# Product Liability

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This Article surveys recent developments in Georgia product liability law.[1] It covers noteworthy cases decided during the survey period by Georgia appellate courts, United States district courts located in Georgia, and the United States Court of Appeals for the Eleventh Circuit. In addition, the Article discusses relevant legislative enactments by the Georgia General Assembly revising the Official Code of Georgia Annotated ("O.C.G.A.").

## I. STRICT LIABILITY

Georgia's product liability practice is centered upon O.C.G.A. section 51-1-11,[2] which provides that the manufacturer of personal property sold as new is strictly liable to individuals who are injured by that property.[3] To establish a strict liability claim under this statute, a plaintiff must prove that (1) the defendant was the manufacturer of the product, (2) the product was defective when it left the control of the manufacturer, and (3) the product's defective condition proximately

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1. The survey period runs from June 1, 2006 through May 31, 2007.
2. O.C.G.A. § 51-1-11 (2000).
3. *Id.* § 51-1-11(b).

caused the injury to the plaintiff.[4] The purpose of the statute is to "ensure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market."[5]

Because the manufacturer is in the best position to discover dangerous product defects and determine how to correct such defects, product liability actions for strict liability can be brought only against the manufacturer of a product.[6] In Georgia, an entity is classified as a manufacturer if (1) the entity actually designs or manufactures the product, (2) the entity is a manufacturer of a component part that failed and caused injury to the plaintiff, or (3) the entity is an assembler of component parts who sells the assembled product as a single item under its own trade name.[7] Despite these seemingly broad definitions, courts strictly construe the strict liability statute,[8] finding that it only applies to "actual manufacturers—those entities that have an active role in the production, design, or assembly of products and placing them in the stream of commerce."[9]

During the survey period, the Georgia Court of Appeals revisited the statutory definition of a product manufacturer. In *Davenport v. Cummins Alabama, Inc.*,[10] the plaintiff was injured when a wood chipper he was operating caught fire and exploded. The plaintiff maintained that the explosion occurred when a hydraulic fuel hose ruptured, releasing a cloud of flammable vapor that caught fire when it came into contact with the hot engine.[11]

In addition to suing Precision Husky, the company that designed and assembled the chipper, the plaintiff brought a product liability action against Cummins Alabama, Inc., the distributor of the engine that was installed in the chipper. The plaintiff asserted that Cummins was a manufacturer of the chipper subject to strict liability under O.C.G.A. section 51-1-11 because a Cummins representative actively participated in the design of the chipper and the placement of the hydraulic pumps

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4. Chicago Hardware & Fixture Co. v. Letterman, 236 Ga. App. 21, 23, 510 S.E.2d 875, 877-78 (1999) (citing O.C.G.A. § 51-1-11(b)(1)). For a thorough discussion of these elements, see CHARLES R. ADAMS III, GEORGIA LAW OF TORTS § 25-8, at 499-507 (2007 ed.).

5. ADAMS, *supra* note 4, at 499.

6. *Id.*

7. Tomlinson v. ResQline, Inc., No. 2:04-CV-122-WCO, 2006 WL 1097833, at *4 (N.D. Ga. Apr. 24, 2006); Mullins v. M.G.D. Graphics Sys. Group, 867 F. Supp. 1578, 1582 (N.D. Ga. 1994); Freeman v. United Cities Propane Gas of Ga., Inc., 807 F. Supp. 1533, 1539 (M.D. Ga. 1992); Morgan v. Mar-Bel, Inc., 614 F. Supp. 438, 440 (N.D. Ga. 1985).

8. *Morgan*, 614 F. Supp. at 441.

9. *Freeman*, 807 F. Supp. at 1540.

10. 284 Ga. App. 666, 644 S.E.2d 503 (2007).

11. *Id.* at 667, 644 S.E.2d at 505.

near the hot engine.[12] According to the plaintiff, the Cummins representative directed Precision Husky to relocate the hydraulic pumps "in dangerous proximity to very hot engine parts where a foreseeable leak of hydraulic fluid would ignite a fire."[13] The trial court disagreed with the plaintiff's argument and granted Cummins's motion for summary judgment, concluding that Cummins was not actively involved in the design of the chipper and could not be classified as a manufacturer.[14]

After reviewing the evidence submitted in support of Cummins's motion, the Georgia Court of Appeals affirmed the trial court's ruling, noting that the evidence of record "belies [the plaintiff's] argument and supports only one conclusion: Cummins Alabama did not actively participate in the conception, design, or specification of the chipper."[15] While the court acknowledged that a Cummins representative "told Precision Husky representatives they would have to relocate the hydraulic pumps to the rear of the engine," the court observed that "[r]epresentatives of Precision Husky made all the design decisions relating to the change, with no input from [Cummins]."[16] As a result, Cummins's input was limited to stating, in essence, that a particular engine would perform adequately in a chipper with a hydraulic pump located at the rear of the engine rather than the front of the engine.[17] The court concluded that "such input does not constitute the type of active role in the design of the final product as will subject the distributor of a component part to liability as a manufacturer of the allegedly defectively designed product."[18] Because Cummins could not be classified as a manufacturer of the chipper, the court agreed that summary judgment in favor of Cummins was warranted on the plaintiff's strict liability claims.[19]

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12. *Id.* at 667-68, 644 S.E.2d at 505.
13. *Id.* at 671, 644 S.E.2d at 508.
14. *Id.* at 667, 670-72, 644 S.E.2d at 505, 507-08.
15. *Id.* at 671, 644 S.E.2d at 508.
16. *Id.* at 670, 644 S.E.2d at 507.
17. *Id.* at 671-72, 644 S.E.2d at 508.
18. *Id.* at 672, 644 S.E.2d at 508 (citing Boyce v. Gregory Poole Equip. Co., 269 Ga. App. 891, 894, 605 S.E.2d 384, 388 (2004)).
19. *Id.*

## II. FAILURE TO WARN

### A. *General Elements*

A manufacturer who has reason to anticipate that its product has the potential for doing harm when used for a particular purpose "'may be required to give adequate warning of the danger.'"[20] The manufacturer's duty to warn depends upon a number of factors, including the "foreseeability of the use in question, the type of danger involved, and the foreseeability of the user's knowledge of the danger."[21] If the manufacturer has a duty to warn, the manufacturer may breach the duty by (1) failing to adequately warn of the product's potential risks or (2) failing to adequately communicate the warning to the user.[22] Failure to adequately communicate a warning generally requires an evaluation of the location and presentation of the warning, including the color, font size, and use of symbols to draw attention to the warning.[23]

In addition to establishing a duty to warn and a breach on the part of the manufacturer, the plaintiff must also establish that the breach proximately caused the alleged injuries.[24] In cases premised upon the content or sufficiency of a warning, the failure to actually read the instructions or warning may prevent the plaintiff from recovering.[25] However, if the plaintiff contends that the manufacturer failed to adequately communicate the warning, the failure to read the warning does not bar recovery.[26] In fact, in cases challenging the location and presentation of the warning, the plaintiff's failure to read the warnings may actually be circumstantial evidence of the inadequacy of the warning.[27]

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20. Wright v. Case Corp., No. 1:03-CV-1618-JEC, 2006 U.S. Dist. LEXIS 7683, at *26 (N.D. Ga. Feb. 1, 2006) (quoting Battersby v. Boyer, 241 Ga. App. 115, 117, 526 S.E.2d 159, 162 (1999)).

21. *Id.* (citing Wilson Foods Corp. v. Turner, 218 Ga. App. 74, 75, 460 S.E.2d 532, 533-34 (1995)).

22. *Wilson Foods Corp.*, 218 Ga. App. at 75, 460 S.E.2d at 534.

23. *Id.*

24. Chicago Hardware & Fixture Co. v. Letterman, 236 Ga. App. 21, 23, 510 S.E.2d 875, 877-78 (1999).

25. *See, e.g.*, Royal v. Ferrellgas, Inc., 254 Ga. App. 696, 705, 563 S.E.2d 451, 458-59 (2002); Powell v. Harsco Corp., 209 Ga. App. 348, 350, 433 S.E.2d 608, 610 (1993); Cobb Heating & Air Conditioning Co. v. Hertron Chem. Co., 139 Ga. App. 803, 804, 229 S.E.2d 681, 682 (1976).

26. *Wilson Foods Corp.*, 218 Ga. App. at 75, 460 S.E.2d at 534.

27. *See, e.g.*, Camden Oil Co. v. Jackson, 270 Ga. App. 837, 840-41, 609 S.E.2d 356, 359 (2004); *Wilson Foods Corp.*, 218 Ga. App. at 75, 460 S.E.2d at 534.

Georgia courts had occasion to evaluate several failure to warn claims during the survey period, and in each reported instance, the court determined that the plaintiff submitted sufficient evidence to support the elements of a failure to warn claim. In *Dozier Crane & Machinery, Inc. v. Gibson*,[28] the plaintiffs brought suit against Dozier Crane for injuries they sustained when the boom of a crane touched a power line while the plaintiffs were guiding a load of metal rebar to the ground. The plaintiffs asserted that Dozier Crane, a company that buys, refurbishes, and sells used equipment, was negligent for failing to properly warn of the dangers associated with operating a crane near electrical power lines. Dozier Crane moved for summary judgment on this failure to warn claim, asserting that (1) it did not have a duty to warn of the dangers of electrocution because it sold the crane "as is, where is" and had no control over its maintenance after the sale date, and (2) even if a duty existed, the plaintiffs failed to show any evidence that the failure to warn proximately caused their injuries. The trial court denied the motion but certified its order for immediate review.[29]

The Georgia Court of Appeals granted the request for interlocutory review, evaluated the evidence submitted by the parties, and affirmed the judgment of the trial court.[30] The court rejected Dozier Crane's argument that it had no duty to warn, observing that "[a]s a supplier of refurbished equipment, Dozier owed a duty to third persons to warn of the foreseeable dangers associated with its refurbished equipment, including the risk of electrocution."[31] While the burden of warning was "slight," the court observed that Dozier Crane generally applied decals on its refurbished equipment which warned of the dangers of electrocution.[32] According to the court, "[t]he requirement of applying the decals in this case would serve not only to inform the crane operator of any dangers but to continually remind him to check for power lines and prompt him, or others on the construction site, to point out the danger to the plaintiffs."[33]

The court similarly rejected the argument that the plaintiffs failed to provide any evidence that the alleged failure to warn proximately caused their injuries.[34] The court acknowledged that it would be difficult to prove the causation element of a failure to warn claim if the plaintiffs

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28. 284 Ga. App. 496, 644 S.E.2d 333 (2007).
29. *Id.* at 496-97, 499-500, 644 S.E.2d at 334-36.
30. *Id.* at 497, 644 S.E.2d at 334-35.
31. *Id.* at 499, 644 S.E.2d at 336.
32. *Id.*
33. *Id.*
34. *Id.* at 500, 644 S.E.2d at 337.

were merely bystanders who did not see or pay attention to the allegedly defective product.[35] However, the court held that the evidence indicated the plaintiffs "were working directly with the crane operator in moving the rebar, looked at the crane, and thus may have seen warning decals had they been attached."[36] Because there was sufficient evidence to create a genuine issue of material fact regarding the elements of the plaintiffs' failure to warn claim, the court of appeals affirmed the trial court's judgment.[37]

