As we approach the end of 2009, let us be one of the first to wish you and your families a joyous and Happy Holiday season. The end of 2009 also marks the end of my and Steve’s tenure as editors for Products Liability Perspectives. It has been an honor and a privilege to work with the wonderful attorneys within the ALFA International community and share their legal insights with you through this newsletter. So as we move "out with the old, in with the new," we would like to introduce and congratulate the two individuals who will be taking over the editor reins: Colleen Murnane of the Cleveland ALFA firm, Frantz Ward LLP; and Robert Smith, Jr. of the Houston ALFA firm, Lorance & Thompson. Welcome aboard!

-Steve Hamilton & Bryan Martin

Notes From the Editors

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But before we go, Steve and I bring you one more edition of Perspectives that is sure not to disappoint. In this edition you will encounter strategies for admitting a plaintiff’s drug or alcohol use in product liability cases, a two-state perspective on a manufacturer’s duty to defend and indemnify its sellers, and updates regarding the Consumer Product Safety Commission and the Consumer Product Safety Improvement Act (“CPSIA”) of 2008, as well as MTBE and the City of New York trial with its recent verdict in the amount of $105,000,000.

Also, do not forget to mark your calendars for the upcoming 2010 ICS, which will be held March 11-14, 2010, in Desert Springs, California. We hope to see you there!

-Steve Hamilton & Bryan Martin
used or abused alcohol or drugs at some time in the past may be critical to the defense’s effort to reduce economic or emotional damages.

This article will address reported decisions from around the country concerning the admissibility of a plaintiff's drug or alcohol use in the product liability context and provide strategies for defense counsel when attempting to admit and use this evidence.

**PLAINTIFF’S INTOXICATION AS THE SOLE CAUSE OF THE ACCIDENT**

The plaintiff in any product liability case has the burden of proving causation. In cases where the plaintiff’s alcohol or drug use may have been a factor in the accident, defense counsel’s first argument for admission of this evidence should be that the evidence negates the element of proximate cause. See, e.g., Englehart v. Jeep Corp., 594 P.2d 510, 514 (Ariz. 1979) (“If decedent’s driving caused the jeep to overturn, defendants prevail not because of the doctrine of ‘unanticipated misuse,’ but because no causal link exists between the defect and the decedent’s death.”); Madonna v. Harley Davidson, Inc., 708 A.2d 507, 509 (Pa. Super. Ct. 1998) (“Where the defense offers evidence to establish that the accident was solely the result of the user’s conduct, and not related in any way with a product defect, it is relevant and admissible for the purpose of proving causation”).

In order to properly set up this argument, defense counsel will need to marshal as much evidence as possible to establish that plaintiff’s alcohol or drug use led to his or her intoxication and that the intoxication, and not any product defect, was the sole cause of the accident. See Sobczak v. General Motors Corp., 871 N.E.2d 82, 95 (Ill. App. Ct. 2007) (“Although highly probative, evidence of alcohol consumption [in a product liability case] is also extremely prejudicial; therefore, actual intoxication must be established, indicating physical or mental capabilities”).

Usually, evidence of intoxication can be presented in two ways: through the opinion testimony of a lay witness, who observed the plaintiff’s behavior, see Fed. R. Evid. 701, or in the absence of eyewitness testimony, through the testimony of an expert (e.g., toxicologist) who has reviewed critical testimony and where available, the results of plaintiff’s blood alcohol test. See Fed. R. Evid. 702.

A good example of defense counsel’s effective use of both means of proving intoxication is found in the Madonna v. Harley Davidson case. The plaintiffs in that case filed suit against Harley Davidson claiming that a manufacturing defect in their motorcycle caused an accident and their resulting injuries. The defense had to concede that an upper mounting bolt on the brake caliper of the front wheel of the motorcycle was defective, subject to a recall and, if it broke during operation, could cause the driver to lose control. Plaintiffs proceeded with a strict liability claim based on the theory that the defective bolt did in fact fracture while the motorcycle was being operated and was the sole cause of the accident. Madonna, 708 A.2d at 508. At trial, over plaintiffs’ objection, the defense was able to call two witnesses who testified that they smelled alcohol on the driver’s breath after the accident. The defense was also able to present an expert pathologist who reviewed the results of the driver’s blood alcohol test and concluded that the driver’s blood alcohol was .14% at the time of the accident and at that level the driver was not fit to operate the motorcycle. Id.

Following a defense jury verdict, plaintiffs appealed, contending that the trial court erred in admitting the evidence of the driver’s alcohol use. While recognizing that negligence concepts are not relevant in strict liability cases, the appeals court found nonetheless that evidence of the driver’s alcohol use was relevant “to negate the theory that the defect caused the accident, and to establish that the driver’s reckless conduct was its sole cause.” Id. at 510; see also Anderson v. Harry’s Army Surplus, Inc., 324 N.W.2d 96 (Mich. Ct. App. 1982) (holding that the trial court abused its discretion by not allowing the defendant to introduce evidence of the plaintiff’s intoxication to show that the plaintiff was so “intoxicated that he was unable to protect himself or escape from the tent once the fire started”) (overruled on other grounds).

There are certain classes of product liability cases in certain jurisdictions where a plaintiff’s alcohol or drug use and impairment may be more difficult to use against the plaintiff on the issue of sole proximate cause. See, e.g., Black v. M & W Gear Co., 269 F.3d 1220, 1235 (10th Cir. 2001) (evidence that plaintiff’s decedent was intoxicated when he drove riding lawnmower off embankment inadmissible in product liability case where allegations concerned the lawnmower’s failure to have rollover protection); Mercurio v. Nissan Motor Corp., 81 F. Supp. 2d 859 (N.D. Ohio 2000) (evidence that driver-plaintiff’s blood alcohol level was .18% excluded in crashworthiness case because “[r]egardless of the cause of [plaintiff’s] accident, the type of accident that is at issue in this case – a frontal collision with a stationary object at thirty to forty miles per hour – is foreseeable”); D’amario v. Ford Motor Co., 806 So. 2d 424, 442 (Fla. 2001) (evidence of driver-plaintiff’s intoxication was improperly admitted in crashworthiness case “[b]ecause the initial collision is presumed in crashworthiness cases” and “the jury’s focus in such cases should be on whether a defect existed and whether such defect proximately caused enhanced injuries”).

**INTOXICATION AS A CONTRIBUTING CAUSE OF THE ACCIDENT**

In products cases where the issue of causation is blurred, evidence of intoxication may be relevant as a potential contributing cause of the accident. A good example of this is found in Grimes v. Mazda North American Operations, 355 F.3d 566 (6th Cir. 2004), where the passenger-plaintiff brought product liability claims against Mazda and others following a rollover accident which rendered her a quadriplegic. Plaintiff contended, among other things, that the truck was defective because its design gave it a high propensity to rollover under reasonably foreseeable circumstances. Defendants sought to
offer evidence that the driver of the vehicle had consumed alcohol and drugs on the night of the accident. The district court allowed the evidence over plaintiff’s objection. On appeal, the Sixth Circuit affirmed the decision, concluding that the driver’s impairment was relevant because it may have caused or contributed to the accident. *Id.* at 573.

The district court in *Harris v. Kubota Tractor Corp.*, 2006 WL 2734460 (W.D. La. Sept. 22, 2006) reached a similar conclusion. In that case, the plaintiff was severely injured while attempting to remove a rotary tiller from a Kubota tractor. While being treated at the hospital, a urinalysis was performed indicating that plaintiff had byproducts of cocaine and marijuana in his system. During subsequent depositions, the plaintiff admitted that he used cocaine a few days before the accident. Plaintiff filed motions in limine to exclude the results of the urinalysis and any testimony concerning plaintiff’s drug use arguing that the evidence did not establish that plaintiff was impaired at the time of the accident. In opposition, the defense submitted expert testimony indicating that the positive test results likely indicated that plaintiff used drugs closer to the time of the accident. Thus, plaintiff could have been feeling the direct effects of the drugs including “fatigue, impaired concentration and apprehension” at the time of the accident. *Id.* at *2. The court denied plaintiff’s motion in limine, finding that plaintiff’s drug use could have affected his ability to operate the tractor and remove dangerous components of the tractor while the tractor was in use. *Id.* at *3.

