consumable manufacturers alleging that defendants' failure to warn caused him to suffer from manganism, a Parkinson's-like disease allegedly caused by exposure to manganese in defendants' products. Based on statute of limitations grounds, Defendants filed motions for summary judgment and for judgment notwithstanding the verdict, both of which were denied by the trial court. Following a jury verdict for plaintiff, defendants appealed.

On September 3, 2002, plaintiff – who had been experiencing slowness in his hands and arms – was diagnosed by a neurologist with "parkinsonism" and was told that it might be related to his work as a welder. Pursuant to Mississippi's three-year statute of limitations, defendants argued that plaintiff should have filed suit by September 3, 2005. Plaintiff, on the other hand, claimed that he first learned of his specific injury (*i.e.*, manganism) in 2005; therefore, the three-year statute did not begin to run until his specific diagnosis. Plaintiff's operative complaint was filed on November 14, 2005. The Mississippi Supreme Court held that plaintiff's cause of action "accrued upon discovery of the injury, not discovery of the injury and its cause." *Id.* at *8. Accordingly, plaintiff's claim was time barred and the trial court's judgment was reversed and rendered.

The Mississippi Supreme Court also addressed the issue of whether previously filed – but not served – lawsuits could serve to toll the statute of limitations. Plaintiff filed suit on August 31, 2004 against the defendants. This suit was voluntarily dismissed without service having been made on any defendant. Plaintiff then filed a virtually identical suit on November 14, 2005, which was amended on March 3, 2006 and served on March 14, 2006. Importantly, if plaintiff received Rule 4's 120-days tolling for the filing of his August 31, 2004 complaint, his November 14, 2005 complaint would have been timely. The Court held that "when a party chooses voluntarily to dismiss an action, the party receives no tolling benefit." Accordingly, plaintiff's claims could not be saved by the filing of an earlier, voluntarily dismissed suit.

Jowers v. The Lincoln Electric Company, 617 F.3d 346 (5th Cir. 2010).

Plaintiff filed suit against The Lincoln Electric Company, The ESAB Group, and The BOC Group (all welding consumable manufacturers) alleging that defendants' failure to warn caused him to incur permanent injury allegedly caused by exposure to manganese in defendants' products. After a compensatory and punitive verdict being returned for the plaintiff, defendants appealed, arguing that (1) the district court gave an improper government contractor jury instruction, and (2) the trial court erred in refusing to permit any apportionment of fault to plaintiff's employer.

In its government contractor jury instruction, the trial court instructed the jury on the three standard elements of the government contract defense: that "(1) the federal government exercised discretion and approved warnings for the product; (2) the warnings the defendant provided about the product conformed to the federal government specification; and (3) the defendant warned the federal government about dangers known to the defendant but not the government." The trial court then added a fourth element, requiring defendants to establish that "the United States Government had an identifiable Federal interest or policy in the existence or methods of warnings on welding products" and that "there was a significant conflict between this Federal interest or policy and the requirements of Mississippi law regarding the provision of adequate warnings." The Fifth Circuit held that – in light of the first two elements of the defense – requiring the jury to find a "significant conflict" between federal interests and state law would be "superfluous" and force the jury to construe an issue of law. Nevertheless, the appellate court held that the additional element did not affect the outcome of the case.

Mississippi law permits apportionment of fault to immune tortfeasors, including employers who are immune by way of workers' compensation laws. *See* Miss. Code Ann. § 85-5-7. The trial court, however, refused to allow the jury to apportion fault to plaintiff's employer. The court's rationale was premised on the fact that plaintiff and his employer fell within the Longshore Harbor Workers Act ("LHWCA"), not state workers' compensation law, and that the LHWCA prevented the jury from apportioning fault to the employer. The Fifth Circuit disagreed, holding that Mississippi law allows for apportionment of fault to all tortfeasors "without regard to whether the joint tortfeasor is immune from damages." *Id.* Accordingly, the appellate court reversed, vacated the compensatory and punitive awards, and remanded for a new trial as to apportionment of fault and damages.

Preemption

Demahy v. Actavis, Inc., 593 F.3d 428 (5th Cir. 2010)

The Fifth Circuit held that the federal regulatory regime governing pharmaceuticals is without preemptive effect over state-law failure-to-warn claims against manufacturers of generic drugs. In other words, simply because a manufacturer of generic drugs obtains an FDA approval for the manufacturing and marketing of its drugs, the manufacturer can still be held liable for its failure to warn consumers of dangerous side effects that it knew or should have known about. This opinion follows the trend of 2009's landmark decision by the Supreme Court in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), that such claims are not preempted against name brand drug manufacturers.

The defendant, the manufacturer of Reglan, a drug widely prescribed for gastroesophogeal reflux was sued by the plaintiff because after taking Reglan for four years she alleged she developed tardive dyskinesia, a neurological movement disorder that causes the body to shake and tremor violently and uncontrollably. 593 F.3d at 430. Plaintiff asserted claims of personal injury under the Louisiana Products Liability Act ("LPLA") for, among other things, failure to warn of the risks of neurological disorder after long-term use of metoclopramide. More specifically, plaintiff argued that the defendant ignored scientific and medical literature establishing a higher risk of developing tardive dyskinesia, failed to request a labeling revision from the FDA, failed to change the label itself even though no prior FDA approval was required, and failed to report safety information directly to the medical community. *Id*. The defendant moved to dismiss plaintiff's claims, arguing the claims were preempted. The Fifth Circuit disagreed.

The defendant claimed that failure to warn cases against the manufacturer of generic drugs should be preempted because the manufacturer of the name brand drug may change its label unilaterally—through the FDA's "changes being effected" ("CBE") process—while seeking the FDA's approval of the change, but that a generic drug manufacturer must produce the same drug and use the same brand drug manufacturer. *Id*. at 433.

The Fifth Circuit held that in this case, the bar to a finding of preemption is set even higher because federal law provides no remedy for an injured consumer. *Id*. at 435. Preemption of state failure-to-warn claims would foreclose a remedy that was traditionally available and for which federal law provides no substitute. *Id*. The Court ultimately concluded that "[b]ecause state imposition of duties to warn on generic drug manufacturers neither renders compliance with federal regulation impossible nor obstructs the goals of that regulation, we AFFIRM the district court's finding that [plaintiff's] state-law failure-to-warn claims are not preempted." *Id*. at 448.

The Supreme Court recently granted *certiorari* on December 10, 2010 and will be among the first generic product liability cases to reach the Supreme Court.

Cenac v. Hubble, C.A. No. 09-3686, slip opinion ,(E.D. La. Oct. 21, 2010)

Plaintiffs filed an action on behalf of their deceased father alleging that in March 2008 the defendant doctor implanted a medication pump, designed and manufactured by Medtronic, into their father. The pump was designed to dispense a controlled amount of medication directly into the area around the spine. Plaintiffs allege that on April 29, 2008, the pump malfunctioned and administered a lethal dose of medication, causing their father's death.

In June 2009, Medtronic filed a motion to dismiss arguing that plaintiffs' claims were preempted by federal law. The court denied the motion to dismiss, but ordered that plaintiffs could amend their complaint to add parallel claims. In September 2009, Medtronic once again moved to dismiss the complaint for failure to adequately plead a violation of federal law. Concluding that the amended complaint also failed to plead a sufficiently specific violation of federal law, the court nevertheless denied Medtronic's motion, giving plaintiffs one more opportunity to amend their complaint.

After plaintiffs filed a second amended complaint asserting eleven causes of action, Medtronic filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), arguing that each of plaintiffs' claims is preempted by federal law. The court dismissed the second amended complaint in its entirety finding that the federal regulations stated by the plaintiffs were not specific enough to state parallel claims. The parallel claims, however, failed for substantive reasons, not just for inadequate pleading.

First, the plaintiffs alleged violations of several sections of the FDA's Good Manufacturing Practices ("GMPs") and the regulation that required the manufacturer to follow its pre-market approval ("PMA"). These, however, were all found too generic to support a parallel violation claim. The plaintiffs then alleged violations of reporting requirements. The court found that by only generally asserting that the defendant was negligent in failing to hear to the requirements that plaintiffs failed to alleged the manner in which any action of the defendant was inconsistent with the PMA, which precluded the plaintiffs from asserting a parallel claim.

The plaintiff next alleged "that [defendant] failed to provide and update information with respect to the device after FDA approved the device." The court held these warning claims were preempted because the Fifth Circuit has determined that state law claims related to a defendants alleged failure to provide information obtained after the FDA approved the devise are preempted.

The plaintiffs then alleged that defendant breached the "implied warranty of the fitness of the product" and express warranty. The court held that both express and implied warranty claims are preempted.

Lastly, the court held that the Louisiana statutes cited by plaintiffs were insufficient to support parallel claims. Plaintiffs asserted that the defendant were negligent in failing to adhere to the requirements of certain provisions of the Louisiana Products Liability Act ("LPLA"). However, the court found that the plaintiffs failed to demonstrate the way in which the cited LPLA provisions parallel a specific federal requirement thus the claims were preempted.

S*anders v. Advanced Neuromodulation Systems, Inc.,* C.A. No., 2010 WL 3785302 (Miss. Sept. 30, 2010)

The Mississippi Supreme Court affirmed a preemption-based summary judgment against an argument that the defendant's Class III device, an implanted spinal-cord stimulator, should be considered Class II (and unpreempted) because the defendant had unsuccessfully sought downclassification. A medical device designated as a class II device is subject to state law, whereas a medical device designated as a class III device is entitled to federal preemption. The court held that the actual classification of the device, and not the lower classification the defendant had unsuccessfully sought, controlled for preemption purposes:

> We find that the trial court did not err by finding that the [product] was a class III medical device, and as such, [plaintiff's] claims were barred, because the claims were subject to federal preemption. . . . The [product], pursuant to the MDA, was classified as a class III device. In an attempt to have the [product] reclassified from a class III device to a class II device, [defendant] petitioned the FDA in 1999. The record contains the FDA's denial of [defendant's] request at

> reclassification. In its 2001 denial letter, the FDA unequivocally stated that the stimulator was "automatically classified into class III."

2010 WL 3785302, at *8.

Hood v. AstraZeneca Pharmaceuticals, LP, C.A. No. 1:10CV104-SA-JAD, 2010 WL 3951906 (N.D. Miss. Oct. 7, 2010)

Mississippi's Attorney General, on behalf of state, brought a state court action against pharmaceutical companies, alleging false statements of material fact for use in determining rights to Medicaid benefit in violation of the state's Medicaid law, violation of the Mississippi Consumer Protection Act ("MCPA"), and claims for fraud and misrepresentation, unjust enrichment, negligence and gross negligence, and injunctive relief. The defendants' removed the action to the federal court and the state then moved for remand.

On the motion for remand, defendants' made the argument that "when a state takes legal action pursuant to its own state law, but its action exceeds its authority under federal Medicaid law, there is a paramount federal interest." 2010 WL 3951906, at *10. The court found, however, that the fact that defendants' alleged that plaintiff's state law claims could possibly exceed the State's authority under federal law is also insufficient to confer federal removal jurisdiction here. Defendants' preemption-type argument arose as a defense to Plaintiff's allegations ("Removal is not proper if based on a defense or an anticipated defense which is federal in nature, 'including the defense of preemption....'").

The court stated that in order to justify removal, defendants would have to show complete preemption, or in other words, that Congress has either explicitly or by inference directed that federal law provide the exclusive cause of action in this area of law (*i.e.* Medicaid). *Id.* at *12. The court held that the defendants could not make such a showing, not that the defendants had in fact failed to point to any sections, or even a single section, of federal Medicaid law that would demonstrate complete preemption. *Id.* Furthermore, the court stated that Medicaid is the hallmark of "cooperative Federalism," and is administered jointly by state and federal governments. *Id.* (internal citations omitted).

While the court was unsure whether the defendants preemption argument also extended to its arguments regarding the FDCA or the FDA, the court it relied upon the Supreme Court's decision in *Wyeth v. Levine,* 129 S. Ct. 1187, 1200 (2009) to confirm that any extent defendants made such an argument, state products liability law is not preempted by FDA regulations, therefore does not justify federal question jurisdiction. *Id.*

Lofton v. McNeil Consumer & Specialty Pharmaceuticals, C.A. No. 3:05-CV-1531-L, 2010 U.S. Dist. Lexis 6390 (N.D. Tex. Jan. 27, 2010)

Plaintiffs' claims arose out of the death of Christopher M. Lofton ("decedent"). Plaintiffs alleged that the decedent began taking Motrin for musculoskeletal pain on May 20, 2000, and developed a rash on May 25, 2000. He was diagnosed with a viral rash in the emergency department, then visited his primary care physician, was treated with steroids, and referred for a dermatology consult. On May 27, 2000, decedent went to the emergency department and was

diagnosed with Stevens-Johnson Syndrome ("SJS") and toxic epidermal necrolysis ("TEN") secondary to ibuprofen. Decedent subsequently developed septicemia and multi-organ system failure, and he died on June 3, 2000.

Plaintiffs brought claims of defective design, marketing defect, breach of express warranty, breach of implied warranty, negligence, and violation of the Texas Deceptive Trade Practices Act as a wrongful death action and as a survival action.

On Defendant's motion for summary judgment, the court held that the Texas exception for fraud on the FDA was preempted. This decision followed the Sixth Circuit's decision in *Garcia v. Wyeth-Ayerst Labs.*, 385 F.3d 961, 965-966 (6th Cir. 2004) which ruled that an exception to the presumption for fraud on the FDA was preempted by *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001) (holding state-law fraud-on-the-FDA claims conflict with, and are therefore impliedly preempted by, federal law).

In its decision, the *Lofton* court held that:

> this court determines that the rationale in *Garcia* is persuasive and that extending the holding of *Buckman* to fraud-on-the-FDA exceptions is warranted. The court finds that the concerns in *Buckman* hold true not only where a plaintiff brings a fraud-on-the-FDA claim but also where it seeks to show an exception to the presumption here. To avoid any intrusion upon the FDA's right to police fraud itself, the court follows *Garcia* and finds that section 82.007(b)(1) [the Texas fraud on the FDA exception] is preempted in some circumstances, including as here, where Plaintiffs ask the court to reach the conclusion opposite of that reached by the FDA, that Defendants did not withhold information or mislead it.

2010 U.S. Dist. Lexis 6390, at * 32.

Bass v. Stryker Corp., C.A. No. 4:09-CV-632-Y, 2010 WL 3431637 (N.D. Tex. Aug. 31, 2010)

A medical device case, the primary preemptive focus was express presumption as posited by *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008). As is common in such cases there are frequently "parallel violation" claims. The court in *Bass* threw them out, finding that they were simply disguised attempts at private enforcement of the FDCA, which is prohibited by the express terms of the statute.

The plaintiff claimed his Trident System hip prosthesis failed and filed suit alleging numerous claims, including products liability, negligence, breach of warranty, and violation of the Texas Deceptive Practices Act. Defendants moved to dismiss, arguing that each of the claims is preempted. The first issue was whether the FDA's premarket approval to the Trident System as a whole meant that the particular component that failed, the Trident ASL Acetubular Shell, had received premarket approval. The court said that it did, following the decision in *Lewkut v. Stryker Corp.*, C.A. No. 09-cv-3695, 2010 U.S. Dist. LEXIS 38345 (S.D. Tex. Apr. 16, 2010). 2010 WL 3431637, at *4.

The more substantial issue was whether the plaintiff had stated viable parallel claims. His complaint included conclusory allegations of "manufacturing deficiencies" and "material deviations" and passing references to a voluntary recall and an FDA warning letter, but no supporting facts, much less facts connecting the alleged problems to his injuries. The complaint therefore failed to plead parallel claims. *Id.*

The court also stated said that plaintiff's putative parallel private pleadings were preempted by 21 U.S.C. § 337(a). Following the decision in *In re Medtronic, Inc*., 592 F. Supp. 2d 1147 (D. Minn. 2009), the court said that "a plaintiff's characterizing his claims as parallel would be no response to a preemption argument under § 337(a)." 2010 WL 3431637, at *5. Although *In re Medtronic* said that a plaintiff could avoid preemption under *Riegel* by alleging a failure to adhere to premarket approval specifications, *Bass* said that such a claim would be preempted by § 337(a)'s language giving the United States the exclusive right to enforce the FDCA, and in any event Bass did not plead facts supporting such a claim. 2010 WL 3431637, at *5.

The *Bass* court said that *In re Medtronic* recognized a second exception for claims under state statutes that create a cause of action for FDCA violations, but the court said that the plaintiff did not rely on any such statute, so that exception did him no good. *Id. Bass* concluded that plaintiff's claims are preempted by § 360k and any alleged parallel claims that escaped § 360k preemption are preempted by § 337(a). *Id.*

What is also noteworthy about the *Bass* decision is the lack of reference to the presumption against preemption. Following the decision in *Wyeth v. Levine*, 129 S. Ct. 1187, 1200 (2009) (in holding that federal law does not preempt lawsuits against prescription drug manufacturers for failing to warn of their drug's dangers, the Supreme Court reaffirmed the strong presumption against federal preemption in cases involving the historic police powers of the States) this could be a potentially dangerous omission.

Market Share Liability or other New Theories of Liability

There is nothing of significant to report in the Fifth Circuit on the acceptance of market share liability or other new theories of liability.

SIXTH CIRCUIT

Tort Reform

Michigan – On September 29, 2010, proposed legislation (2009 MI H.B. 6517) introduced that would modify Michigan's existing tort reform statute. This proposed legislation would eliminate cap on non-economic damages related to Taser-like products.

Tennessee – no new cases regarding tort reform; however, newly-elected Republican governor campaigned on promises to institute sweeping tort reform that would limit non-economic damages in all personal injury causes.

Preemption

Wimbush v. Wyeth, 619 F.3d 632 (6th Cir. 2010).

Plaintiff sued the defendant pharmaceuticals company, asserting strict liability and negligence claims regarding the defendant's manufacture and sale of a diet pill that had a high risk of causing a frequently fatal health condition. The trial court granted summary judgment in favor of the defendant on all of the plaintiff's claims. On appeal, the Court reversed the district court's finding that the Food and Drug Administration's ("FDA") approval of the diet pill preempted the plaintiff's negligence claims, taking issue with the defendant's actions before the FDA approved the drug.

While affirming the entry of summary judgment on the merits of plaintiff's post-FDA-approval negligence claims, the Court noted that dismissal of the post-approval claims did not dispose of the claims that the defendant was negligent for bringing the drug to market at all. In applying the law of preemption, the Court explained that, by passing the Federal Food, Drug, and Cosmetic Act (the "FDCA"), Congress did not intend to preempt state common-law tort claims and instead viewed the FDCA as a "complementary" form of drug regulation. The Court concluded that because FDA approval of the drug did not preempt state law tort claims for negligence, the plaintiff could proceed with her claims relating to the defendant's allegedly negligent conduct occurring before the FDA approved the drug for sale on the market.

Howard v. Sulzer Orthopedics, Inc., 2010 WL 2545586 (6th Cir. 2010).

Plaintiff sued the defendant medical device company (under the theory of negligence per se), arguing that Sulzer failed to comply with certain FDA regulations when it manufactured the knee implant at issue. More specifically, Sulzer's new manufacturing process left lubricating oil on certain knee implants, and although Sulzer used an FDA-approved cleaning process for each device, this process did not totally remove the oily residue.

Plaintiff argued that the PMA for the implant required Sulzer to follow not only the specified manufacturing steps listed in the PMA but also follow the Good Manufacturing Practices that the PMA incorporated. These GMP's required a process whereby lubricating oil was removed. The district court granted summary judgment in favor of Sulzer on preemption grounds regarding the negligence *per se* claim, holding that the relevant GMP's imposed no additional obligations otherwise spelled out in the PMA; therefore, Plaintiff's claim was preempted as it imposed obligations beyond those in the PMA.

The Sixth Circuit reversed the district court's preemption holding regarding the negligence per se claim. Sulzer argued that the GMP's were too generic to serve as a basis for the Plaintiff's claims; however, the Sixth Circuit determined that the Plaintiff had identified a specific GMP, which provided that:

> Where a manufacturing material could reasonably be expected to have an adverse effect on product quality, the manufacturer shall establish and maintain procedures for the use and removal of such manufacturing material to ensure that it is removed or limited to an amount that does not adversely affect the device's quality.

The Sixth Circuit, using the FDA's comments and interpretations of its own regulations, determined that GMP's, impliedly at least, required removal of manufacturing materials. The Sixth Circuit also reasoned that it was not irrational to think that the FDA desired to assign the risk of a defective device on the party that could actually do something about it.

Lake v. Landsmen, LLC, 2010 WL 891867 (Tenn. Ct. App. 2010).

Plaintiff suffered catastrophic head injuries after being ejected from a shuttle bus that was struck by a concrete truck. Plaintiff sued the bus manufacturer (along with several other defendants), claiming the bus was unreasonably dangerous because it did not have seatbelts, it utilized tempered glass windows, and it used perimeter seating.

Trial court denied defendants' respective motions for summary judgment that argued the Plaintiff's claims were preempted by the National Traffic and Motor Vehicle Safety Act. Tennessee Court of Appeals reversed and remanded, holding that the claims based on the use of tempered glass in the side windows and the lack of seatbelts were preempted (using implied conflict preemption analysis). The court also found that the trial court erred in not granting the defendants' respective motions for directed verdict regarding the perimeter seating claim.

The federal statute at issue regarding the type of glass that could be used in side windows specifically provided for the use of tempered glass, among other types of glass, as tempered glass protected against head and neck injuries although it increased the risk of ejection (as opposed to lamented glass, which decreased the risk of ejection, but increased the risk of head and neck injuries). The choice regarding safety concerns, however, was left to the manufacturer.

The Tennessee Court of Appeals held that the Plaintiff's argument that tempered glass should not have been used in the side windows would "present an obstacle" to the federal policy.

Regarding the Plaintiff's seatbelt argument, the court again held that it was preempted by the FMVSS 208 and 49 C.F.R. § 571.208. The court looked to the NHTSA's statements and reasoning behind these regulations, finding where the NHTSA had determined that seatbelts should not be required in passenger buses like the one at issue, i.e. greater than 10,000 lbs. The Plaintiff's claims, therefore, would be an obstacle to the policies and decisions of the NHTSA and to Congress's "goal of uniformity in the motor vehicle industry."

Tobacco

Philip Morris USA Inc. v. Scott, __ U.S. __; 131 S. Ct. 1; 177 L. Ed. 2d 1040; 2010 U.S. Lexis 5738 (2010).

Plaintiff filed a putative class action against several large tobacco companies on behalf of all smokers in the state of Louisiana, alleging that the defendants defrauded the plaintiff class by "distorting" public knowledge about nicotine's addictive effects. A Louisiana appeal court granted relief in favor of the plaintiff class and entered judgment against the defendants in excess of $250 million, to be used to fund a "smoking cessation program" for the benefit of the class members. After the Supreme Court of Louisiana declined review, the defendants filed a petition for a writ of certiorari in the Supreme Court of the United States, and requested that the Court stay the judgment until it acted on the petition.

In granting a stay of the execution of the judgment, the Court discussed how fraud cases generally require each individual plaintiff to demonstrate detrimental reliance on the defendants' misrepresentations, and noted the class action at issue dispensed with this requirement to a certain extent and denied the defendants an opportunity to contest that any particular plaintiff detrimentally relied on the alleged distortions.

Thus, the Court explained that it was "reasonably probable" that it would grant the defendants' petition for a writ of certiorari and a stay was warranted in the interim, because the case implicated constitutional (due process) constraints on the "allowable alteration of normal process in class actions."

State of Ohio ex rel. Attorney Gen. v. Markedonoja Tabak 2000, 2010 Ohio 2903; 2010 Ohio App. Lexis 2399 (Ohio App. 2010).

The Attorney General for the state of Ohio filed a complaint for injunctive relief, requesting enforcement of a state law requiring manufacturers that sell tobacco products in the state to file certain certifications and make annual payments into an escrow account used to help pay for health costs stemming from smoking-related illnesses, fund prevention programs, and subsidize any future judgments or settlements of claims brought against the manufacturers.

The state sought delinquent payments from both a tobacco product manufacturer and the importer of its products, under the theory that the importer was the manufacturer's agent and attorney-in-fact. The trial court granted summary judgment in favor of the state, holding that the state was a third-party beneficiary of the power-of-attorney between the manufacturer and importer and thus could collect the escrow payments from the importer as well. Moreover, the trial court held that the manufacturer and importer were jointly and severally liable for a statutory civil fine.

On appeal, the Court held that there were genuine issues of material fact regarding whether the manufacturer and importer intended for the state to become a third-party beneficiary of the power-of-attorney agreement, thereby precluding summary judgment. Further, summary judgment was improper with respect to the finding that the manufacturer and importer were jointly and severally liable for the civil fine because, even if the state were a third-party beneficiary of the parties' contract, the power-of-attorney contained a clause limiting the importer's liability. Therefore, the state would not be permitted to impose "additional" statutory penalties on the importer beyond the principal escrow payments owed.

Automobiles

Alberto v. Toyota Motor Corp., 2010 Mich. App. Lexis 1501 (Mich. App. 2010).