The Middle District of Georgia undertook a similar analysis in *Folsom v. Kawasaki Motors Corp. U.S.A.*[38] In *Folsom* the plaintiffs filed suit against Kawasaki Motors Corp. U.S.A. and others to recover for the death of their son. The suit arose out of an accident involving a Kawasaki Jet Ski. On the date of the accident, the Jet Ski was being used by a novice operator who temporarily lost control of the watercraft, causing the rear of the Jet Ski to strike the decedent in the head. The decedent was knocked unconscious, and he sank to the bottom of the lake where he ultimately died as a result of his injuries. In the complaint, the plaintiffs alleged that Kawasaki was liable for their son's death because (1) the Jet Ski was defectively designed because the operators lost their ability to control the watercraft once the throttle was released, and (2) Kawasaki failed to adequately warn operators of the complications associated with the loss of control. Kawasaki filed motions for summary judgment on both of these claims, asserting that the design defect claim was preempted, and the failure to warn claim was not supported by the evidence. Kawasaki also attacked the plaintiffs' design defect claim by challenging the qualifications of their experts and the reliability of their experts' opinions.[39]

In support of its motion for summary judgment on the plaintiffs' failure to warn claim, Kawasaki argued that it adequately warned operators that the ability to steer is lost when the throttle is released.[40] Kawasaki noted that a warning label on the Jet Ski stated, "**Releasing the throttle completely reduces the ability to steer.** This can cause you to hit an object you are trying to avoid. You must have thrust to turn."[41] While the plaintiffs acknowledged the presence of the warning, they argued that Kawasaki breached its duty to warn by failing to

35. *Id.*
36. *Id.* (citing Daniels v. Bucyrus-Erie Corp., 237 Ga. App. 828, 516 S.E.2d 848 (1999)).
37. *Id.*
38. No. 3:04-CV-42(CDL), 2007 WL 1544640 (M.D. Ga. May 24, 2007).
39. *Id.* at *1-4, 8, 13.
40. *Id.* at *2, 13.
41. *Id.* at *2.

adequately communicate the warning. According to the plaintiffs, the method of communication was inadequate because the Jet Ski had numerous other warning labels affixed to it, the warning regarding the inability to steer was buried among numerous other product warnings, and the warning was not conspicuous.[42] Construing the evidence in the light most favorable to the plaintiffs, the district court found that a jury could conclude that the method of communication was inadequate because Kawasaki failed to place the warning "in such position, color, and size print or to use symbols which would call the user's attention to the warning or cause the user to be more likely to read the label and warning than not."[43]

The court's analysis of the failure to warn claim did not end with this determination. Instead, the court also evaluated the causation element of the plaintiffs' failure to warn claim.[44] In its motion for summary judgment, Kawasaki argued that the alleged failure to warn did not cause the accident because the operator would not have read the warning in this instance, and even if the operator had read the warning, it would not have produced a different result.[45] The district court concluded that genuine issues of material fact existed regarding the element of causation because the record established that the individual operating the Jet Ski on the date of the accident did not notice the warning labels affixed to the Jet Ski.[46] The court also found that if the operator had noticed the labels, he would have understood an instruction to "keep the throttle engaged to maintain steering" and could have avoided the accident if he had kept the throttle engaged.[47] Thus, a jury could conclude that Kawasaki's failure to adequately warn the operator proximately caused the accident.[48] Because genuine issues of material fact existed on this issue, the district court denied Kawasaki's motion for summary judgment on the plaintiff's failure to warn claim.[49]

### *B. Type of Harm Giving Rise to a Duty to Warn*

During the survey period, the Georgia Court of Appeals resolved an issue of first impression—whether a claim for negligent failure to warn

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42. *Id.* at *13.
43. *Id.* (internal quotation marks omitted).
44. *Id.* at *14.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* The district court's opinion also addressed the design defect claim and the legal and evidentiary issues surrounding that claim. For a detailed discussion of these issues, see *infra* Parts V.A., VI.B.

can be brought when the plaintiff does not suffer "bodily harm." In *Johnson v. Ford Motor Co.*,[50] the plaintiff filed suit against Ford Motor Company and Texas Instruments, Inc. for property damages she sustained when a neighbor's car caught fire. The fire spread to the plaintiff's house, damaging the house, its contents, and the plaintiff's cars. According to the plaintiff, the fire was caused by a faulty control deactivation switch installed in her neighbor's Lincoln Town Car. The switch, which was manufactured by Texas Instruments, contained a crack which permitted brake fluid to leak through the switch, resulting in a short. Ford ultimately issued a recall because of problems associated with the switch.[51]

The plaintiff brought claims of negligent manufacture, strict liability, and failure to warn against Ford and Texas Instruments. Ford and Texas Instruments moved for summary judgment, asserting that the negligent failure to warn claim was barred because the plaintiff suffered only property damage as a result of the fire. The trial court granted summary judgment for the defendants on this claim, finding that the liability of a product supplier was limited to those cases which resulted in physical harm due to the failure to warn.[52]

The Georgia Court of Appeals reversed, concluding that the trial court erroneously relied upon dicta from an appellate opinion and misinterpreted section 388 of the Restatement (Second) of Torts.[53] Section 388, which was adopted as the law of Georgia,[54] states in pertinent part:

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for *physical harm* caused by the use of the chattel in the manner for which and by a person for whose use it is supplied . . . .[55]

While Ford and Texas Instruments correctly observed that the original version of section 388 referred to "bodily harm," the section was revised in 1965, and the phrase "bodily harm" was replaced with "physical harm."[56] Because the Restatement defines "physical harm" as "the physical impairment of the human body, or of land or chattels,"[57] the

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50. 281 Ga. App. 166, 637 S.E.2d 202 (2006).
51. *Id.* at 166, 637 S.E.2d at 202-03.
52. *Id.* at 167, 637 S.E.2d at 203.
53. *Id.* at 172, 637 S.E.2d at 206.
54. *Id.*
55. RESTATEMENT (SECOND) OF TORTS § 388 (1965) (emphasis added).
56. *Johnson*, 281 Ga. App. at 171-73, 637 S.E.2d at 206.
57. RESTATEMENT (SECOND) OF TORTS § 7(3) (1965).

plaintiff asserted on appeal that her claim for property damages was appropriate and that the trial court erred in granting the motion for summary judgment filed by Ford and Texas Instruments.[58] The court of appeals agreed, concluding that "bodily harm [was] not required to maintain a claim for negligent failure to warn as set out in [section] 388 of the Restatement [(Second)] of Torts."[59] Because no other Georgia cases had addressed this issue, the court of appeals noted that its holding was consistent with cases from other states that have adopted section 388.[60]

The Eleventh Circuit also had occasion to determine whether bodily harm was required for a plaintiff to maintain a negligent failure to warn claim. In *Pillsbury Co. v. West Carrollton Parchment Co.*,[61] Pillsbury brought suit against the manufacturer and distributor of printed wax dividers that were incorporated into the packaging of Pillsbury pie crusts. Pillsbury requested that West Carrollton manufacture the wax dividers in a specified manner to prevent the transfer of ink to the pie crusts. Soon after Pillsbury began inserting the dividers between the pie crusts, Pillsbury received complaints that ink from recipes on the wax dividers was being transferred to the pie crusts. At the direction of the Food and Drug Administration, Pillsbury recalled the entire production run of the pie crusts.[62]

Pillsbury thereafter filed a complaint against West Carrollton for negligent manufacture, negligent failure to warn, punitive damages, and breach of contract. West Carrollton moved for summary judgment on a number of Pillsbury's claims, including the negligent failure to warn claim.[63] The district court granted West Carrollton's motion for summary judgment on the failure to warn claim, holding that "there was 'no indication in the record that West Carrollton's dividers posed any health risk to Pillsbury's customers,' and that absent such a showing, Pillsbury failed to establish that West Carrollton had a duty to warn."[64] Pillsbury appealed the district court's ruling, arguing that the district court erred because it "impermissibly narrowed West Carrollton's duty

58. *Johnson*, 281 Ga. App. at 171-73, 637 S.E.2d at 206-07.

59. *Id.* at 173, 637 S.E.2d at 207.

60. *Id.* (citing Midwest Specialties, Inc. v. Crown Indus. Prods. Co., 940 F. Supp. 1160 (N.D. Ohio 1996); Callas v. Trane CAC, Inc., 776 F. Supp. 1117 (W.D. Va. 1990); Clarke Indus., Inc. v. Home Indem. Co., 591 So. 2d 458 (Ala. 1991)).

61. 210 F. App'x 915 (11th Cir. 2006) (per curiam).

62. *Id.* at 916-17.

63. *Id.* at 917-18.

64. *Id.* at 920.

to warn to only those instances in which its dividers posed *health risks* to Pillsbury's customers."[65]

The Eleventh Circuit agreed with Pillsbury and reversed the district court's ruling, relying upon both the Restatement (Second) of Torts and *Johnson*.[66] The Eleventh Circuit noted that Georgia's tort law incorporated the Restatement, including the definition of "physical harm" as "'the physical impairment of the human body, or of land *or chattels*.'"[67] Thus, claims of negligent failure to warn, as set out in section 388 of the Restatement (Second) of Torts, can be brought when a plaintiff suffered only property damage.[68] In addition, the Eleventh Circuit observed that the Georgia Court of Appeals had recently examined this issue and determined that bodily harm was not required to assert a negligent failure to warn claim.[69] Because the district court erroneously narrowed the duty to warn to only those instances where a product posed health risks to persons, the Eleventh Circuit reversed the district court's grant of summary judgment on Pillsbury's failure to warn claim and remanded the case to the district court.[70]

## III. PROXIMATE CAUSE

Proof that a manufacturer's product proximately caused the plaintiff's injuries is an essential element of all product liability claims, regardless of whether the plaintiff is proceeding under a strict liability or negligence theory.[71] Without a showing of proximate cause, there can be no recovery.[72] The reason for this requirement is that liability is imposed for injuries that proximately result from the use of a defective product, not for the mere manufacture of a defective product.[73] Defining proximate cause presents a dilemma for trial courts—particularly when instructing a jury—that the Georgia Court of Appeals has described as follows:

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65. *Id.*
66. *Id.*
67. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 7(3)) (emphasis added by court).
68. *Id.* at 920-21.
69. *Id.* at 920 (citing *Johnson*, 281 Ga. App. at 173, 637 S.E.2d at 207).
70. *Id.*
71. *See, e.g.*, O.C.G.A. § 51-1-11(b)(1) (2000); Steinberg v. SICA S.P.A., No. 7:04-CV-22(HL), 2006 WL 618593, at *4 (M.D. Ga. Mar. 10, 2006); Hoffman v. AC&S, Inc., 248 Ga. App. 608, 610, 548 S.E.2d 379, 382 (2001).
72. *Hoffman*, 248 Ga. App. at 610, 548 S.E.2d at 382.
73. *Steinberg*, 2006 WL 618593, at *5 (citing Talley v. City Tank Corp., 158 Ga. App. 130, 135, 279 S.E.2d 264, 269 (1981)).

