2020 Product Liability Conference Caselaw Update

Allison A. Waase

Kaufman Borgeest & Ryan LLP

120 Broadway
New York, New York

Kate Van Namen

Butler Snow LLP

6075 Poplar Avenue, Suite 500
Memphis, TN 38119

Catherine Ava Kopiec

Rogers Townsend LLC

1221 Main St., 14th Floor
Columbia, SC 29201

Allison A. Waase is an associate with Kaufman Borgeest & Ryan LLP in New York City. She focuses in the fields of general liability, fire and explosion, premises liability, product liability, and construction and labor law. She represents a diverse group of clients including building owners, management companies, hotels, business owners, security companies, and trucking companies in all aspects of civil defense. Ms. Waase is active in DRI and serves on the DRI Young Lawyers Committee Steering Committee and the DRI Products Liability & Fire Science Committees.

Kate Van Namen is a member of Butler Snow's Litigation Department in Memphis, Tennessee. She is licensed to practice law in Tennessee, Mississippi, and Arkansas and concentrates her practice in the areas of general and commercial civil litigation, product liability, and construction litigation. Ms. Van Namen has experience handling a variety of business and commercial matters involving claims of breach of contract, interference with business relationships, unfair competition, misappropriation of trade secrets, and other complex litigation. She also routinely counsels and represents clients in product liability matters and all aspects of the construction industry. Kate is active in DRI and serves on the DRI Young Lawyers Steering Committee and is the Second Vice-Chair of Seminar Planning.

Catherine Kopiec is an associate in the Columbia, SC office of Rogers Townsend. She focuses her practice in the areas of civil litigation, namely products liability, construction defect litigation, and general insurance defense. She is a 2012 graduate of the University of South Carolina School of Law and earned her undergraduate degree at the University of North Carolina at Chapel Hill. Catherine has handled various complex construction defect matters, representing a range of parties from developers to general contractors, subcontractors, and materials suppliers. She has also represented a wide variety of product manufacturers and distributors in cases ranging from property damage to catastrophic injury. Ms. Kopiec also serves as Second Vice-Chair of DRI Young Lawyers and is the DRI State Membership Chair for South Carolina.

Table of Contents

I. First Circuit

Lindsay E. Dansdill, Esq. Grotefeld, Hoffman, Schleiter, Gordon, Ochoa, Evinger, LLP, 311 South Wacker, Suite 1500, Chicago, Illinois 60606.

A. Product Defects – Defined

Starr Surplus Lines Ins. Co. v. Mountaire Farms, Inc., 920 F. 3d 111 (1st Cir. 2019)

Starr concerned a suit by the insurer of a chicken products manufacturer for losses that the manufacturer incurred when its products were recalled following a salmonella outbreak. The manufacturer's insurer, as subrogee, sought damages from the manufacturer's supplier for claims based in strict products liability. The insurer alleged that the raw chicken the manufacturer received from the supplier was "defective" because it was contaminated with salmonella. The supplier filed a motion to dismiss, arguing that the raw chicken was not "defective." The district court agreed and granted the motion, finding that the complaint's allegations did not plausibly allege that the raw chicken was "defective." The district court reasoned that salmonella is an inherent, unavoidable and recognized component of raw chicken that is eliminated by proper cooking methods, and the complaint failed to plausibly allege that the chicken was contaminated with any pathogen other than such salmonella. The insurer appealed.

The First Circuit affirmed. It found that raw chicken is not "defective" because it is contaminated with salmonella. It also rejected the insurer's argument that the complaint plausibly alleged that the subject raw chicken was contaminated with a type of salmonella that could not be eliminated by proper cooking methods.

B. Personal Jurisdiction

Knox v. MetalForming, Inc., 914 F.3d 685 (1st Cir. 2019)

The issue in *Knox* was whether there was personal jurisdiction in Massachusetts over a foreign manufacturer of an allegedly defective product. The plaintiff sued the manufacturer after his hand was badly injured by the manufacturer's product. The manufacturer moved to dismiss the plaintiff's claims against it based on a lack of personal jurisdiction. The manufacturer was headquartered in Germany and maintained no operations in the United States. It sold its products in the U.S. through a separate and independently owned distribution company. The district court granted the motion. It found that the manufacturer had not purposefully availed itself of the privilege of doing business in Massachusetts. The district court reasoned that, although the manufacturer had derived substantial revenue from sales to Massachusetts customers, the manufacturer had not done anything to specifically target customers in Massachusetts.

The First Circuit reversed. It found that the manufacturer had purposefully availed itself of the privilege of doing business in Massachusetts. It reasoned that the manufacturer's voluntary acts led to a regular flow or regular course of sales in Massachusetts. It explained that over sixteen years, the manufacturer had sold 45 machines and 234 parts to purchasers in Massachusetts, resulting in nearly $1.5 million in sales. Purchasers provided specifications for each of the machines that the manufacturer sold in Massachusetts. Furthermore, the manufacturer instructed the purchasers to contact the manufacturer directly when purchasing replacement parts or if assistance was needed to troubleshoot or fix the products. The First Circuit reasoned that these activities opened, and kept open, channels that established a direct link between the manufacturer and its purchasers in Massachusetts. In addition, the First Circuit noted that the manufacturer retained control over where its products were sold to end-users.

Practitioners should keep *Knox* in mind when formulating arguments for or against personal jurisdiction over foreign manufacturers of allegedly defective products. *Knox* provides that when assessing whether the exercise of jurisdiction over a foreign manufacturer is voluntary and foreseeable, courts should consider whether the foreign manufacturer established a direct link between itself and customers in the jurisdiction.

C. Breach of Implied Warranties

Carrozza v. CVS Pharm., Inc., 391 F. Supp. 3d 136 (D. Mass. 2019)

In *Carrozza*, the plaintiff filed a lawsuit against a pharmacy alleging that he suffered an allergic reaction after the pharmacy sold him medication that had been prescribed by the plaintiff's doctor. The pharmacy's internal patient database included a "hardstop" warning that the plaintiff was allergic to the medication. The pharmacist on duty investigated further and found notes stating that the patient had been prescribed the medication on multiple prior occasions. The pharmacist ultimately decided to dispense the drug. Plaintiff alleged that he had an allergic reaction to the drug that caused him injuries. He pled causes of action based in strict products liability against the pharmacy. The pharmacy moved for summary judgment, and the motion was granted.

The district court granted the pharmacy's motion for summary judgment because it found that Massachusetts's strict product liability laws did not apply. The district court reasoned that under Massachusetts law, there is no strict liability in tort apart from breach of warranty under the Uniform Commercial Code. Because the UCC applies only to sales of goods, the court considered whether the contract between the plaintiff and the pharmacy was a contract for the sale of goods or services. The court applied the predominant purpose test. It reasoned that the contract was one for services because the pharmacist had discretion in deciding to ultimately fulfill the prescription, but no input into the suitability of the drug. Accordingly, the UCC did not apply and the pharmacy's motion for summary judgment was granted.

Practitioners should remember that insofar as product liability theories are predicated on breaches of implied warranties under the UCC, those theories can be avoided if the contract in question is one for services. If the contract is a mixed contract (one for goods and services), practitioners should know which test to apply to determine whether the contract is for goods or services and should be prepared to argue for their preferred outcome.

II. Second Circuit

Jaime L. Regan, Esq., Harris Beach PLLC, 100 Wall Street, 23rd Floor, New York, New York 10005.

A. Pleading Requirements

Green v. Covidien LP, 2019 WL 4142480 (SDNY, August 30, 2019)

Following claimed personal injuries, plaintiff alleged numerous strict products liability, negligence, breach of warranty, and consumer fraud claims against the manufacturer of a composite mesh product that her doctor had used to repair a hernia. Defendant-manufacturer moved to dismiss the claims based on insufficient particularity in the pleadings, and the court dismissed all claims, including the manufacturing and design defect claims, on this basis. In particular, the court found that the complaint sought to use the existence of the injury alone to plead a defective manufacturing claim, which the court deemed insufficient without allegations as to how defendant's manufacturing process was flawed. Similarly, as the complaint contained only a conclusory allegation that "[a]lternative designs for hernia mesh products and/or procedures existed

that were and/or are less dangerous and equally, if not more, effective," the court dismissed the design defect claims for failure to provide any facts in support of this contention.

Philadelphia Indemnity Ins. Co, as subrogee of Almost Home Day Care, LLC v. Lennox Industries, Inc., 2049 WL 1258918 (D. Conn. March 18, 2019)

A fire broke out at a premises owned by Almost Home Day Care, which plaintiff alleged originated from a furnace that plaintiff used without modifying the product in any way. Plaintiff brought suit against the manufacturers of the furnace and the manufacturer of the blower motor contained therein. The court dismissed the failure to warn, design defect, and manufacturing defect claims for failure to plead the claims with the requisite particularity. In fact, the court found that plaintiff's conclusory assertion that the manufacturers simply "fail[ed] to provide adequate and sufficient warnings" lacked even basic factual support and was thus subject to dismissal. Similar allegations stating only that the manufacturers "designed and manufactured the products in a dangerous and defective condition" failed to plausibly state a claim as they did not identify any specific problem with the design or manufacturing of the subject products.

B. Causation

In re: Mirena IUS Levonorgestrel Related Products Liability Litigation No. II, 387 F.Supp.3d 323 (SDNY 2019)

Plaintiffs brought suit against the manufacturer of an intrauterine contraceptive device that was implanted in the uterus and functioned by releasing a synthetic steroid hormone; plaintiffs alleged the hormone caused them to suffer from idiopathic intracranial hypertension ("IIH"), a rare disease marked by increased pressure in the skull. Following discovery, the device manufacturer filed a *Daubert* motion to preclude plaintiffs' experts from testifying that the device caused IIH, holding generally that this conclusion was not sufficiently reliable because none of the experts had reached the conclusion through performing an experiment, lab work, or a new epidemiological study of his or her own. Shortly thereafter, the device manufacturer moved for summary judgment on the issue of general causation, arguing that plaintiffs had failed to demonstrate during discovery that the hormone at issue was capable of causing IIH, particularly in light of the preclusion of plaintiffs' expert reports and testimony on this point.

The court granted the motion for summary judgment, and held that like New York state courts and numerous federal jurisdictions, plaintiffs were indeed required to prove general causation by adducing admissible evidence based on which a jury could conclude that the product at issue could cause the injury alleged. Significantly, in ruling on the issue of whether plaintiffs had established general causation, the court declined to categorically require that a plaintiff in a products liability case must provide expert testimony to establish a general causation claim, and opined that, in theory, "other forms of lay evidence" could establish general causation. That said, the court ultimately concluded that plaintiffs had not established general causation. In fact, the court held that that without plaintiffs' own expert testimony and with plaintiffs relying only on unreliable methodology and a mischaracterization of defendants' expert testimony, plaintiffs had failed to put forth any admissible evidence that the intrauterine device and associated hormone was capable of causing IIH.

C. Personal Jurisdiction

Williams v. Summit Marine, Inc., 2019 WL 4142635 (NDNY, August 30, 2019)

After sustaining personal injuries following the use of a boat lift, plaintiffs brought suit in a New York state court against the boat lift manufacturer in a New York state court. Plaintiffs then removed the action to federal court and the boat manufacturer impled the manufacturer of the lift's winch brake, a component part

internal to the lift. The component part manufacturer was a non-New York domiciliary and moved to dismiss for lack of personal jurisdiction.

The court applied a growing body of law to dismiss the claims based on lack of personal jurisdiction, holding that New York's long arm jurisdiction statute and due process requirements did not provide a basis for jurisdiction over the component part manufacturer. Specifically, the Court stated that the provision of New York procedural law that allows for suits against a non-domiciliary who "transacts business" within New York also requires a causal connection between the claim at issue and the business transaction at issue. Here, there were only broad allegations that the component part manufacturer had generally conducted business in New York. Specific to the case, however, the component manufacturer: (1) had supplied the component to the lift manufacturer for production of the finished product outside of New York; (2) had not marketed the product in New York or sold the product to plaintiffs directly; and (3) had no knowledge that the boat lift manufacturer distributed the lifts in New York. Accordingly, the court found that there was no connection between the forum state and alleged injury.

III. Third Circuit

Kevin W. Kita, Esq. and Ashley C. Wakefield, Esq., Sutter O'Connell, Co., 3600 Erieview Tower, 1301 East 9th Street, Cleveland, Ohio 44114.

A. Breach of Express Warranty – Auto Manufacturers – Design Defect not a defect in "workmanship" or "material"

Coba v. Ford Motor Co., 930 F.3d 174 (3d Cir. Jan. 23, 2019)

Coba v. Ford Motor Co. involved a class action claim regarding vehicle's that had defective fuel tanks, asserting claims for breach of express warranty, violations of consumer protection laws, and breach of the duty of good faith and fair dealing. The district court entered summary judgment in favor of the auto manufacturer and the plaintiff appealed. On appeal, the Third Circuit of Appeals affirmed the trial court's ruling, and held, like many other courts, that a design defect was not a defect in "workmanship" or "material" as defined in the warranty:

> In short, we conclude that, under New Jersey law, a warranty that limits its coverage to defects in "materials" and "workmanship" does not, without more, apply to defects in "design." While parties are free to redefine words in their contracts in ways that deviate from plain and ordinary meaning, they did not do so here. "Materials" and "workmanship" in the NVLW carry their plain meaning, and the warranty therefore does not extend to design defects.

Therefore, a plaintiff cannot sustain a breach of express warranty claim, which requires that he show that his specific vehicle does not conform to a manufacturer's warranty, based on a claim that all like make/models vehicles contain a design defect.

B. Sealing Records – Drug Products – Public's common law right of access requires remand to District Court

In re Avandia Mktg., 924 F.3d 662 (3d. Cir. March 6, 2019)

In re Avandia involves a claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO") based on allegations that the manufacturer concealed evidence of cardiovascular risks associated with a certain prescription medication. The suit involved the claims of medical providers who had purchased the drugs as well as consumers who brought personal injury cases, causing the case to turn into a multi-dis-

trict litigation ("MDL"). Certain confidential documents were covered by a protective order as part of the litigation. The manufacturer filed a motion for summary judgment, in which certain confidential documents were filed under seal. The district court granted the summary judgment, and granted in part the manufacturer's request to keep confidential documents under seal and redact portions of the entry regarding the same.

On appeal, the Third Circuit Court of Appeals and remanded the sealing orders because the trial court did not correctly apply the factors set forth in the *Pansy v. Borough of Stroudsburg (23 F.3d 772)* that are to be used when considering challenges to the confidentiality of documents. Instead, it applied the standard applicable to protective orders, and did not place enough weight on the public's common law right to access nor did it spend enough time reviewing each alleged confidential document. The Court also noted that the evidence to support a sealing order needs to be current and identify the current harm with specific, non-conclusory language. The Appellate Court reversed and remanded the rulings on the sealing orders.

C. Asbestos – Federal Procedure – Behavior consistent with intent to litigate results in waiver of personal jurisdiction, despite expressed intent to preserve that defense

In re Asbestos, 921 F.3d 98 (3d. Cir. Apr. 9, 2019)

This case involves an asbestos products multi-district litigation ("MDL"). The plaintiffs appealed after the district court dismissed their claims for lack of personal jurisdiction. On appeal, the Third District Court of Appeals reversed the district court's ruling, holding that if you proceed with litigating a case on the merits, you waive personal jurisdiction - even if you include personal jurisdiction as an affirmative defense in your Answer. The Court explained, "[b]ehavior that is consistent with waiver, and which indicates an intent to litigate the case on its merits, is sufficient to constitute waiver, regardless of whether the parties also express an intent to preserve the defense."

D. Defective Design – Failure to Warn – Observed, but unread, warning is not defective

Ruggiero v. Yamaha Motor Corp., U.S.A., 2019 U.S. App. LEXIS 18143 (3d Cir. Feb. 13, 2019)

In *Ruggiero*, the plaintiff asserted products liability claims after suffering a severe injury while riding a WaveRunner. She claimed that it did not have adequate warnings because of their style and placement. At trial, Plaintiff attempted to introduce the expert testimony of William Kitzes, J.D., who would opine that the warnings should have been placed on the seat of the vehicle, but the trial court excluded such testimony under *Daubert.* After a trial, the district court dismissed Plaintiff's claims, holding she did not prove that the warnings on the vehicle were inadequate.

On Appeal, the Third Circuit of Appeals noted that the Plaintiff admitted that she had seen the warning labels before on the WaveRunner, but never read them. Plaintiff was not claiming that the warnings were inadequate themselves; only that their location was inadequate. However, the Court noted that New Jersey law does not require a warning label be placed in a specific spot in order to be adequate. S As a result, the Court agreed that there was not evidence that the vehicle was defective.

The Court also agreed with the trial court's ruling excluding plaintiff's expert testimony. The Court found that his testimony, which was not based on any testing or other reliable methods, was nothing more than subjective belief and speculation.

E. Defective Design – Airplane Manufacture – GARA – "Manufacturer" of a part includes company which designed part and, after 3rd party manufactured it, tested part after for conformity with design

Snider v. Sterling Airways, Inc., 758 Fed. Appx. 283 (3d. Cir. December 28, 2018)

In *Snider*, the plaintiff alleged that the plane crash, in which her husband was killed, was caused by a defective component of the plane. The defective component was a cylinder which had been replaced in 2004. After a jury trial, a verdict was entered in favor of plaintiff and plaintiff was awarded more than 3 million dollars in damages against Continental. On Appeal were the following issues: 1) whether the General Aviation Revitalization Act ("GARA") insulated Continental, as the manufacturer, from liability; 2) whether GARA excluded the claim because the component broke more than 18 years after manufacture; and 3) whether the evidence showing that the manufacturing defect caused the crash was sufficient.

The Third Circuit noted that GARA bars lawsuits where the defective component fails more than 18 years after manufacture; however, it noted that where there is a replacement of a component, that clock restarts. Because the part was replaced in 2004, the claim was not barred. The Court also rejected Continental's claim that it did not manufacture the cylinder because, although it was technically manufactured by a third party, Continental designed them, they were manufactured specifically for Continental, and they were tested by Continental. Lastly, the Court held that there was sufficient evidence to support the jury's verdict.

IV. Fourth Circuit

Brennan Morrissett - McCandish Holton, 1111 E. Main St. Suite 2100 | Richmond Virginia 23219.

A. Third Party Sellers

Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135 (4th Cir. 2019)

The main issue before the Court was whether Amazon.com, Inc., was subject to liability for a defective product that a customer purchased on its website from a third-party seller with Amazon "fulfilling" the transaction by storing the product and shipping it to the customer. A Maryland resident purchased a headlamp on Amazon's website, then gave it to friends as a gift. The headlamp batteries malfunctioned, catching the friend's house on fire. The homeowner's insurer, Erie Insurance Company, paid the loss, and brought the action against Amazon as subrogee for negligence, breach of warranty, and strict liability in tort. Erie argued Amazon was liable under Maryland law as the "seller" of the headlamp. On Amazon's motion, the district court granted summary judgment to Amazon, concluding that Amazon was not the seller of the headlamp and therefore did not have liability for its defective condition. It further held Amazon was immune from suit under the Communications Decency Act, 47 U.S.C. §230(c)(1), a federal law which protects intermediaries in the online publication of a third-party's information.

On appeal, the Fourth Circuit disagreed, concluding that Amazon was not immune under §230(c)(1). The Communications Decency Act provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. §230(c)(1). By its terms, the Act provides immunity for claims against providers of interactive computer services, such as Amazon, "as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. §230(c)(1) (emphasis added). Thus, to implicate the immunity of §230(c)(1), a claim must be based on the interactive computer service provider's publication of a third party's speech. Here, the products liability claims asserted by Erie in this case were not based on the publication of

another's speech, meaning The Communications Decency Act was not implicated, and did not render Amazon immune under its terms.

However, the Fourth Circuit did agree with the district court that Amazon was not the "seller" of the headlamp and therefore was not liable under Maryland law for products liability claims asserted by reason of the product's defective condition.

Commentary:

Identifying the nominal seller can often be unclear to a buyer making a purchase on the Amazon site. When a buyer goes to the Amazon site and purchases an item, typically the buyer becomes aware of two entities with which it has dealt – Amazon (the fulfiller) and the product manufacturer. At checkout, the purchaser will likely see one of three categories of information concerning the sale: (1) sold by X, shipped by X; (2) Sold by X, fulfilled by Amazon; or (3) sold and shipped by Amazon. Presumably, it is only in the third instance that Amazon would concede liability for a defective product which ultimately causes injury or damage. Otherwise, Amazon would argue it is merely acting as an intermediary fulfiller, not a "seller."

Where additional confusion can arise has been the subject of various articles and commentary on the outcome and implications of this opinion. Particularly, in its agreement with sellers, Amazon reserves the right to substitute products with those provided by other sellers. This can, intentionally or otherwise, confuse or hide the true seller's identity, leaving a potential plaintiff unable to identify against whom she has a viable cause of action, while also leaving the potential for dangerous products to enter the market simply by hiding behind immunized third party "fulfillers."

Read the Opinion here: https://us4thcircuitcourtofappealsopinions.justia.com/2019/05/22/erie-insurance-co-v-amazon-com/.

B. Attorneys' Fees

In re Neomedic Pelvic Repair Sys. Prods. Liab. Litig., MDL NO. 2511, 2019 U.S. Dist. LEXIS 15705, 2019 WL 386208 (S.D.W. Va. Jan. 30, 2019)

In its Petition for an Award of Common Benefit Attorneys' Fees and Expenses, the Common Benefit Fee and Cost Committee asked the Court to award attorneys' fees and expenses in the amount of 5% of the settlements and judgments subject to the court's ordered common benefit assessment. The seven multidistrict litigations before the court comprised one of the largest multidistrict litigation proceedings in this country's history. The nine-year process began as 36 plaintiffs suing one company for one allegedly defective pelvic mesh product. It transformed into over 104,000 individual plaintiffs suing numerous defendants who manufactured various pelvic mesh products. Further, many individual plaintiffs were implanted with different products manufactured by multiple defendant manufacturers across the districts. The District Court was tasked with determining whether common benefit counsel was entitled to 5% of all recoveries for their efforts, totaling nearly half a billion dollars.

The District Court analyzed the "Barber factors" as instructed by the Fourth Circuit to analyze the appropriate fee award. The ten "Barber factors" include: time and labor required, novelty and difficulty of the issues, preclusion of other employment, attorney expectations at the outset of the litigation, the undesirability of the case, the skill required to perform the legal services adequately, the experience, reputation and ability of the attorneys, the amount involved and results obtained, the customary fee for similar work in the community, and awards in similar cases.

This litigation is the largest mass tort product liability litigations in U.S. history. It was the only mass tort products liability litigation in the U.S. involving multiple related districts, each with multiple products, which was coordinated before the same court at once.

Ultimately, the Court granted the Petition. In making its determination, the Court observed that the common benefit work performed by leadership "guaranteed that each plaintiff was the beneficiary of well-researched and briefed theories of liability with organized supporting factual resources and carefully vetted and developed expert opinion testimony making the case for general causation of damages resulting from allegedly defective products." The Court further reflected on the benefit of counsel's collective settlement experience. Lastly, "of the hundreds of firms representing 104,000 plaintiffs subject to the holdback," the Court noted that only three law firms objected to the Petition, which the Court resolved were either frivolous or untimely.

Upon consideration of the Barber factors, the Court resolved the holdback and award of 5% was reasonable and appropriate in each of the multidistrict litigations, and granted the Petition.

Most persuasive to the Court's granting the Petition were several of the Barber factors under Fourth Circuit instruction. First, the Court recognized that the amount of time and effort necessary to coordinate this multidistrict litigation precluded involved counsel from handling other matters, perhaps entirely, for a number of years (Factors 1, 4, 6). Adding to the encompassing nature of the high volume work, the Court further recognized counsel "was not only required to address the difficult legal questions that arise in products liability cases generally but also had to navigate the unique regulatory, scientific and medical issues presented in these cases." (Factors 2, 10). Factor 8 is considered "the most important factor in determining the reasonableness of a common benefit fund fee award is the "'degree of the success obtained.'" Specifically, the gross recovery, number of individuals who benefit from settlements and verdicts, the degree to which plaintiffs are fully compensated, and the benefit to the public at large are the measures of success.

Read the Opinion here: https://casetext.com/case/in-re-neomedic-pelvic-repair-sys-prods-liab-litig.

C. Joinder of Claims

Cardoza v. Med. Device Bus. Servs, 389 F. Supp. d 399 (W.D.Va. 2019)

Plaintiff Susan O. Cardoza alleged that the liner of her total hip replacement hip implant, fractured shortly after being implanted, requiring her to have emergent revision surgery. Because some of the fractured pieces could not be removed in either surgery, shards of the liner remained in her body. Her complaint named five out-of-state defendants, all of whom are related to the development, manufacture, or distribution of the hip implant and/or the liner. Her complaint also named three Virginia resident defendants. Two of Cardoza's motions were before the Court: (1) Cardoza's motion to remand; and (2) the DePuy Defendants' motion to stay, which asks the court to stay the case and delay consideration of the motion to remand pending a decision by the Judicial Panel on Multidistrict Litigation (JPML) on whether these cases will be transferred to a pending multi-district litigation action.

The Court examined what it considered to be an illustrative case where a court severed products liability claims from claims against healthcare providers that involved the same product—*Sullivan v. Calvert Mem. Hosp*., 117 F. Supp. 3d 702 (D. Md. 2015). In Cardoza's case, the claims against the non-diverse defendants involved different legal theories. However, unlike a medical malpractice claim and a products liability claim, where each claim could stand or fall on its own merit, the Court reasoned Cardoza's "ability to prove her claims against the diverse defendants is intertwined with her allegations regarding the conversion and spoliation of the extracted implants." Because of the specific spoliation issues raised, the claims against the out-of-

state defendants likely depended entirely on the resolution of the claims (and any related ruling on spoliation) against the non-diverse defendants. As such, the Court resolved the two sets of claims were inextricably and very closely related. Thus, the Court declined to find the claims against the non-diverse defendants were fraudulently misjoined.

D. Evidence of Defect at Time When It "Left Defendant's Hands"

Sardis v. Overhead Door Corp., Civil Action No. 3:17-cv-818, 2019 U.S. Dist. LEXIS 22940 (E.D.Va. Feb. 12, 2019)

This matter came before the Court on a number of pending motions. Plaintiff Sardis and the defendant, Overhead Door Corporation, each moved to exclude experts and specific testimony. Overhead Door also moved for summary judgment.

