The old adage “perception is reality” holds true in today’s society of advanced information technology. With search engines like Google and Bing and software applications galore, virtually any person, at any time, may get whatever information they seek. The advances we have seen in information technology have come at a cost to manufacturers and their insurers and legal advisors who try to minimize legal risks. More information that may have been generally “private” in the past has become truly public. In fact, blogs, websites, and other electronic media have resulted in the creation of “instant public information” about companies and their products. One such example is the Consumer Product Safety Commission’s (“CPSC”) new public website, www.saferproducts.gov, set to come on-line in March 2011.

In this issue of our Newsletter, we discuss CPSC’s new web-site, what it means to manufacturers, strategies to plan for once the site comes on-line, and steps for addressing its content. We also discuss litigation strategies for bringing successful motions for summary judgment on claims of defective design as well as recent court opinions that may have implications for all.

Notes From the Editors

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-New to this edition is a section called “Member Spotlight”, which features an ALFA International member firm. “Member Spotlight” was added to provide our clients with locale specific information on our member firms, the people in their product liability practices, their particular areas of expertise and pertinent recent accomplishments. We hope this new section of the Newsletter will help everyone become better acquainted with our many members and the services they provide in dealing with today’s difficult legal challenges.

-Colleen Murnane, Stanton Shuler and Jackson Ables
The United States Consumer Product Safety Commission (CPSC) plans to have its consumer product database online in March 2011, and businesses can act now to avoid having their products listed. The Consumer Product Safety Improvement Act of 2008 (CPSIA), Congress’s reaction to the 2007 lead-tainted toy recalls, requires the CPSC to create a public Internet database of reports of product defects and harm caused by consumer products. This database will quickly become a favorite tool for regulators, plaintiffs’ lawyers, consumer interest groups and the media. Manufacturers (which are defined to include importers) and private labelers of consumer products should therefore take precautions now to reduce the chances that this open database will include adverse reports about their products. Manufacturers and private labelers should also develop a plan so that they may quickly address such reports to minimize their potential negative impact.

What the CPSC Database Will Include and Why You Should Think About It Now

The database (www.saferproducts.gov) will allow any person to review “reports of harm relating to the use of consumer products, and other products or substances regulated by the [CPSC]” that the Commission receives from consumers, health care professionals, child service providers, and local, state, or federal government agencies. 15 U.S.C. §2055a(b)(1)(A). The CPSC will also include notices that it receives from a manufacturer, supplier, or retailer about a product that is allegedly hazardous or fails to conform to any federal product safety regulation, including notices related to voluntary recalls. 15 U.S.C. §2055a(b)(1)(B) (requiring the database to include “[i]nformation derived by the Commission from notice under section 2064(c) of this title or any notice to the public relating to a voluntary corrective action taken by a manufacturer, in consultation with the Commission, of which action the Commission has notified the public”).

The reports in the database will describe the product at issue and the alleged harm or defect related to the product. This database will be searchable by each report’s date of submission, the name/model of the product, and the name of the product’s manufacturer or private labeler. 15 U.S.C. §2055a(b)(4). The database will also include any other information the CPSC deems “in the public interest.” 15 U.S.C. §2055a(b)(3). Reports will be posted going forward after the database is publicly launched in March 2011. While the CPSC has not yet decided how long it will keep reports in the database, it will likely keep them long enough so that patterns and trends become identifiable.

Manufacturers and private labelers may comment on the reports, and at their request, the CPSC will include these comments in the database. 15 U.S.C. §2055a(c). The CPSC expects to send the manufacturer or private labeler a report within five days after it receives the report “to the extent practicable” by given circumstances. 15 U.S.C. §2055a(c)(1). Manufacturers and private labelers that receive such a report should respond quickly because the CPSC must add a new report to the database within ten business days after sending it to the manufacturer or private labeler for comment. 15 U.S.C. §2055a(c)(3)(A).

Other than requesting a comment from a manufacturer or private labeler, the CPSC will not independently investigate a report before it adds the report to the database. Although the CPSC is supposed to reject reports it knows are inaccurate and to correct inaccurate information already posted, the CPSC does not have any affirmative duty to verify the accuracy of a report. See 15 U.S.C. §2055a(c)(4). Thus, if a manufacturer or private labeler does not comment, a report in the database regarding one of its products is left unchallenged, even if it is inaccurate or exaggerated. The CPSC is required to include in the database “a clear and conspicuous notice to users of the database that the Commission does not guarantee the accuracy, completeness, or adequacy of the contents of the database,” but that disclaimer will be of little assistance to a company facing the fallout from negative reports about its product. 15 U.S.C. §2055a(b)(5).

The Legal and Public Relations Implications of the Database

The database will provide significant new information about specific consumer products and their manufacturers and private labelers. Accurate reports cause greater problems than inaccurate reports because they increase the likelihood of significant legal consequences. Any report, however, poses substantial challenges for companies, including increased private litigation (especially class actions), and the exposure to sig-
sificant damage awards and legal fees, not to mention the potential damage to companies’ brands and the risk that retailers may refuse to purchase those products.

The database is also likely to facilitate cooperation between federal and state regulators, particularly State Attorneys General (AGs) and the CPSC. The CPSIA authorizes AGs to seek injunctive relief to stop the sale of products that violate federal consumer protection laws and regulations. This empowerment combined with easy access to the database may prompt an investigation of the alleged "dangerous product" listed by any number of AGs, either independently or in coordination with the CPSC.

