RECENT DEVELOPMENTS IN AUTOMOBILE LAW

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This survey article reviews a sampling of numerous 2004–2005 state and federal judicial decisions affecting automobile law, including apportioning liability, automobile insurance, criminal law, damages, evidentiary issues, procedural and discovery rulings, uninsured and underinsured motorist coverage issues, workers' compensation, national automobile class actions, and automotive expert witnesses.

I. LIABILITY

On August 10, 2005, President George W. Bush signed into law the Transportation Equity Act.[1] The Act provides guaranteed funding for federal

1. H.R. 3, 109th Cong. (2005).

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highway, transit, and safety programs through 2009. Of notable import is a provision of the law that eliminates state vicarious liability statutes that hold car rental and leasing companies financially responsible for lessees' actions.[2] State vicarious liability statutes have discouraged automobile manufacturers from leasing cars in states with strict vicarious liability laws, such as New York. Automobile manufacturers, leasing companies, and automobile-related interest groups have praised the new federal statute as a long-awaited repeal of outdated state statutes.

II. AUTOMOBILE INSURANCE

When the same insurance company insures both an accident victim and a negligent third party, the carrier may recoup medical payments from the victims, the West Virginia Supreme Court ruled in *Ferrell v. Nationwide Mutual Insurance Co.*,[3] but only when policy language allows it and when the victim's recovery from the third party "clearly" duplicates the medical payments.[4] The case involved an automobile accident in which Ms. Ferrell's vehicle was struck by another vehicle; Nationwide insured both drivers. Ms. Ferrell initially sought coverage for her medical bills from the Nationwide policy that covered her vehicle. That policy contained family compensation coverage for the payment of any medical expenses resulting from any accidental bodily injury sustained by any person while occupying the vehicle, regardless of fault.[5] Nationwide paid Ms. Ferrell almost $3,000 for medical expenses.

Ms. Ferrell then filed a claim for damages against the other driver's Nationwide liability policy. As part of her claim, Ms. Ferrell submitted the same medical expenses for which she had previously received payment from Nationwide under her family medical coverage. Nationwide offered to settle Ms. Ferrell's claim for $10,000, and she accepted on the condition that Nationwide would waive any right to repayment or subrogation of its pay-

2. The statute will be codified at 49 U.S.C. § 30106. The relevant provision provides:

> (a) IN GENERAL—An owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if:
>
> (1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and
>
> (2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner).

Id.

3. 617 S.E.2d 790 (W. Va. 2005).
4. *Id.* at 791.
5. *Id.*

ment to it under her own coverage. Nationwide, citing policy language, refused to waive its right to repayment.[6]

The West Virginia Supreme Court of Appeals ruled that, in the absence of a conflict of interest with its insured, an insurance company may seek reimbursement of medical expense payments from its insured when: (1) the policy allows an insurance company to seek "reimbursement" of medical expense payments to an insured out of any recovery obtained by the insured from a third party; and (2) the insured obtains a recovery from a third party that duplicates the insurance company's medical expense payments to the insured.[7]

In *Lake v. State Farm Mutual Automobile Insurance Co.*,[8] the Washington Court of Appeals ruled that a four-wheel all-terrain vehicle ("ATV") is a motor-driven cycle, despite having four wheels, and that State Farm owed no duty to an insured who was injured while riding an ATV. Ms. Lake was injured when she was thrown off the ATV while it was being driven on sand dunes. The ATV was not insured, but Ms. Lake had underinsured motorist ("UIM") coverage through State Farm.[9] Ms. Lake's policy contained an exclusion that barred coverage "for bodily injury to an insured or property damage while an insured is operating or occupying . . . a motorcycle or a motor-driven cycle."[10] The Washington Court of Appeals agreed with State Farm's decision to deny coverage, finding that the exclusion was not ambiguous and that "the average insurance buyer would understand that ATVs are included within the terms 'motorcycle' or 'motor-driven cycle.'"[11]

In *Ash v. Continental Insurance Co.*,[12] the Pennsylvania Superior Court, resolving a conflict among various state trial courts, ruled that a cause of action under Pennsylvania's insurance bad faith statute[13] is subject to the two-year limitations period applicable to actions in tort. Plaintiffs argued that their bad faith claim based on the insurer's refusal to cover a fire claim was subject to a six-year statute of limitations pursuant to the Pennsylvania statute.[14] The court relied on a decision of the U.S. Court of Appeals for the Third Circuit reaching the same conclusion on the following grounds: (1) courts historically have treated bad faith causes of action as torts; (2) the nature of a bad faith action suggests that it is based upon a standard of

6. *Id.*
7. *Id.* at 796.
8. 110 P.3d 806 (Wash. Ct. App. 2005).
9. *Id.* at 806–07.
10. *Id.* at 807.
11. *Id.* at 808.
12. 861 A.2d 979 (Pa. Super. Ct. 2004).
13. 42 Pa. Cons. Stat. § 8371 (1998).
14. *Ash*, 861 A.2d at 980 (citing 42 Pa. Cons. Stat. § 5527 (2004)).

conduct imposed by society and, therefore, is similar to a tort; (3) the emerging jurisprudence among Pennsylvania trial courts treats a bad faith cause of action as a separate and distinct action from the underlying contract claim; and (4) the majority of other states that have recognized a cause of action for bad faith have characterized the action as a tort.[15]

In *Wanggaard v. Safeco Insurance Co. of America*,[16] the Wisconsin Court of Appeals held that a reducing clause in an automobile insurance policy was valid, thereby reducing the insurer's payments to a claimant by the amounts received under workers' compensation or disability benefits. After the claimant was injured in an automobile accident, he received more than $50,000 in workers' compensation payments.[17] The claimant also was insured under a Safeco automobile policy that contained the following reducing clause in connection with uninsured motorist ("UM") coverage:

> The limit of liability shall be reduced by all sums:
> 1. Paid because of bodily injury or on behalf of persons or organizations who may be legally responsible. This includes all sums paid under Part A; and
> 2. Paid or payable because of the bodily injury under any of the following or similar law:
>   a. workers' compensation; or
>   b. disability benefits law.[18]

After his accident, the claimant sought UM coverage from Safeco. The insurance company applied the reducing clause and denied the claim. The Wisconsin Court of Appeals rejected the claimant's arguments that the reducing clause was ambiguous and conflicted with other parts of the policy.[19]

