



Products Liability Perspectives



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From the Chairman



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I am honored to have been selected as the Chair of the Product Liability Practice Group of ALFA International. I look forward to the next few years and hope that I can maintain the momentum that Skip Martin created during his tenure as Chair. We have already begun plans for our next meeting,

which will take place in the Fall of 2008. In preparing for that meeting, please let us know if you are aware of any hot issues that would be of interest to ALFA clients and attorneys. We strive to make our meetings as informative as possible and appreciate any suggestions we receive to make them better each time.

Kevin Owens of the Chicago ALFA firm, Johnson & Bell, will be the Program Chair for this next meeting. I have worked with Kevin for years now and have found him to be a very dedicated and hardworking person. I have high expectations for his next meeting and I know we will not be disappointed.

Dennis Keene and Krsto Mijanovic have done a terrific job in getting this newsletter out. I have asked them to work with me and two other persons to transition out of the position and

to give other ALFA attorneys the opportunity to contribute to this publication. Dennis and Krsto will continue to work closely with the new editors through the transition, and then they will turn over the overall responsibility for the newsletter within the next six months.

We continue to have requests from clients and associations to assist in various ways. Our practice group hopes that we will continue to hear from our clients and their associations whenever matters arise that need our help. Please feel free to call me at (334) 956-7610 or send an email to cstewart@bradleyarant.com if you have any suggestions for making the Product Liability Practice Group better or more relevant to your business. I look forward to seeing you all soon.

-Chuck Stewart

Notes From the Editors

Not only do Brazil, Australia, India and Texas, USA, make great vacation destinations,

they also happen to be home to the authors of our featured articles for this edition of *Perspectives*. From product warnings to the protection of consumers in Brazil, this edition takes you around the globe to provide scholarly articles on topics relevant to our community.

We hope you enjoy the Summer Edition of *Perspectives* and look forward to your input for future editions.

-Dennis Keene &
Krsto Mijanovic



The Challenge of Product Warnings: Do I Use Words (Which language)? Or Pictures? Or Both? [A/ K/ A: Utilizo Las Palabras (en qué lenguaje)? O Cuadros? O Ambos?]¹

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As most reasonable people would agree, the goal of an effective warning or technical instruction is to deliver pertinent safety information clearly, concisely, accurately and with the appropriate urgency to convey the seriousness of a potential hazard. The ways to achieve that goal, however, are as numerous as there are products available. In certain instances, hazard information may be better conveyed by the use of pictographs rather than words. In other situations, pictographs may be inappropriate or misleading and the textual statement of the hazard (and how to avoid the hazard) is the preferable choice. The ANSI Z535 standards provide acceptable options for text warnings and pictographs. ANSI Z535.3 contains design criteria for images that are almost universally recognized; therefore, users have become familiar with the concepts conveyed by those pictographs and are able to understand and follow them to avoid many hazards associated with certain products or activities.

For many products, however, pictographs or symbols may be either inappropriate or have not been developed. In these instances, one of the more difficult choices facing industry today is whether to provide information only in English or whether to incorporate additional languages. This consideration is impacted by the rapid diversification of the American population. In a survey published in May 2006, *USA Today* listed the five most common names found in the real estate records of thirty-seven states where records of home purchases are easily accessible. Of the thirty-seven states, nine listed at least one Hispanic surname in the top five, and five reported at least one Asian surname in the top five. Of those, two (California and New Mexico) reported Hispanic surnames for all top five positions, and Texas reported Hispanic surnames for four of the top five.² In a US Census Bureau analysis of its 2000 census, it was found that forty-seven million people (18% of the total population age five and over) spoke a language other than English at home.³ The influx of immigrants to the United States, many of whom will *not* consider English their primary language, will

only add to this situation. According to a January 2001 publication, those immigrating to the United States in the 1990's, and children born to them, accounted for almost two-thirds of the population growth between 1990 and 2000.⁴

Unfortunately for manufacturers, courts have not provided a clear answer to the question of whether a duty exists to provide warnings in languages other than English. For example, a manufacturer of children's aspirin was not held liable for a child's contracting Reyes' disease because the English-only labeling inserts complied with FDA requirements.⁵ In another case, a manufacturer of a railway hopper car used to transport bulk quantities of beans argued that it was not responsible for the death of a Spanish-speaking worker because any warnings it would have used (there were none on the suffocation hazard at issue) would have been only in English. The Court observed, however, that it was "no great stretch to infer" that the English warnings, had they been used, would "more likely than not" have been read by a co-worker or supervisor and conveyed to the worker, at least implying that English-only warnings would have been sufficient.⁶

