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PRODUCT LIABILITY LAW *

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I. INTRODUCTION

While Virginia is not typically seen as “progressive” in the field of product liability law, the Commonwealth is nonetheless a forum in which these product liability battles take place. This article summarizes selected decisions of the United States Court of Appeals for the Fourth Circuit, federal district courts in Virginia, and courts of the Commonwealth issued between July 1, 2004 and May 15, 2005. This article also includes a discussion of the most relevant legislative changes made by the Virginia General Assembly over the same time period. While a complete analysis of every decision and statute affecting product liability is not possible, this article summarizes those which should be the most useful to practitioners in Virginia.

II. JUDICIAL DECISIONS

A. *United States Court of Appeals for the Fourth Circuit*

1. Failure to Request Adverse Inference for Spoliation Waives Right to Bring Assignment of Error on Appeal

The Fourth Circuit was called upon to decide whether or not to entertain a plaintiff’s argument that she was entitled to an ad-

* In addition to cases dealing with product liability, this survey includes cases involving civil procedure which will also prove useful to the practitioner.

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verse inference in the trial court based upon the defendant's alleged spoliation of evidence in *Horton v. Synthes*.¹ Horton, the plaintiff, was involved in an automobile accident in which her leg was broken, and her surgeon placed a plate and five screws manufactured by Synthes in her leg to assist the healing process.² Over an eighteen month period, two of the five screws broke and her leg failed to heal.³ She was forced to undergo another surgery in which the original screws were removed and a different type of hardware was inserted.⁴ Horton filed suit against Synthes asserting a breach of warranty with respect to the screws used in her leg.⁵

Horton's case was tried in the United States District Court for the Western District of Virginia under the court's diversity jurisdiction.⁶ At the close of Horton's case, Synthes moved the trial court to enter judgment as a matter of law against the plaintiff, finding that she failed to establish any breach of warranty.⁷ After the district court dismissed Horton's case, she appealed the district court's decision, alleging that "she was entitled to an adverse inference of defectiveness in light of the failure of one of Synthes' employees to appear to testify."⁸

On appeal, the Fourth Circuit noted that "[a] district court has inherent power to impose a sanction, including an adverse inference, for spoliation of evidence."⁹ Under federal law, the rule provides that an adverse inference may be drawn "against a party whose intentional conduct causes . . . the destruction of evidence . . . [and] against one who fails to preserve or produce evidence—including the testimony of witnesses."¹⁰ The court concluded, however, that Horton's failure to raise the issue before the trial court failed to adequately preserve the issue for appellate review.¹¹

1. No. 04-2111, 2005 U.S. App. LEXIS 9628 (4th Cir. May 25, 2005).

2. *Id.* at *1.

3. *Id.* at *1-2.

4. *Id.* at *2.

5. *Id.*

6. *Id.* at *1.

7. *See id.* at *2.

8. *Id.*

9. *Id.* (citing *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 449 (4th Cir. 2004)).

10. *Id.* (quoting *Hodge*, 360 F.3d at 450).

11. *See id.* at *2-3.

Horton also contended that the district court erred in granting judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure.¹² Granting de novo review and reviewing the evidence in the light most favorable to Horton (the non-moving party), the court concluded that Virginia law required her to establish “(1) that the goods were unreasonably dangerous either for the use to which they would ordinarily be put or for some other reasonably foreseeable purpose, and (2) that the unreasonably dangerous condition existed when the goods left the defendant’s hands.”¹³ The metallurgist expert testifying for Horton, however, “stated that he found no manufacturing defect, and admitted that he was not qualified to comment on the design of the device.”¹⁴ Even the orthopedic expert called by the plaintiff testified that he had used the Synthes system on other occasions with good results.¹⁵ The court concluded that “even giving Horton the benefit of all inferences, . . . she failed to establish her cause of action[,] [t]herefore, judgment as a matter of law was properly granted.”¹⁶

2. Determining the State of Residence for National Banking Associations

The Fourth Circuit was asked in *Wachovia Bank, N.A., v. Schmidt*¹⁷ to interpret 28 U.S.C. §§ 1332 and 1348 with respect to national banking associations.¹⁸ Wachovia was sued in South Carolina state court for allegedly fraudulently inducing “the plaintiffs to engage in a risky tax-motivated investment scheme.”¹⁹ Several months later, Wachovia sought a petition from the United States District Court for the District of South Carolina “seeking an order compelling arbitration and a motion to compel

12. See *id.* at *3.

13. *Id.* at *3–4 (quoting *Logan v. Montgomery Ward & Co.*, 216 Va. 425, 428, 219 S.E.2d 685, 687 (1975)).

14. *Id.* at *4.

15. *Id.*

16. *Id.*

17. 388 F.3d 414 (4th Cir. 2004).

18. *Id.* at 415–16.