Plaintiff sought to depose two high-ranking Toyota corporate executives in connection with a products liability suit asserting that a vehicle defect caused an accident that resulted in the death of the plaintiff's decedent. The defendant moved for a protective order to prevent the depositions, claiming that the executives were not involved in any aspect of the vehicle production and had no knowledge thereof, that the information the plaintiff sought could be obtained from others, and that the trial court should adhere to the so-called "apex" deposition

rule. The trial court held that, although the deponents were high-ranking corporate officers, Michigan case law and court rules did not preclude the depositions.

On appeal, the Court held that the trial court abused its discretion in denying the defendant's motion for a protective order, and vacated the order. In doing so, the Court officially adopted the apex deposition rule in the corporate context, stating that before a high-ranking corporate office may be deposed, the plaintiff must show that the officer possesses "superior or unique information relevant to the issues being litigated" and that the information cannot be obtained by less intrusive means, such as deposing lower-ranking employees.

State Farm Fire & Cas. Co. v. Ford Motor Co., 2010 Mich. App. Lexis 474 (Mich. App. 2010).

The plaintiff's insured suffered significant property damage when their Ford F-150 truck caught fire while parked in the garage, destroying another vehicle and causing severe damage to the garage and house. The fire was caused by a defective "cruise control deactivation switch." The plaintiff insurance company paid the insured under the terms of their policy and, in turn, commenced a products liability action to recover from the defendant.

The trial court granted summary judgment in favor of the defendant, holding that the economic loss doctrine, which bars tort recovery and limits a plaintiff's remedies to those set forth in the UCC, applies to consumer transactions, and that the plaintiff's action was thus time-barred by the shorter statute of limitations contained in the UCC. On appeal, the Court reversed the trial court, stating that the economic loss doctrine did not prevent the plaintiff's products liability claim because, when the insured purchased the Ford F-150, they did not anticipate or contemplate losses occurring by fire. Further, the nature of the lawsuit was not the type generally encompassed by the UCC. Therefore, the UCC, and its statute of limitations, did not apply to the plaintiff's claims.

Specifically, the Court explained that fire-related damages as a possible consequence of ownership of a vehicle, even a defective vehicle, would not have been the subject of negotiations in a consumer vehicle purchase agreement. Such extensive and unanticipated property damage is different than, for example, the delivery of a vehicle of poor quality that simply failed to live up to the full economic expectations of the purchasers. Additionally, permitting the plaintiff to proceed outside of the UCC encourages the design and production of safer vehicles. Therefore, the Court concluded that, although the economic loss doctrine typically extends to individual consumer transactions, the fact that only property was damaged does not automatically make the case subject to the UCC or remove it from "underneath the umbrella of products liability law."

Drug Litigation

See *Wimbush v. Wyeth*, 619 F.3d 632 (6th Cir. 2010), above.

Class Action Fairness Act

U.S. Bank National Association v. Adams, No. 3:10CV555, 2010 WL 3022445 (N.D. Ohio Aug. 2, 2010)

Capital One Bank (USA) N.A. v. Jones, 710 F. Supp.2d 630 (N.D.Ohio Mar. 29, 2010)

In *Adams* and *Jones*, the Northern District of Ohio considered whether a counterclaim defendant could remove to federal court under the removal provision of the Class Action Fairness Act ("CAFA"). 28 U.S.C. § 1453(b). In *Adams*, U.S. Bank filed a foreclosure action against Adams. Adams answered and counterclaimed against U.S. Bank and Wells Fargo for alleged wrongdoing in connection with the origination of the note and mortgage. Wells Fargo, the counterclaim defendant, removed the case to federal court. In *Jones*, Capital One sued Jones in state court for failure to pay her credit card. Jones filed a class action counterclaim against both Capital One and the law firm that signed Capital One's complaint, Morgan & Pottinger, P.S.C. Morgan & Pottinger removed the case to federal court.

The issue in both cases was whether the language in CAFA's removal statute permitted a counterclaim defendant to remove the case to federal court. Ultimately, the issue focused on the language of § 1453(b), which reads that "such action may be removed by *any* defendant without the consent of all defendants." (Emphasis added). The language of the general removal statute, 28 U.S.C. § 1441(a), has been interpreted to mean that "defendant" only means the *original* defendants to an action – not counterclaim, cross-claim or third-party defendants. Adams and Jones argued that "defendant" in § 1453(b) must be read consistently with the interpretation of "defendant" in § 1441(a). Wells Fargo and Morgan & Pottinger argued that § 1453(b) is distinguishable because the language "*any* defendant" means the statute encompasses more than the original defendants.

Courts are split on the interpretation of § 1453(b) and the Sixth Circuit has not weighed in on the debate. The majority of courts, including both the Fourth and Seventh Circuits, have found that (1) 'any', as used in CAFA, can only modify the word 'defendant' as that word had been previously defined by cases - an *original* defendant"; and (2) according to the wording of § 1453(b), a class action can be removed only *in accordance with* § 1446. Contrarily, the minority, including the Northern District of Ohio's *Deutsche Bank National Trust Co. v. Weickert*, 638 F. Supp.2d 826 (N.D.Ohio 2009), rely on the distinction between "the defendant" as used in § 1441 and "any defendant" as used in § 1453(b). The minority argues that statutory interpretation requires the courts to allow any defendant, not just the original defendants, to remove a class action. Additionally, the minority argues that allowing any defendant to remove a case to federal court would be in line with Congress's intent to expand federal jurisdiction through CAFA.

In both *Adams* and *Jones*, the Northern District of Ohio disregarded the decision in *Weickert* and found the reasoning of the majority more persuasive and concluded that "§ 1453(b) does not expand the ability to remove to counterclaim defendants."

Carter v. Pikeville Medical Center, Inc., No. 10-105-ART, 2010 WL 4483968 (E.D.Ky. 2010)

In *Carter*, the Eastern District of Kentucky considered whether the defendant satisfied its burden of establishing by a preponderance of the evidence that the amount in controversy was satisfied. Plaintiff, a law firm, sought class certification in Kentucky state court alleging that the defendants violated a Kentucky statute requiring hospitals to provide patients with one free copy of their medical records. One of the defendants removed the case to federal court under CAFA.

Yet, the court remanded back to state court because the defendant could not satisfy its burden that the amount in controversy exceeded $5,000,000.

The defendant attempted to prove the amount in controversy by arguing that it charged $400,000 per year for medical records, which would equal $2,000,000 over the five year period covered in the complaint. Then the defendant argued that damages for unlawful collection practices, possible punitive damages, attorney's fees, and the costs of complying with an injunction would create damages in excess of $5,000,000 to satisfy the amount in controversy. This was not sufficient reasoning for the court. First, out of the $400,000 per year in charges for medical records, the defendant did not show how much of those charges were improper under the statute and how much of the charges were billed to attorneys, which was the putative class. The defendant argued that it would be too burdensome to go through the thousands of records to make that determination. The court rejected the defendant's argument, emphasizing that, as the party seeking federal jurisdiction, the defendant could not argue that the burden of proving that jurisdiction was too burdensome. Second, it is insufficient to show that the amount in controversy "may" exceed $5,000,000. Rather, the removing party must show that the amount in controversy is more likely than not to exceed $5,000,000.

Other

Fluke Corp. v. LeMaster, 306 S.W.3d 55; 2010 Ky. Lexis 61 (Ky. 2010).

After filing suit against a coal processing facility relating to injuries sustained by the plaintiffs in an electrical explosion at the facility, the plaintiffs amended their complaint to assert products liability claims against the manufacturer of a hand-held voltage multimeter. The multimeter allegedly malfunctioned and failed to measure or detect electrical voltage flowing in the coal processing facility at the time of the accident.

The defendant filed a motion for summary judgment based on the statute of limitations, and the plaintiff argued that the statute of limitations was tolled because, among other things, the defendant allegedly fraudulently concealed known defects in the product and failed to publicly report those defects. The trial court granted the defendant's motion, but the court of appeals reversed, finding that the defendant was equitably stopped from relying on the statute of limitations since it failed to report a potentially hazardous consumer product under the Consumer Product Safety Act ("CPSA").

The Supreme Court of Kentucky reversed the court of appeals and reinstated the trial court's order, explaining that the court of appeals adopted an expansive view beyond that recognized by Kentucky precedent. According to the court of appeals, the statute of limitations would not start to run against a consumer, even where the consumer is immediately aware that the product caused an injury, unless and until the manufacturer has publicly disclosed the existence of defects. Such an approach essentially abrogates a plaintiff's duty to inquire into product safety where it is apparent that the product may have caused or contributed to the injury at issue. The Court reaffirmed that an injured plaintiff has an affirmative duty to use diligence in exploring potential causes of action within the applicable statute of limitations period. Therefore, even if the defendant failed to publicly disclose potential defects in its meters, that did

not excuse the plaintiffs' duty to exercise due diligence in investigating potential claims, or constitute fraudulent concealment sufficient to invoke principles of equitable estoppel.

Maness v. Boston Scientific, No. 3:10-CV-178, 2010 U.S. Dist. LEXIS 118748 (E.D.Tenn. Nov. 4, 2010)

Plaintiff filed a product liability action against Boston Scientific and other defendants in Tennessee state court alleging that an implanted spinal cord simulation system caused her pain, suffering, and infections. Boston Scientific removed the case to federal court and then filed a 12(b)(6) motion to dismiss for failure to state a claim under *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). First, the court ruled that the federal pleading standards applied to the complaint even though it was initially brought in state court. Second, the court found that plaintiff failed to state claims for strict product liability against defendants.

In order to satisfy *Twombly* and *Iqbal* in a strict liability, defective design, defective manufacturing, or failure to warn claim, the "[p]laintiff must allege facts for the court to infer that: (1) the product was defective and/or unreasonably dangerous, (2) the defect existed at the time the product left the manufacturer's control, and (3) the plaintiff's injury was proximately caused by the defective product." The plaintiff's conclusory allegations were insufficient to satisfy this initial pleading burden. For example, it was insufficient for the plaintiff to allege that the medical device was not fit for its intended purpose or that the device caused her pain. Rather, the plaintiff is required to set forth specific facts supporting its conclusion that the device was not fit for its intended purpose and how the alleged defect in the device caused her pain.

Tamraz v.Lincoln Elec. Co., 620 F.3d 665 (Sept. 8, 2010).

Plaintiffs, an independent-contracting welder and his wife, brought a products liability action against five manufacturers of welding rods, alleging that the use of the rods triggered the welder's Parkinsonism. At trial, plaintiff's doctor opined that plaintiff suffers from "manganese-induced parkinsonism." Although all of the medical experts did not dispute that he suffered from Parkinsonism, they did not agree on the cause. Specifically, they could not agree as to whether manganese exposure caused the illness. Plaintiffs were awarded $20.5 million in damages. The United States District Court for the Northern District of Ohio denied the manufacturers' motion to overturn verdict with exception of claims against one manufacturer. The remaining manufacturers appealed. The Court of Appeals held that the opinion of the welder's neurologist was speculative in violation of Rule 702, and that the error of the trial court in admitting the speculative opinion substantially affected judgment in favor of plaintiffs. The Court of Appeals held that just because a medial expert's opinion is called a "differential diagnosis" or "differential etiology" does not by itself answer the reliability question; instead it prompts three more: (1) Did the expert make an accurate diagnosis of the nature of the disease? (2) Did the expert reliably rule in the possible causes of it? (3) Did the expert reliably rule out the rejected causes? The Court held that if any of the answers to these questions is no, then the court is required to exclude the ultimate conclusion reached. The Court of Appeals reversed and remanded the case for a new trial.

SEVENTH CIRCUIT

Preemption

Bausch v. Stryker Corp., 2010 WL 5186062 (7th Cir. Dec. 23, 2010)

In this case, the Seventh Circuit faced the question of whether federal law preempts product liability claims against manufacturers of Class III medical devices where a patient claims that she was harmed by the manufacturer's violation of federal law. The plaintiff brought an action against the manufacturer of a hip replacement system which was implanted in the plaintiff's body and subsequently recalled by the manufacturer, asserting claims under Illinois common law for negligence and strict liability for a defective product. The District Court for the Northern District of Illinois dismissed the case on the grounds that the plaintiff's claims were preempted by federal law and the plaintiff appealed. The Seventh Circuit reversed the District Court, holding that the plaintiff's claims for defective manufacture were not expressly preempted by the preemption provision in the Medical Device Amendments Act of 1976 to the federal Food, Drug and Cosmetic Act.21 U.S.C. § 360k(a). In so holding, the court stated that "[m]edical device manufacturers who subject their Class III devices to the rigorous premarket approval process are protected by federal law from civil liability so long as they *comply* with federal law. That protection does not apply where the patient can prove that she was hurt by the manufacturer's *violation* of federal law." The court went on to quote the Supreme Court's decision in *Riegel v. Medtronic, Inc.*, 522 U.S. 312, 317-20 (2008), in which the Court stated: "§ 360k does not prevent a State from providing a damages remedy for claims premised on a violation of FDA regulations; the state duties in such cases 'parallel,' rather than add to, federal requirements."

The court further held that the plaintiff was not required to allege and prove a violation of a "concrete, device-specific" federal regulation to avoid preemption. Manufacturers of Class III medical devices are required by federal law to comply with Quality System Regulations ("QRS") established by the FDA. The court rejected the defendant's argument that the QRS regulations are too general to allow juries to enforce them. Rather, the court noted that the QRS regulations are legally binding requirements and that the defendant's proposed distinction would leave injured patients without any remedy for a multitude of harmful violations of federal law.

Finally, the court rejected the defendant's argument that the plaintiff's claims were impliedly preempted merely "because they conflict with the FDA's regulatory regime." More specifically, the court stated that Congress did not intend preemption of state claims based on violations of federal law, beyond the limitations set forth in the express preemption clause. Going further, as Bausch's claims did conflict with the federal regulations, the court found no reason for them to be impliedly preempted.

Heisner v. Genzyme, 2010 WL 894054 (N.D. Ill. March 8, 2010)

In another case involving the Medical Device Amendments ("MDA"), the United States District Court for the Northern District of Illinois held that a common law duty to provide supplemental warnings imposed an additional obligation on the manufacturer; therefore, plaintiff's state common law claims against the manufacturer were preempted by the MDA.

Plaintiff's wife underwent surgery to remove an ovarian cyst. After the surgery, a Seprafilm barrier manufactured and marketed by the defendant, was placed into the wife's body to prevent post-surgical adhesions. The wife subsequently developed a reaction to the device and died a few weeks later. Plaintiff brought suit against the manufacturer alleging, *inter alia*, that the manufacturer violated a common law duty to supplement the device label after the manufacturer became aware of information regarding the dangerous nature of devices containing hyaluronic acid. Defendant filed a motion to dismiss.

Plaintiff argued that state common law paralleled the federal requirements in the FDA Changes Being Effected (CBE) regulations. The CBE regulations allow a drug manufacturer to implement labeling changes that "add or strengthen a contraindication, warning, precaution, or adverse reaction" during the pendency of a supplemental application to the FDA. See 21 C.F.R. § 314.70. However, the court pointed out that the CBE applies to drug products, not medical devices. Plaintiff's failure to plead a relevant statute was sufficient grounds for dismissal. Notwithstanding, even assuming plaintiff had plead the relevant statute, 21 C.F.R. § 814.39(d)(1-2), dismissal was still proper. The court determined that §814.39 does not require a manufacturer to provide interim supplemental warnings pending approval by the FDA and a common law duty to provide such warnings would impose an additional obligation on the manufacturer. The duties imposed under state common law and §814.39 were not equivalent. Therefore, the court held that "the MDA preempts all negligence and strict liability claims turning on Defendant's failure to provide supplemental warnings." The court further held that any claims remaining that were not preempted by the MDA, were not sufficiently plead and therefore, plaintiff's complaint was dismissed with prejudice.

Market Share or Other New Theories of Liability

Gibson v. Am. Cyanamid Co., 719 F. Supp.2d 1031 (E.D. Wis. 2010)

In a case involving Wisconsin's risk contribution rule, the plaintiff alleged injuries from ingesting paint containing white lead carbonate pigment and sought to hold several companies involved in the white lead carbonate pigment industry liable. The plaintiff was unable to identify the manufacturer, supplier, or distributor of the white lead carbonate he allegedly ingested. He brought suit against seven "industry defendants," but he did not name as a defendant every company that manufactured and sold white lead carbonate pigments in Wisconsin because some of the companies no longer were in existence. The court considered a motion for summary judgment filed by one of the defendants, Atlantic Richfield Co. ("ARCO"). The plaintiff's claim against ARCO was based on sales of white lead carbonate by ARCO's alleged predecessors-in-interest. ARCO argued that the imposition of liability under the risk contribution rule would violate its substantive due process rights under Section 1 of the 14th Amendment to the United States Constitution. The court agreed and granted ARCO's motion.

In granting summary judgment in ARCO's favor, the court examined the Supreme Court's fragmented decision in *E. Enters. v. Apfel*, 524 U.S. 498 (1998), to form a framework to analyze ARCO's potential liability. The court quoted Justice Kennedy's concurring opinion in *E. Enters.*to hold that liability "might be unconstitutional if it imposes (1) severe (2) retroactive liability on a (3) limited class of parties that (4) could not have anticipated the liability, and the extent of that liability is (5) substantially disproportionate to the parties' experience." The court

found each of these factors satisfied with respect to ARCO, noting that the only potential connection between ARCO and the plaintiff was that ARCO's predecessor-in-interest produced or marketed white lead carbonate for use at some point while the house where the plaintiff lived existed. The court emphasized that the white lead carbonate that allegedly injured the plaintiff could have been applied at any time during the house's existence and even when ARCO was no longer producing or marketing the substance. "This raises a substantial possibility that defendants 'not only could be held liable for more harm than they actually caused, but also could be held liable when they did not, in fact, cause any harm to plaintiff at all.'"

Gibson v. Am. Cyanamid Co., ___ F. Supp.2d ___, 2010 WL 4627662 (E.D. Wis. Nov. 15, 2010)

Following the court's decision to grant summary judgment to ARCO (see above), the remaining defendants in *Gibson* moved for summary judgment on the same grounds: that imposing liability under the risk contribution rule for the plaintiff's alleged injuries would violate the defendants' substantive due process rights. The court granted summary judgment in favor of the remaining defendants and noted that its prior analysis with respect to ARCO applied equally to the remaining defendants. The court rejected the plaintiff's arguments that sought to defeat summary judgment: (i) the defendants failed to satisfy pleading standards to claim that their substantive due process rights would be violated (the court dismissed this argument and observed that such pleading standards are inapplicable because the defendants asserted due process as an affirmative defense to liability); (ii) the risk contribution rule would not impose retroactive liability because a tort is not complete until the tortuous act or omission results in harm (the court noted that the plaintiff's argument misconstrues the relevant analytical framework; "[t]he risk contribution rule imposes retroactive liability because it 'attaches new legal consequences' to the manufacture and sale of white lead carbonate pigments"); and (iii) the court erred by extracting an analytical framework from the fragmented decision of *E. Enters. v. Apfel* (the court observed that even if it erred in its analytical approach to *E. Enters.*, an alternative analysis under the Takings Clause would be equally applicable and likewise would bar the imposition of retroactive liability).

Tobacco

Richardson v. Reynolds Tobacco, 2010 WL 2430778 (E.D. Wis. 2010)

The United States District Court for the Eastern District of Wisconsin granted Defendant tobacco company's motion for summary judgment and rejected the plaintiff's argument that the cigarettes which he smoked for over thirty years were defectively designed thereby causing him to contract emphysema. In so holding, the court reasoned that under the consumer expectation test, no reasonable juror could find for the plaintiff because he submitted no evidence indicating that the cigarettes in question were in a dangerous condition not contemplated by an ordinary consumer. The court reasoned that the plaintiff's own negligence/disregard of the inherent risks of tobacco caused him to suffer the complained of injury. Furthermore, the plaintiff did not present expert medical testimony to support his claim that the emphysema was caused directly by his use of cigarettes.

Automobiles

TRW Vehicle Safety Systems, Inc. v. Moore, 936 N.E.2d 201 (Ind. 2010)

Moore died after he was ejected through the sunroof of his 1997 Ford Explorer during a rollover, despite the fact that he was wearing his seatbelt.The plaintiff brought a wrongful death action against the vehicle manufacturer (Ford) and seat belt manufacturer (TRW). The parties agreed that the seat belt apparently developed slack during the rollover, but competing expert witnesses disputed the cause of the slack. A fourteen-day trial commenced and the jury awarded the estate $25 million in damages. The apportionment of fault was as follows: 33% fault to the decedent; 31% to Ford; 31% to non-party Goodyear; and 5% to TRW. Ford and TRW appealed. Ford and TRW argued that there was insufficient evidence that the seatbelt system or sunroof were negligently designed. They further argued that in order to prove his defective design claims, plaintiff needed expert testimony on the standard of care, breach of the standard, and the existence of a feasible alternative safer design. Plaintiff cross-appealed, arguing that there was insufficient evidence to support the jury's apportionment of 31% fault to Goodyear.The Court of Appeals reversed the judgment against Ford and TRW and the Indiana Supreme Court granted transfer.

The Indiana Supreme Court declined to require proof of an additional or more particular standard of care in product liability actions alleging a design defect. The court explained that although the plaintiff is required to prove a breach of duty, the sufficiency of such proof is determined from the evidence itself and not the declaration of the expert witness. The evidence that Ford elected to equip its 1997 Ford Explorer with a seatbelt system without utilizing the pretensioner technology it used for Ford vehicles manufactured in Europeconstituted probative evidence of Ford's use of reasonable care and supported a reasonable inference that Ford was negligent in the seatbelt system design. There was also evidence to support a reasonable inference that the sunroof was defectively designed where the decedent was ejected through the sunroof opening after the sunroof glass dislodged because of the failure of its mounting brackets.

The court vacated the judgment against TRW because the alleged design negligence as to TRW was its decision to use a seatbelt assembly with pretensioners, but the plaintiff failed to identify any evidence that this decision was attributable to TRW. The evidence showed that the seatbelt assembly was manufactured by TRW according to Ford's design specifications. While there was evidence that an alternative seatbelt assembly design was feasible and available to Ford, there was no evidence that TRW was authorized under its contract with Ford to substitute and supply such an alternative seatbelt design. The court held that "[t]he mere availability of an alternative seatbelt design does not establish negligent design by a defendant that lacks the authority to incorporate it into the assembled vehicle."

The court further held there was insufficient evidence to support the allocationof fault to non-party Goodyear. Although the evidence supported a reasonable inference that the rollover was precipitated by a tire failure, there was no evidence showing whether it resulted from a tire defect attributable to Goodyear, or whether it resulted from normal wear and tear, under inflation, a slow leak, a road hazard or puncture, or another cause.This evidence was insufficient to sustain a product liability verdict against Goodyear even if it had been a named party.

The court also found that plaintiff's counsel improperly invited the jury to calculate a damage award for the deceased driver's fifteen-year-old son past his eighteenth birthday. Therefore, a new trial on the issue of total damages was warranted unless the plaintiff accepted a remitter of $9,025,417, thereby reducing the total damages subject to comparative fault allocation to $15,974,583. The case was remanded for a new trial to allocate between Ford and the plaintiff the remaining 36% fault that was previously allocated to TRW and Goodyear.

Green v. Ford Motor Co., 2010 WL 2673926 (S.D. Ind. June 30, 2010)

The United States District Court for the Southern District of Indiana certified a question of law to the Indiana Supreme Court regarding the application of plaintiff's comparative fault in causing the underlying collision in a "crashworthiness" or "enhanced injury" case. Plaintiff was injured in his 1999 Ford Explorer Sport when the vehicle left the runway, struck a guardrail, and rolled down an embankment. Plaintiff claimed that the Ford Explorer was defective and unreasonably dangerous and that Ford was negligent in its design of the vehicle's restraint system. More specifically, plaintiff claimed that his injures were enhanced by defects in the vehicle's restraint system. Ford asserted an affirmative defense under the comparative fault act, arguing that plaintiff's negligencein causing the underlying accident barred any recovery. Plaintiff filed a motion *in limine* seeking to exclude any evidence of his contributory negligence at trial, arguing that his negligence in causing the collision, if any, was not relevant. Plaintiff argued that in a crashworthiness case, where the sole claim for damages relates only to the plaintiff's enhanced injuries, evidence of plaintiff'snegligence in causing the underlying accident is irrelevant and impermissibly prejudicial. Ford countered that Indiana's Comparative Fault Act dictates that plaintiff's alleged negligence in causing the underlying accident must be considered by the jury. Plaintiff moved to certify the question of law to the Indiana Supreme Court and the district court granted the motion to certify.

The district court acknowledged that Indiana's comparative fault act required the jury to apportionfault to all parties who caused the harm and, in a crashworthiness case, the physical harm at issue is the enhanced injury caused by the defective design. The court stated that the "critical question is whether a plaintiff who negligently causes the underlying accident in a crashworthiness or enhanced injury case also 'causes' the enhanced injuries that, by law, the plaintiff is required to prove were caused by the defective design."The district court determined that Indiana's Comparative Fault Act did not answer the question and the issue was outcome determinative where under Indiana's Comparative Fault Act, plaintiff could not recover if he is more than fifty percent at fault.