On the other side of the issue, several courts have refused to excuse a manufacturer from claims that it should have provided non-English or pictograph warnings under circumstances where the product is used by non-English speaking parties. For example, in *Hubbard-Hall Chemical Co. v. Silverman*, 340 F.2d 402 (1st Cir. 1965), the court, applying Massachusetts law, held that a pesticide manufacturer was liable for the death of Puerto Rican farm workers for failing to supply pictographs or non-English warnings even though the pesticide met all applicable regulations. Similarly, in *Stanley Ind., Inc., v. Wm. Barr & Co.*, 784 F. Supp. 1570 (S.D. Fla. 1992), the district court in Florida refused to grant summary judgment to the manufacturer of boiled linseed product because the manufacturer failed to include graphics or non-English warnings of combustion dangers when evidence demonstrated that the product was specifically

advertised to the Spanish-speaking community in the Miami area. Texas has also recognized that bi-lingual warnings may be necessary at times. In *Lozano v. H.D. Ind., Inc.*, 953 S.W.2d 304 (Tex. App. – El Paso 1997, no writ), the court stated "[w]hile we are concerned that in a bicultural community, such as El Paso, an effort should be made to ensure that workers are provided with safety instruction in their primary language, a review of the record convinces us that [the Plaintiff] was fluent in English."

As the population continues to diversify, the pressure will only increase towards requiring that warnings and technical information be accessible and understandable to people of differing backgrounds. Currently, the ANSI Z535 standards provide translated versions for the signal words "DANGER", "WARNING", and "CAUTION".⁷ While the standard provides that the translations are "optional considerations", the fact remains that sixteen non-English translations for each of these words are provided. It is anticipated that the revised version of this standard will include several additional non-English languages, as well as the translation for the signal word "NOTICE", upon its release in the near future. The availability of these translations will provide support for the argument that a manufacturer should include non-English language warnings in certain situations.

In light of the authorities discussed above, manufacturers must carefully consider when it is appropriate to utilize pictograph and/or non-English warnings with their products. Factors to consider when making this decision include (but are not limited to): (1) the market to which the product is directed; (2) the known (or reasonably anticipated) resale market for the product; (3) the characteristics of the "typical" user – including the user's expected skill or experience; (4) the risk assessment for the product which indicates the probability and severity of the specific harm to be addressed by the instruction; (5) the feasibility of including multi-language warnings; and, (6) the effectiveness (or lack thereof) of a pictograph to adequately convey the hazard and

hazard avoidance information. As with the development of English warnings, manufacturers must be mindful to not provide so much information that "information overkill" becomes a risk. For those manufacturers who determine non-English warnings are appropriate, the ANSI Z535 standards will provide great assistance in translating key signal words needed to bolster their effectiveness.

¹ Originally written for and published in the March 2007 Newsletter of Hazard Communication Systems, LLC.

² "Hispanics' Surnames Move Up On Buyers' Lists," *USA Today*, May 11, 2006 at 15A.

³ Census Bureau, U.S. Dep't of Commerce, Publ. C2KBR-29, Language Use and English-Speaking Ability: 2000, (2003).

⁴ Steven A. Camarota, Immigrants in the United States - 2000: A Snapshot of America's Foreign Born Population, Center for Immigration Studies (2001), <http://www.cis.org/articles/2001/back101.html>.

⁵ *Ramirez v. Plough, Inc.*, 863 P.2d 167 (Cal. 1993).

⁶ *Garay v. Missouri Pacific Ry. Co.*, 38 F.Supp.2d 892 (D. Kan. 1999).

⁷ See, ANSI Z535.4-2002, Annex D.

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Professional Duty Exclusions in Product Liability Policies

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Insurers often try to deny indemnity for product liability claims by relying upon clauses which exclude claims arising in circumstances where the insured owed some sort of professional duty to the claimant. The intention of these exclusions is to prevent dual coverage for claims under a professional indemnity policy and under the product liability policy. Although these exclusions are often invoked, they rarely come before the courts and so the recent case of *Fitzpatrick v Job & Job trading as 'Jobs Engineering'* [2007] WASCA 63 is of interest. In this case, a majority of the Western Australian Court of Appeal found that the duty an insured owes in its "professional capacity" does not extend beyond the person who contracted with it to obtain its products and services.

Background

Jobs Engineering custom-made and supplied a wood processing machine to Ridolfo. The machine was specifically manufactured without a cabin to facilitate its transport from Tasmania to Western Australia. Once the machine had been transported to Western Australia, Ridolfo arranged for a cabin to be custom-made by a local fabricator.

Ridolfo owned and operated the machine without incident for nearly two years. In August 1998, Ridolfo sold the machine to Mr. Fitzpatrick. When Mr. Fitzpatrick purchased the machine, Ridolfo explained to him that if a log became misaligned, the

splitter box mechanism needed to be put into neutral and the wood adjusted with a hooked metal bar. Mr. Fitzpatrick, however, did not follow these instructions and instead regularly used his foot to realign any logs that became misaligned - without first having put the splitter box mechanism into neutral. Unfortunately, on one occasion while performing this operation, Mr. Fitzpatrick's left foot became trapped in the splitter box and had to be amputated.

