Products Liability Conference 2024 Caselaw Update

Compiled by:

YL Chair: Xan Ingram Flowers, Butler Snow, LLP, 1819 5th Ave. N., Ste. 1000, Birmingham, AL 35205

As a member of Butler Snow's Products, Catastrophic and Industrial Litigation and Appellate practice groups, Xan focuses her practice on defending product manufacturers in complex litigation and mass tort cases. Xan's experience spans every stage of a case, whether that be a trial or final hearing in a litigated or arbitrated matter, or in immigration court, or seeking appellate relief via mandamus petitions, or interlocutory or secondary appeals. Xan has argued in front of the Court of Appeals for the Eleventh Circuit, regularly practices in both state and federal trial and appellate courts, and been selected to act as special appellate counsel, amicus counsel, pro bono counsel, and trial counsel. In addition to her product liability and appellate practices, Xan also has experience advocating for her clients in a wide range of commercial, insurance, bankruptcy, OSHA, and personal injury litigation, including recently achieving a defense verdict in a personal injury matter in Alabama state court.

YL Vice-Chair: Jason Hodge, Nelson Mullins Riley & Scarborough, LLP, 901 E. Byrd Street, suite 1650, Richmond, VA 23219

Jason focuses his practice on advanced motions, with an emphasis on products liability defense, class actions, multidistrict litigation, and appeals. He works with clients on matters in federal and state court from coast to coast. As both a principal and contributing brief writer in many of his cases, Jason authors motions at all stages of litigation, including motions to dismiss, motions for summary judgment, motions to strike, Rule 702 motions, various discovery and non-dispositive motions, and briefing on interlocutory and final appeals. He provides foundational support to the briefing and trial teams with meticulous legal research and analysis and actively participates in the development of global defense strategy. He has experience with traditional case work-up, including taking depositions and providing discovery strategy and analysis. He also works on appeals from the amicus perspective, authoring amicus briefs and promoting client interests and positions.

YL Marketing Chair: Amber Bonnell, Gowling WLG, 345 King S. W, Ste. 600, Kitchener, Ontario, N2G 0C5, Canada

Amber (she/her) is an associate lawyer, practising in Commercial Litigation within the broader Advocacy Group of Gowling WLG's Waterloo Region office. Amber's practice includes a wide variety of commercial matters, including product liability litigation, real estate litigation, property law disputes, estate litigation, collections, and various contract disputes. Amber assists a wide range of clients, from individuals to multinational businesses, across diverse sectors, including the tech, automotive, and product manufacturing sectors, as well as local establishments. Amber has successfully represented clients at a variety of levels of Court. She takes a holistic approach in assisting clients in finding creative resolutions to contentious legal issues.

YL Marketing Chair: Ryan Savercool, McCarter & English, Four Gateway Center, 100 Mulberry St., Newark, NJ 07102

Ryan Savercool is an associate in the Products Liability, Mass Torts and Consumer Class Actions group where he represents companies of all sizes in complex product liability and consumer fraud matters. Prior to joining McCarter, Ryan served as a law clerk to the Honorable Michael A. Hammer of the U.S. District Court for the District of New Jersey and to the Honorable Anne M. Patterson of the Supreme Court of New Jersey. He also worked at a large New Jersey law firm as a litigation associate where he represented a wide range of clients in state and federal court litigation. Ryan also has experience counseling clients regarding regulatory compliance and responding to governmental inquiries. Ryan received his JD from Seton Hall University School of Law where he served as a member of the *Seton Hall Legislative Journal* and the Center for Social Justice's Impact Litigation Clinic. Prior to law school, Ryan earned his BA in Integrative Physiology from the University of Colorado Boulder.

YL Liaison: Frederick King, Troutman Pepper Hamilton Sanders LLP, 600 Peachtree St. NE, Suite 3000, Atlanta, GA 30308

Frederick is an associate attorney in the firm's Health Sciences Litigation Practice Group. He focuses his practice on civil litigation involving pharmaceutical companies, medical device manufacturers, and health care industry clients. He has represented clients at all stages of litigation, including trial, and enthusiastically digs into his cases, ensuring no stone is left unturned in advocating for his clients. He has argued motions in court, helped bring cases through discovery, and worked on trial teams for complex healthcare cases across the U.S. In addition to his healthcare practice, Frederick maintains an active pro bono practice representing his clients in complex civil rights litigation. Before he joined the firm, Frederick served as a law clerk to the Honorable Lisa Godbey Wood of the Southern District of Georgia.

FIRST CIRCUIT:

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Threshold Questions of Justiciability—Article III Standing and Subject-Matter Jurisdiction Under CAFA

Wilkins v. Genzyme Corp., 93 F.4th 33 (1st Cir. 2024), cert. denied 2024 WL 4427245 (Oct. 7, 2024)

This lawsuit involves a putative class action brought by both individuals with a rare genetic disorder called Fabry Disease, as well as their spouses, against the manufacturer of the only FDA-approved treatment for the disease in the United States. The Plaintiffs alleged a variety of common law and statutory claims, and contended they experienced injuries resulting from the manufacturer's purported mishandling of a shortage of the drug between June 2009 and March 2012 leading to rationing and reduced doses for U.S. patients. Notably, the majority of the twenty-six Plaintiffs were also Plaintiffs in two prior putative class actions commenced in 2011 and 2013 that were ultimately dismissed due to a lack of Article III, standing except for one specific claim involving two Plaintiffs, both of whom eventually settled.

In its motion to dismiss in connection with this lawsuit, the manufacturer raised threshold questions of justiciability, being subject matter jurisdiction and standing. Although the District Court of Massachusetts concluded that the Plaintiffs' claims were timely filed, it held that twenty-two Plaintiffs lacked Article III standing and their claims were dismissed without prejudice. For the four remaining Plaintiffs, although they were able to establish standing, the District Court dismissed their claims with prejudice on the merits pursuant to Rule 12(b)(6) for failure to state a claim. The Plaintiffs appealed.

The First Circuit affirmed in part and reversed in part, holding that all twenty-six Plaintiffs had Article III standing and that the Court had subject matter jurisdiction under the Class Action Fairness Act ("CAFA"). With respect to standing, the First Circuit scrutinized whether the Plaintiffs sufficiently demonstrated the three essential elements: injury in fact, traceability, and redressability. Ultimately, the Court concluded that all Plaintiffs had standing for purposes of this case because their individualized allegations of injury were sufficiently specific and plausible. The Court also emphasized that proving causation and the merits of the claims were separate issues from establishing standing.

The First Circuit also rejected the manufacturer's argument that the Plaintiffs' CAFA claim was likely to fail and, as a result, the Court would lose subject matter jurisdiction. The First Circuit concluded that this argument was premature, as federal Courts might retain jurisdiction even if class certification is denied under CAFA. As the Court observed, CAFA was designed, in part, to keep certain class action suits in federal Courts to prevent perceived less rigorous certification practices in state Courts. In any event, the Court concluded that the district Court had subject matter jurisdiction at the time the Plaintiffs filed the complaint, since the case fit CAFA's broad definition of a class action, and met all jurisdictional requirements.

Although the Court held that it had subject matter jurisdiction, and all of the Plaintiffs had standing to proceed, the Court nevertheless affirmed the District Court's dismissal of the four Plaintiffs with prejudice on alternative, statute-of-limitation grounds. Neither a savings statute nor a tolling agreement between the parties was able to bridge any gap that would have otherwise prevented the lawsuit from proceeding many years later. Because the manufacturer did not cross appeal, the Court declined to apply its statute-of-limitations, holding to the other twenty-two Plaintiffs. Instead, the Court reversed the dismissal of the claims of those Plaintiffs and remanded the case so that the district Court could determine whether their claims withstood the manufacturer's statute-of-limitations and/or merits-based defenses in the first instance.

Federal Officer Jurisdiction

Gov't of Puerto Rico v. Express Scripts, Inc., 119 F.4th 174, 179 (1st Cir. 2024)

The Commonwealth of Puerto Rico brought a state Court action against pharmaceutical benefit managers ("PBMs") and drug manufacturers for allegedly engaging in a scheme to unlawfully inflate insulin prices through rebate negotiations and price setting. The PBMs, who act as "middlemen" between health plans, pharmacies, and pharmaceutical managers, removed the case to federal Court, asserting federal officer jurisdiction under 28 U.S.C. § 1442. Although the District Court granted the Commonwealth's motion to remand the case to state court, the First Circuit reversed.

As the First Circuit opined, the federal officer removal statute permits removal if Defendants are (1) acting under federal authority, (2) relate the charged conduct to that official authority, and (3) possess a colorable federal defense. Here, at least one PBM performed rebate negotiations for plans that covered federal employees under the Federal Employees Health Benefits Act ("FEHBA"). The PBM argued that it acted under federal authority in connection with its rebate negotiations for the FEHBA. The Commonwealth, on the other hand, argued that because it included a specific disclaimer in its complaint stating it was not seeking relief related to any federal program or contract, the Defendants were precluded from removing the case to federal Court.

The First Circuit determined that the PMBs were acting under federal officer authority, had a colorable federal defense, and the Commonwealth's disclaimer was not effective in preventing the removal of the case to federal Court. More specifically, the Court observed that: (1) the PBM negotiated rebates for all clients at once without distinguishing between the federal and non-federal plans; (2) the PBM's negotiations with respect to the FEHBA carriers were performed under the authority of the federal Office of Personnel Management, making the actions related to federal authority; and (3) the PBM asserted a colorable federal preemption defense under the FEHBA's express preemption provision. The Court also held the Commonwealth's disclaimer did not prevent federal officer removal because the disclaimer did not eliminate the possibility of the Commonwealth recovering for acts under federal authority given the indivisible nature of the PBM's work for both FEHBA and non-FEHBA clients.

PMA Preemption

Franks v. Coopersurgical, Inc., 722 F. Supp. 3d 63 (D.R.I. 2024)

The Plaintiff brought a products liability lawsuit against the manufacturers and distributors of surgical clips used in her tubal ligation surgery. The clips are a Class III Pre-Market Approved ("PMA") medical device. The Plaintiff had surgery in 2014 and started experiencing several adverse symptoms shortly thereafter. In 2021, a CT scan revealed that the clips had migrated to another part of her body. The Plaintiff's core allegation was that the clips' migration rate was higher than what was reported to the FDA. The Defendants moved to dismiss for lack of personal jurisdiction and failure to state a claim citing preemption, statute of limitations, and the learned intermediary doctrine.

The Rhode Island District Court found sufficient grounds to exercise jurisdiction over the manufacturer of the clips, citing factors such as substantial sales in Rhode Island and the manufacturer's ongoing involvement in marketing and FDA compliance. Two affiliated companies were dismissed due to lack of personal jurisdiction. The Court concluded that the Plaintiff failed to demonstrate that these entities had sufficient minimum contacts with Rhode Island or were "alter egos" of the manufacturer.

The Court held that the Plaintiff's design defect and manufacturing defect claims were expressly preempted by the Medical Device Amendments ("MDA") of the Federal Food, Drug, and Cosmetic Act ("FDCA") because the Plaintiff did not allege deviations from the FDA-approved design or manufacturing process. However, the Court held that the Plaintiff's failure-to-warn and negligence claims were neither expressly nor impliedly preempted finding that a state law duty to warn parallels federal requirements, specifically the responsibility to report adverse events to the FDA.

The Court rejected the Defendants' statute-of-limitations defense and applied the discovery rule to conclude that the Plaintiff's claims were not time-barred. It agreed with the Plaintiff that the Defendants' alleged failure to report higher migration rates may have delayed the discovery of the cause of her injury.

Lastly, the Court acknowledged the potential applicability of the learned intermediary doctrine in Rhode Island, which could shield manufacturers if they provided adequate warnings to physicians. However, it determined that at the motion-to-dismiss stage, the Plaintiff's allegations regarding the failure to adequately warn the FDA, and subsequently the physicians, were sufficient for her remaining claims to proceed.

Express Preemption Involving OTC Drug

Musikar-Rosner v. Johnson & Johnson Consumer Inc., No. 23-CV-11746-ADB, 2024 WL 3596897, at *1 (D. Mass. July 31, 2024)

In this putative economic loss class action, the Plaintiff sued the manufacturer of over-the-counter ("OTC") Tylenol® Extra Strength Rapid Release Gelcaps, alleging that the manufacturer's marketing as "rapid release" was false and misleading and led consumers to believe

they were more effective and faster-acting than traditional tablets. The Plaintiff cited a 2018 study indicating that the gelcaps dissolve slower than regular tablets.

The District Court of Massachusetts granted the Defendant's motion to dismiss, concluding that the FDCA expressly preempted the Plaintiff's state law claims. The Court concluded that OTC drug labeling is regulated by the FDA, and the gelcaps met the federal standards for dissolution. Therefore, any additional state requirements or claims related to labeling not imposed by the FDA were precluded.

Learned Intermediary Doctrine

Corrigan v. Covidien LP, No. 22-CV-10220, 2024 WL 4190064 (D. Mass. Sept. 13, 2024)

A patient and his spouse commenced litigation against the manufacturer of a surgical stapler used during the patient's laparoscopic sigmoidectomy which the Plaintiffs allege caused certain complications and required additional surgeries. The Plaintiffs asserted claims for, among other things, failure to warn, negligent misrepresentation, and unfair and deceptive trade practices in violation of the Massachusetts consumer protection statute. The Massachusetts District Court granted the manufacturer's motion for summary judgment and denied the Plaintiffs' motion to amend their complaint.

The District Court relied on the learned intermediary doctrine, in which the manufacturer's duty to warn extends to the Plaintiff's surgeon, not the Plaintiff directly, and concluded that the Plaintiffs failed to prove causation. The Court ruled that the manufacturer had successfully rebutted the presumption that the surgeon would have acted differently with additional warnings since the Plaintiff's surgeon did not read any specific warnings or adverse event reports about the stapler and was already aware of the risks associated with such devices. The Court also concluded that the Plaintiffs failed to present evidence that the manufacturer had a duty to publicly report adverse events. Because the District Court found that there was no state-law duty for manufacturers to report adverse events to the FDA under Massachusetts law, it declined to reach the manufacturer's alternative argument that the Plaintiffs' failure-to-warn claims based on an underreporting-theory were impliedly preempted under the FDCA.

SECOND CIRCUIT:

Atasia Richardson, Esq., Abrams, Gorelick, Friedman & Jacobson, LLP, One Battery Park Plaza, 4th Floor, New York, New York 10004

Delgado v. Universal Beauty Prods., Inc. | 2024 U.S. App. LEXIS 7202

The Plaintiff-Appellant Lucky Delgado ("Delgado") appealed from an award of summary judgment in favor of the Defendant-Appellee Universal Beauty Products, Inc. ("Universal Beauty"). Delgado bought and used University Beauty's Diamond Bond Protective Shield Hair Gel (the "Product") and alleged hair loss after attempting to wash out the product after having the Product in her hair for two weeks. The purpose of the Product was to form a barrier around a person's hair to allow the user to glue hair extensions to the dried barrier.

Delgado's complaint alleged causes of action for defective manufacture, negligent manufacture, breach of the warranties of merchantability and fitness for use, and negligence in failing to place a warning label on the Product. Under each of these theories, the Plaintiff must show that the defectively designed product caused injury and that the defect was the proximate cause of the injury.

Here, the Court determined that Delgado failed to proffer any evidence of a defect in the Product through expert testimony. In fact, Delgado's expert toxicologist, Dr. Christopher Spaeth, testified that all the ingredients in the Product were approved for use. Dr. Spaeth did not identify any ingredient in the Product that caused permanent hair loss or cell damage at the concentrations present in the Product, and he could not cite any scientific studies or claims supporting the contentions that the Product caused hair loss. An expert's conclusory opinions, opinions without factual basis and based on speculation or conjecture, or opinions unsupported by an evidentiary foundation are inappropriate material for consideration on a motion for summary judgment and should not be given any probative force.

Interestingly, Delgado recognized these deficiencies in her expert evidence and contended that her circumstantial evidence was sufficient to survive summary judgment. The Court disagreed. Under the circumstantial-evidence approach, a plaintiff must (1) "prove that the product did not perform as intended," and (2) "exclude all other causes for the product's failure that are not attributable to the defendant." For the first requirement, New York courts have explained that a Plaintiff can circumstantially demonstrate that a product did not perform as intended if the harm "was of a kind that ordinarily occurs as a result of product defect." For the second requirement, if a Defendant offers evidence of other potential causes for the harm not attributable to its product to withstand summary judgment, a Plaintiff must come forward with competent evidence excluding those other causes.

Here, the Court stated, that assuming *arguendo* that Delgado satisfied the first requirement, she nevertheless failed on the second requirement because Universal Beauty pointed to other evidence in the record of potential causes of Delgado's hair loss. It is uncontroverted that Delgado used a hair boning glue, which was not produced by Universal Beauty, that contained the following warning: "This product contains natural rubber latex which may cause allergic reactions in some individuals. Do not put on scalp. Do not use it if scalp is injured or irritated. Keep out of eyes. To avoid hair loss, do not pull." It also did not help that Delgado's expert testified that certain bonding glue contains latex, a sensitizer, that can cause scalp irritation and fungal infections, where both can lead to hair loss. Delgado testified that she experienced itching within 24 hours of using the bonding glue and did not remove it. She visited a dermatologist nine months after removing the glue and was prescribed a shampoo that treated fungal infections and allergic

reactions. Accordingly, she was testifying to facts that collaborated with her own expert's testimony of plausible causes of hair loss other than Universal Beauty's Product.

Ultimately, the Second Circuit affirmed the District Court's decision to grant summary judgment because Delgado argued an insufficient basis on which a rational jury could conclude that Delgado excluded any other plausible causes of her hair loss other than Universal Beauty's Product.

Khusenov v. Prokraft Inc. | 2024 U.S. App. LEXIS 5384

The Plaintiff-Appellant Isojon Khusenov ("Khusenov") initiated an action in District Court against Prokraft, Inc ("Prokraft") and Procut (together, the "Distributor Appellees") to recover for severe injuries he sustained while using a Pro-Cut KG-32 meat grinder. At the time of the incident, Khusenov worked for Karzinka US Inc ("Karzinka" or the "Employer Appellee") as a butcher apprentice.

The meat grinder at issue was sold by the Distributor Appellee Prokraft, which, as sold, was equipped with a safety guard from the manufacturer which was not a removable device. The meat grinder came with a "plunger" meant to push meat into the machine and keep the operator's hand away from the headstock opening. A warning label was affixed to the front of the meat grinder, which stated the following: "WARNING. Moving parts can crush and cut. Keep hands and fingers out of the grinder's head. Do NOT use your hands to feed product into machine, use the stomper or pusher. Do NOT operate if safety guard is removed or damaged. "

On January 7, 2020, Karzinka purchased the meat grinder from a non-party retailer for use at one of its stores ("the Meat Store"). Eventually, the butchers at the Meat Store decided to remove the safety guard from the meat grinder because the guard slowed their work. They removed the guard using an angle grinder, which took 10 to 15 minutes. Khusenov began working at the Meat Store in June 2020 as a butcher apprentice and had been working at the store for approximately six months before he began operating meat grinders, including the one at issue without the safety guard. He operated the meat grinders four to five times a week. On May 29, 2021, Khusenov was operating the meat grinder when the sleeve of his uniform, which was too big for him, got caught in the machine. His right hand and arm were pulled into the grinder and crushed. As a consequence of his injury his right arm was amputated below his elbow.

Khusenov filed suit against the Distributor Appellees in New York State court, asserting claims of negligence, strict product liability, and breach of express and implied warranty. This matter was removed to the Eastern District of New York, and the Distributor Appellees filed a third-party complaint against Karzinka, seeking contribution and common law indemnity. In response, Karzinka filed a crossclaim against the Distributor Appellees, also seeking indemnity. The Distributor Appellees and Karzinka filed separate motions for summary judgment seeking to dismiss Khusenov's claim and motions to disqualify each other's experts. The District Court granted the motions for summary judgment against Khusenov and dismissed the case.

The Second Circuit followed a highly deferential abuse of distraction standard of review in the District Court's decision to admit or exclude expert testimonies. A decision to exclude or admit expert testimony is only an abuse of discretion when it is "manifestly erroneous."

On Appeal, Khusenov contended that the District Court erred in four ways: (1) excluding the Plaintiff's expert, Dr. Andrew Foley from opining on the foreseeability of the removal of the safety guard; (2) finding that Appellees had established that the meat grinder was safe as designed; (3) finding that the substantial modification defense applied as a matter of law; and (4) finding that the warning label was adequate as a matter of law.

First, the Second Circuit found that the District Court did not abuse its discretion by excluding Dr. Foley's opinion on the foreseeability of removing the safety guard because the District Court meticulously analyzed Dr. Foley's qualifications, methodologies, and conclusions before ultimately precluded his testimony which opined on how users were likely to remove the safety guard to obtain the high, advertised meat-processing rate. Specifically, the District Court provided the following analysis:

> "When pressed to explain his conclusion … Dr. Foley admitted that (i) he did not ascertain the processing capabilities of the Meat Grinder; (ii) he did not attempt to place meat into the hold of the Meat Grinder; (iii) he does not know what the processing rate for workers at Karzinka [was]; and (iv) he did not cite any studies for the conclusion that the Meat Grinder would be unable to meet the processing rated advertised other than his view that it would be a "feat" to get 3,000 pounds of meat into the Meat Grinder.[1]"

Second, the Appellees established that the meat grinder was not defective when sold. A defendant moving for summary judgment based on substantial modification … must make the same showing required to prevail on any design defect claim and that that product was "not defective" when manufactured and sold. The Appellees' expert agreed that the safety guard would have prevented Khusenov's accident. Khusenov's expert also agreed that it was a "misuse" of the grinder to cut off the guard. Ultimately, the Second Circuit found there was adequate evidence for the Appellees to make the initial showing that the meat grinder was "not defective" when it was made and sold to Karzinka.

