

**“Product Liability Case Law Updates, U.S. 7th Circuit,” 2010 DRI Product Liability Conference:
The Masters of Product liability Litigation, April 7-9, 2010.**

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ILLINOIS

A. Tort Reform

Ready v. United/Goedecke Servs., 393 Ill. App. 3d 56, 911 N.E.2d 1140 (1st Dist. 2009)

In 2008, The Illinois Supreme Court rendered a decision in *Ready v. United/Goedecke Servs.*, 232 Ill. 2d 369, 905 N.E.2d 725 (2008), which set the stage for the 2009 decision. Michael P. Ready ("Ready") was fatally injured when a beam that was to be used for scaffolding fell eight stories and struck him. The decedent's estate sued Midwest Generation EME, L.L.C. ("Midwest"), Ready's employer; BMW Constructors, Inc. ("BMW"), which was hired as the general contractor; and United/Goedecke Services, Inc. ("United"), which was hired by BMW as the scaffolding subcontractor. Prior to trial plaintiff settled with defendants Midwest and BMW and the jury returned a verdict for plaintiff in the amount of \$ 14,230,000. The jury assessed Ready's contributory negligence at 35%, which reduced the judgment to \$ 9,250,000. The circuit court allowed a set-off of approximately \$ 1,112,502, i.e., the total amount paid to plaintiff by the settling defendants. On appeal United argued that the trial court erred when it barred United from presenting any evidence at trial regarding the conduct of the settling defendants and by failing to include the settling tortfeasors on the verdict form so that the jury could allocate fault to all parties that were sued by the plaintiff. Therefore, the issue before the Supreme Court of Illinois was whether the settling tortfeasors "were defendants sued by the plaintiff" within the meaning of 735 Ill. Comp. Stat. 5/2-1117. (The plaintiff's bar wants to keep a settling defendant off the jury form because under Illinois law if a defendant's portion of the total fault is determined by a jury to be less than 25%, then pursuant to Section 2-1117, that defendant is only severally liable for plaintiff's non-economic damages.)

The Illinois Supreme Court held that the phrase "defendants sued by the plaintiff" in Section 2-1117 is not defined in the statute and is thus ambiguous. Therefore, the Illinois Supreme Court engaged in a legal analysis outside the four corners of the legislation to conclude that Section 2-1117 did not apply to good-faith settling tortfeasors who have been dismissed from the lawsuit. However, the Illinois Supreme Court remanded the case to the appellate court for a decision on United's claim that the circuit court erred when it excluded evidence of the conduct of defendants Midwest and BMW, and refused United's jury instruction on sole proximate cause.

In *Ready v. United/Goedecke Servs.*, 393 Ill. App. 3d 56 911 N.E.2d 1140 (1st Dist. 2009) the appellate court rendered an opinion on this issue and held that the circuit court should not have excluded evidence of Midwest and BMW's conduct and it was an abuse of discretion for the circuit court to grant plaintiff's *motions in limine* as to that issue. The appellate court reasoned that a defendant's answer, which is a general denial that an injury was the result of or caused by the defendant's conduct, is sufficient to permit the defendant to present evidence that the injury was the result of another cause. United claimed that the evidence would have shown that Midwest was in charge of operating the tugger and deciding how the signaling would be done and that Midwest's workers failed to barricade off the tugger bay where Ready was struck by the beam. As for BMW's conduct, United argued that the evidence would have shown that BMW should have provided a crane to lift the beams outside the factory as required by the contract and discussed in the pre-bid meeting. The appellate court stated that "had the jury heard the whole story, its verdict may have been different." The appellate court thus allowed the defendant to offer evidence of the settling defendants negligence and allowed the non-settling defendants to argue that the settling defendants were the sole proximate cause of plaintiff's injury. It is important to note that a sole

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proximate cause defense does not mean one entity has to be the sole proximate cause. Pursuant to the facts of the *Ready* case, a non-settling defendant can clearly argue that multiple settling defendants, in addition to the plaintiff and any remaining defendants, were the sole proximate cause, i.e., sole does not mean "one" or "singular."

