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# 4

## Defenses to Product Liability

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## I. [4.1] INTRODUCTION

Product liability claims may be advanced under various theories, such as strict liability, negligence, or breach of warranty. Often, defense counsel will be faced with defending more than one theory, depending on the underlying liability issues and the nature of the damages sought to be recovered. This chapter raises methods of attacking the different theories of product liability. As strict liability remains the most frequently litigated theory, it is discussed first and in greater detail. However, as defense counsel will often face multiple theoretical approaches, please bear in mind that the comments made in discussing one theory may apply to others.

Defending product liability claims requires knowledge of applicable legal principles. However, defense counsel must also develop a working knowledge of the allegedly defective product and the environment in which it is used. Early examination and consultation with a representative of the client may reveal possible defense theories such as alteration of the product, misuse, improper maintenance, or other causes of an injury unrelated to the manufacture of the product.

## II. DEFENSE OF STRICT LIABILITY CASES

### A. [4.2] In General

Strict liability for a defective product has existed in Illinois since *Suvada v. White Motor Co.*, 32 Ill.2d 612, 210 N.E.2d 182 (1965). Although the theory is called “strict liability,” Illinois law has never made a manufacturer or seller an insurer of the safety of those using its product. A plaintiff must prove that the injury or damage resulted from a defect in the product, the defect was an unreasonably dangerous one, and the defect existed at the time the product left the defendant’s control.

Strict liability was not intended to protect every user or consumer of a product. Nor was it intended to subject to liability every commercial entity that might have some peripheral relationship to the manufacture or distribution of a product. Rather, the doctrine was intended to protect an unsophisticated and unwary consumer and subject to potential liability those directly related to the manufacture or distribution of a product. Therefore, a threshold question in any product liability case is whether strict liability is an applicable theory. This determination requires an analysis of the relationship of the plaintiff and the defendant.

### B. [4.3] Attacking the Plaintiff’s Case

When defending a strict liability claim, it is important to understand the concept behind the doctrine. While it has been variously identified as liability without fault, strict liability, and other similar terminology, the gravamen of the action is that of liability without proof of negligence. The rationale is based on the public policy that an unsophisticated consuming public does not have the ability to protect itself from unreasonably dangerous products or the capacity to determine and prove what negligence existed that brought about the particular defect. Rather, a plaintiff must prove membership in the class of persons protected by the doctrine and that the defect existed when the product left the control of the defendant.

As the doctrine evolved, it became clear that it was not to be a doctrine of absolute liability entitling any person injured while using a product to recover from the manufacturer or seller. Strict liability was never intended to make a manufacturer an insurer of the user's safety. *Korando v. Uniroyal Goodrich Tire Co.*, 159 Ill.2d 335, 637 N.E.2d 1020, 202 Ill.Dec. 284 (1994). Although strict liability was intended to be liability without negligence, it was not intended to be liability without limitation.

### 1. [4.4] Improper Plaintiffs

Not all plaintiffs are within the class of persons intended to be protected by the theory of strict liability. The drafters of the RESTATEMENT (SECOND) OF TORTS (1965), as evidenced by the comments, clearly intended the doctrine to protect only an unsophisticated and unwary consumer. It was not their intent to apply the doctrine to litigation involving sophisticated large corporations in their dealings with one another. In *Toledo, Peoria & Western R.R. v. Burlington Northern, Inc.*, 67 Ill.App.3d 928, 385 N.E.2d 937, 24 Ill.Dec. 796 (3d Dist. 1979), a plaintiff's verdict was reversed, and strict liability was held to be inapplicable in a claim by a railroad against a railroad car manufacturer. The railroad, by contractual affiliation in an industry association that approved standards for car design, was precluded as a matter of law from asserting strict liability for an alleged design defect. The court distinguished the situation in *Toledo* from that in which a plaintiff is a member of the general public since the railroad had the same expertise and knowledge of the characteristics of the alleged defect as the defendant. Similarly, in *Phillips Petroleum Co. v. Norfolk & Western Ry.*, 96 Ill.App.3d 1093, 422 N.E.2d 138, 52 Ill.Dec. 457 (4th Dist. 1981), it was determined as a matter of law that a railroad that participated in the development of design specifications for the construction of a railroad car could not seek relief under strict liability against the railroad car manufacturer for a design defect.

A manufacturer may owe a duty to the user of a product, but not others who may be injured by an alleged defect. For example, a manufacturer has a duty to design a vehicle that is reasonably safe for its occupants but owes no duty to those who collide with it. The court in *Rennert v. Great Dane Limited Partnership*, 543 F.3d 914 (7th Cir. 2008), affirmed dismissal of strict liability wrongful death and personal injury claims on behalf of occupants of a van that slid under a trailer manufactured by the defendant that allegedly had a defectively designed underride guard. *Accord Beattie v. Lindelof*, 262 Ill.App.3d 372, 633 N.E.2d 1227, 199 Ill.Dec. 236 (1st Dist. 1994). The court in *Mieher v. Brown*, 54 Ill.2d 539, 301 N.E.2d 307 (1973), reached the same result in dismissing negligence claims.

Contractual provisions precluding consumers from bringing strict liability claims for personal injuries have been held to violate public policy. *Sipari v. Villa Olivia Country Club*, 63 Ill.App.3d 985, 380 N.E.2d 819, 20 Ill.Dec. 610 (1st Dist. 1978). However, sophisticated commercial parties can use their business judgment to exculpate claims for liability in exchange for lower costs. *Chicago Steel Rule & Die Fabricators Co. v. ADT Security Systems, Inc.*, 327 Ill.App.3d 642, 763 N.E.2d 839, 261 Ill.Dec. 590 (1st Dist. 2002), held that a clear and unambiguous exculpatory clause precluded a steel plant from maintaining actions against an alarm service for property damage other than to the alarm system.

## 2. [4.5] Improper Defendants

Not all entities involved with the design, manufacture, or distribution of a product are subject to strict liability. Rather, to have responsibility attached, the defendant must be engaged in the business of selling or distributing the product and must in fact have distributed the particular product in question. *Cunningham v. MacNeal Memorial Hospital*, 47 Ill.2d 443, 266 N.E.2d 897 (1970). Illinois does not recognize the market-share theory of liability, as it would turn manufacturers into insurers of their own products as well as products made by others in the industry. *Smith v. Eli Lilly & Co.*, 137 Ill.2d 222, 560 N.E.2d 324, 148 Ill.Dec. 22 (1990). Rather, causation in fact requires a plaintiff to establish a causative link between the tortious conduct of a specific defendant and the injuries for which recovery is sought, regardless of whether the theory is strict liability, negligence, or willful and wanton misconduct. *Lewis v. Lead Industries Ass'n*, 342 Ill.App.3d 95, 793 N.E.2d 869, 276 Ill.Dec. 110 (1st Dist. 2003). Therefore, counsel should determine whether a particular defendant is properly within the sphere of entities potentially subject to liability.

### a. [4.6] Product Identification

Situations occur in which a product causes an injury but it is not possible to identify the specific manufacturer. Plaintiffs have argued that under those circumstances, possible manufacturers of the involved product should be subject to liability under a market-share theory. Under this concept, manufacturers who marketed a product in a geographic area who failed to establish that they did not manufacture or sell the injury-causing product would be presumed to have equal shares of the market. They would then proportionately share responsibility for a verdict. Fortunately, the Illinois Supreme Court rejected the market-share theory of liability in *Smith v. Eli Lilly & Co.*, 137 Ill.2d 222, 560 N.E.2d 324, 337 – 338, 148 Ill.Dec. 22 (1990). The court noted numerous flaws in the concept: (1) there may be little or no reliable information available to establish a defendant's market share; (2) the task of attempting to formulate market shares would often not be possible because the data does not exist; (3) acceptance of the theory would burden courts in an almost futile endeavor; and (4) the potential determinations could be arbitrary and unfair. In *Millar-Mintz v. Abbott Laboratories*, 268 Ill.App.3d 566, 645 N.E.2d 278, 206 Ill.Dec. 273 (1st Dist. 1994), the appellate court found the market-share theory of liability unworkable and refused to apply it in an action against seven manufacturers of diethylstilbestrol (DES).

In *Wysocki v. Reed*, 222 Ill.App.3d 268, 583 N.E.2d 1139, 164 Ill.Dec. 817 (1st Dist. 1991), the First District accepted the plaintiff's urging to invoke the rule of alternative liability found in RESTATEMENT (SECOND) OF TORTS §433B (1965). The trial court dismissed a legal malpractice claim because the identity of the proper drug manufacturer could not be determined. The alternative liability concept is that if there are two or more tortfeasors but there is uncertainty as to which one caused the injury, the burden of proof is shifted to the defendants to establish that they did not sell the product. If that showing is not possible, multiple defendants could be liable.

The court in *Estate of Henderson v. W.R. Grace Co.*, 185 Ill.App.3d 523, 541 N.E.2d 805, 133 Ill.Dec. 594 (3d Dist. 1989), entered summary judgment against a plaintiff who was unable to



produce evidence identifying any defendant as a manufacturer of asbestos used in the insulation of a grade school. It is a plaintiff's responsibility to use discovery methods and obtain knowledge of the proper manufacturer before liability can attach. *See also Zimmer v. Celotex Corp.*, 192 Ill.App.3d 1088, 549 N.E.2d 881, 140 Ill.Dec. 230 (1st Dist. 1989); *Naden v. Celotex Corp.*, 190 Ill.App.3d 410, 546 N.E.2d 766, 137 Ill.Dec. 821 (1st Dist. 1989).