In *Padgett v. General Motors Corp.*, 544 F.2d 704, 705 (4th Cir. 1976), plaintiff alleged that defects in the engine restraining system of his 1969 Chevrolet caused the vehicle to go out of control and hit a utility pole. As a result of the accident, plaintiff, who was a passenger in the vehicle, was rendered a paraplegic. During trial, defendants offered evidence that both plaintiff and the driver of the vehicle consumed several alcoholic drinks within the four hours preceding the accident. The jury returned a defense verdict and plaintiff appealed, challenging the district court’s admission of the alcohol evidence. In refusing to find error, the Fourth Circuit explained that “evidence of drinking could have been relevant to the perceptive abilities of [the plaintiff and driver], both of whom testified about the accident at trial.” *Id.* The court apparently found the evidence of alcohol consumption relevant to the issue of plaintiff’s decision to ride with the potentially intoxicated driver and on the issue of accident causation.

Finally, in *Sobczak v. General Motors Corp.*, the plaintiff suffered severe burn injuries when he was unable to timely exit a parked Chevrolet Astro van that caught fire while he was sitting in it. 871 N.E.2d 82, 86. Plaintiff filed suit against General Motors, alleging that a defect in the van’s fuel management system caused the fire. At trial, General Motors sought to introduce evidence that plaintiff had consumed alcohol on the night of the incident and had a blood alcohol content of .184% at the time the incident occurred. The trial court allowed the evidence over plaintiff’s objection and the jury returned a verdict for General Motors. The appellate court affirmed, finding that plaintiff’s intoxication was highly relevant to the issue of whether plaintiff’s injuries were caused by a defect in the van or by plaintiff’s intoxication, which may have impaired his ability to remove himself from a dangerous situation. *Id.* at 96.

**EVIDENCE OF DRUG OR ALCOHOL USE IS RELEVANT TO THE EXTENT OF PLAINTIFF’S INJURIES**

Defense counsel should also consider whether the presence of alcohol or drugs in plaintiff’s system at the time of the accident may have made the injuries more severe than they would have otherwise been. The obvious example is where the plaintiff fails to avail himself or herself of a safety device that could have reduced the potential for injury. For example, in *Adams v. Pacific Cycle, L.L.C.*, 2009 WL 532629 (Ariz. Ct. App. Mar. 3, 2009), the plaintiff brought strict product liability claims against a bicycle distributor for injuries he received when the front wheel of his bicycle allegedly separated from the bicycle frame during use. At trial, the court allowed the admission of evidence that plaintiff had smoked marijuana and consumed alcohol before riding the bicycle and that his intoxication may have led to his decision not to wear a helmet. The defense presented expert testimony that, if plaintiff had worn a helmet, the forces applied to his brain would have been significantly less. The trial court’s decision to admit the evidence was affirmed on appeal.

In *Mercurio v. Nissan Motor Corp.*, 81 F. Supp. 2d 859 (N.D. Ohio 2000), the defense argued that evidence of plaintiff’s blood alcohol content of .18% at the time of the accident should be admitted to show that alcohol use enhances central nervous system injuries by reducing cardiac output, increasing susceptibility to hemorrhagic shock, and increasing pulmonary vascular resistance. The defense had a psychologist prepared to offer these opinions. While the district court was openly skeptical of the proffered expert’s qualifications and ability to offer opinions that would satisfy *Daubert*, the court did not rule out that defendants could make the required showing at a later time.

Expert testimony can also be used to show that plaintiff’s health or behavioral problems are the product of his or her long history of drug or alcohol abuse, rather than an injury sustained in the accident. For example, in *Dillon v. Nissan Motor Co.*, the Eighth Circuit held that plaintiff’s cocaine and marijuana use was admissible, despite being highly prejudicial, because plaintiff attempted to prove that he suffered from emotional injuries as a result of the accident. 986 F.2d 263, 270 (8th Cir. 1993). The court allowed the defense to rebut plaintiff’s testimony with evidence that drug abuse can cause aggressive and hostile behavior. *Id.*

**EVIDENCE OF INTOXICATION IS RELEVANT TO PLAINTIFF’S FAILURE TO HEED A WARNING**

In a failure-to-warn case, evidence that the plaintiff was intoxicated at the time of the accident may, depending on the circumstances, be used to show that the plaintiff was not the
type of person who would heed warnings. For example, in *Holmes v. Honda Motor Co.*, 960 F. Supp. 844 (D.N.J. 1997), the court allowed defendants to offer evidence that plaintiff was intoxicated at the time he was operating his ATV, finding it was relevant to his failure-to-warn claim. The court explained as follows: “Clearly, evidence that a plaintiff who has been warned about consuming alcohol prior to riding his ATV, and nevertheless, does so, is relevant to rebut the ‘heeding presumption,’ in that it portrays an individual who is unlikely to heed warnings.” *Id.* at 854.

**PLAINTIFF’S INTOXICATION IS RELEVANT TO THE DEFENSES OF PRODUCT MISUSE, CONTRIBUTORY/COMPARATIVE NEGLIGENCE, AND ASSUMPTION OF THE RISK**

While jurisdictions may vary, the defenses of product misuse, contributory or comparative negligence, and assumption of the risk, in some form or fashion, are often considered defenses to a plaintiff’s product liability claim.

A good example of plaintiff’s alcohol and drug use being admitted on the issue of product misuse is found in the *Adams v. Pacific Cycle* case. In *Adams*, discussed above, the trial court allowed evidence of plaintiff’s drug and alcohol use on the issue of product misuse and the appeals court affirmed, noting that it would not hold, as a matter of law, “that riding the [bicycle] while intoxicated and possibly under the influence of marijuana is . . . a reasonably foreseeable use of the bicycle.” *Id.* at 854. Similarly, the Oklahoma Supreme Court in *Kirkland v. General Motors Corp.*, 521 P.2d 1353 (Okla. 1974), held that plaintiff’s admission that she was drinking “vodka and tonic” on the night in question and smelled of a strong odor of liquor according to five eyewitnesses was sufficient to warrant admission of this evidence on the issue of plaintiff’s abnormal or misuse of an automobile.

In *Wallace v. Ford Motor Co.*, defendant was successful in having evidence of plaintiff’s intoxication admitted on the issue of comparative negligence. 723 A.2d 1226, 1231 (N.J. Super. Ct. App. Div. 1999). In that case, plaintiff filed suit against Ford, alleging that a defect in the right rear axle of the decedent’s 1989 Ford Mustang caused the accident that resulted in the decedent’s death. Ford contended that the right rear axle fractured during the accident and that the accident occurred because the decedent was drunk and travelling at seventy miles per hour on a curvy road. The trial court admitted the evidence of intoxication over plaintiff’s objection and the jury returned a defense verdict. On appeal, the trial court’s ruling was affirmed, with the appeals court holding that the intoxication of the decedent was properly admitted on the issue of comparative negligence. *Id.*

In some states contributory negligence may be a complete defense to a product liability action. For example, in *Hinkamp v. American Motors Corp.*, 735 F. Supp. 176, 178 (E.D. N.C. 1989), the district court applied North Carolina contributory negligence law to bar a plaintiff from pursuing a design defect claim where there was evidence that the plaintiff was intoxicated at the time he was operating the allegedly defective automobile.