Lebron v. Gottlieb Memorial Hospital (Illinois)

In December 2009, the Illinois Supreme Court was scheduled to render an opinion on the constitutionality of the Malpractice Reform Act of 2005 ("Act"), in the case *Lebron v. Gottlieb Memorial Hospital*. As of the date of this publication, the Illinois Supreme Court has yet to render an opinion. The Act caps jury awards for non-economic pain and suffering and other non-liquidated damages in medical malpractice lawsuits at \$500,000 against physicians and \$1 million against hospitals. *LeBron* was a suit brought by the mother of a 3-year-old child born with cerebral palsy allegedly as a result of medical negligence. The Cook County Circuit Court held that the arbitrary cap on non-liquidated damages as specified by the Act was unconstitutional, relying on an earlier Illinois Supreme Court decision in 1997, *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 689 N.E.2d 1057 (1997). The *Best* Court held that caps on non-economic damages imposed by a similar 1995 Act infringe on the jury's role in determining appropriate compensation. Nonetheless, the Act is narrowly tailored and only seeks to establish caps for medical malpractice claims, while the 1995 Act contained extensive provisions on product liability tort reform which the *Best* Court also held to be unconstitutional.

B. Tobacco Litigation

Cleary v. Philip Morris, Inc., 2009 U.S. Dist. LEXIS 82032 (N.D. IL 2009)

In Illinois, the plaintiffs' bar is still trying to find a way to maintain lucrative lawsuits against the tobacco industry after the Illinois Supreme Court dismissed *Price v. Philip Morris, Inc.*, 219 Ill. 2d 182 (2006). In *Price*, a Madison County class action, plaintiff's counsel alleged that the tobacco companies concealed the true nature of "light" cigarettes; however the Illinois Supreme Court held that under the Illinois Consumer Fraud Act ("Act") the complaint failed because the Act exempts from liability "conduct in compliance with orders" of a federal agency. Because the defendants were authorized by the Federal Trade Commission practice and consent orders in the marketing of light cigarettes, the claims were barred. *Id.* In 2009, plaintiffs took another shot at the tobacco industry, pursuant to a different theory in *Cleary v. Philip Morris, Inc.*, 2009 U.S. Dist. LEXIS 82032 (N.D. IL 2009). The intervening catalyst was *Altria Group, Inc. v. Good*, 129 S.Ct. 538 (2008), in which the United States Supreme Court held that neither the Federal Labeling Act nor the FTC's decisions regarding the advertising of low tar or light cigarettes preempt state law claims predicated on a duty not to deceive.

The plaintiffs in *Cleary* argued that the *Altria Group* holding represented a significant change in the law as compared with the Illinois Supreme Court's *Price* decision. On March 13, 2009, the case was removed to Federal Court, by Lorillard, a new defendant, pursuant to the Class Action Fairness Act, 28 U.S.C. § 1446(b) ("CAFA") premised on the proposition that the inclusion of the light cigarettes-based claims against Lorillard amounted to the filing of a new action under CAFA. Plaintiffs sought to remand the case to state court alleging that the claim against Lorillard was not a new claim but instead related back to the original complaint; however the court concluded that the light cigarette claims against Lorillard did not relate back to the plaintiffs' first amended complaint because that complaint mentioned only Marlboro Lights, a Philip Morris product. (In a later ruling, the Court dismissed the light cigarettes claims against Lorillard as time-barred.)

Thereafter, the plaintiffs conceded that the light cigarettes claims against all defendants except Philip Morris were time-barred and therefore the only issues before the court was whether the light cigarettes claims against Philip Morris were timely and, if so, whether plaintiffs could assert those claims

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with respect to brands other than Marlboro Lights. Philip Morris argued that because the light cigarettes claims in the first amended complaint were dismissed with prejudice, the new claim cannot relate back to the date plaintiffs filed that version of the complaint. Philip Morris also argued that plaintiffs' filing of a second amended complaint, which omitted the light cigarettes claims, renders impossible relation back to the date plaintiffs filed the first amended complaint.