Mr. Fitzpatrick sued Jobs Engineering and Ridolfo for damages. At first instance, a verdict and judgment was entered in favour of both Jobs Engineering and Ridolfo. On appeal, the majority found that although the danger associated with deliberately placing one's foot into the splitter box while it is in motion is clearly perceptible, Jobs Engineering had breached the duty it owed to potential users of the machine, including Mr. Fitzpatrick, by failing to advise Ridolfo to install a barrier guard between the cabin and the splitter box (to discourage the sort of activity Mr. Fitzpatrick had engaged in). The damages awarded to Mr. Fitzpatrick were reduced by 70% to take into consideration his contributory negligence in failing to take reasonable care of his own safety.

Professional Services Exclusion

At all relevant times, Jobs Engineering held a combined business insurance policy with GIO General Limited. The policy provided liability insurance for both bodily injury and damage to property caused by an occur-

rence related to the design, manufacture and supply of machinery and equipment during the period of insurance. The policy did not provide professional indemnity coverage to Jobs Engineering.

GIO denied coverage to Jobs Engineering in relation to Mr Fitzgerald's claim, inter alia, on the basis that an exclusion clause in the policy stated that GIO shall not be liable for claims arising:

out of a breach of duty owed in a professional capacity by you or persons for whose breach of such duty you may be legally liable.

The question that came before the Court was whether or not Jobs Engineering's failure to advise Ridolfo of the need to fix a barrier between the cabin and the splitter box amounted to a breach of duty owed by Jobs Engineering in its "professional capacity."

Acting Justice Pullin held that the exclusion clause did not apply because any failure by Jobs Engineering to give advice was merely a failure to provide information and did not amount to a breach of duty in its "professional capacity." Acting Justice Buss, with whom President Steytler agreed, also found that the exclusion clause did not apply, but on the basis that the duty owed by Jobs Engineering in its "professional capacity" was limited in its application to persons who had retained Jobs Engineering to provide professional services and did not ex-

tend to subsequent purchasers or users.

The majority judgment is significant because it effectively says that a professional services or professional duty exclusion clause like that in the GIO policy will not apply to claims made by parties who did not have a contractual relationship with the insured. Thus, claims involving a breach of duty owed in a professional capacity, which are generally thought to be beyond the scope of a public or product liability policy

and more appropriately dealt with by a professional indemnity policy, may in fact be covered when the injured party did not directly retain the insured to perform the work or services in issue.

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Consumer Protection for Products in India

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Product Liability

Product liability is the legal liability imposed upon a manufacturer, seller, importer, exporter or supplier of any product to compensate buyers, users or bystanders for any damage, physical injury or economic loss caused to the purchaser or user of a product or to any third party, due to some defect in the product. Although the ultimate responsibility for injury or damage in a product liability case most frequently rests with the actual manufacturer, liability may also be imposed upon a party wholly outside the manufacturing and distributing process. Certain other liabilities may also accrue under the relevant laws depending upon the nature of products that one deals with.

Product liability has acquired immense importance in the last 50 years. Many product-caused injuries are governed by liability rules/laws. In India, product liability falls within the ambit of the laws of consumer protection.

The law of consumer protection is based on the principle of "caveat emptor" (let the buyer beware), which imposes the burden of proof and responsibility regarding the purchases on the buyer. This, however, changed as the law recognized the inability and imperfect knowledge of the purchaser in the economic affairs. The consumer protection law that was actually developed from the law of torts achieved the statutory form due to the enactment of various consumer protection acts in various countries such as the Consumer Protection Act, 1986 (the "CP Act") in India.

Concept of Consumer

The case of *Donogoue v. Stevenson* gave

rise to tort law remedy for the consumer even before the CP Act developed. In *Donogoue*, the appellant and her friend went to a café where the friend bought a bottle of beer and gave it to her. After she had consumed the contents, they noticed a decomposed snail in the bottle, causing her to suffer shock and severe gastroenteritis. Though the appellant was not a party to the contract i.e., as a purchaser of goods, the manufacturer was held liable on the ground that he owed a duty of care to the ultimate consumer. Thus, the term consumer was held to have wider connotation covering not only the purchaser but also the ultimate consumer. This principle applies not only to the manufacturers, but also to the suppliers, distributors, retailers, assemblers, packagers, bottlers and repairers of the goods.

The CP Act covers within its purview the concept of product liability as deficiency in services / goods (Section 2 (1) (O)) which is any fault, imperfection or short coming in the quality, quantity, potency, purity or standard, which is required to be maintained. The CP Act, however, excludes from its purview the services rendered free of charge and services that are rendered as a part of the services of the sovereign authority. This principle of excluding the sovereign authority is one of the tort law principles but, if they render the services that can also be rendered by any other private authority that will come with in the purview of the CP Act.

Law of Torts

Various provisions of the CP Act stand for various tort law principles from which the entire consumer law developed. These developments show us how the tort law principles developed into the international princi-

ples of the Consumer protection.

For a tort, there must be a breach of the legal duty leading to the violation of a legal right. To enable a consumer to bring an action he must have availed the services for the consideration, which may be either paid or promised or partly paid, or under any system of deferred payment.