Evidence merely raising a possibility that the defendant manufactured a product is insufficient to defeat summary judgment. In *Sutton v. Washington Rubber Parts & Supply Co.*, 176 Ill.App.3d 85, 530 N.E.2d 1055, 125 Ill.Dec. 646 (1st Dist. 1988), the court affirmed summary judgment against a plaintiff who asserted strict liability and breach of warranty claims against three droplight manufacturers. Evidence that a manufacturer sold droplights to a supplier from whom the plaintiff's employer purchased lights was insufficient to establish the specific manufacturer. A defense summary judgment was proper when the plaintiff could not establish the probability that the product came from the defendant. *Naden, supra*, noted that while a manufacturer's identity can be established by direct or circumstantial evidence, liability cannot be based on speculation, guess, or conjecture. The court believed there was nothing to justify the inference that the decedent was exposed to asbestos products manufactured or distributed by the defendants. In *Zimmer, supra*, the court reached a similar result, affirming a defendant's summary judgment when the plaintiff could not show that the particular defendant's product was used at the shipyard where the decedent worked for 15 years.

*b. [4.7] No Sale or Distribution*

Even though a defendant may have designed or produced a product, liability will not attach unless the defendant actually placed the product into the stream of commerce. For example, the owner of a forklift who had manufactured the product for use in its own plant was not in the chain of distribution within the context of strict liability. *Winkler v. Hyster Co.*, 54 Ill.App.3d 282, 369 N.E.2d 606, 12 Ill.Dec. 109 (4th Dist. 1977). Similarly, a company that designed a product for use in its own plant was not in the distributive chain regardless of the fact that the product allegedly was defective in design. *Mechanical Rubber & Supply Co. v. Caterpillar Tractor Co.*, 80 Ill.App.3d 262, 399 N.E.2d 722, 35 Ill.Dec. 656 (3d Dist. 1980). Nor was a road construction contractor liable for injuries caused by a partially constructed guardrail that had not been turned over to the state, as the contractor had not yet placed it into the stream of commerce. *Maddan v. R.A. Cullinan & Son, Inc.*, 88 Ill.App.3d 1029, 411 N.E.2d 139, 44 Ill.Dec. 233 (3d Dist. 1980).

*c. [4.8] Furnishing Services*

The RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998) reflects earlier Illinois law that those who provide a service are not subject to strict liability. Section 19(b) states that “[s]ervices, even when provided commercially, are not products.” Applying this principle, a hospital was not liable for furnishing X-ray services to a patient. *Dubin v. Michael Reese Hospital & Medical Center*, 83 Ill.2d 277, 415 N.E.2d 350, 47 Ill.Dec. 345 (1980). Nor was an elevator installer subject to strict liability, as he did not sell the product but merely performed installation services. *Hinojasa v. Automatic Elevator Co.*, 92 Ill.App.3d 351, 416 N.E.2d 45, 48 Ill.Dec. 150 (1st Dist. 1980). Although an auto dealer could be liable under a negligence theory for improper servicing of a car, it could not be subject to strict liability for

merely performing a service. *Abel v. General Motors Corp.*, 155 Ill.App.3d 208, 507 N.E.2d 1369, 108 Ill.Dec. 28 (2d Dist. 1987). Summary judgment was proper on behalf of an engineering consultant hired by a product manufacturer to assemble a list of attributes that purchasers might desire. This activity did not create a responsibility to design a safe product, and the engineer's receipt of a \$10,000 fee did not place it in the distributive chain of the product. *Bittler v. Doyen & Associates, Inc.*, 271 Ill.App.3d 645, 648 N.E.2d 1028, 208 Ill.Dec. 106 (1st Dist. 1995). A contractor who disassembled a machine in Tennessee and reinstalled it in Illinois was merely an installer of the product who was not involved in placing it into the stream of commerce even though the contract required it to perform "all design, engineering and construction services necessary" for relocation and installation. *Winters v. Fru-Con Inc.*, 498 F.3d 734, 745 (7th Cir. 2007).

*d. [4.9] Lessors, Bailors, and Lessees*

Strict liability can attach to a commercial lessor of a product. *Galluccio v. Hertz Corp.*, 1 Ill.App.3d 272, 274 N.E.2d 178 (5th Dist. 1971); *Crowe v. Public Building Commission of Chicago*, 74 Ill.2d 10, 383 N.E.2d 951, 23 Ill.Dec. 80 (1978); *Knapp v. Hertz Corp.*, 59 Ill.App.3d 241, 375 N.E.2d 1349, 17 Ill.Dec. 65 (1st Dist. 1978). However, a lessor can be liable under strict liability only if it is engaged in the business of leasing the injury-causing product. *Patton v. T.O.F.C., Inc.*, 79 Ill.App.3d 94, 398 N.E.2d 313, 34 Ill.Dec. 638 (1st Dist. 1979). Similarly, a bailor must be in the business of bailing the product involved in the incident. *Zanzig v. H.P.M. Corp.*, 134 Ill.App.3d 617, 480 N.E.2d 1204, 89 Ill.Dec. 461 (1st Dist. 1985). Thus, it is important to analyze the actual business of the defendant to determine whether the purported leasing or bailing of the allegedly defective product is actually a commercial undertaking. This determination must be made on a case-by-case basis. The court in *Jones v. McCook Drum & Barrel Co.*, 229 Ill.App.3d 1083, 595 N.E.2d 670, 674, 172 Ill.Dec. 309 (3d Dist. 1992), affirmed dismissal of a strict liability claim against a steel drum manufacturer following the plaintiff's injury when the landing gear on a semitrailer kicked back. The defendant left the trailer at a chemical company to facilitate delivery and storage of its drums as a mere convenience that was not "incident and necessary" to the sale of the steel drums. In *Johnson v. Burlington Northern, Inc.*, 107 Ill.App.3d 130, 437 N.E.2d 334, 62 Ill.Dec. 807 (3d Dist. 1982), the court held that a railroad car lessee was not liable for defects existing in the car even though it had been used extensively on a number of railroads and had repeatedly gone through interchange.

It is not always necessary for the purported lessor or bailor to be directly involved in the leasing business. For example, a gas seller who loaned a customer a storage tank into which it put its product was held to be responsible for a defect in the tank. Although there was no direct charge for the tank, it was concluded that the cost of the loan was incident to the sale price of the gas. *Federal Insurance Co. v. Country Mutual Insurance Co.*, 24 Ill.App.3d 917, 322 N.E.2d 66 (2d Dist. 1975) (abst.). However, as liability is predicated on placing the item into the stream of commerce, the furnishing of a grocery cart by a store did not create strict liability against the grocer. *Keen v. Dominick's Finer Foods, Inc.*, 49 Ill.App.3d 480, 364 N.E.2d 502, 7 Ill.Dec. 341 (1st Dist. 1977). Nor was a gas station liable for furnishing an allegedly defective tire gauge, as loaning the gauge was not an integral part of the defendant's operation. *Gilliland v. Rothermel*, 83 Ill.App.3d 116, 403 N.E.2d 759, 38 Ill.Dec. 528 (2d Dist. 1980). A lessor whose only involvement was to provide a means for financing the purchase of the product was not in the

chain of distribution. *Abco Metals Corp. v. Equico Lessors, Inc.*, 721 F.2d 583 (7th Cir. 1983). Thus, when faced with the question of whether the purported leasing or bailing is a commercial undertaking, counsel must look to whether the lessor or bailor receives any money from the loan of the product as well as whether the product is a necessary element of the operation of the defendant's related business.

*Rivera v. Mahogany Corp.*, 145 Ill.App.3d 213, 494 N.E.2d 660, 98 Ill.Dec. 538 (1st Dist. 1986), included a claim against a lessor who financed a machine's purchase by the plaintiff's employer through a 60-month lease arrangement. Under the lease, the employer had the duty to inspect and maintain the machine, while title was maintained in the lessor until the employer exercised a purchase option at the end of the lease. In a case of first impression in Illinois, it was held that the lessor was not in the distributive chain of the product. A distinction was made between a conventional commercial lessor and a financial lessor. A commercial lessor rents a product for a short period of time, generally less than its expected useful life, with the expectation that the product will be returned at the end of the lease. A financial lessor purchases a product, leases it to a customer who is expected to purchase it, and does not expect that it will be returned at the end of the lease. Although a financial lessor has economic gain under the lease agreement, public policy considerations supporting strict liability would not be advanced by subjecting the financial lessor to liability. A similar result was reached in *Beattie v. Lindelof*, 262 Ill.App.3d 372, 633 N.E.2d 1227, 199 Ill.Dec. 236 (1st Dist. 1994). Strict liability did not exist against a financial lessor because profit derived from placing money, rather than the defective product, into the stream of commerce.