Therefore, the district court certified the following question to the Indiana Supreme Court: "[w]hether, in a crashworthiness case alleging enhanced injuries under the Indiana Products Liability Act, the finder of fact shall apportion fault to the person suffering physical harm when that alleged fault relates to the cause of the underlying accident."The Indiana Supreme Court accepted the certified question in *Green v. Ford Motor Co.*, 931 N.E.2d 377 (Ind. 2010) and heard oral arguments in December 2010. The Indiana Supreme Court had not rendered a decision at the time of this publication.

Kucik v. Yamaha, Corp. U.S.A., 2010 WL 2694962 (N.D. Ind. July 2, 2010)

The court found that a recall notice was inadmissible to prove that a motorcycle was defective. Plaintiff was injured when his motorcycle lost power while attempting a jump. Shortly after the accident, plaintiff received a letter from Yamaha advising that some intake valves had experienced fatigue, causing loss of power and possible engine failure. Yamaha offered a free replacement at the dealer and the valves were replaced a couple of months later. Plaintiff sold the motorcycle and later sued Yamaha, the distributor of the motorcycle, alleging that his injuries were caused by the use of the defective intake valves. Plaintiff asserted defective manufacturing, design and warning claims against defendant. The motorcycle was never inspected to determine whether it contained any defects, including the defect in the intake valve that was the subject of the recall. Plaintiff argued that the recall notice should have been admissible as evidence of a defect and feasibility of precautionary measures.

Yamaha filed a motion for summary judgment arguing that: 1) plaintiff could not prove his product liability claims without the motorcycle; 2) plaintiff did not have the requisite expert testimony to prove his defect claims; 3) defendant was the American distributor of the motorcycle and had no role in the design or manufacture of the product and Indiana's statutory exemption that would hold the distributor liable as the manufacturer did not apply; and 4) the recall notice was inadmissible under Federal Rule of Evidence 407 as a subsequent remedial measure.

The court held that the recall notice was a subsequent remedial measure that was inadmissible, as the notice was issued after plaintiff's accident. The court further held that due to a lack of expert testimony on causation, plaintiff failed to present sufficient evidence that the motorcycle contained a manufacturing or design defect that was the proximate cause of his injuries. Plaintiff's expert's testimony was inadmissible because he relied on the recall notice to assume there was a defect in the intake valves. He never examined the motorcycle or similar models, never examined or tested the intake valves or other manufactured in the same lot, and otherwise did not attempt to eliminate other potential causes of loss of engine power. Plaintiff also did not present sufficient evidence that Yamaha could have warned about the potential danger with the intake valves. Finally, plaintiff could not bring a strict product liability claim against the distributor because there was no evidence he could not have sued the manufacturer. Under Indiana law, a strict product liability claim cannot be brought against a seller unless the court is unable to hold jurisdiction over the manufacturer. There was no evidence that the court could not have exercised jurisdiction over the Japanese manufacturer. Therefore, summary judgment in favor of Yamaha was granted.

Drug Litigation

Meharg v. I-Flow Corp., 2010 WL 711317 (S.D. Ind. March 1, 2010)

A patient claimed that a pain medication manufactured by AstraZeneca caused deterioration of the patient's shoulder cartilage. The patient filed a failure to warn claim against the manufacturer. The medication was administered through the use of a continuous infusion pain pump, infusing a continuous injection of the pain medication directly into the shoulder joint. This was an off-label use of the medication that was not promoted by the manufacturer. The

court found that the duty to warn does not ariseuntil the manufacturer knows or should know of a risk. The court explained that in an off-label use of prescription drugs not promoted by the manufacturer, the requisite knowledge of the risk is two-fold: the manufacturer must know (or be charged with knowledge) that: 1) the off-label use is occurring and 2) the off-label use carries with it the specific harm that is at issue.

The court acknowledged that there were no Indiana cases adopting the rule that a drug manufacturer has no duty to warn with regard to off-label uses. The court further acknowledged that there wereno Indiana cases holding that a drug manufacturer must be aware of both "common and widespread use" and "serious harm" in order to have a duty to warn against an off-label use. The court declined to adopt any such rules. Rather, the court decided the case on the general principal established in *Ortho Pharmaceutical Corp. v. Chapman*, 388 N.E.2d 541 (Ind. Ct. App. 1979), that the prescription drug manufacturer's duty to warn does not arise until the manufacturer knows or should know of the risk.

Tucker v. SmithKline Beecham Corp., 701 F.Supp.2d 1040 (S.D. Ind. 2010)

The decedent, a catholic priest, began taking the antidepressant, Paxil, and a few weeks later he committed suicide. The decedent had no history of suicidal thoughts but was prescribed Paxil because he complained of having panic episodes. His sister alleged that a few weeks after taking the medication, the decedent began to exhibit side effects, including paranoia and loss of appetite. Plaintiff filed suit against the manufacturer, asserting causes of action for negligence, strict liability, and breach of express and implied warranties. Plaintiff alleged that the manufacturer failed to warn the doctors and patients about the increased risk of suicide in adults using the drug. The manufacturer filed a motion for summary judgment arguing that its warnings were adequate and plaintiff's expert testimony was inadmissible.

The court held that a reasonable jury could find that the label was inadequate to warn of an association between Paxil and an increased risk of suicide. The court also determined that a reasonable jury could find that the doctor prescribing the medication may have decided not to prescribe Paxil if the drug contained an explicit warning of a risk of suicide. The court also held that the expert witness met the *Daubert* standard and did not develop his opinions exclusively for the purpose of the litigation. Therefore, the court denied the manufacturer's motion for summary judgment.

Mason v. Smithkline Beecham Corporation, 596 F. 3d 387 (7th Cir. 2010)

Plaintiffs brought suit against the drug manufacturer of Paxil for the failure to warn of the danger of suicide in young adults on the drug's label. Plaintiff's twenty-three year old daughter, Tricia Mason, committed suicide two days after starting to take Paxil. The district court entered summary judgment in favor of the manufacturer on federal preemption grounds, holding that the warnings that the plaintiffs alleged should have been included about Paxil conflicted with the FDA-approved warning labeling for the drug.

The Court of Appeals for the Seventh Circuit reversed and remanded, stating that the manufacturer failed to demonstrate by clear evidence that the FDA would have rejected a label change on the drug warning about the risk of suicide by young adults. In so holding, the court

considered *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), wherein the Supreme Court held that there could be preemption if the manufacturer proved by clear evidence the FDA would have rejected the proposed change in the drug's label. In *Levine*, the Supreme Court held there was no preemption, but the Court did not clarify what would constitute clear evidence.

Therefore, the Court of Appeals could only compare this case with *Levine* in determining whether if it met the clear evidence standard. The court found that the manufacturer did not meet its burden of showing clear evidence that the FDA would have rejected a label change warning about the risk of suicide by young adults and held that the plaintiff's claims were not preempted.

Robinson v. McNeil, 615 F. 3d 861 (7th Cir. 2010)

Consumer brought a product liability action in state court against the manufacturer of children's Motrin. The consumer was living in Virginia when she ingested the Motrin but subsequently moved to Illinois after she suffered a severe allergic reaction and her condition continued to deteriorate. The consumer read the allergy warnings when she first bought the medication, but failed to reread the warning labels prior to taking the medication. After her condition continued to worsen, she continued to take the mediation without reading the warning label. The action was removed to federal district court in Illinois under the diversity jurisdiction. The district court determined that Virginia law governed the action. The jury returned a verdict for the consumer, finding that the manufacturer was negligent. However, the jury also found that the consumer was contributorily negligent, which in Virginia, is a complete defense to negligence. (On the other hand, the Illinois comparative fault approach merely reduces the damages awarded the plaintiff unless the plaintiff's negligence exceeds the defendants). Therefore, due to the consumer's contributory negligence, the district court entered judgment for the manufacturer and the consumer appealed.

The Court of Appeals for the Seventh Circuit affirmed the district court's ruling and held that Virginia law governed because the consumer first had symptoms of an allergic reaction from the children's Motrin before she left Virginia. Thus, the court reasoned that it would not apply the law of the state (Illinois) in which the greatest costs of the injury were incurred in order to avoid forum shopping by an injured plaintiff. Nevertheless, even if Illinois law applied, the court stated it would not change the outcome of the appeal because there was enough evidence that the consumer's contributory negligence exceeded the defendant's negligence to bar her claim. Furthermore, Plaintiff could not claim the warnings were inadequate where she failed to reread or remember the contents of the warnings.

Class Action Fairness Act (CAFA)

*Cunningham Charter Corporation v. Learjet, Inc.,*592 F.3d 805 (7th Cir. 2010)

Buyer brought a class action in state court against an aircraft manufacturer for breach of warranty and products liability. The action was removed to federal court under CAFA. The district court denied the buyer's motion for class certification and remanded the case back to state court. Addressing an issue of first impression, the Court of Appeals for the Seventh Circuit subsequently held that pursuant to 28 U.S.C. § 1332(d)(8), federal jurisdiction under CAFA does

not depend on class certification and failure to meet the criteria for certification under CAFA does not eliminate subject matter jurisdiction so as to require remand. In so holding, the court reasoned that despite the district court finding "fatal flaws" in the plaintiff's motion for class certification, they were not so obviously fatal as to make the plaintiff's attempt to maintain the suit as a class action frivolous.

Anderson, et al., v. Bayer Corporation, 610 F.3d 390 (7th Cir. 2010)

Plaintiffs brought suits in state court against defendant drug manufacturer for personal injuries allegedly caused by its prescription medication. Defendants removed the case to federal court invoking the "mass action" provision of CAFA, which allows removal of cases joining the claims of at least 100 plaintiffs that otherwise meet CAFA's jurisdictional requirements. The district court granted the plaintiffs' motion to remand the cases to state court and argued that plaintiffs' five separate pleadings were a transparent attempt to circumvent CAFA, and, as such, should be treated as a mass action. The Court of Appeals for the Seventh Circuit upheld the district court's decision to remand and further held that the mass action provision gives plaintiffs the choice to file separate actions that do not qualify for CAFA jurisdiction. The court discussed the fact that under CAFA, "the term 'mass action' shall not include any civil action in which the claims are joined upon motion of a defendant." Thus, under the rule, plaintiffs could choose to structure their claims to remain outside of CAFA's grant of jurisdiction. However, the court indicated that the state court action may eventually become a removable mass action if the claims of more than 100 plaintiffs are subsequently proposed to be tried jointly.

Other Significant Cases

A. Asbestos

Tatera v. FMC Corp., 786 N.W.2d 810 (Wis. 2010)

For 25 years, the decedent worked at a machining shop and machined asbestos-containing friction disks that later were incorporated into electric brake systems. After the decedent died from malignant mesothelioma, his wife and his estate brought an action against several defendants, including FMC Corporation ("FMC"), the owner of a Milwaukee-based company that manufactured electric brakes and outsourced some of its machining work to the company for which the decedent worked. Plaintiffs alleged negligence and strict liability. With respect to the negligence claim, plaintiffs alleged that FMC had a duty to exercise reasonable care for the safety of the decedent and those who worked with or were exposed to FMC's asbestos-containing products and that FMC knew or should have known that exposure to those products caused disease or death. The trial court granted FMC's motion for summary judgment on the negligence and strict liability claims. The Wisconsin Court of Appeals affirmed the trial court's grant of summary judgment on the strict liability claim but reversed the trial court's order regarding the negligence claim.

In a 4-3 decision, the Wisconsin Supreme Court reversed the Court of Appeals' decision and ruled that FMC was not liable in tort (whether on a negligence or a strict liability theory). The court noted that under *Wagner v. Continental Casualty Co.*, 421 N.W.2d 835 (Wis. 1988), a principal employer like FMC is not liable in tort for injuries sustained by an independent

contractor's employee while he or she is performing the contracted work. The court noted that there are two exceptions to this rule: (1) where the principal employer commits an affirmative act of negligence and (2) where the principal employer contracts for work that qualifies as extrahazardous. With respect to the first exception, the court held that FMC's alleged negligent conduct did not constitute an affirmative act of negligence. Plaintiffs' allegations were grounded in FMC's alleged omission (*i.e.*, the failure to warn the decedent and the machining shop where he worked of the health hazards associated with asbestos and asbestos-containing products); Wisconsin law requires more than an omission to impose liability on a principal employer for injuries sustained by an independent contractor's employee. With respect to the second exception, the court noted a fine distinction between an extrahazardous activity that can subject a principal employer to liability and an inherently dangerous activity that does not satisfy the standard to subject the principal employer to liability. The court determined "as a matter of law that machining an asbestos-containing friction disk is not an extrahazardous activity because steps may be taken to minimize the risk of injury. Therefore, while inherently dangerous, the activity of machining an asbestos-containing friction disk does not create an exception to FMC's protection from tort liability." The court observed that the decedent could have minimized his risk of injury by wearing protective equipment like a respirator and taking other precautions.

B. Expert Witnesses and *Daubert* Issues

Lemmermann v. Blue Cross Blue Shield of Wis., 713 F. Supp.2d 791 (E.D. Wis. 2010)

The plaintiff brought negligence and strict liability claims against several defendants, including the manufacturer of a chemical treatment designed to help combat green algae in swimming pools. The plaintiff alleged that when she mixed the treatment with water, the solution exploded and caused her respiratory injuries. The defendants moved to exclude the plaintiff's two experts and for summary judgment. The court granted the motions.

The plaintiff named a chemical engineer as an expert to opine on (1) the propensity of the chemical treatment to explode when mixed with water and (2) whether the manufacturer should have provided a warning about the possibility of such an explosion. Regarding the first issue, the court found that although the plaintiff's expert was qualified to relate an opinion on the volatility of the chemical treatment when mixed with water, his methodology regarding that proposed testimony was not scientifically reliable, rendering his testimony excludable under *Daubert*. Most concerning to the court was the fact that the expert did no testing to determine what occurs when the chemical treatment is mixed with water, did not provide the court with any studies that employed any such testing, and could not cite to any literature or other study that indicates that a violent reaction is possible when the chemical treatment is mixed with water. Additionally, the court was concerned that the expert's theory was not subjected to peer review and did not attempt to address what the court characterized as "the most obvious alternative explanation" for how the explosion occurred: a third substance contaminating the treatment/water mixture. With respect to the warnings issue, the court found the expert unqualified to testify regarding whether the manufacturer was negligent in failing to warn regarding any explosive nature of the product and noted that the witness conceded that he had very little knowledge or experience regarding regulations relating to pool chemicals.

The court also excluded the plaintiff's second expert, a pulmonologist who sought to testify regarding the plaintiff's medical condition and the medical causation issue. The court found "striking flaws" with the physician's methodology for arriving at her diagnosis, especially the physician's reliance on faulty information the plaintiff provided and the physician's reliance only on recent medical records and not prior records showing the plaintiff's history of respiratory problems. The pulmonologist's alternative diagnosis was not disclosed in her expert report, and she only hinted at the alternative diagnosis during a deposition (causing the court to characterize the alternative diagnosis as "cooked up in the haste of deposition testimony after the doctor's original diagnosis of RADS could not survive even the slightest scrutiny in the form of the opposing counsel's questioning."). With respect to causation, the court found that the physician provided little to no explanation for her conclusions that the plaintiff's medical condition is a result of the alleged chemical explosion; the physician did nothing to investigate the magnitude of the plaintiff's exposure to chemical substances and did not undertake any effort to explain her findings regarding causation. The court noted that the proffered expert testimony failed to survive *Daubert*or even the "laugh test." The court subsequently concluded that the plaintiff had no evidence to support critical elements of her negligence and strict liability claims and that summary judgment in favor of the defendants was proper.

Sub-Zero, Inc. v. General Electric Co., 2010 WL 3584427 (W.D. Wis. Sept. 10, 2010)

The plaintiffs brought strict liability and negligence claims against the manufacturer of a metal halide lamp that ruptured and caused a fire in one of the plaintiff's facilities. The manufacturer moved for summary judgment on the grounds that plaintiffs (1) cannot provide liability without an expert witness and (2) cannot prove causation after ignoring the manufacturer's written warnings and receiving actual knowledge of the relevant risks associated with the metal halide lamps. The court granted the motion. With respect to the strict liability claim, the court noted that the plaintiffs needed to come forward with some evidence of the knowledge of risk attributable to a typical consumer of commercial or industrial lamps of the type at issue. The plaintiffs failed to do so and, accordingly, failed to satisfy their burden of showing that the lamp was defectively dangerous. Additionally, the plaintiffs failed to offer evidence that the alleged defect in the lamp caused the injury. With respect to the negligence claim, the court noted that a claim based on negligent design cannot survive without expert testimony on the nature of the duty of care and whether there was a breach of that duty. Because the court earlier struck the plaintiffs' only expert on the grounds that the expert was not timely disclosed, the plaintiffs were unable to introduce the required expert testimony.

Show v. Ford Motor Co., 697 F.Supp.2d 975 (N.D. Ill. 2010)

In this case, the District Court for the Northern District of Illinois granted summary judgment in favor of the defendant, Ford Motor Company, on the plaintiffs' Illinois-based strict liability and negligence claims following a low-speed accident in which their 1993 Ford Explorer rolled over. The main issue presented was whether, as a matter of law, plaintiffs must present expert testimony at trial to prove that the Explorer contained an unreasonably dangerous defect in its design or manufacture that caused it to roll over. The defendant contended that without expert testimony, a *prima facie* case for strict liability or negligent design/manufacture cannot be made. The plaintiffs argued, on the other hand, that expert testimony is not required if their allegations are proven under the "consumer expectation" test.

In rejecting the plaintiffs' arguments and granting the defendant's motion for summary judgment, the court summarized the relevant Illinois and Seventh Circuit precedent and concluded that "when a plaintiff proceeds under the consumer-expectation test, he must present expert testimony to establish a prima facie case of strict products liability when the claim involves technical knowledge beyond the common knowledge and experience of jurors." Moreover, "a plaintiff cannot establish a defect through circumstantial evidence of the accident alone if an intervening force could have caused the accident." Because the plaintiffs did not offer expert testimony to assist the jury in determining that (1) a defect in the Explorer existed at the time it left the defendant's control, and that (2) it was a defective condition in the Explorer and not in the intervening collision that caused it to roll over, the court concluded that it was improper to force the jury to speculate from the accident alone that the Explorer contained an unreasonably dangerous defect. The court noted that the subject of stability systems in vehicle design and manufacture goes well beyond the knowledge of an average juror.

The court also held that the lack of expert testimony was fatal to the plaintiffs' negligence claims as the plaintiffs could not establish that the defendant deviated from any standard of care. Accordingly, summary judgment was granted to the defendant on both of the plaintiffs' claims.

C. Sophisticated Intermediary Doctrine

Hatter v. Pierce Manufacturing, Inc., 934 N.E.2d 1160 (Ind. Ct. App. 2010)

Plaintiff firefighter and his spouse brought a product liability action against the manufacturer of the fire truck after the firefighter wasinjured when a cap on the truck's rear intake pipe propelled off the pipe and struck the firefighter in the face. The firefighter sued the manufacturer alleging theories of defective design and failure to warn. The fire department purchased the trucks from Pierce but provided training to its firefighters on the use of the trucks. After purchasing the truck, the fire department replaced the cap on the pipe with a "quick release" cap without informing Pierce. The jury entered a verdict for the manufacturer and firefighter appealed. He argued, *inter alia*, that the trial court erred in giving a sophisticated intermediary instructioninvolving the fire department because the fire department did not know and could not have known about the danger of combining the engine's design with a quick-release cap. The Indiana Court of Appeals disagreed. The court held that the jury could have inferred from the evidence that the fire department should have known the dangers arising from the combination of the plumping design of the pipe and the quick-release cap. Therefore, the jury could have concluded that the fire department, rather than the manufacturer, should have warned the firefighter.

D. Service Bulletin No Substitute for Expert Testimony

Myers v. Briggs & Stratton Corp., 2010 WL 1579676 (S.D. Ind. April 16, 2010)

Plaintiff alleged that a defect in a log splitter's engine caused the splitter to kick back and injure him. Plaintiff sued the manufacturer of the engine and the seller from whom he purchased the splitter. Plaintiff argued that a service bulletin concerning a defect in the engine could substitute for expert testimony on causation. The court disagreed. The court held that the

service bulletin could not replace the required expert testimony for several reasons. The service bulletin:did not state that a defect existed; did not state that the engine would kickback, but merely provided direction on how to inspect or repair in the event of a kickback; did not state how often a kickback would occur; and providedinformation about hard starting and/or kickbacks, rather than just kickbacks. The manner in which the splitter operated was beyond the scope of a layperson's knowledge and,therefore, expert testimony was required.

E. Guns

Gardner v. TriStar Sporting Arms, Ltd., 2010 WL 3724190 (S.D. Ind. Sept. 15, 2010)

A 14-year-old minor accidentally shot himself in the leg with a double-barrel shotgun. His mother sued the shotgun manufacturer claiming the gun was defective and the warnings were inadequate. The minor admitted he did not read the manual or the warnings. The court held that with this admission, the minor could not prove how the allegedly inadequate warnings could have caused his injury. Further, the court found that if the minor had read and heeded the warnings, the accident would have been avoided. The court entered summary judgment in favor of the shotgun manufacturer on the failure to warn claim.

The court also granted summary judgment on the design defect and breach of implied warranty claims. The court found that plaintiff could not pursue the design defect claim where plaintiff did not identify a feasible safer alternative design. With respect to the breach of warranty claim, the court held that breach of implied warranty claims have been subsumed by the Indiana Products Liability Act and since Plaintiff failed to address this argument, summary judgment on this claim was warranted. The court denied the motion for summary judgment on the manufacturing defect claim finding that there were genuine issues of material fact as to whether the gun was defective. Plaintiffpresented evidence that the shotgun was defective because it could fire when the safety is on and becauseboth barrels of the shotgun could fire from a single trigger pull.

F. Attorneys Fees Not Recoverable Under Adult Wrongful Death Statute

McCabe v. Commissioner, Ind. Dept. of Ins., 930 N.E.2d 1202(Ind. Ct. App. 2010)

In an issue of first impression, the Indiana Court of Appeals held that attorney fees and expenses incurred by the personal representative's attorney were not recoverable damages under the Adult Wrongful Death Statute. In this medical malpractice action, plaintiff sought to recover attorney fees from the administration of the wrongful death estate and prosecution of the wrongful death claim. He had brought the claim under Indiana's Adult Wrongful Death Statute ("AWDS"). The trial court concluded that attorney fees, costs and expenses were not recoverable under the AWDS. Indiana has three separate causes of action for the wrongful death of an individual: a general wrongful death statute ("GWDS"), a statute governing the wrongful death of children ("CWDS") and the AWDS, which governs the wrongful death of adults who do not have dependents and who are not considered a child under applicable law. Although the GWDS and CWDS specifically provide for recovery of reasonable attorney fees, the AWDS is silent. The court found that allowing recovery of attorney fees under the AWDS would expand the circumscribed damages defined by the legislature. The court explained that this result was

consistent with the general rule that wrongful death statutes must "be construed strictly against the expansion of liability." Furthermore, this strict construction was consistent with Indiana's adherence to the "American Rule" concerning the payment of attorney fees where each party is to pay his or her own attorney fees absent an agreement, statutory authority, or rule to the contrary.

The Indiana Supreme Court granted transfer, 2010 Ind. Lexis 668 (Ind. Oct. 21, 2010), but no decision had been issued at the time of this publication.

G. Seller in Chain of Distribution Cannot Be Held Strictly Liable Without Knowledge of Defect

Grove v. Manchester Tank and K.A. Bergquist, Inc., 2010 WL 3724801 (Ill. Sept 15, 2010)

In this case, the plaintiffs, employees of PekinHickgas, filed causes of action in strict products liability and negligence against the defendant, K.A. Bergquist, Inc. The defendant acted as a re-seller of aluminum tanks thatwere designed and manufactured by Manchester Tank and one of the tanks exploded at Hickgas's facility, causing injuries to the plaintiffs. Prior to the incident, Bergquist was notified by a Hickgas representative that several tanks were leaking propane. On appeal, Bergquist's motion for summary judgment was granted as to the strict liability count and denied as to the negligence count.

While the Illinois Supreme Court noted that in Illinois, all persons in the distributive chain may be strictly liable for injuries resulting from an unreasonably dangerous product, once the manufacturer has been added to a lawsuit, 735 ILCS 5/2-621 mandates that other parties along the distribution chain must be dismissed unless they had actual knowledge of the defect. In dismissing the strict liability count against Bergquist, the court reasoned that this cause of action is generally intended to impute liability to the link in the distribution chain most directly responsible for the defect, which, in this case, was the manufacturer. Because Bergquist had no knowledge of any unreasonably dangerous condition in the tank at the time the tanks left the manufacturer's control, the court held that dismissal of the strict product liability count was appropriate.

However, the plaintiffs' negligence count against Bergquist was upheld by the court. In so holding, the court reasoned that the burden on Bergquist to respond quickly to a report of a leaky tank was minimal and far from onerous. The question of whether there was a causal link between Bergquist's failure to respond and the explosion of the tank that caused the plaintiffs' injuries remained a question of fact for the jury.

