2021 Products Liability Conference Caselaw Update

Prepared by:

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FIRST CIRCUIT:

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Distinctions Among Bodies of Product Liability Law – Express Warranty, Implied Warranty and Common Law

***Taupier v. Davol, Inc.,* --- F. Supp. 3d ---, 2020 WL 5665565 (D. Mass. Sept. 23, 2020).**

The plaintiff's cause of action in *Taupier* arose from injuries that were allegedly caused by the migration and deterioration of a mesh patch that had surgically implanted years prior as part of a hernia repair procedure. The complaint asserted claims for breach of express warranty, breach of the implied warranties of merchantability and fitness for a particular purpose, strict liability for failure to warn and negligence. The defendant moved to dismiss the complaint *in toto* under Rule 12(b)(6). The court allowed the motion to dismiss as to the majority of the claims, but allowed matter to proceed on the theories of negligent design and breach of implied warranty of merchantability based on design defect. In doing so, the court issued a highly insightful Memorandum of Decision that very precisely identified the pleading and evidentiary standards for the various theories of recovery in product liability that are all-too-often inappropriately lumped together.

Perhaps most importantly, the court addressed the question of whether Massachusetts applies Comment k to the Restatement (Second) of Torts § 402A to bar breach of warranty claims for defectively designed implanted medical devices, noting that neither the Massachusetts Supreme Judicial Court, the Massachusetts Court of Appeals nor the First Circuit have previously taken up the issue. The court undertook a contentious analysis of decisional law from other jurisdictions and social policy considerations previously recognized by Massachusetts courts to predict that the Massachusetts SJC would follow the case-by-case approach used in the majority of jurisdictions rather than the categorical bar approach used in others. Specifically, the

court observed that (1) Massachusetts courts have decided that "'holding sellers liable for the quality and safety of their products' supports the breach of warranty theory of liability," (2) comment (k) specifically uses the examples of "'drugs, vaccines, and the like' as examples of unavoidably unsafe products" and points to "the FDA's 'more rigorous oversight' of drugs" (as opposed to implanted medical devices) as reason to decline an extension of the categorical bar to the surgical mesh at issue in this case, and (3) that applying comment (k) on a case-by-case basis is "'in essence nothing more than another name for the risk-utility test,' which the SJC has accepted."

Beyond this issue of first impression concerning the application of comment (k), the court in *Taupier* provided several other insightful explanations of and rulings on other theories of Massachusetts product liability law. First with respect to the express warranty claim, the court noted that "'an express warranty claim is and generally has been understood to be an action in contract … [defined by] the Massachusetts version of the Uniform Commercial Code, Mass. Gen. Laws ch. 106 §2-313(1)." The court dismissed the breach of express warranty claim because the complaint failed to identify "any affirmation or promise" made by the defendant, did not allege that the product failed to conform to a description, sample or model, and failed to allege that the plaintiff relied on any express representation made by the defendant concerning the product.

The court also dismissed the breach of implied warranty of fitness for a particular purpose, and in doing so, highlighted important distinctions in the nature of the implied warranty of a merchantability and the implied warranty of fitness for a particular purpose. The court noted that with respect to the implied warranty of merchantability, "a seller impliedly warrants that a product is fit for the ordinary purposes for which such good are used," and therefore "the relevant inquiry focuses on the product's features, not the seller's conduct." However, the warranty of fitness for a particular purpose applies only "where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods." A "particular purpose" differs from the "ordinary purpose" at issue in connection with the warranty of merchantability in that it "envisages a specific use by the buyer which is peculiar to the nature of his business." In that sense, the inquiry and required allegations are more focused on the conduct of the buyer (or

others) concerning how the seller came to know of the particular purpose for which the buyer intended to use the product. Applying this distinction to the plaintiff's cause of action in *Taupier*, the court dismissed the claim for breach of the implied warranty of fitness for a particular purpose because the plaintiff failed to allege that he used the mesh patch for a purpose that differed from its ordinary purpose or that Defendant had knowledge of any such particular purpose.

Finally, the court in *Taupier* dismissed the plaintiff's negligent failure to warn claim, finding that the plaintiff failed to offer any description of the warnings and instructions that were provided, and that his allegations that the warnings and instructions were incorrect, inadequate and incomplete were conclusory and insufficient to state a claim even under the lenient standard of Rule 12(b)(6). The court also provided an analysis of the "learned intermediary" doctrine recognized in Massachusetts, and made the time-saving observation that the SJC has "effectively collapsed" the two standards for negligent failure to warn and breach of the implied warranty of merchantability based on defective warnings into a single analysis.

In summary, the *Taupier* case provided an analysis of a previously un-examined aspect of Massachusetts product liability law, as well as precise delineations of the metes-and-bounds of several other theories of recovery in product liability actions. This case (and the cases it collects) could well-serve as a hornbook on Massachusetts product liability law and should be considered required reading for all Massachusetts practitioners.

Personal Jurisdiction – Out-of-State Distributor

***Red Oak Apartment Homes, LLC v. Strategis Floor & Décor, Inc.*, --- A.3d ---, 2020 WL 5390918 (N.H. 2020).**

The case of *Red Oak* involved a question that is often faced by out-of-state product manufacturers and up-stream distributors – Whether a court can assert personal jurisdiction over an out-of-state product distributor which sells a product to an unrelated out-of-state intermediary which in-turn sells the product into New Hampshire. In a split-decision, a majority of the New Hampshire Supreme Court answered that question by saying 'No.'

Red Oak involved vinyl flooring that was installed in approximately 195 apartment units in New Hampshire which were owned and operated by the plaintiff, Red Oak Apartment Homes, LLC. The plaintiff contracted with New Hampshire-based Holmes Carpet Center to install the flooring. Holmes purchased the flooring from Maine-based N.R.F. Distributors (which is registered to do business in New Hampshire), which in-turn purchased the flooring from the party at-issue in this appeal, Quebec-based Strategis Floor and Décor. Stategis moved for and was granted dismissal of the claims against it based on lack of personal jurisdiction.

The court established the framework for its consideration of the *Red Oak* case as follows. It noted that New Hampshire courts have construed its long-arm statute to be coextensive with the Due Process Clause of the United States Constitution. In order for a New Hampshire court to exercise in accordance with constitutional due process (1) a defendant's contacts with the jurisdiction relate to the cause of action, (2) the defendant has purposefully availed itself of the protection of New Hampshire's laws, and (3) it would be fair and reasonable to require a defendant to answer a suit in New Hampshire. Only prong two of the foregoing test (purposeful availment) was at issue in *Red Oak*, which requires both foreseeability and voluntariness. New Hampshire uses the "stream of commerce plus" theory established by a plurality of the United States Supreme Court in *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102 (1987), to assess whether a defendant has purposefully availed itself of protection of New Hampshire's laws in satisfaction of this aspect of the personal jurisdiction due process analysis.

Under the "stream of commerce plus" theory:

> [P]lacement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Instead, there must be some additional conduct on the part of the defendant indicating an intent or purpose to serve the market in the forum State. Examples of such conduct include designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. A defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed towards the forum State.

The plaintiff argued that Strategis had purposefully availed itself of New Hampshire's laws by establishing a distribution relationship with N.R.F. which was the largest flooring distributor in New England and which sold approximately 31,000 cartons of Strategis-sourced flooring to retailers in New Hampshire, developing print advertising to be marketed in the Northeast region, including New Hampshire, and by providing a written warranty to end users, including New Hampshire consumers. The court disagreed.

The court reasoned that Strategis's relationship with N.R.F. and its knowledge of the sales figures were insufficient to establish purposeful availment (at least without additional context), stating that "mere awareness that the product would reach customers in New Hampshire was not sufficient to establish purposeful availment." With respect to the plaintiff's arguments concerning Strategis's print advertising, the court noted as an initial matter that that the plaintiff had not established that any of those marketing materials actually reached New Hampshire customers. More substantively, however, the court held that Strategis had not purposefully availed itself of the protection of New Hampshire's law by virtue of the marketing materials because those materials were developed for customers in the "Northeast" and not specifically New Hampshire. Finally, the court reasoned that the inclusion of a written warranty does no more to establish purposeful availment than the distribution of the flooring itself. The court also noted that its conclusion is accord with the holdings of the high courts in other jurisdictions that apply the stream of commerce plus theory, including Tennessee, Montana, South Dakota and Texas.

Minimum Level of Specificity Required to Sustain Claim for Breach of Express Warranty

***Bessette v. IKO Industries, Inc.*, 4:19-cv-40017-TSH, 2020 WL 6110943 (D. Mass. Aug. 18, 2020).**

In *Bessette*, the plaintiff alleged that in 1999 he purchased roofing shingles from Howe Lumber Co. that were manufactured by IKO Industries, Inc., and that he had installed those materials later that year. The plaintiff further claimed that in 2016 he learned that the roofing shingles had deteriorated and needed to be replaced at a cost of

$29,000.00. He asserted a claim for breach of express warranty based on the claim that the shingles came with a "thirty-year warranty."

Following discovery, the defendant moved for summary judgment based on the assertion that the plaintiff had failed to adduce any evidence that could establish the existence of a valid express warranty. The plaintiff opposed the defendants' motion claiming that the receipts from Howe Lumber described the product as "BLD WEATHERWOOD CHATEAU 30YR" and that a statement by a Howe Lumber sales associate that the shingles "came with a 30-year warranty" constituted an enforceable express warranty.

The court began is assessment of the parties' respective positions on this Rule 56 motion by setting forth pertinent aspects of Massachusetts contract and express warranty law: Under Massachusetts law, to create an express warranty, the word warrant need not be used, nor is any precise form of expression necessary; but if the vendor, at the time of the sale, affirms a fact, as to the essential qualities of his goods, in clear and definite language, and the purchaser buys on the faith of such affirmation, that is an express warranty. As in other contract actions, the subjective belief of a party is immaterial. Rather, in order to succeed on an express warranty claim, the plaintiff must demonstrate that the defendant promised a specific result.

The court then applied this controlling decisional law to the facts before it and found that there was no information beyond the plaintiff's subjective belief of what exactly was promised over the thirty-year period. Specifically, the court noted that it could not discern whether "30YR" meant thirty years without leaks, thirty years without curling, thirty years without discoloration, or none of the foregoing. The court continued that without knowing what the promise was, there was no way to determine if a breach had occurred. Accordingly, the court granted the defendants motion for summary judgment.

Importantly, the court distinguished the facts of the *Bessette* case from those at issue in the Massachusetts Appeals Court's decision in *Coca-Cola Bottling Co. of Cape Cod v. Weston & Sampson Engineers, Inc.*, 45 Mass. App. Ct. 120 (1998), which had relaxed the specificity requirements to establish a breach of express warranty under Massachusetts law. The court noted that in *Coca-Cola*, a representative of the defendant engineering firm stated that "it would work" with respect to the wastewater treatment

system it had designed. The court recognized that the statement that "it would work" at issue in *Coca-Cola* was a specific promise for a specific result, unlike the amorphous "30YR" designation at issue in *Bessette*.

The *Bessette* ruling provides the Massachusetts product liability defense bar a helpful piece of permissive authority when confronting an express warranty with vague terms, particularly by specifically recognizing and distinguishing the *Coca-Cola* decision.

SECOND CIRCUIT:

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Lack of Admissible Expert Testimony

***Urena v. ConAgra Foods, Inc.*, No. 16-CV-5556, 2020 WL 3051558 (E.D.N.Y. June 8, 2020).**

The Eastern District of New York's decision in *Urena*, granting summary judgment for the manufacturers of a cooking spray can, illustrates the consequences of failing to preserve key evidence in a manufacturing defect case as well the failure to ensure one's expert testimony is compatible with the facts of the subject case.

The plaintiffs in *Urena* brought various product liability claims against the manufacturers of a can of PAM cooking spray after suffering burns when the can exploded. Prior to expert discovery and analysis, the subject cannister was accidentally discarded by Plaintiff's counsel's custodial staff. Resultingly, the plaintiffs had to voluntarily dismiss their manufacturing defect claims and were left to proceed with only a design defect and failure to warn theory.

Unfortunately, the opinions offered by Plaintiffs' expert on design defect were more indicative of a manufacturing defect rather than design – so much so that the court was prompted to ask the expert whether "he was mixing a manufacturing issue or some other cause with the design." Of note, the expert's own stimulations found that if the can had been manufactured to specification, the circumstances of the case would not have resulted in the can heating to a temperature that would have caused the explosion. This, in conjunction with other deficiencies, led the court to find the expert could not withstand a *Daubert* analysis because (1) the expert's proposed alternative design would "have

made no actual difference with respect to the accident at issue," and (2) the expert did not propose a safer propellant, nor had he tested any.

With the strike of Plaintiffs' expert, the court found summary judgment was appropriate on their design defect claims. Importantly, the court concluded that even if the expert's opinions had not been excluded, the expert evidence was still insufficient to establish a design defect as the expert had not identified a specific propellant that could replace the one that was currently in use. Specifically, there was no testimony establishing the "risks and benefits of using the alternative can or explain[ing] whether the alternative design would have enabled [Plaintiff] to avoid injury." Thus, the court concluded the plaintiffs' design defect claim failed as a matter of law.

Presumably, the plaintiffs would have fared better had their manufacturing defect claims not been thwarted by the accidental destruction of the subject can. Regardless, the case is a reminder of the importance of preservation as well as the alignment of expert testimony with the specific facts of each case.

Knowledge of Danger in Failure to Warn

***De La Cruz v. Ecolab Inc.*, 1:18-CV-06983-GHW, 2020 WL 247885 (S.D.N.Y. Jan. 16, 2020).**

De La Cruz reinforces one of the principal elements in any failure-to-warn claim; a manufacturer's duty to warn runs only to those dangers that it knows or should have known of. In this case, Plaintiff filed suit in the Southern District of New York against a manufacturer of a dishwashing product claiming that the company had failed to warn of the product's ability to cause chemical burns. The manufacturer moved for summary judgment contending that the plaintiff had failed to establish that it was aware or should have been aware that the product could cause such burns.

In finding for the manufacturer, the court reiterated the longstanding and practical point of law that "without evidence that a manufacturer knew or should have known about the danger alluded by the plaintiff, no rational jury could conclude that [the] defendant should have warned the plaintiff." The court listed numerous ways in which a plaintiff could demonstrate such knowledge including relevant medical studies, other filed cases and public news reports regarding similar incidents, and the results of a manufacturer's

testing of the product, yet, the court additionally warned that a manufacturer "does not have an unqualified duty to uncover all damages that are scientifically discoverable." Without any evidence even suggesting that the manufacturer knew or should have known about a risk of chemical burns with its dishwashing product, the court concluded summary judgment was appropriate.

Deceptive Labeling

***Steele v. Wegmans Food Markets, Inc.*, No. 19 Civ. 9227, 2020 WL 3975461 (S.D.N.Y. July 14, 2020).**

Steele was one of several putative class action suits filed in 2020 involving claims against the manufacturers of vanilla ice cream for deceptive labeling. The crux of these lawsuits, including *Steele*, was the allegation that the manufacturer had deceived consumers by using a label on their ice cream that stated "Vanilla" and "made with milk, cream, and *natural vanilla flavor*." The plaintiffs in *Steele* contended such labeling induced consumers to believe that vanilla ice cream's vanilla flavor was derived from vanilla beans or vanilla bean extract, when "in fact, the ice cream got most of its vanilla flavor from some non-vanilla source."

The manufacturer moved to dismiss the case for failure to state a claim for misrepresentation. In analyzing the plaintiffs' complaint, the Southern District of New York took note of the fact that the plaintiffs' extensive discussion involving Federal Drug and Cosmetic Act was "without consequence" as there is no private civil right of action for breaches of its provisions. Thus, the focus of the court's inquiry had to be on the honesty and accuracy of the ice cream container's label as required under the applicable state consumer protection laws.

The court concluded that the label was not deceptive as the container did not mention vanilla beans or bean extract – stating plainly, "even if vanilla bean or bean extract [was] not the predominant factor, if the sources of the flavor are natural, not artificial, it is hard to see where there is deception. What is misrepresented? The ice cream is vanilla flavored. The sources of the flavor are natural, not artificial." Essentially, the court summarily rejected the plaintiffs' contention that consumers would assume

natural vanilla flavor meant the vanilla flavor was largely derived from vanilla beans or vanilla extract.

Yet, the inquiry was not over. The plaintiffs had submitted an expert test (a mass spectrometry analysis) that concluded there was "too little vanilla bean extract in the ice cream, and the flavoring must come from non-vanilla bean sources." The court was unimpressed with this "self-evident conclusion," finding that the test was speculative as it may just confirm that the vanilla flavor derives solely from vanilla extract. As a result, the plaintiffs' complaint was subject to dismissal.

Along with reasserting a plaintiffs' inability to privately enforce the FDCA, the court's analysis is also additional insight into how similar, recent class actions involving vanilla flavoring and deceptive labeling may be decided as well.

Failure to Test

***Vardouniotis v. Pfizer, Inc.*, No. 152029/2019, 2020 WL 3890928 (N.Y. Sup. July 7, 2020).**

The decision in *Vardouniotis* is notable given its deviation from, what appeared to be, settled New York law regarding negligent failure to test claims. *See Tuosto v. Philip Morris USA Inc.*, No. 05 Civ. 9384(PKL), 2007 WL 2398507, at *11 (S.D.N.Y. Aug. 21, 2007); *In re Zimmer Nextgen Knee Implant Prods. Liab. Litig.*, 2017 WL 36406, at *13 (N.D. Ill. Jan. 3, 2017) (applying New York law). Here, the plaintiff alleged a variety of product liability causes of action against the manufacturer of a drug used to quit smoking. The manufacturer moved to dismiss the claims on the grounds that many were preempted by the Federal Food and Drug Act (FDCA) and others had failed to meet the pleading standards.

While the court properly concluded that the plaintiff's failure to warn claims were preempted by the FDCA, the court went on to find that Plaintiff's negligence cause of action had been adequately pled because Plaintiff "allege[d] that she was injured as a result of [the manufacturer's] failure to adequately test [the product]." Thus, the manufacturer was on notice of the "transaction, occurrences, or series of occurrences, intended to be proved." This conclusion is in spite of the fact that numerous decisions interpreting New York law have held that a failure to test is not a cognizable claim. Yet,

without even an acknowledgement to these cases, the court declined to dismiss the plaintiff's cause of action.

For that reason, *Vardouniotis* is worth keeping on the radar as counsel for plaintiffs may be inclined to cite the case in future motion to dismiss.

THIRD CIRCUIT:

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Manufacturing Defect – New Jersey Product Liability Act

***McManus v. Barnegat Operating Co., L.P*., No. 19-3184, 2020 WL 5870248 (3d Cir. Oct. 2, 2020).**

Plaintiff sued the manufacturer of a pallet jack—a vehicle used to lift and transport heavy loads—for injuries he sustained while using the pallet jack. He brought a manufacturing defect claim under the New Jersey Product Liability Act, arguing that although the specific product used had been lost or destroyed, the "circumstantial evidence test" allowed him to "attribute a product defect to the manufacturer based on factors including the product's age, prior usage, and expected durability." The district court granted summary judgment to the manufacturer on the basis that because the plaintiff could not allege a specific defect, he could only bring his claim under the indeterminate product defect test, not the circumstantial evidence test, and he could not meet his burden under the indeterminate product defect test.

The Third Circuit disagreed, predicting that the New Jersey Supreme Court would not limit the circumstantial evidence test to specific defects only. The court explained that *Myrlak v. Port Auth. of N.Y. & N.J.*, 157 N.J. 84 (1999) established the indeterminate product defect test for cases where a plaintiff cannot prove a specific defect, but the introduction of that test "does not necessarily mean a plaintiff who cannot prove a specific defect is limited to the indeterminate product defect test." The Third Circuit then remanded the case to the district court to determine whether or not there are genuine issues of material dispute under the circumstantial evidence test.

Personal Jurisdiction

***Laurel Gardens, LLC v. Mckenna*, 948 F.3d 105 (3d Cir. 2020).**

A group of landscaping and snow removal service providers brought suit against competitors in the Eastern District of Pennsylvania, alleging both federal RICO and Pennsylvania state law claims. At issue on appeal was whether there was personal jurisdiction over one set of defendants ("Isken Defendants").

The plaintiffs argued that jurisdiction was proper pursuant to the RICO statute as well as pendent personal jurisdiction. The district court granted the motion to dismiss as to Isken defendants on the basis that they lacked minimum contacts with Pennsylvania. On appeal, Plaintiffs argued that under Fed. R. Civ. P. 4(k)(1)(C), "serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant 'when authorized by federal statute'"—in this case, RICO.

The Third Circuit reviewed a question of first impression: "whether 18 U.S.C. § 1965(b) or 18 U.S.C. § 1965(d) governs the exercise of personal jurisdiction in this case." Subsection (b) provides that if "the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof." Subsection (d) provides that "All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs."

The Third Circuit held that Subsection (b) applies to this case, joining the majority of circuits (Second, Seventh, Ninth, Tenth, and D.C.) in this holding. This meant that, because the Isken defendants are "other parties residing in any other district [who] may be brought before the court," the requirements of personal jurisdiction under Fed. R. Civ. P. 4(k)(1)(C) were satisfied. In its decision, the Third Circuit reasoned that the provisions of Section 1965 must be read together. Subsection (b) requires only that "at least one other defendant [must] meet the traditional contacts test" before nationwide service can be authorized for "other parties." Subsections (a) and (c) relate to other forms of service. Subsection (d), therefore, "must mean process different than a summons or a government subpoena, both of which are dealt with in previous subsections," and cannot apply to the Isken defendants.

Strict Liability

***Gross v. Coloplast Corp*., 434 F. Supp. 3d 245 (E.D. Pa. 2020).**

The central issue in this case is whether the Pennsylvania Supreme Court would extend *Hahn v. Richte*r, 543 Pa. 558 (1996), in which it adopted comment k of the Second Restatement of Torts to exempt prescription drugs from strict liability claims in the state, to prescription medical devices. While a state superior court had extended the exemption to medical devices, the Pennsylvania Supreme Court has discouraged lower courts from "carving out certain categories of products for special treatment within the common law of products liability" and from "thoughtlessly extending Hahn and comment k." The federal district court here concluded that because there was a "distinct possibility the Pennsylvania Supreme Court may allow these claims to proceed, a better result is to allow Plaintiffs' claims to proceed in this case, at this stage."