*e. [4.10] Occasional Sellers*

Strict liability requires that the defendant actually be engaged in the business of selling or distributing a particular product. An occasional seller is not subject to strict liability. For example, a sawmill that sold a saw it had used in its business was not liable. *Siemen v. Alden*, 34 Ill.App.3d 961, 341 N.E.2d 713 (2d Dist. 1975). Similarly, a switch maker that furnished a die for casting to its supplier of component parts was not subject to strict liability because loaning the die was an isolated transaction outside the scope of the defendant's regular business. *Zanzig v. H.P.M. Corp.*, 134 Ill.App.3d 617, 480 N.E.2d 1204, 89 Ill.Dec. 461 (1st Dist. 1985). A golf course that made a one-time sale of all of its golf carts was not subject to strict liability because it was not in the business of selling golf carts. *Timm v. Indian Springs Recreation Ass'n*, 187 Ill.App.3d 508, 543 N.E.2d 538, 135 Ill.Dec. 155 (4th Dist. 1989). A prior owner of an allegedly defective truck was not subject to strict liability because the sale of the truck was an "isolated sale." *Beattie v. Lindelof*, 262 Ill.App.3d 372, 633 N.E.2d 1227, 1235, 199 Ill.Dec. 236 (1st Dist. 1994).

*f. [4.11] Apparent Manufacturers*

Under the "apparent manufacturer" doctrine, liability can attach even though the defendant did not design or manufacture the product but marketed it and participated in the resultant economic benefits. In *Connelly v. Uniroyal, Inc.*, 75 Ill.2d 393, 389 N.E.2d 155, 27 Ill.Dec. 343 (1979), the Supreme Court determined that strict liability can apply to a party that, for consideration, authorizes the use of its trademark or name, particularly if the product itself bears no indication that it was manufactured by any other entity. However, an essential element is that

the apparent manufacturer receive economic benefits. In *Hebel v. Sherman Equipment*, 92 Ill.2d 368, 442 N.E.2d 199, 65 Ill.Dec. 888 (1982), summary judgment was properly entered in favor of an apparent manufacturer who had no participatory connection with the enterprise that produced and marketed a car wash conveyor system. There was no indication to the purchasing public by the defendant that it was the actual manufacturer. In *Root v. JH Industries, Inc.*, 277 Ill.App.3d 502, 660 N.E.2d 195, 214 Ill.Dec. 4 (1st Dist. 1995), the court affirmed summary judgment for the purchaser of a van ramp manufacturer's assets even though the defendant advertised that the product line had over 30 years' experience. The product purchaser could not have relied on the representation at the time the ramp was purchased.

The RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §14 (1998) provides that "[o]ne engaged in the business of selling or distributing products who sells or distributes as its own a product manufactured by another" is subject to the same liability as if it had been the manufacturer. This provision is consistent with current Illinois law.

*g. [4.12] Successor Corporations*

An underlying principle in strict liability is that the product must be shown to have been manufactured, sold, or distributed by the defendant before liability will attach. Similarly, one who has done nothing to create a risk of injury cannot be subject to liability under a negligence theory. As commercial enterprises do not remain static, it is not uncommon for a product to be manufactured or sold by a corporation that is later acquired by another corporation. If the successor corporation agrees to assume unlimited responsibility for debts, liability may attach. However, if the transaction is solely a transfer of assets, the successor corporation will not be liable because the successor corporation did not participate in placing the product into the stream of commerce. *Domine v. Fulton Iron Works*, 76 Ill.App.3d 253, 395 N.E.2d 19, 32 Ill.Dec. 72 (1st Dist. 1979); *Nguyen v. Johnson Machine & Press Corp.*, 104 Ill.App.3d 1141, 433 N.E.2d 1104, 60 Ill.Dec. 866 (1st Dist. 1982). The purpose is to protect bona fide purchasers from unassumed liability and to keep corporate assets fluid. *Vernon v. Schuster*, 179 Ill.2d 338, 688 N.E.2d 1172, 1175, 228 Ill.Dec. 195 (1997). This principle would apply regardless of whether the plaintiff advances strict liability, negligence, or warranty theories. *Green v. Firestone Tire & Rubber Co.*, 122 Ill.App.3d 204, 460 N.E.2d 895, 77 Ill.Dec. 591 (2d Dist. 1984). RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §12 (1998) is in accord with Illinois law. It provides that liability will attach to a successor only if the acquisition is accompanied by an agreement to assume liability, results in a fraudulent conveyance to escape liability, constitutes a consolidation or merger with the predecessor, or results in the successor becoming a continuation of the predecessor.

These principles have been applied in a number of Illinois decisions. *Domine, supra*, held that the public policy of Illinois did not favor the extension of liability to a successor corporation that purchased the assets of a manufacturer of a punch press. Similarly, there was no exposure under strict liability for the purchaser of a manufacturer's entire product line, including a straightening roll machine. *Barron v. Kane & Roach, Inc.*, 79 Ill.App.3d 44, 398 N.E.2d 244, 34 Ill.Dec. 569 (1st Dist. 1979). A successor corporation would not be liable for the actions of a company that allegedly sold a defective printing press ten years before the successor's purchase of assets. *Diguilio v. Goss International Corp.*, No. 1-07-1584, 2009 WL 1175089 (1st Dist. Apr. 30,

2009). Strict liability, breach of warranty, and negligence theories could not be applied against a corporate successor of a lawn mower manufacturer despite the plaintiff's attempt to invoke automatic responsibility following the defendant's purchase of a product line. *Green, supra*. Nor does a corporate successor have a duty to warn absent a continuing relationship with the former company even though it continued to manufacture a punch press line for a number of years. *Gonzalez v. Rock Wool Engineering & Equipment Co.*, 117 Ill.App.3d 435, 453 N.E.2d 792, 72 Ill.Dec. 917 (1st Dist. 1983). The purchaser of a product line of pipe and tube cutoff machines was not liable under strict liability or negligence for a machine sold prior to its purchase, rejecting the product line liability theory. *Nilsson v. Continental Machine Manufacturing Co.*, 251 Ill.App.3d 415, 621 N.E.2d 1032, 190 Ill.Dec. 579 (2d Dist. 1993).

There are three exceptions to the general rule: (1) when the transaction amounts to a consolidation or merger of the purchaser and seller corporations; (2) when the purchaser is merely a continuation of the seller; and (3) when the transaction occurs for the fraudulent purpose of escaping liability for the seller's obligations. *Hernandez v. Johnson Press Corp.*, 70 Ill.App.3d 664, 388 N.E.2d 778, 780, 26 Ill.Dec. 777 (1st Dist. 1979); *Freeman v. White Way Sign & Maintenance Co.*, 82 Ill.App.3d 884, 403 N.E.2d 495, 38 Ill.Dec. 264 (1st Dist. 1980). Generally, a merger is the absorption of one corporation by another with the latter maintaining its name and corporate identity with the added capital and investment of the merged corporation. A consolidation involves the creation of a new corporation and termination of the constituents. The major distinction between a merger or consolidation and a sale of assets is that in a merger or consolidation there is a continuation of the existing corporate interests of the shareholders, officers, and employees, while in a sale of the corporation's assets, the seller parts with its interest for a consideration and receives no further benefit from and maintains no interest in the purchasing corporation.

In *Fenderson v. Athey Products Corporation, Kolman Division*, 220 Ill.App.3d 832, 581 N.E.2d 288, 163 Ill.Dec. 337 (1st Dist. 1991), the plaintiff alleged negligence in the design and manufacture of a conveyor manufactured by Kolman Manufacturing Company in 1961. In 1964, Athey Products entered into an asset purchase agreement providing that Athey would purchase all of Kolman's assets for a purchase price consisting of cash, a nine-year interest-bearing corporate note, and shares of Athey's common stock. After the sale, the same products continued to be manufactured under the Kolman name at the same location with substantially the same workforce. Kolman's president became a member of Athey's board of directors. The First District reversed a defense summary judgment, holding that the transaction constituted a de facto merger, thus making the successor corporation liable.

*h. [4.13] Component Part Manufacturers*

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §5 (1998) discusses the liability of a component part manufacturer whose product is incorporated into another product. It provides that the supplier can be

**subject to liability for harm to persons or property caused by a product into which the component is integrated if:**

**(a) the component is defective in itself . . . or**

**(b)(1) the seller or distributor of the component substantially participates in the integration of the component into the designed product.**

While stating the generally accepted view that a component part manufacturer is liable if the plaintiff proves that the component itself was defective, the section clarifies that the plaintiff cannot establish liability against the component part manufacturer merely by showing that the product into which it was incorporated was defective.

Illinois has recognized that a component part manufacturer has generally no control over its product once the product has been sold and no control over the final assembly of the product into which it was incorporated. Illustrative of this concept is *Depre v. Power Climber, Inc.*, 263 Ill.App.3d 116, 635 N.E.2d 542, 200 Ill.Dec. 203 (1st Dist. 1994). Because it would be inequitable to hold a component part manufacturer liable under these circumstances, special considerations have developed that reflect the realities of the manufacturing process. The *Depre* court affirmed summary judgment for the manufacturer of a stirrup bar that was a component part of a skeleton elevator car used during the installation of a permanent elevator because it had no control over the subsequent manufacturer who attached the bar with only one bolt, which allegedly created the danger.