A complaint can be made by a consumer if there is:

1. An unfair trade practice (Sec 2(c) (i))
2. Defect in the goods (Sec 2(c) (ii))
3. The goods or services suffer from deficiency of the standards stated (Sec 2(c) (iii))
4. Excess price is charged than was stated
5. Hazardous goods when offered for sale in contravention of law (Sec 2(c) (iv))

The above conditions of complaint deal with the aspects of fraud, negligence, and recklessness that are tort law principles.

Negligence

Negligence is a breach of duty caused by the omission to do something, which a prudent and reasonable man would not do. This principle of tort law is inserted into the CP Act under Sec.14 (1) (d).

The consumer must show that:

1. He had suffered from the negligence of the producer;
2. There must be a nexus between the loss/injury suffered and the negligence of the goods/service provider;
3. The damage suffered must not be

too remote a consequence of the negligence of the defendant; and

4. There should be no contributory negligence by the consumer.

Where a person is guilty of negligence *per se*, no further proof is required. For example where a homeopathic doctor practices in the allopathy without being qualified in that, negligence *per se* and he is liable in consonance with the maxim '*sic utero tuo ut alienum non leodas*' (a person is held liable at law for the consequences of his negligence). The burden of proving the negligence is always on the consumers. They have to establish that:

1. The defect was present when it left the hands of the manufacturers or any other party who is a defendant;
2. The defect was due to the negligence of the above said parties; and
3. The defendant has a duty of care.

By proving the above, the consumer can seek remedies under Section 14 of CP Act and the defendant can be made liable for negligence both in services and goods.

Unfair Trade Practices

The CP Amendment Act, 1993, incorporated a complete definition of "unfair trade practice" in Section 2(1)(r) of CP Act. The same definition is contained in Section 36 (a) of the Monopolies and Restrictive Trade Practice Act, 1969. It means 'a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice'. For example, false representation of the particular standard, quality, quantity, grade, composition etc. of the good, giving such warranty or guarantee of the performance, efficacy or the life of the product which is not based on the proper test, etc. representing that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not have or making a false or misleading representation concerning the need for, usefulness of, any goods or services or gives false or misleading facts disparaging the goods, and services or trade of another person are all unfair trade practices.

Unfair trade practice applies both to services and goods. But, in order to constitute an "Unfair trade practice" there has to be a trade practice at issue.

An unfair trade practice claim is based on the tort law principle of fraud for which the person can be made liable i.e., the in-

tention to mislead the public or the consumer is important. In such cases, under the provisions of Section 14 of CP Act, the forum can order the defendant to stop such unfair trade practice. The provisions of CP Act will be in addition to and not in derogation of the provisions of any law for the time being in force.

Compensation and Other Remedies

Compensation and the payment of damages, are designed to place the consumer in the same position as he was before the injury. There are various kinds of damages: Exemplary, ordinary, nominal and contemptuous damages.

Damage alone will not suffice until it is a consequence of a legal right (*damnum sine injuria*). Loss is a generic term. Injury too means invasion of any legally protected interest of another. Mere loss or injury without negligence is not contemplated under Section 14. Loss for which the compensation is claimed should be caused due to the negligence of the person. Section 14 of CP Act, 1986 talks about the remedies to the consumer in case of violation of his rights. According to Section 14 the consumer redressal forum can ask the producer or the manufacturer:

1. to remove the defect;
2. to replace the goods with new goods;
3. to return the price or the charges paid;
4. to pay the compensation for loss or injury;
5. to remove the deficiencies in the goods or services;
6. to discontinue the unfair trade practice;
7. to cease the manufacture or not to offer or with draw the hazardous goods from the market;
8. to issue corrective advertisements; or
9. to provide adequate costs to the parties etc.

On a complaint of the consumer the respective Consumer Forum may pass an order to the opposite party, for instance, to remove the defect, to replace the goods, to return to the complainant the price and/or charges, to pay compensation, to discontinue unfair trade practice, not to offer hazardous goods for sale, to withdraw the hazardous goods or to provide for adequate costs to parties. Further, under the principles of product liability the holder of a trademark, who is identified as manufacturer of a product by his trademark, may be held liable for paying compensation to others under certain circumstances.

Redressal forums can now assess and determine damages based on facts and also on the inconvenience and mental agony caused on account of negligence of the opposite party. It is not mandatory or obligatory on part of the complainant to ask for specific relief and forums are not debarred from granting relief not prayed by the complainant if they can be justified on merit.

Conclusion

Product liability claims have increased significantly in recent times. There are several reasons for this trend. Technological advances have made it easier to pinpoint defects and prove that the harm was caused by the product. Social attitudes towards claims have changed thanks to better awareness of the public's right to press liability claims. The increased awareness has been fueled by solicitors' advertisements and extensive media coverage.

Companies need to manage product liability risks in a proactive way since the real damage is often to the brand name and the company's reputation. Careful planning and reflection can help them to avoid faulty design, defective raw materials and inadequate safety mechanisms. Documented quality control procedures such as ISO 9000 can pinpoint the gaps, which exist in product design, development and manufacture.

