

Texas

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Introduction

Like other American jurisdictions, Texas recognizes a theory of product liability known as “marketing defect,” or failure to provide adequate warnings and instructions with a product. Under Texas law, a manufacturer will be liable for failing to provide adequate warnings or instructions when the omission renders an otherwise adequate product unreasonably dangerous.¹

What is the scope of the duty to warn in Texas?

The duty to warn is limited in scope and applies only to hazards of which the consumer is unaware.² Manufacturers have a duty to warn users adequately of foreseeable and known risks associated with the use of their products.³ Manufacturers are within the scope of liability if they: (1) engage in the business of selling or placing the product in the stream of commerce; and (2) the product reaches the user without substantial change in the condition in which it was sold.⁴

The duty to warn applies to four types of dangers: (1) risks or dangers inherent in the design of the product; (2) foreseeable dangers or risks of harm from unintended uses of a product; (3) risks of danger that affect only a limited number of users susceptible to a danger in the product; and (4) unavoidably unsafe products.⁵

Elements of Marketing Defect Claim

A marketing defect cause of action consists of five elements: (1) a plaintiff must show a risk of harm that is inherent in the product or that may arise from intended or reasonably anticipated use of the product; (2) the manufacturer must actually know or reasonably foresee the risk of harm at the time the manufacturer markets the product; (3) the product must possess a marketing defect; (4) the absence of the warning or instruction must render the product unreasonably dangerous to the ultimate user or consumer of the product; and (5) the manufacturer’s failure to warn or instruct must constitute a causative nexus in the product user’s injury.⁶ The plaintiff has the burden of showing the manufacturer knew or should have known of the dangers associated with the

product and that the manufacturer could have provided a warning.⁷

Marketing defect cases focus on: (1) if the risks were reasonably foreseeable by the manufacturer or seller at the time of the manufacture; (2) if the lack of warnings or instructions created an unreasonable danger, and (3) if warnings were given, the adequacy of those warnings.⁸ Manufacturers are not liable for failing to warn of dangers that were unforeseeable at the time they sold the product.⁹ However, if the manufacturer knew (or should have known of a danger), then the manufacturer has a duty to warn.¹⁰ Courts measure foreseeability in terms of the dangers that are reasonable to anticipate and courts deem the manufacturer as possessing knowledge of the latest scientific advances.¹¹

What factors go into deciding the adequacy of a warning?

Texas courts use a four factor test to determine the adequacy of a warning or instruction: (1) if a warning or instruction can reasonably be expected to catch the attention of the consumer; (2) if the warning or instruction is comprehensible; (3) if the warning or instruction gives a fair indication of the specific risks involved with the product; and (4) if the warning or instruction consists of an intensity justified by the magnitude of the risk.¹² Courts determine the adequacy of the warning at the time the product left the manufacturer.¹³

The plaintiff has the burden of proving that an adequate warning would have made a difference in the outcome because the plaintiff would have heeded the warning.¹⁴ Generally, the adequacy of a warning is a fact question the jury determines.¹⁵ However, if a warning specifically mentions the circumstances complained of, then it is adequate as a matter of law.¹⁶

Is it always necessary to warn?

Commonly Known Dangers

Under Texas law, manufacturers are not required to provide warnings for dangers commonly known to the community.¹⁷ The dangers attributable to the product must be a matter of common knowledge when the consumer received the product.¹⁸ Common knowledge encompasses only those things so patently obvi-

ous and well known to the community generally, that there can be no question or dispute concerning their existence.¹⁹ Thus, common knowledge means the danger is beyond dispute.²⁰

Courts consider the commonly known danger defense extraordinary and difficult to establish.²¹ Courts determine common knowledge under an objective standard based on the overall knowledge common to the community.²² Courts generally determine the level of appreciation of danger that amounts to common knowledge.²³ However, if factual issues exist, then a jury may determine if the danger was common knowledge.²⁴

