Defense UPDATE

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GROWTH OF FEDERAL PREEMPTION

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In products liability law there are many available defenses, some better than others. However, few defenses are as all encompassing, and as likely to terminate the plaintiff's claim as thoroughly and as completely, as through the use of federal preemption.

The Bush Administration, frustrated in its efforts to enact tort reform legislation, turned to a different method of tort reform, federal preemption. An effort has been underway to add introductions, called preambles, to regulations issued by such federal agencies as the Food & Drug Administration, the U.S. Department of Transportation, and others. Business and industry groups, who prefer to avoid state court products liability lawsuits, have been encouraging the use of this form of regulatory preemption as a means to get around Congress' unwillingness to amend statutes to insert preemption provisions. During the last several months, the Administration has added language focusing on preemption into about 50 separate rules governing such things as motorcycle brakes, pain medication and seatbelts. These preamble provisions are asserted by defendants in litigation to demonstrate the regulator's intent that personal injury lawsuits arising out of issues, such as design defects and warnings, are preempted by federal regulations encompassing the same or similar subject matters. Such arguments are made even if the precise regulations are not devoted nor focused on the precise design defect or warning issue which is the subject of a particular lawsuit. In recent times, drug and medical device litigation has been a hotbed for the use of the federal preemption defense. The FDA in particular, has been proactive in promoting preemption through, not only adding preamble language asserting an intention to preempt, but also by the filing of amicus briefs supporting preemption arguments made by defendants.

Historically, the analysis of whether a statute preempted state court tort claims involved determining Congressional intent. Sometimes, such intent is clear because there is a specific statutory provision which clearly provides for preemption. Examples of such statutes include that contained in the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §136v(b) and the Federal Hazardous Substances Act, 15 U.S.C. §1261, et seq. These two statutes deal in part with labeling requirements, and so assertion of preemption there often occurs in the context of failure to warn claims. Another type of preemption is

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implied preemption. This occurs where Congressional regulation is so pervasive that courts find that the states cannot regulate contrary to the provisions of a statute notwithstanding the lack of a specific preemption provision in the statute. The National Childhood Vaccine Injury Compensation Act, 42 U.S.C. §300aa-1, et seq. does not have an express preemption provision, but has been interpreted by some courts has having preemptive effect on state court design defect related products liability suits. Congress can authorize federal agencies to regulate such that the actions of the agency can have preemptive effect.

In recent years, the U.S. Supreme Court has decided a few preemption cases. In the 2008-2009 term, the U.S. Supreme Court will be addressing two more cases. The first such case, argued in early October 2008, was *Altria Group v. Good*, No. 07-562. There, the issue involved false advertising claims with respect to "light" cigarettes. The defendant argued that such false advertising claims were preempted by the Federal Cigarette Labeling & Advertising Act, 15 U.S.C. §1331, *et seq*. In that case, the First Circuit Court of Appeals ruled that the suit was not preempted. *Good v. Altria Group*, 501 F.3d 29 (1st Cir. 2007). While the Act at issue does expressly address the issue of advertising and labeling with respect to mandated warnings, plaintiffs argued that the preemption provision does not address marketing type language such as the use of the word "light" to promote the notion that such cigarettes are less unhealthy.

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The second case, *Wyeth v. Levine*, No. 06-1249, was argued on November 3, 2008. This case involved an appeal from the Vermont Supreme Court which upheld a six million dollar jury verdict against Wyeth arising out of an alleged failure to warn about the side effects of a medication. The medication was administered into an artery, not a vein, resulting in the need to amputate the plaintiff's hand and forearm. The regulation at issue there did not expressly preempt the suit. Plaintiff argued that the label for the drug did not warn against injection into an artery. In asserting preemption, the drug company argued that its labeling complied with federal law in that it was approved by the FDA. Yet the defendant was put in the position of being held responsible for not using a different, non-approved label; the language suggested by the plaintiff in that case. The defendants here are asserting implied preemption.

In the previous term, the U.S. Supreme Court rendered its decision in *Riegel v. Medtronic, Inc*., ___ U.S. ____, 128 S.Ct. 999, 169 L.Ed.2d 892 (2008). That case involved a state law, design defect claim concerning a Class III medical device that was approved for marketing by the FDA after extensive premarket review process. The Court found that the Medical Device Amendments to the Food, Drug & Cosmetic Act expressly preempted the suit. Legislation was introduced in Congress which would effectively reverse this result. Some believe that this action is only the first step toward reducing the number of situations where preemption is available.

Defense counsel should be vigilant in looking for opportunities to assert preemption while these opportunities exist.

