

NEW YORK PRODUCT LIABILITY DECISIONS IN SQUIB FORM-2002 TO DATE

a. What is this program?

On an annual basis our firm has outlined all of the New York product liability decisions it could find from both state and federal courts. This is done for the Days of Decisions programs for the New York State Trial Lawyers Institute (September presentations).

We have assembled here all of the case squibs we have done since 2002; currently 13 years' worth of outlines. So far there are approximately 525 cases included. The usual format for a case is to give the cite, set forth the facts, and then give the holding.

The cases have been arranged as they have been categorized in the annual format. See the table of contents at the start of this program for the topics. Within a topic, the cases generally run backward in time from the most recent ones.

Over the years the annual format changed somewhat; these changes show up when we melded the cases on the same topic from various years. Further, copying problems created some discontinuities or rough spots, but we believe that the assemblage will prove useful.

It goes without saying that you should read the case fully and check its status, as appeals may have been taken.

b. How to use.

Because this is such a massive program, one way to access is to search within it for the subject you want, or by case name. Another method is to locate the specific topic in the Table of Contents.

Since for the most part, a case is placed only once, there may be multiple topics which the squib covers. Here again searching may help.

c. Who is responsible for this?

The project of annual outlines has been by Paul D. Rheingold, plus the concept of now placing these on line. The grunt work of assembling these 525 or so squibs was done by Scott D. Kagan, an associate in our firm. Over the years many

associates in the firm have assisted directly in the location and squibbing of the cases. These include: Simcha D. Schonfeld, Laura Pitter and Michal L. Ihrig II.

A. Theories of Liability	1
1. Strict Liability	1
a. Design defect	1
b. Optional safety Equipment; machine guards	32
c. Crashworthiness	36
d. Labeling; warning	38
e. Manufacturing defect	68
2. Negligence	72
3. Breach of Warranty	74
a. Breach of warranty, express and implied	74
b. Magnuson-Moss Warranty Act	85
4. Fraud/Misrepresentation	86
a. Fraud	86
b. Negligent misrepresentation	88
5. Consumer protection	89
6. Medical monitoring	91
B. Special Plaintiffs.....	93
C. Special Defendants	94
1. Supplier of finished product with defective component	94
2. Component part manufacturer	95
3. Modifier of product	98
4. Successor corporations	99
5. Casual seller	100
6. Lessor	102
7. Installer/Repairer/Remodeler	104
8. Maintenance contractor	105
9. Hospital	105
10. Restaurant/Provider of food	106
11. Distributor	107
12. Transporter	109
13. Defendant not in privity	110
14. Patent and trademark holder	111
D. Defenses	112
1. Preemption	113
2. Statute of limitations	137
3. Compliance with standards, regulations, industry custom	139
4. State of the art	141
5. "Open and obvious"	142
6. Optional safety equipment	144
7. Misuse/Abuse	146
8. Unforeseeable user	147
9. Unintended use	147
10. Illegal acts	148
11. Superseding cause	148
12. Post sale modification of product	149
13. Assumption of risk; plaintiff's conduct	154

14. Superior knowledge of employer	157
15. Learned intermediary rule	157
16. Waiver of liability	158
17. Economic loss doctrine	158
E. Evidence	161
1. Lay testimony	161
2. Expert testimony	163
a. Federal courts	163
b. State courts	185
3. Res ipsa loquitur	194
4. Circumstantial evidence; inference of defect; elimination of alternatives	195
5. Standards, publications	201
6. Trade secrets	201
7. Similar claims	201
8. Spoliation	202
F. Procedure Points	
1. Jurisdiction; venue; forum non conveniens	212
2. Collateral estoppel	218
3. Choice of law	218
4. Pleadings	220
5. Discovery	222
6. Empty chair defense: CPLR Article 16	225
7. Contribution/Indemnification	225
8. Insurance issues	228
9. Summary judgment – absence of proof of defect; defendant identification	228
10. Consolidation for trial	243
G. Damages	244
1. Emotional distress	244
2. Punitive damages	244
3. Pre-existing conditions	244
H. Class Actions and Mass Torts	245
1. Class action certification	245
2. Mass tort litigation	249

A. Theories of Liability/Causes of Action

1. Strict Liability

- Voss v. Black & Decker Mfg. Co., 59 N.Y.2d 102; 450 N.E.2d 204; 463 N.Y.S.2d 398 (N.Y. 1983). One of the ways to prove product defect is by presenting evidence that it was defectively designed. In order to make this claim, P must make a showing that: (1) the manufacturer marketed a product which was not reasonably safe in its design; (2) that it was feasible to design the product in a safer manner; and (3) that the defective design was a substantial factor in causing the plaintiffs injury.
- **Design defect**
 - **Design defect issue for jury where saw had no guard.** Shamir v. Extrema Mach. Co., Inc., 125 A.D.3d 636, 3 N.Y.S.3d 389 (2d Dept. 2015): **Facts-** Plaintiff was injured using a power table saw. No more facts are set forth, other than there was no guard over the blade. Plaintiff asserted products claims for design defect and failure to warn. As to the design defect, defendant manufacturer on a SJM submitted documentary evidence demonstrating that it was not feasible to attach a permanent guard. However, plaintiff presented an affidavit of an expert describing an alternative design of the saw available at the time of the accident which had a permanent overarm guard. The trial court granted SJ, on both theories. **Holdings-** It was error to grant SJ on the design defect claim since plaintiff's proof raised a triable issue of fact. However, as to the claim of failure to warn, it was proper to grant SJ since the manufacturer was under no duty to warn plaintiff, an experienced cabinet maker who had been using table saws for more than 20 years. The specific hazard was readily discernable.
 - **Design defect claim requires proof of safer alternative.** S.F. v. Archer Daniels Midland Co., 594 Fed. Appx. 11 (2d Cir. 2014): **Facts-** Parent brought action for child who allegedly developed type 2 diabetes due to consumption of high fructose corn syrup made by various defendants. Various product liability theories were pleaded, including design defect. The district court dismissed the case on the pleadings. **Holdings-** Dismissal was proper. A plaintiff in a NY design defect case must plead a safer alternative design, citing the Voss case. Here plaintiff did not so plead there was a safer form of high fructose syrup, and, as far as a claim that it should not be used at all, this would amount to an outright ban, which is beyond design defect concepts. In a second holding, the court refused to apply the concept of "market share" to the present situation, where the plaintiff could not identify the actual makers of the

syrup to which his child was exposed. That doctrine, adopted in the DES case, *Hymowitz v. Eli Lilly & Co.*, was a special one time use that does not fit here.

- **Substantial modification defense inapplicable where plaintiff shows machine dangerous due to defectively designed safety feature** – *Hoover v. New Holland N. Am., Inc.*, 23 N.Y.S.2d 41, 988 N.Y.S.2d 543 (2014): **Facts**- Plaintiff, 16 years old daughter, lost her arm and sustained other serious injuries when she was pulled into a post hole digging auger. The machine had been purchased and long used by a man who lent it to the father of the plaintiff. Over the course of years, a plastic guard, which surrounded a projecting bolt, which entrapped plaintiff in this accident, had broken and been repaired a number of times. Eventually the owner threw the guard away as useless and did not replace it (as he testified it would only break again). The machine itself and the manual had warnings about use without the guard. The defendants were the manufacturer of the machine, its distributor, the retail seller, and the guard manufacturer. Plaintiff sought to impose liability based on strict liability and other causes of action. All sought SJ, which was denied. A large verdict was rendered for the plaintiff, with varying percentages of liability. Appellate Division affirmed the judgment entered below, in a decision turning on whether SJ should have been entered. Defendants had relied upon the leading case of *Robinson v. Reed-Prentice Div. of Package Mach. Co.*, 49 N.Y.2d 471, 426 N.Y.S.2d 717 (1980), which recognized the defense of substantial modification. In that case as here, a guard had been removed. **Holding**- The decision of the lower court is affirmed. Plaintiff can resist a MSJ based on the defense of post-sale modification by showing, as done here, that the product at the time of the sale incorporated a defectively designed safety feature. A product can be defective if a guard or other safety feature itself is not reasonably safe and the defective design is a substantial factor in the injury. The court also dealt with the defense argument that the failure of the owner to replace the broken shield was itself a substantial modification. Such an act did not justify SJ, based upon the owner's testimony that he felt it would only break again. Overall, the court held, whether a product is defectively designed is a jury question.
- **Manufacturer may be liable for defective design of vehicle restraint system; role of comparative negligence in crashworthiness case**- *Harrison v. Ford Motor Co.*, No. 3:11-cv-0840 MAD/DEP, 2013 WL 3098695 (N.D.N.Y. June 18, 2013): **Facts**-Plaintiff driver was ejected from her 1987 Bronco

II during a rollover. The extended facts statement by the judge shows how much the vehicle had been modified, and sold; the last sale was for \$100. Although there was some dispute, the court found that the seat belt part of the vehicle had not been changed; this utilized the RCF-67 buckle mounted on a stalk. Plaintiff claimed that the seatbelt has become unbuckled during the rollover due to the phenomenon of inertial unlatching. Plaintiff moved for SJ on any claims of comparative negligence and defendant cross moved for SJ on all causes of action. **Holding**-All motions denied at the present stage of this litigation. As for the primary issue of design defect, the court dealt with two defenses put forward by Ford. The first was the argument that the unlatching plaintiff claimed was a "parlor trick," Ford citing many cases which involved this particular system in the Bronco from around the country. The second was that the opinion of plaintiff's expert on this issue did not meet Daubert standards. After extensive analysis of cases nationwide, both defenses were rejected as a basis for a grant of summary judgment. **2d holding:** As to plaintiff's motion to strike any defenses based upon comparative negligence of the driver in causing the accident, the court analyzed the situation under plaintiff's claim of crashworthiness or second accident, again looking at non-NY decisions. Since it could not find a NY decision on point, it denied plaintiff's summary judgment motion as well.

- **Evidence that pump created a substantial likelihood of harm and it was feasible to design the product in a safer manner created fact issue- Hall v. Husky Farm Equipment, Ltd., 92 A.D.3d 1188, 939 N.Y.S.2d 604 (3d Dept. 2012): *Facts*: While P was in the process of removing ice, he fell into a pit and his right hand was severed when his arm was drawn into a hydraulic agitator. P and his wife sued hydraulic pump manufacturer asserting claims of strict liability and negligence for defective design and manufacture of the pump, failure to warn of latent defects and breach of warranty. D manufacturer moved for SJ. Trial court denied D's motion. D appealed. Reversed in part and affirmed in part. *Holding*- (1) Genuine issues of material fact existed as to whether the pump was reasonably safe; (2) D manufacturer's failure to include fencing with product did not render it defective or preclude it from performing as intended; and (3) P was a knowledgeable user of product and D manufacturer was relieved from any obligation to warn him of latent dangers that existed when agitator was operating. P's manufacturing defect claim failed because industry standards did not require fencing around the pit be included in the production of the**

manure pump. Additionally, Ds are not obligated to provide warnings to knowledgeable user who is aware of specific hazards that exist when product is in use and which caused accident. SJ was properly denied as to P's design claim, but should have been granted with respect to failure to warn claim. Breach of warranty claim was untimely as pump was acquired in 1995.

- **Whether pump design that permitted pressure to build was not reasonably safe is a fact issue- Fisher v. Multiquip, Inc., 2012 WL 2137254 (3d Dept. 2012):** *Facts-* P was injured while clearing concrete inside a concrete pump owned by D and manufactured by D Multiquip, Inc. P commenced this action seeking damages for his injuries based on negligence and strict product liability claims premised on defective design and inadequate safety warnings. *D* moved for SJ. Supreme Court granted MSJ. *P* appealed. Affirmed in part and reversed in part. *Holding-* *D* provided adequate warnings and safety instructions on the pump and in the manual to *P* that hydraulic pressure could continue to build even when the pump is off, thereby precluding liability premised on failure to warn, but fact issues remained whether pump design that permitted hydraulic pressure to continue to build was not reasonably safe and was substantial cause of P's injury because of the conflict of the experts' opinions
- **Court erred in charging jury on strict liability when no specific design defect was presented- Simon v. Nortrax N.E., LLC. et al., 94 A.D.3d 861, 941 N.Y.S.2d 706 (2d Dept. 2012):** *Facts-* *P* was operating a dump truck when it rolled down an embankment and overturned. *P* alleged that the accident was caused by brake failure. Truck was designed and manufactured by a John Deere and leased to P's employer by D Abele Tractor & Equipment. D Nortrax N.E., LLC was an authorized John Deere dealership and repair company. *P* alleged strict product liability against D John Deere and negligent repair and maintenance against *Ds* Nortrax and Abele. Judge charged jury on negligent maintenance and repair but not strict liability. Jury verdict in favor of *Ds* on liability. *P* appealed. Appellate Division affirmed. *Holding-* *P*'s evidence was insufficient to support strict product liability jury instruction against *D*, lessor, and the verdict in favor of *D*. lessor and *D* repair company was not contrary to the weight of the evidence. Here, *P* presented no evidence at trial that the subject dump truck contained a manufacturing flaw, was defectively designed, or was not accompanied by adequate warnings. Furthermore, *D* did not exclude that operator error

could have been a cause of the accident. Thus, in the absence of evidence of a specific design or manufacturing flaw in the truck, there was no basis for the court to give a strict product liability charge.

- **Despite meeting minimum industry standards and being state of the art, fuel hose might still be defective-** Reeps v. BMW of North America, LLC. et al., 94 A.D.3d 475, 941 N.Y.S.2d 597 (1st Dep. 2012): *Facts-* P's child, was allegedly injured in utero as result of his mother's inhalation of gasoline fumes from fuel hose filed action against D manufacturer alleging strict product liability, breach of warranty and negligence claims and against D mechanic alleging negligence in servicing vehicle. Ds moved for SJ. Trial court denied motion. Ds appealed. Granted and denied in part. *Holding-* (1) Parents' failure to preserve vehicle did not warrant dismissal; (2) factual issue existed as to design defect; (3) viable product liability and breach of express and implied warranties claims did not exist against business that serviced vehicle; and (4) defense of laches was unavailable.- Ds failed to demonstrate that parents disposed of vehicle with knowledge of potential evidentiary value. Moreover, loss of the opportunity to inspect vehicle did not deprive Ds of the means of establishing their defense against the allegations. P raised inference that the fuel hose, despite meeting minimum industry standards and being state of the art, was defective. However, Hassel established, and P did not dispute, that it did not design, manufacture, distribute or sell vehicle, and therefore the product liability and breach of express and implied warranties claims should be dismissed as against it.
- **Builder of open bridge trap door that caused injury may be liable for design defect-** Bailey v. Disney Worldwide Shared Services. 35 Misc.3d 1201(A)(Sup. Ct. N.Y. Co. 2012): *Facts-* P, an actor, fell through a trap door left open after a pre-show test at The Little Mermaid. The operator failed to look at the display monitors showing that the doors had not been closed. D Showman Fabricators, Inc. built the bridge (pursuant to agreement with D Disney). D Niscon, Inc. provided the automation system that allowed trap doors on the bridge to be remotely operated. D Disney sold bridge to Buena Vista Theatrical Group, LTD which produced The Little Mermaid. P alleged negligence, breach of warranties of fitness for a particular use and merchantability and strict product liability. Ds moved for SJ. Granted in part and denied in part. *Holding-* D Showman was not entitled to SJ. They were a custom fabricator of the bridge, and thus a question of fact

existed as to strict liability. As to design defect, Showman may have been involved in design and installation of the defective bridge/trap door. Showman also could be liable for failure to warn as there is a question of fact as to whether there were any warnings about the door. The breach of warranty claims were also not dismissed for the same reason. The negligence claim also was not dismissed since it was foreseeable that any defects in the bridge may cause serious injury. As to D Niscon, they were entitled to SJ on all claims. As to strict liability, the remote was controlled by Buena Vista and was functioning properly. Mere speculation of any failure in the mechanism was not enough to raise to the level of a triable issue of fact. As to failure-to-warn, production crew was found to be knowledgeable users who were aware of the risks. Thus, the breach of implied warranties were dismissed since there was no showing that a product defect was a significant factor in causing Ps injury. As to Disney, they were entitled to SJ on most claims, but Showman raised an issue of fact as to whether buying goods and reselling them to other Disney entities such as Buena Vista was a regular part of Disney's business.

- **Suit proceeds where manufacturer did not prove utility of product outweighed its dangers-** Sivec v. The City of Long Beach, NYLJ 1202562432365 at 1 (Sup. Ct. Nass. Co. 2012): *Facts*: P, an infant, was at a public park slipped and fell from a beam. P sustained injuries to her arm and leg. P asserted claims for strict liability based on design defect, failure to warn and negligence. City of Long Beach and manufacturer moved for SJ. *Holding*: Manufacturer failed to demonstrate that the intended use of the product outweighed the danger of the product. D failed to reduce the risks inherent in the use of the product. Accordingly, the failure to warn claim proceeded. D City's MSJ was also denied based on the fact that they received guidelines from the manufacturer directing that any painted surfaces that are rusted or worn could become potential structural hazards. P slipped on a spot where the paint had worn. Thus, there are issues of fact with respect to both Ds.
- **Plaintiff must retain expert to proceed with design defect claim-** Soliman v. Daimler AG, 2011 WL 4594313 (E.D.N.Y. 2011): *Facts*-P was injured in a head-on collision between vehicle he was in, a 2003 Mercedes Benz CL 55, and another vehicle. P argued that accident was caused by design defect in car's engine or transmission, which caused it to lunge into oncoming traffic. P also alleged defects in design of seatbelt,

seat back and airbags against Ds manufacturer and insurer. D manufacturer moved for SJ. Magistrate issued Report and Recommendation concluding that Dsmotion be granted. Motion granted. *Holding-* P had not identified any expert to testify on his behalf and had not submitted an expert report on the design defect theory of his case, and thus failed to raise triable issue of fact (P actually identified himself as an expert). Additionally, P's seat belt claim failed because he failed to identify an expert and because it was preempted by federal law (FMVSS 208).

- **Reviewing pictures of basic defect, the site of the accident, the industry standards and submitting alternative designs was sufficient basis for design defect fact issue-** Mathis-Kay v. McNeilus Truck & Manufacturing, Inc., 2011 WL 4498386 (W.D.N.Y. 2011): *Facts-* P decedent was riding on the back of the garbage truck when he fell off sustaining a head injury. P claimed that Ds were strictly liable for design and manufacture of an exterior riding step and grab bars, which were part of the garbage truck. P also brought claims of inadequate warning, breach of warranty and negligence. Ds moved for SJ and to exclude expert testimony. Motion to exclude expert testimony was denied, but the SJ motion was granted in part and denied in part. *Holding-* P's expert's methodology was sufficiently supported by his review of images of the truck and application of ANSI standards. P's other expert reviewed photographs of the site as well as visited the accident location. In addition, he was given measurements to determine the mechanics of the accident, and thus his testimony was admissible. Sufficient evidence was produced through experts that numerous individuals have been injured on rear loader garbage trucks. Ds attempted to rebut this testimony by stating that the truck met the industry standards. These issues were proper for a jury to decide. P's proposed alternative design of side-loading garbage truck operated by a single individual is a feasible, safer and economic alternative even though the preferred truck is the subject truck. P provided sufficient evidence from which to conclude that the riding step and grab bars' design flaws caused decedent to fall
- **Strict liability may apply even where product misused, especially if product inherently dangerous; standards for summary judgment-** Chow v. Reckitt & Colman, Inc. et al., 926 N.Y.S.2d 377, 17 N.Y.3d 29 (2011): *Facts-* P was injured while using Lewis Red Devil Lye 100% sodium hydroxide to clear clogged floor drain in kitchen of restaurant where he worked.

P could not and did not read instructions and warnings on bottle. Immediately after P simply poured a mixture of 3 spoonful's of lye and 3 cups of cold water directly into drain, it splashed back onto his face. He sustained serious burns and ultimately lost sight in one eye as a result. Ds, manufacturers, alleged that P's handling of product was not in accordance with label's instructions and warnings which indicate that one should use a spoon instead of pouring product directly in the drain. Ds moved for SJ, which was granted. First Department was divided with respect to whether Ds were entitled to SJ on defective design claim, but was unanimous in affirming SJ on strict product liability based on an alleged failure to warn. Court of Appeals reversed trial court's order. **Holding-** Mere statement in attorney's affirmation in support of motion for SJ to the effect that everyone knows lye is dangerous does not shift burden to P to explain how the product could be made safer. The question remained: was it reasonable for Ds to place it into stream of commerce as a drain cleaning product for use by a layperson. P's mishandling of product, alone, is not enough to entitle D to SJ. D failed to show that P's handling of the product constituted sole proximate cause of his injuries, because a factfinder could conclude on the basis of the record that product was so inherently dangerous that it should never have found its way into stream of commerce as packaged and marketed. **Comment:** This is an extremely liberal approach to refusing to grant SJ prematurely to defendants in a case where the facts are of the type that often lead courts to throw out plaintiffs. As such we should cite it in briefs giving it an expansive reading. Plaintiff's misuse of the product did not warrant a grant of SJ. It is further of great value in suggesting that some products are so inherently dangerous that the risk/utility test does not even come into play. As the concurring opinion observes, while the record before the court might lead to a failure to meet the burden on plaintiff to make out a prima facie case, here it was sufficient to defeat a SJM. Also note the observation that, under federal law, defendant might well have won because a larger burden is placed on a party resisting SJ than in state court.

- **Manufacturer of water heater can be strictly liable when someone spills gasoline outside of store, fumes ignite because of a pilot light in the water heater resulting in an explosion-** Fahey v. A.O. Smith Corp., 77 A.D.3d 612 (2d Dept. 2010): **Facts-** Ps were firefighters injured in an explosion at a hardware store, their spouses, and the administrators of the estates. Ds include owners of hardware store and manufacturer of a hot water heater. The fire allegedly started

when a person accidentally spilled a container of gasoline outside the store, gasoline flowed under a door into the basement, and vapors were ignited by the pilot light in hot water heater. After firefighters arrived, an explosion occurred, killing three and injuring several others. Ps alleged negligence, breach of implied and express warranty, and strict product liability against D, manufacturer. They also asserted causes of action pursuant to General Municipal Law §205-a, which provides an injured firefighter with a cause of action to recover damages from any person who, “at the time of injury,” is guilty of the negligent or willful failure to comply with a statute premised upon D, manufacturer’s, alleged violation of the implied warranty of merchantability (UCC 2-314, which provides that seller impliedly warrants that goods “are fit for the intended purpose for which they are used and that they will pass in the trade without objection”). D, manufacturer, moved for SJ. Supreme Court granted motion finding a lack of proximate causation due to intervening negligence of other Ds. Further, the Supreme Court held that a violation of UCC 2-314 is not a proper predicate to support General Municipal claims. Ps’ appeal was granted in part and denied in part. ***Holding-*** Trial court properly dismissed causes of actions asserted pursuant to GML §205-a, but remaining causes of action and cross claims should not have been dismissed. Regarding GML claims, Ps did not demonstrate, based on UCC 2-314, that the statutory violation directly or indirectly has a reasonable connection to Ps’ injuries. A triable issue of fact was raised with respect to existence of a design defect in the water heater based on proof that it was not reasonably safe and that alternative, safer designs were available at that time. There was also a triable issue of fact as to whether the water heater was a substantial cause of the fire. Accordingly, injury from an explosion could be a foreseeable consequence of D’s conduct

- **Manufacturer failed to establish entitlement to summary judgment for strict liability when it could not prove that temperature sensors on its hot tub were safety devices or part of the circuitry of the hot tub and whether sensors were physically disconnected or became disconnected by mere use of the hot tub- Casey v. Northway Pool Service, Inc., 2011 WL 555852 (Sup. Ct. N.Y. County 2011): ***Facts-*** P commenced this action to recover damages for wrongful death and injuries sustained by decedent due to a design defect in hot tub manufactured by D, Jacuzzi Spas International, and serviced or repaired by other Ds. Following P’s death, Suffolk County Police Department took readings which indicated that water in hot tub exceeded recommended temperatures for safe**

use. P alleged, *inter alia*, that the hot tub was improperly designed without a fail-safe or interlock system to prevent use of the hot tub after intentional or unintentional removal of its temperature sensors and D manufacturer failed to adequately train and monitor actions of repairmen that it recommends to the public. D manufacturer contended that sensors are safety devices which, when modified, destroyed the utility of a key safety feature, relieving it of any responsibility in this action.

Holding- D manufacturer failed to establish a prima facie entitlement to SJ based on proof problems

• **Jury verdict not inconsistent when manufacturer found negligent in failing to install starter interlock device, but vehicle was not defective due to lack of device-** Reis v. Volvo Cars of North America, Inc., 2011 WL 679431 (Sup. Ct. N.Y. County 2011): **Facts-** P was injured when a friend, who had recently purchased a 1987 Volvo, asked P if he wanted to see the engine running. The car, which was in gear, lacking a starter interlock device, lurched forward, crushing P's leg resulting in an amputation. Jury verdict for P. The jury found that Ds, Volvo entities, were negligent in failing to use a starter interlock device, but that Ds were not strictly liable. Ds, Volvo entities, moved for an order directing judgment in their favor or, alternatively, a new trial. Ds motion was denied but the court reduced P's future medical expenses. **Holding-** Ds first moved to set aside the verdict on failure to warn claim based on an earlier determination by Appellate Division (the trial had proceeded during the pendency of the appeal, and the verdict was reached prior to the appellate determination), which dismissed P's failure to warn claim. The Court was bound by Appellate Division's orders and held that jury's verdict on failure to warn must be set aside. Next, Ds claimed a verdict inconsistency based on the determination that Ds were negligent in failing to use a starter interlock device, but the jury determined vehicle was not defective due to lack of such device. This inconsistency is not a basis for setting aside the verdict, as it was not raised until after the jury was discharged. Ps' award did not deviate.

• **Lack of automatic safety device on product constitutes design defect** – Adams v. Genie Indus. Inc., 14 N.Y.3d 535 (CANY 2010): **Facts** – P was seriously injured while operating a personnel lifting machine that tipped over when about twelve feet off the ground. P sued D, the manufacturer, under a negligence and defective design theory arguing that D should have included an interlock device that would automatically interrupt operation of the lift without the outrigger, which

balanced the machine, in place. P presented evidence that a former employee of D suggested the use of interlocked outriggers to the company prior to sale and had obtained approval to present the idea to a committee setting standards in the industry. Additionally, a competitor's lift came with an interlocked outrigger. D argued that P did not show that interlocked outriggers were commonly used or that more than one manufacturer included them on its product. Also, the American National Standards Institute (ANSI) did not call for interlocked outriggers. The jury returned a verdict for P. The Supreme Court denied D's motion to set aside the verdict (and directed a new trial on damages unless D stipulated to increase the awards for past and future pain and suffering). The Appellate Division affirmed and afterwards, the D stipulated to increase the damages but appealed on other grounds. P then argued D was not an "aggrieved party" within the meaning of CPLR § 5511 because it had stipulated to modify damages and therefore had no right of appeal. **Holding:** Reversing prior court precedent, D is an "aggrieved party" under CPLR § 5511 because it was unfair to bar a party from raising legitimate appellate issues simply because it had made an unrelated agreement on damages. Further, the standards set forth in Voss v. Black & Decker Mfg. Co., 59 N.Y.2d 102 (CANY1983) apply to both strict liability and negligent design causes of action. P has produced enough evidence for a jury to find that D's product without interlocked outriggers was not reasonably safe as, Voss defines the term. The evidence clearly showed more than a mere theoretical possibility of a safer machine. Not only did P present evidence that a better way was thought possible but it presented evidence it had actually been implemented by a competitor. Additionally, D's own label warned against the use of the product without outriggers. Although the trial court erred in submitting to the jury the question of whether D was negligent in failing to recall its product, the error was harmless because this claim duplicated its design defect and negligent design claims. Therefore, despite the lack of ANSI standards requiring interlocked outriggers, the evidence was enough to support the jury's verdict

- **Question of fact raised as to whether workable guards on the market could have prevented P's injury, barring summary judgment** – Cwiklinski v. Sears, Roebuck & Co., Inc., 894 N.Y.S.2d 277 (4th Dept. 2010): **Facts** – P injured while using a molding head cutter attached to a table saw to cut a piece of wood. While holding down the wood to steady its "chatter," the wood kicked back causing Ps hand to contact the

saw's blade. P sued the manufacturer of the molding head cutter and the saw as well as the seller of the products. Ds moved for summary judgment (SJ). The Supreme Court denied the manufacturer of the molding head cutter's motion in its entirety, granted the saw manufacturer and seller's motion on the breach of warranty claims and denied the remaining parts of their motions. The Appellate Division affirmed in part and reversed in part. **Holding:** SJ on the negligence and strict products liability claims predicated on a manufacturing defect should have been granted. Ds established that the molding head cutter and table saw had no manufacturing defect and the Ps failed to raise any issue of fact to rebut. Further, SJ on the failure to warn claims should also have been granted. There is no duty to warn of an open and obvious danger of which the user is or should have been aware as a result of ordinary observation or common sense. P read the instruction manuals and therefore the danger of placing one's hands near an unguarded blade was open and obvious. However, denial of SJ on design defect was proper. Ds met their initial burden of establishing, through expert testimony, that no feasible guards were available on the market, including the suggested "Uniguard," that could have been used without hindering operation or putting the user at further risk. However, P raised triable issues of fact, also through expert testimony, that workable guards did exist on the market, including the "Uniguard," that were appropriate and could have prevented the accident

- **Failure to warn claim defeated because P knew should have used guard but issue of fact raised as to alternative design** – *Sugrim v. Ryobi Tech., Inc.*, 901 N.Y.S.2d 327 (2d Dept. 2010): **Facts** – P was injured while using a table saw without a blade guard. P sued the manufacturer and distributor of the saw. Ds moved for summary judgment submitting evidence P admitted the saw operated properly; he was aware he should have used a guard at the time of injury; and it was not feasible to attach a permanent blade guard. P submitted expert evidence that, at the time of manufacture, an alternative design in the form of a retractable, over-the-arm blade guard was available. The Supreme Court granted Ds' motion for summary judgment based upon a manufacturing defect and failure to warn but denied their motion based upon design defect. The Appellate Division affirmed. **Holding:** Ds established prime facie entitlement to summary judgment regarding a manufacturing defect by presenting evidence the saw operated properly. They also presented sufficient evidence regarding failure to warn by showing P knew he should have used a blade

guard. The duty to warn does not arise when the injured party is already aware of the specific hazard or the danger was readily discernable. P failed to present any evidence that would raise a triable issue of fact as to these claims. However, the Supreme Court properly denied summary judgment based upon a design defect because P did raise an issue of fact regarding the feasibility of an alternative design.

- **For certain products, where main function of product is consumer satisfaction, P must meet burden of showing safer product also equally satisfying** – Adamo v. Brown & Williamson Tobacco Corp., 872 N.Y.S.2d 415 (CANY 2008): **Facts** – P smoked for more than 40 years, consuming more than a pack a day of regular cigarettes manufactured by Ds. P was diagnosed with lung cancer and another condition allegedly caused by smoking and during the pendency of the appeal, she died. P asserted a number of claims against the Ds alleging that the D’s tar and nicotine containing product caused P’s injuries. All but the negligent product design were dismissed at the trial level. P presented evidence that light cigarettes were safer than regular cigarettes but failed to put forth evidence that they were as functional or satisfying as regular cigarettes. A jury found in favor of P, awarding compensatory and punitive damages. The Appellate Division reversed and the Court of Appeals affirmed. **Holding** - It is not necessary that in every product liability case, P show the safer product is as acceptable to consumers as the one D sold but such a showing was necessary here where satisfying the consumer is the only function of the product. The court is not unaware of the obvious irony in speaking of the “utility” of cigarettes when a strong argument can be made that, when balanced against the harm they cause, they are worse than useless. But holding that every sale of regular cigarettes imposes liability on the manufacturer would amount to a judicial ban on the product. **Dissent** - Ps met their burden of establishing that Ds were able to design a safer cigarette and maintain functionality. When the majority concludes, however, that Ps were also required to prove that smokers find light cigarettes as satisfying as regular ones, this unfairly shifted the burden of proving consumer acceptability to Ps.
- **Failure to include safety guards raised triable issue on design defect despite expert’s failure to cite industry standards in support** – Ramos v. Simon-Ro Corp., No. 06-CV-6105, 2008 WL 4210487 (S.D.N.Y. Sept. 11, 2008): **Facts** – P’s fingers were severed when he placed them inside some inspection ports on a crane not knowing the crane was about

to move. P admitted he knew it was dangerous to interact with the crane when it was moving. P sued D, manufacturer of the crane, and submitted expert testimony that D should have included safety guards over the ports and that it could have at relatively little cost. D moved for summary judgment arguing, *inter alia*, that the ports did not present a hazard because they were located in an area where they would not be accessible during normal operation of the unit. Injury occurred in this case because P recklessly climbed onto the crane while it was in operation even though he knew it was dangerous. D's second expert admitted that on subsequent models of the crane, the manufacturer had guards installed over the ports. The District Court denied D's motion. **Holding** - Although feasibility of a safer design was clear given the fact that D did put guards over the ports on later models, this must be balanced by whether the product, as designed, posed a substantial likelihood of harm. P's expert opined that failure to attach covers to the ports posed a foreseeable risk but did not cite to any industry standard in support. While failing to cite industry standards was troubling, it was not fatal to his opinion. Industry standards are helpful in assessing the existence of a design defect, they are not dispositive and therefore the P raised triable issues of fact.

- **In airbag case, expert opinion evidence must be met with expert opinion evidence** – Fitzpatrick v. Currie, 861 N.Y.S.2d 431 (3d Dept. 2008): **Facts** – P was riding in the front passenger seat of a vehicle with his seatbelt on. When his vehicle collided with another car, his air bag deployed, resulting in injuries to the P's face and right eye. P sued D, manufacturer, alleging the air bag deployed with excessive force or improperly split open, releasing gas and causing trauma and chemical burns to his face and eyes. D moved for summary judgment submitting expert evidence that it was clear the air bag deployed properly because P did not suffer the kind of injuries one would have had P hit the solid structure of the car. Rather, P's facial and eye injuries were consistent with someone who had been blocked by a properly deployed air bag. Further, in response to P asserting the air bag deployed too forcefully, D's expert responded that D had no choice but to make the air bag system forceful because applicable government regulations at the time required it. The Supreme Court granted summary judgment and the Appellate Division affirmed. **Holding** - P failed to meet his burden of demonstrating that his injuries were caused by a defect in the air bag. Notably, P's response did not include the opinion of any expert on the design and functioning of an air bag. While

the opinion of an expert may not always be necessary in establishing a product liability case, the complex issues involved in the design and operation of an air bag make expert proof imperative, especially when D's motion is supported by the opinion of an expert.

- **To survive summary judgment where no specific defect claimed, P's theory must not be speculative and must rule out all causes other than those attributable to D for product's failure** - *Ramos v. Howard Indus., Inc*, 855 N.Y.S.2d 412 (CANY 2008): **Facts** - P was injured when a transformer made by the D exploded. P sued D claiming the transformer was defectively manufactured and designed. The transformer was not available for inspection due to the plaintiff's lengthy delay in reporting the incident. D moved for summary judgment offering expert opinion that, although an internal defect could have caused an explosion, D complied with all applicable industry standards and adhered to rigorous testing and inspection procedures, rendering it virtually impossible for the defective transformer to have left its plant. D also argued the explosion could have been due to P's employer rewiring or rebuilding. P countered that the transformer exploded due to defective coil/windings and/or insulation and that the two safety devices failed to operate. The Fourth Department had overturned summary judgment below. Reversed. **Holding** - Although in a product liability case, P is not required to identify a specific defect, the opinion offered by P's expert to defeat summary judgment was pure speculation as to the defect and failed to exclude the alternative causes offered by D's expert. **Dissent** - When a product is unavailable for testing, requiring the P to exclude D's unestablished, possible alternative causes in order to defeat summary judgment, improperly shifted the burden to P. **Comment**: This CANY decision follows one we previously outlined, *Speller v. Sears, Roebuck & Co.*, 760 N.Y.S.2d 79 (CANY 2003) (fire in a refrigerator). These decisions, and many lower court ones, indicate the uncertain nature of the plaintiff resisting summary judgment (SJ). As the dissent by Justice Jones states, one must look first to the quality of the defendant's expert proof seeking SJ, in order to see what is sufficient rebuttal due from the plaintiff to avoid SJ. Since Justice Jones would have found that the defense expert was himself just speculating as to the cause of the transformer explosion (as did the court below), he would hold that the plaintiff's expert met the very minimal burden of presenting a basis for the case going to a jury. As a further comment, it would be more productive of the time of appellate court judges to provide guidance for lower courts as

compared to taking the simplest way out and resolving fact disputes.

- **P must present evidence that alternative design has the same utility and acceptability in the market as the product in question** - Rose v. Brown & Williamson Tobacco Corp., 855 N.Y.S.2d 119 (1st Dept. 2008): **Facts** – P developed lung cancer and neurological damage from decades of smoking. P sued Ds, manufacturers and distributors of regular cigarettes, a product they argued was negligently designed in that it was unreasonably dangerous. P argued that the Ds should have made and sold only safer, light cigarettes. P put forward evidence regarding the technical feasibility of making the lighter cigarettes as an alternative design but did not present evidence that such cigarettes would have been acceptable to more than a small portion of the regular cigarette smoking public as a substitute. The jury returned a verdict in favor of P along with punitive damages. D appealed arguing that D’s motion for a directed verdict after the case should have been granted. The Appellate Division agreed. **Holding** – Under New York law, a manufacturer cannot be held liable for failing to adopt an alternative product design that has not been shown to retain the “inherent usefulness” of the allegedly offending product. Here the product’s usefulness is measured by certain subjective sensations and feelings in the user. P failed to present evidence that light cigarettes would be accepted by smokers of regular cigarettes in the market. Therefore, the P has not shown it was feasible to design the product in a safer manner. **Dissent** – Evidence adduced at trial sufficiently established that the safer alternative light cigarette was the same as a regular cigarette in all respects save for its non-addictive levels of nicotine and cancer-causing tar. There is no legal basis for requiring P to meet an additional burden of showing that consumers would necessarily accept the non-addictive product, especially when the consumers are nicotine addicts – a class of consumer created by Ds through their admitted manipulation of nicotine levels.
- **Differing opinions regarding reasonableness of design raised an issue of fact sufficient to defeat summary judgment** - Steuhl v. Home Therapy Equip., Inc., 857 N.Y.S.2d 335 (3d Dept. 2008): **Facts** - P was seriously injured when the head of the motorized hospital bed she had been prescribed for home use suddenly dropped flat. P sued D manufacturer for, *inter alia*, defective design and D lessor for negligently assembling the bed. P’s expert asserted that the requirement that the hitch pin be inserted into the clevis pin during

assembly created a danger of improper installation which could cause the bed to collapse and that safer, economic and technically viable alternative designs were available. D's experts asserted there was no defect in the design and that the bed was reasonably safe for its intended use. SJ denied.

Holding – Because there were conflicting expert opinions regarding the reasonableness of the bed's design, a question of fact was raised and summary judgment was properly denied.

- **Post-accident description of product as broken at the threads and observation that threading was cut too deep should have allowed P to survive summary judgment –**

Reyes v. Harding Steel, Inc., 856 N.Y.S.2d 562 (1st Dept. 2008):

Facts – P sustained injuries when a parking lift collapsed. P sued Ds, manufacturers and distributors, alleging that the telescopic lift rods failed. P testified that after the accident, the rear lift rods were broken at the threads and “opened up like a flower.” An installer of parking lift machines, who inspected the rods shortly after the accident, wrote to one of the Ds that the rods could not support the weight of the lift because their threading was cut too deep. The Supreme Court granted summary judgment and the Appellate Division reversed.

Holding – These facts should have been sufficient to raise an inference that the rods did not perform as intended and were the cause of the lift's collapse sufficient to defeat D's motion for summary judgment.

- **P's expert must examine product, characterize facts appropriately and rule out causes not attributable to D to avoid summary judgment –** Vitello v. General Motors Corp., 853 N.Y.S.2d 550 (1st Dept. 2008): **Facts** – Infant P injured in motor vehicle accident. P sued D manufacturer alleging that a defect, the subject of a recall notice seven years earlier, caused the accident. D submitted testimony from driver that vehicle hydroplaned on a wet road when going into a curve and expert testimony that accident was due to the vehicle's handling abilities being diminished by fresh rain. P's expert, who did not examine the vehicle, submitted testimony that the defect caused the vehicle's inner bushing retainer nuts to come loose and the suspension control arm shaft to become bound or to break. **Holding** – D's denial of summary judgment reversed. P failed to produce any direct evidence that the alleged defect caused the accident or that it was not due to road conditions or other causes not attributable to D. Further, P's expert opinion was based on the recall notice, not an examination of the vehicle, and on mischaracterizations of the driver's testimony about vehicle handling.

- **Establishing that defect did not exist when product was manufactured entitled Ds to summary judgment –** Heimbuch v. Grumman Corp., 858 N.Y.S.2d 378 (2d Dept. 2008): **Facts** – P injured while attempting to lift the hood of a truck during a standardized pre-trip vehicle inspection for employer. Ds manufactured body of truck sold to P's employer. P claimed manufacturing and design defects alleging that vehicle was missing a gas assist device which would have made the hood easier to lift. Ds presented evidence that the truck was equipped with a gas assist device at the time of manufacture but device was not there when the P was injured. The Supreme Court denied summary judgment and the Appellate Division reversed. **Holding** – The gas assist device was there at the time of manufacture but not when the P was injured. Therefore, any alleged defect in design of the gas assist device could not have caused the P's injuries.
- **Failing to place warning directly on product and failure to design product to prevent improper use defeated summary judgment –** Anaya v. Town Sports Int'l, Inc., 843 N.Y.S.2d 599 (1st Dept. 2007): **Facts** – P sustained severe injuries when he fell approximately 30 feet while descending an indoor rock climbing wall. The accident occurred because the operator tied the safety line to a non-weight bearing gear loop instead of the weight bearing anchor point of the harness. P settled the case with the operator but continued against the manufacturer and distributor claiming the harness was defectively designed and contained insufficient warnings. D moved for summary judgment. Both Ds admitted that novice climbers sometimes tied the safety lines incorrectly to the gear loop. Rather than make the gear loop weight bearing they chose to make it appear flimsy in the expectation that the user then would not use it. A warning was in the harness manual, in a technical notice, and on a small label on the harness containing a skull and cross bones symbol directing the user to the manual and the technical notice. An expert stated that these warnings were inadequate in that they did not warn, on the harness itself, against the dangers of tying a safety line to a gear loop. The Supreme Court granted summary judgment and the Appellate Division reversed. **Holding** – It was reasonably foreseeable that a climber might attempt to attach a safety line to a gear loop and expect it to bear his weight. Triable issues of fact exist as to whether it was reasonable to not make the gear loop weight bearing and whether the warnings were adequate.
- **Plaintiff can establish a claim for defective design by ruling out other causes of the product's failure-** Riglioni v.

Chambers Ford Tractor Sales, Inc., 828 N.Y.S. 2d 520 (2d Dept. 2007): *Facts*- P was injured when he fell while operating a lawnmower after a piece of the lawnmower broke. P sued D manufacturer claiming that the lawnmower contained unspecified defects. D moved for summary judgment arguing that the lawnmower broke because of a prior alteration or damage to the product. P submitted evidence that the only possible cause of the product's failure was a defect in the product but did not specify what the claimed defect was. Supreme Court denied the motion and the Appellate Division affirmed. *Holding*- P raised an issue of fact that precludes summary judgment. P need not allege a specific defect to survive summary judgment; rather P must demonstrate that the accident would not have occurred absent a defect in the product. *Comment*: this case would generally be regarded as one involving circumstantial evidence. However, this court did not use that analysis in reaching its decision.

- **The occurrence of injury alone is insufficient to demonstrate that a product was defective-** Beckford v. Pantresse, Inc., 13 Misc. 3d 1245A (S.C. Queens Cty. 2006): *Facts*- P was injured when she had an allergic reaction hair dye manufactured by D. P sued D claiming that the product was defective. P did not allege any specific defect. D moved for summary judgment on the ground that no other customer had experienced a similar reaction. Supreme Court granted the motion. *Holding*- in response to D's motion, the only argument that P offered was that she was injured as a result of her use of the product. Mere injury alone is not proof of defect. D's showing that no other customers experienced a similar reaction demonstrated that the product was reasonably safe. P failed to prove otherwise and summary judgment was therefore appropriate.
- **Relatively minor and avoidable risk of harm does not render an otherwise useful product defective -**Viscusi v. P&G, 2007 U.S. Dist. LEXIS 51307 (E.D.N.Y. 2007): *Facts*- P claimed that she sustained injuries as a result of an allergic reaction she had to a hair dye. The instruction that accompanied the product directed users to perform an allergy test before each use that involved applying a small amount of dye to the arm and waiting 48 hours to see if there was a reaction. P conducted the test before using the product and did not suffer a reaction. P then used the product and became ill. She was admitted to the hospital where she was diagnosed with anxiety and depression and treated with an anti-anxiety medication. P claimed that she also suffered an allergic reaction

and that the anxiety symptoms were a result of the allergic reaction. D moved for summary judgment, arguing that the product was reasonably safe, there were very few complaints of allergic reactions and that the test described in the instructions mitigated the risk associated with the product. The district court granted the motion. *Holding*- D had received only 1 complaint per 37,000 units sold, none of which were medically verified. The ingredient in the product at issue was widely used in the hair care industry. Thus, the fact that the risk of allergic reaction was minor and was easily avoidable by using the test described in the instructions did not render this widely used product unreasonably dangerous

- **Plaintiff must demonstrate that the challenged design violated industry custom or practices** - McAllister v. Raymond Corp., 827 N.Y.S.2d 705 (2d Dept. 2007): *Facts*- P was injured when a 1,700 pound industrial battery of a forklift he was operating fell and crushed his leg. At the time of the accident, P was attempting to drive the forklift through a doorway that was 10 inches lower than the forklift itself. P sued D manufacturer, claiming that the forklift was defectively designed. The exact nature of the claimed defect is not described in the opinion. D moved for summary judgment and P submitted an expert affidavit in opposition to the motion that concluded that the forklift was defective. Supreme Court denied the motion and the Appellate Division reversed. *Holding*- the affidavit of P's expert was insufficient to raise an issue of fact because it "failed to identify any violation of industry-wide standards or accepted practices." Therefore, summary judgment should have been granted. *Comment*: we do not believe that the principle stated in this opinion, namely that a plaintiff must demonstrate that product was non-compliant with industry standards, is correct. Rather, it is accepted that a proposed alternative can involve designs not yet utilized by the industry.
- **Expert must rule out possibility of that wear and tear or misuse caused the product to fail**- Donuk v. Sears, Roebuck & Co., 2007 N.Y. Misc. LEXIS 3907 (S.C. Kings Cty. 2007): *Facts*- P was injured when he stuck his hand inside the chute of a snow blower while it was operational to remove a chunk of ice that jammed the chute. P sued D manufacturer claiming, *inter alia*, that the machine was defective because the blade did not stop within five seconds of the release of the auger control as required by SI standards. This was based on an inspection by P's expert during which he noted that the blade "sporadically crept and rotated" after the auger control

was D moved to dismiss, arguing that the machine was not released defective as designed. Supreme Court granted the motion. *Holding*- P's expert did not state that the rotations observed in his inspection were caused by something other than wear and tear or improper maintenance of the snow blower. Therefore, his opinion was insufficient to create an issue of fact

- **Defense verdict on strict products liability claim and plaintiff's verdict on negligence claim is inconsistent - Kosmynka v. Polaris Indus., 462 F.3d 74 (2d Cir. 2006):** *Facts* - P sustained serious injuries when an all-terrain vehicle he was loading onto a ramp flipped backwards and crushed him. P sued D manufacturer, claiming that the machine was defective in that it failed to contain a kill switch and failed to contain adequate warnings about the risk of flipping backwards. P also advanced claims of negligent design and negligent failure to warn. The jury returned a verdict finding that the vehicle was not defective but that was negligent and that the negligence was the cause of the harm. Following trial, D argued that the verdict was inconsistent and both parties suggested that the jury be reinstructed because it was still empanelled. The court refused to reinstruct the jury and entered judgment. D appealed on the ground that the verdict was inconsistent. The Second Circuit vacated the verdict and remanded. *Holding*- a claim of negligent design and negligent failure to warn is based on the same principles that a claim of strict liability is predicated upon. The only difference is that a claim of negligence requires that the flaw could have been discovered and remedied by the exercise of reasonable care. Here, the jury's finding that the product was not defective precluded a finding of negligent design or negligent failure to warn. Therefore, the verdict was inconsistent and the case should be remanded for a new trial
- **Plaintiff must demonstrate that the claimed defect was the proximate cause of the harm- Baughn v. Pride Mobility Prods. Corn., 2007 U.S. App. LEXIS 3981 (2d Cir. 2007):** *Facts* - decedent suffered fatal injuries when the scooter he was riding caught fire and burned. P sued D manufacturer claiming that the a series of defects in the scooter caused the battery cables in the scooter to short circuit, spark a fire, and caused decedent's death. P's expert testified that the maximum amount of time that the short circuit's charge could have lasted was ten seconds. D's expert testified that the shroud around the battery cables would have needed 2 minutes and 27 seconds of direct flame before it would

ignite. D moved for summary judgment on the ground that any alleged defect could not have caused decedent's injuries. The district court granted the motion and the Second Circuit affirmed. *Holding*- the testimony of D's expert was uncontroverted. Therefore, even if the scooter was defective, it could not have caused decedent's death

- **Expert Affidavit Creates a Triable Issue of Fact – Warnke v. Warner-Lambert Co., 799 N.Y.S.2d 666 (3d Dept. 2005):** *Facts* – P was injured when a portion of the razor that she was using broke. This caused the blades to come out of alignment and lacerated P's leg, requiring sutures. P sued D manufacturer claiming, *inter alia*, that the razor was defectively designed because it was made a brittle material that has low impact resistance. D moved for summary judgment and P opposed the motion with an expert affidavit that stated that there were alternative designs available that would have prevented the razor from breaking. Specifically, the expert stated that a polymer with a higher rubber content would have prevented the razor from breaking. Supreme Court denied the motion and following a plaintiff's verdict, the Appellate Division affirmed. *Holding*- the court affirmed the denial of summary judgment because the expert affidavit created a triable issue of fact. The expert testimony that alternative designs were available at the time that the subject device was manufactured created an issue of fact that precluded summary judgment.
- **Expert Affidavit Creates a Triable Issue of Fact – Lee v. Hino Motors, Ltd., 801 N.Y.S.2d 778 (Sup. Ct. Kings Cty. 2005):** *Facts* - P was injured when the vehicle he was driving collided with another vehicle. P sued D manufacturer, claiming that the design of the subject vehicle was defective because it allowed too much crash energy to be transferred to occupants of the truck instead of being absorbed by components outside of the occupant survival space. D offered expert affidavits stating that the vehicle was not defective and that crash testing performed on similar models confirmed its crashworthiness. In opposition, P submitted expert affidavits stating that the design of the vehicle was defective and that numerous alternative designs existed that would have prevented the harm. D moved for summary judgment and the Supreme Court denied the motion. *Holding*- The affidavits of the P's and D's experts create an issue of fact as to whether the vehicle was defective and whether alternative designs existed. Thus, summary judgment was inappropriate.
- **Consumer expectations are not relevant to deciding whether a product was defectively designed- Tomasino v.**

American Tobacco Co., 2005 NY App. Div. LEXIS 13284 (2d Dept. 2005): *Facts* – P widower’s decedent died from lung cancer that she contracted as a result of smoking cigarettes for more than twenty years. P sued D cigarettes manufacturers claiming, *inter alia*, that the cigarettes were defectively designed because D failed to explore or develop available technologies to reduce the levels of toxins in the cigarettes. D sought summary judgment, arguing that the dangers of cigarette smoke were known to the public and as a result, the product was in a condition reasonably contemplated by the consuming public. Supreme Court denied the motion and the Appellate Division affirmed. **Holding**- the court explained that under the applicable risk/utility test, the expectation of consumers is not dispositive. Rather, the inquiry focuses on the product itself. Here, the expert testimony that safer alternative designs were available and not utilized created an issue of fact that precluded summary judgment.

- **Foreseeability of use is a question for the jury** – Adams v. Rathe, NYLJ 8/12/05 at 18 (Sup Ct NY Cty. 2005): *Facts*- P was injured when he fell from a portable personnel lift manufactured by D. P was being raised in the lift in order to tackle a beam when the lift tipped over, causing him to fall 12 feet. Detachable outriggers that were supplied with the lift which would have prevented the fall were either lost or otherwise misplaced before the accident. P sued D manufacturer claiming *inter alia* that the lift was defectively designed because it did not contain an electronic interlock system that prevented the lift from operating without the outriggers in place. D moved for summary judgment, arguing that the lift was manufactured in accordance with the state of the art available at the time. In opposition, P offered an expert affidavit stating that it was foreseeable that outriggers would get lost and that technology was available when the product was manufactured that would have facilitated use of an electronic interlock system. Supreme Court denied the motion. **Holding**- the court ruled that the expert affidavit created an issue of fact as to whether or not the lift was defective. The expert testimony established that the proposed alternative design may have been feasible at the time that the machine was manufactured and that its use of the machine without the outriggers was foreseeable. Therefore summary judgment was inappropriate.
- **Employee affidavits not supported by records or documents insufficient to warrant summary judgment** - Ebenezer Baptist Church v. Little Giant Mfg. Co., Inc., 2006 N.Y.

App. Div. LEXIS 5481 (4th Dept. 2006): *Facts*- P church sustained damage as the result of a fire that was caused by a heater that was manufactured by D. P sued D claiming negligence and strict products liability. D moved for summary judgment, arguing that it did not manufacture the heater. In support of the motion, D offered affidavits of its employees, who testified that the heater had a metal housing that was not used on any heaters manufactured by D. Supreme Court denied the motion and Appellate Division affirmed. *Holding* – The testimony in support of the motion was conclusory in that it was not based on any specific evidence or records indicating that it was correct. Thus, D failed to make a prima facie case for summary judgment. Furthermore, P submitted evidence that it was purchased from a store that had purchased all of its heaters from D. Therefore summary judgment was properly denied.

- **Conflict between defense expert and defendant's corporate witness creates an issue of fact that precludes summary judgment** – Vincenty v. Cincinnati, Inc., 807 N.Y.S.2d 92 (1st Dept. 2006): *Facts* - P lost three fingers when the ram of a press brake descended unexpectedly and crushed his hand. P sued D manufacturer on the grounds that the machine was defectively designed because it continued to operate even after the motor was shut off and that the ram could descend even as the result of accidental actuation of the foot pedal. D's expert testified that the machine was reasonably safe, was consistent with the customs and practices of the industry at the time of its manufacture and that the technology employed in its design was the state of the art at the time of its manufacture. However, D's product safety manager testified that a safer alternative design could have been used when the machine was manufactured. D moved for summary judgment on the basis of the expert testimony Supreme Court denied the motion and the Appellate Division affirmed. ***Holding***- The testimony of defendant's expert was contradicted by the testimony of defendant's own witness. Thus, D failed to establish its prima facie entitlement to summary judgment and the motion was properly denied. COMMENT: While N.Y. law does recognize a post-sale duty to warn, cases which utilize the doctrine are rare.
- **Attorney affirmation insufficient to create an issue of fact** – Ramirez v. Miller, 814 N.Y.S.2d 148 (1st Dept. 2006): *Facts* – P sustained serious bum injuries when he was unable to open a locked door while trying to escape a fire. The door was manufactured by D and contained a "panic bar" that allowed

the door to open even when locked. Shortly before the fire the cylinders on the lock were changed. When trying to open the door, P tried to use his key but for some reason was unsuccessful. P then tried to push the panic bar but it did not open the door. P sued D claiming that the lock was defectively designed. D's expert examined an exemplar and concluded that it was not defective and that photographs of the subject lock indicated that it was in working order at the time of the fire. The expert offered a number of explanations as to why it did not open on the day of the fire. D moved for summary judgment. P opposed the motion with an affirmation from his own attorney stating that the conclusion of D's expert were "remote" "speculative" and "incredible". Supreme Court denied the motion and the Appellate Division reversed. **Holding-** D's expert affidavit established its prima facie entitlement to summary judgment. P offered no expert testimony of affidavit in opposition to the motion. The conclusory affirmation of his own counsel did not demonstrate the existence of an issue of fact.

- **Use of the product if unintended must be foreseeable – Estrada v. Berkel Inc., 789 N.Y.S.2d (2d Dept. 2005): *Facts* –** The father of 2 year old infant P left him alone in the kitchen of his restaurant. The father had also left a meat grinder running. P climbed up to the meat grinder and put his hand inside, causing him to lose four fingers. P sued D manufacturer, alleging *inter alia*, unspecified claims of strict products liability. D moved for summary judgment, arguing that the injured P was not a reasonably foreseeable unintended user of the product. Supreme Court granted the motion and the Appellate Division affirmed. **Holding-** Even if a product is defective, liability can only attach where the plaintiff is a reasonably foreseeable unintended user of the product. Here; it was not foreseeable that a two year old child would be using the meat grinder. In a dissenting opinion, Justice Crane argued that foreseeability is not a factor to be considered in evaluating claims of defective design or manufacture. Justice Crane would hold that plaintiff's expert affidavit stating that alternative designs existed created an issue of fact and summary judgment should not have been granted.
- **Alternative design must offer the same benefits as the product in question – Perez v. Radar Realty, 2005 N.Y. Misc. LEXIS 794 (Sup. Ct. Bronx Cty. 2005): *Facts* –** P sustained personal injuries and property damage as the result of a fire that erupted while plaintiff was refurbishing a wood floor with lacquer sealer and polyurethane. P sued D1 manufacturer and

D2 seller, claiming *inter alia* that the products were defectively designed in that they were too flammable. D1 move for summary judgment, based on an expert affidavit stating that while the products in question were "highly volatile" they offered other advantages including the fact that they were quick drying and prevented top coats from penetrating wood surfaces. These advantages are not present with water based sealers. As opposition, P submitted expert testimony that stated that less volatile alternatives were available including water based sealants. Supreme Court granted the motion. *Holding* – The alternative design that P offers does not provide the same benefits that the challenged products offer. The water based solvents do not dry as quickly and do not offer the same protection to wood surfaces as those at issue in this case. Therefore, P failed to submit an alternative design and the claim of design defect must fail.

- **Evidence of an alternative design already in use is sufficient to survive summary judgment** – Wald v. Costco, 2005 U.S. Dist LEXIS 2723 (S.D.N.Y. 2005): *Facts* – D moved for summary judgment, arguing that P had failed to make a prima facie showing that the product was defectively designed. P argued that the expert testimony established that the helmet was defective and that other manufacturers had utilized the proposed design alternative of using thicker helmet exteriors. The court denied the motion. *Holding* - As discussed below, the court ruled that the challenged expert testimony was admissible. The court also noted that the alternative design advocated by the plaintiff was already in use by other manufacturers. Therefore, P had satisfied its burden and presented a prima facie case for design defect.
- **Unrebutted alternative theory of causation warrants summary judgment** - Maciarello v. Empire Comfort Systems, 792 N.Y.S.2d 671 (3d Dept. 2005): P insurance company sought recovery of sums paid for property damage incurred as a result of a fire that started in a propane heater manufactured by D. P sued, claiming that the fire was caused either by a defect in the heater or improper installation. The heater was not installed by D. D moved for summary judgment, and offered the testimony of a service manager who stated that this model of heaters had an impeccable safety record, that he inspected the specific heater in question and saw no signs of defect and that the heater could not have been operation in the days prior to the fire if it was defective. P submitted an expert affidavit stating that "a properly installed defect free" heater

would not cause a fire. Supreme Court granted the motion and Appellate Division. Affirmed. *Holding* – D made a prima facie case for summary judgment. By failing to exclude causes other than defect, P failed to sustain its burden. Here, there was evidence that defective installation could have caused the fire and not product defect. Therefore, the manufacturer could not be held liable and summary judgment was appropriate.

- **Must be unsafe to a substantial number of consumers** – Pai v. Springs Indus. Inc., 795 N.Y.S.2d 98 (2d Dept. 2005): *Facts* – P was injured when she suffered an adverse reaction to sheets manufactured by D that contained formaldehyde. P sued claiming *inter alia* that the sheets were defectively designed in that they caused allergic reactions. D moved for summary judgment, arguing that the allergy to formaldehyde was rare. Supreme Court granted the motion and Appellate Division affirmed. *Holding* – A product is defective if it is not reasonably safe. In order to fit this category, the product must pose a risk of harm to a substantial portion of the population. Here, the evidence indicated that the allergy affecting P was very rare and did not give rise to a claim based on defective design.
- **Product Must Be Evaluated in Light of Technology Available At the Time of Manufacture** – *Fernandez v. Otis Elevator Co.*, 772 N.Y.S.2d 14 (1st Dept. 2004): *Facts* – P was injured when he fell through an elevator shaft after the elevator got stuck between floors. P sued D elevator manufacturer on the claim, *inter alia*, that the elevator was defectively designed in that it did not contain a toe guard or door restrictor, which would have prevented the fall. [A toe guard is a device placed at the floor of the elevator to prevent falls and a door restrictor is a device that prevents the opening of an elevator door if the car is located a certain distance above or below the opening.] D moved for summary judgment on the ground that the elevator was not defectively designed at the time it was manufactured in 1923. Supreme Court denied the motion and Appellate Division reversed. *Holding*– The determination of whether or not a product is defective for strict liability purposes depends on industry and safety standards at the time that the product was manufactured. Here, the alternative designs advocated by P - toe guards and floor restrictors -were not available in 1923. The fact that D continued to service the elevator in the years since its installation does not diminish the fact that it was not defective when it was originally designed.
- **Consumer Expectations Are Only One Factor to Consider in Determining Whether a Product is Defectively Designed** –

Miele v. Am. Tobacco Co., 770 N.Y.S.2d 386 (2d Dept. 2003):
Facts - P's decedent died of lung cancer that she contracted as a result of smoking cigarettes for more than twenty years. P sued five tobacco companies claiming, *inter alia*, that the cigarettes were defectively designed in that they failed to utilize available technology that would have reduced the toxins in cigarettes that cause lung cancer. This claim was advanced with respect to cigarettes manufactured after warnings were required to appear on cigarette cartons. Ds moved for summary judgment on the ground that the cigarettes met consumer expectations because they contained warnings about their dangers and therefore the consumers reasonably contemplated that they were harmful. Supreme Court granted the motion and the Appellate Division reversed.
Holding - Consumer expectations is only one of a number of factors to be considered in determining whether or not a product is defective. The ultimate determining factor is whether or not the product's utility outweighs the risks associated with it and whether P has demonstrated the availability of a reasonable alternative design. Here, P submitted an expert affidavit setting forth a reasonable alternative design and a jury could reasonably have concluded that the product was defective. It was error for the Supreme Court to view consumer expectations as a sole basis for determining the validity of the claim.

- **P Must Prove Actual Causation to Survive Summary Judgment** - *Gonzalez v. Delta Int'l Mach. Corp.*, 763 N.Y.S.2d 844 (2d Dept. 2003): **Facts** - P was injured while operating a table manufactured by D to make an ordinary "thru cut." The blade guard was specifically designed to be removable so as to allow the user to make "non-thru cuts." Prior to the incident, P's employer had removed the guard and never replaced it. P was unaware of the existence of a guard and his employer never mentioned one to him. P sued claiming, *inter alia*, that the saw was defectively designed because the blade guard was difficult to move and replace. P introduced expert testimony that a simpler alternative was available. At the close of trial, D moved for judgment as a matter of law and the Supreme Court denied the motion. The Appellate Division reversed. **Holding**- Even if the saw was defectively designed, P offered no proof that the difficulty of replacing the guard was the cause of the harm. The testimony at trial indicated that it was equally likely that the employer did not place the guard on the saw based solely on his own experiences using table saws. Since there is evidence that the injury may have been caused through no fault of D, P had the burden of

proving that the injury was indeed caused in whole or in part by D's negligence. Since P failed to do so, the motion should have been granted.

- **P Must Prove Actual Causation to Survive Summary Judgment** - *Milazzo v. Premium Tech. Serv. Corp.*, 777 N.Y.S.2d 167 (2d Dept. 2004): **Facts** - P was injured when the bracing arm of a machine that he was operating became loose and struck him in the face. P sued D manufacturer, claiming that the machine was defectively designed in that it did not have a treadle guard, which would have prevented the injury. P provided an expert affidavit, which stated that a treadle guard or an alternative break or shut-off device should have been installed on the machine and that those devices were inexpensive and feasible. D moved for summary judgment on unspecified grounds and the Supreme Court granted the motion. P appealed and the Appellate Division reversed. **Holding**- The expert affidavit submitted by the plaintiff was sufficient to raise a triable issue of fact. Therefore, summary judgment was inappropriate.
- **Expert Affidavit Sufficient to Defeat Summary Judgment** - *Finazzo v. Am. Honda Motor Co. Inc.*, 766 N.Y.S.2d 575 (2d Dept. 2003): **Facts** - P's decedent was killed when a fire started in the engine of the car he was sleeping in. P sued D car manufacturer, claiming, *inter alia*, that the vehicle was defectively designed. D offered evidence not detailed in the opinion, indicating that the vehicle was not defective and P countered with an expert affidavit stating that the vehicle was defectively designed. D moved for summary judgment and the Supreme Court denied the motion. Appellate Division affirmed. **Holding**- Although D did make a prima facie showing that the car was not defectively designed, the plaintiff's expert affidavit was sufficient to raise a triable issue of fact.
- **Economic Loss Necessary** - *Catalano v. Heraus Kulzer, Inc.*, 759 N.Y.S.2d 159 (2d Dept. 2003): **Facts** - P, a dentist, commenced a suit on behalf of himself and other similarly situated dentists against D manufacturer of dental restoration materials that failed prematurely. P alleged that a design defect and D's negligence caused the products to fail. P sought recovery for loss of professional reputation and business good will. D moved to dismiss the claim and the Supreme Court granted the motion. The Appellate Division affirmed. **Holding** - The "Economic Loss Rule" requires that a plaintiff suffer actual financial loss in order to recover based on claims of strict product liability and

negligence. Claims of loss of reputation and good will do not satisfy this requirement. Since P suffered no personal injury, property damage or pecuniary loss, recovery was barred. However, the court did allow P to proceed on a claim of breach of express warranty

- **No Defect If Product Meets Industry Standards** - *Lamb v. Kysor Industrial Com.*, 759 N.Y.S.2d 266 (4th Dept. 2003): **Facts** - P was injured while using a bridge saw [the nature of the injury was not discussed in the opinion]. P sued defendants, successors to the manufacturer of the saw, claiming, *inter alia*, that the saw was defectively designed because it did not have an 'emergency stop' or 'panic' button or 'kill' switch. D introduced expert testimony that the saw was consistent with the industry standards present at the time it was manufactured. D moved for summary judgment and the trial court denied the motion. The Appellate Division reversed. **Holding** - The expert testimony was sufficient to establish that the original saw guard met industry standards at the time of manufacture, and that a larger guard would have defeated the functional utility of the saw. Furthermore, the testimony established that the switches advocated by P were neither standard nor state of the art at the time the saw was manufactured. Therefore, Ds satisfied their burden by demonstrating that the saw was in a condition reasonably contemplated by the consumer and was reasonably safe for its intended use. A claim of defective design must therefore fail
- **Notice of Defect Not Necessary to Give Rise to Cause of Action** - *Sulinski v. Ardco, Inc.*, 298 A.D.2d 992 (4th Dept. 2002): **Facts** - P was injured when she tripped and fell on the floor of the refrigerator room at her place of employment. She sued D refrigerator supplier on a claim, *inter alia*, of design defect [the court did not specify the nature of defect alleged]. D moved to dismiss on the grounds that, *inter alia*, they had no actual or constructive notice of the defect. The trial court granted the motion and the Appellate Division reversed. **Holding** - Notice is not an element of a cause of action for design defect.
- **Requirements for a Cause of Action**- *Ramirez v. Sears Roebuck and Co.*, 286 A.D.2d 428; 729 N.Y.S.2d 503 (2d Dept. 2001): **Facts**- P was injured while using a table saw. There was a removable safety guard that was not attached and could not be found at the time. P sued, claiming that the saw was defectively designed since the safety guard was removable. An expert testified that it could have been affixed to the saw by a chain to ensure that it would not be misplaced,

however there was no evidence or data supporting the testimony. Supreme Court entered judgment on a *jury* verdict finding the manufacturer 50% at fault and the Appellate Division reversed, dismissing the complaint. **Holding** - To establish a prima facie case on claim of design defect, a plaintiff must show (1) that the manufacturer marketed a product which was not reasonably safe in its design; (2) that it was feasible to design the product in a safer manner; and (3) that the defective design was a substantial factor in causing the plaintiff's injury. Since the case was built on expert testimony that was "unencumbered by any trace of facts or data" a prima facie case had not been made.

- **"Not Reasonably Safe" Requirement** - *Daley v. McNeil Consumer Products Co., A Div. Of McNeil-PPC, Inc.*, 164 F.Supp.2d 367 (S.D.N.Y. 2001): **Facts**- P suffered severe allergic skin reactions after taking the drug Lactaid. When she first became symptomatic, she called the company's 1-800 number but was told that the drug could not cause problems since it was a natural enzyme. P continued taking the medication in reliance on the information she received during the phone call. {D drug manufacturer had no record of any such call having been received.} After consultations with numerous doctors, it was determined that Lactaid was in fact the cause of her allergic reactions. D had not received any reports associating reactions like that of P with the drug and P did not introduce any evidence suggesting that a substantial number of people suffered *any* allergic reaction to the drug. P sued, claiming (*inter alia*) failure to warn. D drug company moved for Summary Judgment and the motion was granted. **Holding**- P failed to prove that the drug in question was not reasonably safe and that the defect was a substantial factor in the cause of her injuries. Hundreds of millions of Lactaid pills have been produced with no records of the allergic reactions complained of. D drug company has sponsored numerous tests of the drug and never found any evidence of danger. P failed to impeach the safety record and has therefore not met her burden.
- **Reasonably Safe for its Intended Use**- *Bombara v. Rogers Bros. Corp.*, 289 A.D.2d 356; 734 N.Y.S.2d 617 (2d Dept. 2001): **Facts** – P was injured when he fell into a wheel well while riding on the back of an open trailer used for transporting construction materials. P sued on a claim (*inter alia*) of failure to warn and D, designer and manufacturer of the truck, moved for summary judgment. Supreme Court denied the summary judgment motion and Appellate Division

reversed. **Holding** – A defectively designed product is one that is in a condition reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use. The injury to P resulted from an unforeseeable misuse of the trailer. This does not create a cause of action for defective design.

- *See also - Colon ex ref. Molina v. Bic USA, Inc.*, 199 F.Supp.2d 53 (S.D.N.Y. 2001)(holding that the design alternative suggested by P was inadequate because (1) he could not show that the alternative design would have averted the injury; (2) P offered no evidence as to what the cost of the alternative would have been.
- **Reasonableness of Proposed Design Alternative is Jury Question** – *Giunta v. Delta International Machines*, 751 N.Y.S.2d 512 (2d Dept. 2002): **Facts**- P was injured while using a table saw whose blade guard had been removed. D manufacturer designed the guard to be removable to facilitate certain cutting angles that would not be possible with a guard in place. P sued for defective design and negligence. As a proposed alternative design, P suggested that a moveable guard that was used in other saws could have been used in this saw as well. That design would ensure that the guard not be removed but not hamper the ability to make cuts such as the one made by P. Whether the proposed alternative would have actually worked was a matter in dispute at trial. After the jury returned a verdict finding D 40% liable, D moved for judgment as a matter of law on the grounds that the proposed alternative was unreasonable as a matter of law and therefore a case for design defect had not been made. The trial court granted the motion and the Appellate Division reversed. **Holding**- The question of whether the proposed design alternative was reasonable is generally one for the jury and not for the court. The trial court's reliance on previous case law suggesting that a mechanism that would prevent a saw from operating without a guard in place was unreasonable as a matter of law, was misplaced because that design would not allow obscure cutting whereas the design advocated by P would. Whether the design would actually work was not for the court to decide.
- **Optional Safety Equipment**
 - **Optional safety equipment** – *Beemer v. Deere & Co.*, 749 N.Y.S.2d 253 (4th Dept. 2005): **Facts** – P was injured when a tractor he was driving, equipped with a backhoe and roll guard, jarred with unexpected force and he struck his head on the ground. P sued D manufacturer, alleging that the tractor was defectively designed because a taller roll guard, that would have prevented the injury, should have been standard on the tractor. D moved for summary judgment on the ground that a taller roll guard was offered as an optional safety device and P's employer – the tractor's owner –

elected not to purchase it. Supreme Court granted the motion and Appellate Division reversed. *Holding* - Where a claim of design defect is based upon the contention that the optional safety equipment should have been standard, a defendant must make the following initial showings: (1) the buyer was thoroughly knowledgeable regarding the product and its use and was actually aware that the safety feature was available; (2) there exist normal circumstances of use in which the product is not unreasonably dangerous without the optional equipment; (3) the buyer was in a position to balance the benefits and risks of not having the safety device in the specifically contemplated circumstances of the buyer's use of the product. The court found that deposition testimony of the product's purchaser created an issue of fact as to the first prong. The Court also found that the remaining factors were not satisfied by the defendant. Therefore, dismissal of the design defect claim was inappropriate.

- **Optional Safety Equipment** – Cordani v. Thompson & Johnson Equip. Co., Inc., 792 N.Y.S.2d 675 (3d Dept. 2005): *Facts* – P was injured when he was struck by a forklift that was driving in reverse by a co-worker in the course of his employment. P sued D forklift manufacturer, claiming that the forklift was defective in that it was not equipped with a backup alarm that would have sounded when the vehicle was in reverse. D moved for summary judgment, arguing that a backup alarm was an option that P's employer elected not to install on the vehicle. Supreme Court denied the motion and Appellate Division reversed. *Holding* – Citing the three factors listed in the Beemer case above, the court found that summary judgment was appropriate. First, the forklift's purchaser had been using forklifts for more than 20 years and at the time of the accident, had more than 30 forklift operators on staff. Therefore, they were knowledgeable about the product. Second, the forklift was in compliance with all applicable safety standards and provided an unobstructed view of the rear. Third, the buyer was in the best position to evaluate the utility of the backup alarm under the specific circumstances of its business operations. Therefore, the manufacturer could not be held liable for the decision of the purchaser not to utilize an optional safety feature.
- **Optional Safety Equipment** – Sexton v. Cincinnati, Inc., 792 N.Y.S.2d 264 (4th Dept. 2005): *Facts* – P was injured while operating a press brake when a ram came down and struck his hand. P sued D manufacturer, claiming that the machine was

defective because it did not contain a toe guard safety mechanism on the foot switch. D moved for summary judgment, arguing that a toe guard was available and the purchaser, P's employer, elected not to purchase it. Supreme Court denied the motion and the Appellate Division reversed. *Holding* – The purchaser is in the best position to decide whether or not to purchase an optional safety feature. Here, the purchaser elected not to purchase the toe guard. Therefore, the manufacturer cannot be held liable.