Third, it is undisputed that Karzinka's employer substantially modified the meat grinder to remove the safety guard. While a negligence claim will survive where a plaintiff can show a manufacturer was responsible for a defect that caused an injury and that the manufacturer could have foreseen the injury, when a third party causes a material alteration to a product by substantially changing the condition of the product from when it was made by destroying the functional utility of a key safety feature, no matter how foreseeable the modification may have been, it is not the manufacturer's responsibility.

Here, Khusenov admitted that the butchers at the Meat Store removed the safety guard with a metal grinder. Therefore, the Appellees have established, and a reasonable jury could only find, that the meat grinder was substantially modified in a way that destroyed the functional utility of a key safety feature. The Court notes, that while a plaintiff may defeat a substantial modification defense by showing that a product is purposefully manufactured to permit its use without a safety feature, the record is devoid of any evidence establishing that the meat grinder was intentionally manufactured to be used without the safety guard.

Finally, Khusenov's failure-to-warn claim failed because the warning label was not the proximate cause of his injury. A manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known. However, failure-to-warn claims should be dismissed when there is no evidence such failure was a proximate cause of the injury. Where the injured party was fully aware of the hazard through general knowledge, observation, or common sense, a lack of a warning about that danger may well obviate the failure to warn as a legal cause of an injury resulting from that danger. When a risk is well understood by the Plaintiff, a warning would have made no difference, and the failure to warn was therefore not a cause of the harm. Khusenov was fully aware through general knowledge, observation, and common sense of the hazards of the claims he was never warned about. He used the meat grinder or one similar to it, four to five times a week in the months leading up to the incident, and knew to be careful when putting meat into the grinder, was very cautious to put the meat in slowly and to take care of his wrist and fingers. He operated the meat grinder cautiously because it is common sense

[1] Khusenov, 2023 U.S. Dist. LEXIS 19937, 2023 WL 1785527 at 6.

that under his hand there was a high-speed accelerator grinding the meat. Khusenov's uncontroverted testimony demonstrated, as a matter of law, that he fully appreciated the exact hazards he claimed he was inadequately warned about, therefore, the district court properly granted summary judgment against Khusenov's failure to warn claim.

The Second Circuit concluded that Khusenov's claims were properly dismissed on summary judgment and affirmed the District Court's decision.

Rouviere v. Howmedica Osteonics Corps., 2024 U.S. Appl. LEXIS 8201

The Appellant Jodi Rouviere ("Rouviere"), who proceeded on appeal *pro se*, sued two medical device companies, Howmedica (aka Stryker) and DePuy, for product liability and breach of warranty in 2018. Rouviere suffered complications from her hip replacement in 2012 after parts made by Stryker and DePuy allegedly impinged upon one another and eventually caused a wide variety of issues, including metallosis. The District Court granted both Defendants' motions for summary judgment. DePuy's motion was based primarily on Plaintiff's lack of expert evidence and proximate cause, and Stryker's motion was based on the statute of limitations.

The Second Circuit reviewed the decisions granting summary judgment *De Novo*. *Pro Se* submissions are liberally construed to raise the strongest arguments they suggest.

First, the Second Circuit affirmed that Rouviere's 2018 Complaint was time-barred. Pursuant to N.Y.U.C.C § 2-735, Rouviere's breach of warranty claims had a four-year statute of limitation. A breach of warranty claim accrues when tender of delivery is made regardless of the aggrieved party's lack of knowledge of the breach. There is no provision under New York law[2] for an extension of the limitations period linked to the discovery of the breach. The parties disagree whether CPLR § 214(5)[3] or CPLR § 214-C(2)[4] was applicable. For purposes of this appeal, the Court "assumes," without deciding, that the case is governed by CPLR § 214-c(2), under which a cause of action accrues in the toxic tort context when a plaintiff discovers an injury. The New York Court of Appeals has held that this accrual happens when the injured party discovers the primary condition on which the claim is based and not when the connection between the symptoms and the injury's exposure to a toxic substance is recognized. Accordingly, accrual does not depend on the medical sophistication of an individual Plaintiff or the diagnostic acuity of his or her chosen physician.

Rouviere's product liability claims are time-barred because there is no genuine dispute of material fact that she discovered the manifestations or symptoms of her injury from the hip replacement more than three years before she filed suit in 2018. Rouviere did not dispute that she experienced the relevant symptoms from 2012 to 2014 and did not connect those symptoms to her hip replacement.

[2] This matter was brought into Federal Court based on diversity and both parties agreed that New York was applicable to the Statute of Limitations.

[3] The following actions must be commenced within three years: … (5) an action to recover damages for a personal injury except as provided in sections 214-b, 214-c, 214-i and 215 …. New York CPLR § 214(5).

[4] Certain actions to be commenced within three-year of discovery: … (2) Notwithstanding the provisions of section 214, the three year period within which an action to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier …. New York CPLR § 214-C(2)

Rouviere's breach of warranty claims were also time-barred because they accrued, at the latest, on the date of her surgery in August 2012, which is the last day the relevant products could have been delivered and was more than four years before she commenced suit.

Finally, the Second Circuit affirmed the decision to deny the application of equitable estoppel or tolling to Rouviere's claim. To establish equitable estoppel or tolling, Rouviere must demonstrate that specific actions by the defendants kept her from timely bringing suit; either fraud, misrepresentation, or deception. Rouviere argued that her equitable tolling and/or estoppel claim relied on the defendants' alleged concealment of the defectiveness of their products and their misrepresentations to the U.S. Food and Drug Administration about the safety of their products.

Even assuming those allegations were true, Rouviere failed to explain what "subsequent and specific action" DePuy and Stryker took, beyond their initial alleged omissions and representations about the safety of their products, to prevent her from timely suing. None of the allegedly fraudulent actions concerned Rouviere. She had not shown that either defendant misrepresented the appropriate statute of limitations or sought to prevent her suit after she began to experience symptoms from her hip replacement. She has not shown that she did not file her suit within the statute of limitations because she reasonably relied on the defendants' alleged misrepresentation to the FDA.

Accordingly, the Second Circuit affirmed the District Court's denial of equitable following and estoppel and affirmed the District Court's decision to grant the Defendants' motions for summary judgment because Rouviere's claims were time-barred.

THIRD CIRCUIT:

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Early and Complete Witness Disclosures

TAKTL, Ltd. Liab. Co. v. IWR, No. 2:18cv1546, 2024 U.S. Dist. LEXIS 200752 (W.D. Pa. Nov. 5, 2024)

TAKTL originally filed a lawsuit against IWR in a construction-related dispute, with fact discovery concluding in November 2020. Nearly four years later, on October 18, 2024, the Defendants sought to introduce a new witness, Brian O'Shell ("O'Shell"), the Chief Financial Officer of Ajay Glass Company. O'Shell had not been mentioned in the original disclosures or any discovery updates. Despite this, the defendants identified O'Shell as a "will call" witness and issued a subpoena for his trial deposition just days before the scheduled trial date of November 12, 2024.

The Court granted the Plaintiff's motion for a protective Order, which prevented O'Shell from being deposed or testifying. The Court applied the Pennypack factors, and determined that allowing this testimony would prejudice the Plaintiff, disrupt trial preparation, and give the Defendants an unfair tactical advantage. The Court highlighted that the Defendants had ample opportunity to identify O'Shell earlier, but failed to do so. The ruling emphasized that deadlines must be respected in complex litigation to ensure fairness and efficiency.

This case highlights the importance of timely and complete witness disclosures. Defense attorneys should identify all potential witnesses early in the discovery process and promptly update disclosures if new information emerges. Courts will likely exclude witnesses introduced at the last minute, significantly when their testimony could unfairly disrupt trial preparation.

Challenge Broad Fraud and Misrepresentation Claims

Badalamenti v. Resideo Techs., Inc., No. 22-cv-05592 (MEF)(CLW), 2024 U.S. Dist. LEXIS 199749 (D.N.J. Nov. 4, 2024)

A homeowner sued Resideo Technologies after purchasing a burglar/fire alarm allegedly non-compliant with Underwriters Laboratories (UL) safety standards despite being marketed as "UL Listed." The lawsuit was filed as a potential class action and included allegations of fraud, misrepresentation, breach of warranty, and consumer protection violations under New Jersey law.

The Defendants filed a motion to dismiss, which the Court granted in part. The claim under the *Magnuson-Moss Warranty Act* was denied because the statute requires 100 named Plaintiffs for class actions, while this case had only one. The Court also rejected state-law fraud and misrepresentation claims, determining that stating that a product is "UL Listed" does not necessarily imply full compliance with all UL safety standards. Since the Plaintiff did not assert that the certification was false, the fraud claims could not proceed.

The Court dismissed the claims under the *New Jersey Consumer Fraud Act* and the *Truth in Consumer Contract, Warranty, and Notice Act*, concluding that there was no evidence of fraudulent misrepresentation or omission. However, the Court allowed the Plaintiff to submit additional arguments about whether claims for breach of implied warranty and unjust enrichment could proceed.

This case underscores the importance of precise language in product marketing and the limitations of consumer fraud claims. Defense attorneys should challenge broad misrepresentation claims and concentrate on whether the Plaintiff can demonstrate a specific false statement. Additionally, attorneys should carefully assess the requirements for class certification under federal and state consumer protection statutes.

Scrutinize Standing and Economic Harm Theories

Huertas v. Bayer US LLC, 120 F.4th 1169 (3d Cir. 2024)

This case originated when Bayer voluntarily recalled millions of dollars worth of Lotrimin and Tinactin antifungal sprays in 2021, due to benzene contamination. A group of consumers who purchased the recalled products sued based on the benefit-of-the-bargain theory. They argued that they had paid for uncontaminated products, but instead received ones tainted with a carcinogen, rendering them economically worthless.

The District Court dismissed the case for lack of standing, concluding that the Plaintiffs had not adequately demonstrated economic harm. However, the Third Circuit partially reversed this decision. It ruled that the benefit-of-the-bargain theory applies when a product's contamination decreases its financial value. The Court differentiated this case from the J&J Talcum Powder Litigation, where the Plaintiff had fully used the product without any issues and only claimed post-purchase regret. In this case, the Plaintiffs convincingly alleged that the benzene contamination made the product unusable, diminishing its inherent value.

Nevertheless, the court upheld the dismissal of the Plaintiffs, who could not provide many numbers that matched the recalled products, finding their claims speculative. The case was remanded for further proceedings, and the court noted Bayer's lawsuit against its supplier, Aeropress Corporation, as additional support for the Plaintiffs' claims.

This case underscores the significance of standing and the need to demonstrate economic harm in product liability cases. Defense attorneys should challenge claims where Plaintiffs fail to connect their purchases to the alleged defect. While Courts are open to accepting economic harm theories, Plaintiffs must provide a factual basis for contamination. Corporate admissions in supplier lawsuits should be managed carefully, as they may inadvertently strengthen Plaintiffs' claims.

Expect Increased Litigation Over Algorithmic Liability

Anderson v. TikTok, Inc., 116 F.4th 180 (3d Cir. 2024)

This case centers around the tragic death of ten-year-old Nylah Anderson, which resulted from TikTok's algorithm promoting the "Blackout Challenge," a dangerous trend that encourages self-asphyxiation. Nylah encountered this challenge on her "For You Page" (FYP), attempted it, and ultimately lost her life. In response, her mother ("Anderson") filed a lawsuit against TikTok and its parent company, ByteDance, alleging negligence and strict product liability. The lawsuit claimed that TikTok's algorithm was inherently flawed because it recommended and promoted harmful content.

The District Court initially dismissed the lawsuit, ruling that Section 230 of the *Communications Decency Act* (CDA) protected TikTok from liability. However, the Third Circuit Court partially reversed the decision, stating that TikTok's algorithm constitutes first-party speech rather than third-party content. The court referenced the Moody v. NetChoice, LLC case, in which the Supreme Court determined that a platform's algorithm represents its own expressive choices. Since Section 230 only shields platforms from liability for third-party content, it does not protect TikTok's algorithmic recommendations.

The case was returned for further proceedings, allowing Anderson's claims to advance. Nonetheless, Judge Matey's partial dissent suggested that while Section 230 does not protect TikTok's algorithmic choices, it does provide immunity for the company regarding liability for hosting the videos related to the Blackout Challenge.

This ruling is important because it significantly limits the scope of Section 230 immunity for social media platforms. Defense attorneys representing tech companies should anticipate more litigation concerning algorithm-driven content recommendations, particularly in cases involving harm to minors. Additionally, the decision raises product liability concerns related to social media algorithms, meaning these platforms may need to revise their content moderation and recommendation systems to reduce legal risks.

Pharmaceutical failure-to-warn claims and federal pre-emption in drug labeling

In re Fosamax (Alendronate Sodium) Prods. Liab. Litig., 118 F.4th 322 (3d Cir. 2024)

This case addresses whether state law claims against drug manufacturer Merck Sharp & Dohme ("Merck") for failing to warn about the risks associated with its osteoporosis drug, Fosamax, are preempted by federal law. The Plaintiffs allege that Merck inadequately warned about the risk of atypical femoral fractures linked to Fosamax. The District Court granted summary judgment in favor of Merck, concluding that federal law preempted the Plaintiffs' claims because the Food and Drug Administration (FDA) had rejected Merck's proposed label change due to insufficient scientific support. However, the Third Circuit Court of Appeals vacated that decision, ruling that the District Court had erred in its preemption analysis by not giving sufficient weight

to the presumption against preemption. The Court determined that the Plaintiff's state law claims were not preempted, and remanded the case for further proceedings.

The legal context involves the *Federal Food, Drug, and Cosmetic Act* (FDCA), which grants the FDA authority over drug labeling. The FDA regulates drug safety information and requires manufacturers to ensure their labels remain adequate as long as the drug is on the market. While manufacturers generally must obtain FDA approval before making label changes, they can implement specific updates through the "Changes Being Effected" (CBE) process. This process allows modifications without prior authorization if supported by newly acquired information demonstrating a causal relationship with the drug.

In 2008, Merck proposed a label change to include a warning about low-energy femoral fractures, suggesting that this information be added to the "Precautions" section. However, the FDA ultimately rejected this request in a 2009 Complete Response Letter, stating that the justification for the proposed warning was inadequate and that the discussion on "stress fractures" was not supported by available scientific evidence. The District Court found that this response showed the FDA would not have approved a more substantial warning regarding atypical femoral fractures, thereby preempting the Plaintiffs' claims.

The Third Circuit, however, held that the District Court misapplied the preemption standard outlined in Wyeth v. Levine and Merck Sharp & Dohme Corp. v. Albrecht. Under this framework, preemption applies only if "clear evidence" exists that the FDA would have rejected a label change that complied with state law. The Court determined that the FDA's rejection of Merck's proposed language was ambiguous; it could have been based on an insufficient causal link between Fosamax and fractures or on Merck's use of misleading terminology (such as "stress fractures"). Given this ambiguity and the strong presumption against preemption, the Court ruled that Merck had not met its burden of proving that federal and state laws were irreconcilably in conflict.

Careful documentation of all interactions with the FDA is essential in defending against failure-to-warn claims. This case highlights how ambiguities in agency responses can create vulnerabilities in preemption defenses. Maintaining comprehensive records of all communications, submissions, and agency feedback creates a precise and well-documented timeline, reducing the risk of misinterpretation regarding whether the FDA definitively rejected a proposed label change.

Precision in terminology is also crucial when submitting labeling requests to the FDA. Merck's proposed label change was rejected partly because it used the term "stress fractures" instead of "atypical femoral fractures," which the FDA deemed misleading or insufficiently specific. Defense attorneys should ensure that proposed warnings accurately reflect the associated risks to prevent rejection based on wording rather than substantive scientific disagreements.

The *Albrecht* decision emphasizes the high burden of proof in preemption cases. To establish impossibility preemption, manufacturers must present "clear evidence" that the FDA

explicitly rejected a label change due to insufficient scientific support. Courts are unlikely to find preemption if the rejection is based on phrasing, presentation, or lack of clarity rather than a definitive scientific determination. Defense attorneys must be prepared to demonstrate that the FDA blocked all reasonable efforts to amend the label.

Moreover, the Third Circuit's ruling suggests that Merck may have had the option to update its label through the Changes Being Effected (CBE) pathway, which allows manufacturers to implement specific label changes without prior FDA approval. Defense counsel should continuously evaluate whether the CBE process is a viable alternative before asserting a preemption defense. If a label update could have been made unilaterally, impossibility preemption is unlikely to succeed.

Finally, defense attorneys should anticipate the strong presumption against preemption in failure-to-warn cases. Courts are reluctant to displace state law unless there is a direct and unavoidable conflict with federal regulations. Given this judicial skepticism, defense counsel must be prepared to meet a high evidentiary standard in preemption claims.

FOURTH CIRCUIT:

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Clarifying the Requirements to Prove Alternative Feasible Design

Shears v. Ethicon, Inc., 109 F.4th 235 (4th Cir. 2024)

This case highlights an important clarification under West Virginia law pertaining to strict-liability design-defect claims—to prevail, a plaintiff is required to prove a feasible alternative design that *substantially reduces* the risk of injury, but the plaintiff need not prove that the alternative design would *eliminate* the risk of injury.

In *Shears*, Plaintiffs brought suit in a multi-district litigation ("MDL") against a pelvic mesh manufacturer asserting claims under West Virginia law for, among other things, strict liability design defect. In the MDL, the United States District Court for the Southern District of West Virginia held, based on a West Virginia pattern jury instruction, that a plaintiff bringing a strict-liability design-defect claim under West Virginia law had to prove the existence of a feasible alternative design that would have eliminated the risk of harm suffered by the plaintiff.

Plaintiffs' action was then transferred for trial and the trial court granted the manufacturer's pretrial motion to preclude Plaintiffs' expert's testimony about the strict-liability design-defect claim based on the expert's failure to opine that an alternative design eliminated the risk. After granting the pretrial motion, the trial court granted judgment as a matter of law for the manufacturer.

On Plaintiffs' appeal, the Fourth Circuit certified to the Supreme Court of West Virginia questions as to a plaintiff's burden of proof on strict-liability design-defect claims regarding feasible alternative product design. The Supreme Court of West Virginia answered the questions by disapproving the West Virginia pattern jury instruction and holding that a plaintiff bringing a strict-liability design-defect claim must prove that a feasible alternative design existed at the time the product was made that would have substantially reduced the risk of the injury suffered by the plaintiff, but not that the alternative design would have eliminated the risk. The Fourth Circuit, in *Shears*, adopted the opinion of the Supreme Court and found that the trial court abused its discretion in excluding Plaintiffs' expert's testimony by relying on an erroneous legal principle, and vacated the judgment of the trial court and remanded the case.

Question Certified to West Virginia Supreme Court in Opioid Case

City of Huntington, W. Virginia v. AmerisourceBergen Drug Corp., 96 F.4th 642 (4th Cir. 2024)

The Fourth Circuit certified question to the West Virginia Supreme Court of whether, under West Virginia law, conditions caused by the distribution of a controlled substance could constitute public nuisance, and, if so, what would constitute the elements of such a claim. This case involved claims filed in 2017 by a city and county against distributors of opioids, claiming that the companies created the opioid epidemic by repeatedly shipping to pharmacies orders of opioids in quantities that the companies knew or should have known exceeded any legitimate market for the drugs. Plaintiffs claimed that this conduct resulted in a public nuisance.

After holding a bench trial in 2021, the district court ruled in favor of the distributors, finding that West Virginia's common law of public nuisance did not cover Plaintiffs' claims. On Plaintiffs' appeal, the Fourth Circuit observed that public nuisance cases in West Virginia traditionally have addressed hazards or inconveniences affecting property or resources. But the Fourth Circuit did not view as dispositive the fact that the Supreme Court of West Virginia had not yet applied principles of public nuisance to the distribution of a product, and thus certified the question. This will be an important case to watch.

No Standing in Medical Monitoring Case

Sommerville v. Union Carbide Corp., No. 2:19-CV-00878, 2024 WL 2139394 (S.D.W. Va. May 13, 2024)

In a strongly worded opinion about the importance of justiciability in federal courts, the Southern District of West Virginia dismissed Plaintiff's proposed medical monitoring class action for lack of standing. Judge Joseph Goodwin noted that he had "previously expressed [his] skepticism about the viability of medical monitoring as a tort in light of Article III's justiciability doctrines."

In *Sommerville*, an individual brought claims against the owners and operators of a manufacturing facility for alleged emissions of a known carcinogen. The individual and proposed class members resided in neighborhoods surrounding the facility, and the individual's lawsuit was based on an alleged increase in the risk of developing cancer because of the emissions.

The court noted that the case was based on diversity jurisdiction, so West Virginia substantive law would apply. In West Virginia, the tort of medical monitoring was wholly constructed by the Supreme Court in *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424 (W. Va. 1999), where the Court "created a state cause of action for medical monitoring allowing for unrestricted relief absent present physical injury." As the *Sommerville* court noted, "[r]ather than a remedy based on traditional tort law, the *Bower* court created a broad cause of action allowing for a wide range of relief based upon an 'increased risk' of future harm."

However, for purposes of Article III justiciability, it is not dispositive that a state judiciary has recognized a cause of action in state courts. The Plaintiff seeking to bring a medical monitoring claim under West Virginia law in federal court had to go beyond merely proving the elements required by West Virginia law; she needed to also independently satisfy Article III's standing requirements. For several reasons, the court held she was unable to do so. One reason is highlighted below.

Plaintiff sought monetary damages based on the premise that because Defendants emit carcinogens into the air and she, in turn, breathes that air, Defendants have put her and proposed class members at a higher risk of eventually getting cancer. But Plaintiff relied entirely upon expert opinions to prove her alleged increased risk of cancer, and "expert opinions are just that—opinions, not facts." Regardless, the court had previously excluded Plaintiff's emissions expert because he used "patently unreliable data and methods" in creating the air model used to determine

the alleged estimated emissions, and therefore the increased risk of disease. This unreliable model was then used to assume that a speculative disease might someday materialize in some unknown person. The court held this did not establish an imminent injury sufficient to survive a standing challenge.