Overhead Door is a garage door designer and manufacturer. Its commercial garage doors roll around a shaft at the top of the doorway behind a metal hood. Overhead Door manufactures the hoods in separate sections. Because of this, it ships the hood sections to distributors in cardboard crates it also designs and manufactures. Each crate weighs a maximum of approximately 300 pounds. Overhead Door's crate design featured a triple-wall cardboard body with wooden endcaps. Plaintiff Sardis worked for an Overhead Door distributor named Washington Overhead Door. At the installation site, Sardis and Lawrence tried to remove the hoods from the truck separately. Lawrence called for a forklift after they were unable to remove the hoods without damaging them. Lawrence and another employee struggled to operate the forklift, causing the crate to tip toward the truck when they tried to move it. Sardis climbed onto an extension ladder on top of the truck, and pulled on the handhold of the crate. The slat came off the wooden endcap of the crate. When this happened, he then fell off the truck and the back of his head hit the asphalt. Sardis died fourteen days later.

Sardis' wife sued Overhead Door, alleging (1) wrongful death - negligence; (2) wrongful death - design defect; (3) breach of implied warranty; and (4) failure to warn.

A primary pre-trial evidentiary issue was Overhead Door argument the plaintiff's claims fail as a matter of law because the plaintiff cannot produce the crate at issue here. The Court referred to Virginia law which "does not support the proposition that a products liability case absolutely cannot go forward in the absence of the specific product alleged to have produced the injury, but the burdens which such a circumstance imposes on the plaintiff are substantial." *Lemons v. Ryder Truck Rental Inc.*, 906 F. Supp. 328, 333 (W.D. Va. 1995). In light of this, the Court instructed that for the plaintiff to satisfy her burden, the plaintiff must establish both that (1) the crate was defective, *and* (2) that the defect existed "when it left the defendants' hands." *Id*. The plaintiff's expert witness testified the crate was defective because it failed to comply with relevant industry standards. He based his decision on his post-accident examination of photographs of the crate. Focusing on the timing of post-accident photographs, the Court here reasoned this litigation differs from products liability cases in which the plaintiff only produces photographs "taken long after the accident and which do not even definitively depict" the product at issue. Ultimately, the Court resolved the plaintiff's claims do not fail as a matter of law merely because she has not produced the crate.

Read the Opinion here: https://law.justia.com/cases/federal/district-courts/virginia/vaedce/3:2017cv00818/379507/98/.

E. Definition of "Product", Integration of Packaging

Cook v. Bluelinx Corp., No. 9:19-cv-01050-DCN, 2019 U.S. Dist. LEXIS 98355 (D.S.C. June 12, 2019)

BlueLinx is a manufacturer and seller. It sent a shipment of plywood to Blackmon Warehouse Systems, Inc. which was shipped in a steel container. The plaintiff alleged the plywood "was in such a configuration as to be a crush danger to anyone in proximity." David Slagle III was employed by Blackmon. In March 2016, he was assisting a forklift operator in unloading the plywood. Plaintiff alleges BlueLinx defectively designed, manufactured, and packed the plywood steel container. As a result, Slagle was ultimately killed while unloading the container shipment.

Plaintiff Matt Cook, personal representative of Slagle's estate, brought this action in the Court of Common Pleas for the County of Hampton, South Carolina. He asserted claims for products liability, negligence, and breach of implied warranty. BlueLinx removed the action to federal court and filed a motion to dismiss in April 2019. BlueLinx argued Cook's claims must be dismissed because they were based on products liability theories, but the container together with the plywood filling it was not a "product" under South Carolina law. South Carolina Code provides "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer . . . is subject to liability for physical harm caused to the ultimate user or consumer . . . ." Liability may be based upon theories of strict liability, negligence, and/or warranty.

The Court observed the South Carolina General Assembly had not defined the word "product," but explicitly incorporated the comments to §402A of the Restatement (Second) of Torts into the legislative intent of the statute. The particular comment relied upon indicated, "[n]o reason is apparent for distinguishing between the product itself and the container in which it is supplied; and the two are purchased by the user or consumer as an integrated whole. Where the container is itself dangerous, the product is sold in a defective condition." With respect to the example of a carbonated bottled beverage, the comment further notes, "[t]he container cannot logically be separated from the contents when the two are sold as a unit, and the liability stated in this Section arises not only when the consumer drinks the beverage and is poisoned by it, but also when he is injured by the bottle while he is handling it preparatory to consumption." Cook alleged the combination of the plywood and container formed a single product. The Court observed, "Cook omits crucial language from these quotes. The full sentence of the first part of the quote is '[n]o reason is apparent for distinguishing between the product itself and the container in which it is supplied; *and the two are purchased by the user or consumer as an integrated whole*.'" Here, the Court indicated it was unclear whether the container with the plywood filling was as single, integrated container, or whether the container was simply used to ship the plywood (and was thereafter returned or destroyed).

The Court ultimately denied the motion to dismissed reasoning it contained sufficient allegations the plywood and container were a product under South Carolina law. However, the Court cautioned, "[t]o be sure, if discovery reveals that the container in which the plywood bales were shipped was simply meant for transporting the plywood and not part of the unit that was sold to Blackmon, then the container and the plywood are clearly not 'integrated as a whole.'"

Read the Opinion here: https://law.justia.com/cases/federal/district-courts/south-carolina/scdce/9:2019cv01050/249644/14/.

F. Jurisdiction

Burrell v. Bayer Corp., 918 F.3d 372 (2019)

Plaintiff Kristiana Tweed Burrell received an Essure implantation in December 2013. Tests performed in the following months confirmed the implant was causing only a partial blockage of one of her fallopian tubes, thus failing to provide complete contraceptive protection. In June 2015, Burrell discovered she was pregnant. She went into premature labor two days later, was admitted to the hospital, and her baby was delivered stillborn. She was diagnosed with placental abruption, a serious pregnancy complication in which

the placenta prematurely separates from the uterus. Subsequent doctor visits confirmed that Burrell's Essure implant had failed and was eroding through the left fallopian tube. To remove the device, Burrell was required to undergo a total hysterectomy.

The Fourth Circuit, applying North Carolina products liability and torts law, resolved the district court erred in exercising jurisdiction over a tort/products liability action brought by a consumer against the manufacturer of a female sterilization device, which was FDA regulated, after the action was removed under 28 U.S.C.S. §1331. The plaintiffs argued that while they sought relief under state law, their claims implicated questions regarding Bayer's compliance with federal regulations, thus presenting a federal question for jurisdictional purposes. The Fourth Circuit remanded the case to North Carolina state court. The Fourth Circuit based its reasoning on (1) the conclusion that a preemption defense is inadequate to confer federal jurisdiction, (2) the federal questions implicated by the consumer's assertions of negligence per se and fraud on the FDA bore no hallmarks of "substantiality," (3) the manufacturer could not show that removal would be consistent with the congressionally approved balance of federal and state judicial responsibilities, and (4) there was "no indication that Congress intended to divert a multitude of fact-intensive, state-law suits against medical-device manufacturers to federal court since Congress declined to create a federal cause of action for violations of the FDCA."

V. Fifth Circuit

Xan Ingram Flowers, Butler Snow LLP, 6075 Poplar Avenue, Suite 500, Memphis, TN 38119.

A. Alternative Theories of Liability

Meador v. Apple, Inc., 911 F.3d 260 (5th Cir. 2018)

Erie did not permit the Fifth Circuit to hold Apple liable under Texas law for distracted driver's actions, despite creative arguments analogizing Apple's alleged liability to that of a dram shop. Practitioners should be aware of potential for theories of liability with similar reasoning as dram-shop liability, and should be prepared with creative arguments for why such theories are unworkable or inapplicable.

The family of a victim of a texting-while-driving accident brought general negligence and strict product liability claims against Apple, Inc. arising out of the accident. Plaintiffs alleged that Apple, Inc., who had secured a patent five years before the accident for "[l]ock-out mechanisms for driver handheld computing devices," was negligent for not implementing such a mechanism on the driver's iPhone 5 and for not warning iPhone 5 users of the dangers of distracted driving. Apple successfully moved to dismiss for failure to state a claim, and Plaintiffs appealed to the Fifth Circuit.

The Fifth Circuit held that Plaintiffs' claims failed because they had not shown that Apple's actions were a "substantial factor" of the victim's injuries under Texas law. Plaintiffs, relying heavily on studies regarding the neurobiological response induced by receiving a notification on a smart phone, argued that Apple's and the driver's actions were concurrent causes of the accident. The Fifth Circuit likened this to a dram shop liability claim, which it explained that Texas had adopted as a response to its claimed duty to recognize evolutions in the law as seen in other jurisdictions. The Fifth Circuit declined to extend this analogy because it could not say whether Texas courts would adopt a theory of liability for smartphone manufacturers, and because the existing case law in Texas placed the onus on the distracted driver, not the manufacturer of the phone.

B. Alternative Design

Herbert v. Titan Int'l., 778 F. App'x 275 (5th Cir. 2019)

Multi-piece wheel was not unreasonably dangerous under Louisiana Products Liability Act, as alternative design was dangerous and could be unworkable, and warnings on manufacturer's website were adequate and not required to be delivered to end-user who would have known how to properly use the product. Practitioners should be prepared with strong evidence regarding utility of alternative designs, and should be wary of having experts offer opinions they are not qualified to render.

Plaintiff was injured when a multi-piece wheel exploded as he was inflating the tire around the wheel. Plaintiff sued wheel manufacturer alleging that the wheel was unreasonably dangerous under the Louisiana Products Liability Act (LPLA) based on design defects and inadequate warnings. The jury found in favor of wheel manufacturer, and Plaintiff appealed to the Fifth Circuit.

To succeed in a design defect claim under the LPLA, a plaintiff must prove that a product is "unreasonably dangerous," meaning that there is an alternative design "capable of preventing the claimant's damages" and that the likelihood and severity of the damage outweighs the adverse effect the alternative design's impact on the product's utility. Manufacturer produced evidence that single-piece wheels (which Plaintiff proposed as the appropriate design) are also dangerous without providing similar utility, and would be impossible to use on some agricultural equipment. Importantly, manufacturer also presented evidence that Plaintiff was not using the multi-piece wheel in a reasonably anticipated manner. The Fifth Circuit further held that a reasonable jury could have found that warnings on the manufacturer's website and catalog, even though not copied on the wheel itself, were adequate. The Fifth Circuit also noted that Louisiana law did not require delivery of the warning to end-user who would have known how to properly handle the product. Finally, the Fifth Circuit affirmed the District Court's decision not to grant Plaintiff a new trial on the basis of admitting evidence that Plaintiff tested positive for methamphetamine, agreeing with the District Court that the evidence was not unduly prejudicial and that the expert who testified regarding the methamphetamine did not render any toxicological opinions which he was not qualified to testify to.

C. Intentional Conduct, Releases

Petrobras Am. Inc. v. Vicinay Cadenas, S.A., 780 F.App'x 96 (5th Cir. 2019).

Louisiana law limits parties' ability to prospectively release one another from claims involving intentional conduct. Practitioners working in in oil and gas law for claims arising from offshore activities should carefully determine which body of law applies to the claims.

Oil and gas production company asserted various tort claims against sub-contractor manufacturer of marine chains used in oil and gas production activities based on failure of a marine chain during oil and gas production operations. Plaintiff's contract with general contractor contained release and waiver provision that applied to willful and wanton conduct on the part of sub-contractors as well as personal injury claims. The district court granted summary judgment in favor of sub-contractor based on release and waiver. Plaintiff appealed to the Fifth Circuit, who reversed and remanded the case.

Outer Continental Shelf Lands Act (OCSLA) required that Louisiana law govern the dispute. OCSLA further mandated that Louisiana law apply to tort claims, as Louisiana was the adjacent state to the accident, and that all contract-based defenses to the tort claims would be governed by Louisiana law as well. Therefore, Louisiana law, which restricts parties' ability to prospectively release parties from claims for intentional conduct, would govern sub-contractor's affirmative defenses.

The District Court interpreted Louisiana law to be such that the Plaintiff could not recover for sub-contractor's intentional conduct under the Louisiana Products Liability Act (LPLA). As the LPLA permits recovery for less than intentional conduct, but does not prohibit recovery for intentional conduct, the District

Court erred by applying the LPLA as a ceiling rather than a floor. The Fifth Circuit reversed and remanded for further proceedings applying the LPLA appropriately and with due consideration for Louisiana law restricting parties' ability to prospectively release parties from liability for intentional conduct.

D. Conflict of Laws

Matter of Am. River Transp., Co., LLC, No. 18-2186, 2019 WL 2847702 (E.D. La. July 2, 2019).

General maritime law, rather than Louisiana Products Liability Act, governed claims arising out of fire on a tug boat on the Mississippi River. Practitioners need to be aware of instances where maritime law will displace state law.

In a case where an Inland tug boat caught fire while on the Mississippi River, general maritime law applied rather than Louisiana Products Liability Act. The Supreme Court recognized that Courts of Appeals' general maritime law incorporated concepts of products liability law, based on negligence and strict liability. The applicable tort law that applied would be the Restatement (Second) of Torts section 402A. Therefore, Defendant's motion to dismiss was analyzed under the Restatement, resulting in dismissal of Plaintiff's claims under the LPLA, but not under general maritime law.

E. Choice of Law/Conflict of Law

Shively v. Ethicon, Inc., Nos. 3:27-0716, 3:17-0721, 2018 WL 6816083 (W.D. La. Dec. 27, 2018).

Louisiana law, not New Jersey law, governed whether punitive damages could be awarded. Practitioners should carefully analyze claims for choice of law conflicts with regard to awards of punitive damages.

Plaintiffs in MDL regarding pelvic mesh products moved for partial summary judgment for a determination that the New Jersey Punitive Damages Act applied to their claims. Defendants countered that the Louisiana Products Liability Act (LPLA) applied to bar punitive damages. The District Court denied Plaintiffs' Motion for Partial Summary Judgment.

The District Court first concluded that there was a conflict between Louisiana and New Jersey. law: New Jersey law provided for punitive damages in certain instances, while the LPLA unambiguously does not. Louisiana's choice of law statutes compel application of the LPLA to damages except in exceptional circumstances. Plaintiffs' argued that their cases represented exceptional circumstances, but the District Court disagreed, noting that "numerous products liability actions are brought in Louisiana each year, and many involve allegedly defective medical products or devices manufactured out-of-state, but which have caused injury to Louisiana residents in this State." Therefore, the LPLA barred punitive damages.

F. Exposure Issues

Dickens v. A-1 Auto Parts & Repair, No. 1:18CV162-LG-RHW, 2019 WL 5197555 (S.D. Miss. Oct. 15, 2019).

Summary judgment in favor of Defendant was proper where Plaintiff had only established de minimis exposure to Defendant's product. Practitioners should explore amount and intensity of plaintiffs' exposure to potentially toxic products in anticipation of arguing that exposure is only de minimis.

Plaintiff brought suit against numerous defendants, alleging that exposure to their various products caused his mesothelioma. Defendant Edelbrock, LLC moved for summary judgment on grounds that Plaintiff had only established eight exposures to Edelbrock's carburetor kit in four years, and that Plaintiff had not established any evidence that he was exposed to asbestos from Edelbrock's carburetor kit from the way he had used it. The District Court for the Southern District of Mississippi held that the small number of exposures

were insufficient under the Lohrman test, which does not provide for recovery for de minimis exposure. The Court noted Edelbrock's argument that Plaintiff had not shown that he had used the kit in such a manner as to expose himself to asbestos, but the Court did not reach that issue in granting summary judgment.

G. Economic Loss Rule

Golden Spread Cooperative, Inc. v. Emerson Process Mgmt. Power & Water Solutions, Inc., 360 F. Supp. 3d 494 (N.D. Tex. 2019).*

"Object of the bargain" test is used in Texas to determine whether an object is "other property" such that recovery for damage to same is barred by the economic loss rule. Practitioners in Texas should follow this case and appeal, as well as subsequent case law, to remain aware of the status of the newly described "object of the bargain test" and whether the test could apply to their cases.

Defendant, who agreed to replace a distributed control system for Plaintiff's steam turbine, moved for summary judgment on grounds that Plaintiff's tort damages (based on damage to the turbine caused by the distributed control system) were barred by the economic loss rule, that Plaintiff's contract claim should be dismissed because Plaintiff had accepted the machine and was thus limited to a warranty claim, and that Plaintiff's breach of warranty claim should be dismissed because Defendant had fulfilled its warranty obligations. The District Court agreed with Defendant regarding the contract and warranty claims and granted summary judgment accordingly.

With regard to the tort claims, Defendant contended that because the distributed control system was installed into the turbine, it became a part of the finished product, and therefore any damage to the turbine was damage to the finished product, not damage to other property. Defendant further claimed that damage to the turbine in the event of a distributed control system malfunction was foreseeable and should therefore be governed by the allocation of risk provisions in the parties' contract. Plaintiff contended that the damage was to "other property"—permitting them to recover and barring application of the economic loss rule.

The District Court applied the economic loss rule as a bar to recovery for Plaintiff's tort claims by piecing together decisions from Texas courts and supporting law from other jurisdictions to use an "object of the bargain test" to determine that the turbine was not "other property." Therefore, because the economic loss rule precludes recovery when the only harm is economic loss of a contractual expectancy, and the parties had contracted for a completed and usable turbine, Plaintiff could not recover in tort against Defendant. This required the Court to expand the economic loss rule to a new circumstance: a replacement component part purchased from a source other than the manufacturer, after the initial transaction, to be used by the Plaintiff rather than resold. The Court also analyzed the public policy behind the economic loss rule, determining that Texas law favored contractual allocation of risks in comparable circumstances. The Court described the "object of the bargain" test as being a sort of "benefit of the bargain" type test that did not consider only the literal object of the contract, but the ultimate use and purpose of the component part and whether the parties had contractually addressed foreseable damages. The District Court ultimately held that the turbine did not constitute "other property," and granted summary judgment as to Plaintiff's tort claims.

* This case is currently on appeal.

H. Seller Liability/"Innocent" Seller

Hinton v Sportsman's Guide, Inc., No. 2018-CA-00043-SCT, 2019 WL 5999624 (Miss. Nov. 14, 2019).

Innocent sellers, absent active negligence, cannot be held liable for damages caused by a product under the Mississippi Products Liability Act. Practitioners should carefully analyze whether innocent-seller

provisions are applicable to their cases, and whether recovery could be possible regardless under their state's law.

In 2012, Timothy Hinton died while deer hunting when he fell from a tree stand and his fall-arrest system (FAS) snapped. His parents sued the manufacturer and retailer of the FAS under Mississippi products liability law. The parents were unable to recover from either the manufacturer, who defaulted, or the manufacturer's insurer, whose insurance policy with the manufacturer contained a tree-stand exclusion. The parents then sought recovery against the Minnesota-based retailer, who was granted summary judgment based on the innocent-seller provision in the Mississippi Products Liability Act (MPLA). The parents appealed from that grant of summary judgment, and the Mississippi Supreme Court affirmed the grant of summary judgment.

The parents argued on appeal that Minnesota law applied, which provides for recovery against a retailer if the manufacturer is judgment proof. The parents also argued that the innocent-seller provision is a grant of statutory immunity, and therefore an affirmative defense. The parents then argued that the retailer had waived the defense under the Horton waiver doctrine by not pursuing the defense during discovery. Finally, the parents argued that they should be allowed to recover because the manufacturer was not a "reputable manufacturer."

The Mississippi Supreme Court dismissed the parents' choice of law arguments as meritless, as the parents had expressly brought the case under Mississippi law and could not ask the courts to change law to a state that was more favorable to them. The Mississippi Supreme Court further held that, based on the language and legislative history, the innocent-seller provision is a grant of statutory immunity, and thus an affirmative defense. The Court ruled that the trial court had not abused its discretion in ruling that the retailer had not waived the defense, which it raised in its Answers, for not pursuing the defense during discovery because the majority of the litigation had focused on the parents' attempted recovery from the insurance company. The Court also noted that the innocent-seller provision of the MPLA did not contain a "reputable manufacturer" requirement and that Mississippi law is clear that innocent sellers cannot be held liable in a products liability case absent active negligence. Therefore, the Court affirmed the trial court's grant of summary judgment.

VI. Sixth Circuit

Kaitlyn O. Hawkins, Legal Intern & Frank Carson, 3300 Great American Tower, 301 East Fourth Street, Cincinnati, Ohio 45202.

A. "Seller" under Tennessee Products Liability Act of 1978;

B. Duty to Warn Under Restatement (Second) of Torts §323 and §324A

Fox v. Amazon.com, 930 F.3d 415 (6th Cir. 2019).

In *Fox* the Court reviewed whether Amazon.com falls within the definition of "seller" under the Tennessee Products Liability Act of 1978. The Middle District of Tennessee held that Amazon Marketplace, which provides a platform for third parties to sell their products, does not fall under the TPLA's definition of "seller", the Sixth Circuit Affirmed in Part and Reversed in part. In this case, the Plaintiffs purchased a hoverboard from Amazon.com through Amazon Marketplace, subsequently the hoverboard caused a fire in the Plaintiffs' home.

The Sixth Circuit rejected the Middle District of Tennessee's conclusion that "seller" under the TPLA is an entity that is regularly engaged in transferring title to a product for an agreed upon price. Instead, the Court sided with the Plaintiffs holding that the definition of "seller" under the TPLA is any entity regularly

engaged in exercising sufficient control over a product in connection with its sale, lease, or bailment, for livelihood or gain.

Although the Court sided with the Plaintiffs' definition of "seller", it found that Amazon.com did not fall within that definition. In this case, the Plaintiffs argued that because Amazon.com: stored and shipped the hoverboard, initially obtained the payment made in exchange for the hoverboard, retained the payment made in exchange for the hoverboard, and handled all communications with Plaintiff regarding the hoverboard, it retained sufficient control over the hoverboard. The Court disagreed, the Court found that Amazon.com did not choose to offer the hoverboard for sale, did not set the purchase price of the hoverboard, and did not make representations about the safety or specifications of the hoverboard on its marketplace. Therefore, the Court affirmed the District Court's finding of summary judgment for Amazon.com.

In *Fox* the Court also overruled the Middle District of Tennessee's holding that §324A was inapplicable to Plaintiffs claims because it contemplated liability to third parties as well as the District's ruling that the Plaintiffs forfeited any §323 claim.

When Amazon.com first learned of the dangers of rechargeable lithium ion batteries they decided to send a "non-alarmist" email to all customers of the hoverboard, warning of recent news stories concerning lithium ion batteries and sharing additional safety tips. The email also asked the recipient to "pass along" the information to the proper recipient.

The Court held that through this email Amazon.com assumed a duty to warn the Plaintiffs of the dangers posed by the hoverboard. Because Amazon.com assumed this duty, there remained a genuine issue of fact as to whether they breached that duty. The email did not inform the hoverboard customer of any of the actions taken by Amazon.com, including findings from an internal investigation or that the reported safety issues included the risk of fire and explosion. The email also did not inform customers that Amazon.com had ceased all hoverboard sales worldwide. The Court held there was also an issue of fact as to whether the Plaintiff read the email and thereby could have acted in reliance on it. Because of these material issues of fact, the Court overruled the District Court's grant of summary judgment on §323 and §324A.

C. Alternative Design

Taillard v. The Rooto Corp., No. 18-1738, 2019 WL 4389143 (September 13, 2019).

In *Taillard* the Court affirmed the District Court's grant of summary judgment due to the Plaintiffs' failure to demonstrate that a reasonable alternative design was available. This suit came about because the Plaintiffs suffered burns that became infected after a bottle of drain cleaner fell from their shopping cart, causing the cap to come off of the bottle. The drain cleaner splashed onto Plaintiffs causing the burns.

The bottle in question did not have a pull tab that would seal the bottle before its first use. Although Plaintiffs provided expert testimony from a competitor whose drain cleaner bottles had a seal, the Court ruled that this testimony did not create a genuine issue of material fact about whether the alternative seal would have created equal or greater risk of harm or significantly impaired the usefulness or desirability of Rooto's product. The Court ruled that under Michigan's products liability law, both of those elements are necessary, and held that there was no genuine issue of material fact.

D. Standing

Chapman v. Tristar Products Inc., 940 F.3d 299 (6th Cir. 2019).

The Court determined that the Attorney General of Arizona did not have standing to appeal the terms of a settlement in a response to a class action suit. In *Chapman*, the District Court approved a nation-

wide settlement agreement which provided approximately $1 million in coupons for customers of allegedly defective pressure cookers and approximately $2 million in fees for their attorneys. The Attorney General of Arizona felt that the settlement was unfair and that the consumers should receive a greater portion of the settlement.

In the underlying case, the district court did not certify a nationwide class, but instead certified three separate state classes for trial: Ohio, Pennsylvania, and Colorado. After the first day of trial, the parties agreed to a settlement with a nationwide class. Arizona sought to officially intervene for purposes of appeal under either Rule 24(A) (intervention of right) or Rule 24(b)(permissive intervention) under the FRCP.

The Court ruled that Arizona must show that they have Article III standing in order to appeal the final judgment by the trial court. The Court's decision rested on whether Arizona had an "injury in fact" as to support standing, Arizona presented three arguments for injury in fact: 1. Standing under *Parens Patriae*, 2. Standing under the Class Action Fairness Act (CAFA), and 3. Standing under Participatory Interests. The Court rejected all three theories.

The Court rejected Arizona's argument for standing under *Parens Patriae* because although they alleged an injury to an identifiable group of Arizonians (class members in the litigation), it did not flesh out the indirect effects of this alleged injury on Arizona as a whole.

The Court also rejected Arizona's claim to standing under CAFA. Under CAFA, participants in a class action settlement are required to notify the attorneys general of any states of which at least one class member is a citizen of the terms of the settlement. However, the Court, relying on the plain text of CAFA, ruled that this requirement in CAFA does not grant the attorneys general standing to intervene and/or appeal the underlying litigation.

Finally, the Court rejected Arizona's claim that it had standing based on Participatory Interests. Arizona argued that it is a "repeat player" in class actions and therefore should be granted Article III standing. The court held that Arizona's regular participation in class actions was not sufficient to confer standing because the only injury that Arizona could put forward is an outcome that is contrary to its policy views.

E. Subrogation

Certain Underwriters at Lloyd's, London v. Sunbelt Rentals, Inc.

In *Loyd's London*, a malfunction in a Sunbelt heater caused the sprinklers to go activate at a construction site causing $100,000 of water damage. Lloyd's paid the insurance claim and then filed suit in federal court seeking a declaration that it could recover the payments through subrogation against Sunbelt. The District Court sided with Lloyd's, the Sixth Circuit reversed.

Under the policy, Sunbelt was considered an "additional insured", but the District Court ruled that subrogation was possible notwithstanding the policy's waivers of subrogation against additional insureds. The Court determined that because the policy provided specific exemptions for "additional insureds" (*i.e.* poor workman ship, damages arising out of contractors sole negligence) that the policy was ambiguous as ti whether they could seek subrogation against Sunbelt for the malfunctioning of their product because it was not explicitly present in the policy.

Under Tennessee Law, ambiguous terms in an insurance contract must be construed against the drafter, therefore the Court concluded that Lloyds could not seek subrogation against Sunbelt.