19. *Id.* at 416.

arbitration of the state claims."²⁰ The district court denied Wachovia's petition, and Wachovia appealed.²¹

On appeal, Schmidt contended, for the first time, that the district court lacked subject matter jurisdiction over the case because the parties were not diverse.²² To support this, Schmidt argued that national banking associations are located in each state in which they operate branches for purposes of 28 U.S.C. § 1348, and thus are citizens of each of those states for purposes of diversity jurisdiction.²³ The Fourth Circuit agreed, holding that "[i]t is indisputable that a national banking association becomes physically present in a state when it opens branch offices in that state and conducts business there."²⁴ The court reasoned that "within the ordinary meaning of 'located,' a national banking association is 'located' wherever it operates branch offices."²⁵ Because Wachovia had branch offices in South Carolina, the Fourth Circuit concluded that there was no diversity of citizenship and that its petition should have been dismissed for lack of subject matter jurisdiction.²⁶

Although not dealing with product liability law specifically, this case is nonetheless relevant because the vast majority of product liability cases within federal court are grounded in the court's diversity jurisdiction. The Fourth Circuit's ruling essentially removes federal courts as a permissible forum for product liability claims in any case in which a national banking association is a party.

3. Qualifying Experts under the *Daubert* Standard

The Fourth Circuit in *Higgenbotham v. KCS International, Inc.*²⁷ was asked to decide whether the United States District Court for the District of Maryland erred in finding that the plaintiff's sole expert was unreliable and unscientific.²⁸

20. *Id.*

21. *Id.*

22. *See id.*

23. *See id.* (citing 28 U.S.C. § 1348 (2000)).

24. *Id.* at 416–17 (citing 12 U.S.C. § 92).

25. *Id.* at 417.

26. *See id.* at 432.

27. No. 02-1527, 2004 U.S. App. LEXIS 947 (4th Cir. Jan. 22, 2004) (unpublished decision).

28. *See id.* at *3.

KCS International, Inc. manufactured the yacht owned by the plaintiff on which he was allegedly injured.²⁹ The swim platform ladder was stuck in the closed position but released suddenly and swiftly when the plaintiff attempted to force the ladder open.³⁰ He was thrown against the transom of the yacht injuring his back and shoulder when the ladder released without warning.³¹

In his case against the defendant, the plaintiff called a naval engineer who had knowledge of ladders used on swimming platforms on marine vessels to testify that the defect in the ladder was the result of normal use of the ladder.³² The district court found that the plaintiff's expert was unreliable and that the plaintiff's claim should be dismissed for failing to establish a causal link between the alleged defect and his injury.³³

On appeal, the Fourth Circuit noted that "an expert's testimony is admissible under Rule 702 if it 'rests on a reliable foundation and is relevant.'"³⁴ The court upheld the district court's exclusion of the plaintiff's expert, finding that he merely stated that the defect in the ladder would have been less likely to occur had the manufacturer used steel rather than aluminum.³⁵ The Fourth Circuit concluded that just because a better material exists, it does not necessarily mean that the use of an inferior material constituted a design defect.³⁶ Accordingly, the plaintiff's expert was not reliable for purposes of establishing a design defect at trial.³⁷

4. Creating Privity Through Agency for Breach of Warranty Purposes

The Fourth Circuit in *Maryland & Virginia Milk Producers Cooperative Ass'n v. Crowell Farms*³⁸ was asked to determine

29. *See id.* at *4.

30. *See id.* at *3-4.

31. *Id.* at *4.

32. *See id.* at *2, 7 n.1.

33. *Id.* at *2-3.

34. *Id.* at *6 (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999)).

35. *See id.* at *16-17.

36. *See id.* at *15.

37. *See id.* at *15-16.

38. No. 03-1769, 2004 U.S. App. LEXIS 11343 (4th Cir. June 9, 2004) (unpublished decision).

whether a cooperative reimbursement of a purchaser for contaminated milk was subject to indemnification in a breach of warranty suit.³⁹ The Maryland and Virginia Milk Producers Cooperative (the "Cooperative") paid Milkco, a milk-producing facility, almost \$500,000 in damages after Milkco discovered that the milk it purchased was contaminated with antibiotics.⁴⁰ The Cooperative sought to be reimbursed by Crowell Farms ("Crowell") for the amount it paid to Milkco because it was Crowell's milk that was contaminated and created the obligation.⁴¹ Crowell maintained that it was not obligated to pay the Cooperative because it never was contractually obligated to pay Milkco for the contaminated milk, and the Cooperative voluntarily decided to pay Milkco of its own accord.⁴²

In reviewing the facts of the case, the Fourth Circuit concluded that the district court properly granted summary judgment to the Cooperative because the Cooperative was in privity with Crowell, as it was acting as Crowell's agent for purposes of selling its milk to purchasers.⁴³ Because Crowell, and thus the Cooperative, sold adulterated milk to Milkco, the Fourth Circuit concluded that the implied warranty of merchantability was breached and that Cooperative was entitled to reimbursement from Crowell.⁴⁴

B. *United States District Court for the Eastern District of Virginia*

1. Unilateral Pre-Injury Release Provisions

The United States District Court for the Eastern District of Virginia, in *Green v. Sauder Mouldings, Inc.*,⁴⁵ held that a pre-injury release and indemnification provision was "violative of the public policy of the Commonwealth of Virginia, and [was] thus void."⁴⁶ The case resulted from an accident in which a boom lift

39. *See id.* at *6.

40. *See id.* at *4-6.

41. *See id.* at *5-6.

42. *Id.* at *6-7.

43. *Id.* at *14.

44. *See id.* at *11, 14.

45. 345 F. Supp. 2d 610 (E.D. Va. 2004).