Open and Obvious Dangers

Texas law does not require manufacturers to warn of open and obvious dangers because readily apparent dangers serve the same function as warnings.²⁵ Courts reason that open and obvious warnings accomplish little and may be counterproductive because consumers are prone to ignore them.²⁶ To determine if a danger is open and obvious, courts use the ordinary user of the product standard, not an average person.²⁷ Therefore, a particular user's knowledge and experience may factor into this objective standard.²⁸

Unavoidably Unsafe Products

Manufacturers may sell a product that is unavoidably unsafe if they properly warn consumers.²⁹ Unavoidably unsafe products are dangerous, but beneficial.³⁰ A manufacturer is liable only if the failure to warn is a producing or proximate cause of the plaintiff's injuries.³¹ A product is "unavoidably unsafe" if it is known to be unsafe by an ordinary customer with ordinary knowledge common to the community.³²

Is there a heeding presumption in Texas?

Texas recognizes a heeding presumption when a manufacturer fails to provide adequate warnings or instructions for a product. The heeding presumption provides that the user of a product would have read and heeded warnings or instructions if the manufacturer had not failed to give them.³³ The manufacturer may rebut this presumption by showing some circumstance existed whereby the plaintiff's improper

use of the product would have occurred regardless of the proposed warning or instruction.³⁴ The heeding presumption only shifts the burden of production to the defendant.³⁵ The plaintiff still has the burden of persuasion.³⁶

Texas courts allow the heeding presumption when the manufacturer fails to warn or instruct of its product's danger. If the manufacturer provides conspicuous warnings, and the evidence shows that the plaintiff did not read them, then, even if the warnings are inadequate, the heeding presumption is not available.³⁷

What defenses are available to those within the chain of distribution?

Manufacturers

Assumption of the Risk

In Texas, assumption of the risk is a valid defense to a strict product liability claim.³⁸ Under this defense, a claimant's recovery may be reduced if: (1) the claimant discovers the defect and is aware of the danger and (2) voluntarily and unreasonably proceeds to encounter the known danger.³⁹ Because Texas assesses liability under a proportionate liability scheme, assumption of the risk reduces the percentage of a manufacturer's or seller's responsibility for the harm.⁴⁰ However, the Texas Supreme Court, *in dicta*, has indicated that a consumer that assumes the risk is barred from recovery.⁴¹

Contributory Negligence

Contributory negligence may be a defense to a product liability claim.⁴² If a plaintiff is only negligent of failing to discover a product defect, or to guard against the possibility of a defect, then no contributory negligence defense exists.⁴³ In contrast, a contributory negligence defense may exist if a plaintiff fails to act reasonably or fails to take reasonable precautions, regardless of the known or unknown product defects.⁴⁴ Texas law does not allow recovery where a claimant is more than 50 percent responsible for the injury.⁴⁵ If the claimant is not more than 50 percent liable, then the claimant's recovery will be reduced by the percentage equal to the claimant's percentage of responsibility for the harm.⁴⁶

Statute of Limitations

A claimant has two years from the time the cause of action accrued to sue the manufacturer in a product liability suit.⁴⁷ If the claim involves wrongful death, then the claim accrues two years from the date of death.⁴⁸ The discovery rule, in appropriate cases, may extend the two-year statute of limitations.⁴⁹

Statute of Repose

Texas law bars claimants from bringing a product liability lawsuit fifteen years after the manufacturer originally sold the product.⁵⁰

Misuse

A manufacturer is not liable when the resulting harm from its failure to warn was unforeseeable at the time the manufacturer marketed the product.⁵¹ The manufacturer must show that it did not know, nor reasonably could have known, of the risks.⁵²

Bulk Suppliers

Bulk suppliers generally have no duty to warn when it is nearly impossible for them to identify and communicate with the ultimate consumer.⁵³ This defense allows bulk suppliers to arrogate the duty to warn to an intermediary when the intermediary (1) is adequately trained; (2) the intermediary is familiar with the properties and the safe methods of handling the product; and (3) is capable of passing its knowledge to the customers.⁵⁴ Since the bulk supplier defense does not necessarily involve a learned intermediary, the bulk supplier must (1) warn the intermediary of the product's dangers and (2) verify that intermediary is adequately trained in the use of the product.⁵⁵

Distributors and Retailers

Although protected by statute, non-manufacturing distributors and retailers may be liable for a faulty warning if they participate in the product's design, alteration or installation.⁵⁶ Types of behavior that may lead to liability include: (1) exercising substantial control over the content of an inadequate warning or instruction; (2) making incorrect factual representations about the product, and (3) selling a product with knowledge that the warning is inadequate.⁵⁷ To the extent that distributors and retailers are liable for participating in these prohibited activities, both

may employ the same defenses as those available to manufacturers.

