

PRODUCTS LIABILITY update

Is Your Product Defectively Designed? The Risk-Utility Test v. Consumer-Expectation Test in Missouri and Illinois State Courts

Strict product liability actions, unlike negligence actions, do not rely on evidence of wrongdoing by the producer of a product. Therefore, a plaintiff need not prove any breach of duty (that classic negligence phrase) by the defendant in manufacturing an item. A plaintiff may be successful merely by demonstrating his or her injury was caused by the unreasonably dangerous condition of a product that existed at the time it left the manufacturer's control. See Rodriguez v. Suzuki Motor Corp., 996 S.W.2d 47, 65 (Mo. Banc 1999); Solami v. Eaton, 772 N.E.2d 215, 219 (Ill. 2002).

For example, the Illinois Supreme Court recently encountered a strict product liability action in Mikolajczyk v. Ford Motor Company. James Mikolajczyk died as a result of injuries sustained in a rear-impact car accident. His wife sued the other driver (who had consumed approximately a pint of gin before the accident) for negligence and Ford Motor Company and Mazda Motor Corporation based on strict liability, claiming defective design of the driver's seat. Mikolajczyk v. Ford Motor Co., 2008 WL 4603565, 1 (Ill. 2008). Ford manufactured Mikolajczyk's Escort, while Mazda designed its driver's seat. Id. Ford had the authority to approve or disapprove of Mazda's seat design. Id.

Mikolajczyk relied on a theory of defective design. There are two different

tests to prove defective design, the "risk-utility" test and the "consumer-expectation" test. The consumer-expectation test allows a plaintiff to demonstrate defective design by proving a product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. Id. at 4, citing Lamkin v. Towner, 563 N.E.2d 449, 457 (Ill. 1990). The risk-utility test requires a plaintiff to introduce evidence the product's design proximately caused injury; then, if the defendant fails to prove that on balance the benefit of the challenged design outweighs the risk of danger inherent in the design, the plaintiff prevails. Id., citing Lamkin v. Towner, 563 N.E.2d at 457. Alternatively, some Courts state the risk-utility test requires a plaintiff to prove (1) a reasonable, safer, alternative design existed at the time of sale, and (2) omission of the safer alternative rendered the product not reasonably safe. Rodriguez v. Suzuki Motor Corp., 996 S.W.2d at 65, citing Newman v. Ford Motor Co., 975 S.W.2d 147, 152-53 (Mo. Banc 1998).

Defendants generally attempt to persuade Courts to apply the risk-utility test, while plaintiffs generally attempt to persuade Courts to utilize the consumer-expectation test. See Mikolajczyk v. Ford Motor Co.; Rodriguez v. Suzuki Motor Corp. Strategically,

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Protecting Others: The Duty of Automobile Manufacturers to Parties Outside the Vehicle

The Seventh Circuit Court of Appeals recently wrestled with predicting the Illinois Supreme Court's resolution of whether Illinois law would allow the driver and passenger of one vehicle to sue the manufacturer of a separate vehicle based on strict liability. Shmuel Rennert was injured and his wife Devorah Rennert was killed when the minivan they were travelling in collided with the back of a trailer designed by Great Dane. Rennert v. Great Dane Ltd. Partnership, 543 F.3d 914, 915-16 (7th Cir. 2008). Rennert alleged Great Dane designed the trailer's underride guard poorly and the risks of the design chosen outweighed the benefits of the design. Id. at 916.

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Risk-Utility Test (continued from page 1)

this difference arises because the risk-utility test sets a higher burden on plaintiffs than the consumer-expectation test. Additionally, plaintiffs likely favor the consumer-expectation test because it allows jurors to view the product from the perspective of an “ordinary consumer.” The risk-utility test requires plaintiff’s attorneys to persuade the jury by relying on a more abstract balancing of costs and benefits of particular product designs. Finally, the risk-utility test allows defendants an opportunity to demonstrate the benefits of their particular design and show how they outweigh the costs; these measures may be ruled irrelevant by a Court applying the consumer-expectation test because all that matters for this test is the consumer’s perspective, rather than actions performed by defendants.