> "Although many legal scholars have attempted to lay down a single standard to determine proximate causation, . . . no satisfactory universal formula has emerged. Instead, proximate cause is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent. The best use that can be made of the authorities on proximate cause is merely to furnish illustrations of situations which judicious men upon careful consideration have adjudged to be on one side of the line or the other."[74]

Although the concept of proximate cause eludes precise definition, a well-established principle of Georgia law provides that in cases involving the negligence of multiple tortfeasors, the negligence of each tortfeasor must be a contributing factor to the plaintiff's injury to be considered a proximate cause of the injury:

> Where the injury is the result of the concurring negligence of two or more parties, they may be sued jointly or severally. All may be sued jointly, notwithstanding different degrees of care may be owed by the different defendants.
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> . . . It is well settled that an action may be maintained against two joint tort-feasors whose negligence contributes to produce an injury, even though the same obligations do not rest upon each with respect to the person injured. It is sufficient to support a recovery if the negligence of both be a contributing cause, even though one owes to the person injured a higher degree of care, and even though there be differing degrees of negligence by each.[75]

Because there may be more than one proximate cause of an injury, as this principle recognizes, the term "proximate cause" is not synonymous with the term "dominant cause."[76]

In cases involving multiple alleged tortfeasors, one tortfeasor may be liable for the acts of a subsequent tortfeasor if he or she could have foreseen or anticipated the negligent acts of the subsequent tortfeasor.[77]

> While the general rule is that if, subsequently to an original wrongful or negligent act, a new cause has intervened, of itself sufficient to stand as the cause of the misfortune, the former must be considered as

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74. John Crane, Inc. v. Jones, 262 Ga. App. 531, 533, 586 S.E.2d 26, 29 (2003) (quoting Atlanta Obstetrics & Gynecology Group, P.A. v. Coleman, 260 Ga. 569, 569-70, 398 S.E.2d 16, 17 (1990)).

75. Gooch v. Ga. Marble Co., 151 Ga. 462, 463-64, 107 S.E. 47, 48 (1921) (citation omitted) (internal quotation marks omitted).

76. Thompson v. Thompson, 278 Ga. 752, 753, 605 S.E.2d 30, 31 (2004).

77. *Id.* at 754, 605 S.E.2d at 32 (citing Ont. Sewing Mach. Co. v. Smith, 275 Ga. 683, 686, 572 S.E.2d 533, 535-36 (2002)).

> too remote, still if the character of the intervening act claimed to break the connection between the original wrongful act and the subsequent injury was such that its probable or natural consequences could reasonably have been anticipated, apprehended, or foreseen by the original wrongdoer, the causal connection is not broken, and the original wrongdoer is responsible for all of the consequences resulting from the intervening act.[78]

During the survey period, the Georgia Supreme Court addressed the definition of proximate cause and the extent to which a court must instruct a jury regarding the foreseeability of intervening acts. In *Pearson v. Tippmann Pneumatics, Inc.*,[79] Cody Pearson and his parents filed a strict liability and negligence action against Tippmann Pneumatics, Inc. and Ashton Ballesteros, seeking damages for personal injuries Pearson sustained during an accidental shooting. The injuries occurred when Ballesteros pointed a paintball gun at Pearson and pulled the trigger, mistakenly believing that the safety mechanism was engaged. The plaintiffs alleged that the paintball gun manufactured by Tippmann was defective, unreasonably dangerous, and negligently designed because the gun's safety mechanism was not appropriately marked to indicate whether the gun was in the "safe" or "fire" position. The plaintiffs also alleged that Ballesteros was negligent.[80]

Tippmann denied these allegations, asserting that the defect or design did not proximately cause Pearson's injuries. During trial, Tippmann attempted to show that Ballesteros's conduct was grossly negligent and that the intervening acts of Ballesteros proximately caused the injuries. At the conclusion of trial, the court gave the jury several instructions dealing with proximate cause and foreseeability of intervening acts. The instructions stated, in part, as follows:

> Proximate cause is that which in the natural and continuous sequence unbroken by other causes produces an event and without which the event would not have occurred. Proximate cause is that which is nearest in the order of responsible causes as distinguished from remote, that which stands last in causation not necessarily in time or place but in causal relation. . . .
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> Now, Georgia law provides that a Defendant may be held liable for an injury when that person commits a negligent act which puts other forces in motion or operation which results in the injury when such other forces are the natural and probable result of the act which the

78. Williams v. Grier, 196 Ga. 327, 336-37, 26 S.E.2d 698, 704 (1943).
79. 281 Ga. 740, 642 S.E.2d 691 (2007).
80. *Id.* at 740-41, 642 S.E.2d at 692-93.

> Defendant committed and which reasonably could have been foreseen by the Defendant. When the injuries could not reasonably have been foreseen as the natural, reasonable, and probable result of the original negligent act, then there can be no recovery.[81]

Shortly after the deliberations began, the jury submitted a written question asking the court to explain proximate cause in "layman's terms" because the jury was "confused as to how a natural and continuous sequence, unbroken by other causes, is to be constructed."[82] The jury attached the original instruction on proximate cause to the written question, underlining a section of the instruction to add emphasis.[83] The underlined portion related to the distinction between proximate cause and the concept of remoteness, including the portion defining proximate cause as "that which stands last in causation not necessarily in time or place but in causal relation."[84] After receiving proposed instructions for the recharge from the parties, including an instruction offered by the plaintiffs containing examples of how multiple wrongdoers can both be deemed the proximate cause of an injury, the trial court provided the following additional instruction to the jury:

> [Y]ou[] have asked the Court to explain how a natural and continuous sequence, unbroken by other causes, is to be construed by us. If subsequently to an original wrongful or negligent act a new cause has intervened of itself sufficient to stand as the sole cause of the misfortune, the original act must be considered as too remote. If the cause is too remote, it was not the proximate cause.[85]

After further deliberations, the jury returned a special verdict finding that Tippmann was negligent but that Tippmann's negligence was not the proximate cause of Pearson's injuries.[86]

The plaintiffs appealed, asserting that the trial court erred by failing to accurately recharge the jury on the legal issues of proximate cause and the foreseeability of an intervening act.[87] While the initial charge contained this instruction,[88] the plaintiffs contended on appeal that the

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81. Pearson v. Tippmann Pneumatics, Inc., 277 Ga. App. 722, 723-24, 627 S.E.2d 431, 433-34 (2006) (internal quotation marks omitted).

82. *Id.*, 627 S.E.2d at 434 (internal quotation marks omitted).

83. *Id.*

84. *Id.* at 725, 627 S.E.2d at 434 (emphasis omitted) (internal quotation marks omitted).

85. *Id.* at 726, 627 S.E.2d at 434 (second brackets in original) (internal quotation marks omitted).

86. *Pearson*, 281 Ga. at 742, 642 S.E.2d at 693.

87. *Id.*

88. 277 Ga. App. at 724, 627 S.E.2d at 433-34.

recharge was misleading because it failed to address the foreseeability of an intervening act.[89] The Georgia Court of Appeals rejected the plaintiffs' argument, concluding that the plaintiffs had waived this issue for appeal by failing to object on "this distinct ground after the jury was charged or recharged" and by failing to provide an alternate charge to preserve their objection.[90]

The Georgia Supreme Court granted certiorari, determined that the plaintiffs had properly objected to the recharge as contrary to the law, and reversed the judgment of the court of appeals.[91] In addition to ruling on this procedural aspect of the case, the supreme court also addressed the merits of the alleged error in the recharge.[92] The supreme court observed that the recharge given by the trial court was pulled almost verbatim from an opinion issued by the court of appeals in a case involving one defendant and one causal factor.[93] The supreme court concluded the instruction in that case was appropriate for cases involving one defendant and one causal factor.[94] The supreme court also concluded, however, that the instruction was not appropriate in the present case—a case involving multiple defendants and evidence of multiple causes in fact.[95] Because the recharge given by the trial court "failed to accurately and completely instruct the jury on the legal principles of proximate cause and the foreseeability of intervening acts as applied to the facts of this case," the supreme court reversed the judgment of the court of appeals.[96] Thus, while the facts of a case may not always necessitate an instruction regarding the foreseeability of intervening acts, counsel must be mindful of the various definitions of proximate cause and the extent to which the instructions given by the court are tailored to the facts and circumstances at issue in the case.

## IV. ASBESTOS AND SILICA LITIGATION

By the end of 2002, approximately 730,000 people in the United States had filed claims for asbestos-related injuries against at least 8400 entities, the total cost of which was approximately $70 billion.[97] Most

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89. 281 Ga. at 742, 642 S.E.2d at 693.
90. 277 Ga. App. at 728, 627 S.E.2d at 436.
91. 281 Ga. at 744, 642 S.E.2d at 695.
92. *Id.* at 742-43, 642 S.E.2d at 694.
93. *Id.* at 743, 642 S.E.2d at 694-95.
94. *Id.*, 642 S.E.2d at 694.
95. *Id*.
96. *Id.* at 744, 642 S.E.2d at 695.
97. STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION 70-72, 79, 92-94 (2005). Between 1976 and the summer of 2004, 73 asbestos defendants had filed for bankruptcy. *Id.* at 109.

claims have been filed against entities in the traditional asbestos-related manufacturing and installation industries.[98] However, many claims are now being filed against entities in other industries that do not require workers to handle asbestos on a routine basis but nevertheless have asbestos present in the workplace.[99] In fact, one nonprofit research organization has determined that asbestos litigation now "touch[es] almost every form of economic activity that takes place in the United States."[100] Thus, we are truly experiencing what the United States Supreme Court has described as an "asbestos-litigation crisis."[101]

The United States Judicial Conference Ad Hoc Committee on Asbestos Litigation described some of the consequences of asbestos litigation as follows:

> "The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether."[102]

Another problem with asbestos litigation is that more than ninety percent of all claims are for nonmalignant conditions, and there is some evidence showing that most of these claimants are unimpaired.[103] As a result, dockets in courts across the country are becoming clogged with claims filed by people who have not yet suffered a cognizable injury.[104] Compounding this problem in certain plaintiff-friendly states is the fact that claims are being filed by people who are not residents of, and have not been exposed to asbestos in, the state where the claims are filed.[105] Several states have attempted to remedy these problems by enacting various tort reform measures, including statutes that establish medical

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98. *Id.* at 76.

99. *Id.* at 77, 81.

100. *Id.* at 81. Out of 83 industries recognized by the United States Department of Commerce Standard Industrial Classification System, 75 had at least one company that had been named as a defendant in asbestos litigation. *Id.*

101. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 597 (1997); *see also* Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999) (describing the volume of asbestos cases as an "elephantine mass").

102. *Amchem Prods., Inc.*, 521 U.S. at 598 (quoting REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 2-3 (1991)).

103. CARROLL ET AL., *supra* note 97, at 75-76.

104. *Id.*

105. *Id.* at 29.

criteria and venue limitations for asbestos claims.[106] Georgia is one such state.