Preemption Bars Plaintiffs' Claims

In re Gardasil Prod. Liab. Litig., 724 F. Supp. 3d 474 (W.D.N.C. 2024); *Chiapello v. Corin USA Ltd., Co.*, No. CV SAG-23-3149, 2024 WL 3548726 (D. Md. July 23, 2024)

Two recent cases dismissed Plaintiffs' product liability claims, holding their claims were preempted by federal law. *In re Gardasil* was a suit brought by individuals who received the Human Papillomavirus ("HPV") vaccine against the vaccine manufacturer after they experienced various physiological and neurological adverse events allegedly as a result of the HPV vaccines. *Chiapello* was a suit brought by an individual against companies that developed and manufactured a hip implant used for hip surgeries after the individual developed various medical conditions, including low testosterone-related symptoms.

In both cases, Defendants moved to dismiss in part on preemption. *In re Gardasil* concerned an FDA-approved HPV childhood vaccine covered by the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-1, *et seq*. (the "Vaccine Act"), which provided in part that all design-defect claims against vaccine manufacturers brought by plaintiffs who seek compensation for injury caused by vaccine side effects are preempted. The court rejected Plaintiffs' contention that their complaints did not put forth design-defect claims. Looking at the nature of the allegations, the court found that Plaintiffs indeed asserted design-defect claims. For example, the court found that Plaintiffs' allegations that the manufacturer included numerous dangerous ingredients in the vaccine were an attack on the design of the vaccine itself; thus, such claims were preempted by the Vaccine Act.

In *Chiapello*, the court granted the companies' motions to dismiss and dismissed Plaintiff's complaint regarding a hip implant that had received FDA pre-market approval. The court began by outlining the Medical Device Amendments to the Food, Drug, and Cosmetic Act, which classified medical devices into three categories. The court then discussed the statutory provisions that preempt nearly all types of claims concerning FDA-approved medical devices and found that Plaintiff's claims there were preempted. For example, Plaintiff's allegations regarding deficiencies in the design process, such as the failure to establish *in vivo* life expectancy, were preempted as the design process was reviewed and approved by the FDA.

Summary Judgment Based on Insufficient Exposure

Pike v. Dempster Indus., Inc., No. 1:21CV921, 2024 WL 1210621 (M.D.N.C. Mar. 21, 2024)

Pike adds to the case law underscoring the need for plaintiffs to bring sufficient evidence of exposure in asbestos product liability cases. Plaintiffs alleged the decedent was exposed to Defendant's asbestos-containing products during the decedent's employment and that this exposure caused his mesothelioma. Defendant moved for summary judgment, contending that the

decedent's interactions with its products were too limited to establish that its products were a substantial cause of his disease.

To prevail in an asbestos-related product liability action under North Carolina law, a plaintiff must establish that he was "actually exposed to the alleged offending products." Consistent with that requirement, the Fourth Circuit has further held that a North Carolina asbestos plaintiff "must prove more than a casual or minimum contact with the product" and that a plaintiff must introduce "evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked." The court applied this standard, known as the "*Lohrmann* test," to Defendant's motion for summary judgment in the *Pike* case. Viewing the evidence in the light most favorable to Plaintiffs, the court found that given the decedent's infrequent and nonregular exposure to Defendant's products, a jury could not reasonably conclude that asbestos exposure from Defendant's products was a substantial factor in causing the decedent's disease. The court granted summary judgment in favor of Defendant.

Suit Dismissed Under Section 230

J.R. v. Mancino, No. 2:23-CV-02519-BHH-MGB, 2024 WL 3048368 (D.S.C. May 31, 2024), *report and recommendation adopted*, No. 2:23-CV-2519-BHH, 2024 WL 3047553 (D.S.C. June 18, 2024)

The District Court for the District of South Carolina dismissed a case against a company operating an internet platform, finding that Plaintiffs' claims against it were barred by the Communications Decency Act ("CDA"). *J.R.* involved claims against a company alleging that the internet platform the company operated permitted individuals to sexually assault minors. The company moved to dismiss Plaintiffs' claims under Section 230 of the CDA.

Section 230 establishes immunity for providers of interactive computer services that provide an online platform allegedly used by third parties to facilitate wrongful conduct. To show that it is entitled to the CDA's protections, a defendant must establish that: (1) it is a "provider or user of an interactive computer services;" (2) the plaintiff's claims hold it "responsible as the publisher or speaker of any information;" and (3) the relevant information was "provided by another information content provider."

Here, the parties agreed the first element was met. Regarding the second element, the complaint made clear that the allegations against the company pertained only to policing and monitoring its platforms; they did not pertain to publishing any kind of content. Nonetheless, the court noted that a number of other courts have repeatedly determined that the decision to allow access to and use of an internet application constitutes publishing activity covered by the CDA, as does the decision not to police communications on that platform.

Regarding the third element, the complaint plainly alleged that another "information content provider" provided the communications at issue in the lawsuit. Plaintiffs argued that the company should nonetheless be held liable because the company materially contributed to the harm by failing to properly monitor the content of communications exchanged on its platform and by failing to implement policies to identify and eliminate sex trafficking on its platform. The court

found these arguments unconvincing as Plaintiffs could not establish that the company made a material contribution to illegal communications by claiming that it *failed* to do something as those claims do not allege affirmative conduct beyond merely providing a platform to communicate. For these reasons, the court ultimately dismissed Plaintiffs' claims against the company.

Latent Disease Exception Inapplicable

Fussell v. Sanofi-Aventis U.S. LLC, No. 1:23-CV-00142-MR-WCM, 2024 WL 1365067 (W.D.N.C. Mar. 12, 2024), *report and recommendation adopted*, No. 1:23-CV-00142-MR-WCM, 2024 WL 1363915 (W.D.N.C. Mar. 29, 2024)

In a case transferred to the Western District of North Carolina from the *In re Taxotere (Docetaxel)* multi-district litigation, the court dismissed Plaintiff's claims as untimely. *Fussell* centered around Plaintiff's claims that the use of docetaxel, a type of chemotherapy, resulted in Permanent Chemotherapy Induced Alopecia ("PCIA")—an absence of or incomplete hair regrowth six months beyond the completion of chemotherapy. Under the most permissive reading of a discovery response provided by Plaintiff, Plaintiff's alleged end-date of chemotherapy was December 31, 2008, and her hair loss began six months later, on June 30, 2009. Plaintiff filed her complaint on March 19, 2018.

The defendants moved for judgment on the pleadings on the basis that. In response to Defendants' arguments that Plaintiff's claims were barred by the applicable six-year statute of repose, N.C.G.S. § 1-50(a)(6), Plaintiff claimed that the statute did not apply because her claims triggered the "latent disease exception," which applies where (1) the plaintiff's injury is a disease; (2) it is difficult to establish the exact time of injury; and (3) it is difficult to establish that the disease was caused by the product. The court disagreed and dismissed the case, finding that PCIA was not a "latent disease" as the onset of PCIA was obvious and Plaintiff's symptoms manifested six months following the completion of her chemotherapy regimen.

FIFTH CIRCUIT:

Gabrielle C. Broders, Irwin Fritchie Urquhart Moore & Daniels, LLC, 400 Poydras Street, Suite 2700, New Orleans, LA 70130

Barnett v. Kia Motors Am., Inc., No. 22-20614, 2023 WL 8946196 (5th Cir. Dec. 28, 2023)

Plaintiff alleged that she was injured when her car's seatbelt and airbag malfunctioned during a collision. After the district court granted summary judgment for Defendant because Plaintiff failed to designate an expert witness on her product liability claims, a requirement under Texas law, Plaintiff appealed. Subsequently, the appeals court *sua sponte* dismissed Plaintiff's appeal as frivolous. The Fifth Circuit reiterated that "[a]bsent the requisite expert testimony, there can be no genuine factual dispute as to whether any product defect caused [the plaintiff's] injuries, and Kia is accordingly entitled to judgment as a matter of law." Accordingly, this short case is a good reminder that when a plaintiff does not have an expert in a products liability matter to prove the product caused her condition (and it's a requirement under the law as it was here), move for summary judgment on those grounds alone.

Pace v. Cirrus Design Corp., 93 F.4th 879 (5th Cir. 2024)

Plaintiff, a Mississippi resident and pilot of an aircraft which crashed in Texas, filed suit in Mississippi state court alleging products liability claims against corporate defendants, and negligence and misrepresentation claims against a Mississippi resident and Mississippi LLC, former owners of the aircraft. The non-Mississippi corporate defendants filed (1) a notice of removal alleging that the Mississippi defendants had been fraudulently joined and (2) motions to dismiss the non-Mississippi corporate defendants for lack of personal jurisdiction. Plaintiff filed a motion to remand, a motion for jurisdictional discovery, and oppositions to each motion to dismiss. The district court denied the motion to remand and Plaintiff's motion for jurisdictional discovery. The district court found that it lacked personal jurisdiction over the corporate defendants, and granted each motion to dismiss.

On appeal, Plaintiff argued the district court erred in three ways: (1) finding the two Mississippi defendants were fraudulently joined; (2) denying Plaintiff jurisdictional discovery; and (3) determining it did not have personal jurisdiction over the non-Mississippi corporate defendants.

First, Plaintiff defended his misrepresentation and negligence claims against the Mississippi defendants, the former owners of the aircraft at issue. The Fifth Circuit applied Rule 9(b)'s heightened pleading standard to assess whether Plaintiff stated a fraud claim. The pnael reasoned that because Plaintiff's claim was based on alleged false statements, Rule 9(b)'s heightened pleading standard applied and provided the standard for the fraudulent-joinder analysis. The Fifth Circuit's ruling here is noteworthy because the Fifth Circuit has previously applied a true Rule 12(b)(6)-type analysis when assessing fraudulent joinder, and specifically indicated that Rule 9(b) makes up a component of the applicable pleading standard. The Fifth Circuit has also previously stated in *Murray v. Gen. Motors, L.L.C.*, 478 F. App'x 175, 181 n.10 (5th Cir. 2012) "that a district court should not find fraudulent joinder and dismiss a fraud claim for failure to satisfy the pleading requirements of Rule 9(b) without first granting leave to amend." Next,

regarding Plaintiff's negligence claim, Plaintiff contended that the Federal Aviation Administration regulations imposed a duty on the aircraft's prior owners to maintain and inspect it. The Fifth Circuit rejected this argument and held that any duty to maintain and inspect applied only to current owners, thus negating the essential duty element of the negligence claim. Accordingly, the Fifth Circuit found that the district court properly denied Plaintiff's motion to remand.

Second, in arguing that there was general jurisdiction over the corporate defendants, the Fifth Circuit rejected Plaintiff's attempt to extend the recently recognized consent-based form of general jurisdiction from the United States Supreme Court's decision in *Mallory v. Norfolk Southern Railway Co.*, 600 U.S. 122 (2023). In Pennsylvania, companies that register to do business in the state must consent to general jurisdiction, a statutory scheme the Supreme Court found compatible with constitutional due process in *Mallory*. Plaintiff argued that Mississippi law operates the same way because it requires foreign corporations that register to do business within the state to appoint a registered agent and provides that a registered corporation becomes "subject to the same duties, restrictions, penalties and liabilities now or later imposed on, a domestic corporation of like character." However, Mississippi law also states that the appointment of a registered agent "does not by itself create the basis for personal jurisdiction over the represented entity." Therefore, the court held that Mississippi law does not have a consent-by-registration doctrine like Pennsylvania.

And finally, in arguing there was specific jurisdiction over the corporate defendants, Plaintiff relied upon the recent Supreme Court case of *Ford Motor Co. v. Montana Eighth Judicial District Court*, 592 U.S. 351 (2021), a products liability case in which the Supreme Court found that car crash plaintiffs' claims arose from or related to the forum state because "Ford had systematically served a market in [the forum states] for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States." However, the Fifth Circuit found that this Supreme Court case was fundamentally different than the aircraft case at issue because, here, the non-Mississippi corporate defendants' various connections to the state could only tangentially be connected to the case and, importantly, Plaintiff was not injured in Mississippi, the forum state: "Yes, the corporate defendants serve the forum, but all their relevant alleged conduct occurred in other states, [Plaintiff's] injury occurred in Texas, and the only connections to Mississippi related to this litigation are [Plaintiff's] residency and the aircraft's hangering there."

Accordingly, this case offers three takeaways for future jurisdictional issues: (1) application of Rule 9(b)'s heightened pleading standard, instead of the lesser 12(b)(6) standard generally applied, may be used in the Fifth Circuit assess whether a plaintiff has stated a fraud claim for purposes of a fraudulent joinder analysis (2) *Mallory v. Norfolk Southern Railway Co.*, 600 U.S. 122 (2023) cannot be extended such that it would effectively rendered all corporations that register to do business in a state subject to the general jurisdiction of courts within that state, although practitioners should note that the specific language of the state's registration law will be key to this analysis; and (3) *Ford Motor Co. v. Montana Eighth Judicial District Court*, 592 U.S. 351 (2021) cannot be read to allow out-of-state defendants' general forum contacts to provide a basis for the exercise of specific jurisdiction.

Johnson v. Ferrellgas, Incorporated, 96 F.4th 852 (5th Cir. 2024)

Plaintiff claims that he was injured when he used a propane gas tank manufactured and distributed by Defendant, Ferrellgas. The tank was placed in circulation in 1999 and subsequently requalified in 2017. In February 2019, Ferrellgas refilled and inspected the tank. At that time, Ferrellgas placed a blue cap on the tank's valve and shipped it to Lowe's, where it sat in an outdoor display until Plaintiff purchased it approximately five months later on July 24, 2019. Two days later, Plaintiff attempted to connect the tank to his Char-Broil grill and pushed the igniter, but nothing happened. After he hit the ignitor a second time, a flash fire occurred, causing him first and second-degree burns.

Plaintiff filed suit against Ferrellgas alleging strict products liability and negligence, arguing that the face seal contained a manufacturing defect such that the "bad" face seal leaked propane gas. The jury found Ferrellgas liable for a manufacturing defect and negligence. On appeal, applying Texas law, the Fifth Circuit reversed and remanded. By a divided vote, the Fifth Circuit held that there was no substantial evidence that this purported defect existed when the tank left Ferrellgas because no expert or witness could identify when this purported defect arose. Specifically, the court reasoned that Plaintiff's expert was unable to testify that a defect existed when the tank left Ferrellgas and instead offered "merely speculative" opinions when he opined that the face seal "probably dried out," "degraded," or "shrunk" at some point and conceded on cross that the seal could have degraded after the tank left Ferrellgas.

Plaintiff additionally relied the sealed container doctrine (when it is shown that the product involved comes in a sealed container, it is inferable that the product reached the consumer without substantial change in the condition in which it was sold) to make up for this lack of evidence, but the Fifth Cirucit found that the blue cap over the face seal valve is not a seal. Instead, it is "placed over" the valve on the tank containing the seal, and the cap has indentations that allow contaminants to enter.

Conversely, the dissent stated that it was reasonable to infer that the tank was defective when it left Ferrellgas, and that Texas law does not require plaintiffs to definitely establish the moment a defect arose or exclude all other possible causes of a defect. The dissent explained that plaintiffs are permitted to rely upon circumstantial evidence that the product was defective at the time of the sale, and it is sufficient for plaintiffs to provide reasonable grounds for finding that the defect did not occur after the product left the manufacturer's control. Additionally, the dissent criticized the majority for finding the sealed container doctrine did not apply because there was no testimony of any contaminants entering the blue cap and degrading the face seal.

Based on the foregoing, in future manufacturing defect cases, attorneys should seek to get a comparable concession from the plaintiff's expert at his deposition or at trial with the holding of this case in mind.

Oglesby v. Medtronic, Inc., No. 23-50274, 2024 WL 1283341 (5th Cir. Mar. 26, 2024)

Plaintiff asserted manufacturing defect, negligence, and failure-to-warn claims after a medical device implanted in her body disintegrated. Defendants each filed a motion for summary

judgment, which the district court granted upon concluding that (1) the plaintiff's manufacturing defect and negligence claims failed because she did not identify a specific defect in the medical device and (2) her failure-to-warn claim failed because she could not show that her doctor would have read the warning even if an adequate warning was provided.

On appeal, the Fifth Circuit, applying Texas law, emphasized that, although a manufacturing defect may be established exclusively through circumstantial evidence, product failure alone is not enough to prevail on a manufacturing defect claim. Instead, the plaintiff must attempt to identify any specific way in which the product deviated from its design. Failure to do so means that the manufacturing defect claim cannot succeed. As to the negligence claim, the court reasoned that a manufacturer cannot logically be held liable for failing to exercise ordinary care when producing a product that is not defective, and that the plaintiff's reliance on *res ipsa loquitor* does not relieve her of her burden to allege a specific defect. Finally, regarding the failure to warn claim, the plaintiff's doctor testified that he could not recall reading a product manual or any other Medtronic resources about the medical device at issue; that he "probably" did not read the product's instructions for use when preparing for the plaintiff's surgery or when he first learned about the medical device, and that he "maybe" had not ever read the instructions for use. Accordingly, the court explained that the plaintiff cannot show that an adequate warning would have prevented her physician from using the product.

Accordingly, this case is a good reminder that a product's failure, by itself, is not sufficient to show a manufacturing defect. The plaintiff must identify the specific defect, and an allegation of *res ipsa loquitor* does not defeat this basic requirement.

Hickey v. Hospira, Inc., 102 F.4th 748, 750 (5th Cir. 2024)

This suit stems from the wider multidistrict litigation over the breast cancer drug docetaxel (branded Taxotere). Specifically at issue here were the allegations of cancer patients against the generic drug manufacturers alleging that their failure to warn that the docetaxel they took as part of their chemotherapy regimen could cause permanent chemotherapy-induced alopecia (PCIA) violated state law. In response, the generic manufacturers moved for summary judgment arguing that federal law preempts the plaintiffs' state law failure-to-warn claims.

A little background on the relevant statutory background may be helpful here. Before selling drugs in the United States, manufacturers of brand name drugs (here, Taxotere) must obtain FDA approval, which typically requires significant cost and testing. The first drug of a specific kind is called the Reference List Drug, and, thereafter, manufacturers who want to prepare a similar, generic version may use an abbreviated pathway to obtain FDA approval with less burden and expense. The path at issue here is laid out in § 505(b)(2) of the Food, Drug, and Cosmetics Act ("FDCA"). § 505(b)(2) allows generic drug manufacturers to rely on the Reference List Drug's safety and efficacy data for a new product if it differs only slightly from the Reference List Drug. Drugs that receive abbreviated FDA approval do not need to use the exact label language as the Reference List Drug, though the FDA must still approve the label text. Generally, drug labels may be changed only after a manufacturer files and the FDA approves a supplemental application. However, one regulation—known as the changes-being-effected (CBE) regulation—allows

manufacturers to update their label at the same time they file their supplemental application for a label change. Specifically, the CBE regulation permits a manufacturer "to add or strengthen a . . . warning where there is 'newly acquired information' about the 'evidence of a casual association' between the drug and a risk of harm." "Newly acquired information" is information that "reveal[s] risks of a different type or greater severity or frequency than previously included in submissions to FDA."

Here, the generic manufacturers had previously sought and received approval under § 505(b)(2) to sell docetaxel, relying on the FDA's findings of safety and effectiveness from the Reference List Drug. The drug labels warned about alopecia as a side effect but did not state that the hair loss could be permanent. In 2015, after concerns were raised about whether docetaxel caused PCIA, the FDA instructed the Reference List Drug manufacturer to update its label to state that cases of permanent alopecia had been reported (although without an affirmative statement regarding causation). The generic manufacturers made similar changes via the CBE regulation. The FDA subsequently approved the updates, noting that the "simple statement that permanent cases have been reported is all that can reliably be said given the tremendous limitations of the data."

Based on the foregoing, the generic drug manufacturers moved for summary judgment on the basis of impossibility preemption, arguing that it would have been impossible to comply with their alleged state law duties (i.e., warning about a causal relationship) because they did not have "newly acquired information" as required to unilaterally update their labels via the CBE regulation. The district court rejected this argument, denied the motion for summary judgment, and the generic drug manufacturers subsequently filed an interlocutory appeal.

On appeal, the Fifth Circuit agreed with the generic drug manufacturers. The Fifth Circuit clarified that the issue of whether the CBE regulation is even available is a threshold issue. To meet the requirements of "newly acquired information" under the CBE regulation, the data must at least "reveal risks of a different type or greater severity or frequency" than the risks described in the pre-approval scientific literature available to the defendant-manufacturers. The Fifth Circuit emphasized that to constitute "newly acquired information," the post-approval literature must reveal more than simply instances of docetaxel-induced PCIA. Thus, if the generic manufacturers did not have newly acquired information showing PCIA occurred with greater severity or frequency than before, they were not liable to plaintiffs for failing to update their labels via a CBE regulation that was legally unavailable to them.

The Fifth Circuit, in reliance upon the analysis it had just laid out and the record before the court, reviewed the pre-approval and post-approval scientific literature to see if anything revealed met the definition of "newly acquired information." The Court ultimately found that there was the potential that one study constituted "newly acquired information" such that this specific issue was remanded to the district court for further review, but none of the remaining post-approval scientific literature revealed a significantly greater risk of PCIA than the pre-approval scientific literature. Therefore, the generic manufacturers were not liable to plaintiffs for failing to update their labels via a CBE regulation that was legally unavailable to them.

Accordingly, this case provides guidance on impossibility preemption as the Fifth Circuit joins the First, Second, Fourth and Seventh Circuits, which have all held, or at least strongly suggested, that there are two separate steps in the preemption inquiry. Additionally, this case offers clarity on what is considered "newly acquired information" under the CBE regulation.