*Curry v. Louis Allis Co.*, 100 Ill.App.3d 910, 427 N.E.2d 254, 56 Ill.Dec. 174 (1st Dist. 1981), held that a distributor of a drive motor later incorporated into a drop hammer would not be saddled with a nondelegable duty to ensure that the motor was sufficiently secured because it had no control over the motor's attachment. *Loos v. American Energy Savers, Inc.*, 168 Ill.App.3d 558, 522 N.E.2d 841, 119 Ill.Dec. 179 (4th Dist. 1988), held that the manufacturer of a tower that was incorporated into a wind energy generator system by another manufacturer had no obligation to anticipate that it might become unreasonably dangerous when used in the final assembly. In *Savage Manufacturing & Sales, Inc. v. Doser*, 184 Ill.App.3d 405, 540 N.E.2d 402, 132 Ill.Dec. 662 (1st Dist. 1989), *rev'd on other grounds*, 142 Ill.2d 176 (1990), the appellate court held that a manufacturer of a multipurpose hydraulic press had no duty to inquire about the intended use to which it would be put by the plaintiff's employer. In *Woods v. Graham Engineering Corp.*, 183 Ill.App.3d 337, 539 N.E.2d 316, 132 Ill.Dec. 6 (2d Dist. 1989), the court reversed a plaintiff's verdict against the manufacturer of a wheel subsequently incorporated into a plastic injection blow molding machine when the dangerous condition was created by the assembler of the final product. *Cimino v. Raymark Industries, Inc.*, 151 F.3d 297 (5th Cir. 1998), is the first case to expressly follow RESTATEMENT (THIRD) OF TORTS §5 concerning an ingredient supplier. It held that a supplier of raw asbestos was not liable for injuries resulting from the use of asbestos-containing end products manufactured by others. The evidence showed that the supplier never participated in designing the insulation products and that the raw asbestos itself was not defective or unreasonably dangerous.

### 3. [4.14] Existence of a Defect

The term "defect" is not capable of a definitive description applicable in all types of cases. Rather, it is a concept that can include a myriad of approaches. Typically, however, defects fall into three broad categories: manufacturing defects; design defects; and failure of a manufacturer to warn properly of a danger or to instruct properly in the use of a product. However, it is

important to bear in mind that it is entirely possible for a product to be dangerous and yet not provide a basis for a strict liability claim. It must be remembered that the product must be “unreasonably dangerous” before an actionable wrong can exist. The fact that an injury occurred through the use of a product does not establish a defect in the product. *West v. Deere & Co.*, 145 Ill.2d 177, 582 N.E.2d 685, 164 Ill.Dec. 122 (1991).

Shortly after *Suvada v. White Motor Co.*, 32 Ill.2d 612, 210 N.E.2d 182 (1965), the Illinois Supreme Court attempted to further delineate a manufacturer’s responsibility under strict liability. In *Fanning v. LeMay*, 38 Ill.2d 209, 230 N.E.2d 182 (1967), the Supreme Court affirmed dismissal of a complaint contending that certain shoes were unreasonably dangerous because they became slippery when the soles got wet. As virtually all shoes become slippery when wet, the court recognized that a defect did not exist.

*Dunham v. Vaughan & Bushnell Mfg. Co.*, 42 Ill.2d 339, 247 N.E.2d 401, 403 (1969), noted that products are defective when they fail to perform in the manner reasonably expected in light of their nature and intended function and adopted the RESTATEMENT (SECOND) OF TORTS (1965) view “that a defect is a condition not contemplated by the ultimate consumer which would be unreasonably dangerous to him,” citing RESTATEMENT (SECOND) OF TORTS §402A, cmt. g. This analysis provided the basis for drafting the definition of “unreasonably dangerous” in Illinois Pattern Jury Instructions — Civil No. 400.06 (Supp. 2008), which provides:

**When I use the expression “unreasonably dangerous” in these instructions, I mean unsafe when put to a use that is reasonably foreseeable considering the nature and function of the [product].**

The basic premise of strict liability is that the injury was the result of an unreasonably dangerous condition of the product. *Rios v. Niagara Machine & Tool Works*, 59 Ill.2d 79, 319 N.E.2d 232 (1974); *Stevens v. Silver Manufacturing Co.*, 41 Ill.App.3d 483, 355 N.E.2d 145 (2d Dist. 1976), *rev’d on other grounds*, 70 Ill.2d 41 (1977). However, a product is not unreasonably dangerous if the injury derives merely from those inherent properties of a product that are obvious to all who come in contact with it. *Hunt v. Blasius*, 74 Ill.2d 203, 384 N.E.2d 368, 23 Ill.Dec. 574 (1978); *Genaust v. Illinois Power Co.*, 62 Ill.2d 456, 343 N.E.2d 465, 471 (1976). The duty placed on a manufacturer does not require it to produce a product that is the ultimate in safety. *Curry v. Louis Allis Co.*, 100 Ill.App.3d 910, 427 N.E.2d 254, 56 Ill.Dec. 174 (1st Dist. 1981). Nor is a manufacturer under a duty to design a product that is totally incapable of injuring those who foreseeably may come into contact with it. *Coney v. J.L.G. Industries, Inc.*, 97 Ill.2d 104, 454 N.E.2d 197, 73 Ill.Dec. 337 (1983).

Applying these principles, an auto manufacturer was not liable for damages merely because the auto skidded on a wet surface. *Zidek v. General Motors Corp.*, 66 Ill.App.3d 982, 384 N.E.2d 509, 23 Ill.Dec. 715 (2d Dist. 1978). Rat poison was not defective or dangerous to an extent beyond that contemplated by the ordinary consumer simply because it had a propensity to contaminate living organisms other than rats. *Camp Creek Duck Farm, Inc. v. Shell Oil Co.*, 103 Ill.App.3d 81, 430 N.E.2d 385, 58 Ill.Dec. 443 (4th Dist. 1981). Raw pork with trichinosis was not unreasonably dangerous, as the community at large would have been aware of the danger and

acted to eliminate it by proper cooking. *Huebner v. Hunter Packing Co.*, 59 Ill.App.3d 563, 375 N.E.2d 873, 16 Ill.Dec. 766 (5th Dist. 1978) (relying on RESTATEMENT (SECOND) OF TORTS §402A, cmt. I (1964)). The lack of a face guard on a motorcycle helmet was an obvious intrinsic property of the product and therefore not unreasonably dangerous to a plaintiff who sustained facial and brain injuries in an accident. *Walker v. Maxwell City, Inc.*, 117 Ill.App.3d 571, 453 N.E.2d 917, 73 Ill.Dec. 92 (1st Dist. 1983). A car seat cover with a hook at the end of an elastic strap that snapped up and hit the plaintiff in the eye was not unreasonably dangerous because the injury resulted from an obvious common propensity of the product. *Van Dettum v. K-Mart Corp.*, 133 Ill.App.3d 861, 479 N.E.2d 1104, 89 Ill.Dec. 98 (3d Dist. 1985). A concealable handgun was not unreasonably dangerous because it could be used to intentionally injure or kill someone. *Riordan v. International Armament Corp.*, 132 Ill.App.3d 642, 477 N.E.2d 1293, 87 Ill.Dec. 765 (1st Dist. 1985). Because it is an inherent characteristic of a refrigerated trailer to draw in warm air and expel cold air when the door is opened, thus creating ice on the floor, a refrigerated trailer in which the plaintiff fell and injured himself was not unreasonably dangerous. *Kokoyachuk v. Aeroquip Corp.*, 172 Ill.App.3d 432, 526 N.E.2d 607, 122 Ill.Dec. 348 (1st Dist. 1988).

A manufacturer is not under a duty to design a product that is incapable of causing injury. Therefore, a person scalded bathing in a motel tub could not recover under strict liability against a water heater manufacturer because the heater performed in the manner reasonably expected in light of its nature and intended function. *Carroll v. Faust*, 311 Ill.App.3d 679, 725 N.E.2d 764, 244 Ill.Dec. 291 (2d Dist. 2000). A pistol was not defective when it killed the plaintiff's decedent, who was playing Russian roulette. The pistol operated as intended and performed according to its design. *Taylor v. Gerry's Ridgewood, Inc.*, 141 Ill.App.3d 780, 490 N.E.2d 987, 95 Ill.Dec. 895 (3d Dist. 1986). In today's society, motorcycles are a common means of transportation, and any adult can be expected to know the hazards of riding a motorcycle. "There is nothing circumspect about a motorcycle rider's vulnerability to injury in the event of a collision," and therefore the lack of a crash bar on a motorcycle was not a defect. *Miller v. Dvornik*, 149 Ill.App.3d 883, 501 N.E.2d 160, 164, 103 Ill.Dec. 139 (1st Dist. 1986). See also *Bossert v. Tate*, 183 Ill.App.3d 868, 539 N.E.2d 729, 132 Ill.Dec. 166 (3d Dist. 1989). A complaint alleging that an unknown defect caused an auto to turn to the right "without any apparent cause" was insufficient to state a cause of action under strict liability, warranty, or negligence. *Strotman v. K.C. Summers Buick, Inc.*, 141 Ill.App.3d 8, 489 N.E.2d 1148, 1150, 95 Ill.Dec. 420 (4th Dist. 1986). An allegation that floor wax was slick or slippery did not identify a defect under strict liability or negligence. *Nazarenus v. J.F. Daley International, Ltd.*, 714 F.Supp. 361 (N.D.Ill. 1989).