Proactive Ways To Prevent Your Product From Being Entered In the Database

Steps that companies can take now to avoid having their products listed in the database include:

- Making sure all required testing is done properly. This process will include making sure suppliers are not testing just one product from one shipment, but rather are testing products randomly to include various colors and sizes, as well as items from many factories and batches made at different times;
- Asking vendors or laboratories to confirm test results in writing and reviewing those results;
- Not taking answers at face value from vendors or laboratories, but instead conducting additional inquiries to ensure continued compliance with applicable standards;
- Researching your suppliers’ laboratories and ensuring they have been properly certified;
- Considering independent random testing of children’s products to ensure compliance;
- Understanding the labeling requirements for the specific product;
- Keeping detailed records of correspondence, as well as representations, certificates, and other documents from suppliers regarding testing processes and the lead content of children’s products.
- Monitoring complaints received from consumers, regulators and consumer groups regularly and, when necessary, investigating and resolving them quickly.

Plan Ahead To Minimize the Consequences of a Product Being Listed

Companies should not wait to prepare a strategy for addressing the negative publicity and the likely increase in public and private enforcement that will arise from individual or multiple adverse reports that appear in the database. Whether those reports are confirmed or unconfirmed, they provide fodder for regulators, plaintiffs’ lawyers, consumer groups and the media.

Companies need a proactive plan to coordinate public relations, political outreach, and legal strategies to timely defuse a negative report on their product. Otherwise, they will have to play an expensive game of catch-up. Having a team and process in place now will allow the company to investigate and resolve problems quickly, which will minimize the company’s exposure in the long run. The team should include counsel and a representative from manufacturing, consumer relations, and public relations. In addition, companies should consult with outside counsel who practice regularly before the CPSC and State AGs to assist in developing cost-effective and efficient compliance strategies. These steps will ensure that companies who manufacture or import consumer products are prepared for the next step in the consumer protection regulatory storm.

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Fido: Man’s Best Friend or “Product”? 

By Christopher C. Koehler

To most of us, pets are living, breathing things; they are companions for life, joyfully jumping through the fields like the mischievous yellow Lab in Marley & Me. The law, however, is not so sentimental. When it is the subject of a lawsuit, a pet can be just another object, there to be analyzed in the dry context of duties and breaches, statutes and public policy.

There has been a recent uptick in claims involving the sale of animals and pets. That uptick, however, has not yet resulted in a corresponding increase in reported decisions assessing the available claims for consumers who allegedly have suffered damages as a result of the purchase of an animal. This article will present an overview of one possible claim plaintiffs have asserted – strict product liability. (There are other claims that aggrieved consumers can pursue, including negligence, breach of warranty, and statutory claims; those are not addressed here.) There is a dearth of recent case law regarding the applicability of strict product liability claims to animals, and the case law that does exist presents two divergent views that provide little evidence of a trend in this area.

Courts that have addressed product liability claims involving pets and other animals have not completely ignored the notion that an animal – as a living, breathing, ever-developing creature – is different from what we traditionally view as “products.” But the typical product liability statute defines “product” very broadly, leaving it to the courts to determine whether a particular object fits within a particular state’s statute. Because of the breadth of definitions of “product,” cases addressing whether an object is a “product” for purposes of a product liability claim are relatively rare. So what should a court do about Fido? Because pets do not fit neatly into perceptions of what constitutes a “product,” the issue of whether a pet can be the subject of a product liability claim is unsettled. Two distinct views of the application of product liability laws to pets have emerged. Both views are grounded in the purpose of strict liability laws – placing the risk of injury on the party who can most effectively avoid it. But courts on each side of the issue interpret that purpose to reach opposite conclusions.

The Illinois Cases: Shift the Risk from Seller to Consumer Because Animals Are Constantly Changing

The first line of cases – the “Illinois cases” – holds that animals are not products because of their mutable nature. This view was initially developed in Whitmer v. Schneble, 331 N.E 2d 115 (Ill. Ct. App. 1975), and more fully explored in Anderson v. Farmers Hybrid Cos., 408 N.E. 2d 1194 (Ill. Ct. App. 1980). In Whitmer, a dog bit a child, prompting a product liability claim against the breeder for allegedly selling an inherently dangerous product. To determine whether such a claim was available for an animal, the court examined the purpose of product liability law. In its view, the purpose of applying strict liability to items deemed to be “products” was to shift the risk of a defect away from consumers, who are not in position to protect themselves, to the manufacturers or sellers of the products. Consistent with this purpose, the Court found that, to be a “product,” an object need not be manufactured, but its “nature must be fixed when it leaves the manufacturer’s or seller’s control...[and] must reach the user without substantial change before strict liability could attach.” Whitmer, 331 N.E. 2d at 119.

Using these principles as guideposts, the Court concluded that a dog’s character – and propensity to bite – is not fixed at the time it leaves the seller, but rather is shaped by the purchaser: “[A] dog’s character is affected by its owner’s personality, their [sic] treatment of it, the affection, indifference or even brutality shown to it. The dog also changes with maturity, with maternity, and as a result of outside events.” Id. Accordingly, the Court found that the dog could not be a “product” for purpose of a strict liability claim.

Whitmer dealt with a defect – the propensity to bite – that was alleged to have developed after the sale of the animal. Five years later, another Illinois appellate court extended the reasoning in Whitmer to an alleged defect that existed before the pet was sold. In Anderson, the plaintiff farmers had purchased several pigs that were alleged to have had a contagious form of dysentery at the time of sale. When the pigs were intermingled with the farmers’ own herd, they caused serious disease to the herd, resulting in considerable expenses for treatment. The trial court dismissed the claim for strict product liability, finding that the pigs were not “products,” and the Court of Appeals agreed. As in Whitmer, the Court reasoned that the purpose of strict liability is generally to ensure that “the costs of injuries resulting from defective products are borne by those who market such products rather than by the injured persons, who are powerless to protect themselves.” Anderson, 408, N.E. 2d at 1199. The Court determined that this purpose would not be
served by imposing liability on manufacturers or distributors for objects that were so mutable that they would necessarily change immediately after entering the stream of commerce:

[T]he purpose of the imposition of strict liability would be defeated if products liability were to be applied to products whose character is easily susceptible to changes wrought by agencies and events outside the control of seller, which is the case with living creatures…Living creatures, such as the swine in the instant case, are by their nature in a constant process of internal development and growth and they are also participants in a constant interaction with the environment around them as part of their development. Thus, living creatures have no fixed nature…at the time they enter the stream of commerce.