46. *Id.* at 613.

tipped over and resulted in significant personal injuries.⁴⁷ United Rentals Incorporated and United Rentals North America (collectively “United”) claimed that Sauder Mouldings (“Sauder”) was obligated to indemnify and hold United harmless for any claim made by the plaintiff against them as a result of the pre-injury release and indemnification clause contained in the lease agreement between United and Sauder.⁴⁸

The court concluded that the pre-injury release and indemnification language “was not bargained for or negotiated, and represent[ed] more of a unilateral release provision.”⁴⁹ Finding that such unilateral releases were not permitted under Virginia law, the court noted that upholding such a unilateral release “would be to hold that it was [acceptable] for one party to put the other parties to the contract at the mercy of its own misconduct, which can never be lawfully done Public policy forbids it, and contracts against public policy are void.”⁵⁰

2. Parents Litigating Pro Se on Behalf of Minor Children

In *Gallo v. United States*,⁵¹ the United States District Court for the Eastern District of Virginia determined that “[i]t is generally not in the interest of a child to be represented by a non-attorney, who will likely be unable to adequately protect [the child’s] rights and vigorously prosecute litigation on [the child’s] behalf.”⁵² In *Gallo*, a mother filed suit against the United States under the Federal Tort Claims Act⁵³ for allegedly providing negligent care to her and her child while at the William Beaumont Army Medical Center in Texas.⁵⁴

The United States filed a motion to dismiss the complaint on the ground that “a parent or guardian cannot litigate pro se on

47. *See id.* at 611.

48. *See id.* at 611–12.

49. *Id.* at 612.

50. *Id.* (quoting *Johnson’s Adm’x v. Richmond & Danville R.R. Co.*, 86 Va. 975, 978, 11 S.E. 829, 829 (1890)).

51. 331 F. Supp. 2d 446 (E.D. Va. 2004).

52. *Id.* at 448.

53. *See* 28 U.S.C. §§ 2671–2680.

54. *See Gallo*, 331 F. Supp. 2d at 447.

behalf of a child.”⁵⁵ The court reasoned that “[a]lthough 28 U.S.C. § 1654 gives litigants the right to bring civil claims pro se, courts are nearly unanimous in holding that a parent or guardian cannot sue on behalf of a child without securing counsel.”⁵⁶ Agreeing with other courts that had ruled on the subject, the court concluded that while representing her daughter pro se, the mother “risks running her daughter’s potentially meritorious claim aground.”⁵⁷

The court noted, however, that granting the government’s request to dismiss her claim would prevent the daughter from “liti-gat[ing] her claim on her own behalf when she reaches adulthood.”⁵⁸ Because the rule against allowing pro se parents to represent their children’s interest is to protect the children, “[i]t would be a perverse result to rest dismissal [of the daughter’s] claim on th[at] ground . . . as she is clearly the person the rule means to protect.”⁵⁹ The court ordered the mother to secure legal counsel within sixty days of its order, or the court would reconsider dismissing the daughter’s claim without prejudice.⁶⁰

3. Bad Faith Attempts to Defeat Removal on Diversity Grounds

In *Schwenk v. Cobra Manufacturing Co.*,⁶¹ the plaintiff served a motion for judgment on the defendant in which he alleged “serious and permanent injuries’ when he fell off of a tree step, used for hunting, manufactured by the [d]efendant.”⁶² The motion for judgment demanded “\$74,000 in damages, plus prejudgment interest and costs.”⁶³ In response, the defendant served a request for admission on the plaintiff, seeking an admission that “the total damages recoverable by [the plaintiff] . . . [did] not exceed

55. *Id.*

56. *Id.* (citing *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 231–32 (3d Cir. 1998); *Johns v. County of San Diego*, 114 F.3d 874, 876–77 (9th Cir. 1997); *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990); *Meeker v. Kercher*, 782 F.2d 153, 154 (10th Cir. 1986); *Brown v. Ortho Diagnostic Sys., Inc.*, 868 F. Supp. 168, 172 (E.D. Va. 1994)).

57. *Id.* at 448.

58. *Id.*

59. *Id.*

60. *Id.* at 449.

61. 322 F. Supp. 2d 676 (E.D. Va. 2004).

62. *Id.* at 677.

63. *Id.*

\$75,000.”⁶⁴ The plaintiff simply stated that the motion for judgment requested only \$74,000 and that he reserved his right to amend the motion for judgment at a later time.⁶⁵

Shortly thereafter, the defendant filed a notice of removal with the United States District Court for the Eastern District of Virginia, asserting that the court had diversity jurisdiction over the case.⁶⁶ The plaintiff responded to the notice by alleging that diversity jurisdiction did not exist because the amount in controversy did not exceed \$75,000 and that the defendant was too late in filing his notice of removal.⁶⁷ The court, however, was less than convinced by what it determined was the plaintiff’s “attempt to avoid the diversity jurisdiction of this Court pursuant to 28 U.S.C. § 1332(a).”⁶⁸ Such an attempt, the court reasoned, was clearly an “attempt to manipulate the system constitut[ing] bad faith by [p]laintiff’s counsel and will not be tolerated by this Court.”⁶⁹ The court made clear that under 28 U.S.C. § 1332(a), “the Court is not bound by the amount the [p]laintiff pleads in the state action,” but rather, “the Court must look at the totality of the circumstances.”⁷⁰

The plaintiff’s second argument was that the defendant’s notice of removal was not filed within the thirty-day limit mandated by 28 U.S.C. § 1446(b).⁷¹ In cases that are not immediately removable, the court reasoned that “the defendant has ‘thirty days after receipt . . . of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable . . .’ to file its notice of removal.”⁷² In the case before it, the court concluded that the “[p]laintiff’s refusal to admit or stipulate that the amount in controversy [did] not exceed \$75,000 was the ‘other paper’ from which the [d]efendant first learned that the case was remov-

64. *Id.* (first alteration in original).