Definition of Product

***Rodgers v. Christie*, 795 F. App'x 878 (3d Cir. 2020).**

A plaintiff whose son was murdered by a man who had been granted pretrial release by a New Jersey court, brought product liability claims against state officials and the foundation responsible for developing a multifactor risk estimation model, the "Public Safety Assessment" (PSA) that the court used to grant release. The state defendants were later dismissed. The Third Circuit affirmed the district court's holding that the PSA is not a "product" under the New Jersey Product Liability Act, because under the Third Restatement's guidance on the definition of products, the PSA 1) it is not commercially distributed, and 2) is not "tangible personal property" or sufficiently analogous to it. The court also noted that under the Second Restatement definition of products as chattels, the plaintiff fares no better.

Qui Tam Actions

***In re Plavix Mktg., Sales Practices & Prod. Liab. Litig*. (No. II), 974 F.3d 228 (3d Cir. 2020).**

Two doctors and a former sales representative formed a limited liability partnership in order to prosecute a qui tam False Claims Act suit against Sanofi-Aventis and Bristol-Meyers Squibb, alleging that the companies promoted the anti-clotting drug Plavix "to treat a broad range of patients, even though they knew that many of them would reap little if any benefit." The LLP was the sole relator in the suit, even after one doctor left the partnership and a new doctor joined. The issues on appeal were 1) whether the False Claim Act's first-to-file bar is jurisdictional; 2) whether the first-to-file bar prevents the new partnership from participating in the action; and 3) whether the new partnership is properly construed as a relator in the action. The Third Circuit concluded that as to the first two issues, the answer is no. The court declined to wade into the third issue and instead remanded to the district court.

FOURTH CIRCUIT:

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Settlement Terms Approval in Class Action MDL Products Liability Matters

***Cantu-Guerrero v. Lumber Liquidators, Inc. (In re Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg., Sales Practices & Prods. Liab. Litig*.), 952 F.3d 471, 952 F.3d 471 (4th Cir. 2020).**

The consolidated appeals stemmed from the district court's approval of the Settlement Approval Order resolving two Multidistrict Litigation proceedings elated to Lumber Liquidators, Inc.'s sale of allegedly dangerous and defective laminate flooring to more than 760,000 customers from 2009 to 2015. The settlement required Lumber Liquidators to pay $22 million in cash and provide store vouchers with a face value of $14 million. Pursuant to the Attorney's Fees Order, Class Counsel received about $10 million of the $22 million in cash.

On appeal, the Fourth Circuit concluded the district court did not abuse its discretion in approving the settlement, which was affirmed. The Attorney's Fees Order, however, was vacated because the district court erred by not applying to the store

vouchers the “coupon” settlement provisions of the Class Action Fairness Act of 2005 (“CAFA”).

The Fourth Circuit recognized that Congress enacted CAFA to address abuses of the class action device, one of which is the coupon settlement whereby the defendant gives class members coupons or vouchers, but pays the lawyers in cash. This is often the case in instances where it is unlikely the obligated party will be able to satisfy the judgment against it. “Coupon” is not well defined under CAFA, leading federal courts of appeals to develop standards for determining whether a settlement award constitutes “coupon” relief under CAFA. The Fourth Circuit looked to the Ninth Circuit for guidance, which considers: (1) whether class members have to hand over more of their own money before they can take advantage of a credit, (2) whether the credit is valid only for select products or services, and (3) how much flexibility the credit provides, including whether it expires or is freely transferrable. Through this analysis and consideration of specific factors such as transferability and flexibility, the Fourth Circuit resolved Lumbar Liquidator’s vouches were “coupons.”

Thus, the Fourth Circuit was satisfied that the vouchers in the proceedings constituted “coupons” within the meaning of CAFA, and that the district court erred in declining to apply CAFA’s “coupon” settlement provisions when calculating the attorney’s fees award. The fact that settlement terms also included a cash option was held unconvincing and an obvious “run around CAFA”. The Attorney’s Fees Order was vacated, though the Settlement Approval Order survived.

Statute of Limitations

***Paynter v. GM LLC*, No: 5:19-cv-00888, 2020 U.S. Dist. LEXIS 158595, (S.D. W.Va, Sept. 1, 2020).**

On September 11, 2017, the plaintiff was operating a GM manufactured vehicle when an oncoming vehicle crossed the centerline and struck the plaintiff’s vehicle. The Takata airbag installed in his car did not deploy, and Plaintiff ultimately succumbed to his injuries.

On September 10, 2019, Plaintiff’s executor filed suit. Summons issued the same day were not served on GM’s counsel. On November 4, 2019, an Amended Complaint

was filed. On November 19, 2019, the Secretary of State was served and, as GM's attorney in fact, accepted process on GM's behalf. On December 12, 2019, GM removed, alleging diversity jurisdiction. On that same day, GM moved to dismiss, asserting Plaintiff's claims were barred by the applicable statute of limitations.

The United States District Court for the Southern District of West Virginia recognized claims controlled by the two-year period prescribed by West Virginia Code typically accrue when the completed tort occurs, cautioning this was not always the case. A prior decision specific to products liability actions doing away with a rigid and purely mathematical analysis in West Virginia product liability actions was relied upon. That case, *Hickman v. Grover*, 358 S.E.2d 810 (W. Va. 1987), demonstrated the need for more flexibility because the plaintiff was not aware that his injuries resulted from fragments of an exploding air tank until the fragments were later found, and he learned the identity of the air tank manufacturer. The court recognized there were often situations the accident cause is hidden and which no one had reason to suspect at the time. The United States District Court for the Southern District of West Virginia ultimately denied the Motion to Dismiss in this context resolving the factual allegations in the Amended Complaint were insufficient to clearly indicate when, from an objective standpoint, there developed the necessary causal linkage between the plaintiff's injuries and death and the airbag installed in his vehicle.

Practitioners should keep *Paynter* in mind when considering the rationale underlying statutes of limitations as applied to products liability cases, as opposed to traditional tort claims when the tort is "complete" given the factual circumstances which can obscure or delay identification of the source of the injury.

Reason to Know Standard

***Sardis v. Overhead Door Corp.*, 446 F. Supp. 3d 47 (E.D.Va. 2020).[1]**

Evangelos Sardis died in 2016 after sustaining injuries on the job after removing a wooden crate from the top of a work truck. His widow, Andrea Sardis, filed this products liability litigation against Overhead Door Corporation. The plaintiff contended that Overhead Door negligently designed the crate at issue, failed to warn Sardis about the

[1] The District Court's finding is currently on appeal to the Fourth Circuit.

product's dangers, and breached the implied warranty of merchantability. Following a four-day trial in July, 2019, a jury awarded Plaintiff in excess of four million dollars. Overhead Door moved for a new trial and for judgment as a matter of law.

Overhead Door asserts six grounds for a new trial: (1) the court misstated the law with respect to a manufacturer's duty to test its products; (2) the court improperly excluded the safety manual while allowing the plaintiff to introduce circumstantial evidence of safety standards; (3) the court erroneously admitted evidence concerning the length of nails without expert testimony; (4) the court should have submitted the assumption of the risk defense to the jury; (5) the court failed to properly instruct the jury on the definition of "reason to know;" and (6) the court failed to properly instruct the jury that the plaintiff had the burden to prove that a warning would have prevented Sardis' death. Given the issues presented largely centered around specific evidentiary presentation at trial, for purposes of this case review, only the "reason to know" issue is discussed.

The United States District Court for the Eastern District of Virginia noted under Virginia law, a manufacturer's duty to warn of its product's dangers "rests on a *reason to know* standard rather than the broader *should have known* standard." *Torkie-Tork v. Wyeth*, 757 F. Supp. 2d 567, 572 (E.D. Va. 2010) (citing *Owens-Corning Fiberglas Corp. v. Watson*, 413 S.E.2d 630, 634–36 (1992)). Overhead Door took issue with the court declining to adopt its proposed jury instruction that included a definition of "reason to know," and contended the court conflated the "reason to know" standard with the "should have known" standard in its response to a jury question. Overhead Door urged the court should have included a "reason to know" definition, and failure to do so constituted grounds for a new trial.

The district court resolved, as a matter of law, that Overhead Door failed to show that the court's decision not to define "reason to know" seriously impaired its ability to make its case. The court resolved it provided the jury the appropriate legal standard and left counsel sufficient room to argue the facts in light of that standard. Additionally, the court resolved it had sufficiently informed the jury because it twice mentioned the phrase "should have known" in response to a jury question.

Practitioners should consider the importance of clear jury instruction on the reason to know versus should have known standard, and the implications in the absence of a

clear definition of the standard. In Sardis, it appears the confusion was largely saved by responses to jury questions, suggesting the jury, was in fact, unclear as to the definition of the applicable "reason to know" standard.

Integrated Product Defined

***Cook v. Bluelinx Corp.*, No. 9:19-cv-01050-DCN, 2020 U.S. Dist. LEXIS 92329, *1 (D.S.C., May 27, 2020).**

This incident involved a work-related death of a plaintiff. Plaintiff was helping unload bales of plywood from a steel shipping container when a bale fell on him causing fatal injuries. Plaintiff's employer owned the warehouse where the plywood was being held on behalf of BlueLinx Corporation. The plywood had been shipped from Russia by another shipping company.

The personal representative for the estate of the deceased plaintiff filed this action in state court on March 6, 2019, and BlueLinx removed the action on April 10, 2019. BlueLinx then filed a motion to dismiss arguing that the complaint must be dismissed because Plaintiff's causes of action were based on theories of products liability, and the shipping container and plywood were not a "product" under South Carolina law. The court denied the motion because it could not determine from the complaint whether the shipping container and plywood could be considered together as a product.[2]

On review, the issue before the court is whether the shipping container and the plywood together are considered a product for the purposes of a products liability claim, not whether BlueLinx owned the property right to possess the plywood and the container.

The plaintiff did not allege the plywood itself was dangerous, nor did he allege the container was dangerous. Instead, he alleged that the plywood and container *together*, as integrated, constituted the product that was the subject of his products liability claims. BlueLinx argued that summary judgment is warranted because discovery has shown that the shipping container and plywood were not an integrated whole, meaning that they together were not a product and could serve as the basis for Plaintiff's claims.

[2] The court also instructed Cook to file an amended complaint to clarify if his negligence cause of action was a products liability claim based on a negligence theory or an ordinary negligence claim.

The South Carolina General Assembly had not defined the word "product" in the products liability statute, but it did explicitly incorporate the comments to § 402A of the Restatement (Second) of Torts into the legislative intent of the statute. A comment to the South Carolina products liability statute provided:

> The defective condition may arise not only from harmful ingredients, not characteristic of the product itself either as to presence or quantity, but also from foreign objects contained in the product, from decay or deterioration before sale, or from the way in which the product is prepared or packed. No reason is apparent for distinguishing between the product itself and the container in which it is supplied; and the two are purchased by the user or consumer as an integrated whole…[particularly when] [t]he container cannot logically be separated from the contents when the two are sold as a unit.

The court resolved both the evidence and the parties' arguments made clear there was no genuine issue of material fact as to whether the plywood and shipping container together constituted a "product." The plywood and shipping container are not an "integrated whole" because the evidence shows that two were not sold as a unit, and the container could be separated from the plywood. In fact, it was separated when the container was returned and the plywood was sent to BlueLinx's customers. Ultimately, because the plywood and the shipping container were not together a product, the plaintiff's claims failed.

Cook is informative given the fine point placed on defining the product based on its component parts integration, which can undermine a products liability claim based on the legislative intent afforded governing the statutory definition of a "product" in the first instance.

Products Liability Claims in Bankruptcy Court

***Robert L. Dawson Farms, LLC v. Meherrin Agric. & Chem. Co.*, 2020 U.S. Dist. LEXIS 49635, 68 Bankr. Ct. Dec. 149 (E.D.N.C. March 23, 2020).**

Appellant was a multi-generational family farming operation which filed a voluntary Chapter 11 case in the bankruptcy court. Appellee asserted two claims relating to goods and services, including pesticides, sold on credit to Appellant, William Earl Dawson, and Robert Earl Dawson. Appellee asserts its two claims are secured by a perfected security interest in certain assets owned by Appellant.

Approximately one and a half months after the bankruptcy court dismissed certain of appellant's claims, the bankruptcy court entered its order confirming the first amended plan of reorganization. Appellee moved to strike appellant's jury demand. The bankruptcy court granted the motion, reasoning all of the claims for relief asserted in the complaint against Appellee are integrally related to the claims-allowance process.

The question of law at issue was whether the Seventh Amendment to the United States Constitution guarantees appellant the right to have its products liability claims tried before a jury in bankruptcy court. The Seventh Amendment guarantees that a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law.

The court resolved the products liability claims, standing alone, were legal claims because the Seventh Amendment applies to wholly private tort, contract, and property cases brought before the bankruptcy court. The court reasoned that products liability claims *themselves* do not restructure the relationship between the parties, but simply augment the bankruptcy estate with additional resources. Ultimately, no creditor's share of the bankruptcy estate would be affected by disposition of the appellant's claims for relief.

As for damages setoff, the court further indicated claims for damages cannot be viewed in isolation from the asserted right of setoff, meaning the underlying damages claims are also integral to restructuring the debtor-creditor relationship.

Ultimately, the court concluded a reasonable jurist could disagree with the approach taken by the bankruptcy courts. Assertion of an equitable claim does not vitiate the right to jury trial of legal claims under ordinary Seventh Amendment principles given jury trial of legal claims must resolve any common factual issues before equitable claims disposition. Accordingly, the court found there is substantial room for disagreement as to whether the bankruptcy court's order is constitutional.

Dawsons Farms, LLC is noteworthy for its examination of products liability claim presentation and viability in non-traditional contexts.

FIFTH CIRCUIT:

Troy L. Bell, Jay M. Mattappally, and Claire A. Noonan, Irwin Fritchie Urquhart & Moore, 400 Poydras Street, Suite 2700, New Orleans, LA, 70130

Untimely and Deficient Plaintiff Fact Sheet (PFS) Equals Dismissal with Prejudice from Multidistrict Litigation (MDL)

***In re Taxotere (Docetaxel) Prods. Liab. Litig.*, 966 F.3d 351 (5th Cir. 2020).**

This opinion involves a case that was consolidated in the multi-district proceeding known as *In re Taxotere (Docetaxel) Products Liability Litigation* (MDL No. 16-2740) ("MDL"), pending before the United States District Court for the Eastern District of Louisiana. Plaintiff, Dorothy Kuykendall, used the defendants' prescription chemotherapy drug for a year to treat her breast cancer, which allegedly led to her permanent hair loss. She subsequently filed a short form complaint in the MDL alleging that the defendants were aware that their drug caused her hair loss but failed to warn her of this side effect.

The district court's pretrial order required each plaintiff in the MDL to complete and submit a Plaintiff Fact Sheet (PFS) seventy-five days after the filing of a short form complaint in the MDL. As is common in most MDLs, the PFS in this MDL required Plaintiff to answer, *inter alia*, questions such as her race, family, medical history, cancer diagnosis, and treatment regimen. If a PFS was not filed by this deadline, Defendants were directed to file a notice of deficiency on MDL Centrality (electronic database). Plaintiff would then have thirty days to file a compliant PFS. If she failed to meet this deadline, Defendants were then directed to serve a notice of non-compliance upon Plaintiffs' Liaison Counsel (court appointed counsel). Plaintiff would then have another thirty days to file a compliant PFS or correct other deficiencies in a submitted PFS. If the Plaintiff yet again filed to provide a complete PFS by this deadline, Defendants could add her to the court's "call docket" for the next scheduled hearing. The pretrial order went even further and explicitly stated that Plaintiff's case could be dismissed if she failed to establish good cause for her continued discovery deficiencies.

Here, Plaintiff failed to meet each of the deadlines noted above, which led to Defendants placing her name on the court's call docket for the next court hearing. Plaintiff ultimately submitted an incomplete PFS missing certain key information, including but not limited to basic information such as the date of her cancer diagnosis, name of the prescribing oncologist, and a list of other medical providers. Despite these deficiencies,

the court still gave Plaintiff an additional thirty days to cure certain key deficiencies, which she again filed to do by the deadline. The district court subsequently dismissed Plaintiff's case with prejudice.

On appeal, the Fifth Circuit affirmed. In doing so, the court – while acknowledging that a dismissal with prejudice can be a "draconian remedy" and a "remedy of last resort" but also noting the "unique context of an MDL" - applied a two-factor test from the *Deepwater Horizon* MDL involving dismissals made for "docket management" purposes: that (1) there is a clear record of delay or contumacious conduct by the plaintiff; and (2) lesser sanctions would not serve the best interests of justice. Here, the first factor was satisfied because of the plaintiff's repeated pattern of non-compliance with the deadlines to submit a complete PFS, despite ample notice of the potential consequences of the failure to comply with the court's orders. The court pointed to the need to establish firm cutoff dates in MDLs, where a delay of even five months (as was the case here) can be significant. The second factor was also satisfied because the district court repeatedly provided Plaintiff with several extensions to file a complete PFS, which Plaintiff continuously failed to meet. The court noted that providing Plaintiff with numerous chances to correct her deficiencies was itself a lenient sanction, and so Plaintiff's failure to take advantage of those chances warranted imposition of the ultimate sanction of dismissal with prejudice.

Inadmissibility of Post-Accident Product Recall Notice

***Stubblefield v. Suzuki Motor Corp*., 826 F. App'x 309 (5th Cir. 2020).**

Plaintiff alleged he suffered personal injuries from a motorcycle accident caused by the failure of his motorcycle's front braking system. In the United States District Court for the Southern District of Mississippi, Plaintiff filed suit against the manufacturers of the motorcycle and the component parts of the front braking system, alleging a design-defect claim under Mississippi product liability law.

The district court excluded the post-accident recall notice regarding the motorcycle's front braking system pursuant to Federal Rule of Evidence 407, regarding subsequent remedial measures, and Federal Rule of Evidence 403. As to use of the post-accident recall notice to prove causation, the district court agreed with the

manufacturer's argument that Federal Rule of Evidence 407 disallows use of such evidence to prove causation, when doing so would allow the evidence to be used in proving a defect. Regarding use of the recall notice to establish that a feasible alternative design existed when the motorcycle left the manufacturer's control that would have prevented the crash, the district court determined such use was likewise impermissible under Mississippi law.

On appeal, the Fifth Circuit Court of Appeals upheld the district court's decision. As to the recall notice, the Fifth Circuit held the district court did not abuse its discretion in refusing to admit the product recall notice into evidence in order to show causation or a feasible alternative design. With respect to use of the recall notice to prove causation, the Fifth Circuit concluded that the recall notice was not applicable to the facts of the case. More specifically, the Fifth Circuit found the recall notice – which addressed conditions occurring only when the brake fluid of the motorcycle had not been changed timely – did not apply because it was undisputed that the plaintiff had changed his brake fluid within the recommended time frame.

Regarding use of the recall notice to establish that a feasible alternative design of the motorcycle's front braking system existed that would have prevented the crash, the Fifth Circuit concluded that using the motorcycle's post-recall braking system would not, to a reasonable probability, have prevented the crash. This conclusion rested on the plaintiff's own expert testimony that the primary cause of the crash was corrosion, and that, because the post-recall braking system maintained the design that would have created corrosion, its improved ventilation system for the hydrogen gas resulting from that corrosion would only lessen the chances of, not prevent, the crash. Based on this reasoning, the Fifth Circuit held the "feasible alternative design" exception to Rule 407 would not be triggered.

Contra non valentem

***Crochet v. Bristol-Myers Squibb Co.,* 804 F. App'x. 249 (5th Cir. 2020)**.

In July 2012, Plaintiff, Raymond Crochet was prescribed Abilify, an FDA-approved atypical antipsychotic to treat his Major Depressive Disorder. Abilify's FDA-approved label contained a warning for tardive dyskinesia at the time that Crochet began his

treatment. On August 1, 2014, he was diagnosed with Parkinsonism. The Parkinsonism symptoms subsided when he discontinued Abilify. Crochet continued to suffer adverse-affects, such as “lip-smacking” from his prolonged use of Abilify. On October 3, 2014, his mental health Nurse Practitioner noticed that Crochet continued to suffer “lip-smacking” and stressed that he follow-up with a neurologist. When the Nurse Practitioner was deposed, he recalled that he was concerned about tardive dyskinesia, but could not recall if he discussed it with Crochet. Crochet was diagnosed with tardive dyskinesia by his treating neurologist on October 7, 2014.

One year later, on October 7, 2015, Crochet sued Defendants for personal injuries that he sustained as a result of his Abilify treatment pursuant to the Louisiana Products Liability Act (LPLA) and warranty against redhibitory defects. Defendants’ moved for summary judgment and asserted that (1) Crochet filed his claim more than a year after he had notice of his claim, (2) he did not have any evidence to show that Abilify had an inadequate warning that caused his injuries, and (3) he did not proffer any expert testimony on design defect pursuant to the LPLA. The district court granted summary judgement in favor of Defendants, holding that Crochet’s claims under the LPLA were time barred by Louisiana’s statutory one-year prescription period that began to run against him the day that the injury or damage was sustained.

On appeal, the Fifth Circuit disagreed and reversed. The Fifth Circuit held that a genuine issue exists as to whether the jurisprudential doctrine of *contra non valentem* could preserve Crochet's claim from the time that prescription began to run until one year before he filed his claim on October 7, 2014. For instance, if the plaintiff is unaware that the damage he sustained is due to the fault of the defendant, *contra non valentem* will suspend the running of prescription until the plaintiff knew or reasonably should have known that his or her damages were the fault of the defendant's negligent act.

Well-pleaded cognizable parallel state law claims are permissible and will not be preempted

***Sheridan Allo v. Allergan USA, Inc.,* No. 19-12493, 2020 WL 814855 (E.D. La. February 19, 2020).**

In *Allo*, the court examined Plaintiff’s amended complaint to determine whether her state law claims were expressly preempted by the Medical Device Amendments of 1976

(MDA), 21 U.S.C. § 360k, or were permissible parallel state-law claims that were adequately pleaded.