In *Ford Motor Co. v. Arguello*, 382 P.2d 886 (Wyo. 1963), Ford appealed a jury verdict that had been entered in favor of a product liability plaintiff who had been injured while riding as a passenger in a 1957 Ford. Plaintiff’s theory of defect was that certain rivets holding the rim to the spider on the right front wheel assembly were defectively manufactured, which inevitably caused one of the rivets to fracture and pop into the tire. Plaintiff contended that the unexpected low tire pressure caused the driver to lose control of the vehicle and leave the roadway. The trial court allowed evidence that the plaintiff and driver had been drinking prior to the accident as relevant to the issue of contributory negligence and assumption of the risk. The Wyoming Supreme Court affirmed. *Id.* at 890-892.

**ADMISSION OF PLAINTIFF’S ALCOHOL OR DRUG USE ON ISSUES RELATED TO DAMAGES**

Evidence of a plaintiff’s drug or alcohol use may also be relevant to mitigation of damages, see Adams, 2009 WL 532629, at *7 n. 12 (holding that plaintiff’s post-accident use of marijuana was relevant on issue of damages because a neuropsychologist testified that marijuana use could interfere with the healing of plaintiff’s brain injury) and lost future income, see *McLaughlin v. Fisher Eng’y*, 834 A.2d 258, 263 (N.H. 2003) (allowing defense counsel to cross-examine plaintiff’s economist regarding plaintiff’s drug use which could arguably impact his future earning capacity); see also *Mercurio*, 81 F. Supp. 2d at 863 (holding that evidence of plaintiff’s alcohol use was relevant to the issue of plaintiff’s future employability and his life expectancy; thus, the evidence was properly admitted) and *Palmer v. Waterman Steamship Corp.*, 328 P.2d 169, 171 (Wash. 1958) (evidence of plaintiff’s intoxication admissible because it could affect plaintiff’s ability to work). However, it is critical that defense counsel discover sufficient evidence of plaintiff’s alcohol or drug use and provide the necessary foundation for admission of the evidence. *See Meller v. Heil Co.*, 745 F.2d 1297, 1303 (10th Cir. 1984) (evidence that plaintiff had two hashish pipes in his possession at the scene of accident excluded in product liability case despite defense’s contention that it was probative of decedent’s life expectancy where medical foundation lacking).

**OTHER AVENUES TO CONSIDER**

If evidence of a plaintiff’s alcohol or drug use is pervasive enough to constitute a regular pattern or habit, defense counsel may be able to use the evidence to show that the plaintiff was likely under the influence of alcohol or drugs at the time of the accident, even though there may be no direct evidence that the plaintiff was acting in conformity with his habit at the time of the accident. This was the situation in *Loughan v. Firestone Tire & Rubber Co.*, 749 F.2d 1519 (11th Cir. 1985), where the Eleventh Circuit had to consider whether the district court
erred in allowing the defense to offer evidence that the plaintiff regularly drank alcohol at work.

The plaintiff in *Loughan* was a tire mechanic who was injured when he was remounting a Firestone multi-piece rim wheel assembly. During the remounting process, the rim assembly unexpectedly separated with explosive force, striking plaintiff in the head. He sued Firestone claiming the rim assembly contained a design defect which made it unstable. Firestone contended that the separation was due to lack of serviceability of the parts and plaintiff’s improper reassembly. In support of their defense, Firestone was allowed to offer evidence under Federal Rule of Evidence 406 that the plaintiff had a habit of drinking on the job for years and was carrying a cooler on the day of the accident. The Eleventh Circuit affirmed the trial court’s decision to admit the evidence over plaintiff’s argument that the evidence was inadmissible character evidence, finding that a sufficient pattern of on-the-job drinking was shown to warrant admissibility as proof of plaintiff’s conduct on the day in question. *Id.* at 1524. The court explained that the evidence of plaintiff’s habitual consumption of alcoholic beverages could be relevant to the defenses of assumption of the risk and apportionment of liability under Florida’s comparative negligence standard. *Id.* at 1522.

While it may be rare that a plaintiff opens the door, defense counsel should pay very close attention to how the plaintiff decides to introduce evidence of his or her damages. We recently tried a crashworthiness case where we had discovered evidence that the plaintiff had used and abused cocaine and other drugs in the years leading up to the accident. While the evidence had nothing to do with the accident and was highly prejudicial to the plaintiff, we were nonetheless able to bring it in on cross-examination of the plaintiff because she testified on direct that she was in good health prior to the accident and her decline in health was caused by her injuries suffered in the accident.

A reported decision that provides a good example of this strategy is *Jenkins v. Chrysler Motors Corp.* In that case, the plaintiff received burns to 20 percent of his body when the 1995 Dodge Ram he was sleeping in caught on fire. 316 F.3d 663, 664 (7th Cir. 2002). Test results revealed that plaintiff’s blood alcohol content on the night of the incident was three times the legal limit. Plaintiff also had a long history of alcohol abuse and drunk driving convictions. Plaintiff filed suit against Chrysler, alleging a defect in the truck’s transmission caused the accident. Prior to trial, plaintiff was successful in using motions *in limine* to exclude all mention of his numerous drunk driving convictions, prior alcohol use, and that he had previously checked himself into a treatment facility. However, during trial, plaintiff’s father took the stand to testify regarding the change in his son’s quality of life following the accident. He said that his son was a happy person and had “a twinkle in his eye” prior to the accident, but had been depressed since the accident. On cross examination, defense counsel took advantage of the testimony and used the previously excluded alcohol-related evidence to impeach the father by insinuating that with all of the alcohol-related incidents, the son could not have been as happy before the accident as the father contended. The trial court’s decision to allow the evidence was affirmed on appeal based on the father opening the door. *Id.* at 665-66.

Where an expert witness testifies that the plaintiff’s post-accident drug or alcohol use is a direct result of the accident subject to the lawsuit, defense counsel is free to question the expert witness regarding any of the plaintiff’s pre-accident drug or alcohol encounters. See *Burke v. Spartanics Ltd.*, 252 F.3d 131, 136 (2d Cir. 2001).

Finally, counsel should consider whether evidence of plaintiff’s drug or alcohol use can be used to show that plaintiff does not have a reliable account of the events that occurred prior to the accident. Where evidence suggests that the plaintiff was under the influence of alcohol or drugs at the time of the accident, defense counsel may want to argue that evidence of the plaintiff’s intoxication is admissible to rebut plaintiff’s memory or version of the accident. For example, in cases where plaintiff presents evidence that it was his or her habit to wear a seatbelt, defense counsel could present evidence that the plaintiff’s consumption of alcohol or drugs prior to the accident may have altered his or her normal practice. See *Grimes v. Mazda N. Am. Operations*, 355 F.3d 566, 573 (6th Cir. 2004); *Evans v. Toyota Motor Corp.*, 2005 WL 3844071, at *5 (S.D. Tex. Sept. 2, 2005). Along the same lines, plaintiff’s intoxication may be used to show that his or her account of the circumstances of the accident is incorrect. See *Ake v. General Motors Corp.*, 942 F. Supp. 869, 875 (W.D.N.Y. 1996) (“Evidence that decedent might have been intoxicated might make the jury more likely to believe that he was traveling at an excessive speed and that he did not use his brakes.”)

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The Manufacturer's Duty to Defend and Indemnify Its Sellers
A Look at Two State Statutes on the Issue and the Problems
Manufacturers Face Due to These Statutes

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If you are one of many ALFA lawyers representing manufacturers who sell products in Oklahoma, you should be aware of the 2004 enactment of 12 O.S. § 832.1, “Manufacturer’s Duty to Indemnify Seller Against Product Liability Actions.” The belief is that § 832.1 was enacted to codify Oklahoma common law pertaining to a manufacturer’s duty to indemnify. However, entities in Oklahoma claiming to be in the “distribution chain” (Oklahoma uses the term “seller” which will be used henceforth) are taking the position that § 832.1 greatly expands a manufacturer’s duty to indemnify downstream sellers for attorney fees and costs.