On April 12, 2005, Governor Sonny Perdue signed into law a comprehensive statutory scheme governing asbestos and silica claims.[107] The most significant provision in the law was its requirement that a plaintiff present "prima-facie evidence of physical impairment resulting from a medical condition for which exposure to asbestos or silica was a substantial contributing factor."[108] This requirement applied both prospectively and retroactively.[109] Another important provision was that a claim could not be filed on or after April 12, 2005, unless the plaintiff resided in Georgia at the time of filing or exposure.[110] According to the law's primary sponsor in the General Assembly, Representative David Ralston of Blue Ridge, limiting out-of-state claims was one of the law's goals: "The law was designed to stem the tide of out-of-state asbestos claims being filed in Georgia . . . . We were seeing a huge number of people that were nonresidents of Georgia and that had not been exposed to asbestos or silica in Georgia who were suing in Georgia courts."[111] In 2005 there were more than 3000 asbestos cases pending in Fulton County alone, and the attorneys involved in those cases estimated that approximately ninety percent had been filed by out-of-state plaintiffs who had not been exposed to asbestos in Georgia.[112]

Shortly after the law was enacted, commentators and attorneys anticipated a challenge to the constitutionality of its retroactive application to pending cases.[113] Within months, the trial courts had reached opposite conclusions on this issue. Seven Cobb County judges issued orders holding that the law affected substantive rights and, therefore, could not be applied retroactively.[114] Two Fulton County judges, however, found that the law simply established a procedural

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106. *Id.* at 132-33; Peter Geier, *States Move to Limit Asbestos Caseload*, FULTON COUNTY DAILY REP., May 25, 2006, at 10.

107. O.C.G.A. §§ 51-14-1 to -10 (Supp. 2005) (repealed 2007).

108. O.C.G.A. § 51-14-3(b) (repealed 2007).

109. O.C.G.A. § 51-14-5 (repealed 2007).

110. O.C.G.A. § 51-14-8(a) (repealed 2007).

111. Steven H. Pollak, *New Law May Nix Asbestos Cases*, FULTON COUNTY DAILY REP., Sept. 19, 2005, at 1 (internal quotation marks omitted). There were several hundred additional cases pending in other counties, including Cobb County. Alyson M. Palmer, *Thousands of Asbestos Cases Clear Hurdle After Ruling*, FULTON COUNTY DAILY REP., Nov. 21, 2006, at 1.

112. Pollak, *supra* note 111, at 1.

113. *Id.*

114. *Id.*

requirement that could be applied retroactively.[115] The defendants in the Cobb County cases appealed, and the Georgia Supreme Court affirmed in *DaimlerChrysler Corp. v. Ferrante*.[116] As framed by the court, the question was "whether enactment of the [asbestos and silica claims law] affected appellees' rights, duties or obligations with respect to their asbestos claims."[117] The court noted that prior to April 12, 2005, a plaintiff was required to establish only that exposure to asbestos was a contributing factor in his or her injuries.[118] After April 12, 2005, however, a plaintiff was required to establish that exposure to asbestos was a substantial contributing factor in his or her injuries.[119] Thus, the court concluded that the law "imposes upon appellees [who had filed their claims prior to April 12, 2005] a greater evidentiary burden than was required under the law in effect at the time their actions were filed."[120] Because the law affected the appellees' substantive rights, the court held that it violated the Georgia constitution's ban on retroactive laws.[121]

The supreme court also held that the unconstitutional provisions could not be severed because they "are the heart of the Act, and their severance from the Act would result in a statute that fails to correspond to the main legislative purpose, or give effect to that purpose."[122] Consequently, the court invalidated the law in its entirety.[123] The General Assembly responded during the 2007 legislative session by enacting a new asbestos and silica claims law, which became effective on May 1, 2007.[124] Under the new law, prima-facie evidence of physical impairment remains "an essential element of an asbestos claim or silica claim."[125] The new law simply redefines "prima-facie evidence of physical impairment" so that the type of evidence necessary to sustain an asbestos or silica claim depends on the nature of the alleged injuries and whether the claim accrued before April 12, 2005, or on or after May

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115. *Id.*
116. 281 Ga. 273, 637 S.E.2d 659 (2006).
117. *Id.* at 274, 637 S.E.2d at 661.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*; *see also* Johnson v. Ga. Pac. Corp., 285 Ga. App. 44, 44, 645 S.E.2d 583, 584 (2007) (reversing the trial court's dismissal of asbestos claims in three cases based on the supreme court's decision in *Ferrante*).
122. *Ferrante*, 281 Ga. at 275, 637 S.E.2d at 662 (internal quotation marks omitted).
123. *Id.*
124. O.C.G.A. §§ 51-14-1 to -13 (Supp. 2007).
125. O.C.G.A. § 51-14-4(a).

1, 2007.[126] Like the 2005 version, the new law provides that a claim cannot be brought or maintained in a Georgia court unless the claimant resides in Georgia at the time of filing or did at the time of exposure.[127] Finally, the General Assembly attempted to avoid a subsequent decision like *Ferrante* by including the following language in the severability clause:

> For example, if a court determines that a particular word renders any portion or application of this chapter unconstitutional, in that event, the court shall strike that word and apply this chapter as if it were enacted without that word. . . . The General Assembly does not intend for this chapter to make any substantive change in the law governing claims that accrued before April 12, 2005, and has only included procedural provisions that govern where such claims can be filed and what early reports must be filed in such cases. This chapter shall be interpreted consistently with the General Assembly's intention not to make any substantive changes in the law applicable to cases that accrued before April 12, 2005. The General Assembly expressly declares its intent that Code Section 51-14-9 [requiring claimants to reside in Georgia at the time of filing or exposure] remain in full force and effect if any other part or parts of this chapter shall be declared or adjudged invalid or unconstitutional.[128]

While the new law seems to have cured the problem of retroactive application, future constitutional challenges should be expected in light of the Supreme Court's decision in *Ferrante* not to consider whether the 2005 version violated the due process and the special laws clauses of the Georgia constitution.[129] Given the volume of asbestos litigation in Georgia, there is too much at stake for plaintiffs' attorneys not to attack all aspects of the new law.

As part of the same act that enacted the new asbestos and silica claims law, the General Assembly also enacted a series of statutes designed to protect innocent successor corporations from asbestos-related liability.[130] The General Assembly found that asbestos litigation "threatens the continued viability of a number of uniquely situated companies that have not ever manufactured, sold, or distributed asbestos or asbestos products and are argued to be liable only as successor

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126. O.C.G.A. § 51-14-3(17), (18). Claims that accrued on or after April 12, 2005 and before May 1, 2007, continue to be governed by the 2005 version of the law. O.C.G.A. § 51-14-12.

127. O.C.G.A. § 51-14-9(a).

128. O.C.G.A. § 51-14-13.

129. *Ferrante*, 281 Ga. at 274-75, 637 S.E.2d at 661-62.

130. O.C.G.A. §§ 51-15-1 to -8 (Supp. 2007).

corporations."[131] The General Assembly also found that "the public interest as a whole is best served by providing relief to these innocent successors so that they may remain viable and continue to contribute to this state."[132] Thus, the General Assembly enacted this law to limit the cumulative recovery by asbestos claimants from innocent successors without impairing the substantive rights of such claimants.[133] To that end, the law provides that "the cumulative successor asbestos related liabilities of a corporation are limited to the fair market value of the total gross assets of the transferor determined as of the time of the merger or consolidation."[134] This limitation applies only to corporations that assumed or incurred "successor asbestos related liabilities" before January 1, 1972.[135] Further, this limitation applies only to "innocent" successors, such as successors that do not continue an asbestos-related business after the merger or consolidation.[136] At present, the Georgia appellate courts have not issued any reported opinions dealing with this law.

## V. EVIDENTIARY ISSUES

### A. *Expert Testimony*

Rumors about constitutional challenges to Georgia's *Daubert* statute[137] have been circulating since its enactment in February 2005.[138] A number of trial courts have ruled on the constitutionality of the statute with varying results,[139] and at least one matter reached the Georgia Supreme Court before the appeal was withdrawn.[140] However, through the end of the survey period, the supreme court did not have the opportunity to assess the constitutionality of the statute.

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131. O.C.G.A. § 51-15-1.
132. *Id.*
133. *Id.*
134. O.C.G.A. § 51-15-4(a).
135. O.C.G.A. § 51-15-3(a).
136. *Id.* § 51-15-3(b)(4).
137. O.C.G.A. § 24-9-67.1 (2007).
138. Robert E. Shields & Leslie J. Bryan, *Georgia's New Expert Witness Rule:* Daubert *& More*, GA. BAR J., Oct. 2005, at 16.
139. *See, e.g.*, Wiggins v. DeKalb Med. Ctr., Inc., No. 99A-54244-4 (State Ct. DeKalb County May 26, 2005) (order holding O.C.G.A. § 24-9-67.1 constitutional); Mason v. Home Depot USA, Inc., No. 97-A-5105-1 (State Ct. Cobb County Feb. 21, 2005) (order holding O.C.G.A. § 24-9-67.1 unconstitutional as applied to this lawsuit that was in pretrial stage when statute was enacted).
140. Isuzu Motor Co. v. Jonah, *appeal docketed*, No. S06A1405, (Ga. Apr. 26, 2006).

The only two opinions from the Georgia Court of Appeals discussing *Daubert* during the survey period, *Cotten v. Phillips*[141] and *Mays v. Ellis*,[142] stress that the gatekeeping function of Georgia's new expert witness rule in keeping "junk science" out of the courtroom is heightened in product liability trials.[143] Although both cases arose from medical malpractice claims, the court of appeals concluded that the inquiry into the credentials of a proffered expert is more relevant in product liability cases than in medical malpractice cases, an area of law in which extensive relevant experience reduces the likelihood that opinions are based on "junk science."[144] Through this distinction, the court of appeals emphasized the importance of a rigorous *Daubert* analysis in product liability cases.[145]

Without many opinions from the Georgia appellate courts interpreting the *Daubert* statute, practitioners and judges assessing the admissibility of testimony from expert witnesses must rely on decisions from the federal courts as persuasive authority.[146] The following cases from federal courts within the Eleventh Circuit offer recent guidance on *Daubert* issues.

Well-qualified expert witnesses are subject to exclusion if they do not follow a reasonable methodology in reaching their conclusions. The Eleventh Circuit confronted this scenario in *Burke v. General Motors Corp.*[147] and affirmed the exclusion of both of the plaintiff's expert witnesses.[148] In the underlying lawsuit, which arose from the crash of a 2002 GMC Sierra truck, the plaintiff alleged that the air bag and seat belt system were defective. The plaintiff's decedent, William Burke, sustained multiple vertebral fractures that were ultimately fatal. At the time of the accident, Burke suffered from ankylosing spondylitis, a disease in which the soft tissue of the spine hardens and calcifies.[149]

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141. 280 Ga. App. 280, 633 S.E.2d 655 (2006).

142. 283 Ga. App. 195, 641 S.E.2d 201 (2007).

143. 283 Ga. App. at 199 n.3, 641 S.E.2d at 204 n.3; 280 Ga. App. at 286, 633 S.E.2d at 659.

144. *Mays*, 283 Ga. App. at 199 n.3, 641 S.E.2d at 204 n.3; *Cotten*, 280 Ga. App. at 286, 633 S.E.2d at 659.

145. *Mays*, 283 Ga. App. at 199 n.3, 641 S.E.2d at 204 n.3; *Cotten*, 280 Ga. App. at 286, 633 S.E.2d at 659.

146. To interpret the application of Georgia's *Daubert* statute, courts may seek guidance from the decisions of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), as well as from other federal court interpretations of these decisions. O.C.G.A. § 24-9-67.1(f).