In *Alfa Specialty Insurance Co. v. Jennings*,[20] the Alabama Court of Appeals ruled that a criminal acts exclusion barred liability coverage for damage to a mobile home resulting from a car crash during an insured's flight from law enforcement officers. The insured was driving his truck when a Florida sheriff's deputy began pursuing him. The insured refused to stop and led several deputies on a high-speed chase.[21] When the insured encountered a police roadblock, his truck left the roadway and he lost control and collided with a doublewide mobile home owned by a third party. Florida authorities charged the insured with aggravated fleeing, and Alabama authorities charged him with reckless endangerment and carrying a pistol in a vehicle without a permit. The insured's carrier denied liability based on its criminal

15. *Id.* at 983–84 (citing Haugh v. Allstate Ins. Co., 322 F.3d 227, 235–36 (3d Cir. 2003)).
16. No. 04–0170, 2004 WL 2952857 (Wis. Ct. App. Dec. 22, 2004).
17. *Id.* at *1.
18. *Id.*
19. *Id.* at *2.
20. 906 So. 2d 195 (Ala. Ct. App. 2005).
21. *Id.* at 196.

acts exclusion that barred coverage for all damages that arise "out of the use of a car in connection with the commission of or the attempt to commit a criminal act by a covered person."[22] The Alabama Court of Appeals granted the carrier summary judgment on the basis that the exclusion was unambiguous and that the Alabama Supreme Court has upheld similar criminal acts exclusions in homeowners' policies.[23]

In *Salvatore v. State Farm Mutual Automobile Insurance Co.*,[24] the Pennsylvania Superior Court ruled that insurance companies have no duty to check that vehicles are removed from the nationwide database of stolen vehicles after the vehicles are recovered and the insurer sells them. The claimant spent a night in jail after police found his 1993 Mitsubishi Diamante listed in the stolen vehicle database.[25] The police released the claimant after learning that the car had been stolen from a previous owner in 1996 and that the claimant was indeed the rightful owner. The vehicle was recovered years after it was originally stolen and returned to the owner of record, State Farm. State Farm then auctioned the vehicle to P&H Auto Sales, the dealership from which the claimant purchased the vehicle.[26] Unfortunately, the vehicle was never removed from the stolen vehicle database. The court found that, by statute, police departments are mandated with the responsibility of removing recovered stolen vehicles from the nationwide database. Accordingly, the court held that forcing a common law duty on insurers to do the same would be duplicative.[27]

III. CRIMINAL LAW

In *Illinois v. Funches*,[28] the court considered whether application of the inference contained in 625 Ill. Comp. Stat. Ann. 5/4–103.2(a)(1) violated the defendant's due process.[29] The defendant allegedly took a deposit bag containing $300 in cash from a drugstore, took control of a running vehicle from a driveway, and struck a drugstore pharmacist with the vehicle. He faced charges of theft, both of money and a vehicle, attempted first-degree murder, and aggravated unlawful failure to obey a peace officer's order to stop.[30] The Illinois Code provides that a person who operates a vehicle without being entitled to possession, with knowledge that the vehicle is stolen, and fails to stop when given a signal by a peace officer is guilty of

22. *Id.* at 197.
23. *Id.* at 198–202 (citing Hooper v. Allstate Ins. Co., 571 So. 2d 1001 (Ala. 1990)).
24. 869 A.2d 511 (Pa. Super. Ct. 2005).
25. *Id.* at 513.
26. *Id.* at 513–14.
27. *Id.* at 514–15.
28. 818 N.E.2d 342 (Ill. 2004).
29. *Id.* at 344.
30. *Id.* at 345.

failure to obey.[31] The statute provides an inference that one who exercises exclusive, unexplained possession of a stolen vehicle has the requisite knowledge that the vehicle was stolen, regardless of how recently the vehicle was stolen.[32] In a motion to dismiss, the defendant argued that the inference was unconstitutional on many grounds, including violations of the proportionate penalties clause, equal protection clause, due process clause, and cruel and unusual punishment clause of both the Illinois and the U.S. Constitutions.[33] In finding the inference unconstitutional, the trial court stated, "The permissive inference violates due process by removing the requirement that a vehicle be recently stolen in order for possession of it to give rise to an inference that the possessor knows that the vehicle was stolen."[34]

The Illinois Supreme Court reversed the trial court on appeal. It relied on the definitional difference between an inference and a presumption. In contrast to a presumption, which establishes a fact unless sufficient evidence rebuts the presumed fact, an inference "is a factual conclusion that *can* rationally be drawn by considering other facts. Thus, an inference is merely a deduction that the fact finder *may* draw in its discretion, but is not required to draw as a matter of law."[35] Inferences are "permissive" only.[36] The court ruled that, based on the use of the words "may be inferred" in the statute and other decisions, the statute created "merely an evidentiary inference."[37] Further, the court held that an inference does not violate due process when "three conditions are satisfied: (1) there must be a rational connection between the basic fact and the presumed fact; (2) the presumed fact must be more likely than not to flow from the basic fact; and (3) the inference must be supported by corroborating evidence of guilt."[38] In particular, a court may only look to whether a statutorily implied inference is unconstitutional as applied to the particular defendant in that case on the basis of the evidence.[39] The court ruled that the defendant failed to show that the inference violated his due process rights and reversed the decision of the circuit court.[40]

IV. DAMAGES

In *Mayberry v. Volkswagen of America, Inc.*,[41] the Wisconsin Supreme Court, deciding an issue of first impression, addressed the proper measure of dam-

31. 625 Ill. Comp. Stat. Ann. 5/4–103.2(a)(7)(A) (West 2002).
32. 625 Ill. Comp. Stat. Ann. 5/4–103.2(a)(1) (West 2002).
33. *Funches*, 818 N.E.2d at 345.
34. *Id.*
35. *Id.* at 346 (emphasis added).
36. *Id.* at 347 (quoting 1 C. Fishman, Jones on Evidence § 4:1, at 299 (7th ed. 1992)).
37. *Id.*
38. *Id.* at 348.
39. *Id.*
40. *Id.* at 350.
41. 692 N.W.2d 226 (Wis. 2005).