- **Removable Safety** - *Fernandez v. Andy, Inc.*, 776 N.Y.S.2d 305 (2d Dept. 2004): **Facts** - P was injured while using a label press that was operated without safety guards. P sued D manufacturer, claiming that the machine was defective in that the safety guards were easily removable and the machine remained operable even without the guards. The guards were not present at the time that P was injured. D moved for summary judgment claiming that the machine was originally equipped with safety devices that were subsequently removed. Supreme Court denied the motion and the Appellate Division affirmed. **Holding**- The fact that the machine was originally manufactured with safety devices does not preclude a claim of design defect. An issue of fact existed as to whether or not the machine was purposefully manufactured to be operable without the safety guards. Therefore, based on *Denny v. Ford Motor Co.*, 639 N.Y.S.2d 250, summary judgment was inappropriate
- **Optional Safety Equipment and the Knowledge of the Buyer** - *Passante v. Agway Consumer Products, Inc.*, 741 N.Y.S.2d 624 (4th Dept. 2002): **Facts** - P was injured while operating a dock leveler purchased by his employer. Upon observing a tractor-trailer backing into the loading dock, plaintiff engaged the dock leveler in order to create a bridge between the loading dock and the floor of the trailer. He then stood on the platform in order to lower the platform of the dock leveler to the level of the dock. In order to exert enough force to lower the platform, plaintiff, who then weighed approximately 140 to 145 pounds, stepped onto the lip of the platform. The dock pulled forward and the lip returned to a vertical position, causing plaintiff to fall. The office manager of P's employer had decided against using the optional safety equipment because it would not have been practical. P sued the manufacturer, alleging (*inter alia*) that the failure to include optional safety equipment amounted to a defect in design. The Supreme Court denied D's motion for summary judgment and the Appellate Division reversed. **Holding**- Citing *Scarangella v. Thomas*, 93 N.Y.2d 655; 717 N.E.2d 679; 695 N.Y.S.2d 520 (N.Y. 1999) The Court stated: "The product

is not defective where the evidence and reasonable inferences therefrom show that: (1) the buyer is thoroughly knowledgeable regarding the product and its use and is actually aware that the safety feature is available; (2) there exist normal circumstances of use in which the product is not unreasonably dangerous without the optional equipment; and (3) the buyer is in a position, given the range of uses of the product, to balance the benefits and the risks of not having the safety device in the specifically contemplated circumstances of *the buyer's* use of the product. In such a case, the buyer, not the manufacturer, is in the superior position to make the risk-utility assessment, and a well-considered decision by the buyer to dispense with the optional safety equipment will excuse the manufacturer from liability." Here, the office manager of P's employer testified that the safety measures were not practical and therefore not employed. Additionally, there were safety precautions in place that were followed at the time of the injury. As a result, the employer was in the best position to know whether the safety equipment was necessary and D could not be held liable.

- Euclides Campos v. Crown Equipment Corp., 2002 WL 1059163 (2d Cir. 2002) [Will not be published and may not be cited]: **Facts**- P was injured as a result of a forklift accident. He sued, claiming that the forklift was defectively designed in that it was not equipped with a backup alarm. D moved for summary judgment. The District Court granted the motion and the Court of Appeals affirmed. **Holding** - The court applied the three Scarangella factors to the case and concluded that the District Court was correct in its dismissal of the case. The ruling was based on the fact that the employer, knowledgeable in the area of forklifts, was aware of the optional safety feature and chose not to install it. The court also said that P failed to prove that there were no circumstances in which the forklift could be safe. Finally, the Court agreed with the District Court that the employer, and not the manufacturer, was in the best position to decide whether or not the safety equipment was necessary.
- **Optional safety Equipment; Machine Guards**
 - When a buyer chooses not to purchase an optional safety feature, the product is not defective as a matter of law if the evidence shows that: (1) buyer is thoroughly knowledgeable regarding product and its use and is actually aware that the safety feature is available; (2) there exist normal circumstances of use in which product is not unreasonably dangerous without optional equipment; and (3) buyer is in a position to balance the benefits and risks of not having the safety device. Scarangella v. Thomas Built Buses, Inc., 93 N.Y.2d

665,661, 695 N.Y.S.2d 520 (1999)

- **Manufacturer may be liable even if employer made decision not to buy optional safety device.** Lent v. Signature Truck Systems, Inc., et al., 2011 WL 4575312 (W.D.N.Y. 2011): *Facts*- P was pumping propane out of his truck when he heard the power take-off designed by D Muncie engage. P's jacket got caught in the PTO drive shaft and he was pulled underneath the truck and into the revolving PTO shaft. P sustained injuries. P initiated an action against Ds Signature Truck Systems, Inc., Base Engineering, Inc., designer and manufacturer of remote control shut off, and Muncie Power Products, Inc. Ds served third-party claims on P's employer, Ferrellgas, Inc. Ds Base and Muncie moved to exclude P's experts or to exclude their supplemental reports. All Ds also moved for SJ. Granted in part and denied in part. *Holding*- D Base argued that experts rested their conclusions on an assumption that the PTO button was inadvertently depressed, and as such, their opinions are mere conjecture. Because there are only three possibilities as to what caused P's injuries and one of them falls into what the experts would discuss, P was entitled to offer the expert testimony. P's expert was excluded because his opinions were befitting of a psychologist and not an engineer. P submitted sufficient evidence that an unguarded PTO shaft is unreasonably dangerous through expert testimony; the PTO and the remote could have been designed more safely; and that the designs at issue were a substantial factor in his injuries. Since P did not purchase the products in question, he has not established a prima facie case based on breach of express warranty and thus SJ was granted on that claim. D Signature argued that it cannot be liable for P's injuries because D Ferrellgas was a knowledgeable user who chose not to purchase optional safety devices that D Signature offered. However, P has provided sufficient evidence that under normal circumstances an unguarded PTO shaft can be unreasonably dangerous. P's failure to warn claim also survived because P may not have been aware of the specific hazard even though he was very familiar with PTOs. Here, Muncie was fully aware of the intended use of its product. Thus, their MSJ motion was denied. D Base designed the remote used to activate the PTO and its motion was denied because many feasible alternatives were suggested. Finally, D Ferrellgas was denied SJ because P received conflicting advice when it came to the problem at issue. Additionally, there are genuine issues of fact regarding whether D Ferrellgas was negligent in purchasing the PTO driveline shaft without a guard.

- **Crashworthiness**

- In our study of the law in Trial Lawyers Quarterly, "Crashworthiness- Law and Practice in New York," 29:197 (1999), we discussed the issue of the effect of culpable conduct on the part of the driver. We again pointed out the lack of clear law defining the second accident as a new start where the driver's conduct in the first accident was irrelevant. Now, with *Alami* we have a holding that the driver's drunkenness, which precipitated the accident, is not a defense to the potential liability of Volkswagen to his widow as to making the car safe to have a crash in. Indeed, the court cites *Bohn v. Triumph Corp.*, 33 N.Y.2d 151; 305 N.E.2d 769; 350 N.Y.S.2d 644 (1973) as a precedent-which is a recognized crashworthiness decision.
- **In crashworthiness or second collision claim plaintiff must show defect-enhanced injuries.** *Doomes v. Best Tr. Corp.*, 126 A.D.3d 629 (1st Dept. 2015): **Facts-** Plaintiff-passengers were injured in single-vehicle bus rollover. Plaintiffs sued bus constructor and bus owner-operator. Product claim against constructor (Warrick Industries) was based on absence of seatbelts. Case previously tried, appealed, reversed and new trial ordered, to be joint trial with both defendants. **Holding-** In crashworthiness claim, burden is on plaintiffs to show by independent proof that the absence of seatbelts was a defect that caused enhanced injuries. As such, there should be a unified trial where jury considers liability of both owner and constructor.
- **Where P's Illegal Conduct Contributed to the Injury- *Alami v. Volkswagen of Am.*** 97 N.Y.2d 281; 766 N.E.2d 574; 739 N.Y.S.2d 867 (N.Y. 2002): **Facts-** Decedent, who was intoxicated at the time, crashed into a tree and sustained fatal injuries. P (his wife) sued on a claim that a defect in the car's design enhanced the injuries to the decedent. P's expert witness testified that due to structural deficiencies in the manufacture of the vehicle, its floorboard buckled upward during the collision. He noted that the vehicle did not have adequate sub-frame reinforcement, and that the resultant buckling caused the decedent to be thrown forward, causing thoracic and abdominal injuries that led to his death. The expert concluded that if the vehicle had a transverse stringer to provide adequate structural support and a three-point combination lap and shoulder harness--safety features which were readily available and in common use in the automobile industry--the decedent would have survived the crash with minimal injury. D argued that the suit should be barred on public policy grounds since the injury was sustained while the decedent was engaged in conduct that was a serious violation of the law. Supreme Court granted D's motion and the Appellate Division affirmed, stating: "the negligent manner in which the decedent was operating his vehicle was the sole proximate cause of the collision and his fatal

injuries." The Court of Appeals reversed. **Holding-** The court explained that its previous rulings, in which similar cases were barred, were based on the notion that an illegal act or relationship cannot be used to create the defendant's duty. Here, however, the duty that Volkswagen owes is one owed to all drivers regardless of any one specific act. As a result, it cannot be said that the duty arises out of the criminal act and therefore the suit will not be barred.

- **Joint and Several Liability-** *Said v. Assaad*, 289 A.D.2d 924, 735 N.Y.S.2d 265 (4th Dept. 2001): **Facts-** P's infant son sustained serious injuries when the car in which he was being driven collided with a pickup truck on which a snow plow had been mounted. P filed suit (*inter alia*) against the manufacturer of the snow plow, claiming that a defect caused a hydraulic cylinder to come loose and strike the child. The jury returned a verdict finding the driver of the car in which P was riding 95% liable and the manufacturer of the snow plow 5% liable. P moved to hold the manufacturer jointly and severally liable for all injuries suffered by his son. Supreme Court denied the motion and the Appellate Division reversed. **Holding-** To the extent that alleged defect in the snow plow may have enhanced one or more injuries, joint and several liability should have been imposed. The charge to the jury was too general by the fact that it did not instruct them to determine the role that the defect played in each injury, making a determination of joint and several liability impossible. As such, the charge was erroneous and reversal was warranted on that issue

- **Labeling; Warning**

- *Liriano v. Hobart Corp.*, 92 N.Y.2d 232; 700 N.E.2d 303; 677 N.Y.S.2d 764 (N.Y. 1998): The general rule in New York, is that a manufacturer has a duty to warn of latent dangers resulting from (1) foreseeable use of its product whether intended or not, (2) of which it knew or should have known. In addition, the fundamental issue of proximate cause must be proven.
 - There are two approaches that a defendant may take in arguing for dismissal of a failure to warn.
 - **No Duty At All** – *Hutton v. Globe Hoist. Co.*, 158 F.Supp.2d 371 (S.D.N.Y. 2001): Where the dangers are so obvious that they should have been recognized as a “matter of common sense” then there will be no duty to warn regardless of whether or not the P was aware of them.
 - **Failed to Prove Proximate Cause** – *Hutton v. Globe Hoist. Co.*, 158 F.Supp.2d 371 (S.D.N.Y. 2001): P was aware of the potential dangers even without warning. D can argue that failure to provide it was not the proximate cause of P's injuries. Even had a warning been given, it would have added nothing

that P did not already know. Under this approach, the Court need reach the issue of whether or not the dangers were “open and obvious”.

- **Fact issue for jury whether a more prominent warning might have prevented injury.** Engler v. MTD Products, Inc., 2015 WL 900126 (N.D.N.Y. 2015): **Facts-** Plaintiff was driving his Cub Cadet power lawnmower down a hill traveling from his property where he finished mowing to another property. He had only recently purchased it. He felt it going forward without him pressing the gas pedal and the brakes seemed not to work. The mower tipped and he was thrown to the ground and injured. Defendants were the makers and sellers of the mower. The usual products liability claims were made in the complaint. After discovery and depositions of experts, defendants sought to strike the testimony of the plaintiff’s expert under Daubert, and also sought SJ. At issue were the qualifications of the expert and the reliability of his opinion, and how it fit into NY law. His opinion is presented as rather diffuse but the central point was that the brakes did not hold due to a misadjustment of the brake system, which was a disc/caliper system. The defense expert, an employee of the defendant, found upon inspection (which the plaintiff’s expert had not done) that the brake pads were badly worn, much more than could be accounted for through normal use, and he opined that the plaintiff abused the mower, by riding the brakes. The manual warned that the user should check the brake pads regularly, but plaintiff had not read the manual. The court, in a heavily fact specific decision, partially denied SJ, finding factual issues to be resolved. **Holdings-** In order to make a strict liability claim for design defect, the plaintiff must provide proof of a feasible alternative design. The expert did not attempt to do so here. As to a manufacturing defect, plaintiff was relying on circumstantial evidence, but the expert had not eliminated all alternative causes, one of which was misuse, as the defendant asserted. As to failure to warn, adequacy of warning may be decided as a matter of law upon a MSJ under circumstances where the risk was patently open and obvious or where a user would be aware of the risks through general knowledge, observation or common sense. Here the court found fact issues for a jury, precluding SJ. The hazards were not clearly open and obvious. This is so even though the user conceded that he had not read the manual (which had warnings with exclamation marks). It is a fact question whether the warnings were prominent and conspicuous enough to bring notice to the user. The fact issues for the jury are whether a more prominent warning would have led plaintiff to have checked the brake pads. Concession that the user had not read written instructions does not necessarily sever the causation issues for the

jury. As to the cause of action based upon breach of implied warranty, the plaintiff is freed from proving a risk/benefit analysis, so this too is an issue for the jury since the mower did not perform as its intended purpose was and hence was not fit for that purpose (citing *Denny v. Ford Motor Co.*, 87 N.Y.2d 248 (N.Y. 1996)).

- **Adequacy of warning is fact issue for jury, which jury can decide without expert testimony.** *Roman v. Sprint Nextel Corp.*, 2014 WL 5026093 (S.D.N.Y. 2014): **Facts-** Plaintiff rode a bus from NC to NYC. She put her cell phone, which was not turned off, inside her camisole (as the judge says) and up against her breast. When she got to NY she found it was stuck to her skin. Medical treatment showed that she had been burned there. Later she developed complex regional pain syndrome (CRPS). She sued the cell phone manufacturer, HTC, and also the seller, Sprint Nextel. Plaintiff asserted a failure to warn claim on the basis that there was no warning in the literature which came with the phone that a burn could occur. After exchange of expert data, defendants moved for SJ, in combination with motions to strike plaintiff's two experts. One expert was an electrical engineer, who explained how the burns were due to radiation, which occurred while the phone was working on its own. The second was a physician who testified to general and specific causation. **Holdings-** Many pages of the decision review the testimony of the experts (which the court makes no final ruling on—nor on plaintiff's motion to strike or limit defendants' experts). SJ was denied on the failure to warn claim. Defendants erred in their assertion that one needed expert testimony to prove a failure to warn. The adequacy of the warning is a fact question for the jury and the jury would not need expert evidence on that issue, since the issues were within the ken of the ordinary juror. In fact, the jury could also infer causation based upon these facts, without expert testimony.
- **Manufacturer and distributor can be held liable for failure to warn of risks in way product was packaged.** *Filer v. Keystone Corp.*, 128 A.D.3d 1323, 9 N.Y.S.3d 480 (4th Dept. 2015): **Facts-** To put simply a complex set of facts, plaintiff was injured when metal parts fell out of a crate being unloaded. One defendant had manufactured the parts and then packed them in the crate. The crate was transferred to a second defendant to nickel-plate the parts. This plater got directions about how to repack and there were contractual provisions as well. It was claimed that the plater did not repackage the parts as directed or otherwise in a safe way; and strict liability was asserted based on this conduct and failure to warn. The trial court refused to grant SJ, and defendants appealed, but the order was affirmed. **Holdings-** The

manufacturer and plater, who was a distributor under the law, are in the chain of distribution and therefore subject to strict products law and common law negligence. The manufacturer could be found liable as to its design of the crating and the directions it gave, and the plater could be liable for failing to repack the parts in a safe way. Further, the court held that the action could be maintained as a breach of contract, for which the injured worker was a third-party beneficiary, in that the contract with his employer required safe delivery. Regarding SJ, the defendants had not met their initial burden of establishing as a matter of law that any acts or omissions were not a proximate cause of the accident.

- **Warning can be found to be adequate as a matter of law.**

McDowell v. Eli Lilly and Co., 58 F. Supp. 3d 391 (S.D.N.Y. 2014) reconsideration denied, 2015 WL 845720 (S.D.N.Y. 2015): **Facts-** Plaintiff was using the prescription drug Cymbalta (duloxetine) for depression. She stopped the use of the drug suddenly and experienced withdrawal side effects (short term dizziness and “brain zaps”). The labeling for the product at the time warned physicians of this risk. The deposition of the prescriber brought out that she was aware of these risks. Plaintiff then argued that the warnings were not adequate, for among other reasons, because they did not state the percentage incidence of these side effects. The district court granted the defendant drug manufacturer’s motion for SJ. **Holding-** A drug manufacturer under NY law must make an adequate warning of side effects associated with the use of its drug. Under the learned intermediary rule, this warning is owed only to the prescriber. In certain cases, as recognized by NY precedents (Martin), the issue of the adequacy of the labeling may be decided as a matter of law. On the record, as very extensively set forth by the court, as a matter of law the warnings relating to rapid withdrawal side effects were adequate. Also, under NY law, the plaintiff must show that if the more proper warning proposed by the plaintiff had been given, the doctor would not have prescribed the drug. Finally, since the warning claim failed, it also took down the claims for fraud and breach of warranty.

- See also Torres v. City of New York, 127 A.D.3d 1163, 7 N.Y.S.3d 539 (2d Dept. 2015), in which the Second Department affirmed the grant of SJ where the plaintiff was injured while working near an excavator. The manufacturer had argued that the risk was open and obvious, and that any warning it might have given would have gone unheeded.

- **Summary judgment proper where instruction manual disregarded** – Admiral Indem. Co. v. Chernoff, 116 A.D.3d 635,

985 N.Y.S.2d 225 (1st Dept. 2014): **Facts** – Plaintiff sought to recover damages resulting from a dryer fire that occurred in a condominium unit, due to lint catching fire. The suit named Electrolux, the manufacturer of the dryer, and Quality Air, LLC, which serviced and cleaned the dryer prior to the fire. Defendant manufactured moved for SJ which was granted dismissing the negligence cause of action. Plaintiff appealed. **Holding** – Affirmed. Evidence, including the Electrolux instruction manual as to the proper way to clean lint out of the clothes dryer, the testimony of Electrolux's safety engineer as to the way consumers should clean lint out of the dryer, and the testimony of unit owners that they did not follow the instructions as to cleaning lint out of the dryer, demonstrated conclusively that Electrolux was not negligent in connection with the fire.

- **Adequacy of a warning is fact to be determined at trial** – Houston v. McNeilus Truck & Mfg., Inc., 115 A.D.3d 1185, 982 N.Y.S.2d 612 (4th Dept. 2014): **Facts** - Plaintiff sought damages arising from the decedent's death during a garbage truck accident (the nature of the accident and defect in the truck are not set forth in the opinion.) Defendant manufacturer moved for SJ as to failure to warn and manufacturing defect, which was granted in part. **Holding** – The court erred in denying defendant's MSJ with respect to the claims for a manufacturing defect. However, the court properly denied that part of defendant's motion as to the claim for failure to warn. A manufacturer has a duty to warn resulting from foreseeable uses of its product, which it knew or should have known. The nature of the warning and to whom it should be given depend on a number of factors including the harm that may result from use of the product without the warnings, the reliability and adverse interest of the person to whom notice is given, the kind of product involved and the burden in disseminating the warning. Thus, in all but the most unusual circumstances, the adequacy of a warning is a question of fact to be determined at trial, the court citing several precedents. (The court also observes that contradictory expert reports, which sets up a credibility battle, remains an issue).
- **Doctor's lack of expertise in field did not disqualify him from offering opinion; duties of drug manufacturer realting to off-label use** – Bee v. Novartis Pharm. Corp., 2014 WL 1855632 (E.D.N.Y. May 9, 2014): **Note** – This is one of a number of cases pending in the EDNY for users of Zometa and Aredia who developed ONJ – osteonecrosis of the jaw. There had been an MDL for these products in Tennessee and these cases were retransferred. Defendant sought SJ on two different bases: striking the testimony of experts who were “case-wide,” that is generic

experts; and also under lack of duty under New York law. As to the latter, the decision is useful as it reads like a treatise on the duties of drug manufacturers in our state. **Facts** – Plaintiff sued Novartis alleging that the drugs Zometa and Aredia, prescribed for osteoporosis caused ONJ. Defendant moved to exclude the testimony of plaintiffs’ case wide experts and for SJ. **Holding** – Denied. With respect to plaintiffs’ duty to warn claim, a pharmaceutical manufacturer has a duty to warn of risks associated with off-label use. Adequacy of the warning is a fact issue, and this includes whether plaintiff’s actions would have differed had the warning been different. The court must ensure that the expert will be proffering opinions on issues or subject matters that are within his or her area of expertise. However, if an expert has educational and experiential qualifications in a general field closely related to the subject matter in question, the court will not exclude expert testimony solely on the ground that the witness lacks expertise in the specialized areas that are directly pertinent. The Court held that Dr. Kraut’s lack of expertise in the pertinent fields did not disqualify him from offering an opinion as to plaintiff’s ONJ. Otherwise, Dr. Kraut’s methodology was sufficient to satisfy Daubert. Thus, defendant’s motion to exclude expert testimony was denied.

- **Manufacturer has duty to warn of the danger of reasonably foreseeable but unintended uses of a product- Saladino v. Am. Airlines, Inc., 500 Fed.Appx.69 (2d Cir. 2012): **Facts** - Plaintiff sustained serious injuries in 1999 while employed as a baggage handler at JFK Airport for third-party defendant. While riding on a baggage tractor manufactured by defendant, plaintiff was struck in the head by the tractor’s hood, rendering him quadriplegic. The hood blew off in jet blast. When originally sold, defendant manufacturer offered a cab as optional equipment, which would have deflected the hood had it been in place. American had purchased the cab but later removed it. Manufacturer impleaded defendant seeking contribution and indemnification. District Court granted summary judgment on all claims except failure to warn and loss of consortium. Jury found for plaintiffs apportioning fault 30% to manufacturer and 70% to the airlines. Defendants appealed liability and denial of remittitur on damages. Affirmed. **Holding**- Manufacturer has duty to warn of the danger of unintended uses of a product provided these uses are reasonably foreseeable. A jury could reasonably have found that it was foreseeable that tractor would be used without a cab, given evidence that cab was only an option, and that cab was designed and marketed for operator’s comfort rather than safety feature. Further, expert testimony as to what a proper warning label should have said (let alone the actual wording) was not required**

because the jury could understand the basic issue. Additionally, the fact that the tractor's hood could rotate into the passenger compartment was not open and obvious to reasonably prudent person, even if plaintiff was seen as a knowledgeable user.

Comment: Perhaps due to the size of the verdict, the defense-minded Product Liability Advisory Council submitted an amicus brief for appellants.

- **Adequacy of warnings as to medical device is a fact question that cannot be decided at a preliminary stage in the litigation-** Henson v. Wright Med. Tech., Inc., No. 5:12-cv-805 FJS/TWD, 2013 WL 1296388 (N.D.N.Y. March 28, 2013): **Facts-** Plaintiff received a Wright ProFemur Total Hip System that defendants designed, manufactured, tested, labeled, marketed, and sold. About eight years later, the femoral neck suddenly fractured causing plaintiff to have emergency surgery for a total hip replacement. Plaintiff asserted various product liability causes of action. Defendant moved to dismiss. Motion granted and denied in part. **Holding -** Plaintiff insufficiently pled a failure to warn claim because his allegations lacked facts as to how or why the acknowledged warning was inadequate, that is, about what risk of harm, or in what way, the acknowledged warning failed to warn. Accordingly motion was granted with leave to amend. Court cannot determine the adequacy of the warnings provided by defendant to physicians at the pleading stage. Lastly, as to the unavoidably unsafe exception, a manufacturer is not strictly liable for injurious side effects from properly manufactured prescription drugs, provided they include adequate warnings about potential side effects and proper directions for use: even if the exception applies, defendant's defense hinges on the adequacy of the warnings it provided to the medical community. Court cannot determine the adequacy of such warnings at this early stage of the proceedings. **2d holding:** The court rejected defendants defense of pre-emption as the device was approved only under the 510(k) provisions of 21 U.S.C. Sec. 360k(a). **3d holding:** A cause of action for misrepresentation under Gen.Bus Law Sec. 349(a) and 350 was dismissed since plaintiff did not plead a violation with specificity.
- **Summary judgment warranted where no evidence was produced to prove manufacturer knew or should have known of particular risk-** Hollman v. TASER Intl., Inc., No. 06-cv-3588 JFB/ARL, 2013 WL 864538 (E.D.N.Y. March 8, 2013): **Facts -** Plaintiff, as Administrator, brought suit against defendant manufacturer alleging that TASER was strictly liable or negligent for failing to warn police officers that repeated applications of an Electronic Control Device (ECD) can result in fatal metabolic acidosis. Defendant moved for summary judgment. MSJ on failure

to warn was granted. **Holding** - Plaintiff did not submit evidence that defendant knew or should have known at the time the gun was used that repeated ECD application in drive-stun mode could cause metabolic acidosis. A manufacturer cannot insure against all injuries that arise from the use of its products. No studies or any other evidence were produced that would have placed defendant on notice of the risk that multiple applications of an ECD in drive-stun mode could contribute to metabolic acidosis. Although plaintiff's experts survived a Daubert challenge, they could not provide proof of defendant's awareness of this risk. Further, defendant does not have an unqualified duty to uncover all dangers that are scientifically discoverable. Accordingly, no reasonable jury could conclude that defendant knew or should have known of this risk at the time of plaintiff's death when no evidence, through medical studies or otherwise, which would have placed defendant on notice. **2d holding:** As to plaintiff's claim of breach of implied warranty, TASER labeling disclaimed all implied warranties. Nor were there any defects in workmanship which would have created a basis for suit under an express warranty.

- **Failure to warn claim survived when similar drug had more detailed warnings; no extra duties created if drug is advertised "direct-to-consumer"- DiBartolo v. Abbott Laboratories, 914 F.Supp.2d 601 (S.D.N.Y. 2012): **Facts-** Consumer brought all the usual product liability actions against defendant manufacturer, alleging her use of Humira to treat her psoriasis caused her to develop squamous cell carcinoma of the tongue. Defendant moved to dismiss. Granted in part and denied in part. **Holding-** Manufacturer's direct-to-consumer (DTC) advertising did not constitute an exception to learned intermediary doctrine. Plaintiff failed to show that defendant alleged DTC advertising or its speculatively alleged compensation of prescriber by manufacturer provided reason for the Court not to apply that doctrine which is firmly established in New York law. Restatement (Third) of Torts: Products Liability sec. 6(d) does not call for a contrary result and in any case is probably not adopted in New York. Plaintiff did however sufficiently allege failure to warn. Although the Humira label warned about the cancer plaintiff developed, it was not as complete a warning as those used on a similar product. The Remicade label referenced by plaintiff was publically available as of September 2006, so it was plausible that defendant knew of this enhanced risk well before plaintiff was prescribed Humira in 2008. Plaintiff did not adequately allege that Humira as designed posed a substantial likelihood of harm. Additionally, plaintiff did not adequately allege that it was feasible to design Humira in a safer manner. Plaintiff did not offer an alternative design. The consumer failed to state a claim for breach**

of express warranty. Two of the three statements alleged as breaches of warranty relate to risks other than the risk that plaintiff is alleging. The third has not adequately been alleged to be false or misleading when made. Overstatements do not constitute breach of express warranty because plaintiff could not have relied on them to her detriment. The New York standard requires a specific affirmation of fact or promise that is false or misleading, which was not the case here. The consumer sufficiently alleged breach of implied warranty of merchantability, based on the defect in the labeling which gave rise to the failure to warn cause of action.

- **Failure to warn claim survived when safety equipment and warning stickers were not installed and manufacturer had knowledge of the problem-** Gunn v. Hytrol Conveyor Co. Inc., No. 10-cv-00043, 2013 WL 2249241 (E.D.N.Y. May 22, 2013): **Facts-** Plaintiff commenced action against defendants alleging breach of warranty, strict liability and negligence. Plaintiff sustained injuries to his left hand while attempting to clear a jam in a conveyor belt. When defendant ships the Model TH conveyor belt to the end user, it includes the dust pan covers along with the other components of the conveyor belt. Similarly, warning stickers were included in the shipment and are to be affixed by the installation company. On date of accident, the conveyor was not commissioned or turned over to Duane Reade for use, but the conveyor belt was operational. There was no dust pan cover installed. There was no warning sticker. Defendant moved for summary judgment. Motion granted in part and denied in part. **Holding-** As for failure to warn, defendant's open and obvious danger defense failed because warning stickers were not on the conveyor belt and plaintiff may not have had a clear view of the rollers. Defendant had a duty to convey that a dust pan cover existed to protect users against the dangers of the Model TH conveyor belt, and that the belt should be used only with such covers. Defendant further presented no facts to rebut the presumption that plaintiff would have heeded warnings had they been given, thus preventing his injury from occurring. The failure to install the correct dust pan cover was not a superseding cause interrupting the link as it is clear that defendant knew they had sent the wrong dust cover. As for design defect, the question was whether the design of the belt is defective because it can operate without the dust pan cover. Here, plaintiff presented evidence raising a triable issue of fact as to whether defendant purposefully manufactured the subject conveyor belt so as to permit use without the dust pan cover. Plaintiff, however, failed to adduce evidence to demonstrate that there was a safer, more feasible design alternative. Since defendant properly excluded any implied

warranties through its express warranty, plaintiff's implied warranty claim must be dismissed. Defendant asserted that the express warranty that the product delivered to Duane Reade conformed to the design specifications was clearly violated by the failure to provide the proper guarding and warning stickers.

- **Failure to warn claim survives summary judgment based on whether plaintiff was warned and whether defendant manufacturer was required to put on a warning decal on the loader arms-** Buitrago v. H.O. Penn Mach., No. 100154/08, 2013 Slip Op 30977(U)(Sup. Ct. N.Y. County 2013): **Facts-** Plaintiff alleged that his left hand was partially crushed by a multi-terrain loader equipped with a pallet fork attachment. It was made by defendant Caterpillar and sold by H. O. Penn. Plaintiff asserted causes of action against defendant seller of the product and defendant manufacturer and designer of the product for strict product liability, negligent design, manufacture, and sale of the loader, failure to warn and breach of warranty. Defendants contended the loader was not defectively designed because the crush danger was open and obvious. Defendants moved for summary judgment. **Holding-** There were triable issues regarding design of the loader sufficient to preclude Summary Judgment. Plaintiff had a qualified expert on the design issues. Defendant manufacturer's repeated contentions that plaintiff was an experienced loader operator and fully appreciated the danger of placing his left hand at a crush point were mere speculation, not based on the evidentiary record. Plaintiff raised triable issues of fact regarding whether plaintiff was warned, and whether defendant manufacturer should have required a warning decal on the loader arms. Further breach of warranty causes of action raised fact issues for a jury to decide. Defendant H. O. Penn was in the chain of distribution and could not escape exposure to liability.
- **Even without expert testimony, there was question of fact as to whether warnings were sufficient-** Quiles v. Bradford-White Corp. et al., 2012 WL 1355262 (N.D.N.Y. 2012): **Facts-** P are husband and wife who have two children. When P wife opened basement door, a sudden violent explosion, flash over and fire occurred. P husband and wife sustained serious burns. Ps theorize that combustible vapors emanating from gasoline that leaked from a lawn tractor in the garage traveled along the floor to a water heater where it was ignited by the pilot light. Ps assert that the water heater was defectively designed and manufactured and unreasonably dangerous and failed to warn of said dangers. D manufacturer moved for SJ. P withdrew manufacturing defect claim. Ps asserted that water heater was defectively designed in that it did not have a flame arrestor on

the pilot light, an elevated pilot light, or a sealed combustion area. D's motion was denied. *Holding- Ps' expert reports did not set forth any analysis about an alternative water heater design or the feasibility of an alternative design. Moreover, neither expert report offered an opinion about whether water heater was reasonably safe or defective as designed. Ps failed to establish alternative design for purposes of the design defect claims in this case. Ps' design defect claims were dismissed. D manufacturer had no duty under NY law to perform a post-sale retrofit or recall of the hot water heater, so these claims were dismissed. The warnings on the hot water heater and in its instructions manual clearly warn of the dangers associated with flammable vapors in the vicinity of the heater. However, there was a question of fact as to whether the warnings sufficiently warned of dangers associated with flammable vapors located in an adjacent room. Accordingly, Ps may be able to establish their failure to warn claim.*

- **Where permissive language is ambiguous and witnesses were unaware of safety device, fact question for failure to warn claim- Goss v. JLG Industries, Inc., 2012 WL 268034 (W.D.N.Y. 2012): *Facts-* Ps received electrical shock caused by static build-up while operating JLG 2033E scissor lift machine which lacked static strap. Ps claimed that D was liable under theories of negligence and strict liability for design and manufacture of scissor lift. D moved for SJ. A also moved to exclude expert testimony. D's motion to exclude expert testimony was granted, but As MSJ was denied in part and granted in part. *Holding-* A alleged that the machine was equipped with a static strap at the time it left its control. Additionally, it is undisputed that it is D's policy to attach static straps any time customers opt for non-marking tires (which was the case here). D's MSJ on the manufacturing defect claim was denied since there appeared to be an issue of fact. D's MSJ as to failure to warn was denied because permissive language of the only warning to explicitly mention static straps combined with numerous witnesses who were wholly unaware of the need for such a strap created a genuine issue of material fact concerning the warning's adequacy. D's motion to exclude the testimony of P's expert was granted because the only purpose for which he was offered was to pull together all of the factual evidence and present it to the jury with scientific explanation which did not warrant the admission of the testimony.**
- **Inadequate warning not basis of liability when n's conduct caused accident- Fredette v. Town of Southampton, 2012 WL 1606066 (2d Dept. 2012): *Facts-* P brought action against town,**

motorcycle manufacturer (Honda) and seller to recover for injuries sustained in accident. Ds moved for SJ. Trial court granted SJ in town's favor, but denied manufacturer's and seller's MSJ. 1t appealed and manufacturer and seller cross-appealed. Affirmed as modified. *Holding-* (1) Town was immune from liability pursuant to recreational use statute; (2) 1t's SJ affidavit did not raise any triable issue as to adequacy of manufacturer's warnings; and (3) alleged inadequacy of warnings was not cause of accident. There was no evidence that manufacturer or seller had special knowledge of condition peculiar to 1t which rendered use of motorcycle unreasonably dangerous, and thus negligent entrustment claim was dismissed. As to failure to warn, 1t concede that he just skimmed through motorcycle's manual, and therefore could not have relied upon any particular warnings. Additionally, 1t testified that he drove right through a pile of leaves.

- **Summary judgment denied on failure to warn claim based on the type of ventilation needed when using a lacquer-sealer even though the label was read- Marache v. Akzo Nobel Coatings, Inc., 2010 WL 3731124 (S.D.N.Y. 2010): *Facts-* P brought an action against D, a solvent-based lacquer sealer manufacturer, alleging that sealer caused a fire in which he sustained burns. P alleged that: D failed to provide adequate warnings; D's lacquer sealer is defectively designed; D acted negligently in the manufacture, formulation, production, distribution and sale of the sealer; and D breached express and implied warranties. D moved for SJ. D's motion was granted in part and denied in part. *Holding-* A report and recommendation of the magistrate judge was accepted except to the extent that D's motion sought SJ on P's claim that D failed to provide adequate warnings about the type of ventilation a consumer would need when using D's lacquer-sealer. The Magistrate Judge issued a supplemental report and recommendation discussing the applicability of Hazard Communication Standard, 29 C.F.R. §1920.1200. P failed to read the warnings label except for the word "flammable," and that P's co-workers instructed P to turn off the gas and electricity before using the lacquer sealer. D incorrectly argued that different federal regulations govern P's failure to warn and claim. This new argument was not considered because the regulation expired and D has faced extensive litigation regarding this particular product and failed to mention it in any of its other papers**
- **Asbestos-containing product supplier liable based on proof of exposure; failure to test and warn - Penn v. Amchem Products, 2011 WL 2225961 (1st Dept. 2011): *Facts-* P was exposed to asbestos-containing dental liners and developed mesothelioma. P's dental technician school gave him boxes containing dental**

liners used to make prosthetic teeth that were manufactured by other Ds, Amchem, and distributed by D, Kerr. The boxes had Kerr's name on them. Ps brought suit against all Ds in the chain. P prevailed at trial. His verdict was sustained on post-trial motions. **Holding-** Evidence, viewed in light most favorable to Ps was sufficient to permit jury to rationally conclude that asbestos-containing dental liners were distributed by Kerr. On issue of causation, sufficient evidence was provided by P's testimony that visible dust emanated while working with dental liners and by his expert's testimony that such dust contained enough asbestos to cause his mesothelioma. On issue of duty to warn, evidence that D, Kerr, did not test or investigate safety of its asbestos liners permitted jury to conclude that D, Kerr, failed to adequately warn P of a potential danger that it knew or should have known about.

- **Where treating physicians would have prescribed Zyprexa even if a different warning had been provided, a drug manufacturer cannot be liable for failure to warn-** Gove v. Eli Lilly & Co., 394 Fed. Appx. 817 (2d Cir. 2010) and Head v. Eli Lilly & Co., 394 Fed. Appx. 819 (2d Cir. 2010): **Facts-** Ps, Arizona residents, brought claims for diabetes allegedly caused by Zyprexa. In re Zyprexa Products Liability Litigation, 2009 WL 5062109 (E.D.N.Y. 2009). Ps assert that they would not have been prescribed it had D properly warned of drug's dangers. The District Court granted SJ motion. The Second Circuit upheld the trial court's ruling. **Holding-** Arizona law recognizes the learned intermediary doctrine exception to failure to warn cases. Ps must prove that had a proper warning been given, prescribing physician would have acted differently. After applying Arizona law, there is no evidence that Ps' treating physicians would have altered their decision to prescribe Zyprexa had a different warning been provided by D. Because Ps' practitioners were aware of risks and still prescribed Zyprexa, Ps have failed to establish that D's inadequate warnings regarding potential risks associated with Zyprexa were a proximate cause of their injuries.
- **Warning to be "extra careful" when using a product insufficiently specific to the circumstances of the danger -** Barker v. Mobile Pallet Truck, Inc., 897 N.Y.S.2d 562 (4th Dept. 2010): **Facts** - P injured when an approximately six-foot-high air compressor tipped off a pallet jack manufactured by D. At the time of the accident, P was helping his supervisor move the air compressor on the pallet jack without the benefit of an underlying pallet. The only relevant instruction on the warning label was to "[b]e extra careful when you handle wide or high loads." D moved for summary judgment arguing that this warning was sufficient and that further warnings would have been superfluous because P

was aware the load was tipping over but continued to move it. P submitted evidence from the designer of the product that it was only meant to be used with a pallet and that moving objects without a pallet would be unstable. Further, any object over four feet high constituted an unstable load and the designer was aware that pallet jacks at times were improperly used. The Supreme Court granted D's motion. The Appellate Division reversed as to the failure to warn claim. **Holding:** A manufacturer has a duty to warn of the danger of unintended uses of a product provided these uses are reasonably foreseeable. The general instruction was insufficient to provide adequate warnings concerning the dangers of moving oversized items or indeed any items without a pallet. Further, P did not observe that the compressor was tilting until after his supervisor had already begun to move it. Also, the compressor began to fall less than a second after the P noticed the instability and he therefore had no time to avoid the accident.

- **P must present evidence that the lack of a warning was a cause of the accident** – Santos v. Ford Motor Co., 893 N.Y.S.2d 537 (1st Dept. 2010): **Facts** – Ps, purchasers of Ford Explorers, sued Ford for failing to warn Ps that the Explorer becomes more unstable as it is loaded with passengers and cargo. At trial, Ps requested the Court charge the jury on failure to warn. The Court refused. The jury returned a verdict for the defense and P appealed. The Appellate Division affirmed. **Holding:** P must prove that D's failure to warn was a proximate cause of the Ps injury. P presented no evidence that they would have bought different vehicles or packed the car differently had Ford given the warning suggested.
- **Failure to warn cause of action requires that user read the product label** – Yun Tung Chow v. Reckitt & Colman, Inc., 891 N.Y.S.2d 402 (1st Dept. 2010): **Facts** – While attempting to unclog a drain using D's drain cleaner, P sustained an eye injury. The product warned users to keep away from the can and drain at all times because splash-back may result in serious injury. P did not speak English and testified that he made no attempt to read or to obtain assistance reading the label. In addition, users were warned to put only one tablespoon of the product directly into a drain. Instead P mixed three spoonfuls of the product with three cups of water in an aluminum can and then, without using eye protection as directed, bent over and poured the mixture into the drain. The liquid splashed back into P's face, causing injury. P sued D manufacturer alleging, *inter alia*, that the warning was inadequate and that the product was unreasonably dangerous due to its propensity to cause splash-back. P claimed a safer alternative would have been to dilute the product to a three to five

percent sodium hydroxide composition as this would have provided the same cleaning power but taken longer to do the job. D moved for summary judgment. The Supreme Court granted D's motion. The Appellate Division affirmed. **Holding:** P's inadequate warning claims were properly dismissed. Because P made no attempt to read the product label, any purported labeling inadequacies were not a substantial factor in bringing about the injury. The design defect claims were also properly dismissed. Although P's expert suggested an alternative design, he did not explain how his recommended dilution would provide enough cleaning power to enable the product to continue to be effective. Further, P's expert opinion that nothing the consumer did caused his injury lacked probative value because it omitted discussion of the fact that P's use of more than the recommended dose and that he failed to keep away from the drain. **Dissent** – P presented reliable expert testimony that pouring D's product down a drain with water caused a chemical reaction generating enough heat to boil the water and produce steam pressure, causing the contents to expand "explosively" out of the drain. Thus it was the pressure from the steam pipe, and not the failure to follow directions and warnings, that caused P's injury. This created a question of fact as to whether the product was too dangerous to be marketed for general use rather than just for professionals and whether the product's risks far outweighed its utility.

- **P required to show warning would have been heeded in order to sustain claim** – Ramos v. Simon-Ro Corp., No. 06-CV-6105, 2008 WL 4210487 (S.D.N.Y. Sept. 11, 2008): **Facts** – [basic facts enumerated above in "Design Defect"]. P's fingers were severed when he placed them inside some inspection ports on a crane not knowing the crane was about to move. The P admitted he knew that the inspection ports open and close when the boom of the crane extends or retracts. Further, he knew the danger of working near the boom of the crane and never would have climbed up the bulkhead if he knew the crane was about to move. Finally, when he grabbed the boom and inserted his fingers into the inspection port, he did not look to see where he was placing his hand and thus would not have seen any warning that might have been present. D moved for summary judgment arguing for, *inter alia*, dismissal of the P's failure to warn claim. The District Court granted D's motion. **Holding** - As part of P's failure to warn claim, P must show that D's failure to provide a warning was a proximate cause of injury. Although in New York, there is a presumption that a user would have heeded warnings if they had been provided, a D may rebut this presumption by showing that the warning would have been futile. P did not present any evidence that he lacked an understanding of the dangers inherent in the inspection port or

that he would have heeded a warning label had it been present. Accordingly, because any warning to this specific P would have been futile, summary judgment is appropriate.

- **No failure to warn claim if P knowledgeable about the risks and specifically advised others on how to avoid dangers.** – Stalker v. Goodyear Tire and Rubber Co., 874 N.Y.S.2d 632 (3d Dept. 2009): **Facts** – P who owned a truck repair business, died after a truck tire which he was attempting to repair, exploded in what is known in the industry as a zipper rupture, propelling him across the room. P sued Ds, manufacturers, claiming that Ds failed to properly warn of the danger. Ds moved for summary judgment arguing that the P had over 20 years of experience working on commercial truck tires, he had warned employees that tires that had been run underinflated could potentially rupture when inflated because the cords in the sidewall had greater risk of failing, and he directed that when re-inflating a tire, to stand to the side and use a clip-on air chuck. The Supreme Court granted the Ds motion and the Appellate Division affirmed. **Holding** - Where the person who would benefit from a warning is already aware of the specific hazard, the manufacturer cannot be held liable for failing to warn. Here, P was aware of the specific risk, was fully knowledgeable of the proper safety instructions and warned others how to avoid the danger.
- **No duty to warn when operator of product is aware of the danger and failed to take proscribed precautions** – Kiersznowski v. Shankman, 889 N.Y.S.2d 781 (4th Dept. 2009): **Facts** – P was injured when she fell from the operator’s platform of a fork-lift truck. P elevated the platform about 12 feet from the ground and took a step back unaware a supplemental platform provided by her employer had become detached. P also failed to fasten her safety belt correctly. P sued D, manufacturer, alleging *inter alia*, that the manufacturer failed to provide adequate warnings with respect to the danger of falling from the operator’s platform. D moved for summary judgment arguing the P was aware of the dangers admitting that she failed to properly attach the safety belt. The Supreme Court granted D’s motion and the Appellate Division affirmed. **Holding**: D met its burden regarding the failure to warn claim by establishing P was aware of the hazards of operating the fork-lift truck without properly wearing her safety belt and ensuring that the supplemental platform was securely attached. D has no duty to warn when doing so would have added nothing to the P’s appreciation of the danger.
- **Failure to warn claim dismissed where P knew of danger and of prior incidents** – Stewart v. Honeywell Int’l Inc., 884 N.Y.S.2d 743 (1st Dept. 2009): **Facts** –P lost a thumb and two fingers when

she reached into the die area of a machine used to mill tin as the machine unexpectedly double-cycled, lowering the machine's ram. P sued D, a successor manufacturer, for failure to warn alleging that the signal words "DANGER" or "WARNING" should have been prominently and permanently displayed on the machine along with wording that it should "NEVER" be used without physical and effective guarding. D moved for summary judgment arguing that the labels on the machine warning that "closing ram and die will result in loss of fingers or limbs if placed in machine" and that one should "never place your hands or any part of your body in this machine" were sufficient. P admitted she had seen the label and was aware of the danger. She had also worked as a press operator for more than 35 years before the accident; had operated the subject machine on five prior occasions; and was aware that two co-workers were injured when the presses double-cycled. The Supreme Court denied summary judgment and the Appellate Division reversed. **Holding:** The accident cannot be deemed to have resulted from a failure to warn about the dangers of double-cycling or operating the machine without guards. Although a P may recover for injuries where a product is purposefully manufactured to permit its use without a safety feature, where an injured party is fully aware of the hazard through general knowledge, observation, common sense, or open and obvious risk, the duty to warn may be obviated. Here P admitted she was aware of the warning, was experienced in the use of the machine and was aware of the possibility of double-cycling. Under such circumstances, claims predicated on failure to warn must be dismissed.

- **D must establish that the warnings came with the allegedly defective product** – *Pierre-Louis v. DeLonghi Am. Inc.*, 887 N.Y.S.2d 628 (2d Dept. 2009): **Facts** – [Basic facts enumerated above in "Manufacturing Defect"]. P was a guest in the home of people who had purchased a portable oil-filled space heater. The day after the purchase, the heater was taken out of the box by the home-owner's son who unintentionally, placed it upside down, causing a fire. P died and sued the manufacturer, DeLonghi and the retailer, Home Depot alleging *inter alia*, failure to warn. Ds moved for summary judgment presenting evidence that the son did not read the warnings contained in the instructions that operating the heater upside down can create a hazard. P countered that the heater unit was the only item that came out of the box when opened and the only writings on the heater itself were the numbers on the temperature dial. The Supreme Court denied summary judgment and the Appellate Division affirmed. **Holding:** Summary judgment as to failure to warn was properly

denied because Ds did not establish, as a matter of law, the subject heater actually came with the claimed instructions.

- **Danger not open and obvious but suggested alternative warnings must be specified** – Cuntan v. Hitachi Koki USA, Ltd., 2009 WL 3334364 (E.D.N.Y. 2009): **Facts** – P, an experienced handyman, carpenter and construction worker, was injured while using a C7S-B2 circular power saw owned by P’s employer and manufactured by D. P claimed he stopped operating the saw and placed it down on the ground so he could reach for a piece of plywood. Ordinarily, once stopped, the saw’s blade continues to rotate for some seconds. However, for safety purposes it is designed with a lower blade guard that automatically closes through the use of a return spring, protecting users from the still-spinning blade. In this case, P claimed the saw continued to operate, moving on its own one-and-half feet across the ground towards his hand, severely lacerating it. Prior to this P had used the saw numerous times without incident with the blade guard operating properly. When experts inspected of the saw the return spring was not present. It was unclear how or when the spring had been removed. Its absence was not visible to the P during the saw’s normal operation. In the safety section of the instruction manual, kept in P’s employers’ office and made available to all employees, users were directed to “check the operation and the condition of the lower guard spring.” The saw itself had a warning that “contact with blade will result in serious injury” as well as a warning to “check lower blade guard. It must close instantly!” P admitted he did not make any special note of the warnings as they looked similar those he had seen on other saws in years past. P sued D alleging, *inter alia*, inadequate warnings. D moved for summary judgment arguing that the claim could not survive because P was already aware of any alleged dangers the saw posed. P countered that the language on the saw and in the manual did not adequately warn of the hazards posed by the failure of the lower blade guard to operate properly. The District Court granted summary judgment. **Holding:** A P cannot prevail on a defective warning claim if the hazard was patently dangerous or posed an open and obvious risk or the injured party was fully aware of the specific hazard through general knowledge, observation or common sense. Here the danger was not open and obvious because the missing spring was not visible during the saw’s normal operation. Therefore, the court must consider whether the warnings D provided were adequate. A warning is not adequate if its substantive language did not warn of the dangers posed by the product or were not displayed prominently enough. P admitted he did not make any special note of the warnings and did not even know if the warning contained the

words “danger” or “warning.” Thus, he cannot claim that the substantive content of the warning labels were inadequate. However, even if the P did not read a product’s labels he can still proceed on the theory that had the warnings been more prominent, he would have read and heeded them. Here P contends very generally that the warnings should have been displayed with color pictograms or other more remarkable language but does not specify what colors or fonts should have been used or where on the saw they should have been displayed. Even if the court were to credit the P’s assertion, P failed to offer any alternatives for the jury to consider.

- **Failure to include warnings on packaging not sufficient to defeat summary judgment since warnings were embossed on product itself** – Vereczkey v. Sheik, 869 N.Y.S.2d 146 (2d Dept. 2008): **Facts** – [basic facts enumerated above in “Manufacturing Defect”] P, two year-old child, was injured when she reached into a bathtub of scalding water in the apartment where she resided with her mother. P sued Ds, manufacturers and distributors of the faucet cartridge and hot water heater alleging, *inter alia*, failure to warn. The thermostat, hot water heater and all component parts were sold as a set. Ds moved for summary judgment arguing that the failure to include instructions in the packaging did not sufficiently allege failure to warn because the warnings were embossed into the parts themselves. The Supreme Court granted their motion and the Appellate Division affirmed. **Holding** - The failure to include the instructions on the packaging did not raise a triable issue of fact since the warnings were installed on the product itself and instructions on the packaging would not have affected the installer of the faucet in any case.
- **Device manufacturer under a duty to warn and cannot prevail on summary judgment motion without proof of giving adequate warnings** – Clar v. Riegler, 849 N.Y.S.2d 739 (4th Dept. 2007): **Facts** – P was injured when a surgical screw installed in his shoulder fractured. P sued D, Synthes, USA, manufacturer of the screw for, *inter alia*, D’s failure to warn. D moved for summary judgment but presented no evidence that it provided warnings to P’s treating physician or to any part of the medical community about the possibility of fracture of the surgical screw. The Supreme Court denied summary judgment and the Appellate Division affirmed. **Holding** – D failed to meet its initial burden with respect to its duty to warn. A manufacturer of a product used by the medical community has a duty to warn of all potential dangers which it knows or should know, and must take such steps as are reasonably necessary to bring that knowledge to the attention of the medical community.

- Manufacturer as well as distributor may have duty to warn foreseeable user of dangerous condition and post-sale safety modifications** – Magadan v. Interlake Packaging Corp., 845 N.Y.S.2d 443 (2d Dept. 2007): **Facts** – P was injured when she inadvertently placed her finger underneath the needle of a book stitching machine she was operating. The subject machine had finger guards that, when properly adjusted, prevented a finger from being put in a position of danger within the machine. The finger guard had not been properly adjusted prior to the P’s use. After the P’s employer had purchased the machine, the manufacturer made safety modifications to the finger guards so they did not need to be adjusted before each use. D manufacturer sent letters to D distributor about the changes to the finger guards and D distributor, in turn, verbally informed its customers who purchased the machines about the changes. Ds moved for summary judgment arguing that they had adequately warned about the need to adjust the finger guards before use and about the post-sale safety modifications. The Supreme Court granted Ds’ motion and the Appellate Division reversed. **Holding** – P raised a triable issue of fact regarding whether P misused the stitching machine in a way that the Ds should have foreseen necessitating a warning; whether the verbal notice given by the distributor about the post-sale modifications adequately explained dangers addressed by the new finger guards; and whether the manufacturer had a duty to inform P’s employer directly of the changes.
- Manufacturer not required to warn against dangers of which it is not aware; proximate cause issues** - Mulhall v. Hannafin, 841 N.Y.S.2d 282 (1st Dept. 2007): **Facts** – P alleged she developed synovitis, an inflammatory condition, after surgery during which a Suretac, a bio-absorbable tack that eventually dissolves as the injury heals, was implanted in her shoulder. Three months after surgery using the Suretac, P developed synovitis requiring another procedure to treat it. P sued D, Smith & Nephew, manufacturer of Suretac among others, for, *inter alia*, supplying insufficient warnings regarding the dangers associated with Suretac. D moved for summary judgment arguing that its package insert warned that a transient inflammatory reaction could develop that appears to be self-limiting or responds to medications. P argued that Ds package insert failed to inform that the transient inflammation could in fact evolve into the permanent inflammatory condition claimed by P. Supreme Court denied Ds motion and the Appellate Division reversed. **Holding** – A manufacturer only has a duty to warn the medical community, not the patient, of those dangers it knows of or are reasonably foreseeable. This is so even if the cause

of action is in strict liability. The record showed that the warning D gave reflected the most current knowledge available concerning the potential risks associated with the product. D never received any reports associating the use of Suretac with the injury P claimed. While P's expert alluded in an affirmation to numerous articles that should have alerted D to the risks, he failed to identify any of these publications or show that any were published before P's surgery. Further, given that P testified that she did not read the consent forms warning against other serious risks but signed them anyway and that the doctor had been using Suretac for years without problem, P failed to show that had the warnings been different, the P would not have used the product.

- **No duty to warn knowledgeable purchaser - Steuhl v. Home Therapy Equip., Inc., 857 N.Y.S.2d 335 (3d Dept. 2008): *Facts* - [basic facts enumerated above in "Design Defect"] P seriously injured when the head of the motorized hospital bed she had been prescribed for home use suddenly dropped flat. P sued both D manufacturers, claiming that the bed should have had a warning for assemblers about the necessity of inserting the hitch pin into the clevis pin, and D lessor for negligently assembling the bed. **Holding** - Under the knowledgeable user exception, there is no duty to warn someone who is already aware of the specific hazard. Here, because the beds were not sold to end users but to dealers who relied on technicians to assemble the beds, such as those employed by D lessor who knew about the danger of not properly inserting the hitch pin, D manufacturer entitled to summary judgment. *Comment*: other courts might have held that there was a duty on the manufacturer running directly to the end user.**
- **Use of product with defect during six months prior to injury defeated P's claim of failure to warn - Heimbuch v. Grumman Corp., 858 N.Y.S.2d 378 (2d Dept. 2008): *Facts* - [basic facts enumerated above in "Design Defect"] P injured while attempting to lift the hood of a truck during a standardized pre-trip vehicle inspection for employer. Ds manufactured body of truck sold to P's employer. P claimed strict product liability based upon failure to warn about missing gas assist device. **Holding** - Because P testified at deposition that she had used the subject truck for six months prior to the date of her accident; lifted the hood every day as part of her pre-trip inspection; and was aware that the gas assist device was missing, any warning the Ds could have issued would have been superfluous given P's actual knowledge of the specific hazard. Ds, therefore, entitled to summary judgment.**
- **P raised issue of fact as to whether federal regulations required "DANGER" to be placed on product - Lichtenstein v. Fantastic Merch. Corp., 850 N.Y.S.2d 462 (2d Dept. 2007): *Facts* -**

Infant P sustained burns to his legs requiring skin grafts, as a result of contact with an oven cleaning product manufactured, distributed and sold by Ds. D distributor moved for summary judgment. P submitted an expert affidavit that federal regulations required the product to be labeled with the word "DANGER." (These were regulations under the Consumer Product Safety Act, 16 CFR 1500 et seq.) P's mother's deposition testimony also indicated that she equated the product with other typical household cleaners, did not appreciate the seriousness of the hazards it posed, and that additional or more conspicuous warnings would have alerted her to the problem. The Supreme Court denied summary judgment and the Appellate Division affirmed. **Holding** – P raised an issue of fact regarding the adequacy of the warnings concerning the requirement that "DANGER" be on the product. Further, where reasonable minds might disagree about the extent of P's mother's knowledge of a hazard, the question is one for the jury.

- **Manufacturer and shipper of dangerous product not strictly liability if carrier aware of the general danger but duty to warn is breached if there is a failure to warn of specific danger** – In re M/V DG Harmony v. PPG Indus., Inc., 518 F.3d 106 (2d Cir. 2008): **Facts** – A fire onboard a container ship, the M/V DG Harmony ("Harmony") resulted in the total loss of both the vessel and its cargo. The source of the fire was a large amount of calhypo, an industrial bactericide manufactured by D and stored on board. D warned carriers that calhypo was unstable above 117 degrees C and that it should be kept away from sources of heat greater than 55 degrees C. But because of the way this particular load of calhypo was packaged by the D – while still warm and in an unusual configuration – it was prone to overheat when reaching below 41 degrees C. Ps, companies with various ownership interests in the Harmony and its cargo, sued D under failure to warn, strict liability and general negligence theories. Ps argued the D did not properly warn of the dangers of calhypo, did not properly package the material, improperly certified it was safe for transport, and should have requested refrigeration or on deck-storage. D argued it did properly warn and that the Ps bore some responsibility for storing the calhypo adjacent to a heated bunker tank. The district court held D solely liable after a bench trial under strict liability and failure to warn theories but was unclear as to whether liability attached under a general negligence theory. The Circuit court reversed and remanded. **Holding** – Although the Ps may not have known of the particular dangers of this load of calhypo, they knew it was an unstable substance and that it became vulnerable to combustion when heated. Under these circumstances when a party knows that such a reaction is possible

and yet still exposes the cargo to the danger, it may prevail under a negligence theory but not a strict liability theory. Here, because the district court found no basis for a finding of negligence other than an incorrect one using a strict liability doctrine, to the extent any liability was found under a negligence theory, it is reversed. D did breach its duty to warn the Ps of the dangers posed by this particular load of calhypo and the manner of packaging; however the case is remanded for a further determination as to whether a proper warning would have affected the Ps storage decisions, preventing an explosion.

- **P must demonstrate that the warnings would have been read in order to sustain a claim for failure-to warn-** Pichardo v. C.S. Brown Company, Inc., 827 N.Y.S.2d 131 (1st Dept. 2006): *Facts-* P was injured while using a snow blower. The snow blower was manufactured by D and improperly repaired by co-defendant. Although the mechanism of injury was not described in the opinion, the improper repair was the cause of P's injuries. P sued D, claiming, *inter alia*, that D failed to warn against making the repair that co-defendant made. D moved to dismiss the claim on the grounds that the manual did in fact contain such a warning and that there was no evidence that co-defendant's employees consulted the manual when making the repairs. Supreme Court granted the motion and the Appellate Division affirmed. *Holding-* contrary to P's claims, the manual for the snow blower did contain a warning against making the repairs that caused P's injuries. Furthermore, since there was no evidence that the manual was consulted by the repairer, the failure to warn was not the cause of the harm.
- **Same-** Perez V. Radar Realty, 824 N.Y.S.2d 87 (1st Dept. 2006): *Facts-* P sustained injuries in the course of his use of a certain type of paint. P sued D manufacturer claiming, *inter alia*, that D failed to warn of the danger associated with the product. The exact nature of the danger and the mechanism of injury are not described in the opinion. D moved to dismiss the claim on the ground the P never read the label. Supreme Court granted the motion and the Appellate Division affirmed. *Holding-* P's testimony established that he did not read the product label before using it. Therefore, the inadequate warning was not a legal cause of the harm
- **No duty to warn about open and obvious risks -** Caruso v. John St. Fitness Club, LLC, 824 N.Y.S.2d 255 (1st Dept. 2006): *Facts-* P sustained burn injuries when he passed out in the steam room of a health club and was exposed to steam for a prolonged period of time while unconscious. P sued D steam generator manufacturer, claiming, *inter alia*, that D failed to warn of the risks

associated with prolonged exposure to steam. D moved to dismiss the claim on the ground that the risks associated with prolonged exposure to steam are open and obvious. Supreme Court granted the motion and the Appellate Division affirmed. *Holding*- the risks that P claims should have been warned of were open and obvious. Therefore, D was under no duty to warn of those risks

- **Same- Donuk v. Sears, Roebuck & Co., 2007 N.Y. Misc. LEXIS 3907 (S.C. Kings Cty. 2007):** *Facts*- [basic facts enumerated above in "Design Defect"]. P sued D manufacturer claiming, *inter alia*, that D failed to warn of the dangers associated with placing your hand in the chute while the machine was operational. D moved to dismiss on the grounds that there were adequate warnings and that the danger was open and obvious. Supreme Court granted the motion. *Holding*- the machine contained three separate labels that offered prominent warnings of the dangers associated with placing one's hands inside the chute of the snow blower. Furthermore, the risks associated with P's behavior were matters of common sense and the danger was open and obvious. Therefore, there was no duty to warn
- **General knowledge within the industry of a danger creates a post-sale duty to warn – Vicnenty v. Cincinnati, Inc., 807 N.Y.S.2d 92 (1st Dept. 2006):** *Facts* - See above. P sued D alleging that it has a post-sale duty to warn of the dangers associated with the design of the subject machine. D's product safety manager testified that there was general knowledge within the industry that accidents can happen as a result of accidental foot actuation of the machine. D moved for summary judgment on unspecified grounds. Supreme Court denied the motion and the Appellate Division affirmed. *Holding*- In light of the admission by D's witness that there was knowledge within the industry of the dangers that caused P's injuries, an issue of fact exists as to whether D had a post-sale duty to warn and summary judgment was properly denied.
- **No liability where plaintiff could not read – Estrada v. Berkel, Inc., 789 N.Y.S.2d (2d Dept. 2005):** *Facts* – P sued D, arguing that the machine should have contained certain unspecified warnings. D moved for summary judgment, arguing that infant P could not read and therefore any warning would have been superfluous. Supreme Court granted the motion and the Appellate Division affirmed. *Holding* – In order to prevail on a claim of failure to warn, P must demonstrate that the inadequate warning was a proximate cause of the injury. Here, P was two years old and could not read. Therefore, inadequate

warnings could not have been a proximate cause of plaintiff's injuries.

- **No liability where user did not read the warnings** – Perez v. Radar Realty, 2005 N.Y. Misc. LEXIS 794 (Sup. Ct. Bronx Cty. 2005): *Facts* – P sued Ds claiming that the lacquer sealer did not adequately warn of the need to properly ventilate rooms in which the lacquer was being used. Ds moved to dismiss the claims based on the bulk supplier doctrine and certain provisions of the Federal Hazardous Substance Act. The Court granted the motion on other grounds. *Holding* – P admitted in his deposition that he did not read any of the warnings that were present on the container of the lacquer. Under these circumstances, P cannot demonstrate that inadequate warnings were the cause of the harm.
- **No duty where plaintiff was aware of the dangers** – Wesp v. Zeiss Inc., 783 N.Y.S.2d 439 (4th Dept. 2004): *Facts* – P, a surgical nurse, was injured while moving a 600 pound surgical microscope and floor stand unit at the hospital where she worked. P sued D manufacturer, claiming *inter alia* that D failed to warn against dangers of moving the microscope. D moved for summary judgment on the ground that P had previously moved the microscope and was therefore aware of the dangers and the difficulties of moving it. Supreme Court granted the motion and Appellate Division affirmed. *Holding* – Based on P's past experience with the microscope, she was aware of the dangers in moving it. Therefore, any warning would have been superfluous.
- **Informed intermediary rule inapplicable where issue of fact is raised as to adequacy of warnings to physicians** – Smith v. Johnson & Johnson Co., 2004 N.Y. Misc. LEXIS 2788 (Sup. Ct. N.Y. Cty. 2004): *Facts* – Decedent died of heart failure after taking the drug Propulsid. P sued D drug manufacturer, claiming *inter alia* that D failed to warn of the danger of cardiac arrest associated with the drug and that the risk was especially high in patients with pre-existing disorders such as the diabetic decedent. D moved for summary judgment arguing that its only duty to warn was to the physician and that it adequately warned physicians. P submitted the affidavit of an expert doctor who stated that the warnings provided were inadequate. Supreme Court denied the motion. *Holding* – The affidavit of P's expert is sufficient to raise an issue of fact as to the adequacy of the warnings to the physicians. Summary judgment was therefore inappropriate.
- **Reliable expert affidavit creates triable issue of fact** – Kraut v. West, 24 PLLR 53 (April 2005) (N.Y. Cty 2005)(unpublished): *Facts* – Decedent underwent a surgical procedure to remove an ovarian cyst. During surgery, a machine was used that cleanses

blood from the operative site and re-infuses it into the patient. The technician noticed that the blood was darker than usual and called the manufacturer. A representative told her that blood from ovarian cysts was not contraindicated and could be re-infused into the patient. Decedent died shortly thereafter of cardiac arrest. P representative sued, alleging failure to warn. D manufacturer moved for summary judgment, arguing that medical science does not support the contention that contents of cysts are contraindicated for blood saving. In opposition, P presented an expert affidavit that stated that the machine should have warned against infusing materials known to coagulate and that ovarian cysts contain certain enzymes that are capable of causing cardiovascular collapse. Supreme Court denied the motion. *Holding* - the expert affidavit created a triable issue of fact as to whether or not the warnings were adequate. Therefore, D failed to meet its burden and summary judgment was inappropriate.

- **No liability where manufacturer was not aware of the claimed danger** – Smallwood v. Clairol Inc., 2005 U.S. Dist. LEXIS 2726 (S.D.N.Y. 2005): *Facts* – P claimed that he suffered a “severe anaphylactic reaction” after using hair color manufactured by D. P sued, claiming that D failed to adequately warn of the danger of an anaphylactic reaction. D moved for summary judgment, arguing that it was not aware of any such danger. The court granted the motion. *Holding* – A manufacturer only has a duty to warn of dangers that it is aware of. Here, the harm suffered by P was the only instance in which the product in question caused the kind of reaction suffered by P. Thus, P failed to demonstrate that D was aware of the risk and as such there was no duty to warn.
- **Duty to Warn of Drug Side Effects Before FDA Requirement** – Garfinkel v. Bayer Corp., 8 A.D.3d 862, 779 N.Y.S.2d 71 (1st Dept. 2004): *Facts* - P ruptured her Achilles tendon during a fall that she suffered after having taken a ten day regimen of the antibiotic known as Cirpo. The drug was prescribed in October 1994 to combat chronic sinusitis and the injury occurred in January of 1995. French authorities had conducted studies about the link between Cipro and ruptured tendons in 1993 and by 1994, the French regulatory authorities required companies to warn that antibiotics carried a risk of causing damage to tendons. However, the FDA did not require drug manufacturers to warn about the dangers of tendon damage until 1995/1996. P sued D drug manufacturer for failure to warn of the link between its product and tendon damage. D moved for summary judgment, claiming that the warnings in place during the time in which P was prescribed the drug were in compliance with FDA guidelines.

The motion was denied. **Holding**- The court ruled that despite the fact that the FDA did not establish a definitive link between the drug and tendon damage until after P sustained her injuries, P had submitted evidence that D was in possession of the information before the FDA's ruling but withheld the data and delayed its reporting. Thus, even if D was reasonable when it put the product on the market, it violated its duty to keep abreast of developing trends and medical research by failing to take proper measures when it first learned of the dangers posed by its product. Therefore, P had created a triable issue of fact as to whether D had adequately warned of dangers posed by its product in 1994.

- **Proximate Cause- *Perillo v. Pleasant View Associates*, 739 N.Y.S.2d 504 (4th Dept. 2002): **Facts**- P was injured on a construction site when he fell on a protruding rod used in the packaging of megalugs. D's motion for summary judgment was granted by Supreme Court and affirmed by the Appellate Division. **Holding** - The court dismissed the claim of breach of a duty to warn since P knew or should have known of the dangers and therefore "any warning would have been superfluous."**
- **Proximate Cause- *Hamm v. Williamette Industries, Inc.*, 2002 WL 342433 (S.D.N.Y. 2002): **Facts**- P was injured when his foot broke through a wooden pallet on which printer rolls were shipped. He sued on a claim (*inter alia*) of failure to warn since Ds (paper retailer, pallet manufacturer and pallet wholesaler) failed to adequately warn against stepping on the pallet. Ds moved for summary judgment and the motions were granted. **Holding** - Even if D was negligent in not providing an adequate warning, P was aware of a previous incident in which a coworker of similar weight was injured when his foot broke through a pallet, and thus the failure to warn was not the proximate cause of his injuries. Even if an adequate warning had been given, it was unlikely to have been heeded**
- **Burden as to Identification Is On Plaintiff - *Stokes v. Strong Health MCO, Inc.*, 744 N.Y.S.2d 650 (Sup. Ct. Monroe County 2002): **Facts** - Plaintiff underwent two surgical procedures in which sharp-pointed surgical instruments called laparoscopic trocars were used. Sometime after the second procedure, a trocar was found in her body. The tip was removed and preserved but plaintiff was unable to conclusively identify during which procedure the tip was left inside of her. Plaintiff sued, *inter alia*, the companies that she claimed manufactured the instrument.' The doctors and hospitals involved in the surgeries stated that they only used trocars manufactured by the named defendants. However, the defendant manufacturers provided specific**

evidence including drawings, patent records and affidavits of their engineers, indicating they could not have produced the trocar recovered from plaintiff's body. Defendant manufacturers moved for summary judgment and the court granted the motion. **Holding** - A plaintiff in a product liability action is required to demonstrate that the defendant manufactured the product in question. The only proof that the plaintiff has offered on the matter is the claims of the doctors and hospitals that they used the products of the defendants exclusively. This evidence is only suggestive, however, and the defendants' affirmative evidence demonstrating that they could not have manufactured the trocar removed from the plaintiff's body overcomes that suggestion.

- **No Claim Where P Was Aware of the Dangers-** *Pelman v. McDonald's*, 237 F.Supp.2d 512(S.D.N.Y. 2003): **Facts** - P was a group of children who purchased and consumed D restaurant's products. P alleges that the members of its class became overweight and suffered serious health problems as a result of consuming D's products. P sued, claiming that D failed to warn of the unhealthy nature of its product. D moved to dismiss on the grounds that the dangers of fast foods are open and obvious. The motion was granted. **Holding** - Since the risks and dangers posed by fast food are open and obvious to a reasonable consumer, D was under no duty to warn of their existence
- **No Claim Where P Was Aware of the Dangers-** *Clarke v. LR Sys.*, 210 F.Supp.2d 323 (E.D.N.Y. 2002): **Facts** - Plaintiff was injured when his hand was pulled into the blades of a plastic grinding machine that he was trying to unjam by manipulating the belts of its motor. The motor of the machine was contained in a metal housing covered by a removable metal cover. Approximately one year prior to the accident, a mechanic removed the metal cover in order to service the machine and did not replace it. Had the metal cover been in place, P would not have been able to reach into the machine in the manner that he did and his injury would not have occurred. P sued claiming, *inter alia*, that D failed to warn against trying to clear jams by pulling on the belts in the motor and against operating the machine without the metal cover in place. While P acknowledged that he knew it was dangerous to place his hand on the belt in the motor, he argued that a duty to warn still existed because he was not aware of the particular danger that caused his injury. D moved for summary judgment on the grounds that the danger was open and obvious and that P was fully aware of the dangers without a warning. The motion was granted. **Holding** - The distinction drawn by P between general

knowledge of danger and knowledge of the specific danger is irrelevant. Since P was aware that his actions could result in significant injuries, any warning would have been superfluous. Since summary judgment was granted based on this fact, the court declined to discuss whether the danger was in fact 'open and obvious'.

- **No Claim Where P Was Aware of the Dangers- *Theoharis v. Pengate Handling Sys. Of NY, Inc.*, N.Y. App.Div. LEXIS 12409 (3d Dept. 2002):** **Facts** - P was injured when he fell off an elevated forklift that was raised 15 feet. The forklift was equipped with a safety harness and tether to prevent such a fall but it was not working on the day of the accident. P was aware of the problem and had previously discussed the matter with his employer. D was the lessor of the equipment and had signed an agreement with the employer under which it would be responsible for the maintenance of the machine. On the day of the accident, D had inspected the machine and ordered a replacement part for the broken safety mechanism. P's employer elected to leave the forklift in operation because it was safe to use at low elevations. P sued claiming, *inter alia*, failure to warn of using the forklift without the harness or tether. D moved for summary judgment on the grounds that P was aware of the danger. The trial court granted D's motion and the Appellate Division affirmed. **Holding** - Since P was familiar with the forklift and others similar to it, he knew the dangers of using it without the safety harness and tether. Furthermore, there was a decal affixed to the forklift that warned against using it without the safety mechanism. As such, any additional warning would have been superfluous.
- **No Claim Where P Was Aware of the Dangers- *Passante v. Agway Consumer Products, Inc.*, 741 N.Y.S.2d 624 (4th Dept. 2002):** **Facts**- [enumerated above in 'design defect']. **Holding**- In certain cases, the court can hold as a matter of law that there is no duty to warn or that the duty has been discharged. Since P understood the dangers even without the warning and warnings were posted near the site of the accident, D established that it was entitled to judgment as a matter of law.
- **Effect of a Lack of Prior Experience with the Product on an "Open and Obvious" Defense – *Ganter v. Makita U.S.A., Inc.*, 291 A.D.2d 847, 737 N.Y.S.2d 184 (4th Dept. 2002):** **Facts** – P, who had never operated a table saw prior to the day of the incident, was injured when his hand came in contact with the blade of a table saw while operating it. He sued claiming (*inter alia*) failure to warn. D, a saw manufacturer, moved for summary judgment, which the Supreme Court denied. Appellate Division affirmed. **Holding** – Court held that in order to succeed on a motion for

summary judgment, D must demonstrate that the danger must be “so apparent as to obviate any duty to warn against such operation.” Since P had never used this saw prior to the incident, the court found that D failed to meet their burden and as such, the adequacy of the warning was an issue for the jury.

- **Effect of a Lack of Prior Experience with the Product on an “Open and Obvious” Defense** – *Chien Hoang v. JCM Corp.*, 285 A.D.2d 971; 727 N.Y.S.2d 840 (4th Dept. 2001): **Facts** – P was injured while operating a punch press. He suffered a partial amputation of 3 fingers when he activated a foot switch while reaching into the point of operation of the machine to remove a jammed circuit board. His employer had added the foot switch to the punch press on the date of the accident while plaintiff was taking his break. P sued the manufacturer of the foot switch, manufacturer of the punch press and the distributor, alleging (*inter alia*) failure to warn. All Ds moved for summary judgment and all motions were denied. The Appellate Division affirmed. **Holding** - Although the danger of placing one’s hand in the point of operation may have been obvious, P’s lack of prior experience with the foot switch creates a triable issue of fact with respect to the failure to warn claim.
- **Reasonably Foreseeable Misuse** - *Bombara v. Rogers Bros. Corp.*, 289 A.D.2d 356; 734 N.Y.S.2d 617 (2d Dept. 2001): **Facts**- [enumerated above in 'design defect'] **Holding**- The manufacturer only has a duty to warn of dangers associated with reasonably foreseeable misuse of a product. Here, the trailer was intended to haul construction materials, not passengers. In fact, there was a cab in the tractor that hauled the trailer but P opted not to use it. Therefore, the risk of danger to P was not foreseeable and D can’t be held liable for the failure to warn against it.
- **Warning Not Required Under the Federal Hazardous Act** – *Schrader v. Sunnyside Corp.*, 297 A.D.2d 369 (2d Dept. 2002): **Facts** - [Basic facts enumerated above in 'design defect']. P sued for failure to warn, claiming that D was guilty of 'misbranding' its product. D moved for summary judgment and the trial court granted the motion. Appellate Division affirmed. **Holding** - With regards to the labeling of hazardous materials such as lighter fluid, any warning not mandated by the Federal Hazardous Substance Act, 15 U.S.C. §§ 1261- 1277.(1988), is preempted as a matter of law. Since the suggested warning is not required by the FHSA, dismissal of the claim was proper
- **Allergic Reactions: No Duty to Warn of Unknown Side Effects** – *Pelman v. McDonald’s.*, 237 F.Supp.2d 512(S.D.N.Y. 2003): **Facts** - [Basic facts enumerated above in 'failure to warn']. P sued, claiming that D failed to warn of the presence of allergens in its

products. D moved to dismiss and the motion was granted.