65. *Id.*

66. *Id.*

67. *See id.* at 678.

68. *Id.*

69. *Id.* (citing *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1410 (5th Cir. 1995) (finding that plaintiffs who “plead for damages below the jurisdictional amount in state court with the knowledge that the claim is actually worth more, but also with the knowledge that they may be able to evade federal jurisdiction by virtue of the pleading” is bad faith)).

70. *Id.*

71. *Id.*

72. *Id.* at 679–80.

able.”⁷³ Thus, a defendant has thirty days from whatever time any document or other form of information comes into its possession that alerts the defendant that the case is removable.

4. More Problems With Diversity—The One Year Bar on Removal

Once again faced with questions concerning its diversity jurisdiction, the United States District Court for the Eastern District of Virginia in *U.S. Airways, Inc. v. PMA Capital Insurance Co.*⁷⁴ was asked to determine “[w]hether § 1446(b)’s one year diversity removal bar precludes removal where, as here, removal occurred more than one year after the case was filed in Virginia state court, but less than one year after defendant was joined and served with process.”⁷⁵ The case involved a fifty-million dollar insurance dispute involving a business interruption in the wake of the September 11, 2001 terrorist attacks.⁷⁶ In reviewing the law surrounding removal and remand of diversity actions, the court concluded that “in Virginia an action commences, for purposes of removal as well as for other purposes, on the date of filing of the initial motion for judgment,” regardless when a particular defendant is served with process.⁷⁷ Therefore, the court concluded that

in accordance with the plain language of § 1446(b) and Rule 3:3 and the principles that removal must be strictly construed and any doubts resolved in favor of remand, the one year diversity removal bar commenced to run on the date the action was commenced by the filing of the motion for judgment.⁷⁸

73. *Id.* at 680 (citing *Yarnevich v. Brink’s, Inc.*, 102 F.3d 753, 755 (4th Cir. 1996) (defining “other paper” as “broad enough to include any information received by the defendant, ‘whether communicated in a formal or informal manner’”); *Rodgers v. Northwestern Mut. Life Ins. Co.*, 952 F. Supp. 325, 328 n.4 (W.D. Va. 1997) (“Suffice it to say . . . that an admission by a party constitutes an ‘other paper’ within the meaning of § 1446(b).”)).

74. 340 F. Supp. 2d 699 (E.D. Va. 2004).

75. *Id.* at 701.

76. *See id.*

77. *See id.* at 707.

78. *Id.* at 709.

C. *United States District Court for the Western District of Virginia*

1. A New Fold to Pharmaceutical Liability—Expert Testimony Required to Prove Causation

In *McCauley v. Purdue Pharma L.P.*,⁷⁹ the United States District Court for the Western District of Virginia decided a case arising “out of the misuse of prescription drugs that has ravaged many rural communities, particularly in the Appalachian South.”⁸⁰ The most widely discussed and notarized drug in this “epidemic” is the opioid, OxyContin.⁸¹ As distinguished from other pain killers, OxyContin’s active ingredient—oxycodone—“is delivered via a controlled-release formulation, leading each tablet to provide pain relief for more hours than traditional immediate-release formulations and allowing patients to thus take fewer doses per day.”⁸² Accordingly, “each tablet of OxyContin contains more milligrams of active oxycodone than does a single tablet of other opiate pain medications.”⁸³

The plaintiffs, a group of individuals who had been prescribed OxyContin, filed suit alleging that “they became dependent upon or addicted to opioids only after they started their treatment with OxyContin and suffered personal harm and financial loss.”⁸⁴ Because the plaintiffs had been prescribed and had taken other opioids prior to and during their ingestion of OxyContin, Purdue Pharma L.P. (“Purdue”), the primary manufacturer of OxyContin, asserted that the plaintiffs’ dependence could not be causally linked to their ingestion of OxyContin.⁸⁵ Accordingly, Purdue reasoned that the plaintiffs’ claims should be dismissed for failing to prove causation.⁸⁶

79. 331 F. Supp. 2d 449 (W.D. Va. 2004).

80. *Id.* at 450.

81. *See id.* The court notes that “an ‘opioid’ is a synthetic drug with the properties of an opiate, but not directly derived from opium.” *Id.* at 450 n.2 (citing MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 815 (10th ed. 1996)).

82. *Id.* at 452.

83. *Id.*

84. *Id.*

85. *See id.* at 452–60.

86. *See id.* at 452.