F. Class Certification

Creech v. Emerson Electric Co., 2019 WL 1723716

In *Creech* Plaintiff, on behalf of himself and all others similarly situated, filed suit against Emerson Electric Company ("Emerson") challenging the recall of four models of digital thermostats manufactured, marketed, distributed, and sold by Defendants, and the allegedly inadequate recall remedy that followed. The matter was before the Southern District on Plaintiff's Motion for Class Certification. Therein, Plaintiff asked the Court to certify three classes, appoint him as the class representative, and appoint two of his five counsel of record as class counsel.

On April 30, 2014, the Consumer Product Safety Commission issued a recall notice for approximate 740,000 White-Rodgers thermostats sold in the United States, alerting consumers to a potential fire hazard. Though four different models of thermostat were subject to the recall, only the model powered through a C-wire with a battery backup posed a fire hazard. The recall notice stated that "consumers should check the thermostats for battery icon on the left side of the blue lighted screen; if the battery icon is not shown, contact White Rodgers to receive a free repair or a replacement thermostat." Only approximately 5,500 thermostat owners registered for the recall. Of those who registered, 1,586 were given replacement thermostats. The remaining 3,870 were given a "sticker kit" and instructed to remove the batteries from the thermostat and place a sticker over the battery compartment, warning them not to insert the batteries because of the fire hazard.

Plaintiff was one of the customers given the sticker kit, and he voiced his dissatisfaction with the proposed remedy. When White Rodgers failed to provide him with free repairs or replacement, he filed suit. Therein, Plaintiff asked the Court to certify three classes: (1) a Nationwide Consumer Protection Class or, in the alternative, a Multi-State Consumer Protection Law Class; (2) Express Warranty Class; and (3) Unjust Enrichment Class. Plaintiff sought the aforementioned certification pursuant to Rule 23(b)(2), which required him to show that Defendants "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

In addressing Plaintiff's alternative Multi-state Consumer Protection Class, the Court cited previous case law holding that "[a] litigant must be a member of the class which he or she seeks to represent at the time the class action is certified by the district court." Plaintiff, a North Carolina resident, was not member of the Multi-State Consumer Protection Class and accordingly could not fairly and adequately protect their interests.

With regard to Plaintiff's Unjust Enrichment Class, the Court noted that it had already dismissed Plaintiff's own unjust enrichment claim. Ohio law requires privity between the consumer and the manufacturer. Because Plaintiff purchased his thermostats from a third-party retailer, and not from White-Rodgers, there was no direct economic transaction to support a claim of unjust enrichment. Since Plaintiff himself did not have a viable unjust enrichment claim, he was not a member of the Unjust Enrichment Class and could not fairly and adequately serve as the class representative.

Plaintiff's Nationwide Consumer Protection Class sought certification based on Defendants' alleged violation of the Missouri Merchandising Practices Act ("MMPA"). Likewise, his Express Warranty Class was comprised of members from ten states that have adopted the Uniform Commercial Code, allegedly without material modifications. The Court analyzed these two classes together and ultimately held that though Plaintiff satisfied the commonality requirement of Rule 23(a)(2), the typicality requirement of Rule 23(a)(3), and the fair and adequate representation requirements of 23(a)(4), he failed to meet the requirements of Rule 23(b)(2). To obtain class certification under Rule 23(b)(2), Plaintiff must prove that Defendants "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole. Here, the Court held that certification was inappropriate under Rule 23(b)(2) because: (1) Plaintiff waived his right to seek certification under Rule 23(b)(2); (2) Plaintiff's claim for injunctive relief was a disguised claim for money damages; and (3) Plaintiff could not satisfy the cohesiveness requirement of Rule 23(b)(2).

G. Definition of "Product" Under OPLA

Rote v. Zel Custom Manufacturing, LLC, 383 F.Supp.3d 779 (2019)

In *Rote*, Plaintiff was injured when allegedly defective ammunition detonated out-of-battery and injured his hand as he was forcing the bolt shut on a rifle.

Plaintiff brought suit under the Ohio Products Liability Act Claim ("OPLA") for inadequate warning or instruction, alleging that a foreign ammunitions manufacturer should have marked the boxes in which it placed the ammunition as being military surplus because "it is commonly known that weapons and ammunition manufactured for the military eventually find their way into the marketplace for purchase by a consumer. This matter was before the Court on defendant's Motion for Summary Judgment and the key issue to be decided was whether the ammunition was a "product" as defined by the OPLA. "Product" means "any object, substance, mixture, or raw material that constitutes tangible personal property" which satisfied each of the following three criteria:

(i) It is capable of delivery itself, or as an assembled whole in a mixed or combined state, or as a component ingredient.

(ii) It is produced, manufactured, or supplied for introduction into trade or commerce.

(iii) It is intended for sale or lease to persons for commercial or personal use.

The Court granted Defendant's Motion, holding that the evidence establishes without genuine dispute that the foreign sovereign manufactured the ammunition exclusively for its own internal, military use. There was no evidence that Defendant manufactured the ammunition for purposes of bringing it into an exchange of goods or commodities or with the intention of selling it for consideration. Thus, as a matter of law OPLA's definition of product was not satisfied in this situation.

VII. Seventh Circuit

Jessica Williams Schnelker and Mary E. Christ, Frost Brown Todd LLC, 201 North Illinois Street, Suite 1900, P.O. Box 44961, Indianapolis, IN 46244-0961.

A. Foreseeable Use, Sophisticated User

Brewer v. PACCAR, Inc., 124 N.E.3d 616 (Ind. 2019)

This case arose from a fatal accident in which a semi-truck struck a construction worker and pinned the worker between the back of the truck and the trailer. A claim for the defective design of the semi-truck's glider kit was brought against the component-part manufacturer under the Indiana Product Liability Act (IPLA). Specifically, the claim alleged that the semi-truck glider kit was defectively designed due to the lack of safety features to prevent the dangers posed by the 40 ft. blind spot, such as the installation of rear windows, backup cameras, and/or alarm systems. The Indiana Supreme Court concluded that component manufacturers have no duty to include safety features when: (1) the end product has multiple anticipated configurations, (2) the end manufacturer determines which configuration the product takes, and (3) the different anticipated configurations prevent the component manufacturer from reasonably knowing whether and how safety features should be included with the part.

Here, however, the glider kit had only one foreseeable use: to be integrated into a semi-truck. Thus, the Indiana Supreme Court determined that a manufacturer who produces a component part with only one reasonably foreseeable use has no duty to install safety features if: (1) the final manufacturer was offered the safety features and declined them; or (2) the component part, once integrated, can be used safely without

those safety features. The component manufacturer failed to show that it offered the safety features and the final manufacturer rejected them. The manufacturer also failed to show that the glider kit could be used safely without the safety features. The manufacturer argued that backup alarms are often disfavored because people may become de-sensitized to the sound. The court found this evidence insufficient because it related to just one of the three safety features alleged. The court noted that the fact that one specific kind of safety feature may be ineffective does not mean that the component-part manufacturer must have no duty to include others.

The court also expanded the sophisticated-user defense to design defect claims. The sophisticated user defense typically exempts a manufacturer from providing warnings when users of the product are, or should be, aware of the product's potential dangers. While this defense formerly only applied in defense of failure to warn claims, the court held that this defense is now available to challenge design defect claims. The court outlined non-exhaustive factors to evaluate a manufacturer's satisfaction of its duty to include safety features: the nature, complexity, and associated dangers of the integrated product; the dangers posed by a lack of safety features; and the user's ability to include the safety features. Here, the Court ruled the availability of the sophisticated user defense was a question of fact, and inappropriate for summary judgment.

B. Design Defect, Expert Testimony on Causation

Timm v. Goodyear Dunlop Tires N. Am., Ltd., 932 F.3d 986 (7th Cir. 2019)

Two motorcyclists sustained serious injuries in a horrific accident and brought a product liability action under Indiana law against defendants involved in the sale and manufacture of the motorcycle, its rear tire, and their helmets. The motorcyclists alleged the helmet design was unreasonably dangerous and that their injuries were more severe than they would have been if not for the defective helmets. The motorcyclists provided their medical records to support this claim but did not proffer expert testimony regarding the enhanced injuries. The court conceded that the medical records confirmed the motorcyclists' injuries but concluded that the records alone failed to distinguish the enhanced injuries caused by the defective helmet from the general injuries caused by the accident. Although expert injury causation testimony may not be required in every case, it was required here because distinguishing enhanced injuries exceeded a lay jury's understanding. Without an expert, jurors could not distinguish injuries caused by the crash from the enhanced injuries caused by the defective helmet without engaging in speculation. Therefore, summary judgment was proper to dispose of this claim.

The court also excluded causation testimony of two experts. It held that the experts' conclusions were not sufficiently reliable under Daubert. A tire specialist could not say the accident was caused by the motorcycle tire unseating from its rim because the expert failed to show its opinion was derived from a rigorous, objectively verifiable approach. The opinion was not supported by empirical data, controlled experiments, or any testing. The tire specialist also could not demonstrate how to objectively replicate his approach. Similarly, an accident reconstructionist was unable to testify that the accident was caused by the rear tire "hopping" when it was unseated from its rim. The reconstructionist cited no tests replicating the conditions under which unseating occurred, or that showed unseating caused tire "hopping."

The court also excluded the experts on qualification grounds. It held that neither expert was qualified to opine that the motorcycle was defective based on the absence of a tire pressure monitoring system. The tire specialist admitted he lacked experience with motorcycles, and the reconstructionist admitted its inexperience with tire pressure monitoring systems. Because the motorcyclists' design defect claims rested on the two experts' testimony, their exclusion defeated the motorcyclists' claims, and summary judgment was proper.

C. Exclusion of Warranties, Economic Loss Doctrine

Indiana Farm Bureau v. CNH Indus. Am., LLC, 130 N.E.3d 604 (Ind. Ct. App. 2019)

When an insurer brought a subrogation action against a seller and manufacturer of a Combine destroyed in a fire, the Indiana Court of Appeals considered whether the trial court properly granted summary judgment in favor of the seller and manufacturer on both plaintiff's warranty and tort claims. The Indiana Court of Appeals affirmed.

Plaintiff brought suit against both the seller and manufacturer of the Combine, claiming breach of express and implied warranties. However, the insureds admitted that when they purchased the Combine, they understood it was sold "as is" with no implied or express warranties. The Court concluded that the language in the sales contract properly excluded all implied warranties under the UCC. It did not need to include the term "merchantability" because the agreement otherwise made plain that there were no implied warranties and such language was conspicuous as a matter of law.

Moreover, the Court affirmed summary judgment in favor of the manufacturer and seller as to plaintiff's tort claims, holding that the economic loss doctrine precluded recovery for damage to the product itself. Plaintiff argued that the corn head attached to the combine should be considered "other property," thus precluding application of the economic loss doctrine. The Indiana Court of Appeals disagreed, concluding that the insureds had purchased the combine and corn head from the same seller and both items were manufactured by the same manufacturer. Although they were purchased several months apart, the farm had purchased the items to be used together for harvesting corn. Testimony established that without the attached corn head, the combine could not harvest corn. Therefore, the product purchased by the farm was a functioning combine and the corn head and intended to be part of the bargained-for product. Because the economic loss doctrine also applied to any claims of negligence service, all tort claims against the manufacturer and seller were dismissed as a matter of law pursuant to the Indiana economic loss doctrine.

D. Burden of Proof, Medical Causation

Robinson v. Davol Inc., 913 F.3d 690, 692 (7th Cir. 2019)

The family of a deceased patient brought an action against the manufacturer of a surgical mesh patch used to repair hernias by implantation, asserting a claim under the Indiana Product Liability Act. The United States District Court for the Southern District of Indiana granted the manufacturer's motion to exclude plaintiffs' expert testimony and for summary judgment. The Seventh Circuit affirmed.

Under the Indiana Product Liability Act, plaintiffs were responsible for establishing causation. Under Indiana law, "questions of medical causation of a particular injury are questions of science necessarily dependent on the testimony of physicians and surgeons learned in such matters." Plaintiffs' key expert for establishing the required medical causation was Dr. Ferzoco. The Seventh Circuit determined that the District Court correctly applied the Daubert standard when it excluded Dr. Ferzoco's theory that the patch buckled and rubbed against the decedent's colon. However, this theory was not tested, subject to peer review, or described anywhere in the medical literature. Furthermore, the theory was not supported by the decedent's medical records or her autopsy report. Dr. Ferzoco's claim that he had previously treated patients injured in this matter was not supported by any identified patients or records. Plaintiffs argued that that lack of peer review did not support exclusion of the expert and that the lack of scientific literature went to weight and not admissibility. The Seventh Circuit rejected this argument, concluding that the exclusion was properly supported by other factors and that the judge was responsible for acting as a vigorous gatekeeper to ensure the reliability of expert testimony.

Because plaintiffs could not prove medical causation without Dr. Ferzoco's testimony, and the record reflected that the District Court judge appropriately applied the Daubert framework, summary judgment in favor of the surgical mesh patch was appropriate as a matter of law.

E. Definition of "seller" in distributive chain, Duty to Warn

Garber v. Amazon.com, Inc., 380 F. Supp. 3d 766 (N.D. Ill. 2019)

Plaintiff brought a claim of strict liability and negligence for a defective hoverboard. The hoverboard was purchased through Amazon.com's online marketplace. The buyer sued Amazon as a "co-seller" to impose strict liability. The court first considered whether an online marketplace falls within the distributive chain. All persons in the distributive chain are liable for injuries resulting from a defective product, including suppliers, distributors, wholesalers, and retailers. The court concluded Amazon was not a "seller" or in the distributive chain, because its primary role was to provide its online marketplace to connect third-party sellers with buyers. Although Amazon earned commission, this was not dispositive, especially when title passed directly from the third-party seller to the buyer, there was no direct sales agreement between Amazon and the buyers, and there was no evidence that Amazon was the exclusive seller of the hoverboards.

The court next considered whether to extend strict liability beyond the distributive chain. In Illinois, non-sellers may still be held strictly liable when the party (1) participated in the manufacture, marketing and distribution of an unsafe product, (2) derived economic benefit from placing the unsafe product in the stream of commerce, and (3) was in a position to eliminate the product's unsafe character and prevent loss. The buyers failed to make this showing because the first and third elements were not met. Amazon did not participate the manufacture, packaging, marketing, and distribution of hoverboard, and was not in a position to eliminate unsafe products. The third element was not satisfied even though Amazon imposed safety requirements on third-party sellers as a prerequisite to access the marketplace. The court noted that Amazon could not be expected to judge the quality of every product sold by millions of third-party sellers using Amazon. The court thus declined to extend strict liability outside the distributive chain.

Finally, the court held that Amazon did not owe the buyers a duty to warn. There was no continuing duty to warn the buyers of defects present at the time of sale because this duty only applies to manufacturers. Amazon also had no duty to issue post-sale warnings. The buyers failed to prove the defect existed at the time of sale, and whether and to what extent Amazon discovered the defect. The court also rejected the buyer's allegation that Amazon voluntarily undertook a duty to warn because the buyers only asserted conclusory claims without evidentiary support. Therefore, Amazon owed no duty to warn the buyers.

F. Alternative Design

Clark v. River Metals Recycling, LLC, 929 F.3d 434 (7th Cir. 2019)

An employee of a salvage company sustained injuries when dismounting a car-crushing machine ("the Crusher"). The employee sued the manufacturer and the company that leased the Crusher to the employer, asserting claims of design defect. The Seventh Circuit affirmed the district court's grant of summary judgment in the manufacturer and lessor's after the court excluded the employee's expert testimony. A mechanical engineer's opinion that the Crusher should have had a ladder, toeboards, and guardrails was excluded because it did not satisfy the FRE 702 requirement that the expert reliably apply the principles and methods to the facts of the case. The expert's brief report was only 5 pages long, cited just one American National Standards Institute (ANSI) standard, and paraphrased it incorrectly. There were no sketches or specifications of the alternative design. The engineer's deposition revealed that he was not familiar with the maintenance of the machine. Thus, the engineer's exclusion was affirmed.

The court concluded that the claim required proof via expert testimony about why the Crusher was defectively designed, why the alternative design's addition of a ladder was acceptable, the location of the ladder, the cost of modifying the Crusher, and whether a ladder alone would be sufficient to make the Crusher

safe. Because the court excluded the engineer's testimony, the employee's claim failed, and summary judgment was proper.

G. Defective Design, Failure to Warn, Misuse

Gillespie v. Edmier, 2019 IL App (1st) 172549 (August 7, 2019)

A truck driver brought negligence and strict products liability actions against a dump trailer manufacturer after falling from the top of the trailer while attempting to climb down the front of the trailer. The trailer had cast iron steps on the front, and back side steps. While the truck driver was working on a trailer loaded with mulch, he climbed the trailer using the front steps, to lower himself into the trailer to level the mulch. When finished, he crawled to the front, and tried to descend the cast-iron steps. He slipped on the wet steps, fell and injured his back.

The truck driver asserted a claim of strict liability because the steps were unreasonably dangerous. The driver provided expert testimony that the design conflicted with industry standards set by OSHA and ANSI, and alternative, safer designs existed on the manufacturer's other models. The manufacturer also did not test the step design for safety and had no formal accident review or investigation procedure. The court found the driver's claim survived summary judgment because there were genuine issues of fact as to whether the steps were unreasonably dangerous.

The truck driver also brought a claim for the failure to warn. The court concluded that the manufacturer was aware of the truck driving industry practice of installing tarps. Further, the manufacturer knew that operators would not be able to maintain three-point contact when tarps were installed. Because the manufacturer understood this problem could occur but did not warn of the potential danger, the court reversed the lower court's decision to grant of summary judgment.

Finally, the court held that the truck driver's use of the steps did not constitute misuse. The Court concluded that the truck driver's purpose was foreseeable. The manufacturer's own expert testified that the products' purpose was to allow drivers to climb the trailer to inspect the load, and that it was foreseeable drivers might use the steps to do so. The truck driver's conduct was not misuse because he used the stairs for their intended purpose and the use was reasonably foreseeable.

H. Extent of Duty to Warn

Zahumensky v. Chicago White Sox, Ltd., 125 N.E.3d 1157 (Ill. Ct. App. 2019).

An electrical worker brought strict liability and negligence actions against the manufacturer of roof material after the worker slipped on a wet area of the White Sox's stadium roof. The worker's job involved servicing the outfield scoreboard of the White Sox baseball stadium, which entailed walking on a PVC membrane-covered roof. The worker slipped on a wet area of the roof and suffered severe injury. The worker claimed the manufacturer had a duty to inform the worker that the PVC surface of the roof was an unsafe work surface because it became slippery when wet. The Court held that the manufacturer adequately discharged its duty to warn.

The court rejected the manufacturer's argument that it had no duty to warn about the dangers posed by the roof when walked upon because it was not intended to be used as a work surface. The manufacturer was fully aware that workers walked on the PVC membranes. It even offered specific slip-resistant walkway products to accommodate this use. The manufacturer could not claim an inability to reasonably anticipate that the roof would be walked upon and consequently, it had a duty to warn. Importantly however, this duty was not owed to the injured worker, but rather, the immediate vendee or purchaser of the product. The court

explained that a manufacturer's duty to warn rarely extends beyond the immediate vendee because the manufacturer lacks the means to control the vendee's subsequent actions or an opportunity to directly warn the ultimate user. The manufacture satisfied its duty based on undisputed evidence that it issued warnings to its immediate vendee, the contractor that installed the roof. It warned that when wet, the roof became slippery, and this posed a danger if walked upon. The manufacturer informed the contractor that slip-resistant walkways were available to prevent accidents and told the contractor to pass this information to the White Sox. It also provided materials to aid the contractor in fulfilling its duty to warn end users of the roof by including caution stickers clearly addressed to the end users in its warranty materials reading "ROOF AND WALKWAYS MAY BE SLIPPERY WHEN ICY, SNOW COVERED, OR WET," and "PROCEED WITH UTMOST CAUTION." This evidence was sufficient to warrant summary judgment in the manufacturers favor.

In contrast, summary judgment was inappropriate with regards to the installing contractor and the White Sox claims. The installing contractor had a duty to warn the White Sox, and the White Sox had a duty to warn the electrical worker. Because the installing contractor was familiar with the roof it installed, it had a duty to warn the White Sox about the dangers created by the slippery roof, and to recommend walkways be installed on the roof. The contractor needed to provide enough information to allow the White Sox to make an informed decision about how to address this hazard. Whether the White Sox knew the walkways should be installed but failed to request them, or whether it lacked sufficient information to make this decision constituted questions of fact. The court concluded that summary judgment in these defendants' favor was improper.

I. Economic Loss Doctrine

Secura Ins. v. Super Prod. LLC, 2019 WI App 47, ¶ 22, 388 Wis. 2d 445, 456, 933 N.W.2d 161, 165 (July 31, 2019)

An insured party bought an excavator from the seller. The excavator comprised of a truck chassis and cab upon which the seller installed the heavy excavation equipment. Subsequently, the excavator caught fire and damaged the excavator itself as well as other property stored nearby and inside the excavator. The insurer compensated the insured for the damages incurred after and then brought a negligence claim against the seller to recover these payments. The insurer sought to recover three categories of damages: (1) damages other property stored in and around the excavator; (2) damages for the total loss of the excavator; (3) and expenses incurred to clean up the excavator and remove debris.

The court held that the economic loss doctrine barred recovery for the damage to the excavator itself. The clean-up expenses were also barred because they were consequential economic losses. The court explained that these clean-up damages were analogous to repair and replace expenses. They are barred because they arose from the product itself in that the expenses involved removing the wastes generated by the product. There is no evidence indicating the clean-up related to any cleanup of physical injury to other property.

The parties did not dispute the damage to the other property was recoverable in tort. This other property included nearby tools and equipment of relatively little value, such as stepladders, trash cans, boots, wheelbarrows etc. The existence of the damage to this "other property" did not enable recovery in tort for the full costs of the excavator or its related clean-up costs. This decision clarified that while damage to other property may be recoverable in tort, it is not the case that, as a consequence of that physical harm to other property, the plaintiff may recover in tort for the damage to the defective product itself. The court rejected the insurer's argument that application of the economic loss doctrine could be avoided any time a party can allege damage to "other property." Only recovery for harm to property other than the product itself is available.

J. Chain of Distribution

State Farm Fire & Cas. Co. v. Amazon.com, Inc., 390 F. Supp. 3d 964 (W.D. Wis. 2019)

A homeowner's insurer brought a strict product liability action against Amazon after its insurer purchased a bathtub faucet adapter from the online marketplace through a third-party seller. Amazon moved for summary judgment, arguing that it was not a "seller" or "distributor" and therefore could not be held liable for product liability claims under the Wisconsin statute.

Because the statute itself did not define the terms, the Court looked to dictionary definitions and the overall structure and purpose of the product liability statutes. The dictionary definitions were not decisive, but the Court did find the structure of the product liability statutes informative. Since the language of the statute was in the negative, the court concluded the purpose of the section was to limit when a plaintiff may target a nonmanufacturer defendant, but not who may be liable as a nonmanufacturer defendant. Broad examination of the statute further supported the reading that the manufacturer of the product was the preferred target for product liability claims since neither sellers nor distributors could be liable for product defects if the manufacturer could be haled into Wisconsin court.

Because the terms and structure of the statute did not completely answer the central question, the court turned to Wisconsin caselaw. Based on the caselaw in Wisconsin, the central question was whether Amazon was a "peripheral" entity or an "integral part of the chain of distribution." The court determined that the undisputed facts showed that Amazon was an integral part of the chain of distribution, and therefore well-positioned to allocate the risks of defective products to the participants in the chain. Without Amazon, the product would not have been provided in the American marketplace. While Amazon did not set the price for the bathtub faucet adapter, it did set the price of the fees it retained for itself. Therefore, it was positioned to insure against the risk of defective products. Because Amazon otherwise served all the traditional functions of both retail seller and wholesale distributor, the Western District of Wisconsin concluded that Amazon bore responsibility for placing the defective product into the stream of commerce in Wisconsin.

VIII. Eighth Circuit

Baxter D. Drennon, Esq., Wright, Lindsey & Jennings LLP, 200 West Capitol Avenue, Suite 2300, Little Rock, AR 72201.

A. "Apparent-Manufacturer Doctrine" – Likely not applicable in Iowa

Merfeld et al. v. Dometic Corp., 940 F.3d 1017 (8th Cir. 2019)

Plaintiffs, the owners of a storage building and personal property that were damaged in a 2014 fire, brought suit against Dometic Corporation ("Dometic") alleging that the fire was caused by a defective Dometic refrigerator installed in a 2003 Forest River Cardinal RV. *Id.* at 1018. The RV was stored on Plaintiffs' property. *Id.*

Plaintiffs brought suit against Dometic alleging strict liability and negligence. *Id.* Dometic responded arguing that because it was not the actual manufacturer of the refrigerator it could not be liable under Iowa law. *Id.* The undisputed facts showed that before 2009 Dometic, a North American company, purchased refrigerators manufactured in Sweden by Dometic AB, a Swedish Company. Those refrigerators were then resold in the North America. After 2009, Dometic began manufacturing refrigerators in the United States. *Id.* at 1019.

In Iowa, a person who is not the "assembler, designer, or manufacturer" of a product but "who wholesales, retails, distributes, or otherwise sells a product" is immune from suit for claims based on strict liabil-

ity or breach of implied warranty when those claims arise from a defect in the design or manufacture of the product. Iowa Code §613.18. *Id.* at 1018-19.

Based on this statute, Dometic moved for summary judgment, arguing that it did not manufacture the refrigerator in the 2003 model RV, and the District Court granted the motion.

On appeal, one argument raised by the Plaintiffs arose from the apparent-manufacturer doctrine. *Id.* at 1019. The Plaintiffs argued that even if Dometic was not the *actual* manufacturer, it cannot claim §613.18 immunity if a jury found that it was the *apparent* manufacturer. *Id.* The apparent manufacturer doctrine arose before the doctrine of strict product liability and is reflected in Restatement (Second) of Torts §400: "One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer." *See generally Hebel v. Sherman Equip*., 442 N.E.2d 199, 200-02 (1982). More than fifty years ago, the Supreme Court of Iowa recognized the adoption of Restatement §400. *Tice v. Wilmington Chem. Corp*., 259 Iowa 27, 141 N.W.2d 616, 628 (1966). *Id.*

The District Court found that the apparent-manufacturer doctrine is "not viable under Iowa law" because the plain meaning of the word "manufacturer" in Iowa Code §613.18 "does not encompass a non-manufacturer that holds itself out as being the manufacturer." *Id.* at 1020. Although the Eighth Circuit recognized that this question was unresolved by Iowa state courts and left open the possibility of the apparent manufacturer doctrine surviving in Iowa, it ultimately found, agreed with the District Court. *Id.*

B. Establishing causation on summary judgment – Attacking defendants' evidence is not sufficient

Singleton, et al. v. BRK Brands, Inc., et al., 934 F.3d 830 (8th Cir. 2019)

Plaintiffs, the administrators of the estates of a mother and her four children (collectively "the Deceased"), brought suit against BRK Brands, Inc. ("BRK"), and a number of other defendants, alleging that the Deceased died from smoke inhalation as a result of a kitchen fire in their apartment. Although each of the Deceased was found out of bed, Plaintiffs claim that the smoke alarm did not sound during the fir warning them to leave the apartment. *Id.* at 834. According to the complaint, the government operated apartment was either not equipped with a working smoke alarm or the BRK manufactured alarm was defective and failed to sound during the fire. *Id.* Plaintiffs' claims against BRK included various product liability claims and negligence. *Id.* at 835.