Plaintiff was implanted with two Allergan-manufactured Natrelle Style 410 FX breast implants following a bilateral mastectomy. The Natrelle Style 410 FX breast implant is a Class III medical device that received premarket approval from the Food and Drug Administration (FDA). Plaintiff alleged she had the implants removed after an MRI revealed one of the implants ruptured, which caused her to suffer pain. Her physician examined the implants and determined that the right implant "partially collapsed." Plaintiff brought claims against Allergan pursuant to the Louisiana Products Liability Act (LPLA), and redhibition claims pursuant to the Louisiana Civil Code.

Plaintiff's initial complaint was dismissed for failure to state a claim against Allergan. Plaintiff filed an amended complaint and alleged Allergan was liable for her injuries pursuant to the LPLA because its Natrelle Style 410 FX breast implant (1) was unreasonably dangerous in construction or composition, (2) contained an inadequate warning, (3) breached an express warranty, and (4) contained redhibitory defects. Additionally, Plaintiff averred that her state law claims were permissible "parallel" claims premised on Allergan's alleged regulatory violations. Allergan countered by filing a Rule 12(b)(6) motion to dismiss Plaintiff's claims, arguing that Plaintiff's claims were expressly preempted by 21 U.S.C. § 360k, and not adequately pleaded under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009).

Although 21 U.S.C. § 360k prevents the recovery for damages related to state law tort claims against medical devices, the United States District Court for the Eastern District of Louisiana opined that "preemption is not plenary." 21 U.S.C. § 360k provides that a State cannot "establish or continue" any requirement that differs from or adds to federal requirements that relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter. On the other hand, 21 U.S.C. § 360k will not exclude a "parallel" state-law claim if it is premised on a federal regulation. Additionally, a plaintiff's parallel state law claim will survive preemption if it is adequately pleaded under *Twombly*.

Here, in count one of Plaintiff's amended complaint, she contended that Allergan violated FDA regulations because the construction or composition of the breast implant

did not meet FDA regulations governing shell thickness. The court denied Allergan's motion to dismiss Plaintiff's LPLA construction defect claim. The court ruled that Plaintiff's state law claim was not preempted – it was a permissible parallel claim premised on Allergan's failure to meet a federal regulation.

In count two of Plaintiff's amended complaint, she could not identify any FDA regulation that Allergan's FDA-approved warning violated. Therefore, the court ruled that her inadequate warning claim was preempted by 21 U.S.C. § 360k(a). The court also ruled that Plaintiff's breach of express warranty claim, count three of Plaintiff's amended complaint, was preempted because Plaintiff failed to plead a plausible parallel claim for breach of express warranty. Plaintiff failed to identify any untruthful express warranty made by Allergan that violated an FDA regulation. Instead, Plaintiff alleged her physician made an untruthful express warranty about the breast implant, which is not a cognizable claim under the LPLA. Plaintiff's redhibitory defect claims in count four of her amended complaint were upheld by the court. They were not preempted because they were premised on Allergan's violation of FDA regulations that the breast implant was not manufactured "in accordance with" the FDA-approved shell thickness range.

SIXTH CIRCUIT:

Matthew G. Berard, Brandon M. Pellegrino, Sunny Rehsi and Geetha Selvam, Bowman and Brooke LLP, 41000 Woodward Avenue, Suite 200 East, Bloomfield Hills, Michigan 48304.

Breach of Express Warranty and Implied Warranties of Merchantability

***Bunn v. Navistar, Inc.,* 797 F. App'x 247 (6th Cir. 2020).**

Plaintiff commenced a products liability action after two used trucks required significant repairs shortly after they were purchased from defendant manufacturer's dealership. Plaintiff purchased a written warranty for the trucks and at the time of purchase, Defendant warranted that the trucks were free from defects and were in perfect working order. At trial, Plaintiff asserted numerous causes of action including breach of express warranty and breach of implied warranty of merchantability. Defendant sought to dismiss these claims by arguing that Plaintiff failed to allege that the trucks were defective at the time they were delivered and for failure to provide pre-suit notice of the breach, as required by §47-2-607(3) of the Tennessee Code.

The district court dismissed Plaintiff's warranty claims, finding that Plaintiff failed to plausibly allege that the warranties were false at the time they were made or that the trucks were not fit for ordinary use at the time they were delivered. The Sixth Circuit affirmed, on different grounds citing failure to comply with § 47-2-607(3) of the Tennessee Code, which requires that a buyer notify the seller within a reasonable time after he discovers or should have discovered any breach or be barred from any remedy. The Sixth Circuit observed that some state courts have treated similar notice requirements as affirmative defenses rather than elements of the claim that must be pled. However, here the court looked at Plaintiff's litigation conduct and determined Plaintiff was required to plead facts giving rise to a plausible inference of notice in compliance with § 47-2-607(3), because during oral arguments, it was conceded that satisfaction of the statute was a condition precedent to suit in Tennessee.

The Sixth Circuit held that Plaintiff's allegations in his complaint did not satisfy this requirement. The complaint itself cannot constitute sufficient notice in a commercial case. Furthermore, Plaintiff's allegations that he notified Defendant of the defects is not sufficient to plausibly allege that Defendant was put on notice of an alleged breach under § 47-2-607(3) of the Tennessee Code. A buyer must put a seller on notice that there was a breach, and not simply that the buyer was experiencing difficulties with the goods.

Federal Preemption

***White v. Medtronic, Inc.*, 808 F. App'x 290 (6th Cir. 2020), *cert. denied*, No. 19-1276, 2020 WL 5882245 (U.S. Oct. 5, 2020).**

Plaintiff's case arose out of a national wave of litigation against Medtronic for allegedly promoting an improper use of its Infuse Bone Graft/LT-CAGE Lumbar Tapered Fusion device. Plaintiff's deceased wife underwent a spinal disc surgery where the surgeons the device in an "off-label" manner when they implanted the device via a posterior, rather than an anterior, approach. The surgeons also did not use the LT-Cage. According to Plaintiff, Medtronic knew about the dangers associated with this off-label use, but illegally promoted it and knowingly circulated materially false information about its safety.

Plaintiff brought a state court action alleging negligence and negligence per se, failure to warn, breach of warranty, violations of Michigan's consumer protection laws, design and manufacturing defects, and fraud. Following removal to federal court, Medtronic moved for dismissal arguing each state law claim was preempted by the Medical Device Amendments ("MDA") to the Federal Food, Drug, and Cosmetics Act ("FDCA"), which was granted. The Sixth Circuit affirmed.

Plaintiff's state law claims were expressly preempted by 21 U.S.C. § 360k and impliedly preempted by § 337(a). The Sixth Circuit recognized the two preeminent federal preemption cases regarding medical devices. The Supreme Court's 1996 holding in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), common law tort claims are not preempted by the MDA where the device at issue had not undergone Premarket Approval ("PMA") review but instead had been approved pursuant to the "substantially equivalent" exception found in § 501(k). The court held that a common law claim does not impose a new "requirement" regarding a device, such that the claim would be preempted under § 360k, if the state and federal duties are "parallel." The Supreme Court further clarified the *Lohr* holding in 2008 in *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008), where a device *had* undergone the PMA review process. In *Riegel*, all state law claims were preempted by § 360k because the state laws at issue imposed safety requirements that were more stringent than the federal requirements. The court established a two-part test for determining if a state law claim is expressly preempted by the MDA: (1) determine whether the federal government has established requirements applicable to the medical device; and (2) if so, determine whether the state law claims are based upon requirements with respect to the device that are different from, or in addition to, the federal ones, and that relate to safety and effectiveness. Since *Riegel*, courts have struggled to determine which claims fit into the "narrow exception" to MDA preemption left open by these two cases.

Here, Plaintiff brought challenges under both parts of the *Riegel* test. First, Plaintiff argued that there is no preemption because the device implanted in his wife was not the Infuse device approved by the FDA (which includes the Bone Graft component *and* the LT-Cage), but instead the Bone Graft only. Plaintiff claimed that § 360k was completed inapplicable because the Bone Graft without the LT-Cage constituted a "non-medical

device" that was not approved by the FDA. The court was not convinced of this novel argument as device-specific federal requirements clearly applied to the Infuse device, a Class III device, because it received approval through the PMA process. The Sixth Circuit—noting a similar situation in the Third Circuit—found that § 360k is implicated even where a physician uses only a component or part of a Class III hybrid device in an off-label manner.

Plaintiff next challenged express preemption by arguing that his state law claims are based on duties that "parallel" federal law rather than imposing requirements that are different from, or in addition to, the federal ones. The court found that Plaintiff did not challenge the Infuse device's labeling or the actual manufacture of the Infuse device but instead sought relief pursuant to state law claims challenging Medtronic's alleged promotion of off-label use. But, Plaintiff did not sufficiently allege that federal law imposed a parallel duty on a device's manufacturer to prevent such off-label use by third parties. Thus, the state law claims imposed requirements different from, or in addition to, the federal requirements.

Personal Jurisdiction

***Snabel v. Great States Corp.*, No. 1:19 CV 2052, 2020 WL 1814148 (N.D. Ohio Apr. 9, 2020).**

Plaintiff, an Ohio resident, purchased a chainsaw from a television home shopping network by calling the listed phone number and completing the purchase over the phone. The chainsaw was designed and manufactured by Great States Corporation, an Indiana Corporation, but the order was fulfilled by a separate entity (overtree.com). While Plaintiff was using the chainsaw to cut down a tree, the battery, manufactured by a Chinese corporation, exploded and shrapnel injured Plaintiff's right lower calf. Plaintiff sued Great States, who moved to dismiss for lack of personal jurisdiction.

The court noted that Plaintiff need only make a *prima facie* showing that Great States had purposely availed itself in Ohio. However, Great States asserted that Plaintiff's complaint did not allege that it advertised or sold products in Ohio, but that the home shopping network had advertised the chainsaw on its television program and a different entity had fulfilled the order. Great States also pointed out that there was no

allegation that it owned or directed the shopping network or website, nor did Great States require these entities to direct any activity to Ohio. Consequently, the court held that Great Lakes did not have a substantial connection with Ohio and to exercise personal jurisdiction would be unreasonable. There was no allegation that the design, manufacture, or creation of the warnings occurred in Ohio. Although the product was used and caused injury in Ohio, the majority of the operative events to determine personal jurisdiction (e.g. designing or manufacturing the product) did not occur in Ohio.

However, the court granted Plaintiff's alternative request to transfer the matter to the Southern District of Indiana. The court determined that Plaintiff's two failed attempts to plead jurisdiction against Great States would not prohibit Plaintiff from transferring the matter to the Southern District of Indiana where venue was proper.

Forum Non Conveniens

***Cruz v. Gen. Motors LLC*, 464 F. Supp. 3d 906 (E.D. Mich. 2020).**

Plaintiffs alleged that the decedents' vehicle was unreasonably dangerous due to its increased risk of a rollover and its lack of a crashworthy roof following a 2018 rollover accident in Mexico. Plaintiffs brought claims of product liability, negligent and/or gross negligent design, and breach of express and implied warranty. GM moved to dismiss for *forum non conveniens*, which was denied.

The subject vehicle was manufactured in part, designed in part, assembled in final form, and sold at wholesale by GM in Wayne County, Michigan. At the time of the accident, the driver lived in the United States, and the three passengers lived in Mexico. Following the accident, estates were opened for each decedent in the Wayne County Probate Court as the primary asset of each estate was the claim against GM (this lawsuit). The personal representatives are residents of Mexico, North Carolina, and Texas.

GM argued that the case should be litigated in Mexico rather than the Eastern District of Michigan, but failed to identify *which* Mexico court should have jurisdiction over the case. While Plaintiffs failed to timely respond to the motion to dismiss, the court still ruled on the merits.

Whether an Alternative Forum Exists: This requires that another forum – generally a foreign country – is both available and adequate. The defendant bears the burden of

identifying an alternative forum, and identifying an alternative forum is a prerequisite for dismissal, not a factor to be balanced. If there is no suitable alternate forum where the case can proceed, the entire inquiry ends. GM failed to meet its burden of demonstrating that Mexico is an alternative form that is both available and adequate for several reasons. First, while GM consented to jurisdiction in Mexico and agreed to toll any Mexico statutes of limitations, it failed to provide any evidence that its consent would be legally meaningful. The Sixth Circuit has explained that a defendant's assertion that it is amendable to process in a foreign forum – without guidance from legal experts or citations to the forum's law or legal treatises – may fail to demonstrate that the foreign forum is actually available.

Second, GM identifying several American courts that have found Mexico courts to be adequate and available forum for products liability cases against American manufacturers was unpersuasive. There is no such *per se* rule. Those cases undertook a careful, case specific inquiry considering particular Mexico laws and remedies, as well as expert testimony concerning Mexico Law to determine whether the Mexico court in question was an available and adequate forum. GM failed to conduct any case-specific analysis. This alone was sufficient to deny GM's motion, however, the court would have ultimately denied it for other reasons.

Whether Plaintiffs' Choice of Forum is Unnecessarily Burdensome: Courts must then look to the private and public interests at play, which is defendant's burden to establish.

Private: Includes the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious, and inexpensive. First, the court found that GM failed to demonstrate that access to sources of proof renders litigation in Michigan more burdensome than in Mexico since key witnesses and documents regarding GM's allegedly defective design, testing, and manufacturer of the vehicle were located in Michigan (and require no translation), the police report had already been translated, and the vehicle was stored in the United States. GM also failed to demonstrate that a lack of compulsory process over Mexican witnesses favors litigating in Mexico as it did not identify any particular witnesses who were unwilling

to appear and would thus require compulsory process to ensure attendance, nor did it submit any evidence that the costs associated with travel would be oppressive or vexatiously burdensome. GM's attorneys and experts would have to undertake travel to observe the accident scene and roadway regardless of where the action is litigated. Finally, GM did not demonstrate any other practical issues that would render litigating in Michigan more burdensome than in Mexico.

Public: Includes administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty. The court found that the public interest factors, in contrast, weighed in favor of dismissal, with the most relevant factors relating to the local interests in the litigation and to conflict of law issues. Given the decedents' connections to Mexico and the injuries occurred in Mexico, Mexico has a strong interest in adjudicating the dispute. The fact that the court will have to untangle a substantial conflict-of-laws dispute weighs in favor of dismissing the action for *forum non conveniens*.

The court found that a transfer based on *forum non conveniens* would be inappropriate with the roughly equal balance between the private and public interests, given that Plaintiffs' choice of forum is entitled to some deference.

Testing the Plausibility of Class Action/Mass Action Complaints

***Roe, et al. v. Ford Motor Co.*, No. 218CV12528LJMAPP, 2019 WL 3564589 (E.D. Mich. Aug. 6, 2019), reconsideration denied in part, 439 F. Supp. 3d 922 (E.D. Mich. 2020), and on reconsideration in part, No. 2:18-CV-12528, 2020 WL 1270778 (E.D. Mich. Mar. 17, 2020).**

Twelve plaintiffs hailing from eleven states sued Ford – in an attempt to represent classes of owners – alleging 55 counts related to failure of allegedly defective water pumps. Ford moved to dismiss Plaintiffs' amended complaint in its entirety under Federal Rule of Civil Procedure 12(b)(6). The court lumped Plaintiffs' 55 counts into three categories: alleged misrepresentations (both affirmative and omissions), breach-of-warranty, and state consumer protection acts. The court dismissed all but two counts.

Alleged Misrepresentations – Plaintiffs' factual allegations did not make it plausible that Ford fraudulently concealed/omitted or negligently misrepresented a water-pump defect and were thus dismissed.

Disclosure Based: Plaintiffs' "misleading-disclosure" theory was seemingly based on the principle *expression uninus est exclusion alterius* ("the explicit mention of one thing implies the exclusion of another") based on Ford's maintenance schedules for their vehicles through 150,000 miles. Since Ford's maintenance schedules wholly omitted the water pump, Plaintiffs maintained that Ford represented that no maintenance or service is needed for the water pump through 150,000 miles. The court was not persuaded by this theory. First, engines are made up of well over 100-plus parts and if any of these parts were not listed in maintenance schedules, under Plaintiffs' theory, Ford represented that the part would last 150,000 miles—the court noted that is seems unlikely that a car manufacturer would make that strong of a representation about so many parts. Further, the stated purposed of the maintenance schedules were not to delineate every single part or component that may need repair/replacement before 150,000 miles, rather it was to identify parts that, if serviced or replaced according to the schedule, would keep the vehicle in good working order and keep the warranty intact. Finally, the express warranty provided that the powertrain, which includes the water pump, was covered for five years or 60,000 miles. In addition, Ford's "Built Ford Tough" slogan was akin to promotional statements and was not false or misleading statements about the lifespan of the water pump.

Omission Based: Regardless of the state under which Plaintiffs' advanced omission-based tort claims, they were all required to show that Ford knew or should have known of the water-pump defect. The allegations of Plaintiffs' amended complaint were insufficient, wrought with legal conclusions (which need not be accepted as fact when assessing plausibility) and a failure to provide any facts about whether testing revealed a defect and leave it to the court to arrive at that conclusion on its own. Plaintiffs also rely on the fact that Ford owners reported issues about water-pump failures and sought repairs. But this, too, was insufficient as it does not make it reasonable to infer that Ford knew or should have known of a defect.

Consumer Protection Acts – Plaintiffs' factual allegations did not make it plausible that Ford violated any consumer protection acts where it does not know, and does not have reason to know, of a defect.

Plaintiffs made it clear that their consumer-protection claims, like their tort claims, were based on the same disclosures and omissions underlying the misrepresentation-based claims. The court dismissed these claims without prejudice, allowing Plaintiffs to file another amended complaint asserting claims under the law of each respective state *if* Plaintiffs believed liability exists under certain consumer protection acts even when the manufacturer does not know, and does not have reason to know, of a defect.

Warranty Claims – All express and implied warranty claims were dismissed except one plaintiff's implied warranty claim.

Express: Ford did not breach the express warranty because no plaintiff presented their vehicle for repair within both the time limit and the mileage limit set forth (five year or 60,000 miles). For those plaintiffs that purchased their vehicle new, the five-year clock started when he/she took delivery; but if they purchased it used, they received any remaining warranty coverage. Each plaintiff admittedly sought water-pump repair after their vehicle surpassed 60,000 miles or purchased the vehicle used when it was over five years old. Plaintiffs sought to circumvent this by arguing that the durational limits were unconscionable and that the express warranty failed its essential purpose. The unconscionability argument failed because Plaintiffs failed to plead sufficient facts permitting the reasonable inference that Ford knew or should have known about a defect, and because Plaintiffs had other meaningful choices in automobile manufacturers with longer powertrain warranties. Plaintiffs "essential purpose" argument was based on two theories: (1) Ford consistently refused to repair the defective water pump and (2) replacing a defective water pump with another defective water pump is an insufficient remedy. The first theory failed because the amended complaint lacked facts supporting Fords "consistent refusal"—to the contrary, no plaintiff timely presented their vehicle for an in-warranty repair. The court ultimately found that the express warranty fulfilled its essential purpose by the time Plaintiffs sought repairs.

Implied: The court found it was plausible – at the pleading stage – that Plaintiffs' vehicles were not merchantable because "like other durable goods, are expected to work

for a good while." However, the court did agree with Ford that – absent one plaintiff – the implied warranty claims were time-barred under the UCC's four-year statute of limitations and the fact that Plaintiffs failed to adequately plead that Ford had knowledge of the defect or equitable tolling.

***Hall, et al. v. Gen. Motors LLC*, No. 19-CV-10186, 2020 WL 1285636 (E.D. Mich. Mar. 18, 2020), appeal docketed, No. 20-1321 (6th Cir. Apr. 20, 2020).**

In this putative class action, Plaintiffs brought a variety of fraud, violations of the consumer protection laws of various states, unjust enrichment, and warranty-based claims against General Motors ("GM") arising out of an alleged defect in the StabiliTrak system. All plaintiffs purchased their vehicles used. GM's motion to dismiss was granted in its entirety.

Plaintiffs attempted to plead GM's pre-sale knowledge of the alleged defect through three types of allegations, all of which are insufficient. First, Plaintiffs allege pre-sale knowledge through pre-production testing and aggregate warranty data. The court found those allegations too vague and too generalized to support a reasonable inference that GM had pre-sale knowledge of a defect. Further, Plaintiffs failed to plead any facts about GM's pre-production testing, any particular analysis GM completed based on the testing, or GM's repair order and parts data that, if proven, would establish pre-sale knowledge. Next, Plaintiffs rely on complaints filed by consumers related to the StabiliTrak with NHTSA and that GM monitored complaints submitted to NHTSA as part of normal business operations. The court found that those complaints do not support a plausible inference of GM's knowledge of a defect, and Plaintiffs provided no support that consumer complaints support such a finding. Beyond this, Plaintiffs failed to contextualize which complaints were related to class vehicles or the alleged defect. Finally, Plaintiffs attempted to establish pre-sale knowledge through three Technical Service Bulletins ("TSBs") issued by GM related to StabiliTrak. The TSBs at issue did not support a reasonable inference that GM had pre-sale knowledge of a defect based on the contents of the TSBs, as the TSBs did not identify or mention any of the core features of the defect as defined by Plaintiffs.

The court quickly dispelled Plaintiff's unjust enrichment claim as not cognizable because there was an express contract that covers the same subject matter – the express

warranty provided by GM at the time the class vehicles were first purchased. Indeed, courts have regularly dismissed unjust enrichment claims filed against automobile manufacturers where a valid, enforceable express warranty covers the same subject matter as Plaintiffs' unjust enrichment claims. Beyond that, Plaintiffs' unjust enrichment claims fail because they did not sufficiently plead that they conferred a benefit on GM since all plaintiffs purchased their vehicles used, and some even purchased their vehicles from third parties with no connection to GM.

Under the federal Magnuson-Moss Warranty Act, and the laws of Illinois and Missouri, some of Plaintiffs' implied warranties were limited to the duration of the express warranty—three years or 36,000 miles. The court agreed with GM that these plaintiffs were time-barred from a viable breach of implied warranty claim because no plaintiff timely sought an in-warranty repair.

While recognizing that leave to amend should be freely given when justice so requires, the court refused Plaintiffs the opportunity to file an amended complaint to remedy the pleading deficiencies based on the court previously provided Plaintiffs with the opportunity to amend while highlighting this was the one chance to cure pleading deficiencies. Meanwhile, other Judges in the Eastern District of Michigan have provided plaintiffs with more than one opportunity to amend.