Holding - A duty to warn of an allergenic ingredient will only arise where the danger or presence of the ingredient is not generally known. Here, P has not alleged that any of the ingredients are 'allergens' nor have they provided any evidence that the public is unaware of their presence. As such P has failed to make a claim for failure to warn of the allergenic ingredients.

- **Allergic Reactions: No Duty to Warn of Unknown Side Effects** – *Daley v. McNeil Consumer Products Co., A Div. Of McNeil-PPC, Inc.*, 164 F.Supp.2d 367 (S.D.N.Y. 2001): **Facts**- [enumerated above in 'design defect']. **Holding** - The court held that P failed to satisfy the two part test articulated in *Kaempfe v. Lehn & Fink Products Corp.*, 21 A.D.2d 197; 249 N.Y.S.2d 840 (1st Dept. 1964), under which a duty to warn will exist on a drug manufacturer if P can show: (1) that she was one of a substantial number or of an identifiable class of persons who were allergic to the defendant's product and (2) that defendant knew, or with reasonable diligence should have known of the existence of such number or class of persons. P did not succeed in satisfying either of those criteria. As a result, D was under no duty to warn.
- **Manufacturing Defect**
 - **In circumstantial case P failed to counter Ds' evidence of compliance with industry standards, pre-existing damage and misuse** – *Johnson v. Bauer Corp.*, 898 N.Y.S.2d 397 (4th Dept. 2010): **Facts** – Ps injured when a scaffold platform collapsed because a ladder supporting it broke. P sued Ds manufacturer and seller. The ladder at issue had been discarded by the Ps employer prior to commencement of the action. Ds moved for summary judgment. The Supreme Court granted the D's motion. The Ps appealed only the manufacturing defect claims. The Appellate Division affirmed. **Holding**: When proving circumstantially a manufacturing defect claim because the product is unavailable, P must prove the product did not perform as intended and exclude all other causes for the product's failure not attributable to D. Ds met their initial burden by establishing that they manufactured their ladders in accordance with industry standards and that the ladder failed as a result of misuse or pre-existing damage. Specifically, Ds submitted evidence the weight on the ladders exceeded its rated capacity; the testimony of other workers that the ladder was damaged prior to the accident; and that the ladder was set up at an improper angle on the date of the accident. Ps did not present evidence excluding all other causes of action not attributable to Ds.
 - **D must show the product was not misconstrued for prima facie case on manufacturing defect** – *Pierre-Louis v. DeLonghi*

Am. Inc., 887 N.Y.S.2d 628 (2d Dept. 2009): **Facts** – P was a guest in the home of people who had purchased a portable oil-filled space heater. The day after the purchase, the heater was taken out of the box by the home-owner’s son who unintentionally, placed it upside down, causing a fire. P died and sued the manufacturer, DeLonghi and the retailer, Home Depot alleging, *inter alia*, manufacturing defect and defective design. D moved for summary judgment presenting expert testimony that the heater, as designed, was safe. The Supreme Court denied summary judgment and the Appellate Division affirmed. **Holding:** A product is flawed when it is misconstrued due to some mishap in the manufacturing process, improper workmanship or because defective materials were used, regardless of whether the intended design is safe or not. There were conflicting expert opinions regarding whether the product was safe. Ds’ own expert admitted that welds breeched and oil spurted out when the heater was operated upside down; it was reasonably foreseeable that it would be operated upside down and; it was known that it had been used in that manner for a number of years prior to the subject fire by other users. Thus, there existed a question of fact and it was up to the jury to conduct the risk-utility analysis.

- **No manufacturing defect claim without evidence of improper construction or malfunction** – Miniero v. City of New York, 885 N.Y.S.2d 45 (1st Dept. 2009): **Facts** – Ps, current and former members of the New York Police Department, allegedly suffered hearing loss and related injuries as a result of exposure to the sound of gunfire at police department firing ranges and the lack of adequate noise protective devices. Ds, the City of New York and the manufacturer of the noise protection devices, moved for summary judgment arguing, *inter alia*, that there was no evidence of a design or manufacturing defect. Ps alleged that the officers’ hearing loss was occasioned by high sound levels that occurred over a period of time. Ds argued that the noise protection devices were tested and certified by the American National Standards Institute (ANSI) to reduce noise by 23 decibels when correctly worn. The Supreme Court denied D’s motion and the Appellate Division reversed. **Holding:** Ps have not set forth any basis to find a manufacturing defect. No evidence was presented that the product was improperly constructed or that it broke or malfunctioned in any specific way. Nor did the Ps show a design defect relative to the purposes for which the particular ear protectors were intended. While it is not necessary to prove a specific defect to succeed in a product defect case, it must at least be shown that the product did not perform as intended. Here, there was no showing that the ear protectors did not reduce noise

by 23 decibels and that inference cannot be drawn merely from the fact that Ps suffered hearing loss over a period of time.

- **Issue of fact raised by inconsistency of expert opinion on ability of hot water heater to effectively control temperature – Vereczkey v. Sheik, 869 N.Y.S.2d 146 (2d Dept. 2008):** **Facts** – P, two year-old child, was injured when she reached into a bathtub of scalding water in the apartment where she resided with her mother. P sued Ds, manufacturers and distributors of the faucet cartridge and hot water heater alleging defective design, manufacture and breach of warranty. The thermostat, hot water heater and all component parts were sold as a set. Ds moved for summary judgment. Ds argued that the original calibration of the thermostat was intact and that the hot water heater was designed so that it would not heat water above 160 degrees Fahrenheit. However D’s expert admitted that the water in the tank was 25 degrees hotter than the thermostat indicated and P’s expert showed that the temperature of the water from the bathtub faucet actually rose in excess of 171 degrees Fahrenheit. The Supreme Court denied Ds motion based on a manufacturing defect but granted their motion on defective design and breach of implied warranty. The Appellate Division affirmed. **Holding** - Due to the temperature discrepancies, Ds failed to establish that the product was not defective when it left their control or that the accident was caused by something other than a manufacturing defect. At best they established that there were concurrent causes of liability which would not absolve them. However, P failed to raise a triable issue of fact regarding the claim that the hot water heater design was not defective and breached implied warranties of being minimally safe for its expected purpose.
- **Questions on distribution and testing of tire product based on manufacturing defect theory also raised triable issue under theory of negligence – Sokolowski v. Manco Prods. Inc., 867 N.Y.S.2d 835 (4th Dept. 2008):** **Facts** – P was injured when a tire rim exploded while he was attempting to inflate the tire of a go-cart. P sued D, the manufacturer and alleged distributor, claiming strict liability for a manufacturing defect and negligence. D moved for summary judgment. The Supreme Court denied D’s motion and the Appellate Division affirmed. **Holding** - Ps raised a triable issue of fact on whether the defective rim was distributed by D and if so whether D’s testing procedures were sufficient with respect to inflation. Since evidence supporting a manufacturing defect may also constitute evidence of negligence, a triable issue of fact was also raised for the negligence claim.
- **Smith v. City of New York, 133 A.D.2d 818; 520 N.Y.S.2d 195 (2d Dept. 1987):** In order to succeed on a claim of manufacturing

defect, a claimant must demonstrate that: (1) the product was not built to the specifications of its intended design; *Lombard, Centrico, Inc.*, 161 A.D.2d 1071; 557 N.Y.S.2d 627 (3rd Dept. 1990) (2) the defect existed when the product left the hands of the manufacturer *VanDeusen v. Norton Co.*, 204 A.D.2d 867; 612 N.Y.S.2d 464 (3d Dept. 2002); and (3) the named defendant was a manufacturer, distributor or in the business of selling that product

- **Deviation from Specifications or Design- *McArdle v. Naviszar Intern. Corp.***, 742 N.Y.S.2d 146 (3d Dept. 2002): **Facts** – enumerated above in 'failure to warn.' **Holding** – On the contention of P that the water tank was defective causing it to leak and contributing to P's injuries. D met its burden by proving that the tank had been built to state specifications and was examined and approved by DOT inspectors prior to delivery. P's expert testimony that the leak must have resulted from a defect, was insufficient to defeat D's motion for summary judgment. Additionally, P's claims that the handholds and hose brackets were improperly placed were claims of design defect and not manufacturing defect.
- **Imposing Strict Liability: Must be a Manufacturer, Seller or Distributor - *Spallholtz v. Hampwn C.F. Corp.***, 741 N.Y.S.2d 917 (2d. Dept. 2002): Memorandum opinion affirming dismissal of strict products liability and breach of warranty claims because D was not the manufacturer, seller or distributor of the machine. Furthermore, "the isolated act of arranging for a temporary exchange between two companies of the subject machine for another machine and for the shipment of the machine does not make it a distributor or seller for the purposes of imposing liability
See also- Franckowiak v. King-Kong Mfg. Co., 289 A.D.2d 1054, 735 N.Y.S.2d 294 (4th Dept. 2001). Reversing a lower court ruling and holding that a seller of a defective bicycle may be held strictly liable for the resulting injuries because the seller was in the distributive chain.
- **Economic Loss: Strict liability Generally Not Allowed - *Rivkin v. Heraeus Kulzer GmbH***, 289 A.D.2d 27; 734 N.Y.S.2d 31 (1st Dept. 2001): **Facts**- Ps claimed they had metal tooth crowns overlaid with the D's restoration system, which failed within months of installation, but they were not charged by their respective dentists for replacement restoration. Ps sought class action certification. Ds opposed class action certification and moved to dismiss the complaint. The Supreme Court with respect to the named plaintiffs. dismissed the complaint except for the products liability claim and granted class action

certification. Appellate Division reversed and dismissed the complaint in its entirety. **Holding** – Where Ps’ only claim against manufacturer is for economic loss, and the product is not “unduly dangerous” New York law does not allow a strict product liability cause of action where the manufacturer made no express or implied warranties of effective performance and has no privity of contract with Ps.

2. Negligence

- To make out a *prima facie* case for negligence in New York, plaintiff must show (1) that the manufacturer owed a plaintiff a duty to exercise reasonable care; (2) a breach of that duty by failure to use reasonable care so that a product is rendered defective, i.e. reasonably certain to be dangerous; (3) that the defect was the proximate cause of the plaintiff’s injury; and (4) loss or damage. Fahey v. A.O. Smith Corp., 77 A.D.3d 612, 615, 908 N.Y.S.2d 719, 725 (1st Dept. 2013).
- **Reasonable person standard, not community standard used to judge defect** – Reis v. Volvo Cars of N. Am., 2014 WL 2931495 (CANY July 2014): **Note** – We have written up this hard luck case over the years and it is still in the courts. The decision by the Court of Appeals can only be regarded as case specific, as it makes little sense. **Facts** – In 2002, plaintiff, standing in front of a 1987 Volvo, lost his leg when the car lurched forward after being started in gear. The manual transmission lacked a starter interlock. The proof was that, in that model year, some manufacturers used interlocks to prevent starting in gear; others didn’t. The case was tried (to a large verdict) at a time when an appeal by the defendant was pending because of denial of SJ. The trial court charged on both negligent design and strict liability; the jury found liability based on negligence but not on strict liability. Plaintiff sought a charge based on PJI 2:15, which was a malpractice charge dealing with duties owed by specialists, which the court gave. While post-trial motions were pending, the MSJ was decided by Appellate Division, holding that it was error not to grant SJ on the negligence cause of action (but the case could proceed on strict liability) So, the trial court upheld the verdict on a strict liability basis (even though the jury had found against the plaintiff on that). **Holding** – The majority opinion, by Judge Smith, first observes that the causes of action for negligent design and strict liability are the same, and suggests charges should not be given on both. Then it reversed the lower court decision for plaintiff on the basis that the charge based on 2:15 should not have been given. It adopts a “community” standard whereas in a product defect case, the reasonable man standard is used. (Although the difference between the two, Judge Smith observes, is “subtle”). In dissent, Judge Graffeo would have affirmed the decision of the Appellate Division.
- **Failure to use starter interlock on vehicle basis for finding of negligence; evidence admissible to modification by other manufacturers**-Reis v. Volvo Cars of N. Am., 105 A.D.3d 663, 964 N.Y.S.2d

125 (1st Dept. 2013): **Facts-** (From prior write-ups of this case we have done, the facts are that someone reached into this 1987 Volvo and the car which had manual transmission went into gear, causing property damage. Here there was a verdict based on negligent design for failure to incorporate a starter safety switch would have prevented the car going into gear. The evidence was that some manufacturers were using such a device at the time. **Holding-**Based on the expert testimony, there was a basis for the jury to find negligent design. Trial court properly admitted as evidence on the issue of feasibility that another maker had modified its vehicles post manufacture but before the accident here. The evidence was not put forward for the truth of the fact but that Volvo should have known of the dangers.

- **Simply mentioning a side effect in the label does not satisfy duty to warn as a matter of law-**Scheinberg v. Merck & Co., Inc., No. 8 civ. 4119 JFK, 2013 WL 76140 (S.D.N.Y. Feb. 5, 2013): **Facts-**Plaintiff developed ONJ (osteonecrosis of the jaw) while taking defendant's Fosamax. This was the 5th bellwether case in the Fosamax MDL before Judge Kaplan in the S.D.N.Y. The jury found for Merck as to design defect but for plaintiff on failure to warn. Defendant moved to set aside the verdict under FRCP 50, on the basis that its label at the time of use listed ONJ as a side effect. **Holding-**The adequacy of the labeling for a prescription drug is generally a fact question for the jury, and on review of the evidence it was properly presented to the jury to decide. Merely stating that there is an association is not the same as explaining the risk in detail. There was evidence in the record that Defendant diluted the warning. **Comment:** This is very useful case to cite in the ongoing NuvaRing and other drug litigation where the manufacturer seeks to obtain a ruling, usually on a summary judgment motion, that as a matter of law the warning was adequate
- **Reasonably foreseeable that supplying large quantities of guns for resale could result in the guns being on the criminal market-**Williams v. Beemiller, 103 A.D.3d 1191, 962 N.Y.S.2d 834 (4th Dept. 2013): **Facts-** Plaintiffs brought action on behalf of shooting victim against Ohio handgun manufacturer, Ohio wholesale distributor, Ohio firearm licensee and New York resale purchaser alleging negligent distribution, negligent entrustment, negligence per se, public nuisance and intentional violation of federal and state gun laws. Defendants moved to dismiss. Supreme Court granted defendants' motion. Plaintiffs appealed. Appellate Division reversed. **Holding-** Plaintiffs alleged that defendants sold the specific gun used to shoot plaintiff to an unlawful straw purchaser for trafficking into the criminal market, and that defendants were aware that the straw purchaser was acting as a conduit to the criminal gun market. Thus, defendants were a direct link in the causal chain that resulted in plaintiff's injuries, and that defendants were realistically in a position to prevent the wrongs. Furthermore, there was a question of fact as to whether it was reasonably foreseeable that

supplying large quantities of guns for resale to the criminal market would result in the shooting of an innocent victim. **Comment:** This decision has to be seen in the context of the Williams litigation that has been ongoing for several years now. The litigation is a cause celeb since it points to a way around the PLCAA-- Protection of The Lawful Commerce in Arms Act, 15 USC §§ 7901–7903, as added by Pub L 109–92, 119 U.S. Stat 2095. The law was intended to immunize gun manufacturers from product suits, and has been involved many times successfully as a defense, although it has a few exceptions written into it. In 2003 the plaintiff was mistakenly shot by a gang member, using a gun manufactured by Beemiller. The gun ended up in Buffalo in the hands of a gang member. After an appeal from a dismissal, it was held that plaintiff could state a cause of action outside of the PLCAA, Williams v. Beemiller, Inc., 100 A.D.3d 143, 952 N.Y.S.2d 333 (2012). The reported opinion above dismissed the reargument which defendants sought.

3. Breach of Warranty

a. Breach of Warranty

- We have actions based both on breach an express warranty and breach of implied warranties—for fitness and merchantability. However, the Court of Appeals in the *Denny* case greatly expanded the scope of the breach of warranty cause of action. To establish a breach of express warranty, plaintiff must prove that there was an “affirmation of fact or promise by the seller, the natural tendency of which was to induce the buyer to purchase, and that the warranty was relied upon. Friedman v. Medtronic, Inc., 42 A.D.2d 185, 190, 345 N.Y.S.2d 637, 643 (2d Dept. 1973).
- A breach of implied warranty of merchantability is when a manufacturer’s products are not fit for the ordinary purposes for which such goods are used. UCC 2-314(2)(c). “The focus of a breach of implied warranty inquiry is whether the product meets the expectations for the performance of the product when used in the customary, usual and reasonably foreseeable manners.” Denny v. Ford Motor Co., 87 N.Y.2d 248, 258-259, 639 N.Y.S.2d 250, 256 (1996). This frees the plaintiff from having to prove a strict liability products case, including proof of a reasonable alternative design.
- **Where product did not meet consumer expectations, claim may withstand preemption defense.** Teixeria v. St. Jude Med., Inc., 2015 WL 902616 (W.D.N.Y. 2015): **Facts-** Plaintiff had a St. Judes defibrillator implanted, which uses a Durata lead wire. (The Durata was a later generation of the Riata lead wire involved in the Rosen case squibbed below under Preemption.) The FDA had given a full PMA (premarketing approval) to the device. Within two weeks it failed and had to be removed, for which plaintiff sought damages. The complaint stated that defects in the manufacturing of the lead led to the failure. The complaint pled some details about the defective lead, based primarily on FDA action relating to the Riata lead. Defendant made two motions: to dismiss on the

pleadings, including a claim based on breach of implied warranty, under FRCP 12(b)(6) based upon preemption; and to strike from the complaint various pleadings which related to the Riata lead. **Holdings-** Since this was a PMA, Class III approval by the FDA, there was preemption; and the only causes of action that can be stated under NY law are those which are parallel to the federal regulations applying to this product, that is plaintiff must plead a state tort claim based upon violation of federal law. So, in light of that requirement, the magistrate judge reviewed each cause of action. As to strict liability for a manufacturing defect, that claim withstands attack on the pleadings since the pleading is that federal rules were violated when the lead was made in a defective manner, deviating from the standards set by the FDA when it approved the device. However, the magistrate recommended dismissal of the cause of action based on failure to warn, since that is an attack on the label, and the label was FDA approved. Of real value is the decision of the judge that the cause of action for breach of implied warranty should stand. That claim is based on the Denny case (discussed later in this outline) basis that the device did not meet consumer expectations. Such a claim is parallel to federal law as it is claimed that the manufacturer deviated from standards prescribed by the FDA. (Also the court observes that this is a contract and not a tort based cause of action.) Finally, as to striking contentions in the pleadings, the court let them stand since they were not prima facie incorrect.

- **Irrespective of length of warranty provided by manufacturer, the time to bring a breach of warranty claim is 4 years from delivery- Katopodis v. Marvin Windows & Doors, 105 A.D.3d 633, 964 N.Y.S.2d 123 (1st Dept. 2013): **Facts-** Homeowners brought action against manufacturers of doors and windows, asserting claims for breach of express warranty. Supreme Court denied defendant's motion for Summary Judgment, and denied plaintiffs' cross-motion for partial Summary Judgment. Parties cross-appealed. Affirmed. **Holding-** Statute of limitations for homeowners' breach of express warranty claim was not tolled based on an estoppel theory. Defendant argued that the four year statute of limitations runs from the date the windows and doors were delivered in December 2004 or January 2005, which means the action was time-barred when it was filed in June 2010. Period within which to sue was not extended by offer by defendant in 2009 to provide certain replacement parts pursuant to the terms of the express limited warranty. The 10-year express warranty given by defendant also did not extend the time.**
- **Claims for express warranty and an implied warranty of merchantability cannot be maintained when a car manufacturer's warranty has expired- Cali v. Chrysler Group LLC, 2011 WL 383952 (S.D.N.Y. 2011): **Facts-** P, as a part of a putative class action, alleged that front brake pads and front and rear brake rotors on model years 2008**

and 2009 Chrysler Town and Country, Dodge Caravan vehicles and Dodge Grand Caravan vehicles wear out prematurely and/or warp prematurely, necessitating early replacement. The complaint pleaded: breach of express warranties; breach of written warranty under the Magnuson-Moss Warranty Act; and breach of implied warranty of merchantability. D's basic warranty indicated that brakes were only covered for 12 months or for 12,000 miles, whichever comes first. D moved to dismiss and motion was granted. **Holding-** Issue was that brakes on P's vehicle were only covered under warranty for the first 12,000 miles, and it is undisputed that P first experienced problems with vehicle's brakes when the odometer read 13,572. New York law applies to breach of implied warranty of merchantability claim because the vehicle was purchased in New York. The warranty expressly stated that implied warranty claims are limited to time periods covered by express written warranties. P's claim for breach of implied warranty failed because it is limited to the time period of the express warranty. Additionally, it also failed because New York law requires privity for implied warranty claims. In this case, no privity existed between P and D. Since claims under Magnuson-Moss Act stand or fall with express and implied warranty claims under state law, the final remaining count of the complaint must be dismissed as well.

- **Statute of limitations for warranty claims is 4 years from product receipt; conclusory language used in complaint to describe misstatements or omissions in support of fraudulent concealment claim warranted leave to amend complaint where a stove exploded; suit was blocked by GBL §349- Woods v. Maytag Co., 2010 WL 4314313 (E.D.N.Y. 2010): **Facts-** P purchased a Maytag 30 inch gas range oven in 2005. In 2008, when P was using the oven, a malfunction occurred causing the oven to explode. P filed a complaint on behalf of a putative class. P asserted claims that Ds possessed and intentionally withheld knowledge of a defective design (specifically, the igniter mechanism), made express warranties and other misrepresentations regarding safety of the oven in order to induce consumers to purchase the oven and spend money on repairs. Ds moved to dismiss on grounds that: P's breach of warranty claims were barred by the statute of limitations; P's fraud claims were duplicative of the warranty claims and failed to state a claim; and P failed to state a claim under GBL §349. Ds' motions were granted in part and denied in part. **Holding-** P's breach of express warranty and implied warranty of fitness and merchantability were time-barred because of four-year statute of limitations starting when P received the product. The statute expired more than four months before the complaint was filed. D's limited warranty was only for repair or replacement and did not guarantee future performance for purposes of the exception to the four-year statute of limitations. Additionally, P learned of defect two years after purchase of product when it exploded, and thus had ample time to file suit. P's fraud complaint was dismissed for failure to meet the heightened pleading requirement because it**

contained vague allegations relating to alleged misrepresentations and omissions of D. Also, P failed to adequately plead scienter so as to raise a strong inference of fraudulent intent. However, if fraud allegations were properly pled, P could have potentially demonstrated that D knew of a specifically identified defect that it concealed because it knew that P would not otherwise buy the oven. As for P's claim under GBL §349, it failed to adequately plead a materially misleading deceptive act or practice, because P failed to provide enough factual information to plausibly suggest that D had knowledge of defect or made misrepresentations to induce purchase of the ovens. P was permitted to replead his fraud allegations with sufficient particularity and his claims under the GBL because conclusory language P used to describe D's alleged misstatements or omissions demonstrated that P may have additional information to include the complaint

- **When label warns of injury sustained, warranty claims as well as strict liability claims fail-** Reed v. Pfizer, Inc and Wyeth LLC, 2012 WL 859729 (E.D.N.Y. 2012): *Facts*- P took Lybrel and developed deep vein thrombosis and other serious injuries that required hospitalization. 1tS' (wife and patient) theories of liability included: (1) failure to warn, (2) manufacturing defect, (3) design defect, (4) breach of express warranty and (5) breach of implied warranty. L\s filed motion to dismiss. L\s' motion was granted. *Holding*- Ps pleaded nothing about the content of Lybrel's warnings. In fact, Lybrel's warnings included injuries listed by Ps. Ps did not identify how provided warnings were inadequate. D s did warn of relevant risks, and thus this claim was dismissed. Ps also did not plead any facts that the particular drug administered to her had a defect as compared to other samples of that drug. Ps design defect claim also failed because it merely asserted that Lybrel was defective. They did not allege existence of feasible alternative design. Additionally, 7tS' express warranty claim failed because reasonable inference could not be drawn that Lybrel was defective or what Ds promised was different than what they provided. For the same reason, Ps' breach of implied warranty also failed.
- **Standard for pleading breach of warranty in pain pump case is minimal when defendant possesses information-** Varveris v. Orthopaedic and Sports Associates of Long Island, P.C. et al., 2011 NY Slip Op 32761(U) (Sup. Ct. Nassau Co. 2011): *Facts*- Ps sustained injuries as a result of two arthroscopic Bankart reconstruction surgeries of P's left shoulder performed at Ds office. The second open arthroscopic surgery performed on July 16, 2007 included insertion of intra-articular pain pump manufactured by D I-FLOW. P filed suit against surgeons, designers, manufacturers and distributors of pain pump. P alleged: strict product liability, negligent manufacture and distribution, punitive damages, breach of express and implied warranties, fraudulent misrepresentation, fraudulent concealment

and violation of consumer fraud and deceptive trade practices. D manufacturer moved to dismiss the complaint. D's motion was granted in part and denied in part. *Holding*- D sought to dismiss the strict product liability and breach of express warranties on the ground that they were time barred as the surgery was performed on July 16, 2007 and the complaint was filed on December 20, 2010. The UCC §2-313 provides a four-year statute of limitations for breach of warranty. P was an infant at the time of the surgery and thus the statute was tolled. Accordingly, neither causes of action were time-barred. Since no evidence was provided on this ground, the strict product liability cause of action was upheld. Punitive damage cause of action was dismissed because New York does not have separate cause of action. P's breach of express warranty was adequately pleaded and most of the necessary information was in D's possession. Fraud allegations were dismissed because they were not adequately pleaded under the heightened requirement of CPLR §3016(b). However, dismissal was not granted because it was afforded the opportunity to replead at conclusion of discovery.

- **Consuming packaged tuna containing mercury created breach of warranty claim**- *Porrizzo v. Bumble Bee Foods*, 822 F.Supp.2d406 (2011): *Facts*- P consumed canned tuna fish for 2 years. D producer's package did not mention anything about mercury. It developed elevated level of mercury in his blood and experienced heart attack-like symptoms. P brought action against Ds, producer of canned tuna and grocery store alleging breach of implied warranty of merchantability and fitness for consumption, failure to warn under both, strict liability and negligence theories, emotional distress and violations of consumer statutes. D s filed motion to dismiss. D's motion was dismissed except for the part seeking dismissal of specific portions of the NY adulteration of food statute. *Holding*- D claimed that PS state law claims were preempted by the FDA which specifically addresses and regulates this industry. The FDA has not promulgated any regulation concerning the risk posed by mercury in fish or warnings for that risk. Accordingly, n's state law claims were not preempted. Additionally, proximate cause was adequately pleaded as plaintiff stated that tuna was his major source of protein and that he was diagnosed with an elevated mercury level. It could not be concluded that the dangers of mercury poisoning from consumption of canned tuna fish are open and obvious, and thus the failure to warn claim was adequately pleaded. Furthermore, It's breach of implied warranty of merchantability succeeded because he was injured by conditions which he could not have reasonably anticipated to be present in the product. As toll seller, this claim was dismissed, because it had no obligation. The Court did however dismiss It's claims with regard to the fact that D added poisonous or deleterious substances to its products. The product was riot adulterated but it did contain mercury, and thus

New York State Agriculture and Markets Law §201(1) and 200(11) survive but 200(2),(3),(5) and (9) failed.

- **Breach of warranty accrues on date of delivery unless there was wrongful concealment-** Statler, et al. v. Dell, Inc., 775 F.Supp.2d 474 (E.D.N.Y. 2011): *Facts-* 1t commenced action against A alleging several causes of action arising out of the malfunction of five Dell Optilex computers leased by 1t in 2003. Accompanying the computers was a limited warranty to repair and replace any defective computers. In 2005, D publicly acknowledged problems with the computers. In 2006, A replaced the motherboards on 1t's computers. 1t sought to represent himself as well as a class of similarly situated individuals. In 2007, the New York Times published an article discussing a lawsuit commenced against D alleging widespread problems with these computers. 1t read this article in 2010. 1t alleged violation of the Magnusson Moss Warranty Act; §2-314 of the New York Uniform Commercial Code; and §349 of the New York General Business Law. D argued that these claims were untimely and moved for SJ. Ds motion was granted. *Holding-*Ps warranty claims accrued at the time of delivery of the computers in 2003. The sole issue was whether principles of equity can be applied to render 1t's claims timely. 1t had to show: (1) wrongful concealment by A, (2) which prevented 1t's discovery of nature of claim within the limitations period and (3) due diligence in pursuing discovery of claim. Here, D tried to repair P's computers acting pursuant to its warranty obligations. Furthermore, no facts exist that D attempted to fraudulently conceal computers' defects. Facts existed prior to the 2010 discovery that would have made this action timely. Thus, P was not entitled to equitable estoppel and claims were dismissed.
- **Breach of warranty accrues on the date of delivery of product unless there was an explicit extension-** Jackson v. Eddy's LI RV Center Inc..et al., 2012 WL 612919 (E.D.N.Y. 2012): *Facts-* n purchased a 2005 Itasca Meridian Motor Home from A Eddy's. P alleged that since delivery, the Motor Home was replete with defects. P returned it over 50 times for repair. 1t sued D seller, A manufacturers, D bank which had financed transaction, A servicer of loan, alleging breach of contract and breach of express and implied warranties. As moved to dismiss. Motion was granted. *Holding-* All claims were barred by statute of limitations. Any claim sounding in breach of contract arising out of the contract of sale and/or breach of express or implied warranty (UCC §2-315) accrued on the date of the delivery of Motor Home. 1t purchased Motor Home on November 18, 2005 and this action was filed on January 19, 2011. Here, there is no language that can be relied upon in support of any claim of an explicit extension of any warranty to future performance. To the extent that n alleged that either A Winnebago or A Freightliner concealed information about Motor Home that allowed his claims to be saved by equity, was rejected as completely implausible and without basis. Lack

of privity of contract was also fatal to any claim against A Winnebago and A Freightliner based upon an alleged implied warranty.

- **Actions of purchaser of “as is” equipment indicated he did not rely upon “safe and ready to rent” tag on product – Meyer v. Alex Lyon & Son Sales Managers & Auctioneers, Inc., 889 N.Y.S.2d 166 (1st Dept. 2010): *Facts* – P injured when a telescopic boom on a man lift he had purchased at an auction, on an “as is” and “where is” basis, collapsed. Ds manufactured and sold the lift. P was aware the lift could not be used until an inspection company had certified it as safe. However, he wanted to use it before this certification and therefore drafted an agreement with the inspection company to hold it harmless for any and all claims arising out of use of the lift. The injury occurred during the time that this agreement was in force. P claimed he relied upon a “Safe Ready to Rent” tag that was on the lift. The Supreme Court granted D’s motion for summary judgment and the Appellate Division affirmed. *Holding*: The strict liability claim was correctly dismissed because, even assuming Ds had a duty to warn, P could have discovered the defect, perceived its danger and averted his injury by not using the lift until it was certified safe. There is no breach of implied warranty claim because the sale was made on an “as is” basis conspicuously stated on the auction registration form signed by P. P’s actions belied any reliance on a “Safe Ready to Rent” tag found on the lift. The proximate cause of P’s injury was his own disregard of the inspection company’s representation that the lift was not safe.**
- **Insurers’ recovery not barred by lack of privity between insurer and manufacturer under breach of implied warranty theory – Wade v. Tiffin Motor Homes Inc., 686 F. Supp. 2d 174 (N.D.N.Y. 2009): *Facts* – Ps were owners of a recreational vehicle (RV) destroyed in a fire. Ps and their insurers sued D, manufacturer of the RV, alleging, *inter alia*, breach of implied warranty of merchantability. Specifically, Ps alleged the RV’s propane gas system was defective, causing a fire that resulted in a complete loss of the RV and the loss of Ps’ property inside. A one-year limited warranty on the RV that covered the propane gas system had expired so there was no breach of express warranty claim. D moved for summary judgment arguing that because there was no privity of contract between the insurers and D, insurer Ps had not stated a viable claim. [The RV owners’ claims under strict product liability and negligence were barred by the economic loss rule, see “Economic Loss” section below]. P insurers countered that because the RV owner had contractual privity, the insurer as the owners’ subrogee, stood in the shoes of the owners and therefore had contractual privity. The District Court denied Ds motion. *Holding*: Under the New York’s Commercial Code § 2-314, a purchaser may assert a breach of implied warranty claim against a seller if he purchases a product that is not fit for the ordinary purposes for which such goods are sold. However, with regard to asserting a claim against a**

manufacturer the general rule is that, absent privity of contract, a purchaser cannot recover mere economic loss under an implied warranty theory. Nevertheless, New York courts recognize an exception to this rule if the product in question is a thing of danger. A defective propane gas system attached to a recreational vehicle which is intended to house sleeping individuals alongside gas appliances is a thing of danger. Therefore, although Ds are correct in noting the lack of privity, it is irrelevant under the circumstances

- **Issue of fact raised by failure of manufacturer and seller to include warnings of the specific hazard in the training and operating manuals** – Leonard v. Thompson & Johnson Equip. Co., 875 N.Y.S.2d 675 (4th Dept. 2009): **Facts** – P was injured when he fell to the floor while attempting to enter a Bobcat Skid Steer Loader (Bobcat). Ds, manufacturer and seller, moved for summary judgment arguing that the warnings issued of the hazard were adequate. P submitted expert affidavits that a safety notice, issued by the manufacturer prior to the accident, concerned a virtually identical scenario to that which resulted in P’s accident and that specific warnings of the hazard should have been contained in the training materials and operating manuals. The Supreme Court denied D’s motion. The case proceeded to trial where the jury found that, although the Bobcat was not defectively designed, it was sold with inadequate warnings. Further, although P could not have discovered the alleged defect, he nevertheless could have avoided his injuries. The jury found P 60 percent and the Ds 40 percent responsible. Both Ds made motions notwithstanding the verdict. The Supreme Court denied and the Appellate Division affirmed. **Holding** - Summary judgment was properly denied because even assuming that Ds established as a matter of law that the warnings were adequate, P raised an issue of fact as to the liability of Ds with respect to the safety notice, the failure to include warnings of the hazard in the training and operating materials and the comparative negligence of P. Further, judgment notwithstanding the verdict was also properly denied because the defendants failed to establish that there was no rational process by which the jury could find in favor of P.
- **Continuing duty to warn and admissibility of evidence of prior accidents** – Adams v. Genie Indus. Inc., 861 N.Y.S.2d 42 (1st Dept. 2008): **Facts** – P seriously injured while operating a personnel lifting machine. P sued D, the manufacturer for negligence and defective design. The jury returned a verdict for P. D moved to set aside the verdict arguing the court erred in qualifying P’s expert and allowing in testimony from him and one of D’s former employees that it was feasible, using technology available at the time, to design a system eliminating safety risks. D further argued the court should not have admitted in evidence that D breached its continuing duty of care during the 11-year period between sale and the accident by not remedying or warning of the defect. The Supreme Court denied D’s motion, conditionally set aside the verdict, and

directed a new trial on damages unless D stipulated to increase the awards for past and future pain and suffering. The Appellate Division affirmed. **Holding** - P's expert, a licensed engineer experienced in the design and manufacturer of industrial machines, including lifts, was properly qualified to testify. Further, testimony from D's former employee of D's pre-sale awareness of the risk and that a similar accident had occurred in the past, was properly admitted. The testimony of both witnesses provided ample support that the product was defective when sold, a safer design was feasible, and that the defective design caused P's injuries. Further, evidence of D's post-sale duty of care was properly admitted. A manufacturer of a product affecting human safety has a continuing duty, after a defect is discovered, to either remedy it, or if not feasible, warn of the danger.

- **Failure to perform with excellent power and acceleration breached implied but not express warranties** - Arthur Glick Leasing, Inc. v. William J. Petzold, Inc., 858 N.Y.S.2d 405 (3d Dept. 2008): **Facts** - P purchased a yacht, where manufacturer warranted that its new engines would be "free from defects in material or workmanship" and that it would correct any such defects during the warranty period. Yacht dealer, not a party to the action, described in its brochure the boat as delivering "exceptional power with excellent acceleration response." Immediately after purchase, the boat's alarm began to sound relating to the oil pressure and manifold inlet temperature without any discernable cause; the engines were rough running; and the boat had acceleration problems and a decrease of RPMs when the fuel reached a certain temperature. P sued D manufacturer for, *inter alia*, breach of express and implied warranties. Part of the suit was based upon violation of the Magnuson-Moss Warranty Act, 15 USC 2301 et seq. Jury found that while D had not breached an express warranty, it had breached implied warranties of fitness for ordinary purposes and merchantability. P requested the court set aside the jury verdict denying breach of express warranty. The court refused. **Holding** - There was no error in the jury verdict as to express warranty. The jury could have rationally concluded that while the engines did not perform as represented by the dealer, they did perform in accordance with their technical specifications and hence were free from defects in material or workmanship. Alternatively, they could have found, based on the existence of conflicting proof, that any defects in the engines had been corrected by the manufacturer in accordance with its express warranty
- **Breach of warranty claim can proceed even if specific defect claim is defeated provided that another defect may be present** - Bradley v. Earl B. Feiden, Inc., 832 N.Y.S.2d 265 (Ct. App. 2007): **Facts**- P sustained property damage when a refrigerator/freezer manufactured by D caught fire. An investigation by the fire department concluded that the fire originated in the freezer. P sued D

on claims of negligence, strict liability and breach of warranty. P claimed that the defrost timer in the refrigerator/freezer was defective and caused the fire. D submitted evidence indicating that the timer was not defective. At the conclusion of the trial, the jury was asked to determine the following: (1) whether the fire originated in the refrigerator/freezer; (2) whether the defrost timer in the refrigerator/freezer was defective; (3) whether the defect was a substantial factor in causing the fire; (4) whether D breached its warranty in that the refrigerator/freezer was not fit for its intended purpose; and (5) whether the breach of warranty was a substantial factor in causing the fire. The jury returned a verdict finding that the fire did originate in the refrigerator/freezer but that the defrost timer was not defective. The jury also found that D breached the implied warranty of merchantability and that the breach was a substantial factor in causing the fire. D moved to set aside the verdict as inconsistent, arguing that if the product was not defective then it cannot be said to have been unfit for its intended purpose. Supreme Court denied the motion and the Appellate Division reversed. The Court of Appeals reversed and reinstated the verdict. *Holding-* the Court of Appeals held that although the jury found that there was no defect in the defrost timer, that does not mean that it determined that the product was free of any other defect. Thus, since the jury was not asked whether the refrigerator/freezer was free from "any defect" the verdict was not inconsistent.

- **No cause of action where product is minimally safe – Adams v. Rathe, NYLJ 8/12/05 at 18 (Sup. Ct. New York Cty. 2005):** *Facts* – See above. *Holding-* the court dismissed the claims grounded in breach of implied warranty. The court noted that even though an issue of fact existed as to whether the product was defective in design, the inquiry as to breach of warranty focuses only on whether the product was minimally safe for its intended purpose, regardless of whether or not a feasible alternative design existed. Here, the evidence demonstrated that the product was minimally safe.
- **No cause of action where the product was not defective – Bradley v. Earl B. Feiden Inc., 2006 N.Y. Slip Op 4478 (3d Dept. 2006):** *Facts* – P sustained property damage as the result of a fire that originated in a refrigerator that he purchased from D. P sued Don claims, *inter alia*, of defective design and breach of warranty. A jury found that the refrigerator was not defective but that D breached the implied warranty of merchantability. Following trial, D moved for judgment notwithstanding the verdict. Supreme Court denied the motion and the Appellate Division reversed. *Holding-* As a general rule, a manufacturer or seller cannot be held to have breached the implied warranty of merchantability if a product is not defective. Thus, when the

jury concluded that the refrigerator was not defective the claim for breach of warranty should have been dismissed

- **Dangers posed to a select few consumers does not give rise to a claim for breach of warranty of fitness** – Pai v. Springs Indus. Inc., 795 N.Y.S.2d 98 (2d Dept. 2005): *Facts* – P sued claiming that the sheets breached the implied warranty of merchantability. D moved for summary judgment, arguing that the reaction by P was due to a rare disorder that affected only a small portion of the population. Supreme Court granted the motion and Appellate Division affirmed. *Holding* – Where, as here, a product caused reactions to only a very small portion of the population, it cannot be said to be unfit for its intended use. Here, P failed to submit evidence that her allergy was shared by a substantial portion of the population. Therefore, the claim for breach of warranty was properly dismissed.
- **Claim Must Be Based on Condition of Product When It Left Manufacturer's Hands** – *Fritz v. White Consol. Indus.*, 2003 N.Y. App.Div. LEXIS 6733 (4th Dept. 2003): *Facts* - P sustained property damage as a result of a fire that started in a humidifier manufactured by D. P sued on theories of design defect and breach of implied warranty. The jury returned a verdict finding that the product was defectively designed but that D did not breach an implied warranty. D counsel objected to the verdict, arguing that a product cannot be defectively designed yet fit for its intended use. In an effort to clarify the verdict, the trial court instructed the jury to determine whether the humidifier was fit for its intended use on the date of the fire. The jury concluded that it was not and that D had breached its implied warranty. D appealed on the grounds that the original verdict was inconsistent and that the second instruction to the jury was erroneous. The Appellate Division reversed. *Holding* - To prevail on a claim of breach of implied warranty, P must prove that the product was not fit for its intended use when it left the hands of the manufacturer. The lower court's instruction to the jury to decide the claim based on the state of the humidifier on the date of the fire instead of when it left the manufacturer was clearly erroneous. Therefore, the original inconsistent verdict still stands and the only appropriate remedy is a new trial
- **Fit For Its Intended Purpose** - *Bombara v. Rogers Bros. Corp.*, 289 A.D.2d 356; 734 N.Y.S.2d 617 (2d Dept. 2001): *Facts*- [enumerated above in 'design defect']. *Holding*- In order to bring an action for breach of implied warranty P must show that the product was not fit for its intended purpose. Here, the injuries resulted when the product was used in a manner for which it was not originally intended and thus no action for breach of implied warranty is available.
- *Daley v. McNeil Consumer Products Co., A Div. of McNeil-PPCm Inc.*, 164 F.Supp.2d 367 (S.D.N.Y. 2001): When advancing a claim of breach of express warranty, P will have the burden to prove: (1) there was an affirmation of fact or promise by the seller, (2) the natural tendency of which is to induce the buyer to purchase.
- *Silivanch v. Celebrity Cruises, Inc.*, 171 F.Supp.2d 241 (S.D.N.Y. 2001): Where the seller is not in privity of contract with P, P can only advance the claim if the alleged warranty was (1) publicly disseminated; and (2) relied upon by the injured party.

- **Basis for the Bargain/Reliance Necessary** - *Daley v. McNeil Consumer Products Co., A Div. of McNeil-PPCm Inc.*, 164 F.Supp.2d 367 (S.D.N.Y. 2001): **Facts**- [enumerated above in 'design defect']. **Holding**- A statement made by the company representative on a 1-800 phone call, can create an express warranty. In order for a statement made by the seller to be considered an express warranty, it must be part of the basis for the bargain and P must have relied on it Here, assuming the company representative stated that there was no risk of allergic reaction as claimed by P, it may be considered an express warranty. Whether this statement was used to induce the P to buy and use more of the product (making it a basis for the bargain) and whether the conversation actually took place were questions for the jury to decide. Summary judgment was therefore denied.
- **Where No Contractual Privity Exists, Warranty Must be Public and Relied On by Plaintiff** - *Silivanch v. Celebrity Cruises, Inc.*, 171 F.Supp.2d 241 (S.D.N.Y. 2001): **Facts**- Ps contracted Legionnaires' disease in a whirlpool aboard a cruise ship. They sued the owner of the cruise ship as well as the designer and manufacturer of the filter, alleging that the filter did not properly function in cleaning the water of the whirlpool. P sued manufactured on numerous claims including failure to warn. D moved to dismiss the claim on the grounds that no express warranty was ever made directly to P. District Court granted the motion and dismissed the claim. **Holding** - While New York does not require actual privity for an express warranty claim to proceed, it does require that the representations on which the claim is based were (1) publicly disseminated and (2) relied upon by the injured party. Since there was no evidence indicating that the warranties were displayed to the general public or that P relied on any such warranty, the claim cannot go forward.

b. Magnuson-Moss Warranty Act

- **Federal Warranty Act Will Not Be Applied to Lessors**- *DiCintio v. Daimler Chrysler Corp.*, 97 N.Y.2d 463 (N.Y. 2002): **Facts** - Pleased a car that was manufactured by D and experienced numerous mechanical difficulties. After his attempts to terminate the lease were unsuccessful, P sued claiming that D had breached express and implied warranties under the federal Magnuson-Moss Warranty Act of 1975 ("The Act"). The Act provides that a warrantor must remedy a defective product "within a reasonable time and without charge." If the warrantor fails to comply with his obligations, the "consumer" - defined by The Act as a "buyer" - may sue for damages. D moved for summary judgment on the grounds that The Act did not extend to a lessor / lessee relationship. Supreme Court held that The Act did apply to this case and the Appellate Division affirmed. The Court of Appeals reversed. **Holding**- Under the plain language of The Act, the plaintiff must be a buyer in order to have a claim. P argued that the lease should be viewed as a sale since it "closely resembles an installment sale" and gave him the right to purchase the vehicle at the end of the lease. However, the court ruled that under the UCC, there must be a "passing of title" to be considered a sale. Since P never took title to the vehicle, he cannot be considered a consumer and is therefore beyond the scope of The Act
- *See also* - *Beyer v. Daimler Chrysler Corp.*, N.Y.S.2d __; 2001 WL 1834090 (2d. Dept. 2002) [Dismissing a similar cause of action by applying the rule set forth in the *DiCintio* decision.]

4. Fraud/Misrepresentation

- **Fraud**

- *Negrin v. Norwest Mortgage, Inc.*, 262 A.D.2d 39; 700 N.Y.S.2d 184 (2d Dept. 1999); *Berrios v. Sprint Corp.*, 1998 WL 199842 (E.D.N.Y. 1998): To recover on a claim of consumer fraud, P must show that they were injured as the result of a deceptive or misleading consumer oriented practice.
- **Benzene-cancer case where court decided many issues, including dismissing fraud causes of action** – McCormack v. Safety-Kleen Sysmtms., 2013 WL 3810119 (Sup. Ct. N.Y. Cnty. July 16, 2013): **Notes** – This decision is a set of rulings on many issues in a major case where a worker claims that as a result of exposure to benzene-containing products in years of work, he developed myelodysplastic syndrome and non-Hodgkin’s lymphoma. Defendants were manufacturers, bulk suppliers, distributors and retailers of the products, which were used for cleaning. Brand names included Liquid Wrench, Gumout, Safety-Kleen and a Sears product. **Facts**- Plaintiff alleged exposure to defendants’ products through inhalation, ingestion and skin contact, and argued that defendants failed to warn him of the dangers associated with the use of their products, and moreover, made misrepresentations to induce him to rely, thereby causing injury. Defendants moved for SJ on various issues. **Holding** – The court granted SJ for defendants Sears and Island Transportation Corp. and partial SJ for defendants USS and Safety-Kleen Systems as to plaintiffs’ fraud claims, finding that the record did not contain evidence that any defendant made any misrepresentations to plaintiff so as to induce him to rely, thereby causing injury. It also refused to grant one manufacturer a “bulk supplier” defense (that it had no duty to users as it sold the chemicals in bulk to smaller suppliers). It further dealt with issues of pre-emption under the Federal Hazardous Substances Act, breach of warranty and the need for a Frye hearing, as well as other case specific issues.
- **Plaintiff established special relationship as required for negligent representation claim; erroneous holding on design liability** – Amos v. Biogen Idec, Inc., 2014 WL 2882104 (W.D.N.Y. June 25, 2014): **Facts** – Wrongful death action for wife who developed progressive multifocal leukoencephalopathy after using Tysabri, a prescription drug for MS. Defendants moved to dismiss all the product liability causes of action. **Holding** – While the Court reviewed all of the causes of action and dismissed some such as the General Business Law claim and one for fraudulent concealment, it had two unusual holdings:
 - **(A)**: On the claim for negligent misrepresentation, the court found that the requirement, under New York law that the

parties stand in some sort of special relationship, which thereby imposed a duty on the manufacturer to render accurate information, was met by the pleading that the manufacturer had specialized knowledge about its drugs, and that his wife relied on that knowledge was sufficient to allege a special relationship. **Comment:** Lawyers doing pharmaceutical cases in New York should take note of this (and the few precedents cited).

- **(B):** On the claim of design defect, the court dismissed on a preemption basis, based on the Supreme Court Bartlett decision, which deals only with devices – to which it says that the plaintiff agreed. **Comment:** Preemption is not applied in drug cases, so this is a questionable ruling and concession!
- **Deceptive Acts and Omissions – *Pelman v. McDonald's*, 237 F.Supp.2d 512 (S.D.N.Y. 2003):** **Facts** - - [Basic facts enumerated in 'failure to warn']. P sued, alleging *inter alia* that D violated GBL § § 349 and 350 because it deceptively advertised that its food was not unhealthful; it failed to provide consumers with nutritional information; and induced minors to consume its products through deceptive marketing ploys. P cited no examples of the alleged deception in the Complaint. However, in its opposition papers, P cited two examples of the alleged deception. The first were the slogans 'McChicken Everyday!' and 'Big 'N Tasty Everyday' that D used in advertising campaigns. The second was a posting on D's website stating, 'McDonald's can be part of any balanced diet and lifestyle.' D moved to dismiss on the grounds that: (1) the complaint was not pleaded with sufficient specificity; and (2) there was no deception since the public is aware of the risks involved. The motion was granted. **Holding** - Inmaking its ruling, the court split the claims into two categories: deceptive acts and deceptive omissions. On the claim that D engaged in deceptive acts, the court ruled that since the allegedly deceptive slogans and website posting were not included in P's complaint, the claim failed for lack of specificity. Furthermore, the court added in dicta that even if P would have included those as examples of the alleged misconduct, it would have likely been considered little more than puffery and thus not actionable. With regards to the claim that D was deceptive in its failure to label its foods with nutrition information, the court explained that such a claim could only be actionable if the information withheld was solely within the defendant's possession. Here, '[i]t cannot be assumed that the nutritional content of McDonald's' products and their usage was solely within the possession of McDonald's

- **Economic Loss Necessary**- *Frank v. DaimlerChrysler Corp.*, 741 N.Y.S.2d 9 (1st Dept. 2002): **Facts**- Class action on behalf of 1,000,000 owners of a class of automobiles, which contained an alleged defect in the seat. Plaintiffs suffered no injuries but sought compensatory damages based on the estimated cost of repair. In addition, they advanced claims of negligence, strict liability, breach of the implied warranty of merchantability, negligent concealment and misrepresentation, fraud, unfair or deceptive business practices and civil conspiracy. Defendants (Ford, General Motors and Saturn) moved for summary judgment on the grounds that Plaintiff failed to state a claim and failed to state the fraud claims with sufficient particularity. Supreme Court granted the motions in their entirety and the Appellate Division affirmed. **Holding** – The defect must manifest itself and cause actual economic loss in order for a cause of action to arise under GBL § 349.
- **Must Show that D Was Deceptive to Consumers** - *Champion Home Builders Co. v. ADT Security Svcs., Inc.*, 179 F.Supp.2d 16 (N.D.N.Y. 2001): **Facts**- Plaintiff alleged numerous causes of action including consumer fraud, against Defendant fire alarm company after an alarm failed to detect a fire that ultimately destroyed Plaintiff's manufacturing facility. In the service contract between Plaintiff and Defendant there was an express waiver of liability for all damages alleged to have been caused by Defendant. **Holding**- In order to make out a cause of action for consumer fraud under GBL § 349, Plaintiff must present: "(1) proof that a 'consumer-oriented' practice was deceptive or misleading in a material respect, and (2) proof that plaintiffs were injured thereby." Here, all Plaintiff alleged was that Defendant failed to provide the services and alarm system that it agreed to. There was no allegation that Defendant had a consumer-oriented practice that was deceptive to its customers. **Note** - In a case decided by the same court shortly thereafter, *Anunziatti v. Orkin Exterminating Co. Inc.*, 180 F.Supp.2d 353, at 361 (N.D.N.Y. 2001) the court listed the requirements as follows: "First, the challenged act must be consumer oriented. Second, that the act was misleading in a material way, and third, that the plaintiff suffered injury as a result of the act."
- **Negligent Misrepresentation**
 - *Credit Alliance Corp. v. Arthur Andersen & Co.*, 65 N.Y.2d 536; 483 N.E.2d 110; 493 N.Y.S.2d 435 (N.Y. 1985):
 - The Court of Appeals has articulated a three-part test that Plaintiff must satisfy in order to succeed on a claim of "negligent misrepresentation". Under the test, Plaintiff will be required to demonstrate: (1) an awareness by the maker of the statement that it would be used for a particular purpose; (2) in the furtherance of which a known party or parties was intended to rely; and (3) some conduct on the part of the maker of the

statement linking them to that party or parties, which evinces the maker's understanding of that party or parties reliance.

- **Statements By a Potential Defendant- *Yanas v. Albany Medical Center Hosp.*, _N.Y.S.2d _; 2002 WL 1032861 (3d.Dept.2002):**
Facts- P underwent back surgery in 1982 during which were placed into two rods his spine. In March of 1996 the rods fractured, causing P serious physical injuries. P sought pre-suit discovery from D hospital attempting to identify the manufacturer and distributor of the rods. In October of 1998, D informed P that the manufacturer was "Smith & Nephew Richards, Inc. ("Smith") but that they were unable to identify the distributor. P then filed suit against Smith, alleging strict products liability and breach of warranty. After Smith denied manufacturing the rods in question, P requested additional information from D hospital indicating that Smith was in fact the manufacturer of the defective rods. D replied that they did not have purchase records dating back that far and that their original statement in which they named Smith as the manufacturer was based on the recollections of a surgical nurse. P therefore filed suit against D hospital, in which he alleged that D negligently misrepresented the identity of the rods' manufacturer, thus inducing P to commence an action against the wrong party and, as a result, harmed P because the Statute of Limitations expired before the error was discovered. D moved for dismissal of the claim on the grounds that it failed to state a cause of action since there was no privity of contract between P and D. Supreme Court granted D's motion and Appellate Division affirmed. **Holding** - In order for a party to be liable for negligent misrepresentation, there must either be actual privity of contract between the parties or a relationship that is so close "as to approach that of privity." Since the surgical procedure was some sixteen years prior, the contractual relationship between the parties had long since expired. Citing the Court of Appeals in *Credit Alliance Corp. v. Anderson & Co.*, 65 N.Y.2d 536; 493 N.Y.S.2d 435; 483 N.E.2d 110 (N.Y. 1985) the court explained that there are three requirements to bring an action for negligent misrepresentation where actual privity of contract does not exist: (1) an awareness by the maker of the statement that it is to be used for a particular purpose, (2) "in the furtherance of which a known party was intended to rely ", and (3) some conduct by the maker of the statement linking it to the relying party "which evinces [the maker's] understanding of that party[s] reliance." The court held that the second prong of the test was not met since it requires a showing that D intended reliance of P. Here, however, D supplied the information in exchange for an agreement by P to drop the claims against it and "not with the purpose of furthering defendant's litigation efforts." As such the claim of negligent misrepresentation is not available.

5. Consumer Protection

- **Market Share liability of chemical manufacturer properly pleaded** – Suffolk County Water Auth. v. Dow Chem. Co., 987 N.Y.S.2d 819 (Sup. Ct. Suffolk Cnty. 2014): **Facts** – Municipal water supplier sued Dow Chemical Co., the manufacturer and distributor of perchloroethylene (PCE; perc), a chemical solvent used in dry cleaning, along with other manufacturers, based on contamination of the municipal water supply at toxic levels. This was as a result of land run off, which worked it into wells. Defendant moved to dismiss as their perc could not be distinguished from that of other manufacturers, nor their percentage of contribution determined. Plaintiff invoked the “market share” form of liability as adopted in Hymowitz, 541 NYS2d 941 (1989). The extensive briefing dealt with whether the perc case was more like the DES drug situation in Hymowitz or more like cases where market share was denied, as for example in lead paint and guns. **Holding** – The Supreme Court held that the water supplier’s allegations were sufficient to invoke market share liability. Taking as true the allegations set forth by plaintiff in its amended complaint along with the accompanying experts’ affidavits, plaintiff has set forth that perc is defective from the moment of its manufacture, that it is a generically fungible product, and that it takes many years from the point of its “ingestion” through seepage into the ground until it appears in one of the supplier’s wells, causing extensive environmental harm, in the form of serious property damage.
- **Market Share liability not allowed in corn syrup case** – S.F. v. Archer-Daniels-Midland Co., 2014 WL 1600414 (W.D.N.Y. Apr. 21, 2014): **Facts** - Plaintiff brought suit alleging that high fructose corn syrup is a toxic substance and that its five manufacturers are liable under strict liability, negligence and failure to warn. Since plaintiff could not identify specifically whose product has exposed her to risk of injury, she sought to apply market share liability. The defendants moved to dismiss on the pleadings. **Holding** – Granted and amended complaint dismissed. New York has not recognized market share liability as a permissible theory of recovery outside the DES context, thus plaintiff’s claims for negligence, strict liability and failure to warn are dismissed. Moreover, plaintiff failed to plead that the product was unreasonably dangerous or that there was a safer alternative.
- **Product That Violates Consumer Product Safety Commission Guidelines is Not defective Per Se** - Merson v. Syosset Central School District, 286 A.D.2d 668; 730 N.Y.S.2d 132 (2d Dept. 2001): **Facts** - Infant P, a seven year old, was injured when she tripped on the chain-walk section of a piece of playground equipment. P sued the school on a claim that the school failed to warn of the dangers in crossing the chains, and the manufacturer of the equipment on a claim that it was defectively designed. The claim of defect was that the equipment was in violation of guidelines set by the Consumer Product Safety Commission guidelines. Both defendants moved for summary judgment. Supreme Court granted both motions and Appellate Division modified and

affirmed. **Holding** - The guidelines set by the Consumer Product Safety Commission "are neither mandatory nor intended to be the exclusive standards for playground safety." As such, the mere fact that D's product violated those guidelines does not establish that it was defective. [Additionally, P failed to prove that the departure from the CPSC guidelines was the proximate cause of her injuries.]

- *See also- Washington v. City of Yonkers*, 742 N.Y.S.2d 316 (2d. Dept. 2002): [Citing *Merson* in dismissing a case that was based upon an alleged violation of Consumer Products Safety Commission guidelines.]
- *But see- Decker v. Forenta*, 290 A.D.2d 925; 736 N.Y.S.2d 554 (3d. Dept. 2002): [Holding that failure to comply with the standards set by the American National Standards Institute may be considered some evidence of negligence if it can be demonstrated that those standards were generally accepted in the industry.]

6. Medical Monitoring

- **New York law does not recognize an independent equitable cause of action for medical monitoring** – *Caronia v. Philip Morris USA, Inc.*, 22 N.Y.3d 439, 982 N.Y.S.2d 40 (2013): **Notes** – In last year's summary we have considerable space to a decision of the Second Circuit in this case, which certified question to the Court of appeals relating to unresolved New York law on medical monitoring causes of action. That court has unfortunately responded in the negative, in a 4-2 decision. **Facts** – Heavy, long term Marlboro smokers who had no signs of lung cancer sought the payment by the defendant manufacturer for medical monitoring using chest x-rays. **Holding** – The majority decision, by Judge Pigott declines to recognize a new so-called independent equitable cause of action for medical monitoring in this state for persons who have no current physical injury. It reviews many decisions from other states, some of which did create such a cause of action, and others which denied it. The rationales given are that it would open the flood gates to litigation and that it would be difficult for the courts to create such a program, and that it was up to the legislature to do something about it. Chief Judge Lippman, in an impassioned dissent, takes the view that creation of this new cause of action was well within the power of the court, and that such aid was greatly needed by the plaintiffs.
 - Affirmed on remand to the Second Circuit. See *Caronia v. Philip Morris USA, Inc.*, 748 F.3d 454 (2d Cir. 2014).
- **Medical monitoring as an independent equitable cause of action** **Question submitted to CANY-** *Caronia v. Philip Morris USA, Inc.*- 715 F.3d 417 (2d Cir. 2013). **Note:** We depart from our usual format because of the unusual nature of this decision—which runs dozens of pages and can be used as a outline of New York state law on a number of topics. This is the long running cigarette cancer cases (2006), based on the alleged manipulation of the tobacco and “light” tobacco claims. Prior decisions in this case are reviewed in detail in the current case. The key

part of this decision—the existence of a independent cause of action for medical monitoring (of smokers not yet diseased)—is reviewed below. Other parts of the decision involve an affirmance of a dismissal below of all tort causes for plaintiffs with cancer, all on a statute of limitations basis. In addition there is a long discussion of the distinction between strict liability and breach of warranty under the Denny decision (see part 3 above). As for a medical monitoring, lower courts in NY have recognized a cause of action, as well as the federal courts in NY. The decision reviews every case. It also analyzes the bases for invoking medical monitoring, and the procedures involved. And it deals with the statute of limitations issue in this context. If the SOL has run on all tort causes of action, can the monitoring cause of action be maintained. The bar may be overlooking litigations in which medical monitoring may be scientifically justified and trusts can be set up to operate the plan. **Facts-** Plaintiffs appealed from order dismissing tort claims alleging negligence, strict product liability and breach of implied warranty of merchantability in connection with the design, manufacture and sale by defendant of cigarettes that allegedly contain unnecessarily dangerous levels of carcinogens. Court granted MSJ on the ground that the claims were untimely. Affirmed dismissal of plaintiffs' negligence, strict liability and breach of warranty claims; with respect to plaintiffs' free-standing equitable claim for medical monitoring, certified several questions to the Court of Appeals with respect to existence of such a claim under New York State law, and, if such a claim is recognized, as to the elements and accrual of such a claim. **Holding-** The injury in this action was the increased risk of developing lung cancer as a result of smoking Marlboro cigarettes for twenty pack-years. A claim for injury caused by harmful exposure to toxic substances accrues when that exposure occurs, and does not, as plaintiffs in the present case argued, repeatedly accrue with each new inhalation. This action was commenced in 2006, and plaintiffs had known more than three years earlier that smoking cigarettes was the cause of their increased risk of lung cancer, and that each plaintiff had reached the 20-pack-year level by the mid-1990s at the latest, the district court properly ruled that their injuries occurred prior to the applicable limitations period. Further, medical monitoring was available prior to the filing of this lawsuit, and thus the statute stilled barred their actions. The issue of fact raised by plaintiffs as to whether Philip Morris could have made Marlboro cigarettes safer, therefore, is not an issue that is material to the claim of breach of implied warranty of merchantability. That implied warranty is not breached if the cigarettes were minimally safe when used in the customary, usual, and reasonably foreseeable manner. The following questions have been certified to the Court of Appeals:

- Under New York law, may a current or former longtime heavy smoker who has not been diagnosed with a smoking-related disease, and who is not under investigation by a physician for such

a suspected disease, pursue an independent equitable cause of action for medical monitoring for such a disease?

- If New York recognizes such an independent cause of action for medical monitoring,
 - What are the elements of that cause of action?
 - What is the applicable statute of limitations, and when does that cause of action accrue?
- **Smokers failed to establish that they would not require the same medical monitoring had tobacco company designed safer product- Caronia v. Philip Morris USA, 2011 WL 338425 (E.D.N.Y. 2011): *Facts-* The central allegation of Ps' suit was that D designed and marketed Marlboro brand cigarettes that delivered an excessive and dangerous level of "tar." Ps originally claimed design defect, negligence and breach of implied warranty. Ps requested that D create and maintain a comprehensive medical monitoring program involving use of LDCT scans to find lung cancer early for certain smokers. Upon motion of D, court granted SJ against two of Ps' three claims. It concluded that Ps' strict liability and negligence claims were time-barred because those claims accrued when Ps discovered their injury and that Ps discovered their injuries well before they filed this action. In light of conflicting expert affidavits, the court declined to award SJ on implied warranty. The Court ordered additional briefing and on the question of whether Ps could timely assert, under New York law, an independent cause of action for medical monitoring. Ps amended their complaint. Ps then renewed their earlier motion to certify a class of New York smokers or, alternatively, to certify certain issues for class treatment. D renewed its opposition to that motion and also moved to dismiss and for SJ on Ps' implied warranty claim on the ground that Ps' knowledge of risks of smoking precluded that claim. D's motions were granted. *Holding-* The New York Court of Appeals would recognize an independent claim for medical monitoring, and it would conclude that the statute of limitations for such a claim begins to run on the first date that some medical monitoring program is accepted within the medical community as an effective method of lung cancer screening or surveillance. To prevail on their medical monitoring claim, Ps must plead the elements of a claim for strict product liability, negligent design or breach of warranty. Ps have failed to do this, however, because they did not plead that D's allegedly tortious conduct is the reason that they must now secure a monitoring program that includes LDCT scans. D's motion for SJ on implied warranty was also granted because Ps offered no evidence that D breached, as a matter of New York law, an implied warranty with respect to Marlboro cigarettes**

B. Special Plaintiffs

- **One engaged in demolition is not a foreseeable user of a product.**
Hockler v. William Powell Co., 129 A.D.3d 463, 11 N.Y.S.3d 45 (1st Dept.

2015): **Facts**- Plaintiff developed mesothelioma while exposed to asbestos made by defendant, in the course of dismantling and salvaging scrap metal, which had asbestos gaskets. Defendant asserted that it owed no duty to the worker since he was not a foreseeable user of its product. SJM denied. **Holding**- Decision reversed and SJ granted. The defect in a product must be a substantial factor in causing the injury when the product is used in the manner normally intended. The court cited cases from other jurisdictions which had held similarly. **Comment**- One could write an opinion just as convincingly which said that it was foreseeable that if you put a dangerous product on the market, someone would come into contact with it in the process of removing it after use.

C. Special Defendants

1. Supplier of Finished Product with Defective Component

- **In the Matter of N.Y.C. Asbestos Litig, 36 Misc.3d 1234(A), 960 N.Y.S.2d 51 (Sup.Ct. N.Y. County 2012):** *Note: We depart again from the usual format because of the complex and multiple issues in this case. This is one of the many asbestos mesothelioma cases pending in New York in a special part. Plaintiff, whose case was accelerated for trial as he was in extremis, had his asbestos exposure while using Crane's valves. In these valves were asbestos-containing components which Crane did not manufacture or supply. The jury returned a verdict for \$32 million. Defendant moved under CPLR 4404(a) to set aside the verdict. In denying the motion, Judge Madden considers many legal issues of relevant to product liability litigation in NY, in a format valuable as a resource on the law.*
- **Duty to warn.** Crane argued that it had no duty to warn or any responsibility since it did not manufacture the component part which had asbestos in it. It relied on the Court of Appeals' decision in Rastelli that a manufacturer did not have to warn about the risks of another manufacturer's product. The court, however, relied on subsequent lower court decisions that based Crane's liability on its awareness of the use of its product and the risks of asbestos exposure.
 - *Michael v. General Tire Inc., 297 A.D.2d 629 (2d Dept., 2002):* **Facts** - P was injured when a tire on his new Nissan Pathfinder blew out. P sued Nissan (D) and General Tire claiming that the tire was defective. The jury found that the tire was defective and that the defect existed before the tire was delivered to Nissan. The trial court entered judgment in favor P and against both General Tire and Nissan. D appealed on the grounds that liability against it for a defect caused by General Tire was inappropriate. Appellate Division affirmed. **Holding** - The tire was already defective at the time that D received it. Therefore, D was subject to liability because it put a defective product into the stream of commerce
- **Proof of exposure to sufficient asbestos.** Based on the Parker decision of the Court of Appeals Crane argued that there was insufficient evidence

to show that plaintiff was exposed to sufficient asbestos from defendant's product to cause mesothelioma. The court relied on more recent lower court decisions holding that plaintiff's expert need not always quantify exposure levels

- **State of the art.** Defendant argued that as of period of plaintiff's exposure, it was not aware that the risk existed, but the court found that Dr. Castleman's testimony formed a basis for the jury finding that it did.
- **Intervening cause and knowledgeable purchaser.** Here the court dealt with the usual defenses in asbestos cases: defendant argued that as a matter of law the user of the valves, the Navy, was aware of the risks of exposure to asbestos, and that this was an intervening and superseding cause of plaintiff's injuries, breaking the chain of causation. Relying on the Derdiarian Court of Appeals decision, the court denied this defense. It also denied the relevance of a related defense, that since the Navy was a knowledgeable user, it shielded defendant from responsibility.
- **Government contractor defense.** Here defendant relied on the U.S. Supreme Court decision in Boyle suggesting that if a supplier was following specifications, the supplier had a defense. The court found that the facts of the case did not give rise to that defense.
- **Proximate cause as to warning.** Defendants next post-trial argument was that even if defendant had tried to use a warning on the valves, the Navy would not have permitted it. This was rejected as speculative.
- **Other issues.** Some other issues resolved in the decision do not directly relate to product liability: The Navy as an Article 16 entity; Article 16 burden of proof and apportionment; remittitur.

2. Component Part Manufacturer

- **Component part supplier is liable for defect in its part which was then assembled into final product.** In re New York City Asbestos Litig., 121 A.D.3d 230, 990 N.Y.S.2d 174 (1st Dept. 2014): **Facts-** This is an asbestos-mesothelioma case, with many issues, most not specific to products law. However, one appellate issue was the liability of the defendant here, Crane, which had made asbestos gaskets for valves. Crane sought to reverse judgment against it, on the basis that it was only a component part manufacturer. **Holdings-** Crane is liable in two ways under the component parts doctrines. First, while a manufacturer of a component part may not be liable for a defect in another part also assembled into the final product, here there was evidence for the jury that Crane knew of the danger of asbestos in the gasket which was being incorporated into the valve. Second, Crane could not argue that the valve it supplied was just a component of the final product—a Navy ship, since strict liability applies to the manufacturer of a component assembled into a final product.
- **Summary judgment denied to defibrillator component part manufacturer for failure to establish defect did not exist at time it left its control; warranty cause also raised** – Angona v. Syracuse, 118

A.D.3d 1218, 987 N.Y.S.2d 761 (4th Dept. 2014): **Facts** – Firefighter suffered a heart attack while fighting a fire; first responders set up a defibrillator. However, they were unable to connect the electrode part to the defibrillator due to a bent pin or misshapen connector housing on one of the electrodes. Defendant ConMed Corp. manufactured and designed the component wire assembly for the electrodes, and defendant Katecho, Inc. manufactured the chest pads and affixed the wire assembly to the pads at the final stage of the manufacturing process. Defendant moved for SJ, which was granted in part and denied in part. Defendants appealed. **Holding** – The Court properly denied those portions of the motions seeking SJ dismissing the strict liability claims for manufacturing defect. Neither defendant established that the defect in the electrode did not exist at the time it left its control. The court further rejected the contention that a defendant is not subject to liability for a manufacturing defect inasmuch as it manufactured only a component part. The Court also properly denied that part of ConMed’s motion seeking dismissal for claims of failure to warn. Trial issues of fact remains whether ConMed should have warned users to pre-connect the electrodes in light of the nature of the product and the potential danger. Finally, plaintiff also raised as a triable issue of fact whether the electrodes were fit for the ordinary purpose for which they were intended (a warranty basis).

- **Joint venture between manufacturer and part supplier set up basis for liability for cigarette filter maker** – Correnti v. Bertram D. Stone, Inc., 2014 WL 912257 (Sup. Ct. N.Y. Cnty. 2014): **Facts** – Plaintiff was diagnosed with mesothelioma as a result of smoking Kent cigarettes manufactured by Defendant Lorillard Tobacco Co. H&V is a paper manufacturer who provided Lorillard with bulk filter material—containing asbestos--used to manufacture Micronite filters. Plaintiff brought suit against defendants for misrepresentations advertising the safety and health benefits of the Micronite filters. Defendant H&V moved for SJ, arguing it could not be held liable for Lorillard’s representations. **Holding** –MSJ Denied. Plaintiff adequately pleaded fraud and misrepresentation against cigarette filter maker. Where, as here, the terms of the agreement between defendants signal that both Lorillard and H&V envisioned significant earnings and did not contemplate having losses, there is a triable issue of fact as to whether Lorillard and H&V were joint venturers.
- **Assembler of component parts liable for defect in component part; summary judgment defeated due to D’s failure to rule out plausible allegations** – Sapp v. Niagara Machine & Tool Works, 845 N.Y.S.2d 626 (4th Dept. 2007): **Facts** – P sustained injuries when a punch press he operated improperly cycled, amputating four fingers on his left hand. P sued D, a successor to the manufacturer for, *inter alia*, negligent design, manufacture or assembly. D moved for summary judgment submitting an expert affidavit that a bent and broken wire was found in the switch

assembly and black particulate matter was found in and around the switch assembly after the accident. D's president testified that the wire, for which they were not responsible, caused the malfunction. P submitted expert opinion that the wire and the black particulate matter caused the accident. The Supreme Court granted summary judgment and the Appellate Division reversed. **Holding** – Even if the D's president could be considered an expert, his testimony failed to negate the plausible theory that the malfunction was caused by the black particulate matter. Further, the fact that the switch assembly was manufactured by a different company does not absolve the D of responsibility since the duty of a manufacturer with respect to a product includes component parts used in constructing that product

- **Component Part Manufacturers Have No Duty to Warn of Dangers Posed by Completed Products** – *Beneway v. Superwinch, Inc.*, 216 F.Supp.2d 24 (N.D.N.Y. 2002): **Facts** - P was injured when he was struck by the ramp on the back of his truck after it unexpectedly fell to the ground. The ramp contained three basic components: (1) a winch which is the mechanism that raises and lowers the ramp by use of a rope; (2) a hook which was fastened to the end of the rope on the winch; and (3) a ring on the ramp to which the hook was attached. The ramp would be lowered by opening the rear door of the truck and activating the winch, which would unravel the rope. Once the ramp was lowered, the hook was removed from the ring so the merchandise could be delivered. The winch was manufactured and installed by D1 and the hook was manufactured by D2 to D1's specifications. D1 explicitly told D2 that the hook would not be used for overhead lifting. On the day of the accident, slack that developed in the wire rope allowed the hook, which was not equipped with a safety latch, to become detached from the ring. As a result, as soon as P opened the rear doors of the truck, the ramp fell and injured him. P sued D1 for (1) strict products liability; (2) negligence; and (3) breach of express and implied warranties. P sued D2 for failure to warn of the dangers of using the hook in conjunction with overhead lifting. D2 moved for summary judgment on the grounds that as a component parts manufacturer, it owed no duty to P. The motion was granted. **Holding** - A component part manufacturer cannot be held liable for failure to warn of a danger when it is in no position to know that the danger exists. Since D1 told D2 that the hook would not be used for overhead lifting, D2 was in no position to know of the potential dangers complained of by P
- **Manufacturer of Equipment Used in Recreational Activities**- *Shea v. Sky Bounce Ball Co., Inc.*, 742 N.Y.S.2d 383 (2d Dept. 2002): **Facts**-P was injured during a stickball game when a stickball bat accidentally flew out of the hands of another player and struck him in the eye. P sued D1 manufacturer of the bat and D2 retailer, alleging negligence and "products liability." Both

defendants moved for summary judgment. Supreme Court granted the motions and the Appellate Division affirmed. **Holding** - It has been established that those who engage in recreational activity are considered to have consented to the risks inherent in that activity. By submitting evidence that it is foreseeable for a bat to slip out of the hands of a participant, defendants met their respective burdens.