The principal argument being asserted by sellers is that a manufacturer is now required to indemnify a seller for all defense costs unless the manufacturer proves the seller committed active negligence, a burden never before imposed on a product manufacturer doing business in Oklahoma. Manufacturers’ counsel dispute the argument. Unfortunately, there is no legislative history relating to the enactment of the statute and even five years after its enactment, there are no Oklahoma published opinions interpreting its scope. Therein lies the problem. There is absolutely no consensus on the interpretation of the statute and considerable time and expense can, and have, been devoted to dealing with these arguments.

For run of the mill product cases where a manufacturer and seller are sued in products liability for off the shelf products, the broad arguments are of little concern because sellers in these instances are rarely involved in creating the alleged product defect and thus, indemnifying the seller is not disputed. But for more complicated products requiring seller assembly and installation, there are many competing interests in seller indemnification. For example, manufacturers could be required to pay all of a seller’s defense costs even though most, if not all, costs were incurred defending separate allegations of a seller’s independent negligence or a seller’s breach of contract, etc. Therefore, all manufacturers having contact with Oklahoma should be aware of the practical difficulties these arguments are causing and the possible ramifications that would result if the broad arguments are embraced. This article discusses these arguments and responses.

OKLAHOMA COMMON LAW

The duty to indemnify is nothing new. All jurisdictions impose a duty on a product manufacturer to defend and indemnify downstream parties in the “distribution chain” for attorneys’ fees and costs incurred defending against a claim based on vicarious liability for placing a manufacturer’s product in the stream of commerce. 79 A.L.R. 3rd 278, Product Liability: Seller’s Right to Indemnity from Manufacturer. Within the scope of the duty, most jurisdictions require a manufacturer to indemnify downstream sellers for attorney fees and costs incurred while defending both product liability and claims of passive negligence for placing the product in the stream of commerce. In Oklahoma, passive negligence is defined as negligence that “merely furnishes a condition by which the injury was possible and a subsequent act caused the injury” as opposed to active negligence which is negligence that causes an event “which in the natural and continuous sequence, unbroken by any independent cause, produces that event and without which that event would not have occurred.” Porter, 405 P.2d at 113 (citing Mathers v. Younger, 58 P.2d 857 (Okla. 1936)); Cheatham v. Van Dalsem, 350 P.2d 593 (Okla. 1960)).

The Oklahoma Supreme Court has never required a manufacturer to indemnify downstream sellers for claims of active negligence. To do so would hold a manufacturer liable for losses unrelated to its actions or its product. To illustrate, in Booker v. Sears Roebuck & Co., 785 P.2d 297, 306 (Okla. 1989), the Oklahoma Supreme Court identified the type of costs that were required to be indemnified to aid the trial court on remand. Specifically, the Oklahoma Supreme Court held that “[a] substantial part of the litigation expenses incurred by the claimants may have been attributable to defending certain independent claims pressed solely against them.” Id. n.1. “Those expenses are clearly beyond the ambit of Manufacturer’s liability for indemnity, since they are utterly unrelated to its legal accountability for the product’s safety.” Id. “[T]he manufacturer should pay for defending only those claims against the distributor which are claims for vicarious liability based on the manufacturer’s wrongful conduct. Thus, the manufacturer is not liable for the expenses of defending claims of negligence on the part of the distributor.” Id. at 304. “A distributor’s liability is vicarious when a defect is said to be attributable solely to the manufacturing process rather than to some conduct in the distribution system.” Id. at 303-04.

The Oklahoma Supreme Court justices made it clear that a manufacturer of a product has no duty to indemnify a seller for attorneys’ fees and costs incurred while defending a claim

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of active negligence. The 1989 *Booker* decision is still binding precedent.

2004 OKLAHOMA INDEMNIFICATION STATUTE – 12 O.S. § 832.1

Oklahoma’s 2004 statute concerning a manufacturer’s duty to indemnify, 12 O.S. § 832.1, provides:

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

B. For purposes of this section, "loss" includes court costs and other reasonable expenses, reasonable attorney fees, and any reasonable damages.

C. Damages awarded by the trier of fact shall, on final judgment, be deemed reasonable for purposes of this section.

D. For purposes of this section, a wholesale distributor or retail seller who completely or partially assembles a product in accordance with the manufacturer’s instructions shall be considered a seller.

E. The duty to indemnify under this section:

   1. Applies without regard to the manner in which the action is concluded; and

   2. Is in addition to any duty to indemnify established by law, contract, or otherwise.

F. A seller eligible for indemnification under this section shall give reasonable notice to the manufacturer of a product claimed in a petition or complaint to be defective, unless the manufacturer has been served as a party or otherwise has actual notice of the action.

G. A seller is entitled to recover from the manufacturer court costs and other reasonable expenses, reasonable attorney fees, and any reasonable damages incurred by the seller to enforce the seller’s right to indemnification under this section.

H. Nothing contained in this section shall operate to permit or require dismissal of a party with a right of indemnification arising under this section and nothing in this section shall be used as a basis for dismissal of a plaintiff’s claim against the seller.

The proponents of expanding a manufacturer’s duty to indemnify have a hard time articulating precisely how § 832.1 indicates an intention to take precedence over the *Booker* decision, or any Oklahoma common law, prior to the enactment of the statute. From all indications, *Booker* has not been superseded and nothing in § 832.1 gives the indication that it was meant to alter *Booker*. Indeed, the language of the statute appears to codify *Booker* to a large extent. Nevertheless, sellers are reading ambiguities into the statute and broadly construing them in their favor, as the next few sections demonstrate.

ALLEGED STATUTORY AMBIGUITIES

From the sellers’ viewpoint, the enactment of the 2004 statute left a number of questions unanswered. Sellers are contending § 832.1 expressly overrules the *Booker* decision and that a manufacturer has a duty to indemnify a seller even for the defense of an active negligence claim and even when a product liability claim is not alleged. In arriving at this conclusion, they have several arguments.

First, only the term "seller" is defined in the statute. "Seller" means “a wholesale distributor or retail seller who completely or partially assembles a product in accordance with the manufacturer’s instructions.” 12 O.S. § 832.1(D). The definition appears clear and unambiguous. But some sellers are contending the definition does not answer the question of whether the term "seller" is to be narrowly or broadly construed. They argue the term "seller" is to be broadly construed to include indirect sellers that do not fall within the parameters of the definition set forth in subsection D, i.e., a person is a "seller" if he hired and paid an independent contractor who purchased and installed a product.

Second, sellers are arguing that no product liability (vicarious liability) claim has to be alleged against the seller to trigger the manufacturer’s duty to indemnify. Simply, if a seller is a party to a “product liability case” (interpreted in its broadest sense vis-à-vis a product liability claim being alleged at some point in the case), then the seller is owed indemnification.

Third, sellers argue the statement “[a] manufacturer shall indemnify and hold harmless a seller against loss arising out of a product liability action, except for any loss caused by the seller’s negligence, intentional conduct, or other act or omission, such as negligently modifying or altering the product, for which the seller is independently liable” is ambiguous. Not surprisingly, sellers argue they are entitled to unlimited indemnification unless the manufacturer proves they committed active causative negligence. They simply ignore the *Booker* decision.

Finally, does “loss” mean an actual realized loss or merely a contemplated loss? Is there a distinction between active and passive negligence claims? The statute says it applies “in addition to any duty to indemnify established by law, contract, or otherwise.” Sellers contend this language “extends” the common law duty from the *Booker* decision to include essentially all claims and losses. Manufacturers contend that such an interpretation necessarily supersedes the *Booker* decision because it would require a duty to indemnify that the *Booker* Court expressly rejected.