ages in a breach of warranty action under Wisconsin's Uniform Commercial Code.[42] In this case, while the buyer alleged that the automobile was defective and not worth what she paid for it at the time of acceptance, she continued to use the vehicle and eventually resold it for more than its fair market value.[43] The court was faced with the question of whether the "special circumstances" provision of the Wisconsin Commercial Code[44] should be interpreted in this case to require damages to be calculated based upon the difference between the fair market value at resale and the actual resale amount by the plaintiff, effectively barring the plaintiff from receiving any award of damages.[45] The Wisconsin Commercial Code specifically provides that damages are to be determined based upon the value, at the time of acceptance, of the goods as accepted and the value of the goods had they been as warranted.[46] Volkswagen, however, argued that the plaintiff should not be permitted to "reap a windfall" under the standard calculation and that, in such cases, an alternate calculation of damages is appropriate under the "special circumstances" clause.[47] The court ultimately found no authority for Volkswagen's proposition, noting that the plaintiff did not receive the benefit of her bargain regardless of the fact that the plaintiff may have resold the vehicle for more than its fair market value.[48] Therefore, the court ruled that the appropriate method for the calculation of damages was that specified in the Wisconsin Commercial Code.[49]

In *Golden v. Gorno Bros., Inc.*,[50] the U.S. Court of Appeals for the Sixth Circuit adopted the reasoning of the Third and Seventh Circuits in determining the proper amount in controversy under the Magnuson-Moss Warranty Act.[51] The defendant sold a customized Ford Mustang to the plaintiff in a retail installment contract that included more than $14,000 in finance charges.[52] In the five months following the purchase, the vehicle allegedly was in for repairs for approximately forty-four days.[53] The plaintiff filed suit in federal court and, in response, the defendant filed a motion to dismiss for lack of subject matter jurisdiction based upon the plaintiff's failure to meet the $50,000 amount-in-controversy requirement under the Magnuson-Moss Warranty Act.[54] The ultimate issue in this case was whether the finance charges should be considered in calculating the amount in controversy.

42. *Id.* at 228.
43. *Id.*
44. Wis. Stat. § 402.714(2) (2001–-02).
45. *Mayberry*, 692 N.W.2d at 228.
46. Wis. Stat. § 402.714(2) (2001–02).
47. *Mayberry*, 692 N.W.2d at 232–33.
48. *Id.* at 237.
49. *Id.*
50. 410 F.3d 879 (6th Cir. 2005).
51. 15 U.S.C. § 2310(d)(3)(B) (2000).
52. *Golden*, 410 F.3d at 880.
53. *Id.*
54. *Id.* at 881 (citing 15 U.S.C. § 2310(d)(3)(B) (2000)).

Citing the Seventh Circuit's decision in *Schimmer v. Jaguar Cars, Inc.*[55] and the Third Circuit's decision in *Samuel-Bassett v. KIA Motors America, Inc.*,[56] the court affirmed the trial court and excluded the finance charges from the amount-in-controversy calculation.[57]

V. EVIDENTIARY ISSUES

In *Matos v. State*,[58] a Florida appellate court considered the issue of whether data from an event data recorder ("EDR")[59] in an automobile was new or novel scientific evidence that has been generally accepted in the relevant scientific fields so as to be admissible. In this case, the defendant appealed his conviction for two counts of manslaughter, arguing that the trial court improperly admitted the speed and airbag information from his vehicle's EDR.[60] Specifically, the defendant challenged the admissibility of EDR data under the general acceptance standard of *Frye v. United States*.[61] The court conducted a *Frye* hearing where it heard testimony from an accident reconstruction expert trained in EDR technology and an industrial engineer who had worked for General Motors and had been responsible for its engine and computer control systems.[62] Citing the Illinois case of *Bachman v. General Motors*,[63] the court found that the process of recording and downloading data from an EDR was not a new or novel scientific method. The court, therefore, held that the evidence was properly admissible under the *Frye* standard as a generally accepted scientific method when used as a tool of automotive accident reconstruction.[64]

In *North Carolina Farm Bureau Insurance Co. v. Nationwide Mutual Insurance Co.*,[65] the North Carolina Court of Appeals addressed the issue of whether an occupant in the front passenger seat who grabs the steering wheel is in lawful possession of the vehicle.[66] In this case, the driver of a vehicle borrowed from her mother[67] lost control of the vehicle, causing a

55. 384 F.3d 402 (7th Cir. 2004).
56. 357 F.3d 392 (3d Cir. 2004).
57. *Golden*, 410 F.3d at 885.
58. 899 So. 2d 403 (Fla. Dist. Ct. App. 2005).
59. In General Motors' vehicles, like the one involved in this case, the EDR is called a "Sensing & Diagnostic Module." Alternatively, the court referred to the EDR as a "black box." *Id.* at 405.
60. *Id.* (noting EDR recorded a speed of 114 miles per hour four seconds prior to the accident and a speed of 103 miles per hour one second prior to the accident, and showed that the defendant's airbag was working properly at the time of the accident).
61. *Id.*
62. *Id.* at 405–06.
63. 776 N.E.2d 262 (Ill. App. Ct. 2002).
64. *Matos*, 899 So. 2d at 407 (citing *Bachman*, 776 N.E.2d at 281–83).
65. 608 S.E.2d 112 (N.C. Ct. App. 2005).
66. *Id.* at 113.
67. *Id.*

fatal crash when the passenger "suddenly grabbed the wheel and attempted to steer the car into a weigh station the car was passing."[68] A North Carolina statute provided that an insurance company must insure anyone "in lawful possession" of an insured vehicle.[69] The trial court granted summary judgment for the defendant, finding that the passenger was not in lawful possession of the vehicle. The appellate court affirmed the trial court's decision.[70] The insurance company, therefore, was not required to insure her.[71] Focusing on North Carolina case law, the court held, "'A person is in lawful possession of a vehicle . . . if he is given possession of the automobile by the automobile's owner or owner's permittee under a good faith belief that giving possession of the vehicle to the third party would not be in violation of any law or contractual obligation.'"[72] Accordingly, the court found that grabbing a steering wheel of a moving vehicle from the passenger seat cannot be possession in good faith.[73]

VI. PROCEDURAL AND DISCOVERY RULINGS

An amended law in Utah changed Utah's Insurance Code relating to the use of arbitration for third-party motor vehicle accident claims.[74] Specifically, the amended law authorizes a person injured in a motor vehicle accident to use arbitration to resolve a third-party claim if the claimant has (1) previously and timely commenced the claim in a district court and (2) filed the notice to submit the claim to arbitration while the claim is still pending in district court and before the plaintiff's initial disclosures have been filed. Any award resulting from this arbitration may not exceed $25,000.