What defenses are available to those within the chain of distribution?

Component-Part Manufacturers

Under Texas law, if a component manufacturer does not participate in the integration of the component into the finished product, then the component manufacturer is not strictly liable for defects in the final product unless the component itself is defective.⁵⁸ The rationale for this rule is that a component manufacturer should not be liable for a design defect in the final product when the component manufacturer did not participate substantially in the product's design.⁵⁹ Therefore, when a sophisticated buyer integrates the component into another product, the component manufacturer generally owes no duty to warn either the immediate buyer or the ultimate consumer of the dangers arising because the component is not suited for the product.⁶⁰

Under component-party manufacturer liability, Texas law distinguishes between duties owed to consumers and duties owed to sophisticated users of a product.⁶¹ Component manufacturers have a limited duty to provide reasonable instructions and warnings to their component part buyers regarding the risks associated with the use of the product.⁶² Because this duty is limited, the component manufacturer is not required to warn or instruct about every characteristic of the component's operation.⁶³ In contrast, a component manufacturer has no duty to warn foreseeable users of a product who have special training, such that any dangers would be obvious to them.⁶⁴ This is true even where persons without such training would not appreciate the risks.⁶⁵

What role does the learned intermediary doctrine play in Texas?

In some cases, Texas law allows a manufacturer to fulfill its duty to warn the ultimate consumer by issuing an adequate warning to a learned intermediary.⁶⁶ A manufacturer may pass its duty to warn to a learned intermediary if: (1) the warning to the learned intermediary is adequate; and (2) the supplier is sure the

intermediary is familiar with the propensities of the product and is capable of adequately warning the ultimate consumer.⁶⁷ If the manufacturer's warning to the intermediary is inadequate or misleading, then the manufacturer remains liable to the ultimate consumers.⁶⁸

It is necessary to warn the sophisticated user?

Texas law relinquishes a manufacturer's duty to warn a sophisticated buyer when the risks of the product are obvious to that buyer.⁶⁹ Under this rule, manufacturers will not have a duty to warn the sophisticated buyer, even where ordinary people without such training would not appreciate the risks.⁷⁰ The rationale is that manufacturers can rely on the sophisticated buyer's professional expertise and tailor the warnings accordingly.⁷¹

Delegation of the duty to warn to third parties.

Texas courts may allow manufacturers to delegate the duty to warn or limit the general obligation of a manufacturer to warn the ultimate consumer.⁷² If a manufacturer seeks to delegate the duty to warn to a third party, the third party is deemed to be an intermediary. The mere presence of an intermediary does not excuse the manufacturer from warning those who it should reasonably expect to be endangered by the use of its products.⁷³ Therefore, a manufacturer may still have a duty to warn the ultimate consumer despite its efforts to delegate that duty to an intermediary.

In an employment context, a manufacturer may have a duty to warn its customers' employees of the risks of using a product, even when the customers are already aware of the risks and are themselves obligated by law to warn their employees.⁷⁴ Whether a manufacturer is required to warn the ultimate users (the customer's employees) in addition to warning the intermediaries depends on whether a legal duty exists between the manufacturer and the ultimate consumer.⁷⁵ Courts use the following factors to determine if a manufacturer has a duty to warn the ultimate consumers: (1) social, economic and political questions and their applicability to the facts; (2) the extent of the

risk involved; (3) the foreseeability and likelihood of injury weighed against the social utility of the actor's conduct; (4) the magnitude of the burden of guarding against the injury, and (5) the consequences of placing the burden on the defendant.⁷⁶ These factors are weighed against each other, with the measure being reasonableness of the circumstances.⁷⁷ Manufacturers have the burden of proof to show no legal duty exists.⁷⁸

Is an expert required on warning issues?