- **Component Parts Manufacturer- *Hothan v. Herman Miller*, 742 N.Y.S.2d 104 (2d Dept. 2002): **Facts**-** P was injured when her height-adjustable workstation collapsed on her hand. The work surface was manufactured by D but the base which contained the mechanism used to adjust the height, was manufactured by another company. P sued, claiming defective design and manufacture. D moved for summary judgment on the grounds that there was no defect in the component that they manufactured and that they did not install the workstation. Supreme Court denied the motion and the Appellate Division reversed. **Holding** - By demonstrating that it did not design or manufacture the work station, but only manufactured the work surface, and further proving that there was no defect in the work surface, D established that it was entitled to summary judgment as a matter of law. Regardless of whether the injuries occurred as a result of a defect in another component or because of negligent installation, D could not be held liable for something in which it had no involvement.
- **Component part manufacturer not strictly liable where it produced a product in accordance with the design, plans and specifications of the buyer- *Gray v. R.L. Best Co.*, 78 A.D.3d 1346 (3d Dept. 2010): **Facts**-** P was injured while performing maintenance on an aluminum extrusion press at factory of his employer, third-party D. P placed a safety alert tag on the press's control panel and informed the press operator that he would be inspecting a mister, a lubricant sprayer used to clean the shear blade following each extrusion of aluminum. Press operator could not see P and cycled die slide which caused P to lose his leg below the knee. P sued Ds, component part suppliers, under theories of strict product liability, negligence and breach of warranty, based upon those Ds having supplied component parts for the machine. P also brought in D, Liberty Electric, Inc., under theories of negligence and breach of warranty for electrical work performed on the machine. Ds moved for SJ. The Supreme Court granted Ds' motions. The Appellate Division affirmed. **Holding**- SJ was properly granted to component part manufacturers where they produced a product in accordance with the design, plans and specifications of the buyer and such design, plans and specifications did not reveal any inherent danger. SJ was also properly granted as to manufacturer of mister because P did not offer evidence to support failure to warn claim since the only inspection was performed after the mister had been removed from the press

3. Modifier of Product

- **Modifier of product not Liable for defect separate from modification-** Bellantoni v. General Motors C01p. et al., 2012 WL 1948779 (S.D.N.Y. 2012): Facts: P, an employee of Alex & Sons towing, was removing side-view mirror from tow truck when a spring-loaded coil in mirror assembly struck him in face. Tow truck was manufactured by D GM. D Champion was hired to modify subject truck. The mirror was a DB6-Mirror Outside RH & LH Remote Unit. Ps brought suit alleging product liability and breach of warranty in connection with design, manufacture and marketing of mirror. Ds moved for SJ. *Holding-* Magistrate recommended SJ be granted. D Champion did not manufacture, distribute or sell the subject truck or the mirror which injured P. Further, D Champion never owned truck. It had no connection to mirror. Thus, all claims against D. Champion should be dismissed.

4. Successor Corporations

- **Under Pennsylvania law, unlike that in NY, a successor corporation can be held liable if it continues the product line.** Vicuna v. O.P. Schuman & Sons, Inc., 2015 WL 3386677 (E.D.N.Y. 2015): *Facts-* Plaintiff, a worker in a bread factory, was using a heat sealing device when her hand was trapped and she had severe damage. The machine was made by a company which had since changed hands several times. The current owner asserted a defense that it was not liable as a successor corporation since it was only an asset sales. *Holdings-* As to a design defect claim, Pennsylvania law would be applied since that is where the machine was made. Unlike NY law, Pennsylvania recognized a “product line” exception to the general non-liability of a successor corporation; if the current owner still made the product, it was liable. Hence SJ was denied on that theory. However, on the claim of failure to warn, NY law applied. That law required a special relationship between the successor and the purchaser of the machine, such as continued maintenance. Since there were no facts supporting such a relationship, SJ was granted on that cause of action.
- **Successor company may be liable because it failed to demonstrate prior company retained existence in sufficiently meaningful way –** Morales v. City of New York, 849 N.Y.S.2d 406 (S.C. Kings Cty. 2007): *Facts* – P, a New York City detective, was injured when a tranquilizer gun misfired. P sued D, a company that had purchased assets of the non-party gun manufacturer. D moved for summary judgment arguing it was not liable under successor liability theories because the asset purchase agreement did not allow for express or implied assumption of liability. Further, it argued it was not a mere continuation of the prior company because the prior company continued to retain its corporate existence not just in name but in a meaningful way. *Holding* – Summary judgment denied. Although D did not expressly or impliedly assume liability and it was clear that the prior company did technically retain its corporate

existence after D made its purchase. D failed to make a sufficient showing that there was no de facto merger. The only business the prior company appears to have continued doing was to collect payments issued to it by D. Further, D continued operation of the business out of the same physical location as the prior company and retained many of the prior company's intangible assets such as good will, trademarks, patents, customer lists, phone numbers and the right to use the prior company's name

- **Successor corporation not liable for tortious conduct of the company it purchased** – Semenetz v. Sherling & Walden, 2006 N.Y. LEXIS 1485 (CANY 2006): *Facts* – P was injured when his hand and fingers got caught in a sawmill manufactured by D1. Following the accident but prior to commencement of plaintiff's action, D1 sold its assets to D2 and the purchase contract provided that D2 assumed none of the liabilities of D1. P sued D1 and D2 as the successor to D1, advancing claims of strict products liability, negligent design and manufacture, failure to warn and breach of warranty. D2 moved for summary judgment arguing that it was not liable for the conduct of a company that it purchased. P argued that under the product line exception to the successor liability rule, D2 was subject to liability. Supreme Court denied the motion, Appellate Division reversed and the Court of Appeals affirmed the Appellate Division's ruling. **Holding**- The general rule, outlined in the Court of Appeals case of Schumaker v. Richards Shear Co., 59 N.Y.2d 239 (CANY 1983) is that a successor is not liable for the tortious conduct of its predecessor. While some jurisdictions recognize the "product line exception" to that rule -which holds that in the context of a defective product a successor can be held liable for the conduct of its predecessor – the Court of Appeals declined to adopt that rule. The Court held that the product line exception could cause "financial destruction" to small businesses that purchase the assets of a manufacturer. Thus D2 was not liable as the successor to D1 and the case was properly dismissed by the appellate division.
- **Successors in Interest**- Subramani v. Bruno Mach. Corp., 289 A.D.2d 167; 736 N.Y.S.2d 315 (1st Dept. 2001): **Facts**- P was injured while using a die cutting machine manufactured in 1948 by a company that subsequently sold all its assets. The assets were repeatedly sold to different companies. P sued two successor companies on a strict liability theory. Ds moved for summary judgment and Supreme Court granted the motion. Appellate Division affirmed. **Holding** -There is a generally accepted rule against successor liability and P failed to demonstrate that he fit any of the few exceptions to that rule. The assumption of liabilities agreement between the companies only covered obligations that existed at the time of the transaction. Additionally, there was no continuity of ownership between the parties and no special relationship between P and D companies to imply that a duty was assumed

5. Casual Seller

- **Casual seller of used machines not strictly liable for workplace accident involving machine sold 16 years prior to accident - Jaramillo v. Weyerhaeuser Co., 878 N.Y.S.2d 659 (CANY 2009): *Facts* – P seriously injured his right hand when it got caught between two rollers of an industrial Flexo Folder Gluer machine (FFG), used to make boxes, that he was operating. The machine was originally manufactured by D1, then acquired by D2 new, then sold used to another company D3, who after upgrading it but not changing the original safety mechanisms, sold it used to P’s employer D4 in an “as-is” condition 16 years before P’s accident. The sale to D4 was made by a division of D3 that ordinarily disposes of its obsolete or unneeded equipment generating a minute percentage of D3’s overall sales. P sued Ds in state court arguing that, when D3 sold the machine to D4, FFGs were defective if not equipped with a safety device shutting off operation in the event a foreign object was sensed in the machine’s open spaces. After the case was removed to federal court, D3 moved for summary judgment arguing it was a casual seller of FFGs and therefore not strictly liable, relying on the Sukljian decision. P cross-moved for summary judgment on the issue of whether D3 was an ordinary seller. The District Court granted D3’s summary judgment motion, denied P’s cross-motion and dismissed the complaint. P appealed. The Second Circuit, noting that while NY courts make a clear distinction between “regular” sellers of products - who are strictly liable, and “casual” sellers – liable only for a failure to warn, it was unclear if in NY strict product liability applied to regular sellers of used goods. The Court certified this question to the New York Court of Appeals which answered in the negative. *Holding* - Not every seller is subject to strict liability. Regular sellers are in a better position than casual ones to exert pressure for improved safety on the manufacturers. They also can be said to have assumed a special responsibility to the public which will expect them to stand behind their goods. By contrast, the casual seller does not undertake the special responsibility of public safety assumed by those in the business of regularly supplying those products and the public does not have the same expectation when it buys from such a seller. While there may be some imaginable future case where imposition of strict product liability on the seller of used goods would be justified, in this case, where a company sold one of its used machines (itself purchased used) to a different company 16 years prior to the accident; where imposing liability on D would likely not exert any significant pressure for improved safety on manufacturers; and where it was likely that a company like D would just stop selling its used machinery, thus depriving small businesses of the ability to purchase otherwise unaffordable equipment, imposing liability is not justified.**
- **Seller regularly engaged in the sale of the product- Stalker v. Goodyear Tire & Rubber Co., 826 N.Y.S.2d 794 (3d Dept. 2006): *Facts*-decendent P was killed while a tire he was attempting to mount**

exploded because of a defect in its sidewall. The tire was manufactured in 1993 and retreaded in 1996. P sued the manufacturer who then commenced a third party action against the entity that retreaded D the tire. Third Party D moved for summary judgment, arguing that it could not be held liable because it was not regularly engaged in the retreading and sale of tires. Supreme Court denied the Motion and the Appellate Division affirmed. *Holding*- there was evidence in the record to suggest that the movant was in fact engaged in the business of retreading and selling tires. Therefore it was subject to liability for selling a defective tire in the ordinary course of business.

- **Casual Manufacturer/Seller** – *Sprung v. MTR Rosenberg, Inc.*, 742 N.Y.S.2d 438 (3d Dept. 2002): **Facts**-P, an employee of General Electric ("GE"), was injured when a pit cover, which also served as the floor for the area above the pit, dislodged from the wall enclosures and fell on him. The pit cover in question was produced specifically for GE and in accordance with specific instructions provided by GE. The manufacturer was in the business of custom steel and sheet metal fabrication. GE also designed the sidewall and foundation for the pit cover and performed the actual installation. After the incident, a GE inspection revealed that the foundation was not designed to prevent the cover from coming out and they subsequently made modifications to remedy the error. P sued D1 manufacturer of industrial lathe, D2 fabricator of the steel panels, and D3 president of D2 company. P sought recovery on (*inter alia*) strict liability and negligent design. Ds moved for summary judgment on all claims. Supreme Court denied the motion and the Appellate Division reversed. **Holding** – While the holding was primarily based on the fact that there was no evidence indicating fault on behalf of any defendants, the court also pointed to the fact that D2 (fabricator of the steel panels) was not in the business of manufacturing the panels that caused the injuries to P. As such, D2 could not be held liable for strict liability or negligent design.
 - **Note**- This ruling is significant because had the court looked at the general business in which D2 was involved- custom steel and sheet metal fabrication- it could have found D not to be considered casual sellers. However the court opted to look at the specific product produced in this case and not the business as a whole

6. Lessor

- **Financing lessor never in possession of product cannot be held strictly liable.** *Houston v. McNeilus Truck and Mfg., Inc.*, 124 A.D.3d 1205, 997 N.Y.S.2d 572 (4th Dept. 2015): **Facts**- Plaintiff's decedent died in an accident involving a garbage truck, with no details given in the opinion. One defendant in this action was a leasing company which financed, owned and leased the truck. After the grant of SJ for all defendants on other theories, plaintiff sought to amend the complaint to add a cause of action founded on strict product liability. The trial court did not grant SJ to the lessor on the product claim, but on appeal the court

(3-2) reversed and granted SJ. **Holding-** Strict liability cannot be imposed on a financing lessor which only offered the use of money and did not market the truck or place it in the stream of commerce. The facts of this case differ from others where potential liability has been found based upon the lessor takes possession of the equipment before leasing, or where the finance lessor is the financing arm of the manufacturer.

- **Lessor can be held strictly liable for defective product – Stokes v. Komatsu Am. Corp., 117 A.D.3d 1152, 984 N.Y.S.2d 657 (3d Dept. 2014):** **Facts** – Plaintiff commenced an action for injuries sustained when, while wearing work boots with wet soles, he slipped and fell from the top of an excavator as he was accessing the engine compartment to check the oil. Plaintiff asserted a negligence cause of action against, among others, A. Montano Company, Inc., the commercial lessor of the excavator. Defendant moved for SJ and plaintiff cross moved to amend the complaint to add a claim of strict products liability against Montano. Defendant Komatsu also moved for SJ dismissing the complaint against them on the ground that they were not responsible for the design, manufacture, marketing or distribution of the excavator, and plaintiff cross-moved to amend the complaint by adding the manufacturer, Komatsu U.K., Ltd. as a defendant. Supreme Court granted defendants’ MSJ and denied plaintiff’s cross motions to amend. **Holding** – The Court properly granted Montano’s MSJ dismissing the negligence causes of action. However, plaintiffs’ cross motion to amend the complaint to add a cause of action for strict liability against Montano should have been granted. A commercial lessor may be held liable, even in the absence of fault, for injuries caused by a defective product that the lessor is in business of leasing. Given the functionally synonymous nature of negligence and strict products liability claims, the court concluded that the complaint provided adequate notice of the necessary elements and the proposed amendment relates back to the timely interposition of the negligence claim. **2nd Holding** – The MSJ by Komatsu defendants should have been denied. Although a Komatsu employee submitted an affidavit claiming that none of the Komatsu defendants either manufactured, designed, distributed or sold the excavator, the employee did not identify his position or offer any evidentiary facts to support his assertions. Supreme Court did not err, however, in denying plaintiffs’ cross motion to add Komatsu U.K. Ltd. because the proposed claims were untimely.
- **Car lessor has no duty to equip a leased vehicle with an optional side curtain airbag as it did not design the vehicle; FMVSS 208 and 214 do not preempt an unreasonably dangerous design claim- Noveck v. PV Holdings Corp., 742 F.Supp.2d 284 (E.D.N.Y. 2010):** **Facts-** P was driving a rented 2005 Chevrolet Trailblazer that was not equipped with an optional side curtain airbag when he was involved in an accident that resulted in being paralyzed from the neck down. P sued Ds, GM and Avis. P and D, GM, settled before trial. P asserted claims of strict liability,

negligence and breach of express and implied warranties against D, rental company. D moved for partial SJ. Ds motion was granted. **Holding-** Federal Motor Vehicle Safety Standard (FMVSS) 208 does not include a side curtain airbag requirement or option, and thus would not be undermined if a state law side curtain airbag requirement was imposed. P was also not preempted by FMVSS 214 because P's claim was that the design of the vehicle was unreasonably dangerous, not that the vehicle failed to meet side impact crashworthy tests. However, D did not have duty to equip subject vehicle with side curtain airbags because D had no involvement with design, assembly or testing of vehicles it purchased from GM. Finally, there was no reason that the rental agent knew or should have known that the Trailblazer was unsafe and any statements made by the agent are casual responses

7. Installer/Repairer/Remodeler

- **Installer/Repairer - O'Connor v. Circuit City Stores, Inc.**, 789 N.Y.S.2d 252 (2d Dept. 2005): **Facts** - P sued D, the entity that installed the door and performed repairs at the request of the store. D moved for summary judgment, arguing that it did not create the defective condition and had no notice of it. Supreme Court granted the motion and the Appellate Division affirmed. **Holding** - D met its initial burden by demonstrating that it did not create the defective condition and did not have actual or constructive notice of it. In opposition, P submitted an expert affidavit that was speculative and conclusory and therefore insufficient to create an issue of fact.
- **Repairer- Levine v. Sears Roebuck & Co.**, 200 F.Supp.2d 180 (E.D.N.Y. 2002): **Facts** - [enumerated above in 'inference of defect']. **Holding** - While a repairer does have a duty to warn intended users of potential dangers, this duty only extends to dangers that are not obvious. Where the dangers are open and obvious there is no duty to warn against them. Since P was fully aware of the danger, no duty to warn was owed her.
 - **Note-** This rule was a departure from the approach taken by the Second Circuit in which the court stated that "plaintiffs individual awareness of risks does not negate the duty to warn" but should instead be considered in determining whether the failure to warn was the proximate cause of the harm. *See Hamm v. Wilamette Industries, Inc.*, 2002 WL342433 (SD.N.Y. 2002) quoting *Burke v. Spartanics, Ltd.*, 252 F.3d 131 (2d. Cir. 2001).
- **Installer- Passante v. Agway Consumer Products, Inc.**, 741 N.Y.S.2d 624 (4th Dept. 2002). **Facts** - [enumerated above in 'design defect']. **Holding** - manufacturer cannot be sued for negligent installation and maintenance since it did not install the item and the buyer did not purchase a maintenance agreement from it.
- **Remodeler - Miller v. Creekside of Western N.Y. Construction, Inc.**, 75 N.Y.S.2d 558 (4th Dept. 2003): **Facts** - P, a waitress, was injured when she attempted to walk through a swinging door of the restaurant

kitchen at the same time that a coworker was coming through the door from the opposite direction. The restaurant door had recently been remodeled by the defendant. P sued on claims of negligence, breach of contract and strict products liability. D moved for summary judgment and the Supreme Court granted the motion. The Appellate Division affirmed. **Holding**- The court ruled that despite the fact that D had contracted to perform work for P's employer, D owed no duty to P herself and thus could not be held liable for her injuries even if her claims were valid. The court also ruled that P failed to raise a triable issue of fact as to the merits of the claims.

8. Maintenance Contractor

- *Theoharis v. Pengate Handling Sys. Of N.Y, Inc.*, 2002 N.Y. App. Div. LEXIS 12409 (3d Dept., 2002): **Facts**- [Basic facts enumerated in 'failure to warn']. P sued claiming that D had a duty to take steps ensuring that the forklift be taken out of service. D moved for summary judgment and the trial court granted the motion. The Appellate Division affirmed. **Holding** - The maintenance agreement between P's employer and D did not grant D 'exclusive managerial control' over the forklift. Therefore, D owed no duty to P

9. Hospital/Pharmacy

- **Plaintiff failed to state claim against pharmacy** - *Burton v. Sciano*, 110 A.D.3d 1435, 972 N.Y.S.2d 755 (4th Dept. 2013): **Facts** - Plaintiff sued Rite Aid Pharmacy for negligence in filling a prescription. Neither the drug nor the alleged mistake by the pharmacy is stated in the decision. Defendant moved to dismiss the complaint for failure to state a cause of action, which was granted. **Holding** - Affirmed. The standard of care which is imposed on a pharmacist is generally described as ordinary care in the conduct of their business. As applied to the business of a druggist it means the highest practicable degree of prudence, thoughtfulness and vigilance commensurate with the dangers involved and the consequences which may attend inattention. Generally, a pharmacist cannot be held liable for negligence in the absence of an allegation that he or she failed to fill a prescription precisely as directed, or was aware that the customer had a condition that would render the prescription of the drug at issue contraindicated. The complaint did not set forth any violation of these duties.
- **A hospital is not a seller of a product when it provides it to a physician for installation; there is no independent tort for spoliation of evidence**- *Tucker v. Kaleida Health, et. al*, 2011 WL 1260117 (W.D.N.Y. 2011): **Facts**- P underwent hip replacement surgery and received a Stryker-Howmedica implant, manufactured by D, Howmedica, and purchased by D, Kaleida Health d/b/a Buffalo General Hospital, for installation. The femoral head component failed and was replaced. It failed again 3 years later, and she received a total replacement of all prosthetic components. Against D, Kaleida, P alleged breach of warranty

and spoliation of evidence. D, Stryker, removed the action to the Northern District. D, Stryker, claimed that D, Kaleida Health, was fraudulently joined since there was no possibility P could state a claim against it. D, Kaleida, filed a motion to dismiss on the same grounds as D, Stryker. D's motion was granted. **Holding-** P cannot state a cause of action against D, Kaleida Health, and thus it was removed from the action based on fraudulent joinder. P's breach of warranty claim is predicated on D, Kaleida Health's, purported "sale" of prosthetic components she received during her surgery. The relationship between hospital and patient is that of service, rather than sale. P cannot bring a claim for spoliation of evidence against D, Kaleida Health, because New York courts do not recognize an independent tort for spoliation of evidence.

10. Restaurant/Provider of Food

- **Strict liability applied to hotel which provided bottle of ketchup with room service** – Tedone v. H.J. Heinz Co., 686 F. Supp. 2d 300 (S.D.N.Y. 2009): **Facts** – P was injured when she attempted to open a glass bottle of ketchup provided with room service in the hotel where she was staying. The ketchup bottle broke in half and shards of glass were driven into her hand. P brought a product liability suit against Ds, the manufacturer and distributor of the ketchup bottle as well as against the hotel where P was supplied the bottle with room service. D manufacturer submitted evidence of tests, mechanical processes and inspections demonstrating that the bottle was free from defects when it entered the stream of commerce. P submitted expert evidence the bottle failed as a result of improper annealing during the manufacturing process. All Ds moved, *inter alia*, for summary judgment alleging P failed to demonstrate a triable issue of fact as to the existence of a manufacturing defect. Additionally, the hotel D argued it was not in the chain of distribution because it did not in fact "sell" the ketchup bottle but merely provided it as a free part of a room service meal. Further, any "sale" of its ketchup is incidental to its true business of running a casino and operating a hotel. The District Court denied Ds' motions. **Holding:** A D seeking summary judgment dismissal must submit proof in admissible form that P's injuries were not caused by a manufacturing defect. Once this has been established, the burden shifts to the D to demonstrate a triable issue of fact as to whether a defect nevertheless exists. D, manufacturer of the bottle, met its burden by submitting specific evidence the bottle was free from defects when it entered the stream of commerce. P however overcame this and demonstrated a triable issue of fact with expert evidence identifying specific properties of the bottle fragments supporting a theory of failure – improper annealing. The hotel D cannot claim that it is not part of the distribution chain. No authority requires that a technical, isolated "sale" occur before a party may be subject to strict product liability for distributing a defective product. Having sold P a meal – a meal that included ketchup - the hotel D cannot plausibly claim

the sale of ketchup was not part of its regular business practices, especially when it admits it purchases and stocks caseloads of ketchup

- *Gunning v. Small Feast Caterers, Inc.*, 4 Misc.3d 209 (Sup. Ct. Kings County 2004): **Facts**- P was injured when a glass of water "exploded" in his hand. P sued the restaurant and the distributor that P claims supplied the defective glass. P advanced claims of breach of warranty and strict products liability. D restaurant moved for summary judgment on the ground that it was not a "seller" of the defective product and therefore could not be held liable under the theories advanced by the plaintiff. Supreme Court denied the motion. **Holding**- The court noted that the glass of water that exploded was served in the course of a meal that P was paying for. Thus, the water was "sold" by the restaurant, which impliedly warranted that that glass holding it was fit for its intended use. As the court put it, "if the container that held the water was defective, then the water was not fit for consumption." The fact that the water itself was free was of no import because it was served as part of a meal that was paid for. Therefore, the restaurant was considered a "seller" for purposes of imposing liability for the defective glass and the claims of breach of warranty and strict products liability were allowed to proceed

11. Distributor

- **Indemnity action by supplier against those further up the chain of distribution** – *Miele Auto Parts, Inc. v. Auto Capital, LLC*, 109 A.D.3d 883, 972 N.Y.S.2d 579 (2d Dept. 2013): **Facts** – Defendant Nissens manufactured a radiator and supplied it to defendant Automotive Capital, who supplied it to Miele Auto Parts, plaintiff in this indemnity action. Miele had sold it to the employer of an automobile technician. The technician sued Miele after the radiator cracked, pouring hot coolant on him. Miele was found liable and then commenced this action seeking contribution from Nissens and Automotive. **Holding** – Where a party is injured as a result of a defective product, the product manufacturer or others in the chain of distribution may be liable for those injuries. Nissens failed to meet its burden as it failed to establish that the radiator was not defective. Moreover, Automotive also failed to meet its burden that it did not supply the radiator. Motions denied.
- **Providing instructions for use of a product included in distribution chain** – *Galluscio v. Atico Int'l U.S., Inc.*, 41 Misc. 3d 576, 971 N.Y.S.2d 190 (Sup. Ct. Nassau Cnty. 2013): **Facts** – Death action arising out of heating pad sold at CVS. Defendant claimed that it was not involved in the design, testing, manufacturing, sale, shipping or distribution of the product, and accordingly sought SJ. **Holding** – Motion denied. Strict products liability for defective products applies to anyone responsible for placing the defective product in the marketplace including: distributors, retailers, processors of materials and makers of component parts, but liability is not to be imposed upon a party whose role in placing the defective

product in the stream of commerce is so peripheral to the manufacture and marketing of the product that it would not further these policy considerations. One cannot claim the defendant's involvement in the distribution chain was so peripheral as to be excluded from liability. While defendant was not part of the manufacturing, it was part of the distribution chain of placing this product in the stream of commerce.

- **Sufficient evidence presented that D distributed asbestos-containing dental liners to sustain verdict against company-** Penn v. Amchem Prods., 903 N.Y.S.2d 1 (1st Dept. 2010): **Facts** – P, a student at a dental technician school, brought suit against a manufacturer and distributor of asbestos-containing dental liners used to make prosthetic teeth. P claimed his mesothelioma was due to exposure to these liners, manufactured and distributed by Ds. After a jury returned a verdict for P, D distributor made a motion to set aside the verdict, arguing that there was not enough evidence presented that D distributed the dental liners. D argued P's description of the dental liners he used differed from those given by D's representatives. Further, D's witnesses testified that other companies supplied D with prepackaged asbestos liners and rolls. P countered that his dental technician school gave him boxes of dental liners with D's name on them; P followed a chart specifically made from D's casting ring product when given a box with D's name on it; D supplied asbestos-containing dental liners to dental technician schools at the time P was a student; and D often packaged its casting ring product with its dental liners. The Supreme Court granted Ds motion to set aside the verdict. The Appellate Division reversed. **Holding:** Contrary to the trial court's finding, viewing the evidence in a light most favorable to P, there was sufficient evidence to permit a jury to conclude that the subject asbestos-containing dental liners were distributed by D. Merely because P's description of the dental liners differed from those presented by D's witnesses does not establish conclusively that P did not use D's product, it simply raises a credibility issue for the jury. Further, the jury need not have credited D's representative's testimony that other companies supplied D with prepackaged asbestos liners and rolls. D's argument that the verdict is inconsistent in holding that D, but not the alleged supplying companies, is liable, is unpreserved since it was not raised until after the jury was discharged.
- **Distributor could not escape liability despite merely taking order, directing shipment and never inspecting product** – Fernandez v. Riverdale Terrace, 2009 WL 1750904 (1st Dept. June 23, 2009): **Facts** – P sustained personal injuries while cleaning an allegedly defective building trash compactor during the course of his employment. A general contractor for construction of the building, contracted with D for the sale and installation of the compactor. D chose the make and model of the compactor, purchased it directly from an entity related to the manufacturer at a "distributor" price and then subcontracted for the

installation of the compactor to that entity. D moved for summary judgment arguing that it did not design, manufacture, install or maintain the subject compactor. The Supreme Court denied Ds motion and the Appellate Division affirmed. **Holding** - It is well established that a party injured as a result of a defective product may seek relief against the product manufacturer or others in the distribution chain if the defect was a substantial factor in causing the injury. This is the case even if the distributor has merely taken an order and directed the manufacturer to ship the product directly to the purchaser and has never inspected, controlled installed or serviced the product. D in this case failed to meet its prima facie burden because it did not submit any evidence to establish that it was not a distributor, claiming only that it did not design, manufacture, install or maintain the compactor.

- **Strict product liability claims against pharmaceutical distributor sufficiently pled to defeat fraudulent joinder assertion** – Gensler v. Sanolfi-Aventis, No. 08-CV-2255, 2009 WL 857991 (E.D.N.Y. March 30, 2009): **Facts** – P alleged her mother suffered injuries to her liver resulting in death from taking the drug Ketek. P sued manufacturers of Ketek as well as the non-diverse distributors and pharmacist. Ds removed the case to Federal court based on diversity arguing the distributors and pharmacist were fraudulently joined solely to keep the action in state court. Ds claimed: 1) P’s theories against the non-diverse Ds were inconsistent alleging knowledge and failure to warn on one hand but that the manufacturer withheld information from them on the other; 2) under New York law, strict product liability generally does not apply to pharmacists, and; 3) claims against the non-diverse Ds were insufficiently pled. P made a motion to remand which the District Court granted. **Holding** - To show fraudulent joinder, D must demonstrate no possibility a claim can be asserted against a non-diverse D. The Ds did not meet their burden. The two theories P presented were not inconsistent in that even if information was withheld, it was possible the non-diverse Ds still discovered it. Further, even if inconsistent, a P may maintain two theories at the pleading stage. In addition, liability against a drug distributor or pharmacist is possible if some level of fault is shown and although uncertainty exists regarding the scope of liability, the issue is resolved in favor of the P. Finally, the causes of action against the non-diverse Ds were sufficiently pled. P’s complaint refers to chemical imbalances caused by Ketek, references FDA letters of concern, cites at least 160 adverse events related to liver problems, and notes European regulators required warnings about liver problems. Although New York case law is unclear if defective design claims should stand against pharmaceutical distributors, these doubts are resolved in favor of P. **Comment** - The decision is also a virtual primer on the law of the liability of drug manufacturers, probably incorporated from a memo from the court’s clerk.

12. Transporter

- **A transporter of an inherently dangerous product is not strictly liable-** McCormack v. Safety-Kleen Systems, Inc., et al., 2011 WL 1643590, Sup. Ct. N.Y. County (2011): **Facts-** P worked as a splicer helper and mechanic. During the course of employment, P was exposed to products containing benzene including Safety-Kleen 105 solvent, Gumout brake cleaner and carburetor cleaner, liquid wrench, gasoline, Sears penetrating oil and Sears paints. P asserted causes of action: negligence in failing to warn the dangers of benzene-related products; strict liability; intentional tort; fraudulent misrepresentation; plus a derivative action by P's wife. D, Island Transportation Corporation, moved for SJ dismissing the complaint asserted against it. D claimed that they were not actively involved in the chain of distribution of the subject products. D's motion was granted. **Holding-** The question was whether an entity that transports benzene-containing products is an integral part of placing the product in the stream of commerce, or is merely providing a peripheral transportation service for seller. To be found liable under a theory of strict product liability, the entity must have been engaged in actively and regularly selling the substance, and not simply transporting it for other sellers. This conclusion, however, was limited to situations in which the product in question is inherently dangerous and there was no allegation that the transporter, in any way, contributed to the dangerous nature of the product itself

13. Defendant Not in Privity

- **No Hability where purchaser of chair was outside manufacturing, selling or distribution chain-** Quinones v. Federated Dep't Stores, Inc., et al., 92 A.D.3d 931, 939 N.Y.S.2d 134 (2d Dept. 2012): **Facts-1t** brought personal injury action against D department store owner, D Macy's, D Beechwood Mountain, LLC and D Broadway Famous Party Rental, seeking damages for injuries he sustained when wooden folding chair he sat on suddenly collapsed. He alleged negligence, breach of warranty and strict liability. D Macy's moved for SJ. Trial court denied motion. Ds appealed. Reversed. **Holding-** D Macy's established its prima facie entitlement to SJ on breach of warranty and strict liability by demonstrating that it was outside the manufacturing, selling or distribution chain. The subject chair was sold by a Bulgarian company to D Beechwood which sold it to D Broadway, which sold it to D Macy's, which used the chair for its customers to view cooking demonstrations. Macy's also established entitlement to SJ on negligence by showing that it neither created nor had notice, actual or constructive, of the defective condition of the chair
- **Seller of a defective product that is not in privity with the injured party** – Leary v. Syracuse Model Neighborhood Com., 799 N.Y.S.2d 867 (Sup. Ct. Onondaga Cty. 2005): **Facts-** Infant P was injured when a frying pan fell off of a stove and spilled hot oil on her, causing severe burns. The infant and her mother were residents in a housing complex owned by D 1.

The stove had previously been sold to D 1 by D2 supplier and installed in a different residence. Subsequently, the stove was moved by another entity (not a party to this action) to P's home. P sued D1 and D2, advancing negligence claims. In a third party action, D1 sued D2, claiming that the stove was defective when it was first sold to D1. The claim was based on the fact that an "anti-tip bracket" that would have prevented the stove from tilting forward was not installed when it was first sold. The two actions were consolidated and D2 moved for summary judgment against P and D1 on the grounds that it did not install the stove in P's home. Supreme Court granted the motion as to P but denied it as to D1. **Holding-** as a seller of stoves in the ordinary course of business, D2 is subject to liability for the sale of a defective product. Since D2 originally sold the stove at issue to D1, it can be held liable for damages caused as a result of defects in the product. In moving for summary judgment, D2 only argued that it could not have been negligent since it did not install the stove in the home of P, a notion that P did not dispute. This was sufficient to dismiss the claims for negligence but did not speak to the claims of strict product liability advanced by D1. Therefore, D2 did not make a prima facie showing for summary judgment.

14. Patent and Trademark Holder

- **Trademark licensor could not disclaim liability for defective product given extensive control it exercised over the manufacturing process** – Automobile Ins. Co. of Hartford Conn. v. Murray, Inc., 571 F.Supp.2d 408 (W.D.N.Y. 2009): **Facts** – P's home was damaged due to a fire ignited when defective wiring in a lawnmower caused it to burst into flames while in P's garage. P sued Ds, Scotts the manufacturer, another manufacturer, and Home Depot the distributor of the lawnmower. One of the Ds contracted with another D, which by the time of suit was bankrupt, to manufacture the lawnmower and exclusively licensed Home Depot, where P bought the lawnmower, to sell them in the store with its trademark name. This D licensor disclaimed liability on the grounds that it was a mere licensor of the trademark, not the actual manufacturer of the lawnmower and moved for summary judgment. The magistrate judge denied D's motion and the District Court affirmed. **Holding** - Under New York law, a trademark licensor is not liable for injuries caused by a defective product unless shown to have had significant involvement in the distribution or to have been capable of exercising control over the quality of the product. In this case, the D exercised detailed oversight of the manufacturing process, ensuring that the manufacturer conformed to certain specifications and quality control standards. It made frequent on-site visits to the manufacturing facility, operated a toll-free customer complaint telephone number and received numerous complaints regarding the reliability of the lawnmower. Further, the D's contract with the manufacturer included a clause allowing termination of the contract should the manufacturer fail to produce a "high quality" lawnmower

worthy of the D's brand name. Therefore, there was an issue regarding D's liability and summary judgment should be denied.

- **Merely showing manufacturer purchased patent to make a product safer without establishing feasibility of design not sufficient to defeat summary judgment** – Stalker v. Goodyear Tire and Rubber Co., 874 N.Y.S.2d 632 (3d Dept. 2009): **Facts** – [basic facts enumerated above in “Failure to Warn”]. P who owned a truck repair business, died after a truck tire, which he was attempting to repair, exploded in what is known in the industry as a zipper rupture, propelling P across the room. P sued Ds, manufacturers, claiming the tire was defectively designed and that an alternative, safer design was available. Ds moved for summary judgment claiming that zipper ruptures were the result of low air pressure and poor maintenance, that they were an industry-wide problem for which no solution had been found, that a patent they obtained for a safer design ultimately lacked merit, and that the ruptures could be minimized by proper inflation, inspection and use of a safety clip-on air chuck. The Supreme Court granted the Ds' motions and the Appellate Division affirmed. **Holding** -To overcome the Ds having met their threshold burden on design defect, P had to establish by competent evidence that the tire was not reasonably safe and that a feasible alternative design was available. However, P merely presented an expert affidavit attesting that the patent the Ds purchased “cures the problem at the heart of the case.” A factual issue is not established by merely pointing to efforts within the industry to make a product safer without providing some detail as to how the current product is not safe and how an alternative design would be feasible

D. Defenses

1. Preemption

- **Note:** This defense has expanded exponentially in recent years, knocking out device cases, generic drug cases and threatening many other products. Therefore it behooves counsel to determine the status of the regulatory approval of the product before commencement of suit. Every year there are numerous New York federal district court decisions on preemption issues. This year we are itemizing them briefly.
 - Simon v. Smith & Nephew, Inc., 2013 WL 6244525 (S.D.N.Y. Dec. 3, 2013): R3 Acetabular System hip replacement. Dismissed pursuant to Medical Device Act and Riegel v. Medtronic.
 - Franzese v. St. Jude Med., Inc., 2014 WL 2863087 (E.D.N.Y. June 23, 2014): St. Jude Durata implantable defibrillator. The Durata lead wore away and prematurely deteriorated. Motion to dismiss granted. No true parallel claim alleged; no basis for adulteration claim set forth; no proof offered to departure from approved design.
 - Burkett v. Smith & Nephew, Inc., 2014 WL 1315315 (E.D.N.Y. Mar. 31, 2014): R3 Acetabular System hip replacement. Dismissed

pursuant to Medical Device Act and Riegel v. Medtronic. (Here plaintiff sought circumvention of these rules by making arguments relating to the use of the device in this particular situation – to no avail.)

- **Preemption defense may be defeated by making parallel claim of manufacturing defect.** Tansey v. Cochlear Ltd., 2014 WL 4829453 (E.D.N.Y. 2014): **Facts**- Plaintiff had a cochlear implant placed in his ear, which quickly failed and had to be removed. As a result, she alleged greater loss of hearing. Plaintiff claimed that the device had been damaged in the manufacturing process at a stage called brazing. The implant had been approved by the FDA as a Class III device, full PMA examination. She sued the Australian company which made it and a US subsidiary. The Australian defendant moved to be dismissed for want of jurisdiction and the US company sought dismissal on the pleadings, under FCRP 12(b)(6) because of preemption due to FDA Class 3 approval. **Holdings**- The court reviewed all the causes of action pleaded in light of whether there were parallel violations of federal rules involved. It found that it would allow to stand the claim for manufacturing defect, since it was pleaded that this deviated from what the FDA required. Similarly the negligence claim based on failure to recall promptly was permitted to stand. However, it struck the following causes of action: design defect, failure to inspect, and failure to warn. As to the jurisdictional issue, the Australian parent was dismissed. Although plaintiff showed that personal jurisdiction under CPLR 302(a)(3) was obtained, due process would be violated to hold it in, since it was not “at home” here under the Daimler case test or otherwise.
- **Preemption applied to suit involving cosmetic injections.** Pitkow v. Lautin, 800047/11 NYLJ (Sp. Ct. 2014): **Facts**- Plaintiff alleged damage from getting cosmetic injections of Sculptura, manufactured by Aventis defendants. (She also sued the doctors who administered it.) Sculpture had a FDA PMA approval Class III (where it was approved only to treat HIV victims). The product suit alleged the various common bases of liability. The court granted SJ. **Holdings**- After a long review of the law of preemption, the court found that the preemption defense fit this case and dismissed Aventis.
- **Preemption defense denied where hip implant had a manufacturing defect which led to its recall.** Cordova v. Smith & Nephew, Inc., 2014 WL 3749421 (E.D.N.Y. 2014): **Facts**- Plaintiff had a failure of her R3Ceramic Acetabular System hip implant made by defendant Smith & Nephew. It was a device approved in 2008 by an FDA Class III approval, setting up the potential for a preemption defense. Her device when removed in 2013 was found to be cracked and broken. In 2011 defendant had recalled the device for these types of defects. While plaintiff asserted all of the usual product liability claims under NY law, the main claim was premised on a manufacturing defect. In response to

defendant's motion on the pleadings, under FRCP 12(b)(6), the court granted dismissal of some but not all causes of action. **Holdings-** First, the pleadings will be examined pursuant to the Iqbal decision, using a plausibility test. Next, a claim of manufacturing defect survives the preemption defense. That is not true of a design defect claim or failure to warn. As to the claim for breach of express warranty, the court followed which it called the better view among circuits, that the cause of action can stand to the extent it is based on a manufacturing defect. However, since that was not properly pleaded, plaintiff was given leave to amend the complaint.

- **Preemption defense does not provide basis for motion to dismiss on pleadings.** Rosen v. St. Jude Med., Inc., 41 F. Supp. 3d 170 (N.D.N.Y. 2014): **Facts-** This is a complex federal decision by Judge Kahn in the Northern District relating to preemption, which is summarized here. It is however, a good review of the preemption decisions relating to PMA approved medical devices and also of basic NY product law. The device in question is the notorious Riata lead for an implantable cardiac pacemaker made by St. Judes. The lead fractured over time and had to be removed. Plaintiff asserted a manufacturing defect claim, among others. In the complaint, plaintiff pled a lot of facts relating to FDA investigations of the lead, and class I recall that occurred. Defendants brought a motion to dismiss on the pleadings, attacking the complaint in two ways: (a) there was a failure to plead with specificity under the recent Supreme Court decisions in Iqbal and Twombly; (b) there was express and implied preemption under the Riegel decision, as this was a PMA approved device. **Holdings-** Motion to dismiss on the pleadings denied. The court applied the precedents that held that a plaintiff need only plead a general failure to comply with FDA rules and practices and need not at this stage demonstrate a specific PMA rule that had been violated.
- **State law failure to warn claims are preempted under the FDCA and FDA regulations because generic manufacturers cannot unilaterally strengthen their warnings-** Bowdrie v. Sun Pharm. Indus., Ltd., 909 F.Supp.2d 179 (E.D.N.Y. 2012): **Facts-** Plaintiffs brought action in state court against generic drug manufacturers alleging that generic antiepileptic drug phenytoin they ingested differed from the brand name and reference listed drug (RLD) Dilantin approved by FDA in terms of labeling and bioequivalence, and asserting state law claims for strict product liability, negligence, fraud, breach of implied warranties, negligence per se, and wrongful death. The side effect in question was SCAR: severe cutaneous adverse reaction (same as SJS). Following removal, defendants moved to dismiss. Motion granted. **Holding-** Plaintiffs' failure to warn claims are preempted by federal law under *Mensing*. The "impossibility" basis is invoked: defendant could not comply with state law without violation of federal law. Furthermore,

plaintiffs have not stated a claim with respect to their allegation that defendants' phenytoin was not bioequivalent to Dilantin. That either FDA approval of RLD labeling, or a specific FDA directive, is a necessary predicate to generic drug manufacturers' ability to update labeling, including any medication guide, is consistent with the process by which FDA approval is secured in the first instance.

- **Negligent manufacturing is not preempted by the MDA, *Riegel-Messner v. Medtronic, Inc.***, 39 Misc.3d 1213(A), 2013 NY Slip Op 50602(U)(Sup. Ct. Richmond County 2013): **Facts-** Plaintiff underwent a mitral valve replacement surgery at The Heart Institute. A Mosaic Porcine Heart Valve was placed in plaintiff's chest. Testing revealed a leak in the heart valve after months of suffering. Replacement surgery was performed. Plaintiff brought suit against the manufacturer, the hospital and the doctor. Defendant Medtronic moved to dismiss. Granted in part and denied in part. **Holding-** The design of the heart valve had been approved by the FDA. Consequently, plaintiff's claims based upon strict liability for defective design, negligence, the implied warranties of merchantability or fitness for use (UCC 2-314), as well as fitness for a particular purpose (UCC 2-315) and improper labeling, are preempted by the statute and regulations and were dismissed. The court here was relying on a defense of preemption based on the Medical Device Amendments of 1976 and the Supreme Court's decision in *Medtronic v. Rigel* (2008). However, there may have been negligence in the manufacturing process that deviated from the premarket approval of the design and method of manufacturing. If the heart valve was damaged by the surgeon or the hospital staff during the operation, then the surgeon and/or the hospital may be liable to plaintiff. Consequently, it would be premature to dismiss the negligent manufacturing claims against defendant Medtronic.
- **Failure to comply with FDA premarket approval's monitoring and reporting requirements is a valid state law claim that is not preempted-** *Gale v. Smith & Nephew, Inc.*, No. 12-cv-3614 VB, 2013 WL 563403 (S.D.N.Y. Feb. 13, 2013): **Facts-** Plaintiff brought negligence and malpractice action against surgeons and hip resurfacing device manufacturer following a hip replacement surgery that allegedly caused renal damage due to chromium/cobalt exposure. Plaintiff had a Birmingham Hip Resurfacing System installed. Defendant manufacturer moved to dismiss. Motion granted in part and denied in part. **Holding-** Plaintiff's claim that defendant was negligent in its duty to warn was preempted by the Medical Device Amendments of 1976. Further, the Second Circuit has held that implied and express warranty claims are also preempted by MDA. Additionally, Supreme Court made clear that federal law impliedly preempts a state law claim alleging fraud on the FDA. Plaintiff's claim that defendant manufacturer failed to recall component that was mislabeled with an incorrect size survived because

defendant manufacturer was on notice of the claim. Plaintiff's allegation that defendant manufacturer failed to monitor users' blood metal levels stated a claim for negligent monitoring that was not preempted by MDA. This was a state law tort claim based on an alleged violation of a specific premarket approval requirement, and it links the federal violation to plaintiff's injuries.

- **Solvent's warning on label of flash fire hazard satisfied Federal Hazardous Substances Act and preempted strict liability claims- Walker v. Sunnyside Corp., No. 08-cv-2339 FB/CLP, 2013 WL 2298967 (E.D.N.Y. May 24, 2013): **Facts-** Worker was using an alcohol-based solvent to clean windows when someone lit an ignition source. Worker sustained severe burns due to the explosion and died. Worker had read warning label prior to accident. Plaintiff, as administrator, brought suit against defendant for injuries from her late-husband's use of solvent manufactured and sold by defendant. Claims centered upon defendant's alleged failure to warn consumers of dangers and hazards associated with using the solvent. (Defendant filed claims for indemnification and contribution against other defendants.) Defendant moved for Summary Judgment. Motion granted. **Holding-** Since the solvent is a "hazardous substance," it is governed by the FHSA. Accordingly, the Second Circuit has held that where a plaintiff's state law claims seek to impose additional or more elaborate labeling requirements than the FHSA requires, such claims are preempted. The principal hazard of the solvent is the risk of flash fires resulting from ignition of the solvent's vapors- not the method upon which the vapors may come into contact with elements outside the canister. The label also provides more information than is required by the FHSA regarding precautionary measures to take in order to avoid the risk of flash fires.**2d holding:** Although a claim for breach of implied warranty is not barred under the preemption doctrine, plaintiff did not show a breach of any warranty. The product was fit for the purposes intended.**
- **Failure to adequately plead in preemption device case and have proof of defect warrants summary judgment- Burgos v. Satiety, Inc., No. 10-cv-2680 MKB, 2013 WL 801729 (E.D.N.Y. March 5, 2013): **Facts-** Plaintiff underwent transoral gastroplasty as part of a clinical trial where defendant's Transoral Gastroplasty Stapling System (TOGA) was used. TOGA was developed pursuant to a Investigational Device Exception (IDE) from the FDA. During the procedure, plaintiff's esophagus was torn. Plaintiff alleged statutory violations, various product liability theories and other state law tort claims. Defendant's moved for summary judgment on various grounds, renewing motions made over the past few years. Plaintiff moved for summary judgment on the basis that defendant destroyed the TOGA. Defendant's motion granted. Plaintiff's motion was denied. **Holding-** The only claim for which SJ was not granted was plaintiff's negligence claim that the medical device was**

manufactured in violation of the terms, conditions, standards and specifications of the IDE, which would therefore avoid pre-emption. While plaintiff stated a state cause of action in theory predicated upon defendant's failure to manufacture the TOGA device in conformity with the IDE, plaintiff failed to plead a theory of how the IDE was violated and how this violation led to plaintiff's injury. Plaintiff therefore failed to meet burden to state a valid claim. **2d Holding:** Defendant had discarded the device before it could be tested, and plaintiff claimed an adverse inference from that could be drawn, to assist him in making a claim. But, plaintiff failed to establish bad faith and willfulness on the defendant's part. Defendant had a policy to destroy devices within 3 months.

- **FMVSS 208 does not preempt seat belt claims against bus manufacturers- Doomes v. Best Transit Cmp., 17 N.Y.3d 594 (2011):**
Facts- Ps were injured in bus accident. Ps brought suit against owner of the bus, Best Transit Corp.; name-brand manufacturer, Ford; manufacturer of the chassis and cab, Warrick Industries Inc.; manufacturer who completed construction of the bus, J&R Tours; prior owner of the bus, Alcivar; and bus driver alleging that the absence of passenger seatbelts and improper weight distribution of the bus, created by negligent modification of the bus' chassis, caused their injuries. Trial court dismissed actions against D, J&R Tours. Ps settled with D Ford and D Alcivar was deported. DWarrick moved to preclude any evidence that the bus was defective or that it is was negligent due to a lack of seatbelts on the ground of FMVSS 208, which did not require the installation of passenger seatbelts. Trial court reserved decision on this motion. Jury determined that Ds Best and Alcivar were negligent in the operation of the bus and that ll. Warrick defectively manufactured the bus and breached the warranty of fitness for ordinary purposes by modifying the chassis and altering the weight distribution of the bus. It also determined that Best negligently operated the bus without passenger seatbelts and Warrick breached the warranty of fitness for ordinary purposes by failing to install seatbelts. Appellate Division reversed judgments and dismissed complaints as against DWarrick, holding that the seatbelt claims were preempted. With respect to P's weight distribution claim, the evidence was legally insufficient to establish that the modification was a proximate cause of the accident. Ps appealed. Court of Appeals reversed. **Holding-** When read in conjunction with preemption provision, the savings clause permits commencement of common law claims; compliance with applicable federal motor vehicle safety standards is not necessarily a preclusive bar. Additionally there was no implied "field preemption" as the explicit permission of common law claims indicates that the federal statutes promulgated under the Safety Act are not so pervasive as to encompass the entire scheme of motor vehicle safety guidelines. Seatbelt claims were not barred

under implied conflict preemption. Relevant federal standards to the subject bus are silent regarding installation of passenger seatbelts. This does not make it impossible to comply with both the federal standards and P's seatbelt claims. However, Ds argued that the claims are still preempted under Geier v. American Honda Co., 529 U.S. 861 (2000). The Court distinguished Geier based on the fact that 1tS' claims there were preempted because they conflicted with an expressed intent by the DOT to permit manufacturers to select from an array of protective devices and gradually incorporate them into motor vehicles. This case is actually more analogous to Williamson v. Mazda Motor of America, Inc., 131 S.Ct. 1131 (2011), which held that seatbelt claims were not preempted. For buses of this size, NHTSA has been silent in requiring seatbelts but have acknowledged the efficacy of passenger seatbelts in enhancing safety. P s weight distribution claim should be dismissed as it was speculative innature. The weight data were based on speculative weight estimates of passengers, fuel and luggage, and not empirical data. Furthermore, Ps expert opined that the inattentiveness of the driver was a contributing factor.

- **Class III medical device defect claim was preempted; however' 7t was permitted to amend pleadings-** Delango v. New York Presbyterian Healthcare System. 2012 NY Slip Op 30424(U) (Sup. Ct. N.Y. Co. 2012): *Facts-* m alleged medical malpractice, product liability and wrongful death stemming from decedent x's laparoscopic gastric band surgery during which an Adjustable Gastric Banding System was surgically implanted. The Lap Band is a Class III medical device manufactured and sold by A Allergan based on premarket approval from the FDA. As moved for dismissal on the grounds that the state tort claims are preempted under the express preemption provision of the Medical Device Amendments (21 U.S.C. §360k) to the Federal Food, Drug & Cosmetic Act (21 U.S.C. §301). P s moved separately to amend their complaint conceding that their current causes of action were preempted. Ds' motion was granted in part and Ps' motion was granted. **Holding-** Ps' claims were preempted. However, Ps were permitted to amend their pleadings. Ds failed to articulate that the proposed amended complaint prejudices them beyond that this case was 17 months old. Accordingly, Ds' motion was granted in part but Ps were permitted to amend their complaint to assert claims sounding in negligence, by which 1ts alleged that the Lap Band was defective and was manufactured in violation of the FFDCa. Ps further alleged that the Lap Band was adulterated in that it failed to meet established performance standards and that the methods of manufacturing violated federal requirements.
- **Defective design claim of lighter was not preempted-** Slowley 14v. City of New York. et al., 33 Misc. 3d 952, 931 N.Y.S.2d 489 (Sup. Ct.

Queens Co. 2011): *Facts-P*, an infant, sustained injuries as a result of being severely burned when shirt was set on fire by a GM9C utility lighter, imported and distributed by !Scripto-Tokai Corporation. D Scripto moved for SJ. Ds, City of New York and the New York City Department of Education separately moved for SJ. D Scripta's MSJ motion was denied. Ds City's MSJ was granted. *Holding-* D argued that P's design defect claims were preempted by federal regulations. Pursuant to 16 C.F.R. 1212, in order for a lighter to be legally imported into and sold within the United States, it must meet certain child resistancy standards. Preemption was expressly rejected by SONY which held that tort claims of negligence, strict product liability and breach of warranty are not preempted

- **State-law tort claims of defective design and failure to warn preempted by Locomotive Inspection Act- Kurns v. Railroad Friction Products Cmp..etal. 132S.Ct. 1261 (2012):** *Facts-* 7t and his wife brought action in state court against D manufacturer of asbestos brake pads and A successor in interest to A manufacturer of engine valves containing asbestos, alleging P's exposure to Ds' products caused him to develop mesothelioma. Action was removed to Eastern District of Pennsylvania As moved for SJ. District Court granted motion based on preemption. Third Circuit affirmed. Certiorari was granted. *Holding-* Ruling affirmed holding that state-law tort claims of defective design and failure to warn were pre-empted by Locomotive Inspection Act (LIA). First, the argument that the preempted field does not extend to state-law claims arising from repair or maintenance of locomotives is inconsistent with the holding that Congress, in enacting LIA, manifested the intention to occupy the entire field of regulating locomotive equipment. Second, because P's failure to warn claims are directed at the equipment of locomotives, they fall within the preempted field. Finally, the LIA's preemptive scope is not limited to state legislation or regulation but extends to state common law duties and standards of care directed to the subject locomotive equipment.
- **Federal Motor Vehicle Safety Standard 208 does not preempt claim against manufacturer for not installing a lap-and-shoulder seatbelt in all rear seats of a vehicle- Williamson v. Mazda Motor of America, 131 S.Ct. 1131 (2011):** *Facts-* Ps were involved in head-on collision with another vehicle. One P, the rear center passenger, was only wearing a lap belt at the time of the accident and subsequently died. Other rear passengers, Ps, were wearing lap-and-shoulder seatbelts and survived. Ps brought this tort suit in California against D, manufacturer. Ps claimed, *inter alia*, that D should have installed lap-and-shoulder belts in all rear seats, and that P died because D equipped her seat with only a lap belt. The trial court dismissed. The California Court of Appeal, 167 Cal.App.4th 905, 84 Cal.Rptr.3d 545, affirmed based on preemption pursuant to FMVSS 208. The United States Supreme Court granted

certiorari because several courts were interpreting Geier v. American Honda Motor Co., 529 U.S. 861 (2000) as concluding that FMVSS 208 preempts state tort suits claiming that manufacturers should have installed lap-and-shoulder belts on rear inner seat. The Supreme Court held that FMVSS 208 does not preempt a state tort claim against a manufacturer. **Holding-** FMVSS 208 requires, among other things, that manufacturers install seatbelts on the rear seats of passenger vehicles. They must install lap-and-shoulder belts on seats next to a vehicle's doors or frames. On rear inner seats, they can install either (1) simple lap belts or (2) lap-and-shoulder belts. The statute's express preemption clause cannot preempt common-law tort action; but neither can statute's saving clause foreclose or limit operation of ordinary conflict preemption principles. Like the regulation in Geier, the manufacturer is left with a choice. And, like the suit in Geier, the suit here restricted that choice. But unlike Geier, that choice was a significant regulatory objective. Even though the state tort suit may restrict manufacturer's choice, it does not stand as an obstacle to the accomplishment of the full purposes and objectives of federal law

- **Federal law pre-empted state laws imposing duty to change drug's label upon generic drug manufacturers-** PLIVA, Inc. v. Mensing, 2011 WL 2472790 (U.S. 2011): **Facts-** Ps prescribed Reglan in 2001 and 2002, but both received generic from pharmacists. After taking it for several years, both developed tardive dyskinesia. In separate state-court tort actions, Ps sued Ds, generic manufacturers of metoclopramide. Ps alleged inter alia that Ds failed to provide adequate warning labels. Both suits were removed and Ds moved for SJ. Circuits were split on whether federal law preempted state law claims. Supreme Court answered in the affirmative. **Holding-** Court found impossibility in this case. If generic manufacturers independently changed labels to satisfy state-law duty, they would have violated federal requirement that generic labels be the same as brand-name drug labels. The private party, Ds generic manufacturers, could not independently do under federal law what state law requires of it. Court distinguished, Wyeth v. Levine, 129 S.Ct. 1187 (2009), on the ground that federal statutes and regulations that apply to brand-name manufacturers differ
- **The National Childhood Vaccine Injury Act (NCVIA) preempts all design-defect claims against vaccine manufacturers -** Bruesewitz v. Wyeth, LLC, 131 S.Ct. 1068 (2011): **Facts-** P received DTP vaccine manufactured by D's predecessor in April 1992. P's parents filed vaccine injury petition in United States Court of Federal Claims. Special Master denied their claims. They filed this lawsuit in Pennsylvania state court. Complaint alleged that defective design of DTP vaccine manufactured by D's predecessor caused P's disabilities and that D's predecessor was subject to strict liability, and liability for negligent design. D removed to Eastern District of Pennsylvania, which granted D's motion for summary

judgment (SJ) on strict liability and negligence design defect claims holding that these claims were preempted by 42 U.S.C. Section 300aa-22(b)(1) which states in relevant part: “No vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings.” Third Circuit affirmed. Supreme Court affirmed. **Holding-** The silence regarding design-defect liability in the statute and in legislative history was not inadvertent. The legislature wanted to leave complex epidemiological judgments about vaccine design to the FDA and National Vaccine Program. NCVIA preempts all design-defect claims against vaccine manufacturers brought by plaintiffs who allege injury or death caused by a vaccine’s side effects.

- **Claims for injuries sustained due to fumes from manufacturers’ vehicles were preempted by Clean Air Act- In re Jackson v. General Motors, 2011 WL 989601 (S.D.N.Y. 2011): **Facts-** Ps were bus drivers, shifters and mechanics employed by the New York Transit Authority, who sued for injuries sustained due to inhalation of diesel exhaust fumes created by Ds, manufacturers of urban transit buses and diesel engines, alleging that: the design of Ds’ buses violated the emissions standards set forth in the Clean Air Act (CAA), *See* 42 U.S.C. §7521; and that Ds negligently failed to warn Ps about the latent dangers of the exhaust fumes emitted by the buses. Ds moved for judgment on the pleadings, arguing Ps’ claims are preempted by the Clean Air Act. Ds motions were granted. **Holding-** The language of Section 209(a) expressly preempts state common law tort actions premised on failure to meet federal standards promulgated by the Environmental Protection Agency. Further, Ps’ negligence claim relating to the design of the engines was dismissed because there is no private right under CAA and because CAA preempts such a claim. Ps’ failure to warn claims were also dismissed because the claims are preempted and Ps failed to adequately plead proximate causation.**
- **Breach of warranty and negligence claims for over-the-counter child’s laxatives are not federally preempted- Diaz v. Little Remedies Co., Inc. et al., 81 A.D.3d 1419 (4th Dept. 2011): **Facts-** P commenced this action, individually and on behalf of her two-year-old son, based on injuries sustained by a child’s laxative marketed and manufactured by D. P’s son developed contact dermatitis, chemical burns and sloughing of skin on his buttocks and genital area. After treatment, P was arrested because the treating medical professionals suspected that P’s son had been burned by scalding water. A neglect proceeding was commenced in Family Court, and an order of protection was issued on behalf of P’s children. Charges were dismissed several months later based on**

testimony from a medical expert that indicated that the laxative caused child's condition. Ds moved for SJ. The trial court granted Ds' motion. The Appellate Division granted P's appeal in part and denied it in part. **Holding-** The trial court erred by granting Ds' motion with respect to failure to warn claim because it is not preempted by federal regulations concerning over-the-counter laxatives. 15 U.S.C. § 379r(e) states: "[n]othing [in the statute] shall be construed to modify or otherwise affect any action or the liability of any person under the product liability law of any State." As to Ps' breach of warranty and negligence claims, trial court erred in granting the motion as they seek damages for the injuries sustained by P's son and pecuniary damages sustained by P. Trial court properly granted those parts of motion to dismiss claims for damages resulting from her emotional injuries inasmuch as they were not a direct result of a breach of Ds' duty to her but, rather, they were a consequential result of that breach. Furthermore, trial court properly determined that her defamation claims were time barred. However, trial court erred in granting the motion with respect to P's claims for damage to her reputation based upon alleged pecuniary losses.

- **Claims of manufacturing and express warranty not preempted though other causes of action are** – Mitaro v. Medtronic, Inc., 900 N.Y.S.2d 899 (2d Dept. 2010): **Facts** – P was injured when a Sprint Fidelis lead manufactured by D fractured after implantation. P and her husband sued D alleging, *inter alia*, strict liability based upon design and manufacturing defects, failure to warn, negligence and express and implied warranties. D moved to dismiss arguing that the device in question was a Class III medical device approved by the FDA and therefore Ps' claims were preempted under the Medical Device Amendments Act (MDA) 21 U.S.C. § 360 et. seq., and Riegel v. Medtronic Inc., 522 U.S. 312 (2008). The Supreme Court denied D's motion with respect to the manufacturing defect and express warranty claims but granted the motion on all other claims. Ps appealed. The Appellate Division affirmed. **Holding:** The causes of action alleging strict liability based on failure to warn and defective design, negligence, negligence *per se*, and breach of implied warranty are preempted by the MDA and Riegel because these state law claims impose requirements that are different from, or in addition to, federal requirements and because they relate to either the safety or effectiveness of the medical device under the MDA. **Comment:** The lower court had preserved Ps' manufacturing defect claims alleging the welding process used on two different metals in the lead cables damaged the fine, small wires, because it was claimed this process did not conform to federal requirements and were therefore parallel, not different from or in addition to, federal mandates. Similarly, to the extent any express warranties were made which exceed the scope of FDA-approved statements, Ps' express warranty claims also survived

- **P verdict reversed because state law requiring seatbelts for bus passengers was preempted by federal regulation requiring them only for bus drivers** – Doomes v. Best Transit Corp., 890 N.Y.S.2d 526 (1st Dept. 2010): **Facts** – Ps, passengers on a bus, were injured when the driver fell asleep at the wheel, allowing the bus to careen across several lanes and onto a median strip before he woke up and tried to steer it back to the roadway. The bus rolled over several times. Ps sued Ds, the bus and chassis manufacturers, contending the driver was unable to regain control because the bus was overweight and misbalanced, with too much weight over its back, which had an extended chassis. Ps also claimed Ds should have equipped the bus with seatbelts. Prior to trial, Ds moved to preclude evidence regarding the lack of seatbelts on the grounds that the National Traffic and Motor Vehicle Safety Act of 1996, when read together with the regulatory scheme set forth in the Federal Motor Vehicle Safety Standard (FMVSS) 208 (49 CFR § 571.208), requires only the driver’s seat of the bus to be fitted with a seatbelt. The jury returned a verdict for the Ps. Ds appealed. The Appellate Division reversed. **Holding:** Although the federal law at issue preserves a common-law right to a remedy in some instances, the state tort law Ps sought to enforce would effectively require seatbelts at passenger seating positions for all busses governed by FMVSS 208. Thus, it conflicts with the federal goal of establishing uniform standards and is therefore preempted. The weight distribution claim also fails because no credible, non-speculative evidence was admitted. P’s own expert acknowledged that the accident was unrelated to the extension of the chassis and there was no proof it had been caused by anything other than the driver’s inattentiveness.
- **A parallel claim setting forth failure to comply with federal regulations must link the non-compliance to the injury** – Ilaraza v. Medtronic Inc., 677 F. Supp. 2d 582 (E.D.N.Y. 2009): **Facts** – P had an inoperable tumor of the sacrum resulting in severe pain to her pelvis, back and legs. To relieve his pain, P had a medication pump, manufactured by D, implanted under his skin so as to have direct pain medication delivered to his spinal canal. After approximately five years of use, a part of the pump fractured causing the P severe pain. P originally pled breach of warranty and strict liability claims however P amended the complaint to allege just negligence *per se*, labeling it a “parallel action.” In this amended complaint, P claimed D failed to manufacture the pump in accordance with federally prescribed good manufacturing principals (CGMPs) articulated in several provisions of the Code of Federal Regulations (CFR) specifically cited. D moved to dismiss arguing that the allegations were not “plausible” as required by the pleading standard articulated in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). However, even if P pled sufficient facts D argued the allegations were nonetheless preempted by the Medical Device

Amendments (MDA) to the Food and Drug and Cosmetics Act (FDCA) as interpreted by Riegel v. Medtronic Inc., 522 U.S. 312 (2008). The District Court granted the D's motion. **Holding:** The MDA preemption provision bars state law tort actions based upon common law principles that are different from or in addition to requirements imposed by federal law. However, a narrow class of claims seeking damages for injuries based on violations of federal law, (parallel claims), are permitted. P's use of the label "parallel action" in its complaint is a clear recognition that the P recognized the applicability preemption principles to most state tort claims. However, P's remaining claims predicated on a violation of the CFRs and CGMPs are not parallel claims because none of the regulations cited refer specifically to the medical device at issue. Instead each regulation is a general statement of a CGMP which are purposefully broad so as to apply to many types of medical devices. Further, the allegations do not satisfy Twombly. In order to state "plausible" parallel claim under Twombly, P must show a link between a specific federal regulation and P's injury. P has not done so here. Indeed, in view of the long period of time that the device functioned well, the general manufacturing allegation seems all the more remote.

- **Parallel state claims alleging violations of federal hazardous substance act not preempted** – Leibstein v. Lafarge North Am. Inc., 689 F. Supp. 2d 373 (E.D.N.Y. 2010): **Facts** – P bought construction cement to build a radiant-heat floor in his basement. Wearing jeans and gloves P kneeled in the cement mixture for approximately 30 minutes without noticing any dampness, burning or pain. Nonetheless later, he realized his knees were black and learned he had third-degree burns. P and his wife sued Ds, the cement manufacturer and distributor, alleging failure to provide adequate warnings concerning the product's hazards. Written in capital letters on the product's label were "caution, corrosive, contains Portland cement that is injurious to eyes, skin lungs and digestive system." The back panel also warned "avoid contact with skin or eyes." Ds moved for summary judgment arguing P's claims were preempted because they do not allege violations of the Federal Hazardous Substances Act (FHSA) labeling requirements but rather NY common law failure to warn claims. P countered the court should read the complaint broadly to find implicit the necessary elements of FHSA violations and in the alternative, requested to cross-move for leave to amend the complaint to specifically allege FSFA violations. D argued that even if the complaint were amended, summary judgment would still be appropriate because the FHSA violations did not cause Ds injuries; P was a knowledgeable user and; the hazard was open and obvious. The District Court denied D's motion. **Holding:** P's claims based upon violations of the FSFA's labeling requirements are parallel claims and not preempted. Although required by the FSFA, the D's warning labels failed to use the signal word "danger." Further, under the FSFA, a hazardous substance is misbranded if it fails to bear a label containing

an affirmative statement of the principal hazard. P's claim that the label should have said "causes burns" rather than merely "corrosive" and "injurious to skin" raises a triable issue of fact as to whether the label met FSHA's requirements. Had the labels been different, P testified he would not have used the product in the same manner. Therefore, sufficient facts were raised as to whether the alleged labeling violations might have caused P's injuries. D's knowledgeable user defense is usually reserved for professionals or other experts experienced with the product in question and thus it cannot be applied to P. Finally, the open and obvious defense should not apply when aspects of a hazard are not reasonably apparent to the user. Since it was not readily apparent that kneeling in mixed cement while wearing blue jeans could result in severe chemical burns, genuine issues of material fact also remain as to whether the products hazards were open and obvious.

- **Medical Device Amendment Act preempts claims challenging FDA approval but not those alleging "parallel claims" violations – Horowitz v. Stryker Corp., 613 F.Supp.2d 271 (E.D.N.Y. 2009):** *Facts* – P received a Trident artificial hip system manufactured and distributed by Ds. In addition to an audible squeaking sound emanating from the device, P also experienced constant irritation, discomfort, bone loss, and required premature surgery due to the allegedly defective device. Labeling warned of a squeaking sound reported in small percentage of the cases but P claimed to not be informed of this prior to surgery. P sued D alleging defective design, failure to warn, negligence, breach of warranty, and violations of § 349 of New York General Business Law. P cited recalls of other devices manufactured by D and letters warning that some of D's manufacturing plants were not in conformity with FDA quality standards. Ds made a motion to dismiss arguing that P's claims were preempted by the Medical Device Amendments Act (MDA) 21 U.S.C. § 360 et seq. P countered that Riegel v. Medtronic Inc., 128 S.Ct. 999 (2008) (previously outlined) held state claims which are different from or in addition to federal requirements are preempted, whereas "parallel claims" were not. The District Court dismissed P's defective design and failure to warn claims with prejudice but dismissed the others with leave to re-plead. *Holding* - If P's state claims are premised on a failure to comply with FDA standards, then they are parallel and not preempted. However, the P established no link between D's violations of federal quality standards at some of D's manufacturing plants and P's injury. The complaint does not state that P's hip system was manufactured at these plants or what connection the violations have to her injury. P's express warranty claim alleges the Ds warranted the device was safe and appears to refer to the system's FDA approved label referencing the reported squeak. However, in order to avoid preemption, P must identify specific representations made by the manufacturer which exceeded the scope of FDA approved statements and plead reliance upon them. Similarly, in P's NYGBL claim P fails to explain how Ds' conduct

was deceptive or misleading. P's defective design and failure to warn claims must fail because they challenge the FDA's findings that the system is safe and the labeling proper and therefore necessarily impose requirements that are different from or in addition to federal ones.

- **Preemption avoided at dismissal stage by alleging federal manufacturing requisites violated and statements exceed scope of FDA approval** – Mitaro v. Medtronic, Inc., 23 Misc.3d 1122(A) (S.C. Westchr. Cty. April 9, 2009): **Facts** – P was injured when a Sprint Fidelis lead manufactured by D fractured after implantation. P and her husband sued D alleging, *inter alia*, state law claims for manufacturing defects and breach of express warranties. D moved to dismiss arguing that the device in question was a Class III medical device approved by the FDA and therefore Ps' claims were preempted under the Medical Device Amendments Act (MDA) 21 U.S.C. § 360 et seq, and Riegel v. Medtronic Inc., 128 S.Ct. 999 (2008)(discussed above). The District Court denied D's motion with respect to the manufacturing defect and express warranty claim but granted the motion on all other claims. **Holding** - Ps' manufacturing defect claim alleges 1) the welding process D used on two different metals in the lead cables caused damage to the fine, small wires and; 2) the facilities and controls D used were not in conformity with the applicable federal requirements. The MDA does not prevent a state from providing damages for claims premised on a violation of FDA regulations. It is a parallel claim, not one different from or in addition to federal requirements. Ps have pled the allegations with sufficient notice to avoid dismissal at this juncture. Similarly, the express warranty claims remain viable given that at this stage it is not necessary, unlike summary judgment, for the P to identify specific representations which exceed the scope of FDA-approved statements.
- **To circumvent preemption under an express warranty claim, the representations which exceeded the scope of FDA approval must be identified** – Lake v. Kardjian., 874 N.Y.S.2d 751 (S.C. Madison Cty. 2008): **Facts** – P was injured when undergoing treatment for the symptoms of an enlarged prostate utilizing the Targis System of treatment, manufactured by D. P sued D asserting five separate causes of action under New York law. D moved for summary judgment arguing that because the Targis System was a Class III device under the Medical Device Amendments (MDA), 21 U.S.C. § 360 et seq., the doctrine of preemption barred the P's claims. The Supreme Court granted the motion. **Holding** - Under Riegel v. Medtronic, Inc., 128 S.Ct. 999 (2008) all claims asserted under state law for strict liability, breach of implied warranties and negligence in the design, testing, inspection, distribution, labeling, marketing and sale of a Class III device which has received pre-market approval are preempted by the MDA. The only claim not clearly preempted is the express warranty claim. In order to state a viable claim under this theory a P must identify specific representations of the

manufacturer which exceed the scope of FDA approval. Here P only presented evidence that he was provided with pamphlets and a videotape without identifying any specific statements within those items or presenting those items to the court. Further, failure of D to report incidents in which the Targis System may have caused or contributed to a serious injury does not deprive D of the benefit of federal preemption. Enforcement of the FDCA, including the MDA, is the sole province of the federal government and there are no private causes of action for noncompliance with the MDA.

- **Federal agency's adoption of ANSI standards for safety equipment does not preempt defective design claim** – Milliman v. Mitsubishi Caterpillar Forklift Am. Inc., 594 F. Supp.2d 230 (N.D.N.Y. 2009): **Facts** – [basic facts enumerated above in “Failure to Warn”]. In action where P fell some distance to the ground off a fork-lift type elevated machine called an “orderpicker,” P sued D, the manufacturer of the machine. D moved for summary judgment arguing, *inter alia*, that the P's claims were field preempted because the federal Occupational Safety and Health Administration (OSHA) had adopted standards of the American National Standards Institute (ANSI). D also argued as follows: This adoption established a comprehensive scheme for the design of safety equipment such as the orderpicker thereby making compliance with the ANSI standard a sufficient bar to P's claim. Because the ANSI standards did not require a harness be permanently affixed but just supplied, D was in compliance with the federal standard. P's claims were also conflict preempted because incorporation of P's alternative designs could put its orderpicker in conflict with OSHA's adopted standards. The District Court denied D's motion. **Holding** - P's claims are not barred by field preemption because whether D complied with the ANSI requirements at all was unclear since it was not certain that a safety harness was even supplied with the machine. Further, the ANSI standards were still subject to interpretation. P's claims were also not conflict preempted because the ANSI standards give manufacturers the option of installing a guard rail or a means for securing personnel such as a body belt or lanyard. Nothing in P's alternative design suggestions would render it impossible for D to comply with these federal ANSI standards.
- **Common law suits for medical devices which receive pre-marketing approval from the FDA are preempted in some instances** – Riegel v. Medtronic, Inc., 128 S.Ct. 999 (2008): **Facts** – A catheter device, manufactured by D, that had been placed in P during heart surgery ruptured. P developed a heart block, was placed on life support and eventually died. The catheter had received pre-market approval (PMA) from the Food and Drug Administration (FDA) under the Medical Device Amendments (MDA) of 1976, 21 U.S.C. § 360 et seq. P sued D alleging that the device was designed, labeled and manufactured in a manner that

violated New York law. D moved for summary judgment arguing that P's claims were preempted by specific language of the MDA because, although the MDA did exempt some state law claims from preemption, the exemptions did not apply to products granted full PMA by the FDA. The district court agreed and granted D's motion and the Circuit court affirmed. Recused **Holding** –As plaintiff's common law causes of action constitute "requirements" as to safety and effectiveness on the part of the device supplier, they are preempted under the MDA, where the device received pre-marketing approval. **Dissent** – Regulation of matters of health and safety have historically been the domain of state courts. Preemption analysis starts with the assumption that powers of the state are not to be superseded unless that was the clear and manifest purpose of Congress. It is not clear from the MDA that this was the clear and manifest purpose of Congress. Inclusion of the term "requirement" under the MDA does not necessarily refer to State common law claims. There is no indication that by use of the term "requirement," Congress intended a sweeping preemption of traditional common-law remedies against manufacturers and distributors of defective devices. *Comment: Riegel* ends major amounts of litigation over medical devices unfortunately, if they have gone through premarketing approval. Common law suits may still be brought if there is a defect in manufacturing or if the device was not subject to PMA analysis or the defendant otherwise fails to follow FDA approval conditions (so-called parallel claims). Legislation is pending to reverse this decision.