Class Certification and Expert Support Under FRE 702

***Kondash v. Kia Motors Am., Inc.*, No. 1:15-CV-506, 2020 WL 5816228 (S.D. Ohio Sept. 30, 2020).**

Plaintiff attempted to file a class action lawsuit for panoramic sunroofs on certain Kia vehicles unexpectedly shattering, including his 2012 Kia Optima. After years of litigation, the case was presented to the court on a motion to certify the class for the only remaining claims, negligent design, and breach of implied warranty. In an attempt to support class certification, Plaintiff retained two experts who testified that they located the root cause of the damage and alleged defect that caused the panoramic sunroofs to burst. The court addressed the class certification questions and determined that Plaintiff had satisfied the numerosity and commonality requirements of Federal Rule of Civil Procedure 23(a)(2). However, Plaintiff failed to meet the predominance requirement of Rule 23.

Specifically, “Plaintiff’s entire theory of this case is embedded on the assertion that the panoramic sunroofs share a common design concept that makes them prone to abrupt shattering.” Plaintiff asserted that the flaw in Kia’s design is “well-understood.” However, the court disagreed and noted that Kia reported the issue to the National Highway Transportation Safety Administration (“NHTSA”) and NHTSA spent six years investigating the issue without having determined the cause of the purported issue or whether a recall would be necessary. Had NHTSA discovered the issue in its six-year investigation, Plaintiff would not have needed two experts to testify as to what exactly the design defect was and how the alleged defect was common among all twenty-two separate model year class vehicles. Conversely, Kia’s own documents included extensive internal investigation reports that all reached the same conclusion; that there was no evidence of a defect and the cause of panoramic sunroof fractures was likely due to external impact from road debris. Thus, the court noted that the only evidence Plaintiff had to demonstrate a class wide defect were his two expert reports (which Kia had moved to exclude under *Daubert* and Federal Rule of Evidence 702).

The court also addressed Kia’s challenge of Plaintiff’s expert reports and found that Neil Hannemann’s expert report, would be stricken because his testimony with respect to the failure rate was “not reliable” and that the failure rates which were “higher than he would expect” had no factual basis and was purely speculative. With respect to Plaintiff’s other expert, Thomas Read, the court similarly struck his expert report because his opinions were based entirely on speculation. Specifically, while Read had inspected twelve failed Kia panoramic sunroofs, the court noted that he never inspected, tested, measured, or “even laid his hands on” any class vehicles, nor did he know the model, year, or make of any of the twelve sunroofs he inspected. Read also never conducted any comparative analysis whatsoever between Kia’s panoramic sunroofs and other manufacturers panoramic sunroofs. Consequently, Read failed to establish a definitive link between his analysis and his opinion that a class-wide defect existed, which rendered his opinion to amount to nothing more than a hypothesis.

The court denied Plaintiff’s motion to certify the class and granted Kia’s motions to strike and to exclude the two experts.

The Economic Loss Doctrine and Privity

***Sullivan v. Panther Petroleum, LLC*, No. 1:19-cv-01259-STA-jay, 2020 WL 1550230 (W.D. Tenn. Mar. 31, 2020).**

Plaintiff alleged that he incurred damages to his cotton picker machinery after using defective cotton-picker grease that was manufactured, distributed, and labelled by Defendant. Plaintiff sought relief under three causes of action: breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, and negligence. Defendant moved to dismiss the claims arguing that the economic-loss doctrine barred Plaintiff's negligence claim and the requisite privity of contract was lacking for the warranty claims.

Negligence Claim: The court found that consumables vital to the functioning of a product, such as gasoline, oil, and grease should not be considered "other property." In this case, the cotton-picker grease was a "component part" of the cotton picker and any alleged damage to the cotton picker, which was the "product itself," did not constitute damage to "other property" under the economic-loss doctrine. Thus, the economic-loss doctrine barred Plaintiff's negligence claim.

Implied Warranty of Merchantability and Implied Warranty of Fitness: The court found that § 29–34–104 of the Tennessee Code did not require privity in all causes of action for personal injury or property damage brought under claims of negligence, strict liability or breach of warranty. The court held that property damage included similar damages sought by Plaintiff, as statutory warranties were made to run with the product, in accordance with the product's intended and reasonably anticipated use. As such, the court denied Defendant's motion to dismiss.

***State Farm Fire & Cas. v. Gen. Elec. Co.*, No. 345992, 2020 WL 39992 (Mich. Ct. App. Jan 02, 2020), appeal denied, 947 N.W.2d 799 (Mich. 2020).**

A dehumidifier caught fire in the subrogor's home resulting in extensive fire damage to the home and personal property. Plaintiff filed suit against Defendants alleging product liability, breach of express and implied warranty, and negligence. At the close of discovery, Defendants moved for summary disposition arguing that Plaintiff was only seeking to recover for property loss, as opposed to personal injuries, that the economic loss doctrine applied, and it was limited to contract-based recovery under the UCC. Plaintiff appealed the trial court's order granting summary disposition in favor of

Defendants arguing that it erred by concluding the economic loss doctrine applied and Plaintiff's claims were therefore time-barred under UCC's statute of limitations. The court reversed and remanded, agreeing with Plaintiff that the trial court erred by applying the economic loss doctrine and by concluding that the UCC's four-year statute of limitations barred Plaintiff's claims.

The court held that the economic loss doctrine is a judicially created doctrine that bars all tort remedies where the suit is between an aggrieved buyer and a nonperformance seller, the injury consists of damages to the goods themselves, and the only losses alleged are economic. The court also found that Plaintiff's claim rest upon real and personal property damage that went beyond the damage to the allegedly defective humidifier. Such damages were not the result of disappointment with the dehumidifier's unsatisfactory performance, but of a sudden event allegedly caused by the dehumidifier. After considering the underlying policies of tort and contract law as well as the nature of the damages, the court concluded that the losses caused by fire damage to the property are of the sort traditionally remediable in tort. Therefore, Plaintiff's negligence and product liability claims were not limited to claims under the UCC, and the UCC's four-year statute of limitations (MCL 440.2725) did not apply to those claims.

Jury Determining Alternative Design

***Johnston v. Sunbeam Products, Inc.*, No. CV 5:19-104-DCR, 2020 WL 1548061 (E.D. Ky. Mar. 31, 2020).**

The court had to determine whether a genuine issue of material fact existed on Sunbeam's motion for summary judgment. Plaintiffs had purchased a warming throw blanket and failed to read the instructions and user manual, which stated that failure to follow instructions may cause overheating, fire or personal injury and that paraplegics were not to use the throw. One of the plaintiffs was a paraplegic, who suffered a burn to the heel of his right foot when he fell asleep using the throw.

Plaintiffs read the warnings after the injury had occurred and acknowledged that the warnings were clear. Plaintiffs, among other things, contend that the throw was designed defectively as it may become hot to cause serious burns. Plaintiffs did not retain an expert to test the throw or validate their concerns. Sunbeam's expert confirmed that

the throw complied with industry standards. There is a statutory presumption in product liability cases in Kentucky that a product is not defective if it conforms with certain standards and testing. KY. REV. STAT. § 411.310(2).

Ultimately, the court found that strict liability, negligence, and breach of warranty claims for product liability cases all require proof that the product was defective or unreasonably dangerous. The court held that a jury cannot determine the deficiencies in the design of the throw, underlying dangerous conditions, feasible alternative designs, and what warnings would have provided a safer alternative without expert testimony from the plaintiffs and granted Sunbeam's motion for summary judgment.

Strict Product Liability Statutes Applied to Websites

***Stiner v. Amazon.com, Inc.*, --- N.E.3d ---, 2020 WL 5822477 (Ohio Oct. 1, 2020).**

Plaintiffs' eighteen-year-old son died after ingesting a fatal dose of caffeine powder that he obtained from his friend who, several months earlier, went to Amazon's website and performed a product search using the term "pre-workout" dietary supplements. The friend purchased a pure caffeine powder which was fulfilled or sold by a third-party vendor, Tenkoris, but who posted the product for sale on Amazon's website. The court analyzed whether Amazon participated in placing the product in the stream of commerce and, thus, could be held liable as a "supplier" under the Ohio Products Liability Act, R.C. 2307.71 *et seq*. Accordingly, the court addressed two propositions of law limited to Plaintiff's product liability claims: (1) where an Internet provider such as Amazon acts as more than a neutral platform for third-party sales and actively promotes the sale of a deadly product, courts must apply public policy considerations under Ohio's Consumer Protection Laws, including incentivizing safety and shifting risk away from consumers, in determining supplier status, and (2) an Internet provider such as Amazon "otherwise participates in placing a product in the stream of commerce" and is a "supplier" under ORC 2307.71(a)(15) when it agrees to promote a deadly consumable product, introduces, and recommends that product to a consumer, and otherwise uses its influence to lead that consumer to believe the product is safe.

The court held that Amazon should not be held liable as a "supplier" under the Ohio Product Liability Act because the third-party seller, Tenkoris, had sole responsibility for the fulfillment, packaging, labeling, and shipping of the product directly to customers. The court found that "Amazon has no relationship with the manufacturer or entities in the seller's distribution channel. Tenkoris, not Amazon, decided what to sell on Amazon, and by agreement, took on the responsibility of sourcing the product from the manufacturer until it reached the end user." Consequently, the court found that Amazon's role in the chain of distribution is insufficient to trigger the imposition of strict liability for defective products sold by third party vendors on its marketplace.

Plaintiff also attempted to introduce public policy considerations to find that Amazon was a "supplier" using Ohio precedent that cited to the Second Restatement of Torts. The court rejected that attempt because a public policy consideration was not spelled out specifically in the language of the Ohio Product Liability Act. The court further stated that, even if it were to consider the policy objectives of products liability law predating the Product Liability Act, Plaintiff had still failed to demonstrate that holding Amazon liable would promote product safety. Specifically, the court found that "[b]ecause Amazon does not have a relationship with the manufacturers of third-party products, Amazon lacks control over product safety."

Whether Voluntary Product Recall Pushes a Products Liability Claim Across the Line Between Possibility and Plausibility of Entitlement to Relief

***Christian v. Altaire Pharm., Inc.*, No. CV 5: 20-306-DCR, 2020 WL 6051255 (E.D. Ky. Oct. 13, 2020).**

The court found that, standing alone, a voluntary recall notice that fails to identify a specific contamination issue and expressly states that no product has been identified as being out-of-specification, does not constitute a plausible allegation of a product defect and cannot survive a Rule 12(b)(6) motion.

Plaintiff brought a product liability claim, in which she claims that ActivEyes Nighttime Lubricant Ointment ("eyedrops") caused her permanent eye injury. Plaintiff purchased the eyedrops on Amazon. On July 15, 2019 Altaire Pharmaceuticals, Inc. the manufacturer of the eyedrops voluntarily recalled them as a precautionary measure due to management concerns regarding the sufficiency of quality assurance controls over

critical systems in the manufacturing facility. Plaintiff discovered the voluntary recall after Amazon, reported it on July 21, 2019. Plaintiff was given an opportunity to file an Amended Complaint to provide more detailed facts in opposition to Amazon's motion to dismiss.

The court held that Plaintiff did not make any meaningful changes and failed to offer any argument in support of her motion. Plaintiff brought three causes of action against the defendants, strict liability, negligence and breach of warranty. For Plaintiff's strict liability and negligence claims she relies solely on the voluntary recall to point to a possible defect. The court found that the actual voluntary recall itself makes no mention of bacteria, clearly states it is both voluntary and precautionary and there is no evidence of adverse consequences of use.

The court analyzed whether a defect can be alleged by relying solely on a voluntary recall. Rule 8 of the Federal Rules of Civil Procedure does not demand highly specific factual allegations, however in product liability cases it is not enough for plaintiffs to simply rely on their basic injury allegations that a product was defective. The court held that a voluntary recall notice that fails to identify a specific contamination issue and expressly states that no product has been identified as out-of-specification, does not constitute a plausible allegation of a product defect. Accordingly, Plaintiff's strict liability and negligence claims would not survive a Rule 12(b)(6) and any amendment would be futile. Plaintiff's breach of warranty claim fared no better, as Plaintiff alleged an express warranty was breached without actually identifying the specific warranty. The court, based on *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) found that Plaintiff's claim fails to state a claim to relief that is plausible on its face and granted the motion to dismiss.

Kentucky Recognizes a Post-Sale Duty to Warn Claim

***Schall v. Suzuki Motor of Am., Inc.*, 450 F. Supp. 3d 771 (W.D. Ky. 2020).**

This case involves a 2007 Suzuki GSX-R600 motorcycle (the "motorcycle") that Plaintiff purchased used in the Fall of 2012 from a previous owner. On a night in the Summer of 2013, Plaintiff was on his motorcycle going home when the front brakes allegedly stopped working. When Plaintiff applied the back brakes, the back tire locked up and Plaintiff aimed for a corn field. Plaintiff crashed the motorcycle and was paralyzed

from the sternum down. Six months after the accident, Plaintiff received notice from Suzuki Motor of America, Inc. ("SMAI") that the motorcycle's front brakes were defective and, as a result, stopping distances could be extended. On October 18, 2013, six months after Plaintiff's accident, SMAI notified NHTSA of the front brake failure and that there would be a recall issued. On November 18, 2013, SMAI began notifying riders of the defect through a recall notice.

Plaintiff commenced a lawsuit against Suzuki Motor Corp. ("Suzuki"), the manufacturer of the motorcycle, SMAI, the importer of the motorcycle and Nissin Kogyo Co., Ltd. ("Nissin") the manufacturer of the brake master cylinder. Plaintiff brought claims of strict products liability, negligence, negligent failure to warn and negligent advertising, distribution and promotion. SMAI was let out of the lawsuit due to Kentucky's Middleman Statute as to all claims except negligent post-sale failure to warn. Suzuki and Nissin brought motions for summary judgment independently for each of Plaintiff's claims.

The court held that there was a genuine issue of material fact on the manufacturing and design defect claims based on theories of both strict liability and negligence. There also was a genuine issue with the causation element of each claim and that summary judgment would be improper. The court denied Defendants' Motions for Summary Judgment for the design and manufacturing defect claims under theories of both strict liability and negligence.

With respect to Plaintiff's negligent failure to warn claim, Defendants argued that Kentucky does not recognize a duty by a manufacturer to recall, retrofit or warn about a product that was defective when sold. Defendants relied on *Cameron v. DaimlerChrysler Corp*., No. 5:04-CV-24. 2005 WL 2674990 (E.D. Ky. Oct. 20, 2005) (Kentucky would not adopt a post-sale failure to warn cause of action. *Citing Ostendorf v. Clark Equip. Co*., 122 S.W.3d 530 (Ky. 2003)). However, the *Schall* court determined that *Cameron* misinterpreted the analysis of *Ostendorf*. The court then held that based on an extensive review of the cases, Kentucky does recognize a post-sale duty to warn claim for products that were defective when sold. The court agreed that Plaintiff presented sufficient evidence that Defendants knew or had reason to know that their product was likely to be dangerous. Accordingly, the court denied Defendants' Motion for Summary Judgment as

to the negligent failure to warn claim as there is a genuine issue of material fact on each element of the post-sale failure to warn claims as to each of the three defendants.

The court granted Defendants' Motion for Summary Judgment as to Plaintiff's negligent misrepresentation claim.

Governmental Immunity

***Davis v. Flint Cmty. Sch.*, No. 350265, 2020 WL 6372405 (Mich. Ct. App. Oct. 29, 2020).**

Plaintiff, on behalf of her minor son, appealed by right the trial court's order granting Defendants' motion for summary disposition based on governmental immunity. This products liability action arises out of an allegedly defective bench lid located at a school. Plaintiff's minor son, a six-year-old with autism, was injured at school when his hand was caught in a bench lid that he had been holding open. The defendant teacher told the students not to open the bench, and she did not open the bench in front of the students. When the teacher observed Plaintiff's son open the bench, she told him to close it. He did so but dropped the bench lid on his hand. The court affirmed the finding that the public-building exception did not apply as it is inapplicable to design defects, and because a reasonable juror could not conclude that the teacher was grossly negligent. Plaintiff's argument was premised on the bench lid's lack of a safety device or spring, which relates to a characteristic of the bench and not restoring it to a prior state. Specifically, Plaintiff alleged only that the bench lacked a safety device, not that one had existed previously and then deteriorated, failing to satisfy her burden.

Failure to Warn and the Interplay between Tennessee's Products Liability Act & Health Care Liability Act

***Heaton v. Mathes*, No. E2019-00493-COA-R9-CV, 2020 WL 1652571 (Tenn. Ct. App. April 3, 2020).**

Plaintiffs asserted a health care liability action against a pharmacy claiming Defendants failed to warn of the risks associated with a prescription medication, which resulted in several injuries to Plaintiffs. Defendants argued that the Tennessee Products Liability Act ("TPLA") governed and applied to failure-to-warn claims against pharmacists, who were mere sellers of drugs. Defendants filed a motion to dismiss based on the seller

shield statute in the TPLA, which provides that a products liability action cannot be maintained against a product's seller, other than the manufacturer, except in certain enumerated circumstances.

The trial court denied Defendants' motion to dismiss, holding that absent any particular guidance from the legislation as to the applicability of the product liability defenses that may have been available prior to the passage of the expanded Tennessee Health Care Liability Act ("THCLA"), courts have to examine the gravamen of the complaint. Upon reviewing the complaint, the trial court found that this was a health care liability action, not a products liability action, and as such the seller shield statute contained within the TPLA would not shield Defendants from a THCLA claim. The trial court granted Defendants' motion for permission to seek interlocutory appeal regarding whether the seller shield defense contained within the TPLA could be asserted when Plaintiffs' claim was made pursuant to the THCLA.

The Tennessee Court of Appeals affirmed the trial court's decision, determining that the seller shield defense under the TPLA was inapplicable to claims made under the THCLA. The Court of Appeals applied a natural and reasonable reading of Tennessee Code § 29-28-106, which provides that if provisions of different titles or chapters of the code appear to contravene each other, the provisions of each title or chapter shall prevail as to all matters and questions growing out of the subject matter of that title or chapter. THCLA applies to all health care providers, including pharmacies and pharmacists, without limitation based on any type of product seller immunity. Since the complaint stated a cause of action pursuant to the THCLA, the Court of Appeals concluded that only the provisions of the THCLA would govern all matters and questions growing out of the action.

SEVENTH CIRCUIT:

Kevin P. Lolli and Patrick F. Russell, Swanson, Martin & Bell, LLP, 330 N. Wabash, Ste. 3300, Chicago, IL 60611

Illinois Economic Loss Doctrine

***Lewis v. Lead Indus. Ass'n*, --- N.E.3d ---, 2020 WL 124107 (Ill. May 21, 2020).**

Plaintiffs, who were parents, brought an action against Defendants, manufacturers of lead paint, and sought to recover the costs of blood lead screening which their children underwent as required by the Lead Poisoning Prevention Act. The circuit court granted summary judgment in favor of Defendants; however, the appellate court reversed the decision. The Illinois Supreme Court granted Defendants' petition and concluded that Plaintiffs did not suffer any economic loss as their damages did not include physical injury or property damage. As a result, the decision of the appellate court was reversed, the circuit court decision was affirmed, and the case was remanded to the circuit court.

Of note, this was a class action lawsuit certified in 2008 that specifically excluded any claim for recovery of physical injury to Plaintiffs' children. The class definition excluded "such parents and legal guardians who incurred no expense, obligation or liability for lead toxicity testing of their children." In their motion for summary judgment, Defendants noted that the three named Plaintiffs were Medicaid recipients when their children were tested and had not personally paid for the tests. As a result, Defendants argued that Plaintiffs could not prove any economic injury because (1) Medicaid paid the full costs; (2) Plaintiffs received no demand for payment from the medical providers or Medicaid; and (3) state and federal law prohibited reimbursement from Plaintiffs. Plaintiffs conceded that they did not pay for the tests, but stated that the children's parents incurred the expense of the services of treatment even when the actual cost was paid by a third-party.

The court first noted that a plaintiff cannot sue in tort to recover solely for economic loss without any personal injury or property damage. The court recognized that Count III of Plaintiffs' second amended complaint appeared to be a claim for fraudulent concealment. Since the conspiracy count was grounded on a theory of misrepresentation or fraud, it fell within the exception from *Moorman Manufacturing Co. v. National Tank*

Co., 435 N.E.2d 443 (Ill. 1982), prohibiting recovering purely economic loss. Further, the court noted that an actual injury is an essential element of fraud.

The court disagreed that the Family Expense Act established an economic loss. The court reasoned that the ordinary definition of "creditor" is "one to whom money is due." Because Plaintiffs never incurred an obligation to pay the providers for the blood lead screening, they were not creditors. Further, the court ruled that the collateral source rule did not satisfy the injury element of Plaintiffs' cause of action. Notably, the court reasoned that the collateral source rule prescribes the methodology of awarding damages, but does not prescribe rules for determining whether Plaintiffs suffered an injury. Therefore, summary judgment in favor of Defendants was appropriate.

Federal Preemption (Impossibility Preemption) of Illinois State Law Claims; Failure to Warn

***Dolin v. GlaxoSmithKline LLC*, 951 F.3d 882 (7th Cir. 2020).**

Plaintiff brought a failure to warn claim against a drug manufacturer alleging that her husband committed suicide in 2010 as a result of using a generic of the manufacturer's drug that did not include a risk of adult suicide on the labeling. Plaintiff's theory was premised on the manufacturer having ultimate responsibility for the labeling used by generic manufacturers of its products under the applicable Federal regulations [21 C.F.R. § 314.70]. The Seventh Circuit had previously found Plaintiff's Illinois state law claim preempted by federal law under *Wyeth v. Levine*, 555 U.S. 555, (2009) (herein "*Wyeth*"). Under *Wyeth*, impossibility preemption required dismissal of the state law claims, since the drug manufacturer could not have changed the warning labels on the drug to comply with a state law duty to warn without approval from the FDA, and the FDA denied the manufacturer's request to include an adult suicide risk on the warning label. After the Supreme Court's more recent decision analyzing impossibility preemption, *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, (2019) (herein "*Albrecht*"), Plaintiff brought a FRCP 60(b)(6) motion to set aside the prior final judgment. Plaintiff argued under *Albrecht*, the manufacturer could no longer establish its defense of impossibility preemption since *Albrecht* invalidated *Wyeth*.