A manufacturer was not liable for burns sustained by a kitchen worker because the risk of burn in an open deep-fat fryer was obvious. *Scoby v. Vulcan-Hart Corp.*, 211 Ill.App.3d 106, 569 N.E.2d 1147, 155 Ill.Dec. 536 (4th Dist. 1991). Summary judgment was proper for a step van manufacturer who did not have seats or hand grips in an area where a passenger might be. It was obvious that the van had no passenger seat or hand grip, and, consequently, no defect existed because there was no danger beyond what would be contemplated by an ordinary person. *Clark v. Penn Versatile Van*, 197 Ill.App.3d 1, 554 N.E.2d 643, 143 Ill.Dec. 708 (1st Dist. 1990). Similarly, a motorcycle designed with a wide gas tank and no crash bar was not unreasonably dangerous because the claimed defects were open and obvious to anyone who sat on the cycle. *Kutzler v. AMF Harley-Davidson*, 194 Ill.App.3d 273, 550 N.E.2d 1236, 141 Ill.Dec. 190 (1st



Dist. 1990). Summary judgment for the defendants was proper under both strict liability and negligence when the plaintiff tripped over a vacuum's brightly colored electric cord that was a common and obvious inherent condition. *Lara v. Thoro-Matic Vacuum Systems, Inc.*, 194 Ill.App.3d 781, 551 N.E.2d 390, 141 Ill.Dec. 397 (1st Dist. 1990).

Products are not expected to last forever. Failure caused by ordinary wear and tear does not establish a defect. In *Hampton v. Sears Roebuck & Co.*, 252 Ill.App.3d 744, 625 N.E.2d 192, 192 Ill.Dec. 232 (1st Dist. 1993), the court affirmed a defense verdict for a store that sold a clamp used on a swing set a year before the accident occurred. The court noted that the clamp had been put to significant use and would not last forever. A product's useful life cannot be fixed with certainty but depends on many factors, including the construction, maintenance, and conditions of use or abuse. Although approaching the issue as one of alteration of the product, a similar result was reached in *Korando v. Uniroyal Goodrich Tire Co.*, 159 Ill.2d 335, 637 N.E.2d 1020, 202 Ill.Dec. 284 (1994). There, the Supreme Court held that a defense verdict was proper when a tire was manufactured in 1980 and had been subjected to three punctures that were repaired with patches and a plug. Also, the beads of the tire had been damaged, and an inner tube had to be placed inside so the tire would retain air.

Summary judgment is appropriate when there is insufficient evidence that an unreasonably dangerous condition existed in a vehicle at the time it left the manufacturer's control that could be causally connected to the injuries complained of by the plaintiff. *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill.App.3d 313, 722 N.E.2d 227, 242 Ill.Dec. 738 (2d Dist. 1999) (summary judgment affirmed when evidence indicated plaintiff's claims that noxious fumes emanated from vehicle's heating system caused physical injury did not start until 18 months after dealer had replaced heating unit).

In determining whether a product is unreasonably dangerous, the focus should be on the product itself and not the availability of additional safety devices. *Carroll, supra*. In *Carroll*, the court affirmed the dismissal of strict liability claims against a water heater manufacturer and distributor arising from the plaintiff's being scalded because a water heater was preset at 170 degrees. The court held that the water heater performed in a manner to be expected in light of its nature and intended function. No industry standard required an anti-scald device or thermostatic mixing valves.

There is no duty in Illinois to issue post-sale warnings or to retrofit products to remedy defects first discovered after the product has left the manufacturer's control. *Modelski v. Navistar International Transportation Corp.*, 302 Ill.App.3d 879, 707 N.E.2d 239, 236 Ill.Dec. 394 (1st Dist. 1999) (affirmed striking allegations that manufacturer should have retrofitted tractor with safety device to eliminate unexpected loss of bolts when hazard was unknown at time of manufacture).

*a. [4.15] Manufacturing Defect*

The RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998) recognizes that manufacturing defects are fundamentally different from design and warning defects. Section 2(a), which discusses manufacturing defects, provides that a manufacturer may be liable when the

“product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product.” Cases involving a manufacturing defect generally relate to a single product that has failed and can be the most difficult type of case to defend.

Typically, proof in a manufacturing defect case falls into one of two categories: direct evidence of a defect, such as an improper weld or a missing bolt; or circumstantial evidence. Direct evidence is the more common type of proof.

In the direct evidence case, a plaintiff must prove that the defect found in the product was the proximate cause of the injury. The defense should attempt, through the use of expert testimony, to establish that the manufacturing flaw was not causally related to the accident. For example, while a defect might be found in the automatic choke of an automobile, the actual proximate cause of the car’s rolling into a train may have been the plaintiff’s failure to properly apply the brake. *Stammer v. General Motors Corp.*, 123 Ill.App.2d 316, 259 N.E.2d 352 (5th Dist. 1970). Similarly, when an automobile falls off a jack, the proximate cause may not be related to a defect in the jack but rather to the plaintiff’s own conduct. *Brandenburg v. Weaver Manufacturing Co.*, 77 Ill.App.2d 374, 222 N.E.2d 348 (4th Dist. 1966).

In *Tweedy v. Wright Ford Sales, Inc.*, 64 Ill.2d 570, 357 N.E.2d 449, 2 Ill.Dec. 282 (1976), the Supreme Court affirmed earlier appellate court decisions that a plaintiff may prove a case in strict liability through circumstantial evidence. However, this holding has not been construed to mean that all a plaintiff need prove is that an accident or injury occurred. A plaintiff must offer sufficient evidence relating the accident to the defect to inferentially make the defect the most probable cause. For a more detailed analysis of circumstantial evidence, see §4.29 below.

Circumstantial evidence may not be sufficient to establish the existence of a defect at the time the product left the manufacturer’s control. In *Larson v. Thomashow*, 17 Ill.App.3d 208, 307 N.E.2d 707 (1st Dist. 1974), a drive shaft fell from an auto, causing an accident. The auto had 24,000 miles on it, and repair work had been done on it after its sale. In affirming a directed verdict for the manufacturer, the court held that there was insufficient evidence relating the defect to the time of manufacture, noting, “A jury cannot be allowed to predicate its verdict on mere conjecture or surmise.” 307 N.E.2d at 720. Similarly, in *Mateika v. LaSalle Thermogas Co.*, 94 Ill.App.3d 506, 418 N.E.2d 503, 49 Ill.Dec. 649 (3d Dist. 1981), a defendant was entitled to summary judgment when the most the plaintiff could prove was that a packing nut was loose, allowing gas to escape from a propane tank and burn the plaintiff’s hands. The appellate court in *Beetler v. Sales Affiliates, Inc.*, 431 F.2d 651 (7th Cir. 1970), affirmed a directed verdict for a manufacturer of permanent wave solution as there was no reasonable inference of a defect merely because the user’s scalp was burned. In *Rockett v. Chevrolet Motor Division, General Motors Corp.*, 31 Ill.App.3d 217, 334 N.E.2d 764 (1st Dist. 1975), the court affirmed a directed verdict for the defendant when a 4-year-old pickup truck with 61,000 miles overturned, allegedly due to an improperly adjusted front wheel caster, when there may have been a number of other causes of the accident. The court in *Zoerner v. Eisner Grocery Co.*, 111 Ill.App.2d 342, 250 N.E.2d 156 (4th Dist. 1969), held that the fact that a 2-year-old fell from a grocery cart did not give rise to an inference that the product was defective. Likewise, in *Livingston Service Co. v. Big Wheels, Inc.*, 96 Ill.App.3d 591, 421 N.E.2d 1042, 52 Ill.Dec. 179 (4th Dist. 1981), the court affirmed a jury verdict for a defendant manufacturer of a fertilizer spreader that burned approximately 16 months

after sale. The plaintiff's expert established that the cause of the fire was an electrical cable running from an air conditioning unit to the power source but never gave any opinion as to when the defect causing the electrical fault occurred. The evidence was insufficient to support the inference that the fire resulted from a defect that existed 16 months earlier when the unit was sold. *Spivey v. Brown*, 150 Ill.App.3d 139, 502 N.E.2d 23, 103 Ill.Dec. 876 (3d Dist. 1986), included a strict liability claim against the retailer of a prefab fireplace that caused a fire in the plaintiff's home 3 years after installation. A defense verdict was affirmed because the only evidence at trial was that a carpenter improperly installed the fireplace and, therefore, the plaintiff did not prove that it was defective when it left the defendant's control. *Phillips v. United States Waco Corp.*, 163 Ill.App.3d 410, 516 N.E.2d 670, 114 Ill.Dec. 515 (1st Dist. 1987), included negligence and strict liability actions against the manufacturer of a scaffold that collapsed. The plaintiff could not produce the scaffold and had no evidence to establish that the injuries were proximately caused by a defect existing at the time it left the defendant's control or that the defendant was negligent in the design or manufacture of the product. The mere collapse of the scaffold did not establish liability. *Alvarez v. American Isuzu Motors*, 321 Ill.App.3d 696, 749 N.E.2d 16, 255 Ill.Dec. 236 (1st Dist. 2001), involved a claim under the Magnuson-Moss Warranty — Federal Trade Commission Improvement Act, alleging breach of express and implied warranties; the court held that the plaintiff failed to present sufficient circumstantial evidence that the alleged defect existed at the time of sale.