- **Claim holding tobacco companies liable for failing to warn nonsmokers about health risks of environmental smoke preempted by the Federal Cigarette Labeling and Advertising Act** – Tormey v. American Tobacco Co., 850 N.Y.S.2d 309 (4th Dept. 2008): **Facts** – P had been exposed by coworkers to environmental smoke. P sued Ds, tobacco companies, alleging they were negligent in failing to warn nonsmokers about the health risks of environmental smoke. D was granted summary judgment dismissing the claim. **Holding** – The Federal Cigarette Labeling and Advertising Act, 15 USC §1331 et seq, banning states from enacting requirements or prohibitions based on smoking and health with respect to the advertising or promotion of cigarettes preempted the P's claim since it would require Ds to provide warnings based on smoking and health.
- **Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) does not preempt claims of negligent design or manufacture** - Restrepo v. Rockland Com., 832 N.Y.S.2d 272 (2d Dept. 2007): **Facts**- P sustained fatal injuries as a result of an unnamed product that was subject to the provisions of FIFRA. P sued D manufacturer, claiming that the product was negligently designed and manufactured. The nature of the defect claim is not disclosed in the opinion. D moved for summary judgment, arguing that the claims were impliedly preempted by FIFRA. Supreme

Court denied the motion and the Appellate Division affirmed. *Holding*- FIFRA governs labeling and warning requirements. P's claims relating to product defect are not governed by FIFRA and therefore not preempted.

- **Food, Drug, and Cosmetic Act (FDCA) does not preempt claims of failure to warn; Regulations only set minimum standards- Inre Zyprexa Prods.Liab. Litig. v. Eli Lilly & Co., 2007 U.S. Dist. LEXIS 42641 (E.D.N.Y. 2007):** *Facts*- Ps sustained physical and psychiatric injuries as a result taking the diabetes drug Zyprexa. Ps sued D manufacturer claiming that it failed to adequately warn of the dangers associated with the drug. D moved for summary judgment arguing, *inter alia*, that the warnings were approved by the FDA and therefore preempted by FDCA. The district court denied the motion. *Holding*- because the regulation of public health is an area traditionally occupied by the states, there is a strong preemption against implied preemption in a failure to warn case involving pharmaceuticals. The court noted that Congress' silence on the matter of preemption involving prescription drugs is "telling." Here, there is no actual conflict between FDA regulations and state tort law. The requirements set forth by FDA regulations are minimum standards and do not shield defendants from liability.
- **National Childhood Vaccine injury Act of 1986 preempts state law claim of defective design and failure to warn with regards to Tetramune – Militrano v. Lederle Indus., 810 N.Y.S.2d 506 (2d Dept. 2006):** *Facts* – Infant P suffered seizures, encephalopathy, progressive loss of brain function, profound developmental delays and severe neurological impairment as a result of being administered a dose of Tetramune, a combination vaccine immunizing children against diphtheria, tetanus, and pertussis, as well as haemophilus type b, which can cause life-threatening infections, such as meningitis. P sued D manufacturer on the grounds that the vaccine was defective and that the manufacturer failed to adequately warn of the dangers posed by the vaccine. D moved for summary judgment, arguing that the National Childhood Vaccine injury Act of 1986, 42 U.S.C. § 300aa-1 *et seq.*, preempted P's claims. Supreme Court granted the motion and the Appellate Division affirmed. *Holding* – The law was enacted for the purpose of precluding claims of defect where injury results from a properly administered vaccine that carries with it certain unavoidable side effects. Here, P conceded that the vaccine was properly administered. Thus, the claim of product defect was preempted. Similarly, the Court held that the Act barred any claim of failure to warn where the warning at issue complied with FDA requirements. Here, P failed to offer any evidence indicating that the warning was inconsistent with FDA requirements.
- **§360k(a) of the 1976 Medical Device Act Preempts tort claims involving devices that received Pre-Market Approval from the FDA**

– Riegel v. Medtronic, Inc., 451 F.3d 104 (2d Cir. 2006): *Facts* – P was injured when a balloon catheter burst in the course of a cardiac procedure. P sued D manufacturer, claiming, *inter alia*, that the device was defectively designed. D moved for summary judgment on the ground that the claim was preempted by §360k(a) of the 1976 Medical Device Amendments to the Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301 *et seq.* The district court granted the motion and the Circuit Court affirmed. **Holding-** the PMA process is rigorous and imposes device-specific requirements on manufacturers. Thus, to the extent that those requirements are complied with, any tort claim is preempted. However, where the claim is that the manufacturer did not comply with the PMA specifications, a cause of action may go forward. **Comment:** The preemption defense is a trap which needs to be avoided. In the Medtronic and Guidant defibrillator cases we are arguing ways around its application, including misleading the FDA and not following specifications. There is no similar provision for drugs but the leaders of the FDA, reflecting the Republican administration's goals, placed a preamble to a recent regulation purporting to create a preemption defense. So far no court has given credence to this rule.

- **Federal Hazardous Substance Act 16 C.F.R. § 1500.121 does not preempt claim for failure to warn where the warning was placed on the back panel of the product** – Richards v. Home Depot, Inc., 2006 U.S. App. LEXIS 17943 (2d Cir. 2006): *Facts* – P was injured when she breathed toxic fumes in a room that was not properly ventilated after having been painted with a wood-finishing product sold by D. P sued D claiming *inter alia* that the product was defective in that it did not adequately warn of the need to properly ventilate a room in which the product was used. The front panel of the product contained the following warning: "FLAMMABLE LIQUID AND VAPOR. HARMFUL OR FATAL IF SWALLOWED See other cautions on back panel." The rear panel warned against vapor inhalation. D moved for summary judgment, arguing that the warnings were compliant with the FHSA and the claim was therefore preempted. The district court granted the motion and the Second Circuit reversed. *Holding-* By its terms, the FHSA requires that a warning about the risks of vapor inhalation be included on the "principal display panel." Here, the court held that the front of the product was the principal display panel and the failure to warn of the need for ventilation on the front panel rendered the warning non-compliant with the terms of the FHSA. The instruction to "see other cautions on back panel" was insufficient and the claim was therefore not preempted.
- **FDA Prescription drug licensing does not preempt state court claims** – Smith v. Johnson & Johnson Co., 2004 N.Y. Misc. LEXIS 2788 (Sup. Ct. N.Y. Cty. 2004): *Facts* – D moved to dismiss the claims against it on the ground that they were preempted by the FDA regulatory scheme.

Supreme Court denied the motion. *Holding* – Citing a prior holding of the Eastern District of New York, the court ruled that the FDA regulatory scheme did not expressly or impliedly preempt state law claims involving allegedly defective drugs.

2. Statute of Limitations

- **Statute of limitations defense applied to some disease claims of 9/11 workers.** Kwasnik v. 160 Water St., Inc., 2014 WL 7181171 (S.D.N.Y. 2014): **Facts**- Judge Hellerstein, managing the post 9/11 claims by workers for various diseases related to remediation of buildings, dealt in this decision with a SOL defense put forward by the building owners. In a heavily fact-specific decision he determined that time had run on some claims of injury and not others. **Holding**- Under NY law, the SOL in this type of toxic tort does not begin to run when the symptoms are isolated or inconsequential, but on the other hand the plaintiff cannot wait until the time of first diagnosis if he has noticed symptoms earlier. NY has adopted a “two-injury” rule, allowing delay for suit if the new disease is separate and distinct from an earlier one, especially where the older one is not necessarily a predicate for the new one.
- **New York law applied to statute of limitations** – Fargas v. Cincinnati Mach., LLC., 986 F. Supp. 2d 420 (S.D.N.Y. 2013): **Facts** – Plaintiff was injured in New York while operating a milling machine manufactured by Cincinnati Machine, LLC, a predecessor of MAG IAS, LLC. Following removal to federal court, defendants moved to dismiss for failure to state a claim based on the operation of the Ohio Statute of Repose. **Holding** – Denied. Because the case involved a “true” conflict between different loss-allocating rules, the second “Neumeier rule” (31 N.Y.2d 121) requires the application of the law of the jurisdiction in which the injury occurred, in this case New York. Thus the Ohio statute was inapplicable.
- **Statute of limitations for hip implants is 3 years from date of injury resulting from malfunction** - Guisto v. Stryker Corp., No. 12-cv-2489, 2013 WL 2417685 (E.D.N.Y. June 4, 2013): **Facts**- In September 2006, plaintiff had a hip replacement using a Stryker Trident Acetabular. She was in constant pain. (In March 2009, she commenced a medical malpractice action against the surgeon who implanted the hip.) Defendants issued a voluntary recall of some of their Trident System devices in 2008 due to defects. Plaintiff had removal of the device in 2011 and initiated the instant action in May 2011. Defendants moved for summary judgment asserting the statute of limitations. Defendant’s motion granted. **Holding**- For implants the time period is 3 years from date of injury resulting from malfunction. According to plaintiff, the implant failed immediately after the surgery in September 2006. Thus, according to plaintiff’s clear and explicit contentions, the injury resulting from the implant’s malfunction began long before the cutoff date for a negligence action to be timely. Plaintiff’s implied warrant claims expired

four years from the tender of delivery, or when she received the device. The express warranty claims expired then as well.

- **Summary judgment on statute of limitations denied where question of fact exists as to when the primary condition was discovered in hip device case- Cerqua v. Stryker Corp., No. 11-civ 9208 KBF, 2012 WL 5506119 (S.D.N.Y. Nov. 9, 2012): **Facts**- Plaintiffs alleged that the hip replacement devices implanted in November 2004 and manufactured and sold by defendant Stryker were defective. The hip replacement was collectively known as the Trident Hip Replacement System. Defendant filed MSJ. Motion granted in part and denied in part. **Holding**- Pursuant to CPLR sec. 214(c)2), the primary condition on which the claim was based refer to an actual illness, physical condition or other similarly discoverable objective manifestation of the damage or symptoms caused by previous exposure to an injurious substance. The date of discovery was the date that a plaintiff constructively discovered his or her injury and is a mixed question of fact and law. There are material issues of fact regarding both the nature of plaintiff's primary condition and the date it was or should have been discovered. A reasonable jury could find that plaintiff did or should have discovered the primary condition behind his claim immediately after the 2004 surgery, during the period from 2004-2007 when he sought medical advice, after the 2008 knee replacement failed to alleviate the hip pain, or in 2009 when the pain intensified or he underwent the revision surgery. But as to the 4-year statute of limitations for a breach of warranty claim, this accrues at the date the product is sold or placed into the stream of commerce. Thus, this was dismissed.**
- **NY SOL extended for latent torts; latent can be a day or two; when causation is discovered- Giordano v. Market Am., Inc., 2010 NY Slip Op 08382, 15 N.Y.3d 590 (2010): **Facts**- P suffered several strokes in March 1999, which P alleged were caused by ephedra contained in a dietary supplement.. Over 4 years later, P brought suit against D, the distributor of the product after he said he discovered the ephedra was the cause of his injuries. Case was removed to federal court, manufacturer of product was added as a D, and case was consolidated in Southern District of New York with other ephedra-related litigation. D moved to dismiss case on the grounds that it was barred by statute of limitations, CPLR 214. District Court granted D's motion. P appealed to Second Circuit, Giordano v. Market America, Inc., 289 Fed.Appx. 467 (2d Cir. 2008), which certified to Court of Appeals 3 questions: (1) does CPLR 214(c)(4) provide an extension of statute where injuries are caused by latent effects of exposure to substance?; (2) can injury that occurs within 24 to 48 hours of exposure be considered "latent?"; and (3) what is standard to determine whether there is genuine issue of material fact? Court of Appeals answered first two questions in the affirmative and concluded that causal relationship is determined when expert testimony is**

admissible. **Holding-** (1) Provisions of CPLR 214-c(4) are limited to actions for injuries caused by latent effects of exposure to a substance; (2) injury that occurs within hours of exposure to substance can be considered “latent” for these purposes and need not be discovered only after the 3-year statute of limitations has run; and (3) “technical, scientific or medical knowledge and information sufficient to ascertain the cause of [the plaintiff’s] injury” is “discovered, identified or determined” within terms of statute when existence of causal relationship is generally accepted within the relevant technical, scientific or medical community. **Comment:** This is truly a revolutionary case which ends the 3-year SOL for many product cases—if the lower courts give literal reading to it. While CPLR 214-c(4) had been on the books for many years, it was virtually never used since it required a latent injury and there was the concern that, if plaintiff alleged that the causation was originally unknowable, he or she would be setting up a defense for the defendant. The decision of the majority here just seems to sweep such concerns aside. Latent can be at once, it just means that the cause of the injury is not apparent at the time of exposure. The SOL does not start to run until an expert (whose expert?) spots it

- **Second Circuit adopts Court of Appeals holding and remands case for summary judgment ruling- Giordano v. Market America, Inc., 634 F.3d 183 (2d. Cir. 2011): **Facts-** Same as above. **Holding-** Court vacated the district court’s judgment and remanded matter for further proceedings. Court reasoned that P’s injury could be latent for purposes of CPLR 214-c(4) despite the short time between P’s ingestion of ephedra and onset of injury. Inasmuch as lower court did not consider this, they may on remand. Second, district court must decide whether there was general acceptance of relationship between ephedra and aneurism and strokes in the relevant technical, scientific or medical community at some time prior to expiration of period within which action or claim would have been authorized under three-year statute of limitations. Case remanded for further proceedings based on Court of Appeals decision above**
- **Statute of limitations applied as to relation back; duty to plead with specificity for warranty claims, negligent misrepresentation and fraudulent concealment- Fisher v. APP Pharmaceuticals, et al., 2011 WL 812277 (S.D.N.Y. 2011): **Facts-** P was administered heparin manufactured by Ds during surgery. P was diagnosed with heparin-induced thrombocytopenia antibodies (HIT, which causes blood clots), and later died. P claimed Ds separately manufactured, marketed, distributed and sold several forms of heparin. P’s wife alleged: strict liability/failure to warn; strict liability/design defect; negligence; breach of implied warranty; breach of express warranty; negligent misrepresentation; fraud by concealment; loss of consortium and wrongful death. D, Hospira Inc., removed to federal court. P filed an**

amended complaint and added D, APP Pharmaceuticals, LLC. P filed another amended complaint that added, D, Baxter Healthcare Corporation. All 3 Ds moved to dismiss. Ds motions were granted.

Holding- Ds, APP and Baxter, both argued that the amended complaint failed to specifically allege which product injured P. P alleged that all of the Ds manufactured heparin products and all of those heparin products were ingested by P. These factual allegations were more than labels and conclusions and, instead, when accepted as true, were sufficient to state a claim that is plausible on its face. Next, Ds, Baxter and APP, argued that the claims were time-barred. All the relevant claims were subject to the 3-year statute of limitations. Ds, Baxter and APP, were not named as Ds until 4 years after the alleged injury. Therefore, claims against Ds, Baxter and APP dismissed were: strict liability/failure to warn; strict liability/design defect; negligence; negligent misrepresentation; and fraudulent concealment unless they relate back or are tolled by the discovery rule. D, APP, was not named until 2 years and 1 month after decedent's death, and thus this claim was time barred unless the claim related back or was tolled by the discovery rule. The amended complaint, however, failed to allege any unity of interest between D, Hospira and D, APP, or D, Baxter. Thus, P's claims against D, APP, and D, Baxter failed under the relation back test. The discovery rule also did not apply in this case because P knew the cause of his injury when it was diagnosed, not when P found out that it was manufactured by D, APP, or D, Baxter. The claims were time-barred as to D, APP, and D, Baxter were: strict liability/failure to warn; strict liability/design defect; negligence; negligent misrepresentation; fraud by the concealment. Ds, Baxter and Hospira, argued that the amended complaint failed to allege a claim for breach of express warranty because the complaint failed to identify the actual content of the warranty. P failed to allege any specific words, promises or statements made by any Ds to P or his physicians that would create an express warranty. D, Hospira, argued that P failed to plead the negligent misrepresentation claim with sufficient particularity. The complaint lacked any allegations regarding which misrepresentations were made to P or his doctors, and what was relied upon in connection with his decision to take heparin. Ds argued that P's claim for fraudulent concealment failed to satisfy the heightened pleading requirement of Fed. R.Civ.P 9(b). The complaint failed to allege when fraud occurred and where fraud took place, and instead just asserted fraud took place at all times mentioned herein

- **D may amend its answer to include a statute of limitations defense – Frumento v. On Rite Co., Inc., 887 N.Y.S.2d 620 (2d Dept. 2009): **Facts** – P was a hair stylist who claimed she became ill due to chemicals to which she was exposed while working as a hair stylist. P was later diagnosed with vasculitis, a form of lupus, and multiple chemical sensitivity. She ultimately terminated her employment due to her physical condition. P sued Ds, the manufacturer of the chemicals and her former employer,**

alleging strict product liability. Thereafter, D, chemical manufacturer, served its answer but failed to assert a statute of limitations defense. D later moved for leave to amend its answer to add such a defense and to dismiss the complaint as time-barred. The Supreme Court granted Ds motion and the Appellate Division affirmed. **Holding:** Leave to amend pleadings should be freely given provided that the amendment is not palpably insufficient, does not prejudice the opposing party and is not devoid of merit. The limitations period for causes of action sounding in strict product liability is three years from the date of discovery of the injury by the P or from the date when through the exercise of reasonable diligence such injury should have been discovered, whichever is earlier. D showed that P commenced her action more than three years after she began to suffer the manifestations and symptoms of her physical condition. Furthermore, P cannot avoid the applicable three-year limitations period by asserting causes of action to recover damages for fraud or fraudulent misrepresentation which, if colorable at all, were merely incidental to the claims based on negligence and strict products liability.

- **Cause of action for hearing loss began to run when upon first exposure to gunfire – Miniero v. City of New York, 885 N.Y.S.2d 45 (1st Dept. 2009): **Facts** – [Basic facts enumerated above in “Manufacturing Defect”]. Ps, current and former members of the New York Police Department, allegedly suffered hearing loss and related injuries as a result of exposure to the sound of gunfire at police department firing ranges and the lack of adequate noise protective devices. Ds, the City of New York and the manufacturer of the noise protection devices, moved for summary judgment arguing, *inter alia*, that the Ps’ claims were time barred under CPLR § 214 because the statute of limitations began to run on the date the officers were first exposed to the gunfire. Ps argued that the date of an event closer in time to the filing of the law suit triggering the hearing loss was the date that the statute began to run. The Supreme Court denied D’s motion and the Appellate Division reversed. **Holding:** The Ps’ claims are governed not by the exceptional accrual rules that apply to toxic torts and repetitive stress injuries but by the traditional first-exposure rule. Ps’ own expert averred that the Ps’ injuries can manifest themselves upon exposure to high sound levels. Each P was exposed to gunfire over a period of time, and each P’s first exposure, between 1972 and 1987, occurred more than three years before the commencement of this suit. Thus the claims are time-barred by CPLR § 214.**
- **Date of discovery SOL applied since studies about product and injury merely suggested link rather than proved it – In re: Ephedra Prods. Liab. Litig. (Giordano), 598 F.Supp.2d 535 (S.D.N.Y. 2009): **Facts** – P sued for personal injuries resulting from Ephedra dietary supplement, manufactured by D. D moved to dismiss arguing that the applicable**

three-year statute of limitations had run by the time P brought suit. P argued that New York's "latent effects" statute of limitations provision, C.P.L.R. 214-c(4), was applicable instead, allowing suits to be brought, in certain circumstances, one-year from the date of discovery rather than three years from the date of injury. The District Court granted dismissal and P appealed. The Court of Appeals, 289 Fed.Appx. 467, held that in order to use the "latent effects" statute of limitations, P had to show that the requisite scientific or medical knowledge was unavailable to P within the three-year limitations period. However, the District Court record was unclear in this regard and therefore the Court of Appeals remanded the case back to the District Court to determine if this was the case. The District Court reversed its dismissal. **Holding** - The three-year statute of limitations period expired in March 2002 and although there were some studies published at least as early as 1996 suggesting a link between Ephedra and stroke or cardiac injuries, these studies were merely suggestive and not definitive. Therefore, there is at least a genuine issue of material fact as to whether the information available prior to March 2002 was sufficient to enable the medical or scientific community to ascertain the probable causal relationship between Ephedra and P's injuries

- **Time begins to run for statute of limitations in negligence from the time P makes a connection between symptoms and the product and for warranties from the time the product is delivered; additional holdings on preemption and express warranty claims.** Morgan v. ABCO Dealers, Inc., 2007 U.S. Dist. LEXIS 91449 (S.D.N.Y. 2007): **Facts** – In 1995, P, a nurse, developed symptoms which led to her diagnosis with allergy to powdered latex gloves. She switched from powdered to non-powdered gloves but then in 1999 developed a more severe allergy to all latex gloves resulting in respiratory problems interfering with her work. P filed suit against D, distributors, in 2001 for negligence, failure to warn, misrepresentation and breach of warranty. D moved for summary judgment arguing that P's negligence, strict liability and failure to warn claims were time-barred by the three year statute of limitations and her express and implied warranties claims by a four year statute. D claimed the statute began to run in 1995 when she first experienced symptoms. P argued the statute should not begin to run until she developed more serious symptoms in 1999. D also argued that P's state law claims were preempted by the Food and Drug Administration's (FDA) Latex Labeling Rule (the "Rule") requiring the following warning "Caution: This Product . . . May Cause Allergic Reactions." Further, D claimed that because it never made express warranties directly to P but rather to her employer and her employer did not use D's catalogs when purchasing the product, no liability should attach. The District Court granted in part and denied in part summary judgment. **Holding** – P's negligence, failure to warn and misrepresentation claims are time barred because the statute of limitations began to run in 1995 when she was able to make the

connection between her symptoms and latex. However, P's breach of warranty claims survive because time begins to accrue on the date of delivery of the allegedly offending product. However, P's failure to warn claims are preempted to the extent they would impose a different labeling requirement. Express warranty claims run from the seller to the purchaser's employees for whom the purchase was made. Therefore, because an issue of fact exists as to whether D made express warranties to P's employer, summary judgment is inappropriate

- **Statute of Limitations** – *Galletta v. Stryker Corp.*, 283 F.Supp. 914 (S.D.N.Y. 2003): **Facts** - P had knee replacement surgery on April 12, 1996 during which time a polyethylene insert manufactured by D was implanted into his knee. During a June 3, 1999 visit to his doctor, it became clear that the insert was worn and defective. P commenced a product liability suit on May 1, 2002. Pursuant to CPLR § 214(c)(1), the statute of limitations for claims arising out of defective implantation devices is three years from the date that the injury was discovered. In his deposition testimony, P stated that prior to a doctor's visit on April 2, 1998, he felt looseness, slipping and shifting in the prosthetic knee that cause swelling. This required icing of the knee and temporarily affected his ability to work. The doctor's notes from the April 1998 visit made no mention of any problems with the knee. P was confronted with the doctor's report at the deposition but maintained that he had told the doctor about the problems during that visit. D moved for summary judgment on the grounds that the product liability claims were barred by the statute of limitations because P noticed the injury in April of 1998, more than three years before filing suit. P argued that the doctor's notes indicated he was mistaken and did not notice the injury until June of 1999. The court granted the motion. **Holding**- The statute of limitations runs from the time that P discovered the injury regardless of when it was medically diagnosed. By P's own testimony, he discovered the injury in April 1998, more than three years prior to the May 2002 filing of his complaint. The fact that the doctor's report of April 1998 made no mention of any problems is irrelevant, especially in light of the fact that P was confronted with the report and insisted that it was mistaken.
- **Whether or Not Initial Symptoms Triggered the Statute of Limitations Is a Question of Fact** – *Shrakranek v. Long Island Processor*, 195 Misc.2d 902, 762 N.Y.S.2d 799 (Sup. Ct. Nassau County 2003): **Facts** - P sued to recover for injuries sustained as a result of a respiratory disease that she developed while employed as an x-ray technician. P alleged that her ailments resulted from the negligence of the defendants, her former employers, who failed to properly ventilate the dark rooms and eliminate hazardous chemical fumes that resulted from the development of x-rays. P testified that she first suffered respiratory symptoms in May of 1997. In September of 1997 she visited a physician

and was diagnosed with respiratory disease and 'in September or October' of that same year, she left her employment. P commenced an action against D1 on May 30, 2000 and against D2 on September 7, 2000. Both defendants moved for summary judgment on the grounds that the claim was time barred because the statute of limitations began to run when she first manifested symptoms of the disorder and therefore expired before the action was commenced. The trial court denied the motions. **Holding:** CPLR 214-c(2) provides that the statute of limitations for injuries resulting from exposure to toxic substances begins to run from the date of discovery of the injury or when the injury should have been discovered. Defendants have submitted no evidence about the nature, frequency and severity of P's symptoms prior to her diagnosis. The only established fact is that P suffered chest pain and 'heaviness' in May of 1997. However, these symptoms can be indicative of many medical problems and not necessarily the ones for which she now seeks recovery. Thus, the question of whether P's symptoms were severe enough to state that she should have discovered the injury at that point cannot be decided as a matter of law.

- **Breach of Warranty** – *Schrader v. Sunnyside Com.*, 297 A.D.2d 369 (2d Dept. 2002): **Facts** - P sued on claims of breach of express and implied warranties. D moved to dismiss on the grounds that the statute of limitations had run. The trial court granted the motion and the Appellate Division affirmed. **Holding-** The statute of limitations for all breach of warranty claims begins to run 'at the time the product is placed in the stream of commerce or at the time of sale by the manufacturer.' As such, P's claim was untimely.
- **Negligence/Strict Liability/Breach of warranty-** *Doyle v. American Home Products Com.*, 286 A.D.2d 412; 729 N.Y.S.2d 194 (2d Dept. 2001): **Facts** - P first took the drug Minocin in March 1989 and shortly thereafter developed Reiter's syndrome. By 1991 the condition was no longer active. In May of 1993 he resumed taking the drug and again experienced symptoms of Reiter's syndrome whereupon he stopped taking the drug immediately. However, his doctor insisted that there was no connection between the two and Presumed taking the drug. On May 29, 1996 P filed a complaint against the drug manufacturer, alleging (*inter alia*) strict products liability and breach of implied warranty. D moved for summary judgment on the grounds that the negligence and products liability claims were time barred and that P failed to state a claim regarding of breach of implied warranty. Appellate Division affirmed and modified, holding that D could be held liable for exacerbating existing condition. **Holding-** Under CPLR § 214-c(2), the statute of limitations begins to run "when the injured party discovers the primary condition on which the claim is based." For the negligence/strict liability claims, the statute began to run at the time that P discovered his initial injury, namely in 1989. As a result, those claims were time barred. However, on a breach of warranty claim, the statute runs from the time of delivery of the product and not the date the injury was

discovered. Since deliveries of the medication continued during and after 1993, the action for breach of warranty- filed in May of 1996- was not time barred.

- **Note:** Although the Supreme Court's dismissal of the breach of warranty claim was not based on the statute of limitations, the Appellate Court addressed the issue nevertheless.

- **Negligence/Strict Liability- *Gianakakos v. Commodore Home Systems, Inc.***, 285 A.D.2d 907; 727 N.Y.S.2d 806 (3d Dept. 2001): **Facts-** P took delivery of a manufactured home in 1991. In 1992 the furnace exploded and was subsequently replaced by D, the manufacturer. P sued in 1997 alleging (*inter alia*) negligence and strict liability. D moved for summary judgment on the grounds that the claims were time barred and Supreme Court granted the motion. Appellate Division affirmed. **Holding** -The negligence and strict liability claims are subject to a three year statute of limitation period which accrued on the date of the injury. Here, the complaint appears to allege two causes of injury, the 1992 furnace explosion and the inadequate insulation which, for purposes of accrual, occurred on the date of delivery in 1991. Since the suit was not filed until 1997, it was time barred.
- **Second Injury Rule – *Shapiro v. Ansell Peny, Inc.***, 291 A.D.2d 301, 737 N.Y.S.2d 843 (1st Dept 2002): **Facts-** P was aware that she suffered from Type IV latex allergic condition in 1993. In 1995 she began to suffer from Type I latex allergic condition and brought suit in 1997. D, manufacturer of the gloves, moved for summary judgment on the ground that the suit was time barred. Supreme Court granted the motion and the Appellate Division reversed. **Holding** -There was a question of fact as to whether Type I and Type IV were "sufficiently separate and distinct" to invoke the "second injury rule" which would allow the statute of limitations to run from the date that P knew or should have known about the Type I condition. The case was remanded for trial on that issue.

3. Compliance with Standards, Regulations, Industry Custom

- **Expert testimony from manufacturer indicating that a skirt could not have caught fire the way plaintiff described was inadmissible as pure speculation; compliance with Flammable Fabrics Act is merely some evidence of due care and does not preclude a finding of negligence- *Luftman v. Fashion 21, Inc.***, 916 N.Y.S.2d 895 (Sup. Ct. N.Y. County 2011): **Facts-** P alleged that a skirt that was sold by D retailers, and distributed by D, The Original, Inc., ignited by a cigarette causing her to sustain second and third degree burns. Jury found against P on strict liability and on breach of warranty, but found for P on negligence. But, the jury also found that Ds' negligence was not a substantial factor in causing P's injury. P moved to set aside the verdict. New trial was ordered. **Holding-** Verdict was found not to be internally inconsistent based on reading of the negligence charge read to jury. However, Ds' expert based his theories purely on speculation when he testified, and thus his testimony should not have been submitted to the jury. Additionally, it was accepted that the skirt was long and it went up in

flames in a matter of seconds per P's testimony and a witness's testimony. Finally, Ds' contention that the skirt was not defective because it met the standard set forth in the Flammable Fabrics Act of 1953 (15 U.S.C. §§1191-1204, 16 C.F.R. 1610.1(d)(1)) was merely some evidence of due care and does not preclude a finding of negligence.

- **Compliance with minimum federal standards for cigarette lighters did not preclude liability based on design defect** – Nationwide Ins. Co. v. New York Lighter Co. Inc., 891 N.Y.S.2d 148 (2d Dept. 2009): **Facts** – Plaintiffs insureds suffered injury as a result of a fire in their home they claimed was the result of a defective lighter manufactured and distributed by D. Specifically, Ps claimed the fire started accidentally when the P's four-year-old son obtained a beer-shaped lighter from his mother's purse and ignited it in the living room of their home. Ps recovered some, but not all, of their losses from their insurance company. P insureds sued D to recover the losses not covered by insurance and the insurance company, as subrogees, sued D to recover the benefits they had paid. Both Ps claimed the lighter should have been child resistant. D moved for summary judgment arguing that the lighter complied with all minimum standards for cigarette lighters set by the Consumer Products Safety Commission. The Supreme Court denied D's motion for summary judgment and the Appellate Division affirmed. **Holding:** Summary judgment was improper. Compliance with minimum standards does not automatically relieve a manufacturer or importer of state common law liability. Thus, D never met its prime facie showing of entitlement as a matter of law and therefore the burden never shifted to the P.
- **Compliance with industry standards and state of the art design specification do not entitle defendant so summary judgment as a matter of law.** – Ramos v. Howard Indus. Inc., 831 N.Y.S.2d 615 (4th Dept. 2007): **Facts** – P was injured when transformer he was working on exploded. P sued De manufacturer claiming that the transformer was defectively designed or manufactured. D moved for summary judgment arguing that the transformer was manufactured under state of the art conditions, complied with industry standards and would have been individually tested prior to its sale to ensure compliance with industry standards and customer specifications. Supreme Court denied the motion and the Appellate Division affirmed. **Holding-** as the proponent for summary judgment, D had the initial burden of demonstrating that the transformer was not defective as a matter of law. The fact that it may have been compliant with industry standards and customs does not satisfy that burden.
- **Compliance with government regulations satisfies a defendant's initial burden on a motion for summary judgment an shifts the burden to the plaintiff to demonstrate an issue of fact.** – Donovan v. All-Weld Prods. Com., 832 N.Y.S.2d 148 (1st Dept. 2007): **Facts** –

decendent P died when the air respirator helmet he was using while sandblasting did not supply sufficient air to him, leading to his asphyxiation. P sued D manufacturer claiming that the respirator was defectively designed in that it was not equipped with a 2-way communication device and did not have a gas detector monitor. D moved for summary judgment on the grounds that the product's design was compliant with all government regulations including OSHA and received a NIOSH certification. Supreme Court denied the motion and Appellate Division reversed. *Holding*- by establishing that the product was compliant with all government regulations, D shifted the burden to P to demonstrate an issue of fact as to whether the failure to incorporate the additional features it advocates rendered it not reasonably safe. P failed to sustain its burden and the motion therefore should have been granted.

4. State of the Art

- **Manufacturer granted summary judgment on design defect with “state-of-the-art” and “reasonably safe” defense, but denied summary judgment on manufacturing defect** – Buchanan v. Mack Trucks, Inc., 113 A.D.3d 716, 979 N.Y.S.2d 342 (2d Dept. 2014): **Facts** - Plaintiff was a driver of a truck manufactured and sold by defendant to plaintiff's employer. The vehicle driver's seat collapsed, fell or tipped from its base, causing the plaintiff to be injured. P brought suit for breach of warranty and strict liability based on design and manufacturing defects. Defendant later impleaded Bostrom Seating, Inc., the manufacturer of the subject seat. Defendant and third party defendant moved for SJ, which were denied and both appeal. **Holding** – Mack and Bostrom established their prima facie entitlement to judgment as a matter of law dismissing the cause of action to recover damages for strict products liability based upon a defective design by submitting transcripts of deposition testimony and expert affidavits, which established that the subject seat design was “state-of-the-art” and reasonably safe. Moreover, Mack established entitlement to judgment as a matter of law dismissing the cause of action for breach of warranty. However, Mack and Bostrom failed to establish entitlement to judgment as to negligence and strict liability sounded in manufacturing defect.
- **Testimony that the product's design was state of the art and in accordance with industry custom creates a prima facie case for summary judgment** - Wesp v. Zeiss, Inc., 783 N.Y.S.2d 439 (4th Dept. 2004): **Facts** – D moved for summary judgment based on the affidavit of an expert engineer who had first hand knowledge of the large microscope and testified that it was state of the art at the time it was manufactured and that it complied with all applicable industry standards. P opposed the motion based on the testimony of a certified safety expert, who testified that the product was not reasonably safe to be moved because of the degree of force necessary to move it on its

stand. Supreme Court denied the motion and Appellate Division reversed. *Holding* – Testimony that the product was state of the art when it left defendant’s control and complied with industry custom established prima facie entitled to summary judgment. P’s expert – a certified safety professional – was not qualified to testify about the possibility of alternative designs and his opinions were based on safety and not manufacturing standards. Therefore, P failed to counter the testimony of D’s expert and summary judgment was appropriate.

5. “Open and Obvious”

- **Inexperience of user presented question of fact as to whether hazard was open and obvious and small print warnings at knee level put adequacy into question** – Johnson v. Delta Int’l Mach. Corp., 876 N.Y.S.2d 577 (4th Dept. 2009): **Facts** – P was injured while using a Unisaw manufactured and distributed by Ds. At the time of the accident, the safety guard in the Unisaw had been removed and P was performing a non-through cut without using a push stick. The Unisaw contained a warning label instructing operators of the saw to use a push stick for non-through cuts but it was written in small print and located at knee level. Further, P was an inexperienced user of the saw, the safety guard had been removed and P’s employer had directed P not to use the push stick. Ds moved for summary judgment arguing that they had no duty to warn and that there was no defect in the Unisaw. The Supreme Court granted D’s motion and the Appellate division reversed. **Holding** - Although warnings are not required if the hazard is open and obvious, in this case, because the extent of P’s knowledge of the hazard was in question, there were issues of fact as to whether the danger of using the Unisaw without a guard or a push stick was open and obvious. Further, even assuming Ds established that Ds failure to warn was not a proximate cause of P’s accident, P still raised a triable issue. P presented an affidavit that despite her employer’s instructions not to use the push stick, if she had seen the warnings about using the saw without the push stick, she would have used one anyway, despite her employer’s directive not to. Also, because Ds failed to submit evidence that the Unisaw met all applicable industry standards, it did not meet its burden of establishing no defect.
- **Risk of hearing loss from loud sirens on fire truck was open and obvious defeating claims that warning was necessary** – Fitzgerald v. Federal Signal Corp., 2009 WL 1797883 (2d Dept. June 23, 2009): **Facts** – Ps were four firefighters employed by the Fire Department of the City of New York (FDNY) who claimed to have sustained permanent hearing losses as a result of repeated exposure to sirens manufactured by D and installed on FDNY fire trucks. Ps alleged D should have warned about the risk of hearing loss from prolonged exposure to the sirens. D moved to dismiss the pleadings contending, *inter alia*, it owed no duty to warn because risk of hearing loss was open and obvious. The Supreme Court

granted the motion and the Appellate Division affirmed. **Holding** - Even viewing the allegations in a light most favorable to Ps, a cause of action was not established. The risk of hearing loss was open and obvious and readily apparent as a matter of common sense.

- **Danger of failing to use safety harness on highly elevated machine was open and obvious rendering warnings unnecessary** – Milliman v. Mitsubishi Caterpillar Forklift Am. Inc., 594 F. Supp.2d 230 (N.D.N.Y. 2009): **Facts** – P was employed to pick various construction products from warehouse shelves for customers using an “orderpicker.” While attempting to place a fifty-pound box of screws on the machine’s platform, P lost his balance, fell some distance, and suffered severe and permanent physical injuries. Although the D claimed the orderpicker was delivered with a yellow warning label instructing users to wear a safety harness when operating at elevation, at the time of his fall, P was not wearing the harness, no harness was attached, and the warning label was not on the machine. P sued D, the manufacturer of the machine, arguing that there should have been a large, concise, stand-alone warning sign on a metallic surface instructing users that the safety harness should be used at all times during the operation. D moved for summary judgment arguing, *inter alia*, that because the dangers of using the machine without a safety harness were so open and obvious, it had no duty to warn. The District Court granted summary judgment on this issue dismissing the failure to warn claim. **Holding** -The machine’s platform extends more than ten feet into the air and provides a relatively small amount of space for employees to move in. The risk of falling was something P should have been aware of and a risk he admitted he did know about prior to his accident.
- **No Claim If the Danger is Open and Obvious** – *Schurr v. Port Auth. Of N.Y. & N.J.*, 763 N.Y.S.2d 304 (1st Dept. 2003): **Facts** - P was injured when she fell while descending the steps of a stopped escalator located on the defendant's premises. P sued, claiming that D failed to warn of the danger posed by the uneven spacing of the steps at the bottom of the escalator. D moved for summary judgment on the grounds that the danger was open and obvious. The Supreme Court granted the motion and the Appellate Division affirmed. **Holding**- The fact that elevator steps are uneven at the bottom is open and obvious. Therefore, D was under no duty to warn of any dangers they may have posed.
- **No Duty for “Open and Obvious”/Proximate Cause** - *Hutton v. Globe Hoist. Co.*, 158 F.Supp.2d 371 (S.D.N.Y. 2001): **Facts** – P, a mechanic for many years, was injured when a car he was servicing fell off of the hydraulic lift and landed on him. In an attempt to avoid being struck, P ran toward the front of the falling vehicle. P sued D manufacturer on a claim of failure to warn alleging that D should have provided information on how to act when a car begins to fall off of the lift. The claims were

based on the expert testimony and the fact the D was aware of the danger on its own. An expert witness doe D testified that running toward the front of the car was dangerous and a person in that situation should move toward the center of the lift. D moved for Summary Judgment and the motion was granted. **Holding-** Where the danger is so open and obvious that it “should have been recognized as a matter of common sense” the manufacturer will have no duty to warn. Furthermore, if P was already aware of the danger, a failure to warn against it cannot have been the proximate cause of the injury. In this case, P failed to raise triable issue of fact on either issue. The Court found that the danger of a car falling off of the lift was obvious and “running away from the direction of the fall and away from obstacles is so obvious as to be intuitive.”

- **No Duty for “Open and Obvious”/Foreseeability of Use – *McArdle v. Navistar Intern. Corp.*, 742 N.Y.S.2d 146 (3d Dept. 2002):** **Facts** - P, a street sweeper operator for the Department of Transportation, noticed that a water tank was leaking and attempted to refill it He climbed the back of the sweeper, which was covered with non-skid tape, which P described as worn out. As he climbed back down, P slipped and began to fall. He attempted to grab onto the fire hose storage bracket but his wedding band became stuck in the bracket and his ring finger was severed. P's expert witness testified that considering the relative short time that the tank was in use, the leak must have resulted from a defect. P sued on claims of (*inter alia*) strict products liability alleging design and manufacturing defects and failure to warn. D, manufacturer and seller of the sweeper, sought summary judgment. Supreme Court denied the motion and Appellate Division reversed in part and affirmed in part. **Holding** – On P’s contention that the accompanying safety manual should have cautioned operators to “remove rings, wrist bands, and other loose fitting attire” the Court held that D failed to establish these dangers as open and obvious. Additionally, P’s actions in refilling the water tank were reasonably foreseeable and thus did not obviate the duty to warn.

6. Optional Safety Equipment

- **Optional safety feature should be standard when functioning without it is unsafe – *Passante v. Agway Consumer Prods. Inc., & C.*, 12 N.Y.3d 372 (CANY 2009):** **Facts** – P was injured when he fell from a loading dock system called a leveler – a mechanical platform that bridges the gap between a loading dock and a bed of a truck or trailer. The injury happened when the driver of the trailer pulled away from the leveler before the system was secured. P sued Ds, manufacturers and distributors of the leveler claiming, *inter alia*, that it should have come standard with a safety feature, offered but not purchased, called a Dok-Lok. This would have secured the leveler to the trailer, warned workers when they can safely enter the trailer, and warned drivers of the trailer when they can safely pull away. The Fourth Department had overturned

denial of summary judgment below, based on the Scarangella decision. Reversed. **Holding** - A product that fails to incorporate safety equipment is not defective if: 1) the buyer is fully knowledgeable about the product and aware the safety feature is available; 2) normal circumstances exist under which use of the product is not unreasonably dangerous without it; and 3) the buyer is in a position to balance the benefits and risks of not having the safety device. Here Ds met the first factor but not the second. They failed to show that the leveler could be used safely without a feature like the Dok-Lok. Rather, the record here supports P's position that the leveler as designed creates a substantial risk of harm when used normally that cannot be avoided simply by cautious operation. Because the second factor was not met, it was not necessary to discuss the third.

- **Making safety device optional instead of permanently affixed raises issue of fact on defective design** - Milliman v. Mitsubishi Caterpillar Forklift Am. Inc., 594 F.Supp.2d 230 (N.D.N.Y. 2009): **Facts** - [Basic facts enumerated above in "Failure to Warn"]. In action where P fell some distance to the ground off a fork-lift type elevated machine called an "orderpicker," P sued D, the manufacturer offering expert testimony that the machine was defective because a safety harness, which was to come with the machine, was not permanently attached; there was no interlock device preventing the machine from operating without the harness, or alternatively, any guardrails to prevent a fall; and an alternative safer design was feasible. D moved for summary judgment arguing, *inter alia*, that there were substantial post-sale modifications, P had unforeseeably misused the product, and insufficient evidence existed as to proximate cause. The District Court granted summary judgment on these issues (but denied it on others - see "Failure to Warn" and "Preemption"). **Holding** - Because the safety harness allegedly included with the orderpicker required further alterations or assembly before becoming functional and it was not clear that the safety harness was even delivered with the machine, an issue of fact was raised regarding post-sale modifications. There was also an issue of fact regarding unforeseeable misuse because although the P was not using the machine with a safety device, he was using it as intended and therefore the issue of foreseeable misuse was one for the jury. Similarly, if P was using the machine in a foreseeable manner without the safety device, this could be considered the proximate cause of P's injuries and thus summary judgment would not be proper
- **Optional Safety equipment does not preclude a claim of defective design where the product is unsafe without it** - Mustafa v. Halkin Tool Ltd., 2007 WL 959704 (2007): **Facts** - P was injured when his hand became caught in the point of operation of a punch press he was opening. P sued D manufacturer claiming that the press was defectively designed because, *inter alia*, it did not contain a light curtain which would have stopped the ram from descending once P's hand had entered

the area. D moved for summary judgment arguing that a light curtain was offered as an option that the purchaser elected not to purchase. P submitted expert testimony that the machine was not safe without a guard at its point of operation. The district court denied the motion. *Holding*- where there do not exist normal circumstances of use in which the product is reasonably safe without an optional safety device, the fact that it was offered as an option will not shield the manufacturer from liability. Here, there is evidence that the machine is never safe to operate without a guard such as a light curtain. Therefore, summary judgment is inappropriate.

- **No liability for failure to make option safety equipment standard, the buyer was in the best position to decide whether it was necessary** – Dick v. NACCO Materials Handling Group, Inc., 829 N.Y.S.2d 361 (4th Dept. 2007): *Facts* – P was injured when a forklift operating in reverse ran over him. P sued D manufacturer claiming that the vehicle was defectively design in that it did not have a backup warning alarm. D moved for summary judgment arguing that an alarm was an available option. D also demonstrated that the buyer of the forklift was in the best position to determine whether a backup warning alarm was appropriate for their business. Supreme Court granted the motion and the Appellate Division affirmed. *Holding*- in light of the buyer's familiarity with forklifts and its ability to decide whether a backup alarm was appropriate in its work environment, the decision to make the alarm an option as opposed to standard equipment did not render the vehicle defective.
- **D cannot escape liability unless the buyer was actually aware that the optional safety feature was available** – Campbell v. Int'l Truck & Engine Co., 822 N.Y.S.2d 188 (4th Dept. 2006): *Facts* – decedent purchaser was killed when the tractor he was operating rolled over. P sued D manufacturer, claiming that the tractor was defectively designed because it did not contain a rollover protection structure ("ROPS"). D moved to dismiss the claim on the ground that a ROPS was an available option and that decedent was in the best position to decide whether to include that option in the tractor it purchased. Supreme Court denied the motion and the Appellate Division affirmed. *Holding*- D failed to establish that decedent was actually aware of the option at the time that the vehicle was purchased. Thus, even if decedent was in a position to decide whether or not to purchase the option, the fact that he may not have been aware that the option was available precludes dismissal of P's claims.

7. Misuse/Abuse

- **Use of a product without its accompanying safety equipment precludes claim for defective design** – Garcia v. Crown Equip. Corp., 786 N.Y.S.2d 109 (2d Dept. 2004): *Facts* – P sustained serious injuries when he fell from an unenclosed pallet that was raised and supported by

the forks of a forklift while engaged in activities on behalf of his employer. The employer had purchased a safety platform that could attach to the forks of the forklift, completely enclosing the user. This platform also had an interlock switch that prevented the forklift from moving while the forks were being raised and lowered. However, the safety platform was not in use when plaintiff was injured. P sued D, manufacturer of the forklift and the safety platform, claiming *inter alia* that the forklift was defective in that it was prone to movement when the forks were being raised and lowered. D moved for summary judgment and the trial denied the motion. Appellate Division reversed. *Holding* – The forklift was not designed to be used to raise people up without the use of the safety platform. Because P did not use the safety platform, the alleged defective design was not a proximate cause of the injuries.

8. Unforeseeable User

- **Plaintiff need not be a “reasonably foreseeable user of the produce” if incapable of understanding the dangers associated with the product** – Wheeler v. Sears Roebuck & Co., 831 N.Y.S.2d 427 (2d Dept. 2007): *Facts*- 26 month old infant P was injured when his hand got caught in a nip point created by rotating rear roller and stationary rear end cap of a treadmill. At the time of the injury, the treadmill was being used P's older sister. P sued D manufacturer claiming that the treadmill was defectively designed. D moved for summary judgment arguing, *inter alia*, that a 26 month child is not a foreseeable user of a treadmill. Supreme Court denied the motion and the Appellate Division affirmed. *Holding*- the infant P was legally incapable of understanding the danger of placing his hands in the nip point. Therefore, the fact that the plaintiff was not a reasonably foreseeable user of the treadmill did not warrant dismissal of his products liability causes of action.

9. Unintended Use

- **Manufacturer of cargo truck not liable for use of its product in unintended manner** – Small v. Keneston, 870 N.Y.S.2d 547 (3d Dept. 2008): *Facts* – P, riding in the back of a box truck, was injured when, during a red light, he stood up just as the truck moved forward and was thrown into the wheel well. P sued D, manufacturer of the cargo box portion of the truck claiming, *inter alia*, that the truck was defectively designed. D moved for summary judgment arguing that the wheel well was not designed with the intent that passengers ride in the cargo area, much less attempt to stand while the truck was in motion. P asserted it was common practice for people to ride in the cargo area but provided no facts or applicable industry data. The Supreme Court granted D's motion and the Appellate Division affirmed. *Holding* - A manufacturer is obligated to avoid an unreasonable risk of harm to people using the product in an intended manner or for unintended uses that are reasonably foreseeable. Here it was not reasonably foreseeable that the P would ride in the cargo area. **Comment** - While one might agree with

the legal outcome in this case, the opinion sounds unrealistic stating that it is unforeseeable that people ride in the box section of the back of a truck. The judges driving to and from the courthouse every day witness that. Nor would one expect a plaintiff to have to provide “industry data” to prove the point

10. Illegal Acts

- **Recovery not available for injuries sustained during the commission of a crime** – Sorrentino v. Barr Labs., 2007 U.S. App. LEXIS 942 (2d Cir. 2007): *Facts* – P murdered his wife. During his criminal trial, P presented a defense of extreme emotional disturbance caused by the drug Prozac which he was taking at the time of the murder. The jury convicted him. He subsequently filed suit against D drug manufacturer, claiming that Prozac was not reasonably safe. D moved for summary judgment, arguing that the verdict at the criminal trial established that Prozac was not the cause of his state of mind and that he was therefore collaterally estopped from re-litigating the issue. P also argued that the suit was barred by public policy. The district court granted the motion and the Second Circuit affirmed. *Held* – New York law does not allow for recovery of injuries sustained as a result of a criminal act. Here, plaintiff’s claim for damages, arise out of the injuries he sustained as a result of murdering his own wife. Therefore, the suit is barred on public policy grounds.
- **Where P’s Illegal Conduct Contributed to the Injury**-*Alami v. Volkswagen of Am.*, 97 N.Y.2d 281; 766 N.E.2d 574; 739 N.Y.S.2d 867 (N.Y. 2002) [*See description above in "Crashworthiness"*]

11. Superseding Cause

- **Defense of superseding cause rejected in forklift accident.** Ard v. Thompson & Johnson Equip. Co., Inc., 128 A.D.3d 1490, 9 N.Y.S.3d 497 (4th Dept. 2015): *Facts*- Plaintiff, worker in a paper factory, sustained an injury to his foot, leading to amputation, when a heavy roll of paper fell on it. He was maneuvering it with a fork lift which had been modified by a defendant Total, by providing a curved cradle. A second defendant was the distributor of the fork lift. The case was pleaded in strict liability. These defendants sought summary judgment, which was denied. The denial was affirmed on appeal. *Holding*- Defendants set up two proximate cause defenses: the accident was a superseding event; and fork lift design only “furnished the occasion” for the accident, and was not a proximate cause. The court rejected both contentions cursorily.
- **Unforeseeable superseding cause relieves the manufacturer of a defective product of liability** – Mrakovcic v. Rose Art Indus., Inc., 809 N.Y.S.2d 538 (2d Dept. 2006): *Facts* – Infant P was injured when his brother threw a broken piece of an eraser board manufactured by D at him and struck him in the eye. The board has broken when it previously fell from the refrigerator to the floor. P sued D manufacturer, claiming

that the board was defective which caused it to fall and break. D moved for summary judgment on the ground that the act of throwing the broken piece by P's brother amounted to an intervening superseding cause. Supreme Court granted the motion and the Appellate Division affirmed. **Holding** - Throwing a broken piece of a board is not a foreseeable consequence of any flaw in the design or manufacture of the product. Therefore, the consequences here were not "normal or foreseeable" and defendant cannot be held liable.

12. Post Sale Modification of Product

- **Subsequent modification is not a defense where a guard originally provided with a product was made removable.** Guard Ins. Group, Inc. v. Techtronic Indus. Co., Ltd., 2015 WL 293622 (W.D.N.Y. 2015): **Facts**- Suit brought by worker's comp carrier as assignee of injured worker, who had injured his hand when using a Ryobi table saw designed, manufactured and distributed by several defendants. The worker was using the saw to rip a piece of wood. A guard provided with the saw was not on it at the time. Before the present suit, the employer had disposed of the saw. Defendants moved for SJ, and the court denied it, finding that there were genuine issues of fact for trial. **Holdings**- Although NY law recognizes a defense to products liability by virtue of subsequent modification of the product (Robinson case), an accepted exception is where the guard is designed to be removable (Lopez case). That situation, as here, may give rise to a fact issue for the jury as to whether there was a defective design by virtue of a readily removable guard. Further, as to the defense of subsequent modification, the defendant must show that the modification was the "but for" cause of the accident. Here an expert for plaintiff opined that even with the guard on, the hand injury might have occurred. Further, plaintiff's expert had opined that the saw should have had a "SawStop" device, which shuts down the saw once it senses that it is touching flesh. This too presented an issue for the jury. There was a second holding regarding a spoliation defense defendants asserted, due to the unavailability of the saw for their examination. The court denied that defense, on the basis that it applies only to a party which has control over the product. Here the assignee came into the scene after the saw had been disposed of. And, in any case, this was a design defect claim, and any problems arising out of the absence of the product was a problem for both sides. Finally, as to a statute of limitations defense to the breach of warranty claims, the four year period by statute, UCC 2-725(1), there were also fact issues as to when the saw had first been bought.
- **Burden on plaintiff to show triable issues as to subsequent modification.** New York Mun. Ins. Reciprocal v Intl. Truck & Engine Corp., 121 A.D.3d 1352, 995 N.Y.S.2d 322 (3d Dept. 2014) **Facts**- A fire damaging a County garage was traced to a truck made by International Truck some 5 years before. It had been modified thereafter by

defendant Viking-Cives to put in a hydraulic system to operate a plow and other equipment. The fire was traced to a setup which attached the hydraulic lines to battery cables. The evidence by deposition and affidavit showed that employees at the garage made modifications of the position of the lines. SJ was granted as plaintiff-subrogee did not raise a triable issue of fact as to defendant's liability. On appeal, affirmed.

Holding- A manufacturer cannot be held in strict liability or negligence when after a product leaves its control there is a subsequent modification which substantially alters the product and is the proximate cause of the damages. Once the evidence had demonstrated the modification of the cable lines, the burden shifted to the plaintiff to raise a triable issue. It failed to do so, even with the presentation of expert testimony, since the expert had his facts wrong.

- **Subsequent modification bypassing safety feature a defense to liability.** VeRost v. Mitsubishi Caterpillar Forklift Am., Inc., 124 A.D.3d 1219, 1 N.Y.S.3d 589 (4th Dept. 2015) lv to appeal denied, 25 N.Y.3d 968 (2015): **Facts-** Plaintiff was injured using a forklift made by defendant Mitsubishi. He had stood up from his chair to adjust a lever when he had inadvertently stepped on a gear shift, moving the lift and pinning him. When it made the forklift, defendant had incorporated a seat safety switch which would work to shut off the drive if the user left the chair. However, someone had disabled the switch. Defendant sought SJ on the basis of a subsequent modification, which was granted and plaintiff appealed. **Holding-** SJ was properly granted, in that a third party had rendered the machine unsafe by making the alteration. Defendant having demonstrated that in its motion, the burden of proof shifted to plaintiff to raise an issue of fact, which it had not done through its expert.
- **Where press was changed to remove safety feature, defense of subsequent modification applied.** Rivera v. Unipress Corp., 24843/2012 NYLJ (Sp. Ct. 2015): **Facts-** Plaintiff was using a pressing machine to iron shirts in a laundry, when her hand was caught in the press and injured. The press was made by defendant, which had originally provided a safety feature—called an “anti-tie down” in the opinion: two buttons, which the worker had to press with each hand, to keep out of the press. Plaintiff's employer (of course) had rewired the press to allow it to be operated by one button. Defendant sought SJ on the basis of a subsequent modification defense. **Holding-** On the facts of this case, the subsequent modification defense applied. Under the Robinson decision, the defectiveness of the press is to be gauged at the time of its sale—at which time it has the anti-tie feature. By so showing, defendant shifted the burden of proof to the plaintiff on the SJM. Plaintiff's expert had sought to fit within an exception to Robinson, where a machine is manufactured with removable guards, but presented insufficient proof for that contention.

- **Bathroom fan manufacturer is not liable for fire when fan was allegedly modified post-manufacturing to remove a safety device-** State Farm Fire & Cas. Co. v. Nutone, Inc., 2010 WL 3154853 (E.D.N.Y. 2010): **Facts-** P sought to recover sums paid to its insureds as a result of fire damage. P alleged that the fire was caused by a faulty bathroom ceiling fan manufactured by D. D disputed the fire originated in the fan and argued that even if the fire had started in the fan, it was modified subsequent to its manufacture when a safety device was removed. P claimed that if the fan was modified, D failed to warn users regarding consequences of such modification. D's motion for SJ was denied and a nonjury trial was held. Trial resulted in a defense verdict. **Holding-** The fire originated in the fan and the safety device would have prevented it. A safety device was installed on the fan but was removed, and thus the fan was substantially modified after it left D's hands. With regard to the defective design claim, P did not provide any evidence of how or where a warning should have been displayed
- **No liability when there is sufficient evidence to support that a product was equipped with safety devices when it left the factory-** Wick v. Wabash Holding Corp., 2010 WL 6075730 (W.D.N.Y. 2010): **Facts-** P sued D for hand injuries sustained while using a Diehl moulding machine, manufactured by D. P alleged negligence, strict product liability and breach of warranty. D filed a third-party complaint against P's employer, alleging that the machine had been substantially modified. D then sought SJ and, alternatively, challenging P's expert's qualifications. D's SJ motion was granted. **Holding-** The moulder was originally equipped with the necessary safety devices when it left the possession of the manufacturer. Thus, D cannot be held liable for injuries resulting from a substantial modification by someone else
- **No subrogation claim where product was subsequently modified to remove a safety device-** State Farm Fire & Cas.Co. v. Nutone, Inc., 2011 WL 2417148 (2d Cir. 2011): **Facts-** P commenced a product liability action against, D, Nutone, to recover monies paid out to its insureds as a result of fire damage. P alleged that fire was caused by faulty bathroom ceiling fan. The district court found that P established, by a preponderance of evidence, that the fire originated in the bathroom fan and presence of a functional thermal cut-off (TCO) device would have prevented this fire; but that a TCO device was installed in the fan motor in this case; and TCO device was removed. D, Nutone, cannot be liable under a product liability theory. **Holding-** The magistrate judge relied on documentary evidence and expert testimony in concluding that ceiling fan was designed and manufactured with a TCO and that ceiling fan was modified at some point after leaving D, Nutone. Further, P offered no evidence showing that D's, Nutone, failure to warn was a substantial factor in causing the fire. There was no evidence as to where

a warning should have been placed, what it should have said, and whether it would have been heeded

- **D must meet burden of establishing no defect or that post sales modifications responsible in order to survive summary judgment** – Armijo v. George A. Mitchell Co., 863 N.Y.S.2d 34 (2d Dept. 2008): *Facts* – P was injured by a product although the opinion does not state what type or how. P sued D, manufacturer, alleging product liability and negligence. D moved for summary judgment. The Supreme Court denied D’s motion and the Appellate Division affirmed. *Holding* - Regardless of the adequacy of P’s opposing papers, D failed to establish, *prime facie*, that it did not design or manufacture an unreasonably dangerous product or that the purchaser’s post-manufacture modifications to the product rendered it unreasonably dangerous
- **Installing replacement not necessarily a substantial modification that would immunize defendant** - Call v. Banner Metals Inc., 846 N.Y.S.2d 827 (4th Dept. 2007): *Facts* – P was injured when a bakery truck ramp designed and manufactured by D sprang open and knocked P to the ground. D moved for summary judgment claiming post-manufacture modifications rendered the ramp unsafe. P submitted evidence the modifications only consisted of installing replacement parts. The Supreme Court denied D’s motion and the Appellate Division affirmed. *Holding* – By submitting evidence that the modifications involved merely installing replacement parts, the P raised triable issues of fact as to whether these replacements parts did nothing more than perpetuate D’s already bad design as the Ds representatives foresaw it might
- **Manufacturer not liable for injuries that occurred as a result of a substantial modification of the product** – Pichardo v. C.S. Brown Co., Inc., 827 N.Y.S.2d 131 (1st Dept. 2006): *Facts* – P sued D claiming that the product was defectively designed. The nature of the defect and the mechanism of the injury are not described in the opinion. D moved to dismiss the case, arguing that the improper modification of the snow blower by co-defendant amounted to a substantial modification that relieved the manufacturer of liability. Supreme Court granted the motion and the Appellate Division affirmed. *Holding*- the improper repair of the product was a substantial modification and was the cause of the injuries sustained by P. Therefore, the manufacturer can not be held liable
- **Manufacturer is not liable for injuries caused by a material modification to its products** – Vega v. Stimsonite Corp., 783 N.Y.S.2d 605 (2d Dept. 2004): *Facts* – P sustained burn injuries while operating a road marketing machine manufactured by D. P sued, claiming *inter alia* that the machine was defective. D moved for summary judgment, arguing that certain parts on the machine were replaced with other items. Supreme Court granted the motion and Appellate Division affirmed. *Holding*- The court ruled that the changes to the machine constituted a material modification of the product that proximately

caused the injuries to the plaintiff. Therefore, D could not be held liable and summary judgment was properly granted.

- **Same** – Islam v. Modern Tour, Inc., 2004 U.S. Dist. LEXIS 19768 (S.D.N.Y. 2004): *Facts* – P was injured when his hand became caught in an ice bagging machine as he was attempting to clear an obstruction from the machine’s chute. P sued D manufacturer, claiming that the machine was defectively designed. D introduced evidence demonstrating that at the time of sale, the machine was equipped with the following safety features: (1) a guard at the opening of the chute; (2) a foot pedal that was the sole method of activating the machine and (3) warnings against placing hands inside the machine. During his deposition, P testified that there was no guard in place; the machine had no foot pedal but instead was operated by a switch; and there were no warnings on the machine. D moved for summary judgment on the ground that there was a material alteration to the product. The court granted the motion. *Holding* – A manufacturer cannot be held liable for injuries caused by alterations to a product that it manufactured. Here, the evidence indicated that the machine contained safety devices that would have prevented the injuries sustained by the plaintiff when it was sold by the defendant. Therefore, injuries caused by subsequent alterations to the product do not give rise to a claim of defect against the original manufacturer.
- **Must Be Proximate Cause of Plaintiff's Injuries**- *Korthas v. Suzuki Motor Co.*, 289 A.D.2d 1093; 735 N.Y.S.2d 322 (4th Dept. 2001): *Facts* - P was injured when the sidestand of his motorcycle came into contact with the ground while making a left turn. P sued claiming (*inter alia*) design defect. D moved for summary judgment on the grounds that there were alterations to the side stand warning light system on the motorcycle. *Holding* - Alterations to a product can only be used as a defense when they substantially alter the product and are the proximate cause of the plaintiff's injuries. Here even if the warning light system had not been altered, the stand would have still hit the ground and the injuries would have occurred anyway. Summary judgment was therefore denied.
- **Same as above**- *Fraser v. Stihl Inc.*, 286 A.D.2d 661; 730 N.Y.S.2d 124 (2d Dept. 2001): *Facts*- P was injured when a gasoline-powered saw he was using kicked back. Prior to the P's use of the saw, his employer attached a carbide-tipped blade to cut wood, despite warnings that the use of such a blade in the saw would lead to a kickback. Supreme Court held that the modification to the saw precluded recovery against the manufacturer. Appellate Division affirmed. *Holding*:The attachment of the carbide-tipped blade was a substantial alteration that was the proximate cause of plaintiff's injuries. The original manufacturer cannot be held liable.
 - i. See also *Serwatka v. Freeman Decorating Corp.*, 2001 WL 1203805 (S.D.N.Y. 2001) (not reported in F.Supp2d): Dismissing strict product liability claims against a lessor substantial modifications were made to a forklift when "grabbers" were added to the forklift's blade.

- **Not Applicable If the Product Was Purposely Manufactured In a Way That it Would Still Be Usable Despite Removal of the Safety Equipment** – Colon ex rel. Molina v. Bic USA, Inc., 199F.Supp.2d 53 (S.D.N.Y. 2001): **Facts** [basic facts enumerated above in 'evidence']. D moved for summary judgment on the defect claim, arguing that removal of the child safety guard constituted a substantial modification of the product and thus barred recovery. The motion was denied. **Holding:** While the general rule is that a substantial modification to a product will bar recovery, such is not the case where P can prove that the "product was purposefully manufactured to permit use without a safety feature." Since Ps did submit some evidence on the matter, summary judgment was not appropriate.
- **Not A Defense to "Design Defect" Claim**- Evans v. Biro Mfg., 289 A.D.2d 187; 735 N.Y.S.2d 384 (Mem.) (1st Dept. 2001): Holding that testimony about the condition of the product at the time of the injury "simply does not address the safety of the product as designed, and is otherwise insufficient to shift to plaintiff the burden of coming forward with evidence of design defects.'

13. Assumption of Risk; Plaintiff's Conduct

- **Assumption of risk not a defense where risk is concealed.** Dann v. Family Sports Complex, Inc., 123 A.D.3d 1177, 997 N.Y.S.2d 836 (3d Dept. 2014): **Facts**- Plaintiff was playing soccer in an indoor dome facility. About 55 inches away from the goal line was a concrete block or footer, used in the construction of the dome. It was concealed by cloth. Plaintiff slid into the block and damaged his knee severely. Defendants, all sued on the theory of strict product liability for defective design and failure to warn (as well as negligence), were the dome owner, dome operator, and the erector of the dome. Defendants set up an assumption of the risk defense, which the court granted. A further issue in the appeal related to whether strict liability could be applied to the dome erector (the other defendants were outside of the chain of distribution of a product). To avoid summary judgment, plaintiff presented the affidavit of an expert who claimed the dome was defectively designed in that the concrete block was too close to the area of play. That cause of action was also granted SJ. **Holdings**- A fact issue existed as to whether plaintiff assumed the risk of his injury, and SJ should not have been granted. The particular risk was concealed and presented danger beyond that usually assumed in the sport. However, SJ was properly granted on this negligence theory to the dome builder since it had no role in the layout or design of the structure. The affidavit by plaintiff's expert did not raise triable issues of fact on a products cause of action against the dome builder. The expert's opinion that the supports were too close to the goal line was not backed up by any recreational guidelines.
- **Being a knowledgeable user does not negate a duty to warn** – Pubic Adm'r of Bronx Cnty. v. 485 East 188th St. Realty Corp., 116 A.D.3d 1, 981 N.Y.S.2d 381 (1st Dept. 2014): **Facts** – The deceased plaintiff was supervising a work crew refinishing wood floors in an apartment

building. The products being applied to the floors—lacquer sealer and polyurethane sealer suddenly ignited; decedent was seriously burned and died. The New York City fire department concluded that the fire was caused by flammable vapors from the sealer. The lacquer sealer was manufactured by non-party Akzo Coatings, Inc. and distributed by defendant T.C. Dunham Paint Company, Inc. Dunham also created its own polyurethane. Dunham in turn repackaged the product into containers and labeled them with its customer's name. In this case the customer was New Palace who sold the lacquer and polyurethane to Appula. Both the lacquer and polyurethane containers contained warnings. Defendants' expert opined that the warnings were sufficient, while plaintiff's experts claims the warnings were too general and failed to mention that indoor use of the product was prohibited in the City of New York. Defendants asserted a defense of knowledgeable user—what decedent knew as a supervisor. The court dismissed all of plaintiff's causes of action against New Palace and Dunham, except for negligence and strict liability claims premised on the theory of failure to warn. Defendants' appealed as to failure to warn claims. **Holding** – The Court correctly denied defendants' MSJ seeking to dismiss the case on the ground that decedent was a knowledgeable user which would obviate the need for any warnings and/or be the sole proximate or intervening cause of the flash fire. A product may be defective due to inadequate warnings of the risks and dangers involved in its foreseeable use and foreseeable misuse. Even if a duty to warn exists, recovery may be denied to a knowledgeable user, that is, one who was fully aware of the specific hazard without receiving the warning. Even if a user has some degree of knowledge of the potential hazards in the use of the product, SJ will not lie where reasonable minds might disagree as to the extent of the knowledge. While there is evidence that decedent had some knowledge about general hazards associated with using floor refinishing products, it cannot be said, as a matter of law that his knowledge was sufficient to relieve defendants of any duty to provide adequate warnings. User negligence in the handling of these highly dangerous products is entirely foreseeable and the very reason warnings are required.

- **Assumption of risk not a defense in a strict liability case; conflicting opinions of the parties' experts regarding the reasonableness of the swing's design creates a triable issue of fact- Faherty v. Birchwood Lodge, Inc., 37 Misc.3d 1214(A), 964 N.Y.S.2d 58 (Sup. Ct. Queens County 2012): **Facts**- Infant sustained amputation of two fingertips when he jumped from a swing, as the fingers became caught in the chain of the swing as he was holding on to it. Plaintiff alleges that the swing set was dangerous, in part, because the chain supporting the swing was improperly-sized and harbored a trap to small children's fingers and because a covering over the chain was not provided. Defendant manufacturer of the playground equipment moved for Summary**

Judgment. Motion denied. **Holding-** Defendant's experts shifted the burden by opining that the chain met appropriate industry standards and was reasonably safe as designed and manufactured and that there were no malfunctions, failures or defects in the swing that were the cause of the accident. Plaintiff presented competent proof that the swing's design was not reasonably safe because there was a substantial likelihood of harm and it was feasible to design the product in a safe manner through expert's affidavit. The conflicting opinions of the parties' experts regarding the reasonableness of the swing's design present a question of fact. Further, defendant attempted to argue assumption of risk as a defense to justify dismissal. The court makes a careful distinction between two types of assumption of the risk, that of a person's own conduct creating risk, and primary assumption of risk, which was involved here—inherent risks of sports and the like. Under NY law, as the court points out, primary assumption of the risks is not a defense to a strict product liability claim, as against public policy. Lastly, defendants failed to demonstrate their prima facie entitlement to judgment as a matter of law by submitting evidence that the chain link swing which pinched infant's fingers was not inherently dangerous and was readily observable by the reasonable use of one's senses.

- **Contributory negligence and implied assumption of the risk are defenses for manufacturer in a subrogation claim-** Automobile Ins. Co. of Hartford v. Electrolux Home Products, 2011 WL 1434672 (W.D.N.Y. 2011): **Facts-** P, as subrogee, sought recovery of damages paid to its insured, as a result of a fire at her home, which was caused by a defective Electrolux gas clothes dryer. D asserted affirmative defenses, and P sought dismissal of all of those defenses except misuse of product. D does not oppose most of the motion except for the following defenses: contributory negligence and assumption of the risk. Ps motion was granted in part and denied in part. **Holding-** Expert testimony is not required to determine contributory negligence because the proper use and operation of a clothes drier is sufficiently within "ken of laymen." In addition, P did not move for dismissal of misuse of the affirmative defense which goes to contributory negligence. Thus, the contributory negligence defense was allowed. As for primary assumption of risk, this was not available to eliminate or reduce a manufacturer's duty to produce a non-defective product even where the product's dangerous qualities are obvious to and appreciated by users. However, any finding of implied assumption of the risk by Ps here would result in proportional reduction of any damages but not a total bar to recovery.
- **Sole proximate cause of the P's injuries was his own negligence -** Bruno v. Thermo King Corp., 888 N.Y.S.2d 523 (2d Dept. 2009): **Facts -** P was injured while working on an air conditioning system in a bus. P attempted to check for a loose or broken wire by using his hand to "wiggle" the clutch wire as the engine was turned on and, as he did this,

his fingers became caught in a moving belt. P sued Ds, the air conditioning system and bus manufacturer. Ds moved for summary judgment arguing that P knew it was dangerous to place his hand near the belt while it was moving and that he disregarded a warning label cautioning against it. Ds also argued Ps expert did not disclose, pursuant to CPLR § 3101(d), that he would testify that a feasible alternative design was available. In opposition to Ds motion, P presented an affidavit from his expert opining about a safer feasible alternative design. The Supreme Court granted Ds motion and the Appellate Division affirmed. **Holding:** It was within the Court's discretion to decline considering P's expert affidavit. However, even if the court had considered it, the submission was not enough to raise a triable issue of fact in opposition to the Ds prima facie showing that the sole proximate cause of the P's injuries was his own negligence in placing his hand near the belt while the engine was turned on.

14. Superior Knowledge of Employer

- Manufacturer has independent duty to alert employer-buyer that uniforms were not flame resistant- Johnson v. UniFirst Cotp., 90 A.D.3d 1539, 935 N.Y.S.2d 763 (4th Dept. 2011): *Facts*- 1t brought action against supplier of work uniforms seeking to recover damages for personal injuries sustained when his uniform caught fire. D moved for SJ. Motion denied. D appealed. Reversed on negligence, implied warranty and design defect, but affirmed on failure to warn. *Holding*- Supplier owed no duty to P welder, to provide or recommend flame resistant uniforms; D did not breach implied warranties of merchantability and fitness for a particular purpose; D did not market or supply a defective product. But genuine issue of material fact existed as to whether D provided an adequate warning with respect to flammability of the uniform. D supplied evidence that 1t's employer was in the best position to provide flame resistant garments. In all but the most unusual circumstances, this is a question of fact to be determined at trial. A had an independent duty to warn employees that the uniforms were not flame resistant. Ps failure to read the label on his uniform does not necessarily sever the casual connection between the inadequacy of the warning and the accident.

15. Learned Intermediary Rule

- **Under the “sophisticated intermediary doctrine,” manufacturer must show it adequately warned employee of dangers and ways to prevent injury** - Rickicki v. Borden Chemical, Div. of Borden Inc., 876 N.Y.S.2d 791 (4th Dept. 2009): *Facts* – Ps inhaled silica dust while working for their employer and suffered injuries as a result. Ds were several manufacturers of silica. Ps claimed that Ds failed to adequately warn Ps of the latent dangers of silica dust inhalation. Ds moved for summary judgment claiming that they did warn the plaintiff's employer about the dangers and under the “sophisticated intermediary” doctrine,

the employer was in the best position and should have taken safety measures for its employees. Ps submitted an expert affidavit setting forth the differences between amorphous silica and crystalline silica, the different effects each can have on lung health, and the additional measures needed to prevent inhalation of crystalline silica. The Supreme Court granted the D's motion and the Appellate Division reversed. **Holding** - Even assuming the "sophisticated intermediary" doctrine is viable in New York, Ps' affidavit raises an issue of fact as to whether the Ps' employer was knowledgeable about the differences between amorphous and crystalline silica and thus whether Ds failure to warn with respect to those differences was a proximate cause of the injuries sustained by Ps.

- **Learned intermediary rule not applicable where the product was marketed to the general public** - Amico v. Pfizer, Index No. 105359/05 (Sup. Ct. N.Y. Cty. 2005)(unpublished): **Facts** - P suffered a heart attack as a result of taking the prescription drug Bextra, manufactured by D. P sued D, advancing numerous claims including failure to warn. D made a pre-answer motion to dismiss, arguing that because the drug was prescribed by a physician, the learned intermediary rule precluded claims of failure to warn insofar as they relate to the general public. Supreme Court denied the motion. **Holding**- while the learned intermediary does stand as a defense to claims of failure to warn the general public, the court held that where, as here, the drug was marketed directly to the general public, that doctrine "can be attenuated". **Comment:** New Jersey recognizes the exceptions to the learned intermediary law when the drug company advertised directly to the public. See Perez v. Wyeth Lab. Inc., 734 A.2d 1245 (N.J. 1999). The instant case is one of the first in our state to make this inroad into the doctrine.