Id. Even though the alleged “defect” at issue – dysentery – was alleged to have existed at the time of sale, and was not the result of the farmer’s care or treatment of the pigs, the Court found that the inherent mutability of the pigs excepted them from the definition of “product.”

More recent decisions in other states have echoed the Illinois courts’ application of the purpose of strict liability to animals, without regard to whether the alleged defect existed at the time of sale or developed afterward. In Malicki v. Koci, 700 N.E. 2d 913 (Ohio Ct. App. 1997), for example, an Ohio court determined that a parrot that had infected plaintiffs with a disease could not be subject to a product liability claim. Like the Illinois courts, the Court anchored its decision in its view of the purpose of strict liability: Imposing strict liability upon the defendants in this case would yield the harsh result of holding them responsible as absolute insurers of the health of a living organism whose health can be affected by many factors totally outside the defendant’s control.” Id. at 915, See also Blaha v. Stuard, 640 N.W. 2d 85 (S.D. 2002) (adopting view of Illinois cases that dog that bit child was not a “product” because of its “constant process of development” and lack of “fixed nature.”); Latham v. Wal-Mart Stores, 818 S.W. 2d 6763 (Mo. Ct. App. 1981) (finding summary judgment was proper for seller of diseased parrot because it “seems unreasonable for us to hold a seller liable for changes potentially wrought upon a ‘product’ by the purchaser, while the item was completely outside the seller’s control.”)

The Opposing View: Animals Are “Products,” But Their Mutable Nature Can Affect a Plaintiff’s Ability to Prove a Claim.

In direct contrast to the Illinois line of cases is a second line of cases holding that animals are “products” for purposes of products liability claims. These courts focus on the same purpose of strict liability – proper apportionment of risk – but they find that purpose better served by characterizing animals as “products.” These courts do not ignore the changing nature of animals. They simply find that mutability only affects a plaintiff’s ability to prove a claim, and therefore shift risk on a product-by-product, case-by-case basis.

These cases have their genesis in the New York case of Beyer v. Aquarium Supply Co. 404 N.Y.S. 2d 778 (N.Y. Sup. Ct. 1977). In that case, the plaintiff became ill after coming into contact with diseased hamsters distributed by the defendant. With very little analysis, the Court rejected the defendant’s argument that the doctrine of strict liability should be limited to cases involving complex manufactured products, and determined that product liability claims could extend to animals. Like the Illinois courts, it found that the purpose of the doctrine of strict liability is to “distribute fairly equitably the inevitable consequences of commercial the inevitable consequences of commercial enterprise and to promote the marketing of sale products.” Id. at 779. Unlike the Illinois courts, however, the Court reached a different conclusion – that animals are “products”:

[T]here is no reason why a breeder, distributor or vendor who places a diseased animal in the stream of commerce should be less accountable for his actions than one who markets a defective manufactured product. The risk presented to human well-being by a diseased animal is as great and probably greater than that created by defective manufactured product and in many instances, for the average consumer, a disease in an animal can be as difficult to detect as a defect in a manufactured product.

Id. The Court did not consider or address the argument, raised in the Illinois line of cases, that the changeable nature of an animal excepts it from the definition of a “product.”

Later cases following the Beyer decision, however, have engaged in a careful analysis of that issue, and have determined that the changeable nature of an animal impacts only the proof of a product liability claim, not the animal’s status as a “product.” In Worrell v. Sachs, 563 A. 2d 1387 (Conn. Super. Ct. 1989), a plaintiff, whose child lost his sight as a result of exposure to a diseased puppy, pursued a product liability claim against the pet shop. The Court acknowledged the split between the Illinois cases and the Beyer case, and found that the Illinois cases “inadequately analyze the interrelationship between mutability and product status.” Id. at 1387. The Court acknowledged that animals are highly mutable. However, it concluded that mutability is relevant only to the issue of liability, not to the threshold question of prod-
uct status. If a product does not reach the consumer without substantial change in its condition, a plaintiff may not be able to prevail on its product liability claim. But, according to the Court, “it does not necessarily follow logically that inability to prove a case because of mutability means that an animal is not a product at all. Rather, it means that liability may not attach to that particular product. The argument confuses proof of liability with status.” Id. The Court, therefore, held that the puppy was a “product,” and allowed the product liability claim to proceed.

Similarly, in Sease v. Taylor’s Pets, 700 P. 2d 1054 (Ore. Ct. App. 1985), the Court rejected the reasoning of the Illinois cases that the mutability of live animals excepts them from the definition of “product.” It determined that many objects considered to be “products” are subject to natural change or intentional alteration, providing a defense to the seller or manufacturer that the product is not substantially in the same condition in which it was sold to the consumer. Therefore, the Court held that a skunk that was diseased at the time it left the seller could be the subject of a product liability claim.

Two Divergent Views, and Little Guidance for the Practitioner

Can these two diametrically-opposed viewpoints be reconciled? Not really. Courts on both sides of the issue support their decisions by citing the purposes of imposing strict liability and the division of risk between seller and consumer, but reach opposite conclusions as to where the risk should fall. While some of the courts may have engaged in result-based decision-making – in several of the cases, other common law or statutory causes of action were available to the plaintiffs, blunting the punitive effect of dismissal of the product liability claim – other courts left the plaintiff with no remedy.