During the course of investigation and discovery, BRK performed non-destructive testing of the subject smoke alarm. *Id.* at 834. As a result of the testing, BRK submitted the affidavit of expert Dr. Daniel T. Gottuk, who testified that the application of the enhanced soot deposition ("ESD") methodology showed the smoke alarm did sound during the fire. Based on Dr. Gottuk's testimony, BRK moved for summary judgment. *Id.* at 835.

The District Court granted BRK's motion for summary judgment, finding that there was insufficient evidence to establish when the Deceased became aware of the fire, the relationship in time as to when the smoke alarm sounded and when the Deceased became unconscious, and whether the Deceased lacked sufficient time to escape the fire as a proximate result of any claimed issue with the smoke detector. *Id*.

On appeal, the Plaintiffs argued that they submitted sufficient evidence to support their claim that BRK violated its duty to supply a non-defective smoke detector. *Id.* at 836. To support their arguments, Plaintiffs cited to the affidavit of their expert Dr. B. Don Russell. *Id.* Dr. Russell, who did not examine the smoke alarm, did not claim that the smoke alarm did not sound. *Id.* Instead, much of Dr. Russell's affidavit focused on attacking the ESD methodology used by Dr. Gottuk. *Id.*

In finding the Plaintiffs failed to produce sufficient evidence to defeat BRK's motion for summary judgment, the Eighth Circuit noted that there were multiple reasons that the smoke alarm may not have awoken the Deceased – other than that the alarm might not have sounded, including that the wires to the alarm were found to be cut, the soot pattern showed the alarm fell to the ground early during the fire, and there was a scratch mark in the ceiling near where the alarm had been potentially caused when the alarm was removed from the ceiling. *Id.* at 836-837. Significantly, the Eighth Circuit also criticized the Plaintiffs' expert evidence, finding that "merely attacking the reliability of the defendants' evidence 'do[es] nothing to satisfy [the] plaintiffs' burden of proving that the smoke alarm failed to sound.'" *See Anderson v. Liberty Lobby*, 477 U.S. 242, 256-57 ("The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict.... [T]he plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment."). *Id.* at 836.

Ultimately, the Eighth Circuit found that the Plaintiffs offered insufficient evidence affirmative evidence to allow a factfinder to do more than simply guess between possible explanations. *Id.* at 836-37. "Factfinders cannot fill in the gaps in the evidence with speculation." *Id.* Simply pointing to the fact that the Deceased died in the apartment was insufficient evidence for a factfinder to reasonably conclude the alarm failed to sound. *Id.* at 837. Thus, the Eighth Circuit affirmed the District Court granting summary judgment to BRK. *Id.*

IX. Ninth Circuit

Britta Stamps, Shook, Hardy & Bacon, LLP, 2555 Grand Blvd., Kansas City, MO 64108.

A. Class Action Certification

In re Hyundai and Kia Fuel Economy Litigation, 926 F.3d 539 (9th Cir. 2019).

Defendants seeking to settle nationwide class actions found relief in the Ninth Circuit's In re Hyundai and Kia Fuel Economy Litigation ruling. 926 F.3d 539 (9th Cir. 2019). Product liability class actions generally require a deep dive into the variations among multiple states' consumer protection laws, but after In re Hyundai, classes seeking to be certified for settlement purposes are no longer required to meet the same rigorous standards under Rule 23 as contested class certification motions. Exhaustive efforts to demonstrate "predominance" and "manageability" are no longer necessary in every class action settlement: "A class that is certifiable for settlement may not be certifiable for litigation if the settlement obviates the need to litigate individualized issues that would make a trial unmanageable."

The *In re Hyundai* settlement class was defined as all current and former owners and lessees of specified vehicles, who were all harmed in the same way by the automakers' mass marketing efforts related to fuel-economy representations. The Ninth Circuit held that the predominance prong can be satisfied in nationwide class actions where, as here, common issues turn on a common course of conduct by the defendant. Counsel representing defendants in product liability class actions in the Ninth Circuit should welcome the opportunity to settle cases under the less stringent standard, but remain prepared to use differences among states' consumer protection laws in predominance arguments when contesting class certification.

B. Causation

Pilliod v. Monsanto Co., No. RG17-862702 (Cal. Super. Ct. July 25, 2019) and *Hardeman v. Monsanto Co.*, No. 16-cv-00525-VC (N.D. Cal. July 15, 2019).

A major point of focus of product liability practitioners in the Ninth Circuit continues to be cases involving glyphosate's alleged causation of cancer. In addition to cases against the manufacturer of Roundup, Monsanto, additional cases have been filed against stores selling Roundup, such as Home Depot and Lowe's, and the plaintiffs' bar has even explored the possibility of filing suits against food producers whose products contain trace amounts of glyphosate. While the future of glyphosate-related claims is yet to be determined by pending appeals, defendants can at least breathe a sigh of relief about two California judges slashing large jury verdicts. After a jury awarded $55 million in compensatory damages and $2 billion in punitive damages against Monsanto, a judge reduced both awards in Pilliod v. Monsanto Co., No. RG17-862702 (Cal. Super. Ct. July 25, 2019).

In doing so, the judge found certain categories of compensatory damages were not supported by the evidence, and the punitive damages award was unconstitutionally large. These judgments were reduced to $17.3 million in compensatory damages and $69.3 million in punitive damages. In another California Roundup case, the judge concluded the jury's award of $5 million in compensatory damages was supported by the evidence, but the jury's decision to award $75 million in punitive damages was "constitutionally impermissible." Hardeman v. Monsanto Co., No. 16-cv-00525-VC (N.D. Cal. July 15, 2019). The judge reduced the punitive damages award to $20 million, in line with the compensatory damages-to-punitive damages ratio of 4-1 generally accepted by the Supreme Court. As defendants look forward to relief from appellate court rulings, defense of these cases will continue to focus on the science related to causation issues.

C. Labeling Claims, Misrepresentation

Truxel v. General Mills Sales, Inc., No. C-16-04957, 2019 WL 3940956 (N.D. Cal. Aug. 13, 2019), *Joslin v. Clif Bar & Company*, No. 4:18-cv-04941-JSW, 2019 WL 5690632 (N.D. Cal. Aug. 26, 2019).

The Ninth Circuit, and California in particular, have recently become a hotbed for fraud and misrepresentation claims involving food and beverage labels. However, a pair of district court cases signals good news for defendants facing such food labeling claims. In *Truxel v. General Mills Sales, Inc*., plaintiffs challenged the defendant's marketing of breakfast cereals and snacks, claiming health and wellness statements about the food could not be true in light of their high sugar content. No. C-16-04957, 2019 WL 3940956 (N.D. Cal. Aug. 13, 2019). The defendant showed that the products' labels and ingredient lists provided consumers with all truthful and required objective facts. The court held that a reasonable consumer could not plausibly claim to be misled about the sugar content of a product in light of the information given by the defendant on the product's box. Likewise, the plaintiffs in *Joslin v. Clif Bar & Company* alleged the defendant misled consumers into believing their Clif Bars contain white chocolate, when the bars did not actually contain white chocolate. No. 4:18-cv-04941-JSW, 2019 WL 5690632 (N.D. Cal. Aug. 26, 2019). The court pointed out that "[a]lthough some part of a product's packaging may be misleading, when another part of that product's packaging discloses the truth of the product, district courts have held that a plaintiff's knowledge of the truth forecloses the risk of future harm." Because the product's ingredient list truthfully disclosed its actual ingredients, the court concluded that plaintiffs' allegations were insufficient to show that reliance on a misrepresentation on another part of the label was reasonable or justifiable. *Truxel* is currently on appeal to the Ninth Circuit, but in the meantime, defendants should focus on educating the court about all aspects of a product label to defeat claims of misrepresentation.

X. Tenth Circuit

Brandon M. Meyers, Esq. McCoy Leavitt Laskey LLC, 317 Commercial Street Northeast, Suite 200, Albuquerque, New Mexico 87102.

A. Tenth Circuit Court of Appeals

1. Exclusion of Experts

Rodgers v. Beechcraft Corp., 759 Fed. Appx. 646 (10th Cir. 2018)

Plaintiffs alleged personal injuries as a result of an airplane crash after both engines inadvertently shut down during the flight. In the United States District Court for the Northern District of Oklahoma, Plaintiffs contended (1) the airplane's manufacturer was liable based upon products liability and (2) the airplane's repair and maintenance provider was liable based upon negligence. Prior to trial, Defendants moved to exclude the proposed testimony of Plaintiffs' expert witnesses and also moved for summary judgment. Despite submitting additional affidavits from each of their experts (which the District Court struck as improper or untimely), the District Court limited the testimony of three of Plaintiffs' experts. As to the fourth expert, the District Court altogether excluded him from testifying. In light of the excluded testimony, the District Court granted Defendants' motion for summary judgment.

On appeal, the Tenth Circuit Court of Appeals held the District Court did not abuse its discretion by striking Plaintiffs' supplemental affidavits, limiting Plaintiffs' expert evidence, and granting summary judgment. With respect to the striking Plaintiffs' supplemental affidavits, the District Court did not abuse its discretion because Plaintiffs neither articulated why the information contained within the supplemental affidavits could not have been included in the experts' original reports nor explained how allowing the supplemental affidavits would not have harmed or prejudiced the Defendants. Because such explanation was lacking, the fact that the supplemental affidavits introduced new arguments and material and did not fill a gap or a previously incomplete claim or discussion in their original reports as required by Federal Rule of Civil Procedure 26 properly supported their exclusion.

Regarding limitation of expert evidence, the Tenth Circuit Court of Appeals agreed with the District Court that two of the experts lacked proper experience for their opinions and their opinions were either unreliable, not relevant, or did not bear out in the record, *e.g.*, ignored significant evidence that contradicted the opinions. The third expert was limited simply because counsel inadequately briefed the issue for the Tenth Circuit Court of Appeals. And finally, the last expert was completely excluded because he did not sufficiently prepare his report. With the limitations and exclusions of Plaintiffs' experts, there was neither proof of defects nor proof of causation sufficient to survive summary judgment.

This decision stresses how important it is that supplemental expert evidence not only be timely disclosed, but also meet the standards articulated in Federal Rule of Civil Procedure 26. Failure to do so can result in categorical exclusion of the supplementation, which can be lethal for the expert's opinions. Defense lawyers should scrupulously review opposing counsel's expert evidence supplementation and consult with this opinion—and potentially move for the supplementation to be struck—if it appears the supplementation simply introduces new arguments and material or does not fill a gap or a previously incomplete claim or discussion in originally produced material. Additionally, this decision provides further guidance to practitioners in the evolution of admissibility of expert evidence after *Daubert*. Lastly, this opinion illustrates how easily claims can fall when expert evidence is excluded. Should practitioners be successful in getting expert evidence excluded, they should analyze whether the evidence excluded was so critical to the opposing side's case that summary judgment could be obtained.

Siegel v. Blue Giant Equip. Corp., Nos. 18-5113, 19-5007 & 19-5008, 2019 WL 5549331 (10th Cir. Oct. 28, 2019)

Plaintiff alleged personal injuries as a result of a workplace accident where he fell out of a stationary dock scissor lift. In the United States District Court for the Northern District of Oklahoma, Plaintiffs con-

tended Defendant was liable based upon products liability. Defendant moved for a protective order because its discovery responses contained proprietary information and trade secrets. Additionally, Defendant moved to exclude Plaintiff's expert and for summary judgment. The District Court granted the motions and entered judgment in favor of Defendant.

On appeal, the Tenth Circuit Court of Appeals upheld the District Court's decision. As to the protective order, the Tenth Circuit Court of Appeals held the District Court did not abuse its discretion because Defendant had shown good cause for the requested protective order and Plaintiff neither challenged any documents as being improperly designated as confidential under the protective order nor asserted the protective order impeded his ability to respond to Defendant's summary judgment motion.

Regarding exclusion of Plaintiff's expert, the Tenth Circuit Court of Appeals held Plaintiff's expert lacked relevant experience to offer his opinions. He had never designed a lift or similar machine that was produced and put into production. In addition to never (1) working in the industry, (2) being involved and/or attending meetings of relevant organizations, and (3) authoring a paper on the subject, his only experience was from his involvement as an expert in litigation or anticipated litigation, which was not sufficient. In light of this exclusion and the evidence in the record, the Tenth Circuit Court of Appeals upheld the Trial Court's grant of summary judgment.

This decision builds on the admissibility of expert evidence after *Daubert*. The Tenth Circuit Court of Appeals focused heavily on the experience of the expert in assessing admissibility. Defense lawyers should be aware that an expert's experience in the industry can be crucial to offer opinions about certain products. Moreover, this opinion highlights the burden which a party will need to overcome to show why the issuance of a protective order is improper. The opinion offers a cautionary note to defense lawyers that they should carefully review all documents to be produced pursuant to a protective order and ensure same are properly confidential. Failure to do so can be grounds to deny entry of the protective order.

2. Corporate Successor-Liability

Lopez v. Stanley Black & Decker, Inc., 764 Fed Appx. 703 (10th Cir. 2019)

Plaintiff alleged two of his fingers were severed by the blade of a table power saw. In New Mexico state court, Plaintiff contended Defendants were liable based on products liability. Defendants removed the case to the United States District Court for the District of New Mexico. Upon removal, the District Court dismissed numerous defendants for lack of personal jurisdiction, except for Corporate Successor Defendant. In denying Plaintiff additional discovery and time to respond, the District Court granted summary judgment in favor of Corporate Successor Defendant, reasoning that under Texas law it could not be held liable as the successor for the liabilities of the acquired company. The District Court also denied Plaintiff's subsequent motion to alter or amend the summary judgment decision.

On appeal, the Tenth Circuit Court of Appeals upheld the District Court's decision that Texas law governed whether Corporate Successor Defendant was liable as a result of its successor status. While both tort and contract principles have a role to play in corporate successor-liability, the Tenth Circuit Court of Appeals agreed with the District Court that tort-based considerations predominate and, therefore, tort-based conflict-of-law rules should apply. Because New Mexico's tort-based conflict-of-law rule dictates that the laws of the state where the wrong occurred apply, Texas law governed due to the fact that the accident which injured Plaintiff occurred in Texas.

Under Texas law, successors cannot be held liable merely as a result of their successor status unless they expressly assume the liability of the acquired company. An analysis of Corporate Successor Defendant's acquisition agreement revealed it unambiguously did not assume such liabilities in the acquisition. Therefore,

the general rule of no successor liability applied and summary judgment was appropriate. Plaintiff's requests for additional discovery and time to review this issue and relief from this decision were denied as Plaintiff had neither lack of notice as to the issue of corporate successor-liability nor prejudice sufficient to warrant reversal.

This case stresses that defense lawyers should be keen to analyze the various laws possibly implicated for every case. Defense lawyers should resort to conflict of law analysis when appropriate because same can result in application of laws that are favorable to clients from the outset of a case.

3. Utah Law Regarding Defective Warnings

Cerveny v. Aventis, Inc., 783 Fed. Appx. 804 (10th Cir. 2019)

Plaintiffs alleged birth defects to their son from pre-pregnancy ingestion of Clomid, a drug that helps women conceive by stimulating ovulation. In the United States District Court for the District of Utah, Plaintiffs contended Defendant was liable based on products liability, negligent misrepresentation, and fraud. The District Court granted summary judgment in favor of Defendant.

On appeal, the Tenth Circuit Court of Appeals upheld the District Court's decision based on the fact that Clomid's warning did not apply to Plaintiffs. Defendant had warned of the risk of harm if Clomid was taken during pregnancy, not before pregnancy. Plaintiffs had not taken Clomid during pregnancy. As such, the warning did not apply to Plaintiffs. Plaintiffs thus failed to prove a claim under Utah law based on product liability. The Tenth Circuit Court of Appeals agreed with the District Court as to Plaintiffs' remaining claims for negligent misrepresentation and fraud, dismissing them because the content of the warning was not false.

This case provides defense lawyers with a good reminder to analyze products liability warning claims and determine whether plaintiffs bringing those claims are subject to the warnings which they claim are deficient. In many states, this lack of a connection can be fatal to a defective warnings claim.

B. United States District Court for the District of Colorado

1. Personal Jurisdiction

Fischer v. BMW of N. Am., LLC, 376 F. Supp. 3d 1178 (D. Colo. 2019)

Plaintiff alleged he suffered personal injuries when his finger was pinned between the asphalt and a lug wrench while changing his front tire. In the United States District Court of Colorado, Plaintiff alleged Defendant was liable based upon products liability, negligence, and breach of warranty. Defendant moved to dismiss Plaintiff's claims for lack of personal jurisdiction.

The District Court granted the motion. The District Court found that Defendant did not have sufficient minimum contacts with Colorado to satisfy due process. Plaintiff had offered no evidence that Defendant had specifically targeted Colorado with its distribution efforts. The creation of a global, or even nationwide, distribution system was insufficient, standing alone, for minimum contacts with Colorado. Even voluminous sales to the United States was insufficient for the exercise of personal jurisdiction. Moreover, Plaintiff offered no evidence that Defendant exercised direction or control over distribution efforts in Colorado to support the exercise of personal jurisdiction. Finally, the District Court rejected the notion that Defendant's subsidiary in Colorado was the agent or alter ego of Defendant. The District Court concluded by declining to determine whether exercise of personal jurisdiction over Defendant would offend traditional notions of fair play and justice.

This case provides defense lawyers with insight into how the District Court is handling personal jurisdiction after the United States Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of*

Cal. Defense lawyers with clients in Colorado should use this decision, in connection with the following two cases, in deciding whether they have a valid personal jurisdiction defense. Additionally, the case highlights for defense lawyers how reluctant the District Court is to assert personal jurisdiction over a defendant on the basis of agency/alter ego.

Eim v. CRF Frozen Foods, Civil Action No. 18-cv-01404-PAB-KLM, 2019 WL 1382790 (D. Colo. Mar. 26, 2019)

Plaintiff alleged he got sick after consuming frozen vegetables. Defendants issued a recall thereafter for several types of frozen vegetables, including those consumed by Plaintiff, potentially contaminated by Listeria—from which doctors had confirmed Plaintiff had suffered an infection. In Colorado state court, Plaintiff alleged Defendants were liable based upon breach of express and implied warranties, violation of the Colorado Consumer Protection Act, products liability, and negligence. Defendants removed the case to the United States District Court for the District of Colorado. Thereafter, Distributor Defendants moved to dismiss Plaintiff's claims against them for lack of personal jurisdiction.

The District Court granted the motion to dismiss. The District Court found Distributor Defendants did not have sufficient minimum contacts with Colorado to satisfy due process. Distributor Defendants were not registered to do business in Colorado, did not maintain a physical presence in Colorado, did not maintain agents for service of process in Colorado, and did not have any employees in Colorado. Finally, the District Court rejected the notion that Distributor Defendants' subsidiaries were the agents or alter egos of them.

Again, this case shows how the District Court is handling personal jurisdiction after *Bristol-Myers Squibb Co. v. Superior Court of Cal*. Defense lawyers with clients in Colorado should use this decision, in connection with the preceding and following case, in deciding whether they have a valid personal jurisdiction defense. Unique to this case, defense lawyers should look into whether their clients have registered to do business in Colorado, which could provide a basis for the exercise of personal jurisdiction in the District Court.

Thompson v. Ford Motor Co., Civil Action No. 18-cv-3324-WJM-KMT, 2019 WL 4645446 (D. Colo. Sept. 24, 2019)

Plaintiff alleged she suffered personal injuries when her vehicle self-shifted into reverse and rolled backwards over her leg. In the United States District Court for the District of Colorado, Plaintiff alleged Defendant was liable based products liability, negligence, breach of implied warranty, and fraud. Defendant moved to dismiss for lack of personal jurisdiction.

The District Court granted the motion. The District Court held it did not have general personal jurisdiction over Defendant since Defendant was incorporated in Delaware and had its principal place of business in Michigan. Moreover, its activities in Colorado were not so substantial and of such a nature as to render Defendant at home in Colorado. The District Court also held it did not have specific personal jurisdiction over Defendant because there was not a sufficient connection between Defendant's activities in Colorado and Plaintiff's claims. Defendant did not design or manufacture the vehicle in Colorado. Moreover, Defendant did not distribute the vehicle to a dealership in Colorado. Similarly, Defendant did not sell—and Plaintiff did not purchase—the vehicle in Colorado. Taken in concert, Plaintiff had not demonstrated her injuries arose out of Defendant's forum-related activities to warrant personal jurisdiction over Defendant.

To repeat, this case shows how the District Court is handling personal jurisdiction after *Bristol-Myers Squibb Co. v. Superior Court of Cal*. Defense lawyers with clients in Colorado should use this decision, in connection with the preceding cases, in deciding whether they have a valid personal jurisdiction defense.

2. Service of Process

Forzani v. Peppy Prods., Civil Action No. 18-cv-01715-RM-KLM, 2018 WL 5845051 (D. Colo. Nov. 8, 2018), *aff'd and modified Forzani v. Peppy Prods.*, Civil Action No. 18-cv-01715-RM-KLM, 2018 WL 6791100 (D. Colo. Dec. 8, 2018)

Plaintiff alleged he suffered severe burns to his left leg when an e-cigarette exploded in his pocket. In Colorado state court, Plaintiff alleged Defendants were liable based upon products liability and negligence. Plaintiffs did not serve Defendants with the lawsuit in the time originally permitted by the Colorado Rules of Civil Procedure, nor the time permitted by the order of a Colorado state court judge. After the Colorado state court judge issued an order to show cause directing Plaintiff to file a return of service, Plaintiff filed an amended complaint. Two days later, Plaintiff served Defendants with the amended complaint and Defendants removed the case to the United States District Court for the District of Colorado. After removal, Defendants moved to dismiss Plaintiff's claims against them for insufficient service of process.

The District Court denied the motion to dismiss without prejudice. The District Court found Plaintiff failed to timely serve Defendants both under Colorado law and federal law before or after removal. Nevertheless, the District Court granted Plaintiff an extension to properly serve Defendants. While Plaintiff could not demonstrate good cause for the failure to timely effect service, the District Court granted Plaintiff an extension because (1) Defendants were notified of Plaintiff's lawsuit, albeit improperly, well before the deadlines; (2) Defendants did not claim prejudice and the fact that they were eventually served indicated that there was a reasonable prospect service could be completed properly; and (3) if Plaintiff's claims against Defendants were dismissed without prejudice for failure to properly effect service, Plaintiff would effectively be barred from refiling due to the statute of limitations. Nevertheless, the District Court mandated that service be completed by a date certain or Plaintiff's claims would be dismissed.

Unfortunately, this case exemplifies how forgiving courts can be to litigants who fail to properly advance their claims. Insufficient service of process is a difficult to prove and, ultimately, a ground on which to obtain dismissal. Nevertheless, defense lawyers should be at the ready to demonstrate to the court the prejudice their clients have suffered from insufficient service of process because, without it, the court will likely rule against them.

3. Failure to State a Claim

Barry v. Weyerhaeuser Co., Civil Action No. 18-cv-01641-CMA-STV, 2018 WL 6589786 (D. Colo. Dec. 14, 2018)

Plaintiffs were inspectors, supervisors, and other individuals involved in the construction and inspection of homes built using Defendant's product. After installation of Defendant's product in these homes, it became known that the product was emitting a formaldehyde odor. As a result of these odors, Plaintiffs alleged they suffered personal injuries including, but not limited to, coughs, shortness of breath, burning eyes, rashes, sinus issues, and increased risks of respiratory ailments and cancer. In the United States District Court for the District of Colorado, Plaintiffs alleged Defendant was liable based upon products liability and negligence. Defendants moved to dismiss for failure to state a claim.

The District Court denied the motion. The District Court held Plaintiffs had plausibly alleged they sustained damages and that the product caused those damages. Plaintiffs alleged they suffered damages through a wide-range of ailments. And the product could have caused those damages based on Defendant's own admission its product was found to be releasing formaldehyde odorant, *e.g.*, by instructing individuals to vacate their homes which had been built with the product. Thus, Plaintiffs had met their burden to survive dismissal for failure to state a claim.

As tends to be the case, this case reinforces the rather well-known dogma that dismissal for failure to state a claim is difficult to obtain. In reinforcing this idea, this case also warns defense lawyers that plaintiffs in a multi-plaintiff case do not have to specifically identify each injury suffered by each of them in order to plausibly plead their claims.

Lynch v. Olympus Am., Inc., Civil Action No. 18-cv-00512-NYW, 2019 WL 2372841 (D. Colo. June 5, 2019)

This is a decision on renewed motions to dismiss in connection with a decision that was previously summarized in last year's case law update. Defendants, who were the manufacturer, sellers, and distributers of an endoscope, were sued by Plaintiff, a former patient, related to the redesign of an endoscope. In October 2018, the District Court found that Plaintiff's complaint suffered from numerous fatal deficiencies and dismissed it in its entirety. However, the District Court granted Plaintiff leave to file an amended complaint to address these deficiencies. She filed an amended complaint shortly thereafter, to which Defendants again moved to dismiss for lack of personal jurisdiction and failure to state a claim.

The District Court denied the motions claiming the amended complaint sufficiently addressed the deficiencies identified in the previous order. As to personal jurisdiction, the District Court found that the exercise of personal jurisdiction was proper because Plaintiff had met the burden of showing sufficient minimum contacts, *e.g.*, Defendants maintained a relationship with a Colorado doctor, physically sent its representative into the forum to solicit business and sent scopes for prototype testing, and had another representative travel to Colorado to build loyalty and increase sales of the endoscopy scopes in Colorado. And the District Court held the exercise of personal jurisdiction did not offend traditional notions of fair play and justice.

As to setting forth a cognizable claim, the District Court held Plaintiff stated plausible claims for relief for design defect product liability, failure to warn product liability, and intentional and negligent misrepresentation. With respect to design defect, Plaintiff identified the unsafe characteristic of the product, pointed to a feasible alternative, and provided facts regarding causation which the District Court found to be sufficient. Regarding warning claims, Plaintiff identified that the endoscope lacked any warning as to its dangerous propensity, and so could not have disclosed the nature and extent of the danger. Finally, as to intentional and negligent misrepresentation, Plaintiff individually identified the misstatements at issue, including the time and place of same, while alleging that the misstatements were jointly made by all Defendants. Thus, the District Court was satisfied these allegations met the heightened pleading standards.