The *Cleary* Court held that the state courts' ruling on Philip Morris' motion to strike in 2002 was an interlocutory order, as it did not "settle or finalize any rights between the parties" and under Illinois law, a court may modify or vacate an interlocutory order at any time before final judgment. *Hemphill v. Chicago Transit Auth.*, 357 Ill. App. 3d 705, 708, 829 N.E.2d 852 (2005). The same is true under federal procedural law. The *Cleary* Court reasoned that the plaintiffs agreed to withdraw their light cigarettes-based claims against Philip Morris in the state court case solely because certification of the class was pending in a Madison County case. The *Cleary* Court held that state court's decision to dismiss the plaintiffs' Marlboro Lights claims with prejudice was premised on the pendency of the Madison County case and although the Madison County case was later dismissed, the Supreme Court's decision in *Altria* amounted to a change of the law that enables plaintiffs to proceed. The *Cleary* Court held that there was no evidence of Judge-shopping on the plaintiffs' part because it was not plaintiffs' decision to remove the case to federal court, and furthermore, the claims did not prejudice Philip Morris unfairly because it had notice of these claims long ago.

Although the *Cleary* Court allowed the claims to proceed against Philip Morris, the *Cleary* court only allowed the claims which were directed at Philip Morris' Marlboro Lights brand; the twenty-eight other Philip Morris brands that were not part of the claims in the first amended complaint did not relate back and thus were barred. This is because there was nothing in the first amended complaint from which Philip Morris would have received notice of a potential claim relating to its low tar, light, and ultra light cigarette brands other than Marlboro Lights.

C. Market Share Liability

No reported cases.

D. Automobiles

Henry v. Panasonic Factory Automation Co., 917 N.E.2d 1086 (4th Dist. 2009)

Plaintiff worker was injured when attempting to repair a cutter bade on a high-speed placement machine known as an "MSH," while working at automotive component manufacturer. Plaintiff was attempting his repairs while inside of the MSH. The undisputed facts established that the machine was capable of being repaired from its exterior. Plaintiff was also trained to repair the machine from its exterior. It was also undisputed that the plaintiff would not have been injured if he had conducted his repairs from the exterior of the MSH. Plaintiff's only retained design expert admitted during his deposition that the machine would not be unreasonably dangerous if a person could repair the MSH machine from its exterior. Manufacturer's summary judgment motion, which asserted the plaintiff was unable to support his allegations with expert testimony per *Baltus v. Weaver Division of Kidde & Co.*, 199 Ill.App.3d 821, 145 Ill.Dec. 810, 557 N.E.2d 580 (1990), was granted. Although *Baltus* involved a plaintiff who did not retain an expert, the Fourth District upheld the trial court's holding in the instant case because plaintiff's expert admitted the MSH machine was not unreasonably dangerous if capable of being repaired from its exterior.

Piagentini v. Ford Motor Co., 901 N.E.2d 986 (1st Dist. 2009)

Plaintiff sued automobile manufacturer in strict liability and negligence, alleging various design

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allegations. The strict liability count alleged various sub-allegations in strict liability. Manufacturer filed summary judgment motion as to a portion of the strict liability sub-allegations. Motion was granted and plaintiff was given leave to re-plead. Plaintiff voluntarily dismissed its claims against manufacturer, and later re-filed his complaint against the manufacturer as to those remaining sub-allegations. Manufacturer moved for summary judgment again, this time based on res judicata, and the motion was granted by the trial court. On appeal, the appellate court reversed and remanded. The Illinois Supreme Court issued a supervisory writ directing the First District to vacate its judgment and reconsider.