Often, a plaintiff's case can be attacked on the basis of the age of the product in relation to the claimed defect. Obviously, a purported defect that did not manifest itself until years after manufacture may not have resulted from the manufacturing process at all. Rather, failure may have been the result of wear and tear. A manufacturer is not required to produce a product that will last forever. *Hampton v. Sears Roebuck & Co.*, 252 Ill.App.3d 744, 625 N.E.2d 192, 192 Ill.Dec. 232 (1st Dist. 1993), affirmed a defense verdict in a case involving a clamp used in a swing set, noting that the useful life of a product cannot be fixed with certainty but depends on many factors of its use. The court in *Oquendo v. Teledyne Pines*, 235 Ill.App.3d 463, 602 N.E.2d 56, 176 Ill.Dec. 749 (1st Dist. 1992), affirmed summary judgment, holding that a manufacturer was not liable when a hydraulic hose burst on a 33-year-old machine since it was not required to use hoses that were impervious to cuts and the wear and tear of old age.

The possibility that the claimed flaw may have been the result of a violent impact rather than a manufacturing defect should not be overlooked. This defense requires thorough analysis by an expert, often requiring an accident reconstructionist or a metallurgist to make a finite element analysis.

RESTATEMENT (THIRD) OF TORTS §3 discusses circumstantial evidence supporting the inference of a product defect. It provides that an inference may be drawn that the product was defective, without proof of a specific defect, when the plaintiff's damages were "of a kind that ordinarily occurs as a result of product defect" and was not "solely the result of causes other than product defect." If this principle is embraced in Illinois, it would most frequently apply in manufacturing defect cases. However, it is important to remember that the plaintiff still bears the burden of proving that the defect existed at the time of sale or distribution.

b. [4.16] *Design Defect*

In a design-defect case, the product is properly manufactured according to specifications but is allegedly unreasonably dangerous due to an error in judgment on the part of the designer. While a manufacturing defect will usually pertain to a single product, the design defect often applies to all similar products manufactured under the same design. Therefore, it can often relate to an entire product line. Consequently, design-defect cases are usually vigorously defended by manufacturers.

A plaintiff may demonstrate that a product is defective in design in two ways: “(1) by introducing evidence that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner [under the ‘consumer-user contemplation test’] or (2) by introducing evidence that (a) the product’s design proximately caused . . . injury and (b) the defendant failed to prove that on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design [under the ‘risk-utility test’].” *Miller v. Rinker Boat Co.*, 352 Ill.App.3d 648, 815 N.E.2d 1219, 1230, 287 Ill.Dec. 416 (4th Dist. 2004), citing *Scoby v. Vulcan-Hart Corp.*, 211 Ill.App.3d 106, 569 N.E.2d 1147, 1149, 155 Ill.Dec. 536 (4th Dist. 1991). In a strict product liability case based on defective design, it may be appropriate to instruct the jury on both the consumer-expectation test and the risk-utility test. *Mikolajczyk v. Ford Motor Co.*, 231 Ill.2d 516, 901 N.E.2d 329, 327 Ill.Dec. 1 (2008). It has been suggested that the open and obvious nature of a risk may preclude recovery in a design-defect case under the consumer-expectation test but is just one factor to consider under a risk-utility test. *Wortel v. Somerset Industries, Inc.*, 331 Ill.App.3d 895, 770 N.E.2d 1211, 1220, 264 Ill.Dec. 515 (1st Dist. 2002).

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §2(b) (1998) provides that a product “is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided” by using a reasonable alternative design. The definition clearly requires the risk of harm to be foreseeable, and therefore the plaintiff must show that a reasonable alternative design existed or reasonably could have been available at the time of manufacture and sale. This is a risk-utility test that requires consideration of the overall safety of the product. It is not sufficient that a proposed alternative design would have reduced or prevented the specific injury suffered by the plaintiff if it would have also introduced into the product other dangers of equal or greater magnitude.

A manufacturer is held to the degree of knowledge and skill of experts in the design of its products. *Dunham v. Vaughan & Bushnell Mfg. Co.*, 86 Ill.App.2d 315, 229 N.E.2d 684 (4th Dist. 1967). A manufacturer is also under a nondelegable duty to prevent its product from being unreasonably dangerous. Thus, it cannot depend on the purchaser or others to make corrections or additions to the product. *Rios v. Niagara Machine & Tool Works*, 59 Ill.2d 79, 319 N.E.2d 232 (1974). However, a manufacturer is not liable for every injury that might possibly occur. *Winnett v. Winnett*, 57 Ill.2d 7, 310 N.E.2d 1 (1974). Thus, the design must be judged in the context of the intended or reasonably foreseeable use of the product. In defending a claim of a design defect, particular attention should be paid to foreseeability and misuse as discussed in §4.18 below and the state of the art as discussed in §4.28 below.

In defending a design-defect case, counsel will almost always be involved with expert testimony. Some defense lawyers prefer the use of an independent expert, which they feel suggests impartiality and objectivity to a jury. Other defense lawyers prefer someone from the defendant's engineering staff because they believe that such a person will have more in-depth knowledge of the product than a plaintiff's expert who probably has been involved with a number of different products while acting as a witness in a wide variety of cases. Both approaches have their assets and liabilities. However, it is important that whichever type of expert is selected, he or she be well qualified in the subject matter of the suit and have the ability to explain the engineering concepts or other areas of testimony in terms easily understandable to a jury.

735 ILCS 5/2-2105, which prohibited the introduction of subsequent remedial measures in product liability cases, was held unconstitutional in *Best v. Taylor Machine Works*, 179 Ill.2d 367, 689 N.E.2d 1057, 228 Ill.Dec. 636 (1997). However, Illinois continues to adhere to the common-law evidentiary rule that public policy requires exclusion of this evidence because of the possible chilling effect on safety improvements. *Brown v. Ford Motor Co.*, 306 Ill.App.3d 314, 714 N.E.2d 556, 239 Ill.Dec. 637 (1st Dist. 1999) (refusing to allow evidence of manufacturer's change in fuel lines from plastic to metal after vehicle was manufactured but before accident).

*c. [4.17] Noncompliance with Safety Statutes or Regulations*

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §4 (1998) discusses the impact of product safety statutes or regulations. Section 4(a) provides that "noncompliance with an applicable product safety statute or administrative regulation renders the product defective." Under current Illinois law, compliance or noncompliance with applicable safety standards or administrative regulations is merely evidence as to whether a product is unreasonably dangerous and is not determinative. The RESTATEMENT suggests a negligence-per-se rule when a design or product warning does not comply with applicable safety statutes or regulations. Unfortunately, the converse is not true for defendants. Section 4(b) provides that compliance with applicable statutes or regulations may be considered, "but such compliance does not preclude as a matter of law a finding of product defect."

**4. [4.18] Foreseeability and Misuse**

A manufacturer or distributor is not liable for every injury caused by its product. Rather, the product must be defective, and the injury must occur when it is used in a foreseeable manner. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998) §§2(b) and 2(c) state that a manufacturer is liable only when its product is put to reasonably foreseeable uses. If the plaintiff can be shown to have used the product in a manner other than for its intended use and if that abnormal use resulted in injury, liability will not follow unless the abnormal use or misuse was itself foreseeable. As observed in *Williams v. Brown Manufacturing Co.*, 45 Ill.2d 418, 261 N.E.2d 305, 312 (1970), the issue of misuse can arise in connection with the plaintiff's proof of an unreasonably dangerous condition, in connection with the issue of proximate causation, or in connection with both.

Under strict liability, the plaintiff must allege and prove that there is a defect that makes the product unreasonably dangerous when used by those persons who are members of the community

for whom it was intended and who have the skill to use that type of product for its normal and intended use. *City of Chicago v. General Motors Corp.*, 467 F.2d 1262 (7th Cir. 1972). Although early in the development of strict liability law there was disagreement as to whether misuse was an affirmative defense, it is clear that the plaintiff bears the burden of proof that the product was being used in its intended or a reasonably foreseeable manner. *Gallee v. Sears, Roebuck & Co.*, 58 Ill.App.3d 501, 374 N.E.2d 831, 16 Ill.Dec. 56 (1st Dist. 1978); *Illinois State Trust Co. v. Walker Manufacturing Co.*, 73 Ill.App.3d 585, 392 N.E.2d 70, 29 Ill.Dec. 513 (5th Dist. 1979); I.P.I. — Civil No. 400.06. Thus, the plaintiff's case must be carefully examined to determine whether the injury was one that was reasonably foreseeable considering the nature and function of the product.

It is important to bear in mind that foreseeability is to be objectively determined. *Williams, supra*. It is not determined by the unreasonable expectation of the consumer. *Artis v. Fibre Metal Products*, 115 Ill.App.3d 228, 450 N.E.2d 756, 71 Ill.Dec. 68 (1st Dist. 1983). Neither the knowledge of the plaintiff in the use of the product nor the manufacturer's intended use is controlling. What is objectively foreseeable is ordinarily a jury question. *Lewis v. Stran Steel Corp.*, 57 Ill.2d 94, 311 N.E.2d 128 (1974); *Dunham v. Vaughan & Bushnell Mfg. Co.*, 42 Ill.2d 339, 247 N.E.2d 401 (1969). However, when the plaintiff's use of a product is clearly not foreseeable, the issue may be disposed of as a matter of law. As noted in *Winnett v. Winnett*, 57 Ill.2d 7, 310 N.E.2d 1, 4 – 5 (1974): "A foreseeability test, however, is not intended to bring within the scope of the defendant's liability every injury that might possibly occur. . . . Foreseeability means that which it is *objectively reasonable* to expect, not merely what might conceivably occur." [Emphasis in original.] In *Winnett*, the court affirmed dismissal of a complaint involving a claim for a four-year-old child who placed her fingers into an operating farm forage wagon.