16. Waiver of Liability

- **Fire Alarm Case**- *Champion Home Builders Co. v. ADT Security Svcs., Inc.*, 179F.Supp.2d 16 (N.D.N.Y. 2001): **Facts** - [enumerated above in 'consumer fraud.'] **Holding**- The exculpatory clause barred all product liability claims against D.

17. Economic Loss Doctrine

- **Economic loss doctrine does not bar products suit based on damage to other property.** 126 Newton St., LLC v. Allbrand Commercial Windows & Doors, Inc., 121 A.D.3d 651 (2d Dept. 2014): **Facts**- Plaintiff building owner sought property damages based upon alleged defective doors and windows that leaked water. The damages sought included replacement of the doors and windows and water damage to adjacent floors and walls. Defendant appealed a refusal to grant summary judgment and on appeal that decision was partially reversed. **Holding**- New York law bars product liability suits for property damage (whether based on strict liability or negligence) when no personal injury is

involved, the so-called economic loss doctrine. The litigation is limited to suits for breach of contract or warranty. (Of interest, the defendant failed to assert the doctrine below but the appeals court said it had the right to raise this defense itself.) The doctrine also bars claims in tort for consequential damages—for example here the cost of retrofitting. However, the court held that the part of damages sought by the owner for the other property, such as water damage to the floors, could be sought under tort/product liability law.

- **Property owner’s product liability and negligence claims against manufacturer were barred by economic loss doctrine** – Washington Apts., L.P. v. Oetiker, Inc., 978 N.Y.S.2d 731 (Sup. Ct. Erie Cnty. 2013): **Facts** – The owner of an apartment building sued the manufacturer of allegedly defective plumbing clamps, the supplier of the clamps and the general contractor claiming products liability and negligence due to the failure of the clamps, which in turn, caused flooding and damage to the building. Plaintiff claimed that the clamps contained manufacturing and/or design defects that made the clamps predisposed to failure by rupturing, and were unreasonably dangerous and unfit for its intended use in PEX plumbing systems. Manufacturer moved for leave to renew their prior motion to dismiss. **Holding** – Granted. It is irrelevant whether the product failure is the result of a faulty installation or a breakdown of the product itself. The economic loss doctrine reflects the principle that damages arising from the failure of the bargained-for consideration to meet the expectations of the parties are recoverable in contract, not tort. Defendant’s motion for leave to renew is granted and upon renewal, their motion to dismiss is granted.
- **Economic loss doctrine not applicable** – REDF Organic Recovery, LLC v. Rainbow Disposal Co., Inc., 116 A.D.3d 621, 985 N.Y.S.2d 10 (1st Dept. 2014): **Facts** – Supreme Court denied defendant’s motion to dismiss the amended complaint. Defendant in part relied on the economic loss doctrine. **Holding** – Affirmed. Defendant’s reliance on the economic loss rule was unavailing, and did not apply in the instant action.
- **Strict liability and negligence causes of action unavailable where claim is for damage to property; cause of action stated under BCL sec. 349**- Bristol Village, Inc. v. Louisiana-Pacific Corp., 916 F.Supp.2d 357 (W.D.N.Y. 2013): **Facts**- Assisted living facility which had used allegedly defective composite-wood trim product on exterior of its building filed putative class action against seller alleged breach of express warranty, breach of implied warranty of merchantability, negligence, amongst other causes of action. Defendant moved to dismiss all except breach of express warranty. Motion granted in part and denied in part. **Holding**- Plaintiff was an incidental, rather than a third party beneficiary of construction contract, so lacked privity to assert breach of implied warranty. There was no evidence of agency relationship, as would support privity. Four-year statute of limitations

on claim of breach of implied warranty accrued upon installation of product. Negligence claim was barred by economic loss doctrine. In cases involving the failure of exterior building products to perform properly, the economic loss rule bars recovery for both the direct loss of the product itself as well as the consequential damages to the underlying structure, as plaintiffs were downstream users. Claim for unjust enrichment could not be maintained given express written warranty. Complaint sufficiently alleged seller's consumer oriented activity, as required to state claim for deceptive business practices, under Business Corporation Law (BCL) sec. 349. There was no evidence of seller's malice, as required to support punitive damages on claim of breach of express warranty. The Court also found consideration of whether plaintiff has established class certification under Rule 23 of FRCP was premature.

- **Economic loss resulting from damage to allegedly defective product barred by economic loss rule but claim for damage to other property survives** – Wade v. Tiffin Motor Homes Inc., 686 F. Supp. 2d 174 (N.D.N.Y. 2009): **Facts** – [Basic facts enumerated above in “Breach of Warranty” and other facts in “Spoliation” below]. Ps were owners of a recreational vehicle (RV) destroyed in by fire. Ps and their insurers sued D, manufacturer of the RV, alleging, *inter alia*, strict product liability and negligence. Specifically, Ps alleged the RV's propane gas system was defective causing a fire that resulted in the RV and Ps' property contained therein being completely destroyed. Ps were not physically injured in the fire. Ps' insurer had paid \$81,777 for loss of the RV and \$23,436 for loss of property inside. Ds moved for summary judgment claiming, *inter alia*, that applying the economic loss rule, Ps claims were barred. The District Court granted D's motion in part and denied it in part. **Holding:** Under the economic loss rule, while a product owner may have tort remedies for personal injuries caused by a defective product, if the owner suffers only economic harm, he is limited to only what he may recover in contract. Thus, the claim for \$81,777 is not recoverable under a strict liability or negligence theory because it stems directly from the loss of the RV itself. However, the economic loss rule does not apply where a defective product causes damages to other property. Thus, the \$23,436 for Ps' other property contained in the RV is recoverable under a strict liability or negligence theory
- **Economic loss doctrine bar to suit only if damages result from product failing to perform as intended** – Praxair v. General Insulation Co., 611 F.Supp.2d 318 (W.D.N.Y. April 29, 2009): **Facts** – P used D's insulation coating product (“mastic”) in the insulation of aluminum piping and vessels at its cryogenic testing facility. P sued D alleging, *inter alia*, that chlorides in the mastic caused acid to form, resulting in extensive damage to P's facility. D moved to dismiss arguing that P's claim was barred by the economic loss doctrine, disallowing claims

based on negligence or product defect resulting in damages which are purely economic. D alleged that because P did not claim any personal injury, only damage related to the corrosion of its piping as a result of using its product for its intended purpose – as a sealant – P’s claim was barred. The magistrate court granted in part and denied in part D’s motion to dismiss. The District Court affirmed. **Holding** - Key to determining whether the economic loss doctrine applies is whether the damages sought are for failure of the product to perform as intended, for which recovery is barred, or whether they are sought for direct and consequential losses caused by a defective product. P did not claim damages from using the product as intended, as a sealant. Rather, it claimed damages resulting from chlorides in the product, D’s failure to ascertain the presence of the chlorides, and D’s failure to warn of damage that might result from use of the product. As such, P does not seek to recover from the product’s failure to perform as intended, as a sealant, and therefore its claim is not barred

E. Evidence

1. Lay Testimony

- **Plaintiff’s eyewitness testimony as to how an accident occurred creates a material issue of fact as to whether or not there was a manufacturing defect in a bicycle, even without expert testimony- Lynch v. Trek Bicycle Corp., 2011 WL 1327032 (S.D.N.Y. 2011): **Facts**- P alleged that while riding his bicycle, a 1996 Zurich LeMond (Trek), a manufacturing defect caused his left front fork tube to suddenly snap causing the right tube to also snap, which in turn caused P to crash. The case was removed to federal court. The court dismissed P’s claims for negligence, breach of express and implied warranty, as those claims were barred by the statute of limitations. P proceeded on strict product liability based on manufacturing defect. Following a *Daubert* hearing, court excluded P’s expert. Court found that since no evidence remained in the record to support causality of P’s claim, D was entitled to judgment as a matter of law. The Second Circuit, 374 Fed. Appx. 204 (2d Cir. 2010), affirmed. It, however, vacated granting of judgment as a matter of law and directed the lower court to allow the parties to present their positions on SJ. The trial court permitted the case to move forward based on P’s testimony. **Holding**- D’s motion for SJ was denied because a product liability cause of action may be proved by circumstantial evidence and P does not have to identify a specific product defect. If P’s testimony regarding how the bicycle accident occurred is believed by a jury, it would also permit the jury to impose strict liability. Furthermore, P identified a specific flaw through his own eyewitness testimony: the bicycle forks failed during normal, intended use, which the jury can attribute to a manufacturing defect**
- **Plaintiff’s asserted statements about where a product was purchased did not create a triable issue of fact where there is**

objective proof that a defendant did not sell the defective product- *Spiconardi v. Macy's East*, 2011 WL 1364285 (1st Dept. 2011): **Facts-** P's shirt caught on fire as she was cooking. She was severely burned as a result. The trial court denied Ds' motions for SJ. Appellate Division reversed trial court's ruling and dismissed P's complaint. **Holding-** Ds, alleged seller and manufacturer of subject garment, established their prima facie entitlement to judgment as a matter of law. D, Liz Claiborne, Inc., demonstrated the shirt was not contained in any of the product "line books" offered during the relevant time period and that the garment was not contained in Fabric Utilization Reports. Contrary to P's position, the Fabric Utilization Report may be considered, as it was not an existing business record subject to the motion court's discovery orders, but rather was a document created for litigation. P's "subjective" statements about where a product was purchased were not sufficient to create a triable issue of fact where there is objective proof that a defendant did not sell the allegedly defective product. In any event, Ds also established that the garment was reasonably safe. Ds' experts concluded that the industry standard was met and P's expert made conclusory allegations without evidence to support the allegations

• **Admissibility of Lay Testimony** - *Colon ex rel. Molina v. Bic USA, Inc.*, 199 F.Supp.2d 53 (S.D.N.Y. 2001):

- **Facts-** Infant P was injured when a cigarette lighter he was playing with ignited his clothing causing severe burns. The lighter in question was manufactured with a child safety guard but it had been removed from the lighter at some point. P's aunt, owner of the lighter, claimed that the safety guard was still present when she last used it. P sought to introduce testimony by its expert witness regarding the condition of the lighter after the incident, including marks, scratches and other visible signs of force. D moved to exclude all testimony on the grounds that the expert was not qualified.
- **Holding** - The testimony offered on these issues was not expert testimony but lay testimony. Lay testimony will be admissible where it is: (1) rationally based on the perception of the witness; (2) helpful to an understanding of the witness's testimony or the determination of a fact in issue; and (3) not based on scientific, technical or other specialized knowledge. Here, the witness himself observed the lighter, the testimony would be helpful in determining whether or not the latch was forcibly removed and the testimony was not based on any "scientific, technical or other specialized knowledge." As such the testimony was admissible.

• **Proof in the Absence of Expert Testimony-** *Faryniarz v. Nike, Inc.*, 2002 WL 530997 (S.D.N.Y. 2002):

- **Facts-** P was injured when the shoelace of her right sneakers got caught on the "pull-tab" of the heel of her left sneaker causing her to fall. She alleged defective design in that the laces were too long and a

pull-tab should not have been placed near the heel of the shoe. D, shoe manufacturer, moved for summary judgment, arguing that P "must present expert testimony in a technical case like this in order to prove causation" and her failure to do so was fatal to her claim. The motion was denied.

- **Holding** - Expert testimony is only necessary if the witness cannot provide evidence of the causation herself. Unlike toxic tort or medical cases, a reasonable jury could accept plaintiff's theory that the shoelace loop caught the pull-tab and caused her to fall without supporting expert testimony.

2. Expert Testimony

- In the Federal Courts, admissibility of expert testimony is determined by applying the test set forward in *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). *Daubert* listed four criteria to be considered: (1) whether the expert's theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error; and (4) whether the theory has been generally accepted.
- In New York State Courts, the testimony is examined under *Frye v. United States*, 293 F.1013 (D.C. Cir. 1923), in which the Court will have to determine whether or not the data is generally accepted in its specific field.
- **Federal Courts**
 - **Expert need not have done testing on specific product.** *Cruz v. Kumho Tire Co., Inc.*, 2015 WL 2193796 (N.D.N.Y. 2015):
Facts- Plaintiff on his job was driving a Mack dump truck, with a right front tire on it made by Kumho. Plaintiff alleged the following series of events: a failure of the tire, due to improper tread adhesion; leading to the truck going off the road and into trees; a fire starting in the collision due to improper design of the truck in relation to the position of the gas tank, the battery and other parts; and plaintiff sustaining burns and other injuries as he attempted to escape through a broken window. Plaintiff sued, on standard product liability cause of action, the tire manufacturer, the tire seller, the truck manufacturer, the truck seller and others. After discovery and proffer of experts (on the tires, truck construction, and accident reconstruction), and their depositions, defendants moved to strike their testimony under *Daubert* and also for SJ on that and other legal bases. In a long, very fact specific decision, the district judge, Hon. Mae D'Agostino, for the most part denied SJ, and found that the experts would be allowed to give their various opinions at trial. **Holdings**- An expert need not have done testing on the specific product if he or she otherwise has training and experience to substitute for that. The

visual-tactile method of examining a tire as to tread separation is an accepted method among tire experts. The ultimate opinions of an expert are generally beyond the issues a judge evaluates on a Daubert motion. While the court allowed the claim against Kumho for manufacturing defect, it did not find support for a claim of design defect. And while various main causes of action against Mack Trucks could go forward, ones based on failure to warn and breach of express warranty were unsupported on the evidence.

- **SJ granted as plaintiff's expert lacked reliable basis for testimony on drill press defects.** Benjamin v. Fosdick Mach. Tool Co., 2015 WL 1822669 (W.D.N.Y. 2015): **Facts-** Plaintiff's hand was injured when it became entangled in a reamer tool spinning on an upright drill press. The machine had been manufactured in the mid-1940s, by defendant's predecessor. Plaintiff's expert presented the opinion that there was a design defect in that the machine lacked a guard. The methodology he used was called "design hierarchy." He wrote a report and was then deposed by defendant. Thereafter defendant moved to strike the opinion of the expert and for SJ. The trial judge granted the motions, in a long, intelligent opinion. **Holdings-** The judge dealt first with a threshold contention by plaintiff that under NY law, defendant had not borne its burden of proof in a SJ motion in a products case by showing that the drill was reasonably safe. The court rejected the need for defendant to make this prima facie showing since the case was a federal one (having been removed by defendant) and federal procedure applied. FRCP 56 had no such requirement. The court's review of NY substantive law included the rule under Voss that the plaintiff show a reasonable alternative design; and a review of federal law regarding admissibility of expert evidence under Daubert and FRE 702. Defendant's first objection was that the expert had never tested the proposed design, to which plaintiff responded that the machine was gone. The court then held that in lieu of testing an expert should identify other machines, made at the same time, which had guards. The expert had not done that. However, he did refer to patents for guards, which predated the manufacture. The court rejected this basis, since there was no showing that the designs in the patents had been put into practical use. Also an ANSI standard, relied on the expert, had come out after the time of manufacture.
- **SJ granted as plaintiff's expert testimony in exploding bottle case was not competent.** Toomey v. MillerCoors LLC, 96 Fed. R. Evid. Serv. 1078, 2015 WL 667508 (E.D.N.Y. 2015): **Facts-** Plaintiff, a bartender, was in the act of placing glass bottles of

Coors beer into an ice bin, when one exploded and injured a finger. He sued the bottler in products liability. He presented expert evidence (by report and a deposition) to the effect that the glass was too thin, creating a risk of explosion; and also that there should have been a warning about the risk of explosion.

Defendant moved to strike the expert's testimony under Daubert and for SJ under Rule 56. The district court granted the motion.

Holding- The expert's opinions are not based on reliable data and methodology and must be rejected. First, he had never done work with bottles, although he was a glass expert. Second, the testing method he used was unreliable. He had broken some competitor's bottles with a hammer and measured the wall thickness. This procedure was too speculative. **Note to the practitioner:** The court also faults the plaintiff for not complying with Local Rule 56.1 requiring a party opposing summary judgment to submit a paragraph-by-paragraph response to the denial of genuine issues to be tried set forth in the defendant's moving papers. **See also** *Hilaire v. DeWalt Indus. Tool Co.*, 54 F. Supp.3d 223 (E.D.N.Y. 2014), involving a hand off in an unguarded table saw case, where the court sustained the opinion of a magistrate judge that the expert did not have a reliable basis for his claim of design and warning defects, and SJ was granted defendant saw manufacturer. The decision is very fact specific. **See also** *In re New York City Asbestos Litig.*, 11 N.Y.S.3d 416 (Sup. Ct. 2015), involving an asbestos mesothelioma case, where the trial judge set aside a \$8 million verdict pursuant to CPLR 4404(a) on the basis it was not supported by legally sufficient evidence. The evidence presented came from experts and dealt with asbestos dust exposure. The court determined that expert testimony failed to meet the Frye test as developed in the Parker and Cornell decisions by the Supreme Court.

- **Exclusion of expert testimony not an abuse of discretion –** *Valente v. Textron, Inc.*, 559 Fed. Appx. 11 (2d Cir. 2014): **Facts** – Plaintiff sued the manufacturer of a golf car for serious injuries arising from a tip-over. The claim was a design defect in having only a two wheel braking system rather than a four. Both sides moved to exclude expert witness testimony and for SJ. The Eastern District granted defendant's motion and plaintiff appealed. **Holding** – Affirmed. The district court acted within its discretion in excluding as unreliable expert testimony for plaintiff. He had made certain assumptions about the coefficient of friction that lacked a proper basis. Moreover, there was no evidence that the golf car had a design defect or that such design defect caused plaintiff's accident. With plaintiff's expert testimony excluded, the record was devoid of any evidence supporting plaintiff's theory of design defect.

- **Expert's testimony admissible in mold case** – Burnett v. Damon Corp., 2013 WL 6230108 (N.D.N.Y. Dec. 2, 2013): **Facts** – Plaintiff sued defendant Damon Corp., manufacturer of her recreational motor home, for injuries caused by mold that grew in it. Defendant moved to preclude the testimony of plaintiff's expert and in turn for SJ. The challenge under Daubert was based on attacks allowed by various New York state mold cases, such as the sufficiency of air sampling. **Holding** – The conclusions offered by the experts could reliably follow from the data known to them at the time and the methodology they employed. This was sufficient to establish admissibility under Daubert and therefore may be used to raise question of fact on the strict liability claim. As to plaintiff's failure to warn claim, the adequacy of the instruction or warning is generally a question of fact to be determined at trial, but nonetheless, may be decided as a matter of law where the plaintiff was fully aware of the risks through general knowledge, or was specifically warned that the failure to maintain the seals and caulking can result in mold and mildew growth. Hence, plaintiff was unable to assert a failure to warn claim.
- **Daubert is a flexible standard** – Coyle v. Home Depot U.S.A., 2013 WL 5537316 (E.D.N.Y. Oct. 7, 2013): **Facts** – Plaintiff fell from a ladder manufactured by defendant Tricam Industries, and sold by defendant Home Depot. After removal to the Eastern District, all parties moved for SJ claiming that the opposing party's expert witness could not testify under Rule 702 and the applicable Daubert standards. **Holding** – Denied. The Daubert guidelines as laid out by the Supreme Court are "flexible," non-dispositive and non-exclusive. The court could not conclude that the opinions expressed by the parties' experts fell below the threshold established by Fed.R.Evid. 702 and Daubert. Denying the cross motions to exclude expert testimony, paired with the presence of questions of fact required denial of all SJ motions.
- **Treating physician may not offer expert opinion where lacked specialized knowledge** – Morritt v. Stryker Corp., 973 F. Supp. 2d 177 (E.D.N.Y. 2013): **Facts** – Plaintiff sued Stryker Corp., the manufacturer of a defective polyethylene tibial insert in a knee prosthesis implanted in the plaintiff. After removal, defendant moved to exclude certain scientific testimony of plaintiff's treating doctor who was being put forth as an expert on the causes of polyethylene wear. **Holding** – Motion in limine granted. A treating physician may not offer an expert opinion, even one formed during the course of treatment, on specialized subjects in which that physician has no training or for which there is no sufficiently reliable basis. Plaintiff's treating physician, an orthopedic surgeon, was not qualified to offer expert

testimony involving bone cement and the expert's methodology of differential diagnosis was not reliable.

- **Expert qualified by experience even if he lacked formal education in field-** Argonaut Ins. Co. v. Samsung Heavy Indus. Co., Ltd., No. 8:10-cv-1516 MAD/CFH, 2013 WL 936538 (N.D.N.Y. March 11, 2013): **Facts-** Fire occurred at Town's garage. In garage, Town kept three trucks manufactured by International Trucks used for snow and ice removal and a SL 12-2B ("Samsung Loader"). The Samsung Loader also caught fire. Plaintiffs filed as subrogee seeking to recover proceeds of the insurance policies that each company paid to Town as a result of fire. Plaintiffs alleged that fire started when Samsung Loader's battery cable ground faulted causing an arcing event and ignition of surrounding combustible materials under theories of negligent design and manufacture, failure to warn and strict liability. Plaintiffs filed motions to exclude defendants' experts. Plaintiffs' motions were denied. Defendants moved to exclude plaintiffs' expert and for Summary Judgment. Defendant's motion to exclude was denied. MSJ granted in part and denied in part. **Holding-** Court considered Defendants' experts' investigation, their background and experience, and reviewed their reports and affidavits and found that their testimony would assist the jury. Further, they were the product of reliable principles and methods, and the result of a reliable application of these principles and facts. Additionally, most of defendant's arguments go to the weight of the testimony, and thus the testimony is admissible. While plaintiffs' expert admittedly lacked formal education, his considerable experience was sufficient to qualify him as an expert. Furthermore, plaintiffs' expert offered an alternative design which he designed, implemented, installed and tested and is thus qualified to testify
- **Testimony admissible where expert's opinion re clothes dryer fire based on sufficient data, sufficiently reliable, employs an appropriate methodology and will assist the jury-** Auto. Ins. Co. of Hartford, Conn. v. Electrolux Home Prods., Inc., No. 10-cv-0011 CS, 2012 WL 6629238 (S.D.N.Y. Dec. 20, 2012): **Facts-** Following a fire started in a clothes dryer, homeowner made a claim with plaintiff-insurer which ultimately compensated owner for fire damage. Plaintiff as subrogee brought a product liability suit against the dryer manufacturer, defendant moved to preclude expert testimony and argued that expert's opinions regarding design defect was not based upon sufficient facts and data and not the product of reliable methodology. The expert's explanation was that the design allowed lint to accumulate in a heater pan, which caught fire.

Motion denied. **Holding-** That there might be some sample bias in examining the location of lint accumulation only in dryers involved in fires does not render opinion so unreliable as to be excluded entirely. Potential sample bias is a subject for cross. Further, this was not the sole basis of expert's opinion as he cited numerous studies and tests. Thus, expert can opine about situs of lint accumulation in subject dryer. Expert also conducted testing which could support his opinion that lint will deposit in heater pan under normal operating conditions. Expert's opinions are based on sufficient data, are sufficiently reliable, employ a methodology appropriate to expert's field and will be helpful to jury.

- **District Court's exclusion of expert in tractor case must be affirmed unless abuse of discretion; lack of reliable methods-** Hunt v. CNH Am. LLC, 511 Fed.Appx.43 (2d Cir. 2013): **Facts-** Plaintiff and coworker drove an International Harvester tractor to tow a Steiger CA-325 tractor. The Steiger's brakes failed and it crashed into the back of the International Harvester. Plaintiff sustained serious injuries to his right leg. Plaintiff claimed a design defect in the Steiger and failure to warn. District Court granted defendant's motion to exclude plaintiff's expert testimony, and then granted summary judgment. Plaintiff appealed. Affirmed. **Holding-** Based on a careful and comprehensive review of testimony and report, District Court concluded that expert's theory of design defect was not based on sufficient data and was not product of reliable principles and methods. Summary judgment must be affirmed because the expert's testimony was excluded.
- **Expert's self-created computer simulation in golf-cart rollover case was not admissible under Rule 702-** Valente v. Textron, Inc., No. 08-cv-4192 MKB, 2013 WL 1149145 (E.D.N.Y. March 18, 2013): **Facts-** Plaintiffs filed action after plaintiff was seriously injured while operating a golf cart manufactured by Defendants. Plaintiffs alleged that the golf cart was defectively designed because it only had a rear-wheel braking system and did not have a seatbelt restraint system. Defendants moved to preclude experts and for Summary Judgment. Defendant's motions granted. **Holding-** In a very long, fact specific opinion, the court determines that plaintiffs' experts did not meet the requirements of Rule 702. One expert, Kristopher Seluga, created a simulation model that he court found to be unreliable. The court could not validate the simulation as Seluga used his own formulas for the program. Where the central issue is the yaw instability of the golf car, and the determinative factor is the coefficient of friction, the use of confidential data that does not involve similar

circumstances does not render the simulation reliable. Seluga's simulation model was never subjected to peer review. His model was not available to the public and, thus, does not have general acceptance in the scientific community. Seluga's simulation model was also not reliable because its error rate was unknown and could not be determined. Since the simulations were inadmissible, Seluga did not have a proper basis for his opinion, and thus his testimony was excluded. Bruce Gorsak did not have the requisite knowledge, skill, experience, training or education in the area in which his testimony was offered. He had very little experience with golf carts and did not have a degree in mechanical engineering technology. A second expert, Gorsak, did not conduct any independent testing. He did not even consider the governing standards for golf carts in reaching his opinions. Having excluded experts' testimony, plaintiffs did not have any evidence that the golf cart had a defect. There is no direct evidence of a defect or any evidence to exclude other possible causes. As to a breach of warranty cause of action, plaintiffs did not produce any admissible evidence from which a reasonably jury could infer that the subject golf cart was not minimally safe for its ordinary purpose. Plaintiffs also did not offer any admissible evidence to establish that the warnings on the golf cart were inadequate or that the failure to include an adequate warning was a proximate cause for plaintiff's injuries.

- **Expert's theory was not based on sufficient data and was not the product of reliable principles, and thus was inadmissible-** Hunt v. CNH America LLC, 2012 WL 777321 (W.D.N.Y. 2012): *Facts-* P sustained injuries in farming accident, when Steiger CA-325 tractor he was operating was struck from behind by another tractor. P's employer directed him and another employee to tow the Steiger back. Other employee inspected the brakes. Going down a hill, other employee felt the Steiger's brakes fail. The Steiger rammed into the back of the other tractor causing both to tum over onto their sides. P sustained serious injuries to his right leg when he was partially ejected. P asserted claims for negligence and strict product liability agains D CNH, Inc., the manufacturer of the tractor which struck him. D moved for SJ and moved to exclude the testimony of P's expert. P cross moved to strike the testimony of D's expert. D's motions were granted and P's motion was denied. *Holding-* P's expert's theories, as to design defect and causation, failed to satisfy Federal Rules of Evidence 702, and would mislead a jury in violation of Rule 403. P's expert's theory of design defect was not based on sufficient data and was not the product of reliable principles and methods. P cannot show a brake design defect or duty to warn, and alternatively, P could

not show that any such design defect or failure to warn was the cause of P's injury. The design defect claim was dismissed because P's expert's opinions were excluded and thus there was no causation. As to the failure to warn, P could not establish why the brakes failed, and thus could not produce evidence that D knew or should have known that the brake pads would fall apart, or that the brakes would otherwise fail in any way if the Steiger was towed

- **Expert testimony admissible when coffee maker caused fire; the contentions go to the weight of the evidence-** Denny v. Bunn-O-Matic Corp., 2011 WL 494662 (N.D.N.Y. 2011): **Facts-** P purchased a coffee maker in 2004 or 2005. P sued D, manufacturer, seeking damages she sustained when her home was destroyed by a fire allegedly caused by coffee maker prior to second recall. P asserted that coffee maker was defective, unreasonably dangerous and caused fire. Action was removed. The fire investigator was unable to determine whether the coffee maker or outlet caused the fire. A claim representative gave coffee maker to a cause and origin investigator who noticed that evidence bag was only semi-sealed. He along with a forensic electrical engineer, concluded that the fire was caused by the subject coffee maker. Vice president of quality assurance for D and an investigator retained by D investigated the accident and determined that coffee maker did not start the fire. D moved for: (1) an order precluding the testimony of P's experts; (2) spoliation sanctions for P's failure to preserve evidence; and (3) SJ. D's motions were denied. **Holding-** D's own experts agreed that the point of origin was in the area of kitchen where coffee maker was plugged in. Accordingly, P's experts' analyses and conclusions were relevant, reliable and would help a jury understand the cause of the fire. D's criticisms go toward the weight of the evidence, not its admissibility. Also, there was insufficient evidence to support D's claim that P's representatives failed to carry out their obligation to preserve the physical evidence
- **Expert testimony on bone screw defect was precluded because of incompleteness-** Dolphin v. Synthes (USA), 2011 WL 1345334 (S.D.N.Y. 2011): **Facts-** P commenced action against Ds, Synthes (USA) Ltd. and Synthes, Inc., asserting claims for negligence, strict product liability, negligent misrepresentation and breach of warranty as a result of defective Synthes surgical bone screws that were implanted during various surgeries to repair P's fractured ankle. Ds moved to preclude P's expert, Dr. Vassilis Morfopoulos, an engineer, materials scientist and metallurgist. The trial court ruled that the expert was precluded

from testifying. **Holding-** In P's expert's preliminary report, he indicated that during his failure analysis study, he discovered an improper manufacture of fasteners and/or use of inferior materials. He indicated that a materials analysis would be carried out later to ascertain quality compliance. P claimed he needed more discovery to supplement the report. Ds provided P with discovery, but P did not supplement the report. The court gave P a final date to submit the report, but P served it a day late. D moved to preclude P's expert's testimony. Dr. Morfopoulos was a qualified expert given his over forty-year career with the American Standards Testing Bureau and his involvement with knee implant devices. However, Dr. Morfopoulos did not perform the additional tests he stated that he would and did not obtain the specifications of the screws

- **Product liability claim fails when expert does not have sufficient grounds to base his opinion- Pinello v. Adreas Stihl Ag & Co. KG, 2011 WL 1302223 (N.D.N.Y. 2011): **Facts-** P was injured while using a STIHL TS 400 Cutquik cutoff machine to cut an eight-inch ductile iron pipe in an excavated trench. P and his crew positioned a strap on the pipe where it was to be removed. As P completed the cut, he was struck in the face by the pipe. P brought claims for negligence, breach of warranty and strict liability. Case was removed to the Northern District. Ds moved to exclude P's expert because P failed to timely serve an expert disclosure after two extensions of the deadline, and to grant SJ dismissing P's claims. Ds' motions were granted. **Holding-** P's expert is sufficiently qualified to render an expert opinion regarding cutoff machine, the hazard associated with kickback and the hazard of making cuts with upper front quadrant of the machine's cutting attachment. However, P's expert testimony should be precluded because it did not rest on a reliable foundation. P's expert did not test the subject machine. P's expert did not submit his analysis for peer review. P's expert did not make any reference to known or potential rate of error of his analysis. Without this testimony, P failed to show how the subject machine was defective**
- **Expert medical evidence is necessary to differentiate pain caused by defective product versus underlying causes; metallurgical expert not qualified to testify regarding pain- Donovan v. Centerpulse Spine Tech Inc., 2011 WL 1086861 (2d Cir. 2011): **Facts-** Suit to recover damages for injuries sustained by P following spinal fusion surgery. P's surgeon utilized the Centerpulse Spine Tech Silhouette Spinal Fixation System, an implant system of rods and screws. One of the screws fractured which resulted in a need for surgery to remove the System. P**

alleged that she suffered permanent and disabling injuries as a result. D's motion for SJ on Ps' strict product liability and negligence claims was granted. The Second Circuit affirmed. **Holding-** Ordinarily, expert medical evidence of causation is not required to prove a product liability case but, because P had the Spinal System installed to help remedy a pain condition that continued unabated after removal, testimony was necessary. Ps have not supported their claims with expert medical opinion. In fact, their metallurgical expert was not qualified to opine on medical causation and their doctor indicated during his deposition that P's pain was caused "in part" by the loose hardware. A reasonable jury could not find that the Spinal System was a substantial factor in causing P's lasting injuries. Additionally, Ps failed to timely plead failure to warn. Even if it was timely, it would be futile because P's doctor was given adequate information to make an informed decision as to risks of installation of the device

- **Summary judgment is improper where there are conflicting affidavits submitted by engineering experts regarding design defect of hand truck-** Messina v. New York City Transit Authority, 2011 WL 1642519 (1st Dept. 2011): **Facts-** P was injured when a 1,000 pound load he was moving with a hand truck fell onto him. P brought claims against D, Stevens Appliance Truck, Co., manufacturer of the hand truck, amongst others. Ds moved for SJ. The trial court denied Ds motion. Appellate Division affirmed the trial court's ruling. **Holding-** Triable issues remained as to P's product liability claims with respect to D, Stevens, and D, New Haven, because of the conflicting affidavits submitted by both parties' engineering experts
- **Product must be defective when it leaves manufacturer's hands; Expert qualified and relevant when he has performed in-depth inspection of product and read through all relevant discovery materials-** Morton v. Otis Elevator Company, 2011 WL 2199848 (W.D.N.Y. 2011): **Facts-** P sought damages sustained while operating a hospital elevator. Five days prior to accident, D, maintainer of elevator, installed a Lambda 3D door protection device on the subject elevator. When P went to use elevator, it was three inches below hallway floor. This, and similar incidents, were reported. When she was wheeling in a patient, the door began to close striking the pole. Then, the door slammed into the gurney crushing her hand. P claimed her injuries were caused by negligence on the part of D, manufacturer. The case was removed to the Western District. D filed a motion for SJ or, in the alternative, to preclude testimony of P's designated liability expert for failure to meet Daubert standards. Ds motion was

granted in part and denied in part. D's motion to preclude expert testimony was precluded. **Holding-** P failed to come forward with evidentiary support that elevator was appropriately designed, manufactured, and installed inconsistent with safety standards and state of the art at the time of manufacture and sale in 1955. P's product liability claim was dismissed; however, P's expert's testimony was deemed admissible. The listed qualifications of the expert coupled with substance of his deposition testimony, provided an ample basis to conclude that he possessed knowledge, skill, experience, training, and education that would assist the trier of fact. Furthermore, his opinion was deemed to be reliable because of his in-depth inspection of mechanical components of the elevator, and upon thorough review of all deposition testimony and other evidentiary materials produced during discovery

- **P generally must have feasibility of alternative design expert to survive summary judgment** – Cuntan v. Hitachi Koki USA, Ltd., 2009 WL 3334364 (E.D.N.Y. 2009): **Facts** – [Basic facts enumerated above in “Failure to Warn”]. P, an experienced handyman, carpenter and construction worker, was injured while using a C7S-B2 circular power saw owned by P's employer and manufactured by D. P claimed he stopped operating the saw and placed it down on the ground so he could reach for a piece of plywood. Ordinarily, once stopped, the saw's blade continues to rotate for some seconds. However, for safety purposes it is designed with a lower blade guard that automatically closes through the use of a “return spring,” protecting users from the still-spinning blade. In this case, P claimed the saw continued to operate, moving on its own one-and-half feet across the ground towards his hand, severely lacerating it. Prior to this P had used the saw numerous times without incident with the blade guard operating properly. When experts inspected of the saw the return spring was not present. It was unclear how or when the spring had been removed. Its absence was not visible to the P during the saw's normal operation. P sued D alleging, *inter alia*, defective design. D moved for summary judgment arguing that P failed to state a claim for design defect because he did not present expert testimony regarding a feasible alternative design; the missing spring was a substantial alteration of the saw's safety features. P countered, not with expert testimony but with the testimony of D's own vice president for operations, that other saw manufacturing companies use a technology known as a “saw stop” that automatically shut down a saw's motor as soon as the blade made contact with human flesh. As to the alleged substantial modification, P argued that the Ds failed to consider the possibility that the spring exited the saw at the precise time of

the accident and not prior, either intentionally or due to poor maintenance. The District Court granted summary judgment. **Holding:** A P seeking to establish a design defect is generally required to provide expert testimony as to the feasibility and efficacy of alternative designs. However, instead here the P makes the illogical argument that the “saw stop” technology used by other companies should have been used by the D even though he presents no expert testimony explaining the differences between the two models and analyzing whether the technology in one could be viably integrated into the other without affecting the saw’s utility or that it would be technologically or economically feasible to do so. If a P fails to provide expert testimony, a P may only proceed beyond summary judgment if he can establish that the product did not perform as intended and exclude all other causes of the accident. Here, even if the spring fell out at the time of the accident, that still does not refute D’s theory that the blade guard malfunctioned due to the absence of the spring. Nor does it establish liability on the part of the D unless P establishes that its absence was not due to poor maintenance or intentional removal.

- **Expert conducting late inspection of evidence lacking specific ladder design experience precluded from testifying –** Delehanty v. Kli Inc., 663 F. Supp. 2d 127 (E.D.N.Y. 2009): **Facts** – P was standing on a glass fiber extension ladder, manufactured and distributed by Ds, when all of a sudden he felt a jolt and the ladder collapsed. P injured his hip, wrist and arm in the fall and sued Ds alleging design defect, failure to warn and breach of implied warranty. P hired an expert engineer who worked half-time consulting building owners on safety issues and the other half on real estate and forensic consulting on the design safety of tools and the building maintenance industry generally. The expert opinion centered on a bolt in the right foot-pad housing of the ladder. P’s expert claimed the bolt: 1) either rusted and froze, not allowing the ladder foot housing to adjust properly; 2) slipped to the bottom of the housing under the Ps weight; or 3) that the sudden shift of the bolt caused the ladder to shift and P to fall. Additionally, the bolt should have been made from case aluminum or stainless steel and the Ds should have warned customers to store the ladder in a dry location so as to prevent rusting. Ds moved for summary judgment and to exclude P’s expert under Fed.R.Civ.P. 702 and Daubert v. Merrel Dow Pharms. Inc., 509 U.S. 579 (1993). Ds did not present their own theory but argued that P’s expert was not qualified and his opinion based solely on conjecture. He had not examined the ladder until three months after the accident and therefore could not have known if the rust on the bolt was present at the time of injury. Additionally, he performed no tests or calculations to determine

when the rust had accumulated or whether the rusted bolt could give way under P's weight. The District Court granted the D's motion. **Holding:** P's expert has no specific expertise in ladder design or ladder accident reconstruction, has never designed any ladder, never worked for a manufacturer that designed a ladder and never participated in any standards committee which addressed ladder safety. Although a court's inquiry could cease there after determining an expert is not qualified, it is important to address expert testimony's complete lack of reliability. Not only has he changed his theory several times to suit the facts he also did not examine the ladder until three months after the fall. He offers no research demonstrating that ladders with stainless steel housing bolts are safer, nor can he because no manufacturer in the U.S. makes a ladder with either stainless steel or case aluminum bolts. In short he offers nothing at all to establish the bases of his opinion and presents exactly that kind of junk science that Daubert aims to prevent. Without expert testimony, P's claims fail.

- **Expert permitted to testify about ethanol feasible alternative in MTBE suit** – In Re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 643 F. Supp. 2d 471 (S.D.N.Y. 2009): **Facts** – As part of a consolidated multi-district litigation, the City of New York and other Ps alleged that a number of gasoline makers were strictly liable for their use and handling of the gasoline additive Methyl Tertiary Butyl Ether (MTBE). Oil companies added MTBE to gasoline as an oxygenate in order to meet emissions requirements under the Clean Air Act (CAA) of 1990. The sole non-settling gas maker, Exxon Mobile Corp., moved *in limine* to exclude the testimony of the city's expert witness who would testify that Exxon could have used another oxygenate, ethanol, in place of MTBE at roughly comparable cost. He also planned to testify that Exxon's market share for MTBE gasoline was five times higher than the share calculated by Exxon's expert. In explaining how he came to his conclusions regarding Exxon's market share, P's expert presented data and explained how to use it but did not actually perform any calculations. Exxon argued the expert's method for comparing the cost of ethanol and MTBE was unreliable by implying that Ps attorneys provided him incomplete studies and reports to analyze. The District Court denied D's motions. **Holding:** P's expert opinion is reliable and admissible. To reach his conclusions regarding the lower cost of ethanol, P's expert surveyed the results of over a dozen government and industry cost studies comparing MTBE with other oxygenates. He then supplemented this assessment with a review of internal technical and economic analysis conducted by refiners. Further, regarding his testimony as to Exxon's market share, Exxon claims

the testimony is unreliable because he misunderstands the data but the Expert's description of the data shows his fundamental understanding of it

- **Part of expert evidence rejected under Daubert but other portions allowed based on expert's experience** – Milliman v. Mitsubishi Caterpillar Forklift Am. Inc., 594 F.Supp.2d 230 (N.D.N.Y. 2009): **Facts** – [basic facts enumerated above in “Failure to Warn”]. In action where P fell some distance to the ground off a fork-lift type elevated machine called an “orderpicker,” P sued D, the manufacturer of the machine. P offered expert testimony that the machine was defective because a safety harness, which was to come with the machine, was not permanently attached; it did not include a large and more permanent warning label; it had no interlock device preventing the machine from operating without a safety harness or, in the alternative, guardrails around the perimeter to prevent a fall; and an alternative safer design was feasible. D moved to strike the P's expert witness. The District Court granted D's motion in some respects and denied it in others. **Holding** - Although P's expert had relatively little experience pertaining to orderpickers, he was nevertheless qualified to testify as to design since he had been a professor of mechanical engineering, had published hundreds of articles, at least 50 of which concerned biomechanics, and had served as editor-in-chief of an international journal of health care engineering. This experience gave him specialized knowledge. Any quibble over his shortcomings should go to weight. His opinions regarding the safety harness and guard rail were untested, not subject to peer review and not generally accepted in the scientific community. However, they were nevertheless admissible since his considerable experience provided him with an independent and reliable basis for his opinions. Any alleged deficiencies under the Daubert factors do not justify inadmissibility, especially given D's admission that the safety harness could have been attached. His opinions regarding the interlock device and feasibility of an alternative design however were not admissible because he had never designed an orderpicker with an interlock device; he had no basis for his opinion that such a design was possible other than the fact that other machines, entirely different from orderpickers, use them; and he had conducted no research into the cost of an interlock design.
- **Expert evidence on alternative designs admissible despite failure to test** – Robinson v. Garlock Equipment Co., No. 05-CV-6553, 2009 WL 104197 (W.D.N.Y. Jan 14, 2009): **Facts** – P was injured by 300 degree Fahrenheit asphalt which poured out of a

tank after he turned the spigot on, filling his work boots and causing severe burns. P sued D, the designers and manufacturers of the tank. P's expert proposed four alternative designs but did not test these designs. D moved to preclude this expert testimony. The District Court denied the D's motion. **Holding** - The language in Daubert does not require the hypothesis be tested by its proponent, only that it can be tested. The expert based his theory on expert knowledge of material scientific principles. The fact that he could have bolstered his opinions by conducting experiments, but did not, goes to the weight of the evidence, not its admissibility.

- **Biomechanical engineer with medical degree not qualified to testify about injuries from low speed MVA – Santos v. Nicolos**, 879 N.Y.S.2d 701 (S.C. Bronx Cty. May, 12, 2009): **Facts** – P allegedly suffered a meniscus tear and a serious injury to his lumbar spine during a motor vehicle accident. D's expert, a biomechanical engineer with a medical degree, proposed to testify that, by examining photos of the impacted vehicle, repair records, the weight and dimensions of the vehicles, and the change in velocity (Delta V) that occurred, the low-speed, rear-end collision could not have produced the alleged injuries. The expert did not cite to any studies, articles, journals or other scientific literature which utilized his methodology in support of his theory. In addition, although the expert had a medical degree, he was not licensed to practice and had never done so other than during a three-month residency in pathology. P moved to preclude D's expert. The court held a Frye hearing and subsequently granted P's motion. **Holding** - Because the expert could not cite to any studies, articles, journals or other scientific literature in support of his conclusions he failed to show that his theory was generally accepted as reliable in the scientific community. Furthermore, although some New York courts have allowed biomedical engineers to testify as to whether the forces experienced by a P in a motor vehicle accident could cause the complained of injuries, they have not stated the bases for their holdings. Rather, the better view, held in other jurisdictions, is that such testimony should be precluded on the ground that a biomechanical engineer is not a doctor and is therefore not qualified to testify about the causal relationship between a motor vehicle accident and the injuries that the person sustained. **Comment** - This is not a products case but the holding would apply in the field too.
- **Allegations of expert bias against a particular product go to the weight and not admissibility of the evidence - Manoma Realty Mgmt. v. Fed. Pac. Elec. Co.**, 2007 U.S. Dist. LEXIS

54887 (S.D.N.Y. 2007): *Facts*- P sustained property damage as a result of a fire. P claimed that the fire was caused by a defective circuit breaker manufactured by D. P submitted the expert opinion of Dr. Aronstein who concluded that a defect in the subject breaker caused heated material from the circuit or its protective steel cable to ignite combustible materials located near the cable and resulted in the fire. D moved to exclude the opinion of the expert because he had conducted extensive testing of many breakers manufactured by D over many years and concluded that they were all defective. Thus, D argued that the expert was "partisan" and his opinions were unreliable. The district court denied the motion. *Holding*- the expert is qualified to offer testimony about the circuit breaker. Any claim of bias or partisanship goes to the weight and not the admissibility of the proffered testimony.

- **Expert's opinion must be supported by the facts of the case – Davidov v. Louisville Ladder Group, Inc., 169 Fed. Appx. 661 (2d Cir. 2006):** *Facts* – P was injured when he fell from a ladder. P sued D manufacturer claiming that his fall was caused by the ladders' defective design. Following motion practice, the district court granted D's motion to exclude the testimony of P's expert because it determined that the testimony was inconsistent with the facts of the case. The Court subsequently dismissed the case and P appealed. The Circuit Court affirmed. *Holding* – In order for the testimony of P's experts to hold up, a strange set of unusual facts must have occurred, for which there is no support in the record. Thus, the challenged testimony amounted to "little more than speculation" and was properly excluded by the Court.
- **Differential diagnoses is insufficient under *Daubert* to establish general causation-** Ruggiero v. Warner Lambert, Co., 2005 WL 2240999 (2d Cir. 2005): *Facts* – Decedent suffered from Type II diabetes and was taking Rezulin, a diabetes drug manufactured by D, for more than a year when he died as result of cirrhosis of the liver. P widower sued D, claiming that the drug was defective and caused the cirrhosis. In support of her claims, P offered the expert testimony of a physician who stated that based on a differential diagnosis, the cirrhosis was caused by the drug. D argued that the testimony was inadmissible under Daubert and the district court agreed. After excluding the testimony, the district court granted summary judgment because there was no evidence of general causation, i.e. that Rezulin was capable of causing cirrhosis. P appealed and the Court of Appeals affirmed. *Holding* – the court noted that the differential diagnosis "rules in" the fact that Rezulin causes cirrhosis before the doctor is able to

rule out causes other than Rezulin. This is not a proper basis for medical testimony under Daubert.

- **Expert Testimony must be placed on reliable methodology** – In re Rezulin Prod. Liab. Litig., 2004 U.S. Dist. LEXIS 25038 (S.D.N.Y. 2004): *Facts* – Decedent died from hepatic failure caused by cirrhosis. P claimed that the cirrhosis was caused by the drug and that there had been “many published incidents” of liver failure due to Rezulin use. During his deposition, the expert conceded that he had not actually see any literature supporting his position nor had he conducted his own research on the matter. D moved for summary judgment on the ground that the expert testimony was inadmissible under Daubert and that P could therefore not prove general causation. The court granted the motion. *Holding* - In light of the expert’s own testimony that his opinions were not supported by medical literature or accepted methodology, they are inadmissible under Daubert. Therefore, P has not raised a triable issue of fact as to whether or not the drug caused the injury suffered by the decedent.
- **Expert testimony contradicted by photographs and the party’s testimony is inadmissible under Daubert** – Macaluso v. Herman Miller Inc., 2005 U.S. Dist. LEXIS 3717 (S.D.N.Y. 2005): *Facts* – P sustained personal injuries when a chair he was sitting on broke. Following the accident, the chair was photographed but subsequently misplaced. Experts for P and D manufacturer examined an exemplar model. P testified during his deposition that the problem with the chair was the angle of recline. P’s expert concluded that the chair had broken at its based as the result of a defective design. D’s expert stated that the chair was not defective and was manufactured in compliance with all applicable standards. The photographs of the chair after the accident did not support the opinions of P’s expert. D moved for summary judgment, arguing that the testimony of P’s expert was not admissible under Daubert and the court granted the motion. *Holding* – The testimony of P’s expert who did not examine the actual chair, was contradicted by the photographs and the testimony of the P himself. These opinions are not sufficiently reliable and therefore may not form the basis of a claim that the chair was defective. In the absence of a valid expert opinion, P’s claims must be dismissed.
- **Case Specific testing need not be subject to peer review** – Seeley v. Hamilton Beach, 349 F.Supp. 381 (N.D.N.Y. 2004): *Facts* – P sustained property damage as the result of a fire that occurred while a Pop-tart was baking in his toaster oven. P sued D manufacturer, claiming that a portion of the heating element was left exposed and frosting dripped onto the heating

element and caused a fire. P's expert performed many tests on toasters manufactured by D as well as others and concluded that this was a design unique to D. The expert further stated that this amounted to a design defect that caused the fire. D moved to preclude the testimony of the expert, claiming he was not qualified and that his theory was not tested. The court denied the motion. *Holding* - The court ruled that the expert's experience in the fields of engineering and fire cause and origin were sufficient to allow him to testify in this case. With regards to the claim his theory was not adequately tested, the court held that the tests performed "were so specific to the situation that it is not reasonable to require that it have been subject to peer review."

- **Questionable testing based on an accepted theory is sufficient under Daubert** - Wald v. Costco, 2005 U.S. Dist. LEXIS 2723 (S.D.N.Y. 2005): *Facts* - P sustained serious brain injuries when he fell off his bicycle and his head struck the ground. P was wearing a helmet that was manufactured and sold by the Ds. P sued claiming, *inter alia*, that the helmet was defectively designed in that the outer shell was too thin to absorb reasonably foreseeable impacts. As a result, the foam interior came in contact with the ground, causing P's head to shake violently and resulting in his injuries. The fact that brain injuries can result from the friction caused by foam helmets striking the ground was the subject of numerous peer reviewed studies in the 1990's. P's expert tested numerous helmets by placing a 10 pound weight inside to simulate a human head and dragging it with a car. She concluded that the outer shell of the subject was too thin and rendered the helmet defectively designed. D challenged the testimony of the expert, arguing that her technique was not reliable. The court denied the motion. *Holding* - Although the methodology used by the expert may have been questionable, she was simply applying an accepted theory to the facts of this specific case. The theory had previously been subject to peer review. Therefore, her testimony and conclusions are admissible.
- **Expert only needs to be qualified in the general field and not with regard to the specific product at issue** - Ochoa v. Jacobson Div. of Textron, Inc., 790 N.Y.S.2d 708 (@d Dept. 2005): *Facts* - P was injured when the blade of a commercial riding mower suddenly engaged while he was trying to free a jammed golf ball from the mower. P claimed that he had disengaged the mower before the incident occurred. During trial, the court refused to allow P's expert to testify because he was not knowledgeable about riding lawnmowers, although he was knowledgeable with regards to mechanical safety and interlock

systems. The jury returned a verdict in favor of D manufacturer and P appealed. Appellate Division reversed. *Holding* – the expert testimony was relevant to the issues at hand. His lack of experience in the specific area of riding lawnmower goes to the weight and not the admissibility of the evidence. The expert should have been allowed to testify and the verdict must therefore be vacated.

- **Expert Must Have Experience With the Specific Device He Seeks to Testify About** – *Doe v. Am. Med. Sys., Inc.*, 2004 U.S. App. LEXIS 8544 (2d Cir. 2004): **Facts** - P sustained undisclosed injuries because of a penile implant that P claimed was defective. P sued D manufacturer and sought to introduce the expert testimony of an engineer who would testify that the device was defectively manufactured D moved to preclude the testimony on *Daubert* grounds, claiming that the expert did not have experience with this specific device. P argued that the witness' experience in the field of engineering was sufficient. The district court granted D's motion and the Second Circuit affirmed. **Holding**- Despite the witness' "substantial engineering credentials" he did not have experience with the device in question or others similar to it. As such, he was not qualified to testify as an expert.
- **Expert Witness Must Meet *Daubert* Test** - *Hutton v. Globe Hoist Co.*, 158 F.Supp.2d 371 (S.D.N.Y. 2001): **Facts**: [enumerated above in 'failure to warn'] D moved to exclude the testimony of the expert witness and the motion was granted. **Holding**- The Supreme Court, in *Daubert v. Merrell Dow Pharmaceuticals* set a list of criteria to be used in evaluating the admissibility of expert testimony: (1) whether the expert's theory or technique can be, and has been tested; (2) whether the *theory* or technique has been subjected to peer review and publication; (3) the known or potential rate of error, and (4) whether the *theory* has been generally accepted. P in this case introduced no evidence that any of the requirements were met. As such, the court considered the testimony as "pure conjecture" and held it to be inadmissible.
- **Failure to Satisfy *Daubert* Factors Not Dispositive Where Opinions Are Based on Observable Conditions of Product** – *Byrne v. Gracious Living Indus.*, 2003 U.S. Dist. LEXIS 2552 (S.D.N.Y. 2003): **Facts** - The court did not state the facts in detail but the opinion implies that plaintiff sustained injuries when a plastic chair (s)he was sitting on collapsed. Plaintiff sought to introduce expert testimony that as a result of a manufacturing defect, the chair was unreasonably fragile and therefore collapsed under the weight of the P. The expert came to this conclusion based solely on his examination of the failed chair.

Defendant manufacturer moved to preclude the expert testimony on the grounds that the expert did not test his hypothesis and had never published any peer-reviewed articles regarding plastic chair manufacturing. The court denied the motion. **Holding-** The court first stated that the expert's opinion was admissible despite the fact that it wasn't tested because of the nature of his expertise and that fact that the opinion was based 'on observable conditions of the subject chair.' Furthermore, the failure to test or publish articles on the matter 'are forensic quibbles that do not seriously affect the analysis.' The court explained that the expert's examination of the chair constituted a form of testing his hypothesis that a defect in its manufacture caused it to collapse.

- **Treating Physician Who Testifies About Information Acquired in Treating Patient is Not an “Expert Witness”** - *Byrne v. Gracious Living Indus.*, 2003 U.S. Dist. LEXIS 2552 (S.D.N.Y. 2003): **Facts** - After learning that P was planning to use testimony of his treating physician, D moved to exclude that testimony on the grounds that the physician was not identified as an expert witness in response to their interrogatories and therefore precluded from testifying under FRCP 26(a)(2)(A) and (b). The motion was denied. **Holding** - Since the physician was only to testify about information acquired as a result treating the P, he was not considered an expert witness for the purposes of Rule 26. However, the court added that if D can show at trial that the physician was testifying as an expert engaged specifically for trial and not merely as a treating physician then the ruling may be reconsidered.
- **Expert’s Failure to Test Proposed Design alternatives Renders His Testimony Inadmissible –**
 1. *Rypkema v. Time Mfg.*, 263 F.Supp.2d 687 (S.D.N.Y. 2003): **Facts** - P, an experienced cable splicer employed by Nynex (now Verizon), was injured when he fell from an aerial lift truck. According to P's testimony, as he tried to enter the lift bucket on the truck, P used the top portion of the closed bucket door to hoist himself up. However, the door opened unexpectedly causing him to fall to the ground. P sued D manufacturer of the lift on claims of personal injury, breach of warranty, and strict products liability. Following the accident, P's co-worker operated the lift without any problem. It was later inspected by D's expert who found it to be fully functional. P sought to introduce expert testimony that the latch on the bucket door was defective and that an alternatively designed latch would have prevented the

fall. However, the expert did not test any of his proposed design alternatives. D moved to exclude the testimony and the court granted the motion. **Holding-** It is essential that an expert witness proposing a novel design alternative demonstrate that the methodology has been tested and would work satisfactorily. P's expert advocated a number of alternatives including deadbolt and crane latches but had not tested any of them. He further conceded that none of his proposed alternatives was actually used by other manufacturers in the industry and that his approach was entirely untested. Since the expert did not test the alternative designs and failed to consider the possible problems that their implementation may present, the testimony was inadmissible.

2. *Zaremba v. Gen. Motors Corp.*, No. 98-cv-02505, 2003 WL 25781434 (E.D.N.Y. April 28, 2003): **Facts:** P sustained serious injuries when the vehicle in which he was a passenger rolled over. P sued D car manufacturer on a claim of design defect and maintained that faulty design of the vehicle's roof, windows and seat contributed to his injuries. To support this contention, P sought to introduce two expert witnesses. The first expert would testify that alternative roof and glass designs would have better withstood the impact of the crash. The second expert would testify that the alternatives proposed by the first expert would have reduced the extent of the injuries to P. The experts did not produce data, calculations or test results to support their testimony. D moved to exclude the expert testimony and the court granted the motion. **Holding-**The proffered testimony was not based on anything other than speculation and conjecture. Neither expert examined the subject vehicle and neither performed tests to support their conclusions. Furthermore, the proposed alternatives have not been subjected to peer review or evaluation and the experts have given no indication that the proposed alternatives are accepted or utilized by other manufacturers in the industry. As such, the expert testimony is inadmissible.

- **Expert Testimony Not Necessary To Prove Causation -** *Buckley v. Gen. Motors Co.*, 2003 U.S. App. LEXIS 181 (2d Cir. 2003): **Facts** - P, *pro se*, was injured when her 1996 Chevrolet Blazer veered off of the road and rolled over. She sued D car manufacturer alleging that the accident resulted from a defect in the left rear axle of the vehicle. During discovery, D moved to exclude P's expert witness (a mechanic) on the grounds

that he did not meet the qualifications required under Daubert. After excluding the expert, the district court granted summary judgment to D *sua sponte* on the ground that there is no expert testimony that supports causation.' The Court of Appeals affirmed the exclusion of the expert witness but vacated the granting of summary judgment. **Holding:** The court vacated the summary judgment ruling because P had not received notice of the nature and consequences of summary judgment, which she was entitled to receive as a *pro se* litigant. The most significant part of the ruling was added in dicta when the court explained that P's failure to provide expert testimony to support her theory of causation was probably insufficient grounds for granting summary judgment. As the court put it, "[i]t would appear that New York law does not require expert witnesses to prove causation in a product liability action, but permits proximate causation to be established solely on the basis of the jury's consideration of the characteristics of the product and plaintiff's description of how the accident happened." (citations omitted).

- **Expert's Failure to Employ the Suggested Alternative Design in His Private Practice Goes to Weight Not Admissibility** – *Clarke v. LR Systems*, 219 F.Supp.2d 323 (E.D.N.Y. 2002): **Facts** – P's expert testified that had the cover and the motor been interlocked, the motor would not have operated without the cover and P would not have been injured. The expert noted that D has used interlocking covers on similar machines and the cost was not great. D moved to exclude the expert testimony on the grounds that the expert himself never designed an interlock guard on any of the machines that he maintained or designed while an engineer. The motion was denied. **Holding-** The expert's conclusions were based on detailed analysis and evidence. The fact that he himself did not use the design that he advocates may be explained by factors that distinguish the machines that he worked on from the once in this case. In any event, the expert's failure to use an interlock may be used during cross-examination but ultimately goes to weight and not admissibility.
- **Expertise in the General Area is Sufficient to be Considered Qualified** - *Colon ex rel. Molina v. Bic USA, Inc.*, 199F.Supp.2d 53 (S.D.N.Y.2001): **Facts-** [enumerated above] P sought to introduce expert testimony indicating that the lighter was defective on two grounds: (1) it could have been manufactured with a "fail-proof" safety mechanism which would have disabled it completely if the child safety guard were removed; (2) the color and size of the lighter rendered it defective by the fact that it was attractive to children. D moved to exclude testimony completely. The court granted the motion as to both parts of the testimony. **Holding** – On the issue of color and size

of the lighter, the court ruled that the expert was unqualified to testify since he had no experience in the area of child psychology. Regarding the safety mechanism, however, the court found that he was qualified. The expert was an engineer with thirty-two years' experience manufacturing and testing fuel products. The fact that he did not have experience working with lighters specifically did not disqualify him as an expert. "An expert's training need not narrowly match the point of dispute in the case." As such, the threshold requirement of qualification had been satisfied. However, the court then analyzed the four *Daubert* factors and determined that the expert testimony failed all four prongs. The crux of the problem was that the alternative design that he advocated had never been tested. As a result, it could not have been subjected to peer review, subject to a potential rate of error or generally accepted. The court therefore held the entirety of the expert's testimony to be inadmissible.

- **Novel Methodology Need Not Necessarily Be Tested - *Silivanch v. Celebrity Cruises, Inc.*, 171 F.Supp.2d 241 (S.D.N.Y. 2001):** **Facts-** Ps contracted Legionnaires' disease in a whirlpool aboard a cruise ship. They sued the owner of the cruise ship as well as the designer and manufacturer of the filter, alleging that the filter did not properly function in cleaning the water of the whirlpool. P presented expert witnesses who testified as to various tests that they conducted which demonstrated that the filter was defective. The jury found for P and D filed post-trial motions arguing numerous grounds for reversal including improper admission of the expert testimony. The motion was denied. **Holding-** Although the specific test used by the witness may have been a novel one, it will still pass the *Daubert* test because it was simply a variation of well-established methods. Despite the fact that the "specific methodology" met none of the *Daubert* requirements, it was still considered sufficiently reliable. Other factors of the holding included the fact that their admission caused no "substantial prejudice" and a general presumption in favor of admissibility.

b. State Courts

- **Factual issues precluded summary judgment on negligence and strict liability claims - *Mangano v. Town of Babylon*, 111 A.D.3d 801 (2d Dept. 2013):** **Facts** - Plaintiff was injured when a metal dumpster tipped over as she was loading it with trash, and sued, among others, the manufacturer, Cooper Tank & Welding Corp. Defendant manufacturer moved for SJ, which the Supreme Court granted. **Holding** - It was error to dismiss the negligence and strict liability causes of action. Plaintiff's engineering expert opined that it was reasonable to foresee that the dumpster, because of its defective slanted-front design, could be tipped forward in use. He further concluded that the manufacturer could have provided reasonable means of preventing such

accidents, and the manufacturer failed to provide adequate warnings or instructions. Plaintiff expert's affidavit was not conclusory or unsupported by fact or relevant data; thus triable issues of fact existed as to the expert's conflicting opinions.

- **Expert's novel testing methodology must pass Frye test – In re N.Y.C. Asbest. Litig.**, 984 N.Y.S.2d 633 (Sup. Ct. N.Y. Cnty. 2013): **Facts** – Three consolidated product liability cases where plaintiffs contracted mesothelioma from asbestos exposure through their use of Cashmere Bouquet dusting powder, a talc powder manufactured by defendant Colgate-Palmolive. Defendant asserted that there was an absence of proof that its product contained asbestos and attacked plaintiffs' expert, Dr. James Millette. **Holding** – Motion granted to preclude Dr. Millette from offering any opinion that the talc powder sample he tested contained asbestiform contaminant. This was not a question of weight as to the opinions of dueling experts, but rather a question of admissibility involving a scientific opinion that the court believed did not pass muster under Frye. The reliability of a novel scientific testing methodology can never be solely grounded on the stellar reputation of the expert no matter how impressively credentialed he is. The acceptability and reliability of a testing methodology emphasize counting scientists' votes, rather than on verifying the soundness of a scientific conclusion (the court relying on the Court of Appeals' decision in Parker).
- **Conflicting, admissible expert reports raised a genuine issue of material fact in fork lift case- Melendez v. Abel Womack, Inc.**, 103 A.D.3d 609, 959 N.Y.S.2d 252 (2d Dept. 2013): **Facts**- Forklift operator brought action against manufacturers alleging that they were liable under theories of strict product liability, defective design and negligent design for failing to equip forklift with operator door guard, which would have prevented injury to his foot in collision with column. Defendants moved for Summary Judgment. Supreme Court denied. Defendants appealed. Affirmed. **Holding**- Genuine issue of material fact existed regarding whether stand-up forklift was reasonably safe for its intended use without operator door guard, precluding summary judgment on operator's claims for strict product liability, defective design and negligent design against manufacturer. Affidavit of plaintiff's expert, who specialized in mechanical engineering and had published three peer-reviewed papers specifically on issues relating to the safety of stand-up forklifts, was sufficient to raise a triable issue of fact. Given the conflicting expert opinions with regard to the reasonable safety of the subject forklift, Supreme Court properly denied the MSJ.

- **Expert lacked sufficient basis to testify that D-ring was defectively designed-**Delgado v Markwort Sporting Goods, Co., 39 Misc.3d 147(A), 2013 NY Slip Op 50899 (App. Term, 2d Dept. 2013). **Facts**-While playing flag football in 1994, plaintiff got her finger caught in the D-ring holding her opponent's flag on her belt. Under the theory of strict liability for defective design, she obtained a \$1.6 million verdict in Civil Court. The court set aside the verdict under CPLR 4404(a), and plaintiff appealed. **Holding**-Affirmed. Plaintiff's expert did not provide a proper basis for his opinion as to defective design of the D-ring (versus a pull-away type), His tests were invalid. The lower court properly prevented him from relying on two standards which related to children's equipment.
- **Expert's theory that P's cirrhosis was attributable to acetaminophen was not properly founded on general accepted methodology, and therefore was inadmissible-**Ratner v. McNeil-PPC Inc., 91 A.D.3d 63, 933 N.Y.S.2d 323 (2d Dept. 2011): **Facts**-P: had consistently used Tylenol since 1985 to relieve migraines. In 2001, a MRI indicated that 1t had micronodular cirrhosis. In 2004, 1t underwent liver transplant surgery. Thereafter, 1t was diagnosed with incomplete septal cirrhosis and hepatoportal sclerosis. P commenced this action against D manufacturers of Tylenol. P Alleged negligence, failure to warn, defective design and breach of implied and express warranties. Trial court granted D drug manufacturer's motion to preclude x's expert's testimony and for SJ. 1t appealed. Second Department held that x's expert testimony relating to 1t's theory that his cirrhosis was attributable to acetaminophen was not properly founded on general accepted methodology, and therefore was inadmissible. Affirmed. **Holding**- D met its burden on SJ by demonstrating that there was no evidence linking acetaminophen to cirrhosis. P's theory was a novel one. 'It did not put forward any clinical or epidemiological data or peer reviewed studies showing that there was a causal link between acetaminophen and liver cirrhosis. The methodology employed by n's experts, correlating long term, therapeutic acetaminophen use to the occurrence of liver cirrhosis, primarily based upon case studies, was fundamentally speculative and that there was too great an analytical gap between the data and the opinion proffered.
- **Use of expert with no design or manufacturing experience failed to raise issue of fact** - Kiersznowski v. Shankman, 889 N.Y.S.2d 781 (4th Dept. 2009): **Facts** -[Basic facts enumerated above in "Failure to Warn"]. P was injured when she fell from the operator's platform of a fork-lift truck. P elevated the platform

about 12 feet from the ground and took a step back unaware a supplemental platform provided by her employer had become detached. P also failed to fasten her safety belt correctly. P sued D, manufacturer, alleging *inter alia*, that the truck was defectively designed. D moved for summary judgment arguing the fork-lift truck met all applicable safety standards relating to its design. The Supreme Court granted D's motion and the Appellate Division affirmed. **Holding:** D met its initial burden by submitting an expert affidavit from the design engineer of the forklift truck that it met all applicable safety standards. P failed to raise a triable issue of fact with submission of her expert affidavit because P's expert did not have any experience or personal knowledge in the design, manufacture or use of forklift trucks. Also, her expert's conclusions were not based upon any foundational facts, such as a deviation from industry standards or statistics showing the frequency of injury in use of the fork-lift truck.

- **Expert conclusions on need for a compartment door and defective brakes not novel theories requiring a Frye hearing** – Hutchinson v. Crown Equip. Corp., 852 N.Y.S.2d 187 (2d Dept. 2008): **Facts** – P was injured while working on a forklift manufactured by D. P sought to prove the existence of a design defect through expert testimony that the forklift required a compartment door which would have prevented P from being ejected and that the braking system did not employ the necessary redundancy or failsafe circuitry. D moved to preclude the testimony or for a Frye hearing. The Supreme Court denied the motions and the Appellate Division affirmed. **Holding** – The expert's conclusions regarding the lack of a compartment door and defectively designed brakes were not based upon novel theories warranting a Frye hearing.
- **Highly advanced simulation testing not acceptable substitute for actual crash testing when seeking to demonstrate crashworthiness of an alternative design** – Lascano v. Lee Trucking, 2007 N.Y.Misc. LEXIS 6872 (S.C. N.Y. Cty. 2007): **Facts** – While driving a cab-over-engine style truck, manufactured by one of the Ds, P rear-ended a Mack truck whose steel rear-end penetrated the front of P's truck causing catastrophic injuries. P sued, *inter alia*, the manufacturer, arguing the vehicle was defectively designed in that it did not adequately protect its occupant. P through experts proposed three alternative designs: a conventional truck, a modified conventional truck and a cab-over-engine truck with an enhanced structure – each of which would have better protected the P and would be feasible to manufacture. P proposed to present this evidence through highly advanced

simulated crash testing called LS-DYNA simulations, articles published by experts in the field, and reports about crash tests of other similar vehicles. Ds argued that the LS-DYNA simulations were unreliable on their own and needed to be validated by actual crash tests and that the reports and articles upon which the P intended to rely did not involve vehicles that were substantially similar to the Ps. The court held a Frye hearing to determine admissibility. **Holding** – P may not use LS-DYNA simulation testing to present evidence of its alternatives designs. This brand of simulated testing has not been generally accepted in as reliable evidence without being supported by actual crash testing. P’s own expert admitted that LS-DYNA testing was not a replacement for actual crash testing. Further, the additional papers and reports, upon which the P intends to rely, concern generalized categories of vehicles rather than the specific one at issue and the conditions of the tests discussed were not substantially similar to those at issue in the P’s case.

- **Physician specializing in occupational medicine qualified to give expert opinion regarding whether exposure to chemicals caused injury; additional holding on preemption** – Lopez v. Gem Gravure Co., 858 N.Y.S.2d 226 (2d Dept. 2008): **Facts** – P claimed exposure on the job to certain chemicals manufactured and sold by Ds, caused him to suffer end-stage renal failure. Ds moved for summary judgment arguing, *inter alia*, that one of the P’s experts was unqualified to render an opinion on the matter because she specialized in environmental and occupational medicine rather than nephrology. D also argued that P’s failure to warn cause of action based on D’s Material Safety Data Sheets for the specific chemicals to which P was exposed was preempted by the federal Occupational Safety and Health Administration Law or the regulations promulgated there under. The Supreme Court denied the motion and the Appellate Division affirmed. **Holding** – P raised a triable issue of fact. P’s expert is not unqualified simply because she does not specialize in nephrology. She is a board-certified physician in internal medicine and occupational medicine and has extensively lectured and published on the subject of occupational medicine. The objections to her qualifications do not preclude her testimony but only raise an issue of fact as to the weight it is to be accorded. Further, P’s failure to warn claim is not preempted by the federal standards. The D’s objections raise issues regarding the adequacy of the warnings which are questions for the jury.
- Expert must be able to establish a link between the amount of exposure to a toxin and the claimed injury- Parker v. Mobil Oil, 824 N.Y.S.2d 584 (2006): **Facts**- P, a gas station attendant,

was exposed to benzene for a period of 17 years and ultimately contracted Leukemia. P sued D benzene manufacturer, claiming that it failed to warn of the danger associated with benzene and failed to provide adequate protective gear. P offered affidavits of experts who concluded that exposure to benzene causes leukemia and that P was exposed to sufficient levels of benzene to have caused his leukemia. However, the experts did not specifically quantify the exact levels of P's exposure. D moved to strike the expert opinions as unreliable. Supreme Court denied the motion, holding that the experts sufficiently established a link between P's exposure to benzene and his disease. Appellate Division reversed, holding that the failure to quantify P's exposure renders the opinions not scientifically reliable. The Court of Appeals affirmed the Appellate Division's holding but disagreed with its reasoning. *Holding*- the Court of Appeals held that an expert need not quantify the exact levels of exposure to a toxic substance in order to establish a causal link. Rather, as long as the expert can establish a link between the exposure and the disease, the opinion will be admissible. This can be done through mathematical modeling, assessing the overall level of exposure at the facility or other similar methods. Here, however, the opinions were conclusory, stating only that P was "frequently" exposed to "excessive" amounts of benzene without quantifying or elaborating upon those statements in any way. Thus, the opinions were not reliable and should have been excluded.

- **Expert must be qualified by knowledge or experience in area of proffered testimony - O'Boy v. Motor Coach Indus., Inc.** 834 N.Y.S.2d 231 (2d Dept. 2007): *Facts*- P was injured when his head struck the rear access door of a bus he was entering. P sued D bus manufacturer claiming that the rear access system was defectively designed. D moved for summary judgment, arguing that the design was not defective. In opposition, P offered the opinions of a licensed professional engineer. However, P's expert did not have any experience with rear access doors systems nor did he have experience with bus design or manufacture in general. Supreme Court granted the motion and the Appellate Division affirmed. *Holding*- P's expert did not possess knowledge or experience that rendered him qualified to offer an opinion on the issue of the rear access door design. Therefore, the opinions were insufficient to raise an issue of fact.
- **Frye hearing is appropriate to determine whether the evidence presented is generally accepted - Duffy v. Bristol-Myers Products**, 12 Misc. 3d 1155 (A) (Sup. Ct. N.Y. Cty. 2006): *Facts* - P suffered an ischemic stroke while taking Comtrex, a

drug that contains PPA. P sued D manufacturer, claiming that Comtrex caused the stroke and that the drug is defective. D introduced evidence that the type of stroke suffered by P is not associated with PPA and moved for summary judgment. In opposition, P offered an expert affidavit stating that his stroke was caused by Comtrex. Supreme Court held that a Frye hearing was warranted. *Holding* – citing decisions of Judges Rothstein and Ackerman in the PPA MDL, the court noted that there is evidence indicating that even ischemic strokes can be caused by PPA (Judge Rothstein is in the PPA MDL; Judge Ackerman was in charge of the cases statewide in Pennsylvania. Thus, the court held that a Frye hearing was necessary to determine whether or not this is the case and further, whether the specific stroke suffered by P was caused by Comtrex.

- **Frye hearing unnecessary where the evidence relied upon is generally accepted** - Nonnon v. City of N.Y., 2006 N.Y. App. Div. LEXIS 7326 (1st Dept. 2006): *Facts* – Ps, a group of residents who lived near a landfill owned and operated by D, sued D claiming that toxic substances in the landfill caused cancer related illnesses and deaths. D moved for summary judgment based on expert affidavits stating that there is no connection between the illness and the landfill. In opposition, Ps submitted toxicological and epidemiological studies and expert affidavits to the contrary. D also asked for a Frye hearing to determine the reliability of the experts' testimony and reports. Supreme Court denied the motions for summary judgment and a Frye hearing, and the Appellate Division affirmed. *Holding*- the expert testimony challenged by D was based on studies and analyses that utilized generally accepted methodology in reaching the conclusions. Furthermore, the sciences of toxicology and epidemiology are not novel. Thus, Ps demonstrated an issue of fact and there was no need for a Frye hearing.
- **Frye hearing unnecessary where the evidence relied upon is generally accepted** - Berger v. Amchem Products, 2006 N.Y. Misc. LEXIS 1845 (S.C. N.Y. Cty. 2006): *Facts*- Plaintiffs' decedents died as a result of mesothelioma. P sued D asbestos manufacturers, claiming that the decedents suffered their illnesses as a result of exposure to asbestos in motor vehicle brakes in the course of their employment. D submitted expert affidavits indicating that mesothelioma could not be contracted as a result of exposure to "friction products" such as brake pads. . P submitted expert affidavits to the contrary. D moved for summary judgment or in the alternative a Frye hearing. Supreme Court denied the motions. *Holding*- the fact that mesothelioma

can result from exposure to asbestos products is well known and accepted in the scientific community. The opinions offered by Ps' experts were reliable and based on accepted studies and methodologies. Therefore, an issue of fact existed and a Frye hearing was not necessary.