H. Crashworthiness Doctrine Applied in Lawn Mower Case

Malen v. MTD Products, Inc., 2010 WL 4670176(7th Cir. Nov. 19, 2010)

Plaintiff filed suit against the manufacturer of a lawn mower and the seller after he slipped while getting off his reconditioned riding lawn mower and injured his foot on the rotating blade. The Court of Appeals for the Seventh Circuit reversed and remanded the lower court's decision granting summary judgment in favor of the defendant lawnmower manufacturer.

The court held that genuine issues of material fact existed as to whether the lawn mower was unreasonably dangerous, negligently designed and whether its defective condition was the proximate cause of the plaintiff's injuries. The court further held that the manufacturer was obligated under the crashworthiness doctrine to foresee this type of injury. More specifically, the crashworthiness doctrine states that under Illinois law, some products although not made for certain purposes, such as accidents, should nevertheless be reasonably designed to minimize the injury-producing effect of an accident. This theory is consistent with the idea that a reasonably foreseeable intervening act, such as an accident, will not relieve a defendant of liability.

I. Exception to Open and Obvious Rule in Premises Liability Cases Not Extended to Products Liability Action

Salerno v. Innovative Surveillance Technology, Inc., 402 Ill.App.3d 490 (Ill. App. Ct. 2010)

In this instance, an employee of a state narcotics investigation unit brought a strict products liability and negligence action against the employer's supplier of surveillance products after the employee struck his head on a periscope mounted on the ceiling of a surveillance van.

The court affirmed summary judgment in favor of the defendant supplier and held that the "distraction and deliberate encounter" exceptions to the open and obvious rule only applied in premises liability cases and thus did not support the employee's products liability claim. Furthermore, the plaintiff employee waived his strict products liability and negligence claim on appeal by conceding that the van was not poorly designed in addition to his failure to provide expert testimony regarding the supposed negligent design of the periscope.

EIGHTH CIRCUIT

Tort Reform

McCoy v. Augusta Fiberglass Coatings, 593 F.3d 737 (8th Cir. 2010).

In this products liability action, the Defendant manufacturer appealed a jury verdict finding the manufacturer 70 percent liable for injuries the Plaintiff worker suffered while repairing a caustic soda leak in a chemical tank. The manufacturer sought an apportionment of fault against the Plaintiff's employer, who was not a party to the action. A provision of the Arkansas Civil Justice Reform Act, specifically Arkansas Code Annotated § 16-55-202, provided for an apportionment of fault against non-parties, but the court held that because that provision of the Act had been declared unconstitutional by the Arkansas Supreme Court, the Defendant was only entitled to a jury instruction such as given by the court in this case—the court instructed the jury that it could consider an event "such as" the conduct of the premises owner to be an intervening proximate cause but refused to explicitly instruct that an act by the worker's employer could be considered an intervening cause.

Preemption

In re Medtronic, Inc., Sprint Fidelis Leads Products Liability Litigation, 623 F.3d 1200 (8th Cir. 2010).

Plaintiffs commenced products liability actions against a medical device manufacturer alleging that leads of the manufacturer's implantable cardiac defibrillators ("ICD") were defective. The cases were transferred to the District of Minnesota for pretrial proceedings by the Judicial Panel on Multi-District Litigation. The district court granted the device manufacturer's motion to dismiss on preemption grounds. The Eighth Circuit affirmed, holding Plaintiffs' claims were preempted by § 360k(a) of the Medical Device Amendments to the Federal Food, Drug and Cosmetic Act ("MDA").

The MDA authorizes the Food and Drug Administration (FDA) to regulate the safety and effectiveness of medical devices. Because of the class in which the ICD in question was characterized, the manufacturer had to assure the FDA through a Pre-Market Approval ("PMA") process that the device is safe and effective. Once approved, the manufacturer of the product may not change its design, manufacturing process, labeling or anything that would affect the product's safety or effectiveness without filing a PMA Supplement. Here, the FDA granted the manufacturer pre-market approval for its device's lead system and then later approved progressively smaller leads in a series of PMA Supplements. Over time, there were concerns raised about the lead products and Plaintiffs allege the manufacturer applied for a PMA Supplement approving design and manufacturing changes to the leads without advising FDA of the failures. Ultimately, after reporting adverse events, the manufacturer suspended sales and then recalled the leads.

Section 360k(a) of the MDA contains an express preemption provision that states no State "may establish or continue in effect with respect to a device . . . any requirement (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and (2) which relates to the safety of effectiveness of the device or to any other matter included in a requirement applicable to the device." 21 U.S.C. § 360k(a). In *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008), the United States Supreme Court held that for § 360k(a) preemption purposes Pre-Market Approval required by the FDA is "federal safety review" that results in federal "requirements" specific to the approved device. The *Riegel* court also held that common law product liability claims result in "state requirements" that are preempted to the extent they relate to the safety and effectiveness of the device and are "different from, or in addition to" the federal requirements established through a PMA. The court noted, however, that § 360k does not prevent a state from providing a damages remedy for claims premised on a violation of FDA regulations; "the state duties in such a case 'parallel' rather than add to, federal requirements."

As to Plaintiffs' failure to warn and related claims, Plaintiff argued that state law required the manufacturer to give additional warnings regarding its products. The court determined that even if federal law allowed the manufacturer to provide additional warnings, any state law imposing an additional requirement is preempted by section 360k. The court similarly disposed of Plaintiffs' design defect claims because the claims constituted attacks on the risk/benefit analysis that led the FDA to approve an inherently dangerous device and such claims are expressly preempted by section 360k. As to Plaintiffs' manufacturing defect claims, the court

held Plaintiffs failed to adequately plead that the manufacturer violated a federal requirement specific to the FDA's PMA approval of the device. Rather, Plaintiff alleged the leads had an unreasonably high risk of fracture failure. As such, the manufacturing defect claims were not parallel to but rather a "frontal assault" on the FDA's decision to approve a PMA Supplement. Finally, the court affirmed dismissal of Plaintiffs' express warranty claims, which would require Plaintiffs to prove the leads were not safe and effective, a finding that would be contrary to the FDA's approval of the PMA supplement. As such, the claims interfere with the FDA's regulation of medical devices and are preempted.

In Re: Levaquin Products Liability Litigation, Civ. No. 08-5743, 2010 WL 4882595 (D. Minn. Nov. 24, 2010).

This case centered on the warnings Defendants allegedly should have given about the drug Levaquin. The issue before the district court was the admissibility of Food and Drug Administration ("FDA") labeling of Levaquin approved after Plaintiff was prescribed the drug in 2005. The court first addressed the admissibility of the post-2005 labeling and then went on to address preemption issues. The Defendants argued the FDA has complete authority to institute a "black box warning," and controls the content of class labeling to which Levaquin is subject. Thus, Defendants argued, any allegation that Defendants are liable under state law for not instituting a stronger label is preempted by federal law. The court noted that on a previous motion to exclude an expert in this case it determined that the central premise of *Wyeth v. Levine*, 129 S. Ct. 1187, 1197-98 (2009) – that the manufacturer of a drug "bears all reasonability for the content of its label at all times [and] is charged both with crafting an adequate label and with ensuring that its warning remain adequate as long as the drug is on the market" – applies in this case, as it is similarly premised on a drug manufacturer's ability to warn its customers. The court noted *Wyeth* specifically preserved the state law failure to warn claims made in this case. Consequently, preemption did not apply to the evidence. The court held as such even though the subsequent labeling decision by the FDA was to include a black box warning which Defendants could not have unilaterally instituted.

Warren v. Howmedica Osteonics Corp., No. 4:10-CV-1346-DDN, 2010 WL 5093097 (E.D. Mo. Dec. 8, 2010).

The court denied Defendant's motion to dismiss based on federal law preemption. Plaintiff brought suit against Defendant after her hip replacement device malfunctioned. Plaintiff alleged Defendant failed to comply with multiple federal procedures, including failure to comply with the Medical Device Reporting Act as set forth in 21 C.F.R §803; the failure and quality assurance procedures set forth in 21 C.F.R. §820; and the recall and notification procedures set forth in 21 C.F.R. §806. Defendant moved to dismiss Plaintiff's complaint arguing that the claims were both expressly and impliedly preempted. The Court relied upon *Riegel v. Medtronic*, Inc., 552 U.S. 312 (2008), when noting that state law is preempted by the Medical Device Amendments of 1976 to the Federal Food, Drug and Cosmetic Act only if the Federal government has established requirements applicable to the device and a plaintiff's claims are based on state law requirements that are "different from or in addition to" federal requirements. The court found that the Plaintiff's state law claims did not impose any additional duties on the Defendant; Plaintiff's claims stemmed solely from the Defendant's alleged violation of federal regulations, and therefore were not preempted.

Tobacco

Curtis v. Altria Group, Inc., --- N.W.2d ---, 2010 WL 5292065 (Minn. Ct. App. Dec. 28, 2010).

Purchasers of Marlboro Lights cigarettes commenced a class action lawsuit against Altria Group Inc. (formally Philip Morris Companies Inc.) and Phillip Morris under Minn. Stat. § 8.31, which is frequently referred to as Minnesota's private attorney general statute. Plaintiffs alleged false advertising, consumer fraud, and deceptive trade practices in violation of consumer-protection statutes. Plaintiffs' Complaint also asserted common law fraud and unjust enrichment claims. The Marlboro Lights ("Lights") cigarettes in question were marketed by Philip Morris beginning in 1971 as having less tar and nicotine than regular Marlboro cigarettes and Plaintiffs allege Phillip Morris did so knowing those statements to be false.

The Minnesota Court of Appeals considered a number of legal issues, the most significant of which will be discussed here. First, the court concluded Plaintiff did not establish that Defendant Altria operated Philip Morris as its Minnesota alter ego such that Minnesota has vicarious personal jurisdiction over Altria. The court thus reversed the district court's denial of Altria's motion to dismiss for lack of personal jurisdiction. The court also held Plaintiffs satisfied the "public benefit" element required of any action under Minn. Stat. § 8.31 based on allegations that Philip Morris made allegedly false representations to the general public. Additionally, the section 8.31 claims were not barred by a previous tobacco settlement release that precluded further action by or on behalf of the state. Because the court reinstated Plaintiffs' claims under Minn. Stat. § 8.31, the court affirmed dismissal of Plaintiffs' unjust enrichment claim; Plaintiffs now have another legal remedy available to them.

Finally, Plaintiffs challenged the district court's denial of their motion for partial summary judgment based on collateral estoppel principles. Plaintiffs asserted Philip Morris's violation of consumer protection laws had been established by findings of fact and conclusions of law in *United States v. Philip Morris U.S.A., Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006), *aff'd in part, vacated in part by* 566 F.3d 1091 (D.C. Cir. 2009), on which Plaintiffs intended to rely to establish Philip Morris represented that Lights contained lower tar and nicotine while knowing those statements to be false. The district court denied application of collateral estoppel, noting in part that Philip Morris had won similar cases brought against it and the United States Supreme Court has stated courts should not apply collateral estoppel where the judgment relied upon as a basis for the estoppel is inconsistent with one or more previous judgments in favor of the defendant. The Minnesota Court of Appeals affirmed the district court's exercise of its discretion to deny application of collateral estoppel in this case.

Automobiles

Daigle v. Ford Motor Company, 713 F. Supp. 2d 822 (D. Minn. 2010).

Plaintiffs commenced this putative class action alleging Ford Freestar Minivans have a design defect that causes transmission failure. The case was before the federal district court on Ford's motion to dismiss under Fed. R. Civ. P. 12(b)(6). As to Plaintiffs' express warranty claims, the court noted cases indicating Minnesota courts may have abandoned the reliance requirement with respect to breach of warranty claims under the Uniform Commercial Code, but

determined a plain reading of the statute required the bargain be based on a representation made by the seller. Because Plaintiffs alleged specific possible sources of representation upon which the vehicle owners may have relied, the court denied Ford's motion on the claims.

The court, however, dismissed Plaintiffs' breach of good faith in fair dealing claims because Plaintiffs did not allege they had a contract with Ford. The court noted no Minnesota case has ever extended an exemption to the privity requirement allowed for breach of warranty claims to breach of good faith and fair dealing claims.

Finally, Ford argued that Plaintiffs' strict liability and negligence claims should be dismissed because they are barred by the economic loss doctrine. Under Minnesota law, a buyer may not bring a product defect tort claim for compensatory damages unless the defect "caused harm to the buyer's tangible personal property other than the goods, or the buyer's real property." Minn. Stat. §604.101, subd. 3 (2010). There is no bar against claims for an injury to a person. *Id.* at subd. 2. While Plaintiffs argued several of the transmission failures occurred in situations where risks of a dangerous accident were high, none of the main Plaintiffs had suffered any personal injury or damage to real property. As such, their tort claims were barred by state law.

Dobrovolny v. Ford Motor Co., 18 Neb. Ct. App. 483, 785 N.W.2d 858 (2010).

Plaintiff asserted a strict liability claim against Ford when his car, while parked with the engine shut off, caught fire and was destroyed. The trial court granted the manufacturer summary judgment based in part on the general rule that actions for strict liability cannot be maintained when damages are confined to the defective property. On appeal, the Plaintiff asserted that the sole cause of the fire was the result of a "sudden, violent event," which took his claim outside the general rule precluding recovery for damages confined to the defective product.

Ford maintained on appeal that the only sudden, violent event alleged by the Plaintiff was the defect in the vehicle, which caused the destruction of the vehicle by fire. Ford contended that because the Plaintiff alleged only that the defect caused the fire and made no allegation of any event which aggravated the alleged defect or any outside event which caused the alleged defect to manifest itself, the Plaintiff had not shown a sudden, violent event; thus, the Plaintiff's recovery under strict liability was barred.

The court of appeals cited an Eighth Circuit opinion for the proposition that the Nebraska Supreme Court had, in essence, followed the majority of courts that have considered the applicability of strict liability to recover damages to the defective product itself and have permitted use of the doctrine, at least where the damage occurred as a result of a sudden, violent event and not as a result of an inherent defect that reduced the property's value without inflicting physical harm to the product.

The Nebraska Court of Appeals held that the Plaintiff's contention that the fire did not merely reduce the value of his vehicle but, rather, the fire that destroyed his vehicle was a sudden, violent event that inflicted physical harm to the vehicle, was sufficient to defeat summary judgment.

Drug Litigation

Cheatam v. Teva Pharms. USA, 726 F. Supp. 2d 1021 (E.D. Ark. 2010).

Plaintiff initiated a products liability action when his wife died after ingesting the medication Tramadol. Among the Defendants was Wolters Klower Health, Inc. ("WKH") based on its role in "creating and publishing warning and instruction language information on drugs, including for the drug Tramadol, for which it copyrighted the language used in the warning and instruction which it and the other defendants provided to [the pharmacy]." WKH had nothing to do with the manufacture, distribution, or testing of Tramadol. WKH simply published drug information in electronic databases, including patient drug education information. The court noted that Arkansas recognizes the "learned intermediary doctrine" pursuant to which a drug manufacturer may rely upon the physician to warn the patient of the risks of a prescription drug. The court further stated it would be contrary to existing legal principles to impose upon WKH a duty greater than the pharmacy that filled the prescription and provided the monograph to the Plaintiff, and the court granted summary judgment on behalf of WKH.

Fullington v. Pfizer, Inc., 2010 U.S. Dist. LEXIS 98518, No. 4:10CV00236 JLH (E.D. Ark. Sept. 17, 2010).

The trial court granted summary judgment to all Defendants because Plaintiff admittedly did not consume any drug manufactured by the Defendants. Metoclopramide is a prescription drug approved by the FDA to treat gastroesophageal reflux disease and diabetic gastroparesis. It is available in both brand name and generic formulations. The brand name of the drug is "Reglan." At different times, Wyeth, Schwarz, and Alaven manufactured and distributed Reglan. The Plaintiff ingested only generic metoclopramide; she did not ingest any metoclopramide, whether generic or brand name, that was manufactured or distributed by Wyeth, Pfizer, Schwarz, or Alaven. The Plaintiff nonetheless argued the Defendants were liable for her injuries because they failed adequately to warn consumers of the dangers of using metoclopramide.

The court reaffirmed that a plaintiff in a product liability action must allege that the actual product manufactured or distributed by the Defendant caused the injury to the plaintiff. Recognizing other courts' holdings that brand name manufacturers should not be liable for injuries caused by generic versions of their drugs, and finding that the Plaintiff did not ingest and was not injured by any product manufactured by the named Defendants, the court granted the Defendants' motions for summary judgment and dismissed the case with prejudice.

Notably, another judge in the Western District reached the same conclusion based on the same rationale as in this case, and that Western District opinion was a basis for the *Fullington* decision. *See Neal v. Teva Pharms. USA, Inc.*, 2010 U.S. Dist. LEXIS 65390, No. 09-CV-1027 (W.D. Ark. July 1, 2010).

Lefaivre v. KV Pharmaceutical Co., No. 4:09CV00588SNLJ, 2010 WL 59125 (E.D. Mo. Jan. 5, 2010).

The court granted Defendant's motion to dismiss because Plaintiff's claims were based entirely on violations of the Food Drug and Cosmetic Act (FDCA). Plaintiff filed a potential

class action suit alleging damages arising from his purchase of the drug Metoprolol Succinate ER. Plaintiff's cause of action was reliant on the fact that the FDA had previously filed a complaint against Defendant, resulting in a joint decree issued by the FDA and Defendant wherein Defendant agreed that it had not utilized proper quality control procedures while manufacturing the medication, and that some of the medication had been misbranded in violation federal regulations. As a result, Defendant agreed to destroy its remaining stock of the drug and issue a recall for all stock of the medication sold within the relevant timeframe. The only injuries Plaintiff alleged in his current suit were his purchase costs for the medication. Upon review of Defendant's motion to dismiss, the court held that Plaintiff's claim for breach of the implied warranty of merchantability was preempted by federal law. The court stated Plaintiff's allegations were based solely on FDCA regulations, and emphasized that there has not been a private cause of action for enforcement of the FDCA for more than thirty years. The Missouri court cited the United States Supreme Court case of *Buckman Co. v. Plaintiff's Legal Comm'n,* 531 U.S. 341 (2001), in support of its decision. Plaintiff's Complaint also contained allegations for violations of the Missouri Merchandising Practice Act. The court similarly noted that these claims were based entirely on violations of FDCA regulations and therefore solely within the province of the federal government.

Schilf v. Eli Lilly and Co., No. CIV 07-4015, 2010 WL 4024922 (D. S.D. Oct. 13, 2010).

Decedent was diagnosed with depression and was provided samples of Cymbalta. Decedent committed suicide. Plaintiffs claimed the pharmaceutical manufacturer's warnings were inadequate. The United State District Court for the District of South Dakota predicted that the South Dakota Supreme Court would adopt the learned intermediary doctrine. The court found the record supported the conclusion that the prescribing physician was aware of the same warnings Plaintiffs believed Defendants should have given to prescribing physicians. In granting summary judgment in favor of Eli Lilly, the Court concluded: "a warning from Defendants would not have informed [the prescribing physician] of anything he did not already know." The Court further held that there was insufficient evidence on causation to allow the failure to warn claim to be presented to a jury; the uncontradicted testimony of the prescribing physician was that he still believed his decision to prescribe Cymbalta was appropriate. Finally, Plaintiffs state law deceit claims were dismissed because they were "completely subsumed" by their failure to warn claims.

The Plaintiffs remaining claims were addressed in a prior ruling. *Schilf v. Eli Lilly and Co.*, No. CIV 07-4015, 2010 WL 3909909 (D. S.D. Sept. 30, 2010). The Court dismissed Plaintiffs' negligent failure to test claim because no expert testimony was presented in the record. Plaintiffs' negligent overpromotion claim was dismissed because South Dakota has not adopted this claim. And even if overpromotion was recognized, the Court held the facts on the record did not support such a claim. Plaintiffs' negligent infliction of emotional distress claim was also dismissed. The Plaintiffs "did not contemporaneously observe" the suicide and were not in the "zone of danger." Defendants' summary judgment motion based on federal preemption was denied by the Court. The Court held that the record did not contain "clear evidence" of preemption.

Summary of other Significant Cases in the Eighth Circuit

Campbell v. Davol, Inc., 620 F.3d 887 (8th Cir. 2010).

The Plaintiff had breast cancer and underwent a right mastectomy. A subsequent breast reconstruction surgery involved harvesting fat from her abdomen for use in the reconstruction. A surgical mesh device--Kugal Hernia Patch--typically used to repair hernias was placed in the Plaintiff's abdomen. The Plaintiff later developed chronic and unexplained abdominal pain, as well as abdominal infections which required hospitalization. The Plaintiff claimed her pain and infections were caused by the use of the patch.

The Kugel Hernia Patch was originally manufactured and distributed by Surgical Sense. In January 2000, C.R. Bard, Inc., and its subsidiary Davol, Inc., entered into an Asset Purchase Agreement with Surgical Sense, through which Bard/Davol acquired substantially all of Surgical Sense's assets, including the Kugel line of hernia repair products. The Asset Purchase Agreement also established that Surgical Sense was retaining all obligations and liabilities that were not expressly assumed by Bard/Davol. Upon becoming the owner of the Kugel hernia repair product line, Bard/Davol repackaged the remaining inventory of patches, in order to include the Bard name on the packaging. Bard/Davol then began production on its version of the hernia patch, the Bard Kugel Hernia Patch, which was essentially the same as the original Kugel Hernia Patch.
The district court granted summary judgment in favor of Bard/Davol, finding that Bard/Davol did not succeed to the liabilities of SSI/WCO, that the continuation of business exception was not applicable, that Arkansas has not recognized a post-sale failure to warn claim, and that the facts do not support a post-sale failure to warn claim.

The Plaintiff argued, among other things, that the "mere continuation" exception to the general rule of successor liability applied in this case. The Eighth Circuit noted that courts considering this exception "emphasize a common identity of officers, directors, and stock between the selling and purchasing corporations." In the case at bar, there was no evidence of any such overlap. Although the sole directors and officers of Surgical Sense were temporarily employed by Bard/Davol, the undisputed evidence is that they were consultants, and did not serve in a managerial capacity. The other former Surgical Sense employees who were hired by Bard/Davol after the asset purchase also served in non-managerial positions. Finally, there was no stock transfer involved in Bard/Davol's purchase of Surgical Sense assets. The Plaintiff's additional arguments that two non-traditional exceptions--(1) the continuity of enterprise and (2) product line exceptions--applied were rejected by the court, which held that is was likely that, if given the opportunity, the Arkansas Supreme Court would side with the large majority of jurisdictions that have rejected the non-traditional continuity of enterprise and product line exceptions.

Thach v. Tiger Corp., 609 F.3d 955 (8th Cir. 2010).

Plaintiffs claimed a rice cooker manufactured by Defendant caused a fire resulting in injury and death. The case was not resolved on any products liability theory, rather the district court held the South Dakota three-year limitations period had run. Plaintiffs' attempt to serve Japanese defendant pursuant to the Hague Convention was untimely and the Court declined to toll the period. *Id.* at 960.

Davis v. Goodyear Tire & Rubber Co., 2010 U.S. Dist. LEXIS 40820, No. 4:09CV00030 JMM (E.D. Ark. Apr. 26, 2010).

The Plaintiff was injured while working on equipment alongside a hose-fitting assembly when the assembly burst and sent a stream of fluid in his direction. The hose-fitting assembly consisted of multiple components, including metal fittings, band clamps, and rubber hose. Defendant Goodyear Tire & Rubber Company manufactured the rubber hose and supplied it in bulk to hose distributors. The Plaintiff's employer purchased reels of Goodyear rubber hose in bulk from one or more hose distributors. In conjunction with the hose, many types of fittings could have been inserted in the ends of the hose. The Plaintiff's employer purchased metal fittings and band clamps from suppliers other than Goodyear.

The court quoted the following passage from a 2007 Arkansas Supreme Court case that discussed the component-parts doctrine:

> The component-parts doctrine . . . provides that suppliers of inherently safe component parts are not responsible for accidents that result when the parts are integrated into a larger system that the component-part supplier did not design or build. The doctrine applies to claims for negligence and strict liability. If the component-parts manufacturer does not participate in the integration of the component into the finished product, it is not liable for defects in the final product if the component itself is not defective.

The court held that although the Arkansas Supreme Court did not "adopt" the doctrine, it applied the doctrine to the facts of the case. The court therefore, relying on the component-parts doctrine, found the Defendant did not have a duty to warn end-users of the hose-fitting assembly of the dangers posed by the incorporation of the hose into that product.

Wedgewood v. U.S. Filter/Whittier, Inc., 2010 Neb. App. LEXIS 194, No. A-09-1280 (Neb. Ct. App. Dec. 21, 2010) (not designated for permanent publication).

In a products liability action against the manufacturer of a filter, summary judgment on behalf of the manufacturer was affirmed because, among other reasons, the actions of the Plaintiff's co-employee were found to be, as a matter of law, an intervening proximate cause. The co-employee falsely verified that he had complied with multiple steps of the safety protocol. The co-employee was admittedly responsible for draining a tank of lactic acid but failed to initiate the drain sequence or confirm the tank had been drained before the Plaintiff opened the tank's filter. As a result, when the Plaintiff opened the filter, a large amount of the hot acid poured onto him, burning forty percent of his body and causing other injuries to him as he was knocked to the ground.