SEVENTH CIRCUIT RECOGNIZES THAT ILLINOIS LAW DOES NOT REQUIRE VEHICLE MANUFACTURERS TO CONSIDER RISK TO OCCUPANTS OF OTHER VEHICLES

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On September 11, 2008, in *Rennert v. Great Dane LP*, the U.S. Court of Appeals for the Seventh Circuit set forth that Illinois law does not impose an affirmative duty on vehicle manufacturers to design vehicles which are reasonably safe for those who collide with that vehicle.

Plaintiff, Rabbi Shmuel Rennert and his wife, were involved in a rear end collision on July 1, 2005, with a truck towing a trailer designed by Defendant Great Dane. As a result of a faulty underride guard on the rear of the trailer, Plaintiff's automobile slid underneath the trailer. The collision injured Plaintiff and killed his wife. Consequently, on behalf of himself and as a representative of his wife's estate, Plaintiff brought suit in state court alleging that Great Dane was liable under "Illinois's strict product liability regime." Thereafter, Defendant removed the action to federal court based upon diversity jurisdiction, whereupon the federal district court dismissed the claim with prejudice; Plaintiff appealed.

On appeal, as all of the parties to the action agreed that Illinois law governed, the question before the Seventh Circuit, was whether the Supreme Court of Illinois would recognize a cause of action based on Plaintiff's allegations. Plaintiff's argument was that, if it had the chance, the Illinois Supreme Court would find merit in claims such as Plaintiff's. To support this argument, Plaintiff relied upon the fact that nine other states have recognized a cause of action in cases such as these, and that the last time the Illinois Supreme Court visited this issue was over twenty years ago. The Seventh Circuit rejected this argument, stating that Illinois has taken a consistent position with regard to this issue, and that "strong evidence that the Supreme Court of Illinois is on the brink of changing its position" is not present.

First, in its reasoning, the Seventh Circuit stated that the Supreme Court of Illinois had in fact already considered a similar issue in *Mieher v. Brown*, 301 N.E.2d 307 (Ill.1973). Specifically, the Seventh Circuit stated that in *Mieher*, while the court was considering a negligence claim, as opposed to one premised on strict liability, the court nonetheless "drew a bright line based on Restatement (Second) of Torts § 435(2)," and found that the manufacturer does not owe a duty to protect those who collide with its vehicles. Further, in direct response to Plaintiff's contention that the Supreme Court of Illinois has not recently visited this issue, the Seventh Circuit set forth the Illinois Appellate Court decision, *Beattie v. Lindelof*, 633 N.E.2d 1227 (Ill. App. Ct. 1994). In *Beattie*, the plaintiff was injured in an underride accident, and brought suit in strict liability against a former owner for failure to maintain. While the claim was not brought against a manufacturer, the court "extended the reasoning of *Mieher* to cover a strict liability claim and predicted that the state supreme court would agree with it." The Supreme Court of Illinois denied leave to appeal. With regard to this precedence, the Seventh Circuit stated, "We have a fairly clear articulation of law from the state supreme court, and the state appellate court has extended this ruling to cover facts materially identical to those before us now."

Still, in addition to state precedent, the Seventh Circuit also noted that the Illinois General Assembly's reluctance to change its view with regard to this issue in light of the "promulgation of regulations for rear guards by the National Highway Traffic Safety Administration" which provides further support that Illinois is not on the brink of changing its stance. In particular, the Seventh Circuit reasoned that these federal regulations "postdated both *Mieher* and *Beattie"* and that the General Assembly "has not acted either to overrule *Mieher* legislatively or even to suggest a different balancing of the relevant policy considerations."

Lastly, the Seventh Circuit affirmed the decision of the District Court, reasoning that "there is no indication that there is any confusion in the state on the matter," and thus, the fact that a number of other states have taken a different approach is irrelevant.

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ILLINOIS SUPREME COURT DECLINES TO ADOPT THE RISK-UTILITY TEST AS THE SOLE METHOD OF PROOF TO SHOW THAT A PRODUCT IS UNREASONABLY DANGEROUS IN A STRICT LIABILITY DESIGN DEFECT CASE

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The Illinois Supreme Court, in its October 17, 2008 decision in *Mikolajczyk v. Ford Motor Company,* declined to adopt the risk utility test as the sole test which may be used to prove that a product is "unreasonably dangerous" in a strict liability design defect case. The Court further stated that the trial court in such actions should take into account the specific issues raised in the pleadings and evidence presented at trial when deciding whether a jury instruction on either or both tests is proper.

On February 4, 2000, Plaintiff's decedent James Mikolajczyk was killed and his daughter seriously injured when the 1996 Ford Escort he was driving was hit in the rear by another vehicle. Mikolajczyk's wife and Special Administrator of his estate filed suit against the other driver, Ford Motor Company, the manufacturer of the Escort and Mazda Motor Corporation, the manufacturer of the Escort's driver's seat. As against Ford and Mazda, Plaintiff alleged strict products liability based on what she asserted was the defective design and unreasonably dangerous nature of the driver's seat.