In pursuance of the recommendations of the Central Consumer Protection Council, the Central Government, [Ministry of Consumer Affairs, Food & Public Distribution, Department of Consumer Affairs (Consumer Protection Unit)] on 16th January, 2004 constituted a Working Group to consider amendments in the CP Act and formulate new Acts for protecting the interests of consumers including a Product Liability Act.

Until such time, the CP Act is reasonably protecting the consumer against the unreasonable terms and conditions under the standard form contract (which often puts the supplier of goods or services in a dominant marketing position). Moreover, today no company wants to be seen as an entity responsible for unjust business practices. But many times the consumer chooses to suffer injustice and exploitation in silence. The need of the hour is a well-informed consumer and consumer movements willing to espouse causes aggressively.

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Brazilian Consumer Defense and the Importance of Health Protection

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The protection of the consumer appeared almost simultaneously in different countries as a response to the changes that created an unbalanced relation between suppliers and millions of consumers, which became, especially after the Industrial Revolution, more and more distant from the production process. This distance meant not only that consumers would know less about the products, but also have less power to require the maintenance of production quality.

Each country has a different history with respect to consumer protection legislation. In Brazil, the first such law was published in 1938. The law provided about crimes against popular economy, and thus indirectly, protected consumers. Over the sixties, the protection was developing, but still were not specifically designed to offer consumer protection. They consisted of laws establishing standards for the quality of the goods and services sold. Other forms of indirect protection to consumers were (and still are) the Sanitary Vigilance rules that regulate the activities of those working with perishable goods, or those rules that impose limits to the freedom to practice some professional activities like medicine, banking, and education. The regulations aim to maintain a minimum quality in the services performed.

In 1985, Law No. 7.347 was published, and despite its main procedural characteristics, this law consolidated the rules already existing, providing them with a collective character. The collective character of the consumer right was already considered important by the legislator once the consumer is not an individual, but a collectivity and the entire society can be defined under the concept of consumers. For such reason, protecting the consumer means protecting a collective right, thus deserving a more accurate protection from the State.

The legislator was inspired by the fact that in modern life, almost every, if not all, of a Brazilian's basic rights are satisfied by some form of consumption - from food to electricity, nearly all daily relations are consumption means-, and therefore decided that consumer rights should be elevated to

the category of fundamental human rights.

Currently, the consumer protection is ratified in the 1988 Federal Constitution,¹ complemented by Law No. 8.078/1990, known as the Consumer Defense Code. Although Brazil's normative systems for consumer defense were inspired by foreign systems, they have been entirely and specifically adapted to Brazilian social and economic reality, characterized by a scenario with a huge gap separating rich and poor, making it even more difficult for consumers to impose their will and rights.

The most relevant peculiarities and important innovations in the Brazilian Consumer Defense Code are: i) a very wide-ranging concept of supplier (including direct and indirect suppliers); ii) consumer basic rights with specific instruments to validate these rights; iii) protection against quantity and quality differences; iv) improvement in the deadlines of statutes of limitation and laches; v) increase in the hypotheses of disregarding the legal entity; vi) regulation on publicity; vii) control of abusive clauses, personal data and consumer debt; viii) introduction of a sanctioning system (administrative and criminal); ix) easier access to the Judiciary system; and x) encouragement to private settlement between consumers and suppliers, with the possibility of consumption collective agreements.

Among the particularities mentioned above, it is worthy to point out the specific protection provided to consumers in the contractual relations relative to Health Insurance. Such kind of relation is usually established by the so-called adhesion contracts. "Adhesion Contracts" are pre-established contracts that are usually signed with Insurance Companies or other enterprises that are in a more powerful position than the person intending to contract the services, without being able to negotiate the contractual clauses. Thus, it is very common in such cases that the person has not even agreed to all its contents. Some clauses in this type of contract are considered abusive and have been subject to regulation and limitation by both Legislative and Judiciary Powers.

Generally, the "restriction to abusive clauses" means that the Consumer Defense Code (as the whole system) allows the Public Power to intervene and restrict the autonomy in private contractual relations in order to prohibit conditions that might be harmful for consumers, based on the relevance of consumer relation, as previously mentioned.

Specifically, in the case of Health Insurance contracts, the social role is highly important. These relations involve two fundamental human rights: health and consumption. Health is defined in the Federal Constitution as a fundamental human right, and although the government is responsible for assisting and providing the conditions for treatments and health maintenance, private institutions are also authorized to provide such services, which does not mean that the service loses its social importance, being still a matter of public interest, and must be regulated and supervised by the Government.

In 1998, Law No. 9656 was published to regulate Health Assistance and Private Insurance Health Companies. The Federal Constitution, the Consumer Defense Code and this Law are applicable to Health Insurance Contracts. The Constitution has the highest level in hierarchy. The other two normative texts do not conflict. The Consumer Defense Code serves as a guideline created to establish limits to the ordinary legislator, avoiding the enactment of restrictive or abusive norms that might be harmful to consumers, and has a broad range of application that affects different consumption relations in the public and private sectors. Law No. 9656 is more specific, subject to the guidelines determined by the Code, and its interpretation must be enlightened by the same; however, it is applicable to the specific cases of health insurance contracts and their consumption issues.