The court of appeals held that the Plaintiff's co-employee was in complete control of the situation and his negligence was not such that the manufacturer was bound to anticipate it, nor could it be said that the manufacturer could have contemplated it. As such, the new and independent conduct of the co-employee was the proximate cause of the injury in question and

broke the causal connection between the original conduct of the manufacturer and the injury. In other words, the co-employee's acts were not foreseeable.

Reiss v. Komatsu America Corp., No. 1:08-cv-082, 2010 WL 3238901 (D. N.D. Aug. 17, 2010).

Plaintiff's decedent was a construction worker who operated heavy machinery for a construction company. Decedent was killed when he rolled a road compactor on uneven ground. The compactor was manufactured by a Brazilian company, though it was imported by a predecessor company of Defendant Komatsu and sold under the predecessor company's name. Plaintiff claimed strict products liability, failure to warn at the time of manufacture, failure to warn at the time of discovery of the danger, negligence, breach of warranty of merchantability, and breach of warranty of fitness for a particular purpose. Defendant Diesel Machinery, the machinery dealer that sold the compactor to the construction company, argued that as a non-manufacturing seller of the compactor, it was entitled to summary judgment on all claims. The Court predicted that the North Dakota Supreme Court would adopt the apparent manufacturer rule as stated in section 400 of the Restatement (Second) of Torts. Though the court determined that Komatsu, as a successor company, held itself out to be the "manufacturer" of the compactor, it denied summary judgment because of genuine issues of material fact as to whether a post-manufacture roll-over protection system was an element of the compactor design, whether Diesel Machinery had actual knowledge of a product defect, and whether Diesel Machinery created the defect that caused the death. The court denied Defendants' motion for summary judgment on the failure to warn claims, finding genuine issues of material fact existed relating primarily to the roll-over protection system. The court also denied Defendants' motion for summary judgment on Plaintiff's negligent design claim because genuine issues of material fact existed. The Court held the four-year limitations period barred Plaintiff's breach of warranty claims.

NINTH CIRCUIT

Preemption:

Durham v. County of Maui, 696 F.Supp.2d 1150 (D.Haw. 2010)

Survivor of automobile driver and passenger who had been killed in a collision, brought action against automobile manufacturer, alleging that automobile was defective because it lacked side-impact airbags. Defendant Ford filed a motion for summary judgment contending that the Federal Motor Vehicle Safety Standards Act ("FMVSS") contains a comprehensive regulatory scheme that actually conflicts with plaintiff's claims. The court denied defendant's motion for summary judgment, holding that the FMVSS provides minimum safety standards and, thus, no conflict between Congress' purpose and the present suit existed.

Mabon Cornwell v. Stryker Corporation, 2010 U.S. Dist. LEXIS 116824 (November 1, 2010).

Plaintiff underwent a total hip replacement wherein a Trident System with metal acetabular cup and femoral stem was implanted. After her hip replacement, he continued to experience pain and eventually underwent a revision of his total hip replacement. He brought

suit against the manufacturers alleging defects in the Trident acetabular shell prevented the bone in his hip from growing into the cup to secure it and led to the subsequent revision.

Defendants brought a Motion to Dismiss for Failure to State a Claim alleging that Plaintiff's claims are all preempted by the express preemption provision of the Medical Device Amendments ("MDA") to the Food, Drug and Cosmetics Act ("FDCA"). The FDCA preempts product liability claims in the case of medical devices approved by the FDA's pre-market approval process. Plaintiff claimed that the Trident metal acetabular cup was approved by a less vigorous process than pre-market approval, and thus, his claims were not preempted. Plaintiff also claimed that he pled manufacturing defects which were premised on alleged FDA regulation violations and those claims were parallel to the requirements of the MDA, and thus, not preempted. The District Court determined that the acetabular cup was approved by the PMA process. Accordingly, the District Court determined that plaintiff's product liability claims were preempted by the MDA. As for plaintiff's alleged parallel claims, the court found that only the U.S. government may prosecute a claim for adulterated devices, as there is no private right of action.

Tobacco:

Chriske v. State ex rel. Dept. of Corrections and Institutions, 357 Mont. 28, 235 P.3d 588 (July 13, 2010).

Former resident at state run school filed a personal injury complaint against the State and the Department of Corrections and Institutions that alleged defendants caused her lung disease by rewarding students with cigarettes, which led to her smoking habit. The District Court granted defendants summary judgment. The Supreme Court held that former resident's personal injury was barred by the statute of limitations.

The Estate of Michelle Schwarz v. Philip Morris Incorporated, 348 Ore. 442, 235 P.3d 668, 2010 Ore. LEXIS 469 (2010).

"Low-tar" tobacco case. Husband brought suit against Philip Morris after his wife's death from metastatic lung cancer alleging three claims: negligence, strict product liability, and fraud in the manufacture, marketing and research of defendant's brand of low-tar cigarettes. The jury found Philip Morris liable on all three claims asserted. On appeal, the Oregon Supreme Court found that the trial court correctly refused defendant's requested instruction that would have informed the jury on the impermissible uses of evidence of harm to others without also instructing the jury on its permissible use, but that the trial court erred in its instruction on punitive damages. The Court found that the jury could have understood the uniform jury instruction for punitive damages to permit it to use evidence of harm to others in arriving at its punitive damages verdict without specific instruction of impermissible use.

Automobiles:

In re: Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation, 2010 U.S. Dist. LEXIS 131330 (C.D.Cal. Nov. 30, 2010)

A putative class of plaintiffs sought damages against Toyota for diminution in the market value of their vehicles because of a combination of both of acknowledged and perceived defects in those vehicles. Plaintiffs' claims arose from alleged defects in the vehicles' electronic throttle control system which resulted in sudden unintended acceleration ("SUA"). The claims of all plaintiffs who failed to allege facts establishing standing under Article III of the United States Constitution were dismissed by the district court for lack of jurisdiction. The court also held that plaintiffs' express and implied warranty claims also implicated claims under the Magnuson-Moss Warranty Act, 15 U.S.C.S. § 2301 et seq. The district court granted Toyota's motion to dismiss claims based on breach of warranty from Toyota's advertising, revocation, and unjust enrichment. The rest of the case is proceeding.

Diaz v. Phoenix Lubrication Service, Inc., 224 Ariz. 335, 230 P.3d 718 (May 4, 2010).

Motorist took the Volvo owned by his parents to a Jiffy Lube for an oil change, which included a check of the Volvo's tire pressure. A few weeks later, motorist lost control of the Volvo while it was raining and the car travelled off the road and rolled over, resulting in serious injuries. Motorist filed suit against Ford Motor Company, Volvo Car Corporation, Volvo Cars of North America, LLC., Volvo Cars of North America, Inc., and Discount Tire Company, alleging a strict products liability claim against Ford and Volvo for defective design regarding the Volvo's handling characteristics, roof structure, and seatbelt restraint system. Motorist also alleged a negligence claim against Discount Tire. Following the inclusion of Jiffy Lube in a non-party at fault, Motorist amended the complaint to claim Jiffy Lube was negligent for failing to perform a safety inspection of the tires on the Volvo during the oil change. The Arizona Court of Appeals held that the oil charge service contract, which included an agreement to check pressure of tires, did not create a duty to conduct safety inspection of tires; public policy did not support imposing a common-law duty to perform safety inspection of tires; and undisputed facts of lubrication service's limited undertaking, rather than an alleged industry standard, formed foundation for determining whether a duty existed to perform safety inspection of tires.

Drug Litigation:

Wyeth v. Rowatt, 126 Nev. 44, 2010 WL 4812919 (2010)

Consumers brought action against drug manufacturer based on claim that they developed invasive breast cancer as a result of defendant's estrogen-progestin hormone drug. At trial, the jury returned a verdict in favor of plaintiffs awarding them $35.1 million in compensatory damages and $99 million in punitive damages. On appeal, the court affirmed the judgment. In so doing, the court made two significant determinations in the products liability arena. First, the court determined that when a slow-developing disease is involved, like cancer, the substantive law of the state where the disease, or injury, was first ascertainable constitutes the "legal" place of the injury. Second, the court determined that compliance with FDA standards does not negate liability for punitive damages.

PhotoMedex, Inc. v. Irwin, 601 F. 3d 919 (9th Cir., Apr. 14, 2010)

(Medical Device) Plaintiff, a manufacturer and seller of medical lasers, sued a former employee and the direct competitor company he started for violations of the Food Drug and

Cosmetics Act ("FDCA") 21 U.S.C. § 301 et seq., as well as for misleading advertising under the Lanham Act, 15 U.S.C. § 1125(a)(1)(B) and under California's false advertising and unfair competition laws. The United States District Court for the Southern District of California granted the defendants' summary judgment motion on plaintiff's Lanham Act claims for misleading advertising and on its California state law claims for false advertising and unfair competition. Plaintiff could not bring a private action against defendants to enforce the FDCA. Additionally, plaintiff could not maintain a suit under the Lanham Act based on a claim that defendants had violated the FDCA by misrepresenting that their product had received FDA approval. Sufficient summary judgment evidence cast doubt as to whether defendants intentionally misrepresented the release date of their laser. The Ninth Circuit affirmed the district court's granting of summary judgment the claim based on alleged misrepresentations regarding FDA clearance but vacated the ruling on the claims based on alleged misrepresentations regarding the release date for defendants' laser and defendant founder's role as the inventor of plaintiff's laser.

Betty and Delbert Phelps v. Wyeth, Inc., 2010 U.S. Dist. LEXIS 61847 (Ore. May 28, 2010).

Husband and wife sued a pharmaceutical company after the wife ingested a generic competitor's product. The wife took generic metoclopramide tablets from November 2002 through August of 2009. She claimed that the metoclopramide caused her to develop tardive dyskinesia. Instead of claiming Wyeth manufactured the drug she believed responsible, she claimed that Wyeth negligently failed to adequately warn her doctors about the risks associated with long-term use of metoclopramide. The court granted the Defendant's Motion for Summary Judgment, finding that name-brand manufacturers cannot be held liable for injuries caused by consumption of their generic competitors' product.

Class Action Fairness Act (CAFA):

Lewis v. Verizon Communications, Inc., 627 F. 3d 395 (9th Cir., Nov. 18, 2010)

Plaintiff, a Verizon customer, sought to represent a class of Verizon customers that she brought in California Superior Court. The putative class action complaint alleged that customers had been billed for services that they never expressly agreed to or requested. The complaint did not state a fixed amount of damages sought. Relying on under the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332(d)(2), Verizon removed the case to the United States District Court for the Central District of California. Verizon submitted a declaration stating that the customers were billed more than $5 million, the jurisdictional amount under CAFA. The district court found that the complaint placed only unauthorized charges into controversy. Therefore, according to the court, the declaration therefore did not satisfy the provider's burden to demonstrate the requisite amount in controversy. Verizon appealed this decision to the Ninth Circuit Court of Appeals. The court of appeals held that Verizon had established federal jurisdiction under CAFA. The appellate court further held that the district court based its ruling upon the assumption that consumers' total billings included both authorized and unauthorized charges even though no evidence or allegation presented by the plaintiff supported that assumption. Because Verizon presented evidence of the total billings, and the plaintiff had not argued that the damages were less than the total billed, the Ninth Circuit found that the entire

amount of the billings was "in controversy." Therefore, CAFA's jurisdictional requirements were satisfied, and the case could proceed in district court.

Coleman v. Estes Express Lines, Inc., 2010 U.S. App. LEXIS 24434 (9th Cir., Nov. 30, 2010)

Plaintiff brought a putative class action against his former employer in California Superior Court. The defendant-employer was a trucking company and a holding company was another defendant. The companies removed the case to the United States District Court for the Central District of California under the Class Action Fairness Act ("CAFA"). Having found that the case involved a local controversy under 28 U.S.C. § 1332(d)(4), the district court remanded the case. The defendants argued that the CAFA criteria for local controversies under 28 U.S.C. § 1332(d)(4)(A)(i)(II)(aa) and (II)(bb) had not been satisfied. Because of the existing split in the federal courts on whether to look beyond the complaint in determining whether the local controversy exception applies to a particular case, the defendants applied for leave to appeal the district court's order under 28 U.S.C. § 1453(c)(1). On appeal, the Ninth Circuit was asked to determine when it was appropriate to hear discretionary appeals under CAFA. The Circuit Court did not rule on the correctness of the district court's decision. But based on the wide split of courts on both sides of the question, appellate review would be useful. Thus, the companies' application for leave to bring the discretionary CAFA appeal was granted.

Marketshare or other New Theories of Liability:

Lips v. Scottsdale Healthcare Corp., 224 Ariz. 266, 229 P.3d 1008 (May 3, 2010).

In context of patient's action against manufacturer of defective hip prosthesis, patient brought claim against hospital for spoliation of evidence. Plaintiff filed suit against manufacturer for hip prosthesis failure, and asked surgeon to preserve the explanted parts. Plaintiff learned during discovery that the prosthesis parts could not be found, and filed an amended complaint claiming that the hospital was liable for spoliation of the parts. The hospital filed a motion to dismiss, asserting that Arizona does not recognize third-party spoliation of evidence as a separate tort. The Arizona Supreme Court held that Arizona does not recognize a cause of action for first-party spoliation of evidence, Arizona does not recognize a cause of action for negligent spoliation of evidence, and even assuming that Arizona recognized the tort of third-party intentional spoliation, plaintiff's allegations did not state claim for same.

Other:

Primiano v. Cook, 2010 WL 1660303 (9th Cir. 2010)

Plaintiff, a 36 year old woman, fell in her kitchen and broke her elbow. As a result of the fall, plaintiff underwent several elbow replacement surgeries. She brought an action against the manufacturer of the prosthetic elbow joint device, as well as, her treating physician. The district court ruled that the testimony of plaintiff's expert witness was inadmissible, leaving her with inadequate evidence to support her claims. Thus, the district court granted summary judgment and dismissed her case.

The Ninth Circuit Court of Appeals reversed the district court. The court applied the *Daubert* standard and held that the testimony of plaintiff's expert witness was admissible. Specifically, the court held that the practice of medicine is not an exact science, and given that the court's role is a "gatekeeper, not a fact finder," the gate could not be closed to a relevant opinion offered with sufficient foundation by one qualified to give it.

Smallwood v. NCSOFT Corp., 2010 WL 3064474 (D.Haw. 2010)

Video gamer brought action against computer game manufacturer, alleging that he suffered extreme and serious emotional distress and depression as a result of becoming psychologically dependent and addicted to playing manufacturer's game, and manufacturer's banning of him from the game for engaging in an elaborate scheme to create real money transfers. Manufacturer moved to dismiss, alleging that (1) the limitation of liability provision in the license agreement precluded plaintiff's claims; (2) plaintiff failed to plead fraud with particularity; and (3) plaintiff failed to state a claim upon which relief could be granted. The court held that "clickwrap" agreements are enforceable; however, such an agreement cannot limit liability for gross negligence. The court also dismissed plaintiff's intentional tort claims because they were not pled with particularity; however, plaintiff's other claims remained viable.

Rodriguez v. General Dynamics Armament and Technical Products, Inc., 696 F.Supp.2d 1163 (D.Haw. 2010)

Relatives of two Army soldiers who were killed, and two soldiers who were injured during training exercises in Hawaii when mortar cartridge prematurely exploded, filed suit against defense contractor. Defendant moved for summary judgment, contending that plaintiff cannot prove that a defectively manufactured mortar cartridge caused the explosion, and that plaintiff's claims are barred by the government contractor defense, the political question doctrine, and combatant activities exception. The court concluded that questions of fact remained precluding summary judgment, and that the political question doctrine and combatant activities exception were not applicable. The court also held that a witness with mechanical engineering degree and explosives background was qualified to testify as expert regarding possible manufacturing defect in mortar cartridge.

Miidas Greenhouses, LLC v. Global Horticultural, Inc., --- P.3d ----, 2010 WL 5185789 (Ariz.App. Div. 2, Dec. 22, 2010).

Miidas Greenhouses purchased 720 bales of peat moss from Global Horticultural. After seeds were planted in the peat moss, they did not sprout as they should have and the plants that sprouted were deformed. All of Miidas's seeds and resulting crops were lost. Miidas filed suit against Berger Group, ltd., the producer of the peat moss, and Global Horticultural, asserting two contract claims against Global and product liability and negligent misrepresentation against both Global and Berger. Global filed a motion for summary judgment, asserting that the tort claims were barred by the economic loss rule and Berger joined in the motion. The trial court granted the motion. Applying the three prong test of *Salt River Project Agricultural Improvement & Power District v. Westinghouse Electric Corp.,* 143 Ariz. 368, 694 P.2d 198 (1984), Division Two of the Arizona Court of Appeals held that the economic loss rule did not apply because the

peat moss was dangerous to the seeds, the damage caused was calamitous, and the damage occurred to other property.

Patterson v. Home Depot, USA, Inc., 684 F.Supp.2d 1170, (Feb. 16, 2010).

Consumer brought negligence and products liability action against German ladder designer, distributor, and retailer, seeking to recover damages for injuries he sustained when ladder collapsed, causing him to fall. Designer moved to dismiss for lack of personal jurisdiction. The District Court held that collateral estoppel did not bar designer from contesting personal jurisdiction, designer lacked substantial, continuous, or systematic contacts with Arizona sufficient to give rise to general jurisdiction, designer did not exert substantially total control over distributor, as would warrant imputing distributor's contacts with Arizona, under the alter-ego doctrine, to designer, distributor did not act as designer's general agent, as would warrant exercise of personal jurisdiction against designer, designer purposefully availed itself of privileges of conducting activities in Arizona, as required for exercise of specific jurisdiction over it, and arising out of requirement for specific jurisdiction was met.

Hulstine v. Lennox Industries, Inc., 357 Mont. 228, 237 P.3d 1277 (Aug. 17, 2010).

Plaintiffs sued Lennox and Anderson's Heating and Air Conditioning, Inc. for personal injuries resulting from carbon monoxide poisoning under theories of negligence and strict liability. Plaintiffs settled with Anderson's and proceeded to trial against Lennox where the jury awarded damages. The District court reduced the amount of damages pursuant to M.C.A § 27-1-703 and calculated interest from the time it entered its judgment rather than from the time the jury entered its verdict. Plaintiffs appealed. The Supreme Court held that statute utilizing comparative negligence principles for reduction of damages awards in actions involving multiple defendants could not be applied to reduce residents' damages award, pro tanto reduction of the damages award was required, and residents were entitled to award of post-judgment interest from time the jury entered its verdict.

Mari Daniel v. Coleman Company, Inc., 599 F.3d 1045 (9th Cir. Wash. 2010).

Plaintiff brought a wrongful death action after her husband and father died from carbon monoxide poisoning after running a Coleman Powermate 5045 heater labeled not for indoor use inside of their camper. Plaintiff claimed Coleman failed to provided adequate warnings at the time of manufacturer, that Coleman's knowledge of other incidents involving its heaters created a post-manufacture duty to warn of the risks associated with the Powermate 5045. Also claimed that the heater was defectively designed because it was more dangerous than a reasonable consumer would expect and because it lacked alternative design features which would have made the heater more safe. The District Court dismissed Plaintiff's post-sale duty to warn claim and all other claims proceeded to trial. Jury returned verdict that the heater was reasonably safe in its design and time-of-manufacture warnings.

On appeal, the Ninth Circuit Court of Appeals affirmed the dismissal of post-sale duty to warn claim because Plaintiff did not present evidence of a new and distinct danger which arose after the point of sale. Court determined there is no post-sale duty to warn of a danger already accounted for (risk of carbon monoxide poisoning).

Larry and Ruth Newkirk v. Conagra Foods, Inc., 2010 U.S. Dist. LEXIS 66568 (Wash. July 2, 2010).

Plaintiff sued manufacturer of microwave popcorn claiming he developed bronchiolitis obliterans as a result of ingesting microwave popcorn containing butter flavorings. According to Plaintiff, the diacetyl flavoring agent caused obstructive lung disease. Manufacturers of microwave popcorn stopped using diacetyl around 2007. Defendant sought to exclude supplemental opinions from Plaintiff's expert but the court allowed the supplemental opinions because there was no prejudice to Defendant. The court conducted a detailed *Daubert* analysis of the opinions of Plaintiff's expert and ultimately determined that the expert's opinions fell below the threshold standard of scientific validity.

Todd and Anne Erickson v. MicroAire Surgical Instruments, LLC, 2010 U.S. Dist. LEXIS 55855 (Wash. May 6, 2010).

Doctor and his wife sued the manufacturer of his surgical drills claiming that MicroAire's product was unsafe as designed, and that MicroAire failed to provide adequate warnings of the danger that the product could cause permanent hearing loss. Plaintiffs claimed the doctor could no longer practice as a maxillofacial surgeon as a result of hearing loss. This case involved a discovery dispute related to 23 requests for admission served by Plaintiffs, to which Defendant objected. The court found the Defendant's responses legally sufficient and denied Plaintiffs' Motion challenging their sufficiency.

Weedman Ranches, Inc. v. Deere & Company, 2010 U.S. Dist. LEXIS 78367 (Ore. Aug. 3, 2010).

Plaintiff purchased a used 2005 Deere model STS 9760 combine which caught on fire while being operated and was destroyed. At the time of the fire, the combine had been operating normally. Plaintiff sued alleging that the fire started because of electrostatic discharge (ESD) resulting from a design defect in the Deere STS 9760. Defendant moved for summary judgment and sought to exclude evidence offered by Plaintiff in opposition, specifically an expert affidavit. Defendant claimed that the opinion evidence offered by Plaintiff did not satisfy the *Daubert* factors. The court determined that the *Daubert* test was flexible and the proffered affidavit passed the inquiry. Accordingly, Defendant's Motion to Exclude and Motion for Summary Judgment were denied.

Lisa Cochran v. Burlington Coat Factory of Oregon, LLC, Infantino, LLC, *et. al*, 2010 U.S. Dist. LEXIS 101268 (Ore. Aug. 25, 2010).

Plaintiff purchased an Infantino Baby Sling from Burlington Coat Factory. Baby was found unconscious in the sling with the sling around his neck. CPR was unsuccessful. Parents brought six claims, three for their emotional distress and three on behalf of their son's estate. Defendants moved to dismiss all of the parents' individual claims. The court noted that Oregon products liability law prohibits recovery for mental distress where there is no physical harm or physical impact. Parents' "Product Liability/Infliction of Emotional Distress" claim was dismissed because they did not adequately allege physical injury or impact from the alleged

defects of the sling. This claim was also barred by Oregon's Wrongful Death Act. As for Plaintiffs' Intentional Infliction of Emotional Distress claim, the court denied the Motion to Dismiss because the parents had set forth sufficient facts to state a claim for relief.

Teddy Smith v. Home Depot USA, Inc., 2010 U.S. Dist. LEXIS 118510 (November 5, 2010).

Products liability action in which the plaintiff claimed he was injured by a defective ladder manufactured by Krause and sold by Home Depot. Plaintiff sought discovery from Home Depot on past claims of incidents involving Krause ladders. Home Depot was compelled to disclose the event description information corresponding to the past Krause ladder claims previously disclosed to Plaintiff.

TENTH CIRCUIT

Tort Reform

Effective July 1, 2010, Utah enacted a variety of medical malpractice tort reforms. Noneconomic damages in cases arising after May 15, 2010 are capped at $450,000.00, without an annual inflation adjustment. Utah Code § 78B-3-410 (2010). Cases arising before May 15, 2010, are capped on a sliding scale starting at $250,000 as adjusted for inflation. *Id.* A claimant who received a decision of "non-meritorious" from the medical prelitigation panel must file an "affidavit of merit" if pursuing litigation for an alleged a breach of the standard of care or that the breach proximately caused the alleged injuries. § 78B-3-423(1). The defendant may recover attorneys' fees if the claimant files a false "affidavit of merit." § 78B-3-423(5)(a).

Preemption

U.S. Airways, Inc. v. O'Donnell, No. 09-2271, 2010 U.S. App. LEXIS 24799 (10th Cir. Dec. 3, 2010).

U.S. Airways filed this action in the United States District Court for the District of New Mexico seeking to enjoin New Mexico officials from regulating, pursuant to the New Mexico Liquor Control Act ("NMLCA"), the alcoholic beverage service that airlines provide to passengers on flights. The district court held that federal law did not preempt the NMLCA, and US Airways appealed. Relying on theories of both express and implied preemption, U.S. Airways argued that the Federal Aviation Act of 1958 and federal regulations preempt the field of aviation safety to the exclusion of state regulation. U.S. Airways argued that the NMLCA's application to an airline implicated the field of aviation safety.

The 10th Circuit held that New Mexico's regulatory scheme was impliedly preempted because it fell within the field of aviation safety that Congress intended federal law to occupy exclusively. However, the Court also held that the Twenty-first Amendment to the U.S. Constitution required the district court to conduct a balancing test between New Mexico's core powers and federal interests under the Federal Aviation Act.

The Court's Opinion is also noteworthy due to the Tenth Circuit's analysis of its previous preemption jurisprudence, most notably *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir. 1993). In *Cleveland*, the Court held that Congress did not indicate a clear intent to occupy the field of aviation safety to the exclusion of state common law. Thus, *Cleveland* permitted courts in the Tenth Circuit to consider state common law with respect to determining the standard of care in aviation cases. In *U.S. Airways* the Court recognized that subsequent cases called into question the analysis in *Cleveland*. Thus, given the right opportunity, the Tenth Circuit may be willing to depart from *Cleveland* and further expand the scope of federal preemption recognized in the Tenth Circuit.