In *Schultz v. Ford Motor Co.*,[75] the Indiana Court of Appeals considered the appropriateness of a jury instruction informing the jury of a rebuttable statutory presumption that a manufacturer is not negligent if it complied with a Federal Motor Vehicle Safety Standard ("FMVSS"). The trial court instructed the jury about this presumption, over the objection of plaintiffs' counsel, in regard to FMVSS 216, pertaining to roof crush resistance.[76] On appeal, the plaintiffs objected that a legal presumption serves no evidentiary purpose and, thus, may not be the basis of a jury instruction.[77] In

68. *Id.*
69. N.C. Gen. Stat. § 20–279.21(b)(2) (2004).
70. *N.C. Farm Bureau Ins. Co.*, 608 S.E.2d at 113.
71. *Id.*
72. *Id.* (quoting Belasco v. Nationwide Mut. Ins. Co., 326 S.E.2d 109, 113 (1985)).
73. *Id.*
74. *See* Utah Code Ann. § 31A-22–321 (2005).
75. 822 N.E.2d 645 (Ind. Ct. App. 2005).
76. *Id.* at 645.
77. *Id.* at 653.

contrast, the defendant argued that the presumption of nonnegligence under the statute was closer to a statutorily recognized inference that would make for a proper jury instruction.[78] The Indiana Court of Appeals agreed with the plaintiffs, finding that the trial court erred in allowing the instruction.[79] The appellate court, focusing on the difference between a rebuttable presumption and a permissive inference, as well as the language of the Indiana statute,[80] held that the statute provided for a mandatory presumption not entitled to be instructed to the jury and remanded the matter.[81]

In *Harris v. Drake*,[82] the Washington Supreme Court considered whether the report of an independent medical examination ("IME") conducted pursuant to an automobile insurance policy's personal injury protection ("PIP") terms could be deemed work product in subsequent litigation.[83] After being rear-ended by Drake in a car accident, Harris filed a PIP claim with his insurer, USAA.[84] USAA required Harris to undergo an IME, where it was determined, after two written reports, that Harris's injuries were not related to the automobile accident with Drake.[85] Harris later filed suit against Drake, seeking damages for these injuries. Through what was likely an inadvertent disclosure, Drake obtained copies of the IME reports and listed the IME doctor as its only defense expert.[86] The trial court granted a motion to exclude the testimony based upon the work product doctrine.[87] The Washington Supreme Court affirmed the trial court's ruling.

The court considered three specific questions in determining whether the work product doctrine applied to the facts of this case:

> Did the work product protection attach in anticipation of PIP litigation or arbitration between USAA and Harris?, (2) If the privilege attached, did it terminate before the trial of this tort litigation between Harris and Drake?, and (3) If the privilege attached and did not terminate, was it properly claimed at the trial of this tort litigation between Harris and Drake?[88]

Relying on the case of *Heidebrink v. Moriwaki*,[89] the court found that work product protection attached to the IME reports.[90] Further, the court relied on the Washington Court of Appeals in finding that "it would be

78. *Id.*
79. *Id.* at 655.
80. Ind. Code § 34–20–5-1 (1999).
81. *Schultz*, 822 N.E.2d at 655.
82. 99 P.3d 872 (Wash. 2004).
83. *Id.* at 873.
84. *Id.*
85. *Id.*
86. *Id.* at 873–74.
87. *Id.* at 874.
88. *Id.* at 875.
89. 706 P.2d 212 (Wash. 1985).
90. *Harris*, 99 P.3d at 875.

intolerable to interpret [Washington law] as providing protection only to the parties in the particular case for which the documents were created."[91] Finally, the court found that a subrogation specialist at USAA properly asserted the work product protection and that the subrogation specialist was an authorized agent of USAA.[92]

In *Lacy v. Cox*,[93] the Tennessee Supreme Court considered whether a trial court had the discretion to grant a voluntary dismissal after a jury has retired to deliberate.[94] After the jury asked two questions to the trial court during deliberations, the last being whether they were required to award monetary damages if they found that the defendant was negligent, the plaintiff moved for a voluntary dismissal without prejudice, which was granted by the trial court.[95] The defendant, in turn, moved for the voluntary dismissal to be deemed with prejudice, as the Tennessee Rules of Civil Procedure prohibit the plaintiff from taking a voluntary dismissal without prejudice once the jury has begun to deliberate.[96] The plaintiff conceded that his motion was untimely and asked for a new trial.[97] The trial court acknowledged its mistake and did not alter its first ruling that it was a voluntary dismissal without prejudice.[98] The defendant appealed.

The court of appeals held that, based upon the case of *Panzer v. King*,[99] a trial court has the discretion to grant a voluntary dismissal without prejudice during jury deliberations even if the Tennessee Rules of Civil Procedure did not provide for one as of right.[100] However, given that the trial judge had admitted that he had not properly exercised his discretion in granting the voluntary dismissal, the appellate court reversed the trial court, relying upon analogous decisions from other states and the Tennessee Rules of Appellate Procedure.[101] The Tennessee Supreme Court found that the *Panzer* opinion was written more broadly than intended and lim-

91. *Id.* at 877. In making this ruling, the court overruled a Washington Court of Appeals case finding that "medical evidence would be subject to work product protection only if prepared for the instant litigation between [the parties]." *Id.* (citing Johnson v. McCay, 893 P.2d 641, 644–45 (Wash. Ct. App. 1995)).

92. *Id.* The dissenting opinion is noteworthy in that Justice Alexander found that USAA had waived the work product protection by (even if inadvertently) disclosing the documents to Drake and not attempting to rectify the disclosure until more than two years after the disclosure. *Id.* at 879–80.

93. 152 S.W.3d 480 (Tenn. 2004).

94. *Id.* at 481.

95. *Id.* at 482.

96. *Id.*

97. *Id.*

98. *Id.*

99. 743 S.W.2d 612 (Tenn. 1988). In *Panzer*, the court held that a trial court had the discretion to allow a voluntary dismissal without prejudice after a motion for a new trial had been granted. *Id.* at 615.

100. *Lacy*, 152 S.W.3d at 485.