The three plaintiffs⁸⁷ discussed in the court's opinion all alleged similar impacts from their use of OxyContin.⁸⁸ Each plaintiff took other pain medications prior to OxyContin and had either developed a tolerance to the other pain medications or needed additional medication to cope with the pain.⁸⁹ Each man suffered from a substance abuse problem, engaged in behaviors that were designed to thwart and subvert the chemical dependence checks utilized by pharmacies, and eventually went in and out of rehabilitation clinics.⁹⁰

Purdue called several expert scientists who testified that "OxyContin [was] not the cause of the plaintiffs' injuries because the plaintiffs had engaged in using other opioids, both prior to and concurrent with their use of OxyContin."⁹¹ The first expert, Dr. Kathleen T. Brady, testified that "OxyContin 'if taken repeatedly over an extended period of time at a sufficiently high dose, causes physical dependence[,] and that the severity of this dependence depends on various factors, including the duration of opioid intake, the dosage, and the co-utilization of other drugs."⁹² The second expert, Dr. John A. Hagy, similarly opined that any substance abuse problem allegedly suffered by the plaintiffs was the result of their long histories of opioid use and not from the use of OxyContin.⁹³ The final expert, Dr. Marc A. Swanson, concluded that "it is rare for a patient without a prior history of abuse to become addicted to opioids prescribed for pain when that patient is properly monitored by the physician."⁹⁴ Faced with

87. The three plaintiffs were A.F. McCauley, Charles C. Brummett, and Joseph D. Deckard. *See id.* at 452, 455, 457.

88. *Id.* at 451.

89. With respect to plaintiff McCauley, he was first "prescribed several short-release opioid medications, including Endocet and Percocet, and additionally first prescribed OxyContin . . . on January 31, 2000." *Id.* at 453. Plaintiff Brummett had taken several opioids, "including Percocet, Lorcet, Lortab, and Endocet" prior to being prescribed OxyContin to be taken along with Endocet. *Id.* at 455. Lastly, plaintiff Deckard, after developing a tolerance to hydrocodone—the active ingredient in Lorcet and Lortab—was prescribed OxyContin. *See id.* at 457.

90. *See id.* at 453–59.

91. *Id.* at 459.

92. *Id.* (alteration in original). Dr. Brady also specifically noted that "if any of the plaintiffs . . . had a substance use disorder with regard to opioids, he had that substance use disorder long before he was prescribed' OxyContin, and that 'any consequences [he] experienced [were] not caused by [OxyContin], but by a history of opioid use.'" *Id.* (alterations in original).

93. *Id.* at 459–60.

94. *Id.* at 460.

Purdue's three experts, the plaintiffs failed to designate any experts to refute the only scientific testimony before the court.⁹⁵

In response to plaintiffs' failure to designate any experts, Purdue sought summary judgment.⁹⁶ Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is mandated, "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."⁹⁷ Agreeing that Virginia law controlled the only remaining claims, the plaintiffs were confronted with "the burden to produce evidence showing that the defendant was the proximate cause of the injury sustained."⁹⁸ The court concluded, however, that "[t]he evidence [was] undisputed that McCauley, Brummett, and Deckard were all regular users of opioid pain medications prior to ever being prescribed OxyContin."⁹⁹ In sum, the court found that "the plaintiffs have failed to create a genuine issue of material fact that their use of OxyContin was the proximate cause of their alleged injuries because there is inadequate evidence to differentiate between the plaintiffs' use of OxyContin and the other medications taken by them."¹⁰⁰

The court noted that Virginia law does not require the use of expert testimony to prove causation.¹⁰¹ Where the cause of action deals with product liability, however, the court instructed that, "proof of causation must ordinarily be supported by expert testimony because of the complexity of the causation facts."¹⁰² Despite the high level of complexity associated with proving drug dependence, the plaintiffs' failed to designate an expert who could establish even some causal link between OxyContin and their inju-

95. *See id.*

96. *See id.* The court noted that "[s]ummary judgment is appropriate when there is 'no genuine issue of material fact,' given the parties' burdens of proof at trial." *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

97. *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

98. *Id.* at 461. In Virginia, proximate cause is "that act or omission which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the event, and without which that event would not have occurred." *Id.* (quoting *Beale v. Jones*, 210 Va. 519, 522, 171 S.E.2d 851, 853 (1970)).

99. *Id.*

100. *Id.* at 462.

101. *See id.* at 464.

102. *Id.* (citing *Rorhough v. Wyeth Labs., Inc.*, 916 F.2d 970, 972 (4th Cir. 1990)).

ries.¹⁰³ Accordingly, the court granted summary judgment in favor of Purdue.¹⁰⁴

2. Imputing an Adverse Inference—Punishment for Spoliation

In *Ward v. Texas Steak Ltd.*,¹⁰⁵ the United States District Court for the Western District of Virginia was asked to determine whether the plaintiff was entitled to recover damages he suffered as a result of a defective chair at the Texas Steakhouse restaurant.¹⁰⁶ The defendants moved for summary judgment claiming that the plaintiff could not establish constructive notice of the allegedly defective condition.¹⁰⁷

The plaintiff was having dinner at the local Texas Steakhouse restaurant for over an hour without any incident or warning that something was wrong with the chair in which he was sitting.¹⁰⁸ Suddenly, and unexpectedly, the chair collapsed, injuring Ward's lower back and right elbow.¹⁰⁹ An employee of the restaurant gave the plaintiff a new chair and the assistant manager placed the broken chair in the dumpster.¹¹⁰ The assistant manager then helped the plaintiff prepare an accident report and faxed it to the defendant's corporate headquarters that night.¹¹¹ At no time was the defendant ever asked to recover the damaged chair, nor was there ever any attempt to do so.¹¹²

The plaintiff subsequently filed suit against the defendants alleging that they "were negligent for failing to discover and warn him about the defect in his chair."¹¹³ In order to establish the liability of a premises owner for passive conduct, the plaintiff "must establish evidence of actual or constructive notice of a dangerous condition on the part of the defendant, and a failure by de-

103. *See id.* at 462–65.