Hart v. The Boeing Co., Inc., No. 09-cv-00397, 2010 U.S. Dist. LEXIS 70404 (D. Colo. June 28, 2010); *Hart v. The Boeing Co., Inc.*, No. 09-cv-00397, 2009 U.S. Dist. LEXIS 117766 (D. Colo. Nov. 23, 2009).

The 2009 *Hart* opinion is a notable example of a Court following the Tenth Circuit's opinion in *Cleveland*. *Hart* involved a consolidation of several cases related to the crash of Continental Flight 1404 in Denver on December 20, 2008. Plaintiffs asserted negligence and strict liability claims based on the alleged defectiveness of the aircraft's directional control and stabilization system, which allegedly caused the plane to careen off the runway, land in a ravine, and burst into flames.

The Court recognized that the United States Supreme Court's decision in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) undermined the rationale of *Cleveland*, and further noted that the Tenth Circuit appears to be an outlier in the area of preemption. Nevertheless, the Court found it was bound to follow *Cleveland* and denied the Defendant's Motion to Dismiss based on federal preemption.

In the 2010 *Hart* opinion, the Court certified its 2009 Order denying the Motion to Dismiss as final for interlocutory appeal. The Court found that while *Cleveland* remained controlling, the issue of preemption in the Tenth Circuit was not settled in light of subsequent Supreme Court precedents. The Court noted that other circuits "have taken an arguably more nuanced approach to the issue of implied preemption under the FAA [Federal Aviation Act]," and essentially invited the Tenth Circuit to overrule *Cleveland*. In a disappointment to defense practitioners, a three judge panel of the Tenth Circuit decided, 2-1, not to grant Boeing's Petition for Leave to Appeal.

Preemption

Stanley v. Mylan, Inc., 2010 WL 3718589 (D.Utah Sept. 17, 2010)

Estate sued drug manufacturer after fentanyl patch allegedly delivered a lethal dose of fentanyl to user. Utah only allows punitive damage awards in drug manufacturing cases if plaintiffs can show a fraud was committed on the FDA in getting the drug approved. Plaintiffs alleged such a fraud. Mylan argued that the punitive damage claim should be dismissed because the "fraud on the agency" exception to Utah's statute was impliedly preempted under the principle that policing fraud on a federal agency was a matter of federal law. Following *Lake-Allen v. Johnson & Johnson, L.P.*, 2009 WL 2252198 (D.Utah July 27, 2009) as well as *Wyeth v. Levine*, 129

S.Ct. 1187 (2009), the Court held that the punitive damage exception was not preempted because the defendant offered no proof that Congress intended to preempt the fraud on the FDA exception to punitive damages. Accordingly the court denied the motion to dismiss.

Tobacco

Romero v. Phillip Morris, Ins., No. 31,433, 2010 N.M. LEXIS 370 (N.M. June 25, 2010).

In this class action lawsuit, Plaintiffs alleged that several tobacco companies engaged in an agreement to fix the price of cigarettes from 1993 to 2000. The New Mexico Court of Appeals held that Plaintiffs could prove the conspiracy by parallel conduct alone, as long as independent conduct was implausible. The Supreme Court of New Mexico reversed.

The Supreme Court of New Mexico held that, under federal antitrust law, evidence of parallel price increases alone is not sufficient to prove an agreement to fix prices. The Court held that Plaintiffs who allege a price-fixing agreement must also provide evidence that tends to exclude the possibility that parallel price increases were the result of independent conduct. Plaintiffs cannot meet this burden based on circumstantial evidence alone.

Automobiles

In a series of opinions, the Tenth Circuit and the United States District Court for the District of Colorado considered the admissibility of expert testimony in the context of automobile product liability lawsuits. The Courts' decisions provide an excellent primer or refresher with respect to *Daubert* and its progeny in the Tenth Circuit, particularly in the products liability context. *See Bullock v. Daimler Trucks N.A., LLC*, No. 08-cv-00491, 2010 U.S. Dist. LEXIS 133025, 108629, 108635, 108636, 108708, 108710, (D. Colo. 2010); *Cruz v. Bridgestone*, No. 08-2242, 2010 U.S. App. LEXIS 15133 (10th Cir. July 22, 2010).

Bustos v. Hyundai Motor Co., No. 28,240, 2010 N.M. App. LEXIS 129 (N.M. Ct. App. June 17, 2010).

In *Bustos* the New Mexico Court of Appeals upheld a $4.2 million jury verdict based on claims that the roof structure of the 2002 Hyundai Accent was defectively designed. The case involved a roll-over accident resulting in the death of a passenger in the car. The Court found that the jury's verdict that a design defect caused an enhanced injury was supported by substantial evidence.

The Court rejected Defendants' challenges to experts under *Daubert* and its New Mexico counterpart, *State v. Alberico*, 861 P.2d 192 (1993). The Court's opinion is noteworthy for its analysis of the role of *Daubert* in New Mexico state cases. Specifically, the opinion explains and applies New Mexico's limitation of the *Daubert*/*Alberico* analysis to testimony that requires scientific knowledge, as opposed to testimony based solely on experience or training.
(Note: *certiorari* was granted on October 18, 2010.)

Graves, et al. v. Mazda Motor Corp., 2010 U.S. App. LEXIS 25562 (10th Cir. Okla. 2010)

Plaintiff Cheryl Graves rented a Mazda 6 while in Hattiesburg, Mississippi. While driving to the airport to fly back to Oklahoma, Ms. Graves became lost. She pulled over at a private residence to ask for directions. When Ms. Graves exited the vehicle, the vehicle was in reverse rather than park. The Mazda 6 knocked Ms. Graves to the ground and rolled over her, causing injury. Ms. Graves alleged that the Mazda 6 gear shifter was defectively designed as to prevent her from knowing the car was not in park, but was in reverse.

Plaintiffs offered expert testimony of Mr. Stephen Syson, a human factors engineer. Human Factor Engineers address issues such as "How far from the seated operator can a control switch be located and still be reached? How much seat adjustment must be provided so that both the fifth percentile operator and the ninety-fifth percentile operator can reach the operation controls?"

The District Court analyzed Mr. Syson's testimony under *Fed. R. Evid. 702* and refused to permit Mr. Syson to testify. The District Court rejected Mr. Syson's proffered expert testimony because Mr. Syson failed to provide the basis for his expert opinion in the form of data or industry standard, nor did Mr. Syson perform any testing to support his opinion that the Mazda 6 gear shift design is defective.

While Plaintiffs, through their expert testimony, listed safety analysis techniques that Defendant should have used, Plaintiff failed to offer any evidence to show that Defendant Mazda did not use such techniques. Additionally, Plaintiff was unable to show that even if Mazda did not use the listed techniques, had Mazda done so, it would have pursued a different gear shift design. Judgment for Defendant AFFIRMED.

Freeman Family Ranch, LTD v. Maupin Truck Sales, Inc., et al., 2010 U.S. Dist. LEXIS 21557 (March 9, 2010)

Plaintiff Freeman Family Ranch ("Freeman") purchased a 2006 model Sterling truck from Defendant Maupin Truck Sales ("Maupin"). Freeman purchased an after-market air conditioner, installed by a Maupin employee. Controls, and all wiring, were installed between the seats of the truck. Freeman purchased a feed mixer from Defendant Mohrlang, who installed the mixer's controls between the seats. On January 29, 2006, the truck caught fire destroying the feed mixer, the building and its contents, and two other vehicles. Freeman asserted claims of negligence and products liability also including theories of alternate liability and res ipsa loquitur to both claims.

Defendants objected to the testimony offered by Mr. Little, Plaintiff's expert. Mr. Little concluded that the cause and origin of the fire was the wiring between the seats of the truck; however, he could not determine exactly which product and installation, Maupin's or Mohrlang's, was defective.

Plaintiff's alternative liability theory rested on the inability to determine which negligent act, of many, caused Plaintiff's injury. The Court allowed Plaintiff's alternative liability theory to survive with respect to Plaintiff's negligence claim, but granted summary judgment on Plaintiff's products liability claim.

The Court reasoned that while both products could potentially be defective, an essential element of a products liability claim is causation. Plaintiff will not reap the benefits of strict liability for a defective product unless the Plaintiff is able to establish which product caused the injury. Plaintiff's expert was not allowed to testify that the conduct of both Defendants caused the fire because it was not supported by the facts present. Absent evidence of causation, Plaintiff's claim for products liability failed.

Plaintiff's attempt to revive its products liability claim through alternative liability and res ipsa loquitur also fails. An alternative liability theory is premised upon the inability to demonstrate the precise cause of an injury to the Plaintiff. Even if both products were defective, Plaintiff must how that one, or both, caused the fire to move forward with the products liability claim. If Plaintiff could accomplish this, Plaintiff would not have use for an alternative liability theory.

Plaintiff's theory of res ipsa loquitur regarding its products liability claim fails because the Oklahoma Supreme Court expressly declined to extend this theory to products liability cases in *Dutsch v. Sea Ray Boats, Inc.*, 1992 OK 155, 845 P.2d 187.

Egbert v. Nissan Motor Co., Ltd., 2010 UT 8, 228 P.3d 737 (Feb. 19, 2010)

The Utah Supreme Court accepted certification and answered these questions:

1. Is the statute of limitations under the Products Liability Act, codified at § 78-15-6(3), constitutional; and
2. Does Utah Recognize § 16(b-d) of the Restatement (Third) of Torts: Products Liability?

Regarding the first question, the Utah Supreme Court held that the statute of limitations was constitutional. Plaintiffs argued that it was void because the Utah Supreme Court held that the statute was void *ab initio* in 1985. Defendant argued the statute had been impliedly validated by the Utah Legislature's recodification of § 78-15-6(3) in 1989, which resolved the issues that made its predecessor constitutionally infirm. The Utah Supreme Court rejected both arguments and affirmed its validity because: (1) it had become a common law rule over the past 20 years; and (2) the Utah Legislature recodified and revised the section in 2008.

On the question of whether Utah follows the Restatement (Third) of Torts: Product Liability § 16(b-d), the Utah Supreme Court answered "no." Subsections b-d of § 16 address the burden of proof and damage apportionment in enhanced injury claims. Egberts argued that the Court should adopt the *Fox-Mitchell* approach, which creates joint and several liability on the manufacturer where a defect was a substantial factor in causing an indivisible injury and it places the burden of proof on the manufacturer to establish that the injury can be apportioned. Nissan argued for adoption of the *Huddell-Caiazzo* approach, followed in a minority of jurisdictions, which requires an enhanced injury plaintiff to bear the burden of both causation and apportionment. The Utah Supreme Court rejected both arguments.

Utah crafted its own approach to reflect its abolition of joint and several liability. Even in cases where an indivisible injury is alleged, § 78B-5-817 requires a jury to apportion fault

between the alleged tortfeasors. "Because all injuries, as a matter of Utah law, can and must be apportioned, there is no shifting of the burden – informal or formal – to a defendant product seller to prove apportionment." ¶ 38. Accordingly, to prevail, a plaintiff must show that "the product defect is a substantial factor in increasing the plaintiff's harm beyond that which would have resulted from other causes." ¶ 37 (citing *Egbert I*, 2007 UT 64, ¶ 19, 167 P.3d 1059 (quoting Restatement (Third) of Torts: Products Liability § 16(a) (1998)).

Winzler v. Toyota Motor Sales USA, Inc., 2010 WL 3064364 (D.Utah Aug. 3, 2010)

Plaintiff filed a proposed class action lawsuit for an alleged engine defect that sought recovery under products liability, negligence, and breach of warranty theories. Winzler did not allege that she had had any problems with her car; instead, she asserted that her injury was being forced to drive an unsafe automobile with the potential to stall without warning. Toyota moved to dismiss the complaint because Winzler had not suffered any injury, which the court granted.

Drug Litigation

O'Connell v. Bionet, Inc., No. 09CA0224, 2010 Colo. App. LEXIS 359 (Colo. Ct. App. March 18, 2010).

Plaintiffs sued a medical device manufacturer and its sales representative based on injuries sustained when one of the Plaintiff's physicians attempted to install an external elbow fixator. The fixator was a medical device regulated by the F.D.A. and may only be sold by or upon order or prescription of a physician.

In upholding the dismissal of Plaintiffs failure to warn claim, the Colorado Court of Appeals expressly adopted the learned intermediary doctrine – no Colorado appellate court had previously done so. The Court likened the medical device at issue to prescription drugs and held that the manufacturer's duty to warn was limited to an obligation to advise the prescribing physician of the potential dangers that may result from the product's use.

With respect to the claim against the sales representative, the Court held that the claim was properly dismissed under the "captain of the ship doctrine." The Court held that the doctrine extends to all persons present in the operating room on request and authorization of the physician, as long as the physician has the right to control and supervise the person's activities. The treating physician, with whom the Plaintiffs had previously settled, was vicariously liable for the acts of the representative.

Hayes v. SmithKline Beecham Corp., 2009 U.S. Dist. LEXIS 116081 (N.D.O.K. Dec. 14, 2009)

Plaintiff Jennifer Hayes became pregnant while taking Paxil, an anti-depressant medication. Plaintiff gave birth to a son who now suffers from various heart defects and abnormalities, allegedly the result of Jennifer Hayes' consumption of Paxil during her first trimester of pregnancy.

Defendant SmithKline Beecham, d/b/a GlaxoSmithKline, argued that Plaintiff's failure to warn theory was preempted by FDA regulations. The District Court followed the United States

Supreme Court decision in *Wyeth v. Levine*, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009), holding that a Plaintiff's failure to warn theory is not barred by preemption unless the Defendant presents evidence that the FDA would have rejected a stronger warning. Summary Judgment reversed.

Stanley v. Mylan, Inc., 2010 WL 3718589 (D.Utah Sept. 17, 2010)

Estate sued drug manufacturer after fentanyl patch allegedly delivered a lethal dose of fentanyl to user. Manufacturer moved to dismiss. The court held the plaintiff adequately pleaded a manufacturing defect claim where he alleged that the patch was designed to provide a non-lethal drug dose, the patch was being properly used, and the patch delivered a lethal dose of fentanyl. The court dismissed the failure to warn claim because, while plaintiff alleged the decedent was unaware of the dangers of using the patch, the estate made no allegations that tied the lack of knowledge to a failure of Mylan to warn the prescribing physician about foreseeable risks of harm. Even though Utah law precludes design defect claims against drug manufacturers, the court refused to strike a paragraph that vaguely addressed a possible design defect claim because it supported other claims that were asserted and did not prejudice the defendant.

Cody Laboratories, Inc. v. Sebelius, 2010 WL 3119279 (D.Wyo. July 26, 2010)

Cody Laboratories ("Cody") sough a declaratory judgment and injunctive relief to preclude the FDA from enforcement activities related to Cody's alleged violations of the federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-399a. Cody argued that its morphine sulfate solution met the requirements of the act's 1938 grandfather clause and did not require a completed new drug application. The court denied relief and dismissed the complaint because Cody had no likelihood of success on the merits for the following reasons:

1. Following *Ewing v. Mytinger and Casseberry*, 339 U.S. 594, 70 S.Ct. 870 (1950), the court lacked jurisdiction to prospectively enjoin or prospectively question an FDA enforcement action. Rather the drug company had to wait for the FDA to commence an FDCA enforcement action and raise their defenses in that action;

2. The claim was not ripe because FDA warning letters do not constitute "final agency action" for purposes of judicial review under the Administrative Procedures Act; and

3. Cody lacked proof on the issue of whether their drug satisfied the 1938 grandfather clause requirements. Specifically, Cody had no pre-1938 labeling and the court refused to rely on treatises that showed the same compound proportion was used between 1906 and 1938 because that did little to prove that there had been "no changes whatsoever" to the formulation, dosage form, potency, route of administration, indications for use, or intended patient population since 1938.

Other

Boles v. Sun Ergoline, Inc., 223 P.3d 724 (Colo. 2010).

Plaintiff Boles alleged a strict products liability claim against *Sun Ergoline*, the manufacturer of a tanning bed in which Boles was allegedly injured. The Defendant argued that

Plaintiff's claim was barred by a release she signed as a condition of using the tanning facilities. The exculpatory agreement broadly released all owners, operators, franchisers, and manufacturers from any damage or harm.

Under Colorado law, exculpatory agreements attempting to insulate a party from liability for its own negligence are disfavored, but not necessarily void. Such agreements are subject to a four-part test for enforceability. *See Jones v. Dressell*, 623 P.2d 370, 376 (Colo. 1981). In *Boles* the Colorado Supreme Court rejected the contention that the same analysis applies to instances where the agreement purports to insulate a party from a strict liability claim. Specifically, the Court held that an ordinary consumer's agreement to release a manufacturer from liability cannot, consistent with public policy, extend to claims for strict products liability (as distinguished from simple negligence). The Court held that agreements releasing a manufacturer from strict products liability for personal injury, in exchange for nothing more that the right to have or use the product, are void under Colorado law.

Volunteers of Am. v. Gardenswartz, 242 P.3d 1080 (Colo. 2010).

The Colorado Supreme Court considered whether a successful tort plaintiff may recover damages for the full amount of medical expenses incurred, or only the discounted amount paid by the plaintiff's insurance company. In a 4-3 decision, the Court held under the Colorado collateral source rule (Colo. Rev. Stat. § 13-21-111.6) a plaintiff may recover the full amount of medical expenses incurred.

The majority reasoned that that the provider/insurer discounts (i.e. the difference between what the insurer paid and what the injured person would have otherwise been billed) constituted contractual benefits that fell within Colorado's contract exception to the collateral source rule. The Court's decision is troubling for all tort defendants in Colorado because it allows a plaintiff to recover "phantom" damages– i.e. medical expenses that were not paid by a plaintiff or his or her insurer.

Carter v. Brighton Ford, Inc., No. 09CA1966, 2010 Colo. App. LEXIS 1394 (Colo. Ct. App. September 30, 2010).

Carter involved the purchaser of an allegedly defective automobile who sued the dealership from which he purchased the automobile for breach of the implied warranty of merchantability. The dealership moved for summary judgment under Colorado's "innocent seller" statute (Colo. Rev. Stat. § 13-21-402), which insulates innocent sellers from all "product liability action[s]" under Colorado law.

The Court held that a warranty claim for a defective product without collateral damage or risk of injury does not constitute a product liability action under Colorado law. The Court reversed the trial court's decision which awarded summary judgment to the Defendant based on the innocent seller statute. The Court's decision is noteworthy as this was an issue of first impression, and because the Court rejected a 2002 United States District Court decision to the contrary. *See Loughridge v. Goodyear Tire & Rubber Co.*, 207 F. Supp. 2d 1187 (D. Colo. 2002).

Iskowitz v. Cessna Aircraft Co., No. 07-cv-00968; 2010 U.S. Dist. LEXIS 88791 (D. Colo. August 5, 2010); *Iskowitz v. Cessna Aircraft Co.*, No. 07-cv-00968; 2009 U.S. Dist. LEXIS 90166 (D. Colo. Sept. 30, 2009).

These cases are significant for their analysis of choice of law issues. The Court's decisions offer a detailed application of Colorado's "most significant relationship test" in a product liability case involving an aircraft accident and contacts with at least five states. The Court ultimately found the place of the accident, Colorado, to be fortuitous. The Court placed particular weight on the place of the conduct that allegedly caused the injury. For example, with respect to the claims against Cessna, the manufacturer of the allegedly defective aircraft, the Court applied the law of Kansas - the state where Cessna was located and the aircraft was manufactured.

Cessna 208B Litigation, Master Docket Maintained by the United States District Court for the District of Kansas.

Mountain Bird, Inc., et al. v. Goodrich Corp., et al., 369 Fed. Appx. 940 (10th Cir. Kan. 2010)

Spirit Air, Inc. and Mountain Bird, Inc. sued Cessna Aircraft Company and Goodrich Corp. alleging liability under theories of defective product and negligence when the Cessna 208B purchased from Cessna in 1999 crashed due to ice accumulation on the wings, killing the pilot and one passenger. The District court, applying Idaho law, dismissed Plaintiffs' tort action under the economic loss rule.

Idaho's economic loss rule operates to bar the buyer of a product from recovering economic losses, such as costs of repair and replacement of defective property, commercial loss for inadequate value, and loss of profits through a tort theory of liability. Property damage, as relevant to this litigation, is damage to property other than the allegedly defective property that is the subject of the lawsuit. Plaintiffs failed to establish that they were entitled to any of the three exceptions to the economic loss bar to recovery.

The first exception is that of a "special relationship". Idaho recognizes two types of special relationships: 1) where personal services are performed by a professional or quasi-professional; and 2) "where an entity holds itself out to the public as having expertise regarding a specialized function, and by so doing, knowingly induces reliance on its performance." *Goodrich* at 943. Plaintiffs alleged that Cessna self-certified that the de-icing system complied with all Federal Aviation Administration regulations. The Court acknowledged a distinction between stating a product meets certain regulations and certifications, which Cessna did, and holding oneself out as an expert, which Cessna did not.

The second exception to the economic loss bar is when unique circumstances require a different allocation of risk. The District Court rejected this, as the Idaho Supreme Court has never applied this exception.

The third exception is when economic loss is parasitic to an injury to person or property. The District Court rejected this exception because Plaintiffs did not suffer any injury to their

person and while the airplane damaged, the airplane is the subject-property to the lawsuit. Additionally, the Tenth Circuit declined to consider Plaintiffs' argument that the de-ice system was an aftermarket addition; therefore, the airplane was not the property that is the subject of the lawsuit because such argument was not made to the trial court below. Judgment for Defendants was affirmed.

Tortorelli, et al. v. Mercy Health Center, et al., 2010 OK CIV APP 105; 242 P.3d 549.

Plaintiff Teresa Tortorelli underwent surgery at Mercy Health Center to remove a tumor in her right leg. The surgery required the surgeon, Dr. Smith, to remove a significant portion of Plaintiff's bone. To encourage bone formation where the tumor was removed, Dr. Smith used bone putty, a paste-like substance made from human tissue harvested from cadavers. Subsequent to surgery, Plaintiff's leg became infected and she was readmitted to the Mercy Health Center.

The District Court granted summary judgment to all defendants except Oklahoma Orthopedics and Dr. Smith. At trial, the jury returned a defense verdict in favor of Oklahoma Orthopedics and Dr. Smith. Plaintiffs appealed the entry of summary judgment in favor of Defendants IsoTis and Orthobiologicals, Inc., and Mercy Health Center, alleging that inadequate warnings regarding the bone putty render the learned intermediary doctrine inapplicable.

The "learned intermediary doctrine" applies to cut off manufacturer's liability so long as the warning to the doctor is adequate. The warning associated with the bone putty stated, "Although the production technique is designed to eliminate antigenic properties of the product, the possibility of such a reaction is present with any allograft." The Court held the evidence was sufficient to establish the adequacy of this warning to a doctor contemplating using bone putty. Appellant's allegation of an inadequate warning fails.

Appellant also alleged that the manufacturer failed to conduct sufficient testing which rendered the product defective and inherently dangerous. The Court of Civil Appeals explained that such an argument highlights a misconception of the learned intermediary doctrine. The doctrine applies when a product is already deemed inherently dangerous or unable to be made safe, thus requiring an intermediary such as a doctor to ensure its proper use and application. Appellant's argument goes to the manufacturing *process* rather than the properties of the product itself. Even where a product is shown to be the proximate cause of the injury sustained, the learned intermediary doctrine will preclude liability of the manufacturer.

The Court also affirmed summary judgment in favor of Mercy Health Center on the claim of inadequate warning.

Minter v. Prime Equipment Co., 356 Fed. Appx. 154 (10th Cir. Okla. 2009)

Plaintiff Terry Minter was in the process of painting a ceiling at a worksite when he accidentally stepped off the scissor lift and fell 20 feet. Plaintiff suffered spinal injuries rendering him a paraplegic for life.

Plaintiff filed suit against Prime Equipment because Prime Equipment modified the scissor lift by replacing a moveable piece of the solid top guardrail at the entrance to the lift with a section of chain. A jury trial returned a defense verdict and Plaintiff appealed.

Plaintiff argues that the trial court erred in denying the Plaintiff a claim of manufacturer's liability and in granting Defendant's mid-trial motion in limine excluding evidence of "but for" causation.

a. Manufacturer's Liability

Plaintiff sought to present evidence that Prime failed to abide by American National Standards Institute guidelines, but only manufacturers are held to these standards. The Court determined that no case in Oklahoma has ever held a seller or reseller to be a manufacturer. Additionally, compliance with standards or adherence to industry guidelines is irrelevant under strict liability theories such as products liability. The issue was not whether Prime failed to meet industry standard while there were safer available alternatives. The issue was whether the scissor lift was defective when it left the possession of the seller.

b. "But For" Causation

The Court's grant of Defendant's motion in limine relating to Plaintiff's "but for" causation was affirmed. Plaintiff asserted that the accident would not have occurred if Prime had not replaced the solid guardrail with the chain. The Court found this argument applicable to negligence, not products liability. The Plaintiff must prove that the product was defective in the condition it left the seller's possession. If a product leaves the seller's possession and is not defective, Oklahoma law will not find the Defendant liable, even if there were safer alternatives available.