Expert testimony is required if a case involves information unfamiliar to ordinary persons.⁷⁹ Texas courts generally require expert testimony in product liability cases regarding the nature of the product, foreseeability of the danger, the standard of care and causation.⁸⁰ Because many product liability cases are complex, Texas courts are requiring expert evidence more frequently.

Is there a post-sale duty to warn?

Texas law generally does not impose strict liability on manufacturers for hazards that arise after the sale of a product.⁸¹ In a product liability suit, a defect must exist at the time the manufacturer sells the product.⁸² If the product reaches the buyer in a safe condition, then a manufacturer is generally released from a duty to warn.⁸³

However, a manufacturer may have post-sale liability in two scenarios. First, a manufacturer may be strictly liable in a post-sale scenario if (1) the manufacturer regains a significant degree of control over the product; (2) the product is determined to be defective during that period of control; and (3) a plaintiff is injured because of that defect.⁸⁴ Second, a manufacturer can be liable under a negligent undertaking theory when: (1) the manufacturer voluntarily assumes a post sale duty to warn (recalls for example); and then (2) the manufacturer does not exercise reasonable care to perform that duty.⁸⁵

Has the duty to warn been preempted with respect to any product in Texas?

Statutes Preempting the Duty to Warn

Inherently Unsafe Products

Texas law prohibits product liability suits involving common consumer products intended for personal consumption.⁸⁶ Under this law, products such as sugar, alcohol, tobacco, butter, and castor oil cannot be the subject of a marketing defect lawsuit because the statute deems any harms from such products to be generally known as unsafe.⁸⁷

Non-manufacturing Sellers

Texas law generally does not hold a non-manufacturing seller liable for harm caused by a defective product.⁸⁸ However, a non-manufacturing seller may be liable if it: (1) participated in the design of the product; (2) altered the product and the alteration caused the harm complained of; (3) installed the product or had the product installed on another product and harm resulted from the installation; (4) exercised substantial control over the content of the warning or instruction and that instruction was inadequate; (5) made express factual representations about the product that were incorrect; or (6) knew of the product defect at the time of the sale. The non-manufacturing seller may also be liable if the manufacturer of the product is insolvent or not subject to the court's jurisdiction.⁸⁹

Firearms and Ammunitions

Texas law generally restricts a plaintiff's right to sue firearm or ammunition manufacturers and sellers for design defects in the firearms or ammunition.⁹⁰ To bring suit, the plaintiff must show: (1) the actual design of the firearm or ammunition was defective and such defect caused the firearm or ammunition not to function as reasonably expected by its user; and (2) the defective design was the producing cause of the harm. Plaintiffs are precluded from proving that a design is defective based on weighing the benefits of firearms against the risk of injury when the firearm is discharged.

Medicines

Texas law allows a rebuttable presumption that a manufacturer or distributor of pharmaceuticals that com-

plies with federal safety standards is not liable for a failure to provide adequate warnings or information.⁹¹ The rebuttable presumption is available where the warnings or information accompanying the product (1) were FDA approved, or (2) were those stated in the monographs developed by the FDA for pharmaceutical products that may be distributed without an approved new drug application.⁹² The plaintiff may rebut the presumption by showing the defendant: (1) misrepresented or withheld information relevant to the performance of the product and that actually caused the plaintiff's injury; (2) sold or prescribed the product in the United States after an FDA order to remove the product from the market; (3) recommended or promoted the product for an indication not approved by the FDA and the use caused the plaintiff's injury; (4) prescribed the product for a non-FDA approved condition; and (5) the defendant's conduct violated federal law such that the warnings or instructions approved by the FDA were inadequate.⁹³

Compliance with Government Standards

Texas law provides a rebuttable presumption to all claims that a product was defective in labeling if the manufacturer complied with mandatory safety standards promulgated by the federal government that were applicable to the product at the time of manufacture and governed the product risk that caused the alleged harm.⁹⁴ A similar presumption is available if the manufacturer shows the product was subject to pre-market licensing or approval by the federal government.⁹⁵

A claimant may rebut the presumption by establishing that: (1) the federal safety standards were not adequate to protect the public from unreasonable risks of injury or (2) the manufacturer withheld or misrepresented information or material relevant to the federal government's determination of adequacy of the safety standards or regulations.⁹⁶

Has the Restatement (Third) been adopted in Texas?