101. *Id.* at 487–88 (citing Tenn. R. Civ. Proc. § 41.01(1) (2004)).

ited the *Panzer* precedent only to those cases in which the motion for a voluntary dismissal occurs after the granting of a new trial.[102] In so limiting the prior precedent, the court ruled that "a trial court has no authority to grant a voluntarily [sic] dismissal without prejudice from the time the jury has retired up to the jury's rendering of a verdict."[103]

In resolving a question of juror bias, the Alabama Court of Civil Appeals in *Peden v. Fuller*[104] considered whether a court may inquire into facts surrounding potential jurors' automobile insurance policies, after the trial court elicited responses that twenty-four of the potential jurors had policies with a particular company.[105] Citing *Welborn v. Snider*,[106] the court reversed the trial court's decision not to allow such questioning.[107] In adopting *Welborn*, the court focused on the fact that, while under Alabama law a party may challenge a juror with a financial interest in an insurance company, the party may not do so blindly and that to exercise a challenge properly and fairly a trial court must allow the party more than just the information that a potential juror has a policy issued by such company.[108]

VII. UNINSURED AND UNDERINSURED MOTORIST COVERAGE ISSUES

In *Dempsey v. Allstate Insurance Co.*,[109] the Montana Supreme Court held that its earlier decision finding Montana's antistacking statute unconstitutional and voiding antistacking policy language applied retroactively to cases pending on direct review or not yet final. On April 18, 2003, the court had decided *Hardy v. Progressive Specialty Insurance Co.*,[110] finding an antistacking statute unconstitutional and the antistacking language in a Progressive Insurance Company automobile policy void, and further holding that Progressive had to "stack" and pay UIM benefits for each coverage for which the insured had paid a separate premium.[111] Accordingly, the court required insurers in Montana to pay stacked UM, UIM, and medical payment insurance coverages in qualifying circumstances on claims arising before the date of the *Hardy* decision.[112]

102. *Id.* at 488.
103. *Id.*
104. 919 So. 2d 296 (Ala. Civ. App. 2005).
105. *Id.* at 297.
106. 431 So. 2d 1198 (Ala. 1983).
107. *Peden*, 919 So. 2d at 296–98.
108. *Id.* at 298.
109. 104 P.3d 483 (Mont. 2004).
110. 67 P.3d 892 (Mont. 2003).
111. *Id.* at 899–900.
112. *Dempsey*, 104 P.3d at 490.

In *Hobbs v. Hartford Insurance Co. of the Midwest*,[113] a single decision covering two unrelated cases, the Illinois Supreme Court reversed judgment for automobile accident victims who attempted to stack their UIM coverage, ruling that antistacking clauses in the policies were permissible and not ambiguous. In June 2000, Ms. Hobbs was involved in an automobile accident and suffered injuries and damages in excess of $200,000. Ms. Hobbs settled claims against the driver of the other vehicle for the driver's policy limits of $50,000.[114] At the time of the accident, Ms. Hobbs carried UIM coverage for two vehicles under a single policy issued by Hartford, in the amount of $100,000 per person and $300,000 per occurrence.

Pursuant to the coverage, Hartford paid Ms. Hobbs $50,000. This amount represented the difference between the $100,000 per person coverage under Ms. Hobb's policy and the $50,000 that Ms. Hobbs received from the other driver's insurer. Ms. Hobbs, however, asserted that the Hartford policy was ambiguous as to the limits of coverage and that she should be allowed to stack the coverage for her two vehicles, producing a per person limit of $200,000.[115] The Illinois Supreme Court ruled that Ms. Hobbs was not entitled to stack coverage, noting previous rulings that antistacking provisions are not ambiguous and do not contravene public policy, and that the Illinois Insurance Code expressly authorizes their use.[116]

The Wisconsin Supreme Court, in *Progressive Northern Insurance Co. v. Romanshek*,[117] reaffirmed that the statutory definition of "uninsured motor vehicle" requires physical contact in accidents involving an unidentified vehicle, refusing to read the term "miss and run" into the state insurance law. Mr. Romanshek sought coverage from Progressive for an accident that he suffered when an unidentified vehicle turned in front of his motorcycle, causing him to lose control and fall to the ground. Mr. Romanshek's motorcycle did not come into physical contact with the other vehicle, which was never identified. Mr. Romanshek sought coverage under his motorcycle insurance's uninsured motor vehicle provision, arguing that the physical contact requirement should be abandoned.[118] The Wisconsin Supreme Court rejected Mr. Romanshek's argument:

> If the legislature had intended its mandated uninsured motorist coverage to apply to any accident involving an unidentified motorist . . . that result could have been reached merely by deleting the term "hit-and-run" from the lan-

113. 823 N.E.2d 561 (Ill. 2005).
114. *Id.* at 562–63.
115. *Id.*
116. *Id.* at 564–70.
117. 697 N.W.2d 417 (Wis. 2005).
118. *Id.* at 420–21.

> guage in [the statute] and having that provision read: an unidentified motor vehicle involved in an accident.[119]

VIII. WORKERS' COMPENSATION

In *Cullen v. Truck Lease Corp.*,[120] the U.S. District Court for the Southern District of New York considered whether a workers' compensation carrier must contribute "fresh money" to a liability settlement beyond the reduction of its lien to zero.[121] The parties, Legion Insurance and the Cullens, settled their dispute, which was based upon an allegation of personal injuries sustained as a result of an automobile accident.[122] The plaintiffs submitted an order to the court to compel Legion Insurance, the plaintiffs' workers' compensation carrier, and its adjusters to approve the settlement and pay plaintiffs accordingly.[123]

Under the New York Workers' Compensation Law, a claimant may bring a third-party suit while receiving compensation benefits from a carrier.[124] Upon recovery, the carrier is granted a lien against the proceeds from the third-party suit in the amount of the past compensation paid, with interest, minus a deduction in the amount of the carrier's equitable share of costs and attorney fees.[125] A carrier's equitable share of costs is determined by the value of estimated future benefits.[126] In this case, the carrier's equitable share of costs was larger than the amount of its lien against the award.[127] The carrier argued that it could not be compelled to compensate the plaintiffs for any amount beyond the total amount of the lien against the award, thereby not being responsible for providing "fresh money" to the plaintiffs.

Relying on *Wood v. Firestone Tire & Rubber Co.*,[128] the court found that there was no precedent precluding an award of fresh money from a workers' compensation carrier:[129]

> Not only does existing legal precedent not preclude that awarding of fresh money, logic suggests that fresh money should be awarded in cases such as these. The thrust of [ ] *Wood* is to ensure that the carrier pay its fair share of litigation costs from a claimant's settlement or judgment in a third-party action. It makes no meaningful difference if this outcome is achieved by the

119. *Id.* at 432.
120. 351 F. Supp. 2d 147 (S.D.N.Y. 2004).
121. *Id.* at 150.
122. *Id.* at 148.
123. *Id.*
124. *Id.* at 149–50 (citing N.Y. Workers' Comp. § 29(1) (2002)).
125. *Id.*
126. *Id.*
127. *Id.* at 150.
128. 475 N.Y.S.2d 735 (N.Y. Sup. Ct. 1984).
129. *Cullen*, 351 F. Supp. 2d at 151.

carrier transferring additional money to the claimant, the claimant transferring money to the carrier, or by the court simply extinguishing the lien.[130]