Gudmondson v. Del Ozone et al., 2010 UT 33, 232 P.3d 1059

After denial of claim for workers' compensation benefits, Plaintiff sued manufacturers of ozone-laundry system and its component parts for significant brain injuries. The district court denied recovery from installers, distributors, and manufacturers of the laundry system on the grounds that plaintiff was collaterally estopped in its action from establishing causation because the ALJ in the work comp hearing concluded there was no causal link. The district court alternatively granted Del Ozone summary judgment on the basis that Gudmondson failed to prove the ozone generator was defective. The Utah Supreme Court reversed on both of these issues.

Focusing on the underlying purposes of workers compensation and collateral estoppel, along with state law permitting claims by injured employees against third-parties who caused or contributed to their injuries, the Court found no reason to apply collateral estoppel to block Gudmondson's claims.

The court also reversed summary judgment to Del Ozone because of the existence of genuine issues of material fact as to whether (1) the ozone generator itself was defectively designed and (2) the ozone-disinfection system as a whole was defective under a component-parts theory. ¶ 43.

Gudmondson argued the design was unreasonably dangerous because it lacked pollutant monitors and an automatic shut-off feature that would activate when pollutants exceeded acceptable levels. Del Ozone argued those features were "accessories." Because Gudmondson

offered deposition testimony that the installed ozone generator lacked certain available shut-off features, offered treatises that indicated ozone detectors were necessary when installing an ozonizer, and offered e-mails indicating the laundry system had to be shut down at least once due to excessive ozone levels, the Utah Supreme Court found she presented sufficient evidence of a product defect to render summary judgment inappropriate.

The court also reversed summary judgment to Del Ozone because it adopted § 5(b) of the Restatement (Third) of Torts: Products Liability, which makes the manufacturer of a non-defective component that is incorporated into a larger system and who participates in the design of a larger system liable for defects in the larger system. To prevail the plaintiff must satisfy two elements: (1) the component manufacturer "substantially participated" in the design of the system, which requires some control over the decision-making process of the final product or system and not just knowledge of the ultimate design; and (2) the integration of the non-defective component into the larger system or product must cause the defect in the larger system.

ELEVENTH CIRCUIT

Tort Reform

"Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt et al, 286 GA. 731 (March 22, 2010)

In an appeal focused on the constitutional right to a jury trial in health care provider negligence claims, the Court held the constitutional right included the right to a jury determination for a full damage award—noneconomic damages included. In cases of noneconomic damages, the court found the O.C.G.A § 51-12-1 noneconomic damage caps unconstitutionally infringed on the right to a jury determination because the application of the caps post-jury determination undermined the jury's basic function through nullification of the jury's finding of fact through trial court reduction. The court held that the very existence of the caps was an unconstitutional violation of the right to trial by jury, regardless of the permitted recovery under the existing caps along with other methods of recovery such as putative damages, statues allowing multiple damage awards, and the remittitur power of the trial court. The court found § 51-12-1 to be void in its entirety from the date of enactment.

Preemption

Weatherspoon v. Tillery Body Shop, Inc., Supreme Court of Alabama Case No. 1081131 (February 12, 2010).

Plaintiff Debra Weatherspoon's vehicle was left in a parking lot where it remained for several days. At the direction of the local police department, Tillery Body Shop, Inc. towed the vehicle and subsequently sold it at auction. Weatherspoon later sued Tillery alleging various state tort claims relating to the towing and selling of the vehicle. Tillery moved to dismiss the complaint alleging that the trial court lacked subject matter jurisdiction over the claims because they were preempted by the Federal Aviation Administration Authorization Act ("the FAAA") and the ICC Termination Act ("the ICCTA"). The trial court dismissed the claims finding that they were preempted. On appeal, Weatherspoon argued that: (1) the FAAA was unconstitutional under the Commerce Clause; (2) Congress did not intend to preempt state law claims in enacting

the FAAA and the ICCTA; and (3) her claims are exempt from preemption. The Supreme Court upheld the trial court's finding that: (1) the FAAA was constitutional under the Commerce Clause; (2) Congress intended to preempt state law claims in enacting the FAAA and the ICCTA, and that Weatherspoon's claims fell within the scope of claims preempted by the FAAA because the claims related to Tillery's services as a motor carrier of property; and (3) Weatherspoon's claims were not exempted from preemption because they related to the service of towing and selling the vehicle, not the price of the services.

Tobacco

While there are no significant appellate decisions or Florida Supreme Court decisions, it is important to note that a progeny of cases following the *Engle v. R.J. Reynolds* decision in which the Florida Supreme Court overturned a $145 billion verdict against the tobacco companies, but allowed as many as 700,000 individuals who could have obtained judgments to pursue their claims as individuals. That decision will likely result in several important decisions affecting tobacco litigation.

Brown v. R.J. Reynolds Tobacco Co., United States Court of Appeals for the Eleventh Circuit, Docket No. 08-16158 (July 22, 2010).

Plaintiffs filed this action against the major domestic manufacturers of cigarettes seeking compensatory and punitive damages under various theories of liability. A class was eventually certified and later decertified. Between certification and decertification, a jury sitting in one of three trial phases returned verdicts finding that cigarettes were unreasonably dangerous, caused a number of diseases, and that cigarette manufacturers were aware of the dangers cigarettes posed yet failed to warn consumers of the risk. After the initial class was decertified, a group of former class members filed a new lawsuit, contending that the jury's findings in phase one had a preclusive effect on their claims. The trial court disagreed, finding that giving preclusive effect to the jury's findings would violate the defendants' due process rights. On appeal, the Eleventh Circuit reversed and held that *res judicata* did, in fact, apply to the former class member's claims because the parties litigated in the first trial phase common issues related to the defendants' conduct and the health effects of smoking.

Automobiles

McReynolds v. Krebs, 2010 Fulton County D. Rep. 3854 (Ga.App. 4th Division, 2010)

The Georgia Court of Appeals affirmed the judgment of the trial court in an injured passenger claim against the defendant driver of the car that struck the plaintiff and the manufacturer of the GM Chevrolet Trailblazer. The defendant driver struck the plaintiff passenger's car causing the automobile to roll over and land in a ditch next to Interstate 75. A settlement agreement was reached between the manufacturer and plaintiff passenger with terms that included a confidentiality agreement. The trial court entered judgment against the defendant driver for full liability denying motions to enforce the settlement agreement the driver's claim for contribution and set-off against the manufacturer. The Court of Appeals affirmed holding that

The driver argued that she was entitled to either contribution from the manufacturer or setoff in the amount of the settlement. The court held that apportionment of damages was required even though it was undisputed that the victim was not at fault. The manufacturer was not required to be a party to the suit after it settled, and the driver had no claim of contribution under the statute. There was no basis for setoff given that O.C.G.A. § 51-12-33 required each liable party to pay its own percentage share of fault, and the driver presented no evidence at trial regarding the manufacturer's alleged fault on which apportionment of liability could be based.

Roe v. Michelin N. Am., Inc., United States Court of Appeals for the Eleventh Circuit, Docket No. 09-15141 (August 5, 2010).

Plaintiff filed this wrongful death action against a tire manufacturer. The defendant removed the action under diversity jurisdiction and the plaintiff moved to remand, arguing that the defendant had failed to establish that the amount in controversy exceeded seventy-five thousand dollars. The trial court denied the motion, finding that the complaint sufficiently showed that the jurisdictional amount in controversy threshold was satisfied. The plaintiff appealed and the Eleventh Circuit affirmed the trial court's ruling and explained that courts may use their judicial experience and common sense in determining whether the case stated in a complaint meets federal jurisdictional requirements.

Miller v. Cleckler, Alabama Court of Civil Appeals, Case No. 2090195 (June 11, 2010).

Plaintiff and defendant were driving automobiles that were involved in a four-car accident. Plaintiff was driving in the left lane behind her husband, Mr. Miller, and in front of another driver named Charles Williams. Defendant was traveling in the right lane when he moved into the left lane directly in front of Mr. Miller, causing Mr. Miller to apply his brakes, which in turn caused the plaintiff to apply her brakes, which then caused Williams to collide with the back of the plaintiff's vehicle. Plaintiff's vehicle then collided with Mr. Miller's vehicle, which then collided with the vehicle driven by the defendant. Plaintiff sued defendant and Williams, alleging negligence and wantonness. The trial court granted defendant summary judgment on the grounds that Williams' conduct in following too closely behind the plaintiff was an intervening cause, and thus, defendant's actions did not proximately cause the accident. The Court of Civil Appeals reversed, holding that there was a fact question as to whether Williams' conduct was an intervening cause that would relieve the defendant of liability. In order for conduct to constitute an intervening cause, the conduct must (1) occur after the defendant's actions giving rise to the negligence claim, (2) be unforeseeable to the defendant at the time the defendant acts, and (3) be sufficient to be the sole proximate cause of the plaintiff's injury. Given the disputed testimony regarding the order of the collisions and the uncertainty surrounding the foreseeability of Williams' following too closely, this question was required to be submitted to a jury.

Phillips v. Seward, Supreme Court of Alabama Case No. 1081226 (June 25, 2010).

Plaintiff sued Defendant driver and his employer, alleging negligence after she was injured in a rear-end collision. A jury returned a verdict in favor of the defendants and the plaintiff appealed. On appeal, Plaintiff argued: (1) that the trial court erred in failing to enter judgment as a matter of law in her favor on the issue of negligence; and (2) that the trial court erred in failing to grant a new trial because a proffered jury instruction on contributory

negligence was erroneous and prejudicial. The Supreme Court of Alabama found that the trial court did not err in denying plaintiff's motion for judgment as a matter of law because defendants presented evidence from which the jury reasonably could infer that plaintiff's actions leading up to the accident (i.e., traveling behind plaintiff with the expectation that she would not stop abruptly leaving defendant driver with no time to brake) were reasonable. Nevertheless, the Court found that the trial court erred in denying plaintiff's motion for a new trial because a contributory negligence jury instruction was erroneous and prejudicial because defendants did not present substantial evidence that plaintiff's actions in stopping, then moving forward and then stopping again while attempting to merge into heavy traffic established contributory negligence.

Gene William Cheshire v. Pearl Putman, et al., Supreme Court of Alabama Case Nos. 1071678 & 1071679 (July 23, 2010).

Defendant driver was employed as an electrical contractor by defendant Allstate Electric. As he was driving home from a job site, he rear-ended a car driven by Plaintiff, which was stopped in the road attempting to make a left turn across traffic. Plaintiff and two of her grandchildren suffered injuries in the accident and subsequently filed suit for negligence and wantonness and also sought to hold the defendant's employer vicariously liable. The case went to trial, and the defendants filed motions for judgment as a matter of law after the close of plaintiffs' evidence and again at the close of all evidence. The trial court granted the employer's motion for JML as to the plaintiffs' claims for wanton hiring, training, and supervision but otherwise denied the JML motions. The jury returned a verdict in favor of the plaintiffs on all counts and awarded punitive damages. Both plaintiffs and defendants appealed. The defendants made two primary arguments on appeal. First, the employer argued that the driver was not acting within the scope of his employment when the accident occurred. The Supreme Court affirmed the trial court's denial of the employer's motion for JML on this issue on the grounds that an employee is deemed to be acting in the scope of his employment while driving home if the employer reimburses the employee for his transportation expenses, as the employer did for the driver in this case. Second, defendants argued that plaintiffs were not entitled to punitive damages as a matter of law because they failed to present clear and convincing evidence of wantonness. The Supreme Court agreed, finding that plaintiffs failed to introduce evidence showing that the driver possessed the conscious culpability required to allow a jury to return a verdict on a wantonness claim. Accordingly, the Supreme Court reversed the trial court's denial of Cheshire's motion for JML on plaintiffs' wantonness claim and set aside the punitive damages awarded by the jury relating to that claim.

Ex parte Michelin North America, Inc., Supreme Court of Alabama Case No. 1081268 (August 13, 2010).

The personal representative of a decedent driver filed suit under the Alabama Extended Manufacturers Liability Doctrine after the driver died in a car accident caused by a tire separation which allegedly caused his vehicle to be uncontrollable. The personal representative plaintiff based venue on his own residence in Barbour County and the allegation that Michelin did business in that county. Michelin answered the Complaint and asserted the affirmative defense of improper venue and forum non conveniens. More than thirty days thereafter, Michelin moved to transfer the case. The trial court denied Michelin's motion, finding that Michelin waived its venue objection by failing to move to transfer venue within 30 days as

required by Alabama Rule of Civil Procedure 82. Michelin successfully petitioned for a writ of mandamus. Specifically, the Supreme Court of Alabama held that the 30-day requirement of Rule 82 does not apply if venue is improper at the commencement of the action. Instead, Rule 82 only requires a "timely motion" by the defendant. The Court held that, by asserting the affirmative defense of improper venue in its answer, Michelin preserved its right to file a timely motion for change of venue. The Court determined that Michelin's motion, filed within two months of its answer, was timely.

Liebherr-America, Inc. etc., and Zurich American Insurance Co. v. McCollum et al, 43 So. 3d 65 (3rd Dist. 2010)

After being found partially liable for the death of a longshoreman who was run over by a crane, the seller of the crane appealed, claiming that as a seller, it did not owe a duty to the Plaintiff because it did not design or manufacture the crane. Plaintiff was a veteran longshoreman, who on the date of the accident sat in a chair under the crane to rest and/or sleep. The crane was a travelling crane that at the time, had finished its duties and began to engage the steps necessary to begin moving, which included a series of alarms and checks to ensure that no one was in close proximity to the crane. Plaintiff, who apparently did not hear or heed the warnings, was crushed by the crane's wheel when it began moving.

Appellant, seller of the crane appealed the Trial Court's denial of summary judgment and subsequent partial finding of liability against it by the jury. The jury, in reaching their allocation of fault, found that the crane was no defective at the time of sale. Plaintiff/Appellee argued that it was the duty of the seller to retrofit the crane with under-chassis lights and warnings. The Appellate Court rejected this argument, holding that there is no duty on the part of a seller to warn of dangers presented by its operation after the product had left its control.

Aviation

Godfrey v. Precision Airmotive Corp., 46 So. 3d 1020, 1022 (Fla. Dist. Ct. App. 5th Dist. 2010)

After Plaintiffs, victims of a plane crash, appealed the Trial Court's Order granting Defendants, airplane manufacturers motion for a new trial, Defendants filed a cross appeal, contending that the Trial Court erred in permitting the introduction into evidence some 100 other incidents involving aircraft engines. The crash from which the lawsuit arose was apparently caused by a faulty carburetor.

At trial, the Court permitted the Plaintiff to introduce approximately 100 other incidents involving aircraft engines. Many of the incidents however involved a much larger engine made by a competing manufacturer and did not involve an issue with the carburetor. Plaintiffs' expert contended that the engine in question was similar to the ones in the "similar incidents." The only similarity shown between the incident at issue and the incidents introduced into evidence as the presence of carbon build-up in the engines. The expert could not testify however that the same condition in the incident at issue and the "similar incidents" was the cause of the carbon build-up.

The Florida Court of Appeals held that in order to introduce evidence of other incidents, the incidents must pertain to the "use of the same type of appliance or equipment under substantially similar conditions." In the instant case, Plaintiffs could not show that the incident they sought to introduce occurred with the same type of appliance and under the same circumstances.

Drug Litigation

Dietz v. SmithKline Beecham Corp., United States Court of Appeals for the Eleventh Circuit, Docket No. 09-10167 (March 5, 2010)

Plaintiff brought a personal injury action on behalf of her deceased spouse against a drug manufacturer alleging that the decedent committed suicide as a result of taking defendant's antidepressant. Applying Georgia law, the Eleventh Circuit affirmed summary judgment for defendant based on the learned intermediary doctrine. Specifically, the Court found that the plaintiff could not demonstrate that the defendant drug manufacturer's alleged failure to warn the plaintiff's doctor about increased suicide risks associated with the drug proximately caused the decedent to commit suicide.

Guinn v. AstraZeneca Pharms. LLP, United States Court of Appeals for the Eleventh Circuit, Docket No. No. 09-11104 (April 6, 2010)

Plaintiff brought this action against the defendant drug manufacturer and affiliated companies alleging that her use of the drug Seroquel, developed and manufactured by the defendants, caused her to develop diabetes. The Eleventh Circuit affirmed the trial court's entry of summary judgment in the defendants' favor, finding that: (1) the district court did not abuse its discretion by finding that plaintiff's expert's differential diagnosis was unreliable under *Daubert* because the expert failed to adequately consider possible alternative causes of plaintiff's weight gain and diabetes; and (2) plaintiff identified no evidence of specific causation other than the expert's testimony.

Kilpatrick v. Breg, Inc., United States Court of Appeals for the Eleventh Circuit, Docket No. 09-13813 (August 12, 2010).

Plaintiff brought this negligence and product liability action against the manufacturer of a pain pump, alleging that he suffered injuries caused by the pump. The plaintiff proffered one expert on the issue of causation. The defendant successfully moved to exclude the expert's testimony as unreliable under *Daubert*. The trial court found that medical literature did not support the expert's conclusion and that the expert's opinion was flawed because it presumed the existence of general causation. The Eleventh Circuit affirmed, holding that the district court did not abuse its discretion in excluding the expert's testimony

Guinn v. AstraZeneca Pharms. LP, 602 F.3d 1245 (11th Cir. Fla. 2010)

In her lawsuit alleging product liability, among other things, Plaintiff alleged that Defendant, pharmaceutical company knew that its drug caused weight gain and consequently, diabetes. Plaintiff's expert concluded that after reviewing Plaintiff's weight gain history, Defendant's drug caused Plaintiff's weight gain and worsened Plaintiff's resistance to insulin, causing her diabetes. At deposition and at the subsequent *Daubert* hearing however, Plaintiff's

expert acknowledged that Plaintiff's diabetes could have been caused by other contributing factors and that she did not rule out other possible causes because she knew of no methodology to do so. The Trial Court, in excluding the Plaintiff's physician expert held that Plaintiff's expert was unable to "articulate" any scientific methodology by which Defendant's drug caused Plaintiff's diabetes. The Court went on to state that the expert's "opinion on causation 'amounts to nothing more than inadmissible *ipse dixit*, as 'the only connection between the conclusion and the existing data is the expert's own assertions.'"

On Appeal, Plaintiff argued that her expert used the methodology of differential diagnosis to form her conclusion. The Appellate Court indicated that the theory of differential diagnosis must "consider other factors that could have been the cause" of the injury. While the use of the differential diagnosis theory was considered reliable by Courts scrutinizing it under the lens of *Daubert*, the Court held that in this instance, Plaintiff's expert did not apply the theory reliably because she did not consider other potential causes. Finally, the Court held that even if Plaintiff's expert's finding were deemed reliable according to *Daubert*, that the expert's conclusions were not supported by the facts.

Class Action Fairness Act (CAFA)

Pretka v. Kolter City Plaza II, Inc., United States Court of Appeals for the Eleventh Circuit, Docket No. 10-11471 (June 8, 2010).

Plaintiffs filed suit against a real estate developer for violations of the Florida Condominium Act and breach of contract. The defendant removed the action under CAFA. The plaintiffs successfully moved to remand, arguing under the Eleventh Circuit's *Lowery* decision that the defendant had failed to show from a document provided by the plaintiffs that the amount in controversy exceeded five million dollars. On appeal, the Eleventh Circuit reversed the trial court's remand order, holding that: (1) defendant established by more than a preponderance of the evidence that the amount in controversy exceeded $5 million; and (2) the jurisdictional evidence that defendant attached to its opposition to remand should not have been excluded merely because it was submitted in response to the plaintiffs' motion to remand. In doing so, the Eleventh Circuit clarified its holding in *Lowery* and explained that: (1) in cases removed in the first 30 days after filing, a defendant can rely on its own affidavits to support jurisdiction; (2) the limitation to documents received from the plaintiff is confined to cases removed under the second paragraph of § 1446(b) -- complaints that become removable after they are filed; (3) The requirement that evidence of the jurisdictional amount be unequivocally clear is limited to cases that become removable after the complaint is filed; and (4) the "receipt from the plaintiff" requirement does not apply to all cases that have unliquidated damages. Judge Pryor's concurrence also casted doubt on *Lowery*'s prohibition against post-removal discovery.

Other

State Auto Property and Casualty Company v. Matty et al, 286 Ga. 611 (March 1, 2010)

A vehicle driven by the insured struck a bicyclist, killing him, and then struck a second bicyclist, seriously injuring him. An accident reconstruction expert testified that, assuming the insured traveled at a constant speed of 55 miles per hour, it would have taken her just over a

second to travel between the two bicyclists. The insurer contended that this incident constituted one accident and that under the policy, it was responsible for providing only a single $ 100,000 limit of coverage; the policy contained a liability limit for bodily injury of $ 100,000 for all damages resulting from any one auto accident, regardless of the number of insureds, claims, and vehicles in the policy declaration or involved in the accident. The court rejected the insured's contrary interpretation of the term accident because it rendered certain policy language surplusage. The court adopted the cause theory for use in liability insurance cases in Georgia, whereby courts looked to whether, after the cause of an initial collision, a driver regained control of the vehicle before a subsequent collision, so that it could be said that there was a second intervening cause and therefore a second accident.

OUTCOME: The court answered the certified question by concluding that the meaning of the term "accident," when not otherwise defined in setting limits of liability, should be determined using the cause theory. The court held that this theory applied to the insurance contract at issue in this case and returned the case to the district court with directions to resolve the case by applying the cause theory to the facts of the case.

E.I. DuPont de Nemours & Company v. Waters et al, 287 Ga. 235 (June 1, 2010)]

Plaintiff moved for order an camera review of the documents contained in the corporation's privilege log and asked the trial court to appoint a special master to review the logs and documents. The trial court appointed a special master. The supreme court agreed with the court of appeals Court that the case had to be remanded to the trial court for further proceedings, although it based its opinion on the precepts of Ga. Unif. Super. Ct. R. 46, not § 9-7-1 et seq. The trial court's order appointing a special master failed to comply with all of the requirements of Rule 46. Therefore, as recognized by the parties, the trial court could, upon its own motion or by request of the parties, enter a new order in compliance with the requirements of Rule 46, which set forth a clearly defined scheme for the appointment of a special master. Pursuant to Rule 46, a trial court could appoint a special master in difficult cases to aid in the discovery process. However, Rule 46 required the trial court to follow certain procedures before entering an order appointing a special master, and the order, itself, had to also contain specific enumerated provisions.

OUTCOME: The supreme court affirmed the order in part and reversed it in part.

Mather v. L'Oreal USA, Inc., 304 Ga.App. 163 (Ga. App. 2010)

Background: Consumer brought failure-to-warn products liability action against manufacturer of self-tanning lotion, alleging that use of lotion caused her to develop abscesses and lesions, and exacerbated her multiple sclerosis. The Gwinnett State Court, Cook, J., entered summary judgment in favor of manufacturer. Consumer appealed.

Holding: The Court of Appeals, Andrews, P.J., held that manufacturer was not liable to consumer for failure to warn of danger of which it reasonably had no knowledge.

Dixie Group, Inc. v. Shaw Industries Group, Inc., 303 Ga. App. 459 (Ga. App. 2010)

Background: Widow of maintenance technician who was fatally injured while attempting to tighten bolt on paddle arm of carpet-wrapping machine filed strict liability action against manufacturer and negligence action against machine's former owner, which had sold the machine to the technician's employer. The Fulton State Court, Dixon, J., denied defendants' motions for summary judgment. Defendants appealed.

Holdings: The Court of Appeals, Phipps, J., held that:

(1) fact issue as to proximate causation precluded summary judgment for manufacturer on strict liability claim;

(2) fact issues precluded summary judgment for manufacturer based on assumption-of-risk defense;

(3) former owner owed no duty to maintenance technician; and

(4) former owner did not proximately cause injuries at issue by failing to warn technician of dangers allegedly arising from former owner's repositioning of switch on machine.

Judgment affirmed in part and reversed in part in one case; judgment affirmed in one case.

Adamson v. General Electric Company et al., 303 Ga. App. 741 (Ga. App. 2010)

Background: Worker brought action against phosphate plant owner and manufacturers, alleging that his exposure to asbestos-containing products caused him to contract mesothelioma. Following substitution of executor of worker's estate as plaintiff upon death of worker, the Fulton Superior Court, Campbell, J., granted summary judgment motions of owner and manufacturers. Executor appealed.

Holdings: The Court of Appeals, Adams, J., held that:

(1) hearsay contained in reports attached to summary judgment memorandum could not be considered by Court of Appeals, and

(2) manufacturers' products were not cause of worker's mesothelioma absent evidence that he was in proximity to such products while he worked at plant.

Affirmed.

Hendrix v. Evenflo Company, Inc., et al., United States Court of Appeals for the Eleventh Circuit, Docket No. 09-10079 (June 22, 2010).