104. *Id.* at 465.

105. No. 7:03cv00596, 2004 U.S. Dist. LEXIS 10575 (W.D. Va. May 27, 2004).

106. *Id.* at *1.

107. *Id.*

108. *Id.* at *2.

109. *Id.*

110. *Id.*

111. *Id.*

112. *See id.*

113. *Id.* at *3.

fendant to reasonably react to such conditions."¹¹⁴ Although the plaintiff put forth no evidence of any notice on the part of the defendants, he contended that they "failed to do so because the defendants destroyed the chair."¹¹⁵ Such a destruction of evidence, the plaintiff argued, warranted the court imposing "an adverse inference" that the defendants had such notice.¹¹⁶

The court initially grappled with the question of whether the spoliation of evidence should be determined by Virginia law or federal common law.¹¹⁷ The court concluded that "when spoliation of evidence does not occur in the course of pending federal litigation, a federal court exercising diversity jurisdiction in which the rule of decision is supplied by state law is required to apply those spoliation principles the forum state would apply."¹¹⁸ Under Virginia law, "where one party destroys material evidence, the other party may be entitled to an inference that the evidence, 'if it had been offered, would have been unfavorable to [the party destroying the evidence].'"¹¹⁹ Because spoliation in Virginia can arise through either intentional or negligent conduct, "[a] spoliation inference may be applied in an existing action if, at the time the evidence was lost or destroyed, 'a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action.'"¹²⁰

The court concluded that because the plaintiff informed the assistant manager that he would likely file a claim unless the pain stopped, an adverse inference was appropriate against the defendants.¹²¹ The court reasoned that "despite knowing of the potential dispute and that the chair would be relevant evidence in a dispute, the defendants made no effort to preserve the chair."¹²² Thus, for purposes of the motion for summary judgment, the court concluded that the "defendants acted negligently by not attempting to preserve the chair and that [the plaintiff was] enti-

114. *Id.* (citing *Ashby v. Faison & Assocs.*, 247 Va. 166, 170, 440 S.E.2d 603, 605 (1994)).

115. *Id.* at *4.

116. *Id.*

117. *See id.* at *5-7.

118. *Id.* at *7.

119. *Id.* (quoting *Wolfe v. Virginia Birth-Related Neurological Injury Comp. Program*, 40 Va. App. 565, 580-81, 580 S.E.2d 467, 475 (Ct. App. 2003)).

120. *Id.* at *8 (quoting *Boyd v. Travelers Ins. Co.*, 652 N.E.2d 267, 271 (Ill. 1995)).

121. *See id.* at *9.

122. *Id.*

tled to an inference that, had the chair been preserved, it would have provided some evidence unfavorable to the defendants."¹²³ With the adverse inference in favor of the plaintiff, the defendants' motion for summary judgment was denied.¹²⁴

D. *Courts of the Commonwealth of Virginia*

1. Regular Visits to a Physician as a Basis for Venue¹²⁵

The Richmond City Circuit Court was asked in *Gaynor v. Wood*¹²⁶ to determine whether regular visits to one's physician constitute "affairs or business activity" for the purposes of venue under Virginia Code section 8.01-262(3).¹²⁷ The defendant made a motion to change venue, citing the Supreme Court of Virginia's decision in *Meyer v. Brown*¹²⁸ as support.¹²⁹ For purposes of deciding the defendant's motion to change venue, "the parties agree[d] that any basis for venue here would be derived from defendant's contacts with her gynecologist centering around office visits and surgery and follow-up surgery, all occurring . . . both before and after filing."¹³⁰ Judge Hughes determined that the defendant's doctor's visits were not "either 'affairs or business activity' as either commercial, professional, or public business or business activity."¹³¹ As a result, he granted the defendant's motion to transfer venue.¹³²

123. *Id.*

124. *Id.* at *10.

125. Under Virginia law, where a cause of action involves multiple parties and venue is permissible as to one party, it is permissible for all of the parties. See *Claypoole v. Ag-Chem Equip. Co., Inc.*, 6 Va. Cir. 404, 405 (Cir. Ct. 1986) (Richmond City). Thus, where venue is permissible for a medical doctor in a product liability case, it will be deemed permissible for the pharmaceutical company as well.

126. 64 Va. Cir. 143 (Cir. Ct. 2004) (Richmond City).

127. *Id.* at 143.

128. 256 Va. 53, 500 S.E.2d 807 (1998).

129. *Gaynor*, 64 Va. Cir. at 143.