In the end, the First District held that the summary judgment order was not a "final order" for purposes of res judicata. For purposes of res judicata, a final order either terminates litigation on the merits or disposes of the rights of the parties, either on the entire controversy or a separate branch thereof. The order at issue dismissed only a portion of the strict liability sub-allegations, and not the negligence count against the manufacturer. Moreover, even if re-filing of the complaint by plaintiff after its voluntary dismissal constituted "claim-splitting," manufacturer acquiesced to the claim-splitting as it waited 3 ½ years after the suit was re-filed to raise its defense, and participated in complete fact and expert discovery.

E. Environmental or "Green" Products

No reported cases.

F. Drug Litigation:

Abad v. Bayer Corp., 563 F.3d 663 (7th Cir. 2009)

Two separate suits brought by residents of Argentina were dismissed on *forum non conveniens* grounds in favor of Argentine courts. On appeal, the matters were consolidated. One matter involved a class action against pharmaceutical companies regarding allegations of plaintiffs who became infected with HIV or hepatitis C by using the defendants' medications while in Argentina. The second suit was against a tire manufacturer alleging wrongful death for a vehicle accident which occurred in Argentina. Both cases involved Argentine citizens, and in each case the injury occurred in Argentina. The 7th Circuit, noting the abuse of discretion standard, affirmed the district courts' rulings. The majority of evidence and witnesses were in Argentina and the law of Argentina would govern the substantive issues.

G. Class Action Fairness Act:

No reported cases.

H. Pre-Emption:

Adames v. Sheahan, 233 Ill. 2d 276, 909 N.E.2d 742 (Ill. 2009)

Decedent, a child, was killed when he was accidentally shot by his friend with his friend's father's service revolver. Decedent's estate sued the Sheriff of Cook County, the father's employer, and Beretta, the revolver manufacturer. The Supreme Court upheld the appellate court's granting of summary judgment in favor of Beretta, dismissing plaintiff's counts for strict products liability because the gun performed as it was intended. More importantly for preemption purposes, the court ruled the plaintiff's failure to warn claim against Beretta was preempted by the "Protection of Lawful Commerce in Arms Act" codified at 15 *USCS* § 7901 because the discharge of the gun was caused by a volitional act that constituted a criminal offense.

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I. Other:

Henry v. Panasonic, 917 N.E.2d 1086; 2009 Ill. App. LEXIS 1024 (4th Dist. 2004)

Plaintiffs, Keith and Sue Henry filed a two count complaint against Panasonic sounding in strict products liability arising out of an incident which occurred while plaintiff was working a Panasonic "MSH." An MSH is a high speed placement machine that is used to assist in the manufacture of safety systems for automobiles. Plaintiff argued that the machine was unreasonably dangerous because it required the operator to enter the machine while it was operating in order to ensure that it was operating correctly. At deposition, plaintiffs' expert acknowledged that if the machine's operation could be evaluated while outside of the machine, then the machine would not be unreasonably dangerous. Consequently, Panasonic's motion for summary judgment was granted. Plaintiffs appealed, arguing that their expert's testimony was *prima facie* evidence that the machine was unreasonably dangerous. The appellate court upheld the dismissal of Panasonic indicating that plaintiffs' experts inability to point to any specific defect was tantamount to providing no expert testimony at all, and that in a products liability case, specialized knowledge is necessary to maintain a cause of action.

INDIANA

A. Tort Reform

No reported cases.

B. Tobacco Litigation

No reported cases.

C. Market Share Liability

No reported cases.

D. Automobiles

Cook v. Ford Motor Co. 913 N.E.2d 311 (Ind.App.,2009).

Plaintiff sued auto manufacturer for injuries to child when the front-passenger seat airbag deployed. Plaintiff's claim was based on a failure to warn. Following a mistrial, the trial court granted summary judgment to manufacturer on the failure to warn claim. Manufacturer argued the warning claim was preempted by FMVSS 208. Over a dissent, the appellate court reversed summary judgment finding that the plaintiffs state law tort claim for failure to warn was not preempted by FMVSS 208. The appellate court reasoned against preemption because the standard described only the general content of the warning at issue. Although the Supreme Court's ruling in *Geier* involved air bags and FMVSS 208, the case at hand was more akin to *Wyeth* in that the standard at issue left the content of the warnings to the manufacturer's discretion.