Plaintiff's case against the driver of the other vehicle was resolved by entry of Summary Judgment against him. At trial against Ford and Mazda, both Plaintiff's and Defendants' experts testified about the risks and benefits involved in use of the "yielding" seat design of the Escort's driver's seat, the seat's compliance with federal safety standards, the availability and feasibility of a rigid seat, the risks and benefits of that design and the various seat designs used in other vehicles manufactured in 1996.

The jury was instructed using Plaintiffs tendered versions of Illinois Pattern Jury Instructions, Civil Nos. 400.01.01, 400.02, 400.06. The trial court rejected a non-pattern instruction tendered by Defendants to either be given with or instead of instruction 400.06, which defines "unreasonably dangerous". The non-pattern instruction asked the jury to consider the "overall safety of the design, whether the foreseeable risks of harm of the design outweighed its benefits, and whether the adoption of the feasible alternative design would have avoided or reduced the risks". The jury answered in the affirmative a special interrogatory which asked: "Was the driver's seat of the Mikolajczyk car in an unreasonably dangerous condition that was a proximate cause of James Mikolajczyk's death?", returned a verdict in Plaintiffs favor, awarded damages for loss of money, goods, services and for loss of society. A portion of the fault was assigned to Ford and Mazda. The First District Appellate Court declined to accept Defendants' argument that the jury instructions were improper. Defendants appealed.

Defendants asserted to the Supreme Court that the "risk utility test" was the only test which should be utilized in Illinois cases alleging defective design of a complex product and in the alternative asserted that if the Illinois Supreme Court had not previously adopted it as the exclusive test in these types of cases, it should do so. The Defendants argued that the trial court incorrectly applied substantive law to Plaintiff's case by its refusal to use Defendants' tendered non-pattern jury instruction. They asked for a new trial based on this and based on their assertion that the jury instructions

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given did not correspond to the evidence at trial. Various interested organizations, including the Illinois Association of Defense Trial Counsel filed Amicus briefs in support of the Defendants' position. The IDC advocated exclusive use of the risk-utility test in strict liability design defect claims involving complex products used in circumstances beyond ordinary consumer experience. It argued that use of the risk-utility standard would allow product manufacturers to bring reasonably safe products to the market with some confidence in their ability to defend their design decisions in a strict liability action.

The Illinois Supreme Court rejected the Defendants' argument and held that, depending on the issues raised in the pleadings and by the evidence, both the risk-utility test and the consumer-expectation test could be utilized in a strict liability design defect case to prove that a product was unreasonably dangerous but found, based on the pleadings and evidence, that the trial court had abused its discretion when it refused to instruct the jury using Defendants' tendered non-pattern instructions.

The Court declined to adopt the risk-utility test as the exclusive test to be used in all design defect cases, as to do so, they said, would inappropriately alter the "unreasonably dangerous" element in design defect cases.

The Supreme Court, in its reasoning, recounted the evolution of its rulings in strict liability, design defects cases in Illinois regarding proof that a product is unreasonably dangerous, stated that it had never rejected the consumer-expectation test merely because a complex product was involved nor had it, as Defendants asserted, adopted Section 2 of the Products Liability Restatement as the sole, exclusive test for dangerousness in such cases and held that it had not abandoned or limited "use of the consumer-expectation test". The Court, distinguishing *Calles v. Scripto-Tokai Corp.,* also stated that it had not, in prior rulings, adopted a "simple product exception" to application of the risk-utility test in these cases.

The Court declined to adopt the risk-utility test as the exclusive test to be used in all design defect cases, as to do so, they said, would inappropriately alter the "unreasonably dangerous" element in design defect cases. Such a change, reasoned the Court, would require a Plaintiff to plead and prove the existence of a feasible alternative in every case and would place the burden on Plaintiff to prove that the product was "not reasonably safe" rather than "unreasonably dangerous".

Regarding the issue of jury instructions in strict liability design defect cases, the Court, following their reasoning and result reached in *Calles,* stated that Illinois Pattern Instruction No. 400.06 is inappropriate in some cases and that "when the consumer expectation analysis does not apply, an instruction that incorporates consideration of risk and utility, including feasibility of an alternative design, is required". It held that in a situation where either or both parties plead and present evidence relevant to the risk-utility analysis and that evidence supports use of a broad and integrated test, a non- pattern jury instruction which correctly states the legal principles applicable to the case and is supported by the evidence should be given at the request of either party. Finally on the issue of whether results of applying the risk-utility test should "trump" differing results obtained when applying the consumer-expectation test, the Court held that because the consumer expectation test is narrow and only considers one factor, if a design defect allegedly exists in a complex product, the broader risk-utility test should be applied as consumer expectation is one of the factors incorporated in that analysis.