The final application of any test will come with the jury instructions in a lawsuit. Cases reaching the appellate stage concerning the applicability of the risk-utility or consumer-expectation tests hinge on whether or not the instructions provided to the jury were appropriate. The legal differences between the states become apparent at this level. Some states allow instruction on only one test or the other. Some states (like Illinois) allow instruction on both, while others (like Missouri) allow instruction on neither.

In *Mikolajczyk*, when asked the either/or question, “Should jurors be instructed on the risk utility test or on the consumer-expectation test for product liability cases alleging defective design?” the Illinois Supreme Court simply answered “yes” to both, but added a caveat creating an exception that nearly swallows the rule.

The defendant urged the Court to hold the risk-utility test to be the exclusive test in design defect cases involving complex products. *Mikolajczyk* at 13. It argued the consumer-expectation test fails in complex situations, such as the proper degree of flexibility in a car seat during a variety of potential accident scenarios, because consumers do not have reasonable expectations regarding these kinds of situations. *Id.* at 14. Plaintiff countered that any difference between simple and complex products becomes unworkable because no rational basis exists on which to draw a distinction. *Id.* The Court rejected the defendant’s argument and determined the existence of a feasible alternative design and the balancing of risks and benefits are relevant considerations in a strict product liability design defect case, but are not significant elements to be proven in every case. *Id.* at 16.

Ultimately, the Illinois Supreme Court decided to apply both tests. However, when plaintiffs and defendants present evidence implicating both the consumer-expectation test and the risk-utility test, the risk-utility test will prevail. *Id.* at 22. The Court based this decision on the broader nature of the risk-utility test when compared to the consumer-expectation test. *Id.* Furthermore, the Third Restatement’s formulation of the risk-utility test explicitly incorporates the consumer’s expectations. *Id.* The Court held incorporating the consumer-expectation test into the risk-utility test adequately addresses the legal issues involved in design defect cases. *Id.*

In order to obtain the benefit of the risk-utility test in Illinois, defendants must present evidence sufficient to implicate the test. *Id.* at 25. To obtain an instruction there need only be some evidence in the record to justify the theory, a threshold the Illinois Supreme Court describes as “rather low.” *Id.* at 25-26. Despite the low threshold, defendants should carefully prepare each element of the

test for presentation to the jury and develop a theory of the case to demonstrate the advantages of the particular design chosen by the defendant manufacturer. When preparing for trial, the defendant should take steps to create a narrative of the product’s design in order to effectively communicate to the jury why a particular design was chosen and the advantages of it over other potential alternatives.

Much like Illinois, when presented with an either/or decision, Missouri selected a third option. Unlike Illinois, however, Missouri does not allow instruction on either the risk-utility test or the consumer-expectation test. Missouri’s jury instructions require a plaintiff to demonstrate a product was “in a defective condition unreasonably dangerous...when put to a reasonably anticipated use...” *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d at 64. The Missouri Supreme Court had previously rejected an opportunity to define the phrases “defective condition” and “unreasonably dangerous” in *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371, 377-78 (Mo. Banc 1986). *Rodriguez*, 996 S.W.2d at 65. Following the Court’s rejection in *Nesselrode*, the Missouri legislature declined to define the phrases in its 1987 tort reform act, an action the Court decided was a tacit adoption of the *Nesselrode* approach. *Id.* The Court then determined judicially defining the terms in question appeared inconsistent with legislative intent and again declined to define “defective condition” and “unreasonably dangerous.” *Id.* Neither the consumer-expectation test nor the risk-utility test are to be used to instruct the jury in the current pattern Missouri jury instructions.