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PRACTICAL PROBLEMS FOR MANUFACTURERS

If a seller is merely a retailer who sold an off the shelf product, then the indemnification issue is simple. Again, a manufacturer in such situations will not dispute that it must indemnify the seller. Likewise, if a plaintiff merely alleges a product liability cause of action against a seller for placing a product in the stream of commerce, the duty to indemnify issue can be addressed up front and with little debate.

Unfortunately, experienced plaintiffs' counsel often allege active negligence claims against a seller either independently or in conjunction with a product liability cause of action. This is done to force the seller and manufacturer to take adverse positions to each other on the indemnification issue. If Oklahoma law was clear, as it was prior to the statute, a manufacturer would have no duty to indemnify for active negligence claims and no adverse positions would surface.

To illustrate, prior to the enactment of 12 O.S. § 832.1, when a plaintiff sued a manufacturer for product liability and a seller for active negligence, independent or in conjunction with a product liability claim, the decision was easy for the manufacturer. If the seller was being sued for active negligence, then the manufacturer had no duty to indemnify. The manufacturer would have its own counsel, the seller would have counsel to defend the active negligence claim, and if the negligence claim was later dismissed, the manufacturer's counsel would take over the seller's defense for any remaining product liability claim. Now however, if a manufacturer and several defendants are sued and the plaintiff alleges a product liability claim against the manufacturer and active negligence claims against the seller, the appropriate and most cost effective course of conduct for the manufacturer is by no means clear.

Based upon the alleged ambiguities in § 832.1, if the manufacturer denies indemnification at the outset based upon the assertion of active negligence on the seller's part, then the seller seeking indemnification will likely take an adverse position to the manufacturer attempting to disprove the plaintiff's active negligence claim. In such a situation, only the plaintiff wins because all parties are aligned against the manufacturer.

On the other hand, if the manufacturer decides at the beginning of the case to indemnify the seller who was sued for active negligence, then the manufacturer eliminates any defense that the improper assembly or product installation caused the plaintiff's damages. In turn, the manufacturer would be imposed with the additional burden of proving the seller did assemble and install the manufacturer's product correctly, an obligation that is inconsistent with the rationale behind vicarious liability.

Moreover, what happens if the manufacturer decides to take over a seller's defense once the active negligence claim is dismissed short of trial? The arguments sellers are raising put the manufacturer in a bind. If the seller maintains a claim that the manufacturer has a duty to indemnify the seller for all attorney fees and costs incurred prior to the manufacturer taking over its defense, the manufacturer's counsel cannot take over the defense because the competing indemnification claims create a conflict of interest. The manufacturer has to either retain new independent counsel to take over the defense or allow counsel for the seller to continue representing the seller on the manufacturer's dime.

Quite frankly, if the sellers' arguments are adopted as Oklahoma law, manufacturers will have an onerous burden to defend a seller's indemnification claim. A manufacturer is unlikely to go to trial just to prove negligence against a seller, the sellers are aware of this fact, and therefore, it would appear a manufacturer would be better off taking over the defense of a seller at the beginning of a case. However, doing so increases a manufacturer's burden to disprove an active negligence claim against the seller, and the manufacturer's defense of improper installation or assembly would terminate—proving it would simply impose an obligation on the manufacturer vis-à-vis indemnification. A manufacturer's defense costs will increase having to defend the active negligence claim against the seller.

Alternatively, if the manufacturer does not take over the defense of the seller at the outset, proving that the seller committed active negligence will be expensive and it is questionable whether § 832.1 permits a reciprocal award of attorney fees and costs when it is the manufacturer who prevails on an indemnification claim. The manufacturer would have to be aware that it could be stuck with a substantial judgment for the seller's attorney fees and costs, and in all likelihood, the attorney fees and costs were incurred taking an adverse position to the manufacturer!

Sellers would argue it is time they were provided protection; however, in reality, sellers would receive unlimited protection, manufacturers would be absolutely penalized, and plaintiffs would ultimately win. No option is good for the manufacturer if the broad arguments become Oklahoma law. In summary, the enactment of 12 O.S. § 832.1 has already caused considerable hassle and expense to manufacturers.

CONCLUSION

It is unlikely that Oklahoma courts will agree with the expanded, broad interpretation of § 832.1; however, until a published opinion provides otherwise, a manufacturer's defense costs will undoubtedly increase in every case a seller alleges these broad interpretations.

Just recently a trial court judge provided a ruling requiring one of our manufacturing clients to indemnify an “indirect seller” for all attorney fees and costs incurred during the defense of active negligence and breach of contract claims. By way of background, the manufacturer was not an initial party and no product liability claim was even alleged against any defendant. Later during discovery, the indirect seller filed a third-party petition against the manufacturer. The plaintiff later amended his petition to assert a claim against the manufacturer, but changed no allegations against the indirect seller. Eventually, the plaintiff dismissed the active negligence claim at the close of discovery and asserted only product liability claims. At that point, the manufacturer agreed to indemnify the indirect seller and take over its defense. The case was later settled prior to trial.
The trial judge’s ruling requires our client to indemnify (1) the indirect seller, i.e., the party does not fall within the definition of “seller” in § 832.1(D); (2) for attorney fees and costs incurred when no product liability claim was even alleged against any defendant; and (3) for attorney fees and costs incurred by the indirect seller defending against active negligence and breach of contract claims. The judge’s rationale being that the case was “really just a product liability case.” Needless to say, we are appealing the decision and hope the appellate court provides clear precedent on the scope of indemnification.

ARIZONA

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Every manufacturer or seller of a product should know that the Arizona legislature has created a statutory duty for manufacturers of products to defend and indemnify the seller in any product liability action. Product liability actions are defined very broadly by statute in Arizona. Product liability actions include “any action brought against the manufacturer or seller of a product for damages for bodily injury, death or property damage caused by or resulting from the manufacture, construction, design, formula, installation, preparation, assembly, testing, packing, labeling, sale, use or consumption of any product, the failure to warn or protect against a danger or hazard in the use or misuse of the product or the failure to provide proper instructions for the use or consumption any product.” A.R.S. § 12-681. This definition of a product liability action is much broader than the general language in most “indemnity” and “duty to defend” provisions found in supply end contracts and sales agreements, for example.

Arizona Revised Statutes § 12-684 (“the statute”) creates an affirmative duty requiring that a manufacturer indemnify the downstream seller of the manufacturer’s product in cases where the seller is required to defend itself against claims of product liability. The statute also requires that the manufacturer indemnify and defend the seller in cases where there are claims of independent negligence against the seller. The duty to defend and indemnify arises where any product liability claims have been made. “In any product liability action where the manufacturer refuses to accept a tender of defense from the seller, the manufacturer shall indemnify the seller for any judgment rendered against the seller and shall also reimburse the seller for reasonable attorney’s fees and costs incurred by the seller in defending such action unless either paragraph 1 or 2 applies:

1. The seller had knowledge of the defect in the product.
2. The seller altered, modified or installed the product, and such alteration, modification or installation was a substantial cause of the incident giving rise to the action, was not authorized or requested by the manufacturer and was not performed in compliance with the directions or specifications of the manufacturer. A.R.S. § 12-684.

The exceptions to the statute are very narrow. As will be seen below, the manufacturer’s duty to defend is not extinguished by claims made by a plaintiff that the seller was independently negligent. In fact, the manufacturer must indemnify the downstream seller even where there is no ultimate judgment rendered against the manufacturer. And if the manufacturer refuses to indemnify the seller, regardless of whether the manufacturer is found to be completely without fault, the manufacturer is required to reimburse the seller’s defense costs. “The seller’s right to reimbursement for the costs and attorney’s fees does not depend upon the entry of a judgment in the plaintiff’s favor.” See McIntyre Refrigeration, Inc. v. Mepco Electra 799 P.2d 901, 904 (Ariz. App. 1990). It should be noted that the party seeking indemnity and a reimbursement of its attorney’s fees is not entitled to a reimbursement of the attorneys’ fees and costs incurred pursuing the indemnity claim against the manufacturer. See Id. at 906.