- **Novel use of a combination of tests requires a Frye hearing - Styles v. GM. Corp., 20 A.D.3d 338 (1st Dept. 2005): *Facts*- Ps decedent suffered fatal injuries when the vehicle he was driving overturned and the roof crushed. P sued D manufacturer, claiming that the vehicle was defective in that it was not crashworthy. P's experts conducted two separate tests on an exemplar vehicle. The first test consisted of removing the windshield and lowering the vehicle upside down on its roof, causing the roof to crush. The second test performed on the same vehicle, was a drop test. D moved for a Frye hearing and the trial denied the motion. After a P's verdict, Appellate Division reversed and remanded for a Frye hearing. *Holding* - While each of the tests independently is generally accepted, the combination of both tests on the same vehicle novel. Thus, Frye hearing should have been held prior to the trial to determine the admissibility of the evidence.**
- **Expert affidavit must be supported by actual facts and not just the opinion of the expert - D'Auguste v. Shanty Hollow Corp., 809 N.Y.S.2d 555 (2d Dept. 2006): *Facts* - P was injured when his left ski snapped off snapped off causing him to fall down the mountain. A report prepared by an employee of the shop that rented the ski equipment stated that one of the ski bindings had a cracked heel housing. P sued D manufacturer, claiming that the ski binding was defective. D moved for summary judgment based on an expert opinion that the housing was not defective. In opposition, P submitted the affidavit of an expert who concluded that it was defective. P's expert was not experienced with ski equipment. His opinions were not based on any testing, statistical analysis or other reliable data. Supreme Court granted the motion and the Appellate Division affirmed. *Holding* - The P's expert did not have experience in the manufacture or design of ski equipment and therefore, his opinions had no credence. Furthermore, the affidavit was not supported by foundational facts or actual testing and therefore was of no probative value. Therefore, P failed to establish the existence of an issue of fact and summary judgment was appropriately granted.**
- **Must be Generally Accepted Under Frye or Based on Actual Clinical Data** - Selig v. Pfizer, 290 A.D.2d 319; 735 N.Y.S.2d 549 (1st Dept. 2002): *Facts* - P sought to introduce an expert witness whose testimony was to be based on studies that suggested a causal

link between Viagra and heart attacks. One study indicated that Viagra causes a small drop in blood pressure and an increase in heart rate. A second study indicated side effects in a drug "related" to Viagra, known as Milrinone, although the evidence indicated that the two drugs actually caused different reactions. A third study concluded that Viagra might cause heart problems, but only invited further studies and did not make any conclusions based on the data. D moved to preclude the testimony and for summary judgment Supreme Court granted both motions and the Appellate Division affirmed. **Holding:** Under *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923), testimony based on scientific data must be generally accepted in its specified field. The studies in question were not based on any scientific evidence or accepted principles and thus failed the *Frye* test. Regarding the first study, there is no evidence indicating that the drop in blood pressure or increased heart rate actually led to heart attacks. The second study was not admissible because the evidence indicated that despite their similarities, the effects of Viagra and Milrinone were in fact quite different. Even in the areas in which they were similar (their effect on phosphodiesterase 3) there was no evidence that the effects of Viagra were capable of inducing a heart attack. The final study merely suggested that a link *may* exist and that further research was necessary. However it did not draw any factual conclusions and thus cannot be used as evidence.

- **Expert Testimony Must Be Supported by Facts** – *Ramirez v. Sears Roebuck & Co.*, 286 A.D.2d 428, 729 N.Y.S.2d 503 (2d Dept. 2001): **Facts:** [enumerated above in 'design defect']. **Holding-** The court dismissed the testimony of the expert witness out of hand because it "was not supported by foundational facts or any other type of evidence." Quoting *Amatulli by Amatulli v. Delhi Constr. Corp.*, 77 N.Y.2d 525; 571 N.E.2d 645; 569 N.Y.S.2d 337 (N.Y. 1991) the court explained that since the testimony was "unencumbered by any trace of facts or data [and thus] should be given no probative force whatsoever."
 - *See also Clarice v. Helene Curtis, Inc.*, 742 N.Y.S.2d 325 (2d Dept. 2002): Dismissing P's case against deodorant manufacturer because "[t]he opinion of the plaintiffs expert physician, a general practitioner, that the plaintiffs disease was triggered by her use of the defendant's product, was speculative and conclusory."
 - *See also- Cervone v. Tuzzolo*, 291 A.D.2d 426; 738 N.Y.S.2d 60 (2d Dept. 2002): Dismissing P's claim that a dinette table was defectively designed causing her to trip, on the grounds that "[t]he testimony of the plaintiffs expert, who had no practical experience or personal knowledge in the design of dining room furniture, was unsupported by foundational

facts such as a deviation from industry standards or statistics showing the frequency of injuries caused by such a design.'

3. Res Ipsa Loquitur

- **Application of res ipsa loquitur doctrine requires exclusive control.** Z.C. v. Wal-Mart Stores, Inc., 574 Fed. Appx. 52 (2d Cir. 2014): **Facts-** Plaintiff sustained an eye injury when using a BB gun made by defendant Daisey and sold by defendant Wal-Mart. The district court granted SJ, and plaintiff appealed, asserting that he had a case based upon res ipsa loquitur (RIL). He also claimed he had a manufacturing defect cause of action. It was conceded by the parties that an examination of the gun after the accident would not reveal any flaws. **Holdings-** The SJ was affirmed. RIL did not fit the facts since the defendants did not have exclusive control of the BB gun and its internal firing mechanism. Nor could a claim for manufacturing defect be sustained by relying on circumstantial evidence, as allowed by Speller, which requires the elimination of other causes. Here the gun might have been handled by others, who may have dropped it.
- **Res ipsa loquitur applied where event was not one which normally occurs without someone's negligence.** Canzanese v. Otis El. Co., 2015 WL 423207 (W.D.N.Y. 2015): **Facts-** As plaintiff was entering an Otis elevator at the Seneca Niagara Casino, the doors closed on her, the outer-door striking her arm causing her to fall backwards and break her hip. Otis had manufactured and installed the elevator and had maintained it thereafter after a service contract. On a SJ motion, the court has available testimony of elevator experts on both sides, and also a video surveillance film. The video showed her husband entering the elevator 2 seconds before. Plaintiff claimed that the timing was off and the sensor was not set to a 3 second opening time and sought to rely on res ipsa loquitur (RIL). SJ denied. **Holding-** The doctrine of RIL applied here, where the plaintiff showed that the event is not one that normally occurs without someone's negligence; and the elevator was under the exclusive control of Otis. There were fact issues if the doors closed too quickly.
- **Summary judgment warranted when there is a lack of prior history of escalator performing similarly to alleged defect; res ipsa loquitur inapplicable.** Lenigan v. Syracuse Hancock Intl. Airport, No. 5:10-cv-1420 GTS/DEP, 2013 WL 149461 (N.D.N.Y. Jan. 14, 2013): **Facts-** Plaintiff was riding an escalator that was manufactured, inspected and maintained by Defendant Otis. Escalator allegedly failed to operate properly, causing her to fall backward and sustain severe injuries. Defendant Otis moved for summary judgment and defendant Syracuse (airport) moved for Summary Judgment. Both motions were granted. **Holding-** The maintenance records for the escalator going back two years before the accident revealed no prior history of jerking or stopping and restarting abruptly. Airport employees never experienced or otherwise observed any issues with the operation of the escalator. None

of the prior six incidents involved the defect asserted in this action. No evidence existed that five of the six incidents were reported to defendant Otis. Plaintiff failed to adduce evidence controverting that the escalator was not in defendant Otis' exclusive control. Evidence of extensive amount of public contact on a daily basis is, in and of itself, sufficient to preclude the application of *res ipsa loquitur* in personal injury cases arising from escalators that suddenly jerked, shook and/or stopped. Plaintiff failed to respond to defendant Otis argument that Schindler Elevator Company designed, manufactured and produced the escalator, and thus they cannot be liable for strict product liability.

- **Plaintiff raised issue of fact as to whether *Res Ipsa Loquitur* was applicable in product liability case** - *O'Connor v. Circuit City Stores, Inc.*, 789N.Y.S.2d 252 (2d Dept. 2005): *Facts* – P was injured when she was struck by an electronically controlled door at the store owned by D. P sued claiming that the doctrine of *Res Ipsa Loquitur* was applicable and that the injury would not have occurred absent negligence of D. D moved for summary judgment, arguing that it did not have exclusive control of the door. Supreme Court granted the motion and Appellate Division reversed. *Holding* - In order to make out a prima facie case for *Res Ipsa* the event (1) must be a kind which ordinarily does not occur absent someone's negligence; (2) must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) must not have been due to any voluntary action or contribution on the part of the plaintiff. Here, P raised an issue of fact as to all three factors and summary judgment was therefore inappropriate.

4. Circumstantial Evidence; Inference of Defect; Elimination of Alternatives

- **Triable issue of fact raised as to whether or not defective alarm device was substantial factor in exacerbating firefighter's injuries** – *Dryer v. Musacchio*, 117 A.D.3d 1115, 985 N.Y.S.2d 302 (3d Dept. 2014): *Facts* – Firefighter responded to a fire at a bowling alley and, while attempting to locate the fire, a large portion of the ceiling collapsed on him. Additional firemen entered the building in attempt to find plaintiff, however they could not hear plaintiff's Personal Alert Safety System (PASS) device sounding. The device, which is integrated into the firefighter's self-contained breathing apparatus, emits audible noises when the air circuit on the breathing apparatus is opened. Plaintiff's PASS alarm did not go off. Plaintiff sustained serious injuries including burns and loss of his right arm, exacerbated during the lengthy period in which he was not found. Defendant manufacturer's MSJ was denied. *Holding* – Affirmed. Defendant's argument was centered on the substantial factor element of the product liability claim. More specifically, they contended that every rescuer knew of plaintiff's location within the debris, thus the defect did not hinder the rescue. Testimony from witnesses that included plaintiff's medical expert, was

sufficient to raise triable issues of fact as to whether the delay in extracting plaintiff from the burning debris field exacerbated his injuries. One witness, an engineer and expert in personal protection equipment, asserted that the failure of the device to function as intended contributed to the severity, because he was covered in burning debris during search and rescue.

- **Failure to exclude all other causes for vehicle's failure not attributable to manufacturer compels dismissal of product liability claim- Rodriguez v. Ford Motor Co., 106 A.D.3d 525, 965 N.Y.S.2d 451 (1st Dept. 2013): *Facts*-Plaintiff sought damages for personal injuries she sustained when she was hit by a Ford vehicle; her claim was based on the driver's claim that the steering froze and the brakes failed. On prior appeal, this Court reversed a grant of summary judgment to Ford. Affirmed. *Holding*-Accident reconstruction expert's testimony about tire marks at the scene was inadmissible. Documents concerning manufacturer's investigation into claims of sudden acceleration were not admissible. Pedestrian failed to preserve for review on appeal claim regarding trial court's grant of owner and operator's motion for a directed verdict. New evidence was produced that the driver could have been intoxicated meaning the law of the case doctrine did not preclude a directed verdict in Ford's favor. Plaintiff's failure to exclude all other causes for the vehicle's failure not attributable to Ford compels the dismissal of the product liability claim. Plaintiff failed to exclude driver's negligence as a cause of the vehicle's failure not attributable to Ford**
- **P must exclude all other causes of injury in order to succeed on liability- Blount v. Stryker Cor.p., et al., 2012 WL 1029931 (W.D.N.Y. 2012): *Facts*· P was injured by a defective hip implant device manufactured and distributed by D Stryker. Device was replaced and discarded during second surgery. D s moved for SJ. Motions granted. *Holding*· P did not exclude all potential causes of product's failure that are not attributable to Ds Stryker. The record indicated that there were several causes. Failure to warn was not properly pleaded, but nonetheless, no evidence was produced by 1t to support such a claim**
- **Proof of defect can be done by elimination of alternative causes; no Frye hearing should have been held where issues not novel- Alexander v. Dunlop Tire Co., 81 A.D.3d. 1134 (3d Dept. 2011): *Facts*- This action stemmed from a single-car rollover accident. Three of the four Ps were injured. The fourth P is the surviving spouse of a passenger who was killed in the accident. Actions were commenced against multiple Ds, including D, Dunlop Tire Corporation, alleging strict liability, breach of warranty and negligence. Ps asserted that accident was caused by tread separation failure of the left rear tire, a product manufactured by D. Following discovery, D moved to exclude testimony of Ps' expert, Robert Ochs, who concluded after a visual and tactile analysis of subject tire that tread separation was due to an adhesion/cohesion failure**

caused by defects in manufacturing process. Additionally, D moved for SJ. Following a *Frye* hearing, the trial court excluded Ps' expert's testimony based on the fact that the support for his conclusion was lacking. Consequently, D's motion for SJ was granted. D's motion was overturned on appeal. **Holding-** A products case can be proven without evidence of any particular defect. In order to prove a claim of defective manufacturing, a plaintiff must prove that the product did not perform as intended and exclude all other causes for the product's failure that are not attributable to defendant. Och's experience is undisputed. D argued that Ps' expert used process of elimination to rule out possible causes of tire failure and this is not a scientific process. Because D is not actually challenging a novel scientific procedure, *Frye* is inapplicable here, and thus traditional standards in evaluating a motion to preclude evidence were applied. Ps' expert undertook a generally accepted methodology of visual and tactile inspection to analyze and determined potential causes of tread separation failure. Additionally, Ps' expert indicated that because of the tire's condition, no other tests were feasible. This testimony is admissible because there was sufficient foundational evidence, and that such evidence raised a triable issue of fact precluding SJ.

- **Circumstantial evidence sufficient to raise jury question in sudden acceleration case** – *George v. Ford Motor Co.*, 2007 U.S. Dist. LEXIS 90829 (S.D.N.Y. 2007): **Facts** - At a *Daubert* hearing, Ps initially planned to introduce testimony from a witness that “transient electric signals” triggered a malfunction of the cruise-control system of the vehicle causing the accident, but later withdrew that witnesses' testimony. D moved to exclude the testimony of the Ps' other witnesses that they claimed was dependent upon the witness now no longer testifying. The D also moved to dismiss the case, claiming that the Ps could no longer succeed in raising a material issue for the jury. Ps argued that the testimony of the remaining witnesses was not being offered to advance the theory of transient signals but to exclude possible alternative explanations such as driver error and to corroborate testimony by occupants of the vehicle about the human factors. Ps no longer sought to identify a specific defect but intended to submit evidence that the car suddenly accelerated and that no action of the driver or other failure such as worn or poorly maintained brakes contributed to the accident. The district court denied the D's motion. **Holding** – Absent a specific defect, Ps may rely upon circumstantial evidence to prove their case. The testimony the Ps seek to offer would tend to refute the driver's responsibility for the crash. Ps' case may not survive a motion for a directed verdict but judgment for the defendant cannot be awarded here
- **Plaintiff's Subjective Belief is Insufficient to Establish the Presence of Asbestos** – *Plumb v. A.C.S., Inc.*, 759 N.Y.S.2d 809 (3d Dept. 2003): **Facts** - P alleged that he was exposed to asbestos-containing

products manufactured by GE in 1941 and other asbestos materials manufactured by Sears from 1950 through 1960. In 2000, P was diagnosed with mesothelioma as a result of exposure to asbestos. Before trial, P settled with GE. The jury apportioned 98% of the responsibility to GE and 2% to Sears. The basis of GE's liability was P's testimony in which he stated his belief that the GE electrical cables he worked with contained asbestos because there was a high intensity of heat generated from those cables. He also stated his belief that a gray substance inside the cable was asbestos. After the verdict was rendered, P moved to set aside the verdict in so much as it apportioned liability between GE and Sears. The Supreme Court granted the motion and the Appellate Division affirmed. **Holding** - A jury verdict may be set aside when there is no competent evidence to support it. Here, the jury apportioned liability based on P's speculative comments as to the nature of the products that he was working with. There was no proof presented that that cables actually did contain asbestos materials. Therefore, the jury's apportionment of fault to GE could not be sustained and the court correctly granted the motion to set aside that portion of the verdict

- **Definitive Testimony of P is Sufficient to Establish Use of Defendant's Asbestos Products** – *Taylor v. A.C.S., Inc.*, 762 N.Y.S.2d 73 (1st Dept. 2003): **Facts** - P sustained undisclosed injuries as a result of prolonged exposure to asbestos. P testified that from the 1970s through the 1990s, he used asbestos-laden gloves, aprons and towels that bore the symbol of D manufacturer. In 1977, D had ceased its production of asbestos products. D moved for summary judgment, arguing that P failed to offer proof that D's products were actually those that P used over the years especially in light of the fact that D stopped manufacturing the dangerous products almost 20 years before P stopped working. The trial court granted the motion and the Appellate Division reversed. **Holding** - P's direct testimony that he used products containing D's symbol was sufficient to create a triable issue of fact. D had introduced no evidence demonstrating that the asbestos products that had previously manufactured were not available at the time that P claimed to been exposed to them.
- **Specific Defect Need Not be Alleged** - *Jarvis v. Ford Motor Co.*, 283 F.3d 33 (2d Cir. 2002): **Facts** - P was injured when her six-day-old minivan suddenly accelerated and crashed. She attempted to brake repeatedly but was unsuccessful. P introduced expert witnesses who testified as to possible causes for acceleration but did not definitively identify a specific defect. D moved for summary judgment on the grounds that P failed to provide proof of a specific defect. The District Court granted the motion and the Second Circuit reversed. **Holding** - Citing *Codling v. Paglia*, 32 N.Y.2d 330; 298 N.E.2d 622; 345 N.Y.S.2d

461 (N.Y. 1973) and Restatement (Third) of Torts: Products Liability § 3 (1998), the Court explained that a specific malfunction need not be proved in order to succeed in a claim of defect. The evidence offered in this case was enough to create an inference of defect.

- **Must be the Only Possible Cause of the Injury** - *McEvily v. MediSense, Inc.*, 2002 WL 1402242 (S.D.N.Y. 2002): **Facts**- P, a Type II diabetic, began using a blood glucose testing meter in 1995 that was manufactured by D. Like all such meters, this one required the insertion of a "test strip" for the blood to be placed on. Test strips are purchased separately from the meter and each time a new set of strips is used, the meter must be calibrated to the code that appears on the box of those strips. This is accomplished by entering the information on the "calibration bar" that is included on every box of new strips. For example, if a box of test strips bears the code "ABC" the meter must be calibrated to "ABC" in order to properly function. If not properly calibrated, the meter's readings will be inaccurate. In 1997, after having used the meter for two years without incident, P tested his blood sugar levels in his doctor's office. The meter indicated a blood sugar level of 298 mg/dl. However, separate tests conducted by the doctor and in a laboratory that same day, indicated that his actual blood sugar level was more than 440 mg/dl. P filed suit, alleging that the meter was defective and seeking damages for loss of consortium. Aside from the discrepancies in the tests results on that one day, P submitted no other evidence to indicate that the meter was defective. D moved for summary judgment and introduced evidence that (*inter alia*) the meter was miscalibrated on the day of P's visit to the doctor and that the miscalibration caused the reading to be inaccurate. The motion was granted. **Holding** - In order for a products liability action to proceed on a claim of inference of defect, P's proof must exclude the possibility of any other cause of the incident. Here, D presented evidence that the meter was miscalibrated on the day that P claims it malfunctioned, which P has not disputed. D also presented evidence that miscalibration can lead to the kinds of erroneous readings that P encountered. As such, P "completely failed to exclude other possible causes of the incident."

- **Burden of Proof After Disputation of the Inference**- *Speller v. Sears, Roebuck and Co.*, 742 N.Y.S.2d 96 (2d Dept. 2002): **Facts**- P was injured in a fire that originated in her kitchen. She sued, claiming that the fire was the result of a defective refrigerator. Following discovery, D manufacturer moved for summary judgment and submitted the deposition testimony of numerous experts stating that the fire originated from a source not attributable to their product. In opposition to the motion, P presented an expert witness who testified that the fire could have originated from the refrigerator or an external source. Relying on P's expert testimony the Supreme Court denied the motion but the Appellate Division reversed. **Holding**- Once D has introduced evidence establishing that the P's injuries were not necessarily caused

by a manufacturing defect in the product, the burden then shifts back to P who must then produce “direct evidence of a defect in the product” in order for the motion to be defeated. The equivocal testimony of P’s expert witness fell short of meeting that burden.

- **Burden of Proof After Disputation of the Inference-** *Rachlin v. Volvo Cars of North America, Inc.*, 289 A.D.2d 981; 734 N.Y.S.2d 798 (4th Dept. 2001): **Facts** – Shortly after she leased a car, P was coming off of an exit ramp when the brakes allegedly failed causing her to collide with a truck in front of her. D manufacturer submitted affidavits stating that in the week prior to the incident the vehicle underwent a 4-5 hour test in which it showed no signs of brake trouble. Furthermore, there were no “recorded fault codes” either before or after the accident and the technician was unable to duplicate the alleged failure. D moved for summary judgment and in opposition to the motion, P presented an expert who testified that “possible air in the braking systems...could have compromised the ability of this vehicle to be operated safely” (emphasis added). Supreme Court granted D’s motion and the Appellate Division affirmed. **Holding** – The court held that the prior and subsequent inspections were sufficient evidence to shift the burden back to P and require “direct evidence” that a defect existed. P’s expert witness did not succeed in presenting any such evidence.
- **Circumstantial Evidence Must Have a Sound Basis** - *Levine v. Sears Roebuck & Co.*, 200 F.Supp.2d 180 (E.D.N.Y. 2002): **Facts**- P was injured when she slipped over the door of a dishwasher that was hanging lower than it should have been. P had been aware of the defect and called a repairman from D company who tried to fix it but did not succeed. She showed him that it was still shaky, loose and slanted but he said that this was the best he could do. P sued, alleging (*inter alia*) strict liability and failure to warn on the part of the service technician. D moved for summary judgment and the motion was granted. **Holding** - A specific defect need not be proven by direct evidence, but may be shown through circumstantial evidence that the products did not perform as intended by the manufacturer. However, there must be some sound basis for creation of the inference. Plaintiffs “speculative and wholly conclusory allegation” that there must have been some defect in the door, without more, is not enough.
- **Conclusory Expert Opinions are Insufficient to Defeat Motion for Summary Judgment** – *Schrader v. Sunnyside, Corp.*, 297 A.D.2d 369 (2d Dept. 2002): **Facts**- P was injured when a can of lighter fluid that he was holding exploded as he was lighting a barbeque after soaking the coals with the fluid. He sued D manufacturer / distributor / seller on a claim of, *inter alia*, design defect. D moved for summary judgment on unspecified grounds and the trial court denied the motion. Appellate Division reversed. **Holding**- After D had established its *prima facie* entitlement to summary judgment, the burden shifted to P to prove

that material issues of fact remained. Here, P merely provided expert opinions that were conclusory or unsupported by the record, which is insufficient to defeat D's motion for summary judgment.

- *Codling v. Paglia*, 32 N.Y.2d 330; 298 N.E.2d 622; 345 N.Y.S.2d 461 (N.Y. 1973): Where P is unable to furnish evidence of any specific defect, he may still proceed on a product liability claim by presenting circumstantial evidence excluding all causes of the accident not attributable to the allegedly defective product. This creates an inference that the accident must have resulted due to some defect in the product

5. Standards, Publications

- **Not Dispositive of Issue Of Defect** – *Clarke v. LR Systems*. 219 F. Supp.2d 323 (E.D.N.Y. 2002): **Facts** - D challenged the admissibility of P's expert on the grounds that the product as originally designed comported with the standards set by the American National Standards Institute. As such, D argued that the expert testimony labeling the product as defectively designed should not be admitted. The motion was denied. **Holding:** The court rejected D's argument and reiterated the long established rule that 'Compliance or lack of compliance with industry safety standards... is not dispositive of the issue of a design defect and other evidence concerning the design and safety of the machine may be considered.'

6. Trade Secrets

- **Trade Secrets Not Protected If They Are Indispensable** – *Hodgson v. Isolatek Int'l Corp.*, 300 A.D.2d 1047, 752 N.Y.S.2d 472 (4th Dept. 2002). **Facts** - P leased five floors of a building and hired D to apply a spray on fireproofing material called CAFCO 300. Shortly after the CAFCO 300 was applied, mold and fungus were discovered. Efforts to remove them were unsuccessful and the floors were destroyed and rebuilt. After D refused to answer interrogatories and document requests that sought disclosure of the ingredients of CAFCO 300 on the grounds that it was a protected trade secret, P moved to compel compliance. The trial court granted the motion provided that counsel for P executes a 'reasonable confidentiality agreement.' D appealed and the Appellate Division affirmed. **Holding:** The ingredients of CAFCO 300 were 'indispensable to the ascertainment of truth and cannot be acquired in any other way'. As such, the trial court was correct to compel their disclosure

7. Similar Claims

- **D Must Provide Information About Claims/Complaints Similar o Those of P Regardless of When Made** - *Hodgson v. Isolatek Int'l Corp.*, 300 A.D.2d 1047, 752 N.Y.S.2d 472 (4th Dept. 2002): **Facts** - P submitted interrogatories requesting information about other claims of mold and fungus after application of CAFCO 300. D argued that the request should be limited only to those incidents that occurred prior to the

time that CAFCO 300 was applied to P's property. P moved to compel compliance and the trial court granted the motion. Appellate Division affirmed. **Holding-** The court found D's assertion to be totally without merit and ruled plaintiffs in product liability cases are entitled information about all claims similar to the ones alleged regardless of when they were made.

8. Spoliation

- Cody v. Scifit Sys., Inc., 998 N.Y.S.2d 305 (Table), 2014 WL 4449693 (Sup. Ct. 2014): **Facts-** Plaintiff, 85 years old, went to a cardiac rehab department of co-defendant Hospital to use defendant Scifit's treadmill. As she started it, it went to full speed and she was thrown off and injured. After complicated discovery, plaintiff found that defendant Scifit had, after receiving notice of the accident, but before plaintiff's expert had examined it, modified the software on the machine. It put in a patch that prevented it from running at once up to full speed even if the control button was held down. Plaintiff's expert, not knowing of the modification, has come up with an explanation of how the machine failed. Plaintiff asserted a claim for spoliation, based on defendant's change of the machine without notice. Defendant Scifit sought summary judgment. **Holdings-** After review of conflicting expert testimony, the court denied defendant's MSJ. Even though plaintiff's expert might have made some misassumption, and defendant's expert made out a prima facie basis for SJ, plaintiff had developed this into a battle of experts, to be resolved by a jury. On the spoliation issue, the court found that the defendant had committed spoliation, as laid out in the law by the Squitieri and other decisions. The proper sanction for this was to allow the jury to draw an adverse inference (based on PJI charge 1:77).
- **Striking plaintiff's complaint for spoliation may be appropriate where vehicle lost** – Affronte v. Toyota Motor Sales, U.S.A., 41 Misc.3d 1223(A), 981 N.Y.S.2d 633 (Sup. Ct. Rich. Cnty. 2013): **Facts** – Plaintiff sustained injuries due to an unspecified defect in the vehicle's supplemental restraint system (SRS), better known as an airbag system, which spontaneously deployed. The vehicle was manufactured and sold by Toyota Motor Sales, U.S.A. to a dealer, Gateway Toyota, and in turn sold to plaintiff. Within a couple of days of the accident, police informed plaintiffs that the vehicle could not be kept on the street, thus plaintiffs had the vehicle towed to a junkyard. Defendants moved for SJ due to plaintiffs' spoliation of crucial evidence. **Holding** – Defendants' motion was granted. The court stated that the defendant correctly pointed out that when a product liability action arose from an incident involving a single person, there were two witnesses, the plaintiff and the product. Defendants' expert affidavits demonstrated defendants were prejudiced by plaintiffs' expert to preserve the vehicle, while plaintiffs' expert submitted no evidence rebutting the defense's position that the vehicle

was necessary to understand if the air bag malfunctioned. Thus, striking the plaintiffs' complaint was an appropriate sanction.

- **Disposing of shower glass constituted spoliation and dismissal of case** - Antonucci v. Home Depot U.S.A., Inc., 34 Misc.3d 1212(A), 2012 N.Y Slip Op. 50061(U) (Sup. Ct. Dutchess Co. 2012): *Facts*- Ps asserted strict product liability, negligence, breach of warranty and loss of consortium claims against Ds as a result of 1t injuring her hand when the glass shower door in their home broke. The shower door was purchased at Home Depot and P installed the door. Ps discarded the shattered remnants and replaced the door before this action commenced. /1s moved for SJ and sanctions for spoliations of evidence. Motion granted. *Holding*- No pictures, videos or other recordings or visual evidence exist which depict the subject glass door prior or after the accident. Ds never had an opportunity to inspect subject door. There was no way for Ds to defend themselves in absence of crucial evidence. P's case was dismissed
- **Partial preclusion warranted by removal of key piece of evidence from allegedly defective RV prior to other party's inspection** - Wade v. Tiffin Motor Homes Inc., 686 F. Supp. 2d 174 (N.D.N.Y. 2009): *Facts* - [Other facts enumerated above in "Breach of Warranty" and "Economic Loss" sections]. Ps were owners of a recreational vehicle (RV) that was destroyed in a fire. Ps and their insurers sued D, manufacturer, alleging strict product liability, breach of warranty and negligence. Specifically, Ps alleged the RV's propane gas system was defective, causing a fire that resulted in a complete loss of the RV and loss of Ps' property inside. Several days after the fire, Ps' expert fire investigator inspected the destroyed RV and took pictures. He also removed piping from the RV's propane gas system because he was informed the RV would be towed away shortly thereafter. Seven days later D's expert inspected the RV, shrink-wrapped it and towed it to a storage facility. During later inspections, with both D and Ps' experts present, the piping was replaced back into the system. D moved, based on spoliation of evidence, for dismissal of Ps' cause of action, or in the alternative, exclusion of Ps' expert testimony. D argued that Ps' expert's disassembly of the propane gas lines prior to determining that the set-up of the lines caused the RV to catch fire, made it virtually impossible to get a precise picture of where the lines were running in the vehicle at the time of the fire. Ps countered that their expert acted reasonably under the circumstances; that D had multiple opportunities to test and inspect the RV; that Ds were not prejudiced as a result; and that any shortcomings in how Ps' experts secured the evidence may be addressed upon cross-examination. The District Court denied D's motion in part and granted it in part. *Holding*: Before a court may sanction a party for spoliation of evidence, the moving party must show that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; that they had a culpable state of mind and that the missing evidence is relevant to the

moving party's claim or defense. Here, Ps clearly had a duty to preserve the evidence. The damage was significant and litigation was likely. Ps claims that the piping needed to be removed immediately are undercut by the fact that the D's experts came and examined the RV seven days after Ps' expert. Additionally, the fact that the RV was shrink-wrapped and removed shows it was possible to transport it prior to the piping being dismantled. Finally, the evidence was relevant. D adduced diagrams showing that the routing of the lines at the factory was inconsistent with the routing observed by P's expert before the gas lines were removed. While the actions do not rise to the level, some sanction is warranted. Thus, Ps' expert testimony, based in any way upon his personal observation of the gas lines before their removal, but not the photographs taken prior, will be precluded.

- **Spoliation of evidence and failure to disclose expert during pre-trial disclosure warranted preclusion and therefore summary judgment** – King v. Gregruss Mgmt. Corp., 870 N.Y.S.2d 103 (2d Dept. 2008): **Facts** – P was injured when a steel drum containing windshield washer fluid exploded while he was cutting the drum open with an electric saw. P sued Ds alleging, *inter alia*, that they negligently manufactured or reconditioned the drum. Ds moved for summary judgment arguing that the drum was not manufactured or reconditioned by them. P presented expert evidence that markings on the drum and fluid in the drum identified the Ds as the manufacturer and reconditioners of the drum. Ds then moved to preclude the P's expert evidence. P had not identified their expert in pretrial disclosure and Ds were unaware of him until they were served with his affidavit in response to the summary judgment motion. Further, P destroyed the drum after it was examined by their expert. The Supreme Court denied D's motion for preclusion and for summary judgment. The Appellate Division reversed. **Holding** - P's actions in destroying the drum prevented D's from inspecting it and performing other tests. Since, given the preclusion, the P is not capable of rebutting the D's denial of manufacture or reconditioning, there is nothing remaining of the P's opposition thus summary judgment is granted. **Comment** - This case reminds the bar that the Second Department, in recently decided Construction by Singletree Inc., v. Lowe, 866 N.Y.S.2d 702 (2d Dept. 2008), radically changed the rule regarding when and what is required during expert disclosure. In Construction, the court affirmed summary judgment for a defendant, even though the lower court had refused to consider P's expert report, because the P had not identified the expert during pre-trial disclosure, only serving the expert affidavit after the note of issue and certificate of readiness had been filed. The majority of courts, however still follow an interpretation of CPLR 3101(d)(1)(i), articulated by the dissent in Construction - that the section only requires pre-trial disclosure of experts or consultants who will testify at trial, not those who are retained and utilized for other purposes such as in support of summary judgment motions

- **Negligent destruction of key part warrants preclusion of expert testimony and a fine** – Dean v. Usine Campagna, 845 N.Y.S.2d 62 (2d Dept. 2007): **Facts** – P was injured when his T-Rex, a three-wheel motor vehicle, crashed into the rear of a parked tractor trailer. P sued the designers and manufacturers of the T-Rex asserting that the accelerator throttle pedal became jammed causing the accident. P’s expert photographed the T-Rex, inspected it, and generated a report concluding, *inter alia*, that the vehicle had a defective throttle pedal. During discovery Ds demanded that P make the T-Rex available. After 10 months of delay, the P finally informed the court that the T-Rex had been disassembled while in a storage facility and that the throttle pedal was missing. Ds moved for summary judgment. The Supreme Court did not grant summary judgment but did preclude the P from offering any evidence based upon their expert’s inspection of the vehicle. **Holding** – The preclusion of P’s expert evidence was proper. P’s negligent destruction of the vehicle negates his manufacturing defect claim but does not preclude Ds from defending against a design defect. Both parties could use an exemplar T-Rex to support their arguments. (However, because P’s took 10 months to inform the court of the vehicle’s negligent destruction, a \$5,000 penalty against P was imposed.)
- **Inadvertent loss of key evidence warrants dismissal** - Lichtenstein v. Fantastic Merch. Corp., 850 N.Y.S.2d 462 (2d Dept. 2007): **Facts** – [facts enumerated above in “Failure to Warn”] Infant P sued D for burns to his legs allegedly due to contact with an oven cleaning product manufactured, distributed and sold by the Ds. The actual bottle of cleaning product was inadvertently misplaced by the person to whom the infant’s father gave it to in anticipation of litigation. The subject bottle was one of several the D had purchased from various manufacturers, each one containing different concentrations of hydroxide. As a sanction against the P, the Supreme Court ordered that if found, the P should be precluded from introducing the bottle into evidence. **Holding** – The Ds were severely prejudiced by the loss of the subject bottle and by their lack of an opportunity to inspect it. By merely precluding the bottle’s introduction as evidence, the Ds were prevented from establishing that Ps injury could have been caused by damage to the bottle after it was shipped rather than by defective manufacturing or design. Accordingly, dismissal was the appropriate sanction.
- **No third-party spoliation claim available even with duty to preserve** – Ortega v. City of New York, 845 N.Y.S.2d 773 (CANY 2007): **Facts** – A day after having had their car inspected and tuned up at a licensed service station, Ps smelled fumes and pulled over. Shortly thereafter, their car burst into flames. Both Ps suffered severe burns. The vehicle was towed at the direction of the city police and the passenger obtained a court order to preserve. However, the vehicle was destroyed before it could be inspected. Ps sued the city claiming negligent spoliation and

civil contempt. Ps moved for summary judgment on both claims arguing that the destruction of the vehicle resulted in Ps' inability to inspect it, presenting a fatal obstacle to determining the cause of the fire or identifying the responsible parties. D opposed arguing that the spoliation of evidence claim was inherently speculative because inspection of the vehicle might not have revealed the cause of the fire and that destruction did not necessarily preclude a viable lawsuit. The Supreme Court dismissed the driver's cause of action because she was not a party to the proceeding resulting in the preservation order, denied passenger's motion for summary judgment because issues of fact existed and dismissed the contempt claims entirely reasoning that contempt should be adjudicated by the court that issued the order. The Appellate Division, Second Department modified the order to grant the city summary judgment on all claims. The Court of Appeals affirmed. **Holding** – Although the City did have a duty arising from the preservation order to safeguard the vehicle, the court was not convinced that it would be sound public policy to create a new tort that shifts liability from responsible tortfeasors to government entities. Municipalities might prove unduly attractive litigants, diverting attention away from the actual tortfeasors. There can be no doubt that the city's violation of the preservation order interfered with an interest worthy of protection but we are not convinced New York remedies are inadequate. P can still recover under the civil contempt statutory scheme albeit only for damages flowing from the city's destruction, not also for pain, suffering and emotional distress

- **Sanctions not appropriate where loss of evidence was no intentional or negligent** – Langer v. Well Done, Ltd., 11 Misc.3d 1056 (A) (Sup. Ct. Nassau Cty. 2006): *Facts* – P was injured while opening a bottle of grease remover. P sued D1 manufacturer and D2 retailer, claiming that a defect in the manufacturing process caused the cap to get stuck, requiring additional force that caused the solvent to spill and burn her. Defendants moved for summary judgment claiming, *inter alia*, that P's loss of the original bottle amounted to spoliation of evidence. Supreme Court denied the motion. **Holding** - The evidence indicated that P took the bottle with her to the hospital and that the hospital staff took possession of it. Thus, the loss was not the result of any negligence or intent on the part of the plaintiff and spoliation sanctions are not appropriate.
- **Inadvertent loss of key evidence warrants dismissal** – Cutroneo v. Dryer, 784 N.Y.S.2d 247 (3d Dept. 2004): *Facts* – P was injured after a titanium rod inserted in her spine broke. P's counsel sent the rod to an expert who examined it and opined that the rod failed because of an indentation in the rod that occurred during surgery. P sued D manufacturer, advancing claims of product liability. During discovery, D requested that the rod be produced for testing but it was learned that P's expert had died and the rod was lost. D moved to dismiss the complaint for spoliation and Supreme Court granted the motion. Appellate Division

affirmed. *Holding* - The court ruled that even unintentional loss of evidence may warrant spoliation sanctions where, as here, dismissal is required "as a matter of elementary fairness." The court explained that since the evidence lost was the very instrumentality giving rise to the suit, spoliation sanctions were appropriate. The court also found that the photographs available were insufficient to compensate for the loss of the evidence.

- **Same** – Abuhlasan v. Uniroyal Goodrich Tire Co., 788 N.Y.S.2d 497 (3d Dept. 2005): *Facts* – P's decedent sustained serious and ultimately fatal injuries as a result of a single car accident that occurred due to a tire blowout. P sued D1 tire manufacturer and D2 seller, claiming that the tire was defectively manufactured. Prior to commencement of the litigation, P disposed of portions of the tire remnants, including the part that contained the DOT number. D1 moved for summary judgment, arguing that loss of the DOT number prevented it from demonstrating that it was not the entity that manufactured the defective tire. P argued that photographs of the tire and an examination of the remaining remnants by P's expert witness were sufficient to establish that D1 manufactured the tire. Supreme Court denied the motion and the Appellate Division reversed. *Holding* - The DOT number was a "critical" piece of evidence that would have determined definitively whether or not D1 manufactured the tire. The evidence presented by P created only the possibility and not the probability that D1 was the manufacturer. Therefore, "elementary fairness" required that spoliation sanctions be imposed and the plaintiffs complaint be stricken.
- **Same** – Neal v. Easton Aluminum, Inc., 790 N.Y.S.2d 70 (2d Dept. 2005): *Facts* – P was injured when a component of a bicycle he was riding broke. Following the accident, counsel for P had the bicycle inspected by an expert who photographed it and concluded that it was negligently manufactured and designed. P sued D manufacturer on claims of negligence, breach of warranty and strict products liability. Although P's counsel had originally stated to D counsel that it was on possession of the bicycle, it subsequently claimed that the bike was stolen prior to commencement of the action and produced a police report stating as much. D moved to dismiss the claims based on P's failure to produce the bicycle for inspection. Supreme Court denied the motion and the Appellate Division reversed. *Holding* – The bicycle itself was the key piece of evidence that is crucial to the claims and defenses advanced in the case. The photographs taken by P's expert are no an adequate substitute. Therefore, spoliation sanctions were appropriate here and the complaint should have been stricken.
- **Spoliation sanctions appropriate where Defendant retailer will be prejudiced in a separate action** – Abuhlasan v. Uniroyal Goodrich Tire Co., 788 N.Y.S.2d 497 (3d Dept. 2005): *Facts* - D2 moved for summary judgment, arguing that the inability to identify the tire's manufacturer

prejudiced its ability to seek indemnity or contribution for the judgment entered against it. P argued that as a seller of a defective product, D2 was liable for the injuries regardless of its ability to seek contribution or indemnification. Supreme Court denied the motion and Appellate Division reversed. *Holding* – The inability to identify the manufacturer due to P’s disposal of the DOT number, prejudiced D2 in its ability to be reimbursed for any judgment entered against it. The prejudice is sufficient to warrant dismissal of P’s complaint against D2 on spoliation grounds.

- **Sanctions More Appropriate in Negligence Cases than Design Defect** – *Travelers v. C.C. Controlled Combustion Insulation Co.*, 2003 N.Y. Slip Op 51430U (Civil Ct. N.Y. County 2003): **Facts** - P was injured when a boiler exploded. The allegedly defective component was manufactured by D1 and the boiler was installed by D2. In December of 2002, P commenced an action against D1 and D2 on claims grounded in manufacturing and design defects, negligence and breach of warranties. In February of 2003, D1 served a Notice to Preserve on all parties. In March of 2003, P notified D1 that boiler was no longer in its custody and its whereabouts were unknown. D1 moved for summary judgment on the ground that disposal of the boiler amounted to spoliation which prevented a definite identification of the product's manufacturer and inhibited the ability to mount a relevant defense. The court denied the motion in part and granted it in part. **Holding**- The court noted that there was circumstantial evidence indicating that D1 was in fact that manufacturer of the component. The evidence included a contract between D1 and D2 in which D2 agreed to use the components manufactured by D1 as well as a technician's report that specified the model number of the component, which was consistent with D1's product. The court also held that dismissal of the design defect claim was inappropriate because additional discovery could provide D1 with sufficient evidence to mount an adequate defense. However, the claims grounded in negligence were dismissed because of unavailability of the component prevented D1 from defending the claim.
- **Sanctions Inappropriate Where Loss of Evidence Does “Fatally Compromise” the Movant and Where All Parties are Equally Prejudiced** – *Ifraimov v. Phoenix Indus. Gas. Co.*, 772 N.Y.S.2d 78 (2d Dept. 2003): **Facts** – P was injured as a result of a fire that occurred inside his luncheonette truck. The truck contained a cooking system was fueled by twenty pound gas tanks stored inside the truck. D was responsible for delivery and filling of the gas tanks. P sued D, arguing that the fire was caused by a leak from a spare gas tank that was defective and improperly filled. Prior to commencement of the action, P's son signed a waiver allowing the police department to destroy the truck. The tanks were also no longer available after the suit was filed. D moved for summary judgment on spoliation grounds, claiming that the loss of the

truck and the tanks inhibited its ability to formulate a defense. Supreme Court granted the motion and Appellate Division reversed. **Holding-** The record did not demonstrate that the loss of evidence "will fatally compromise" defendant's ability to defend itself. Furthermore, because the plaintiff was equally prejudiced by the loss of evidence, spoliation was inappropriate

- **Dismissal Rarely Appropriate in Design Defect Cases – *Klein v. Ford Motor Co.*, 756 N.Y.S.2d 271 (2d Dept. 2003):** **Facts** - P was injured when her SUV manufactured by D overturned. After the accident, D was afforded the opportunity to inspect the vehicle and took more than 300 photographs of the damaged truck. P instituted an action based on defective design, claiming that the vehicle's high center of gravity made it prone to flipping over. After commencing the action, P moved for permission to sell the truck based upon the mounting storage costs but the motion was denied. Shortly thereafter, however, the storage facility inadvertently scrapped the vehicle. D moved for dismissal of the claim against it based on spoliation of the evidence. The Supreme Court granted the motion and the Appellate Division reversed. **Holding –** Since P's claim is that the vehicle was defectively designed, the loss of the specific vehicle involved in the action is not automatically prejudicial to the D manufacturer because the same alleged defect is present in other vehicles of the same design. Since this is a claim for design defect and the loss of the vehicle was inadvertent, dismissal of the action based on spoliation is inappropriate. This is especially true in this case where the vehicle was inspected and photographed by D before it was disposed of.
- **No Cause of Action for Spoliation by Non-Party – *MetLife Auto & Home v. Jos Basil Chevrolet, Inc.*, 303 A.D.2d 30, 753 N.Y.S.2d 272 (4th Dept. 2002):** **Facts-** P's home sustained serious damage caused by a fire that began in a truck in a neighboring garage. After the fire, D, the neighbor's insurance company, took possession of the vehicle and placed it in a storage lot. P, D and General Motors – the manufacturer of the vehicle – arranged for a joint inspection of the vehicle to determine what may have caused the fire. However, before the inspection took place, the vehicle was sold and significantly altered so that inspection was no longer possible. At the original trial, P brought a claim against D for spoliation of evidence. The trial court denied the motion and the Appellate Division affirmed. **Holding-** The court took note of the fact that this question had not been presented to Court of Appeals and this area of the law was unsettled. After reviewing case law in other jurisdictions, the court concluded that no action for spoliation may be brought against a non-party to the underlying litigation. The court reasoned that D could not be said to have violated any duty to P since it owed none. The court also explained that recognizing such a claim would create a duty on third parties to preserve evidence for the benefit of unknown potential litigants in anticipation that a suit may

commence at some later date. Interestingly, in its conclusion, the court suggested that P may have a claim for spoliation against the owner of the vehicle [who was a party in the original litigation but not on this appeal] if D is deemed to have been acting as his agent.

- In *Marro v. St. Vincent's Hospital & Medical Center*, 742 N.Y.S.2d 327 (2d Dept. 2002) the Second Department outlined three possible approaches that a court may take when presented with allegations that a relevant item of evidence was lost or destroyed by one of the parties:
 - i. If the item was (a) a crucial; and (b) intentionally or negligently lost, the party responsible for its unavailability will be precluded from offering evidence as to its condition.
 - ii. If the item was “the key evidence in the case”, the pleading of the responsible party will be stricken
 - iii. If the loss does not have the effect of depriving the non-responsible party the ability of establishing a claim, a sanction “less drastic” than dismissing the pleading should be imposed.
- **Must Be Deliberate** - *Santorelli v. Apple & Eve, L.P.*, 290 A.D.2d 499; 736 N.Y.S.2d 262 (2d Dept. 2002):
 - i. Affirming denial of P's motion to strike the answer of D based on alleged spoliation evidence, since P failed to establish that D "destroyed evidence which it knew might be needed for future litigation.
 - ii. *See also Silivanch v. Celebrity Cruises, Inc.*, 171 F.Supp.2d 241 (S.D.N.Y 2001): **Facts** - [enumerated above in 'evidence']. **Holding** -Although D removed the filters identified as having been the cause of the diseases complained of, an "adverse inference" charge to the jury was not appropriate because the removal was not intentional. While D did have a duty to preserve them, the subsequent disappearance was at most the result of negligence.
- *See also Hamilton v. New Branford, Inc.*, 289 A.D.2d 87, 735 N.Y.S.2d 22 (1st Dept. 2001):
 - In a case arising out of injuries sustained when a garment caught fire, the Court held that a spoliation sanction was not applicable since P submitted evidence that the garment produced was all that remained after the fire and D never sought to test the garment.
- **Must Be Viewed in the Context of all Available Evidence** - *Jones v. General Motors Corp.*, 287 A.D.2d 757, 731 N.Y.S.2d 90 (3d Dept. 2001): **Facts**- P was rendered a paraplegic in a single car accident, the details of which he cannot recall. After the accident, P agreed to transfer title of the damaged vehicle to MIC, a subsidiary of D manufacturer. P's claim was based on the allegation that the accident occurred as a result of a defective hood latch, which caused the hood to open while he was

driving. After P was informed that the roof line had been altered while in D's possession and thus not available for examination, P moved to strike D's answer and affirmative defense based on spoliation of evidence. Supreme Court denied the motion and Appellate Division affirmed.

Holding - Absent "willful or contumacious behavior" by D, the court will look to the extent that the spoliation of evidence may prejudice a party, in deciding whether or not to strike an answer. In this case, despite what the court termed as the "inexplicable and deplorable" conduct of D, "the alteration of the crushed roof line was not so crucial to the accident reconstruction that dismissal is required as a matter of fundamental fairness." The ruling was based in large part on the fact that there was other evidence available such as witnesses, photographs and the ability to examine other models of the same car.

- **Sanctions Are Appropriate Where P is on Notice That the Product May Be Needed for Examination**- *Horace Mann Ins. Co. v. E.T. Appliances, Inc.*, 290 A.D.2d 418; 736 N.Y.S.2d 79 (2d. Dept. 2002): **Facts**- John and Linda Knapp's home was damaged when a stove manufactured by D exploded. Knapp's insurance company (P) inspected the stove and concluded that the fire was a result of a manufacturing defect. Shortly thereafter, the stove was inadvertently destroyed. P then filed suit to recover the damages, claiming breach of contract D moved to dismiss claiming spoliation of evidence. Supreme Court denied the motion and the Appellate Division reversed. **Holding** – Since P's own expert concluded that the stove was the cause of the fire, P was effectively put on notice that it would be needed for future litigation. The destruction of the stove was prejudicial to D's case and therefore merited dismissal of the claims based upon that evidence.
- **In the Absence of a Promise or Notice that the Evidence May Be Needed for Future Litigation, There Will Be No Duty to Preserve It** – *Ripepe v. Crown Equipment Corp.*, 741 N.Y.S.2d 64 (2d. Dept. 2002): **Facts**- P was injured when a pallet jack rolled onto his foot while working. Sometime later, an attorney for P and an engineer visited the store to inspect the pallet. Also present were representative of the employer. The pallet jack was photographed, examined and observed for about an hour. P did not indicate that any further inspection would be necessary. P sued the manufacturer, claiming (*inter alia*) that the brakes were defectively designed and manufactured. Manufacturer then commenced a third party action against the employer for indemnification or contribution. Supreme Court ordered an inspection of the pallet but the employer was unable to produce it. P moved to leave to amend their complaint to assert a direct cause of action against the employer on the grounds of spoliation of evidence. Supreme Court granted the motion and the Appellate Division reversed. **Holding** -There was no evidence that the employer promised to preserve the evidence and nothing to indicate that the employer was on notice that the jack might be needed for future

litigation. As such there was no duty on the employer to preserve the evidence and the motion should not have been granted.

F. Procedure Points

1. Jurisdiction; Venue; Forum Non Conveniens

- **Case removed to federal court ordered remanded after adding non-diverse defendant.** Sims v. Electrolux Home Products, Inc., 2014 WL 4828151 (N.D.N.Y. 2014): **Facts**- Plaintiff commenced this wrongful death action in state court, based on a defect in a refrigerator which caused a house fire. There was diversity between plaintiff and defendants, and they removed to federal court. Plaintiff sought to add a non-diverse defendant—the retailer who sold the refrigerator—and remand the case to state court. The original defendants oppose remand. **Holding**- Case remanded. Even though plaintiff was aware of the retailer and originally decided not to sue it, the complaint could be amended to add this defendant and break diversity.
- **Case removed from a state court on basis of “fraudulent joinder” remanded** – Humphrey v. Riley, 2014 WL 3400964 (N.D.N.Y. July 10, 2014): **Facts** – This is a combined medical malpractice and product liability case, filed in Albany County. The product is a Mirena IUD. Plaintiff’s decedent developed toxic shock syndrome due to the indwelling IUD; various doctors and hospitals failed to diagnose and treat it; and she died. Bayer, the manufacturer, removed the case to federal court, claiming “fraudulent misjoinder” – plaintiff has just added some non-diverse parties to prevent the case from being in federal court. **Holding** – Plaintiff’s motion to remand granted. Even if the law recognizes removal based on “fraudulent joinder,” this is not such a case. There is a substantial medical malpractice claim; there are issues common to both the malpractice and the products case; and one jury should decide all the issues.
- **Court had long arm jurisdiction over foreign manufacturer** – Darrow v. Deutschland, 119 A.D.3d 1142, 990 N.Y.S.2d 150 (3d Dept. 2014): **Facts** – Plaintiff was operating a boom with a radio remote control manufactured by defendant when the boom engaged and crushed plaintiff. Defendant manufacturer is an LLC registered in Germany. Defendant moved to dismiss for lack of personal jurisdiction. After limited discovery, the Supreme Court denied defendant’s motion and defendant appealed. **Holding** – Affirmed. The exercise of long arm jurisdiction over defendant was compatible with both CPLR 302 and due process. By selling to a distributor known to market to various locations in the United States, including New York, defendant sought indirectly to market its product in New York and, thus, should have reasonably expected a manufacturing defect to have consequences in this state.
- **Foreign corporation is subject to personal jurisdiction when it maintained a website, and directed consumers to retail locations, plus long-arm jurisdiction was justified.** Halas v. Dick’s Sporting

Goods, 105 A.D.3d 1411, 964 N.Y.S.2d 808 (4th Dept. 2013): **Facts**- Hunter brought action against tree stand manufacturer, Big Dog, and Dick's, its seller and exclusive distributor, seeking to recover damages for injuries sustained when he fell from tree stand. Supreme Court denied defendant manufacturer's motion to dismiss. Defendant appealed. Affirmed. **Holding**- Defendant manufacturer is subject to both general jurisdiction for doing business in the state and long-arm jurisdiction for a tort within the state, pursuant to CPLR 302(a)(1) and 302(a)(3)(ii). Defendant manufacturer transacted business in New York, under the long-arm statute. Defendant manufacturer committed a tortious act causing injury to person within the state. Exercise of jurisdiction over defendant manufacturer comported with due process because, in light of defendant's website and exclusive distributorship agreement, the exercise of jurisdiction over defendant was proper.

- **No jurisdiction over foreign defendant device manufacturer when failed to prove defendant regularly conducted, or solicited business or derived substantial revenue in New York-** J.R. ex. rel. Reid v. Advanced Bionics, LLC, No. 5:11-cv-843 GLS/TWD, 2012 WL 5472304 (N.D.N.Y. Nov. 9, 2012): **Facts**- Plaintiffs commenced action against defendant s alleging multiple causes of action. Plaintiffs alleged that the feed thru component on cochlear implant in child was defective and caused the infant to endure multiple surgical procedures. Defendant Astro Seal moved to dismiss for lack of personal jurisdiction, after limited discovery. **Holding**- Defendant Astro Seal is a California corporation who contracted with defendant Advanced Bionics to supply certain components for a cochlear implant. The entire transaction took place in California. Once the components were delivered, Astro Seal had neither knowledge nor control over where the completed implants were sold. Given that there is no indication that Astro Seal is present in New York, it is not amenable to general jurisdiction. The plaintiffs also failed to present facts that, if credited by trier of fact, would suffice to establish personal jurisdiction over defendant through solicitation of business or deriving substantial revenues in the state.
- **Proper forum is where accident occurred where only connection to state was successor manufacturer of product-** Emslie v. Borg-Warner Automotive, Inc., 655 F.3d 123 (2d Cir. 2011): **Facts**- Ps residents of Scotland, brought product liability action against D manufacturer and designer of all-terrain vehicle (ATV), seeking damages for injuries sustained in England as result of ATV's defectively designed and manufactured transmission. Manufacturer was Recreative, a New York corporation. Recreative bought the rights from Borg-Wamer which designed transmission. D Designer moved for SJ. WDNY granted SJ to designer and dismissed claims against manufacturer on basis of forum non conveniens. Ps appealed. Ruling upheld. **Holding**- (1) Designer had not placed transmission in stream

of commerce, as required to establish claim for defective design under New York law, and (2) district court did not abuse its discretion in dismissing consumers' claims against manufacturer on basis of forum non conveniens. Borg-Werner should not be viewed as having placed transmission into stream of commerce as it had been out of transmission business for 26 years. For that period of time, Borg-Werner had no ability to learn from experience whether its design was causing injuries, no ability to conduct safety tests and no ability of improving the design to diminish risk of harm. Additionally, most of the connections in this case were in England or Scotland and Recreative was subject to the jurisdiction of British courts.

- **Plaintiff merely has to show a sufficient start and show their position not to be frivolous when asserting personal jurisdiction-** Lettieri v. Cushing, et al., 80 A.D.3d 574 (2d Dept. 2011): **Facts-** In an action to recover damages for personal injuries, Ds, Wal-Mart Stores, Inc. d/b/a Sam's Club, and Jumpking, Inc. (the manufacturer), appealed, an order of the Supreme Court, Suffolk County, denying their motion to dismiss the complaint insofar as asserted against D, Jumpking, Inc., and denying, as premature, without prejudice to renewal, that branch of their motion which was for SJ dismissing the complaint insofar as asserted against D, Wal-Mart Stores, Inc. **Holding-** In opposing a motion to dismiss on the ground that discovery on the issue of personal jurisdiction is necessary, Ps need not make a prima facie showing of jurisdiction, but instead must only set forth, a sufficient start, and show their position not to be frivolous. Here, Ps established that facts may exist to exercise personal jurisdiction over D, Jumpking. However, the trial court should have denied that branch of D's motion without prejudice to renewal upon the completion of discovery
- **Foreign corporation must be served with required notice and process at registered office address with the Secretary of State-** VanNorden v. Mann Edge Tool Co., 77 A.D.3d 1157 (3rd Dept. 2010): **Facts-** P alleged injuries when a portion of splitting maul, manufactured and sold by one or more of the named Ds, broke off and became lodged in his eye. Ps purportedly effectuated service upon D, Mann Edge Tool Company, pursuant to Business Corporation Law §307. Issue was not joined and the Supreme Court entered a judgment against D in excess of \$1 million. D moved to vacate default judgment, alleging that Ps failed to obtain personal jurisdiction over it prior to expiration of the statute of limitations. The Supreme Court vacated the judgment but denied D's motion to dismiss the complaint. D's cross appeal was granted and Ps' cross appeal was rendered moot. **Holding-** D claimed that Ps failed to comply with service requirements pursuant to Business Corporation Law §307. Here, Ps submitted an affidavit of service that established that personal service was effectuated on the Secretary of State, but Ps did not mail required notice and process to the registered office address for D.

- **Diversity jurisdiction defeated by presence of New York repairer who was repairer for manufacturer-** Dulski v. Intuitive Surgical, Inc., 2011 WL 578758 (W.D.N.Y. 2011): **Facts-** P underwent a proctectomy with a DaVinci robotic surgical device. During the course of the procedure, the device created a hole in P's colon. P commenced a medical malpractice action against the surgeons. During discovery, Ps learned that service calls were made on the surgical device prior to surgery and that D, repairman, worked on the device 18 times prior to surgery. As a result, Ps commenced a second action claiming that D, Intuitive Surgical, Inc., and its employee D, repairman, negligently designed, manufactured, planned, maintained, repaired, sold and/or distributed the surgical device. D filed a motion to remove to the Western District. **Holding-** As Ps' complaint alleged that D, repairman, was acting as a field engineer for D, Intuitive, responsible for maintaining and repairing the surgical device, liability for any negligence would lie with D, Intuitive. His joinder cannot defeat diversity jurisdiction. Further, the complaint stated only that P was severely and permanently injured. This is insufficient to support removal. However, D attached portions of P's deposition testimony claiming erectile dysfunction, incontinence as well as various other injuries, P underwent four additional surgical procedures. This is more than sufficient to demonstrate a reasonable probability that P's damages exceed \$75,000
- **On minimal showing court grants discovery on personal jurisdiction over foreign corporation –** Schmidt v. Martec Indust. Corp., 2009 WL 2883071 (E.D.N.Y. 2009): **Facts –** P, a 52 year-old triathlete, was injured when riding a bicycle made with a carbon fiber reinforced fork because the bike stopped suddenly causing catastrophic injuries. P sued D, a Taiwanese manufacturing company, alleging defective design and manufacture in that fractures and cracks in the carbon fiber front fork caused the bicycle to suddenly stop. D moved to dismiss the complaint for lack of personal jurisdiction and P cross-moved for jurisdictional discovery. D submitted an affidavit from its vice president contending that it has no office in the U.S. and does not distribute or advertise its products or have any employees in the U.S. Further, D does not manufacture bicycle forks or components but merely takes orders for them from other entities, including bicycle manufacturers, and utilizes forwarding companies in Hong Kong to ship the components to the ordering companies. In opposition, P submitted an invoice for \$5,250.00 worth of bicycle parts shipped from D to a California company and two internet printouts evidencing shipment of D's products to NY ports and other geographical areas within the U.S. P argued these documents showed D's products were routed from Hong Kong to NY and that the D knew its products were used in NY. The District Court denied D's motion. **Holding:** Ps have not made out a prima facie case for general jurisdiction under CPLR § 301. However, under NY's long arm statute, CPLR § 302, P

has raised the specter of a jurisdictional issue warranting P's request for further discovery. Under CPLR § 302, P must show D committed a tortious act outside NY, the act caused injury in NY, D should have foreseen its conduct might have consequences in NY, and D derives substantial revenue from international commerce. There appears to be no dispute that D's sale of a defective product constitutes a tort, that the injury occurred in NY or that D receives substantial revenue from international commerce. Rather, the issue is whether D should have foreseen its conduct would have consequences in NY. P raised a jurisdictional issue of fact by presenting evidence that D arranges for its product to be shipped to NY. Although the documents submitted in their present form would not be admissible as evidence, consideration of them is appropriate on the current motion given that a P can meet its prima facie burden on jurisdiction with just mere allegations in its pleadings. Whether D, either itself or through a forwarding company, ships its product into NY, jurisdictional discovery is appropriate. **Comment:** This decision is important precedent given that more frequently than ever domestic companies contract out manufacturing to foreign corporations that have become extremely savvy at avoiding U.S. jurisdiction

- **Common design defects are the same logically related transaction for purposes of joinder and there is no private right of action under the CPSC – Kehr v. Yamaha Motor Corp. U.S.A., 596 F.Supp.2d 821 (S.D.N.Y. 2008):** **Facts** – Two Ps, in separate incidents, suffered injuries while riding in a 2007 Rhino ATV manufactured by D that allegedly tipped over during routine maneuvers. Ps sued D alleging defective design in that, in addition to tipping over excessively, when they do, the ATV's unpadded steel roll cages cause severe crushing injuries and in some cases death. P alleged D knew of these problems but nevertheless failed to report them to the Consumer Product Safety Commission in violation of the Consumer Product Safety Act (CPSA) 15 U.S.C. § 2064. D moved, *inter alia*, to dismiss due to improper venue or in the alternative, to transfer or sever the claims because they involved two separate incidents. D also moved to dismiss the CPSA claim on the grounds that there was no private cause of action. The District Court denied D's motions due to improper venue and to transfer or sever the claims but granted the motion to dismiss the CPSA claim. **Holding** - Although both accidents occurred in another district, current venue was proper because an action may be brought in any district where any defendant resides. Further, a motion to coordinate this case with others in a yet to be determined Multidistrict Litigation (MDL) court was pending, rendering transfer to another district inefficient. The cases were not improperly joined. Although they involve two separate occurrences, allegations of a common design defect in automobiles are logically related transactions for the purposes of joinder, under FRCP 20. Finally, although lower courts are split on the issue, the weight of authority, relying on Congressional intent, finds no private cause of action under the CPS.

- **In forum non conveniens case, witnesses residing out of state and underlying facts taking place elsewhere outweighed fact that D was headquartered in state** – Keller v. Pfizer, Inc., 856 N.Y.S.2d 498 (S.C. N.Y. Cty. 2008): **Facts** – Two Ps were prescribed Viagra and claimed they suffered ischemic optic neuropathy after taking the drug. Ps brought product liability claims against D, the manufacturer, in New York. D moved to dismiss on the ground of forum non conveniens claiming the actions should be litigated in California and Arizona, where the Ps reside, the doctors prescribed Viagra, the Ps ingested the drug, and where care for their alleged injuries was rendered. Ps argued that D failed to overcome the strong presumption in favor of their choice of forum, that since the D is headquartered in New York and their attorneys were based there, litigating in New York is not inconvenient, and even though many witnesses were outside the state and therefore beyond the subpoena power of the court, their testimony is likely to be uncontroverted and therefore well suited to videotaped depositions. **Holding** – Motion to dismiss granted. The underlying events have no connection to New York, the alternative forums, California and Arizona, are not inconvenient, and although videotaped depositions may be possible, prior case law makes relevant only the fact that witnesses are located beyond the subpoena power of the court. Because there are other forums which will best serve the ends of justice and the convenience of the parties, D’s motion to dismiss should be granted. **Comment:** Granting or refusing FNC is highly discretionary with the courts, and often can be the subject of negotiation, especially in mass torts. Thus, in the ReNu Moisture Loc litigation discussed below, Justice Freedman allowed suits by out-of-state citizens to remain in NY, and in the Bextra litigation, before Justice Kornreich, the parties agreed that cases of plaintiffs east of the Mississippi could remain in NY
- **Home state of the defendant is not an inconvenient forum for litigation** – In the Matter of Oxycontin, 833 N.Y.S.2d 357 (Sup. Ct. Richmond Cty. 2007): **Facts** – numerous plaintiffs filed suits against the makers of the drug OxyContin, claiming that the drug was addictive and that D manufacturer failed to warn of its addictive nature; All of the cases were coordinated for discovery purposes in the Supreme Court of New York, Richmond County. D moved to dismiss the claims of the out of state plaintiffs on the ground of forum non conveniens. D argued that the treating physicians were out of state and the ability to subpoena and depose them was limited. P argued that New York was a proper forum because D corporation had significant contacts with the state. Supreme Court denied the motion. **Holding-** D had substantial contacts in New York that were related to the litigation. New York is the home state of D; the facility where the drug was researched and developed was in New York; most of the documents and witnesses related to plaintiffs’ liability claims are located in New York; D chose its New York counsel to

handle all litigation matters; the other named defendants are New York corporations; and claims advanced against D in other states are being handled by its attorneys located in New York as well. Thus, New York cannot be said to be an inconvenient forum for this litigation.

- **Venue Should Be Changed if the Liability Witnesses Would be Inconvenienced** - *Austin v. Daimler Chrysler Corp.*, 741 N.Y.S.2d 685 (Mem.) (1st Dept. 2002): ["The venue of this action should be changed to Suffolk County, where the liability witnesses either work or live, many of whom, namely, police, fire and ambulance personnel who responded to the accident, have submitted affidavits stating that they would be inconvenienced by having to testify in New York County

2. Collateral Estoppel

- **Collateral estoppel bars claim for strict product liability when plaintiff had full and fair opportunity to litigate-** *Tinnell v. Invacare Corp.*, 2011 WL 1831571 (W.D.N.Y. 2011): **Facts-** P sought recovery from D while operating a semi-electric hospital bed. The bed was manufactured by D and sold to a non-party distributor who in turn sold or rented the bed to her employer. P asserted claims of breach of express warranty, implied warranty and strict product liability. D removed the action to the Western District. D then filed a motion to dismiss. While the motion was pending, P commenced a second action against D, distributor. D, distributor, moved in state court to dismiss the action. P agreed that the strict products liability action should be dismissed because it was time-barred. The judge reserved judgment on D, manufacturer's, motion to dismiss because there was nothing within the complaint indicating when the bed was sold or otherwise placed into the stream of commerce. Meanwhile, D, distributor's, motion was granted. D, manufacturer, filed this motion to dismiss the warranty claims as barred by collateral estoppel. D's motion was granted. **Holding-** There is no question that the issue of the timeliness of P's claims is the same as those before the state court action. As such, the Court gave the state court decision preclusive effect with regard to the instant action so long as P had a full and fair opportunity to litigate the statute of limitations issue in the state court action. P never filed an appeal in the state court action. As such, P had a full and fair opportunity to litigate the statute of limitations issue in the state court action. Additionally, although the four-year statute of limitations available expired four years after the hospital bed was delivered, P still had 3 years in which to timely bring a claim based on breach of express or implied warranty measured from the date of her injury because the UCC provides exclusion of express or implied warranties may be void as unconscionable in case of personal injury. She did not

3. Choice of Law

- **When different states' laws conflict on allocation of loss, state law where tort occurred controlled** – *Burnett v. Columbus McKinnon Corp.*,

887 N.Y.S.2d 405 (4th Dept. 2009): **Facts** – P was injured when struck by a steel coil that fell from a hook manufactured by the D in NY and owned by the P’s employer, a development company. D was a NY corporation, P was an Ohio resident and the accident occurred in Indiana. NY applies a “pure” comparative negligence analysis to tort claims where P’s fault is proportionally diminished by P’s recovery but recovery not barred unless P solely at fault. In Indiana, by contrast, a P may not recover if P’s fault is greater than 50 percent. Also, in NY, comparative fault may not be apportioned against the employer of an injured worker covered by worker’s compensation insurance unless that worker suffered a grave injury. In Indiana, by contrast, the employer may be named as a “nonparty” to apportion fault even though the employer is immune from suit and no damages may be recovered. P moved for an order applying the law of NY and D opposed arguing Indiana law should apply. The Supreme Court granted P’s motion and the Appellate Division reversed. **Holding:** As an initial matter, the situs of the tort is the place of injury not the location where the allegedly defective product was manufactured. Further, because NY is the forum state, NY choice of law rules, articulated in Neumeier v. Kuehner 335 N.Y.S.2d 64 (1972), apply. Under Neumeier, when parties are domiciled in different states with conflicting local laws, the law of the situs of the tort typically applies unless it can be shown that by not applying this rule, relevant substantive law purposes will be advanced without impairing the smooth working of the multi-state system or producing great uncertainty. In this situation, where the interest of each jurisdiction in enforcing its law is roughly equal, the situs of the tort is appropriate as a “tie-breaker” because that is the only jurisdiction where the parties have purposefully associated themselves in a significant way. Here P purposely associated himself with Indiana where the Indiana legislature made a policy judgment barring a P from recovering damages in cases where he or she bears more than 50 percent of the fault. Further, Indiana’s interest in applying its substantive law to a workplace accident outweighs NY’s interest especially for the benefit of nonresidents and to the detriment of its own citizens.

- **Courts apply law of state where drug was sold and ingested rather than where manufacturer headquartered** – Devore v. Pfizer Inc., 867 N.Y.S.2d 425 (1st Dept. 2008): **Facts** – Ps alleged injuries from taking the drug Lipitor, manufactured by D. P argued New York law, where D had its headquarters and committed alleged tortious conduct, should apply. D argued Michigan law, where Ps were residents and the drug was ingested should apply. Michigan’s drug products liability statute gave immunity to pharmaceutical companies if the drug was FDA approved, unless approval was secured by fraud or bribery. D moved to dismiss arguing the Ps made no such showing. Ps argued D’s motion was premature because no discovery had taken place allowing Ps to obtain the necessary evidence. The Supreme Court granted the D’s motion and the Appellate Division affirmed. **Holding** - Ps lived and worked in Michigan where the

injuries occurred and the drug was sold. Where rules of product liability are involved, the place where the drug was sold is the forum where the tort occurred. When the purpose of a statute in question is to regulate conduct rather than to allocate loss, the law of the jurisdiction where the tort occurred will generally apply. Here the statute is conduct-regulating because the legislature intended to shield manufacturers from liability. Ps did not set forth in their complaint or argue before the motion court fraud or bribery. Ps cannot use pretrial discovery as a “fishing expedition” to investigate “mere suspicions.”

- **Courts apply the law of state where a drug was purchased and ingested in an action against the drug manufacturer – Devore v. Pfizer, Inc., 58 A.D.3d 138 (1st Dept. 2008):** *Facts* - P, a resident of Michigan, sustained injuries there as a result of his use of the drug Lipitor. P sued D manufacturer, advancing claims of negligence, strict liability, breach of warranty, and fraudulent concealment. D moved to dismiss, arguing that it was immune from tort liability under Michigan Law. P argued that New York law applied. There was no dispute that if Michigan law applied, the suit was barred under MCL §600.2946(5). Supreme Court granted the motion. *Holding*- the court held that the state in which a product was sold and consumed - here Michigan - has the predominant interest in litigation that results from that consumption. Therefore, because the product was purchased and used in Michigan, Michigan law applies and the suit is barred. *See also* Norris v. Pfizer Inc., 2007 N.Y. Misc. LEXIS 1S41 (S.C. N.Y. Cty. 2007) (conducting the same analysis and reaching the same conclusion).

4. Pleadings

- **Plaintiff must plead more than legal conclusions in a complaint – Cavanagh v. Ford Motor Co., 2014 WL 2048571 (E.D.N.Y. May 19, 2014):** *Facts*- Plaintiffs commenced suit against defendants as a result of injuries sustained while using a bucket truck designed, manufactured and sold by defendants. Ford removed the action on diversity jurisdiction, and then moved to dismiss the complaint for failure to state a claim. Plaintiff's opposed and cross moved in the alternative for leave to file an amended complaint. *Holding* – Granted with leave to amend. Plaintiffs pled no facts supporting their claim that the truck was defectively designed, and make no mention of a feasible alternative design. The complaint further makes no mention of any facts that support a claim for manufacturing defect or failure to warn. Plaintiffs have not sufficiently specified the terms of the alleged warranty relied on. Despite plaintiffs' failure to state a claim, plaintiffs' motion to file an amended complaint as to design defect and failure to warn was granted.
- **Since hip implant case was removed to federal court and defendant would not be prejudiced, leave to amend complaint to plead more detailed causes of action was granted in device case - Goldin v. Smith & Nephew, Inc., No. 12 civ. 9217 JPO, 2013 WL 1759575 (S.D.N.Y. April**

24, 2013): **Facts**- Plaintiff had hip revision surgery utilized the Smith & Nephew 56mm R3 acetabular component with screw fixation, 22mm inside diameter constrained polyethylene liner and modular femoral head. Two months later, the right femoral head became dislodged from the polyethylene liner and shortly after, a voluntary recall was issued. Plaintiff filed suit in NY state court, and defendant removed. Defendant filed motion to dismiss. Defendant's motion granted, but plaintiff granted leave to amend. **Holding**- Plaintiff failed to allege any facts regarding the manufacturing process. Plaintiff also failed to adequately allege facts in support of her claim that there was no other possible cause for her product's failure. Plaintiff needed to offer more facts to nudge her claim from speculative into the realm of plausible. Plaintiff has not alleged any facts to demonstrate that the product as designed posed a substantial likelihood of harm or that it was feasible to design the product in a safer manner that would have prevented plaintiff's injuries. In the absence of factual allegations identifying an existing design defect, this claim cannot succeed. Plaintiff did not identify the allegedly defective warnings, nor did she allege facts in support of her claim that those warnings were, in fact, defective. However, since the federal pleadings are heightened, pursuant to the Twombly and Iqbal decisions, court granted plaintiff leave to amend.