Similar to prior case summaries on personal jurisdiction, this case illustrates how specific personal jurisdiction can be obtained in the District Court. Additionally, similar to the preceding case, this case illustrates just how difficult dismissal for failure to state a claim is to obtain. When plaintiffs are provided the opportunity to amend their complaint to address potential deficiencies in same, defense lawyers should carefully review the amendments to discern if the amendments address the deficiencies. If they arguably do, moving to dismiss for failure to state a claim may not be successful.

Mestas v. Air & Liquid Sys. Corp., Civil Action No. 18-cv-01006-RM-NYM, 2019 WL 1967129 (Jan. 29, 2019), *aff'd Mestas v. Air & Liquid Sys. Corp.*, Civil Action no. 18-cv-01006-RM-NYM, 2019 WL 1253683 (D. Colo. Mar. 19, 2019)

Plaintiffs alleged development of mesothelioma from take-home and direct exposure to asbestos. In the United States District Court for the District of Colorado, Plaintiffs alleged Defendants were liable based upon products liability, breach of express and implied warranty, and negligence. Defendants moved to dismiss all claims based on their allegations that (1) they owed no duty to Plaintiffs, (2) Plaintiffs were not end users of the product, and (3) Plaintiffs were not married to support loss of consortium claims.

The District Court denied, in part, and granted, in part, the motion. While Colorado state courts had not resolved when a manufacturer, supplier, or employer owes an individual subject to take-home asbestos exposure any duty either in negligence or products liability, the District Court denied the motion as to negligence and products liability claims because a duty may exist depending on the foreseeability of Plaintiffs being subjected to take-home asbestos exposure—which was a question of fact outside of the scope of a motion to dismiss for failure to state a claim. With breach of warranty claims, the District Court granted the motion as to a number of Defendants who did not manufacture the products at issue involved with the direct exposure. Finally, the District Court denied the motion as to loss of consortium claims because a reference in the Complaint to Plaintiffs as spouses was sufficient to survive a motion to dismiss.

Defense lawyers practicing in asbestos litigation should take heed of the District Court's analysis with respect to take-home asbestos exposure and the potential expansion of a duty of care to manufacturers, suppliers, and/or employers. The District Court's determination that the touchstone of analysis is foreseeability, which it deemed a question of fact, no doubt affects summary judgment in future cases involving these issues.

4. Protective Orders

Shaw v. Shandong Yongsheng Rubber Co. Ltd., Civil Action No. 1:18-cv-00867-RM-SKC, 2019 WL 5593305 (D. Colo. Oct. 30, 2019)

Plaintiff alleged she suffered personal injuries from a motor vehicle accident which was caused by the failure and tread separation of a tire manufactured and distributed by Defendants. In the United States District Court for the District of Colorado, Plaintiff contended Defendants were liable based upon products liability. In the process of submitting a stipulated protective order to the District Court, the parties disagreed over specific provisions of the proposed order and submitted the dispute to the District Court for resolution.

The District Court entered the protective order agreeing with Defendants as to all provisions at issue. First, Plaintiff could not make a showing for the necessity of a sharing provision which would have allowed her to disseminate confidential information to any attorneys handling claims or legal proceedings involving a substantially similar tire. Second, Plaintiffs' proposed provision to further limit—beyond the proposed limitation in Defendants' proposed provision—the sharing of her private health information denied Defendants the opportunity to use confidential information to assess and evaluate Plaintiff's claims and was unnecessary in light of statutory protections from HIPAA. Third, Plaintiff's redundant provision from the local rules regarding filing protected information with the District Court was confusing. Fourth, Plaintiff's exception to a standard "return after litigation" provision would strip the provision of any meaning and render the provision superfluous. And finally, Plaintiff's proposed provision that would deem protected documents as authentic copies of business records if produced and designated as protected was neither necessary nor useful and Plaintiff could provide no stipulated exemplar protective order with such a provision.

With the prevalence of protective orders, defense lawyers should consult with this case when plaintiffs seek to add overly broad or unnecessary provisions to protective orders. Particularly helpful in this case is the limitation on sharing private health information, which the District Court held denied Defendants' the opportunity to meaningfully evaluate the case. This reasoning should be used where plaintiffs seek to restrict defendants' ability to share information to their clients to evaluate cases.

Strough v. Gen. Motors LLC, Civil Action No. 18-cv-03303-PAB-NRN, 2019 WL 2357306 (D. Colo. June 4, 2019)

Plaintiff alleged Decedent died from a single roll-over accident where Decedent was ejected from the vehicle. In the United States District Court for the District of Colorado, Plaintiff alleged Defendant was liable

based upon products liability. A protective order was entered by the District Court but Plaintiff requested the protective order be modified or revised to include a sharing provision.

The District Court denied the motion. The District Court agreed with Defendants that an unfettered sharing provision as proposed by Plaintiff was an improper attempt to provide a strategic discovery benefit to counsel and litigants in future cases against Defendants and had no bearing on discovery in the case. Moreover, Plaintiff provided no evidence of the number of rollover accident deaths involving similar facts or that there are a multitude of similar cases across the country involving the same technology or design.

This case's analysis of the need for a sharing provision should be readily referred to by defense lawyers. Unless plaintiffs can show claims or legal proceedings involving substantially similar facts, sharing provisions are not necessary and defense lawyers should fight to keep them out of protective orders.

C. United States District Court for the District of Kansas

1. Remand

Schehrer v. Smith & Nephew, Inc., Case No. 19-2003-JWL, 2019 WL 1002419 (D. Kansas Mar. 1, 2019)

Plaintiff alleged she suffered harm resulting from the implantation of a particular medical device in her hips in two surgeries. In Kansas state court, Plaintiff alleged Defendants were liable based upon negligence, negligent misrepresentation, violations of the Kansas Consumer Protection Act, products liability, and breach of express and implied warranties. Defendants removed the case to the United States District Court for the District of Kansas on the basis of diversity jurisdiction. Defendants filed a motion requesting a stay of proceedings until the issue of the transfer to the MDL has been decided by the Judicial Panel on Multidistrict Litigation. To the contrary, Plaintiff moved to remand the case back to state court based on a lack of diversity jurisdiction.

The District Court denied Defendants' motion to stay and granted Plaintiff's motion to remand. There was no diversity of citizenship and Defendants could not establish fraudulent joinder as to non-diverse defendants because it failed to show that there is no possibility that Plaintiff could establish a cause of action against the non-diverse defendants in Kansas state court. Due to the lack of jurisdiction, the District Court exercised its discretion to deny the motion for a stay in order to avoid any unnecessary delay before the MDL court could consider the issue of its jurisdiction in the case.

This case highlights the difficulties in arguing for fraudulent joinder in response to a motion to remand. Where the law could arguably support a plaintiff's claims against a non-diverse defendant, assuming all legal and factual issues are decided in her favor, fraudulent joinder will be almost impossible to prove. Moreover, the case highlights how reluctant federal courts are to stay litigation when subject matter jurisdiction is being challenged.

2. Amending Complaint

Knobbe v. Deere & Co., Case No. 19-1248-EFM-ADM, 2019 WL 6307723 (D. Kansas Nov. 25, 2019)

Plaintiff alleged he suffered property damage arising out a fire. In Kansas state court, Plaintiff alleged Defendants were liable based upon negligence, products liability, and breach of warranty. Defendant removed the case to the United States District Court for the District of Kansas and moved to dismiss for failure to state a claim. However, Plaintiff moved to amend his complaint to reframe his causes of actions under the Kansas Product Liability Act in light of the Kansas Supreme Court's clarifying that the economic loss doctrine does not bar a plaintiff from recovering for property damage, including damage to the product at issue, on product liability claims.

The District Court granted Plaintiff's motion to amend his complaint, in part, to reframe his claims under the Kansas Product Liability Act. However, the District Court denied Plaintiff the opportunity to seek damages for tow services and farm labor at the time because he needed to come up with an alternative claim to support those damage theories. That being said, the District Court held Plaintiff could seek leave to amend to claim these types of damages at a later date if and when he was prepared to assert theories of recovery that would support these types of damages.

Defense lawyers should be aware of the Kansas Supreme Court's decision regarding property damage being recoverable in product liability actions in Kansas. The viability of the economic loss doctrine in Kansas is up in the air. As litigants continue to test the boundaries of the Kansas Supreme Court's decision, defense lawyers should be prepared to argue that other economic damages not for property damage, are unrecoverable.

Bratcher v. Biomet Orthopedics, LLC., Case No. 19-cv-4015-SAC-TJJ, 2019 WL 2342976 (D. Kansas June 3, 2019)

Plaintiffs alleged they suffered injuries from the failure of metal-on-metal hip implant systems. In the United States District Court for the District of Kansas, Plaintiffs alleged Defendants were liable based upon products liability, negligence, breach of implied and express warranties, violation of the Kansas Consumer Protection Act, and loss of consortium. Plaintiffs moved to amend their complaint to add a claim for punitive damages and add a new defendant.

The District Court granted the motion. The only objection to the motion was from the defendant to be added, on the basis that there would not be a basis for personal jurisdiction over it so the amendment to Plaintiff's complaint would be futile. The District Court concluded that the proposed amendment would not futile. Plaintiffs should be afforded the opportunity to offer evidence to support their allegations. And this new defendant suffered no prejudice from the amendment.

Unfortunately, this decision again illustrates the liberality with which amendments to complaints will be granted to litigants. Prospective defendants facing such amendments should reconsider whether opposing the amendment before it occurs is really prudent. Rather, it may be more beneficial to move to dismiss post-amendment.

3. Preemption

Frontier AG, Inc. v. Nuseed Americas Inc., Case No. 18-2352-DDC-TJJ, 2019 WL 3219334 (D. Kansas July 17, 2019)

Plaintiff alleged sunflower seeds failed to germinate at their expected rate. In the United States District Court for the District of Kansas, Plaintiff alleged Defendant was liable based upon negligence, products liability, breach of express warranty and the implied warranty of fitness and merchantability, and misrepresentation. Defendant moved to dismiss all of Plaintiff's claims except breach of express warranty.

The District Court granted the motion. As to negligence, products liability, and misrepresentation, the District Court held Plaintiff failed to plead its various tort theories as a single action under the Kansas Product Liability Act and the Federal Seed Act did not preempt the Kansas Product Liability Act's consolidation of tort claims, arising from defects in seeds, into a single products liability action. Moreover, Plaintiff's property damage allegation could not stand alone because the Kansas Product Liability Act embraced it and, regardless, Plaintiff did not suffer the property damage alleged in the complaint, others did. And as to breach of the implied warranty of fitness and merchantability, the District Court held there was no requisite privity of contract between Plaintiff and Defendant.

This decision provides a strong analysis of the Kansas Product Liability Act's consolidation provision. Where plaintiffs asserting product liability claims attempt to splinter their cause of action while contemporaneously asserting product liability claims, defendants should argue against such efforts based on the Kansas Product Liability Act's consolidation provision.

Watson v. Mylan Pharms., Inc., Case No. 18-04137-CM-JPO, 2019 WL 3252745 (D. Kansas July 18, 2019), *appeal filed Watson v. Mylan Pharms.,* Case No. 19-3162 (10th Cir. Aug. 5, 2019)

Plaintiff, proceeding *pro se*, alleged she was injured from the use of an FDA-approved generic of the anti-acne drug, Accutane. In the United States District Court for the District of Kansas, Plaintiff alleged Defendants were liable based upon products liability, negligence, and breach of express and implied warranty. Defendants moved to dismiss for failure to state a claim, arguing Plaintiff's claims were preempted, barred by claim preclusion, and inadequately pleaded. Plaintiff moved to strike Defendants' motion to dismiss, for default judgment against Defendants, and both objected to and moved to vacate the magistrate judge's order staying discovery.

As to Plaintiff's motions, the District Court first denied Plaintiff's motion for default judgment as Defendants filed their motion to dismiss within 60 days of their waiver of service. Second, the District Court denied Plaintiff's motion to strike Defendants' motion to dismiss because it was improperly raised in a reply brief and the facts did not warrant such a drastic and disfavored remedy. Third, the District Court overruled Plaintiff's objection to, and motion to vacate, the magistrate judge's order staying discovery because the magistrate judge, who properly had the power to stay discovery, made no error in so doing.

Contrary to Plaintiff's motions, the District Court granted Defendant's motion to dismiss. To begin with, Plaintiff's claims were barred by claim preclusion because Defendants were identical to, or in privity with, defendants in the original final judgment from a previous lawsuit against these Defendants filed by Plaintiff and Plaintiff's current claims arose from the same transaction. Moreover, Plaintiff's claims were barred by the two-year statute of limitations in the Kansas Product Liability Act because she had an actionable injury well over two years before the instant action. Finally, Plaintiff's claims under federal law for alleged violations of the Food Drug and Cosmetic Act were preempted.

With respect to Plaintiff's various motions, the case provides defense lawyers with a reminder that *pro se* litigants' failure to adhere to the rules can be grounds for denying their requested relief. Additionally, with respect to claim preclusion, the case illustrates how privity can exist between corporate defendants and its executives, and that such privity can further extend to other parties based on the close relationships and similar litigation interests.

Brooks v. Mentor Worldwide, LLC, Case No. 19-2088-KHV, 2019 WL 4628264 (D. Kansas Sept. 23, 2019), *appeal filed Brooks v. Mentor Worldwide, LLC*, Case No. 19-3240 (10th Cir. Oct. 24, 2019)

Plaintiffs alleged they suffered injuries from silicone breast implants. In the United States District Court for the District of Kansas, Plaintiffs alleged Defendants were liable based upon products liability, negligence, and negligence *per se*. Defendants moved to dismiss for failure to state a claim.

The District Court granted the motion. The District Court held that the Medical Device Amendments to the federal Food Drug and Cosmetic Act either expressly or impliedly preempted all of Plaintiffs' claims. Plaintiff either advanced claims that would add to the federal requirements (which the MDA expressly preempts), or were based on violations of federal law, not state law (which the MDA impliedly preempts).

Defense lawyers defending clients with products subject to the MDA should be aware of the preemptive scope of the MDA and be prepared to argue that plaintiffs are asserting claims which would add to the federal requirements. Moreover, defense lawyers in these situations should confirm that federal law does not

supply the basis for any purported violations for which plaintiffs are seeking damages. If it does, defense lawyers should seek dismissal on the basis of implied preemption.

4. Staying Discovery

Gale v. Mentor Worldwide, LLC, Case No. 19-cv-2088-KHV-TJJ, 2019 WL 2567790 (D. Kansas June 21, 2019)

Plaintiffs alleged they suffered personal injuries from the use of silicone breast implants. In the United States District Court for the District of Kansas, Plaintiffs alleged Defendant was liable based upon negligence and products liability. Defendant moved to stay discovery and all other Federal Rule of Civil Procedure 26 activities until its motion to dismiss for failure to state a claim was resolved.

The District Court granted the motion. Although Defendant made no showing that discovery would be wasteful and burdensome, the District Court recognized the expense and complexity that discovery in this case could involve. And if Defendant's motion to dismiss was granted, the parties would have incurred unnecessary expense.

The District Court's recognition that the expense and complexity of discovery in the case would be wasteful if the motion to dismiss was ultimately granted is helpful to defense lawyers with clients in similar predicaments. Defense lawyers should strive to make painstakingly clear to courts how unnecessary costs will be if discovery takes place prior to ruling on a motion to dismiss.

D. United States District Court for the District of New Mexico

1. Personal Jurisdiction

Schmidt v. Navistar, Inc., 18cv321 KG/KBM, 2019 WL 1024285 (D.N.M. Mar. 4, 2019) *appeal filed Navistar v. Schmidt*, Case No. 19-701 (10th Cir. June 3, 2019)

Plaintiff alleged Decedent died in a single-vehicle rollover. In New Mexico state court, Plaintiff alleged Defendants were liable based upon negligence, products liability, and breach of implied warranty of merchantability. Defendants removed the case to the United States District Court for the District of New Mexico on the basis of diversity of citizenship. Thereafter, Defendants moved to dismiss based on issue preclusion and, alternatively, lack of personal jurisdiction.

The District Court denied the motion. With respect to issue preclusion, the personal representative of the wrongful death estate was not a party to the prior action involving Decedent's daughter (in which an order stated personal jurisdiction over Defendants was improper) and no exceptions to the general rule of issue preclusion (issue preclusion cannot bar the claims of a party that did not have a full and fair opportunity to litigate the claims, *i.e.*, was not a party to the prior action) applied. Regarding personal jurisdiction, Defendants consented to general personal jurisdiction in New Mexico by registering to transact business in New Mexico and by maintaining its registration under the New Mexico Business Corporation Act and consent by registration remains constitutionally valid.

This case provides two very important lessons to defense lawyers. First, a deceased person's estate and his or her family members may not be the same party for purposes of issue preclusion. Defense lawyers should take effort to confirm same prior to moving to dismiss on that ground. Second, general personal jurisdiction in New Mexico can be obtained by registering to do business there. In the continuing evolution of personal jurisdiction, defense lawyers should advise their clients on consent by registration in the event personal jurisdiction is to be had in future litigation.

Kellogg-Borchardt v. Mazda Motor Corp., 1:18-cv-01105-JHR-KK, 2019 WL 2189527 (D.N.M. May 21, 2019)

Plaintiffs alleged injuries from an automobile accident. In New Mexico state court, Plaintiffs alleged Defendant was liable based upon products liability, negligence, breach of implied warranty of merchantability, and loss of consortium. Defendant removed the case to the United States District Court for the District of New Mexico. Thereafter, Defendants moved to dismiss for lack of personal jurisdiction.

The District Court granted the motion. Defendant's contacts with the forum state were not of a character to warrant the exercise of general personal jurisdiction. As to specific personal jurisdiction, Defendant did not sufficient minimum contacts with New Mexico. Evidence did not bear out that Defendant purposely directed its activities at New Mexico residents. Jurisdictional discovery was denied as Plaintiffs did not articulate with specificity what facts could be obtained through jurisdictional discovery or how such facts would prevent prejudice to them.

As has been the case throughout these summaries, this case shows how the District Court is handling personal jurisdiction after *Bristol-Myers Squibb Co. v. Superior Court of Cal.* Defense lawyers with clients in New Mexico should use this decision, in connection with the preceding cases, in deciding whether they have a valid personal jurisdiction defense.

2. Remand

Schmidt v. Reinalt-Thomas Corp., Civ. No. 18-CV-845-JAP-KBM, 2018 WL 6002394 (D.N.M. Nov. 14, 2018)

Plaintiff alleged Decedent died from a roll-over accident that took place in New Mexico, allegedly caused by a defective tire. In New Mexico state court, Plaintiff claimed Defendants were liable based upon negligence, breach of warranty, products liability, and New Mexico's Unfair Practices Act. Defendants removed the case to the United States District Court for the District of New Mexico on the basis of diversity of citizenship. Plaintiff moved to remand.

The District Court granted Plaintiff's motion to remand. Although Defendants' removal to the District Court was timely (based on recently discovered evidence of citizenship), the District Court found there was not diversity of citizenship. While Decedent was a resident of Arizona who had been in the process of moving to Wisconsin when he died, Decedent did not physically take up residence in a new domicile because he never made it to Wisconsin. Considering the presumption in favor of Decedent's established domicile and resolving all doubts against removal as it must do, the District Court concluded Defendants did not met their burden to prove jurisdiction by a preponderance of the evidence, and therefore the case was remanded to state court.

This case highlights the niche rule in personal jurisdiction dealing with the changing of domiciles for personal jurisdiction. Defense lawyers with clients moving between states should use this decision in deciding whether they have a valid personal jurisdiction defense.

Sleep v. Schwan's Co., Civ. No. 19-137 GJF/JHR, 2019 WL 2124468 (D.N.M. May 15, 2019)

Plaintiff alleged she suffered personal injuries from a nail allegedly found in a frozen pizza she purchased. In New Mexico state court, Plaintiff alleged Defendants were liable based upon products liability, negligence, and bad faith insurance practices. After all Defendants answered, Plaintiff sent a demand package, which included information about her intent to add additional claims as well as a discussion regarding the value of the claim. Defendants received the demand package on January 17, 2019. Believing that the demand package established federal diversity jurisdiction, Defendants removed the case to the United States District Court for the District of New Mexico on February 19, 2019. Plaintiff moved to remand.

The District Court denied the motion. The District Court held Defendants timely removed the matter within the 30-day limitation dictated by the Federal Rules of Civil Procedure (including additional time for a holiday and the deadline landing on a weekend). Concluding removal was timely, the District Court also concluded removal was proper. There was diversity of citizenship and the amount in controversy exceeded $75,000. While Plaintiff asserted in her complaint that the amount in controversy did not exceed $75,000, her efforts were effectively foiled, however, when she later sent a settlement demand package to Defendants on January 16, 2019 stating, *inter alia*, damages may exceed $75,000.

The case stands as a strong reminder to defense lawyers that cases which were not previously removable to federal court may eventually be so. Here, the fact that Plaintiff stated in a settlement demand package that damages exceeded $75,000 was sufficient to establish the amount in controversy, despite pleadings otherwise. Should defense lawyers receive similar indications that the amount in controversy will exceed $75,000, despite plaintiffs pleading otherwise, they should analyze whether their cases are removable to federal court.

Swanson v. JSR Trucking Inc., Civ. No. 19-65 MV/GBW, 2019 WL 2121364 (D.N.M. May 15, 2019) *aff'd Swanson v. JSR Trucking Inc.*, No. 19-CV-65 MV/GBW, 2019 WL 2392909 (D.N.M. June 6, 2019)

Plaintiff alleged he suffered personal injuries falling from the side stairs of a semi tractor-trailer. In New Mexico state court, Plaintiff alleged Defendant were liable based upon products liability, negligence, and breach of implied warranty of merchantability. Defendant timely removed the case to the United States District Court for the District of New Mexico. However, a co-defendant had not answered or otherwise appeared in the action (in fact, it was in default), nor had it consented to removal despite being served prior to removal. Plaintiff moved to remand.

The District Court granted Plaintiff's motion. Consent from all defendants was required to properly remove. And no exceptions to this general rule applied. The co-defendant was neither a nominal or formal party and it was not improperly joined or served. Moreover, the fact that the co-defendant was in default was irrelevant and, even if it had relevance, Defendant never attempted to contact or communicate with the co-defendant in an effort to obtain its consent prior to removing the action in spite of said default.

Before filing for removal, defense lawyers are reminded to seek consent from co-defendants. The narrow grounds for lack of consent are difficult to meet, and if not met, are likely fatal to removal. Nevertheless, if it appears unlikely that such consent can be obtained, efforts to obtain consent should be undertaken as it might provide defense lawyers with an argument for a different exception to the general rule.

3. Failure to State a Claim

Nowell v. Medtronic Inc., 372 F. Supp. 3d 1166 (D.N.M. 2019) *appeal filed Nowell v. Covidien*, Case No. 19-2073 (10th Cir. Apr. 30, 2019)

Plaintiff alleged she suffered injuries from repair of her hernia. In the United States District Court for the District of New Mexico, Plaintiff alleged Defendants were liable based upon negligence, products liability, and breaches of express and implied warranties. Defendants moved to dismiss for failure to state a claim.

The District Court granted Defendants motion. Plaintiff's claims were untimely per the statute of limitations. The District Court concluded that Plaintiff's factual allegations in her complaint lacked sufficient specificity as to: (1) causation as to her negligence claim; (2) specific defect for her products liability claims; (3) existence of a feasible alternative design; (4) affirmations or representations for her express warranty claim; (5) defects that rendered Defendants' product sufficiently unfit for its particular purpose or sufficiently unmerchantable for her breach of implied warranty claim; and (6) conduct maliciously, intentionally, fraudulently, oppressively, recklessly, or wantonly offended Plaintiff's rights for punitive damages.

The case provides defense lawyers with a detailed analysis of the discovery rule to the statute of limitations in New Mexico. Defense lawyers should always be keen on establishing when plaintiffs become aware of their injuries to argue for application of the statute of limitations.

Derrick v. Standard Nutrition Co., No. CIV 17-1245 RB/SMV, 2019 WL 2024960 (D.N.M. May 8, 2019) *reh'g denied Derrick v. Standard Nutrition Co.*, No. CIV 17-1245 RB/SMW, 2019 WL 2717150 (D.N.M. June 28, 2019)

Plaintiffs alleged their horses were injured and died from monensin-contaminated feed manufactured and sold by Defendant. In the United States District Court for the District of New Mexico, Plaintiff alleged Defendant was liable based upon absolute liability, products liability, negligence, negligence per se, breach of contract, breach of warranties, negligent infliction of emotional distress, outrage, cruelty to animals, unfair, deceptive, and unconscionable trade practices under New Mexico's Unfair Practices Act, fraud and misrepresentation, vicarious liability, and negligent hiring, management, and supervision. Both Plaintiffs and Defendant moved for summary judgment on a variety of claims. Defendant also moved to exclude the testimony of Plaintiff's expert.

The District Court granted Defendant's motion for summary judgment in part, granted Defendant's motion to exclude Plaintiff's expert, and denied Plaintiffs' motion for partial summary judgment. The District Court excluded Plaintiffs' expert because Plaintiffs failed to comply with the relevant rules regarding the disclosure of experts. Regarding Defendant's summary judgment motion, Plaintiffs did not provide expert testimony that monensin exposure caused injuries and/or death to their horses (since Plaintiffs' expert was excluded). Therefore, Plaintiffs' claims for negligence, negligence *per se*, products liability, breach of implied warranty, and breach of contract were due to be dismissed.

Plaintiffs' cause of action for cruelty to animals was not viable as the statute did not authorize a private right of action. As to negligent infliction of emotional distress, Plaintiffs could not direct the Court to authority that would allow for damages where the victims were animals. Finally, the Court denied the parties' summary judgment motions as to fraud, misrepresentation, and unfair, deceptive, and unconscionable trade practices under the New Mexico Unfair Practices Act because fact issues remained.

Defense lawyers should use this case for support in cases where expert evidence is not timely disclosed and seek sanctions for dismissal. The District Court's exclusion of Plaintiffs' key witness came after Plaintiffs sought to have their key witness testify about matters not contained in the disclosure and obtained months after his deposition, the close of discovery, the dispositive motions deadline, and less than two months before trial was scheduled. This serves as a strong reminder to litigants that timely disclosure of expert materials is necessary, otherwise they risk losing critical pieces in their cases.

Aguirre v. Atrium Med. Corp., No. 2:18-cv-0153-WJ-GBW, 2019 WL 2210801 (D.N.M. May 22, 2019)

Plaintiff alleged she was injured by a product that was used to repair her hernia. In the United States District Court for the District of New Mexico, Plaintiff alleged Defendants were liable based upon negligence, products liability, and breach of express and implied warranty. Defendants moved to dismiss.

The District Court granted Defendants' motion in part. Some Defendants were dismissed for lack of personal jurisdiction. There were no facts to support the exercise of general personal jurisdiction or specific personal jurisdiction over these Defendants.