Despite Missouri’s refusal to allow instruction on either the consumer-expectations test or the risk-utility test, awareness of these two tests remains important for parties litigating in Missouri. This importance results from the parties’ ability to argue consumer’s expectation or that the utility of a design outweighs its risks. *Id.* Because the jury will not be instructed on the consumer-expectations test or the risk-utility test, a defendant attempting to persuade the jury to view its case through the lens of one or the other will have to work even more carefully to craft a compelling narrative. Without the jury instruction to walk the jurors through the specifics of each test in deliberations, a party must emphasize the points it wants a jury to retain regarding its theory throughout the case, for example, by using the risk-utility test as a theme throughout trial, emphasizing with evidence and witnesses proffered that the particular design used was chosen because it was the best possible design available or because it possessed necessary advantages over alternative designs.

While defendants in both Missouri and Illinois need to be conscious of the consumer-expectation test and the risk-utility test when litigating design defect cases, the emphasis will be slightly different for each jurisdiction. A Missouri defendant will need to focus on emphasis and repetition of the key elements it wants a jury to remember when it retires to deliberate. An Illinois defendant will need to ensure it has presented sufficient evidence for the jury on each element of the instruction to allow a jury to receive the desired instruction and decide the case in its favor.

Significant Developments: Year-in-Review of Missouri State and Federal Court Decisions

Joint and Several Liability:

In *State Ex. Rel Nixon v. Dally*, plaintiffs’ car was struck in the rear by one driver in February 2005. Ten months later, plaintiff

and her husband were rear-ended by another driver in a different accident. Plaintiffs filed suit in 2007 and named both drivers as defendants under a theory of joint and several liability. The trial court sustained one of the defendants' motion to sever, but, on appeal, the Missouri Supreme Court held the two discrete accidents involved in plaintiffs' action constituted a series of occurrences, and concluded they were properly joined because the second collision aggravated injuries resulting from the first accident. *State Ex. Rel Nixon v. Dally*, 248 S.W.3d 615 (Mo. banc. 2008).

Preemption:

In *Smith v. Brown & Williamson Tobacco Corp.*, the survivors of decedent Barbara Smith brought a wrongful death action against the defendant tobacco corporation. While alive, decedent instituted an action against defendant, in which defendant was granted summary judgment as to most of decedent's claims. The remainder of decedent's claims were dismissed with prejudice after decedent died in 2000. In 2003, the decedent's survivors brought their wrongful death action. A jury returned a verdict against defendant on negligence and strict liability claims, awarding \$2,000,000 in compensatory damages. The jury found decedent was 75% at fault, and, accordingly, the trial court reduced the survivors' compensatory damages by \$1,500,000. Additionally, the jury found defendant liable for aggravating circumstances and assessed \$20,000,000 in punitive damages. Defendant appealed, asserting various point of error.

On appeal, defendant argued survivors' claims based upon the inherent risks of cigarettes were barred by federal conflict preemption. Defendant relied on the U.S. Supreme Court's decision in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) for the proposition that Congress' foreclosure of the removal of tobacco products from the market implicitly preempts state law theories of liability based on the inherent risks of cigarettes because the only way a manufacturer can avoid liability under such theories would be to stop production.

The appellate court held that by demonstrating defendant's specific design choices that had the potential of injuring decedent, survivors did more than present evidence of the general inherent risks of cigarettes. Additionally, the court held *FDA* did not specifically address the issue of preemption of state law claims and declined to expand the Supreme Court's opinion to imply preemption of state law claims. *Smith v. Brown & Williamson Tobacco Corp.*, 2008 WL 5211857 (Mo.App. W.D. 2008).

Punitive Damages:

In *Smith v. Brown & Williamson Tobacco Corp.*, *supra*, the court held that survivors failed to make a submissible case for punitive damages because the evidence, which did not include evidence defendant knew cigarettes were dangerous fifty years prior to the lawsuit or that defendant did not want to develop a safer cigarette, did not clearly and convincingly demonstrate that defendant's sale of cigarettes without adequate warning was tantamount to intentional wrongdoing. However, the court held that evidence of defendant's conduct of engaging in an active process of creating controversy regarding the health risks of smoking, planning to dispute every Surgeon General's report, instituting policies of preventing harmful information from becoming available to the public, and establishing procedures to ensure negative information did not reach the public, rose to the level of clear and convincing evidence to support a claim for punitive damages and remanded the case for a new trial on punitive damages as to survivors' strict liability product defect claim only.

