

[Products Liability Law Daily Wrap Up, DESIGN AND MANUFACTURING DEFECTS—ASBESTOS—Fla. App.: Consumer expectations test still applies to strict liability claims in Florida, \(Jul. 28, 2016\)](#)

Products Liability Law Daily Wrap Up

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By John W. Scanlan, J.D.

An asbestos plaintiff bringing negligence and strict liability failure-to-warn and manufacturing defect claims against Union Carbide and other manufacturers and distributors of asbestos was entitled to present to the jury an instruction defining "unreasonably dangerous" under the consumer expectations test as well as the risk-utility test, a Florida Court of Appeal ruled in reversing and remanding the strict liability claim for a new trial. The appellate court's previous decision affirming the trial court's decision to allow only the risk-utility test to be presented to the jury was remanded by the Florida Supreme Court with directions to follow the high court's decision in a similar case ([Font v. Union Carbide Corp.](#), July 27, 2016, *per curiam*).

The daughter of a man who died of malignant pleural mesothelioma brought suit against Union Carbide and other asbestos manufacturers and distributors, alleging that his illness resulted from exposure to Union Carbide SG-210 asbestos in joint compound and texture spray products they designed, manufactured, and distributed. She requested that the jury be given standard jury instruction PL 5, which states: "A product is unreasonably dangerous because of its design if the product fails to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer or the risk of danger in the design outweighs the benefits." Union Carbide argued that that this instruction was not applicable to her case in light of recent decisions by the appellate court in that district, and that the only standard that could be submitted was the risk-utility test as articulated in the Third Restatement. The trial court agreed and denied her request.

After the jury found in favor of Union Carbide, she appealed, and the appellate court affirmed. According to the appellate court, its 2010 decision in *Agrofollajes, S.A. v. E.I. Du Pont De Nemours & Co.* had rejected the consumer expectations test, and it further held in 2012 in *Union Carbide v. Aubin (Aubin I)* that a trial court had erred in failing to apply the Third Restatement's exclusive adoption of the risk-utility test for a design defect claim. While the daughter's appeal in the present case was pending before the Florida Supreme Court, that court issued its *Aubin II* decision, in which it held that the consumer expectations test also could apply to design defect claims and quashed the *Aubin I* decision [see *Products Liability Law Daily's* October 30, 2015 [analysis](#)]. The high court then accepted jurisdiction over the present case, granted the daughter's petition for review, quashed the appellate court's decision, and remanded the case to the appellate court to reconsider in light of *Aubin II*.

Jury instruction/new trial. The standard jury instruction requested by the daughter correctly stated Florida law, the appellate court said in reversing and remanding for a new trial on the strict liability claim. The daughter presented substantial factual evidence supporting use of the instruction and it was necessary for the jury to decide the issue. Union Carbide did not identify any relevant factual differences between *Aubin II* and the present case that would indicate that the court should not apply *Aubin II*, with the court noting that the defendant, product, use by a plaintiff, injury, theories of liability, underlying issues, and much of the evidence were identical.

The case is No. [3D11-3270](#).

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Companies: Union Carbide Corp.

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