In *Mieher v. Brown*, 54 Ill.2d 539, 301 N.E.2d 307 (1973), the decedent's administrator sued a truck manufacturer for wrongful death following a collision in which a vehicle ran under the rear of a truck. The truck had no bumper, fender, or shield. The court determined that neither public policy nor social requirements placed a duty on a truck manufacturer to design a vehicle to prevent injuries from the extraordinary circumstances of this particular case. In *Schierer v. Ameritex Division, United Merchants & Manufacturers, Inc.*, 81 Ill.App.3d 90, 400 N.E.2d 1072, 36 Ill.Dec. 492 (3d Dist. 1980), the court affirmed summary judgment for a stove manufacturer, holding that it was not foreseeable that a three-year-old child wearing a flammable nightgown would climb on top of the stove. The court in *Yassin v. Certified Grocers of Illinois, Inc.*, 150 Ill.App.3d 1052, 502 N.E.2d 315, 104 Ill.Dec. 52 (1st Dist. 1986), affirmed a jury verdict based largely on the unforeseeability that a three-year-old child would be in proximity to a commercial meat tenderizer in a grocery store and would place her hand into a chute, where it would be injured. However, the court in *Pierce v. Hobart Corp.*, 159 Ill.App.3d 31, 512 N.E.2d 14, 111 Ill.Dec. 110 (1st Dist. 1987), vacated a defense summary judgment, determining that a fact question existed as to whether it was foreseeable that the ten-year-old plaintiff or any person with small hands could place a hand through a two-and-one-half-inch-diameter opening of a commercial meat grinder.

In *Wenzell v. MTD Products, Inc.*, 32 Ill.App.3d 279, 336 N.E.2d 125 (1st Dist. 1975), it was held that the operation of a power lawn mower by a seven-year-old child who ran into a four-

year-old was not a reasonably foreseeable occurrence. In *McCormick v. Bucyrus-Erie Co.*, 81 Ill.App.3d 154, 400 N.E.2d 1009, 36 Ill.Dec. 429 (3d Dist. 1980), a jury properly concluded that the plaintiff's operation of a crane on a surface that he knew or had reason to know was not solid ground and adding counterweights to offset the 25-ton weight of the load in unfavorable wind conditions amounted to misuse. In *Schroeder v. Reddick Fumigants Inc.*, 128 Ill.App.3d 832, 471 N.E.2d 621, 84 Ill.Dec. 92 (1st Dist. 1984), the court affirmed a defense summary judgment when the plaintiff's decedent ignored warnings on a gas mask canister that showed an expiration date 14 months prior to use. It was not reasonable for the manufacturer to have expected its product to be used in that manner. In *Kempes v. Dunlop Tire & Rubber Corp.*, 192 Ill.App.3d 209, 548 N.E.2d 644, 139 Ill.Dec. 259 (1st Dist. 1989), it was held unforeseeable that an eight-year-old boy would cut open one of the defendant's golf balls, unravel some of the thread, and cut through the remaining threads into a paste center of the ball that, when punctured, squirted into the boy's eyes. Strict liability encompasses only those individuals to whom injury from a defective product may reasonably be foreseen in only those situations in which the product is being used for its intended purpose or for a reasonably foreseeable use. The court in *National Bank of Bloomington v. Westinghouse Electric Corp.*, 235 Ill.App.3d 697, 600 N.E.2d 1275, 175 Ill.Dec. 817 (4th Dist. 1992), affirmed summary judgment for a water heater manufacturer, holding that it was unforeseeable that an unattended 14-month-old child would crawl into a sink and turn on hot water and become scalded.

Lack of foreseeability can relate to the conduct of someone other than the injured plaintiff. For example, in *DeArmond v. Hoover Ball & Bearing, Uniloy Division*, 86 Ill.App.3d 1066, 408 N.E.2d 771, 42 Ill.Dec. 193 (4th Dist. 1980), an employer's removal of a safety device was determined to be unforeseeable as a matter of law. The appellate court in *Woods v. Graham Engineering Corp.*, 183 Ill.App.3d 337, 539 N.E.2d 316, 132 Ill.Dec. 6 (2d Dist. 1989), reversed a plaintiff's verdict against a component part manufacturer because it was not foreseeable that the plaintiff's employer would remove safety guards. Likewise, in *Gasdiel v. Federal Press Co.*, 78 Ill.App.3d 222, 396 N.E.2d 1241, 33 Ill.Dec. 517 (1st Dist. 1979), the court held as a matter of law that an employer's modification of a punch press was not foreseeable, so the manufacturer was relieved from liability. In *Augenstine v. Dico Co.*, 135 Ill.App.3d 273, 481 N.E.2d 1225, 90 Ill.Dec. 314 (1st Dist. 1985), it was held that an employer's substitution of a crane's nonconductive remote control cable with a conductive one manufactured by the same defendant was not foreseeable as a matter of law. The appellate court in *Mohr dieck v. Village of Morton Grove*, 94 Ill.App.3d 1021, 419 N.E.2d 517, 50 Ill.Dec. 409 (1st Dist. 1981), affirmed summary judgment for the manufacturer of a street-sweeping machine when a metal bristle that had dislodged from the machine was thrown by the plaintiff's brother and hit a tree, and a piece of the bristle broke off and struck the plaintiff's eye. In *Riordan v. International Armament Corp.*, 132 Ill.App.3d 642, 477 N.E.2d 1293, 87 Ill.Dec. 765 (1st Dist. 1985), the court affirmed dismissal of two consolidated wrongful death claims by survivors of men who were killed through criminal misuse of concealable handguns. The court in *Drobney v. Federal Sign & Signal Corp.*, 182 Ill.App.3d 471, 539 N.E.2d 186, 131 Ill.Dec. 833 (4th Dist. 1989), affirmed dismissal of a complaint on behalf of the estate of a 16-year-old girl who was raped and killed by three men, holding that it was unforeseeable as a matter of law that criminals would use a red, oscillating, rotating light manufactured by the defendant to impersonate police. In *Puckett v. Empire Stove Co.*, 183 Ill.App.3d 181, 539 N.E.2d 420, 132 Ill.Dec. 110 (5th Dist. 1989), the court affirmed a

directed verdict for the defendant furnace manufacturer, holding that it was not objectively foreseeable that someone would remove a gas valve from a furnace and replace it with another model requiring numerous modifications and the bypass of a safety feature.

### 5. [4.19] Assumption of the Risk

Assumption of the risk has been recognized since *Williams v. Brown Manufacturing Co.*, 45 Ill.2d 418, 261 N.E.2d 305 (1970). Assumption of the risk as a complete defense, unless it is a sole proximate cause, was abrogated in *Coney v. J.L.G. Industries, Inc.*, 97 Ill.2d 104, 454 N.E.2d 197, 73 Ill.Dec. 337 (1983), in which the court applied comparative fault principles. Therefore, if the plaintiff's assumption of the risk was more than 50 percent of the total proximate cause of the injury, recovery would be barred, but if it was less than 50 percent, the plaintiff's damages would be reduced by the percentage of the plaintiff's fault. See I.P.I. — Civil No. B400.02.01. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §17(a) (1998) provides that the plaintiff's recovery of damages "may be reduced if the conduct of the plaintiff combines with the product defect" and the "plaintiff's conduct fails to conform to generally applicable rules establishing appropriate standards of care."

Historically, assumption of the risk differed from contributory negligence in that the "reasonable person" standard was not to be employed in determining whether a plaintiff had assumed the risk. Instead, the appropriate test was a subjective one based on the plaintiff's own knowledge and awareness of the risk. However, the determination was not to be made solely on the plaintiff's own statement but rather on the jury's assessment of all facts in evidence. As noted in *Williams, supra*, 261 N.E.2d at 312:

**No juror is compelled by the subjective nature of this test to accept a user's testimony that he was unaware of the danger, if, in the light of all of the evidence, he could not have been unaware of the hazard.**

The traditional elements of assumption of the risk are that the plaintiff knew of the condition that made the product unreasonably dangerous, that the plaintiff understood and appreciated the risk of injury from that condition and proceeded to use the product, and that the known condition was a proximate cause of the injuries. I.P.I. — Civil No. B400.02.01. Thus, a plaintiff who deliberately uses a product known to be dangerous, merely taking the chance of escaping injury, is guilty of assumption of the risk. *Sweeney v. Matthews*, 94 Ill.App.2d 6, 236 N.E.2d 439 (1st Dist. 1968), *aff'd*, 46 Ill.2d 64 (1970). For example, the driver of an auto who continued to operate the vehicle after learning of a steering defect assumed the risk. *Kirby v. General Motors Corp.*, 10 Ill.App.3d 92, 293 N.E.2d 345 (4th Dist. 1973). An experienced coal miner who continued to use a "roofbolter" even though he knew of its propensity to allow a wrench to fly out of a chuck assumed the risk of injury in its use. *Prince v. Galis Manufacturing Co.*, 58 Ill.App.3d 1056, 374 N.E.2d 1318, 16 Ill.Dec. 440 (3d Dist. 1978). An experienced truck driver who had used a particular cab for a year assumed the risk of injury from an allegedly dangerous ingress-egress ladder. *Darrough v. White Motor Co.*, 74 Ill.App.3d 560, 393 N.E.2d 122, 30 Ill.Dec. 467 (4th Dist. 1979). Assumption of the risk was appropriate when the plaintiff, who was hit in the eye by a flying object thrown by a brush trimmer, knowingly appreciated and assumed the risk that the trimmer's safety shield was inadequate. *Calderon v. Echo, Inc.*, 244 Ill.App.3d 1085, 614 N.E.2d 140, 185 Ill.Dec. 6 (1st Dist. 1993).