Most interestingly, the manufacturer’s duty to defend and indemnify exists even where a conflict of interest would prevent the manufacturer’s attorneys from taking over the defense of the seller. The conflict of interest does not negate the manufacturer’s duty to take over the defense of the seller and indemnify the seller. “The statute does not include a ‘conflict of interest’ exception or defense. If the legislature had wanted to include such an exception, it could and presumably would have done so.” See Bridgestone/Firestone North America Tire, LLC v. A.P.S. Rent-A-Car and Leasing, Inc., 88 P.3d 572, 511 (Ariz. App. 2004) (quoting State v. Fell, 52 P.3d 218, 220-222, ¶¶ 9,13

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In the Bridgestone case, the defendant seller not only failed to diligently defend against the product liability claims brought against it but affirmatively blamed the manufacturer for the defect and advanced a theory that the defect was the cause of the underlying accident. Even after the seller advanced a case adverse to the manufacturer, the manufacturer was still found to have improperly rejected the tender pursuant to the statute and required to pay for the defense which was undertaken and which affirmatively blamed the manufacturer. The seller pointed out on appeal “if a manufacturer declines a tender and leaves a seller to fend for itself, it gambles on its ability to later prove one of the statutory exceptions.” The seller also argued that once the manufacturer rejected the seller’s defense tender, the seller “had to make a tactical decision on whether to defend the tire or admit it was defective and defend the remaining allegations.” Id. at 582. The Court of Appeals accepted the seller’s arguments and found that even where tactical decisions were made to the detriment of the party to whom the tender was made, those tactical decisions would not negate the statutory duty to defend. Id.

What is most important is that the manufacturer understands the penalty of not accepting the seller’s tender. Generally, in practice it is assumed that when a manufacturer settles a case on behalf of the seller, the manufacturer expects, reasonably, that the seller will absorb the defense cost. The statute makes this assumption a bit more dangerous. Armed with the statute, sellers in Arizona are now demanding that the tender be accepted and even amending their answer to include a cross-claim for statutory indemnity against the manufacturer. This makes mediations and settlement conferences more tenuous between the manufacturer and seller and ultimately leaves the manufacturer and seller in an adverse position. Any manufacturer litigant in Arizona must understand the statute. The penalty for not accepting the tender of defense is significant and in drawn out product liability litigation, often very costly.

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Consumer Product Safety Improvement Act (“CPSIA”) Update

The U.S. Consumer Product Safety Commission (“CPSC”) issued a one-year enforcement stay of the new lead and phthalate testing and certification requirements for manufacturers and importers of regulated products that were imposed by the Consumer Product Safety Improvement Act (“CPSIA”). The stay is in effect until February 10, 2010, at which time the Commission will vote whether to terminate the stay. As indicated in a previous edition of Perspectives, the new lead and phthalate testing and certification requirements engendered considerable confusion and controversy due to a lack of CPSC guidance and the short implementation schedule, catching many manufacturers and retailers off guard.

These newly expanded CPSIA certification and testing provisions are generally intended to shift the burden of determining a product’s compliance with all standards and bans from the CPSC to manufacturers and importers. The new certification procedures will require importers and manufacturers to conduct their own testing to support compliance certification. If the product is not properly certified, the CPSC may refuse importation on that basis alone – even without sampling or testing the product. The one-year stay primarily allows the CPSC more time to finalize several proposed rules, which should provide additional guidance and possibly relieve certain materials and products from testing and certification requirements (i.e. inventory).

On November 6, 2009, the CPSC released preliminary guidance entitled Testing and Certification Requirements Under The Consumer Product Safety Improvement Act of 2008. Basically, the document provides interim guidance pending the completion of the proposed regulations. Of particular significance to manufacturers is the guidance regarding the CPSC’s position on a reasonable testing program and how to certify that a product complies with all rules, bans, standards, etc. applicable to a product.

Currently, the CPSC has not given any indication whether the stay will be lifted on February 10, 2010. However, additional guidance has been made available on test methods that will be used by the CPSC testing laboratory for the analysis of phthalate content in childcare items and toys. This Statement of Policy (with comments) was issued on October 27, 2009. Regulations for testing and certification of children’s products containing lead are available for review and public comment until November 30, 2009.

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MTBE and the City of New York Trial

In the August Newsletter, we reported generally on the history and major developments in the nationwide Methyl Tertiary Butyl Ether (“MTBE”) litigation. We also reported on the then ongoing trial in the City of New York v. Amerada Hess case (CONY). We report here on the trial and recent verdict in the amount of $105,000,000. The CONY case was filed against most of the domestic refining and manufacturing industry but by the time of trial only ExxonMobil remained. The case concerned a large number of drinking water wells in Queens, New York but the trial concerned a subset of wells that served as bellwethers and those wells were largely not in use for reasons having nothing to do with MTBE. The trial was structured in four phases. It began on August 3, 2009 and the jury was excused on October 19, 2009 after rendering its verdict on the Phase III issues. In Phase I, the jury found the City had a “good faith intent” to begin construction of a water treatment facility within the next 15 years and to use the water from the wells within the next 15 to 20 years as a “backup drinking water source.”

Phase II addressed whether and at what level MTBE would be present when those wells were operational. Plaintiff’s UST expert, who co-authored a 1986 article widely recognized as focusing attention on the issue of MTBE in groundwater, was permitted to testify that “any facility that has been operating for any length of time has had substantial releases on the order of thousands of gallons” on average per station. Permitting this expert to testify on “assumed” releases was akin to concluding from statistics that, on average, all drivers speed, and on this conclusion issuing speeding tickets.

Plaintiff’s hydrogeology experts testified that non-MTBE gasoline plumes did not present problems because “they did not get very long” and because they would readily biodegrade. According to the CONY experts, MTBE presented very different concerns and “changed everything” in dealing with releases from UST systems. Relying on predictions and models, the City’s experts testified that significant MTBE would be in the wells when they were turned on in 15 to 20 years. Perhaps in recognition of either the complexity of the technical and scientific issues or the jury charge itself, the jury returned its Phase II verdict finding that MTBE would be present in the drinking water at the concentration of 10 ppb which, coincidentally, is the maximum allowable amount in the State of New York.

Phase III addressed causation, design defect, failure to warn, trespass, private nuisance, public nuisance, negligence and damages. Phase III began on August 26, 2009, the jury heard summations on October 2 and returned its verdict on October 19, 2009. The more than 2 weeks of deliberations were not without controversy with reports of a juror consulting outside resources and one juror making threats to another.

Despite almost four years of intense focus on alternative theories of liability, most notably the MDL Court’s own alternative “commingled product liability” scheme, the jury’s verdict was mundane in simply finding that ExxonMobil was liable under a traditional “direct spiller” theory and the jury never got to alternative liability.

The jury found that the 10 ppb peak concentration in 2033, did constitute “injury” and that ExxonMobil was “a cause.” While the jury found that gasoline with MTBE was not reasonably safe for its intended purposes or in light of the reasonably foreseeable harms, it did not find that there was a safer alternative design. This was no small victory because for over a decade MTBE Plaintiffs have argued that ethanol was a safer alternative bringing into evidence an avalanche of decades old documents and testimony regarding industry’s choice of oxygenate to replace lead in gasoline.