130. *Id.*

131. *Id.*

132. *Id.*

2. Using Internet Sales as a Basis for Asserting Personal Jurisdiction

The Fairfax County Circuit Court in *Malcolm v. Esposito*¹³³ was asked to decide whether a Connecticut car dealership's sale of a car on eBay was a sufficient contact with Virginia to grant the court in personam jurisdiction over the dealership.¹³⁴ The defendant dealership advertised an automobile for auction on the eBay website, which was bid on and won by the plaintiff, a resident and domiciliary of Virginia.¹³⁵ Prior to delivery, the plaintiff discovered that the car had a manufacturing defect which was not disclosed by the seller and sought to rescind the agreement.¹³⁶ Upon the defendant's refusal to rescind the agreement, the plaintiff filed suit alleging a breach of warranty, fraud, and violation of the Virginia Consumer Protection Act.¹³⁷

The defendant made a special appearance in the Fairfax County Circuit Court to contest that court's personal jurisdiction over the defendant.¹³⁸ In reviewing the defendant's challenge to the court's jurisdiction, the court noted that "[t]he purpose of the long-arm statute 'is to assert jurisdiction over nonresidents who engage in some purposeful activity in Virginia, to the extent permissible under the Due Process Clause of the Constitution of the United States.'"¹³⁹ Under Virginia law, each bid made at an auction without reserve is a consummation of a contract.¹⁴⁰ The court concluded that because the defendant had no control over the eventual buyer at the auction, and because the defendant had "consciously decided to transmit advertising information to all internet users, knowing that such information would be transmitted globally,"¹⁴¹ sufficient contacts existed with Virginia to provide the court with personal jurisdiction over the defendant sellers.¹⁴²

133. 63 Va. Cir. 440 (Cir. Ct. 2003) (Fairfax County).

134. *See id.* at 441.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 442 (quoting *Nan Ya Plastics Corp. USA v. DeSantis*, 237 Va. 255, 259, 377 S.E.2d 388, 391 (1989)).

140. *Id.* at 443 (citing *Holston v. Pennington*, 225 Va. 551, 557, 304 S.E.2d 287, 290 (1983)).

141. *Id.* at 446 (quoting *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1333 (E.D. Mo. 1996)).

142. *See id.*

III. LEGISLATIVE CHANGES

A. *Federal Legislation—The Class Action Fairness Act of 2005*¹⁴³

The Class Action Fairness Act of 2005 was signed into law by President George W. Bush on February 18, 2005.¹⁴⁴ Although declaring class action lawsuits to be an important and integral part of the nation's legal system, Congress criticized the mechanism as being widely abused—injuring consumers, commerce, and the judicial system as a whole.¹⁴⁵ Congress passed the Class Action Fairness Act to:

- (1) assure fair and prompt recoveries for class members with legitimate claims; (2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and (3) benefit society by encouraging innovation and lowering consumer prices.¹⁴⁶

One of the most important changes in the legislation was the expansion of federal diversity jurisdiction in class actions to include actions in which the aggregate value of plaintiffs' claims exceeds five million dollars and minimal diversity of jurisdiction exists.¹⁴⁷ Minimal diversity of citizenship, for purposes of most class action lawsuits, exists where any plaintiff has a different citizenship from any defendant at the time the lawsuit was filed.¹⁴⁸

Additionally, the Class Action Fairness Act of 2005 provides federal courts with jurisdiction over "mass tort" cases—"any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact."¹⁴⁹ Much like the

143. This legislation is especially important for Virginia plaintiffs because class action suits are not permitted within the state court system.

144. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4.

145. *See id.* § 2(a)(1)-(4), 119 Stat. at 4-5.

146. *See id.* § 2(b)(1)-(3), 119 Stat. at 5.

147. *See id.* § 4(a)(2), 119 Stat. at 9-12 (to be codified at 28 U.S.C. § 1332(d)(2), (6)).

148. *See id.* (to be codified at 28 U.S.C. § 1332(d)(2)(A)-(C)). There are, however, other restrictions and requirements that must be met before a federal district court's expanded federal jurisdiction is available. *See id.* (to be codified at 28 U.S.C. § 1332(d)(9)(A)-(C)).

149. *Id.* (to be codified at 28 U.S.C. § 1332(d)(11)(B)(i)). Such class actions must meet the \$75,000 amount in controversy requirement currently in existence for federal diversity actions. *See id.*

expansion of the federal district courts' diversity jurisdiction, however, there are numerous restrictions on the availability of the court's mass tort jurisdiction.¹⁵⁰

The act also provides that class actions may be removed under 28 U.S.C. § 1446 "without regard to whether any defendant is a citizen of the [s]tate in which the action is brought," and may be removed "by any defendant without the consent of all defendants."¹⁵¹

Lastly, the Class Action Fairness Act of 2005 includes a "Class Action Bill of Rights" for class members in class actions throughout the United States.¹⁵² Without going into the cumbersome details of the bill of rights, the law essentially seeks to (1) modify coupon settlements in class action suits to limit the amount of recoverable attorneys' fees;¹⁵³ (2) prohibit any settlement that would result in a net loss for class members, without court approval;¹⁵⁴ (3) mandate equal treatment among class members;¹⁵⁵ and (4) require notice to be given to public officials of any settlement prior to court approval.¹⁵⁶ The impact of this legislation on class action lawsuits from a practical perspective remains to be seen.

150. A "mass action" does not include actions in which: (1) the claims arise from an event or occurrence in the forum state and that causes injuries in that state or contiguous states; (2) the claims are joined upon motion of a defendant; (3) the claims are asserted on behalf of the general public pursuant to a state statute specifically authorizing such action; or (4) the claims have been consolidated solely for pretrial proceedings. *See id.* (to be codified at 28 U.S.C. § 1332(d)(11)(B)(ii)(I)-(IV)).