Plaintiff filed suit against the manufacturer of a child restraint system, alleging that her son sustained traumatic brain injuries when the child restraint system in which he was sitting malfunctioned during a minor traffic incident. The Plaintiff alleged that the brain injuries caused her son to develop autism spectrum disorder ("ASD") and a spinal cord defect known as syringomyelia. The district court excluded testimony from two of the Plaintiff's expert

witnesses, concluding that the methods they used were not sufficiently reliable under the *Daubert* standard. Thereafter, the district court then granted partial summary judgment to the defendant manufacturer on the plaintiff's compensatory damages claim, finding that without the excluded testimony there was no reliable evidence to support the plaintiff's theory that the accident caused her son's ASD. Plaintiff voluntarily dismissed, with prejudice, her remaining damages claims and appealed the court's entry of summary judgment. The Eleventh Circuit affirmed the judgment on appeal, holding that the district court properly excluded the expert testimony because of a lack of reliable proof of general causation between the allege injury and the purported cause of that injury.

Arthur v. Bolen, Supreme Court of Alabama Case No. 1081142 (January 8, 2010).

Plaintiffs filed a personal-injury action based on the failure of a pull-down attic ladder in their house, which defendant built and sold to them. After trial, the jury returned a verdict for the plaintiffs. The Supreme Court affirmed, finding that the trial court did not err in allowing plaintiffs' unlicensed engineering expert to testify that the ladder failure resulted from improper installation. Alabama Code § 34-11-1 no longer includes "testimony" as the "practice of engineering." The current Code requires an engineering witness to hold an engineering license (from any state) only if he or she testifies as to the standard of care applicable to Alabama engineers. Because plaintiffs' expert testified only as to the adequacy of the attic ladder, a license was not required. The trial court also did not err in instructing the jury that plaintiffs had an obligation to reimburse their insurer out of any jury award for medical expenses the insurer had paid. The plaintiffs did not offer testimony from the insurer that reimbursement would be required, but they did apprise the trial court of the federal Medical Care Recovery Act, a statute of which the trial court may take judicial notice. Although the Court noted a split of authority concerning whether reimbursement is required under that Act, the defendant never challenged applicability of the Act.

Owens-Illinois, Inc. v. John W. Wells, et al., Supreme Court of Alabama Case Nos. 1070213 through 1070218 (April 23, 2010).

Six plaintiffs filed individual actions against Owens-Illinois, Inc. ("Owens"), seeking damages for injuries and deaths that were allegedly caused by asbestos-containing products manufactured by Owens under the trade name Kaylo. Owens sold its Kaylo product line to Owens-Corning Fiberglass Corporation in 1958 and did not subsequently produce or install any asbestos-containing Kaylo products. Owens moved for summary judgment, arguing that the plaintiffs' claims were barred by Alabama's twenty-year common-law rule of repose. Specifically, Owens argued that the twenty-year period began to run when it manufactured the asbestos-containing products. The trial court denied the motion, holding that the time period for the rule of repose began running when the essential elements of plaintiffs' claims presented themselves in a manner that would give rise to the causes of action. The trial court recognized, however, that substantial grounds for differences of opinion existed regarding the application of Alabama's twenty-year rule of repose and, therefore, certified its ruling for immediate interlocutory appeal. On appeal, the Supreme Court affirmed the trial court's ruling and held that, for purposes of Alabama's twenty-year rule of repose, the time period starts when the essential elements of a plaintiff's claims exist in a manner that would provide the plaintiff with a maintainable cause of action.

Lingefelt, et al. v. Int'l Paper Co., et al., Alabama Court of Civil Appeals, Case No. 2081192 (July 16, 2010).

Plaintiffs were injured in an accident that occurred at a paper mill owned by defendant International Paper ("IP"). The accident allegedly occurred when a stitch weld failed and a duct fell. The complaint alleged claims of negligence and wantonness based on IP's failure to maintain a safe premises, failure to warn of a dangerous condition, and failure to repair a dangerous condition. IP moved for summary judgment, arguing that plaintiffs failed to prove the elements of their claims, specifically that the failure of the stitch weld proximately caused plaintiffs' injuries. In doing so, IP moved to strike a report of plaintiffs' proffered expert and an investigative report of the accident by an employee of Rimcor, a sub-contractor. The trial court struck both reports and granted summary judgment in favor of IP. Plaintiffs appealed both the granting of summary judgment, as well as the striking of the respective reports. First, regarding the admissibility of the expert report, the Court of Civil Appeals noted that an expert may not provide his opinion on matters outside his field of training and experience. Applying this doctrine, the Court held that the trial court correctly struck the report of plaintiffs' proffered expert who testified that he had no experience in structural welds. Second, the Court found that the investigative report also was inadmissible because it was authored by a person who admittedly had no "specialized knowledge" in the field of structural welds and therefore did not qualify as an expert under Alabama Rule of Evidence 702. Finally, addressing the primary summary judgment issue, the Court held that the trial court correctly found that there was not substantial evidence in the record that the failure of the stitch weld proximately caused plaintiffs' injuries. Essentially, without admissible reports in the record, there was no evidence of proximate causation. Thus, the Court affirmed the summary judgment in favor of IP.

Galaxy Cable v. Davis, Supreme Court of Alabama, Case No. 1090086 (September 10, 2010).

Plaintiff's minor son was injured when he fell into an exposed and frayed metal guy wire supporting a utility pole. Defendant, a cable company, had a lease agreement allowing it to attach one of its cables to the subject utility pole. Testimony at trial indicated that guy wires are typically surrounded by a plastic yellow guard at the bottom. The plastic yellow guard on the guy wire at issue in this action had been pushed to the top of the guy wire. Defendant testified that its technicians performed annual "ride-outs" to inspect for leaks as required by the Federal Communication Commission and that, if Defendant's employees were out on a service call and spotted a problem, they would usually correct it immediately. The jury found in favor of Plaintiff on claims for negligence and wantonness. Defendant appealed, arguing, among other things, that sufficient evidence had not been presented to allow a finding of either negligence or wantonness. The Supreme Court affirmed in part and reversed in part, holding that Plaintiff had submitted enough evidence for the jury to have found that Defendant was negligent but that there was insufficient evidence to prove that Defendant was wanton. In reversing the finding of wantonness, the Court noted that the fact that Defendant, when it was conducting its annual inspections of poles or when its employees were conducting service calls for other problems, did not notice that the yellow guard had been moved did not support a finding of a conscious disregard for the rights or safety of others. The Court stated that it was speculative to conclude that the position of the yellow guy wire guard was the same at the time of any such inspection as it was on the date the injury occurred.

Baldwin Mutual Ins. Co., Inc. v. Edwards, Supreme Court of Alabama, Case No. 1090957 (November 24, 2010).

Edwards sued Baldwin Mutual, his insurance company, over his homeowner's policy. As part of his argument, Edwards claimed that he was entitled to an additional twenty percent of the actual cash value to pay for material and labor costs that would be charged by contractors. Edwards sought to represent a proposed class of plaintiffs who had been insured by Baldwin Mutual, had suffered damage to their property, whose loss had been settled on "an actual cash value basis," and whose payment did not include a twenty percent increase to cover labor and material costs. The trial court held a hearing on class certification; afterwards, the trial court permitted Edwards to submit a revised class definition and allowed briefing from both parties before making its determination. The revised class definition did not limit itself to those plaintiffs whose loss had been settled on "an actual cash basis." The trial court ordered certification of the revised class. On appeal, the Court found that the new definition materially changed the scope of the class and that the trial court had exceeded its discretion in certifying the newly defined class without conducting a new hearing. The Court reversed the class certification decision of the trial court and remanded for further proceedings.

Elliot v. Navistar, Inc., Supreme Court of Alabama, Case No. 1090152 (December 3, 2010).

Approximately forty students were riding a school bus that collided with a car and careened off the edge of an elevated highway. On February 9, 2007, fourteen of the students ("Plaintiffs") injured in the accident filed suits against the owner and operator of the bus, the driver of the bus, and the driver of the car that caused the accident (the "Original Complaint"). Plaintiffs named as fictitious defendants the manufacturer and seller of the bus. In June 2009, Plaintiffs amended their complaints to assert products-liability, breach-of-warranty, and negligence and/or wantonness claims (the "Additional Claims") against Navistar, Inc. and its subsidiary, IC Bus, LLC, the manufacturers of the bus (the "Bus Companies"). The Bus Companies moved for summary judgment on the grounds that Plaintiffs' claims were barred by the applicable statute of limitations, as well as the doctrines of waiver and laches, and the trial court granted that motion. The Alabama Supreme Court reversed on three grounds. First, the Court held that Plaintiffs' claims were not barred by the statute of limitations because under the plain language of Ala. Code § 6-2-8(a), minor at the time a right accrues has three years, or the period allowed by law for the commencement of an action if it is less than three years, after reaching the age of nineteen to commence the action. The fact that the injured minors were represented by guardians or next friends who initiated actions on their behalf while they were still minors but did not pursue the Additional Claims until more than two years later did not bar recovery. Second, Plaintiffs did not waive their right to assert the Additional Claims by actively pursuing claims against the owner and driver of the bus, as well as the driver of the car that caused the accident, but waiting two years to name the Bus Companies as defendants. There was no indication that Plaintiffs intended to waive their rights, as they named the bus manufacturers as fictitious defendants in the Original Complaint. Third, the doctrine of laches was inapplicable because the statute of limitations had not yet run on Plaintiffs‟ claims, which were for money damages.

CANADIAN RULINGS

Class Actions

Griffin v. Dell Canada Inc., [2010] O.J. No. 177, 98 O.R. (3d) 481, 315 D.L.R. (4th) 723 Ontario Court of Appeal; leave to appeal to Supreme Court of Canada refused, [2010] S.C.C.A. No. 75

Dell Canada Inc. ("Dell") appealed from the dismissal of its applications (a) to stay a proposed class action against it in favour of arbitration, and (b) for reconsideration of the decision to deny its stay application in the wake of new jurisprudence in the area.

The proposed class action arose from the sale of allegedly defective Dell notebook computers. Dell sold notebook computers over the Internet and telephone and its standard-form sales agreement contained a clause requiring that all disputes be submitted to arbitration. The first representative plaintiff leased his Dell notebook through his business, and therefore, Dell argued, did not qualify as a "consumer" under the *Consumer Protection Act, 2002*, S.O. 2002, c. 30 ("CPA"), which prohibits mandatory arbitration clauses in consumer agreements.

On the motion for certification of the action as a class proceeding (under Ontario's class proceeding legislation), the motion judge refused to enforce the arbitration clause in the sales agreement finding the clause to be a barrier to each claimants' access to justice. The Court did not believe that individual plaintiffs would or could pursue their claims against Dell in arbitration. The Court granted a certification order conditional on the plaintiff filing an improved litigation plan, and gave the plaintiff leave to amend to add a second representative plaintiff. A second representative plaintiff, who had purchased his computer after the CPA came into effect, was added.

The Court of Appeal focused on three issues: (a) does the demise of the National Arbitration Forum ("NAF"), the body specified in Dell's arbitration clause to administer the arbitration clause, render Dell's appeals moot, (b) was the CPA applicable, and (c) should a partial stay of the non-consumer claims be granted.

The Court of Appeal dismissed Dell's appeals. First, the Court of Appeal held that the demise of NAF was not determinative of the appeals because it was not named as arbitrator, only as administrator. The Court, under Ontario's *Arbitration Act,* S.O. 1991, c. 17, had discretion to appoint an arbitrator if doing so was appropriate.

Second, the Court of Appeal found that the CPA was applicable. Although ordinarily contracting parties are entitled to have their chosen method of dispute resolution respected by the courts, the Court of Appeal held that suppliers and sellers regularly insert arbitration clauses in order to defeat claims, not because they truly wish to arbitrate disputes with consumers. The Court of Appeal found that clauses that require arbitration and preclude the aggregation of claims have the effect of removing consumer claims from the reach of class actions. The Court of Appeal held that the amendments to the CPA, to prohibit mandatory arbitration clauses, applied to the case because the computers purchased by the proposed representative plaintiffs failed after the amendments came into force.

Finally, consumer and non-consumer contracts containing an arbitration clause could, for reasons of judicial economy, be certified in the same class proceeding. The Court of Appeal held that a partial stay, relating to non-consumer claims would result in inefficiency, a potential multiplicity of proceedings, and additional costs and delays. The liability and damages issues to be litigated were the same for both consumer and non-consumer claims.

Negligent Design

More v. Bauer Nike Hockey Inc., [2010] B.C.J. No. 1954, 2010 BCSC 1395, B.C. Supreme Court

A seventeen year old suffered a devastating brain injury playing organized ice hockey. By way of a litigation guardian, he sued Bauer Nike Hockey Inc. and Bauer Hockey Corp. ("Bauer"), the corporations responsible for the design and manufacture of the hockey helmet that the plaintiff was wearing at the time of his accident, and the Canadian Standards Association ("CSA"), the organization responsible for setting the minimum standards for impact resistance applicable to ice hockey helmets in Canada and for certifying helmets that meet the standard. All amateur hockey players playing organized hockey in Canada are required to wear a CSA approved helmet.

Bauer acknowledged that it owed a duty of care to the plaintiff; however, the CSA argued that it did not owe such a duty. In addressing the CSA's argument, the Court distinguished the case at bar from *Hughes v. Sunbeam Corp. Canada Ltd.* (2002), 61 O.R. (3d) 433 (Ont. C.A.) ("*Hughes*"). In *Hughes* the Court of Appeal held that a standards setting organization does not owe a duty of care to users of goods that the organization has tested and approved. The B.C. Court circumscribed that decision to cases involving economic loss (at issue in *Hughes*), and maintained that it was not binding on cases involving personal injury.

The Court then applied a two part "*Anns"* test set out in *Cooper v. Hobart*, [2001] 3 S.C.R. 537 (S.C.C.) (which originated from the seminal House of Lords case *Anns v Merton London Borough Council,* [1978] A.C. 728), to determine whether the CSA owed the plaintiff a duty of care. First, the Court held that there was sufficient proximity to create a *prima facie* duty of care, because it was reasonably foreseeable that a hockey player and wearer of a mandatory certified hockey helmet might suffer harm if the CSA set the certification standard unreasonably low. The Court noted that by legislative definition, any hockey helmet that is not certified is a hazardous product and cannot be sold in Canada. There was, therefore, reliance by the consumer on the fact of certification and an expectation that the risk of at least some injuries is reasonably reduced.

Second, the Court held that there were no policy considerations that should negate the duty of care. There were policy reasons for finding a duty of care, as it may serve as a deterrent and educative function, which the Court held was more important in the context of personal injury than in the context of economic loss.

Having found that both Bauer and the CSA owed a duty of care to the plaintiff, the Court nevertheless found that neither defendant breached the standard of care. The British Columbia Supreme Court dismissed the plaintiff's claims against both Bauer and the CSA. The plaintiff's helmet exceeded the standard that the plaintiff argued Bauer should have adopted. Moreover, since the helmet surpassed the more rigorous standard, the plaintiff was unable to show that the

failure to adopt this standard caused the plaintiff's injuries. The Court held that there was no substantial likelihood of harm associated with the helmet's ordinary use, nor did the evidence demonstrate that it was feasible to design the helmet in a safer manner to protect against the risk of injury suffered by the plaintiff.

Attorney General / Tobacco

British Columbia v. Imperial Tobacco Canada Ltd., [2009] B.C.J. No. 2444, 313 D.L.R. (4th) 651, B.C. Court of Appeal; leave to appeal to the Supreme Court of Canada granted, [2010] S.C.C.A. No. 43;

The *Tobacco Damages and Health Care Costs Recovery Act,* S.B.C. 2000, c. 30 authorizes the province of British Columbia (the "B.C. Government") to bring an action against manufacturers of tobacco products for the recovery of the province's costs incurred in the treatment and care of individuals with diseases contracted through exposure to tobacco products. The B.C. Government commenced an action against various tobacco manufacturers, including Imperial Tobacco Canada Ltd. (collectively, the "Respondents"). Many of the Respondents commenced third party proceedings against the Government of Canada ("Canada"), seeking contribution and indemnity.

The Respondents argued that if they were found liable to the B.C. Government for the sale of tobacco products and a failure to issue appropriate warnings, Canada should be found liable for contribution and indemnity to the Respondents. The Respondents maintained that Canada researched and developed tobacco strains for use in light and mild cigarettes in concert with the Respondents over many years, and these tobacco strains were then licensed for sale and incorporated by the Respondents in tobacco products sold in British Columbia. Moreover, Canada gave directions to the Respondents concerning the content of warnings to consumers, which directions were followed by the Respondents.

The Government of Canada applied to strike out the third party notices as disclosing no reasonable cause of action. The application was granted and the Respondents appealed. The majority of the British Columbia Court of Appeal allowed the appeal in part, striking out the third party notices except for the portions relating to claims of liability in connection with an alleged failure to warn, negligent misrepresentation and negligent design. The Court of Appeal applied the two part *Anns* test to determine whether the Canada owed the Respondents a duty of care. First, the majority of the Court of Appeal held that there was sufficient proximity between Canada and the Respondents. It was reasonably foreseeable that if smoking light and mild cigarettes turned out to be more rather than less hazardous to smokers' health, such cigarettes would cause additional harm to smokers. If additional harm was caused, Canada could have also reasonably foreseen that the Respondents had potential liability for the damages flowing from the additional harm.

In applying the second part of the *Anns* test, the Court of Appeal held that with respect to the claim of failure to warn, it was plain and obvious that the *prima facie* duty of care owed by the Canada was negated by policy considerations, since this claim was against Canada in its role as regulator. Moreover, the Court of Appeal held that the *prima facie* duty of care owed by Canada with respect to negligent design was negated by the spectre of indeterminate liability. However, the Court of Appeal held that it was not plain and obvious that policy considerations

negated the *prima facie* duty of care owed by Canada in connection with claims of negligent misrepresentation.

Market Share, Secondary Markets or Other New Theories of Liability

McKenna v. Gammon Gold Inc., [2010] O.J. No. 3183, 2010 ONSC 4068, Ontario Divisional Court

This action arose from alleged misrepresentations that Gammon Gold Inc. ("Gammon"), some if its directors and senior officers (collectively, the "Gammon Defendants") and underwriters made that allegedly artificially inflated the price of Gammon's shares. The representative Plaintiff had purchased shares in Gammon pursuant to a short-form prospectus. The Plaintiff asserted the following causes of action against the Gammon Defendants on behalf of the primary market purchasers (a) Prospectus misrepresentation under s. 130 of the *Securities Act*, R.S.O. 1990, c. S.5 (the "OSA"); (b) Reckless misrepresentation; (c) Negligent misrepresentation; and (d) Conspiracy to conceal material facts from Gammon investors. The Plaintiff asserted the same causes of action on behalf of the secondary market purchasers (except for the cause of action under s. 130 of the OSA). The proposed class included purchasers located anywhere in the world.

The certification judge certified the action only with respect to the claim of prospectus misrepresentation, and limited the class to Canadian purchasers. The certification judge found that Ontario law did not recognize a claim for reckless misrepresentation, and that the claim failed to include the necessary elements required to plead fraudulent misrepresentation. The certification judge would not certify the negligent misrepresentation claim because it gave rise to individual inquiries as to reliance. The certification judge also declined to certify the claim of conspiracy because he found that the Plaintiff failed to allege damages that are separate and distinct from the damages suffered from the underlying tort itself. The Plaintiff sought leave to appeal.

The Ontario Divisional Court allowed the Plaintiff's motion for leave to appeal only with respect to the conspiracy claim. The Divisional Court agreed with the certification judge that the pleadings did not disclose the necessary elements of fraudulent misrepresentation. The Divisional Court also found that given the number of representations at issue and the fact that they did not have a common import, the certification judge was correct to conclude that the negligent misrepresentation claims were unsuitable for certification. Furthermore, the Court held that the certification judge did not err in excluding from the class persons who purchased securities from underwriters outside of Canada.

However, the Court granted leave to appeal with respect to the conspiracy claim. Under the doctrine of merger, if a plaintiff pleads that the defendants conspired to commit a tort, and pleads that the defendants committed that tort, once that underlying tort has been proven the cause of action in conspiracy will merge with that tort, and only the damages caused by the tort can be recovered. The Court concluded that the public interest would be served if an appellate court were to clarify what pleading standards the litigants must meet at the certification stage.

Pharmaceutical Companies

Goodridge v. Pfizer Canada Inc.(2010), 101 O.R. (3d) 202, Ontario Superior Court of Justice

The Plaintiffs brought a motion for the certification of a class proceeding against Pfizer Canada Inc. and Pfizer Inc. (collectively, "the Defendants"), which manufactured and marketed the drug Neurotonin. The motion was brought on behalf of all persons resident in Canada (except Quebec) who were prescribed and ingested Neurotonin or its generic equivalent gabapentin, as well as those family members who have derivative claims for damages under the *Family Law Act* or similar provincial statutes. The Plaintiffs alleged that the Defendants (a) negligently promoted Neurotonin for "off-label uses" (i.e. uses for which the drug had not received regulatory approval); (b) negligently designed and distributed a drug that was useless for "off-label" uses; (c) negligently designed and distributed a drug that was harmful in that it caused a propensity for suicidal behaviour; (d) are liable not only for the harm caused to consumers by Neurotonin but also for the harm caused to consumers of generic gabapentin that was manufactured and distributed by Defendants competitors; and (e) are liable for the derivative claims of family members who used Neurotonin and gabapentin. The Defendants opposed certification and brought a cross-motion to strike out portions of the statement of claim.

The Ontario Superior Court of Justice granted, in part, both the certification motion and the motion to strike portions of the statement of claim. The Court did not certify the class with respect to claims or common issues about the Defendants promoting Neurontin for "off-label uses" in Canada, as there was no basis in fact to conclude that the Defendants carried on these activities in Canada. Because there was no basis for these allegations, the Court struck them from the Plaintiff's statement of claim.

The Court also did not certify the class for claims or common issues regarding the Defendants being liable for generic drugs manufactured by their competitors. While the Court agreed with the Plaintiffs that it was reasonably foreseeable to the Defendants that harm would be caused by its competitors manufacturing the allegedly defective drug gabapentin, they have no duty of care to the Plaintiffs by virtue of the fact that they invented generic gabapentin. The Court applied the two part *Anns* test. First, with respect to proximity, the Court held that the relationship between an innovator and consumer is more remote that the relationship between manufacturer and consumer, and it would be unfair to impose strict liability on an innovator while denying it the defence of providing an adequate warning about the product.

Second, the Court held that even if it was wrong with respect to the first branch of the *Anns* test, there are two policy reasons that would negate the duty of care. First, the imposition of a duty of care on the innovator to the competitor's consumer would be to impose strict liability for defective products and to make an innovator an insurer against all harm from its innovation. Second, the imposition of liability on the innovator would discourage medical advances and innovative technologies that could be beneficial to society. The Court struck out allegations about the duty of care the Defendants owed to consumers of gabapentin from the Plaintiff's statement of claim.

Damages

Zawadzki v. Calimoso, [2011] B.C.J. No. 53, 2011 BCSC 45 (B.C.S.C.).

The Plaintiff was struck from behind by the defendant's truck and sustained various injuries as a result of the accident. The Plaintiff was a 44 year old man who worked as an automotive technician. He also played the drums in a band, played golf regularly, went camping regularly, went boating, and went dirt biking a few dozen times a year. He had sole custody of his 17 year-old daughter. He was described as a positive, extremely outgoing, and social individual.

As a result of the accident, the Plaintiff suffered from pain in his elbow, lower back, knee, ribs, shoulder and right wrist. The Plaintiff also claimed that the quality of his sleep had markedly deteriorated, that he was depressed and anxious and that he had undergone various personality changes. He claimed that he was unable to work as an automotive technician, play the drums, do mechanical work, play golf, go camping, go boating, or go dirt biking. He further claimed to have withdrawn from his friends, suffered from significant mood disorders, and struggled with his temper. The Court held that the changes in mood were a foreseeable consequence of the accident. The Plaintiff also began drinking heavily shortly after the accident. The Court accepted that the Plaintiff drank to deal with the pain from which he suffered. The Plaintiff had a genetic vulnerability to alcohol abuse, and thus the "thin skull" rule applied. The Court found that the Plaintiff's alcohol abuse was caused by the accident and that such alcohol abuse was reasonably foreseeable.

In assessing damages for **pecuniary and non-pecuniary loss**, the Court took into account the Plaintiff's failure to mitigate. He was awarded $144,000 in non-pecuniary damages, which reflected a discount of 20% for his failure to seek professional help.

He was granted $206,312 for **past wage loss**. The Court, citing *Parypa v. Wickware*, (B.C. Court of Appeal; 1999 BCCA 88) held that the Plaintiff was required to find and accept work that would enable him to replace the income he had lost.

For **future income loss**, the Court addressed four elements set out in *T.W.N.A. v. Canada (Minister of Indian Affairs)*, (B.C. Court of Appeal, 2003 BCCA 670): (1) whether the plaintiff has been rendered less capable overall from earning income from all types of employment; (2) whether the plaintiff is less marketable or attractive as an employee to potential employers; (3) whether the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and (4) whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market. The Court awarded the plaintiff $320,000, which reflected a 20% discount for failure to seek assistance and take reasonable positive steps to address the many problems from which the Plaintiff struggles.

The Court held that a **future care claim** should be assessed by asking what expenses would be incurred by a reasonable person to obtain medically recommended treatment. The Court assessed this claim to be $130,690, which included costs for exercise programs, physiotherapy, house and yard maintenance, etc. The parties agreed that special damages should be fixed at $18,035.99. In total, the Plaintiff was awarded $819,037.99 in damages.