Palmquist v. Hain Celestial Group, Inc., 103 F.4th 294 (5th Cir. 2024)

Plaintiffs sued Hain Celestial Group, Inc., a baby-food manufacturer, and Whole Foods Market, Inc., a grocery store, in Texas state court alleging that their minor son suffered from several physical and mental disorders due to heavy metal toxicity from the baby food he consumed. Plaintiffs alleged strict-liability and negligence claims against Hain and breach-of-warranties and negligence claims against Whole Foods. Hain removed the case to federal court, contending that Whole Foods, a multinational supermarket chain headquartered in Austin, Texas, was improperly joined to defeat diversity jurisdiction. Plaintiffs amended their pleading to "clarify" and "amplify" claims against Whole Foods under the federal pleading standard and based their remand motion on the details in this second pleading. The district court denied Plaintiffs' motion to remand and dismissed Whole Foods from the case, finding that jurisdiction was resolved by looking at the complaint at the time the notice of removal was filed, and, even under the purportedly new claims, "retail sellers such as Whole Foods are not liable for the harm caused by the products they sell." Plaintiffs' claims against Hain continued in federal court. At the conclusion of trial on the merits, the district court granted Hain's motion for judgment as a matter of law, reasoning that it was impossible to prove that heavy meatal toxicity was the cause of the minor's injuries.

On appeal, the Plaintiffs challenged both the denial of their motion to remand and the granting of Hain's JMOL. The Fifth Circuit subsequently reversed the district court and remanded the case to state court. In doing so, the Fifth Circuit detailed several notable holdings.

First, the court found that when a case is removed from state to federal court on improper joinder grounds, the removed plaintiff can file an amended complaint that clarifies its allegations against the non-diverse defendant in order to conform the state-court pleading to the newly applicable federal "plausibility" pleading standard. Although the removed plaintiff cannot add new claims to defeat federal jurisdiction, clarification of the factual basis and legally material details of the existing claims is permitted and must be considered when a district court rules on the plaintiff's motion to remand. Thus, Plaintiffs' second pleading in which it just clarified its state court petition allegations was proper.

Second, Texas law allows products liability claims against nonmanufacturing sellers only under limited circumstances, such as when the seller made an express misrepresentation about the product. The Fifth Circuit concluded that "fairly generalized statements" about a product may be "adequate enough to support a claim against a nonmanufacturing seller," especially "where a seller purports to have specialized knowledge." Accordingly, Plaintiffs' generalized statements regarding Whole Foods' express misrepresentation of Hain's baby food were sufficient due to Whole Foods' purported special knowledge about the ingredients in Hain's baby food that is not available to customers. Additionally, the court pointed to the Whole Foods business model, which

depends on its reputation and customers' willingness to a pay a premium for products that Whole Foods advertises as healthy and high quality.

And finally, the Fifth Circuit held that when a district court erroneously denies a motion to remand and the jurisdictional defect is not subsequently cured by voluntary dismissal of the claims against the non-diverse defendant, all of the district court's later actions must be vacated — even a final judgment following a trial on the merits — and the entire case must be remanded to state court due to lack of subject matter jurisdiction.

Accordingly, this case offers several procedural takeaways: (1) in a removed case, jurisdiction is judged based on the claims in the state court pleading as it exists at the time of removal; (2) because the pleading must comply with the federal "plausibility" pleading standard, plaintiffs are permitted to amend the pleading post-removal to conform to federal pleading standards; (3) this amendment can only add allegations or facts that "clarify" or "amplify" a claim that was asserted in state court; and (4) if a district court improperly denies a motion to remand based on lack of diversity jurisdiction and the non-diverse defendant remains through judgment, then the whole case must be remanded to state court, even after a final judgment following a trial on the merits.

With these lessons in mind, when evaluating whether to remove or oppose a motion to remand, consider the likelihood that success in the district court could, nevertheless, result in a jurisdictional reversal on appeal.

First v. Rolling Plains Implement Company, Inc., 108 F.4th 262 (5th Cir. 2024)

Plaintiff asserted fraud and breach of warranty claims against AGCO Corporation, the manufacturer of a combine, and a Rolling Plains, a farm implement seller, who sold a used combine to Plaintiff. Plaintiff alleged that he was misled as to the combine's quality and condition. Specifically, the seller's employee told Plaintiff that the combine was part of the manufacturer's Certified Pre-Owned Program, that it was "vigorously inspected" and "Darned Near Good As New," that the combine had roughly 400 hours on it, and that it had "never been to the field."

The district court dismissed the fraud claims against the manufacturer, and the Fifth Circuit affirmed. The Fifth Circuit held that the statements of the seller's employee could not be imputed to AGCO, the manufacturer and a different company from the seller. The court reasoned that because corporations are distinct legal entities, generally one corporation will not be held responsible for the acts of another. Thus, because the seller and the manufacturer were separate legal entities, the manufacturer could not be held responsible for the acts of the seller.

Additionally, the district court dismissed the breach of warranty claims against the manufacturer. The Fifth Circuit affirmed, reasoning that the seller made the statements about the combine's history and quality, not the manufacturer. Plaintiff failed to provide evidence that the seller had actual or apparent authority to act as the manufacturer's agent.

Accordingly, this case is a good reminder that, in any context, business law and the law of agency is important. Just because an entity is selling a manufacturer's product, that does not make the manufacturer liable for the entity's actions or render the entity an agent of the manufacturer.

Accordingly, not every statement—or misstatement—from the seller can be imputed to the manufacturer.

SIXTH CIRCUIT:

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Certification of Class Actions

Speerly v. Gen. Motors, LLC, 115 F.4th 680 (6th Cir. 2024)

At issue in this case were two purported defects related to the transmissions in GM vehicles that were manufactured between 2015 and 2019. The Plaintiffs alleged that their transmissions caused their vehicles to slip, buck, kick, jerk and harshly engage, as well as exhibit other issues. Plaintiffs filed a class action lawsuit against GM spanning 26 different states including claims of breach of express and implied warranty and violations of consumer protection statutes.

The thrust of this case centered around the validity of the district courts certification of the class, which GM challenged on a host of different grounds. GM first challenged Article III standing. The Sixth Circuit noted that they had not yet concretely decided whether all class members must actually experience an alleged defect in order to establish Article III injury-in-fact for a proposed class. Here, all named Plaintiffs alleged that they had experienced the shudder or shift quality issues. The Plaintiffs produced evidence suggesting that even if defects had not yet manifested in vehicles, they were likely to develop at some point. The Sixth Circuit concluded the allegation of overpayment for a defective product sufficiently provided the Plaintiffs with Article III standing. Further, the appropriate time to address claims of absent class members whose vehicles never manifested any defect is a Rule 56 motion for summary judgment.

The remaining challenges to certification proposed by GM all centered around individualized factual issues or substantive variations in state laws. These challenges included: different manifest defect rules, defect differences, differences in the Plaintiffs' subjective perception regarding alleged issues caused by the defects, different rules regarding opportunity to present, different rules regarding individual reliance and causation, different merchantability rules, different state bars, and individualized differences between current and former owners of the vehicles. The Sixth Circuit noted that the relevant question for these issues is whether the district court conducted "a rigorous analysis" of the claims under Rule 23 and did not abuse its discretion in concluding that common questions of law and fact predominated over individualized issues. The Sixth Circuit reminded that the class certification stage is not to be used as a dress rehearsal for the trial on the merits. The Sixth Circuit concluded that at this point in the proceedings, the district court had not abused its discretion in determining that GM's challenges did not preclude it from certifying the class. The district court sufficiently investigated all of these issues in its decision to certify. Further, in the event that any individualized issues arose in the course of the class action that did come to predominate over the common questions of law and fact, the district court could cull the class later.

The Sixth Circuit also upheld the district court's determination that GM had acted inconsistently with, and therefore waived, its right to arbitrate Plaintiffs' claims. GM's initial motion to dismiss contained jurisdictional claims and a number of arguments on the merits. The

motion to dismiss also sought dispositive rulings from the Court. The district court did not err in viewing GM's myriad filings as inconsistent with its later claim that certifying the class impeded its right to arbitration. The Sixth Circuit affirmed the district court's grant of certification.

In re Nissan N. Am., Inc. Litig., No. 23-5950, 2024 WL 4864339 (6th Cir. Nov. 22, 2024).

In 2016, Nissan began equipping its cars with automatic electronic braking systems. Essentially, if the data suggested a potential collision, the control unit issued a visual and audible warning. If the driver brakes, the system helped him by increasing braking force, and if not, the control unit alerts the driver again and may brake automatically. The control unit brakes harder as the risk of a crash becomes imminent. Drivers could deactivate this system at any time. In 2017, some drivers reported "phantom activations" of the automatic braking system. Engineers deduced that the radar hardware sometimes misread the road ahead. In 2018, Nissan released the "S1" update to both the radar's software and the control unit's software, notifying dealers and owners of the available modification. In 2019, Nissan released an additional "S2" software update. In 2020, individuals from ten states sued Nissan, alleging that it had sold them defective cars because they contained faulty automatic braking systems. They argued that the defects breached their warranties, constituted fraud, violated their states' consumer protection statutes, and unjustly enriched Nissan. The district court certified all ten classes.

In determining whether the district court abused its discretion in certifying the class, the Sixth Circuit first examined the common questions of law or fact. Even assuming that one defect linked all the claims, the district court below had failed to grapple with the software updates that remedied those alleged flaws in some cars. Because of this, the court could not determine whether common evidence established Nissan's knowledge as to the defects or whether, for each state class, a common question of liability existed for all claims. The district court did not consider evidence on these differences because it viewed them as rooted in a level of specificity that was not required in the certification stage. However, assessing the materiality of these differences is critical to analyzing whether these questions will yield common answers, even if that analysis requires specificity in some circumstances. The Sixth Circuit instructed that on remand, the district court must do more than identify whether the Plaintiffs' questions have some common answers. It is only "central" issues that matter. The only way to determine whether an issue is central is to deal with the material elements of each claim. The district court must examine each cause of action, identify the relevant elements, and evaluate how the common answer at hand helps to resolve at least one of them. It must repeat this analysis for all ten classes. It does not suffice simply to allege a common "defect" in the car. Courts must consider the merits to the extent relevant to determining whether the Rule 23 prerequisites are met.

The issue of predominance was tainted by the above analysis as well. The final issue the court disposed of involved expert witnesses under *Daubert*. The court adopted the majority rule, holding that if challenged expert testimony is material to a class certification motion, the district court must demonstrate the expert's credibility under *Daubert*. The court vacated the lower court's ruling and remanded.

Motions for Summary Judgement

Rogers v. Restore Contracting, Inc., 721 F. Supp. 3d 630 (S.D. Ohio 2024)

Plaintiffs and Defendant Restore Contracting, Inc., entered into a contract for Restore to provide roof replacement to Plaintiffs' house. Restore used shingles manufactured by Defendant GAF. Soon after completion of the roofing project, shingles began to fall off the roof of Plaintiffs' home, which were replaced on three occasions. Plaintiff then called a roofing company which inspected the roof and determined that it had been installed in an unworkmanlike manner due to many construction flaws. Plaintiffs asserted claims against all Defendants for general negligence, engineering professional negligence, violation of the Ohio Consumer Sales Practices Act, state-law products liability, and breach of implied warranties under the Uniform Commercial Code.

The court first considered Plaintiffs' motion for summary judgment. Regarding the claim for general negligence, Plaintiffs were not entitled to summary judgment. Plaintiffs did not identify the source of any non-contractual duty to perform in a workmanlike manner, so there was no liability for negligence. Regarding their product liability claim, Plaintiffs were not entitled to judgment because (1) Restore was neither a manufacturer nor a supplier with respect to the GAF shingles, and (2) the roofing system as a whole was a fixture and not a product. The court next held that Plaintiffs were not entitled to summary judgment on their UCC claim. Plaintiffs offered no evidence that the shingles were defective. While their evidence identified a myriad of problems with their installation, this did not suggest that the shingles themselves were defective. Plaintiffs also did not obtain summary judgment on their Consumer Sales Practices claim. Plaintiffs had merely recited statutory language, and made no effort to identify what practices or representations by Restore were unfair, deceptive, or unconscionable under the statute. Further, Plaintiffs did not identify any defect in any of the roofing materials or any misrepresentations as to the roofing materials' performance characteristics, benefits, or quality.

The Court then considered GAF's motion for summary judgement. Plaintiffs had attempted to request additional time to depose a witness before this ruling. However, Plaintiffs were aware that this witness had knowledge relevant to their claims before the litigation was even commenced. Further, it was not clear that the desired discovery would affect the Court's decision on GAF's Motion for Summary Judgment and the discovery period had lasted 10 months. Plaintiffs waited until more than seven months had elapsed before seeking the witness's deposition. Plaintiffs then failed to follow up with Defendants' counsel when they suggested possible dates. Given this, the request for additional time was denied. The court then determined that summary judgment in GAF's favor was warranted. Per the above analysis, Plaintiffs had provided no evidence that the shingles themselves were defective.

In re Onglyza (Saxagliptin) & Kombiglyze (Saxagliptin & Metformin) Prods. Liab. Litig., 93 F.4th 339 (6th Cir. 2024)

Defendants manufactured and sold FDA-approved type 2 diabetes drugs containing saxagliptin, a dipeptidyl-peptidase-4 (DPP-4) inhibitor. In 2008, the FDA recommended more clinical studies evaluating the link between diabetes drugs and cardiovascular risk. The resulting study observed a statistically significant 27% increase in hospitalization for heart failure rates in

patients administered saxagliptin compared to patients receiving a placebo. However, the study cautioned that the observed association was unexpected and should be considered within the context. The study also noted that the finding merited further investigation, needed to be confirmed in other ongoing studies, and that a class effect should not be presumed. This study sparked this litigation. Plaintiffs sued defendants in federal courts across the country, asserting claims for strict product liability, negligence, failure to warn, breach of warranty of merchantability, and breach of express and implied warranties, all stemming from heart failure allegedly caused by saxagliptin.

Plaintiffs presented a single general causation expert that testified that it was more likely than not that saxagliptin was capable of causing heart failure. The Sixth Circuit ultimately held that the district court did not abuse discretion by excluding this testimony. The expert's reliance on this one study, to the exclusion of all others, was unreliable. The expert even conceded that no clinical study beyond the one above has found a statistically significant association between saxagliptin and heart failure. Instead, four later observational studies, collectively following 175,000 saxagliptin users, found no association. Further, the first study did not even demonstrate a causal link, just a higher incidence of hospitalization among patients treated with saxagliptin. The only other support included was the expert's unqualified analysis of animal studies. In addition, the expert had cherry picked data and applied the Bradford Hill factors inconsistently.

The Sixth Circuit next reviewed the district court's grant of summary judgment in Defendants' favor. Given that all jurisdictions require expert testimony to show general causation in complex medical cases such as this, the exclusion of the expert's testimony warranted the district court's grant of summary judgment. Finally, the district court had also not abused its discretion by denying Plaintiffs leave to identify a new causation expert. While Plaintiffs were diligent in identifying the expert that was excluded, they failed to identify reliable general causation experts despite years of expert discovery. Further, the Sixth Circuit concluded that granting Plaintiffs' request would essentially restart expert discovery, requiring depositions, briefing, hearings, and motions on plaintiffs' new expert. In the Sixth Circuit's view, this would all seriously prejudice Defendants.

Motions to Dismiss

Stanley v. Nissan N. Am., Inc., 719 F. Supp. 3d 786 (M.D. Tenn. 2024)

Buyers of a pick-up truck brought a putative class action against an engine manufacturer and automobile manufacturer, alleging that the trucks' engines had defective fuel injection pumps, and asserting claims for fraud by omission, breach of implied warranty of merchantability, unjust enrichment, and violations of consumer protection statutes. Nissan, the automobile manufacturer, filed a motion to dismiss for failure to state a claim, and Cummins, the engine manufacturer, filed a motion to dismiss for lack of personal jurisdiction and failure to state a claim.

Nissan moved to dismiss the case on numerous grounds. Nissan first asserted that the allegations failed to establish that it had knowledge of the allegedly defective pump prior to Plaintiffs' purchases. Plaintiffs' evidence of recalls and consumer complaints occurring prior to the named Plaintiffs purchasing their vehicles was unpersuasive to this end. However, Plaintiffs argued that this was just a sample of scores of similar complaints that Nissan would be aware of.

They also alleged that Nissan would be aware of industry publications and investigations that demonstrated the inherent alleged flaw in Nissan's design. Considering these allegations as true, dismissal on this front was inappropriate. Nissan next argued that the economic loss rule that applied in several of the states at issue prohibited fraudulent omission claims against a manufacturer for damage to the product or losses from the inability to use the product. The court found that the claims arising from Florida were barred by this rule. The same result occurred for the Plaintiffs in Texas, though their statutory claim was allowed to continue as the parties had not briefed whether the rule would apply to that as well. Under Maryland law, the Plaintiffs were allowed to proceed because an exception to the rule applied there.

Nissan next attempted dismissal of the implied warranty of merchantability claims on several grounds including failing to allege facts showing that their vehicles were truly unmerchantable, lack of privity, statutes of limitations, and the expiration of express warranties. Defendants failed as to the first ground, as it had been alleged that the vehicles were defective at the time of purchase and could unexpectedly stall at any time due to a fuel pump failure, resulting in extensive and expensive repairs. For the second ground, a Plaintiff under Florida law was dismissed for lack of privity, as privity is required for implied warranties under Florida law. As to the statutes of limitation, the plaintiffs had adequately alleged that fraudulent concealment applied to toll the statute of limitations. Finally, regarding the expiration of express warranties, the court held that the expiration of an express warranty does not necessarily bar implied warranty claims, and the Plaintiffs here had alleged that the defective pump begins to harm the fuel system from its first use. Nissan also attempted dismissal of the unjust enrichment claims, which failed, as Plaintiffs had alleged that Nissan benefitted from selling and leasing the Class Vehicles for more than they were worth as a result of the concealed defects, that the Plaintiffs overpaid and had incurred other expenses, and that some Plaintiffs incurred economic injury for repair costs at Nissan dealerships. However, one Plaintiff's unjust enrichment claim was dismissed, as the Plaintiff had bought the car used, and therefore, hadn't conferred a benefit to Nissan.

The court then turned to Cummins' motion to dismiss. Cummins focused its personal jurisdiction challenge on whether the Plaintiffs' claims "arise out of or relate to" Cummins' contacts with Tennessee. While the Plaintiffs did not purchase their vehicles, experience mechanical problems, seek repairs, or suffer injury in Tennessee, their claims against Cummins still arose from and were related to Cummins' relationship with Nissan in Tennessee. Nissan's presence in the state anchored Cummins' activities and the Plaintiffs' claims to Tennessee. Cummins also allegedly supplied Nissan engines that it knew or should have known were defective, with knowledge that the defective fuel pumps would be marketed and sold nationwide. Following this, Cummins next asserted that the fraudulent omission claims should be dismissed. The court held that the complaint did not adequately allege that Cummins engaged in fraudulent omissions, because it does not plausibly allege contact between Cummins and the Plaintiffs. Finally, Cummins was also awarded dismissal of the same implied warranty of merchantability claim that Nissan got dismissed for lack of privity.

Fox v. Kia Am., Inc., 726 F. Supp. 3d 765 (N.D. Ohio 2024)

Plaintiff in this case was injured when her vehicle was hit by a driver of a stolen Kia who was attempting to flee from police. Plaintiff brought a defective design and manufacture action against Kia arising from Kia's failure to install certain anti-theft devices. Kia moved for judicial notice and to dismiss. The National Highway Traffic Safety Administration had promulgated a safety standard requiring minimum theft-protection for nearly all passenger vehicles in the United States. This was to reduce the incident of crashes resulting from theft and accidental rollaway of motor vehicles. Specifically, it required that each vehicle must have a starting system which, whenever the key is removed, prevents normal activation of the vehicle's engine and steering, or forward self-mobility, of the vehicle.

Kia first requests judicial notice regarding a letter from the National Highway Traffic Safety Administration indicating that they had not yet determined that this issue constitutes either a safety defect or noncompliance requiring a recall under the National Traffic and Motor Vehicle Safety Act, 49 U.S.C. Chapter 301. As the letter was an authentic NHTSA document, the court took judicial notice of the existence of the letter. However, the court did not take judicial notice of the truth of the matters asserted in the letter, as the substance of the letter was subject to reasonable dispute, specifically, the hotly contested issue of causation. The court then considered Kia's motion to dismiss. After considering the relevant authority, the court held that Plaintiff's defective design claim was subject to dismissal because, as a matter of law, the theft and subsequent reckless operation of the Kia Sportage involved in Plaintiff's accident constituted an intervening, superseding cause that breaks the chain of causation with respect to Defendant Kia. Dismissal was also appropriate regarding factual causation as Plaintiff had waived any opposition to the issue by failing to respond to Kia's arguments regarding it.

Harrison v. Gen. Motors, LLC, 712 F. Supp. 3d 949 (E.D. Mich. 2024)

Plaintiffs claimed that the valve-train systems in their General Motors vehicles were defective. Plaintiffs claimed that they heard chirping, squeaking, or ticking coming from the engine, and that they experienced issues with their engine stalling, surging, or losing power while driving. Plaintiffs sued GM for fraudulent omission or concealment, unjust enrichment, breach of express and implied warranties, violations of the Magnuson-Moss Warranty Act, and violations of consumer-protection statutes across many states. GM filed a motion to dismiss.

First, GM asserted that a Plaintiff's implied warranty claim was subject to dismissal because he failed to allege privity. The Plaintiff had alleged that GM acted through authorized GM dealerships by directing consumers to take their vehicles to authorized dealerships for repairs or services and controlled the way in which its authorized dealers could respond to complaints and conduct repairs. At this stage, this was sufficient to plausibly allege that the authorized dealership where this Plaintiff purchased his vehicle was an agent of GM, especially since privity is a fact-intensive inquiry. This Plaintiff had also plausibly alleged that he fell under an exception to the requirement to allege privity because he was an intended third-party beneficiary of the implied warranties that GM made to its dealerships.