The District Court refused to dismiss Plaintiff's tort and express warranty claims as time barred because it was not clear on the face of the complaint that her claims ran afoul of them. However, her implied warranty claim was time-barred. The District Court further denied Defendants' motion as to Plaintiff's

product liability claims because Plaintiff had stated facts in support of them and Defendants provided no support for their allegation that the product at issue was incapable of being made safe.

The case provides defense lawyers with an example of the difficulties in obtaining dismissal for failure to state a claim merely at the outset of the case. Unless it is clear on the face of the complaint that the statute of limitations bars the claims, it will be treated as a factual dispute to be addressed via summary judgment or at trial.

4. Amending Complaint

Munoz v. FCA US LLC, No. 1:17-cv-00881-WJ-SCY, 2019 WL 3007095 (D.N.M. July 10, 2019)

Plaintiff alleged he suffered personal injuries from the apparent failure of an airbag to deploy during a car accident. In the United States District Court for the District of New Mexico, Plaintiff alleged Defendants were liable based upon products liability. Plaintiff sought leave to file a fourth amended complaint. Defendants moved to strike Plaintiff's expert report and disclosures.

The District Court denied Plaintiff's motion. Evidence presented showed that Plaintiff knew of the facts which he sought to add to his complaint before filing his original complaint and Plaintiff did not file a reply or give an explanation for failing to include these allegations. Thus, the failure to plausibly explain the undue delay justified denying the motion to amend.

The District Court also denied, in part, and granted, in part, Defendants' motion. The District Court refused to strike Plaintiff's expert report because the report was a complete statement of the opinions the witness intended to give. To the extent the report did not address information necessary for Plaintiff's claims, same was a matter to be addressed via summary judgment or trial, not a motion to strike. As to Plaintiff's treating physician expert disclosures, the District Court agreed that the disclosures were deficient and did not comply with Federal Rule of Civil of Procedure 26. Nevertheless, the District Court held the deficiency was harmless and ordered Plaintiff to amend his expert disclosures to comply with the Rule.

The case reminds defense lawyers that, even though amendments are liberally permitted to the complaint, that liberality has a limit. It exists where plaintiffs seek to amend the complaint to include information known at the time of filing the complaint without justification for the delay. With respect to expert disclosures, the decision shows that technical deficiencies in expert disclosures will likely be permitted to be cured so long as the opposing party has not been prejudiced.

E. United States District Court for the Northern District of Oklahoma

1. Corporate Successor-Liability

Sowell v. Bourn & Koch, Inc., Case No. 18-CV-0320-CVE-FHM, 2019 WL 3850526 (N.D. Okla. Aug. 15, 2019)

Plaintiff alleged he suffered injuries from an allegedly defective machine used for cutting metal. In Oklahoma state court, Plaintiff alleged Defendant was liable based upon negligence and products liability. Defendant removed the case to the United States District Court for the Northern District of Oklahoma. Defendant moved for summary judgment. Plaintiff and Defendant also moved to exclude each other's experts.

The District Court granted Defendant's motion for summary judgment, mooting the competing exclusionary motions. The District Court held Defendant, as a corporate successor, did not owe Plaintiff a continuing duty to warn of a defective product post-sale. Moreover, with respect to product liability claims, the District Court held Defendant did not impliedly assume liability in the acquisition of the manufacturer/designer. In interpreting Defendant's acquisition agreement of the manufacturer/designer under Ohio law

(per the acquisition agreement's choice of law clause), the corporate successor was not responsible merely by acquiring the company's assets. Were Plaintiff to prevail, every company that failed to include an express liability clause would impliedly assume liability.

Similar to preceding cases, this case stresses that defense lawyers should be keen to analyze the various laws possibly implicated for every case. Defense lawyers should resort to conflict of law analysis when appropriate because same can result in application of laws that are favorable to clients from the outset of a case.

2. Economic Loss Doctrine

Great Divide Ins. Co. v. Kimble Mixer Co., Case No. 18-CV-0428-CVE-FHM, 2019 WL 2167412 (N.D. Okla. May 17, 2019)*, aff'd on other grounds*, *Great Divide Ins. Co. v. Kimble Mixer Co.,* Case No. 18-CV-0428-CVE-FHM, 2019 WL 2372604 (N.D. Okla. June 5, 2019)

Plaintiff alleged it suffered property damage when a truck caught fire while being operated. In Oklahoma state court, Plaintiff alleged Defendant was liable based upon negligence and breach of warranty. Defendants removed the case to the United States District Court for the Northern District of Oklahoma. Defendants moved to dismiss.

The District Court partially granted the motion. With respect to negligence claims, the District Court held the entire truck, including its engine, constituted the "product" for purposes of the economic loss rule and, therefore, Plaintiff's negligence claims were barred by the economic loss rule. Regarding Plaintiff's breach of warranty claim, the District Court held the breach of warranty claims were time barred because the statute of limitation period began accruing at the time of tender of delivery—the warranties did not extend to future performance.

Defense lawyers should be aware of efforts to circumvent the economic loss doctrine by arguing that the damage was to a component part of the product, and the product as a whole is a separate product. This case provides defense lawyers with a detailed analysis on the issue.

F. United States District Court for the Western District of Oklahoma

1. Exclusion of Experts

Harris v. Remington Arms Co., LLC, 398 F. Supp. 3d 1126 (W.D. Okla. 2019)

Plaintiffs alleged personal injuries when a rifle discharged as they were climbing into an elevated tree stand. In the United States District Court for the Western District of Oklahoma, Plaintiff alleged Defendant was liable based upon products liability. Defendant moved for summary judgment, to exclude the opinion testimony of Plaintiffs' liability expert, and to strike the new affidavit of Plaintiffs' expert.

The District Court granted the motions. Plaintiffs' expert presented a new opinion establishing causation not previously disclosed. Moreover, Plaintiffs did not shown a substantial justification for, or the harmlessness of, their tardy disclosure as required by Federal Rule of Civil Procedure 37(c)(1) to avoid harsh sanctions. Therefore, the District Court held Plaintiffs could not rely on their expert's new opinion as required to prevail on their products liability claims. As a result, the District Court held Plaintiffs' claims could not survive.

As indicated in previous summaries, this decision also stresses the importance of timely and proper supplemental expert evidence. Failure to adhere to the rules can result in categorical exclusion of the supplementation, which can be lethal for the expert's opinions. Defense lawyers should scrupulously review opposing counsel's expert evidence supplementation and consult with this opinion—and potentially move for the

supplementation to be struck—if it appears the supplementation is unjustified. Lastly, this opinion illustrates how easily claims can fall when expert evidence is excluded.

2. Failure to State a Claim

Mears v. Astora Women's Health, LLC, Case No. CIV-18-1091-R, 2019 WL 1590592 (W.D. Okla. Apr. 12, 2019)

Plaintiffs alleged personal injuries from the use of a pelvic mesh product. In the United States District Court for the Western District of Oklahoma, Plaintiffs alleged Defendants were liable based upon negligence, products liability, and breach of warranty, among other causes of action. Defendants moved to dismiss for failure to state a claim.

The District Court granted Defendants' motion in part and denied the remainder. Plaintiffs conceded Oklahoma's Consumer Protection Act did not apply so that claim was dismissed. They also conceded fraudulent concealment was not an independent cause of action under Oklahoma law, so that claim was dismissed. Finally, the District Court dismissed Plaintiffs' negligent infliction of emotional distress claim because same is not an independent tort in Oklahoma and Plaintiffs had already pled negligence separately. The District Court refused to dismiss the remaining claims because they were sufficiently pled and/or constituted factual issues not properly addressed with a motion for failure to state a claim.

This decision's holdings with respect to fraudulent concealment and negligent infliction of emotional distress are helpful to members of the defense bar. As they are not viable independent claims, defense lawyers should be on the lookout for such claims to argue for their dismissal.

Pando v. Barberwind Turbines, LLC, CIV-17-1062-R, 2019 WL 3806634 (W.D. Okla. Aug. 13, 2019)

Plaintiff alleged personal injuries when a wind turbine he was dismantling collapsed. In the United States District Court for the Western District of Oklahoma, Plaintiff alleged Defendant was liable based upon negligence and products liability. Defendant impleaded Third-Party Defendant on the basis of common law and statutory indemnity because Third-Party Defendant manufactured, fabricated, and/or assembled various parts of the wind turbine. Third-Party Defendant moved to dismiss for failure to state a claim.

The District Court denied the motion. While Defendant conceded its claim was limited only to statutory indemnity, the District Court held dismissal was not appropriate at this stage as it was without information to substantiate whether Defendant designed the turbine, or components thereof—which, if it did, would not entitle it to statutory indemnity per Oklahoma statute.

The case provides defense lawyers with yet another example of the difficulties in obtaining dismissal for failure to state a claim merely at the outset of the case. Unless it is clear on the face of the complaint, the issue will be treated as a factual dispute to be addressed at a later point.

AMC West Housing LP v. Nibco, Inc., Case No. CIV-18-959-D, 2019 WL 4491331 (W.D. Okla. Sept. 18, 2019)

Plaintiff alleged damages from the purchase and installation of allegedly defective plumbing products in homes it owned and managed. In the United States District Court for the Western District of Oklahoma, Plaintiff alleged Defendant was liable based upon negligence, products liability, breach of express and implied warranty, deceptive trade practices, and fraud. Defendant moved to dismiss for failure to state a claim.

The District Court granted the motion without prejudice to Plaintiff's right to amend its complaint. Plaintiff was admittedly aware of a problem with the plumbing products at least eight years prior. Plaintiff's purported failure to know the exact cause of the leaks was insufficient to toll the statute of limitations. Nor did Defendant fraudulently conceal the facts necessary to file a lawsuit prior to the statute limitations. Instead,

Plaintiff's own failure to exercise diligence in pursuing its claims against Defendant caused the filing to occur after the statute of limitations. Although amendment could be futile, the District Court stated it was unwilling at that point to hold Plaintiff was unable to state a claim upon which relief may be granted.

While exemplifying the liberality with which amendments to complaints will be granted, this decision nevertheless provides detailed analysis on the discovery rule to statutes of limitations. Also, defense lawyers should refer to this decision's analysis of fraudulent concealment, which indicates that, while a defendant may conceal facts from a plaintiff, if those acts do not actually prevent that plaintiff from discovering the cause of its injury, fraudulent concealment will be inapplicable.

3. Personal Jurisdiction

Cagle v. Rexon Indus. Corp., Ltd., Case No. CIV-18-1209-R, 2019 WL 1960360 (W.D. Okla. May 2, 2019)

Plaintiff alleged he suffered personal injuries using a portable table saw. In the United States District Court for the Western District of Oklahoma, Plaintiff alleged Defendant was liable based upon products liability. Defendant moved to dismiss for lack of personal jurisdiction, insufficient service of process, and failure to state a claim.

The District Court granted the motion on the ground that it lacked personal jurisdiction over Defendant. The District Court found only three potential contacts with Oklahoma: the saw itself, Defendant's website, and Defendant's customer service telephone number. But the saw was sold to an intermediary not located in Oklahoma, which does not represent an act purposefully directed at Oklahoma. And to the extent the District Court was even willing to assume that the website and telephone number count as forum contacts, they were wholly irrelevant to Plaintiff's claim.

This decision's analysis of personal jurisdiction should be helpful to defense lawyers representing clients who distribute and market products nationally, despite not directing any of its efforts at the forum state. The case continues to provide insight into how personal jurisdiction is handled by lower courts after *Bristol-Myers Squibb Co. v. Superior Court of Cal.*

Pando v. Barberwind Turbines, LLC, CIV-17-1062-R, 2019 WL 3806635 (W.D. Okla. Aug. 13, 2019)

Plaintiff alleged personal injuries when a wind turbine he was dismantling collapsed. In the United States District Court for the Western District of Oklahoma, Plaintiff alleged Defendant was liable based upon negligence and products liability. Defendant moved to dismiss for lack of personal jurisdiction.

The District Court denied the motion. While most of Defendant's activities occurred in South Carolina, Defendant sent a representative to Oklahoma two times before the incident at the location where the turbine was construction to (1) get a better understanding of the scope of the project and determine if Defendant's services would be needed for future projects and (2) to inspect some broken welds. Combined with Defendant's knowledge that the parts it manufactured were to be used in a turbine in Oklahoma, the District Court held the exercise of specific personal jurisdiction was proper.

Contrary to the prior decision, this decision emphasizes that actions remotely related to the specific incident at issue can be sufficient for the exercise of personal jurisdiction. In analyzing whether a personal jurisdiction defense is available, defense lawyers should analyze all of their clients' forum-related contacts in connection with the manufacture of the product at issue to ascertain whether personal jurisdiction is proper.

4. Statute of Limitations

Odom v. Penske Truck Leasing Co., LP, Case No. CIV-16-442-PRW, 2019 WL 2358408 (W.D. Okla. June 4, 2019)

Plaintiffs alleged personal injuries from an accident caused in part by a defective height control valve on a trailer. In the United States District Court for the Western District of Oklahoma, Plaintiffs alleged Defendant was liable based upon negligence, products liability, and breach of warranty. Defendants moved to dismiss for failure to state a claim.

The District Court granted Defendant's motion. Plaintiff's tort claims for negligence and products liability were barred by Oklahoma's two-year statute of limitations. Plaintiffs brought claims against Defendant more than three years after the accident and outside of the statute of limitations. The fact that they had claims pending appeal against other defendants was irrelevant. With the breach of warranty claim, the District Court held Plaintiffs had not alleged sufficient facts to establish horizontal privity. Instead, the facts indicated Plaintiffs were not the purchaser of the trailer and, therefore, lacked horizontal privity with Defendant.

The decision reminds litigants that just because certain aspects of a case are pending appeal, does not mean that they are prevented from prosecuting claims against other litigants. Defense lawyers representing clients added to ongoing litigation should take note of the delay in their client being added and argue for claims to be time barred where applicable. The filing of the lawsuit does not toll the statute of limitations as it relates to litigants not involved in the ongoing litigation.

5. Intervention

Sinclair v. Hembree & Hodgson Const., L.L.C., Case No. CIV-18-938-D, 2019 WL 3755502 (W.D. Okla. Aug. 8, 2019) *rev'g Sinclair v. Hembree & Hodgson Const., L.L.C.*, Case No. CIV-18-938-D, 2019 WL 1179419 (W.D. Okla. Mar. 13, 2019)

Plaintiff alleged he suffered personal injuries from an automobile accident when two trucks collided at his work. In the United States District Court for the Western District of Oklahoma, Plaintiff alleged Defendant was liable based upon negligence and products liability. Plaintiff's employer's workers' compensation insurance carrier moved to intervene in the lawsuit. On March 13, 2019, the District Court denied intervention. The workers' compensation insurance carrier moved to reconsider.

The District Court granted the motion and overturned its previous decision. While it was unclear whether the Oklahoma Workers' Compensation Act required the workers' compensation insurance carrier to intervene to formally preserve its lien, it seemed impractical to the District Court to deny the motion to intervene. If it did, the Oklahoma Workers' Compensation Act would have allowed the workers' compensation insurance carrier to file a separate tort action. Intervention would avoid duplicative litigation involving the same subject matter. Finally, the workers' compensation insurance carrier demonstrated that its interest was possibly inadequately represented by Plaintiff. Thus, the District Court found that the workers' compensation insurance carrier had made the necessary minimal showing.

Defense lawyers should be aware of this decision as it relates to claims involving workers' compensation insurance carriers. It doesn't take much for a workers' compensation insurance carrier to show that its interests are inadequately represented by the plaintiff and, therefore, it will almost assuredly be permitted to intervene in the underlying litigation.

G. United States District Court for the District of Utah

1. Excluding Experts

Wells v. Kawasaki Motors Corp., U.S.A., Case No. 2:16-CV-01086-DN, 2019 WL 5842921 (D. Utah Nov. 7, 2019); *Wells v. Kawasaki Motors Corp., U.S.A.*, Case No. 2:16-CV-01086-DN, 2019 WL 5802637 (D. Utah Nov. 7, 2019)

Plaintiff alleged she suffered personal injuries during a trip to Lake Powell when she fell off the back of a personal watercraft. In the United States District Court for the District of Utah, Plaintiff alleged Defendants were liable based upon products liability, breach of warranty, and negligence. Defendants moved to exclude the proposed testimony of Plaintiff's expert witnesses regarding warning and design/negligence claims. Defendants also moved for summary judgment.

The District Court granted the motions. Plaintiff's warnings expert was not qualified and her opinions were unreliable as she had not published articles in the field of human factors engineering and, most importantly, she had not supported her opinion with any testing, *e.g.*, a survey of personal watercraft users. Plaintiff's design/negligence expert's opinions were also unreliable as they relied primarily on his own laboratory tests that had not been subjected to peer review, had no identified rate of error, and did not appear to be generally accepted throughout the applicable scientific community. Without expert testimony, the District Court held Plaintiff's claims were due to be dismissed.

This decision should be helpful to defense lawyers challenging expert witness evidence after *Daubert*. Specifically, the District Court's analysis of Plaintiff's experts' qualifications, coupled with the reliability of their opinions, provide defense lawyers with an example of how to successful argue for exclusion of expert witnesses.

2. Personal Jurisdiction

Spencer v. Delphi Auto. Sys., LLC, Case No. 2:16-cv-00427-DN-PMW, 2019 WL 1382285 (D. Utah Mar. 27, 2019)

In Utah state court, Plaintiff alleged Defendant was responsible for personal injuries based upon various product liability violations. Defendant removed the case to the United States District Court for the District of Utah. Thereafter, Defendant moved for summary judgment for lack of personal jurisdiction.

The District Court granted the motion. General personal jurisdiction was lacking as to Defendant because it was incorporated in Delaware, had its principal place of business in Michigan, and there was no evidence that Defendant's operations in Utah were so substantial as to render it at home in Utah. The same was true with specific personal jurisdiction. There was no evidence that Defendant had any contacts with Utah, performed any activity in Utah, or purposefully directed any activity at residents of Utah. Even if it did, there was still no evidence that Plaintiff's injuries arose out of Defendant's forum-related activities.

As with numerous other summaries regarding personal jurisdiction, this decision's analysis of personal jurisdiction is thorough and involved, and should be helpful to defense lawyers in support of a personal jurisdiction. And it offers another example as to how personal jurisdiction is handled by lower courts after *Bristol-Myers Squibb Co. v. Superior Court of Cal.*

Marocovecchio v. Wright Med. Grp., Inc., Case No. 2:18-cv-00274, 2019 WL 1406606 (D. Utah Mar. 28, 2019); *Fugal v. Wright Med. Grp., Inc.*, Case No. 2:18-cv-0367, 2019 WL 1406613 (D. Utah Mar. 28, 2019)

Plaintiffs in these two lawsuits alleged personal injuries arising out of hip replacement surgery with the Hip System. In the United States District Court for the District of Utah, Plaintiffs alleged WMG and WMT were liable for compensatory and punitive damages based upon products liability, negligence, misrepresentation, breach of express and implied warranties, fraudulent misrepresentation, and fraudulent concealment. WMG moved to dismiss for lack of personal jurisdiction. WMT moved (1) to dismiss for failure to state a claim as to all of Plaintiffs' claims except breach of implied warranties and (2) to strike Plaintiffs' demands for punitive damages and prejudgment interest.

The District Court granted the motions to dismiss for lack of personal jurisdiction. WMG did not design, market, or sell the hip system in the state of Utah, WMT did. There was no evidence WMT was a representative, agent, or the alter ego of WMG. Thus, Plaintiffs had not come forward with any evidence suggesting WMG had sufficient minimum contacts with Utah to exercise personal jurisdiction.

The District Court denied WMT's motion to strike and granted the motion to dismiss for failure to state a claim, in part. The District Court denied the motion to strike because punitive damages and prejudgment interest were not the proper subject of a motion to strike and, even if they were, Plaintiffs could be entitled to both based upon the facts alleged. Regarding the motion to dismiss, Plaintiffs' claims for products liability, negligent failure to recall/retrofit, breach of express warranty, fraudulent misrepresentation, and negligent misrepresentation were not adequately pled and granted this portion of the motion. However, the District Court provided Plaintiffs with leave to amend the complaints. Finally, Plaintiffs' claims for fraudulent concealment were proper because Plaintiff alleged WMT was aware of material information related to the safety and effectiveness of the Hip System that they failed to disclose.

As with numerous other summaries regarding personal jurisdiction, this decision's analysis of personal jurisdiction is thorough and involved, and should be helpful to defense lawyers in support of a personal jurisdiction. And it offers another example as to how personal jurisdiction is handled by lower courts after *Bristol-Myers Squibb Co. v. Superior Court of Cal*. The decision also offers insight into the various elements of Utah product liability claims and what information is necessary to properly pled same and survive, or not survive, a motion to dismiss them.

Seaver v. Estate of Cazes, Case No. 2:18-cv-712-DB, 2019 WL 2176316 (D. Utah May 20, 2019)

Plaintiffs allege Decedent died by ingesting an illicit drug. In the United District Court for the District of Utah, Plaintiffs alleged Defendant, the service provider that created the network through which Decedent accessed the website that sold him the drug on the dark web, was liable based upon products liability, negligence, abnormally dangerous activity, and civil conspiracy. Defendant moved to dismiss based on lack of personal jurisdiction and, in the alternative, based on the Communications Decency Act.

The District Court granted the motion based on Plaintiff's claims being barred by the Communications Decency Act. The Communications Decency Act bars immunizes computer service providers like Defendant if (1) it's an interactive computer service, (2) its actions as publisher or speaker form the basis of liability, and (3) another information content provider provided the information that forms the basis of liability. Defendant met this bar. First, it fit the definition of an interactive computer service because it enabled computer access by multiple users to computer servers via its browser. Second, Plaintiff sought to hold Defendant liable for information about the illicit drug Decedent was able to access through Defendant's browser. Finally, that information was not created by Defendant, but rather a third-party.

With respect to personal jurisdiction, the District Court held Plaintiff had set forth substantial evidence that the number of Defendant's users in Utah was likely between 3,000 and 4,000, daily. The District Court held this amount of traffic was *prima facie* evidence that Defendant maintained continuous and systematic contacts in the state of Utah so as to satisfy the general jurisdiction standard. The District Court also further held that the exercise of jurisdiction would not offend traditional notions of fair play and substantial justice.

This decision's analysis with respect to personal jurisdiction is particularly enlightening to defense lawyers. Despite most courts finding general jurisdiction lacking, this is one of the few times where it was found. Apparently, substantial users from the forum state is sufficient to establish general personal jurisdiction in a forum. This could be a troubling development for defense lawyers' clients who are internet content

providers going forward. However, the Communications Decency Act should serve as an effective tool to prevent specific forms of liability.

3. Failure to State a Claim

Castleman v. FCA US LLC, Case No. 2:18-cv-00342-JNP-PMW, 2019 WL 1406611 (D. Utah Mar. 28, 2019)

Plaintiff alleged personal injuries from an automobile accident when her vehicle overturned. In the United States District Court for the District of Utah, Plaintiff alleged Defendant was liable for compensatory and punitive damages based upon products liability, negligence, and breach of warranties. Defendant moved to dismiss for failure to state a claim.

The District Court denied the motion. While Defendant's acquisition agreement with the manufacturer assumed liability for all product liability claims which do not include any claim for punitive damages, the District Court held each of the three individual product liability claims (strict liability, negligence, and breach of warranty) can stand alone and none of the three claims included a claim for exemplary or punitive damages. The District Court held as to punitive damages that the facts surrounding their imposition were grounded in Defendant's post-acquisition conduct, in the form of a continuing post-sale duty to warn, which was not encompassed within the acquisition agreement so as to bar the punitive allegations.

Besides illustrating the difficulty with which to obtain dismissal via failure to state a claim, defense lawyers representing clients who have acquired product manufacturers should pay attention to this claim. While an acquisition agreement can validly exclude assumption of prior liabilities, post-acquisition conduct is not encompassed with such an agreement.

Crowther v. Wright Med. Techn., Inc., Case No. 1:18-CV-00120-DN, 2019 WL 1059966 (D. Utah Mar. 5, 2019)

Plaintiffs alleged personal injuries arising out of hip replacement surgery. In the United States District Court for the District of Utah, Plaintiff alleged Defendant was liable based upon products liability, among other causes of action. Defendant moved to dismiss for failure to state a claim.

The District Court denied the motion. Under Utah law, a claim of manufacturing defect is a viable cause of action. Plaintiff's claim that the metal acetabular cup and metal ball head implanted in him differed from the manufacturer's specifications, and specifically that the clearance levels differed from the manufacturers' specifications, were plausible and had a reasonable likelihood of being proven through available evidentiary means. The allegation was specific enough to allow Defendant to identify the specific claimed defect. Therefore, Plaintiff's allegations were sufficiently specific to survive Defendant's motion to dismiss.

The case provides defense lawyers with yet another example of the difficulties in obtaining dismissal for failure to state a claim merely at the outset of the case. Unless it is clear on the face of the complaint, it will be treated as a factual dispute to be addressed via summary judgment or at trial.

4. Statute of Limitations

Salt Lake City Corp. v. Sekisui SPR Americas, LLC, Case No. 2:17-cv-01095-JNP-BCW, 2019 WL 4696278 (D. Utah Sept. 26, 2019)

Plaintiff alleged damages from rehabilitation of a sewer line that was leaking. Plaintiff brought suit against Contractor, whom it hired to rehabilitate the sewer line, and Suppliers, who provided components used to complete the project, and alleged they were liable based upon breach of warranty, products liability, and negligence. Contactor filed crossclaims against Suppliers for breach of contract, apportionment of fault,

and indemnification. Suppliers moved to dismiss Plaintiff's claims and Contractor's cross claims. Plaintiff and Contractor moved to certify statute of limitations questions to the Utah Supreme Court.

The District Court granted Suppliers' motion to dismiss Plaintiff's claims because Plaintiff was on inquiry notice of its claims against Contractor and Suppliers more than four years before it asserted them, when it discovered leaks in the rehabilitated sewer line.

The District Court granted Suppliers' motion to dismiss Contractor's crossclaims, in part. Contractor's breach of warranty, and some of its breach of contract, crossclaims constituted claims for which apportionment of fault could not be had under the Utah Liability Reform Act. Moreover, Contractor's claims that Suppliers breached the terms of collateral "agreements" failed as a matter of law. Additionally, Contractor's breach of contract claim based on breach of a specific provision of the contract between the parties was barred by the UCC statute of limitations. However, the remaining claims for breach of contract against Suppliers were viable under the six-year statute of limitations for written contracts. Finally, regarding Contractor's indemnification claim, the District Court held no provision in agreements which Contractor was subject barred its indemnification crossclaim.

As to certification of statute of limitations questions, the District Court denied Plaintiff's and Contractor's requests. The motions to certify were untimely, as Plaintiff and Contractor requested such a ruling only when they received an unfavorable outcome. And in any event, the motions did not pose questions on unsettled areas of Utah law.