147. 218 F. App'x 951 (11th Cir. 2007) (per curiam).

148. *Id.* at 954.

149. *Id.* at 952.

The plaintiff retained Dr. Brian Frist to offer an expert opinion regarding injury causation. In reaching his opinion that the deployment of the driver's air bag would have mitigated Burke's fatal injuries, Frist relied on statistical data which indicated that thirty-seven to fifty percent of the population would have sustained injuries similar to Burke. But Frist—and the data he used—did not account for Burke's ankylosing spondylitis. Therefore, because Frist did not consider Burke's pre-existing condition, Frist's testimony was determined to be unreliable and inadmissible.[150]

In addition, the plaintiff retained Don Phillips to testify that the decedent would not have sustained fatal injuries if a dual-level air bag system and seat belt pretensioners had been installed in the truck. To show that the dual-level air bag system would have deployed in Burke's crash, Phillips compared data from the air bag system in the Burke truck to data from GM crash tests. The only way that Phillips could make the data fit his theory was to eliminate the first forty milliseconds of data recorded by the Burke truck's air bag system.[151] The court held that this omission of data made Phillips's methodology unreliable.[152] With the exclusion of testimony from both of the plaintiff's expert witnesses, GM was entitled to summary judgment.[153]

In *Caldwell v. Howard Industries, Inc.*,[154] a product liability matter arising from an allegedly defective bolt in a transformer lifter, the defendant moved to exclude the testimony of M.T. Harrelson, the plaintiff's expert witness. Harrelson had opined that the bolt failed because it was not screwed in all the way, a conclusion which was identical to that of the defendant's expert witness.[155] In his *Daubert* analysis, Judge Clay Land found that Harrelson, a Georgia Tech graduate who had worked for Georgia Power Co. for twenty-eight years, was qualified to offer his opinions about the cause of the bolt failure.[156] In addition, Judge Land concluded that Harrelson's methodology of interviewing witnesses and examining the bolt was proper.[157] The court emphasized that Harrelson may have been required to undertake testing to support his opinions if he had reached a more extensive conclusion, for example, "that the lifting mechanism, installed properly,

150. *Id.* at 952-53.
151. *Id.* at 953.
152. *Id.*
153. *Id.* at 952.
154. No. 4:03-CV-198(CDL), 2006 U.S. Dist. LEXIS 45711 (M.D. Ga. July 6, 2006).
155. *Id.* at *3-4.
156. *Id.* at *5.
157. *Id.* at *4-5.

could not accommodate the transformer."[158] Because the court found Harrelson to be qualified and concluded that his testimony was reliable and relevant, Howard Industries' motion to strike was denied.[159]

In *McCurdy v. Ford Motor Co.*,[160] an automotive product liability case arising from an allegedly defective sway bar link system, Judge W. Louis Sands denied Ford's motion to exclude the testimony of the plaintiff's expert witness, Dr. George Flowers, who had opined that the design of the linkages for the stabilizer bar was defective.[161] Ford challenged Flowers's qualifications because he had never designed an automobile suspension.[162] However, Judge Sands found that this factor was not relevant in the *Daubert* analysis because Flowers was not offering an opinion regarding how the suspension should have been designed.[163]

In addition, Ford complained that Flowers had not actually performed the tests he relied upon in developing his opinions.[164] But the court explained that there is no requirement under *Daubert* that the expert actually perform the studies or the testing relied upon in the formulation of the expert's opinions.[165] Instead, the expert may use studies and testing from others in the field.[166] The court denied Ford's motion to exclude because Flowers had satisfied the *Daubert* factors.[167]

In *Folsom v. Kawasaki Motors Corp. U.S.A.*,[168] a lawsuit involving a personal watercraft ("PWC"), Judge Clay Land concluded that neither of the plaintiffs' two expert witnesses were qualified to offer the opinion that the steering system of the PWC was defective.[169] The plaintiff had proffered the testimony of Ronald Simner and Bradley Cuthbertson.[170] Simner was the owner of a company that "specializes in rudders designed to address the issue of off-throttle steering."[171] Simner was also a member of the Society for Automotive Engineering PWC Subcommittee and had participated in the development of the

158. *Id.* at *5 n.1.
159. *Id.* at *5.
160. No. 1:04-CV-155(WLS), 2006 U.S. Dist. LEXIS 69201 (M.D. Ga. Sept. 26, 2006).
161. *Id.* at *5-7, 13-14.
162. *Id.* at *9-10.
163. *Id.* at *11.
164. *Id.*
165. *Id.* at *11-12.
166. *Id.* at *12.
167. *Id.* at *13-14.
168. No. 3:04-CV-42(CDL), 2007 WL 1544640 (M.D. Ga. May 24, 2007).
169. *Id.* at *12.
170. *Id.* at *8.
171. *Id.*

industry standard for PWC off-throttle steering. Cuthbertson was a former professional PWC racer who had consulted with the United States Coast Guard and other law enforcement entities regarding PWC issues. Simner and Cuthbertson worked together to undertake a series of tests designed to investigate whether additional rudders would allow the subject PWC to be steered in an off-throttle condition.[172]

Although both expert witnesses had extensive PWC experience, including design experience regarding off-throttle steering, the court found that neither witness had sufficient experience "to compare the off-throttle steering design to the rudder-equipped model and conclude that off-throttle steering makes the Jet Ski simply so dangerous that it should not have been made available at all."[173] General knowledge about off-throttle steering and PWC maneuverability was found to be insufficient to make the witnesses qualified to opine about the defectiveness of the PWC steering system.[174] Because the witnesses were not considered qualified to offer this opinion, the court excluded their testimony.[175]

### *B. Other Incidents*

In product liability cases, evidence of other incidents involving an alleged product defect is important because showing a jury evidence of, in some cases, hundreds of allegedly similar incidents can have a powerful—perhaps determinative—effect.[176] The general rule in Georgia is that "'[s]imilar acts or omissions on other and different occasions are not generally admissible to prove like acts or omissions at a different time or place.'"[177] However, evidence of other incidents may be admissible for alternative purposes, such as to show notice or knowledge of a defect, to prove punitive damages, or to rebut a contention of impossibility.[178] To limit the substantial prejudice that the admission of such evidence can cause, the Georgia Supreme Court has adopted a rule of substantial similarity, which the court has described as follows:

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172. *Id.* at *8-9.

173. *Id.* at *12 (internal quotation marks omitted).

174. *Id.*

175. *Id.*

176. Cooper Tire & Rubber Co. v. Crosby, 273 Ga. 454, 455, 543 S.E.2d 21, 23-24 (2001).

177. Colp v. Ford Motor Co., 279 Ga. App. 280, 280-81, 630 S.E.2d 886, 887 (2006) (brackets in original) (quoting Stovall v. DaimlerChrysler Motors Corp., 270 Ga. App. 791, 792, 608 S.E.2d 245, 247 (2004)).

178. Mack Trucks, Inc. v. Conkle, 263 Ga. 539, 544, 436 S.E.2d 635, 640 (1993); Browning v. Paccar, Inc., 214 Ga. App. 496, 498, 448 S.E.2d 260, 263 (1994).

> In products liability cases, the rule of substantial similarity prohibits the admission into evidence of other transactions, occurrences, or claims unless the proponent first shows that there is a substantial similarity between the other transactions, occurrences, or claims and the claim at issue in the litigation. The showing of substantial similarity must include a showing of similarity as to causation.[179]

In Georgia, therefore, evidence of other incidents is admissible only if the proponent shows that the product at issue and the products involved in the allegedly similar incidents shared (1) a common design and manufacturing process, (2) a common defect, and (3) common causation.[180]

In product liability cases filed in or removed to federal court on the basis of diversity jurisdiction, federal law governs the admissibility of evidence of other incidents because the admissibility of evidence is a procedural issue.[181] Under the federal rule of substantial similarity, evidence of other incidents may be admissible to show "'notice, magnitude of the danger involved, the [party's] ability to correct a known defect, the lack of safety for intended uses, strength of a product, the standard of care, and causation.'"[182] The proponent must show that (1) conditions substantially similar to the occurrence at issue caused the other incidents, (2) the other incidents are not too remote in time, and (3) the prejudicial effect of evidence of the other incidents is not disproportionate to its probative value.[183] Although the requirements for the admissibility of evidence of other incidents are stated differently under federal and Georgia law, the federal and Georgia rules are analogous and, as illustrated by one case decided by the Northern District of Georgia during the survey period, often lead to the same result.

In *Reid v. BMW of North America*,[184] the plaintiff was injured when the radiator of a 1993 BMW 325i (E36 series) exploded while he was looking under the hood to determine why the vehicle was overheating. After the explosion, the plaintiff noticed that the neck of the radiator had broken off. The plaintiff alleged that the radiator and cooling system were defectively designed or defectively manufactured or both.

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179. *Cooper Tire & Rubber Co.*, 273 Ga. at 455, 543 S.E.2d at 23-24 (footnote omitted).

180. *Id.* at 456, 543 S.E.2d at 24.

181. Heath v. Suzuki Motor Corp., 126 F.3d 1391, 1396 (11th Cir. 1997); *Colp*, 279 Ga. App. at 285, 630 S.E.2d at 890.

182. *Heath*, 126 F.3d at 1396 (brackets in original) (quoting Jones v. Otis Elevator Co., 861 F.2d 655, 661 (11th Cir. 1988)).

183. *Id.* at 1396 nn.12-13; *Jones*, 861 F.2d at 661-62.

184. 464 F. Supp. 2d 1267 (N.D. Ga. 2006).

The plaintiff also alleged that BMW had known about these defects for fourteen years prior to the incident. The plaintiff further alleged that BMW failed to warn him about these defects, despite having knowledge of them before he was injured. In response to BMW's motion for summary judgment, the plaintiff submitted seventy-five Quality Control Information Sheets, which were forms prepared by BMW dealers to notify BMW of recurring problems. These sheets showed that there had been similar radiator problems in other vehicles dating back to 1992, although the vehicles were not of the same series as the vehicle that injured the plaintiff. BMW argued that the other incidents upon which the plaintiff relied were inadmissible because they were not substantially similar to the incident involving the plaintiff insofar as they did not involve a common design, a common defect, or common causation. Relying on Georgia law governing the admissibility of evidence of other incidents, the district court found that the other incidents were admissible because BMW had not shown that they were not substantially similar to the incident involving the plaintiff. The district court further found that the other incidents, on their face, appeared to be substantially similar to the incident involving the plaintiff.[185]

BMW filed a motion for reconsideration, arguing that the district court improperly placed the burden of proving dissimilarity on BMW rather than requiring the plaintiff to prove substantial similarity. Both BMW and the plaintiff, in his response to BMW's motion, relied on the Georgia rule of substantial similarity in arguing their respective positions.[186] As a preliminary matter, the district court candidly acknowledged that it erred in its previous decision by relying on Georgia law.[187] "Instead, federal law and the Federal Rules of Evidence govern the admissibility of evidence in a diversity action because the admissibility of evidence is a procedural matter."[188] Thus, "[a]dmission of other similar accidents or occurrences is governed by the federal substantial similarity doctrine and not state law."[189] Turning to the elements of the federal rule of substantial similarity, the district court first found that the incidents shown in the seventy-five Quality Control Information Sheets tendered by the plaintiff involved upper radiator neck failures that were substantially similar to the failure that injured the plaintiff, even though

185. *Id.* at 1269-70, 1272; *see also* Reid v. BMW of N. Am., 430 F. Supp. 2d 1365, 1373-74 (N.D. Ga. 2006).