The *Dolin* court rejected Plaintiff's argument, agreeing with the district court that *Albrecht* is better understood as a clarification of the impossibility standard in *Wyeth*, not a repudiation of *Wyeth*. The *Dolin* court noted that the following clear evidence standard found in *Wyeth* was ambiguous: "absent clear evidence that the FDA would not have approved a change to [the drug]'s label, we will not conclude that it was impossible for Wyeth to comply with both federal and state requirements." *Wyeth*, 555 U.S. at 571. However, *Albrecht* established a definition for the "clear evidence" standard when it held that a manufacturer must provide "evidence that shows the court that the drug manufacturer fully informed the FDA of the justifications for the warning required by state law and that the FDA, in turn, informed the drug manufacturer that the FDA would not approve a change to the drug's label to include that warning." *Albrecht*, 139 S. Ct. at 1672. The *Dolin* court also noted that its prior decision based on *Wyeth* would have been the same if decided under *Albrecht*. Here, the manufacturer brought evidence that it proposed new warning labels to the FDA in 2006 and the FDA rejected the drug-specific labels.

Fraudulent Joinder of Defendant with Illinois Citizenship

***Ali v. Volkswagen Group of Am., Inc.*, 19-CV-06148, 2020 WL 5250669 (N.D. Ill. Sept. 3, 2020).**

Plaintiff brought a products liability action against Defendant car manufacturer after his car struck a piece of debris and it ignited into flames. Defendant subsequently removed the case to federal court on the basis of diversity jurisdiction. Plaintiff amended his Complaint to add Defendant's parent company as well as the car dealership where the car was purchased. Both Plaintiff and the car dealership were Illinois citizens. Defendants argued the joinder of the car dealership was improper and qualified as fraudulent joinder. The court agreed with the defendants that the dealership was fraudulently joined and denied the addition of the new non-diverse defendant.

The Seventh Circuit has established four factors to consider in a fraudulent joinder analysis: (1) the plaintiff's motive for seeking joinder; (2) the timeliness of the amendment; (3); whether the plaintiff will be prejudiced if joinder is denied; and (4) other equitable considerations. The court next determined that the primary issue in determining Plaintiff's

motive is whether Plaintiff's purpose for the joinder is to defeat federal jurisdiction. Although fraudulent joined is not dispositive, the court noted that the standard was whether there is no reasonable possibility of success on the clam against the in-state defendant.

Defendants argued Plaintiff's motive was suspicious because he could have brought the claims against the defendant car dealership in his original complaint. Further, pre-settlement overtures to Defendants indicated Plaintiff never intended to sue the car dealership. Lastly, Defendants noted that Plaintiff had no reasonable possibility of prevailing against the car dealership. Plaintiff argued that he had a viable claim against the car dealership under the Illinois Consumer Fraud and Deceptive Business Practices Act, so motive was irrelevant.

The court first determined that Plaintiff was not a "consumer" under the Fraud Act because the subject vehicle was titled to a corporation. The court ruled that the correct legal entity must bring the action. In this matter, the corporation that held the title for the vehicle was the appropriate entity to bring the subject fraud action. Since there was no evidence Plaintiff purchased the vehicle, he was the wrong party to bring a claim under the Fraud Act. Further, Plaintiff had not met the heightened pleading standard required for a fraud claim. Specifically, Plaintiff did not state the identity of the person making the misrepresentation and the time, place, and content of the misrepresentation. Additionally, the timing of the addition, immediately after removal and without discovery, suggested the joinder only occurred to defeat diversity.

The third and last factor involved "whether the plaintiff will be significantly injured if joinder is not allowed." Plaintiff argued that the Fraud Act allows for the recovery of attorneys' fees and costs for which he would not be able to apply. However, the court noted that Plaintiff could have brought the fraud claim originally, and still had the ability to file the claim in state court. As a result, the court noted the proper relief was to dismiss the car dealership.

Seller's Exception for Illinois State Law Claims;

***Breeze v. Bayco Prod. Inc.*, --- F. Supp. 3d ---, 2020 WL 4365471 (July 30, 2020).**

Decedent's estate filed this lawsuit after a fire in the decedent's home resulted in her death. Plaintiffs alleged counts of strict liability, negligence, consumer fraud, breach of warranty, wrongful death, and survival actions against the manufacturer and retailer of a Clamp Light. Plaintiffs claimed that Decedent informed her landlord that the water pipes in her home were frozen and the landlord purchased a Clamp Light and light bulb, and placed both in a crawlspace under the home. Plaintiffs alleged that the Clamp Light was defective and dangerous, resulting in the fire. Defendant retailer brought a motion to dismiss pursuant to the statutory seller's exception. The court ruled that the seller's exception did not apply in the current matter.

The court reasoned that the seller's exception allowed the dismissal of a strict products liability claim against a nonmanufacturer defendant where the defendant files an affidavit identifying the manufacturer of the product. Plaintiffs can avoid dismissal of the lawsuit if they prove one of the following: (1) that the defendant exercised some significant control over the design and manufacture of the product, or provided instructions or warnings to the manufacturer relative to the alleged defect in the product which caused the injury, death, or damage; (2) the defendant actually knew of the product defect that caused the injury, death, or damage; or (3) the defendant created the product defect that caused the injury, death, or damage.

It was undisputed the retailer provided a satisfactory affidavit and the manufacturer was named as a defendant. However, Plaintiffs' amended complaint alleged that both Defendants were aware of the nature of the defective nature of the Clamp Light. Despite the retailer's affidavit that it had no knowledge of the defective nature of the subject Clamp Light, the court noted this was a factual issue. As a result, Plaintiffs' allegations that the retailer "knew or should have known" of the defective nature were sufficient to prevent dismissal pursuant to the seller's exception.

Fraudulent Joinder for Illinois State Law Claims

***Andersen v. Phillip Morris USA Inc.*, No. 19 C 5812, 2020 WL 433867 (N.D. Ill. Jan. 28, 2020).**

Plaintiff filed suit against manufacturers of cigarettes and a cigarette retailer alleging that the collective defendants participated in a marketing campaign to minimize the health risks associated with smoking. As part of the campaign, Plaintiff alleged that the defendant retailer learned about the health risks of cigarettes and requested cigarette manufacturers to indemnify it against lawsuits. Defendants removed the case to federal court. Plaintiff moved to remand the case due to lack of diversity since Plaintiff and Retailer were both Illinois residents. The court granted Plaintiff's motion.

The manufacturer defendants did not dispute that Retailer and Plaintiff were both citizens of Illinois. Instead, Defendants argued that Retailer was fraudulently joined so its citizenship should be ignored. The court first noted that Defendant must demonstrate there was no reasonable possibility Plaintiff could state a cause of action against the subject defendant in state court.

Plaintiff brought negligence and strict liability claims against Retailer. Illinois law establishes that all entities in the distributive chain of a defective product are strictly liable for injuries resulting from the product. Subsequently, Retailer submitted an affidavit pursuant to the seller's exception. However, the court reasoned that Illinois law provided that if the non-manufacturer had actual knowledge of the defect, it should not be dismissed.

The court next applied the consumer expectations test to determine whether the retailer knew cigarettes were more dangerous than consumer expectations. The court explained that the retailer had close communication with the tobacco industry and therefore obtained knowledge that was unavailable to the average consumer. Unlike prior cases, Plaintiff alleged specific facts that suggested the defendant manufacturers and Retailer shared information about the health consequences of cigarettes. As a result, the seller's exception may not apply due to the retailer's specialized knowledge and the likelihood of success of the strict liability claim. As a result, Defendant manufacturers failed to establish that the defendant retailer was fraudulently joined.

Illinois Long Arm Statute/Minimum Contacts Test

***Levy v. Gold Medal Products Co.*, 156 N.E.3d 106 (Ill. App. Ct. 2020).**

Plaintiff sued the distributor of butter flavoring chemicals diacetyl and acetyl propionyl in negligence and strict products liability, seeking recovery for lung injuries due to exposure. The defendant distributor filed a third-party complaint against the manufacturer of the products seeking contribution and indemnification. The third-party defendant manufacturer filed a motion to dismiss for lack of personal jurisdiction. The circuit court denied the motion to dismiss. The appellate court affirmed dismissal of count VII, indicating that the court had personal jurisdiction, but reversed the denial of the motion to dismiss count VIII, finding that the forum selection clause mandates the contractual allegations be brought in Ohio.

The defendant distributor's principal place of business was in Cincinnati, Ohio and it sold butter flavoring chemical to Plaintiff's employer which has locations in Lake Zurich, Illinois and Elgin, Illinois. The defendant manufacturer's principal place of business was Brea, California. The defendant manufacturer argued that it did not manufacture the popcorn products in Illinois, did not deliver them to the distributor in Illinois, and did not control where the distributor might sell them. The defendant distributor responded to the motion to dismiss by attaching screenshots of its website that indicated it had locations in Illinois and screenshots of the defendant manufacturer's website indicating it had a manufacturing plant in Thornton, Illinois. The defendant distributor also provided an affidavit from an employee indicating the manufacturer was familiar with its business, distribution channels, and end users.

The court first employed an analysis of stream of commerce theories. The United States Supreme Court ruled that a state is allowed to exercise personal jurisdiction over a nonresident defendant only when it has "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Initially, the Supreme Court articulated how to meet the minimum contacts test in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The Supreme Court further addressed the stream of commerce theory in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987). Although there has not been a definitive answer, the Court has developed competing theories: a narrow stream of

commerce theory and a broad stream of commerce theory. Despite the competing theories, the Court concluded that the defendant manufacturer had the requisite minimum contacts under either a broad or narrow stream of commerce theory.

The defendant manufacturer regularly manufactured products for the defendant distributor that were subsequently sold to Illinois, and the defendant manufacturer was aware that the products were being marketed in Illinois. Of note, the evidence showed that the defendant manufacturer delivered 40,000 pounds of popcorn products to the distributor 5-10 times a year for the past 25 years. Testimony from the defendant manufacturer's employees indicating that they were unaware of the distributor's location in Illinois did not bar personal jurisdiction under the broad stream of commerce theory.

Under a narrow stream of commerce theory, the defendant manufacturer still had the requisite minimum contacts. In addition to the large volumes of sale, the defendant manufacturer also labeled those products with the distributor's brand names for sale in Illinois. The defendant manufacturer also sells 6,000 pounds per year of its products to customers in Illinois other than those sold to the distributor. Therefore, the defendant manufacturer has done more than simply place its product in the stream of commerce. The court then found that the action arose out of and was related to the manufacturer's contacts with Illinois. Lastly, the court determined it was reasonable for the defendant manufacturer to litigate this matter in Illinois. The defendant manufacturer had a plant in Illinois and has been party to litigation in Illinois on multiple occasions. Additionally, Illinois and the defendant distributor have a clear interest in resolving the dispute in Illinois. As a result, the defendant manufacturer had the sufficient number of minimum contacts.

The court next addressed the forum selection clause. The distributor's own purchase orders included a provision that it was governed by Ohio law and all legal actions must be brought in Ohio. The court stated that the defendant distributor did not show that the enforcement of the forum selection clause would be unreasonable. Accordingly, the court granted the defendant manufacturer's motion to dismiss count VIII.

Federal Preemption; Lack of Reasonable Alternative Design Requirement under Indiana Products Liability Act; Consumer-Expectancy; Failure to Warn

***Kaiser v. Johnson & Johnson*, 947 F.3d 996 (7th Cir. 2020).**

Plaintiff brought a claim against a surgical mesh medical device manufacturer and the manufacturer's parent company, seeking damages under the Indiana Products Liability Act ("IPLA"). A jury found the defendant manufacturer liable for defectively designing the surgical mesh medical device and for failing to adequately warn surgeons about the extent and degree of the complications. The jury awarded $10 million in compensatory damages and $25 million in punitive damages, which was reduced by the district judge to $10 million on the defendant manufacturer's motion for remitter. The district judge denied the manufacturer's motion for judgment as a matter of law and is motion for a new trial. The manufacturer appealed.

On appeal, the manufacturer first argued that the federal law pre-empted Plaintiff's IPLA claims. The manufacturer argued the surgical mesh medical device was submitted to the Food and Drug Administration (FDA) for market-approval prior to the plaintiff's injury. The court rejected this argument. The court found that the manufacturer brought the device to market prior to seeking pre-market clearance under FDA regulation. The device was submitted for clearance only at the request of the FDA, two years after market. Importantly, the device was cleared as being substantially equivalent to a prior device. The court noted impossibility preemption was not applicable here, since federal law did not stop the manufacturer from satisfying its state-law duties regarding the medical device's design before seeking FDA clearance. Here there was also evidence that the product was rushed to market without seeking FDA pre-market clearance.

The manufacturer also argued that the IPLA requires a plaintiff to produce evidence of a reasonable alternative design to prevail on a design-defect claim. In rejecting the manufacturer's argument, the court held that the IPLA did not expressly require a plaintiff to prove an alternative product design would have prevented the injury. The court noted the 7th Circuit's longstanding precedent in interpreting the IPLA *had* required plaintiffs to prove alternative product design. However, the *Kaiser* court recognized that the Indiana Supreme Court had rejected the federal approach in *TRW Vehicle Safety Systems, Inc. v. Moore*, 936 N.E.2d 201 (Ind. 2010), finding the alternative-

design requirement was inconsistent with the IPLA standards for design-defect liability. Since federal jurisdiction was based on diversity of citizenship, the court concluded it was required to follow *TRW*, and that the federal precedent requiring a plaintiff to prove alternative product design was not an accurate interpretation of Indiana state law. The court noted Plaintiffs remained free to establish design defect liability through evidence of a reasonable alternative design, but Plaintiffs were not required to prove reasonable alternative design as an element of an IPLA design-defect claim.

The manufacturer also attacked the sufficiency of the evidence. It argued that under the consumer-expectancy test, there was insufficient evidence that the product was unreasonably dangerous since the consumer, here a pelvic floor surgeon, was aware of the general risks of implanting surgical mesh. The court rejected this argument. While there was evidence to support the manufacturer's position, the court held that the determination of whether a product is unreasonably dangerous is usually a question of fact to be resolved by a jury. Here, there was sufficient evidence for a reasonable jury to conclude that the manufacturer created risks beyond the expectations of a pelvic floor surgeon.

The manufacturer argued that Plaintiff's failure-to-warn claim was deficient as a matter of law, since the manufacturer distributed a "Surgeon's Resource Monograph" at training events, and that its duty to warn did not extend to detailing the frequency, severity, or permanence of the medical device's side effects. Under Indiana's learned-intermediary doctrine, a medical-device manufacturer can discharge this duty by providing adequate warnings to physicians. Here, however, the court declined to rule as a matter of law on the contents of a reasonable warning for a specialized medical device. The court found the duty to warn was a question for the jury. The court noted that evidence was presented at trial that the manufacturer was aware of a substantial risk of injury, and complications relating to subsequent surgeries to remove the mesh were not communicated to the surgeon-consumers.

The manufacturer also brought a motion for new trial, but the *Kaiser* court summarily disposed of that argument. Defendant argued it was entitled to a state-of-the-art instruction, but it did not provide any expert testimony on the state-of-the-art when the surgical mesh was first designed and manufactured, and it did not produce evidence of

existing industry standards. The court found that the only evidence Defendant produced was highly generalized statements which failed to satisfy the legally sufficient evidentiary basis to support the state-of-the-art presumption. Similarly, the court affirmed the trial court's exclusion of the FDA market clearance under FRE 403. The court agreed with the district judge that the FDA clearance was remote and distinct from a FDA safety review, and allowing the evidence would have confused the jury and belabored the details of the FDA clearance process. Finally, the *Kaiser* court affirmed the compensatory and punitive damages awards. The court noted that the district judge should not have used the federal standard for reviewing the compensatory damages, but the error was harmless since the damage award was not excessive under Indiana law either.

Removal from Indiana State Court Under 28 U.S.C. § 1442(a)(1); Pleadings - Government Contractor Defense

***Baker v. Atl. Richfield Co.*, 962 F.3d 937 (7th Cir. 2020).**

Plaintiffs sued nine defendant industrial manufacturing companies in Indiana state court alleging that the companies contaminated a property with lead, arsenic, and likely other substances between 1910 and 1965 in the area where Plaintiffs' residence was later built. Several defendants removed the case to federal court under 28 U.S.C. § 1442(a)(1) based upon the location in question being operated by Defendants as a lead refinery, white lead carbonate plant, and zinc oxide plant under U.S. Government supervision during World War II. Plaintiffs brought a motion to remand which the district court granted, finding Defendants acted under the color of federal office, but only for a limited period of the time at issue. Defendants appealed the district court's opinion to remand the action to state court.

The 7th Circuit reversed the district court. While showing compliance with federal regulation alone is not sufficient, when a private contractor helps the federal government produce an item that it needs pursuant to government instruction and supervision, a defendant satisfies the first element of § 1442(a)(1) of acting under a federal officer. Here, one of the defendants established that it followed the federal government's detailed specifications under federal supervision. The court also found a sufficient connection between the conduct at issue and the asserted official authority. The court noted that in

the Removal Clarification Act, Congress broadened federal officer removal to actions not just causally connected, but alternatively connected or associated with acts under color of federal office. While the 7th Circuit had previously required causation, the court joined the other circuits in replacing "causation" with "connection."

The court noted that Plaintiffs had raised serious questions about whether the defendants' pollution that allegedly caused Plaintiffs' injuries flowed from the specific wartime production or from their more general manufacturing operations outside of the wartime period. The court made the distinction though that causation was a merit question that a federal district court should decide. The court rejected the district court's rationale that a relevant time frame was applicable to the removal issue. For removal, Defendants only had to show that some of the pollution at issue arose from the federal acts.

The court then analyzed whether the defendants had a colorable government contractor defense. The government contractor defense immunizes government contractors from state tort law when the government had a hand in a defendant's allegedly defective design. The court held the government contractor defense broadly applies to any product supplied for government use as long as it conformed to the government's reasonably precise specifications. Here, the supply of lead and industrial products under government specification could not be considered off-the-shelf. The court contrasted the instant matter with decisions in which courts had not found a colorable government contractor defense, citing contracts to provide standard gasoline fuel to a military base or other standardized consumer products to governmental entities. The court concluded that at this initial stage of the litigation it was not concerned with what the final determination would be as to liability, but who would make that determination. As pled, the defendants made a threshold showing that their federal contractor defense was sufficiently colorable to remove the case to federal court.

Sufficiency of Evidence in Wisconsin Common Law Negligence and Strict Liability Claims Against Paint Manufacturer

***Burton v. Am. Cyanamid Co.*, 441 F. Supp. 3d 705 (E.D. Wis. 2020).**

In three cases consolidated for trial, Plaintiffs brought negligence and strict liability claims against six former manufacturers of white lead carbonate pigment (WLC) under the risk contribution theory of liability. The jury returned verdicts in favor of each plaintiff against three of the six named defendants, awarding each plaintiff $2 million dollars. One manufacturer defendant brought a FRCP 50 motion for judgment as a matter of law, setting forth eight arguments relating to insufficient evidence.

Defendant first argued that Wisconsin does not recognize a claim of negligence based only on the manufacture and sale of a product known to be dangerous, and Plaintiffs' allegations were essentially a claim for negligent product design, which had been previously rejected by the Wisconsin Supreme Court in *Godoy ex rel. Gramling v. E.I du Pont de Nemours and Co.*, 768 N.W.2d 674 (2009). The district judge rejected this argument. The judge noted that Defendant, like all manufacturers, had a duty of ordinary care, but the scope of the duty would vary based on the underlying facts. Also, prior rulings finding certain specific duties were not required of a manufacturer did not then absolve this defendant manufacturer of its duty of ordinary care. Here there was evidence that at the time WLC based paint was marketed and sold to consumers, Defendant was aware of the health risks of WLC.

Defendant next attacked the strict liability claims, arguing that to hold it strictly liable for Plaintiffs' injuries would violate its due process rights, because at the time Defendant manufactured and marketed WLC (1910-1965), Wisconsin courts had not yet recognized the strict liability standard and the related concept of foreseeable misuse. The district judge acknowledged there are due process limits on the retroactive application of judicial decisions, but only if the judicial decision is unexpected and indefensible when considering the applicable law prior to the conduct in issue. Here, Defendant failed to explain how the development of either "strict liability" or "foreseeable misuse" was unexpected and indefensible in reference to the prior law. The district judge also summarily denied Defendant's argument that the sophisticated user defense barred the

strict liability claims, noting that under Wisconsin law the sophisticated user defense is only applicable to negligence claims, not strict-liability claims.

Defendant argued that Plaintiffs were required to bring evidence of what warnings Sherwin-Williams needed to provide in order to render the WLC non-defective. The district judge rejected this argument. The court applied the consumer-expectancy test which states that a product is defective if, at the time it leaves the seller's hands, it is in a condition not contemplated by the ultimate user, and it is unreasonably dangerous if it is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Therefore, Plaintiffs were not required to show that reasonable warnings would have made WLC non-defective, only that WLC was not in a condition contemplated by consumers when it left Defendant's control. The district court concluded its decision by rejecting Defendant's challenges to the lack of evidence to support findings of causation and damages. The district judge noted causation was a question of fact and there was sufficient evidence for the jury to find for the plaintiffs on the issue of causation. The court similarly noted there was sufficient evidence of the plaintiffs' cognitive injuries to support their respective $2 million verdicts.

EIGHTH CIRCUIT:

Brittany S. Ford, Esq., Quattlebaum, Grooms & Tull, PLLC, 111 Center St. Ste 1900, Little Rock, Arkansas 72201

Design Defect

Smith v. Toyota Motor Corp., 964 F.3d 725 (8th Cir. 2020) (applying Missouri law).

Plaintiff Smith sued Toyota for strict products liability, negligence, and breach of warranty for injuries she sustained in a single-vehicle rollover accident. She alleged that her 1997 Toyota 4Runner was unreasonably prone to roll over and that its seatbelt system failed to restrain her during the accident.

Smith's list of defects included the vehicle's lack of "adequate and reasonable levels of occupant protection in the event of a rollover." Confusion about the seatbelt defect claims arose during the deposition of one of Smith's experts. Toyota's counsel asked whether the expert intended to express an opinion about a seatbelt design defect.

The witness responded: “the question that I am expected to ... explain to the jury is if we assume that a driver ... was belted ... [then] they’re fully ejected and the belt is still buckled at the end of the event, how can you reconcile those things.”