Accordingly, the court held that fresh money could be awarded in cases in which the carrier's offset exceeds its lien.[131]

IX. AUTOMOBILE CLASS ACTIONS

A. *Litigation*

In *Collins v. DaimlerChrysler Corp.*,[132] a Florida appellate court ruled that a product need not have malfunctioned to state a claim under Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA").[133] Plaintiff sued DaimlerChrysler in a putative nationwide class action, essentially claiming that the value of her Chrysler automobile was diminished because it was equipped with allegedly defective seatbelt buckles. Plaintiff alleged that she had based her decision to buy her vehicle in part on the company's advertising of its vehicles as safe and compliant with all relevant safety standards.[134] According to plaintiff, DaimlerChrysler knew or should have known that the seatbelt buckles were defective, but it did nothing to correct the problem. DaimlerChrysler moved to dismiss the complaint with prejudice on the grounds that the plaintiff failed to demonstrate that she had suffered a compensable loss under FDUTPA: plaintiff's seatbelt buckles never manifested a defect prior to her replacing them.[135] The trial court agreed and granted DaimlerChrysler's motion. The Fifth District Court of Appeal reversed, finding that Florida case law holds that a product's diminution of value constitutes actual damages under FDUTPA and the product need not have malfunctioned or otherwise shown an alleged defect to state a cause of action.[136]

In *Gilchrist v. State Farm Mutual Automobile Insurance Co.*,[137] the U.S. Court of Appeals for the Eleventh Circuit held that the federal McCarran-Ferguson Act[138] bars an antitrust class action lawsuit alleging that automobile insurers conspired to use substandard parts in repairing policyholders' vehicles. The ruling decertified a plaintiff class of seven million members. The McCarran-Ferguson Act, passed in 1945, exempts insurance companies from liability under federal antitrust law and gives states

130. *Id.*
131. *Id.*
132. 894 So. 2d 988 (Fla. Dist. Ct. App. 2004).
133. Fla. Stat. Ann. §§ 501.201 to 501.213 (West 2003).
134. *Collins*, 894 So. 2d at 989.
135. *Id.*
136. *Id.* at 990–91.
137. 390 F.3d 1327 (11th Cir. 2004).
138. 15 U.S.C.A. §§ 1012 & 1013(b) (2000).

the power to regulate insurers. Plaintiffs alleged that a group of insurance companies, including State Farm, Allstate, Nationwide, and GEICO, conspired to use parts not made by the original equipment manufacturers ("OEM"). By using non-OEM parts, plaintiffs alleged that the defendant insurance companies reaped illicit profits by not passing cost savings on to policyholders.[139] The Eleventh Circuit found that the challenged conduct fell squarely within the business of insurance, as protected by the McCarran-Ferguson Act, and that Florida and many other states are aware of the non-OEM issue and have taken steps to regulate it.[140]

In a widely reported decision hailed by business groups as evidence that state courts are asserting control over class action abuse, the Illinois Supreme Court in *Avery v. State Farm Mutual Automobile Insurance Co.*[141] vacated a $1.05 billion judgment against State Farm over its use of aftermarket automobile parts. The plaintiffs alleged that State Farm's practice of using aftermarket parts instead of OEM parts to repair damaged vehicles constituted consumer fraud. Moreover, they alleged that State Farm's actions breached contractual obligations that the insurance company would restore vehicles to preloss conditions using parts of like kind and quality.[142] The Illinois Supreme Court, in a lengthy opinion, found that State Farm's aftermarket parts practices did not violate the Illinois Consumer Fraud and Deceptive Business Practices Act.[143] The court also held that there was no breach of contract between State Farm and its policyholders.[144] Moreover, the court found that State Farm's various insurance policies were too diverse to permit classwide treatment of the issues. In light of this lack of uniformity, the court found that the lower court's ruling certifying a class of 4.75 million policyholders in forty-eight states was an abuse of judicial authority.[145]

B. *Class Action Fairness Act of 2005*

On February 18, 2005, President Bush signed into law the Class Action Fairness Act of 2005,[146] an attempt to address various perceived abuses principally in consumer class actions brought under state law. By expanding federal diversity jurisdiction, the Act seeks to prevent plaintiffs from filing

139. *Gilchrist*, 390 F.3d at 1329.

140. *Id.* at 1333–34. In a different case in California state court involving almost identical allegations, a car repair practices lawsuit was permitted to proceed as a class action. In that case, the California Supreme Court refused to hear the insurers' arguments that the class action should be decertified. *See* Lebrilla v. Farmers Group Inc., 16 Cal. Rptr. 3d 25 (Ct. App. 2004), *review denied*, No. S126861 (Cal. Sept. 29, 2004).

141. 835 N.E.2d 801 (Ill. 2005).

142. *Id.* at 811.

143. *Id.* at 835–63 (citing 815 Ill. Comp. Stat. 505/2 (1998)).

144. *Id.* at 812–35.

145. *Id.* at 819–24.

146. Pub. L. No. 109–2, 119 Stat. 4 (2005).

and prosecuting certain interstate class actions in state courts that have been historically favorable to plaintiffs. It adds new provisions facilitating the removal of class actions from state courts, authorizes speedy appeals of orders granting or denying remand motions, calls for heightened judicial scrutiny of class action settlements involving coupons and attorney fee awards, and requires defendants to notify federal and state officials about proposed class action settlements. Importantly, the Act will only apply to actions commenced on or after the enactment date.

The Act adds a new subsection to the federal diversity jurisdiction statute.[147] The new provision will generally vest federal district courts with original jurisdiction over any class action in which: (1) there are more than 100 class members; (2) at least one class member is a resident of a different state from one defendant; and (3) the class members seek, in the aggregate, at least $5 million exclusive of interest and costs.[148] Because the Act does not specify how the $5 million is to be determined from a valuation standpoint, existing case law on this issue should still control. Determining the amount in controversy is, and will probably remain, a contentious issue because plaintiffs often do not assert a specific monetary amount in their class action complaints. These new diversity jurisdiction provisions represent a significant change from existing law. Currently, federal diversity jurisdiction over a class action cannot exist unless there is complete diversity of citizenship between all named plaintiffs and all defendants.[149]

The Act expressly excludes certain types of class actions. For example, it does not apply to: (1) shareholder class actions relating to securities, and the rights and obligations created by securities, as defined by the Securities Act of 1933 and the Securities Exchange Act of 1934; (2) any class actions in which a state government entity is a primary defendant; and (3) any class actions brought against a primary defendant in its home state where two-thirds or more of the class members are also residents of that state. It also contains a so-called Delaware carve-out exception, meaning that the new diversity jurisdiction provisions would not apply to state class actions relating to corporate governance issues arising under the law of the state of incorporation. In addition, the Act provides for a local controversy exception, which is aimed at leaving in state court controversies that involve at least one local defendant, local conduct, and local injuries.[150]

If more than one-third but less than two-thirds of the class members and the primary defendants are citizens of the state where the suit was originally filed, the district court has the discretion, in the interests of

147. *See* 28 U.S.C. § 1332.