E. Environmental or "Green" Products Litigation:

No reported cases.

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F. Drug Litigation:

Kovach v. Caligor Midwest, 913 N.E.2d 193 (Ind. 2009)

Plaintiffs claimed their son was given an overdose of pain medication by a nurse following surgery, and which allegedly caused his death. Plaintiff's sued the manufacturer of the medicine cup used to administer the pain medication, claiming it was inadequately designed so that it created inaccurate medicine measurements. Plaintiff also claimed the cup failed to contain adequate warnings regarding inaccurate measurements. On appeal, the trial court's granting of summary judgment was reversed as the appellate court found the lack of any type of warning was sufficient evidence in itself to overcome summary judgment. The Indiana Supreme Court reversed, and granted summary judgment as to the manufacturer. The Supreme Court found that the uncontested facts, i.e., the medical examiner's report and the father's eye witness testimony, established that the decedent had been given double the amount of pain medication by the administering nurse. Although the cup could be capable of an error ratio of 20-30%, it was undisputed that the proximate cause of death was due to the nurse doubling the prescription, and not an imprecise measurement. Lastly, the "read-and-heed" presumption applicable to allegations of missing warnings was not applicable because the child's death was not factually caused by the danger that a warning could have prevented.

G. Class Action Fairness Act:

No reported cases.

H. Preemption/Other:

Cook v. Ford Motor Co., 913 N.E.2d 311, 2009 Ind. App. LEXIS 1633 (Ind. Ct. App. 2009) — See also the motor vehicle section for Indiana and elaborated preemption discussion below.

The National Traffic and Motor Vehicle Safety Act (the Act) codified at 49 U.S.C. § 30101 seeks to "reduce traffic accidents and death and injuries to persons resulting from traffic accidents." The Act mandates specific requirements which pertain to visor warnings and airbag warnings. Ford contended that their adherence to such standards preempted any failure to warn claims under Indiana law. The court cited that under the Act, "compliance with a motor vehicle safety standard under this chapter does not exempt a person from liability at common law." *Cook v. Ford Motor* 913 N.E. 2d 311, 320. However, the court indicated that "state law tort actions may be preempted if the state standards in question actually conflict with federal objectives." The court, in holding that the failure to warn claims were not preempted by the Act, stated that "the implementing agency's comments, if not outright stating that the standard is a floor only, strongly imply that such is the case by allowing the manufacturers flexibility to tailor the warning language to their vehicles." *Id. at 325*

I. Other:

Ford Motor Co. v. Moore, 905 N.E.2d 418 (Ind. Ct. App. 2009)

Plaintiff, as personal representative of Decedent, sued Ford Motor Company, TRW (seatbelt manufacturer), Goodyear Tire and Rubber, and Renner Motors Inc., after her husband was killed when his front tire separated causing his automobile to lose control, ejecting him from the sunroof despite wearing his safety belt. Goodyear and Renner Motors settled before trial. At trial, the jury was instructed based upon an alleged design defect theory regarding the crash-worthiness of the vehicle that the decedent was

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driving and that the alleged design defect was either the seat-belt assembly or the sunroof of the vehicle. The appellate court, in reversing the jury's verdict which apportioned fault, in part, to Ford and TRW, held that plaintiff failed to present sufficient evidence that Ford and TRW breached a duty of reasonable care. Indiana law requires plaintiff to establish that Ford and TRW failed to exercise reasonable care under the circumstances in designing their products. In order to meet such a burden, the plaintiff was required, and failed, to present alternative designs that would have prevented the decedent's death and would have improved the safety of drivers in a cost-effective manner.