GM next argued that a different Plaintiff's fraudulent concealment claim was preempted because the Louisiana Product Liability Act and redhibition statutes were the exclusive theories of recovery for defective products. The court observed that Louisiana courts distinguish damages in tort, which fall within the exclusivity provisions of the LPLA, from damages in contract, which do not. Yet, the carve-out for contract claims is narrow. When plaintiffs do not allege a contract with the manufacturer, they cannot get around LPLA's exclusivity. The Plaintiff here did not allege that they had a contract with GM, so their fraud claim could not be based in contract, and was therefore preempted by the LPLA and dismissed. GM also argued that this Plaintiff could not assert any claim under the LPLA. The court stated that plaintiffs can bring claims under both the LPLA and redhibition, but the portion of damages that fall under redhibition are not compensable under the LPLA. Louisiana's redhibition laws provide that sellers must reimburse buyers for any damage to the purchased product that arises from a defect in the product. Here, the Plaintiff did not allege that the danger of the defect caused them physical harm. They were only seeking compensation for harm caused by the cost of attempted repairs, the continued defect with their vehicle after unsuccessful repairs, and lost confidence in the safety of their vehicle. Because their claims were economic in nature and pertain only to damages to the product itself, they had not plausibly alleged claims that exceeded the scope of a redhibition theory.

The final dispute centered around the Virginia Consumer Protection Act. The parties only disputed the first requirement, fraud. The court had already held that the Plaintiffs adequately pled GM's superior knowledge of the defect. The parties only disagreed on whether this was sufficient under Virginia law to give rise to a duty to disclose. The court held that a defendant could have a duty to disclose even when it is not a party to the sale contract. Since Plaintiffs had alleged that the Defendants' authorized dealerships act as their agents during sales transactions, such that the failure to provide pertinent information could expose the Defendants to liability, the Plaintiffs had sufficiently alleged their claim under the act.

SEVENTH CIRCUIT:

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Standing: Voluntary Recalls and Refund Programs Could Negate Injury in Fact

In re: Recalled Abbott Infant Formula Products Liability Litigation, 97 F.4th 525 (7th Cir. 2024)

In a significant decision involving Abbott Laboratories ("Abbott"), the producer of infant formula, the Seventh Circuit upheld the dismissal of economic harm claims brought by purchasers of Abbott products. The plaintiffs alleged that Abbott's Sturgis, Michigan, plant had a history of quality control issues and argued they suffered economic losses due to a risk of contamination in infant formula produced at the facility. The claims stemmed from a U.S. Food and Drug Administration (FDA) investigation and consumer warning issued in February 2022, advising against the use of certain formula batches produced at the plant. In response, Abbott initiated a voluntary recall and offered full refunds. Despite these measures, a putative class of plaintiffs sought recovery for economic harm under two theories: deprivation of the "benefit of the bargain" and overpayment of a "premium price."

The district court analyzed whether the economic harm plaintiffs suffered an "injury in fact," a prerequisite for standing. While acknowledging that economic harm can constitute a concrete injury, the court concluded the plaintiffs' alleged injury was hypothetical and not particularized. Specifically, the court noted the plaintiffs received what they bargained for—safe and nutritious infant formula—at the time of purchase, as there was no known risk of contamination at that point. Abbott's voluntary refund rendered the injury speculative, as plaintiffs were reimbursed for any formula they chose not to use.

The Seventh Circuit affirmed the district court's decision and held that the purchasers "received the benefit of their bargain" and suffered no tangible economic loss. Without allegations that the formula they purchased was defective or that its value was diminished, the plaintiffs' claims failed to establish a concrete injury.

This decision underscores the importance of challenging plaintiffs' standing by highlighting the lack of concrete and particularized harm in economic loss claims. It also

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demonstrates how voluntary recalls and refund programs can mitigate alleged damages and support arguments that plaintiffs were made whole.

Expert's Unreliable Methodology Leads to Summary Judgment

In re Paraquat Products Liability Litigation, Case No. 3:21-md-3004-NJR, 2024 WL 1659687 (S.D. Ill. April 17, 2024), *appeal filed in Keith Fuller v. Syngenta Crop Protection, LLC*, No. 24-1868 (7th Cir. May 17, 2024)

The Southern District of Illinois's decision in *In re Paraquat Products Liability Litigation* highlights the judiciary's increasing scrutiny of expert testimony under Federal Rule of Evidence 702 and the *Daubert* framework. The multidistrict litigation involved over 5,000 plaintiffs alleging that exposure to the herbicide "paraquat" caused Parkinson's disease. The plaintiffs relied on a single expert, Dr. Martin Wells, to establish a causal link between paraquat exposure and the disease. Chief U.S. District Judge Nancy Rosenstengel excluded Dr. Wells's testimony, citing serious methodological flaws, and subsequently granted summary judgment in favor of the defendants in four bellwether cases.

Dr. Wells performed a meta-analysis on seven (7) of thirty-six (36) epidemiological studies he initially reviewed. The court found that his selection criteria lacked objectivity, transparency, and scientific rigor. He described his methodology as "holistic," but the court determined that his approach excluded a significant amount of relevant information without predefined rules, introducing a high potential for bias. The court further noted that Dr. Wells's justification of his study selection during deposition amounted to a "post hoc methodology," which contradicted the principles of systematic review and failed to meet the standards required by Rule 702. The court emphasized that while meta-analysis is an accepted scientific tool, its reliability depends on adhering to established standards, which Dr. Wells failed to do.

Additionally, the court highlighted the lack of broader scientific support for Dr. Wells's conclusions. Plaintiffs could identify only one peer-reviewed article suggesting a causal relationship between paraquat exposure and Parkinson's disease. The court emphasized that such isolation from the broader scientific community raised significant reliability concerns, consistent with evidentiary standards in the Seventh Circuit and other jurisdictions. Because Dr. Wells's testimony was the sole evidence of causation, its exclusion left the plaintiffs without a viable case, leading to summary judgment for the defendants.

For defense counsel, this case serves as a cautionary tale of the critical importance of challenging expert testimony early in the litigation process. Targeting flaws in the methodology, transparency, and scientific consensus supporting an expert's conclusions can significantly weaken an opposing parties' case. This ruling also signals a trend toward increasingly rigorous expert vetting for manufacturers defending against claims in multidistrict and complex product liability litigation.

Expert Testimony: Wisconsin

Faxel v. Wilderness Hotel & Resort Inc., 113 F.4th 711 (7th Cir. 2024)

The Seventh Circuit's decision in *Faxel v. Wilderness Hotel & Resort Inc.* illustrates the importance of expert testimony cases involving technical or industry-specific standards. Meghan Faxel sustained a shoulder injury when her inflatable tube flipped over on the "Black Hole" water slide at the Wilderness Hotel in Wisconsin Dells. She and her husband, Mike Faxel, sued Wilderness for negligence, premises liability, and loss of consortium. Wilderness filed a cross-claim against ProSlide Technology, Inc., the slides manufacturer, seeking contribution if found liable. The case was initially filed in the Northern District of Illinois, which transferred it to the Western District of Wisconsin for lack of personal jurisdiction. The parties consented to proceed before the magistrate judge. The plaintiffs missed the court-ordered deadline to disclose an expert witness and were denied an extension to cure the oversight. Without expert testimony to establish the standard of care for water park operators, the Western District of Wisconsin granted summary judgment in favor of Wilderness.

The United States Court of Appeals for the Seventh Circuit reviewed the case and affirmed the magistrate judge's decision. The Seventh Circuit held that the safety protocols, inspection, and maintenance standards required of water park operators are matters beyond the understanding of an average juror and require expert testimony to prove. Wilderness's routine safety inspections, daily water slide testing, and reliance on manufacturer recommendations were deemed reasonable on their face. The court rejected the argument that prior incidents, such as a March 2016 "dry spot" issue, demonstrated negligence, finding no evidence that Wilderness failed to take appropriate corrective action based on industry standards. The absence of expert evidence left jurors unable to determine whether Wilderness breached its duty of care.

This decision emphasizes courts' strict adherence to procedural deadlines, particularly in disclosing expert witnesses. Additionally, it reinforces the value of presenting evidence of reasonable, industry-standard safety practices, as courts will not permit jurors to speculate in the absence of expert analysis. Defense attorneys should carefully document clients' adherence to recognized protocols, emphasizing these efforts to counter allegations of negligence effectively.

Proximate Cause with Teeth

Hillman ex. Rel. P.J.H. v. Toro Company, No. 4:21-cv-04081, 2024 WL 4353032 at *6-7 (C.D. Ill. Sept. 30, 2024)

The Central District of Illinois granted summary judgment in favor of Toro, the manufacturer of a residential riding lawnmower, in a case arising from an accident that caused severe injuries to one of the plaintiffs. The plaintiffs alleged strict product liability and negligence, claiming that the mower was defectively designed and lacked adequate warnings. Central to their claims were allegations that the mower should have included an independent braking system, a separate interlock system, or a Roll-Over Protection System (ROPS). The court excluded the testimony of all three of the plaintiffs' experts under a rigorous *Daubert* analysis, finding their methodologies unreliable and their conclusions speculative.

On the defective design claims, the court determined that the plaintiffs failed to establish proximate cause because the excluded expert testimony left them without evidence that any alleged defect caused the accident. One expert's opinion, asserting that a braking system or ROPS would have prevented the accident, was excluded because it relied on untested and speculative methodologies, such as equating lawnmower impacts to automobile airbag deployment speeds. Another expert's claim that the mower was defective and unreasonably dangerous was dismissed as an impermissible legal conclusion unsupported by testing or industry standards. The court further noted that the plaintiffs failed to show that any specific anti-rollover device could have prevented the accident, particularly since the incident involved a forward rollover rather than the lateral rollovers typically mitigated by ROPS.

Regarding the failure-to-warn claims, the court found that the plaintiffs could not demonstrate proximate cause without evidence that an alternative warning would have changed their behavior. The plaintiffs argued that Toro failed to warn about the disengagement of brakes when the mower's bypass pins were activated, among other risks. However, the court determined that the existing manual adequately addressed these issues and that the plaintiffs failed to follow those instructions. Furthermore, the plaintiffs' evidence of prior accidents involving Toro mowers was excluded as not involving "substantially similar circumstances," leaving the plaintiffs unable to establish foreseeability or causation.

This decision emphasizes the importance of challenging expert testimony under Rule 702 and the *Daubert* framework and thoroughly documenting compliance with industry standards and effective product warnings. Defense counsel should focus on demonstrating that plaintiffs failed to follow existing safety instructions and that alleged alternative designs or warnings would not have altered the outcome.

One to Watch: Tesla "Phantom Braking" Class Action

Santiago v. Tesla, Inc., --- F. Supp. 3d ---, 2024 WL 4871350 (N.D. Ill. Nov. 22, 2024)

The Northern District of Illinois allowed a proposed class action against Tesla Inc. to proceed on claims that the company concealed a "phantom braking" defect in its vehicles, while dismissing other parts of the case. Plaintiff Joshua Santiago, who owns a 2020 Tesla Model 3, alleged that Tesla's forward collision monitoring system would falsely detect obstacles, triggering sudden braking and loud warnings without real collision risks. Santiago claimed Tesla failed to disclose this defect despite knowing about it through consumer complaints and whistleblower reports. While the court dismissed Santiago's claims for breach of implied warranty due to lack of pre-suit notice and certain aspects of his claims under the Illinois Consumer Fraud and Deceptive Practices Act (ICFA), it held that the omission-based ICFA claim could proceed.

Tesla argued that it had no prior knowledge of the defect before one plaintiff purchased his car in 2021 and denied actively misleading consumers. However, the court found the plaintiffs' allegations sufficiently plausible to survive dismissal. Judge Alexakis highlighted evidence from a whistleblower report and National Highway Traffic Safety Administration (NHTSA) complaints, which suggested Tesla was aware of the defect years before the vehicles were sold. The court ruled

that Tesla's failure to warn about the defect on its website could have materially influenced consumer decisions.

The court rejected claims under the ICFA's "unfair practices" prong, concluding that Santiago's allegations about inflated insurance premiums tied to the defect lacked sufficient detail. Plaintiffs were granted an opportunity to amend their complaint to revive those claims.

The lawsuit, which seeks class-action status, could have significant implications for Tesla and car manufacturers if more buyers come forward with similar allegations. This case marks an early legal test for advanced driver assistance systems (ADAS) and will likely serve as a framework for future product liability and class action litigation involving this emerging technology.

EIGHTH CIRCUIT:

Tom Wyatt,[6] Quattlebaum, Grooms & Tull PLLC, 111 Center Street, Suite 1900, Little Rock, AR 72201

Norfolk & Dedham Mutual Fire Insurance Co. v. Rogers Manufacturing Corp., 122 F.4th 312 (8th Cir. 2024)

Norfolk & Dedham ("Norfolk"), as subrogee to ten poultry farms in Arkansas, filed suit against Rogers Manufacturing ("Rogers") after its insured farms suffered roof collapses in a snowstorm. Norfolk alleged that Rogers defectively designed the roof trusses installed to the farms' roofs because the trusses did not support a dead-load weight of twenty-three pounds per square foot, as required by the farms' approval to become an integrated farm for poultry products for Tyson Foods. Rogers designed and sold the trusses in the mid-1990s. Rogers moved to dismiss the complaint under Arkansas' five-year statute of repose. The district court granted the motion, but the Eighth Circuit reversed.

The Eighth Circuit's opinion analyzed prior federal decisions about Arkansas' statute of repose and its application to product manufacturers. The court noted that the broad language of the statute apparently applied to virtually everyone involved in a construction project, but the statute apparently did not apply to manufacturers of mass-produced, fungible goods, particularly when the manufacturer was not involved in the installation of the product or the design of the improvement to which the product was installed.

The district court highlighted Norfolk's allegation that Rogers had designed the roof trusses and concluded that Rogers had participated in activities protected by the statute of repose. The Eighth Circuit disagreed, holding that a mere allegation that Rogers had designed the roof trusses did not mean that the designs were custom, and Norfolk had plausibly pleaded an alternative claim for relief that the trusses could have been designed and stocked as standardized goods without a particular customer in mind. The reasonable inference that Rogers' trusses were mass-produced, fungible goods prevented the complaint's dismissal at pleading, but the Eighth Circuit emphasized that its opinion did not foreclose summary judgment in the same case that the statute of repose barred Norfolk's claim if discovery revealed that Rogers' trusses were not standardized goods.

Davis v. Simon Contractors, Inc., 117 F.4th 994 (8th Cir. 2024)

Plaintiffs Ryan Davis and Anthony Crane ordered wet ready-mix concrete from Simon Contractors for a garage project. Davis and Crane suffered chemical burns from prolonged contact with the wet concrete and filed a lawsuit against Simon Contractors for negligence because Simon Contractors' warnings were inadequate. Davis and Crane had prior experience using a product called "thinset" to install floor tiles. Thinset contains the same type of cement as ready-mix

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concrete. Davis and Crane had little experience installing wet concrete or performing a construction project of the garage's size and scope, however. Davis and Crane did not wear the recommended personal protective equipment in the concrete industry for prolonged exposure to wet concrete, such as rubber gloves and boots, to prevent the concrete from sticking to their skin. Simon Contractors provided warnings in its invoices to Davis and Crane that wet concrete was irritating to the skin and eyes, prolonged contact may cause burns, and users should wear rubber boots and gloves. The jury returned a verdict for Simon Contractors, Davis and Crane appealed, and the Eighth Circuit affirmed.

Davis and Crane argued on appeal that the district court erred in instructing the jury on Nebraska's sophisticated-user defense because Davis and Crane did not have prior experience with wet concrete at the scope of their garage project. The Eighth Circuit held that the sophisticated-user instruction was supported by substantial evidence because Davis and Crane had prior experience with thinset, and Simon Contractors' expert testified at trial that it was common industry practice to use personal protective equipment when working with wet concrete to prevent burns.

Davis and Crane contended that the district court erred when it instructed the jury on assumption of the risk because Simon Contractors had not proven that Davis and Crane subjectively knew of the danger of prolonged exposure to wet concrete. The Eighth Circuit held the jury could reasonably find that Davis and Crane had assumed the risk of prolonged exposure because a Simon Contractors delivery driver had notified Davis and Crane when he delivered the wet concrete that Davis and Crane were not wearing proper equipment. The Eighth Circuit also noted that Simon Contractors' expert had testified at trial that Simon Contractors' warning on its invoice discussed the dangers of prolonged exposure to wet concrete, and the warning was like the standard warnings against prolonged exposure that could be found on a bag of tile grout or mortar.

Burke v. Lippert Components, Inc., 112 F.4th 574 (8th Cir. 2024)

David Burke was fatally injured when he fell down retractable steps that were attached to his motorhome. Burke's estate filed products liability claims against Lippert Components, Inc. and its parent company, LCI Industries (collectively, "Lippert"). Lippert did not manufacture the retractable steps installed in Burke's motorhome. Lippert was the successor entity that purchased the brand from the steps' manufacturer. Lippert advised Burke to add the manufacturer to the lawsuit, but Burke took no action until the eve of trial when he moved for leave to amend the complaint. The district court denied the motion and granted summary judgment to Lippert under an Iowa statute that protects an asset purchaser from liability for the transferring corporation's debts and liabilities. The Eighth Circuit affirmed.

Burke argued on appeal that Lippert's reliance on the Iowa statute was an affirmative defense that Lippert did not plead in its answer, so Lippert waived its argument against successor liability. Applying Iowa and federal law, the Eighth Circuit held that Lippert's argument against successor liability was not an affirmative defense because it negated an element of Burke's product-liability claim that the defendant sold or distributed the product. The argument also did not require Lippert to admit the allegations in the complaint while also avoiding liability.

Burke claimed that Lippert had expressly agreed to assume liability as a successor entity in its purchase agreement, but the Eighth Circuit disagreed. The purchase agreement contained an indemnity provision whereby Lippert agreed to indemnify its predecessor for a defined amount of losses arising out of any product-liability claims before the predecessor was obligated to indemnify Lippert. The Eighth Circuit held the provision did not cause Lippert to assume successor liability when the agreement elsewhere specifically excluded the assumption of liability for any product-liability litigations or claims that arose after the purchase agreement's closing date.

Burke contended that Lippert remained liable because it failed to give adequate warnings. The Eighth Circuit agreed with the district court that Burke's failure-to-warn claim required expert testimony, which Burke did not provide, to survive summary judgment. The cause of the steps' failure required technical expertise, and expert testimony was needed to assist the jury in determining whether additional warnings would have reduced or avoided any foreseeable risk of harm based on the customer complaints that Lippert had received about the steps.

Secura Insurance Co. v. Deere & Co., 101 F.4th 983 (8th Cir. 2024)

Secura Insurance Co. ("Secura") sued Deere & Co. ("Deere") when its insureds' tractors caught fire, three weeks after purchase, because the tractors' engine components were shipped with hexagonal holes that allowed for the installation of engine side shields that would cover exposed portions of the engine to prevent fire events. Later models of tractors had the engine side shields installed at Deere's factory. Secura claimed Deere was liable for design and manufacturing defects.

The district court dismissed Secura's design-defect claims at the pleading stage, and the district court later granted summary judgment to Deere on Secura's manufacturing-defect claim. The Eighth Circuit affirmed. The court held that Secura's design-defect claim should have been dismissed because Deere's warranty against defects in material and workmanship did not cover design defects. The manufacturing-defect claim was allowed to proceed to discovery, but the court held that summary judgment was appropriate because a manufacturing defect arises when a product does not match its intended design and Secura presented no evidence that Deere intended for the tractors to have engine side shields.

Wilson v. Harbor Freight Tools USA, Inc., ___ F. Supp. 3d ___, 144 UCC Rep. Serv. 2d 936, 2024 WL 4009634 (N.D. Iowa Aug. 30, 2024)

Kamron Wilson had his finger amputated after it became entangled in an ATV winch sold by Harbor Freight in 2019. Wilson brought claims against Harbor Freight for design defect, failure to warn, breach of express warranty, and breach of the implied warranty of merchantability. Wilson's wife brought claims for infliction of emotional distress and loss of consortium. Wilson and his wife sought punitive damages. The district court granted summary judgment on the claims for express and implied warranty, emotional distress, and punitive damages, but the court denied summary judgment on the claims for design defect, failure to warn, and loss of consortium.

The opinion provided a studied analysis of Iowa's immunity statute that protects sellers from design-defect and implied-warranty claims and Iowa's subsequent case law, after the statute's

enactment, that analyzed the statute's application to negligence cases for which sellers were not immune. The district court concluded that the statute did not apply to Wilson's design-defect claim against Harbor Freight. The claim sounded in negligence because it required Wilson to prove that a person in the chain of distribution failed to exercise reasonable care. The district court rejected Harbor Freight's assumption-of-risk defense, therefore, because the defense is only available in strict-liability cases under Iowa law.

The district court held that Wilson had not submitted sufficient proof that Harbor Freight designed the winch to support a claim for breach of the implied warranty of merchantability. Though Harbor Freight advertised on its website in 2020 that it designed and manufactured the winch, Wilson purchased the winch in 2019, and Wilson offered no evidence either that Harbor Freight provided specifications to the manufacturer or approved designs. Wilson also did not state that he relied on Harbor Freight's brand name to buy the winch.

The district court denied summary judgment on Wilson's failure-to-warn claim because Wilson's expert had opined that Harbor Freight's use of a hazard avoidance symbol instead of a hazard description symbol did not place Wilson on notice that improper use could result in amputation. The expert also opined that Harbor Freight's warning appeared on one side of the winch, the winch could be installed in a way where the warning was not visible, and the owner's manual did not direct the winch to be installed with the warning facing out. The expert also believed the warning's font size and descriptions did not comply with American National Standards Institute's (ANSI) recommendations. The district court granted summary judgment to Harbor Freight on the express-warranty claim, though, because Harbor Freight's representation in the owner's manual that Harbor Freight's products meet high quality and durability standards amounted to puffery, and the warranty was barred by a 90-day limitation, in any event.

