

# TADC PRODUCTS LIABILITY NEWSLETTER

## *Selected Case Summaries Prepared Summer 2012*

### **Editor:**

Joseph S. Pevsner  
Thompson & Knight LLP

### **Co-Editor:**

Janelle L. Davis  
Thompson & Knight LLP

### **Contributing Editor:**

Meghan Nylin  
Thompson & Knight LLP

## **I. Summary**

**1. The Texas Supreme Court held for the first time that the learned intermediary doctrine applies in prescription drug cases. Although the court did not decide whether misleading direct marketing to consumers could void protection of the learned intermediary rule under Texas law, an educational video instructing consumers about how a drug is infused was not sufficient to create an exception to the doctrine based upon direct marketing. Further, the court held that the learned intermediary doctrine is a common law rule, not an affirmative defense; thus the manufacturer does not bear the burden to plead and prove findings supporting application of the doctrine at trial. *Centocor, Inc. v. Hamilton*, 372 S.W.3d 140 (Tex. 2012).**

**2. The Texas Supreme Court reversed a Court of Appeals' holding that a lay witness's testimony unrelated to the alleged malfunction with a rental truck**

**was admissible as other-acts testimony, and it held that the admission of this evidence probably resulted in the rendition of an improper verdict. Further, the plaintiff failed to meet his burden of showing by clear and convincing evidence that a national truck rental company and its subsidiary were grossly negligent. *U-Haul Int'l, Inc. v. Waldrip*, \_\_\_ S.W.3d \_\_\_, No. 10-0718, 2012 WL 3800220 (Tex. Aug. 31, 2012).**

**3. The Houston [1st District] Court of Appeals holds that where a qualified expert testifies that some deviation from typical methodology was necessary to determine the origin of an unusual fire, the party seeking exclusion must show the departure was sufficient to cause the opinion to be unsupported by accepted scientific techniques. Further, the challenge to the expert testimony must go beyond mere conclusions a juror could have drawn from the testimony. *Control Solutions, Inc. v. Gharda USA, Inc.*, \_\_\_ S.W.3d \_\_\_, No. 01-10-00719-CV, 2012 WL 3525372 (Tex. App.—Houston [1st Dist.] Aug. 16, 2012, no pet. h.).**

**4. A trial court abused its discretion by ordering discovery related to an entire family of products from a manufacturer where the plaintiffs' only allegation against the manufacturer was that one of its products was defective. The plaintiffs failed to prove a connection between the design of certain products and the design of the allegedly defective product, rendering discovery related to those products improper. Moreover, although the plaintiffs showed that documents related to some other products were relevant, the trial court erred by failing to limit discovery to documents shown to be**

**relevant.** *In re Am. Power Conversion Corp.*, No. 04-12-00140-CV, 2012 WL 2584290 (Tex. App.—San Antonio July 5, 2012, no pet.) (mem. op.) (not designated for publication).

**5. While Texas Civil Practice & Remedies Code Section 82.003(a) protects a non-manufacturing seller from liability for a defective product subject to certain exceptions such as involvement in design or installation of the product, that protection is inapplicable if the manufacturer is “not subject to the jurisdiction of the court.” The San Antonio Court of Appeals holds that a non-manufacturing seller is protected despite a foreign manufacturer’s failure to appear, because the manufacturer had sufficient minimum contacts with Texas and was properly served.** *Fields v. Klatt Hardware & Lumber, Inc.*, \_\_\_ S.W.3d \_\_\_, No. 04-11-00610-CV, 2012 WL 2335978 (Tex. App.—San Antonio June 20, 2012, no pet.).

**6. The El Paso Court of Appeals affirmed dismissal of a plaintiff’s claims because (a) the plaintiff failed to show that the risk of injury from a long neck beer bottle outweighed its utility, and (b) the plaintiff could not show that the manufacturer had a duty to protect her from the criminal actions of a third party who attacked her with the bottle.** *Gann v. Anheuser-Busch, Inc.*, \_\_\_ S.W.3d \_\_\_, No. 08-11-00017-CV, 2012 WL 3026369 (Tex. App.—El Paso July 25, 2012, no pet.).