WISCONSIN

A. Tort Reform

Phelps v. Physicians Ins. Co. of Wis., Inc., 2009 WI 74, 319 Wis. 2d 1 (2009)

In *Phelps v. Physicians Ins. Co. of Wis., Inc.*, 2009 WI 74, 319 Wis. 2d 1 (2009) a father brought a claim for negligent infliction of emotional distress when one of his children died at the hospital due to the alleged negligence of the treating physician. The Supreme Court of Wisconsin remanded the case to the circuit court to issue a dismissal order. In so holding, the Supreme Court of Wisconsin pointed out that Wis. Stat. §§ 655.005 and 655.007 (1997-98) specify that a relative's claim must be derivative to fall within the scope of allowable medical malpractice recovery, and only certain types of claims are considered derivative. Claims for the loss of society, companionship, and consortium are derivative even though they technically "belong" to the close relative making the claim because the claims are derived from the underlying injury to the other person. However, a claim for the negligent infliction of emotional distress to a bystander is a direct, not a derivative, claim, because the claim "does not depend on the primary tort victim's ability to make the claim." That is, a derivative claim arises from the tort injury to another and does not have its own elements of proof that are distinct from the negligence claim to which it attaches. By contrast, a claim of bystander emotional distress has elements that, while arising from the underlying negligence, are distinct and subject to separate proof. See *Bowen v. Lumbermens Mut. Cas. Co.*, 183 Wis. 2d 627, 657-58, 517 N.W.2d 432 (1994).

B. Tobacco Litigation

No reported cases.

C. Market Share Liability

Godoy v. E.I. du Pont de Nemours & Co., 2009 WI 78, 768 N.W. 2d 674 (2009)

In *Godoy v. E.I. du Pont de Nemours & Co.*, 2009 WI 78, 768 N.W. 2d 674 (2009), numerous defendants, including E.I. du Pont de Nemours and Company, Armstrong Containers, the Sherwin-Williams Company, and American Cyanamid (collectively, "manufacturer defendants") designed, manufactured or sold white lead carbonate products. The plaintiff, Godoy, filed suit alleging that the white lead carbonate pigment was defectively designed and that the defendant manufacturers should be liable under theories of strict liability and negligence. However, Godoy could not identify which defendant produced the defective product that caused his injury, and therefore he proceeded under the "risk-contribution theory."

Wisconsin had previously adopted the "alternative liability" theory enunciated in *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948), which held multiple defendants liable without requiring the

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plaintiff to prove the identity of a specific tortfeasor. *Summers* is a staple of first year tort classes and involves a case in which two hunters negligently shot in the direction of the plaintiff, but it could not be ascertained which hunter's bullet injured the plaintiff. Because the plaintiff could not identify the actual tortfeasor, the court held that "[w]here the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one of them has caused it, the burden is upon each such actor to prove that he has not caused the harm." *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 183, quoting *Restatement (Second) of Torts* sec. 433B(3)(1965). The theory assumes that the defendants would be "in a far better position [than the plaintiff] to offer evidence to determine which one caused the injury."

Under the risk-contribution theory, the plaintiff is not required to identify the specific manufacturer when all similar products are fungible and identically defective. The Wisconsin Supreme Court recently applied the risk-contribution theory to white lead carbonate pigment in *Thomas ex rel. Gramling v. Mallett*, 2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523 (2005); however, the court has not applied the risk-contribution theory to residential paint pigment.

The risk contribution theory was a tangential issue in this case, but it was an issue that created a catch-22 for the plaintiff and a victory for the defendants. That is, the plaintiff was trying to argue that the white lead carbonate paint was defectively designed under strict liability theories; however the court pointed out that lead is a characteristic ingredient of white lead carbonate pigment. By definition, white lead carbonate pigment contains lead and removing lead from white lead carbonate pigment would transform it into a different product. Therefore, the *Godoy* Court held that the design of white lead carbonate pigment was not defective. Plaintiff tried to circumvent this problem by arguing that lead paint is a defective design in reference to the class of all residential paint pigment. However, the *Godoy* Court noted that if this were true and plaintiff could thus argue there was a product design defect in the paint because it was made with lead, the Plaintiff would not be able to prove causation because not all residential paint pigments are identically defective, which is a prerequisite of the risk-contribution theory.

