WINTER 2011 NEWSLETTER

PRODUCTS LIABILITY UPDATE

by Rocky Little

1. *Charles Mach. Works, Inc. v. Butler Rental and Sales*, No. 13-09-00103-CV (Tex. App. – Corpus Christi – Edinburg, October 14, 2010).

While inspecting a ditch being dug at a construction site, Manuel Duron was killed by a Ditch Witch trencher manufactured by Charles Machine Works, and leased to Duron's company by Butler Rental and Sales. Section 82.002(a) of the Texas Civil Practice & Remedies Code imposes a duty on manufacturers such as Charles Machine Works to indemnify sellers/lessors such as Butler Rental and Sales for a loss arising out of a products liability action. That section provides an exception for any loss caused by a seller's negligence, intentional misconduct, or other act for which the seller is independently liable. Therefore, to escape the duty to indemnify, a manufacturer must establish that the seller/lessor's independent culpable conduct caused the injury. Until the manufacturer establishes that the seller/lessor's independent conduct caused the plaintiff's injury, a mere allegation of negligence against the manufacturer is sufficient to invoke the manufacturer's duty to indemnify the seller for all theories properly joined to a products liability claim. In a products liability case, an inference by the manufacturer is not sufficient to establish an exception to the duty to indemnify. Rather, in order to avoid the manufacturer's duty to indemnify the seller/lessor, the manufacturer must prove: 1) that the seller was independently culpable, and 2) that the seller's conduct caused the loss.

2. *Wolf Hollow I, L.P. v. El Paso Mktg., L.P.,* No. 14-09-00118-CV (Tex. App. – Houston, October 28, 2010).

Wolf Hollow owns and operates a natural gas fired power plant, and Enterprise Pipeline allegedly delivered contaminated gas to the plant. Wolf Hollow further alleged that this contaminated natural gas damaged turbines and other equipment at the plant. Enterprise contended that the Economic Loss Rule prohibits Wolf Hollow's negligence cause of action. However, the Economic Loss Rule applies when losses arise from the failure of a product, and the damage is limited to the product itself. The Rule does not preclude tort recovery if a defective product causes physical harm to the ultimate user or consumer or other property of the user or consumer, in addition to causing damage to the product itself. In Texas, the Economic Loss Rule has been applied to preclude tort claims in two related contexts: 1) where the losses sought are the subject matter of a contract between the parties, and 2) when the claims are for economic losses against the manufacturer or seller of a defective product where the defect damaged only the product and did not cause personal injury or damage to other property. Once those parameters are established, the Rule bars recovery even if the parties are not in contractual privity, i.e., there is no contract between those parties. Because Wolf Hollow alleges that

contaminated gas supplied by Enterprise damaged turbines and other plant equipment, the Economic Loss Rule does not apply.

3. *Advanced Envtl. Recycling Techs. v. Am. Int'l Specialty Lines Ins. Co.,* 2010 U.S. App. Lexus 21837 (5th Cir., October 22, 2010, Filed)

AERT manufactures recycled wood composite building products, including decking. AERT customers sought damages based on allegations that the products were vulnerable to mold, mildew, and fungal growth. These product liability claims arise from the allegation that the products were defectively designed and manufactured. The only alleged damage is to the products themselves, and not to any additional property or people. One of the issues addressed by the Federal Court is whether the product liability claims were considered an "accident" for purposes of an insurance policy. The court held that shoddy work, whether in manufacturing a product or working at a construction site, which then fails without collateral damage to a person or other property is not an "accident." "Accident" for purposes of an insurance policy means an event that takes place without one's foresight or expectation—an event that proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected.

4. *Pustejovsky v. PLIVA, Inc.,* 623 F.3d 271, 2010 (5th Cir., October 8, 2010).

In this Federal Court case, Martha Pustejovsky alleged that she suffered a severe neurological disorder as a result of the improper use of the generic drug metoclopramide, which is manufactured by PLIVA. Under Texas law, a manufacturer must instruct consumers as to the safe use of its product, and warn consumers of known dangers. However, where the allegedly-defective product is a prescription drug, the duty to warn of the drug's effects is governed by the Learned Intermediary Doctrine. Under that doctrine, a prescription drug manufacturer may rely on the doctor—the learned intermediary—to pass on its warnings to the ultimate consumer. Therefore, as long as the drug manufacturer properly warns a prescribing physician of the dangerous propensities of the product, the manufacturer is excused from warning each patient who receives the drug. If, on the other hand, the warning to the intermediary is inadequate or misleading, the manufacturer may be liable for injuries sustained by the ultimate user. An inadequate warning to the doctor by itself, however, is not enough. The Learned Intermediary Doctrine also requires that the inadequate warning to the physician was a producing cause of the plaintiff's injuries. Therefore, the injured plaintiff must also show that the inadequate warning caused the doctor to prescribe the drug. Where the evidence demonstrates that the physician was aware of possible risk involved in the product but decided to use it anyway, the plaintiff cannot show that the inadequate warning was a producing cause. Also, even if the physician is not aware of the risk to the patient, the patient must show that a proper warning would have changed the decision of the treating physician. In other words, but for the inadequate warning, the treating physician would not have prescribed the product.