## II. Discussion

### 1. *Centocor, Inc. v. Hamilton*, 372 S.W.3d 140 (Tex. 2012).

In *Centocor*, the Texas Supreme Court held that the learned intermediary doctrine (a) applies in the context of a physician-patient relationship (including in prescription drug cases), and (b) allows a prescription drug manufacturer to fulfill its duty to warn a user of a drug’s potential risks by providing the appropriate warnings to the physician who prescribes the drug. Further, the Court concluded that this was not an affirmative defense but was, instead, more akin to a common law rule. The Texas Supreme Court also unanimously rejected the creation of a direct-to-consumer advertising exception to the doctrine.

Patricia and Thomas Hamilton sued Centocor, Inc., a prescription drug manufacturer, after Ms. Hamilton developed a drug-induced lupus-like syndrome after taking Remicade, a product manufactured by Centocor. The Hamiltons alleged that Remicade was defective and unreasonably dangerous and that Centocor was liable because it distributed inadequate or misleading warnings about the side effects of Remicade.

After several months of problems, Ms. Hamilton and her prescribing physician decided to try Remicade for the treatment of her Crohn’s disease. Her prescribing physician explained the risks and benefits of Remicade, and Ms. Hamilton chose to use it. While Ms. Hamilton was at an infusion clinic receiving her first treatment of Remicade, she watched a video about Remicade. The video had been made by Centocor. The Hamiltons alleged that this video failed to warn consumers about the potential side effect of a lupus-like

syndrome, and that the video over-emphasized the benefits of Remicade.

The FDA-approved package insert for Remicade explained that a lupus-like syndrome was a potential side effect of Remicade. Centocor argued that the learned intermediary doctrine—which provides that a manufacturer does not have a duty to provide an adequate warning to end users of its product if it provides an adequate warning to an intermediary, who assumes the duty of passing the warning to the end users—applied here. The court of appeals concluded that there was an exception to the learned intermediary doctrine if a manufacturer markets directly to consumers and provides an inadequate warning in its materials. Centocor appealed to the Texas Supreme Court.

The Texas Supreme Court held, for the first time, that the learned intermediary doctrine applies in the context of prescription drug products liability cases. The Hamiltons argued that there should be an exception to the learned intermediary doctrine where a manufacturer markets directly to consumers. Without deciding whether Texas should recognize a direct-to-consumer advertising exception when a manufacturer provides misleading information directly to patients, the Texas Supreme Court concluded that no such exception would apply in this case.

Here, the court rejected the reasoning of other courts that had found a direct-to-consumer advertising exception and held that the foundation for the learned intermediary doctrine still applies. The court also noted that Ms. Hamilton had already begun treatment with Remicade when she viewed the allegedly misleading video. Thus there was no evidence that the allegedly misleading video was the

producing cause of the patient's injuries, and the Hamiltons failed to meet their burden of proof.

Additionally, the court concluded that this video was not the type of misleading advertising that concerned the court of appeals when it recognized a direct-to-consumer exception to the learned intermediary doctrine. Here, the video was intended to inform a patient about the infusion process, and it was viewed after Ms. Hamilton had already received information about Remicade from her prescribing physician.

The court rejected the Hamiltons' argument that the learned intermediary doctrine was an affirmative defense that had to be pleaded and on which the manufacturer bore the burden of proof. Instead, the learned intermediary doctrine is more akin to a common law rule, and it does not shift the plaintiff's burden of proof.

The court also concluded that the non-prescribing physician did not have a duty to warn the patient. It noted that "[a]s a matter of both necessity and practicality, the duty to warn the patient of the potential risks and possible alternatives to any prescribed course of action rests with the prescribing physician."

Finally, the court found that a plaintiff cannot plead around the applicability of the learned intermediary doctrine. This doctrine applied to all of the plaintiffs' claims, including those for negligence, gross negligence, and fraud, as they were all premised on the alleged failure of Centocor to warn Ms. Hamilton of the risks of using Remicade.