The district court held that Wilson's wife could have stated a claim for emotional distress because she witnessed a portion of Wilson's accident, but the district court ultimately concluded that the claim failed because Wilson's wife had not provided proof that her distress was serious. Wilson's wife had not received medical or psychiatric treatment, and she mentioned the accident once on a Facebook post. Wilson's wife stated a claim for loss of consortium because Wilson's design-defect and failure-to-warn claims survived summary judgment. The district court granted summary judgment to Harbor Freight on the plaintiffs' punitive damages claim because the plaintiffs submitted limited evidence that Harbor Freight had prior knowledge of similar defects and injuries with the winch.

Lawton v. Hyundai Motor America, Inc., 734 F. Supp. 3d 904 (W.D. Mo. 2024)

Gabrielle Lawton, an automobile owner, was shot through a window in her house when thieves attempted to steal her vehicle, manufactured by Hyundai Motor America, Inc. ("Hyundai"). Lawton claimed Hyundai owed her a duty to manufacture a car that was not easy to steal and used an ignition immobilizer anti-theft device to prevent thefts. Lawton argued her injuries were the proximate cause of Hyundai's failure to manufacture a safer vehicle against thefts because it was

reasonably foreseeable that victims of automobile thefts would be shot or injured during the criminal act.

The district court granted Hyundai's motion to dismiss. The district court first concluded that Missouri law applied over California law because the lawsuit involved a Missouri resident, who purchased her car in Missouri and who was injured in Missouri. Under Missouri law, Hyundai had no duty to prevent Lawton from suffering injuries during an automobile theft because there was no allegation in her pleading that Lawton and Hyundai held a special relationship or that Hyundai had warranted to Lawton that it would protect her against criminal assault.

The district court also concluded as a matter of law that Lawton failed to establish that Hyundai was the proximate cause of her injuries. The thieves' criminal assault was an intervening proximate cause that foreclosed liability to Hyundai under Missouri law, and Lawton did not plead any facts, either, to support a plausible inference that Hyundai should have foreseen that the thieves would have shot her during the theft.

Harris v. Medtronic, Inc., 729 F. Supp. 3d 869 (D. Minn. 2024)

Terry Harris received an implantable cardioverter defibrillator, or ICD, manufactured by Medtronic, Inc. ("Medtronic"). Harris brought class-action state-law consumer and product-liability claims against Medtronic after Medtronic and the FDA initiated a recall of the ICDs because the ICDs may provide reduced-energy or no-energy high-voltage therapy, potentially resulting in a failure to correct an arrythmia. The FDA informed physicians that they should not replace the ICDs surgically because the risks could be minimized by reprogramming the affected devices externally. Harris did not allege in his pleading that his ICD had manifested the claimed defect. Harris' injury, then, was a claim that his ICD may manifest the defect later, subjecting Harris to surgery or other medical intervention.

The district court dismissed Harris' complaint because he lacked standing. Harris' claimed injury, that the ICD may be defective later, was speculative and conjectural. Harris did not allege that his ICD had manifested the defect and, even if he had, Harris could not establish that the defect would have to be corrected by surgery because the FDA advised physicians to reprogram the ICD without surgery. Harris could not trace any other injuries that he may have suffered to his ICD, either, because his ICD did not have the defect.

The district court also dismissed Harris' complaint because his causes of action were preempted by the Food, Drug, and Cosmetic Act. The district court concluded that five of Harris' seven counts against Medtronic required Harris to prove that the ICDs were unsafe, defective, or not reasonably safe for their intended use, and this proof was no different than establishing that the ICDs were not "safe and effective," a required element of the FDA's PMA process under the Act. The district court dismissed Harris' remaining counts against Medtronic because a manufacturing or design defect claim may survive federal preemption if a plaintiff alleges a specific violation of the device's PMA process, but Harris did not mention the PMA process in his complaint, nor did Harris plead that Medtronic had specifically violated the PMA during the ICD's approval process.

NINTH CIRCUIT:

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The Applicability of Section 230 of the Communications Decency Act

Est. of Bride by and through Bride v. Yolo Techs., Inc., 112 F.4th 1168 (9th Cir. 2024)

The court's opinion not only underscores the significance of Section 230 immunity in defending against liability for user-generated content, but also highlights the limitations of this defense when it comes to the service provider's own conduct and representations. Ultimately, the Ninth Circuit dismissed the products liability claims on the grounds that the claims sought to hold YOLO responsible for user-generated content, which is protected under Section 230.

The primary defense strategy in this case was invoking the immunity provided under § 230 of the Communications Decency Act (CDA). The defendant, YOLO, argued that as a provider of an interactive computer service, it was shielded from liability for content created by third parties. The district court initially upheld this defense and dismissed the complaint.

However, upon appeal, the 9th Circuit affirmed this immunity only in part. Specifically, the court held that § 230 barred the plaintiffs' products liability claims but did not protect YOLO from misrepresentation claims. This distinction suggests that while § 230 can be a robust defense against certain types of claims, it may not apply to claims involving the service provider's own representations or promises, such as YOLO's promise to unmask and ban abusive users.

Another critical defense strategy highlighted was the importance of clear and enforceable user agreements and disclaimers. YOLO informed users that it would take action against bullying and harassment, which became a focal point in the misrepresentation claims. Ensuring that such statements are accurate and that the company has mechanisms in place to enforce them can be crucial in defending against similar claims.

In re Soc. Media Adolescent Addiction/Personal Inj. Prods. Liab. Litig., 702 F. Supp. 3d 809, 829 (N.D. Cal. 2023)

Defendants must directly address specific allegations and apply Section 230 to those specific allegations, an all or nothing approach in stating that Plaintiff's claim is entirely banned by Section 230 without specifics is not a good strategy and will likely cause the defense to lose. Additionally, defense litigators should bear in mind that age verification targeted claims being barred by Section 230 is not persuasive in the Ninth Circuit.

Asbestos Exposure Claims and Causation

Speck v. CBS Corp., No. 20-cv-05845-JD, 2024 U.S. Dist. LEXIS 63196 (N.D. Cal. Apr. 5, 2024)

In this case, the Northern District of California addressed the issue of causation in asbestos litigation under New York jurisdiction. Plaintiff John Speck, a civilian electrician, alleged that he developed asbestosis from exposure to asbestos-containing products while working at the Mare Island Naval Shipyard. The court denied summary judgment on plaintiffs' failure to warn and negligence claim, as the defendants did not establish that government specifications precluded them from affixing warning labels. The court

also addressed the government contractor defense, finding that the defendants failed to meet the factual prerequisites for this defense.

In this case, the court's opinion holds significant implications regarding the threshold of asbestos exposure in the context of causation - under both California and federal maritime law. The court emphasized the necessity of concrete evidence showing actual exposure to asbestos-containing materials installed by the defendants and that such exposure was a substantial contributing factor in causing the injuries. The court also stated that under California law, and federal maritime law which applied in this case, the defendant is only liable for a plaintiff's exposure to asbestos-containing products that were either manufactured or supplied by them.

Another defense strategy highlighted by this case is the detailed and specific evidence regarding the extent and duration of asbestos exposure to meet the substantial-factor standard under maritime law. In *Speck*, Plaintiff's testimony did not establish the frequency or duration of his work on ITE controllers, nor did it provide a factual foundation for an expert to conclude substantial exposure. Plaintiff's pulmonology expert also admitted to having no knowledge of the proximity or quantity of asbestos fibers Plaintiff was exposed to, which further weakened the causation argument. Defense attorneys should focus on challenging the sufficiency of the plaintiff's evidence on these points to effectively argue against causation in asbestos-related cases.

The Definition of a "Product" in the Digital Context and the Predominant Purpose Test

In re Uber Techs., Inc., No. 3084 CRB, 2024 U.S. Dist. LEXIS 169122 (N.D. Cal. Aug. 15, 2024)

In this case involving allegations that Uber failed to implement adequate safety measures to prevent sexual assaults by its drivers, the court examined whether the Uber app could be considered a product under the Restatement (Third) of Torts: Prods. Liab. § 19. The court established that the Uber app is a product, and Uber could be liable for defects in the app.

The court noted that the applicability of products liability torts to digital products presents novel questions of law. Specifically, the court found the Uber app is a product because "the context of the app's distribution and use is sufficiently analogous to the distribution and use of tangible personal property that it is appropriate to apply the rules" of strict liability. *Id.* at *118. The court went further to explain that the app's frontend interface is designed entirely by Uber, distributed by Uber to app stores, and a user must download the app onto their personal mobile device from the relevant app store to be able to access it. *Id.* at *118-19.

In this case, Uber argued that, even if the app is a product, strict liability does not extend to transactions primarily aimed at obtaining services. Uber mainly relied on *Ferrari v. Grand Canyon Dories*, 32 Cal. App. 4th 248, 38 Cal. Rptr. 2d 65 (1995), to support this argument. However, the court held that the cases Uber referenced do not support the interpretation that a product used to procure a service is excluded from products liability law. Instead, they address who in the distribution chain of a product can be held liable under a product defect theory.

The court went further to give a hypothetical that if a plaintiff were injured in an Uber ride due to a defect in the car, it would be appropriate to hold the car manufacturer liable for the defect, even though the car was used to provide a service (the ride). Accordingly, defense attorneys should be aware that the "predominant purpose" test does not exclude products used to obtain services from products liability law. The primary focus is on who distributes the product and their role in the stream of commerce, not on the

nature of the transaction (service vs. product). Ultimately, the plaintiffs' products liability claims failed due to the absence of plausible causation allegations.

Another defense strategy highlighted by the court in this case is to argue that the alleged "defects" aren't defects in the product (the app), but instead are just problems with app's services. *Id*. at *123-24. Here, the court noted that Uber could argue that alternative designs would not address the problems with sexual assault or that the risk of injury by sexual assault is not "excessive" given the costs of the design. "To say that a failure to conduct an adequate background check or its failure to offer timely support are defects in the Uber app simply stretches the concept too far. These are issues that go to the question of whether Uber breached the applicable standard of care as a provider of services, not whether it placed a defective product into the stream of commerce." *Id*. at *124-25. This suggests that similarly situated defendants can focus on the risk-benefit analysis of the product design to defend claims of design defects.

Jurisdiction – One to Watch

Briskin v. Shopify, Inc., 87 F.4th 404 (9th Cir. 2023), *vacated and granted rehearing en banc* by 101 F.4th 706 (9th Cir. 2024)

In *Briskin*, the Ninth Circuit addressed the issue of personal jurisdiction over a web-based payment processor, Shopify. One of the primary defense jurisdiction strategies was to argue that Shopify's extraction of consumer data reflects more "active" engagement with the forum state than the conduct at issue in the Ninth Circuit's past interactive website cases. In response, the Court stated that this difference does not rise to the level of a fundamentally different legal framework than the already established personal jurisdiction rules. The court noted that defendants' extraction and retention of consumer data and tracking of customers, without more, did not expose them to personal jurisdiction in California. The Court held that that "the defendants are not subject to specific jurisdiction in California because they did not expressly aim their suit-related conduct at the forum state. When a company operates a nationally available ecommerce payment platform and is indifferent to the location of end-users, the extraction and retention of consumer data, without more, does not subject the defendant to specific jurisdiction in the forum where the online purchase was made." *Id*. at 409. The Court affirmed the dismissal of the plaintiff's complaint.

The Court held that for specific jurisdiction to exist, the plaintiff must demonstrate a "forum-specific focus" by the defendant. Alternatively, the plaintiff must allege that the defendant is specifically "appealing to an audience in a particular state," or "actively targeting" the forum state. This is helpful to other company defendants, as merely knowing that the data of California-based consumers was being processed is insufficient; there must be a more direct connection between the defendant's activities and the forum state.

Additionally, the Court distinguished this case from situations involving the sale of physical goods through an interactive website, where personal jurisdiction might be appropriate if the defendant purposefully directed its conduct at the forum state by regularly selling and delivering products there. *See also Impossible Foods Inc. v. Impossible X LLC*, 80 F.4th 1079, 1089 (9th Cir. 2023) (stating that the purposeful direction and availment tests simply frame our inquiry into the defendant's "purposefulness" vis-à-vis the forum state, ensuring that defendants are not "haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts.").

Although the Ninth Circuit vacated this panel decision, *see* 101 F.4th 706 (9th Cir. 2024), it granted a rehearing *en banc*. It is worth watching this case over the next year to see if the full Ninth Circuit follows the panels reasoning or charts a different path.

TENTH CIRCUIT:

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Hickcox v. Hyster-Yale Group, Inc., 715 F. Supp.3d 1362 (D. Kan. 2024)

In Hickcox v. Hyster Yale Group, Inc. the District Court for the District of Kansas granted summary judgment for the defendant after ruling that plaintiff's expert testimony was not admissible. Plaintiff Hickcox sued Defendant, a forklift manufacturer after the plaintiff, a forklift operator seriously injured his arm in an accident. Plaintiff's expert opined that the forklift was defectively designed, that the defendant should have been aware, that the defects caused plaintiff's severe injuries. The expert also opined that defendant could have used three alternative designs that would have prevented the accident.

Defendant moved to exclude the expert arguing that his alternative designs are unreliable and that the expert is unqualified. The court agreed that the expert's designs were unreliable based on deficiencies in his report and that he was unqualified due to Plaintiff's failure to connect his expert's qualifications to the case at issue.

The court analyzed the expert's report and noted that the expert never submitted a mockup and never tested his proposed alternatives. Further, the report did not point to any example in which the proposed alternatives had been used by other manufacturers. It was not sufficient for the expert to point to alternative designs that could have been used, without a specific design of an alternative the court could not compare it to the existing design and as such it was unreliable.

Most notable and fatal to plaintiff's case was that the court found the expert to be unqualified. Defendant noted that the expert, Mr. Sevart, had never designed a forklift or forklift components, and was not even trained or certified to operate the forklift. While Plaintiff responded that this posed an unduly high expert witness standard that no one who had not worked for a forklift manufacturer could meet, the court agreed with the defendant noting that it was the plaintiff's burden to establish the connection between the expert's knowledge and their expert testimony.

Although Mr. Sevart is a licensed professional engineer with a degree in mechanical engineering and expertise in the design of safety systems, he had not designed or built a forklift or forklift components. The court reasoned that Mr. Sevart's expertise in safety systems does not demonstrate enough expertise in the more specific field of forklift safety and design defects.

This case signals at courts' increasing ability to take on a gatekeeper function, as noted in the recent Rule 702 amendments, and illustrates one specific avenue defense counsel can use to exclude experts with irrelevant qualifications. Of note, the court in *Hickcox* focused on how Mr. Sevart's qualifications related to this specific case, rather than stating the expert merely did not have enough qualifications. This distinction shows one way defense counsel can kick out "general" type experts who opine on specific areas they don't have relevant experience in. Likewise, defense counsel should be prepared to address the feasibility of the alternative design proffered by plaintiff's expert.

Oglesbee v. Glock, Inc., No. 23-5134, 2024 U.S. App. LEXIS 32721 (10th Cir. Dec. 27, 2024)

In Oglesbee v. Glock Inc. the Tenth Circuit Court of Appeals affirmed the trial court in finding that the a pistol manufactured by the defendant was not unreasonably dangerous as a matter of law. Plaintiff, a firearms instructor, was injured when he dropped a modified pistol causing it to fire when it hit the ground. Plaintiff sued Glock for products liability and failure to warn. The district court granted summary judgment based on the adequacy of Glock's warnings regarding modified pistols.

Plaintiff argued on appeal that the blanket recommendation not to alter or modify the pistol was inadequate because it did not specify which modifications would impact safety. The Tenth Circuit disagreed, noting that Oklahoma law does not require specificity of warnings and further that such warnings could render the warning incomprehensible. Plaintiff also argued that the warnings were inadequate because they stopped on one page and began again three pages later. The court rejected this argument as well, noting that the layout did not make the warning inadequate.

Overall, the court affirmed that the warnings were adequate and thus the pistol was not unreasonably dangerous. Based on this case defense counsel should note that blanket warnings, when stated clearly, can be effective in warning of potential dangers even with a potentially dangerous product.

Doe v. Lyft, Inc., No. 23-2548-JWB-TJJ, 2024 U.S. Dist. LEXIS 198957 (D. Kan. Nov. 1, 2024)

In Doe v. Lyft the District Court for the District of Kansas addressed whether the facts as pled established Lyft ridesharing app was a software or algorithmic product with sufficient similarities to a tangible product to subject it to product liability law. The matter came before the court on Lyft Inc.'s motion to dismiss for failure to state a claim. Plaintiff had been sexually assaulted by a driver after she used the Lyft app to call for a ride. Plaintiff alleged that while the driver's application included a picture of a valid state license, the driver's "driver photo" submitted to Lyft matched the co-defendant, who had a previous criminal record and did not possess a valid driver's license. Plaintiff brought numerous claims, including multiple under a vicarious liability theory, and in relevant part alleged Lyft was a defectively designed product under the Kansas Product Liability Act.

Defendant argued that under Kansas law the rideshare market was a service, whereas plaintiff contended that the Lyft app is a tangible product. The court noted that historically courts have been hesitant to apply product liability principles to software products that provide matching services to users (such as social media and dating websites). However, it also noted a recent trend of expanding product liability theories toward software that provides matching services, citing cases from district court cases from across the country.

Based on multi-district litigation pertaining to sexual assaults on the Uber platform, the court held that the Lyft app is a software or algorithmic product with sufficient similarities to a tangible product come under product liability law. The court also reasoned product liability law applied because Lyft was a proprietary product, that drivers and passengers were required to use

to receive the Lyft service. Even still the court noted that this does not mean that every injury alleged is automatically traceable to Lyft under a theory of product liability. The plaintiff is still required to show how a flaw in the app software led to a specific injury. Plaintiff still had to show that her injury resulted from the design or functionality of the app.

Based on this case defense counsel should note how a software product can be analogized to a tangible product and fall under product liability law. Further, even if a software product can be construed as a tangible product under a state products liability law framework, a claim can still be defended based on whether the alleged flaw in the software led to a specific injury.

ELEVENTH CIRCUIT:

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Federal Product Regulation Preemption

Carson v. Monsanto Co., 92 F.4th 980 (11th Cir. 2024)

A consumer filed suit against Monsanto, a manufacturer of glyphosate-containing weed killer, in the Southern District of Georgia, under state-law claims for strict liability (design defects), failure to warn, negligence, and breach of implied warranties, alleging Monsanto knew of glyphosate's carcinogenic effects but failed to warn consumers.

Monsanto moved for judgment on the pleadings on the ground that The Federal Insecticide, Fungicide, and Rodenticide Act's ("FIFRA") preemption provision, 7 U.S.C. § 136v(b), expressly preempted the plaintiff's suit. Monsanto argued that FIFRA preempted the failure-to-warn claims, specifically, because the Environmental Protection Agency ("EPA") previously approved the product label without requiring a carcinogen warning and classified the product as "not likely to be carcinogenic."

The district court agreed, concluding that FIFRA's preemption provision, 7 U.S.C. § 136v(b), barred state-law claims addressing label warnings. The district court partially granted Monsanto's motion for judgment on the pleadings. The plaintiff amended their complaint, dropping the design defect and negligence claims, and appealed the dismissal of the failure-to-warn claims.

The Eleventh Circuit, sitting *en banc*, was tasked with deciding if FIFRA preempts state-law failure-to-warn claims. The court ultimately ruled that the failure-to-warn claim was neither expressly nor impliedly preempted by FIFRA.

The court held that FIFRA does not expressly preempt state-law failure-to-warn claims unless the state requirements impose additional or different labeling requirements beyond FIFRA's standards. The court emphasized that FIFRA preempts state "requirements" but not state "remedies." Moreover, FIFRA's label approval process through the EPA does not constitute preemption, as the statute's language does not preempt state regulations that align with FIFRA's general requirements. The court reasoned that Georgia's requirement to warn consumers of known dangers was compatible with FIFRA's misbranding standards, rejecting the notion that EPA label approval implied federal supremacy over parallel state laws.

The court also rejected Monsanto's argument of impossibility preemption, which claimed it was impossible to comply with both FIFRA and Georgia law. Monsanto argued impossibility by claiming that had it produced products which warned of carcinogens to satisfy the Georgia law, hypothetically, the EPA would have denied their submission. The court found no evidence that the EPA would reject a label containing a cancer warning. It noted that in 2022, the EPA publicly acknowledged that it could approve warnings indicating glyphosate's carcinogenic risks, provided they did not misbrand the product. Thus, Monsanto failed to demonstrate any facts which

established that compliance with both federal and state labeling requirements was genuinely impossible. Accordingly, the court concluded that Georgia's labeling requirements were compatible with FIFRA and not preempted.

This case underscores critical lessons for product attorneys advising on regulatory compliance and litigation. Federal approval of warning labels does not shield a product from state-level claims, and preemption defenses require robust evidence of genuine impossibility. Product labeling and compliance strategies must account for the interplay between federal and state regulations, as courts are increasingly scrutinizing preemption claims in failure-to-warn cases.

Understanding Comment K of the Second Restatement of Torts

Smith v. AngioDynamics, Inc., No. 2:24-CV-112-RAH, 2024 WL 1748429 (M.D. Ala. Apr. 23, 2024)

A patient implanted with a vascular access device experienced device failure, causing fragments to migrate to her heart. She brought product liability claims against the device's designers, manufacturers, distributors, and sellers under Alabama's Extended Manufacturer's Liability Doctrine (AEMLD), citing negligence and wantonness. Alabama applies a unique hybrid of strict liability and negligence under AEMLD, which acknowledges some products as "unavoidably unsafe." Such products, when manufactured to specifications and accompanied by proper warnings, are not considered defective or unreasonably dangerous. The AEMLD is derived from the Second Restatement of Torts. Thus, many of its provisions are nearly identical.

The defendant moved to dismiss the case under Rule 12(b)(6), arguing that their device was unavoidably unsafe and included sufficient warnings, thereby barring liability. The court declined to apply the "unavoidably unsafe" rule to all medical devices as a blanket standard, reasoning that such determinations should be made on a case-by-case basis. While Comment K of the Restatement (Second) of Torts and AEMLD by extension provides that unavoidably unsafe products are not defective when properly made and accompanied by adequate warnings, the court emphasized that not all medical devices automatically fall under this rule.