It is difficult, therefore, to divine a single lesson that might provide guidance to one facing a product liability claim involving an animal. Certainly the more in-depth analysis was performed by the courts following Beyer, which looked beyond the simple fact that animals are mutable, and examined whether mutability relates to the status of the animal, or instead merely affects the ability of a plaintiff to prove his or her claim. But a sufficient number of state courts have simply disregarded any in-depth analysis and decided that the mutability of the animal itself is basis enough to deny a product liability claim, regardless of whether the defect alleged existed at the time of sale or developed afterward. Unfortunately, until more courts address this issue, a practitioner in a state that has not yet faced such a claim will have difficulty predicting with confidence which way a court will rule.

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Go In Loaded For Bear:
Difficulty in Shooting Down a Plaintiff's Risk-Benefit
Defective Design Claim on Summary Judgment in California

By Thomas R. Merrick and Rossi F. Maddalena

I. INTRODUCTION

Filing for summary judgment can become automatic at times for a defense attorney. Taking aim at plaintiff's claims by challenging the lack of evidence is the key to any good defense motion for summary judgment. As the Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), held, "the burden on the moving party may be discharged by 'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case.” *Id.* at 325. Pointing out the absence of evidence to support a plaintiff's theory, however, is not always enough. In some product liability cases, demonstrating plaintiff's lack of evidence is only half the battle.

II. A CAUTIONARY TALE

The affirmative burden imposed upon defendants in "risk/benefit" design cases under California law was recently highlighted in *Bispo v. GSW, Inc.*, 361 Fed. Appx. 834 (9th Cir. Or. 2010). There, defendant challenged the sufficiency of plaintiff's design claim under the burden shifting risk-benefit test established in *Barker v. Lull Engineering Co.*, 20 Cal. 3d 413 (1978). Pursuant to *Barker*, once the plaintiff makes a prima facie showing of "risk," the burden then shifts to the defendant to show the product's "benefit" *Id.* at 455-57. Overcoming this shifted burden while having the evidence viewed in a light most favorable to plaintiff [the non-moving party] on summary judgment is a formidable task.

In *Bispo*, defendant sought summary judgment on plaintiff's claims for inadequate warnings, manufacturing defect and design defect (the design being challenged under both the ordinary consumer's expectation test and the *Barker* risk-utility test). The court found the bulk of defendant's summary judgment challenge well taken. The inadequate warnings claims, manufacturing defect claims, and design defect claims under the consumer expectation test were each dismissed by the district court and affirmed on appeal by the Ninth Circuit Court of Appeals. The design claim based upon the risk-benefit test, however, was reinstated by the appellate court.

The defense focused on the "risk" element of the test, arguing that no evidence of "risk" had been presented and dismissal was, therefore, required as a matter of law. The Ninth Circuit Court of Appeals disagreed, finding that under *Barker* and California product liability law, a strict liability claim of defective design only requires a plaintiff to show an injury occurred and that the injury is traceable to the allegedly deficient design. Once this simple showing of risk has been made by the plaintiff, the burden shifts to the defendant to affirmatively present evidence establishing the "benefit" of the product's design.

The Court of Appeals was unimpressed with the evidence of "benefit" defendant presented, which included the absence of an alternative "safer" design and the absence of other similar failures (i.e. the product's "successful" history over many years). Not only did the Ninth Circuit reverse the district court and reinstate the claim, it found that the benefit of the disputed design was a question of fact for the jury. The lower court refused to re-open summary judgment after remand based upon law of the case principles, denying defendant an opportunity to present additional evidence of the design's "benefit." The defendant had taken its one shot and was not entitled to re-load. While its aim found its mark on five of plaintiff's six claims, the risk -benefit claim withstood the fire.

After Bispo, defendants are left asking what evidence must be presented to show successfully the "benefit" of a product? What fire power is necessary to knock out plaintiff's risk-benefit claim? There are no bright lines and answers remain elusive.

III. FUTURE CONSIDERATIONS

Given the difficulty in attacking the various elements of product liability claims within strict page limitations, what additional specific, succinct evidence can be used to show a product's "benefit"?

California's jury instruction on this issue does not provide sufficient guidance. Under 1-1200 CACI 1204, the jury
is instructed to consider the following in determining whether the product at issue has sufficient “benefit” to overcome the “risk”:

(a) The gravity of the potential harm resulting from the use of the [product];

(b) The likelihood that this harm would occur;

(c) The feasibility of an alternative safer design at the time of manufacture;

(d) The cost of an alternative design;

(e) The disadvantages of an alternative design; [and]

(f) [ Other relevant factor(s) ].

1-1200 CACI 1204. While the first five categories are relatively self-explanatory, what constitutes "other relevant factors" for proving a product's "benefit"? The definition of "other factors" is a moving target that is dependent upon the product, its unique characteristics, and the circumstances of the accident. There is little case law providing guidance on this issue, but one older case may provide some direction.

In Rosburg v. Minn. Mining & Mfg. Co. 181 Cal. App. 3d 726 (1986), the plaintiff filed a complaint for damages asserting negligence and strict liability claims against the defendant, a manufacturer of breast implants. The court, in ruling on the risk-benefit aspect of the design claim, found that the plaintiff had established the requisite risk associated with the product’s design, shifting the burden to defendant. The court then found that defendant had presented sufficient evidence of the product's "benefit" to outweigh the risk and dismissed plaintiff's claim.

In Rosburg, the defense succeeded in proving the product's "benefit" by presenting evidence in the following categories:

a) "State of the art" design. The evidence showed there was no better material available at the time of manufacturing.

b) "State of the art" testing. The court found no more appropriate testing measures were available than those used by the defendant.

c) No alternative design which could have increased product's safety. The court found that the saline-filled implants were less dangerous than gel filled implants in the event of a leak.

d) Benefit to the consumer. The court found that an inflatable implant was more pleasing cosmetically to the average consumer.