Therefore, plaintiff was stuck in a quandary in which he needed to argue that the product was white lead carbonate paint because the court had already allowed the risk-contribution test to be used for white lead carbonate paint, but in so arguing plaintiff could not prove there was a design defect. Whereas, if plaintiff elected to argue that using lead was a defect in the design in the class encompassing all residential paints, he would now be able to prove defective design, but would be unable to use the risk-contribution theory to prove causation.

D. Automobiles

Tammi v. Porsche Cars North America, Inc., 768 N.W.2d 783 (Wis., 2009)

Lessee of automobile sued the vehicle manufacturer for violations of Wisconsin lemon law. Manufacturer removed the matter to the District Court for the Eastern District of Wisconsin. Judgment was granted in lessee's favor following a jury verdict. The District Court modified the damages portion of the jury verdict following lessee's motion. On appeal, the Court of Appeals certified various questions relating to damages which were accepted and responded to by the Wisconsin Supreme Court. The case posed unique damages calculation issues under the Wisconsin lemon law. During the pendency of the litigation, lessee elected to purchase the subject vehicle based on the purchase option provision of the lease. In discussing the various damages a manufacturer may be subject to under the lemon law, the Wisconsin Supreme Court went so far as to quote Kenny Rogers from *The Gambler*, noting that a manufacturer must know when "to hold `em and when to fold `em." In conclusion, the court found that since the lessee voluntarily chose to purchase the vehicle, the lessee was not entitled to damages for the price of his voluntary purchase. The purchase was not "caused" by the manufacturer's violation of the lemon law statute. Lastly, the refund and pecuniary loss damages to the lessee was subject to a reasonable

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allowance for use before the doubling of the damages under the statute.

E. Environmental or "Green" Products

No reported cases.

F. Drug Litigation:

No reported cases.

G. Class Action Fairness Act:

In re Safeco Ins. Co. of Am., 585 F.3d 326, 2009 U.S. App. LEXIS 23429 (7th Cir. 2009)

Plaintiff, a chiropractor, filed a complaint against Defendants, insurance carriers, for allegedly programming their computer systems to under-pay on claims arising out of automobile accidents. Four days after Plaintiff's complaint was filed, the Class Action Fairness Act of 2005 (CAFA) was enacted. The Defendants sought removal of the action from state court on the grounds that the post-CAFA class certification definition introduced new claims made on policies issued by their non-party affiliates which did not relate back to the original complaint, thereby commencing a new action for purposes of removal jurisdiction under CAFA. The District Court disagreed, stating that the conduct by affiliates who were brought in as class members and whose conduct was that which was alleged in the complaint prior to CAFA was not grounds for removal. The Appellate court agreed, stating that the additions to the complaint constituted "workaday" changes and not new litigation for purposes of removal under CAFA.

H. Preemption:

No reported cases.

I. Other:

Horst v. Deere & Company, 2009 WI 75, 769 N.W. 2d 536 (2009)

Plaintiff, mother of a minor child who was injured after being backed over by the riding lawnmower his father was operating, sued the lawnmower manufacturer for strict products liability and negligence arguing that the product, as designed, was unreasonably dangerous. At trial, the circuit court rejected plaintiff's negligence and strict liability claims. Plaintiff appealed the circuit court's instruction to the jury which evaluated defendants' product under the lens of the consumer contemplation test. On appeal, plaintiff argued that in bystander claims, such as this one, the consumer contemplation test (the expectation that a product is unreasonably dangerous as contemplated by a consumer) that was given to the jury was inappropriate. Rather, plaintiff argued that the jury should be instructed based on the "contemplation and expectations of an ordinary bystander", what plaintiff called a "bystander contemplation test." The Wisconsin Supreme Court, affirming the Appellate Court, held that even in cases where a bystander is injured, the consumer contemplation test and not the bystander contemplation test applied to strict products liability actions.