The court found that the defendant's argument improperly assumed its medical devices were unavoidably unsafe, without demonstrating why this particular device met the criteria. By denying the motion to dismiss, the court signaled the importance of providing evidence that a specific device is unavoidably unsafe before arguing the sufficiency of its warnings. For litigators, this case highlights the need to carefully tailor arguments and avoid overgeneralizations about product categories, especially in states like Alabama that have adopted the Second Restatement of Torts. It is often better to over plead supportive facts to avoid the risk of a motion being denied for their omission.

Avoiding Raised Lettering Warnings

Brown v. SharkNinja Operating, LLC, No. 1:22-CV-2896-MLB, 2024 WL 4269671 (N.D. Ga. Sept. 20, 2024)

A consumer purchased a blender with warnings against blending hot liquids presented in the user manual and as raised lettering on the blender's surface. The consumer discarded the manual, believing she already knew how to use the blender. Later, while attempting to prepare hot soup, she filled the blender with recently boiled vegetables and water. Despite noticing steam escaping from the blender, she opened the lid, causing the hot liquid to eject and burn her. The consumer subsequently sued the manufacturer, alleging breach of implied warranties and failure to warn.

The manufacturer moved for summary judgment, arguing that the plaintiff's contributory negligence—specifically, throwing away the manual with warnings and not reading the warnings on the blender—barred her claims. The plaintiff countered that the raised letter warning on the blender's surface was unreadable due to its lack of color contrast, rendering the warnings ineffective. The court analyzed the adequacy of the warnings by referencing two seminal failure-to-warn cases, *Thornton v. E.I. Du Pont De Nemours & Co.*, 22 F.3d 284 (11th Cir. 1994) and *Rhodes v. Interstate Battery Sys. of Am., Inc*., 722 F.2d 1517 (11th Cir. 1984). In both cases, the plaintiffs failed to read warnings. Notably, in *Rhodes*, the lettering on the product in question was similar to the lettering in this case, raised and uncolored.

Thus, similarly, the court here concluded that the raised lettering's lack of visibility supported the plaintiff's claim. It held that contributory negligence does not negate a failure-to-warn claim if the warnings are inadequately communicated. Notably, this case differs from *Rhodes* in the fact that the plaintiff chose to throw away and ignore the manufacturer's provided instruction manual. This opinion extends the holding from *Rhodes* to permit plaintiffs, who might previously have been deemed contributorily negligent for disregarding manufacturer-supplied manuals, to rely solely on warnings molded directly onto the product. Accordingly, this decision reinforces the need for manufacturers to provide clear, legible, and accessible warnings on their products at the assumption that consumers will behave unreasonably in throwing away operator manuals with warnings.

This opinion is especially concerning due to the nationwide nature of most product markets. It serves as a cautionary reminder of the evolving standards for product warnings. Product manufacturers that sell products nationwide may need to change production to satisfy states like Georgia in the future. To get ahead of this, manufacturers should proactively use color contrast, clear placement, and engaging user manuals to ensure warnings are clearly communicated such that plaintiffs cannot later plead ignorance. Failure to do so may expose manufacturers to liability, as courts increasingly scrutinize the adequacy of warnings in consumer goods litigation and lean into more plaintiff friendly legal ideologies.

DC CIRCUIT:

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Bond v. Office of Attorney General of United States, No. CV 23-823 (RDM), 2024 WL 2295194 (D.D.C. Feb. 26, 2024)

Plaintiff, Lorraine Bond, acting *pro se*, brought claims against multiple defendants for their involvement in the City of Philadelphia's bombing of a building occupied by members of the "MOVE" group. Plaintiff brought products liability claims against the Office of the Attorney General of the United States and the FBI, predicated on their alleged provision of the explosives used by Philadelphia authorities. In the Court's order dated November 27, 2023, Defendant EIDP's motion to dismiss was granted, as Plaintiff's claims were deemed time-barred by the applicable statutes of limitations (either two or three years), with the events in question occurring 38 years ago.

Plaintiff then moved for a preliminary injunction seeking to remove the judge from the case and, at times, requested relief akin to a motion for reconsideration of the Court's November 27, 2023 order. Bond's motion was denied due to a lack of merit or intelligible arguments supporting her claims. The Court emphasized that preliminary injunctions are extraordinary remedies and require a clear showing of likelihood of success, irreparable harm, and public interest alignment. The Court denied Bond's motion to reconsider the November 27 order under Rule 59(e) as it failed to meet the standard for reconsideration, which requires new evidence, legal changes, or correction of a clear error.

The Court warned Plaintiff for failing to respond to EIDP's motion to dismiss. Even treating her preliminary injunction motion as a response, it did not adequately address EIDP's arguments. The Court stated that dissatisfaction with judicial decisions does not warrant recusal of the presiding judge.

SUPREME COURT OF THE UNITED STATES:

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Federal Arbitration Act

Coinbase, Inc. v. Suski, 602 U.S. 143 (2024)

An important threshold question often arises in contested motions to compel arbitration: who decides whether a dispute is subject to arbitration, the court or the arbitrator? Because arbitration is contractual in nature, parties can agree to not only to send the merits of a dispute to arbitration, but also the threshold question of whether they agreed to arbitrate the dispute at issue. When an arbitration agreement tasks the arbitrator with resolving that threshold question, it does so by what is commonly called a "delegation clause." When a party files suit in contravention of an agreement to arbitrate, courts must unpack these layered contractual provisions. These issues become even more complicated when parties execute multiple agreements related to services offered to consumers. In *Coinbase, Inc. v. Suski*, the Supreme Court provided guidance on whether a subsequent contract supersedes an earlier agreement to arbitrate with a delegation provision by holding that the court—not the arbitrator—decides whether a subsequent contract supersedes an earlier arbitration agreement containing a delegation clause.

Coinbase is the operator of a cryptocurrency exchange platform. Users of Coinbase, the plaintiffs in the underlying putative class action, entered into the Coinbase User Agreement when they created their accounts. This Agreement contained an arbitration provision with a delegation clause stating that an arbitrator must decide all disputes under the contract, including whether a given disagreement is arbitrable. The plaintiffs thereafter entered into a second contract, the Official Rules for a promotional sweepstakes, that contained a forum selection clause providing that California courts "shall have sole jurisdiction of any controversies regarding the [sweepstakes] promotion." The putative class action asserted claims that the sweepstakes violated California law. Coinbase moved to compel arbitration under the User Agreement. Coinbase argued that the first contract's delegation clause established the terms by which all subsequent disputes were to be resolved, so the arbitrability of a contract-related dispute is a matter for the arbitrator to decide. The District Court denied the motion, holding that the Official Rules' forum selection clause controlled the parties' dispute. The Ninth Circuit affirmed.

The Supreme Court granted certiorari and affirmed the judgment of the Ninth Circuit. The Court emphasized that "[a]rbitration is a matter of contract and consent, and . . . that disputes are subject to arbitration if, and only if, the parties actually agreed to arbitrate those disputes." Before the court can reach the question of the enforceability of the delegation clause in the initial contract, the court "needs to decide what the parties have agreed to—i.e., which contract controls." The Court explained:

> In cases where parties have agreed to only one contract, and that contract contains an arbitration clause with a delegation provision, then, absent a successful challenge to the delegation provision, courts must send all arbitrability disputes to arbitration.

> But, where, as here, parties have agreed to two contracts—one sending arbitrability disputes to arbitration, and the other either explicitly or implicitly sending arbitrability disputes to the courts—a court must decide which contract governs. To hold otherwise would be to impermissibly elevate a delegation provision over other forms of contract.

Id. (cleaned up). Accordingly, companies who offer varied products and services to consumers should confirm that their contracts contain consistent dispute resolution provisions.

Smith v. Spizzirri, 601 U.S. 472 (2024)

The Federal Arbitration Act ("FAA") sets forth procedures for enforcing arbitration agreements in federal court. Section 3 of the FAA provides that when a dispute is subject to arbitration, the court "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U. S. C. §3. Notwithstanding the foregoing, parties seeking to compel arbitration oftentimes sought the dismissal of a civil action filed in contravention of a valid arbitration agreement. Lower courts split over the propriety of such dismissals, and the Supreme Court granted certiorari to resolve the dispute.

The Supreme Court held that "[w]hen a federal court finds that a dispute is subject to arbitration, and a party has requested a stay of the court proceeding pending arbitration, the court does not have discretion to dismiss the suit on the basis that all the claims are subject to arbitration." The Supreme Court found the statute to be unambiguous: "When §3 says that a court 'shall . . . stay' the proceeding, the court must do so." The Court further explained that the required stay also "ensures that the parties can return to federal court if arbitration breaks down or fails to resolve the dispute," which is an outcome that would be complicated by a prior dismissal of the lawsuit. In addition, the Court noted that "[t]he provides mechanisms for courts with proper jurisdiction to assist parties in arbitration by, for example, appointing an arbitrator; enforcing subpoenas issued by arbitrators to compel testimony or produce evidence,; and facilitating recovery on an arbitral award."Accordingly, movants seeking to compel arbitration must request a stay of the civil action pending the arbitration.

CANADA:

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Palmer v. Teva Canada Ltd., 2024 ONCA 220

Plaintiffs must plead actual, demonstrable harm or loss for a liability claim in negligence to succeed.

In this case, the Court of Appeal for Ontario reviewed the Superior Court of Justice's dismissal of a motion to certify a class proceeding. The plaintiffs alleged the presence of carcinogens in Valsartan, a blood-pressure medication produced by the defendant pharmaceutical company. The plaintiffs argued that Valsartan therefore caused genotoxic and psychological injuries.

The Court of Appeal upheld the Superior Court's decision to dismiss the plaintiffs' motion to certify the class proceeding. On genotoxic injuries, the court held that "physical change with no perceptible effect upon one's health is not compensable in negligence." On psychological injuries, the court held that, while speculative concern for an increased risk of future physical harm is compensable in negligence, an ordinary person of reasonable fortitude would not have sustained psychological injury in this case.

This decision confirms that plaintiffs must plead actual, demonstrable harm or loss for a liability claim in negligence to succeed.

Ding v. Canam Super Vacation Inc., 2024 BCCA 102

The plaintiff must demonstrate a causal link between the failure to warn and the harm suffered.

In this case, the plaintiffs appealed from a dismissal of their claims against the manufacturer of a bus involved in a vehicle accident, as well as the dismissal of their claims against all the defendants for failing to warn of the dangers of riding in a bus without seatbelts.

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[8] Robert is an associate with Borden Ladner Gervais LLP in Toronto, Canada. Robert focuses his practice on product liability, insurance defence, and risk mitigation. He has experience litigating various product liability matters, including class proceedings. Robert is a current member of the DRI. Edona and Robert acknowledge the tremendous contributions of Michael O'Keefe and Roya Shidfar, who are articling students at Borden Ladner Gervais LLP's Toronto office.

The British Columbia Court of Appeal dismissed the appeal regarding the bus manufacturer's negligent design and failure to warn; however, the court upheld the trial judge's findings on industry and regulatory standards. It was not feasible to install seatbelts when the bus was manufactured in 1998. The court held that the trial judge erred in his causation analysis, but did not overrule his conclusion that the plaintiffs had not proved causation for failing to warn of the dangers of riding in a bus without seatbelts. The court allowed the plaintiffs costs appeal in part, upholding the trial judge's decision not to make a Sanderson or Bullock order, but holding that the trial judge erred in refusing any costs to the plaintiffs.

This decision reinforces the importance of evidence to demonstrate compliance with industry and regulatory standards when defending a claim for negligent design. Further, this decision reinforces that plaintiffs who are unable to establish a causal relationship between failing to warn and the injury suffered will not succeed in negligence claims.

***Burr v. Tecumseh Products of Canada Limited*, 2023 ONCA 135**

Appellate courts owe deference to the trial judge's assessment of expert evidence

In this case, after a heat recovery ventilator overheated and exploded, causing damage to the plaintiffs' home, the plaintiffs sued the ventilator manufacturer (Venmar) and the manufacturer of the ventilator's motor (Fasco, formerly Tecumseh Products). The trial judge determined that Venmar was solely liable for negligently designing the ventilator, but that Venmar did not breach their duty to warn the public. The contract between Venmar and Fasco protected Fasco from any liability for claims relating to their motors. Venmar appealed the decision.

The Court of Appeal for Ontario dismissed the appeal. The court took issue with some of the trial judge's conclusions but affirmed that appellate courts must pay deference to assessments of expert evidence undertaken by trial judges. The court held that there was no basis to interfere with the trial judge's assessment of the evidence and that Venmar was bound under contract to indemnify Fasco.

This decision reinforces the principles underlining the duty of care owed by manufacturers in product liability cases. However, the court focusses largely on the specific facts of this case and the deference it owed to the trial judge's assessment of expert evidence. Therefore, this decision does not provide substantial guidance on the liability of manufacturers of sub-components (like ventilator motors) moving forward. Nevertheless, this decision reinforces the importance of choosing expert witnesses at trial, given the deference that appellate courts must pay to a trial judge's assessment of such experts.

ATCO Energy Solutions Ltd. v. Energy Dynamics Ltd., 2024 ABKB 162

Courts may permit similar fact evidence of other models or products of an impugned manufacturer; however, they are less likely to permit the opinion evidence of employees.

In this case, the operator of a natural gas storage facility alleged that a defective piston in a natural gas compressor ultimately caused an engine failure causing damage. The plaintiff sued the manufacturer and supplier of this piston. The court considered the plaintiff's claim against the manufacturer for negligently designing, manufacturing, and assembling the piston in question, and

for breaching their duty to warn the public. The plaintiff's claim against the supplier was settled prior to trial.

The Court of King's Bench of Alberta held that the plaintiff failed to prove on a balance of probabilities that the piston in question was defective. Further, the court held that, even if the piston in question was defective, the plaintiff failed to establish the causal connection between the piston and the engine failure. The court denied the plaintiff's use of evidence disclosed shortly before trial, holding that the plaintiff had failed to demonstrate sufficient reasons for not disclosing the evidence earlier nor that other interests of justice weighed in favour of not allowing the plaintiff to rely on the evidence. The court did permit similar fact evidence of the plug performance of other models produced by the manufacturer but noted that the similar fact evidenced adduced by the plaintiffs was insufficient to support an inference that the piston caused the damage in question. The court also denied the plaintiff's attempts to rely on the opinion evidence of an employee, holding that this evidence did not fall within the meaning of "witnesses with expertise".

This decision summarized the leading Canadian case law on product liability, as well as commentary on similar fact and opinion evidence. Ultimately, this decision reiterates the importance of building an appropriate expert evidentiary record to establish causation in design negligence claims.

Price v. Lundbeck A/S, 2022 ONSC 7160 (Appealed to Divisional Court; discussed below)

Proposed common issues must be pleaded in a specific and focussed manner.

In this case, the Ontario Superior Court of Justice re-heard and dismissed a certification motion for a class proceeding. The plaintiffs alleged that Celexa, an anti-depressant drug manufactured and distributed by the defendant pharmaceutical company, is a teratogen, which under reasonable circumstances of exposure can disturb the development of an embryo or fetus and thereby cause congenital malformations. The plaintiffs pleaded that the common issue for the class was that the Defendants breached their duty of care by failing to warn about the risk that Celexa is or may be teratogenic.

In dismissing the certification motion, the court held that the plaintiffs led no evidence of a methodology to establish on a class-wide basis that Celexa may cause any particular congenital malformation. Further, the court held that there was no evidence that would enable the court to limit the plaintiffs' proposed class definition or causation issue. On the duty to warn, the court held that general causation could not be established without individual trials on the particular congenital malformation of each class member and that a warning would have to be for a specific risk, not for teratogenicity in general.

This decision reinforces that plaintiffs seeking to certify a class proceeding must plead specific and focussed common issues. Otherwise, courts will likely dismiss certification on the grounds that the pleaded issues are too general and overbroad.

Price v. Lundbeck, 2024 ONSC 845

Proposed common issues must be pleaded in a specific and focussed manner.

In this case, the representative plaintiffs appealed the Ontario Superior Court of Justice's dismissal of their motion to certify a class proceeding to the Divisional Court. The appellants alleged that the judge had made several errors, including by ruling that there was no common issue, as required by s. 5(1)(c) of the *Class Proceedings* Act.

The Divisional Court dismissed the appeal, holding that the judge had correctly applied the relevant legal principles and their expertise in denying certification. Further, the Divisional Court upheld the judge's finding that the appellants' proposed common issues were superficially common.

This decision reinforces that plaintiffs seeking to certify a class proceeding must plead specific and focussed common issues. Otherwise, courts may dismiss certification on the grounds that the pleaded issues are too general and overbroad to be resolved in common amongst class members.

Oberski v. General Motors LLC, 2024 ONSC 345

The plaintiff bears the onus of proving their putative class settlement meets the certification test even on consent certification; courts may look to settlements in other jurisdictions to determine whether settlement is reasonable.

In this case, the plaintiffs moved for the consent certification of a class action for settlement purposes and for leave to discontinue certain causes of action. The plaintiffs had proposed a class action against General Motors for economic loss claims in relation to defective ignition switches, ignition keys, and power steering units. Several proposed class actions were consolidated in Ontario regarding these alleged defects, and two parallel class proceedings were brought in Quebec. The Quebec proceedings were stayed pending the outcome of the Ontario proceedings and ongoing proceedings in the United States for similar class claims. The multijurisdictional claims in the United States were resolved prior to this decision.

The Ontario Superior Court of Justice approved a $12 million settlement for the claims against General Motors. The approved settlement provided a resolution process for claims of personal injury, wrongful death, and other claims under the *Family Law Act*, RSO 1990, c F.3, with the opportunity for individual litigation if claims were not resolved through the settlement process. The court also included a settlement for the actions in Quebec.

This case stands for the proposition that consent certification still requires the plaintiff to demonstrate their putative class proceeding meets each of the certification criteria of the *Class Proceedings Act*, but that court will apply a less rigorous standard and may look to a settlement in other jurisdictions as guidance of the reasonableness of that settlement.

Martin v. Wright Medical Technology Canada Ltd., 2024 ONCA 1

There is a bright line between actions commenced under the "old" *Class Proceedings Act,* and those commenced under the amended *Act.*

In this case, two representative plaintiffs (Martin and Rowland) commenced a claim against the defendant manufacturer of two prosthetic hip implants and sought to certify the claim as a class proceeding. While counsel for the Martin action avoided mandatory dismissal for delay under section 29.1 of Ontario's pre-2020 amendments *Class Proceedings Act*, 1992, SO 1992, c 6 ("*CPA*"), the judge in the Martin action allowed the pleadings to be amended to add the Rowland cause of action and ordered that the combined action continue under the amended *CPA*. Both the plaintiffs and the defendants appealed.

The Court of Appeal for Ontario held that the only legally available option to the motions judge was to continue the Marin action under the old *CPA* and that the Rowland action was to be re-constituted or re-filed and commenced under the amended *CPA*, with the two actions being tried separately or together thereafter. The court made this determination based on statutory interpretation, focussing on the wording section 39 of the *CPA*, which stipulated that the old *CPA* would continue to apply to class proceedings commenced before October 1, 2020. The court dismissed the defendants' submission that different certification tests for the two actions would be "unmanageable and unworkable", holding that a motions judge would be able to manage applying the different criteria in the actions because of similar causes of action and factually related evidence.

This decision affirms that the text, legislative history, and case law on section 39 of the *CPA* indicate that there is a bright line between actions commenced under the "old" *CPA*, and those commenced under the amended *Act*. For those actions commenced after October 1, 2020, the stricter certification test under section 5, and the mandatory dismissal for delay requirements under section 29.1, will apply.

OCHC v. Sloan Valve Company, 2024 ONSC 1493

Claims for pure economic loss are generally not actionable in tort law.

In this case, Ottawa Community Housing Corporation (OCHC) commenced an action against Sloane Valve Company, the manufacturer of a toilet flushing system, and Wolseley Canada Inc., the supplier of this toilet flushing system. The OCHC claimed breach of warranty under the *Sale of Goods Act*, RSO 1990, c S. 1 ("*SGA"*), negligence, and negligent misrepresentation. The defendants filed a motion to strike the plaintiff's claim under rule 21 of the *Rules of Civil Procedure,* RRO 1990 Reg 194.

The Ontario Superior Court of Justice ordered that the OCHC's claims against both the manufacturer and supplier of the toilet flushing system be struck. In doing so, the court held under the doctrine of privity, that the warranties and conditions under the *SGA* do not apply to manufacturers who do not sell good(s) directly to purchasers. Further, the court disagreed with OCHC's submission that it suffered, not damages for pure economic loss, but rather damage to property. The court determined that the water which flowed through the toilet flushing system was supplied by the municipality to the OCHC as an end user; this water was not owned by OCHC.

This decision reaffirms the doctrine of privity's application to conditions and warranties enshrined in the *SGA*. This decision also reaffirms that a plaintiff who brings an action in negligence must prove that there was actual damage and loss to their property or person. Claims for pure economic loss are generally not actionable in tort law.

Underhill v. Medtronic Canada, 2023 ONSC 5919

Courts make use of the *Canadian Judicial Protocol for Management of Multijurisdictional Class Actions and the Provision of Class Action Notice*.

In this case, the plaintiffs proposed a class action in Ontario against a manufacturer of surgical stapler products that were alleged to be defective. Prior to the certification motion, a concurrent action emerged in British Columbia. The plaintiffs brought a motion to discontinue their proposed class action in Ontario and sought for the claims to be advanced in a single proceeding.