ACTUAL NOTICE OF DEFECT EXCEPTION TO THE ILLINOIS DISTRIBUTOR STATUTE REQUIRES MORE THAN KNOWLEDGE OF THE CHARACTERISTICS OF THE PRODUCT

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Section 2-621 of the Illinois Code of Civil Procedure, also known as the "seller's exception" or the Illinois Distributor Statute, allows for a non-manufacturing defendant in a strict products liability action to be dismissed from the action if it certifies the correct identity of the manufacturer of the product which allegedly caused the injury. 735 ILCS 5/2-621 (West 2006). When a defendant complies with the requirements of section 2-621, its dismissal from a strict liability action is mandatory. A plaintiff may move at any time for reinstatement of a previously dismissed defendant if an action against the product manufacturer would be impossible or unavailing. 735 ILCS 5/2-621(b).

Section 2-621(c) provides three exceptions to the mandatory dismissal of a complying defendant. The recent case of *Murphy v. Mancari's Chrysler Plymouth, Inc.*, 887 N.E.2d 569 (2008), concerned the interpretation of the exception stated in section 2-621(c)(2), pursuant to which a court may not dismiss a defendant otherwise eligible for dismissal from the suit if the plaintiff shows that the defendant "had actual knowledge of the defect in the product which caused the injury, death or damage."

In the *Murphy* case, the plaintiffs, Joseph and Patricia Murphy, purchased a Chrysler Sebring automobile from defendant Mancari's Chrysler Plymouth, Inc. ("Mancari's"). In 2005 Joseph Murphy sustained permanent spinal cord injuries when the Sebring rolled over while he was driving it. In 2006, the plaintiffs filed a personal injury action asserting strict product liability claims against Mancari's and DaimlerChrysler Corporation, the manufacturer of the vehicle. Mancari's moved to dismiss the strict liability count against it pursuant to the Illinois Distributor Statute asserting that it was not the manufacturer of the vehicle.

Plaintiffs' responded to Mancari's motion to dismiss by arguing that the strict liability count against Mancari's should not be dismissed because the "actual knowledge of defect" exception stated in section 2-621(c)(2) applied. Plaintiffs asserted that they had adequately pled the exception in their complaint by asserting that "[b]efore the occurrence, Mancari's knew, but did not warn plaintiffs that the vehicle was not equipped with a sufficient roll bar or other devices to protect Joseph from traumatic injuries in a reasonably foreseeable manner." Plaintiffs attached the deposition

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of Mancari's general manager to show that Mancari's had actual knowledge of the fact that the car in question was not equipped with a roll bar. Plaintiffs argued that it was their burden to show only that Mancari's had actual knowledge of the conditions plaintiffs claimed made the Sebring defective and not that Mancari's believed those conditions were in fact defective or unreasonably dangerous.

The trial court granted Mancari's motion to dismiss and certified the following question for immediate appeal: "To state a claim for strict liability in tort against a defendant other than a manufacturer who has filed an affidavit complying with 735 ILCS 5/2-621(a), must a plaintiff relying upon the 'actual knowledge of the defect' exception contained in 735 ILCS 5/2-621(c)(2) allege only that said defendant had actual knowledge of the physical characteristics of the product that plaintiff claims were unreasonably dangerous, or, in the alternative, must plaintiff allege actual knowledge of the physical characteristics of the product *and* actual knowledge that said characteristics made the product unreasonably dangerous?"

The appellate court began its analysis of the question by noting that there is an inherent conflict between the doctrine of strict products liability and Section 2-621 of the Code of Civil Procedure. A strict products liability action is predicated on a finding that the product is unreasonably dangerous, regardless of fault. In contrast, the focus in Section 2-621(c) is on the actions and knowledge of the non-manufacturing members of the distributive chain regarding the defect or alleged defect in the product.

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The appellate court further explained that the issue in this case centered on the legislature's use of the word "defect" in Section 2-621(c)(2). Did the legislature intend "defect" to mean just the physical characteristics/design of the product or did it intend "defect" to mean the unreasonably dangerous physical characteristics/design of the product? Using the dictionary definition of "defect" as an aid, the appellate court concluded that a plaintiff must show that the defendant had actual knowledge of the imperfection/blemish/fault/deficiency in the product which allegedly caused the injury. Absent such a showing, the non-manufacturing defendant is entitled to dismissal from the case.

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2009 CALENDAR *of Events*

- **January 23-24, 2009** — **North Central Region Trial Academy**
  Oak Brook Hills Hotel & Resort •
  Oak Brook, IL
- **March 13, 2009** — **Spring Defense Tactics Seminar**
  Standard Club • Chicago, IL
- **May 1, 2009** — **Diversity Seminar / Ethics and the Legal Profession Seminar**
  University Club of Chicago • Chicago, IL

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