2. ***U-Haul Int'l, Inc. v. Waldrip*, \_\_\_ S.W.3d \_\_\_, No. 10-0718, 2012 WL 3800220 (Tex. Aug. 31, 2012).**

In *U-Haul International, Inc.*, the Texas Supreme Court reversed an appellate court's finding that evidence that was unrelated to the problems that the plaintiff experienced with a vehicle was admissible as other-acts evidence. It remanded the case for a new trial on the issue of negligence. It also found that the plaintiff failed to meet his burden of offering clear and convincing evidence that a national truck rental company and its subsidiary were grossly negligent.

Talmadge Waldrip sued U-Haul International, Inc. d/b/a U-Haul ("UHI"), a national truck rental company, and its subsidiary, U-Haul Company of Texas, Inc. d/b/a U-Haul Company of Dallas ("UHT"). Waldrip alleged that UHI and UHT's (collectively, "U-Haul") negligence and gross negligence in maintaining a rental truck caused the truck's transmission and parking brake to fail, which resulted in serious injuries to Waldrip.

At trial, the court permitted a lay person to testify about the issues that UHI had in Canada related to maintaining its rental fleet. The witness testified about an investigation done by a Canadian safety advocacy group into the safety of U-Haul's vehicles. U-Haul objected on the grounds of relevance, hearsay, and a lack of similarities between the incidents.

The Texas Supreme Court concluded that this testimony was inadmissible, as the vast majority of the testimony had to do with issues that were entirely unrelated to the issues that Waldrip experienced with his rental truck. Moreover, the court found that

this evidence probably resulted in the rendition of an improper verdict, as this testimony was a significant part of Waldrip's case. The court concluded that there was legally sufficient evidence for the jury to have found U-Haul negligent, and this justified a remand for a new trial on the issue of negligence.

Next, the court held that Waldrip failed to offer clear and convincing evidence that U-Haul was grossly negligent. Specifically, Waldrip failed to offer evidence that UHI had "actual knowledge" of the risk that the truck could have harmed Waldrip (or any other renter). The court also rejected Waldrip's reliance on the fact that UHI allegedly violated Department of Transportation regulations. It found that "[t]he mere existence of federal regulations does not establish the standard of care or establish gross negligence per se."

The court also found that Waldrip failed to show that UHT was grossly negligent in hiring the employee who performed the safety certification, as the employee was not sufficiently well trained. The court noted that Waldrip failed to present evidence that UHT was aware of the risk of hiring the employee and consciously chose to disregard the risk. Because the evidence indicated that UHT was not aware of the risk, Waldrip could not show that UHT was grossly negligent.

3. ***Control Solutions, Inc. v. Gharda USA, Inc.*, \_\_\_ S.W.3d \_\_\_, No. 01-10-00719-CV, 2012 WL 3525372 (Tex. App.—Houston [1st Dist.] Aug. 16, 2012, no pet. h.).**

In *Gharda*, the Houston Court of Appeals held that legally and factually sufficient evidence supported a verdict

against a chemical manufacturer where expert testimony related to whether the chemicals were defective and the origin and causation of a fire was properly admitted.

Control Solutions, Inc., United Phosphorus, Inc., and Mark Boyd (collectively, “CSI”) sued Gharda Chemicals, Ltd. and Gharda USA, Inc. (collectively, “Gharda”), after chemicals manufactured by Gharda allegedly caused a fire, destroying CSI’s warehouse. After a jury determined that Gharda’s chemicals were defective and caused the alleged injury, Gharda moved for a judgment notwithstanding the verdict, arguing, *inter alia*, that there was no competent evidence to support the jury’s answers on the negligence and proximate cause issues, as CSI’s expert’s testimony on these issues was speculative and unreliable. Gharda also argued that there was no competent evidence to support the jury’s finding that a manufacturing defect was the producing cause of the fire.