Texas has not adopted the Restatement (Third) of Torts for product liability cases. Texas courts use the Restatement (Third) on a case-by-case basis. Practitioners must research the pertinent section to determine the extent of its persuasiveness in a Texas court.

Texas has followed the Restatement on the following: Section 1 (Liability of Commercial Seller or Distributor for Harm Caused by Defective Products),⁹⁷ Section 2 (categories of product defects),⁹⁸ Section 3 (Circumstantial evidence Supporting Inference of Product Defect),⁹⁹ Section 4 (Non-Compliance and Compliance with Product Safety Statutes or Regulations),¹⁰⁰ Section 5 (Liability of Commercial Seller or Distributor of Product Components for Harm Caused by Products into Which Components are Integrated).¹⁰¹

Texas courts also have referred to Section 6 (Liability of Commercial Seller or Distributor for Harm Caused by Defective Prescription Drugs and Medical Devices)¹⁰² and Section 18 (Exculpations for Products Liability).¹⁰³

Texas courts have expressly rejected Section 20, comment g (Definition of one who sells or otherwise distributes).¹⁰⁴

Conclusion/Practice tips

Marketing Defect: Texas Pattern Jury Charge

A Texas trial court will typically submit the issue of marketing defect in a form consistent with the *Texas Pattern Jury Charge* 71.5. The typical submission would read as follows:

Question: Was there a defect in the marketing of the [insert product] at the time it left the possession of [ABC Company] that was a producing cause of the occurrence in question?

A “marketing defect” with respect to the product means the failure to give adequate warnings of the product’s dangers that were known or by the application of reasonably developed human skill and foresight should have been known or failure to give adequate instructions to avoid such dangers, which failure rendered the product unreasonably dangerous as marketed.

“Adequate” warnings and instructions mean warnings and instructions given in a form that could reasonably be expected to catch the attention of a reasonably prudent person in the circumstances of the product’s use; and the content of the warnings and instructions must be comprehensible to the average user and must convey a fair indication of the nature and extent of the danger and how to avoid it to the mind of a reasonably prudent person.

An “unreasonably dangerous” product is one that is dangerous to an extent beyond that which would be contemplated by the ordinary user of the product with the ordinary knowledge common to the community as to the product’s characteristics.

Answer “Yes” or “no.”

Answer _____.¹⁰⁵

Endnotes

- ¹ *Caterpillar, Inc. v. Shears*, 911 S.W.2d 379, 382 (Tex. 1995).
- ² *Id.*
- ³ Texas Jurisprudence §4, at 484.
- ⁴ *FFE Transp. Serv., Inc. v. Fulgham*, 154 S.W.3d 84, 88 (Tex. 2004).
- ⁵ *USX Corp. v. Salinas*, 818 S.W.2d 473, 483 (Tex. App.—San Antonio 1991, writ denied).
- ⁶ *Salinas*, 818 S.W.2d at 482. More recent: *Ethicon Endo-Surgery, Inc. v. Meyer*, No. 2-05-071-CV, 2007 WL 1095552, at *2 (Tex. App.—Fort Worth April 12, 2007 no pet. h.).
- ⁷ *Gerber v. Hoffman-LaRoche Inc.*, 392 F.Supp.2d 907, 915 (S.D. Tex. 2005).
- ⁸ *Brown Forman Corp. v. Brune*, 893 S.W.2d 640, 644 (Tex. App.—Corpus Christi 1994, writ denied).
- ⁹ *Salinas*, 818 S.W.2d at 483.
- ¹⁰ *General Motors Corp. v. Saenz*, 873 S.W.2d 353, 356 (Tex. 1993).
- ¹¹ *Gerber v. Hoffmann-La Roche Inc.*, 392 F. Supp.2d 907, 915 (S.D. Tex. 2005).
- ¹² *Lozano v. H.D. Industries Inc.*, 953 S.W.2d 304, 314 (Tex. App.—El Paso 1997, no pet.).
- ¹³ *Saenz*, 873 S.W.2d at 356.
- ¹⁴ *Id.* at 357.
- ¹⁵ *Gerber*, 392 F.Supp.2d at 915.
- ¹⁶ *Id.*
- ¹⁷ *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 183 (Tex. 2004).
- ¹⁸ *American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 427 (Tex. 1997).
- ¹⁹ *Id.*
- ²⁰ *Humble Sand & Gravel, Inc.*, 146 S.W.3d at 183.
- ²¹ *Am. Tobacco Co.*, 951 S.W.2d at 427.
- ²² *Brown Forman Corp.*, 893 S.W.2d at 647.
- ²³ *Humble Sand & Gravel, Inc.*, 146 S.W.3d at 183.
- ²⁴ *Id.*
- ²⁵ *Roland v. Daimler Chrysler Corp.*, 33 S.W.3d 468, 469-70 (Tex. App.—Austin 2000 pet. denied).