The decision's analysis with respect to the statute of limitations should be helpful to defense lawyers facing arguments from plaintiffs' counsel that the discovery rule delayed accrual of their clients' claims. Moreover, the decision's analysis of various causes of action for breach of contract and which were viable should be particularly helpful to defense lawyers. Finally, the decision warns that requests to certify questions to state courts should be made prior to an unfavorable outcome, and only when the question addresses an unsettled area of law.

5. Compelling Discovery

Stratton v. Thompson/Center Arms, Inc., Case No. 4:18-cv-40-DN-PK, 2019 WL 2450931 (D. Utah June 12, 2019)

Plaintiff alleged he suffered injuries when the barrel of a muzzleloader rifle exploded. In the United States District Court for the District of Utah, Plaintiff alleged Defendant was liable based upon products liability. Plaintiff propounded discovery upon Defendant requesting (1) the model names/numbers of all Defendant's muzzleloader rifles with barrels made of the same metal as the subject rifle, as well as (2) information and documents concerning barrel failures of any of Defendant's muzzleloaders. Defendant objected to these discovery requests but produced responsive information as to both limited to the same type of muzzleloader as the subject rifle. Plaintiff moved to compel information about other muzzleloader rifles.

The District Court denied the motion. Plaintiff's complaint focused on one particular model of muzzle loading rifle. Therefore, discovery should be limited to information pertaining to the model of muzzle loading rifle at issue, not other firearms. Accordingly, the District Court held Defendant would not be compelled to produce information as to any other model firearm.

Defense lawyers routinely receive overly broad requests regarding prior incidents involving their products. This case's holding that the request should be limited to the specific model at issue, rather than all models, should help defense lawyers in objecting to such overly broad requests and limiting discovery to the particular product at issue.

Spencer v. Delphi Auto. Sys., LLC, Case No. 2:16-cv-00427-DN-PMW, 2019 WL 6324628 (D. Utah Nov. 26, 2019)

In Utah state court, Plaintiff alleged Harley-Davison was responsible for personal injuries based upon various product liability violations. It removed the case to the United States District Court for the District of Utah. Thereafter, BWI was added to the case. BWI served Plaintiff with interrogatories, requests for production, and requests for admission. Plaintiff responded to BWI's requests for production. In response, BWI moved to compel supplemental responses.

The District Court granted the motion. Plaintiff's responses to BWI's requests for production referred to hundreds of previously produced documents provided by Plaintiff but Plaintiff failed to organize the documents in any way. Thus, BWI had no way of knowing whether Plaintiff has complied with its requests for production. Plaintiff neither labeled his documents to correspond with the categories that were in each request for production, nor verified that no such additional responsive documents existed. And there was no indication that the documents previously produced by Plaintiff were produced as maintained in the ordinary course of business. In sum, the District court found the form of Plaintiff's responses to be lethargic, elusive, and contrary to proceeding in a just, speedy, and inexpensive fashion.

Without a doubt, defense lawyers receive unresponsive document production from plaintiffs' which simply refer the party to all documents produced. However, this decision indicates such efforts will not suffice. Defense lawyers should have this case in their back pocket should it receive similar unresponsive discovery responses.

6. Change of Venue

Cusano v. Gen. RV Ctr., Case No. 2:18-cv-581, 2019 WL 575899 (D. Utah Feb. 12, 2019)

Plaintiff alleged his RV was defective following purchase. In Utah state court, Plaintiff alleged Defendant was liable based upon breach of contract, breach of the implied covenant of good faith and fair dealing, express warranties, and the implied warranties of merchantability and fitness for a particular purpose, unjust enrichment, product liability, negligence, misrepresentation, and fraud. Defendant removed the case to the United States District Court for the District of Utah. Thereafter, Defendant moved to dismiss for failure to state a claim, or to transfer the action to Michigan pursuant to the forum selection clause in the purchase agreement for the RV.

The District Court granted the motion to transfer the case to the United States District court for the Eastern District of Michigan, Southern Division. The District Court held Plaintiff failed to satisfy his burden of demonstrating extraordinary or unusual circumstances sufficient to defeat the enforcement of the valid and mandatory forum selection clause. To the extent Plaintiff suffered from a disability and was unable to travel, the District Court noted Plaintiff suffered from such impairments at the time he signed the purchase agreement which explicitly required filing suit in Michigan. Moreover, the District Court held Plaintiff should not be allowed to avoid the agreed upon choice of forum by including additional defendants and then claiming that maintaining two different lawsuits would "offend notions of judicial economy" or otherwise render the transfer unfair. Finally, the District Court held Plaintiff failed to satisfy the Court that he could not obtain counsel and pursue his claims in Michigan.

This case reinforces the superiority of forum selection clauses. Defense lawyers should move to enforce these provisions on behalf of their clients and rest easy knowing that they should be enforced. The burden to disregard them is strenuous. If in this situation, defense lawyers should be ready to make similar arguments as advanced herein.

7. Involvement in the Manufacture, Design, and/or Chain of Distribution

Nielson v. Harley-Davidson Motor Co. Grp., LLC, Case No. 4:18-cv-00013-DN-PK, 2019 WL 6255088 (D. Utah Nov. 22, 2019)

Plaintiffs allege they suffered personal injuries from a motorcycle accident allegedly caused by the failure of the motorcycle's rear tire. In the United States District Court for the District of Utah, Plaintiffs alleged Defendant was liable based upon negligence, strict liability, and breach of warranty. Defendant moved for summary judgment on the basis that Plaintiffs could not present evidence it designed, manufactured, distributed, or sold the subject tire.

The District Court denied the motion. First, the District Court held the motion was denied as to Plaintiff's breach of warranty claim because a breach of warranty action does not depend upon Defendant's status as a designer, manufacturer, distributor, or seller—*e.g.*, Defendant could have warranted the tire despite not being involved in the manufacture, design, or chain of distribution. As to the remaining causes of action, genuine disputes of material fact precluded summary judgment. Facts existed that supported reasonable inferences that Defendant was involved in the manufacture, design, and chain of distribution of the subject tire by, *inter alia*, testing the subject tire, providing feedback to the manufacturer on the subject tire's performance, approving the subject tire's design, approving and overseeing the manufacturer's internal manufacturing quality control process, and approving only the model of the subject tire as replacement tires for the motorcycle. The District Court invited the parties to certify whether apparent manufacturer liability is proper under Utah law.

Defense lawyers should advise their clients that repeated instances of involvement in the chain of distribution of a product, however minor, can cumulatively constitute involvement sufficient for the imposition of product liability. Moreover, defense lawyers should take note that warranty-related causes of action do not depend on their clients' status, but rather its conduct.

XI. Eleventh Circuit

Carlos A. Benach, Esq. Irwin Fritchie Urquhart & Moore, 400 Poydras Street, Suite 2700, New Orleans, LA, 70130.

A. Expert Testimony & Punitive Damages

Taylor v. Mentor Worldwide LLC, 940 F.3d 582 (11th Cir. 2019)

Taylor v. Mentor Worldwide LLC is one of the more than 800 cases consolidated in the multi-district proceeding known as *In re Mentor Corp. ObTape Transobturator Sling Products Liability Litigation* (MDL No. 2004) pending before the United States District Court for the Northern District of Georgia. Theresa Taylor ("Plaintiff") sued Mentor Worldwide LLC ("Mentor") seeking compensatory and punitive damages for injuries she claims were sustained as a result of Mentor's polypropylene mesh sling (known as "ObTape"), which is used to treat stress urinary incontinence. Plaintiff's case proceeded to trial as a bellwether case in the MDL, and the jury found Mentor liable for failure to warn, defective design, and negligence, and awarded her $400,000 in compensatory damages and $4 million in punitive damages. After some post-trial motion practice, the punitive damages award was reduced to $2 million.

On appeal, Mentor argued, among other things, that it was entitled to judgment as a matter of law because the district court erred in admitting certain Plaintiff expert testimony on specific causation. Plaintiff cross-appealed arguing the district court erred in reducing the jury's punitive damages award.

1. Expert Testimony

Mentor argued that the district court erred by failing to strike Plaintiff's expert testimony from Dr. William Porter, a urogynecologist, to the extent that he offered new opinions at trial that had not been disclosed in his Rule 26 report. During his direct examination at trial, Dr. Porter testified that the ObTape caused Plaintiff's urethral thinning, despite not having opined on Plaintiff's urethral thinning in his report or deposition. In response, Mentor moved to strike the testimony per Rule 26, or alternatively, have an extra evening to prepare for his cross examination. The district court denied the motion to strike but did grant Mentor's request for extra time to prepare for Dr. Porter's cross examination. At the end of trial, Mentor moved for judgment as a matter of law arguing that the court should enter judgment in its favor because Dr. Porter's new opinions on specific causation should be struck as violative of Rule 26.

On appeal, Mentor argued that the district court erred because Plaintiff violated the Rule 26 duty to provide "a complete statement of all opinions the witness will express" and duty to supplement the report to the extent that it was "incomplete or incorrect." The Eleventh Circuit disagreed and affirmed the district court's decision not to strike Dr. Porter's expert testimony and denial of Mentor's motion for judgment as a matter of law. At the outset, the court explained that a district court's evidentiary rulings are reviewed "only for a clear abuse of discretion" and must be affirmed absent "clear error of judgment" or the application of the wrong legal standard. The Circuit court then concluded that the district court's decision to allow Dr. Porter's new testimony into evidence was within its discretion pursuant to Rule 37. The court further explained that district court's decision to admit Dr. Porter's testimony did not rise to an abuse of discretion based on the facts and circumstances and agreed that the non-disclosure of Dr. Porter's new opinion was "harmless" considering the extra time granted to Mentor to prepare for cross examination. As a result, Mentor was not entitled to judgment as a matter of law.

Judge Tjolflat issued a dissenting opinion explaining, in part, that the majority recited the correct standard under Rule 37, but incorrectly analyzed the Rule 26 violation by applying a prejudice standard, where Rule 37 requires an evaluation of harm. The dissent argued that the application of the harm standard would have warranted the exclusion of Dr. Porter's new opinions, and thus entry of judgment as a matter of law in favor of Mentor.

2. Punitive Damages

After addressing and denying Mentor's arguments about issues with the evidence considered by the jury for a punitive damages award, the Circuit court considered Plaintiff's arguments that the district court improperly reduced the punitive award to $2 million. The district court reduced the punitive damages award because there was insufficient evidence that Mentor had "a specific intent to harm the claimant" to warrant the application of uncapped punitive damages under Florida law. Interestingly, neither party was able to provide Florida law interpreting the phrase "specific intent to harm the claimant" so the district court turned to a Georgia drunk driving case to interpret the phrase. The Georgia case relied upon the Second Restatement of Torts to define "intent" and concluded that Mentor did not have "specific intent to harm the claimant" and that uncapped damages were not warranted.

In affirming the district court's decision, the Eleventh Circuit articulated a "specific intent to harm the claimant" standard based on the Third Restatement of Torts and explained that it assumed that the district court properly articulated this standard and those previously decided and applicable to the MDL. Thereafter, the court explained that Plaintiff's evidence in support of Mentor's "specific intent" was lacking because under Florida law to prove defendant's "specific intent to harm the claimant" required evidence close to "total certainty." The court then explained that Mentor may have known of a high incidence of injuries with the

ObTape, but this did not rise to the level of "total certainty" that that anyone that used the ObTape would be harmed. As a result, the court affirmed the district court's reduction of the punitive damages to $2 million.

B. Breach of Implied Warranty and Merchantability

Easterling v. Ford Motor Company, 780 Fed.Appx 834 (11th Cir. 2019)

In *Easterling v. Ford Motor Company*, Plaintiff, Jerry Easterling, sued the defendant for a breach of implied warranty of merchantability because of an issue with his car's seatbelt, which allegedly came undone during an accident and lead to serious injuries. At the district court, Defendant was granted summary judgment on plaintiff's claim, and the judgment was appealed to the Eleventh Circuit.

On appeal, the court identified two issues: (1) under Alabama law, what is the standard for a breach of implied warranty of merchantability? and (2) did the summary judgment record contain sufficient admissible evidence of a breach? Considering the first issue, Defendant argued that to prove a breach, a plaintiff must prove that the product was in some way "defective" and that the unfit condition existed "at the time of the sale." In addressing this argument, the court began with a plain reading of the Alabama warranty statute and explained that "a breach occurs when goods are *not fit* for the ordinary purposes for which they are used." The court then explained that there is a distinction between "unfitness," which is derived from warranty law, and "defectiveness," which is based on product liability law, as articulated by the Alabama Supreme Court. Based on this distinction, the issue of "breach" of the implied warranty of merchantability required a trial court to evaluate whether there was sufficient admissible evidence that the product was not "fit for ordinary purposes for which such goods are used." The court also explained that although case law interpreting warranty law does assess a breach "at the time of sale" the inquiry is still forward looking, which means that the fact finder to also consider the age of the product, its wear and tear and how it was used.

Having articulated the standard for a breach of implied warranty, the court addressed whether summary judgment was proper, and concluded that the record demonstrated there was sufficient evidence of a breach to survive summary judgment. The court explained that the record contained evidence of a breach including broken springs in the seatbelt at issue, and issues with the seatbelt based on expert testing, as well as plaintiff's testimony. As a result, the court reversed the district court's decision and remanded the matter for proceedings consistent with its decision.

XII. Supreme Court of the United States

David A. Nasrollahi, Esq., Wall Templeton & Haldrup, P.A., 145 King Street, Suite 300, Charleston, South Carolina, 29401.

A. Duty to Warn

Air and Liquid Systems Corp, et. al. v. Roberta G. Devries, 139 S. Ct. 986 (2019)

This 2019 Supreme Court case decided, in the maritime tort context, whether a manufacturer has a duty to warn when the manufacturer's product requires later incorporation of a dangerous part in order for the integrated product to function as intended?

U.S. Navy ships were outfitted with equipment such as pumps, blowers, and turbines. That equipment required asbestos insulation or asbestos parts in order to function as intended. When used as intended, that equipment can cause the release of asbestos fibers into the air, which if inhaled or ingested may cause various illnesses.

Five businesses-Air and Liquid Systems, CBS, Foster Wheeler, Ingersoll Rand, and General Electric-produced some of the equipment used on the Navy ships. Despite the equipment requiring asbestos insulation or asbestos parts in order to function as intended, those businesses did not always incorporate the asbestos into their products. Rather, the businesses delivered the equipment to the Navy without asbestos. Plaintiffs were U.S. Navy servicemembers and their wives. They brought suit against the equipment manufacturers in Pennsylvania state court alleging that the Servicemembers exposure to asbestos caused them to develop cancer. The Court noted that the Plaintiffs did not file suit against the Navy because they believed the Navy was immune. Further, the Plaintiffs could not recover against the manufacturers of asbestos because those manufacturers had gone bankrupt. The equipment manufacturers subsequently removed the matter was to federal court invoking federal maritime jurisdiction.

The equipment manufacturers moved for summary judgment on the grounds that a manufacturer should not be liable for harms caused by later-added third-party parts, otherwise known as the "bare-metals defense." The District Court granted the manufacturers' motion. The U.S. Court of Appeals vacated and remanded. The Third Circuit held that a manufacturer of a bare-metal product may be held liable for a plaintiff's injuries suffered from later added asbestos-containing materials if the manufacturer could foresee that the product would be used with later-added asbestos-containing materials.

In a 6-3 opinion, the Supreme Court held that in a maritime tort context, a product manufacturer has a duty to warn when (i) its product requires incorporation of a part, (ii) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and (iii) the manufacturer has no reason to believe that the product's users will realize that danger.

The Court determined a product manufacturer will often be in a better position than the parts manufacturer to warn of the danger from the integrated part. Noting that the products manufacturer knows the nature of the ultimate integrated product and is typically more aware of the risk associated with that integrated product. By contrast, a parts manufacturer may be aware only that its part could conceivably be used in any number of ways in any number of products.

Justice Neil Gorsuch, with whom Justice Thomas and Justice Alito joined in dissenting, noted the possible confusion this decision would have on manufacturers and consumers. Justice Gorsuch believes the common law rule that a manufacturer has no duty to warn or instruct about another manufacturer's products, though those products might be used in connection with the manufacturer's own products makes the most sense today, and suspects the new rule will only create further confusion for manufacturers and consumers.

B. Federal Preemption – Failure to Warn – Drug Products

Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668 (2019)

In *Merck Sharp & Dohme Corp. v. Albrecht*, the Supreme Court held that the Third Circuit treated the preemption question as one of fact, not law, and because it did not have an opportunity to consider fully the standards of the Court's opinion, the Court vacated and remanded the Court of Appeals' for further proceedings consistent with the Court's opinion.

Plaintiffs alleged that a drug manufactured by Merck caused a high frequency of femoral fractures. Plaintiffs claim under state law grounds that Merck failed to warn about this risk. Merck argued that Plaintiffs' state-law failure-to-warn claims were preempted by federal law because it had attempted to change the label of the product to reflect the risk, but their request to do so was denied by the FDA.

Pursuant to the Federal Food, Drug, and Cosmetic Act, Merck needed prior approval from the FDA to change the label to reflect the alleged risk. Merck filed a "Prior Approval Supplement" with the FDA to

change both the "Warning & Precautions" and "Adverse Reactions" sections of the label. At first, the FDA allowed the language to appear under the "Adverse Reactions" section but stated that the evidence in support of the language's inclusion in the "Warning and Precaution" section was not sufficient. Subsequently the FDA allowed alterations to the "Warning and Precaution" section, but those warnings were not as strong as the warnings Merck had previously suggested. Thus, Merck claimed that Plaintiffs' state law claims of failure-to-warn were preempted by the "clear evidence" that the FDA would have denied the warning/language Plaintiffs argued should have been included on the label of the drug.

The District Court agreed with Merck's pre-emption argument and granted summary judgment. The Court of Appeals subsequently vacated and remanded, concluding that its pre-emption analysis was controlled by the *Wyeth v. Levin*, 129 S. Ct. 1187 (2009). The Court of appeals understood *Wyeth* as making clear that a failure-to-warn claim grounded in state law is preempted where there is *clear evidence* that the FDA would not have approved a change to the label. The Court of Appeals held that *Wyeth's* use of the standard *clear evidence* was intended to serve as a heightened standard of proof—"the manufacturer must prove that the FDA would have rejected a warning not simply by a preponderance of the evidence, as in most civil cases, but by 'clear evidence.'" Absent a rejection letter from the FDA regarding the inclusion of language that would amount to an adequate warning, the Court of Appeals determined that it was up to the jury to decide if there was *clear evidence* that the FDA would reject such changes. In other words, summary judgment was not proper because only a jury could make said determination. Merck filed a petition for writ of certiorari, asking the Supreme Court to decide whether Merck's case and others like it must got to a jury to determine whether the FDA has disapproved a state-law-required labeling change. Additionally, the Supreme Court granted certiorari, in light of the differences and uncertainties among the courts of appeals and state supreme courts in respect to the application of *Wyeth*.

First, the Supreme Court undertook a carefully determined that *clear evidence* that the FDA would not have approved a change to a prescription drug's label, as a basis for preempting under impossibility pre-emption state-law claim of failure-to-warn, is evidence that shows the court that Merck fully informed a drug manufacturer in formed the FDA of the requested label changes required by state law and the FDA decline to approve a change to the drug's warning labels, was an issue for the court to decide, not a jury. Further, the Supreme Court determined that the question of FDA disapproval is a question of law, for a judge to decide without a jury. In explaining the Supreme Court's decision, Justice Breyer wrote in the opinion, that the complexity of FDA prior approval to change the label to reflect the reflect any alleged risks requires legal skills and analysis, which judges are better suited than are juries to understand and to interpret.

Justice Thomas wrote a concurring opinion explaining that the "physical impossibility" test may not be the proper test for deciding whether a direct conflict exists between federal and state law. Justice Thomas states that under the impossibility pre-emption defense, Merck's defense fails because it did not identify any federal law that prohibited it from adding any and all warnings that would have satisfied state law. Justice Thomas believes that the FDA's letter declining the changes to the label were neither the consummation of the agency's decision-making process not determined Merck's rights or obligations.

Justice Alito, Chief Justice Roberts, and Justice Kavanaugh, in their separate concurring opinion, concurred in judgment only. Justice Alito wrote, *inter alias*, that the standards of proof, such as preponderance of the evidence and clear and convincing evidence, have no place in the resolution of this question of law and the use of the language clear evidence was merely rhetorical flourish. Additionally, the concurring Justices point out the history of communication between Merck and the FDA regarding the warning issue, and determined the FDA's decision not to require a label change prior to October 2010 reflected the FDA's determination that a new warning should not be included in the labeling of the drug.

XIII. Canada

Jessica L. Kuredjian, Carmen Bruni and Jacqueline Karbi, Cassels LLP, 40 King Street West, Suite 2100, Toronto, ON, M5H 3C2.

A. Property Damage – Affidavit Evidence – Production of Documents

Durham Condominium Corporation No. 123 v. Watts Water Technologies, Inc. 2019 CarswellOnt 13154, 2019 ONSC 4833, 309 A.C.W.S. (3d) 487

In this matter, the moving party plaintiff brought a motion for further and better affidavits of documents, refusals stemming from the examinations for discovery of the defendants and an order requiring the defendants' witness to re-attend at a continued examination for discovery.

The action arose out of the alleged failure of a flexible water supply connector tube (the "Connector") attached to a toilet in unit 1105, the plaintiff's condominium. The Connector's failure allegedly caused significant water damage for which the plaintiff claimed damages of approximately $70,000.00. The plaintiff claimed damages stemming from negligence, nuisance and breach of contract.

The defendants denied these allegations and pleaded that they were not the manufacturer, distributor, or vendor of the Connector and therefore had no contractual relationship with the plaintiff. The defendant Watts Water Technologies, Inc. ("Watts US") listed no documents in schedule A to its affidavit of documents. Watts Water Technologies (Canada) Inc. ("Watts Canada") listed two documents in its schedule. A representative of the defendants was examined for discovery on November 1, 2016 and refused several questions.

The defendants settled a class action in the United States (the "US Class Action") which involved similar facts, including the alleged failures of coupling nuts on toilet connectors. The defendant Watts US was a party to that class proceeding. The settlement agreement filed with the United Stated District Court on January 31, 2014 states that the US Class Action involved extensive discovery, including "the Watts Defendants'" (defined in the settlement agreement to include Watts US, a defendant in this action) production of over 125,000 pages of documents and the exchange of numerous expert reports.

The plaintiff argued that the defendants' affidavits of documents were deficient and pointed to the US Class Action as evidence of missing documents. The plaintiff sought an order requiring the production of the documents produced by the Watts defendants in the US Class Action, along with the expert reports exchanged in that proceeding.

The defendants cited the 2010 amendments to the *Rules of Civil Procedure*, RRO 1990, Reg. 194 (the "Rules") which changed the test for the production of documents from a test of "semblance of relevance" to the narrower test of relevance. The defendants argued that the principle of proportionality should also be considered and favours their position. The defendants argued that the production of the US Class Action documents would cost at least $190,000.00 to be hosted and reviewed by a third-party e-discovery provider. The defendants alleged that this would be disproportional given the $70,000.00 figure sought after in this simplified procedure action.

Citing *Bow Helicopters v Textron Canada Ltd.*, [1981] OJ No. 2265 (SCJ – Master) at paras. 5-9, the Court noted the following principles as being applicable to its decision in this case:

- It is common in product liability cases for the defendant to possess a large volume of documents while the plaintiff has little or no information;
- Evidence that simply amounts to intuition, speculation and guesswork is insufficient to justify an order for service of a further and better affidavit of documents;

- There must be evidence that specific documents exist.

The Court noted that the 125,000 pages of documents clearly exist and that there was no evidence to suggest that the documents were not within the defendants' possession, control, or power. The Court also commented that it was not necessary, for the purposes of a discovery motion, that the plaintiff prove the Connector in this case was the same to the connectors in issue in the US Class Action. It was enough that the plaintiff provided evidence to support a reasonable inference that the parts may be the same.

The Court ultimately ordered Watts US to produce to the plaintiff for inspection the 125,000 pages of documents referred to as being produced by the Watts defendants in the settlement agreement for the US Class Action. Per the reasons associated with the proportionality concerns, the Court did not order the production of the expert reports from the US Class Action.

B. Class Action – Certification – Duty of Care – Common Issues – General Causation

Bayer Inc. v Tluchak Estate, 2019 SKCA 64

This matter involved an application by Bayer Inc., Bayer A.G., Bayer Corporation, and Bayer Healthcare LLC (collectively, "Bayer") for leave to appeal the certification order made by the Chambers judge pursuant to s. 39(3)(a) of *The Class Actions Act*, SS 2001, c C-12.01 (the "Act"), and s. 8 of *The Court of Appeal Act, 2000*, SS 2000, c C-42.1.

The Chambers judge held that there was a basis to conclude there was a common issue, which he characterized as "*Did Bayer breach a duty of care in marketing Xarelto in Canada or in failing to provide a reasonable warning that Xarelto could cause serious and irreversible bleeding?*"

This underlying action stems from the alleged breach relating to the medication's description or "monograph" that provides information as to the medication's indications, contraindications, adverse reactions, etc.

Bayer sought leave to appeal on the following grounds:

(a) The judge erred in concluding that the proposed failure to warn issue was appropriately certifiable as a common issue under s. 6(1)(c) of the Act;

(b) The judge erred by finding that a class action was the preferable procedure in this case within the meaning of s. 6(1)(d) of the Act; and

(c) The judge erred in certifying a common issue on punitive damages when liability would not be determined at the common issues trial.

Bayer's proposed notice of appeal requested that the Court set aside the decision of the Chambers judge and dismiss the application to certify this case as a class action. Using the test described in *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119, the Court ultimately dismissed Bayer's leave to appeal.

While most pharmaceutical cases include both, the Court held that it is not necessary, in the certification of a failure to warn common issue, to also certify a general causation common issue, as long as the failure to warn common issue encompasses a general causation element. The Court commented that Bayer's arguments about a lack of general causation will likely significantly impact the action.

C. Indemnity of Manufacturer – Negligent Design – Failure to Warn – Duty to Manufacture a Reasonably Safe Product – Apportionment of Liability

St Isidore Co-Op Limited v AG Growth International Inc, 2019 ABQB 763

This case is a claim for indemnity from the manufacturer of a piece of heavy machinery for injuries resulting in death. St. Isidore Co-Op Limited (the "Plaintiff") purchased the piece of machinery in question from AG Growth International Inc. (the "Defendant") and in turn rented it to end users. The Plaintiff paid approximately $750,000 to the family of the deceased end user in recognition of its liability in renting the faulty equipment. This action is an application by the Plaintiff claiming contribution by the Defendant on a full indemnity basis.

The piece of machinery at issue in the case was a post pounder used by lay people, primarily farmers, to pound fence posts down into the earth. The post pounder sold by the Defendant included a 600lbs mast that fell backwards onto the end user causing severe injuries that ultimately led to his death. The machine in question was manufactured and purchased in 1999. In 2005, the company altered the designed of the machine by welding two steel blocks into a position which would prevent the mast from falling forward or backward after becoming aware of a "near miss" incident. They also developed a retrofit kit which they released for sale for installation on post pounders purchased prior to 2005 that would perform the same safety function as the steel blocks.