Finally, it is important to mention the nature of the Health Insurance Contract. It is a long-term service agreement whose purpose is remuneration in consideration of a guarantee (a risk to the Insurance Health Company) that in case of medical issue, the treatment costs will be borne by the Insurance Company. The client makes monthly

payments, but might never have to use the services of the company. Therefore, the relation is based on risks. Considering the explanation above, in accordance with the legislative guidelines, Brazilian Courts usually decide issues involving Insurance Health Companies in favor of consumers.

We may point out, for instance, the cases in which the health insurance company, under different allegations, does not bear a transplant cost. A transplant is usually a resource used in extreme cases of life or death. A Court of Justice of Rio Grande do Sul decided in favor of the plaintiff² when a health insurance company, with which the plaintiff executed a contract, decided not to pay the expenses of the plaintiff's kidney transplant. The insurance company authorized the client, by phone, to carry on with the procedure ensuring that he would be reimbursed for the expenses made against the receipts evidencing them. Nevertheless, when the procedure was concluded, the company claimed that this was a case not included in the contract signed with the client/patient, which did not have a reimbursement clause, and for such reason, the company was not responsible for the transplant expenses. Finally, the insurance company claimed that Law No. 9.656/98 was approved and published after the contract was signed, and for this reason, should not be applicable to the case. However, the court decided this case in favor of the plaintiff based on the allegations that, since it was a long term renewable contract, the new legislation published during the enforcement of the contract should be incorporated by it. Under the light of Law No. 9.656/98, the court considered abusive the contractual clause denying the payment of the expenses. Abusive clauses disrespect the good faith principle that must govern all contractual relations, hinder consumers' legitimate expectation, and are against the contractual objective, thus such clauses are null.

Another type of clause considered by national courts as abusive and related to insurance health contracts are the ones that

establish a certain limit to the period of the patient's hospitalization, or even limit the quantity of blood bags that might be used while the patient is hospitalized. In both cases, the consumer signs a contract with an insurance company to be covered in case of illness. Time or amount of blood cannot be estimated, neither can any other related quantities that could be necessary for the recovery process. Any clause that might limit the resources to the recovery process is not acceptable.

In the Civil Appeal,³ the court decided that not only the health insurance company had to supply the blood bags, but also to be responsible for transfusion procedures not conditioning treatments to a certain period. The person who signs a contract with a Health Insurance Company expects that in case of need the company will support the treatment costs.

Likewise, a decision rendered in a Special Appeal⁴ should be mentioned. The plaintiff claimed the annulment of the contractual clause that limited the hospitalization period. The plaintiff was pregnant and when the baby was born, she needed to be hospitalized. The contract established a 90 day period for the hospitalization, which was not enough to provide the treatment necessary for the baby recovery. The Superior Court of Justice understood that the clause limiting the hospitalization period offended the principle of reasonability and was abusive since it is a huge disadvantage to the consumer, and also imposed obligation against good faith, which was prohibited by the Consumer Defense Code. Based on such considerations, the Superior Court of Justice condemned the defendant to pay all hospital expenses referring to the period exceeding the 90 day period established by the contract.

The evolution of the Consumer Defense can be observed in both Legislative and Judiciary Powers. The Legislative worded and enacted normative texts providing rights and means to achieve these rights. Not less important is the Judiciary activity that can put in practice the Legislative work.

The most favorable norm to the consumer was considered the one applicable to settle consumer disputes. Since health insurance contracts are long term ones, and the decisions are mostly favorable to consumer, the unanimous understanding was that all legislative texts enacted during the contract enforcement should be included by such contracts, and the insurance company would be responsible for the inclusion, which is the main reason for the contracts signed before the enactment of Law No.9565/98 must be interpreted today in the light of such text.

Finally, when considering the special aspects and the possibility of annulling abusive clauses in consumer contracts to reestablish harmony and balance in relations where one of the parties is clearly more powerful than the other, naturally the object of these contracts involves such an important theme as health, and normative texts and court decisions will be more inclined to protect the weaker party, i.e. the consumer. Even though providing proper protection to consumers is important, it is also relevant to keep the equilibrium between consumer and suppliers without favoring more one of the parties, creating an unsafe ambiance where relations would not be developed naturally.

¹ 1988 Federal Constitution, art. 5, item XXXII: The State will protect the consumers in accordance with the law." (free translation).

² Civil Appeal 7000709064- 6th Civil Chamber.- T.JRSj. 1^o 06.2005- v.u.- Reporting Associate Justice Ubirajara Mach de Oliveira.

³ Civil Appeal s/ Ver 271.814-4/2-00- 7th Chamber "A" of Private Law- TJSP- j. 1^o 02.2006-v.u.- Reporting Associate Justice Carlos Roberto de Souza.

⁴ Resp 345.848/RJ- 4^a T.- STJj. 04.11.2004-majority-reporting. Associate Justice Barros Monteiro- DJU 04.04.2005.