Id. at 305-06. The court was careful in distinguishing its findings of "state of the art" design and testing from "industry custom/norm." The former factor was a relevant consideration in assessing the "benefit" of a product's design, while the latter was not. See also McLaughlin v Sikorsky Aircraft, 148 Cal. App. 3d 203; 195 Cal. Rptr. 764 (1983).

IV. CONCLUSION

There is no doubt that, under Barker, it is difficult for a defendant to affirmatively establish the "benefit" of a product's design. Not only does the burden of production shift to the defendant, but the evidence presented by defendant continues to be viewed in a light most favorable to the plaintiff (the non-moving party). When preparing a motion for summary judgment attacking a design defect claim, it is important to anticipate and to develop evidence regarding the “benefit” of the product and its design. Alternative designs, testing procedures, benefits to consumers, and a good product history are all factors that may be considered by the trial court in weighing the benefit against the risk. All evidence which identifies a benefit should be presented to the court. Doing so will allow the court to make specific findings when adjudicating a motion for summary judgment on a design defect claim under the risk utility model.

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Sixth Circuit’s Exclusion of Etiology Opinion Tightens Standard and Keeps Educated Hunches Out of the Courtroom

By Colleen C. Murnane and Kelly Johnson

Tamraz v. Lincoln Electric Company,
620 F.3d 665 (6th Cir. 2010)

Background

On September 8, 2010, the Sixth Circuit reversed and remanded for a new trial the Northern District of Ohio's decision to uphold a $20.5 million jury verdict against several manufacturers of welding supplies. The Sixth Circuit reversed the decision because the District Court exceeded its discretion in allowing expert medical testimony that the defendants’ products triggered “manganese-induced parkinsonism.” Tamraz v. Lincoln Electric Co., 620 F.3d 665, 2010 U.S. App. LEXIS 18732, at *1 (6th Cir. Sept. 8, 2010).

Plaintiff worked as a contracting welder in California and began to suffer symptoms of parkinsonism in 2001. He and his wife sued several manufacturers of welding supplies for strict liability failure to warn, negligent failure to warn, and fraud by concealment, alleging that the fumes from defendants' products caused his condition. Plaintiff’s expert, Dr. Carlini, opined at trial that plaintiff's exposure to the manganese in defendants’ products caused his condition. The jury agreed and awarded plaintiffs $20.5 million in damages. The manufacturers appealed, arguing that the District Court should not have admitted Dr. Carlini’s testimony on etiology because it did not satisfy the requirements of Rule 702 of the Federal Rules of Evidence.

Opinion on Etiology Is Inadmissible Hypothesis, Not Knowledge.

The Sixth Circuit agreed with defendants on appeal. The Court’s ruling centered on the deficiencies with Dr. Carlini’s opinion on etiology as the defendants did not question the diagnosis of a form of parkinsonism. Dr. Carlini’s opinion failed to meet the Daubert test because he focused mainly on his diagnosis of parkinsonism, but barely explained his conclusion that manganese caused the disease.

The expert's line of reasoning on etiology contained seven tenuous links: "(1) [plaintiff] was exposed to welding fumes presumably containing manganese; (2) he developed symptoms of Parkinson's Disease (though not those of manganism); (3) scientists have identified genetic factors that cause some forms of otherwise "idiopathic" Parkinson's Disease; (4) some literature has hypothesized that toxins combined with genetics may cause other cases of Parkinson's Disease; (5) manganese is known to cause manganism, so it would be a possible candidate for triggering Parkinson's Disease as well; (6) [plaintiff] may have the genes for Parkinson's Disease, and (7) manganese may have triggered these genes and given [plaintiff] parkinsonism." Id. at *11 (internal cites omitted). The Court found the testimony to be "a plausible hypothesis...but it is no more than a hypothesis, and it thus is not 'knowledge,' nor is it 'based upon sufficient facts or data' or the 'product of reliable principles and methods applied...reliably to the facts of the case.'" Id. (citing Fed. R. Evid. 702).

While Dr. Carlini testified manganese-induced parkinsonism “seemed the most likely explanation for [plaintiff's] early onset parkinsonism,” the Court noted, “that manganese could cause Parkinson’s Disease in someone like Tamraz does not show that manganese did cause Tamraz’s Parkinson’s Disease.” Id. at *12. Further, while “Dr. Carlini may be a ‘distinguished’ doctor, and his ‘conjecture’ about causation may be ‘worthy of careful attention’...the courtroom is not the place for scientific guesswork, even of the inspired sort.” Id. at *15-16 (citing Rosen v. Ciba-Geigy Corp., 78 F.3d 316, 319 (7th Cir. 1996)). The fact that Dr. Carlini purported to hold his opinion to a "reasonable degree of medical certainty" did not make it admissible: "Minus that one phrase, nothing in his testimony suggests the sort of 'knowledge' on this point that the Rules require -- only speculation, which is generally inadmissible." Id. at *15.

Discussing the difference between utilizing etiology in the medical field and its application in the courtroom, the Court acknowledged that physicians often advise patients to avoid all potential causes of a disease: “this low threshold for making decisions serves well in the clinic but not in the courtroom, where decision requires not just an educated hunch but at least a preponderance of the evidence.” Id. at *21.

The Court explained that its decision did not bar physicians from ever testifying on etiology, “only that the courts must apply the Daubert principles carefully in considering it. 'The ability to diagnose medical conditions is not remotely the same...as the ability to deduce....in a scientifically reliable manner, the causes of those medical condi-
tions.' (citation omitted). Doctors thus may testify to both, but the reliability of one does not guarantee the reliability of the other." Id. at *12. Here, Dr. Carlini’s testimony was inadmissible speculation.