The Plaintiff's claim of negligence against the Defendant fell within two categories; negligent design and failure to warn. On the question of negligent design, the court concluded that the Defendant's failure to include a safety mechanism to prevent the mast from falling backward onto the operator was a design defect. The court analyzed the state of knowledge of the Defendant at the time of sale in 1999 and concluded that, being an expert in the field, identifying the design defect and developing a solution was well within what was reasonably expected of the manufacturer. The addition of the limiter blocks and creation of the retrofit kit were concluded not to be improvements to an already safe machine but rather a necessary correction made to an inherently dangerous machine that had a latent safety defect. The Defendant, on a balance of probabilities, was found to have failed in its duty to manufacture a reasonably safe product.

On the question of failure to warn, the Court focused on the circumstances surrounding the "near miss" incident in 2005 and whether or not it was sufficient to trigger a duty to warn past purchasers of the relevant risks. The Court concluded this point in the affirmative. There was evidence in the Defendants actions of installing limiter blocks on future models and creating the retrofit kit for previous models that was sufficient to establish that the Defendants recognized the severity of the safety risks sufficient to establish there was a duty to warn. The Court then went on to conclude that the Defendants failed in this duty to warn. The Court considered the actions of a competitor manufacturer who discovered a similar deficiency and the more proactive measures it took to warn end users. The Court found this evidence persuasive in its finding that the actions taken by the Defendants were insufficient both by the company's own standards and industry standards.

The Court found that causation had been established and apportioned liability at 75% to the Defendant and 25% to the Plaintiff. The Court based this apportionment on the fact that even though the immediate cause of the accident was the cylinder rod breaking, a possibility discoverable by the Plaintiff, the Defendant's failure to warn the Plaintiff about the reasonably foreseeable possibility of the mast falling and the availability of the retrofit kit, which could have been installed to prevent that from happening, meant a greater share of liability should go to the Defendant, regardless of the cause.

D. Application for Summary Dismissal – Duty to Warn Customers of Known Defect

Von der Ohe v Porsche Cars Canada Ltd, 2019 ABPC 46

In this application for summary dismissal, the Court considered whether there was a duty of care owed to the owner of a Porsche, Mr. von der Ohe (the "Plaintiff") by a service dealer, Porsche Cars Canada Ltd. (the "Defendant"). The Defendant had no direct involvement in the design, manufacture, distribution or sale of the vehicle in question but had inspected and cleared the vehicle for the Plaintiff upon its arrival in Canada from the United States. Despite having no such involvement in the creation of the vehicle, the Defendant was acutely aware of the design flaw present in the vehicle owned by the Plaintiff and the liability with respect to that flaw that resulted from successful litigation in the United States.

The Defendant argued that it did not owe the Plaintiff any duty to warn of the defect because the Plaintiff did not buy the vehicle in Canada from one of the Defendant's local dealerships. The Defendant also argued that the vehicle was not "its" product (in the narrow sense that the vehicle was not distributed or sold in Canada), and that it had no role in the supply chain resulting in the vehicle ending up in Canada. The court rejected these arguments and found that the Defendant did have a duty to warn its customers of the defect. This was based on the fact that once the vehicle arrived in Canada, the Defendant issued a certification letter to the Plaintiff, after the vehicle was inspected by a local Porsche Cars Canada Ltd. dealer, that certified that there were "no open recalls on this vehicle." The Defendant then put the vehicle on a list of affected vehicles in Canada. As a result, the Plaintiff never received any notification of the defect, or the availability of coverage for related repairs.

The Defendant also argued that there are "established limits on who is liable in tort for a product liability claim," and the "only those who are involved in bringing a product to market…can be liable." The Defendant further submitted that "it would be absurd to suggest that a party that has no control over a product nevertheless has some sort of duty of care to an end user." The court rejected these arguments stating that the Defendant ignored the modern law of negligence regarding novel areas of negligence. The court concluded that a full *Anns/Cooper* analysis would be required to determine whether the Defendant owed a duty of care to warn the Plaintiff and this is an analysis which must be undertaken at trial as it is not appropriate for summary adjudication. The court thereby dismissed the Defendant's application for summary dismissal with costs.

E. Negligence – Failure to Warn of Danger – Non-suit Application

Hall v Sabic Innovative Plastics Canada Inc., 2018 SKQB 344

This action arose from an incident in which the plaintiff, Stephen Hall (the "Plaintiff"), suffered injury when a thermoplastic product marketed under the tradename Lexan shattered while he was cutting it with a circular saw. A piece of the Lexan embedded itself in the Plaintiff's right eye and as a result he lost sight in that eye. The two defendants in the case are the manufacturer, Sabic Innovative Plastics Canada Inc. ("Sabic"), and the retailer, Silvester Glass and Aluminum Products Ltd. ("Silvester") [Collectively, the "Defendants"]. The Defendants filed applications for non-suit on the basis that the Plaintiff had not adduced sufficient evidence which, if left uncontradicted, would satisfy a reasonable trier of fact that the constituent elements of the tort of negligence (and associated breach of duty), or that the statutory claims had been made out.

The judge reviewed the uncontradicted evidence adduced to the end of the Plaintiff's case and ruled to dismiss both applications for non-suit filed by the defendants. The judge found that the documentary evidence, prepared by Sabic, stating that certain types of blades should be used on circular saws to cut Lexan and a caution that failure to use the specified type of blade can result in injury from flying pieces of glazing, was *prima facie* evidence that Sabic was aware of a danger. The judge reasoned that the fact that graphic depictions on the Lexan itself indicated to a consumer that the product could be cut with a circular saw without any associated caution or warning could lead a reasonable trier of fact to conclude that Sabic had breached a duty to warn and that this breach was a contributing cause of the Plaintiff's injury.

With respect to the non-suit application of Silvester, the judge considered whether there was evidence that made out a *prima facie* case that Silvester knew or ought to have known that there was a danger inherent in the product or that would arise incidental to its use in a particular manner. In also dismissing this application the judge considered the fact that Silvester signed off on the submission of the trial exhibit book which contained certain pieces of evidence that could lead a reasonable trier of fact to conclude that Silvester had knowledge of their contents at the time of the sale of the Lexan to the Plaintiff. Having reached the conclusion that Silvester knew about the documents, which contains information regarding the dangers associated with the Lexan, the same reasonable trier of fact could then conclude that given this knowledge Silvester knew or should have know of the risks inherent in use of the product and thus a reasonable retailer had a duty to warn its customer of this inherent danger.

F. Class Action Against Pharmaceutical Manufacturer – Breach of Duty to Warn – Duty to Inform – Appeal Dismissed

*Brousseau c Laboratoires Abbott limité*e, 2019 QCCA 801

In this case, Angéle Brousseau and Jean-Claude Picard (the "Appellants") appealed a judgment of the Superior Court that dismissed their class action against Abbott Laboratoires Limited (the "Respondent"), a pharmaceutical manufacturer, for breach of duty to warn of the neuropsychiatric side effects of Biaxin, a widely-used antibiotic that has been marketed by the Defendant in Canada since 1992. The main issue of the appeal was whether the Appellants had proved that Biaxin presents a danger of neuropsychiatric side effects, triggering the Respondent's duty, as a pharmaceutical manufacturer, to warn users.

In dismissing the appeal, the Court of Appeal applied the test that in order to obtain redress against a manufacturer under the regime of extra-contractual liability for safety defects in things, a user must prove, on a balance of probabilities: (1) that the thing presents a danger, (2) that the user sustained an injury, and (3) that there is a causal link, namely that the injury represents the concrete realization of the danger. If the user is able to prove the foregoing, the manufacturer's liability is presumed.

The Plaintiff failed on the first element of the test. The Court concluded that the evidence did not establish that Biaxin had the capacity to cause neuropsychiatric side effects despite five class action members presenting convincing evidence otherwise. Even though the evidence did not establish enough to conclude there was a "presence of danger" under the legal liability test, the Respondent still made the decision to inform users of the risks of neuropsychiatric side effects from the moment Biaxin went to market. The Respondent included the possible neuropsychiatric side effects in the "Adverse Reactions" section of Biaxin monographs directed at pharmacists and physicians. The Court accepted this evidence as proof that the Respondent discharged its duty to inform the learned intermediaries of the risks and dangers of the medication's use.

The Court in this case also considered the Plaintiff's submission that the Respondent was liable pursuant to section 53 of the *Consumer Protection Act* (the "**Act**:") which deals with liability for latent defects and which includes, as a latent defect, the lack of instructions necessary for the protection of the user against risks or dangers of which the user would otherwise be unaware. The Court rejected this argument by concluding that the heath professionals in question, pharmacists and physicians, are not acting as merchants within the meaning of the Act and therefore the sale of prescription medications by a pharmacist is not a consumer contract giving rise to the manufacturer's liability under section 53 of the Act. The Court commented that it rejected the proposition that the legislature could have wanted to burden pharmaceutical manufacturers with an irrefutable presumption of knowledge of all the potential risks and dangers that appear after a medication is brought to market. Pharmaceutical manufacturers are already subject to a rigorous market approval process and a duty to meticulously monitor for new side effects.

G. Negligence – Duty to Warn of Risk – Failed Duty of Care

Kettle v Saint John Energy, 2019 NBQB 117

In this case, Patricia Kettle (the "Plaintiff") claimed Saint John Energy (the "Defendant") breached its duty to warn her of the danger of living in a house under the Defendant's 7,500-volt hydro line. Early one morning the line overheated, causing it to fall on the Plaintiff's home and setting it on fire.

Applying product liability jurisprudence to the facts of this case the Court concluded that the Defendant's greater knowledge of the risk of a high voltage line over a house placed it under a legal duty to implement a system to detect that kind of danger, take reasonable steps to address it and until that risk could be resolved, to take reasonable steps to warn of that risk. The Court dismissed the Defendant's argument that a ruling in favour of the Plaintiff would create "indeterminate liability" because its wires pass over and under roadways, railways, parking lots, backyards, parks and sidewalks and if it had a duty to notify one claimant then it would have a "duty to warn them all." In the opinion of the Court the facts in question were that of a specific and unusual hazard and the burden it would place on the Defendant to warn a few customers or landowners that their homes are under high voltage lines was negligible.

The Defendant appealed to the New Brunswick Court of Appeal (the "NBCA") on the basis that the trial judge effectively created a novel common law duty and incorrectly applied product liability jurisprudence to the facts of the case. The NBCA dismissed the appeal on the grounds that the appeal did not raise a question of law alone and therefore was not appealable according to law.

H. Motion to Strike – Request for Particulars – Lumping Defendants Together

Dowd et al v Skip the Dishes Restaurant Services Inc. et al, 2019 MBQB 63

This matter involved two motions. The first motion was by the defendants to strike all of the statement of claim pursuant to the Court of Queen's Bench Rule 25.11(1), without leave to amend. Alternatively, the defendants moved to strike parts of the statement of claim, as against all or some of the defendants, or order further particulars. The second motion was by the plaintiffs requesting to amend the statement of claim to replace the definition of the corporate defendant, Skip the Dishes Corporation, to include Skip the Dishes, Corp. with an address in Delaware.

The Court dismissed the plaintiffs' motion, noting that it would be an abuse of process to allow the proposed amendment. The Delaware corporation noted in the amendment did not exist at the material time during which the events complained of are alleged to have occurred. As well, the Court noted that there was no additional reason to believe that the Delaware corporation named in the proposed amendment was related to any other defendant, in any way that would give rise to a reasonable cause of action.

The Court analyzed the pleadings on their face, including the particulars, in an effort to assess whether the claims should survive. The plaintiffs filed the statement of claim on November 24, 2017, as against five defendants total, including Skip the Dishes Corporation, the claims against which have since been struck. The defendants, Skip the Dishes Restaurant Services Inc. ("Skip"), Joshua Simair, Just Eat Canada Inc., and PLC were lumped together in the statement of claim, in which the plaintiffs sought relief for 12 different alleged causes of action for in excess of $160,000,000.00. The listed causes of action included: (i) misappropriation of proprietary information; (ii) breach of confidence; (iii) breach of *The Privacy Act*; (iv) negligent misrepresentation; (v) negligence; (vi) unjust enrichment; (vii) *quantum meruit*; (viii) breach of contract; (ix) inducing breach of contract; (x) unlawful interference with economic relations; (xi) breach of partnership; and (xii) breach of fiduciary duty.

The plaintiffs alleged that the defendants Skip and Joshua Simair, the principal and directing mind of Skip at all material times, participated in conversations and discussions leading to an alleged agreement or partnership with the plaintiffs. The plaintiffs alleged that the terms of the partnership or contract involved the sharing of confidential or proprietary information with the defendants to develop a delivery platform in Winnipeg. Skip and Joshua Simair agreed that, in exchange, the plaintiffs would provide exclusive delivery services for Skip, would be paid for those deliveries, and/or would share in the profits of Skip. The plaintiffs alleged that Skip used their confidential and proprietary information to deliver its delivery platform and that the plaintiffs provided exclusive delivery services for Skip during the material time for a fee, plus a portion of Skip's profits. The plaintiffs pleaded that Skip stopped using the plaintiffs for delivery services and purported to terminate the agreement between the parties, but ultimately continued to do business with third party restaurants with whom the plaintiffs had pre-existing business relationships.

The defendants requested particulars of the actions alleged to have been taken by each of the defendants that gave rise to each cause of action. The particulars filed did not provide much assistance in this regard, as the lumping problem still persisted.

The Court noted that lumping defendants together as one, specifically where the role of each defendant in relation to the plaintiffs was not identical, inevitably led to a lack of clarity of pleadings. This, in turn, led to a higher likelihood that the pleadings may be struck, with or without leave to amend, for failing to disclose a reasonable cause of action, or as an abuse of process.

The Court ultimately concluded that the lumping of defendants was not appropriate, because each defendant's role in relation to the plaintiffs and/or actions complained of were different. The particulars did not remedy this problem, which left the Court to determine whether the failure to separate the allegations should give rise to a decision to strike the pleadings as a whole. The Court noted that the purpose of pleadings is to ensure that the defendant knows the case it must meet, and can properly respond, beyond a mere denial, but that because of the plaintiffs' failure to split the defendants or provide further particulars per the claims against each defendant, the defendants in this case could not easily do so.

The Court struck all claims for misappropriation of proprietary information and *quantum meruit*, without leave to amend, as the Court held that these were not separate causes of action supported by law. The claims against all defendants under *The Privacy Act of Manitoba*, C.C.S.M. c. P125, were also struck as the statement of claim did not disclose a reasonable cause of action supported by law. All claims against Joshua Simair, Just Eat Canada and PLC were also struck, without leave to amend. The claims against Skip were upheld, and the motion to strike denied, subject to further and better particulars being ordered to be provided within 30 days regarding the claims for inducing breach of contract and unlawful interference with economic relations. As well, the claim for breach of fiduciary duty against Skip was struck without leave to amend.

I. Application for an Order Certifying Action as Class Proceeding – Contested Claims – Cannabis Class Action Certified

Downton v Organigram Holdings Inc., 2019 NSSC 4

This is an application by Dawn Rae Downton (the "Applicant") for an order certifying the action as a class proceeding against Organigram Holdings Inc. and Organigram Inc. (together, the "Defendants"). The Applicant purchased and consumed medical cannabis from the Defendants which was subject to a recall by Health Canada which was initiated as a result of testing that revealed that it contained unauthorized pesticides. The Applicant claims that she has suffered adverse health consequences as a result of consuming the recalled cannabis.

The first issue the Court must consider in a class action certification application is whether the pleadings disclose a cause of action. To make this determination the court is to assume all facts pleaded to be true and to give the claim a generous interpretation in light of the fact that deficiencies may be addressed by amendments. Applying the facts of the application to established Canadian product liability jurisprudence, the Court found that the pleadings disclosed a cause of action on all four contested claims. These included negligent design, development, and testing; negligent distribution, marketing and sale; and, in unjust enrichment.

The second issue the court must consider is whether there is an identifiable class of two or more persons that would be represented by a representative party. The Court accepted the Plaintiff's submission that at minimum there are two potential class members, the Plaintiff and another witness who submitted affidavit evidence.

The third issue considered was whether the claims of the class members raised a common issue and whether or not the common issue predominates over issues affecting individual class members. Canadian jurisprudence only requires that a plaintiff advance some evidence to show that there is a basis in fact that issues are common. It also requires that the Court not satisfy itself with the first cause of action made out but satisfy itself regarding each cause of action raised. The Court satisfied itself that the fact-finding and legal analysis central to a determination of the negligence common issues are common among all class members. This was based on the finding that the positions of the class members are identical in that each purchased cannabis for medical purposes that was subsequently recalled at the instance of Health Canada, and with the cooperation of the Defendant, due to the risk that cannabis contained unauthorized pesticides.

The Court also considered whether there was common issue in a claim for breach of contract. The Court performed an assessment of the express and implied terms of class members' contracts governing their purchases of recalled product from the Defendant and whether the Defendant breached any contractual terms. The Court found basis that the Defendant breached express and implied terms of the contract between the Defendant and each class member. The next accepted common issue was a breach of section 52 of the *Competition Act* in the course of advertising, marketing and/or promoting the recalled cannabis to class members. The Court also found common issues between all class members regarding breach of consumer protection legislation, breach of sale of goods legislation and unjust enrichment. With regards to the final common issue considered, remedies, the Court found all types of damages to be in common except punitive or exemplary damages. The issue of punitive or exemplary damages were left to be determined after a finding of liability and an assessment of individual harm had been conducted.

The fourth issue considered in a class certification application is whether a class proceeding is the preferable procedure for the fair and efficient resolution of the dispute. To determine this the Court considered whether a class action is preferable in light of the three goals of class proceedings; behaviour modification, access to justice, and judicial economy. The Court found that a class proceeding would assist individual class members to have access to justice in a way that requiring each member to separately litigate what could be financially modest claims requiring the expense of generating expert evidence would not. The Court concluded that a class proceeding represented a fair, efficient and manageable method for advancing the claims of class members and that there is no more preferable procedure to resolve the action. The Court found the Plaintiff to be a suitable representative plaintiff and the proposed litigation plan feasible. The Court thereby certified the class proceeding.

J. Class Action – Certification – Common Issues

Mandy Evans v General Motors of Canada Company and General Motors LLC, 2019 SKQB 98

This case dealt with a proposed multi-jurisdictional class action relating to the alleged defects in the cooling system of 2011 and newer models of the Chevrolet Cruze ("Cruze"). The plaintiff claimed general, special and punitive damages, restitution and declaratory relief, applying pursuant to s. 5 of *The Class Actions Act*, SS 2001, c C-12.01 ("*CAA*") for certification of the action as a class action and to be appointed as the representative plaintiff of the class.

The cooling system of a car prevents overheating of and consequential damage to the engine and is also used to regulate the temperature in the passenger's compartment. The plaintiff's statement of claim alleged that the defendants had received numerous complaints of coolant leaks from the water pump, heater core, reservoir, water pump seal and thermostat housing. As well, the plaintiff alleged that the Cruze suffered from coolant leaks, resulting in noxious smells and fumes entering the passenger compartment and performance problems including overheating and low coolant warning lights staying on. The plaintiff claimed that the fumes were dangerous, and alleged that she sold her Cruze vehicle earlier than intended because of the alleged defects and suffered a $6,000 loss resulting from the bad publicity about the defects.

The plaintiff claimed that class members suffered various losses as a result of purchasing the Cruze vehicles with the defects, and that the defendants committed the following wrongful acts and omissions, and are liable to the plaintiff and other class members based on the following causes of action: (i) misrepresentation based on the defendants' marketing of the Cruze as "safe" and "reliable", of good merchantable quality, fit and safe for its ordinary intended use; (ii) negligence based on the defendants breaching a duty of care to design, manufacture and market vehicles that are reasonably safe for their intended uses and to provide true and accurate information to the public; (iii) unjust enrichment based on the enrichment provided by class members in paying for the Cruze vehicles expecting them to operate normally and not to require substantial repairs, and thus enriching the defendants with such payments to the detriment of the class members; (iv) breach of s. 52 of the *Competition Act*, RSC 1985, c C-34 based on the defendants alleged making of false and misleading representations or omissions of material facts in connection with the marketing and promotion of the Cruze; (v) breach of *The Consumer Protection and Business Practices Act*, SS 2013, c C-30.2 ("*CPBPA*") and similar consumer protection legislation in other provinces (except Ontario, New Brunswick and Prince Edward Island) by way of breaching express warranties by representing the Cruze as safe, reliable, and "more for your money"; (vi) breach of contract, though the plaintiffs conceded at the hearing that there was no basis for this claim; and (vii) waiver of tort as the plaintiff reserved the right to elect at the common issues trial to waive the tort and have damages assessed in an amount equal to the gross revenues earned by the defendants or all income they received from the sale of the Cruze.

The Court ran through its analysis of whether or not to certify the within action as a class action, and ultimately concluded that the criteria specified by s. 6(1) of the *CAA* had been met. The Court therefore ordered the within action to be certified as a class action, for the specified class, limited to "all persons in Canada that purchased or leased a model year 2011-2015 or newer Chevrolet Cruze with a 1.4L engine [class vehicles]". As well, the Court appointed the plaintiff as the representative plaintiff for the class. The Court found that there was no basis in fact to support some of the alleged causes of action, and as such, limited the class action to proceed with the following claims: (i) negligence in relation to the development, design and manufacture of the cooling system of the class vehicles, resulting in a defect in the cooling system; (ii) unjust enrichment resulting from payment by class members for vehicles which did not suffer from the defect in the cooling system and receiving vehicles which had the defect; (iii) breach of statutory warranties imposed by the *CPBPA* and similar consumer protection legislation in other provinces by selling class vehicles that were not reasonably fit for their intended purpose, durable, and of acceptable quality; and (iv) waiver of tort.

The relief claimed by the class will include general and special damages, exemplary and punitive damages, restitution for depreciation in resale value, loss of use, annoyance and inconvenience, and a declaration that the defendants made representations to the public which they knew, or were reckless to the fact that they were false or misleading in a material respect for the purpose of selling automobiles. Additionally, the relief will include pre-judgment interest pursuant to *The Pre-judgment Interest Act*, SS 1984-85-86, c P-22.2, and such further and other relief as the court may deem just.

The Court also listed the common issues to be determined at the common issues trial for the general class as being:

(a) Did the cooling system in the class vehicles contain a defect relating to the water pump and/or the reservoir that could cause unreasonable leakage of engine coolant (defect);

(b) If yes, when did or should the defendants have known of the defect;

(c) Did the defendants breach statutory warranties pursuant to s. 16 or 19 of the *CPBPA* or similar legislation in other provinces or territories by selling class vehicles with the defect;

(d) Did the defendants breach a duty of care owed to class members by designing, developing or manufacturing class vehicles with the defect?

K. Class Action Certification

G.C. v Merck Canada Inc., Merck & Co., Inc., Merck Sharp & Dohme Corp., 2019 SKQB 42

The plaintiff, G.C. applied for certification of the within action as a class action pursuant to *The Class Actions Act*, SS 2001, c C-12.01 ("*CAA*"). The defendants opposed the certification. This case concerned the prescription drugs marketed by the defendants, Proscar and Propecia, each containing the active ingredient finasteride which is a Type II 5 a-reductase inhibitor which acts to inhibit the conversion of testosterone to dihydrotestosterone. Proscar was prescribed to men for the treatment of benign prostatic hyperplasia, a condition that can lead to prostate enlargement and urologic events. Propecia was prescribed to men for the treatment of male pattern hair loss.

On November 18, 2011, an advisory that some men had reported an inability to have an erection that continued after stopping the medication was added to the drugs' product monographs. The plaintiff claimed that the defendants were negligent in failing to warn Canadian men of the risk that sexual dysfunction may persist after discontinuation of treatment with either Proscar or Propecia. G.C., along with other witnesses who provided affidavit evidence, had taken Propecia or Proscar for various amounts of time, and each experienced sexual dysfunction that persisted after they stopped taking the drug. The plaintiff and defendants each called an expert witness to give evidence on the drugs and causation relating to sexual dysfunction. The witnesses held opposing opinions.

The Court analyzed whether to certify the action as a class action, walking through the steps of s. 6(1) of the *CAA*. The Court noted that the test is whether there is some basis in fact to support the claim, and that the Court should not be concerned with the claim's merit in deciding certification. The Court found that the requirements for certification under s. 6(1)(a) through (d) of the *CAA* were met and directed that s. 6(1)(e) of the *CAA* (the question of whether there is an adequate plaintiff) be dealt with after the plaintiff files a revised litigation plan.

L. Class Action Certification – Misrepresentation – Failure to Disclose a Cause of Action – Plain and Obvious – Pure Economic Loss

Graham Wright v Horizons ETFS Management (Canada) Inc., 2019 ONSC 3827

The defendants in this case created and managed derivative-based exchange traded fund ("ETF"). These were purchased through stock exchanges in addition to being available to retail investors. The plaintiff was one of the retail investors. One night, the value of the ETF collapsed which eliminated nearly 90% of the assets the fund had accumulated over many years. The plaintiff commenced a proposed class action with a primary cause of action in common law negligence and an ancillary cause of action under s. 130 of the *Securities Act,* for alleged misrepresentation in primary market for securities.

The plaintiff pleaded that Horizons had a duty to exercise the powers and discharge the duties of its office honestly and in good faith and a duty to act fairly, honestly and in good faith with its clients, including unitholders. The plaintiff argued that the defendant failed to meet the applicable standard necessary, and the product contained fundamental design flaws which exposed the investors to severe risk. The defendant argued that the plaintiff's negligence claims which was a product liability claim for pure economic loss, on an allegedly carelessly designed investment product, was not a reasonable cause of action.

The court found for the defendant and dismissed the motion. In relying on the five-part test in s. 5 of the *Class Proceedings Act* the court dismissed the certification action for a failure to meet the first criterion of the test: the pleadings disclose a cause of action. The court found that it was plain and obvious that the plaintiff's negligence action was for pure economic loss and that the scope of the undertaking assumed by the fund manager and developer did not form a proximate relationship for the purposes the plaintiff alleged. Specifically, the court held that extending a duty of care to the creator of an index tracking ETF would deter useful economic activity, encourage a multiplicity of inappropriate lawsuits, disturb the balance between statutory and common law actions envisioned by the legislature and introduce a regulatory function into the courts. Further, the court held the statutory claim under s. 130 of the *Securities Act* was not available for misrepresentations in a prospectus associated with selling of ETFs in a secondary market. The plaintiff's statutory claim should have been brought under Part XXIII.1 of the *Securities Act* which needed leave of court before asserting, but it was not given nor pleaded.

XIV. Endnotes

1 CQLR, c P-40.1.

2 *Saint John Energy v Kettle*, 2019 CanLII 98478 (NBCA).

3 RSC, 1985, c C-34.