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Case and Statute Analyses

ARIZONA

AUCTIONEER NOT SUBJECT TO STRICT LIABILITY

In *Antone v. Greater Arizona Auto Auction*, 155 P.3d 1074 (Ariz. 2007), the plaintiff brought a products liability action against a commercial vehicle auctioneer for damages arising out of an accident where the plaintiff's truck was rear-ended and the improperly installed trailer hitch punctured the truck's fuel tank. The Arizona Court of Appeals held that an auctioneer was not a seller under the state's product liability statute because the auctioneer played a "passive role in contributing to the product's presence in the stream of commerce."

The appellate court rejected plaintiff's argument that the auctioneer was a "seller" under the statute because the auctioneer was part of the largest auction company in the country, inspected the vehicles, profited from sales transactions, and had indemnity agreements and liability insurance. Instead, the court held that the auctioneer "never interacted with the ultimate consumer and at no time took title to or sold any vehicle." Furthermore, the fee it charged to buyers were operating costs, not profit from sales, and all vehicles are sold "as-is." Thus, the auctioneer was not a "seller" and the lower court's summary judgment was proper.

ILLINOIS

APPLICATION OF CONSUMER EXPECTATIONS TEST LOOKS TO POINT OF VIEW OF ADULT RATHER THAN CHILD, AND A PRODUCT DEEMED "SIMPLE" AND ITS DANGERS "OPEN AND OBVIOUS" IS NOT PER SE EXEMPT FROM RISK-UTILITY TEST

In *Calles v. Scripto-Tokai Corp.*, 864 N.E. 2d 249 (Ill. 2007), a three-year-old girl died from smoke inhalation after she started a fire using an Aim N Flame utility lighter. The girl's surviving mother filed suit against the designer, manufacturer, and distributor of the lighter, asserting claims including negligence and strict liability.

The supreme court held that under the consumer-expectation test, the lighter was not unreasonably dangerous because it performed as an ordinary consumer would expect – it produced a flame when used in a reasonably foreseeable manner. The court rejected the argument that it should apply the test from the child's point of view. Instead, it concluded that "[f]or the purposes of the consumer-expectation test, 'ordinary' modifies consumer" thus "we hold that the ordinary consumer of a lighter . . . is an adult – the typical user and purchaser. Therefore, the expectations regarding the Aim N Flame's use and safety must be viewed from the point of view of the adult consumer." The court recognized that the lighter was not used in its intended manner, i.e., by an adult; however, an ordinary consumer would expect that a child could obtain possession of the lighter and attempt to use it.

Although the lighter satisfied the consumer-expectation test,

and therefore it was not unreasonably dangerous, the court then applied the risk-utility test. The Court held that the nature of the lighter's open and obvious danger did not preclude the manufacturer's liability. The court rejected the distributor's argument that when a product is deemed "simple," the risk-utility test need not be employed. The court held that the "simple-product exception," adopted by a court of appeal in *Scoby v. Vulcan-Hart Corp.*, 211 Ill. App. 3d 106 "is nothing more than the adoption of a general rule that a manufacturer will not be liable for open and obvious dangers." Citing twenty-five other jurisdictions that have rejected a *per se* rule barring a manufacturer's liability, the court held that

the open and obvious danger of a product does not create a *per se* bar to a manufacturer's liability, nor does it preclude application of the risk-utility test. Rather, the open and obvious nature of a danger is one factor that may be weighed in the risk-utility test. [Citation.] We reject [the appellate court's] adoption of a "*per se* rule excepting simple products with open and obvious dangers from analysis under the risk-utility test. (260.)

Applying the risk-utility test, the court then held that the appellate court was correct in reversing the trial court's decision to grant summary judgment because "reasonable persons could differ on the weight to be given the relevant factors, particularly where additional proofs are necessary, and thus could differ on whether the risks of the [lighter] outweigh its utility." As such, the summary judgment was correctly reversed.

LOUISIANA

HAIR PRODUCT MAKER EVADES LIABILITY FOR SCALP BURNS

In *Jack v. Alberto-Culver USA, Inc.*, 949 So. 2d 1256 (La. 2007), the Louisiana Supreme Court dismissed a product liability suit against the manufacturer of a hair care product that left a user's scalp burned and infected, finding that inadequate warnings did not contribute to the injuries. At trial, the niece testified that she read the instructions and performed a "strand test" by applying the product to a strand of plaintiff's hair. Plaintiff testi-

fied that she felt a burning sensation during the procedure.

The trial judge ruled in favor of Jack, finding the product warnings inadequate for failure to warn the user to test the product before use. The Supreme Court reversed and dismissed the suit, explaining that plaintiff "presented no evidence in the form of expert testimony or otherwise that the product was unreasonably dangerous because Alberto-Culver should have instructed the user to perform a scalp test."