186. *Reid*, 464 F. Supp. 2d at 1270.

187. *Id.* at 1271.

188. *Id.*

189. *Id.*

the other incidents involved vehicles of a different series.[190] The district court next found that the other incidents were not too remote in time because the plaintiff contended that BMW had been aware of the radiator problem since 1992, and the seventy-five Quality Control Information Sheets reflected incidents that occurred between April 1992 and January 2003.[191] Finally, the district court found that any prejudice or confusion caused by the admission of the seventy-five Quality Control Information Sheets was not disproportionate to their probative value.[192] Thus, the district court confirmed its initial ruling that the seventy-five Quality Control Information Sheets were admissible for the purpose of establishing BMW's notice of prior radiator problems.[193]

### *C. Seat Belt Use*

For injuries that occurred prior to September 1, 1988, evidence of the plaintiff's failure to wear a seat belt was admissible on the issue of damages if there was also evidence that the plaintiff's injuries could have been reduced by the use of a seat belt.[194] In 1988, however, the General Assembly enacted a statute requiring the use of seat belts and abolishing the seat belt defense for all cases arising on or after September 1, 1988.[195] The General Assembly's broad purpose was to promote safety by protecting front-seat occupants of passenger vehicles while at the same time not penalizing those who fail to use a seat belt by prohibiting the admission of evidence of such a failure.[196]

When the section of the statute abolishing the seat belt defense was originally enacted in 1988, it provided as follows:

> Failure to wear a seat safety belt in violation of this Code section shall not be considered evidence of negligence, shall not be considered by the court on any question of liability of any person, corporation, or insurer, . . . and shall not diminish any recovery for damages arising out of the

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190. *Id.* at 1272.

191. *Id.*

192. *Id.*

193. *Id.*

194. *See, e.g.*, Scott v. Chapman, 203 Ga. App. 58, 59, 416 S.E.2d 111, 112 (1992); Payne v. Joyner, 197 Ga. App. 527, 528, 399 S.E.2d 83, 84 (1990); Katz v. White, 190 Ga. App. 458, 458, 379 S.E.2d 186, 187 (1989).

195. O.C.G.A. § 40-8-76.1(b), (d) (2007). The statute has survived constitutional challenges based on both the United States Constitution and the Georgia constitution. C.W. Matthews Contracting Co. v. Gover, 263 Ga. 108, 108, 428 S.E.2d 796, 797-98 (1993).

196. *C.W. Matthews Contracting Co.*, 263 Ga. at 109, 428 S.E.2d at 798; Crosby v. Cooper Tire & Rubber Co., 240 Ga. App. 857, 864, 866 & n.3, 524 S.E.2d 313, 321-22 & n.3 (1999), *rev'd on other grounds*, 273 Ga. 454, 543 S.E.2d 21 (2001).

> ownership, maintenance, occupancy, or operation of a passenger vehicle.[197]

Because the phrase "in violation of this Code section" referred to the fact that only the front-seat occupants of a passenger vehicle were required to use a seat belt, evidence of the failure of a rear-seat occupant to use a seat belt was admissible under the original version of the statute.[198] The General Assembly closed this loophole in 1993 when it deleted that phrase, thereby making the statute apply to all occupants.[199] A 1996 amendment clarified the broad applicability of the statute to all occupants by replacing the phrase "[f]ailure to wear a seat safety belt"[200] with the phrase "[t]he failure of an occupant of a passenger vehicle to wear a seat safety belt in any seat of a passenger vehicle which has a seat safety belt."[201] In 1999 the General Assembly again broadened the applicability of the statute by making three significant changes: (1) it substituted the word "motor" for the word "passenger" in three places, which meant that the statute applied to occupants of "motor vehicles"[202] (defined broadly by the Motor Vehicle Code[203]) rather than just to occupants of "passenger vehicles" (defined narrowly by the statute[204]); (2) it added causation to the list of prohibited purposes; and (3) it substituted the phrase "finder of fact" for the word "court."[205] Each of these amendments shows the General Assembly's intent to strengthen the statute by prohibiting the admission of evidence relating to a person's failure to use a seat belt for *all* purposes.[206] As a result, the statute now provides as follows:

> The failure of an occupant of a motor vehicle to wear a seat safety belt in any seat of a motor vehicle which has a seat safety belt or belts shall not be considered evidence of negligence or causation, shall not otherwise be considered by the finder of fact on any question of liability of any person, corporation, or insurer, . . . and shall not be evidence

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197. 1988 Ga. Laws 31, 33.

198. Purvis v. Virgil Barber Contractor, Inc., 205 Ga. App. 13, 15, 421 S.E.2d 303, 305 (1992).

199. 1993 Ga. Laws 516, 516.

200. *Id.*

201. 1996 Ga. Laws 469, 473.

202. 1999 Ga. Laws 266, 266-67.

203. O.C.G.A. § 40-1-1(33) (2007).

204. O.C.G.A. § 40-8-76.1(a).

205. 1999 Ga. Laws 276, 277.

206. *Crosby*, 240 Ga. App. at 866, 524 S.E.2d at 322 ("Through each successive amendment to this Act, the General Assembly repeatedly expressed its overriding intent not to allow admission of the failure to wear safety belts.").

> used to diminish any recovery for damages arising out of the ownership, maintenance, occupancy, or operation of a motor vehicle.[207]

Although the General Assembly has been clear in its intent to eliminate evidence relating to a person's failure to use a seat belt from all civil litigation, the attorneys for the defendant in *McCurdy v. Ford Motor Co.*[208] used creative lawyering in an attempt to carve out an exception to the statute's broad applicability. The plaintiff was involved in a single-vehicle accident while driving her 1995 Ford Explorer. She sustained severe injuries when her vehicle crashed and rolled over, and she was not using the seat belt at the time of the accident. Initially, the plaintiff alleged strict liability and negligence theories of liability, but she later withdrew all of her negligence claims and rested her case solely on strict liability claims for design defect and manufacturing defect. The defendant's expert testified that the plaintiff's injuries would have been less severe had she been using the seat belt. The plaintiff filed a motion in limine to exclude all evidence relating to her failure to use the seat belt.[209]

The defendant opposed the plaintiff's motion on the ground that the seat belt statute should not apply to claims based on strict liability.[210] The defendant argued that evidence of the plaintiff's failure to use the seat belt should be admissible because it would relate to "'the collateral safety of a feature other than the one that harmed the plaintiff,'" which is one of the factors that Georgia courts must consider under the risk-utility test for claims based on design defect.[211] The district court rejected this argument because that factor "is not high on the list of factors to be considered in the standard risk/utility analysis."[212] The defendant also argued that evidence of the plaintiff's failure to use the seat belt should be admissible because it would relate to the issue of proximate cause.[213] The district court rejected this argument because evidence of the plaintiff's failure to use the seat belt would relate "[a]t best" to her failure to mitigate damages, a purpose that the seat belt statute does not allow.[214] The district court acknowledged that evidence of seat belt use may relate to the "crashworthiness" of the

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207. O.C.G.A. § 40-8-76.1(d).
208. No. 1:04-CV-151(WLS), 2007 WL 121125 (M.D. Ga. Jan. 11, 2007).
209. *Id.* at *1-2.
210. *Id.* at *3.
211. *Id.* at *4 (quoting Banks v. ICI Ams., Inc., 264 Ga. 732, 736 n.6, 450 S.E.2d 671, 675 n.6 (1994)).
212. *Id.*
213. *Id.*
214. *Id.*

vehicle, but it determined that the plaintiff had not asserted a claim based on crashworthiness.[215] For the claims that the plaintiff asserted, evidence relating to her failure to use the seat belt would not be relevant to whether there was a design or manufacturing defect.[216] Accordingly, the district court granted the plaintiff's motion in limine.[217]

The district court's decision was undeniably a correct application of the seat belt statute. As the district court observed, "[i]t is not for a U.S. District Court sitting in diversity jurisdiction to interpret the law where the highest court of the state has clearly addressed the question."[218] Although there are reasons why evidence of a plaintiff's failure to wear a seat belt should be admissible, and although such evidence is admissible in other states,[219] the seat belt statute reflects a policy decision made by the General Assembly. As such, it is for the General Assembly—not a court, whether state or federal—to change this policy, unless it suffers from some constitutional infirmity.

## VI. DEFENSES

### A. *Statute of Repose*

Because many product liability claims do not accrue until years after exposure to or use of the allegedly defective product, the statute of repose is an important defense for manufacturers. A statute of limitations does not begin to run until the cause of action accrues; the action accrues no earlier than the date of injury and possibly as late as the date the injury is discovered.[220] On the other hand, "[a] statute of ultimate repose delineates a time period in which a right may accrue. If the injury occurs outside that period, it is not actionable."[221] In other words, "a statute of limitations operates only on an existing cause of action, while a statute of repose may operate to extinguish or abolish a potential cause of action prior to its existence."[222] Thus, a statute of

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215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405 (2002); Christopher Hall, Annotation, *Nonuse of Seatbelt as Reducing Amount of Damages Recoverable*, 62 A.L.R.5th 537 (1998 & Supp. 2007); Thomas R. Trenkner, Annotation, *Automobile Occupant's Failure to Use Seat Belt as Contributory Negligence*, 92 A.L.R.3d 9 (1979 & Supp. 2007).
220. *See, e.g.*, O.C.G.A. § 9-3-33 (2007) (providing that claims for personal injuries must be brought within two years after the cause of action accrues).
221. Hill v. Fordham, 186 Ga. App. 354, 357, 367 S.E.2d 128, 131 (1988).
222. ADAMS, *supra* note 4, § 25-9, at 507.

repose stands as a substantial obstacle for plaintiffs because it can bar an action even before an injury occurs and before the statute of limitations begins to run.[223] Similarly, a statute of repose can effectively shorten the period of limitations if the cause of action accrues with less time remaining in the period of repose than in the period of limitations.[224] For example, a cause of action that accrues one month before the period of repose expires will be barred if a lawsuit is not filed within that month, even if there is a two-year limitations period applicable to the cause of action.[225]

Georgia's statute of repose for product liability claims is no different; it "stands as an unyielding barrier to a plaintiff's right of action."[226]

> This amounts to a recognition that the legislature may conclude that the time may arrive when past transgressions are no longer actionable. The long history of such conclusions emphasizes their rationality. From the biblical time of the Year of Jubilee to the present day, policymakers have exercised the right to "wipe the slate clean" after a fixed period of time. In doing this, there is the clear distinction between a statute of limitation "barring" an action, and a statute of repose providing for the abolition of a cause of action after the passage of the time provided.[227]

The statute bars strict liability claims brought more than ten years after "the date of the first sale for use or consumption of the personal property causing or otherwise bringing about the injury."[228] The statute similarly bars negligence claims, except those based on injuries or damages arising out of (1) negligence in manufacturing a product that causes disease or birth defects, (2) conduct that "manifests a willful, reckless, or wanton disregard for life or property," and (3) a negligent failure to warn.[229] The General Assembly's purpose in enacting the statute was to eliminate stale claims and remedy problems in the

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223. Hatcher v. Allied Prods. Corp., 256 Ga. 100, 101, 344 S.E.2d 418, 420 (1986), *superseded by statute on other grounds*, O.C.G.A. § 51-1-11(c) (2000).