- ²⁶ *Caterpillar Inc.*, 911 S.W.2d at 382.
- ²⁷ *Sauder Custom Fabrication, Inc. v. Boyd*, 967 S.W.2d 349, 350-51 (Tex. 1998).
- ²⁸ *Id.*
- ²⁹ *Keene Corp. v. Yeager*, No. 05-91-01903-CV, 1994 WL 34159, at *3 (Tex. App.–Dallas Feb. 4, 1994, writ denied).
- ³⁰ *Keene Corp. v. Gardner*, 837 S.W.2d 224, 228 (Tex. App.–Dallas 1992, writ denied).
- ³¹ *Id.*
- ³² TEX. CIV. PRAC. & REM. CODE ANN. §82.004(a)(1).
- ³³ *Norwood v. Raytheon Co.*, 237 F.R.D. 581, 599 (W.D. Tex. 2006).
- ³⁴ *Magro v. Ragsdale Brothers, Inc.*, 721 S.W.2d 832, 834 (Tex. 1986).
- ³⁵ *Saenz*, 873 S.W.2d at 360.
- ³⁶ *Id.*
- ³⁷ *Id.* at 358.
- ³⁸ *General Motors Corp. v. Sanchez*, 997 S.W.2d 584, 592 (Tex. 1999).
- ³⁹ *Id.* at 594.
- ⁴⁰ Tex. Civ. Prac. & Rem. Code Ann. § 33.001.
- ⁴¹ *Id.*
- ⁴² *Id.*
- ⁴³ *Id.*
- ⁴⁴ *Id.*
- ⁴⁵ §33.001.
- ⁴⁶ Tex. Civ. Prac. & Rem. Code Ann. §33.012.
- ⁴⁷ Tex. Civ. Prac. & Rem. Code Ann. §16.003(a).
- ⁴⁸ Tex. Civ. Prac. & Rem. Code Ann. §16.012(b).
- ⁴⁹ *O’Nan v. Velsicol Chem Corp.*, No. 07-96-0362-CV, 1998 WL 774131, at *2 (Tex. App.–Amarillo Nov. 6, 1998, pet. dism’d by agr.)
- ⁵⁰ §16.012.
- ⁵¹ *Salinas*, 818 S.W.483.
- ⁵² *Id.*
- ⁵³ *Khan v. Velsicol Chem. Corp.*, 711 S.W.2d 310, 313 (Tex. App.–Dallas 1986 writ refused n.r.e.).
- ⁵⁴ *Id.*
- ⁵⁵ *Id.*
- ⁵⁶ Tex. Civ. Pract. & Rem. Code Ann. §82.003.
- ⁵⁷ *Id.*
- ⁵⁸ *Brocken v. Entergy Gulf States, Inc.*, 197 S.W.3d 429, 435 (Tex. App.–Beaumont 2006, no pet.).
- ⁵⁹ *Id.*
- ⁶⁰ *Id.* at 436.
- ⁶¹ *Id.* at 435.
- ⁶² *Id.* at 436.
- ⁶³ *Id.*
- ⁶⁴ *Brocken*, 197 S.W.3d at 435.
- ⁶⁵ *Id.*
- ⁶⁶ *Gerber*, 392 F. Supp.2d at 915.
- ⁶⁷ *Alm v. Aluminum Co.*, 717 S.W.2d 588, 592 (Tex. 1986).
- ⁶⁸ *Gerber*, 392 F.Supp.2d at 915.
- ⁶⁹ *Brocken*, 197 S.W.3d at 436.
- ⁷⁰ *Gomez de Hernandez v. New Texas Auto Auction Services, L.P.*, 193 S.W.3d 220, 227 (Tex. App.–Corpus Christi 2006, pet granted).