Both the trial court and the appellate courts relied on *Thomas v. Clairol*, 583 So. 2d 108 (La. Ct. App. 1991), which involved a similar hair product that cautioned users that the product may cause skin

irritations, warned that a preliminary allergy test should be conducted, gave instructions for the allergy test, and provided a toll free number for questions. The appellate court concluded that the warnings accompanying the product were inadequate because “no such warnings existed other than the caution of the possibility of skin or scalp irritation, thus distinguishing the present case from *Thomas*.” (1258.)

The high court observed, however, that the warnings that accompanied the product in *Thomas* were more detailed, and that the trial court could not merely rely on the facts presented in *Thomas*. The court noted:

[T]here is nothing in the record which tells us if the chemicals used in the *Thomas* case were the same as those used in this

case. In addition, the *Thomas* opinion stated that the Clairol warning included a ‘preliminary allergy test,’ and that the directions for the test were ‘set forth at the beginning of the instruction.’ However, nothing in the *Thomas* opinion indicated what the instructions for this test were, what the test entailed, or whether the ‘preliminary allergy test’ in that case was the same as the ‘scalp test’ that plaintiff argued was necessary in this case. (1259, fn. 5.)

Noting that the trial judge was required to examine factual evidence, the high court held, “Because plaintiff presented no factual evidence to satisfy her burden of proof, the trial court’s judgment in her favor was manifestly erroneous.”

MISSISSIPPI

MANUFACTURER ESTABLISHED ASSUMPTION OF THE RISK AS A COMPLETE DEFENSE TO CLAIMS FOR FAILURE TO WARN AND DEFECTIVE DESIGN

In *Green v. Allendale Planting Co.*, 954 So. 2d 1032 (Miss. 2007), the Mississippi Supreme Court affirmed the trial court’s granting of a summary judgment on both an employer liability and product liability claims. There, an employee lost three fingers while operating a mule boy that his employer had purchased three to four weeks before the plaintiff’s accident. Plaintiff heard an unusual noise coming from the mule boy on the day of the accident. Leaving the mule boy running, he knelt down close to moving chains and lost his balance. To regain his balance, he extended his hand, which was pulled into the moving chains.

The supreme court held that based on his deposition testimony the plaintiff “had knowledge and appreciated the dangerous condi-

tion of the mule boy.” (1044.) Thus, because he did not turn off the tractor before approaching the chains, the trial court was correct in finding that he “voluntarily and deliberately approached the dangerous condition.” As such, the manufacturer successfully established an assumption of risk affirmative defense.

Concurring and dissenting in part, Justice Graves disagreed with the majority’s opinion that the manufacturer successfully established the assumption of risk affirmative defense. Justice Graves emphasized that the plaintiff “accidentally fell and injured his hand.” (1045.) Therefore, “although [the plaintiff] placed himself in close proximity to the moving chains attached to the mule boy, he did not deliberately and voluntarily choose to place his hand inside the machine.” (1045.) Justice Graves thus concluded that the manufacturer’s summary judgment was improperly granted because the issue of whether a manufacturer’s failure to install a safety guard caused the plaintiff’s injuries was a jury question.

TEXAS

TEXAS SUPREME COURT REVERSES ASBESTOS AWARD

In *Borg-Warner Corp. v. Flores*, 2007 WL 1650574 (Tex.), the Texas Supreme Court held that in asbestos claims plaintiffs must demonstrate an asbestos-exposure threshold to establish causation against defendants. There, a brake mechanic, who smoked for nearly forty-one years, brought suit against a brake manufacturer, alleging negligence and strict liability. The mechanic claimed that the Borg-Warner brake pads he worked with for four years, five to seven times a week, caused his asbestosis.

The supreme court reversed the appellate court’s holding that “if there is sufficient evidence that the defendant supplied any of the asbestos to which the plaintiff was exposed, then the plaintiff has met the burden of proof.” Instead, courts must consider whether the asbestos in a defendant’s product was a “substantial factor” in bringing about the plaintiff’s injuries. By creating this threshold burden, the court did not intend to replace the “frequency, regularity, and proximity” test established in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986), but rather to provide “quantitative information necessary to support causation under Texas law.” The court found that “[g]iven asbes-

tos’s prevalence[,] some exposure ‘threshold’ must be demonstrated before a claimant can prove his asbestosis was caused by a particular product. . . . [I]t is not adequate to simply establish that ‘some’ exposure occurred.”

Although the court did not doubt that mechanics in the braking industry could generally be exposed to respirable asbestos fibers, the court could not determine the approximate quantum of fibers to which the plaintiff mechanic was exposed. It found that he failed to show any evidence of the

quantity of asbestos to which [he] might have been exposed or whether those amounts were sufficient to cause asbestosis. Nor did [he] introduce evidence regarding what percentage of that indeterminate amount may have originated in Borg-Warner products.

As such, the evidence of causation was legally insufficient and judgment was rendered in the manufacturer’s favor.

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Half Moon Bay, California

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October 25, 2007

2007 ALFA Annual Business Meeting
The Westin, Chicago River North
Chicago, Illinois

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March 6, 2008

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The Ritz-Carlton, Key Biscayne
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April 3, 2008

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June 11, 2008

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