224. *Hatcher*, 256 Ga. at 101, 344 S.E.2d at 420.

225. *Id.* (Gregory, J., dissenting) ("If someone is injured by the use of personal property on the last day, or very near the end, of the ten year period commencing with the date of first sale, there is a great likelihood the injured person would have no opportunity to file suit within the ten year period.").

226. Wright v. Robinson, 262 Ga. 844, 845, 426 S.E.2d 870, 871 (1993).

227. Craven v. Lowndes County Hosp. Auth., 263 Ga. 657, 660, 437 S.E.2d 308, 310 (1993).

228. O.C.G.A. § 51-1-11(b)(2).

229. *Id.* § 51-1-11(c).

insurance industry generated by open-ended liability of manufacturers.[230]

Applying Georgia's statute of repose would be easy if it was triggered by the first sale of the product, but the first sale is not the triggering event. Instead, the statute begins to run upon the "first sale *for use or consumption*" of the product.[231] That sale could be the first sale, but it might also be several sales into the life of the product, depending on the nature of the product and how it is brought to market. Unfortunately, the statute does not define what constitutes the "first sale for use or consumption" of the product, but the Georgia Supreme Court defined the parameters of this phrase in the seminal case on this topic, *Pafford v. Biomet*.[232] In that case, the plaintiff sued the alleged manufacturers of a metal plate that broke several months after it had been installed in his back and allegedly caused him to become disabled. The trial court granted the defendants' motions for summary judgment on the grounds that the plaintiff's claims were barred by the statute of repose and that the plaintiff had failed to prove that either defendant actually manufactured the plate.[233] The Georgia Court of Appeals affirmed.[234]

The evidence showed that the plate was sold to the hospital where the plaintiff's surgery was performed sometime between 1972 and 1980.[235] The plaintiff underwent surgery to have the plate installed in 1988, and he filed his lawsuit in 1990. Thus, there was no conclusive evidence that the plaintiff filed his lawsuit within the ten-year statute of repose. The defendants argued that the statute began to run when the hospital bought the plate, which was almost certainly more than ten years before the plaintiff filed his lawsuit. The plaintiff argued that the statute began to run when the hospital sold the plate to him so that it could be installed in his back, which was only about two years before he filed his lawsuit.[236]

The Georgia Supreme Court held as follows:

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230. Love v. Whirlpool Corp., 264 Ga. 701, 703, 449 S.E.2d 602, 605 (1994); Chrysler Corp. v. Batten, 264 Ga. 723, 725, 450 S.E.2d 208, 212 (1994); *see also Hill*, 186 Ga. App. at 357, 367 S.E.2d at 131 ("These limitations on liability for injuries occurring after a certain period are based upon reasonable expectations about the useful life of a building or a manufactured product.").

231. O.C.G.A. § 51-1-11(b)(2) (emphasis added).

232. 264 Ga. 540, 448 S.E.2d 347 (1994).

233. *Id.* at 540-41, 448 S.E.2d at 348.

234. *Id.* at 541, 448 S.E.2d at 348.

235. Pafford v. Biomet, 210 Ga. App. 486, 487, 436 S.E.2d 504, 506 (1993).

236. *Pafford*, 264 Ga. at 540-42, 448 S.E.2d at 348.

> [B]y purchasing the plate for mere static retention in its inventory, the Hospital was not functioning as an active user or consumer thereof, but only as a dealer or any other person through whom the plate would ultimately be sold for its intended purpose of placement in the back of a patient.[237]

Thus, "[t]he 'first sale for use or consumption' did not occur until [the plate] was removed from the Hospital's inventory and sold to [the plaintiff] for its actual intended purpose of placement in his back."[238]

The supreme court's construction of the phrase "first sale for use or consumption" in *Pafford* survived essentially unchallenged for twelve years. In *Johnson v. Ford Motor Co.*,[239] however, the Georgia Court of Appeals distinguished *Pafford* in a way that promises to strengthen the statute of repose as a defense for manufacturers. In December 1998 the plaintiff's house and vehicles were damaged by a fire that started in her neighbors' vehicle, which was parked in a carport, and the fire spread to her house. The plaintiff contended that the fire was caused by a faulty speed-control deactivation switch that was manufactured by Texas Instruments and installed by Ford when the vehicle was assembled on August 5, 1992. In June or July of 1992, Texas Instruments sold the switch to Ford but shipped it to another company so that it could be installed into a proportional valve. That company shipped the proportional valve to Ford for installation in the vehicle that the plaintiff's neighbors eventually purchased on July 23, 1993. Sometime after August 5, 2002, the plaintiff brought an action for property damage based on negligent manufacture, strict liability, and failure to warn. In their motions for summary judgment, Texas Instruments and Ford argued that they were not liable for negligent manufacture or strict liability. Both claimed that the "first sale for use or consumption" of the switch occurred when the vehicle was assembled on August 5, 1992, which meant that the ten-year period of repose would have expired on August 5, 2002, before the plaintiff filed the complaint. The plaintiff, on the other hand, argued that the first sale for use or consumption did not occur until his neighbors purchased the vehicle on July 23, 1993, which meant that the ten-year period of repose would have expired on July 23, 2003, after the plaintiff filed the complaint.[240] The trial court agreed

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237. *Id.* at 542, 448 S.E.2d at 349 (internal quotation marks omitted).

238. *Id.* at 543, 448 S.E.2d at 349.

239. 281 Ga. App. 166, 637 S.E.2d 202 (2006).

240. The opinion does not disclose the date when the plaintiff filed the complaint. Based on the parties' arguments and the likelihood that the plaintiff's claims were subject to a four-year limitations period, one can deduce that the plaintiff must have filed the complaint after August 5, 2002 and before the four-year anniversary of the incident in

with the plaintiff and denied the motions on the ground that the plaintiff filed the complaint before the period of repose expired.[241]

After analyzing the supreme court's opinion in *Pafford*, the court of appeals distinguished this case on the ground that "the switch in question was not retained as part of Ford's inventory but was placed immediately into another component and then incorporated into the [vehicle] on the assembly line."[242] Under *Pafford*, the pertinent question was "whether . . . the 'actual intended purpose' of the switch was not realized until the car was sold to the customer."[243] Unlike the plate in *Pafford*, which the hospital bought from the manufacturer for mere static retention in its inventory until it was sold to a patient, the switch in this case was not held in Ford's inventory after the vehicle was assembled.[244] Instead, "when the car was driven off the assembly line, the [switch] had been actively placed in use, was in fact being used, and did not require purchase from the end user or consumer to be used for its 'intended purpose.'"[245] Thus, the hospital in *Pafford* was not a user or consumer of the plate because the plate could not be used for its intended purpose until it was inserted into a patient's body, but Ford was a user or consumer of the switch because the switch was capable of being used for its intended purpose as soon as Ford installed it in the vehicle and the vehicle became operable.[246] Based on this rationale, the court of appeals concluded that the ten-year period of repose began to run when Ford assembled the vehicle on August 5, 1992.[247] Because the plaintiff filed the complaint after the ten-year period of repose expired on August 5, 2002, the court of appeals reversed the trial court's denial of the defendants' motions for summary judgment and held that the plaintiff's claims for negligent manufacture and strict liability were time-barred.[248]

### *B. Preemption*

When the federal government regulates the manufacture, use, or marketing of a product, the doctrine of federal preemption may provide a complete or partial defense to a product liability claim brought under

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December 2002.

241. *Id.* at 166-67, 637 S.E.2d at 202-03. For a discussion of the plaintiff's claim for failure to warn, see *supra* Part II.B.

242. *Johnson*, 281 Ga. App. at 170, 637 S.E.2d at 205.

243. *Id.*

244. *Id.* at 171, 637 S.E.2d at 206.

245. *Id.* at 170, 637 S.E.2d at 205.

246. *Id.* at 171, 637 S.E.2d at 206.

247. *Id.*

248. *Id.*

state law. This doctrine is based on the Supremacy Clause of the United States Constitution, which provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[249]

The gist of this doctrine is that "state law that conflicts with federal law is 'without effect.'"[250] A state law conflicts with a federal law "if it interferes with the methods by which the federal statute was designed to reach [its] goal," even if both the federal law and the state law have the same goal.[251] Although preemption is usually a question of congressional intent, "a federal agency acting within the scope of its congressionally delegated authority may [also] pre-empt state regulation."[252] Importantly, preemption does not necessarily require that Congress enact legislation or that a federal agency promulgate a regulation; "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate."[253] Thus, whether a state law is preempted depends upon either the precise provisions of the federal statutory or regulatory scheme at issue or the circumstances of the decision not to legislate or regulate.

The doctrine of federal preemption arose in one case decided during the survey period in the context of the Federal Boat Safety Act ("FBSA").[254] Congress enacted the FBSA in 1971 "'to improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary of the Department in which the Coast Guard is operating—presently the Secretary of Transportation.'"[255]

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249. U.S. CONST. art. VI, cl. 2.

250. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) (quoting Maryland v. Louisiana, 451 U.S. 725, 746 (1981)).

251. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987).

252. La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 369 (1986); *see also* Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 154 (1982) (noting that a "narrow focus on Congress' intent to supersede state law [is] misdirected" when a state law is claimed to be preempted by a federal agency's regulation).

253. Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n, 461 U.S. 375, 384 (1983).

254. 46 U.S.C. §§ 4301-4311 (2000).

255. Lewis v. Brunswick Corp., 107 F.3d 1494, 1498 (11th Cir. 1997) (quoting S. REP.

The FBSA applies to all "recreational vessel[s] and associated equipment" and authorizes the Secretary to (1) "establish[] minimum safety standards" for such vessels and equipment, (2) "establish[] procedures and tests required to measure conformance with those standards," (3) "requir[e] the installation, carrying, or use of associated equipment . . . on recreational vessels," and (4) "prohibit[] the installation, carrying, or use of associated equipment that does not conform with [the minimum] safety standards."[256] Pursuant to this authorization, the Secretary, acting through the Commandant of the Coast Guard, has promulgated regulations governing various aspects of boating safety but has chosen not to regulate personal watercraft.[257]

The FBSA's preemption clause provides that "a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment . . . that is not identical to a regulation" promulgated by the Secretary.[258] The FBSA also includes a savings clause, which provides that compliance with the FBSA or the Secretary's regulations "does not relieve a person from liability at common law or under State law."[259] In *Sprietsma v. Mercury Marine*,[260] in which the plaintiff alleged that a boat motor was defective because it lacked a propeller guard, the United States Supreme Court addressed the preemptive effect of the FBSA.[261] The Court first held that the FBSA does not expressly preempt common law tort claims because: (1) "the article 'a' before 'law or regulation' [in the preemption clause] implies a discreteness—which is embodied in statutes and regulations—that is not present in the common law"; (2) "the terms 'law' and 'regulation' used together in the pre-emption clause indicate that Congress pre-empted

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NO. 92-248, at 1 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333, 1333). Until 2002, the non-Naval functions of the Coast Guard were under the jurisdiction of the Department of Transportation. In 2002 Congress enacted the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, and transferred jurisdiction over the non-Naval functions of the Coast Guard to the newly created Department of Homeland Security, 6 U.S.C. § 468(b), (h) (Supp. IV 2004). Thus, the Secretary of Homeland Security is now responsible for promulgating regulations pursuant to the FBSA.