148. *See* S. 5, 109th Cong. § 4(a) (2005).

149. *See, e.g.*, *In re* School Asbestos Litig., 921 F.2d 1310 (3d Cir. 1990), *cert. denied sub nom.*, U.S. Gypsum Co. v. Barnwell Sch. Dist. No. 45, 499 U.S. 976 (1991).

150. *See* Class Action Fairness Act § 4(a).

justice, to decline to exercise jurisdiction. The Act sets forth various factors that the district court should consider, including: (1) whether the claims involve matters of national or interstate interest; (2) whether the claims asserted will be governed by laws other than those of the state in which the action was originally filed; (3) whether the action has been pleaded in a way that seeks to avoid federal jurisdiction; and (4) whether any similar actions have been filed in the preceding three-year period.[151] Finally, the federal diversity jurisdiction provisions of the Act also apply to "mass actions." Generally, the Act defines mass action as any civil action in which the monetary relief claims of more than 100 persons are proposed to be tried jointly on the grounds of common questions of law or fact.[152]

The Act adds a new provision facilitating the removal of class actions from state court to federal court.[153] Most notably, it authorizes any defendant to remove a case without the consent of any other defendant. Under the current law, only the defendants acting unanimously ordinarily can accomplish removal.[154] In some cases, obtaining unanimous consent can be logistically difficult.

The Act significantly alters the general prohibition against appellate review of remand orders.[155] With respect to class actions, if a party files an appeal within seven days of entry of an order granting or denying a remand motion, a court of appeals may accept the appeal.[156] The court of appeals then must complete all action on such appeals, including rendering judgment, within sixty days after the appeal is filed.

In response to the perceived abuse of attorney fee awards when class members receive coupons or other awards of little or no value, the Act calls for increased judicial scrutiny of class action settlements involving coupons and attorney fee awards.[157] The Act, which applies to all class actions filed in or removed to federal district court, contains special requirements for court approval of class action settlements in which class members would receive noncash benefits or any class member would be obligated to make a payment to class counsel that would result in a net loss to the class member. Specifically, the portion of any attorney fee award attributable to the award of coupons to class members must be based on the value of the coupons that are redeemed. Class counsel traditionally asserts that their fees should be based on the total potential value of a settlement rather than the value actually claimed by class members. Under the Act, if a coupon

151. *Id.* § 4(a)(3).
152. *Id.* § 4(a)(11).
153. *Id.* § 5(b).
154. *See* 28 U.S.C. §§ 1441(a), 1446(a) & (b).
155. *See* 28 U.S.C. § 1447(d).
156. *See* Class Action Fairness Act § 5(c).
157. *Id.* § 3(a).

settlement is approved that has a total potential value of $20 million, but only $1 million worth of coupons are actually redeemed, class counsel could only be awarded fees based on the $1 million value.

How coupons are valued may become the subject of increased litigation among the plaintiffs' class action bar. Many class action settlements are being challenged by objectors seeking to overturn what they view as disproportionate and unfair attorney fee provisions. The Act may fuel such disputes because it expressly authorizes courts, upon motion of a party, to hear expert testimony relating to settlement valuations. A valuation offered by an objector's expert is likely to be considerably lower than the valuation agreed to by the parties to the settlement agreement. Also included is a prohibition on the approval of any settlement that provides for the payment of greater sums to some class members solely on the basis of their proximity to the court.

Another key feature of the Act places an additional administrative responsibility on class action defendants. Within ten days after a proposed class action settlement is filed in court, each participating defendant must provide notice of the proposed settlement to appropriate federal and state officials.[158] In most situations, the appropriate federal official will be the U.S. Attorney General and the appropriate state official will be the primary regulator of the defendant or the state attorney general. Among other things, the notice must include, if feasible, the names of the class members who reside in each state and the estimated proportionate share of the claims of such members to the entire settlement. A class member may refuse to comply with and not be bound by a settlement agreement if the defendant fails to provide the appropriate notice of the proposed settlement. Finally, an order approving a proposed class action settlement may not be issued until ninety days after the last date on which the federal and state officials are notified.

X. AUTOMOTIVE EXPERT WITNESSES

In *Smith v. General Motors Corp.*,[159] the U.S. District Court for the Western District of Virginia ruled that, under Tennessee law, a plaintiff is required to produce expert medical testimony on the causation of her injuries where there is a complex injury.[160] Plaintiff asserted that she was injured due to a defective seatbelt system in her vehicle.[161] General Motors filed a motion for summary judgment based upon plaintiff's failure to produce expert testimony regarding the causation of the injuries allegedly sustained. Citing

158. *Id.*
159. 376 F. Supp. 2d 664 (W.D. Va. 2005).
160. *Id.* at 668.
161. *Id.* at 665.

Thomas v. Aetna Life & Casualty Co.,[162] the court determined that, given the complexity of the injuries sustained by the plaintiff,[163] she was required to produce expert medical testimony to make a prima facie case that the alleged defect caused her sustained injuries.[164]

In *Tunnell v. Ford Motor Co.*,[165] the same court considered the issue of whether expert testimony regarding consumer surveys was admissible.[166] In this case, Ford Motor Company moved to exclude the plaintiff's expert witnesses on the grounds that the opinions proffered by such experts were based upon an improper scientific methodology.[167] Plaintiff alleged that the subject automobile was defective due to its lack of a disconnect device on the battery, which allowed the vehicle in which she was trapped after a collision to catch fire, causing her severe injuries.[168] To support her prima facie case that Ford failed to meet reasonable consumer expectations regarding a disconnect device, the plaintiff sought to introduce evidence of consumer expectation surveys through two expert witnesses.[169] The court ultimately excluded the testimony of both expert witnesses, declining to adopt the Magistrate Judge's Report and Recommendations.[170] The court's ruling relied heavily on the fact that the plaintiff's counsel "was the main drafter of the Information Piece for the [ ] survey[s]."[171] In effect, the Information Piece contained within the surveys was "no more than an opening statement from Plaintiff's counsel, 'one with no rebuttal.' "[172] Survey "respondents were asked to address a complex question after being presented with little or no facts on which to base their decision."[173] Additionally, the court admonished the plaintiff's experts' presentation of the survey to respondents alongside a photograph of a 1999 Ford Mustang equipped

162. 812 S.W.2d 278, 283 (Tenn. 1991) (finding that "[m]edical causation and permanency of an injury must be established in most cases by expert medical testimony").