- **Notice that P was exposed to powder coating satisfied FRCP 8-** Coene v. 3M Co., et al., 2011 WL 3555788 (W.D.N.Y. 2011): *Facts*- Ps' claim that decedent developed silicosis after being exposed to powder coatings manufactured by Ds while employed by D, Eastman Kodak Company. Ds filed motion to dismiss. Motion denied. *Holding*- PS' complaint satisfied FRCP 8(a). It gave Ds fair notice of Ps' claims. It also explained factual ground for claims by stating that he was exposed while employed with D from 1992 to 2002. Although specific products were not named, Ds should know whether they sold "powder coating" material during the relevant time period. Ds can still prove that they did not produce powder coating material at a later date
- **Ps permitted to amend pleadings to clarify if all they were seeking was money back-** Leonard, et al. v. Abbott Laboratories, Inc., 2012 WL 174842 (E.D.N.Y. 2012): *Facts*- D manufacturer recalled approximately five million containers of Similac brand infant powder formula that were potentially contaminated with beetle parts and larvae, which could cause gastrointestinal discomfort. Ps alleged that manufacturer engaged in unfair and deceptive practices by misrepresenting safety of their product and that it failed to warn consumers in timely fashion. D moved for judgment on the pleadings and Ps cross moved to amend complaint. Supplemental briefing was necessary on whether Ps claims were moot before it could reach a decision on the pending motions. *Holding*- Ps sought to add another claimant, include additional factual contentions and waive their right to seek punitive

damages. As contended that Ps only explicitly seek monetary loss associated with their purchases of the contaminated product which were remedied by its recall and consumer refund program. Submission by Ds was insufficient. Parties were asked to supplement their briefings as to whether A's voluntary recall of contaminated formula rendered moot Ps' claims under consumer protection statutes

5. Discovery

- **Defendant cannot demand causation or expert reports before IME exams** – Hamilton v. Miller, 2014 WL 2608461 (CANY June 12, 2014): **Note** – While this case is not a product liability case per se, it does not involve a product: lead-based paint, and more importantly, it is quite pertinent to products litigation, especially in mass tort cases where defendants want expert reports upfront to weed out allegedly non-meritorious cases (so-called Lone Pine motions). **Facts** – These were two very similar lawsuits brought by adults against landlords alleging brain damage due to exposure to lead paint as children. The same plaintiff's firm was involved and the bill of particulars claimed the same, extensive list of injuries – 58 in total. Defendants claimed that, preparatory to its IMEs, and in compliance with 22 N.Y.C.R.R. 202.17(b)(1), plaintiffs must turn over not only the usual medical reports of treaters, but also reports from doctors documenting each of the 58 injuries, plus, a doctor's report causally relating each claim to lead exposure. Trial court granted most of defendants' motion, and the Fourth Department affirmed. **Holding** – Chief Judge Lippman, for a unanimous court, reversed. The NYCRR rule does not speak of a report covering causation, which is an issue for later expert reports, and it does not require that a plaintiff hire an expert to create a report solely for the purposes of litigation.
- **Plaintiffs allowed to inspect plant where tires made; defendant allowed to take tire to its lab for inspection**- Blundon v. Goodyear Dunlop Tires N. Am., Ltd., No. 11-cv-9905, 2012 WL 5473069 (W.D.N.Y. Nov. 9, 2012): **Facts**- In Blundon and Griffith (consolidated), plaintiffs were driving Harley Davidsons with Dunlop D402 tires on the rear of the motorcycles when the rear tires deflated without warning, causing loss of control. The parties made various discovery motions, which the Magistrate Judge ruled on. Plaintiffs moved to compel to inspect defendant's tire plant. Plaintiffs' motion granted. Defendant's cross moved for protective order of proprietary documents. Defendant's motion for protective order granted. Defendant moved to produce tire and rims at their facility. Defendant's motion to compel production of the tires and rims at their facility was granted. **Holding**- Court held that Defendant at its specialized out-of-state lab is to receive tires and rims for inspection, conduct non-invasive, non-destructive testing and return to

plaintiffs. Therefore, defendant's motion to compel production of tires and rims was granted. Further, plaintiffs have established that an inspection of the plant is relevant, given their defective product claim, and necessary to explore their contention that defects in the plant or its operation relating to adhesive dipping may have caused the particular alleged defect in the tires. Additionally, if trade secrets are limited to the categories espoused in initial disclosure, the protective order would be acceptable, balancing plaintiffs' litigation needs and the protectable interests of the defendant from whom discovery is sought.

- **Plaintiffs allowed to inspect plant where tires made; defendant allowed to take tire to its lab for inspection-** Blundon v. Goodyear Dunlop Tires N. Am., Ltd., No. 11-cv-9905, 2012 WL 5473069 (W.D.N.Y. Nov. 9, 2012): **Facts-** In Blundon and Griffith (consolidated), plaintiffs were driving Harley Davidsons with Dunlop D402 tires on the rear of the motorcycles when the rear tires deflated without warning, causing loss of control. The parties made various discovery motions, which the Magistrate Judge ruled on. Plaintiffs moved to compel to inspect defendant's tire plant. Plaintiffs' motion granted. Defendant's cross moved for protective order of proprietary documents. Defendant's motion for protective order granted. Defendant moved to produce tire and rims at their facility. Defendant's motion to compel production of the tires and rims at their facility was granted. **Holding-** Court held that Defendant at its specialized out-of-state lab is to receive tires and rims for inspection, conduct non-invasive, non-destructive testing and return to plaintiffs. Therefore, defendant's motion to compel production of tires and rims was granted. Further, plaintiffs have established that an inspection of the plant is relevant, given their defective product claim, and necessary to explore their contention that defects in the plant or its operation relating to adhesive dipping may have caused the particular alleged defect in the tires. Additionally, if trade secrets are limited to the categories espoused in initial disclosure, the protective order would be acceptable, balancing plaintiffs' litigation needs and the protectable interests of the defendant from whom discovery is sought.
- **Discovery involving different models of product was relevant if they are substantially similar to the accident-causing model-** Cohalan v. Genie Industries, Inc., 276 F.R.D. 161 (S.D.N.Y. 2011): **Facts-** P was utilizing model PLC-15P personnel lift manufactured by D. It tipped over, causing P to fall approximately 20 feet to the ground and sustain significant injuries. P brought product liability action against manufacturer alleging design and warning defect. P filed motion to compel discovery of other lift models manufactured. P's motion granted. **Holding-** P served Rule 34 request for production of documents and materials on D. D objected to disclosure of materials related to models and products other than specific model of personnel lift. D waived all objections to the discovery requests because they

were over 4 months late in responding and they had not offered a reasonable excuse for the delay. Even if D were permitted to object, its objections would fail. Different models of product will be relevant if they share with the accident-causing model those characteristics pertinent to the legal issues raised in the litigation. Information related to the stability and safety features of all of these models will shed light on whether the lift was defective, the feasibility of alternative designs and the adequacy of warnings regarding the product's stability and operation.

- **Tire Manufacturer required to disclose ingredients used in tires**
– Mann v. Cooper Tire, Co., 816 N.Y.S.2d 45 (1st Dept. 2006): *Facts* – Ps were injured in the course of a motor vehicle accident caused by a tread separation of a defective tire manufactured by D. During discovery, P sought disclosure relating to various materials including the ingredients used in the manufacture of the subject tire and other similar tires. D refused to comply on the grounds that the requested information was a trade secret. P moved to compel, arguing that there was no showing that the information sought was protected. Supreme Court denied the motion insofar as it related the ingredients of the subject tire. Supreme Court did require D to provide the other information sought but only with regards to tire with the same green tire specifications of the subject tire. P appealed and the Appellate Division reversed. *Holding*- D has offered nothing other than conclusory assertions of counsel to indicate that the ingredients of the subject tire are trade secrets. Furthermore, P seeks only the ingredients and not the formula used in the manufacture of the subject tire. Thus, the requested information is discoverable. Finally, the limiting of disclosure to tires with the same green tire specifications is an unreasonable restraint on discovery. In the context of tread separation failures, information relating to other similar but not identical tires is relevant and therefore discoverable.
- **Tire Manufacturer required to disclose ingredients used in tires**
– Mann v. Cooper Tire Co., 816 N.Y.S.2d 45 (1st Dept. 2006): *Facts* - Ps were injured in the course of a motor vehicle accident caused by a tread separation of a defective tire manufactured by D. During discovery, P sought disclosure relating to various materials including the ingredients used in the manufacture of the subject tire and other similar tires. D refused to comply on the grounds that the requested information was a trade secret. P moved to compel, arguing that there was no showing that the information sought was protected. Supreme Court denied the motion insofar as it related the ingredients of the subject tire. Supreme Court did require D to provide the other information sought but only with regards to tire with the same green tire specifications of the subject tire. P appealed and the Appellate Division reversed. *Holding*- D has offered nothing other than conclusory assertions of

counsel to indicate that the ingredients of the subject tire are trade secrets. Furthermore, P seeks only the ingredients and not the formula used in the manufacture of the subject tire. Thus, the requested information is discoverable. Finally, the limiting of disclosure to tires with the same green tire specifications is an unreasonable restraint on discovery. In the context of tread separation failures, information relating to other similar but not identical tires is relevant and therefore discoverable.

- **Failure to Comply with Discovery Requests** – *Schrader v. Sunnyside Com.*, 297 A.D.2d 369 (2d Dept. 2002): **Facts** - At trial, P moved to strike D's answer on the grounds that D failed to comply with discovery requests. The trial court denied the motion and the Appellate Division affirmed. **Holding**- D's failure to comply with the discovery request was not 'willful or contumacious.' Rather, the requested materials were located in the Louisiana offices of another law firm and D was simply unable to obtain them. Therefore, the trial court correctly exercised its discretion in refusing to impose the 'drastic remedy of striking a pleading.'

6. Empty Chair Defense: CPLR Article 16

- **Court erred in permitting physician and hospital to produce evidence that machine malfunction or contained a design defect after manufacturer was dismissed from suit**- *Carmona v. Mathisson, et al.*, 92 A.D.3d 492, 938 N.Y.S.2d 300 (1st Dept. 2012): **Facts**- P brought action against Ds physician, hospital and manufacturer of a phacoemulsification machine (Alcon Series 20000 Legacy), seeking to recover for injuries sustained during cataract surgery. Verdict in favor of Ds. P's moved for a judgment NOV, which was denied. P appealed. Appellate Division held that following dismissal of P's product liability claims against D manufacturer, trial court erred in permitting Ds physician and hospital to elicit testimony that machine malfunctioned or contained a design defect. Reversed and remanded for new trial. **Holding**- D manufacturer was dismissed from the case based on its expert opining that product was properly designed and manufactured and that P's injuries resulted from human error. Trial court permitted other Ds to state that machine malfunctioned or contained a design defect. In addition, the verdict sheet had a line for D manufacturer to apportion liability. The trial court erred but medical Ds could have presented a defense based on a claim of unexplained malfunction. There was no way to determine the extent to which the jury was influenced by testimony regarding an alleged design defect or the inclusion of *ll.* manufacturer on the verdict sheet. New trial ordered.

7. Contribution/Indemnification

- **No right of indemnity where no defect.** *Bigelow v. General Elec. Co.*, 120 A.D.3d 938, 991 N.Y.S.2d 497 (4th Dept. 2014): **Facts**- A fire in a

mobile home caused plaintiff's decedent to die. Investigation indicated that the fire was electrical in origin and could be related to the air conditioner. The air conditioner was made by Carrier and sold by GE (under the GE brand). Both defendants moved for summary judgment based on lack of proof of the fire originating with a defect in the air conditioner. In addition, GE sought a common-law implied indemnity right from Carrier to defend the litigation, which it had refused. After the dismissals, GE still sought indemnity costs for the defense costs it had incurred. **Holding-** There is no common law implied right of indemnity for defense costs owed by the manufacturer to the downstream seller upon these facts, since no defect was demonstrated to begin with, and both parties are equally innocent.

- **Manufacturer granted summary judgment on indemnification and contribution claims** – Mack Cali Realty, L.P. v. Everfoam Insulation Sysrms., Inc., 110 A.D.3d 680, 972 N.Y.S.2d 210 (2d Dept. 2013): **Facts** – Plaintiff brought breach of contract action against contractor for damages allegedly arising out of contractor's installation of foam insulation. Defendant impleaded the manufacturer of the foam insulation. Manufacturer's MSJ was granted. **Holding** – Affirmed. Manufacturer demonstrated its entitlement to judgment dismissing the causes of action seeking common law indemnification and contribution. Re indemnification, it was established that Everfoam and its agents participated in the alleged wrongdoing and hence liability was not purely vicarious. Re contribution, Baysystems established, prima facie, that the design, manufacture, and labeling of its foam insulation product did not cause or augment the plaintiffs' injuries.
- **Distributor of a product is entitled to legal fees from manufacturer to defend claims** - Pierro v. Daewoo Motor America, Inc., 2011 WL 1120455 (E.D.N.Y. 2011): **Facts-** P was driving his 1999 Daewoo when, as a result of a fire that started at the bottom of the vehicle, he lost control of vehicle and struck a tree. P sued several entities in the vehicle's chain, including manufacturer and distributor, D, asserting claims of negligence in design and manufacture of the vehicle, strict product liability, breach of warranty and failure to warn. D, distributor, cross-claimed against manufacturer asserting indemnification. D also filed a partial SJ motion requesting a declaratory judgment that it is entitled to contractual indemnification for all legal fees related to this action. Ds motion was granted in part and dismissed in part. **Holding-** P's negligence claim is predicated on his allegation that the subject vehicle was defectively manufactured and/or designed; such claims falls squarely under the umbrella of product liability claims for which the manufacturer agreed to provide indemnification. D's request for a declaratory judgment that it is entitled to legal fees was also granted. However, D was not entitled to be indemnified for the legal fees that D incurs in prosecuting its cross-claim for indemnification

- **Doctrine of claim preclusion bars distributor's indemnification claim against manufacturer when distributor settles out-** Bloom v. ProMaxima Mfg. Co., 743 F.Supp.2d 219 (W.D.N.Y. 2010): **Facts-** P was at a fitness center using a Roman chair manufactured by D, ProMaxima, and sold by D, M-F Athletic. T-bar unexpectedly came out, and P fell head first to the floor. During the trial, Ps reached a settlement with D, M-F Athletic. Jury determined that P had not established any defect in the ProMaxima Roman Chair. D, ProMaxima, filed a motion for SJ dismissing the cross-claims of D, M-F Athletic Company, Inc., for contribution and indemnity, and filed a motion discontinuing its cross-claim against ProMaxima without prejudice. D's motions were granted. **Holding-** Tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person. For D, M-F Athletic, to have a valid indemnification claim, it was required that D, ProMaxima, be liable to P, and since the jury determined that D, ProMaxima, was not liable for injury, the doctrine of claim preclusion barred D's, M-F Athletic, indemnification claim
- **Seller of Defective Product May Seek Indemnification From Distributor** – *Godoy v. Abamaster of Miami Inc.*, 302 A.D.2d 57, 754 N.Y.S.2d 301 (2d Dept. 2003): **Facts** - P lost four fingers on her right hand while using a commercial meat grinder that contained unspecified defects. P filed suit against the distributor (D1) and seller (D2) of the product. The manufacturer was a Taiwanese corporation not subject to jurisdiction in New York. Before disposition of the case, P and D1 settled. At trial, D2 moved for indemnification from D1. After the jury returned a verdict finding D2 10% liable and D1 40% liable, the Supreme Court denied D1's motion on the grounds that the jury found them to joint tortfeasors and thus indemnification was not appropriate. Appellate Division reversed. **Holding** - Although it is well settled that the seller of a defective product may seek Indemnification against its manufacturer, the question of whether indemnification may be obtained from a party that is higher in the distributive chain is a question of first impression. The court reasoned that the same policy considerations underlying the imposition of strict liability against retailers and distributors of defective products would dictate that indemnification may be sought by a retailer from a distributor. Those in the best position to exert pressure on the manufacturers to improve product safety will be held strictly liable as a way of prodding them to do so. Here, since D1 dealt directly with the foreign manufacturer and D2 did not, allowing indemnification from D1 would encourage it to pressure the manufacturer to make its product safer
- **Inability to Identify Supplier-** *Brenner v. American Cyanamid Co.*, 288 A.D.2d 869; 732 N.Y.S.2d 799 (4th Dept. 2001): Products liability claims against lead-paint manufacturers was dismissed since P could not identify which defendant had actually produced the lead pigment found in their home.

- **Against Employer Covered by Workers' Compensation Law: The 'grave Injury' Requirement** -*McCoy v. Queens Hydraulic Co.*, 286 A.D.2d 425; 729 N.Y.S.2d 733 (2d. Dept. 2001): **Facts**- The top portion of P's index finger was severed by an allegedly defective hydraulic press that she was operating during the course of her employment P sued the manufacturer of the press, claiming the product was defectively designed and manufactured. Manufacturer sought contribution or indemnity from the employer in a third party action. Employer moved for summary judgment on the grounds that the injury sustained was not "grave" and thus remained protected by the Workers' Compensation Law. Supreme Court denied the motion and Appellate Division reversed. **Holding**: Under Workers' Compensation Law § 11, an employer may be held liable for contribution or indemnity only where the employee suffered a "grave injury." While the statute does list "loss of an index finger" as a grave injury, this does not include a case such as this in which the employer suffered the *partial* loss of an index finger. As such, contribution or indemnification was not appropriate.

8. Insurance Issues

- **Multiple Policies** – *Serio v. Public Service Mutual Ins. Co.*, 304 a.D.2d 167 (2d Dept. 2003): **Facts** - Infant P was injured as a result of exposure to lead paint over a period of three years. For the first two of those years, the building was insured by an insurance company that remains solvent and for the third year, it was insured by an insurance that has since become insolvent. The claim against the landlord was settled, however the two insurance companies reserved the right to a judicial determination as to their comparative fault and contribution obligations. The trial court ruled that each insurer was liable for half of the total settlement amount. The Appellate Division reversed. **Holding**- Invoking precedent from the Court of Appeals, the Appellate Division ruled that in cases where there was a continuous injury that spanned the term of successive insurance policies, liability must be directly proportionate to 'each insurer's time on the risk.' Therefore, the insurance company whose policy covered the first two years of P's exposure is liable for 2/3 of the damages whereas its successor is liable for 1/3.

9. Summary Judgment – Absence of Proof of Defect; Defendant Identification

- **No dismissal on the pleadings in drug side effect case.** *Benfield v. Pfizer Inc.*, 2015 WL 1958929 (S.D.N.Y. 2015): **Facts**- Plaintiff, a Georgia resident, developed a reaction to defendant Pfizer's antibiotic Tygacil (tigecycline), a Stevens-Johnson Syndrome type injury. Plaintiff sued in NY, which presented initial issues of choice of law. Defendant sought a dismissal of the complaint under FRCP 12 (b)(6), enhanced by the Supreme Court decisions in *Twombly* and *Iqbal*. The district court refused to strike the pleadings. **Holdings**- The court first spends many pages deciding whose law to apply to this case, that of Georgia or New York. It concludes that as to the tort product causes of action and the

contract ones (warranty), Georgia law applies. The court then examines each of the plaintiff's causes of action and finds that under Georgia law they are stated with enough specificity to allow the litigation to proceed. The claims are not implausible.

- Clark v. Dematic Corp., 2014 WL 6387166 (N.D.N.Y. 2014): **Facts-** Plaintiff's hand was badly injured when it was caught in the rollers of a conveyor belt; there being no guard at that point. The sued defendants, allegedly the manufacturer and installer of the conveyor belt moved to dismiss the complaint. There was some evidence, which plaintiff wanted to assert in an amended complaint, that there had been successive changes in ownership of the company which built it. **Holdings-** The court would consider the motion to dismiss as directed against the amended complaint, even though it had not yet agreed to allow amendment. The court held that, at this very early juncture in the case, it would allow the case to proceed.
- **SJ denied as defendant did not demonstrate that there was no design defect.** Montemarano v. Atl. Exp. Transp. Group, Inc., 123 A.D.3d 675, 997 N.Y.S.2d 700 (2d Dept. 2014): **Facts-** Plaintiff's decedent, a passenger on coach bus, was exiting its bathroom when the bus was braked forcefully. He attempted to grip on to a handle attached to the wall, but the handle pulled out, and he fell and evidently died. Plaintiff sued various defendants who made or modified the bus. One theory was strict liability for a design defect, relating to the way in which the handle was screwed in to the wall (the court added that this could also be considered a manufacturing defect). The trial court denied SJ. **Holdings-** SJ was properly denied since defendants had not met their burden of proof. One cannot obtain SJ merely by pointing out gaps in plaintiff's case, as defendants did here; one must demonstrate, prima facie, that the handle was not defectively designed or manufactured, or that the design or manner which it was attached did not cause the decedent to fall. Further, the court held that SJ was properly denied to the defendant DaimlerChrysler AC which claimed that it was outside the chain of distribution (on what basis it is not stated). The affidavit submitted by this defendant was not from an officer or employee with personal knowledge, the court citing to CPLR 3212(b).
- **SJ granted as plaintiff failed to show deviation from industrial standards.** Yargeau v. Lasertron, Cyber Sport Mfg., LLC, 128 A.D.3d 1369, 7 N.Y.S.3d 780 (4th Dept. 2015): **Facts-** Plaintiff was at an amusement venue riding a type of bumper car as part of a game of shooting a ball. A master control device supposedly would shut off power to all cars. However, that failed and another car hit plaintiff's car, injuring her. Plaintiff sought to impose strict liability of the manufacturer of the bumper car and track set up. (She also sought to impose strict liability on the operators of the track.) In support of MSJ, defendant manufacturer presented an expert's affidavit that there were no industry standards for

these devices, and therefore it could not be claimed that the failed method for stopping cars was unsafe. Plaintiff's expert responded generally.

Holdings- SJ was properly granted, since plaintiff's expert was "unable to identify any violation of a safety standard or deviation from industry standards." Further, there was no duty to warn about open and obvious dangers. Further, plaintiff is barred by assumption of the risk. **Comment:** This decision appears to be erroneous on several bases. First, there is law that says that failure to have a standard does not relieve a manufacturer from obligations of safety (otherwise no one would set standards). Second, assumption of the risk is not regarded as a defense in strict products cases.

- i. These and similar issues are discussed in Paul D. Rheingold & Michael Ihrig, Summary Judgment in Products Cases: Decreasing the Burden on Plaintiffs, NYSTLI, Bill Of Particulars, Vol. 1 at 48 (2012).

- **SJ denied as defendant did present evidence of applicable industry standards.** Chamberlain v. MAC Trailer Mfg., Inc., 128 A.D.3d 1336, 7 N.Y.S.3d 762 (4th Dept. 2015): **Facts-** Plaintiff was injured by a roll top canvas tarp at the back door of a trailer. He asserted design defects including the use of an aluminum rather than steel tarp catcher. Defendant manufacturer of the tarp sought SJ, which was denied. **Holding-** Denial of SJ affirmed. Defendant did not bear its initial burden of proof as it presented no evidence regarding industry standards for construction of this type of canvas tarp. An expert may not merely assert in a conclusory way that a product was safe.
- **SJ granted as plaintiff did not advance proof of defect.** Wiacek v. 3M Co., 124 A.D.3d 421, 2 N.Y.S.3d 81 (1st Dept. 2015): **Facts-** In a decision practically devoid of facts, the court dealt with a claim against manufacturers of a mask and a respirator, based on a claim of failure to warn of a defect. Defendants' SJM was denied, but on appeal that was reversed and the case dismissed. **Holding-** Defendants had made a prima facie showing that the equipment met NIOSH standards, and plaintiff had not shown a design, manufacturing or warning defect.
- **Summary judgment denied where defendants fail to establish product was safe for its intended use** – Cecere v. Zep. Mfg. Co., 116 A.D.3d 901, 983 N.Y.S.2d 846 (2d Dept. 2014): **Facts** – Plaintiff was injured while Zep Sewer Aid, manufactured by the defendants to remove obstructions from sewers and industrial drains. It immediately blew back. Plaintiff alleges he was wearing wraparound safety glasses and chemical gloves that extended to his elbows when he poured the product into a floor drain in accordance with the product instructions. Defendant moved for SJ on the grounds that plaintiff's failure to wear an apron and splash proof goggles or a face shield, as called for in Sewer-Aid's label and material safety data sheet. The Supreme Court dismissed all causes of action; Plaintiff appealed. **Holding** – It was error to grant SJ on the

negligence and strict liability causes of action. Defendants' submissions did not demonstrate that plaintiff's handling of the Sewer Aid constituted the sole proximate cause of his injuries. Defendants merely pointed to gaps in the plaintiff's proof, rather than affirmatively establishing that they were not liable. On the basis of the record, a fact finder could conclude that the product was defective and that such defect was a substantial factor in causing the injuries. The court was placing much reliance on the CANY decision in Chow, 17 N.Y.3d 29 (2011). However, the trial court properly granted those branches of defendants' motion dismissing the causes of action in breach of express and implied warranties.

- **Summary judgment denied as defendant failed to show adequacy of labeling** – Colarossi v. C.R. Bard, Inc., 113 A.D.3d 407, 978 N.Y.S.2d 148 (1st Dept. 2014): **Facts** – Plaintiff's decedent was injured when a piece of port/catheter manufactured by Bard and implanted in her chest broke off and traveled to her heart, where it became lodged. Plaintiff sued the manufacturer under numerous causes of action for failure to warn. Defendant manufacturer moved for SJ, which was denied and defendant appealed. **Holding** – Affirmed. While defendant argues that the break was due to the doctor's fault on insertion and that it had warned doctors about the proper method of insertion, defendant's own employee mentioned other possible causes of the implant fracturing.
- **Whether decedent was exposed to asbestos products of supplier is issue of fact** – In the Matter of N.Y.C. Asbest. Litig., (Kestenbaum v. Durez Corp.), 116 A.D.3d 545, 984 N.Y.S.2d 45 (1st Dept. 2014): **Facts** – Wrongful death action for exposure to Bakelite laminated sheets containing asbestos, brought as part of the asbestos litigation concentrated in New York County. Defendant Union Carbide Company did not manufacture the finished laminate product, but was alleged to have been the supplier of the asbestos-containing product of which the laminate sheets consisted. Defendant moved for SJ, which was denied. **Holding** – Affirmed. Plaintiff's evidence established that, during employment, the decedent was exposed to asbestos dust, caused by defendant's product. Testimony established that it was reasonably probable that the laminated sheets contained asbestos from defendant's product. Plaintiff is not required to show the precise cause of his injuries, a point of law established in prior asbestos litigation.
- **On MSJ, manufacturer must establish no liability rather than point to gaps in proof** – Glockenberg v. Costco Wholesale Corp., 110 A.D.3d 952, 973 N.Y.S.2d 360 (2d Dept. 2013): **Facts** – Plaintiff was injured at a store operated by defendant Costco, when she was struck by her shopping cart on a travelator –an escalator on which customers travel with their shopping carts. Plaintiff brought suit against Costco who impleaded the manufacturer of the travelator, Westmont Industries, and the manufacturer of the wheels for the shopping cart, Peggs Company. Peggs

and Westmont moved for SJ. The court granted those branches of Peggs' motion for negligence, strict liability, and breach of warranty as well as Westmont's cross motion for same. **Holding** – Supreme Court erred in granting those branches of Westmont's cross motion for negligence, strict liability and breach of warranty. Westmont merely pointed to gaps in Costco's proof, rather than affirmatively establishing that it was not liable. Those portions of Peggs' motion for negligence and strict liability were properly granted. An expert affidavit submitted by Peggs' established that the wheels on the carts were not defectively designed. In opposition, Costco failed to raise a triable issue of fact as to whether it was feasible to design the product in a safer manner. But as to Costco's cause of action alleging strict liability against Peggs for failure to warn of dangers inherent in the use of cart with the travelator system, there is no duty to warn against a known hazard. **Note** – Though not a products law issue, it is comment worthy that the Appellate Division upheld *plaintiff's* MSJ against Costco, since it was established that Costco had actual knowledge of a recurring dangerous and defective condition and, therefore, could be charged with constructive knowledge of each specific recurrence of the condition, which was a proximate cause of the accident.

- **Summary judgment denied as plaintiff's expert raised fact issues for trial** – Jackson v. Elrac, LLC, 2014 WL 1510989 (Sup. Ct. N.Y. Cnty. Apr. 15, 2014): **Facts** – Plaintiff, previously paralyzed, was injured when a specialized vehicle malfunctioned. The vehicle was owned by Elrac, and rented to plaintiff. It was operated by hand controls. The hand controls has been placed on the vehicle by WWK, Inc. Both defendants made a MSJ. **Holding** – Motion by Elrac denied and the motion by WMK is granted. WMK claimed while it installed the hand controls, it did not design or manufacture them. Plaintiff failed to offer any evidence in support of its argument that WMK had a duty to determine if the vehicle was safe for a paraplegic. Initially, Elrac met its burden providing evidence that the system was designed and manufactured under state of the art conditions, that the manufacturing process complied with industry standards and that proper testing and inspection was performed. Plaintiff's expert, however, raised triable issue of fact with his contention that Elrac had knowledge of the danger of "hot foot."
- **Questions of fact precluded summary judgment for manufacturer** - Gaudette v. Saint-Gobain Performance Plastics Corp., 2014 WL 1311530 (N.D.N.Y. Mar. 28, 2014): **Facts** – Plaintiff was a FedEx truck driver who was injured at the Saint-Gobain premises by a Yale forklift operated by a Saint-Gobain employee. Plaintiff alleged defects in the forklift, whose manufacturer sought SJ. **Holding** – Defendant manufacturer's MSJ as to defective design was denied. Questions of fact created as to the design defect claims, given the admissibility of plaintiff's expert's opinion that the forklift as designed posed a substantial likelihood of harm as well as

offering three proposed alternative designs. Plaintiff's breach of warranty claims, were however, time barred.

- **Fact that object broke is alone insufficient to prove not minimally safe** – Dellatacome v. Polychem Corp., 2014 WL 1641467 (S.D.N.Y. Apr. 24, 2014): **Facts** – Plaintiff, a mailer for the New York Post, was working in a warehouse when he stepped on a wooden pallet. The wood cracked, causing him to fall and be injured. Defendants manufactured, boxed and shipped straps, which were placed on wooden pallets wrapped in polyester. The pallet manufacturer was unknown. Defendant moved for SJ. **Holding** – Granted. Plaintiff failed to proffer any evidence of a design or manufacturing defect in the pallet, but simply relied on the allegation that the pallet broke when he stood on it. The fact that the incident occurred is, however, insufficient to establish that the pallet was not minimally safe for its intended purposes. With respect to plaintiff's failure to warn claim, even assuming that there was a latent defect in the subject pallet (which plaintiff failed to establish), plaintiff produced no evidence establishing that defendants would have known about such a defect and could have properly warned him about it.
- **Summary judgment warranted where plaintiff was experienced user of compressor and there was no evidence of a flaw-** Zapata v. Ingersoll-Rand Co., 36 Misc.3d 1230 (A), 959 N.Y.S.2d 93 (Sup. Ct. Kings. County): **Facts-** Plaintiff was attempting to fix a tire by using an air compressor manufactured by defendant to inflate it. The tire exploded and the rim struck plaintiff. Plaintiff alleged claims based upon defective design, inadequate instructions and warnings, negligence, allowing the marketing department to make safety decisions and breach of the implied warranty of merchantability. Defendant moved for summary judgment. Granted. **Holding-** Plaintiff was injured when he inflated a defective tire without seating it properly on the rim and/or without taking proper safety precautions. More specifically, x-rays taken of the tire showed that it had a bead break. Significantly, the air compressor that plaintiff was using could not possibly have over inflated the tire. Plaintiff also failed to come forward with competent evidence demonstrating that the air compressor had a flaw which caused the accident or, in the alternative, demonstrating that the machine did not perform as intended while excluding all possible causes for the malfunction not attributable to defendant. For the failure to warn claim, plaintiff was a tire mechanic for over 30 years and used the subject air compressor for 8 years without incident. More importantly he testified that he knew that inflating tires was dangerous.
- **Manufacturer not responsible for defective counterfeit products-** Pellon v. Colgate-Palmolive Co., 38 Misc.3d 1220(A), 867 N.Y.S.2d 868 (Sup. Ct. Richmond County 2013): **Facts-** Plaintiff testified that the toothpaste she purchased from Dollar Worth came in Colgate packaging, but she had thrown out the box. She became very ill after ingesting the

toothpaste. The toothpaste came from a middleman to Dollar Worth. A Colgate technical associate testified that the toothpaste was counterfeit. Defendant Colgate moved for Summary Judgment. Motion granted.

Holding- Plaintiff submitted adequate testimony demonstrating that Colgate did not manufacture the toothpaste at issue. Plaintiff failed to demonstrate any of her claims against Colgate-Palmolive for negligent packaging, distribution and sale, or in failing to safeguard and protect their toothpaste from tampering. Colgate-Palmolive is not responsible for counterfeit products sold in the marketplace that violate their trade name and trademarks.

- **Summary judgment granted as no evidence linked death to stun-gun firing- Glowczenski v. Taser Intl., Inc., No. 04-cv-4052 WDW, 2013 WL 802912 (E.D.N.Y. March 5, 2013):** **Facts-** Administrators of police detainee's estate brought action against TASER stun gun manufacturer, village, police department and police officers, alleging claims for failure to warn, wrongful death and excessive force. Decedent had developed metabolic acidosis after being stunned. Defendants moved to strike exhibits and for Summary Judgment. Granted in part and denied in part. **Holding-** Unsworn expert reports were inadmissible. Additionally, medical, scientific and other articles were not admissible as hearsay because no expert has laid a proper foundation for the admission of the articles, and they were not qualified for admission under Rules 703 or 803 and lack of relevance. There was no evidence that stun gun's drive-stun applications caused detainee's death. No expert was able to conclude with a reasonable degree of medical certainty that the ECD stun drives contributed to detainee's death. With the exclusion of the evidence, there was no admissible evidence that the TASER drive-stun applications received by detainee caused or contributed to his death or any other harm. **Comment:** The decision is a handy reminder that a party opposing summary judgment by providing exhibits must use those which constitute admissible evidence. Here dozens of exhibits were excluded by the court as hearsay or unsworn. More generally on avoiding Summary Judgment, See Rheingold and Ihrig, summary judgment in Products Cases: Decreasing the Burden of Plaintiff, *Bill of Particulars*, Vol 1, 2012, p. 48.
- **Summary judgment granted in case of Walmart rhinestone jeans on all legal theories-Menna ex rel Menna v. Walmart, 40 Misc.3d 1221(A), 2013 N.Y.Slip.Op. 51255(U) (Sup.Ct.Suffolk County July 10, 2013):** **Facts-** minor plaintiff tripped over her own feet, and claimed injury to knee due to metal fastener on inside of jeans with rhinestones attached, purchased at Walmart. Causes of action for breach of warranty, design defect and negligence pled. Defendant moved for summary judgment. **Holding-** Summary judgment granted. Plaintiff had no proof of defect, in design or manufacture; jeans were fit for purpose intended.

- **When P's testimony is inconsistent and implausible, SJ is warranted** - Dunshie v. Dick's Sporting Goods, et al., 2012 WL 253383 (W.D.N.Y. 2012)- *Facts*- P sustained injuries while hunting due to the collapse of a Bushmaster XLS Climbing Treestand manufactured by D. P alleged negligence, breach of warranty and strict liability in tort. 1t's story varied from the deposition to the interrogatory responses as to how he fell. P's experts examined the tree stand and determined that it was not defective and did not cause the accident. *Holding*- Magistrate recommended that Ds' motion for SJ be granted. P alleged that the product was defective in its design because D knew that hatch cover could open and that once open, cable could come loose, causing platform to fall. P's deposition testimony was contrary to this when he said that no portion of his weight was supported by foot platform at time it collapsed, and that his weight was entirely supported by upper portion. Not only were Ps versions of the accident inconsistent, they were extremely implausible.
- **Merely being injured by product does not equate to causation-** Pendergrast v. Analog Modules, Inc., 2011 WL 3962598 (S.D.N.Y. 2011): *Facts*- 2t serviced Medlite C6 laser, device used for aesthetic indications. A Hoya ConBio designed and manufactured high-voltage power supply for laser. In addition, A supplied high-voltage cable assembly. 2t was dispatched to make repairs on the machine. While servicing machine, he received high-voltage shock. P brought strict liability and negligence action against A. 2t alleged that pin came in contact with an unknown metal protrusion within machine, providing discharge pathway for electricity to flow through parts he was touching. D moved for SJ. A's motion was granted. *Holding*- All experts agree that high-voltage power supply could not have been the source of P's injuries. P's theory was without support in the record. His own expert testified that it was likely that 1t came in contact directly with the pin. D's expert concluded that 1t's theory is almost impossible. Thus, no reasonable juror could find that a defect in the design was a substantial factor in causing 1t's injuries. Additionally, 1t's theory of causation was too attenuated to impose liability on D based on manufacturing defect. Where a defect merely placed P at the scene of his injuries, does not equate to causation as a matter of law because P's injuries were a result of an intervening defect
- **Summary judgment was premature when discovery had not commenced even though the plaintiff could not produce the subject circular saw-** Smith v. Black & Decker (U.S.) Inc., 2011 WL 572416 (N.D.N.Y. 2011): *Facts*- P commenced suit against D to recover for injuries he sustained while using a circular saw designed and manufactured by D. D moved for SJ. The trial court denied D's motion and D filed a motion for reconsideration or, in the alternative, for leave to appeal denial of its motion. D's motions were denied. *Holding*- Even though P cannot produce subject saw, it cannot be said that it is impossible for P to prove

his claims. Accordingly, the motion to reconsider was denied. Furthermore, D contended that the saw will never be available and the parties will never know the saw's pre-accident condition. However, circumstantial evidence may be available after discovery to assist P in his claims. It was premature to rule on such motions until discovery was underway or completed

- **Cause of action dismissed where manufacturer proved there were no previous explosions caused by product and risks were known by the plaintiff who was experienced in his field; expert did not identify specific defect in manufacturing process-** Guzzi v. City of New York, 2011 WL 1817564 (2d Dept. 2011): **Facts-** P was working as a utility splicer for D, Con Ed, when he attempted to lift a mechanical half, also known as a cable joint, by tying a rope around the insulating sleeve covering the yoke of the cable joint. As P and his partner were lifting the cable joint, water infiltrated space between the yoke and the insulating sleeve, causing an explosion which resulted in P's injuries. P and his wife brought this action against, among others, D, Thomas & Betts Corporation and Elastmold, manufacturer of the subject cable joint. D moved for SJ and was denied. Appellate Division reversed the trial court's ruling and granted D's motion. **Holding-** D demonstrated prima facie entitlement to SJ on the issue of design defect by submitting the affidavit of their senior applications engineer, who had firsthand knowledge of the design and stated that the cable joint complied with all applicable standards and there were no previous incidents of explosions. Additionally, D established SJ on the manufacturing defect claim by proving that failure of the cable joint was attributable to P's own conduct. They also established that they could not be liable for a failure to warn P, because P, an experienced utility splicer, was aware of the dangers presented by live electrical cable near water. The affidavit of Ps' safety expert failed to raise a triable issue of fact because the expert failed to identify any specific defect in manufacturing process. Moreover, the expert had no qualifications or experience in this field and had no personal knowledge of design or manufacture of the cable joint at issue
- **Expert's affidavit inadmissible on SJ motion when expert was disclosed before motion was filed-** Kopeloff v. Arctic Cat, Inc., 923 N.Y.S.2d 168 (2d Dept. 2011): **Facts-** P was injured when snowmobile he was driving turned over and threw him off. P commenced this action against D, manufacturer, alleging that an over-centered sway bar caused his accident. D moved for SJ. In opposition, P submitted, inter alia, an affidavit by an expert whom he had not previously identified to D. Supreme Court granted D's motion for SJ. Appellate Division affirmed. **Holding-** P failed to raise a triable issue of fact as to whether D bore any liability for the accident. Trial court properly exercised its discretion in rejecting as untimely P's expert affidavit. P did not provide any excuse for failing to identify expert in response to D's discovery demands. Even if

affidavit could have properly been considered, result would not have been different, inasmuch as trial court properly concluded that it was speculative, conclusory and partially based on evidence not in record.

- **Where patient or doctor doesn't read the warnings on the label, failure to warn, breach of warranty and GBL violations claims fail-** Kuperstein v. Donald Lawrence, M.D., et al., 2010 NY Slip Op 32361(U) (Sup. Ct. Nassau Co. 2010): **Facts-** Ps sought to recover damages infant P allegedly suffered as a result of taking the generic drug mefloquine hydrochloride (also known as Lariam) prophylactically to prevent malaria when he traveled to China with his parents. The drug caused cognitive defects as well as psychotic and personality changes, memory loss and depression. Ds, Barr Laboratories, Inc. and Barr Pharmaceuticals, Inc., manufactured the drug and D, doctor, prescribed it for infant P. D manufacturers moved for SJ. D's motion was granted. **Holding-** D, Barr Pharmaceuticals, established that it did not manufacture or market mefloquine; D, Barr Laboratories, did. Ps causes of action sounding in negligence, defective design-strict liability, breach of implied warranty of fitness, failure to warn-strict liability were dismissed. In light of the fact that D, Barr Laboratories', warning was not read by D, doctor, adequacy or lack thereof could not have caused P's injuries. D, Barr Laboratories', warning was not read by Ps prior to purchase of product, so reliance is lacking and therefore breach of express warranty was dismissed. Similarly, absent reliance, Ps' claim sounding in fraud failed. And, Ps' claim under GBL §350 failed for that reason as well. As for Ps' claims pursuant to GBL §349, while reliance is not required, absent reviewing inadequate warnings before purchasing the product which is clearly absent here, Ps simply cannot allege causation by a misleading act or practice or deceptive or misleading advertisement.
- **Summary judgment granted where distributor installed machine to manufacturer's specifications and no problems existed prior to injury-** Brethour v. Alice Hyde Medical Center, 2011 WL 2161880 (3d Dept. 2011): **Facts-** D, S&W X-Ray, Inc., installed equipment in D's, Alice Hyde Medical Center, facility. Equipment included keypad for data entry, which was attached with industrial-strength Velcro to piece of equipment above radiology table. As technician positioned X-ray tube over P, an electrical cord caught keypad and pulled it off equipment, causing it to strike P in her forehead. P and her husband claimed, amongst other things, negligence upon theory of res ipsa loquitur. D, Alice Hyde, asserted cross claim against D, S&W, for, amongst other things, product liability. Both Ds moved for SJ, and Ps cross-moved for SJ against D, Alice Hyde. Supreme Court granted D, S&W's motion, denied Ps' cross motion and D, Alice Hyde's motion. Appellate Division affirmed. **Holding-** D's, S&W, burden was satisfied when it proved it installed X-ray equipment according to manufacturer's specifications and D's, Alice Hyde, instructions; no problems related to the keypad's attachment occurred in

the following six years; type of Velcro used did not lose its strength over time; and P's accident resulted from acts of omissions of D's, Alice Hyde, technician. D, Alice Hyde, provided that D, S&W, serviced machine regularly and that it had exclusive control over all safety obligations. However, D, Alice Hyde, needed to prove more than a potential duty; it was necessary to reveal factual issues regarding proximate cause. Record is devoid of any proof of defect or negligence in D's, S&W, maintenance or repair of equipment. Additionally, Ps' res ipsa loquitur claim was precluded. Here, record revealed that Ps had direct evidence sufficient to support cause of action sounding in negligence, rendering the res ipsa claim inapplicable

- **Plaintiff did not present sufficient evidence of nickel toxicity in knee replacement device to defeat summary judgment** – Maxwell v. Howmedica Osteonics Corp., 2010 WL 1930966 (N.D.N.Y. 2010) : **Facts** – P underwent total knee replacement surgery having the Duracon Total Knee System (“Duracon System”), manufactured by D, implanted. However P suffered an allergic reaction due to the high amount of nickel used in the device and had to have it replaced with a new, “nearly nickel free” system several months later. P sued D alleging, *inter alia*, design defect and failure to warn claiming the system’s high percentage of nickel created a foreseeable danger of which D failed to adequately warn. P’s expert, an orthopedic surgeon who performed the replacement surgery, opined that P suffered from an exacerbation of “probable true nickel allergy” arising from D’s system. D moved for summary judgment arguing that P’s expert did not present sufficient evidence of design defect or inadequate warning and that D warned doctors in the package insert about possible metallic stent sensitivity. P contended the toxicity of nickel is widely known and asked the court to take judicial notice of that fact. As a feasible alternative design, P presented the replacement system which was near nickel free. P did not address D’s argument regarding the adequacy of the warnings given to doctors. The District Court granted the D’s motion. **Holding:** Although P was a foreseeable user and D owed her a duty to manufacture a safe product, it is not sufficient to suggest, without more evidence, that the replacement system presented was an adequate alternative design. P must also show the alternative design passes the risk-utility test – that it would have led to overall improved safety and that D’s design created a substantial likelihood of harm. Here P’s expert did not address the utility of D’s product or the replacement product or opine on the incidence of material sensitivity to nickel in the general population. The court would not take judicial notice of the highly toxic nature of nickel because P presented no reports or studies supporting the assertion, the level of sensitivity to nickel in the general population, the industry standard for the acceptable levels of nickel in products or the point at which the utility of using nickel in knee replacement devices outweighs the risk. Since the P did not address D’s failure to warn arguments, D faces a lighter burden on

summary judgment but D's argument would survive even heightened scrutiny. The sufficiency of a manufacturer's warning is generally a question for the jury but where a warning is provided by a manufacturer to a physician as a learned intermediary through package inserts giving specific detailed information on the risks of the product, the manufacturer is absolved from liability as a matter of law. Here the package inserts warned of possible metal sensitivity reactions and suggested that where suspected, appropriate tests be made. The insert detailed the metallic composition of the components in the device. Thus, P failed to even demonstrate a *prima facie* failure to warn claim and it, along with design defect, must be dismissed.

- **Depositions taken in similar litigation may be used to oppose summary judgment** – Knee v. A.W. Chesterton Co., 861 N.Y.S.2d 286 (1st Dept. 2008): **Facts** – P decedent claimed he was injured by exposure to asbestos dust from gaskets on board a ship he worked on. D moved for summary judgment. In opposition, P submitted deposition testimony from P and a second witness from an unrelated asbestos litigation, and the deposition testimony of a P from another unrelated asbestos litigation. These witnesses describe work involving gaskets on the same ship, under the same conditions, within the same time period and identify D as the manufacturer of all the gaskets. D was a party in the two prior litigations and was present at all three depositions. D argued that the depositions from these three witnesses could not be used in support of the P's motion opposing summary judgment. The Supreme Court denied summary judgment and the Appellate Division affirmed. **Holding** - Although one of the witnesses may be available to testify at trial, use of the depositions in opposition to summary judgment was nevertheless proper. The depositions raise an issue of fact as to whether the decedent was exposed to asbestos contained in the D's gaskets.
- **Must establish that product performed as intended and alternative to be entitled to summary judgment** – Calandra v. Crane Plumbing, 863 N.Y.S.2d 485 (2d Dept. 2008): **Facts** – P sued for injuries that resulted from allegedly defective safety glass. D moved for summary judgment. The Supreme Court denied the motion and the Appellate Division affirmed. **Holding** - Because D failed to establish that the subject product performed as intended or that there existed a likely cause of P's injuries not attributable to any defect in the design or manufacture of the product, D failed to establish *prima facie* entitlement to summary judgment as a matter of law
- **Failure to exclude all possible alternatives causes justified granting summary judgment** – Carmona v. Mathisson, 865 N.Y.S.2d 35 (1st Dept. 2008): **Facts** – P was injured during cataract surgery using a phacoemulsification machine. P sued D, manufacturer of phacoemulsification machine alleging, *inter alia*, that the machine was defective. D moved for summary judgment, submitting the expert

affidavit of an engineer with expertise in the manufacture and design of phacoemulsification devices and technology in general attesting that there was no defect upon inspection, no similar defect had ever been reported, and a study found that phacoemulsification complications often resulted from surgical technique. Supreme Court granted summary judgment only as to the negligence and failure to warn claims. The Appellate Division reversed, granting summary judgment on all causes of action. **Holding** - D presented an expert opinion that was neither speculative nor conclusory that posited other possible causes for the injury related to human error. Because P failed to exclude all alternative causes for the injury in response, summary judgment on all claims was proper.

- **P must present evidence raising triable issues of fact in order to defeat summary judgment** - Halliday v. Stevens, 865 N.Y.S.2d 688 (2d Dept. 2008): **Facts** - P was injured while using certain items of firefighting gear. P alleged the gear was defectively designed and manufactured. D moved for summary judgment presenting evidence that they did not defectively design or manufacture the product. The Supreme Court granted D's summary judgment motion and the Appellate Division affirmed. **Holding** - Because P, in response to D's motion, failed to raise a triable issue of fact regarding defective design or manufacture, D's were entitled to summary judgment.
- **If D shows product not defective, P must counter with evidence of defect in order to prevail on summary judgment** - Mincieli v. Pequa Indus. Inc., 867 N.Y.S.2d 535 (2d Dept. 2008): **Facts** - P was injured when gas in a cesspool exploded. P sued Ds, manufacturers and sellers of a cleaner, claiming they sold a defective product which homeowners used and which subsequently exploded while P attempted to clean the homeowners' cesspool. Ds moved for summary judgment and the Supreme Court granted the motion. **Holding** - In order to succeed on a motion for summary judgment, a defendant must show that its product was not defective or that there were other causes of the accident not attributable to D. If so, P must then produce direct evidence of a defect. Here, because Ds established that their product was not defective and P in opposition produced no evidence of a defect, P failed to raise a triable issue of fact.
- **D's summary judgment motion must meet burden of establishing no defect on each of the P's individual claims** - Schlanger v. Doe, 861 N.Y.S.2d 499 (3d Dept. 2008): **Facts** - P was driving with a vehicle and a tractor trailer in the right lanes, just in front of him. The tractor trailer was in front of both the P and the other vehicle. As the tractor trailer went under an underpass, the window of a backhoe the tractor trailer was transporting shattered, causing the driver of the other vehicle to swerve into P's lane, causing P's injuries. P sued, *inter alia*, the manufacturer of the backhoe alleging defective design and manufacture.

D moved for summary judgment submitting an expert affidavit from D's director of product integrity establishing that the design of the backhoe was safe. P submitted only the affidavit of his counsel. The Supreme Court denied D's motion and the Appellate Division reversed. **Holding** - Summary judgment on the issue of design defect was correct because P's attorney affidavit failed to raise a triable issue of fact. However, granting summary judgment on the manufacturing defect was not proper. D's expert affidavit only addressed the design, not the manufacturing defect claim. Regarding the manufacturing defect, D had the initial burden of establishing as a matter of law that the backhoe was not defective. The fact that P did not allege any specific defect and that he relied only on circumstantial evidence in support, does not relieve D of its burden

- **P's experts must not present generalized, conclusory assertions without their significance and P must rule out all causes of injury not attributable to D** - Preston v. Peter Luger Enterprises, Inc., 858 N.Y.S.2d 828 (3d Dept. 2008): **Facts** - P was injured when trying to open a glass bottle of steak sauce manufactured by D. P sued D arguing that the bottle was defectively manufactured and designed. D moved for summary judgment submitting expert affidavits that the thickness of the bottle exceeded general industry standards; that this was the only known instance where the neck of the bottle broke upon an attempt to open it; and detailing an intensive testing and bottle inspection process. P submitted expert affidavits that the long neck bottle had less load carrying capability than a short neck; that the design violated acceptable engineering practices and industry standards; that small discontinuities were found in the bottle's neck and cap section; and that there were potential manufacturing defects in the bottle. The Supreme Court granted summary judgment and the Appellate Division affirmed. **Holding** - P failed to raise a triable issue of fact in that the expert affidavits submitted contained only generalized statements, bare conclusory assertions, did not explain the significance of their findings, and were not supported by any empirical data or foundational facts. Further, in the absence of alleging a specific defect, P needed to rebut D's assertion the bottle could have been mishandled by the numerous distributors it went through before being sold to P. Since a portion of the neck of the bottle was missing and P failed to discuss the likelihood it contained evidence of damage, P failed to come forward with the required rebuttal evidence excluding all causes of breakage not attributable to D.
- **Plaintiff failed to rule out possibility that dangerous condition could have been caused by something other than a defective product** - Blazynski v. A. Gareleck & Sons, Inc., 852 N.Y.S.2d 500 (4th Dept. 2008): **Facts** - P was injured when she slipped and fell on ice that had accumulated in the walk-in freezer of her employer. P claimed the ice formed due to a defective light fixture on the freezer's ceiling allowing water to drip onto the floor. P sued D manufacturer of light fixture and

contractor that supposedly fixed the problem with the light. D moved for summary judgment arguing that P's injuries were not caused by the light fixture but rather by employees who had left the freezer door open. P presented evidence that water was observed dripping from, off, or through the fixture. The Supreme Court granted summary judgment and the Appellate Division affirmed. **Holding** – Summary judgment was proper since the P failed to present competent evidence excluding all causes other than those attributable to the D, namely, the open freezer door, or identifying a specific defect.

- **Fact that warning detectors failed to warn does not rule out design or manufacturing defect necessary for initial burden for summary judgment** - Carmona v. Mathisson, 2008 N.Y.Misc. LEXIS 2192 (S.C. Bronx Cty. 2008): **Facts** – During eye surgery P claimed her doctor used a phacoemulsification device (STTL) which caused a burn around her cornea. P sued D, Alcon Labs, manufacturer of STTL, arguing that device was defective. D moved for summary judgment submitting expert testimony from an engineer that an alarm on the STTL would have sounded if the aspiration was blocked; that a warning gets displayed when the STTL fails to function; and that the STTL ultrasound will not work unless all parts are functioning properly. D's other expert testified that he tested the machine and was unable to find anything wrong with it; that it was difficult to imagine how a machine malfunction could result in any improper aspiration; that occlusions may occur if the vacuum setting is too low; and that the surgeon should manage the probe tip to clear blockages that result during phacoemulsification. As a sanction for failing to disclose some discovery, the court refused to consider the affidavits of two other Ds, the doctor and the medical center. **Holding** - D did not meet its initial burden of ruling out design or manufacturing defects. D's expert affidavits do not address why the alarm did not sound or warning get displayed when the aspiration allegedly stopped during P's surgery. Nor do they address the ultrasound functioning at the time of the injury despite evidence that the machine was not aspirating properly. There is no evidence of what the vacuum setting was, that there were occlusions, or that the probe tip was not properly managed. Therefore, issues of fact exist and summary judgment must be denied.
- **P Must Establish Causal Link Between Chemicals and MCS In Order to Defeat Summary Judgment** - Spierer v. Bloomingdale's, A Div. of Federated Dep't. Stores, Inc., 841 N.Y.S.2d 299 (1st Dept. 2007): **Facts** – P alleged injuries due to multiple chemical sensitivity (MCS) caused by a two-week exposure to mattress and box springs manufactured by D. D moved for summary judgment, submitting two of P's expert reports, obtained through discovery, that were inconclusive regarding the cause of P's symptoms. P submitted unsworn and conclusory reports that were not in admissible form showing some evidence of injury to P but demonstrated no defect in the bedding, did not eliminate other potential

causes of P's injuries and failed to rebut Bloomingdale's proof that no other customer had had ever complained of similar reactions. Further, they only concluded, based on air samples taken a year after the injury, P's symptoms could have been caused by exposure to hydrogen chloride, not that they were. The Supreme Court denied the motion and the Appellate Division reversed. **Holding** – P's proof was insufficient to defeat summary judgment. The reports were inconsistent in determining the chemical compounds to which P might have been exposed, failed to address other potential causes of P's symptoms and lacked scientific support for a causal link between those chemicals found and MCS.

- **Expert Affidavits Are Sufficient to Defeat a Motion for Summary Judgment** – *Speller v. Sears Roebuck & Co.*, 100 N.Y.2d 38, 760 N.Y.S.2d 79 (2003): **Facts** - Decedent P was killed in a house fire that started in the kitchen of her home. P claimed that the fire was the result of defective wiring in a refrigerator manufactured by D. P introduced three expert witnesses who testified that the fire originated in the refrigerator and that defective wiring was the cause. D introduced the report of the Fire Marshall who stated that the fire started on the stove top and was caused by grease that accumulated there. Based on the Marshall's report, D moved for summary judgment. The Supreme Court denied the motion and the Appellate Division reversed. The Court of Appeals reversed the Appellate Division and remanded the case for trial. **Holding** - Where causation is in dispute, summary judgment is only appropriate if 'only one conclusion can be drawn from the established facts.' Despite the fact that the Fire Marshall's report seemed to exonerate D, P introduced competent expert testimony to the contrary. Therefore, a triable issue of fact was presented and summary judgment was not appropriate

10. Consolidation for Trial

- **Consolidation of asbestos cases for one jury trial was proper** – In re N.Y.C. Asbest. Litig., 2014 WL 2972304 (1st Dept. July 3, 2014): **Note** – To expedite resolution of the asbestos cases congregated in New York County, the court set 10 cases of workers, all in extremis with mesothelioma, for one joint trial. All settled, except for two, which were tried by one jury. Verdicts were brought in against defendants in both cases, who appealed on the basis that the fact situations were so different that they should not have been tried together. **Facts** – Plaintiff Konstantin was exposed to pre mixed compound manufactured by the Georgia Pacific Kaiser Gypsum and U.S. Gypsum companies, which contained asbestos. Plaintiff Dummitt was exposed to asbestos insulation used in ship boiler rooms while repairing valves manufactured by Crane. **Holding** – Affirmed. While the court pointed out disparate facts in the two cases, and even some different legal issues, they were similar enough and the verdict indicated no jury confusion. **2nd Holding** – On the challenge by one defendant, Crane, that it was not directly involved with the asbestos at issue, verdict also affirmed. The court disagreed again since Crane

helped write the Naval Machinery manual and provided detailed drawings specifying which components should be used with each valve, thus influencing the Navy's decision to use asbestos.

G. Damages

1. Emotional Distress

- **Loss of personal property, including family pets and a home, is not basis for claim of negligent infliction of emotional distress and loss of companionship where a stove caused a house fire-** Enteliso v. Electrolux Home Products, 2011 WL 572434 (N.D.N.Y. 2011): **Facts-** Ps brought this action against Ds seeking compensation for damages they suffered when home was destroyed by fire. Ps asserted that the fire was caused by an internal malfunction in kitchen stove, which was manufactured by D, Electrolux Home Products, Inc., and sold by Ds, Sears. The complaint alleged causes of action: (1) strict liability; (2) negligence; (3) breach of warranty; (4) negligent infliction of emotional distress; and (5) loss of companionship. Ds filed motion to dismiss the Fourth and Fifth causes of action. **Holding-** Ps could not establish a claim under either bystander theory or direct duty theory of negligent infliction of emotional distress. First, Ds only have a general duty to consumers to prevent dangerous manufacturing defects; it was not a special duty owed to Ps. Second, Ps' physical safety was not threatened because they were not home at the time of the fire. Finally, there was no death or serious injury to an immediate family member. Ps' loss of companionship is based entirely on loss of their dogs. Pursuant to New York law, pets are personal property, and thus there is no independent cause of action for loss of a pet's companionship
- **No Recovery for subsequent Observation of Injuries** -*Colon ex rel. Molina v. Bic USA, Inc.*, 199 F.Supp.2d 53 (S.D.N.Y. 2001). **Facts-** basic facts enumerated above in 'evidence'] P mother sued for recovery of damages for emotional distress that suffered in viewing her son's injuries for the first time and the permanent psychological damage caused by D. D moved for summary judgment on the grounds that she was not in the "zone of danger." The motion was granted. **Holding-** P was in a different state when the incident occurred and certainly did not witness it first-hand That trauma that she experiences upon observing the injuries does not give rise to a claim for emotional distress.

2. Punitive Damages

- **Willful or Wanton Misconduct** - *Bombara v. Rogers Bros. Corp.*, 289 A.D.2d 356, 734 N.Y.S.2d 617 (2d Dept. 2001): **Facts** - [enumerated above in 'design defect']. **Holding-** Although the court granted summary judgment and dismissed the case, it added in dicta that even had summary judgment not been granted, punitive damages would not have been appropriate because there was no evidence of willful or wanton misconduct

3. Pre-Existing Conditions

- **Damages-** *Doyle v. American Home Products Corp.*, 286 A.D.2d 412; 729 N.Y.S.2d 194 (2d Dept. 2001): **Facts** - [enumerated above in

'defenses']. **Holding-** The fact that P's Reiter's syndrome was a pre-existing condition did not absolve D of liability. However, it will be relevant in determining the amount of damages that he can recover

H. Class Actions and Mass Torts

1. Class Action Certification

- **Several class action certifications 2014 – 2015:**

- Segedie v. Hain Celestial Group, Inc., 2015 WL 2168374 (S.D.N.Y. 2015). Plaintiffs claimed that they bought various products put out by defendant (47 in all), which were labeled “Organic” and “Natural,” whereas they had synthetic and artificial ingredients in them. In a lengthy analysis, the court refuses to dismiss some of the causes of action, pursuant to FRCP 12(b)(6). It did not grant a preemption defense. It did dismiss fraud, misrepresentation and warranty actions, but left many others standing.
- Belfiore v. Proctor & Gamble Co., 2015 WL 1402313 (E.D.N.Y. 2015). Plaintiff sought a class action for purchasers of defendant’s flushable wipes sold as Charmin Freshmates. They were represented as “septic safe.” He had used them and paid \$526.83 to a plumber to unclog his sewer. The remedy he sought was an injunction. Defendant moved to dismiss on the pleadings, FRCP 12(b)(6), which was denied. Plaintiff had standing to seek injunctive relief. A cause of action was stated under GBL §349. Plaintiff’s injury was payment of a premium price for the wipes, plus the plumber’s bill.
- Brady v. Basic Research, L.L.C., 2015 WL 1542094 (E.D.N.Y. 2015). The products were supplements known as Zantrex, Fat Burner, etc., where the manufacturer made claims that they were clinically proven to cause weight loss. Defendants moved on the pleadings to dismiss under FRCP 12(b). On review of the complaint, which is taken as true for these purposes, the court dismissed some causes of action but left others standing.
- Kardovich v. Pfizer, Inc., 2015 WL 1506996 (E.D.N.Y. 2015). The class asserted here was purchasers of various Centrum brand multivitamins, which were alleged to be falsely advertised as dealing with stress, metabolism and immunities. Pfizer moved to dismiss on the pleadings, FRCP 12(b)(6). The court did so, evidently regarding the absence of a basis in the complaint that these representations were actionable. A motion for leave to amend was granted.
- Bowling v. Johnson & Johnson, 65 F.Supp.3d 371, 2014 WL 5643955 (S.D.N.Y. 2014). Plaintiff sued objecting to the claim made for defendant’s toothpaste that it “restores enamel,” claiming that was medically impossible. The FDA, which had extensive regulations for toothpastes, had never been critical of

this particular claim. J & J moved to dismiss and the court so ordered. The claims were preempted by the FDA regulations.

- Weisbaum v. Prophase Labs, Inc., 2015 WL 738112 (S.D.N.Y. 2015). These plaintiffs had purchased the homeopathic cold remedy “Cold-EEZE” which made various representations about reducing colds, etc. Defendant manufacturer challenged all causes of action—misrepresentation, fraud, breach of warranty, NY GBL sec. 349 and 351, unjust enrichment, and Magnusson-Moss Warranty Act. The court allowed some to stand and dismissed others.
- Elkind v. Revlon Consumer Products Corp., 2015 WL 2344134. (E.D.N.Y. 2015). Plaintiffs in a class action sought damages for buying “Revlon Age Defying with DNA Advantage” products. The claim was that this was false and misleading in that the products could not affect DNA on a molecular level. The court allowed many of the claims to stand. There was no preemption; the plaintiffs had standing as to some products; liability under NY GBL for deceptive advertising was properly pleaded; the negligent misrepresentation cause of action was struck due to the economic loss rule; the fraud claim was allowed, as was the claim for breach of express and implied warranty; and the unjust enrichment causes of action were struck as repetitive.
- **Permission to substantially alter class defamation and theory of damages nearly 3 years after start of litigation was denied- Oscar v. BMW of North America, LLC.** 2011 WL 6399505 (S.D.N.Y. 2011): *Facts-* P's motion for class certification was denied by trial court. P had leave to renew the motion as to the New York sub-class in the event that he can make an appropriate showing on numerosity and predominance. P proposed a new complaint in which the New York class would consist of: all consumers who purchased or leased new 2005, 2006, 2007, 2008 and 2009 MINI Cooper S vehicles equipped with run-flat tires in New York whose tires have gone flat and been replaced. The proposed new class would differ in two important respects: (1) it would be narrowed by focusing only on a single model of MINI, the MINI CooperS; and (2) it would be significantly broadened by adding five additional tire manufacturers. *As argued* that amendment to the pleadings would prejudice them at this late date and that they would still fail the predominance prong of the class certification inquiry. P's motion to leave was denied. *Holding-* The amendment would substantially overhaul the class definition and theory of damages, nearly three years after the start of this litigation. P unduly delayed filing proposed amended complaint and was not diligent in revising the claims and thus would cause prejudice. P's diligence in investigating and refining his theories of liability and injury did not

supply good cause to set aside deadlines embodied in scheduling orders

- **Putative class action under F.R.C.P. 23(b) for the owners denied- Oscar v. BMW of North America, LLC, 2011 WL 2206747 (S.D.N.Y. 2011):**
Facts- P brought this putative class action against D, car manufacturer, and D, tire manufacturer, alleging that Goodyear run-flat tires (RFTs) with which his 2006 MINI Cooper S was equipped were defective. P incurred five flat tires over a period of three years. P claimed that the tires were falsely advertised and inconvenient. He alleged breach of contract, breach of express warranty, breach of implied warranty, deceptive business practices under GBL §349 and false advertising pursuant to GBL §350. D, tire manufacturer, moved to dismiss. The trial court granted the motion based on the lack of privity between D, tire manufacturer and P for his warranty claims to prevail. P moved for a class certification. P's motion was denied. **Holding-** P did not present sufficient information in support of numerosity. Even assuming that a substantial number of MINIs were equipped with Goodyear RFTs, P had further difficulties in demonstrating their failure rate. The Court did recognize that it does not make a merits determination when certifying a class. The Court decided that P met the numerosity requirement for a nationwide class, but the New York sub-class was denied because the Court did not want to make unsupported inferences and assume that RFTs made up a particularly large portion of the market share during the class period or that RFTs had a particularly high puncture rate. The Court determined that although P will have difficulties demonstrating a common defect, it ultimately does not defeat this prong of the test. The common question is whether the tires were defective. The Court agreed that the typicality requirement was met because P would be a typical member of his class. The Court concluded that P had adequately alleged that his tires failed because of a defect, so he himself was an adequate representative. The Court then undertook the Rule 23(b)(3) analysis which required that: "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and...[that] a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." The Court concluded that it was not satisfied that common claims predominate for either the nationwide class or the New York subclass because there are significant individual legal and factual questions for these claims that defeat predominance. The issue is that tires can puncture for any number of reasons.
- **Certification of class not proper when determination of Ps injury due to Ds misrepresentation required individualized proof – McLaughlin v. American Co., 522 F.3d 215 (2d Cir. 2008):** **Facts** - Ps, a group of smokers, alleged they were deceived into believing that "light" cigarettes (lights) were healthier than "full-flavored" (regular)

cigarettes. As a result Ps claimed they bought lights in greater quantity than they would have and at an artificially high price, resulting in overpayment for the cigarettes. Ps, bringing suit under RICO, sought class certification under FRCP Rule 23. The main issue was whether Ps had established that issues of injury and causation were susceptible to common proof. Ps argued that they could establish causation through generalized proof by showing that (1) D's national marketing campaign represented that light cigarettes were healthier than regular cigarettes in a consistent, singular and uniform fashion, and, (2) D's misrepresentations caused Ps to suffer economic loss because the demand for lights rose resulting in the Ps paying more for the product. Ps also argued they could establish injury by common proof by showing (1) the difference between the price paid for lights as Ds represented and the price they would have paid had they known the truth (a "loss of value" theory), or, alternatively, (2) the price impact that disclosure of the truth would have had on the market (a "price impact" theory). The District Court certified the class and the Second Circuit reversed.

Holding – Ps cannot establish causation without individualized proof because (1) Ps cannot present evidence to overcome the possibility that members of the class purchased lights for reasons other than that they were healthier – for example because they preferred the taste or for matters of style, and, (2) individuals may have relied on Ds misrepresentation to varying degrees in deciding to purchase lights. Regarding injury, Ps cannot demonstrate economic injury through their "loss of value theory" because it estimates expectation damages not tangible property. Ps also cannot demonstrate injury through a price impact theory because Ps have not produced sufficient facts to show a tenable measure of harm. The only measure of damages sustainable is an out-of-pocket loss theory and this would require individualized proof.

- **Class Certification inappropriate where class members were not injured** – Hooper v. HM Mane Solutions, 11 Misc. 3d 1091(A) (Sup. Ct. N.Y. Cty. 2006): *Facts* - Plaintiffs consisted of individuals who purchased a hair straightening product that was defective and caused damage to the hair and scalp of some of its users. Ps sought class certification of all purchasers of the product regardless of whether they sustained injuries. D manufacturer opposed the motion for certification on the ground that individuals who did not suffer injuries do not have an actionable claim. Supreme Court denied the motion for certification. **Holding-** While the merits of a claim are not to be reached on a motion for class certification, the court is required to determine whether the claim on its surface seems to have merit. Here, plaintiffs seek to certify a class of people who sustained no injuries as a result of the defective product. In the absence of injuries or damages, the proposed class members have no claim and class certification is therefore improper.

- **Class certification inappropriate where the cause of the harm and the severity of the injuries varies greatly among the class members** – Hooper v. HM Mane Solutions, 11 Misc. 3d 1091(A) (Sup. Ct. N.Y. Cty. 2006): *Facts* - Plaintiffs also sought certification of a class for all people who were injured as a result of their use of the product. D opposed the motion on the ground that the cause of the harm and severity of the injuries vary from person to person. Supreme Court denied the motion for certification. **Holding** Relying heavily on the decision in a Dalkon Shield IUD case, the court noted that even if there was a defect in the product, it cannot be said for certain that any user who experienced hair or scalp damage did so as a result of the product. There are many causes for such damage. Furthermore, the nature of the injuries varied greatly, from broken hair strands to hair loss to actual scalp damage. Under these circumstances, the claims of each plaintiff must be established on a case-by-case basis and class certification is inappropriate.
- **Class certification “academic” where the underlying complaint fails to state a claim** – Baron v. Pfizer, No. 6429/04 Mealy’s Vol. 11 #10, P. 6 (Sup. Ct. Albany Cty. 2006): *Facts* - P commenced an action under GBL § 349 on behalf of people who purchased the epilepsy drug Neurontin prescribed for off-label use. Neurontin was approved by the FDA for epilepsy but prescribed to P for back pain. P claimed that D manufacturer was aware of adverse effects from the off-label use of the drug but failed to warn of them. P moved to certify a class of all individuals who used the drug to treat illnesses other than epilepsy. D moved to dismiss the complaint on the ground that it failed to state a cause of action. Supreme Court granted the motion and denied P’s motion for class certification as academic. **Holding-** P’s complaint did not allege how any allegedly deceptive acts by D mislead her or her physicians and did not even allege that the drug was ineffective for the purpose for which she used it. Therefore, P underlying claim fails.
- **In The Absence of Economic Loss**· Rivkin v. Heraeus Kulzer GmbH, 289 A.D.2d 27; 734 N.Y.S.2d 31 (1st Dept. 2001): **Facts** – [enumerated above in ‘manufacturing defect’]. **Holding-** In order for a class action to be brought in the name of a particular P, that P must have a cause of action his/herself. In a case such as this, where there were no actual damages, class certification may not be granted.

2. Mass Tort Litigation

- **Federal MultiDistrict Litigation Placed in New York:** These are coordinated pursuant to 21 U.S.C. 1407(a). For a detailed discussion of the MDL process, see Rheingold, *Litigating Mass Tort Cases* (AAJ Press, 2013 supp.). Recent instances are:

- **General Motors-** SDNY, Judge Furman. This is a brand new MDL in which more than 100 suits are now pending and involves the ignition switch recall that began in February. Lead counsel have been named
- **Mirena-** SDNY, Judge Seibel. Coordinated April 8, 2013. This is the IUD which releases the progestin hormone levonorgestrel. The injuries are for perforation or embedment. A good case involves surgical removal. Problems which arise soon after insertion are probably not due to a defect in the problem, but rather due to doctor error. The litigation is in its early stages. There is a parallel litigation coordinated in the N.J. state courts, before Judge Martinotti.
- **Fosamax-** SDNY, Judge Keenan. This is a long standing MDL, for ONJ (osteonecrosis of the jaw) due to this drug, prescribed to treat osteoporosis and osteopenia in post menopausal women. The judge is still trying bellwether cases—see the decision above in this year’s writeup. (The more serious atypical femur fracture cases are assigned to a federal judge in N.J. and most of the cases are in the N.J. state coordinated proceedings.
- **Propecia-** EDNY, Judge Gleeson. Coordinated on April 16, 2012. There are about 400 suits pending for sexual disabilities due to use of this anti-hair loss drug. The side effects include erectile dysfunction and loss of libido. For a recent decision in this litigation, dealing with fraudulent joinder, see *In re Propecia (Finasteride) Products Liability Litig.*, 2013 WL 3729570 (E.D.N.Y. May 17, 2013).
- **Zyprexa-** EDNY, Judge Weinstein. This is a long running MDL in its windup stages. The claims were development of diabetes in this psychotropic medicine.
- **Methyl Tertiary Butyl Ether Products** - SDNY, Judge Scheindlin. This is another long running MDL relating primarily to proper damage due to this gasoline additive
- **Ephedra** - SDNY. These supplement cases have been assigned to Judge Rakoff. All federal cases are disposed of, most through bankruptcies, and the MDL will wind up shortly. Paul was a member of the PSC, which has been paid for its services out of a common fund
- **State Court Coordination:** These are coordinated pursuant to Uniform Civil Rules of the Supreme and County Courts sec. 202.69
 - **Plavix-** Justice Friedman, New York County. Coordinated on February 1, 2012. This is the blood thinner, with injuries due to bleeds in the brain or GI bleeds. There are many pockets of litigation around the country.
 - **Toyota Sudden Unintended Acceleration-** Justice Bucaria, Nassau County. Terrence McCartney serves as plaintiff’s liaison counsel in the litigation. The roughly two dozen cases are

following closely behind the MDL in the Central District of California where the first trial is scheduled for November 2013.

- **Zoloft** - Justice Huff, New York County. Coordinated on January 13, 2012.
- **Mass Torts Coordinated in New Jersey State Courts:** Since so many New York lawyers are practicing in New Jersey when it comes to drugs and devices, here is the website for the mass tort cases pending there and the rules: www.judiciary.state.nj.us/mass-tort/indexz.htm.
- **A District Court must adhere to MDL Court's rulings- Deutsch v. Novartis Pharmaceuticals Corp., 2011 WL 790702 (E.D.N.Y. 2011):**
Facts- Ps commenced actions against D's drugs Aredia and Zometa (IV bisphosphonates) claiming that they caused Ps to develop ONJ. Ps proceeded on strict product liability, negligence, and breach of implied warranty claims against D, predicated on its alleged failure to warn. Ps cases against D were consolidated and transferred to the Middle District of Tennessee. In the MDL court, D filed two general SJ motions based on causation and adequacy of warnings. The MDL court denied both motions. In addition, the MDL court either denied or denied in part and mooted in part D's *Daubert* motions. Following these decisions, the MDL court remanded these two cases to this court for trial. D filed *Daubert* motions to exclude expert testimony. Ps' filed a *Daubert* motion to exclude testimony on causation of ONJ by D's oncologic experts; and a motion to unseal documents. The District Court determined that MDL court's ruling was law of the case. **Holding-** D's motion was denied because it is well-established that orders issued by a federal transferee court remain binding if the case is sent back to transferor court. It was determined that: (1) epidemiologic studies carried sufficient indicia of reliability; (2) physicians' expert testimony concerning ONJ and its causation carried sufficient indicia of reliability; (3) expert testimony of professor of preventative medicine concerning pharmaco-epidemiologic research carried sufficient indicia of reliability; and (4) expert testimony of treating physicians carried sufficient indicia of reliability
- **Certification of nationwide non-opt-out class vacated: In re Simon II Litig., 407 3d 125 (2d Cir. 2005).** In this case, the Second Circuit vacated an order from Judge Weinstein that certified a nationwide non-opt-out class of plaintiff smokers who sought punitive damages under state law for fraudulent denial and concealment of the risks associated with cigarettes. The court held that there was no evidence that would allow the determination of the fund limits or the total amount of punitive damages that would be claimed. Thus, the fund may have been inadequate to pay all of the resulting claims.