151. *See id.* § 5(a), 119 Stat. at 12-13 (to be codified at 28 U.S.C. § 1453(b)). In addition, the one-year limitation in § 1446(b) does not apply. *Id.*

152. *See generally id.* § 3(a), 119 Stat. at 5-9.

153. *See id.* (to be codified at 28 U.S.C. § 1712).

154. *See id.* (to be codified at 28 U.S.C. § 1713).

155. *See id.* (to be codified at 28 U.S.C. § 1714).

156. *See id.* (to be codified at 28 U.S.C. § 1715). The notice must contain: (1) a copy of the complaint; (2) a notice of any scheduled hearing; (3) any proposed or final notification to class members; (4) any proposed or final settlement; (5) any agreement made "contemporaneously" between class counsel and defense counsel; (6) the final judgment or notice of dismissal; (7) "if feasible, the names of class members who reside in each [s]tate and the estimated proportionate share of the claims of such members to the entire settlement," or if unavailable a reasonable estimate of those amounts; and (8) any judicial opinion regarding the settlement. *Id.* (to be codified at 28 U.S.C. § 1715(b)(1)-(8)). The statute also discusses the notice requirements in suits involving depository institutions. *See id.* (to be codified at 28 U.S.C. § 1715(c)(1)-(2)).

B. *Virginia Legislation*

As with most General Assembly sessions, there were several bills introduced which would have impacted the practice of product liability law in Virginia,¹⁵⁷ but the vast majority were either not enacted or never left committee. Nonetheless, a few important bills were passed by the General Assembly this year.

1. Waiver of Formal Process

Enacting legislation conforming to the rules currently in place in the Federal Rules of Civil Procedure, the General Assembly provided that “[i]n an action pending in circuit court, the plaintiff may notify a defendant of the commencement of the action and request that the defendant waive service of process” and that any person who receives such a request “has a duty to avoid any unnecessary costs of serving process.”¹⁵⁸ Such requests for a waiver must: (1) be in writing addressed to the individual defendant or an officer, director, or registered agent of a corporate defendant; (2) be dispatched through first-class mail; (3) be accompanied by a copy of the initial pleading; (4) inform the defendant of the consequences of complying and not complying with the request; (5) state the date on which the request is sent; (6) allow no more than thirty days (sixty days if outside of Virginia) for the defendant to respond; and (7) provide an extra copy of the notice and address and a prepaid means of returning the compliance in writ-

157. For example, House Bills 1544 and 1693 would have placed a \$250,000 limitation on noneconomic damages in all medical malpractice cases, with such limit to include recoveries for attorney fees. See H.B. 1544, Va. Gen. Assembly (Reg. Sess. 2005); H.B. 1693, Va. Gen. Assembly (Reg. Sess. 2005). Also, House Bill 1702 would have allowed the practices and procedures for introducing evidence in general district courts in Virginia to also apply to those cases removed from general district court to circuit court in instances where the amount in controversy does not exceed \$15,000. See H.B. 1702, Va. Gen. Assembly (Reg. Sess. 2005).

House Bill 2926 would have immunized manufacturers of firearms and ammunition from civil liability for damages incurred solely as a result of the criminal use of their firearms or ammunition. See H.B. 2926, Va. Gen. Assembly (Reg. Sess. 2005). Such immunity would not have attached, however, in those instances where the guns were sold or otherwise distributed illegally. See *id.* This legislation was introduced in response to numerous successful efforts around the country to hold handgun manufacturers liable to victims' families and governmental entities for the damages incurred as a result of the criminal use of their products.

158. Act of Mar. 28, 2005, ch. 866, 2005 Va. Acts 1489 (codified as amended at VA. CODE ANN. § 8.01-286.1(A) (Cum. Supp. 2005)).

ing.¹⁵⁹ Those parties that comply with the request are not required to file a grounds of defense, answer, or other responsive pleading until sixty days after the date on which the request for a waiver was sent (ninety days if outside of Virginia).¹⁶⁰

2. Obtaining Documents Already Subpoenaed Without a Subpoena

Virginia Code section 8.01-417 was amended to provide that

[u]nless otherwise ordered for good cause shown, when one party to a civil proceeding subpoenas documents, the subpoenaing party, upon receipt of the subpoenaed documents, shall, if requested in writing, provide true and full copies of the same to any other party or to the attorney for any other party.¹⁶¹

When requested, however, the requesting party is required to pay “the reasonable cost of copying or reproducing the subpoenaed documents.”¹⁶²

IV. CONCLUSION

Although Virginia federal and state courts have considered a number of cases involving product liability issues over the past couple of years, none of those decisions have significantly changed the landscape of product liability law. Whether the Class Action Fairness Act of 2005 will reduce the number of product liability cases in Virginia and across the country will only be determined with the passage of time. It appears, however, that the status of product liability law in Virginia is firm and unlikely to change significantly in the coming years.

159. VA. CODE ANN. § 8.01-286.1(B) (Cum. Supp. 2005).

160. *Id.* § 8.01-286.1(C) (Cum. Supp. 2005).

161. *Id.* § 8.01-417(B) (Cum. Supp. 2005).

162. *Id.*