The Court vacated the multi-million dollar jury award, stating “This is an imperfect system…Mr. Tamraz is a good man who suffers from a terrible disease; we now force him to take the chance of prevailing at trial a second time, with less evidence than before. If he does not, yet it turns out in ten years from now that manganese causes his disease, that result will seem unfair. But the alternative route—allowing the law to get ahead of science—would be just as unfair. Such an approach would destroy jobs and stifle innovation unnecessarily.” Id. at *34.

Judge Martin dissented “because the majority reached this conclusion by acting as sitting judges rather than under the proper standard of review.” He chastised the majority for paying “lip service” to the abuse of discretion standard while stringently critiquing the District Court’s decision and failing to recognize that expert testimony is “inherently difficult to evaluate.” Id. at *42. To Judge Martin, the majority incorrectly created a “newly-minted requirement that scientific testimony must be without flaws or gaps and have no unprovable inferences or assumptions.” Id. at *51-52.

The impact this decision will have on the toxic tort landscape is yet to be seen, but counsel are now assured that rigorous analysis of etiology opinions is required. Their admissibility is not a foregone conclusion even if the diagnosis is uncontested.

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COLORADO

Tenth Circuit Requires Jury Instruction on the Risk-Benefit Test if the Product Defect Claim is Primarily Technical and/or Scientific and Application of State Law Presumptions

By Steve M. Hamilton


A. Background

After a boating accident, allegedly caused by a defective steering cable, the City of Westminster and its injured employee, Karen Kokins, (“Plaintiffs”) brought a product liability action in state court against Telflex, Inc., the maker and seller of the steering cable. Teleflex removed the case to federal district court based on diversity jurisdiction. At trial, the jury returned a verdict for Teleflex and the District Court entered a judgment accordingly.

Plaintiffs appealed, arguing the District Court erred in instructing the jury on Colorado’s risk-benefit test and by refusing to include an instruction on the consumer expectation test. Plaintiffs further argued the District Court improperly instructed the jury on a statutory rebuttable presumption that a product which has been on the market for ten years is not defective.

The Tenth Circuit affirmed the District Court’s judgment and held: (1) if a plaintiff’s claim of product defect involves consideration of primarily technical and/or scientific information, the Court shall instruct the jury on Colorado’s “risk-benefit” test and not the consumer expectation test; and (2) pursuant to Federal Rule of Evidence 302, the District Court correctly applied the state law presumption, since the presumption at issue affected the core element of Plaintiffs’ claim: whether the product was defective.

B. The Risk-Benefit Instruction

In Colorado product liability cases, two different tests are utilized to determine whether a product is defective. First, under the “consumer expectation” test, the jury is instructed to find a defect if the plaintiff proves the product is dangerous “to an extent beyond that which would be contemplated by the ordinary consumer who purchases it.” Kokins, 2010 U.S. App. LEXIS at *5 (citing cases). Second, under the “risk-benefit” test, the jury is instructed to conclude that a product is unreasonably dangerous if the plaintiff proves the risks of a challenged design outweigh its benefits. Id.
entific or technical information, that it is unreasonable to use a material that will rust and corrode in a marine steering cable...In short, rust is not rocket science.” *Id.* at *12. The Tenth Circuit disagreed.

Contrary to Plaintiffs’ contentions, the Tenth Circuit held “where a case is defined primarily by technical and scientific information, the court must use only the risk benefit test; it may not use the consumer expectation test, and it may not use both tests together.” *Id.* at *13 (upholding its ruling in *Montag v. Honda Motor Co. Ltd.*, 75 F.3d 1414 (10th Cir. 1996)). The Tenth Circuit noted that Plaintiffs presented testimony of five experts to establish the defective nature of the steering cable, which was a tacit acknowledgment by Plaintiffs that the issue for the jury’s consideration was one of a technical and scientific nature. *Id.* at *20. As such, the Tenth Circuit affirmed the District Court’s finding that the case involved primarily technical and scientific information and, therefore, the District Court was required to instruct the jury only in accordance with the risk-benefit test. *Id.*

C. Application and Effect of the State Statutory Presumption Under F.R.E. 302

The relevant statutory presumption is set forth in Colorado Revised Statute § 13-21-403(3), which provides that, in a product liability case, “[t]en years after a product is first sold for use or consumption, it shall be rebuttably presumed that the product was not defective and that the manufacturer or seller thereof was not negligent and that all warnings and instructions were proper and adequate.” In construing the statutory presumption in *Mile Hi Concrete, Inc. v. Matz*, 842 P.2d 198 (Colo. 1992), the Colorado Supreme Court held, “it is not necessary to instruct the jury on the presumption of § 13-21-403(3) if the plaintiff has presented evidence sufficient to survive a motion for a directed verdict.” *Id.* at 205. In reaching its conclusion, the Supreme Court focused on the substantive legal context, noting that, to establish liability, a plaintiff must prove each element of a claim, which includes proving the product was defective. *Id.* However, after the decision in *Mile Hi*, the Colorado General Assembly amended the statute and added § 13-21-403(4), which provides: “In a product liability action in which the court determines by a preponderance of the evidence that the necessary facts giving rise to a presumption have been established, the court shall instruct the jury concerning the presumption.”

Plaintiffs claimed the District Court erred in instructing the jury on the presumption because the presumption was a matter of procedure, not substance, and therefore, it was controlled by federal rather than state law. Plaintiffs further contended that, even if state law applied, the amendment to the statutory presumption did not overrule *Mile Hi*.