Exxon did not fare so well in connection with its failure to warn claim, as the jury found “no or insufficient warnings.” The jury also found for the City on its trespass, public nuisance and negligence claims. The City requested damages in the amount of $250,450,000 and the jury found damages in the amount of $250,500,000. They reduced the amount by $70,000,000, the amount the City argued it would cost to treat contaminants other than MTBE. The jury then allocated 42% of the liability to the settling defendants, leaving ExxonMobil with 58% and a verdict in the amount of $105,000,000. It is
Despite the size of the verdict, it may have been worse but ExxonMobil was successful in avoiding Phase IV when the Court granted its motion in limine to exclude evidence on punitive damages. The Court held that the nature of the conduct and severity of the harm, together with the probability of it occurring did not support punitive damages. The Court reasoned that since the jury had already found that the peak concentration of MTBE in the wells would be in 2033 at the level of the current MCL, no water containing MTBE had been served from the wells, and others contributed to the MTBE that would be in the wells:

I predict that the New York Court of Appeals would not permit an award of punitive damages against a manufacturer and distributor of gasoline containing MTBE based on the risk that another company might have caused a major spill contaminating the Station Six wells, which do not actively supply any water the New York City residents.

With the trial of this set of bellwether wells completed, the issue is whether the City can reduce this verdict to a final judgment or whether it must wait until all remaining wells are tried. In this regard, the City has requested a pre motion conference in early December seeking entry of a partial judgment under Fed. R. Civ. P. 54 (b). This will, no doubt, be hotly contested.

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**CASE NOTES**

**CALIFORNIA**

**MANUFACTURER OF ASBESTOS-CONTAINING PRODUCT HAS NO DUTY TO WARN WHERE DEFENDANT NOT IN THE CHAIN OF DISTRIBUTION OF THE PRODUCT**

*Merrill v. Leslie Controls, Inc., et al., 177 Cal.App.4th 1348 (2009)*

Applying the recent decision in *Taylor v. Elliott Turbomachinery Co., Inc.*, 171 Cal.App.4th 564 (2009), California’s Second Appellate District extended the holding of the Taylor case, finding that an asbestos manufacturer cannot be held strictly liable for failing to warn of the dangerous propensities of other manufacturer’s products or for a design defect in those products, where a manufacturer of a product that contained asbestos neither manufactured, supplied, or distrusted the products which caused plaintiff’s exposure to asbestos.

Plaintiff was a Navy machinist from 1959 to 1979. Plaintiff worked four ships over the course of his career and was exposed to asbestos in three ways. First, respondent’s manufactured valves had internal packing and gaskets within the metal housing of the valve: the packing and gaskets contained asbestos. The asbestos would have to be removed during maintenance of the valve. Second, plaintiff was exposed to asbestos when removing external flange gaskets. Third, asbestos insulation pads covered the body of respondent’s valve and the surrounding pipe connected to it.

The Court noted that Plaintiff failed to offer any evidence that Leslie Controls designed, manufactured, supplied, or installed the flange gaskets attached to the exterior of its valves. Leslie Controls also did not provide the asbestos insulation used on the exterior of portions of its valves. Because it was not in the chain of distribution of the product, under the Taylor rationale, it could not be held strictly liable for a failure to warn of the dangers of asbestos exposure.

As to the first means by which Plaintiff was exposed to asbestos, the Court held Plaintiff failed to produce any evidence that the internal packing and gaskets which Leslie Controls installed in its valves when delivered to the Navy was the same packing and gaskets that Plaintiff removed when conducting maintenance on the valves. Because he did not meet his burden of linking the injury-producing product to Leslie Controls, he could not hold the manufacturer strictly liable for failure to warn. The Court noted that a manufacturer’s duty to warn is limited to its own products.

Further, the Court extended Taylor by holding that manufacturer could not be held liable under a design defect theory where a plaintiff cannot show that it was exposed to asbestos from a product manufactured, supplied, distributed, or otherwise placed in the chain of commerce by that manufacturer.

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COMPONENT PART DOCTRINE DOES NOT APPLY TO MANUFACTURERS OF PUMPS AND VALVES ON NAVY SHIPS


The Second Appellate District reversed the judgment entered in favor of a manufacturer of pumps and valves that were used on Navy aircraft carriers between June 1965 and August 1966. The Court also strongly criticized the ruling in _Taylor v. Elliott Turbomachinery Co., Inc._, 171 Cal.App.4th 564 (2009), holding that it was "wrongly decided," and that its holding did not apply in this case. The Court commented that the _Taylor_ case was contrary to the well-established rule that a manufacturer of a finished product is liable for the dangers of its product's components.

At trial, Plaintiff submitted evidence that the decedent was responsible for supervising repairs and maintenance of equipment in boiler and engine rooms on Navy ships. Asbestos was used in the packing that was found in pumps and valves. The manufacturers moved for a nonsuit at the conclusion of trial on the basis of the component parts doctrine, which was granted.

ROWAN V. KIA MOTORS AMERICA, INC.


One of the plaintiffs was injured in an automobile accident while driving her Kia Sephia. The plaintiffs sued the Kia Sephia manufacturer and seller. The plaintiffs claimed the airbags did not, but should have, deployed in the accident. The trial court granted summary judgment for all the defendants. The plaintiffs appealed only the judgment on the breach of warranty claim. The plaintiffs framed the appeal in terms of the Supreme Court's decision in _Forbes v. General Motors_, 935 So. 2nd 869 (Miss. 2006). The appellate court noted the appeal in the Supreme Court's decision in _Forbes v. General Motors_, 935 So. 2nd 869 (Miss. 2006). Like the plaintiffs in _Forbes_, the plaintiffs here asserted they produced evidence from which a jury could find an express warranty (that the airbags in the subject vehicle would inflate upon a "severe" front or front dash angle crash) and they relied upon the warranty in using the vehicle. But the appellate court found the plaintiffs did not produce sufficient causation evidence. While there was a possibility the airbag could have prevented or mitigated the plaintiffs' whiplash injuries, any conclusion it did would be mere speculation. Therefore, the appellate court affirmed summary judgment in the defendants' favor.


_A catfish farm sued defendant tractor companies alleging breach of the implied warranties of merchantability and fitness for a particular purpose with regard to the defendants' tractors. The plaintiffs appealed the defense jury verdict. One of the plaintiffs' two issues on appeal was that the trial court erred in denying the plaintiffs' motion for judgment notwithstanding the verdict because there was overwhelming evidence supporting their theory. The plaintiffs had put on proof that they experienced an inordinate number of problems with the tractors. The defendants had defended on the theory that, while there might have been problems with the tractors, the tractors were comparable to other tractors on the market and, therefore, were "merchantable." The appellate court agreed with the defendants and upheld the defense verdict._


The plaintiffs appealed summary judgment in the defendant tire company's favor. The plaintiffs alleged that the defendant's right rear tire on a Ford Explorer malfunctioned, along with unspecified defects in the Explorer, causing the Explorer to roll over. The Court of Appeals upheld summary judgment concluding the plaintiffs could not prove the tire that was offered as the tire on the vehicle during the accident was actually on the vehicle during the accident. The plaintiffs' counsel's affidavit was insufficient to prove a chain of custody and create a material issue of fact for the jury.
MONTANA

Malcolm v. Evenflo Co., Inc., 2009 MT 285; 2009 Mont. LEXIS 450

In this case, parents Chad and Jessica Malcolm sued Evenflo, a manufacturer of child seats, after their four-month-old son suffered fatal brain injuries in a rollover car accident. The Malcolms’ case sounded exclusively in strict liability in tort, design defect theory. The Malcolms claimed that the Evenflo OMW model 207 infant child safety seat constituted a defectively designed product that failed catastrophically even though they had used the seat in a reasonably anticipated manner. Evenflo contended that the OMW model 207 was not defective in any way and that the severity of the forces involved in the accident solely caused the child’s death. The Malcolms sought compensatory damages and punitive damages based on their allegation that Evenflo continued selling the defective product in conscious, deliberate and intentional disregard of the danger presented. The jury awarded the Malcolms $6.697 million in compensatory damages and $3.7 million in punitive damages.