Failure to Warn: Heeding Presumption:

In *Smith v. Brown & Williamson Tobacco Corp.*, *supra*, defendant, citing decedent's conduct from 1969 to 1990 while cigarettes were required to be affixed with a warning label, argued the presumption decedent would have heeded a warning if defendant had supplied one prior to 1969 was inapplicable. The court held that survivors' evidence the decedent was not aware of the specific injuries that can result from smoking was sufficient to raise the presumption decedent would have heeded a warning and quit smoking if defendant had given such a warning prior to 1969.

Negligence: Open and Obvious:

In *Smith v. Brown & Williamson Tobacco Corp.*, *supra*, defendant argued that it owed no duty to decedent based on evidence the dangers of cigarette smoking are commonly known. The court determined from expert testimony presented at trial that there was no consensus as to the issue of the common knowledge of the dangers of smoking. Accordingly, because reasonable minds could differ as to whether public knowledge about the health risks of developing disease and addiction from smoking cigarettes was so certain and generally known such as to relieve defendant of any duty to protect decedent from injury, the question was properly submitted to the jury for resolution.

Class Action Fairness Act/Class Actions:

In *In re Genetically Modified Rice Litigation*, plaintiffs, rice producers from Arkansas, Louisiana, Mississippi, Missouri and Texas, brought an action alleging that defendants contaminated the United States rice supply with non-approved genetically modified strains of rice, thereby affecting the market price for long grain rice. 251 F.R.D. 392 (E.D. Mo. 2008). Plaintiffs moved to certify their claims as a class action.

The United States District Court for the Eastern District of Missouri determined that because producers each sold their rice according to different and unique methods, the issue of damages was not common to the class. The court therefore concluded calculation of damages was an individual issue raised by each plaintiff's claims and that individual inquiry into their damages predominated over common issues raised by the class action complaint. Additionally, the court noted that some members of the class opposed class certification and desired to prosecute their claims individually. The court determined that, if certified, members of the class who do not opt out will still have to undergo a claims process requiring inquiry into individual plaintiffs' damages which may result in series of "mini-trials" and thereby undermine the goals of class certification. Therefore, the court held that a class action would not be the superior method for resolving plaintiffs' claims. For these reasons, the court denied class certification. *In re Genetically Modified Rice Litigation*, 251 F.R.D.392 (E.D. Mo. 2008).

Medical Monitoring Claims:

In *Ratliff v. Mentor Corp.*, the plaintiff brought a putative class action against the manufacturer of a product she had surgically implanted to treat her urinary stress incontinence, alleging various product liability claims, including medical monitoring as an equitable remedy. 569 F.Supp.2d 926 (W.D. Mo. 2008). Plaintiff claimed damages for the manufacturer defendant to pay the cost of providing a mechanism to detect future latent injury caused by the product and the manufacturer moved to dismiss. Relying on *Meyer v. Flour Corp.*, 220 S.W.3d 712 (Mo. banc. 2007), which defined a medical monitoring claim as a claim that "seeks to recover the costs of future reasonably necessary diagnostic testing to detect

latent injuries or diseases that may develop as a result of exposure to toxic substances,” the District Court held that plaintiff’s “medical monitoring” claims which did not result from exposure to toxic substances were not cognizable under Missouri law. *Ratliff v. Mentor Corp.*, 569 F.Supp.2d 926 (W.D.Mo.2008).