In rejecting Plaintiffs’ arguments, the Tenth Circuit held that, under Federal Rule of Evidence 302, the issue was governed by state law, not federal law. *Kokin*, at *29. Federal Rule of Evidence 302 provides: “In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.” The advisory committee’s note to F.R.E. 302 provides that not all presumptions in diversity cases are governed by state law, but rather, application of the state law is called for only when the presumption operates upon a substantive element of the claim or defense and not upon a lesser aspect of the case, i.e. “tactical” presumptions. The Tenth Circuit held that the presumption of section 13-21-403(3) affects the core element of Plaintiffs’ claim and Teleflex’s defense: whether the cable was defective. *Id.* at *29.

Furthermore, the Tenth Circuit found that the amendment to the statute overruled *Mile Hi*, which altered the effect of the ten year presumption. *Id.* at *41. The Court opined that, prior to the amendment, “the presumption operated as a procedural tool for ordering proof,” in that it required a plaintiff to present credible evidence to rebut the presumption. *Id.* at *39-40. As a consequence of the amendment, “the presumption of section 13-21-403(3) is now accorded substantive effect in the case; it is to be considered by the jury along with traditional forms of evidence, so long as the trial court determines by a preponderance of the evidence that the necessary facts giving rise to the presumption have been established.” *Id.* at *40. Therefore, the Tenth Circuit concluded, the issue was properly considered under state law, as section 13-21-403(3)’s presumption is the kind of presumption that Rule 302’s drafters contemplated would fall within its scope.

Steve M. Hamilton is a member of the firm of Hall & Evans, LLC in Denver, Colorado and can be reached at (303) 628-3300.
Nilan Johnson Lewis (NJL) was founded in 1996 as the largest start-up firm in the state of Minnesota. We began our firm to explore and introduce new strategies for solving our clients’ legal challenges. From day one, we have focused on what really matters: putting our clients first, cultivating highly specialized expertise, and finding solutions to unique and complex business problems. NJL currently employs 53 attorneys and 49 support staff, all of whom work as a team in a central office in downtown Minneapolis. The firm focuses both local and national practices in five areas: product liability/mass tort litigation, commercial litigation, health law/consulting, labor and employment, and business law.

We have been members of ALFA International since 2007 and have found our involvement to be hugely beneficial to our firm in many areas. Our lawyers are involved in a variety of ALFA practice groups and have engaged with ALFA not only to expand business, but also to expand their professional development opportunities.

There are 28 attorneys in our product liability and mass tort practice group. We are fortunate that major multinational corporations retain us to coordinate multistate litigation, try cases, and handle appeals. NJL has been entrusted with the defense of sophisticated product liability and mass tort litigation involving such areas as food borne illness, medical device and pharmaceutical matters, consumer toxic torts, premises liability, fire and explosion cases, workplace safety issues (OSHA), transportation litigation, and defense of personal injury cases. Examples of the types of products we have handled include recreational, chemical, and agricultural products, construction materials and industrial equipment, boilers, furnaces, and other gas-fired appliances.

Below are just a few highlights of some of the work we have handled in the products liability and mass tort arena:

NJL attorneys have defended cases for manufacturers involving a variety of pharmaceuticals, medical devices, over-the-counter products and vaccines on a local, regional, and national basis. Our work has helped set legal precedent and establish law that has benefited the industry. Our attorneys have been actively involved in a number of multi-district litigation cases and served on national teams created to defend serial drug and medical device litigation.

The NJL recreational products team is comprised of experienced trial lawyers who are recognized for their expertise in this field. Our lawyers have handled cases involving ATVs, side-by-side vehicles, snowmobiles, personal watercraft, motorcycles, motocross bikes, and outboard motors as well as cases involving similar technologies. We represent a variety of clients on a national and regional level and have worked on recreational products cases across the United States.

Our fire lawyers have litigated fire and explosion cases all across the country involving electrical failures, natural gas explosions, turbines, recreational vehicles, pyrotechnics, oxygen regulator equipment, industrial equipment, restaurant kitchen fires, sprinkling system failures, vehicle component parts, consumer electronics and more, and have worked on some of the largest fire and explosion cases in the country, including the San Francisco Cathedral Hill Hotel and San Juan Puerto Rico Dupont Hotel fires.

We also represent food processors, distributors and retailers in food borne illness and contamination cases, defending against product liability and mass tort claims and representing them in related commercial litigation. We have served as national or regional counsel in cases arising from many recent outbreaks, involving products such as spinach, lettuce, alfalfa sprouts, peanut butter, ground beef, eggs and melamine-contaminated wheat gluten from China.

We have been national counsel for a major multinational manufacturer in trace benzene mass tort litigation. This work involves both coordinating and executing litigation strategies. It has also required the development and application of both legal and scientific expertise, which has helped us obtain summary judgment for our client in certain cases. We recently obtained a complete defense verdict in a two week trial in Madison County, Illinois.

In our capacity as national counsel for a former manufacturer of lead paint pigment, we successfully defended claims of industry-wide public nuisance, conspiracy, fraud, and misrepresentation by obtaining numerous defense verdicts and, in one case, successfully reversing an adverse Rhode Island jury verdict in one of the most closely watched cases in the country.