Gharda argued that one of CSI’s experts, Sammy Russo, testified in a conclusory manner, and his testimony should have been excluded. The court disagreed, noting that Russo followed the correct methodology, and that he conducted testing at the area where the chemicals were located. Additionally, even though Russo did not follow the methodology exactly, he explained why this fire presented an unusual situation that required deviation from the methodology. Gharda failed to show that the accepted methodology must be rigidly followed in all situations.

Next, Gharda alleged that the testimony of a fire investigator and an electrical engineer should have been excluded, as the experts failed to rule out other potential sources of ignition in the warehouse. The

court rejected this argument, finding that Gharda failed to show that these experts’ investigations failed to comply with the accepted methodology for determining the origin of a fire.

Finally, the court rejected Gharda’s argument that CSI’s experts on causation were unreliable, noting with respect to CSI’s chemical expert that “the contentions made by Gharda regarding the reliability of [the expert’s] testimony are actually arguments concerning the propriety of the conclusions that a juror could have drawn from [the expert’s] testimony.”

In analyzing whether the evidence was sufficient to support the verdict in CSI’s favor, the court found that there was more than a scintilla of evidence to support the jury’s verdict. CSI presented the testimony of two chemists that the fire was caused by Gharda’s defective chemicals. Further, CSI presented the testimony of another expert who stated that the fire originated in the hot box where Gharda’s chemicals were being stored.

Further, the court upheld the jury’s verdict on CSI’s marketing defect claim, finding that the claim was dependent on proof that the defective chemical caused the fire or was unreasonably dangerous. Because the court found that CSI’s experts on these issues were sufficiently reliable and that their testimony constituted sufficient evidence of liability on this claim, the court reversed the decision to grant a judgment notwithstanding the verdict on this issue.

**4. *In re Am. Power Conversion Corp.*, No. 04-12-00140-CV, 2012 WL 2584290 (Tex. App.—San Antonio July 5, 2012, no pet.) (mem. op.) (not designated for publication).**

In *In re American Power Conversion Corp.*, the court held that the trial court abused its discretion by ordering discovery from a manufacturer related to an entire family of products where the plaintiffs' only allegations against the manufacturer was that one of the products within the family was defective. The plaintiffs failed to prove a connection between the design of certain products and the design of the allegedly defective product, rendering discovery related to those products improper. Moreover, although the plaintiffs showed that documents related to certain other products were relevant, the trial court erred by failing to limit the type of documents that were discoverable.

Sara Villareal, Rosalia Godina Medel, and Alvaro Medel sued American Power Conversion Corp. ("APC"), alleging that a backup battery manufactured by APC was defective and resulted in a house fire that killed several people. The plaintiffs alleged that the backup battery, a BE350R model, was "defective, had inferior components, and [was] unreasonably dangerous."

The plaintiffs requested that APC produce documents related to 350 and 500 series power supply devices or batteries. The request failed to specify the time period requested. APC objected that the request was overly broad and contended that the only relevant documents were those related to the BE350R and not other models. The court ordered that APC produce all documents related to the 350 and 500 series

backup power supply products from January 2000 to the present.

The appellate court concluded that the district court abused its discretion in requesting such broad discovery, as it failed to limit the documents to those that were relevant. For example, although discovery related to a previous generation within the same family of products that was recalled for similar reasons was relevant, the district court erred by allowing the plaintiffs to request documents related to discounts and return policies.

The court also held that because the plaintiffs failed to show a connection between the design of the defective product at issue in this case and the design of another family of products (the 500 series products), discovery related to that family of products was irrelevant.

**5. *Fields v. Klatt Hardware & Lumber, Inc.*, \_\_\_ S.W.3d \_\_\_, No. 04-11-00610-CV, 2012 WL 2335978 (Tex. App.—San Antonio June 20, 2012, no pet.).**

In *Fields*, the San Antonio Court of Appeals found that a plaintiff's claims against a non-manufacturing seller of an allegedly defective product are barred by Section 82.003(a) of the Texas Civil Practice and Remedies Code—which provides that a non-manufacturing seller is usually not liable for harm caused by a defective product, unless the manufacturer is "not subject to the jurisdiction of the court"—where the plaintiff properly served the manufacturer, and the manufacturer establishes sufficient minimum contacts with Texas, even though the manufacturer failed to appear.