256. 46 U.S.C. §§ 4301(a), 4302(a)(1), (2).

257. 33 C.F.R. pts. 173-187 (2006).

258. 46 U.S.C. § 4306. Georgia also regulates the use, operation, and equipment of vessels. Georgia Boat Safety Act ("GBSA"), O.C.G.A. §§ 52-7-1 to -26 (1997 & Supp. 2007); GA. COMP. R. & REGS. r. 391-4-5-.01 to -.21 (1982). The GBSA specifically regulates personal watercraft. O.C.G.A. § 52-7-8.2.

259. 46 U.S.C. § 4311(g).

260. 537 U.S. 51 (2002).

261. *Id.* at 54-55.

only positive enactments"; (3) the inclusion of a savings clause "assumes that there are some significant number of [common law] liability cases to save"; and (4) "[t]he contrast between [the savings clause's] general reference to 'liability at common law' and the more specific and detailed description of what is pre-empted by [the preemption clause] . . . indicates that [the preemption clause] was drafted to pre-empt performance standards and equipment requirements imposed by statute or regulation."[262] The Court also held that the plaintiff's claims were not implicitly preempted by the Coast Guard's decision not to promulgate a regulation requiring propeller guards on boat motors.[263] Finally, the Court held that "the FBSA [does] not so completely occupy the field of safety regulation of recreational boats as to foreclose state [common law] remedies."[264]

During the survey period, the Middle District of Georgia applied *Sprietsma* to determine the preemptive effect of the FBSA on a state law claim that was based on a manufacturer's failure to provide off-throttle steering capability for its personal watercraft. In *Folsom v. Kawasaki Motors Corp. U.S.A.*,[265] the plaintiffs' decedent was vacationing at Lake Hartwell during the 2002 Memorial Day weekend with his girlfriend and her family. The decedent and his girlfriend were floating on a raft while the girlfriend's fourteen-year-old cousin was riding a 1998 Kawasaki 900STX Jet Ski.[266] The cousin lost control of the Jet Ski, released the throttle in an effort to regain control, and began coasting toward the decedent and his girlfriend. Unable to steer the Jet Ski without depressing the throttle, the cousin could not change the direction of the Jet Ski. Just before colliding with the raft on which the decedent and

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262. *Id.* at 63 (internal quotation marks omitted).

263. *Id.* at 64-68.

264. *Id.* at 68.

265. No. 3:04-CV-42(CDL), 2007 WL 1544640 (M.D. Ga. May 24, 2007).

266. The 1998 Kawasaki 900STX Jet Ski falls within the category of boats known as "personal watercraft," which Georgia law defines as any boat less than 16 feet in length that (1) "[h]as an outboard motor or which has an inboard motor which uses an internal combustion engine powering a water jet pump as its primary source of motive propulsion"; (2) "[i]s designed with the concept that the operator and passenger ride on the outside surfaces of the vessel as opposed to riding inside the vessel"; and (3) "[h]as the probability that the operator and passenger may, in the normal course of use, fall overboard." O.C.G.A. § 52-7-8.2(a)(3)(A)-(C). This definition specifically includes "any vessels commonly known as a 'jet ski.'" *Id.* Various federal regulations similarly define "personal watercraft." *See, e.g.*, 36 C.F.R. § 1.4(a) (2006) ("*Personal watercraft* refers to a vessel, usually less than 16 feet in length, which uses an inboard, internal combustion engine powering a water jet pump as its primary source of propulsion. The vessel is intended to be operated by a person or persons sitting, standing or kneeling on the vessel, rather than within the confines of the hull.").

his girlfriend were floating, the cousin depressed the throttle and turned hard to the left, but he was unable to avoid a collision. The rear of the Jet Ski hit the decedent in the head, rendering him unconscious. He never regained consciousness and eventually died from his injuries. Among others, the plaintiffs (the decedent's parents) sued three Kawasaki entities who were allegedly responsible in some manner for manufacturing or distributing the Jet Ski.[267]

The plaintiffs' claims against Kawasaki focused on its failure to provide off-throttle steering capability for the Jet Ski and to warn about the dangers associated with off-throttle steering loss. The plaintiffs' design-defect claim was based on their allegations that the Jet Ski was defective and unreasonably dangerous due to its lack of off-throttle steering capability and that the technology to correct off-throttle steering loss was available to Kawasaki at the time it manufactured the Jet Ski. Like other personal watercraft, the Jet Ski was powered by an inboard motor that pushed water through a jet pump, rather than by a propeller, and it did not have any braking mechanism. To steer the Jet Ski, the driver had to turn the handlebars while depressing the throttle so that the angle of the water being pushed through the jet pump would change. Because the driver's ability to steer the Jet Ski was dependent on water being pushed through the jet pump, the Jet Ski could not be steered when the driver released the throttle completely. In other words, there had to be some directional thrust for the driver to be able to steer the Jet Ski. Kawasaki warned owners and operators of the Jet Ski about the dangers associated with the lack of off-throttle steering capability by providing the following warning both on the right side of the front hull and in the owner's manual: "**Releasing the throttle completely reduces the ability to steer.** This can cause you to hit an object you are trying to avoid. You must have thrust to turn." The owner's manual further advised operators to observe minimum boating age regulations and to become familiar with proper operating procedures.[268]

Kawasaki moved for summary judgment on the grounds that the FBSA expressly and implicitly preempted the plaintiffs' design defect claim and that the plaintiffs lacked evidence of a defect because their experts should have been excluded.[269] Relying on *Sprietsma*, the court easily rejected Kawasaki's argument based on express preemption.[270]

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267. *Folsom*, 2007 WL 1544640, at *1-3.

268. *Id.* at *1-2, 4. For a discussion of the plaintiffs' claim for failure to warn, see *supra* Part II.A.

269. *Folsom*, 2007 WL 1544640, at *4. For a discussion of Kawasaki's challenge to plaintiffs' experts, see *supra* Part V.A.

270. *Folsom*, 2007 WL 1544640, at *7.

To determine whether the FBSA implicitly preempted the plaintiffs' claims, the court reviewed the history of the Coast Guard's regulation of personal watercraft.[271] When Congress enacted the FBSA, personal watercraft comprised a low percentage of the overall boating population.[272] As a result, the Coast Guard exempted personal watercraft from specific regulation as long as manufacturers designed them to be as safe as more conventional boats.[273] By the late 1980s, however, sales of personal watercraft, as well as the number of accidents associated with them, had increased dramatically.[274] In August 1988 Representative Doug Barnard wrote a letter to the Coast Guard expressing concern about the lack of specific regulation of personal watercraft.[275] Vice Admiral Paul Yost of the Coast Guard responded to Representative Barnard's letter by assuring him that there was no reason to believe that personal watercraft were more dangerous than other small powerboats, and that if the Coast Guard discovered contrary information, it would re-evaluate its position.[276]

Several months later, the Coast Guard asked the National Boating Safety Advisory Council ("NBSAC") to study personal watercraft and to assess the need for specific regulations.[277] The NBSAC's final report concluded that the increase in accidents associated with personal watercraft was due to increased sales, not poor design.[278] In April 1990 Vice Admiral Yost wrote to Representative Barnard and indicated that the Coast Guard had been unable to discover evidence that accidents involving personal watercraft were attributable to deceptive handling or directional instability.[279] Instead, the evidence indicated that a majority of accidents involving personal watercraft were collisions with other boats and were the result of aggressive operation by the drivers.[280] Thus, Vice Admiral Yost opined that the most effective way to address any dangers associated with personal watercraft was through operator restrictions.[281]

Throughout the 1990s, the Coast Guard continued to evaluate safety issues for personal watercraft, and in 1997 it issued a grant to the

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271. *Id.* at *5-6.
272. *Id.* at *5.
273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.* at *6.
278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.*

Society of Automotive Engineers ("SAE") for research relating to off-throttle steering.[282] The SAE concluded that the technology necessary to correct off-throttle steering loss was not available at that time and that the most effective way to reduce the dangers associated with off-throttle steering loss was to improve driver skills.[283] Around the same time, the National Transportation and Safety Board ("NTSB") conducted its own study of personal watercraft.[284] The NTSB concluded that driver inexperience was partly to blame for accidents involving personal watercraft, but it also concluded that the design of personal watercraft caused some of the problems associated with operator control, including control problems during off-throttle steering situations.[285] The NTSB recommended that manufacturers of personal watercraft implement design changes to improve operator control and that the Coast Guard promulgate specific regulations dealing with personal watercraft.[286] The Coast Guard did not follow the NTSB's recommendations and did not promulgate regulations specific to personal watercraft.[287] In 2002, however, the Coast Guard adopted the SAE's J2608 standard, which requires manufacturers of personal watercraft to provide off-throttle steering capability, but that standard applies only to personal watercraft manufactured in model year 2006 and beyond.[288]

Kawasaki argued that the Coast Guard's decision not to specifically regulate personal watercraft implicitly preempted the plaintiffs' design defect claim.[289] The court disagreed, holding that "the [Coast Guard's] decision not to regulate [personal watercraft] 'does not convey an "authoritative" message of a federal policy against [the regulation of off-throttle steering].'"[290] The court explained that "the [Coast Guard] chose not to impose off-throttle steering requirements because (1) some of the problems associated with off-throttle steering loss can be addressed through operator regulations, and (2) current studies suggest that presently available solutions, such as rudders, may pose additional hazards."[291] Moreover, because the Coast Guard adopted the SAE's

282. *Id.*
283. *Id.*
284. *Id.*
285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.* at *6 n.8. The Coast Guard's adoption of the SAE's J2608 standard is not a "regulation" insofar as it was not adopted pursuant to rulemaking procedures and is not published in the Code of Federal Regulations.
289. *Id.* at *7.
290. *Id.* (third brackets in original) (quoting *Sprietsma*, 537 U.S. at 67).
291. *Id.*

J2608 standard for all personal watercraft manufactured in model year 2006 and beyond, the court stated that "it is clear that the [Coast Guard's] authoritative message is that off-throttle steering is a problem that needs to be addressed."[292] Finally, the court found no reason to believe the Coast Guard had concluded that the lack of off-throttle steering capability did not constitute a defective design.[293] Thus, as in *Sprietsma*, the court concluded that "the [Coast Guard's] decision not to regulate off-throttle steering was primarily due to a lack of available data relating to off-throttle steering solutions."[294] Accordingly, the court denied Kawasaki's motion on the ground that the plaintiffs' design defect claim was not implicitly preempted by the FBSA, or, specifically, by the Coast Guard's decision not to regulate personal watercraft.[295]

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292. *Id.* (internal quotation marks omitted).

293. *Id.* Although Vice Admiral Yost had suggested in a letter to Representative Barnard that the lack of off-throttle steering capability was not a defect, the court found no evidence establishing that Vice Admiral Yost was authorized to speak on behalf of the Coast Guard such that his opinions on this issue could establish a Coast Guard policy against regulation. *Id.*

294. *Id.*

295. *Id.*