The Ontario Superior Court of Justice ordered that the plaintiffs' motion be adjourned indefinitely. The defendant manufacturer had applied for a stay or dismissal in the British Columbia action. Therefore, the court held that if a discontinuation was allowed before the stay was granted, then the limitation period may continue to run as the stay order is granted, and this could bar class claims. Thus, the court held that there was a significant risk to absent class members who might be prejudiced from a discontinuance order before the defendant's stay application was decided. The court also found two reasons to make use of the *Canadian Judicial Protocol for Management of Multijurisdictional Class Actions and the Provision of Class Action Notice*, which are rarely used outside of settlement approvals. First, the outcome of one motion will necessarily change the outcome of the other motion. These motions should be decided on their facts and the law, not timing. Second, given that there was discussion of British Columbia procedural law at the motion hearing, it would be preferable if those arguments were made in a "fully briefed application" context in the Ontario proceeding.

These decisions may indicate that the courts are becoming more open to using the *Canadian Judicial Protocol for Management of Multijurisdictional Class Actions and the Provision of Class Action Notice* beyond settlement approvals. This may impact the process of multijurisdictional class actions brought against product manufacturers in Canada.

Larsen v. ZF TRW Automotive Holdings Corp., 2023 BCSC 1471

A recall program, or similar defect-remedying program, may be preferable to certification of a class proceeding.

In this case, the representative plaintiff sought certification of a class proceeding under British Columbia's *Class Proceedings Act*, RSBC 1996, c 50. The representative plaintiff alleged that the airbag control units (ACUs) designed and manufactured by ZF TRW Automotive Holdings Corp., and installed in vehicles manufactured, distributed, and sold by several large automotive companies, were defective. Several vehicles were subject to voluntary recalls in the United States and Canada for airbag deployment malfunctions. The plaintiffs claimed pure economic loss resulting from negligent design and/or manufacturing. The plaintiffs did not claim that the class members suffered personal injuries or damages.

In dismissing the certification motion, the Supreme Court of British Columbia held that the repair available to consumers through voluntary recall provided access to justice. The court acknowledged that a recall is indicative of a manufacturer's acknowledgment of a defect; however, there was no basis in fact for the alleged defect, or that the defect was common to the proposed class vehicles. The court also took note of the United States National Highway Traffic Safety Administration Office of Defects' investigation into the (ACUs) manufactured by the defendant manufacturer and concluded that the open investigation was not sufficient to "form a basis in fact that the alleged ACU defect exists in the Unrecalled Vehicles". The court held that a class proceeding was not the appropriate procedure to address the defects in the remaining unrepaired recalled vehicles, or to compensate those who had had their vehicles repaired through the recall. The court cited the decision in *Coles v. FCA Canada Inc.* 2022 ONSC 4575.

This decision reinforces that a manufacturer's implementation of a recall program, or similar defect-remedying program, could potentially bar the certification of a class proceeding, particularly if a court finds that the program is effective at compensating the losses of the class members.

Dussiaume v Sandoz Canada Inc., 2023 BCSC 795

The mere risk of harm is insufficient to ground a cause of action; proof of actual damages is required.

A class action was brought on behalf of a class of those who purchased one or more of the drugs distributed by the defendants containing ranitidine—a histamine H2-receptor antagonist. The plaintiffs claimed that the presence of this substance led them to face an increased risk of contracting cancer.

On the motion for certification, the court held that the plaintiff did not plead a claim for any injury that manifested in adverse effects or health conditions. The court stated that the plaintiff's allegations of the resulting cellular changes which can cause cancer was a potential future harm or increased risk of harm claim in "different clothes".

The court concluded it was "plain and obvious [this] claim for potential future harm is bound to fail." The court also addressed the psychological injury claims and affirmed that "claims for worries about increased risk of physical harm are also not compensable". The court held that the jurisprudence is rooted in the principle that damages for psychological injuries are unavailable in the context of an alleged increased risk of harm, or an unmaterialized harm. The court also found that the plaintiff's medical monitoring claim failed.

Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc., 2024 SCC 20

Supreme Court of Canada defines the use of exclusion clauses in sale contracts.

In this case, Pine Valley sued topsoil manufacturer Earthco after it received and used topsoil in a project that did not meet the compositional requirements required. In the contract Pine Valley had waived its right to test the soil before delivery, and the contract had an exclusionary clause that precluded Earthco's liability for the quality of the topsoil. At first instance, the trial

judge dismissed the plaintiff's action. At the Ontario Court of Appeal (ONCA) the court reversed the lower court. Earthco appealed that decision to Canada's highest court.

The Supreme Court of Canada allowed Earthco's appeal, restoring the trial judge's decision. While the Supreme Court determined that the exclusion clause was an express agreement under section 53 of Ontario's *Sale of Goods Act*, RSO. 1990, c. S.1 ("*SGA*"), the court affirmed that courts should adopt a flexible approach when interpreting exclusion clauses under section 53 by focusing on the parties' objective intention. The SCC confirmed that express agreements under section 53 do not require particular "magic words" or explicit language to be effective.

While the decision arose under Ontario's *SGA*, it has broader implications given most provinces in the country use similar statutory language in their respective statutes. For companies seeking to use exclusionary clauses to limit or waive liability, the best practice is to use language that explicitly, clearly, and directly ousts the warranties and conditions embodied by the statute. However, even if the language does not meet this threshold, courts may still enforce the exclusionary clause. This may not be fatal to the party's contractual protection under the clause. Instead, the courts will apply principles of modern contractual interpretation to determine whether the parties objectively intended to contract out of the statutory protections.

Harris v. Bayerische Motoren Werke Aktiengesellschaft et al., 2024 ONSC 2341

For multinational corporations, Canadian courts can accommodate foreign laws so long as it maintains the integrity of the fact-finding process.

A class action was brought on behalf of Canadians who owned or leased certain Mini Cooper cars manufactured between 2002 to 2008 in Germany, and alleged that the class vehicles had a defective steering system that posed a risk to drivers. The class action was certified by the court on April 2, 2020.

The defendant argued that European privacy laws restricted its ability to disclose certain documents in the litigation in Canada. At first instance, the motion judge determined that BMW, in providing a new affidavit of documents, could redact personal data that was deemed irrelevant to the action and/or privileged.

On appeal, the court ruled that the motion judge did not exceed his jurisdiction, as rule 37.13(1) of the *Rules of Civil Procedure*, RRO 1990 Reg 194 in Ontario, read together with rule 1.04(1), gave him discretion to grant the relief on the motion. The court also upheld the motion judge's ruling on the redactions, deeming it consistent with established legal principles and noting the motion judge's consideration in the redaction order of relevancy and potential harm being needed to justify redaction. The court did allow the fourth ground of appeal, finding that the motion judge erred in finding there was a leave requirement under rule 30.05(5).

This decision has significant implications for multinational manufacturers operating in Canada, particularly regarding the disclosure of sensitive information subject to laws in their home jurisdiction. In their discussion of the redaction order, the court discussed the principle of comity, affirming that foreign laws cannot dictate Canadian judicial processes, provided that Canadian fact-finding can be adapted to comply with both domestic and foreign law requirements.

Bourassa c. Abbott Laboratories Ltd., 2024 QCCS 1245

The court will apply a liberal and generous approach to the authorization stage reinforcing the role of class actions as a tool for providing access to justice.

This decision involved a proposed class action in Quebec against multiple pharmaceutical companies who manufactured, marketed, distributed and/or sold prescription opioid drugs. The action alleged that the companies engaged in aggressive and misleading marketing campaigns which promoted the safety of opioids and downplayed their addictive potential.

The court granted the plaintiff's application and appointed Mr. Bourassa's as class representative. The court found the plaintiff satisfied the criteria under Article 575 of the *Code of Civil Procedure,* CQLR c C-25.01 ("*CCP"*), that must be met in Quebec for a class action to be authorized and for the representative plaintiff to be designated.

The court noted that, in analyzing the criteria under Article 575, the court must ensure the proposed class action is not frivolous, while also approaching the evidence liberally and generously with respect to the goals of class actions (namely, deterrence and compensation for victims, amongst others).

Tress v. FCA, 2023 SKKB 186

Product liability class actions require demonstrable proof of compensable loss, and an absence of such evidence can be fatal.

This decision dealt with an application to certify a class action due to alleged misrepresentation, negligence, breach of contract, and a violation of regulatory standards. The plaintiff's claim alleged the defendants (FCA US LLC and FCA Canada Inc.) misrepresented the emissions performance of diesel vehicles, which they allege were equipped with auxiliary emissions control devices ("defeat devices") that caused them to produce exhaust emissions above the regulatory limits.

Before the class certification application, the defendants developed an update to address the emissions issues which was offered to all purchasers and lessees of the class vehicles, free of charge. The update occurred under the terms of a settlement that FCA reached with the US' EPA and CARB in 2019, which settled the regulatory proceedings.

The court, in reviewing the "themes of loss" claimed by the plaintiff, found that the minimum evidentiary basis for compensable harm was not established. The court cited other recent Ontario decisions in *Maginnis v FCA Canada Inc.*, 2021 ONSC 3897 and Maginnis and *Magnaye v FCA Canada*, 2020 ONSC 5462, in support of this finding. The court was clear that "the absence of evidence of a compensable loss cannot be simply overlooked when considering the pre-requisites to certification".

Tress v. FCA US LLC, 2024 SKCA 31

A lack of evidence of compensable loss can be fatal to certification of a defective device class action.

In this case, the plaintiff initiated a class action alleging that the defendants designed, manufacturer and distributed motor vehicles with "defeat devices" that caused excess emissions.

At the first instance the motions judge dismissed the plaintiff's application for certification. On appeal, the Saskatchewan Court of Appeal denied appeal, dismissing the plaintiff's application for class certification. The court held there was no basis in fact to support there was compensable harm, a class action was not the preferable procedure and there was an inadequate class representative. In addressing the appellant's 12 grounds of appeal, the court confirmed that Saskatchewan and, more broadly, Canadian jurisprudence mandates that class certification requires evidence of compensable harm or losses.

This case re-affirms the principle that certification of a class action requires demonstrable proof of compensable loss on the part of the class members. A lack of such evidence will likely be fatal.

Gebien v. Apotex Inc., 2023 ONSC 6792

If there is an issue with the pleadings the court may not outright dismiss certification product liability class actions.

A class action was commenced against seventeen pharmaceutical manufacturers and distributors, claiming over $1.2 billion in compensation. The claims include breaches of the *Competition Act*, RSC 1985, c C-34, negligent representation, fraudulent misrepresentation or deceit, and common law negligence. Further, the defendant was comprised of two groups, the manufacturers, and the producers.

The defendants brought a motion to strike the statement of claim for failing to disclose a cause of action, and in the alternative for violating the rules of pleadings. An additional motion was brought by another defendant challenging the jurisdiction of the proposed class action.

In response to the pleading issue, the court held that the statement of claim was overly rhetorical, argumentative, and violated the rules of pleading. The plaintiffs were granted 120 days to amend their claims. Further, the court struck the claims against the distributor defendants finding there were no material facts or evidence connecting them to the alleged misconduct. For the defendant that brought a motion on jurisdiction, the court held Ontario lacked jurisdiction and Quebec was the more appropriate avenue.

This case demonstrates that if a plaintiff's pleading is non-compliant, such non-compliance may not be a total bar to certification. Further, there is a high bar connecting proposed defendants to alleged misconduct when there is a complex situation involving multiple parties.

D'Heane v. BMW Canada Inc., 2022 ONSC 5973

Plaintiffs must adhere to the procedural timelines or risk having their actions dismissed.

A proposed class action was initiated against several automobile manufacturers. This was one of several national class actions brought against automobile manufacturers for allegedly defective airbags installed in vehicle models. A motion was brought by two defendants to dismiss the immediate action of a proposed class action for delay under section 29.1 of Ontario's *Class Proceedings Act*, 1992, S.O. 1992, c 6 ("*CPA*"). The plaintiff had failed to meet the deadline for advancing the claim by either filing a certification motion agreeing to a timetable.

The court dismissed the action as against the two moving automotive manufacturers. However, the court noted that the dismissal order was subject to being set aside if the representative plaintiffs filed a final and complete motion record in the motion for certification within thirty days. The court noted it had the discretion to use its initiative to make such an order under section 12 of the *CPA.*

This decision suggests that courts may have flexibility in making similar orders under section 29.1, which may, in certain circumstances, still allow the proposed representative plaintiffs to have another kick at the can. However, the impact and acceptance of this decision remains to be seen. The court in *Tataryn v Diamond & Diamond*, 2023 ONSC 6165, considered the phoenix order in *D'Haene and* remarked that section 29.1 would not address the problem it was intended to resolve if such orders could be made.

D'Haene v. BMW Canada Inc., 2023 ONSC 6434

Developments in the law have meant that claims for pure economic loss must meet strict criteria to succeed in product liability cases.

The defendants brought a motion to discontinue a proposed class action which was commenced due to claims of defective airbags posing dangers during deployment. While the action was commenced in April 2015, the intervening years saw developments in case law that diminished the prospects for certification, and the viability of claims for pure economic loss. As such, the plaintiffs instructed counsel to discontinue the action, and the defendants consented to the motion and requested orders.

Recent cases out of the Supreme Court of Canada had changed the framework for claims of pure economic loss. Claims of pure economic loss, with few exceptions, tend to fall within the scope of contract law rather than tort law and claims of negligence. These developments in the law significantly impacted the continuance of this action considering the diminished prospect of recovery. The motion to discontinue was granted.

The decision in this case reiterates that claims of pure economic loss are unlikely to be certified as class proceedings.

DeBlock v. Monsanto Canada ULC, 2023 ONSC 6954

An ongoing individual civil actions against manufacturers or producers, that address the same issue as the proposed class action, will not necessarily weigh in favour of dismissing certification.

This decision addressed an application commenced by a proposed representative plaintiff for a class action against the defendants for their respective roles in producing, distributing, and selling herbicide products which contained glyphosate, a synthetic compound that is allegedly carcinogenic. The representative plaintiff was diagnosed with non-Hodgkin's Lymphoma at 17 and attributed his diagnosis to glyphosate. The defendants acknowledged that the pleadings disclosed a cause of action in negligence but challenged the claims for battery, unjust enrichment, and constructive trust.

The court certified the action as a class proceeding for claims of negligence and failure to warn, although the battery and unjust enrichment/constructive trust causes of action were dismissed. While noting that individual actions related to glyphosate were ongoing, the court determined that a class proceeding in this case would provide easier access to justice and be more economical than pursuing individual claims. The court cited the ongoing glyphosate litigation in the US in support of this conclusion.

The decision seems to suggest that ongoing individual civil actions against manufacturers/producers, that address the same issue as the proposed class action, will not weigh in favour of dismissing certification. Courts may be inclined to find that class actions are preferable for enabling access to justice on a wider scale. This should be considered by manufacturer's facing class action certification motions who are also subject to ongoing individual civil claims.

Fernandes Leon v. Bayer Inc., 2023 ONCA 629

Plaintiffs don't need to specifically identify defects in their statement of claim if sufficient material acts are provided to support the allegations.

This appeal stems from an action brought by a claimant for alleged injuries suffered from an implanted female contraception device. While the action was brought against the doctor who implanted the device and Bayer Inc. (manufacturer), the action against the doctor was discontinued. Bayer brought a motion to dismiss under Ontario's rule 21.01(b) of the *Rules of Civil Procedure*, RRO 1990 Reg 194 arguing that the statement of claim disclosed no cause of action. The Superior Court struck the statement of claim without leave to amend. The plaintiffs appealed this decision arguing they ought to have been granted leave to amend their claim.

The Ontario Court of Appeal allowed the appeal, finding that the proposed amended statement of claim satisfied the "low threshold" to plead a cause of action and provided the essential elements for claims of negligent design and manufacture. Notably, the court did not agree with Bayer's submission that statements of claim must be struck if they do not identify specific manufacturing or design defects in the given product. To do so, according to the court "would place too onerous a burden on a plaintiff at the stage of initiating a proceeding in a product liability action". According to the Court of Appeal, the details of an alleged defect are not always required elements to be pleaded before the claims disclose a cause of action.

The court deemed that in this case, the appellant's met the requirement to plead a cause of action in negligence, even if they could not identify a specific defect in the product's manufacture or design.

Lam v. Flo Health Inc., 2024 BCSC 391

Companies must be cautious with managing client information and must be clear regarding privacy policies and consent it obtains pursuant to those policies.

The plaintiff brought an application to certify a class action on behalf of Canadian users (except those in Quebec) of the Flo Health & Period Tracker app during the proposed class period. The plaintiff submitted that Flo had intentionally violated the privacy of the app's users, having entered into contracts with third-party companies and granting them access to user information for purposes such as advertising and promotion. The proposed causes of action included breach of confidence, negligence, and breach of relevant consumer protection statutes, amongst others.

The court approved the application for the action to be certified as a class proceeding for some of the common issues, including intrusion upon seclusion (in most jurisdictions), breach of confidence, and breach of relevant privacy legislation (and resulting damages from that breach). The court found a basis for the claim that Flo inappropriately handled user information due to evidence tendered by the plaintiff, which include (a) a report from the Wall Street Journal and (b) an investigation by the US Federal Trade Commission into Flo, which resulted in a decision and order by the FTC following the investigation. However, the court found several of the proposed causes of action (including unjust enrichment, breach of consumer protection legislation, and breach of the *Competition Act*, RSC 1985, c C-34) destined to fail, while granting the plaintiff leave to amend the pleadings for their breach of contract claim.

While the ultimate outcome of this action is still to be decided, this case may have significant impacts on manufacturers or producers who collect and manage data about their consumers, particularly those that develop and publish applications.

GlobeAir Holding GmbH c. Pratt & Whitney Canada Corp, 2024 QCCS 2451

Broad ICC arbitration clauses must be respected.

Globe Air alleged that the P&Ws engine suffered from defects which caused frequent breakdowns and significant financial losses. Globe air further alleged that it is also locked into an exclusive 2017 agreement with P&W that prevents it from using alternative service providers. Globe air filed a claim in the Quebec Superior Court, but P&W responded arguing that the dispute was covered by an arbitration clause in the 2017 agreement, broadly referring all disputes to the ICC arbitration in Toronto under Ontario law. The other issue presented was whether the Quebec Superior Court would issue interim measures compelling P&W to provide temporary replacement engines while the arbitration proceeds.

The court held that arbitration agreements should be liberally construed. The judge found that there was nothing in Quebec law preventing the resolution of the issues raised in arbitration, that the arbitration agreement was not null, and that while there was a dispute escalation process in the agreement, neither party had raised it in the hearing. He said that the agreement gave the

broadest possible grant of jurisdiction to an arbitral tribunal, covering "any dispute, questions or controversies arising out of or in connection with the agreement", as well as legal relationships associated with it.

Finally, the court held that they have the authority to grant relief when arbitration is pending, but in this instance, there was not sufficient evidence of urgency and irreparable harm. The plaintiffs had not ultimately demonstrated that their business operations would be irreparable harm without immediate intervention, and this required a haring on the merits. The court emphasized the fact that the agreement was concluded between sophisticated parties and, as such, it must be honored. This case affirms that agreements about arbitration clauses should be liberally construed.

Pelton v. Maytag, 2024 ONSC 3016

Defendants may not have a duty to warn when the risks are remote and reflective of a plaintiff's unique circumstances.

The plaintiff sought damages after a valve in his ten-year-old dishwasher failed, causing extensive flooding and damage to his home. The plaintiff alleged that the valve had been negligently manufactured and failed under ordinary use, and that the defendants had failed to warn of the potential risk of failure due to freezing. The defendants (the manufacturers of the dishwasher and the valve, respectively) argued that the valve failure was unforeseeable as it arose due to an unforeseen freezing event.

The court confirmed that manufacturers have a duty to warn of probable and foreseeable risks; however, there is no duty to warn of remote or merely possible risks or dangers. Even where the alleged risks are generally known to the manufacturer, there is no duty to warn if the risks arise only from plaintiff-specific facts and circumstances unknown to the defendant.

The court held that if plaintiffs are alleging a manufacturing defect, they must prove its existence with reliable evidence. Testing to establish a defect may not be persuasive where it cannot be reliably connected to the affected product, for example, where there is a significant delay or intervening events between the incident and the testing, or where the products used in testing are much newer.

Kane v. FCA US LLC, 2024 SKCA 86

The court is unlikely to certify a class action where claims from defective products are for pure economic loss.

A proposed class action was commenced against several auto manufacturers after they issued various recall notices. The representative plaintiff claimed the vehicle design and manufacturing which resulted in the notices caused financial losses and other damages to class members and argued for damages pursuant to negligence, breach of warranty, unjust enrichment, and violation of consumer protection laws.

At first instance the certification judge dismissed the application for certification finding that the plaintiff's reliance only on the existence of the recall noticed failed to establish that there

was some basis in fact that the proposed common issues existed or could be answered in common across the entire class.

The Saskatchewan Court of Appeal upheld the decision not to certify the proposed class, finding that there was no basis in fact that the defects posed a real, substantial, or imminent danger capable of causing damage. The court agreed that claims for pure economic loss are not typically recoverable under Canadian negligence law unless they are tied to an imminent, real, and substantial danger or harm.

Evans v. General Motors of Canada Company, 2024 SKCA 87

Claims for pure economic loss arising from defective products are not likely to be the preferable procedure for a class action.

A class action was commenced against General Motors for vehicles alleged to have defective cooling systems. The plaintiffs alleged these defects led to economic losses by resulting in performance issues that diminished the value of their vehicles. The claims included negligence, unjust enrichment, and branches of statutory warranties.

The class action was certified by the certificate judge at first instance. The certification judge concluded that there was some basis in fact that the vehicles had manufacturing defects, but there was no evidence of any injuries or damages suffered, nor any evidence that they rendered the vehicles inoperable.

The defendant, General Motors appealed the certification decision. On appeal, the Saskatchewan Court of Appeal allowed the appeal, reversing the lower courts decision. They held that Canadian law limits recovery for pure economic loss unless there is a real or substantial danger posed to person(s) or property. The Court of Appeal held that negligence claim absent evidence of compensable harm do not further judicial economic or access to justice and therefore it failed to satisfy the preferable procedure criterion. In this case, the diminished vehicle value and overpayment did not create a risk of danger.