Toyota moved for summary judgment because Smith failed to present expert testimony showing that the seatbelt was defective. During the hearing on the motion, the court asked Smith’s counsel to clarify her claim. Counsel stated that Smith did not ask her expert to testify about whether this particular system was defective. Instead, the expert would establish a violation of Federal Motor Vehicle Safety Standard No. 209 (FMVSS 209). Smith’s counsel did not ask the expert to go one step further and testify about the design defect in this safety belt “because the defect is per se because it violates the standard.” The district court granted Toyota partial summary judgment on the seatbelt defect claims because it determined that Smith had abandoned the causes of action she pleaded in favor of a new negligence per se claim.

The Eighth Circuit agreed with the district court that Smith failed to include any reference to a seatbelt defect in the negligence section of her complaint. The closest she came was the allegation that Toyota was “negligent [when] *testing* the occupant restraint system to ensure it would operate and function properly in the event of a rollover.” But her description of how the 4Runner had been negligently *designed* made no mention of the seatbelt, which was fatal to Smith’s negligence claim.

Smith’s admissions during the summary judgment hearing also undercut her claim for strict products liability. To prove strict liability in Missouri, Smith needed to show that the 4Runner, as designed, was unreasonably dangerous and therefore “defective”, and that the demonstrated defect caused her injuries. The court explained that the primary inquiry is whether the product—because of the way it is designed—creates an unreasonable risk of danger. In contrast, a claim for negligence per se requires only the violation of a statute, which is shown to be the proximate cause of an injury. Given Smith’s concessions that there was no evidence relating to the *design* of the seatbelt and that her claims instead centered on FMVSS 209, the Eighth Circuit agreed that she abandoned her claim for strict liability.

Design Defect-Safer Alternative, Failure to Warn

***Green Plains Otter Tail, LLC v. Pro-Envtl, Inc.*, 953 F.3d 541 (8th Cir. 2020) (applying Minnesota law).**

Green Plains Otter Tail, LLC owned and operated an ethanol production facility. Green Plains used a regenerative thermal oxidizer (RTO) to burn off pollutants. Defendant Pro-Environmental, Inc. (PEI) manufactured the RTO, which utilized a hydraulic pump unit (HPU). The HPU caused an explosion in 2014 because it was not properly charged. Green Plains sued for negligence and products liability, alleging defective design and failure to adequately instruct and warn users. The district court granted summary judgment to PEI because Green Plains's lack of maintenance was a superseding cause negating PEI's liability for any design defect, and the design was not unreasonably dangerous. The Eighth Circuit, however, reversed, because reasonable minds could differ as to causation as well as to whether the machine was unreasonably dangerous.

Minnesota law merges negligence and strict liability claims into a single products liability theory, which employs a reasonable-care balancing test to determine whether a product is defective. To demonstrate that the product is unreasonably dangerous, the plaintiff ordinarily has the burden of showing the existence of an alternative design that was safer. If the manufacturer presents evidence to dispute that the product is unreasonably dangerous, the trier of fact will resolve the unreasonably dangerous issue.

Green Plains argued that the RTO's design was defective and unreasonably dangerous, emphasizing its use of hydraulic pressure for movement, while other potential designs, like compressed air or weights, could move without a precharge. Green Plains introduced evidence of the existence of alternative designs that are safer, including modifications to the HPU system. PEI countered that the RTO design was consistent with industry standards, and that Green Plains's expert never tested the alternative designs. The district court ruled that "PEI's design struck an acceptable balance among competing factors and was not unreasonably dangerous."

The Eighth Circuit, however, explained that while a manufacturer's compliance with industry standards can be evidence of a reasonable design, it is not conclusive proof on the question of whether a manufacturer exercised reasonable care. Credibility

determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. Under Minnesota law, the jury ultimately decides whether the product is unreasonably dangerous. Because reasonable minds could differ about whether the RTO was defective, the court held that Green Plains submitted sufficient evidence of a defective design to survive summary judgment.

The Eighth Circuit also determined that reasonable minds could disagree as to whether PEI could foresee that a company would view the "suggested" maintenance as mandatory, or would ignore it due to the effort required. The court held that under Minnesota law, PEI was not entitled to summary judgment on proximate causation.

Green Plains also asserted that it did not know the importance of maintaining the unit and that the consequences were not sufficiently apparent. To the contrary, a warning label on the accumulator, under an all capital letters "WARNING!", said: "Failure to read and follow these directions can cause rapidly discharging gas and/or hydraulic fluid which can result in death, personal injury and property damage." The label further directed the reader to instructions in the product catalog or on a website.

Under Minnesota law, there must be a causal relationship between the failure to warn and the injury. Absent a reading of the warning, there is no causal link between the alleged defect and the injury. The warning label on the accumulator specifically says to follow instructions for precharging and maintenance. Additional warnings would not have changed the behavior of Green Plains. Therefore, the Eighth Circuit affirmed summary judgment on the failure to warn claim.

Design Defect- At the Time of Sale, Latent Defect

***Farkas v. Addition Mfg. Techs., LLC*, 952 F.3d 944 (8th Cir. 2020) (applying Missouri law).**

Farkas injured his fingers in a tube-end forming machine manufactured by a successor of Defendant Addition. To operate the machine, the user inserts a piece of thin pipe known as tube. After inserting tube into the machine, the user presses a foot pedal to activate the hydraulic press. The machine then uses hydraulics to bring clamps around the tube and to shape the end of the tube. The machine was manufactured and sold in 1992. At the time of the sale it included a guard which prevented the operator's fingers

from fitting in the clamp when there was tube in the machine. Farkas's employer bought the used machine in 2014. At that time, Farkas's employer altered the guard to accommodate multiple sizes of tube.

While at work, Farkas used the machine to crimp a piece of tube that was smaller than the guard. This allowed Farkas to insert his fingers into the point of operation on top of the tube. When the machine crimped the tube, it also crushed Farkas's fingers. Farkas asserted that Addition was strictly liable for the product's design defect, failed to warn, and negligently manufactured the product. Addition moved for summary judgment, claiming that Farkas failed to provide evidence that the original guard was inadequate at the time of the machine's initial sale. The district court found that Farkas's expert considered the wrong guard because the expert's deposition showed his conclusions relied on the guard present at the time of the injury, not the guard from the time of sale. The court concluded that, without evidence of the initial guard's appropriateness and relevant industry standards, Farkas could not establish any of his claims.

Both strict liability for product defect and strict liability for failure-to-warn claims require that the plaintiff show that the product was defective or dangerous at the time of sale.

During the machine's life, the original guard was lost. The Eighth Circuit explained that without proof of the sufficiency of the original guard, Farkas could not show that it was defective at the time of sale. He attempted to satisfy the element by arguing that the original guard was categorically deficient because any such guard is inherently dangerous when the activation switch is a foot pedal. He highlighted two reasons. First, the machine can bend multiple sizes of tube, but the original guard only applied to one size, so subsequent users had to remove the guard to utilize all of the machine's capabilities. Second, a foot pedal allows the operator to have their hands free when using the machine. Those features—in Farkas's opinion—render the machine inherently dangerous, especially when compared to alternatives that require the operator to remove their hands from the point of operation to activate the machine.

The Eighth Circuit agreed with the district court that there was no evidence "that a machine with a foot pedal and a properly-working point of entry guard" was inherently dangerous. And because Farkas failed to provide evidence that the point-of-operation

guard was not working at the time the machine was sold, Farkas failed to prove that a defective condition existed when Addition sold the machine.

The court further affirmed the district court's determination that Farkas had not offered evidence that the danger of a tube forming machine to the user's hand was anything but "open, obvious, and apparent." The defect, therefore, was not latent under Missouri case law.

Design Defect- Expert Testimony

***Markel v. Douglas Techs. Group, Inc*., 968 F.3d 888 (8th Cir. 2020).**

During the last lap of a flat-track race in Minnesota, Markel was injured after being thrown from his all-terrain vehicle ("ATV") when its right rear wheel came off. Markel sued Douglas Technologies Group, Inc. ("DTG"), the manufacturer of the wheel, seeking redress for his injuries. The Eighth Circuit affirmed summary judgment because Markel failed to present proper expert testimony regarding the design of the wheel and there was no evidence in the record support his failure to warn claim.

In order to prove his product-liability claim, Markel had to show that "the DTG wheels on his ATV were in a defective condition unreasonably dangerous for their intended use . . . ." The Eighth Circuit explained that expert testimony is necessary to get a product-liability claim past summary judgment when the product at issue and any of its relevant inner workings are beyond the ken of a lay jury.

Markel's claim depended on an assessment of the appropriate strength and design of aluminum ATV racing wheels. Such an assessment necessarily involves complex mathematical and engineering concepts that a lay juror cannot be expected to understand without the help of an expert. Markel asserted that his expert provided the requisite background, and in particular, an opinion regarding the alleged design defect in and dangerousness of DTG's wheel. However, the expert's report and deposition testimony specifically disclaimed an opinion as to whether the subject wheel had a design defect that made it unreasonably dangerous. Thus, summary judgment was appropriate in favor of DTG on Markel's product-liability claim.

Markel also brought a failure to warn claim, but the record was devoid of evidence that an inadequate warning caused Markel's injuries. During a deposition, Markel's

counsel referred to an alleged statement by Markel that he would not have used the DTG wheels if he had known they were not meant for racing, but the court explained that hearsay on its own could not save Markel's failure-to-warn claim.

NINTH CIRCUIT:

Olivia J. Miner, Esq., Wilson Turner Kosmo, LLP, 402 W. Broadway, Suite 1600, San Diego, California 92101

Affiliates Language in Arbitration Clauses

***Revitch v. DIRECTV, LLC*, 977 F.3d 713 (9th Cir. 2020).**

In *Revitch*, the plaintiff filed a putative class action against DIRECTV, LLC ("DIRECTV") for alleged violations of the Telephone Consumer Protection Act. Plaintiff claimed DIRECTV made several sales calls to his cellphone using a prerecorded message.

DirectTV moved to compel arbitration of the claims pursuant to the arbitration clause contained in a wireless services agreement between Plaintiff and his cellphone service provider, AT&T (Agreement). The arbitration clause at issue encompassed claims against AT&T and its "affiliates." AT&T acquired DIRECTV, and the entities became affiliates, about four years after Plaintiff signed the Agreement.

A federal court's role in deciding a motion to compel arbitration under the Federal Arbitration Act (FAA) is limited to determining (1) whether a valid agreement to arbitrate between the parties exists, and, if so, whether (2) the agreement encompasses the dispute at issue. 9 U.S.C.A. §4. The federal court must apply ordinary state-law contract formation principles when reviewing the subject arbitration agreement. Pursuant to California law, the federal court must look to the reasonable expectations of the parties at the time of contract, including the parties' reasonable expectations and the circumstances surrounding the contract. Additionally, the federal court must rely on the written terms of the contract when the language is clear and explicit, as long as it does not lead to "absurd results."

The *Revitch* court determined that "absurd results" would follow if it applied the clear and explicit terms of the arbitration clause in a vacuum. The court held that in the absence of some type of forward-looking language (e.g. "any affiliates, both present and

future,"), the arbitration clause could not reasonably be interpreted to include claims against an entity that would not become affiliated with AT&T until years after Plaintiff signed the Agreement. The court explained that Plaintiff, when signing an agreement for cellular services with AT&T and its affiliates, could not have reasonably anticipated that he would be forced to arbitrate an unrelated dispute with DIRECTV, a satellite television provider, when DIRECTV would not become an AT&T-affiliate until years after Plaintiff signed the Agreement.

Standing: Injury v. Damages

***Van v. LLR, Inc.*, 962 F.3d 1160 (9th Cir. 2020).**

Customer filed a putative class action against a clothing company ("Company") alleging it improperly charged sales taxes and, when it eventually refunded the erroneous tax charges, it did so without paying the related interest. Company filed a motion to dismiss for lack of standing. The district court granted the motion, finding Customer had no injury in fact because Company had already refunded the erroneous tax charges, and Customer's claim for lost interest, estimated at $3.76, was "too little to support Article III standing." Customer appealed, arguing that even a temporary deprivation of money creates an injury in fact for Article III standing.

In response, Company argued that lost interest was "too speculative an injury to support Article III standing." The court acknowledged that an injury alleging lost interest income might be too speculative for standing. However, because Customer alleged she was injured due to the loss of use of her money, rather than lost interest income, Customer had alleged an "actual, concrete, and particularized[]" injury. The court of Appeals held that the district court erred by concluding that $3.76 was insufficient to establish Article III standing and that Customer suffered a "cognizable and concrete injury: the loss of a significant amount of money (over $500) [$531.25] for a substantial amount of time (months with respect to some purchases, over a year with respect to others)."

The court explained the distinction between alleging injury due to lost interest versus awarding interest to compensate for an injury: while alleging injury due to lost interest may be too speculative, awarding interest to compensate for the loss of use of money is an appropriate measurement of, and remedy for, Customer's injury.

CAFA and MMWA

***Floyd v. Am. Honda Motor Co.*, 966 F.3d 1027 (9th Cir. 2020).**

Plaintiffs filed a putative class action pursuant to the Class Action Fairness Act of 2005 ("CAFA") against a vehicle manufacturer for violation of the Magnuson-Moss Warranty Act ("MMWA") and breach of express and implied warranties under various state laws related to an alleged vehicle defect. The district court granted the manufacturer's motion to dismiss and Plaintiffs appealed. The Court of Appeals affirmed in part, vacated in part, and remanded the action.

MMWA requires, in the case of a class action, at least 100 named plaintiffs. The manufacturer's motion to dismiss was granted, in part, because Plaintiffs' putative class action had only three named plaintiffs. On appeal, Plaintiffs argued that a conflict existed between CAFA, which has no numerosity requirement, and MMWA, which requires at least 100 named plaintiffs. Due to this conflict, Plaintiffs claimed CAFA impliedly repealed MMWA's numerosity requirement and allowed district courts to exercise federal jurisdiction over MMWA class actions without 100 named plaintiffs.

The court explained that due to a strong presumption against implied repeals, the legislature's intent to repeal a statute must be "clear and manifest." Accordingly, for Plaintiffs' theory of implied repeal to be successful, there must be an irreconcilable conflict between CAFA and MMWA. The court reasoned that interpreting CAFA to provide jurisdiction over MMWA claims, without satisfying MMWA's numerosity requirement, would effectively ignore a portion of the MMWA. Indeed, the court found no irreconcilable conflict because courts "can easily give effect to [MMWA's numerosity command] and apply CAFA in all other cases."

The Court of Appeals affirmed the district court's dismissal of the MMWA claim, holding that "CAFA may not be used to evade or override the MMWA's specific numerosity requirement."

TENTH CIRCUIT:

Kaitlyn Hawkins-Yokley, Frost Brown Todd LLC, 301 E. 4th St., Suite 3300, Cincinnati, OH 45202

Preemption

***In re: MDL 2700 Genentech Herceptin (Trastuzumab) Mktg. and Sales Practice Litig.*, 960 F.3d 1210 (10th Cir. 2020).**

Plaintiffs brought an action against a manufacturer of a biologic drug used to treat breast cancer, claiming breach of express and implied warranties and unjust enrichment. Defendant argued that Plaintiffs' claims were barred by federal preemption.

Plaintiffs claim that the labeling on the drug Herceptin was misleading and that Defendant was purposefully underfilling vials. The label for Herceptin indicates that once prepared, the vial will yield 21 mg/ML of the drug. The FDA approved a range of 405 to 475 mg in each pre-prepared vial.

Plaintiffs claim that it is impossible to get 21 mg/ML of the prepared drug from the vials because Defendant underfills the vials. Defendant claimed that the vials were all within the FDA-approved range and that the Plaintiffs' claims are preempted because the FDA controls the labeling and maximum/minimum volumes of the drug product. The district court granted Defendant's motion for summary judgment, and the Tenth Circuit overruled.

The court rejected Defendant's obstacle preemption claims. Although the FDA propounds general labeling requirements, nothing in the regulatory scheme requires the FDA to police the amount of drug in the vials to ensure it is consistent with the label. The court also relied on FDA enforcement letters to Defendant encouraging Defendant to change its labeling to include the amount of drug in its liquid form rather than solid (the drug is delivered as a solid and must be prepared prior to injection).

After an examination of the federal statutory and regulatory framework, the court determined that the state law claims asserted by Plaintiffs are consistent with the federal framework. Therefore, Defendant's claim of obstacle preemption failed.

The court also rejected Defendant's claim of impossibility preemption. Defendant claimed that in order to establish the higher average content for each vial, the maximum/minimum fill amount would need to be changed, which would lead to modifications in its manufacturing process. According to Defendant, it would need FDA

approval to make these changes. The court rejected this idea because (1) ensuring that the amount of active drug was consistent between the label and the vial is in harmony with FDA regulations, (2) Defendant did not provide sufficient evidence to demonstrate impossibility. The court noted that Defendant did not do any research on whether their manufacturing process could be modified to comply with Plaintiffs' demands. In fact, evidence in the record demonstrated that Defendant exercised a high degree of control over its manufacturing process and the serial underfilling of vials was a result of intentional acts rather than unavoidable deviations in the manufacturing process.

Because Defendant's claims of obstacle and impossibility preemption failed, the Plaintiff's claims were able to proceed.

***Little v. Budd Company, Inc.*, 955 F.3d 816 (10th Cir. 2020).**

Plaintiff, the personal representative of Decedent, brought a state law action against a railcar manufacturer for negligence and strict products liability alleging that Decedent's exposure to asbestos caused mesothelioma and death. Defendant argued that Plaintiff's claims were preempted under the Safety Appliance Act, which requires railroad carriers to equip cars with safety features. Defendant claimed that because the asbestos insulation was added to the car for workers' safety, it was regulated by the Act. The court disagreed.

The insulation at issue in this case was not mandated by the Safety Appliance Act. The Tenth Circuit cited Supreme Court precedent which held that state safety regulations that are not addressed in the Safety Appliance Act are not preempted under the law (for example, headlights on trains). The Tenth Circuit held that the Safety Appliance Act does not preempt state common-law suits as long as the suit does not relate to one of the listed devices in the Act. Because the underlying suit involves asbestos-wrapped pipes, a device not regulated by the Safety Appliance Act, the lawsuit is not preempted.

***Daimler Trucks North America, LLC v. Butler*, 433 F. Supp. 3d 1216 (D. Kansas 2020).**

Plaintiff alleged personal injuries resulting from a multivehicle accident caused by a semitruck's failure to adjust its speed when traffic slowed. Plaintiff made claims that the truck was defectively designed because it did not have Forward Collision Warning and Automatic Emergency Braking. Defendants argued that Plaintiff's claims were preempted

because of the statutory scheme, including National Traffic and Motor Safety Act, Federal Motor Vehicle Safety Standards, and the Federal Motor Carrier Safety Regulations, surrounding Class Eight trucks.

Defendants argued that Plaintiff's common law claims presented an obstacle to the purposes and objectives of a federal law or regulation. Specifically, when the truck was designed, no federal agency required Forward Collision Warning or Automatic Emergency Braking. The court Disagreed.

The court reviewed NHTSA's regulatory history, including a petition for rulemaking in 2015 which proposed a safety standard to require automatic collision avoidance and mitigation systems on certain heavy vehicles. At the time of this decision, there was no final rule, but the court determined that NHTSA's actions do not reflect a federal regulatory objective sufficient to trigger implied obstacle preemption. Therefore, Plaintiff's claims were not preempted.

Failure to State a Claim

***Derrick v. Standard Nutrition Company*, --Fed Appx.--, No. 19-2120, 2020 WL 5797614 (10th Cir. 2020).**

Plaintiffs appealed the district court of New Mexico's grant of summary judgment to Defendants on their claim of death and injury to their horses as a result of eating feed that allegedly contained concentrations of monensin.

The appellate court affirmed the district court's grant of summary judgment, holding that Plaintiffs failed to comply with the relevant rules regarding disclosure of experts. Because Plaintiffs did not provide expert testimony that monensin exposure caused injuries and/or death to their horses (due to the court's exclusion of their expert's testimony), the district court granted Defendant's motion for summary judgment

The court stated that Plaintiffs made the same claims that they argued before the district court, and under an abuse of discretion standard, there is no evidence that the district court's decision was arbitrary and capricious.

Daubert Motions

***Wrum v. Ford Motor Company,* Case No. 2:18-cv-02322-HLT, 2020 WL 1547852 (D. Kansas April 1, 2020).[3]**

Plaintiff alleged spinal injuries as a result of a rollover accident in a 1999 Ford F-250 pickup truck. In the District of Kansas, Plaintiff claimed that a design defect in the truck caused his injuries. Defendant submitted Daubert Motions to disqualify Plaintiff's experts and moved for summary judgment based on inadequate expert testimony.

Plaintiff proffered two experts to support his causation and design defect claims. The first had a master's degree in science in anatomy and physiology, yet he testified concerning occupant kinetics and the plaintiff's movement during the crash. The court granted Defendant's Daubert Motion concerning this expert because the crux of his testimony was a question of biomechanics and occupant kinetics, rather than anatomy and therefore he was not qualified to give causation testimony.

The second expert testified concerning a defect in the roof of the truck. This expert was a biomechanical engineer with over 33 years of experience in the field. However, he never worked on roof structures as a design engineer, his experience was not with truck design, and he did not specialize in rollover accidents. His conclusions relied heavily on lab testing of a similar, but not identical, truck. He did not conduct independent testing. The court concluded that although the expert had experience in car design generally, this experience did not automatically provide the expertise necessary to testify concerning the alleged design defect in this particular case.

With the disqualification of the Plaintiff's experts, the court granted Defendant's motion for summary judgment.

***Munoz v. FCA US LLC*, --- F. Supp. 3d ---, 2020 WL 6117828 (D. N.M. October 16, 2020).**

Plaintiff claimed personal injuries, including neuropsychological claims, from a car accident where the airbag did not deploy. Plaintiff argued that Defendant's neuropsychological expert's testimony was "unreliable and inadmissible" because it violates standards set forth by the American Psychological Association's Ethical Code of Conduct ("APA Code").

[3] Currently on appeal to the Untied States Court of Appeals for the Tenth Circuit.

Plaintiff specifically claimed that because Defendant's expert did not conduct an in-person review and did not explain what efforts he took to conduct a personal assessment as required under the APA Code, the testimony was therefore unreliable and inadmissible. Defendant's expert conducted a records review, including reviewing the entire file of Plaintiff's treating neuropsychologist.