163. The court noted that the plaintiff suffered a tear to her mesentery, requiring surgery and removal of a portion of her small bowel. During her surgery, the plaintiff required mechanical ventilation after respiratory failure and suffered kidney failure as a result of dehydration due to the bowel injury. *Smith*, 376 F. Supp. 2d at 665.

164. *Id.* at 668.

165. 330 F. Supp. 2d 707 (W.D. Va. 2004).

166. *Id.* at 710.

167. *Id.*

168. *Id.* at 713.

169. *Id.* at 713–14.

170. *Id.* at 711–12.

171. *Id.* at 710.

172. *Id.* (quoting Defendant's May 7, 2004, Memorandum of Law in Support of Its Motion to Exclude the Testimony of Dr. Marjorie E. Adams, pp. 10–11). The Information Piece reads, in relevant part:

> One way to prevent damaged electrical wiring from becoming an ignition source is to equip the motor vehicle with a safety device that will disconnect the battery in a collision. Here is a 1999 Mustang equipped with a battery disconnect. These devices have been available since 1975 and they are designed to shut off the electrical energy in the event of a crash.

173. *Id.*

with a battery disconnect device.[174] Ford argued that such a presentation inappropriately created the misperception that the 1999 Ford Mustang was sold with a battery disconnect device, which it was not.[175] The court ruled that "the surveys, as presented, [were] unfairly skewed in favor of Plaintiff" and that cross-examination would not "provide the answers that survey respondents would have given had the questions not been worded in a matter that was biased."[176]

In *Styles v. General Motors Corp.*,[177] the New York Supreme Court held that the results of two-phase rollover testing conducted by plaintiffs' expert witness were inadmissible.[178] Plaintiffs' experts conducted a two-phase test on a single vehicle that was similar to the vehicle that was involved in the subject accident.[179] Plaintiffs' expert witnesses testified that the first phase of the testing, in which the windshield was removed and the vehicle was lowered, upside down, at a pitch angle of sixteen degrees and a roll angle of thirty-six degrees onto the junction of the A-pillar and the roof, was substantially similar to the testing conducted pursuant to FMVSS 216.[180] After conducting this testing, the plaintiffs' experts then utilized the same vehicle and performed another set of tests. Plaintiffs argued that this second "phase" of the testing, in which the vehicle was lifted and dropped on its roof at a pitch angle of zero degrees and a roll angle of thirty-six degrees from a height of six inches, was performed pursuant to a routine, widely accepted scientific technique.[181] While the court found that each phase of the testing, independent of the other phase, could be considered a widely accepted technique, the court continued its analysis to rule that "plaintiffs failed to demonstrate that the use of both tests, *in combination*, *on the same vehicle*, has gained general acceptance within the pertinent scientific community."[182] The plaintiffs' attempt to conduct two tests on the same vehicle was not permitted.

In *Lagola v. Thomas*,[183] the Delaware Supreme Court considered whether a police officer, as a lay witness, was qualified to testify as to accident causation.[184] At trial, Thomas called a police officer who testified that the "primary contributing circumstance" of the accident was Lagola's excessive speed.[185] Lagola appealed after an ambiguous verdict for Thomas.[186] On

174. *Id.*
175. *Id.*
176. *Id.*
177. 799 N.Y.S.2d 38 (App. Div. 2005).
178. *Id.* at 40–41.
179. *Id.* at 39.
180. *Id.* at 39–40.
181. *Id.* at 40.
182. *Id.*
183. 867 A.2d 891 (Del. Super. Ct. 2005).
184. *Id.* at 895.
185. *Id.* at 893–94.
186. *Id.* at 895 (the jury found for Thomas, awarding "five dollars—one million dollars").

appeal, Lagola argued that the police officer's testimony was inadmissible as to the "primary contributing circumstance" of the accident. The court ruled, "[A]bsent [the police officer] being qualified as an expert in accident reconstruction, his testimony on the 'primary contributing circumstance' of the accident was inadmissible under [the Delaware Rules of Evidence]."[187] As a result, the court granted a new trial to Lagola.[188] In so finding, the court expressly overruled the case of *Laws v. Webb*,[189] which stood for the proposition that an officer may testify as to the "primary cause" but not to the "legal or proximate cause" of an accident.[190] The court decided that determinations as to the primary cause of an accident necessarily involve matters of opinion and may only be testified to by expert witnesses.[191]

In *Malbrough v. Crown Equipment Corp.*,[192] the U.S. Court of Appeals for the Fifth Circuit found that expert testimony was not required to prove a design defect case under the Louisiana Products Liability Act. After suffering a crippling injury while operating a forklift, the plaintiff brought suit under the Louisiana Products Liability Act alleging a design defect in the forklift.[193] The plaintiff specifically alleged that the forklift was defective due to its lack of a door to the operator compartment.[194] Defendant Crown filed a motion to exclude plaintiff's expert design defect witness, which the court granted.[195] Crown then moved for summary judgment, arguing that without expert testimony, plaintiff was unable to make out a prima facie case of defective design.[196] The trial court denied Crown's motion for summary judgment, finding that a jury was capable of understanding whether the forklift was defective even absent expert testimony.[197] The Fifth Circuit agreed with the trial court, finding that neither the plain language of the Louisiana Products Liability Act nor Louisiana case law supported Crown's contention that a plaintiff must always produce expert testimony on the issue of design defect to make out a prima facie case.[198]

187. *Id.*
188. *Id.*
189. 658 A.2d 1000 (Del. 1995).
190. *Id.* at 1010.
191. *Lagola*, 867 A.2d at 896. The court also cautioned trial judges in regard to their questioning of witnesses. At trial, the trial judge interrogated many of the defense witnesses and none of the plaintiff's witnesses. While failing to rule that such behavior was improper, the court stated that the questioning "was fraught with potential adverse implications for the jury to draw, despite the trial judge's subjective intention to help the jury." The court continued to caution judges to be careful in their questioning of witnesses due to the possibility of interfering with the province of counsel and the jury. *Id.* at 898.
192. 392 F.3d 135 (5th Cir. 2004).
193. *Id.* at 136.
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.* at 137.