- ⁷¹ *Koonce v. Quaker Safety Products & Mfg. Co.*, 798 F.2d 700, 716 (5th Cir. 1986).
- ⁷² *Humble Sand, & Gravel, Inc. v. Gomez*, 48 S.W.3d 487, 494 (Tex. App.–Texarkana 2001, pet. granted), *rev’d*, 146 S.W.3d 170 (2004).
- ⁷³ *Humble Sand, & Gravel, Inc.*, 146 S.W.3d at 186.
- ⁷⁴ *Id.*
- ⁷⁵ *Id.*
- ⁷⁶ *Id.* at 191-94.
- ⁷⁷ *Id.* at 190.
- ⁷⁸ *Id.* at 195.
- ⁷⁹ *Gomez*, 146 S.W.3d at 183.
- ⁸⁰ *Salinas*, 818 S.W.2d 484.
- ⁸¹ *McLennan v. American Eurocopter Corp.*, 245 F.3d 403, 430 (5th Cir. 2001).
- ⁸² *Jones v. Sig Arms, Inc.*, No. 04-00-0000395-CV, 2001 WL 1617187, at *4 (Tex. App.–San Antonio Dec. 19, 2001, no pet.) (mem. op. not designated for publication).
- ⁸³ *Id.*
- ⁸⁴ *Id.*
- ⁸⁵ *See McLennan*, 245 F.3d at 430-31.
- ⁸⁶ Tex. Civ. Prac. & Rem. Ann Code §82.004.
- ⁸⁷ *Id.*
- ⁸⁸ Tex. Civ. Pract. & Rem. Code Ann. §82.003.
- ⁸⁹ *Id.*
- ⁹⁰ Tex. Civ. Prac. & Rem. Code Ann. §82.006.
- ⁹¹ Tex. Civ. Prac. & Rem. Code Ann. §82.007.
- ⁹² *Id.*
- ⁹³ *Id.*
- ⁹⁴ Tex. Civ. Prac. & Rem. Code Ann. §82.008.
- ⁹⁵ Tex. Civ. Prac. & Rem. Code Ann. §82.008(c).
- ⁹⁶ §82.008(d).
- ⁹⁷ *Am. Tobacco Co.*, 951 S.W.2d at 426.
- ⁹⁸ *Brocken*, 197 S.W.3d at 436.
- ⁹⁹ *Flock v. Scripto-Tokai Corp.*, No. Civ.A. H-00-3794, 2001 WL 34111723, *3 at (S.D. Tex. Nov. 20, 2001).
- ¹⁰⁰ *Id.*
- ¹⁰¹ *Ranger Conveying & Supply Co. v. Davis*, No. 01-05-00128-CV, 2007 WL 2129265, at *7 (Tex.App.–Houston [1st Dist.] 2007, no pet. h.).
- ¹⁰² *Humble Sand & Grevel, Inc.*, 146 S.W.3d at 187-91.

¹⁰³ *Hanus v. Texas Utilities Co.*, 71 S.w.3d 874, 880 (Tex. App.—Fort Worth 2002).

¹⁰⁴ *Gomez de Hernandez*, 193 S.W.3d at 226.

¹⁰⁵ Comm. on Pattern Jury Charges, State Bar of Tex., Texas Pattern Jury Charges: Marketing Defect—No Warning or Instruction or Inadequate Warnings or Instructions for Use Given with Product PJC 71.5 (2006).