Amy Fields purchased Masterjack Drain Opener from Klatt Hardware and Lumber, Inc. She alleged that she experienced second- and third-degree burns when some of the drain opener splashed onto her when she opened the bottle. Fields contended that the product was defective, and she sued Masterjack, the manufacturer, as well as Klatt Hardware, the seller.

Fields obtained personal service on Masterjack's president in Colorado, and she served Masterjack through the Texas Secretary of State in accordance with the Texas long-arm statute. She also established that Masterjack had sufficient minimum contacts with Texas. Nonetheless, Masterjack did not file an answer.

Section 82.003 of the Texas Civil Practice and Remedies Code provides that a non-manufacturing seller of a defective product is ordinarily not liable for an injury caused by the product. However, it also provides that if the manufacturer is "not subject to the jurisdiction of the court," then the plaintiff may proceed against the non-manufacturing seller. Fields argued that securing personal jurisdiction meant that the manufacturer must appear in the lawsuit and, since Masterjack did not do so, she should be able to proceed against Klatt Hardware.

The appellate court rejected this argument, finding that the requirements of Section 82.003 are satisfied if a nonresident defendant "has been properly served and the nonresident defendant has established minimum contacts with Texas such that the court's 'exercise of jurisdiction comports with traditional notions of fair play and substantial justice.'" Therefore, because Klatt Hardware proved that Masterjack had been properly served and had established sufficient minimum contacts with Texas, the

requirements of Section 82.003 had been satisfied. Field could not proceed against the non-manufacturing selling, and the court held that the trial court properly granted Klatt Hardware's motion for summary judgment.

**6. *Gann v. Anheuser-Busch, Inc.*, \_\_\_ S.W.3d \_\_\_, No. 08-11-00017-CV, 2012 WL 3026369 (Tex. App.—El Paso July 25, 2012, no pet.).**

In *Gann*, the El Paso Court of Appeals affirmed the grant of summary judgment to a manufacturer on a design defect claim because the plaintiff failed to show that the risk of injury from a long neck beer bottle outweighed its utility. The plaintiff's alleged injuries arose when a third party struck her with a longneck beer bottle. The court also held that the manufacturer was not liable for negligence because the plaintiff could not show that the manufacturer had a duty to protect her from the criminal actions of third parties.

Marty Danielle Gann was injured when she was struck in the face with a longneck beer bottle manufactured by Anheuser-Busch, Inc. The bottle broke, and Gann sustained five lacerations. She sued Anheuser-Bush for strict products liability, negligence, and breach of warranty. The trial court granted summary judgment in favor of Anheuser-Busch, and Gann appealed.

To determine whether the design of a product was such that it was unreasonably dangerous, courts apply a risk-utility test that analyzes several factors. The appellate court found that Gann failed to produce any evidence that raised an issue of fact as to whether the risks of injury from a longneck beer bottle outweighed the utility of the

design. Gann failed to address: “(1) whether manufacturing a stubby glass bottle or plastic bottle is economically feasible; (2) whether eliminating the unsafe character of a longneck bottle significantly impairs its usefulness or significantly increases its costs; and (3) what the expectations of the ordinary consumer are.”

Gann merely provided conclusory assertions that plastic bottles cost the same as glass bottles. However, the court found that even if Gann had offered any proof that manufacturing plastic bottles was economically feasible, she failed to address whether eliminating the unsafe character of the bottles would significantly impair their usefulness. Therefore, the court held that summary judgment was properly granted on Gann’s design defect claim.

Next, the court affirmed the dismissal of Gann’s negligence claim, finding that Gann failed to show that Anheuser-Busch owed her a duty. The court noted that “[g]enerally, no person has a legal duty to protect another from the criminal acts of a third person.” Gann merely argued that it was reasonably foreseeable that a longneck beer bottle might be used as a weapon. However, this was insufficient to show that Anheuser-Busch owed Gann a duty, and the court concluded that summary judgment was properly granted against Gann on the negligence claim as well.