The court determined that the APA Code does not control because Defendant's expert was only conducting a records review and his opinions were consistent with Plaintiff's treating neuropsychologist. Plaintiff's Daubert motion was denied.

Removal

***New Mexico v. Monsanto Co.*, 454 F. Supp.3d 1132 (D. New Mexico 2020).**

The State of New Mexico originally brought this action in state court against Defendant manufacturer of polychlorinated biphenyls (PCBs) alleging that New Mexico's natural resources were contaminated with toxic PCBs and asserting claims for public nuisance, design defect, failure to warn and instruct, negligence, unjust enrichment, and violations of New Mexico Unfair Practices Act. Defendant removed the case to federal court claiming, among other arguments, "federal officer" removal under 28 U.S.C. §1442, and the state then moved to remand.

Defendant claimed it produced PCBs as a federal officer because it supplied PCBs to the U.S. Government and military contractors for national defense in multiple wars. However, the court disagreed. Federal officer jurisdiction requires both that the party be "acting under" a federal officer and that there is a "causal nexus" between the acts Defendant performed at the Government's direction and the plaintiff's claims.

Defendant claimed that because it sold PCBs to federal contractors and it was ordered by the government to provide PCBs, it had "federal officer" jurisdiction under 28 U.S.C. § 1442. The court determined that because the vast majority of Defendant's sales were to government contractors, rather than directly to the government, that connection was insufficient to confer "federal officer" jurisdiction. The court also rejected Defendant's claim that because other manufacturers *could* use Defendant's PCBs to meet government specifications it was compelled by the Government to provide PCBs.

The court also concluded that there was not a "causal nexus" between Defendant's acts and Plaintiff's claims. The court determined that federal authorities did not require or compel the sale of the PCBs to federal contractors/manufacturers. Although Defendant produced over 500 pages of documents, none of those documents demonstrated a closely controlled process or direction by the Government related to the sales of PCBs.

Because Defendant was not "acting under" a federal officer and there was not a "causal nexus" between Defendant's acts performed at the Government's direction and Plaintiff's claims, the court denied federal officer jurisdiction and remanded the case to state court.

ELEVENTH CIRCUIT:

Angel A. Darmer, Carr Allison, 100 Vestavia Parkway, Birmingham, AL 35216

Evidentiary Questions and Expert Disclosures

***Crawford v. ITW Food Equip. Grp., LLC*, 977 F.3d 1331 (11th Cir. 2020).**

In *Crawford*, a user of a commercial meat saw filed suit against the saw manufacturer for negligent product design after his arm was amputated when it came into contact with the unguarded blade of the saw at a supermarket, where the user worked as the meat-market manager. The user brought claims of both strict liability and negligent design defect. The United States District Court for the Middle District of Florida denied the manufacturer's motion to exclude certain evidence and expert testimony. Following a jury trial, the court entered judgment on the jury's verdict, awarding the user $4,050,000.00. The manufacturer appealed.

The Eleventh Circuit affirmed. Among the issues addressed, the court held that the district court did not abuse its discretion in rejecting the defendant's challenge to an expert's testimony based on inadequate testing of his alternative design. The court reasoned that this goes more to the weight of the expert's testimony regarding his alternative design than to its admissibility. The court also held that, while it may have been an error for the district court not to issue the defendant's requested state-of-the-art instruction, it was not reversible error. The court reasoned that this was because the only issues relevant to the instruction were undisputed. The instruction requires the jury to "consider the state of the art of scientific and technical knowledge . . . that existed at the

time of manufacture, not at the time of injury or loss," and neither the relevant time period nor the state of the art at that time were disputed by the parties.

Next, the court addressed issues of evidence. First, the court addressed whether the district court improperly admitted summaries of PSHA reports of fatalities and catastrophes on the grounds of hearsay. Although the district court admitted these reports under the Federal Rule of Evidence 803(8) public records exception, the defendants argued that the reports should have been excluded because they were double hearsay. In denying the defendant's motion in *limine*, the district court ruled that only the portions of the summaries that were not double hearsay would be admitted. However, at trial, the defendants never specifically pointed to portions that could be deemed double hearsay. Therefore, the court affirmed.

Second, the court held that these reports survive the defendant's relevancy objections. The defendants argued that the OSHA reports were not substantially similar to the instant accident. The court ruled that the district court did not abuse its discretion in ruling that the reports were substantially similar. Every report involved the same blade guard, or one that was substantially similar by having to be moved into place by the operator, or instances of careless operating error resulting from distraction or other lack of focus. Therefore, the court affirmed.

Note that as evidenced in this case, practitioners should be mindful of potential waiver issues, making certain to repeatedly raise evidentiary objections throughout all phases of trial and post-trial proceedings to ensure preservation of those objections notwithstanding a favorable ruling during pre-trial proceedings.

Economic Loss Rule

***Murray v. ILG Techs., LLC*, 798 F. App'x 486 (11th Cir. 2020).**

In *Murray*, bar applicants brought a putative class action in state court against a software company that provided the state bar admissions office with a system to administer the bar-admissions process. They alleged negligence, negligent misrepresentation, breach of contract, strict liability and negligent design and defamation claims, arising out of alleged software errors that caused the applicants to be informed they failed the bar exam, despite having a passing score. The software company

removed the action to federal court. The United States District Court for the Southern District of Georgia granted summary judgment for the software company. The bar applicants appealed.

The Eleventh Circuit affirmed, holding that the economic loss rule barred the applicants' negligence, strict liability and negligent design claims. Georgia's economic loss rule limits the ability of individuals to recover in tort for negligence where the duty breached arises solely out of contract. The rule has its foundation in cases limiting the ability of contracting parties to sue one another, and it originally emerged in the area of products liability. However, the rule has been expanded to bar recovery in all negligence-based tort actions where a plaintiff seeks to recover purely economic losses, regardless of contractual privity. The purpose of the rule is to distinguish between those actions cognizable in tort and those that may be brought only in contract. In determining whether a particular plaintiff's claims sound in tort or contract, courts must look at two interrelated factors: (1) whether the plaintiff suffered any damage to her person or property; and (2) whether the alleged tortfeasor owed any duty to the plaintiff other than a duty imposed by the contract. The presence of these factors indicates a plaintiff would have a right of action for the injury done independently of the contract. The bar applicants attempted to circumvent the operation of the economic loss rule by arguing they sought damages arising out of injury to their persons.

The court disagreed, reasoning that because damages for the listed injuries, including reputational damage, headaches, nausea, and weight gain stemming from emotional distress, were not recoverable under the claims alleged absent a showing of physical injury as well, the existence of such damages did not indicate that the software company breached a duty independent of its contract with the state bar admissions office. The only duty the software company was alleged to have breached that resulted in any harm to the applicants was a duty to provide suitable software, which was solely imposed by the software company's contract with the state bar. Thus, the economic loss rule barred the bar applicants' claims, and the court affirmed.

Practitioners should keep in mind the application of the economic loss rule as a potential defense to any products liability case where no damages to a plaintiff's person or property have been alleged.

Excessive Damages and Sufficiency of the Evidence

***Kerrivan v. R.J. Reynolds Tobacco Co.*, 953 F.3d 1196 (11th Cir. 2020).**

In *Kerrivan*, a smoker plaintiff from an *Engle* progeny case[4] filed suit against tobacco companies, asserting claims of strict liability, fraudulent concealment, conspiracy to fraudulently conceal, and negligence. After the jury found in favor of the plaintiff and awarded him compensatory and punitive damages, the tobacco companies appealed.

The Eleventh Circuit affirmed. It held that the jury's award of $15.8 million in compensatory damages was not excessive under Florida law, and the award of $25.3 million in punitive damages was not unconstitutionally excessive under the Due Process Clause. Despite the fact that the amount of compensatory damages was higher in this case than the other *Engle* progeny cases, this fact alone does not establish that a jury was swayed by passion or prejudice. Because it did not "obviously exceed" the "reasonable range within which the jury must operate," this argument failed. The court further found that just because the jury chose to award an amount higher than the $10 million benchmark amount suggested by plaintiff's counsel does not mean the award was excessive. The tobacco companies' counsel offered no alternative amount or range to Plaintiff's suggested $10 million award. The court noted it "is difficult for a party to challenge an award as excessive after the fact when that party declined to offer any guidance to the jury at trial."

Lastly, the court rejected the argument that other juries finding for Plaintiffs with more serious injuries awarded lower amounts, as jurors are not required to exercise their judgment consistent with other juries in other cases. As for the award of $25.3 million in punitive damages, the court rejected the argument that the award was unconstitutionally excessive because it was disproportionate to the harm the plaintiff suffered. Thus, the court upheld the amounts of compensatory and punitive damages awarded.

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[4] *Engle* progeny cases are cases arising from a class action against tobacco companies on behalf of Florida resident smokers who developed smoking-related illness caused by the addiction to nicotine in cigarettes. *See Engle v. Liggett Grp., Inc.*, 945 So. 2d 1426 (Fla. 2006).

Practitioners should be mindful of the potential for jury awards in excess of the amount requested and should be prepared to offer an alternative range before the case is submitted to the jury for consideration.

Breach of Implied Warranty Not Subsumed by AEMLD

***Darnell v. Yamaha Motor Corp., USA*, --- F. Supp. 3d ---, 2020 WL 4464458 (N.D. Ala. Aug. 4, 2020).**

A passenger who was injured when she fell off a personal watercraft brought an action against the sellers of the watercraft for breach of the implied warranty of merchantability. The sellers filed a motion for summary judgment. The district court held that: (1) Alabama Extended Manufacturer's Liability Doctrine (AEMLD) did not subsume the claim for breach of the implied warranty of merchantability, but (2) the personal watercraft was fit for its ordinary purposes.

The court held that the passenger could maintain a breach of implied warranty of merchantability claim under Article 2 of the Uniform Commercial Code (UCC) distinct from an AEMLD claim if she could demonstrate that such a warranty arose and was breached, resulting in her injuries. ALA. CODE § 7-2-314. However, the personal watercraft was fit for its ordinary purposes, barring the passenger's implied warranty of merchantability claim under Article 2 of the UCC. The watercraft was intended to transport passengers across the surface of the water for recreation, which it did, and there was no evidence the watercraft stalled or malfunctioned in any way while the passenger was riding it. The sellers did not warrant that the watercraft was accident-proof or that passengers would never fall. Rather, warning labels on the watercraft expressly advised passengers they could fall and suggested they wear wetsuits to prevent injuries like those suffered by the passenger.

Practitioners should be mindful of parallel but distinct causes of action from an AEMLD claim (such as negligence, wantonness, and breach of implied warranty of merchantability), the different elements that must be proven to prevail under each, and be prepared to defend those claims separate and apart from AEMLD.

Spoliation of Evidence

***Penick v. Harbor Freight Tools, USA, Inc.*, --- F. Supp. 3d ---, 2020 WL 4818902 (S.D. Fla. Aug. 19, 2020).**

A consumer brought an action against a seller for negligence, strict liability and failure to warn, alleging he was injured in an explosion caused by a gas generator. Following removal, the seller moved for sanctions—either dismissal of the lawsuit or exclusion of expert liability testimony and issuance of a burden-shifting presumption jury instruction—due to the consumer's alleged bad faith spoliation of evidence. The district court held that: (1) the seller demonstrated three foundational elements to establish that the consumer engaged in spoliation by disposing of the generator; (2) the consumer's disposal of the generator that allegedly exploded and caused his injuries was done in bad faith; (3) dismissal of the consumer's complaint was not warranted as a sanction; (4) exclusion of testimony of the consumer's liability experts was not warranted as a sanction; and (5) an adverse jury instruction imposing a mandatory rebuttable presumption that the destroyed generator was relevant and favorable to the seller and unfavorable to the consumer was warranted as a sanction.

The seller demonstrated that the consumer's disposal of the generator was done in bad faith, as required for a finding of spoliation, where the disposal was not accidental or merely negligent and the consumer voluntarily and personally took the generator to a scrap yard after he had retained counsel and anticipated filing suit against the seller. Though the record did not reflect that the consumer specifically intended to harm the seller or obstruct the lawsuit by disposing of the generator, the consumer's decision was purposeful, fully considered and based on a desire to destroy the generator itself, and the consumer should have known the generator needed to be physically inspected and tested by the seller and preserved for litigation as it was important for both parties' arguments.

Practitioners should be mindful of the spoliation of evidence defense and should send a preservation letter at the initiation of the claim or lawsuit, outlining parameters for the handling and storage of the evidence, to lay the groundwork for this defense in the event the plaintiff fails to comply.

Toxic Tort Mass Actions under CAFA

***Spencer v. Specialty Foundry Prods. Inc.*, 953 F. 3d 735 (11th Cir. 2020).**

Plaintiffs, 200+ former workers at Grede Foundry, filed suit against various manufacturers and suppliers of chemical products used in foundries in Alabama state court. The plaintiffs worked in various positions at the Foundry at different times from approximately 1981 until 2017. They asserted counts of wantonness; products liability under the Alabama Extended Manufacturers Liability Doctrine; failure to warn; fraudulent misrepresentation, suppression, and deceit; negligence; and conspiracy.

Defendants removed the case to federal court pursuant to the Class Action Fairness Act of 2005 ("CAFA"), and Plaintiffs moved to remand. The United States District Court for the Northern District of Alabama remanded the case, finding that it fell within the "local event" exception to CAFA because (1) the Foundry, workers, and injuries were in Alabama, making the case "truly local"; and (2) analogizing the case to a continuous exposure case, which some courts had counted as "an event or occurrence" for purposes of the local event exception. 28 U.S.C. § 1332(d)(11)(B)(ii)(1). The United States Court of Appeals for the Eleventh Circuit granted Defendants' petition for permissive appeal pursuant to 28 U.S.C. § 1453(c).

On appeal, Defendants argued that the case was a mass action under CAFA because the local event exception's "an event or occurrence" language carried an inherent 'singularity' requirement, meaning that the event or occurrence had to be a single injury-causing event that culminated in the subject injuries. Plaintiffs argued that "an event or occurrence" encompassed a continuing set of "truly local" circumstances.

<u>"An Event or Occurrence" Meaning:</u> The Eleventh Circuit held "an event or occurrence" means "a series of connected, harm-causing incidents that culminate in one event or occurrence giving rise to plaintiffs' claims."[5] In so holding, the Eleventh Circuit brought its interpretation of "an event or occurrence" more in line with the Third and Fifth Circuits' interpretations, but not as reliant on singularity as the Ninth Circuit's interpretation.

[5] The Eleventh Circuit declined to reconcile an apparent conflict of burdens in CAFA cases: a removing defendant bears the burden of establishing federal jurisdiction, but a plaintiff seeking remand bears the burden of proving an exception to CAFA's removal jurisdiction. The court held that the question was "ultimately academic" because the local event exception did not apply, regardless of who bore the burden.

"An Event or Occurrence" Involving Multiple Defendants Over Many Years: The court held that Plaintiffs' allegations did not meet the "an event or occurrence" standard for three reasons: (1) there were too many defendants involved for the acts to lead to the harm-causing event to be "collective" or "related"; (2) the Complaint did not allege a single culminating event, but rather a string of events over many years later resulting in harm; and (3) the Complaint did not sufficiently allege how the defendants' conduct worked together to create one event or occurrence. The Eleventh Circuit vacated the district court's grant of remand accordingly.

SUPREME COURT OF THE UNITED STATES

Margaret C. Redshaw, Esq., Swanson, Martin & Bell LLP, 330 N. Wabash Street, Suite 3300, Chicago, Illinois, 60654.

State Court Jurisdiction

***Ford Motor Co. v. Montana Eight Judicial District Court et al.,* Docket No. 19-368; *Ford Motor Company v. Bandemer,* Docket No. 19-369.**

The *Ford Motor* cases seek to clarify whether personal jurisdiction exists over a nonresident defendant where the defendant's contacts with the forum state did not cause the plaintiff's injury. This is the Supreme Court's first occasion to review the limits of specific personal jurisdiction since its decision in *Bristol-Myers Squibb v. Superior Court* ("*BMS*"). In *BMS*, the Court held that specific jurisdiction exists only where the defendant "purposefully avails itself of the privilege of conducting activities within the forum" and the plaintiff's claims "arise out of or relate to" the defendant's forum conduct. *Bristol-Myers Squibb v. Superior Court*, 137 S. Ct. 1773, 1785–86 (2017). The *Ford Motor* cases address the bounds of the phrase "arise out of or relate to."

The first case, *Ford Motor Co. v. Montana Eight Judicial District Court,* involves a wrongful death suit brought by the estate of Montana resident Markkaya Jean Gullett. At the time of the incident, Gullett was driving a 1996 Ford Explorer on a Montana interstate when one of the vehicle's tires had tread/belt separation. The vehicle lost stability and rolled into a ditch. Gullett died at the scene. Gullett's estate sued Ford in Montana state court, asserting claims for design defect, failure to warn, and negligence. Ford moved to dismiss for lack of personal jurisdiction, arguing that the lawsuit did not relate to its

Montana contacts. Ford designed and manufactured the car outside of Montana, assembled it in Kentucky, and originally sold it in Washington.

In *Ford Motor Company v. Bandemer*, a 1994 Crown Victoria rolled into a ditch after the driver rear-ended a snowplow. The plaintiff, a passenger in the Crown Victoria, alleged that he sustained severe brain injury after the passenger-side air bag failed to deploy. Bandemer raised products liability, negligence, and breach of warranty claims against Ford in Minnesota state court. Ford moved to dismiss for lack of personal jurisdiction. Ford argued that it was not subject to specific personal jurisdiction because it had not taken any action in Minnesota with a causal connection to Plaintiff's claims. Ford did not design the airbag system, assemble the vehicle, or sell the vehicle in Minnesota.

The Montana and Minnesota courts found personal jurisdiction over Ford. The courts ruled that due process does not require a direct causal connection between Defendant's activities and the ensuing accidents to satisfy the "arise out of or relate to" requirement. The courts applied the "stream of commerce test" and focused on Ford's general contacts within the forum states, including advertising, registering to do business, operating dealerships, and selling cars. It was irrelevant that the activities "did not specifically promote the [subject vehicles]" because the activities were designed to promote sales of Ford's vehicles to Minnesota and Montana consumers, and the injuries were caused by a Ford vehicle sold to a forum state resident. The courts explained that *BMS* is distinguishable because the plaintiffs there suffered no injury in the forum state. The subject medication was not prescribed, purchased, or ingested in California.

The Supreme Court granted certiorari and consolidated the cases, which involve the same issue: whether the "arise out of or relate to" requirement for specific personal jurisdiction "is met when none of the defendant's forum contacts caused the plaintiff's claims, such that the plaintiff's claims would be the same even if the defendant had no forum contacts." The Supreme Court heard oral argument on October 7, 2020. Its decision is currently pending.

Ford's central argument was that the incidents lack a direct relation to its conduct in Montana or Minnesota. This argument relied on a restrictive interpretation of the phrase "arise out of or relate to." Under Ford's reasoning, "related to" is no more inclusive than

"arise out of." Conversely, Plaintiffs adopted a broader interpretation of the phrase. In Plaintiffs' view, a claim can either "arise out of" or "relate to" a defendant's conduct within the state. Thus, the relatedness requirement can be satisfied when a forum state has an interest in the case; for example, when a plaintiff suffers an injury in that state.

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Medical Product Liability Class Action Certification – Some Basis in Fact Standard for Commonality

***Kuiper v. Cook (Canada) Inc.,* 2020 ONSC 128 (Divisional Court).**

This was an appeal from the decision in *Kuiper v. Cook (Canada) Inc.*, 2018 ONSC 6487, which dismissed a motion to certify a class proceeding against Cook (Canada) Inc. and its related entities (Cook Defendants). The plaintiffs allege that the Cook Defendants designed, manufactured and distributed inferior vena cava (IVC) filters, which are implanted medical devices designed to trap blood clots to prevent pulmonary embolism. This case concerned three IVC filter models designed to be "optionally retrievable" – in other words, they can either remain in the patient permanently or be removed.

The proposed class action alleged defective design of the IVC filters, and a breach of Cook's duty to warn of the dangers of using them. Here, the plaintiffs alleged that the Cook Defendants failed to warn "learned intermediaries" (*i.e.* the doctors who recommended, prescribed or implanted the IVC filters).

The motion judge concluded that the appellants had met most of the requirements to certify a class proceeding: there was an identifiable class, a class proceeding would be preferable had all other requirements been met, and there were representative plaintiffs. However, he held that the appellants failed to satisfy their onus with respect to the requirement to plead a cause of action in negligent design and to show some basis in fact for proposed common issues in negligent design and failure to warn.

With respect to negligent design, the appellants alleged that the defect causing the failure was a "matrix of factors," including the IVC filters' conical shape, the use of a

cobalt-chromium alloy and the anchoring mechanism. The motion judge found that this part of the pleading did not disclose a reasonable cause of action, because it did not identify a design defect, instead merely referencing design features. Likewise, the motion judge held that the plaintiffs put forward no evidence to demonstrate some basis in fact that the IVC filters were subject to design defects.

The plaintiffs argued that the warnings included with the IVC filters did not adequately warn of the risks of use. They alleged that these included device migration, perforation, fracture, embolization, and an inability to retrieve the IVC filters. The motion judge found that this part of the pleading disclosed a reasonable cause of action. However, the motion judge held that the plaintiffs put forward no evidence to demonstrate that the warnings in fact given were deficient.

At issue on appeal by the plaintiffs before Ontario's Divisional Court was, among other things, whether the motion judge erred by applying a two-part test to the common issues test, and whether the motion judge applied the wrong standard to the claims for duty to warn and design negligence.

With respect to common issues, the appeal court upheld the motion judge's finding that the two-part test governs. The two-part test requires that a plaintiff show (1) that the proposed common issue actually exists, and (2) that the proposed issue can be answered in common across the entire class. The plaintiffs argued that the Supreme Court of Canada's 2013 decision in *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57, replaced the two-step test with a one-step test. The appeal court rejected this argument:

> *Pro-Sys confirmed the low standard of "some basis in fact" insofar as it applied to the class Plaintiffs' damage or injury. That the whole class suffered class wide damage, injury, or loss must still be demonstrated by some evidence meeting the "some basis in fact" standard…the Supreme Court in Hollick and Pro-Sys did not use the term "common" to mean that the common issue was invariable between the class members. Rather, they used the word "common" in the sense that all class members had to have some basis in fact to say that they all suffered the loss and therefore have a genuine interest in the litigation's resolution.*

The plaintiffs argued that, if the two-step test applies to the commonality question, they met the "some basis in fact" requirement through the evidence of their expert relating to the design defect issue. The Divisional Court disagreed and upheld the motion judge's finding that the plaintiffs' expert did not provide qualified evidence about the design defect

at issue, because the expert admitted on cross-examination that he had no expertise in the design or manufacture of IVC filters.