We enjoy being fully engaged in ALFA and appreciate the opportunities we have had to work with impressive clients and other ALFA lawyers who trust us with their work. Should you need any assistance in Minnesota, we would greatly appreciate the opportunity to work with you. Please contact Brian Johnson (bjohnson@nilanjohnson.com), Sheila Kerwin (skerwin@nilanjohnson.com), or Stan Siegel (ssiegel@nilanjohnson.com) at Nilan Johnson Lewis P.A., 400 One Financial Plaza, 120 South Sixth Street, Minneapolis, MN 55402, 612-305-7500, www.nilanjohnson.com.
Nelson Mullins Partners Win Defense Verdict for Cincinnati Incorporated

Nelson Mullins Riley & Scarborough partners Jim Irvin, Kay West, and Carl Epps recently successfully defended a products liability case seeking damages in excess of $3,000,000, plus punitive damages. The trial lasted one-and-one-half weeks before The Honorable Matthew J. Perry, United States District Court Judge for the District of South Carolina. The Plaintiff, a 28-year-old widower at the time of the accident, alleged that a hydraulic press brake manufactured by Cincinnati Incorporated was defectively designed because the design of the footswitch allowed its guard to be removed, exposing the operator to inadvertent activation of the press brake. The Plaintiff claimed that he inadvertently activated the press brake while installing tooling. This resulted in crushing and degloving injuries to four fingers on his dominant hand and, ultimately, amputation of his fingers. Plaintiff's medical expenses exceeded $175,000, and he claimed that chronic pain prevented him from full-time employment, resulting in over $1,000,000 in past and future lost wages.

In his case-in-chief, Plaintiff called as a witness Cincinnati Incorporated's Manager of Product Safety and Training, who was serving as the Company's representative at trial. Plaintiff cross-examined him on other allegedly similar accidents, the design features of the press brake, and the training and conduct of Cincinnati Incorporated's field service representatives. However, Plaintiff's decision to call the corporate representative provided the defense team with an early opportunity to examine the Manager of Product Safety and Training in order to illustrate the many safety features of the press brake. At the close of Plaintiff's case, Cincinnati Incorporated believed that this presentation of evidence, combined with the cross examination of the Plaintiff, the Plaintiff's experts, and the Plaintiff's employer, eliminated the need to present any additional witnesses or evidence. At that point, Cincinnati Incorporated rested its case. The jury deliberated for less than three hours and returned a unanimous verdict for Cincinnati Incorporated.

Jim Irvin delivered opening statement and closing argument, cross examined the Plaintiff, and examined Cincinnati Incorporated's Manager of Product Safety and Training. Kay West cross-examined Plaintiff's employer and Plaintiff's design-defect and vocational rehabilitation experts. Carl Epps cross examined Plaintiff's expert economist and handled most of the evidentiary motions.

For further information, contact Jan Easterling at 803.255.9794 or Jan.easterling@nelsonmullins.com

Defense Verdict in Pharmaceutical Trial

Beth S. Rose of Sills Cummis & Gross P.C. was part of a trial team that included attorneys from another firm, who successfully defended a product liability claim brought in New Jersey State Court against Novartis Pharmaceuticals Corporation.

After two hours of deliberation on October 6, 2010, a New Brunswick, New Jersey jury returned a 7-2 verdict in favor of Novartis in a ten-day trial involving Aredia® and Zometa®, bisphosphonate drugs given to people whose cancer has metastasized to their bones.

Bessemer v. Novartis was the first bellwether trial in the Aredia/Zometa consolidated litigation in New Jersey state court. Plaintiff Mrs. Jane Bessemer and her husband, Allen, alleged that she developed osteonecrosis of the jaw (ONJ) as a result of her receiving first Aredia® and then Zometa® to prevent skeletal-related events – such as bone fractures – when her breast cancer metastasized to her bones.

By a 7-2 vote, the jury rejected plaintiffs’ failure-to-warn claim by answering “no” to the question: “Did Novartis fail to provide an adequate warning to Mrs. Bessemer’s prescribing physician concerning the risks of jaw problems from Aredia® and/or Zometa® that Novartis either knew or should have known prior to Mrs. Bessemer discontinuing use of the drug(s)?”

The Court recently denied plaintiffs’ motion for a new trial.

For further information, contact Beth S. Rose at 973-643-5877 or brose@sillscummis.com
CORRECTIONS

Corrections to last edition of Newsletter — Giving Credit Where Credit is Due

Two contributing authors to articles in the 2010 Summer edition of the ALFA Product Liability Perspectives newsletter were inadvertently omitted from that publication. Charles J. Falleta co-authored the article titled “A Cautionary Tale: The Duty to Preserve and Collect Documents Revisited” with Beth Rose, and Vincent Lodato co-authored the article “Effective Use of a Regulatory Expert in Product Liability Litigation.” Both men are attorneys with the firm of Sills Cummins & Gross, P.C. in Newark, New Jersey. Thanks are owed to Messrs. Falletta and Lodato for their contributions to those pieces.

Upcoming ALFA International Events

January 26-28, 2011
Health Care Practice Group Seminar
Encore at Wynn
Las Vegas, Nevada
PG Chair: Bruce Arnold
Program Chairs: Carol Romano & Alison Johnson
ALFA Contact:
Katie Garcia at kgarcia@alfainternational.com

March 3-6, 2011
2011 ALFA International - International Client Seminar
Westin Diplomat Resort & Spa
3555 South Ocean Drive
Hollywood, Florida
PG Chair: Patrick Michael
Program Chairs: Nathan Fishbach & Shawn Kachmar
ALFA Contact:
Amy Halliwell at ahalliwell@alfainternational.com

April 7-8, 2011
Workers’ Compensation Practice Group Seminar
Ritz-Carlton New Orleans
New Orleans, Louisiana
PG Chair: Jeff Linder
Program Chair: Mark Robins
ALFA Contact:
Amy Halliwell at ahalliwell@alfainternational.com

May 4-6, 2011
Transportation Practice Group Seminar
The Ritz-Carlton Laguna Niguel
Dana Point, California
PG Chair: Pete Doody
Program Chair: Joe Swift
ALFA Contact:
Katie Garcia at kgarcia@alfainternational.com

June 8-10, 2011
Insurance Law Roundtable
The Ritz-Carlton Battery Park
New York, New York
PG Chair: Jill Endicott
Program Chairs: Bob Hebb & Jim Johansen
ALFA Contact:
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For more information, please contact ALFA International at (312) 642-ALFA or visit our website at www.alfainternational.com
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