On appeal, the Supreme Court of Montana was asked to determine: (1) whether the District Court abused its discretion when it excluded Evenflo’s evidence that the OMW model 207 complied with FMVSS 213 for the purposes of compensatory damages; (2) whether the District Court abused its discretion by admitting evidence regarding the recall and test failures of the OMW model 206; and (3) whether the District Court abused its discretion when it excluded Evenflo’s FMVSS 213 compliance evidence with respect to punitive damages.

The Supreme Court held that the trial court did not abuse its discretion when it excluded Evenflo’s evidence that the car seat complied with safety standards for the purpose of compensatory damages. The safety standards addressed only minimum levels of performance in frontal impacts. The dynamic forces unleashed in a high-speed rollover collision were very different from those present in a frontal crash.

The Supreme Court also held that the trial court did not abuse its discretion under Mont. Code Ann. § 27-1-719(2) by admitting evidence regarding the recall and test failures of an earlier car seat model. Evenflo’s conduct surrounding the testing and recall of the model 206 constituted relevant evidence regarding Evenflo’s state of mind with respect to its sale of the model 207. Evenflo’s state of mind represented a key element in determining whether Evenflo had acted with actual fraud or actual malice for the purpose of determining punitive damages.

Finally, the Supreme Court held that the trial court abused its discretion by prohibiting Evenflo from introducing evidence of the car seat’s compliance with the safety standards for the purpose of considering the appropriateness of punitive damages under Mont. Code Ann. § 27-1-221(2). The Court reasoned that evidence of a manufacturer’s good faith effort to comply with all government regulations is evidence of conduct inconsistent with the mental state requisite for punitive damages.

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PENNSYLVANIA

TO ESTABLISH STRICT LIABILITY, PLAINTIFFS MUST ESTABLISH THAT THE PRODUCT WAS DEFECTIVE AT THE TIME IT LEFT THE MANUFACTURER’S CONTROL


Workers at a particleboard plant were injured when an explosion and fire occurred. Plaintiffs alleged that the factory’s spark detection system, manufactured by defendant, malfunctioned when it failed to activate as intended. The trial court granted summary judgment, which was affirmed on appeal, when plaintiffs stipulated that the alarm had functioned properly for 10 years prior to the incident in question.

In Pennsylvania, a plaintiff may pursue a case for strict products liability under a “malfunction” theory based purely on circumstantial evidence in cases where the allegedly defective product has been destroyed or is otherwise unavailable. The plaintiff does not have to specify the defect in the product, but nevertheless must present evidence from which a jury may infer the elements of a strict liability action beyond mere speculation.

Even under a “malfunction” theory, however, a plaintiff must demonstrate that the unspecified defect existed when the product leaves the manufacturer’s control. In this case, plaintiffs stipulated that the spark detection sensors functioned properly for 10 years. As a matter of law, therefore, the Pennsylvania Supreme Court found that such evidence precluded any inference that the sensors were defective when they left the manufacturer’s control. The Court went on to find that a plaintiff’s admission of prior successful use is relevant to the analysis of liability because it is in direct conflict with the inference to be drawn from the occurrence of a malfunction, and thus undermines the inference that the product was defective when it left the manufacturer’s control.

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TENNESSEE REJECTS AN EXCEPTION TO ECONOMIC LOSS DOCTRINE FOR DAMAGE CAUSED BY SUDDEN, CALAMITOUS EVENTS

Lincoln General Ins. Co. v. Detroit Diesel Corp., et al., 2009 Tenn. LEXIS 512 (2009)

In a case of first impression, the Tennessee Supreme Court adopted the "bright-line" rule regarding the economic loss doctrine as espoused by the United States Supreme Court in East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 868 (1986). The Tennessee Court held that where a defect in a product causes damage solely to the product itself, there can be no tort recovery, and instead a party is limited only to direct and indirect economic losses.

In the case, a rental company owned a bus and obtained a policy of insurance on the bus from appellant. The bus was manufactured by respondents. As the bus was traveling south on a Tennessee interstate, it suddenly caught fire due to an alleged defect in the engine. The fire did not cause personal injury or damage to any property other than the bus itself. The insurer paid the rental company $402,250 pursuant to the insurance policy, and then sued respondents for breach of warranty, negligence, and strict products liability causes of action.

Respondents filed a motion to dismiss, arguing that the "economic loss doctrine" barred the insurer’s claims. The insurer argued that an exception to the doctrine exists where the damage is caused by a sudden, calamitous event, on the basis that because the product was unreasonably dangerous, tort law policies ought to apply. The Tennessee Court reviewed the law of other jurisdictions and found three approaches to the issue presented: the majority view, in which a bright-line rule was drawn barring any recovery in tort by virtue of the economic loss doctrine; the "intermediate" view, in which exceptions to the economic loss doctrine existed where the product was unreasonably dangerous, or the loss was caused by sudden or calamitous events; and the minority view, in which the economic loss doctrine did not bar recovery in tort.

Relying on the Supreme Court decision of East River Steamship, the Tennessee Court rejected the insurer’s argument, noting that it would be difficult for parties, manufacturers, and courts to actually apply a rule that delineated between degrees of risk and the manner in which the product was damaged, as opposed to the bright-line approach. Further, the Court noted that tort law policies of deterrence are adequately promoted: “Because no manufacturer can predict with any certainty that the damage his unsafe product causes will be confined to the product itself, tort liability will continue to loom as a possibility.”

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“In the Trenches”
Notable Accomplishments of ALFA Attorneys

CHARLESTON ALFA FIRM YOUNG CLEMENT RIVERS OBTAINS SUMMARY JUDGMENT IN PRODUCTS LIABILITY ACTION

Partner Duke Highfield and Associate Brandt Horton recently secured a favorable result for their client in a products liability action when the United States District Court for the District of South Carolina, Charleston Division, granted their Motion for Summary Judgment on the eve of jury selection.

The subrogation action was filed against Grove US, LLC and several other defendants in order to recover insurance proceeds paid out following a fire on a large crane. The Plaintiff alleged that a manufacturing defect caused a hydraulic hose on the Crane to separate, allowing hydraulic fluid to spill on a hot engine surface and cause the subject fire. Plaintiff asserted causes of action against Grove and its co-defendants for negligence, strict liability, and breach of various express and implied warranties.

In granting Summary Judgment on the claim for express warranty, the Court agreed that a provision in the Crane’s maintenance manual did not create an express warranty. The Court also granted Summary Judgment on the implied warranty claims, finding that the extensive discovery process failed to produce any genuine issue of fact to dispute that the Crane owner received a limited warranty which the Court determined effectively disclaimed all implied warranties. Finally, the Court granted Grove Summary Judgment on the negligence and strict liability claims, agreeing that such claims were barred by the Economic Loss doctrine.

Because the Court granted Summary Judgment on each and every one of the Plaintiff’s causes of action just before jury selection, the Young Clement Rivers team was able to save their clients from the time and expense of a trial.
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June 2-14, 2010
Retail Real Estate & Business Litigation Seminar
The Ritz-Carlton Palm Beach
Palm Beach, Florida

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June 16-18, 2010
Employment Practices Liability Insurance (EPLI) Seminar
The Ritz-Carlton Battery Park
New York, New York

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July 21-23, 2010
Construction Law Seminar
Four Seasons San Francisco
San Francisco, California

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October 21-23, 2010
ALFA International Annual Business Meeting
The Ritz-Carlton, Buckhead
Atlanta, Georgia

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REMINDER
The 2010 ALFA International Client Seminar
Co-hosted by the Product Liability Practice Group
March 11-14, 2010
JW Marriott Desert Springs
Palm Desert, California
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