Evidence of Absence of Other Prior Incidents:

In *Heitman v. Heartland Regional Medical Center*, patient and her husband sued hospital for personal injuries patient claimed she sustained when she fell exiting the shower in the bathroom of her hospital room. 251 S.W.3d 372 (Mo.App. 2008). The trial court entered judgment on a jury verdict in favor of hospital, and plaintiffs appealed. At trial, plaintiffs presented evidence of another prior incident involving the same shower. In rebuttal, the hospital introduced evidence showing the absence of any reports or problems with the shower in that room. Plaintiffs objected to the rebuttal evidence and subsequently appealed the trial court’s decision to allow it.

The appellate court held that hospital’s evidence of lack of the problems or accidents involving the shower in patient’s hospital room was proper rebuttal evidence to the witness’ testimony she had been in the hospital room three months earlier and had experienced problems with the shower, which testimony was presented to prove hospital had knowledge of the defective shower. *Heitman v. Heartland Regional Medical Center*, 251 S.W.3d 372 (Mo.App. W.D. 2008).

Duty of Automobile Manufacturers (continued from page 1)

In *Rennert*, the Seventh Circuit noted the Illinois Supreme Court had previously decided manufacturers did not owe a duty to individuals who collide with a vehicle in negligence or strict liability claims. *Mieher v. Brown*, 301 N.E.2d 307 (Ill. 1973); *Beattie v. Lindelof*, 633 N.E.2d 1227 (Ill.App. 1994). Absent strong evidence, which *Rennert* did not offer, the Seventh Circuit concluded Illinois would decide an automobile manufacturer did not owe a duty to drivers or passengers of other automobiles, therefore, *Rennert*’s cause of action would not stand and would be dismissed. *Rennert*, 543 F.3d at 916.

When defending automotive products liability actions in Illinois, defendants should always be aware of the rulings determining a lack of duty owed to individuals outside the allegedly defective

vehicle, even in cases originally only involving the driver and/or passengers, in case third party drivers or passengers of other vehicles later become involved in the litigation.

Unlike Illinois, Missouri’s Supreme Court has dealt with this question directly and decided the opposite: an automobile manufacturer may be sued in strict liability because of the duty owed to pedestrians and drivers of vehicles other than the one it manufactured. See *Giberson v. Ford Motor Co.*, 504 S.W.2d 8 (Mo. 1974). Plaintiffs in *Giberson* alleged Ford manufactured an automobile with a defective engine that exploded and created a cloud restricting visibility, causing an accident that injured Plaintiffs. *Giberson*, 504 S.W.2d at 9. The Missouri Supreme Court decided the public policy in protecting drivers and passengers of the defective car applied to protect bystanders as well. *Id.* at 11. The Court reasoned the party controlling the making and inspection of the product should be held responsible for damage caused by defects in the product. *Id.* Additionally, the Court stated no additional burden would be placed on the product’s manufacturer because the same precautions required to protect the buyer or user would generally protect bystanders as well. *Id.*



Obviously, this duty will result in different litigation tactics in Missouri than in Illinois. Manufacturers must be aware of the duty to bystanders prevalent in some states because no reasonable manufacturer will want to design automobiles differently in different states. Therefore, manufacturing and design of automobiles will not change as a result of the Missouri/Illinois distinction. On the other hand, litigation tactics will differentiate significantly due to the need in Missouri for manufacturers to establish a narrative during trial to explain how a manufacturer took steps during the design and manufacture of an automobile to safeguard bystanders. The duty may have discovery implications as well, because following the initial accident, if a manufacturer does informal discovery and investigation, it will need to be aware of the duty to any bystanders in order to efficiently investigate an occurrence.

For further information contact
Mary Anne Mellow, Products Liability Group Leader, at
mmellow@spvg.com
Sandberg Phoenix & von Gontard P.C.
Carbondale, Illinois
Edwardsville, Illinois
St. Louis, Missouri (main office)
www.spvg.com
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Contributors to this Update:

Fibbens A. Koranteng
Mary Anne Mellow
Todd C. Stanton
Tyler C. Thompson

Sandberg Phoenix attorneys
are available to speak
on a wide range of
law-related subjects.

For more information, call
Mary Jennings
at 314-446-4215