However, on the duty to warn issue, the Divisional Court held that there was evidence to constitute "some basis in fact," and overturned the motion judge's decision to not certify the action. In this case, the evidence included four regulatory advisories concerning the IVC filters from the United States, United Kingdom and Canada, and the fact that the Cook defendants issued a "Field Safety Notice – Updated Product Information" to the medical profession in Europe in November 2014, including the information from the 2010 FDA advisory.

Medical Cannabis Liability Class Action – Unauthorized Pesticides – Health Canada Recall – Workable Proposed Methodology & Expert Evidence

***Organigram Holdings Inc. v. Downton*, 2020 NSCA 38.**

The Nova Scotia Supreme Court certified a class action against Organigram Holdings Inc (Organigram) in *Downtown v. Organigram Holdings Inc*, 2019 NSSC 4, alleging claims in consumer protection, adverse health consequences and personal injury. Organigram is a federally-approved producer of medical cannabis which obtained organic certification recognized by the Canadian Food Inspection Agency. Organigram sought an appeal of part of the certification decision.

The class plaintiff experienced health symptoms after first consuming cannabis from Organigram, which stopped only after discontinuing use. In late 2016, testing found trace amounts of certain pesticides that are not authorized for use on cannabis plants under the federal *Pest Control Products Act* in Organigram's cannabis (including myclobutanil and bifenazate). Organigram immediately notified Health Canada of the issue and initiated the recall of 74 lots of cannabis. In early 2017, Organigram implemented a refund and credit program for its customers. The cannabis consumed by the class plaintiff was in a lot of cannabis subject to a recall. For that lot, the probability of serious adverse health consequences was defined as "remote".

Organigram argued that the motion judge incorrectly found the pleadings disclosed a cause of action for negligent design, development and testing, breach of the *Competition Act* based on misrepresentations and unjust enrichment. Organigram also

appealed the certification of the common issues related to adverse health consequences claims based on the argument that the motion judge incorrectly held that the plaintiff failed to put forward evidence of a methodology to establish general causation of harm in common across the class.

With respect to the appeals of the pleadings issues, the Nova Scotia Court of Appeal upheld the motion judge's determination with respect to negligence and *Competition Act* claims, but overturned certification of the claim in unjust enrichment given the apparent existence of contracts.

With respect to the workable methodology requirement, the Court of Appeal allowed Organigram's appeal, noting that, to establish general causation: (a) the symptoms described cannot be so vague and generic that they lack a plausible common cause; and (b) the methodology proposed must relate to the symptoms pleaded and in evidence. In this case, the Court of Appeal described the alleged harm as "common and very transient […] conditions," including nausea, dizziness, and headaches. The plaintiff was unable to link the substances at issue to any specific illness, so she needed a methodology to connect the class members' harms to the defendants' cannabis.

As the Court of Appeal noted, a workable methodology to establish general causation must be grounded in the facts of the case. The motion judge held that the plaintiff's expert evidence showed the availability of relevant data, but the Court of Appeal disagreed, finding that the potential harms described in the plaintiff's expert evidence did not correspond to the symptoms alleged in the claim. Of primary concern to the Court of Appeal was the plaintiff's expert's failure to address the impact of the degree of exposure to the cannabis and the potential for injury, noting:

> *Certification of a common cause has the policy purpose of a reasonable prospect of advancing the litigation. Answering the generic question of whether myclobutanil and bifenazate can cause adverse health effects does nothing to advance the litigation if it ignores exposure (equivalent in the drug cases to a prescribed amount) of the class plaintiffs. Those plaintiffs would still have to prove that exposure to trace amounts of myclobutanil and bifenazate may in general cause the symptoms they describe, and specifically did so in their case*.

The Court of Appeal also noted that the workable methodology requirement could not be satisfied by the fact that Health Canada recalled the contaminated cannabis.

Leave to appeal to the Supreme Court of Canada was denied in November 2020.

Forum selection clause – Agreements of Purchase and Sale – Standard Form Consumer Contract – Manufacturer's Liability

***Schuppener v. Pioneer Steel Manufacturers Limited*, 2020 BCCA 19.**

The plaintiff, Mark Schuppener, brought an action in British Columbia against the defendant, Pioneer Steel Manufacturers Limited. The plaintiff purchased from the defendant a steel storage building, which collapsed on him, causing personal injury. The defendant sought to appeal a decision of the chambers judge which refused to stay or transfer the action to Ontario pursuant to a forum selection clause in the contract of purchase and sale.

The British Columbia Court of Appeal allowed the appeal. The court stated the appropriate two-part test for enforcement of forum selection clauses in contracts: (1) the court must determine whether the forum selection clause is enforceable and applies to the circumstances; and (2) the court must assess whether there are strong reasons not to give effect to an otherwise enforceable forum selection clause. The Court of Appeal noted that courts do not have discretion to refuse to enforce valid contracts without a public policy consideration that is strong enough to override the public interest in freedom of contract, even in a standard form contract for purchase and sale. The Court of Appeal highlighted that the categories of public policy interests that will traditionally be sufficient to override a contractual bargain include when:

a) the contract is injurious to the state;
b) the contract is injurious to the justice system;
c) the contract is in restraint of trade;
d) the contract involves immorality; and
e) the contract affects marriage.

The chambers judge characterized several considerations in his analysis as matters of public policy that were strong enough to override the forum selection clause. The Court of Appeal disagreed.

The chambers judge's first purported public policy consideration was with respect to the standard form consumer contract. While the chambers judge found there was no

significant inequality of bargaining power between the parties, because the forum selection clause was in a standard form consumer contract, the plaintiff did not have the ability to negotiate the applicability or terms. The Court of Appeal disagreed, holding that the standardized form of the contract did not rise to level of a public policy concern significant enough to offset the public policy interest in holding parties to the terms of their bargain. Courts generally give effect to the terms of standard form consumer contract absent legislative intervention, and forum selection clauses are widely recognized as valid and beneficial. Furthermore, the Court of Appeal found that the contract at issue here was comparable to a commercial contract.

The chambers judge's second consideration was with respect to the negligence and personal injury nature of the plaintiff's claim. The chambers judge concluded that these claims engaged public policy interests, unlike a commercial dispute. In overturning the chambers judge's decision, the Court of Appeal noted that the forums of Ontario and British Columbia offer similar laws of contract, personal injury and product liability, so the point provided no basis to preclude effect of the forum selection clause.

The chambers judge's third consideration was with respect to the plaintiff's allegation that the defendant sold him the product, knowing it was unsuitable for the climate in British Columbia, demonstrated a particular public interest in seeing the issues in litigated in British Columbia. The Court of Appeal found ground to be irrelevant, noting that such a "public interest" arguably would exist in any case involving facts and damages arising in a particular province.

Evidentiary Standard at Class Action Certification – Car Tire Manufacturer Liability – Recall Notice Issued

***Spring v. Goodyear Canada Inc.*, 2020 ABQB 252.**

This was a decision of the Alberta Court of Queen's Bench certifying a proposed class action, alleging that Goodyear Canada Inc. (Goodyear) sold a certain model of tire (WSA Tires) that was prone to tread separation during normal use.

Goodyear recalled 6 of the 51 types of WSA Tires that were manufactured at a specific Goodyear plant in 2009. The plaintiff received a recall notice which indicated that use of the tires in severe conditions could result in partial tread separation, which could

lead to vehicle damage or motor vehicle crash. The plaintiff sought a tire replacement in accordance with the recall notice, but was denied replacement on the basis that his tires were manufactured at a time prior to the recall period. The plaintiff was involved in a single vehicle motor vehicle accident a few days later. He sought to certify a class action as a matter of public interest and advances claims in negligent design, manufacture and marketing, and breach of duty to warn and unjust enrichment.

In certifying the action, the court commented on the evidentiary standard to be met at certification. The Court stated that a merits analysis (an "air of reality" test) may be undertaken at the certification stage, an approach which has sometimes been rejected by other Canadian courts. The Court noted that defendant manufacturers have an "enormous information advantage" over a plaintiff, and because discovery rarely occurs at the certification stage, it would be unfair to require a plaintiff to provide evidence relating to matters that exist exclusively within the manufacturer's specialized knowledge. Though the Court held that a plaintiff may be able to establish negligence in design or manufacturing by providing evidence of a defect without evidence as to the cause of the defect.

The court noted that there is no requirement at certification to identify specific prospective class members or claims at the time of certification beyond the identifiable class of the consumer who purchased the WSA Tires; however, there must be some basis in fact that an alleged common issue exists. The court went further to note that there is also no requirement for a specific type of evidence to be relied upon at certification, as long as the evidence provides some basis in fact for the common issues.

The parties disagreed as to the admissibility of the recall notice released by Goodyear and received by the plaintiff. The court found that the recall notice did not constitute hearsay. Rather it was relevant evidence to assess the conditions for an identifiable class and common issues, as it was not being provided for the truth of its contents and only to show "some basis in fact" for a defect in the WSA Tires. The court also noted that a party seeking certification may rely on hearsay and opinion evidence without prejudicing the other party, because it is not relied upon for any substantive purpose.

Overall, the court found that all of the evidence adduced at certification, including the recall notice, provided "some basis in fact" for the plaintiff's allegation that Goodyear knew or ought to have known that there was a dangerous defect affecting more WSA Tires than those only within the recall, and that it failed to take steps to warn consumers of the danger.

The court also concluded that a class action would achieve the advantages of class actions: judicial economy, access to justice, and behaviour modification. Goodyear suggested that there were other, more appropriate venues for the plaintiff to pursue his action, including by relying on Goodyear's warranty process and initiating a complaint to the appropriate regulatory body. However, the court reasoned that it was not clear that these processes would address the behaviour modification objective. It determined that a class proceeding would address the interests of the entirety of the proposed class in a practical and efficient manner.

Car Manufacturer Liability – Jury Trial in Product Liability Cases

***Martin v. Chrysler Canada Inc*., 2019 ABCA 347.**

This decision relates to an action against Chrysler Canada in Alberta for negligent design and manufacture, failure to warn, and negligent misrepresentation arising from injuries to the plaintiff allegedly caused when an airbag deployed in a 2007 motor vehicle collision.

The appellant Mr. Martin first applied in 2017 to have the trial heard by a civil jury, pursuant to s. 17 of the *Jury Act*, RSA 2000, c. J-3. At the hearing, Chrysler Canada argued that the action was too inconvenient for a jury due to voluminous documentary and expert evidence, and numerous complex issues. The case management judge was of the view that the Alberta *Rules of Court* provide options to streamline complex litigation. He delayed his decision on the appropriateness of a civil jury trial to give the parties time to take steps in that regard.

In 2018, the appellant filed a new application for a civil jury trial, as well as an application for a procedural order "directing conflicting expert witnesses to confer with one another", with a view to simplifying the expert testimony for the jury.

Both applications were denied. The case management judge acknowledged that the appellant had a *prima facie* right to a jury trial, and the only issue was whether the court ought to exercise its discretion to deny the application under s 17(2) of the *Jury Act*. However, he found that there had been no real simplification of issues or expert reports, no real reduction in the number of experts, and no concrete proposal for agreement by the experts.

Mr. Martin appealed the decision. In dismissing the appeal, the Court of Appeal explained that the judge must apply a two-part test:

1. Whether there "might" be a prolonged examination of documents or accounts, or a scientific or long investigation?
2. Whether such an examination or investigation "cannot conveniently be made by a jury"?

To assess these criteria, a case management judge may consider such factors as the number of parties and factual issues, the number of experts, the need for interpretation, the legal issues, the potential for conflicts of expert opinion, questions of causation and other factors including what the history of the litigation suggests about the approach the parties can be expected to take.

Citing its judgment in *Balogun v. Pandher* (2010 ABCA 40), the Court explained that the decision of whether a trial involves matters that can conveniently be heard by a jury is an exercise of discretion and appellate intervention is warranted only in limited cases:

> [7] *(…) The standard of review for the exercise of discretion by a case management judge is also deferential and appellate intervention is warranted only if the case management judge has clearly misdirected himself on the facts or the law, proceeded arbitrarily, or if the decision is so clearly wrong as to amount to an injustice (…)*
>
> The case management judge assessed the relevant criteria and made clear that, in his view, the case would have to be significantly simplified for a jury trial to be appropriate. He was not satisfied that the steps taken had resulted in the necessary simplification. In this case, the Court of Appeal was unable to discern any basis for intervention.

An application for leave to appeal from the judgment of the Court of Appeal of Alberta was dismissed by the Supreme Court of Canada.

Product Liability Class Action – Defective Electronic Product – Absence of Damages – Product Recalls Issued

***Paquette v. Samsung Electronics Canada Inc.,* 2020 QCCS 1160.**

This was a Quebec class action authorization decision (certification), where the proposed plaintiff alleged that certain Samsung Galaxy Note 7 smartphones, recently introduced for sale, showed overheating problems. The problem was allegedly caused by a defective lithium-ion battery, that could lead to fire or destruction of the phone. As of early September 2016, approximately 30 overheating incidents had been reported outside of Canada. The action sought damages of $25M, including $5M in punitive damages.

Samsung Electronics Canada (Samsung) halted sales in Canada on September 2, 2016. A few days later, it issued a first recall. The company then offered consumers the opportunity to replace the smartphone with a new device containing a battery manufactured by a different supplier. It was also possible for the consumer to cancel the sale and receive a full refund, especially since they were still within the CRTC Mobile Service Trial Period, which allows for such a cancellation. The plaintiff enrolled in the recall program and received the replacement device. However, she did not return the first device.

The replacement devices containing the new battery also had problems. On October 11, 2016, Samsung stopped all sales and distribution of the Galaxy Note 7, issued a second recall and advised consumers to stop using the smartphone and return it to Samsung or an authorized vendor. Upon return, consumers were offered two options: exchange their Galaxy Note 7 for another Samsung device and receive a $100.00 credit, plus a refund for the accessories; or get a refund for the price paid for the device and the accessories, plus a $25.00 credit.

The plaintiff took advantage of the first option and received a new type of smartphone, in addition to the $100.00 credit. She then returned the device to her authorized vendor. As for her second device, she did not return it. Instead, she chose to advertise it for sale on Kijiji.

The plaintiff claimed various causes of action under the sales provisions of *Civil Code of Quebec* and the *Quebec Consumer Protection Act*, as well as the *Competition*

Act. The plaintiff also alleged a violation of the *Quebec Charter of Human Rights and Freedoms*.

The class action was initially stayed in Quebec as there was a similar authorized class action against the same defendant in Ontario. That national class action, which included consumers from Quebec, was dismissed.

The Quebec Superior Court also dismissed the application for authorization to bring a class action on the basis that the alleged facts did not appear to justify the conclusions sought.

More specifically, the Court found that the alleged damages were purely theoretical since the plaintiff received a full refund for her smartphone and an additional $100 credit within less than two months.

In refusing to authorize the class action, the Court also agreed with the Ontario judge and found that Samsung responded quickly and assumed its responsibility to consumers:

> *[Translation]*
>
> *[41] The real issue in this case is not the defect of the Note 7 devices. The defect is implicitly admitted since all phones sold in Canada were recalled in two successive recalls and production was definitely stopped less than two months after the initial launch.*
>
> *[42] It is clear that [Samsung]'s intervention was aimed at eliminating a problem from which it could hardly escape. Had it done nothing, it could have been blamed in lawsuits. The purchasers would have been justified in bringing a class action (…)*
>
> *[43] However, this is not the case here. [Samsung] responded quickly. It sought to remove the problematic products from the market and offered to replace them or provide a refund. It took and assumed its responsibility to consumers.*
>
> *[44] While not bound by the Ontario decision, the Court, on the basis of the evidence presented, agrees with Rady J.:*
>
> > *[74] In my view, the defendant's prompt response in concert with Health Canada to safety issues, the recall, the termination of sales, and the compensation package, demonstrates the response of a responsible corporate citizen. It is a behaviour that should be encouraged rather than discouraged*

This case is also interesting for stating that the mere existence of a product recall does not justify the authorization of a class action.

Manufacturer's Liability – Forestry Machinery - Improper Use of the Equipment

***Compagnie d'assurances AIG du Canada v. Service Mécanique EGR Inc.*, 2020 QCCS 3249.**

This decision relates to an action against the manufacturer and the seller of two tree cutting machines that caught fire and were totally destroyed as a result of the explosion of the batteries.

At the time of the fires, the machines had respectively 5,000 hours of operation and less than 2,000 hours of operation.

The plaintiff claimed a cause of action under the sales provisions of the *Civil Code of Quebec*, including its article 1729, which has the effect of implementing a presumption in favor of the buyer, but also allowing the manufacturer to rebut that presumption in certain circumstances:

> ***1729.*** *In a sale by a professional seller, a defect is presumed to have existed at the time of the sale if the property malfunctions or deteriorates prematurely in comparison with identical property or property of the same type; such a presumption is rebutted if the defect is due to improper use of the property by the buyer.*

In this case, the evidence showed that the levels of electrolyte in the batteries were not checked every 250 hours as per the operator's manual, which omission likely caused the explosion of the batteries. The judge noted that the operator's manual provided specific instruction for the regular electrolyte check.

This case is particularly interesting for manufacturers doing business in Quebec because the Court dismissed the claim on the basis of an improper use of the equipment by the operators and owner. The maintenance of the tree cutting machines' batteries was found to be deficient and did not comply with the manufacturer's requirements, which rebutted the presumption of article 1729 of the *Civil Code of Quebec*.

Product Liability Class Action – Food Products – Intermediary Supplier Suing Manufacturer – Scope of Liability in Franchise Agreements – Duty of Care

***1688782 Ontario Inc. v. Maple Leaf Foods Inc.,* 2020 SCC 35.**

A class action against Maple Leaf Foods was certified in Ontario, in which a number of Mr. Sub franchisees claimed that they experienced a shortage of "ready to eat meats" (RTE Meats) for six to eight weeks following a recall caused by a listeria outbreak in one of Maple Leaf's facilities. The franchise agreement between Mr. Sub and its franchisees required them to purchase Maple Leaf products exclusively, but no contractual relationship ever existed between the franchisees and Maple Leaf, each being linked to the other indirectly through separate contracts with Mr. Sub.

The franchisees claimed to have suffered pure economic loss, seeking compensation for lost past and future sales, past and future profits, capital value of the franchises and goodwill.

Maple Leaf unsuccessfully brought a motion for summary judgment dismissing these claims. The motion judge held that Maple Leaf owed the franchisees a duty of care "*in relation to the production, processing, sale and distribution of the RTE Meats"* and a duty of care *"with respect to any representations made that the RTE Meats were fit for human consumption and posed no risk of harm*."

The Court of Appeal allowed Maple Leaf's appeal and concluded that no duty of care was owed to the franchisees (*1688782 Ontario Inc. v. Maple Leaf Foods Inc.,* 2018 ONCA 407). The Court of Appeal also found that no one had been harmed by eating Maple Leaf's meat products at one of the franchise restaurants and there was no proximity between the alleged cause and the subsequent harm.

In a 5-4 decision, the Supreme Court of Canada dismissed the appeal of that decision, concluding that the appellant's claim based on negligent misrepresentation or performance of a service or negligent supply of goods must fail, and refusing to recognize a novel duty of care as there was no relationship of proximity between Maple Leaf and the franchisees.

As for the negligent misrepresentation or performance of a service, the Court held that the appellant failed to establish that it relied reasonably on the alleged undertaking received from Maple Leaf:

> *[40] Further, and in any event, the appellant has failed to establish that Mr. Sub franchisees relied reasonably, or at all, on the undertaking that it says they received from Maple Leaf Foods. Bear in mind that detrimental reliance is manifested by the plaintiff altering its position, thereby foregoing more beneficial courses of action that it would have taken, absent the defendant's inducement. The appellant offers no evidence of such a change in position by Mr. Sub franchisees, and indeed the evidence affirms that changing their position would not have been possible. As recalled earlier (at paras. 8-9), Mr. Sub franchisees were bound by their franchise agreement with Mr. Sub to purchase RTE meats produced exclusively by Maple Leaf Foods. While they were able to seek Mr. Sub's permission to find alternative sources of supply, there is no evidence that they did so. It follows that no undertaking on the part of Maple Leaf Foods, even had one been made to Mr. Sub franchisees, caused the franchisees to alter their position in reliance thereon. (…)*

For the negligent supply of shoddy goods or structures, the Court explained that no real and substantial danger was posed to the Mr. Sub franchisees:

> *[57] In our view, the appellant's claim based on negligent supply of goods must fail for two reasons. First, a duty of care in respect of the negligent supply of shoddy goods or structures is predicated, as we have explained, upon a defect posing a real and substantial danger to the plaintiff's rights in person or property. In this case, any danger posed by the supply of RTE meats —— which arose from the possibility that they were actually contaminated with listeria —— could be a danger only to the ultimate consumer. No such danger was posed to the Mr. Sub franchisees. (…)*
>
> *[58] This leads us to our second reason why the appellant's claim must fail. While the RTE meats may have posed a real and substantial danger to consumers when they were manufactured, any such danger evaporated when they were recalled and destroyed.*

Finally, on the recognition of a novel duty of care, the Court held that appellant did not show the requisite proximate relationship with Maple Leaf:

> *[95] In any event, and as we have explained, the appellant cannot show that it and other Mr. Sub franchisees were in a relationship of proximity with Maple Leaf Foods. That is fatal not only to its argument under Winnipeg Condominium, but also to the argument for recognition of a novel duty in these circumstances, since the novel duty also depends, inter alia, on the appellant showing that requisite proximate relationship with Maple Leaf Foods. This is because, while a novel duty, being novel, starts with a blank slate, that slate is filled by applying the same Anns/Cooper framework that, as we have just explained, operates to preclude recovery here under the liability rule in Winnipeg Condominium.*

The Maple Leaf decision is interesting for manufacturers because it reiterates the duties of care owed to end customers or end users, while clarifying that such duties will not necessarily extend to all parties or intermediaries involved in the distribution and processing of their products.