In an industrial setting, a plaintiff may attempt to show that the assumption of the risk was not voluntary by contending that he was instructed by a supervisor to operate a machine in a particular way. However, this defense does not necessarily excuse the assumption of the risk. In *Fore v. Vermeer Manufacturing Co.*, 7 Ill.App.3d 346, 287 N.E.2d 526 (3d Dist. 1972), summary judgment for the defendant was affirmed when the plaintiff, an experienced operator of a trenching machine, continued to use it even though he knew of brake problems. A similar result was reached in *Ralston v. Illinois Power Co.*, 13 Ill.App.3d 95, 299 N.E.2d 497 (4th Dist. 1973), in spite of the plaintiff's attempt to explain away the assumption of the risk by saying he acted as he did because of a directive from his foreman.

Illinois courts have also rejected plaintiffs' claims that due to slipping or some other activity they could not voluntarily assume the risk. When an experienced bulldozer operator slipped and accidentally engaged a clutch while attempting to remount the machine, assumption of the risk was properly submitted to the jury. *Martinet v. International Harvester Co.*, 53 Ill.App.3d 213, 368 N.E.2d 496, 10 Ill.Dec. 901 (1st Dist. 1977). When a plaintiff was aware of exposed cutting blades on a mowing machine, a directed verdict for the defendant was proper even though the plaintiff claimed his foot slipped on grass, causing it to go into the blades. *Denton v. Bachtold Brothers, Inc.*, 8 Ill.App.3d 1038, 291 N.E.2d 229 (4th Dist. 1972).

Assumption of the risk occurs when the user of a product voluntarily exposes himself or herself to a danger that is either known to the person or so open and obvious that it must have been comprehended. Therefore, it was proper to submit assumption of risk to the jury even though it was claimed that the plaintiff's decedent did not know a limit switch would not stop a lift truck platform at 12 feet when circumstantial and other evidence indicated the plaintiff had been instructed on the proper method of operating the lift, including the requirement that outriggers be employed above the 12-foot level. *Campbell v. Nordco Products*, 629 F.2d 1258 (7th Cir. 1980). However, assumption of the risk is not properly submitted to the jury when the plaintiff's injuries were the result of unobservant, inattentive, ignorant, or awkward failure to discover or guard against a danger. For example, in *King v. American Food Equipment Co.*, 160 Ill.App.3d 898, 513 N.E.2d 958, 112 Ill.Dec. 349 (1st Dist. 1987), the plaintiff, believing that a meat blending machine was turned off, placed his hand in a chute and four fingers were amputated. The trial court properly refused to instruct the jury on assumption of the risk.

Assumption of the risk may be an appropriate damage-reducing factor even in a failure-to-warn case. *Erickson v. Muskin Corp.*, 180 Ill.App.3d 117, 535 N.E.2d 475, 128 Ill.Dec. 964 (1st Dist. 1989), was a failure-to-warn case against an above-ground pool manufacturer. A jury verdict finding that the plaintiff assumed 96 percent of the risk of injury was affirmed. The court held that, using a reasonable person standard, a jury could find that the warning given was defective but that the plaintiff knew of the danger of diving into the pool.

The plaintiff's age, experience, knowledge, and understanding, in addition to the obviousness of the defect and the danger it poses, are relevant factors for a jury to consider in determining whether assumption of the risk exists. If there is some evidence from which a jury may infer the plaintiff's assumption of the risk, then it is within the jury's province to determine that issue. In *Cleveringa v. J.I. Case Co.*, 230 Ill.App.3d 831, 595 N.E.2d 1193, 172 Ill.Dec. 523 (1st Dist. 1992), it was held proper to submit assumption of the risk to the jury when the plaintiff knew of

the exposed rotating rods on a trenching machine yet placed his foot so close that a loose shoelace became entangled. The length of the plaintiff's shoelaces and the placement of his foot on the rod were matters entirely within the plaintiff's control. In *Walsh v. Emergency One, Inc.*, 26 F.3d 1417 (7th Cir. 1994), the court held that evidence of a firefighter's failure to use a seatbelt in a fire truck was admissible to prove assumption of the risk.

Assumption of the risk may be established by circumstantial evidence such as a plaintiff's age, experience, and general knowledge. The appellate court in *Hanlon v. Airco Industrial Gases*, 219 Ill.App.3d 777, 579 N.E.2d 1136, 162 Ill.Dec. 322 (1st Dist. 1991), held it was improper to refuse to instruct a jury on assumption of the risk even though there was no direct evidence that the decedent was aware that a nitrogen gas tank manufactured by the defendant could explode. Assumption of the risk was properly submitted to the jury in a wrongful death case following an all-terrain vehicle rollover. *Boland v. Kawasaki Motors Manufacturing Corporation, USA*, 309 Ill.App.3d 645, 722 N.E.2d 1234, 243 Ill.Dec. 165 (4th Dist. 2000) (affirmed defense verdict). In *Boland*, the vehicle had warning labels advising the rider of the potential for rollovers, and evidence indicated that the decedent voluntarily chose to climb a steep hill, which led to the accident.

## 6. Duty To Warn

### a. [4.20] In General

The failure to properly warn may itself constitute the defect in a product liability case. *Woodill v. Parke Davis & Co.*, 79 Ill.2d 26, 402 N.E.2d 194, 37 Ill.Dec. 304 (1980); *Williams v. Brown Manufacturing Co.*, 45 Ill.2d 418, 261 N.E.2d 305 (1970); *Frisch v. International Harvester Co.*, 33 Ill.App.3d 507, 338 N.E.2d 90 (1st Dist. 1975). Most product liability claims, whether based on a manufacturing defect or on a design defect, also allege inadequate warnings or instructions. Crucial to this issue is the understanding that a duty to warn exists only if there is unequal knowledge between the plaintiff and defendant, with the latter being aware of a danger and the former not. This analysis applies regardless of whether the plaintiff proceeds on strict liability, negligence, or warranty theories.

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §2(c) (1998) provides for liability for "inadequate instructions or warnings when the foreseeable risks of harm" could have been reduced or avoided through "reasonable instructions or warnings." Use of the words "reasonable" and "foreseeable," which are clearly negligence terms, establishes the criteria to determine whether a duty to warn exists or has been properly discharged. The comments note that the reasonableness standard may be more difficult to apply in the context of warnings and instructions than in the area of design defects. They note that too many warnings or warnings that are too detailed may not be read by consumers, and determining the appropriate number and type of warning or instruction for a given product is complicated. However, §2(c) of the RESTATEMENT (THIRD) OF TORTS and the comments interpreting it should be helpful to the defense.

Frequently, the charge of a failure to warn is made in cases in which the danger is obvious and known to those persons in the community intended to use the product. If so, there is no duty

to warn. *Genaust v. Illinois Power Co.*, 62 Ill.2d 456, 343 N.E.2d 465 (1976). Thus, there was no duty to warn of alleged dangers that amounted to nothing more than the common propensities of alcoholic beverages. *Garrison v. Heublein, Inc.*, 673 F.2d 189 (7th Cir. 1982). Nor was there a duty to warn that a rat poison would contaminate the tissues of living organisms. *Camp Creek Duck Farm, Inc. v. Shell Oil Co.*, 103 Ill.App.3d 81, 430 N.E.2d 385, 58 Ill.Dec. 443 (4th Dist. 1981). A licensed operator of an automobile was charged with the knowledge that applying the brakes while accelerating in low gear on a slippery surface would increase the likelihood of skidding, and therefore there was no duty to warn that such a risk existed. *Zidek v. General Motors Corp.*, 66 Ill.App.3d 982, 384 N.E.2d 509, 23 Ill.Dec. 715 (2d Dist. 1978). There was no duty to warn the user of a model airplane of the danger of contact with high tension lines. *Holecek v. E-Z Just*, 124 Ill.App.3d 251, 464 N.E.2d 696, 79 Ill.Dec. 792 (1st Dist. 1984). Nor was there a duty to warn of the common propensity of an elastic strap on an auto seat cover to snap up and hit the installer's eye. *Van Dettum v. K-Mart Corp.*, 133 Ill.App.3d 861, 479 N.E.2d 1104, 89 Ill.Dec. 98 (3d Dist. 1985). Likewise, there was no duty on a handgun manufacturer to warn of the common, open, and obvious propensity of a bullet to be discharged from a concealed pistol. *Riordan v. International Armament Corp.*, 132 Ill.App.3d 642, 477 N.E.2d 1293, 87 Ill.Dec. 765 (1st Dist. 1985). As all motorists are presumed to know the danger of running into a train at a railroad crossing, there was no duty on a rail car manufacturer to warn through additional markings on its product. *Morgan v. Bethlehem Steel Corp.*, 135 Ill.App.3d 242, 481 N.E.2d 836, 90 Ill.Dec. 36 (1st Dist. 1985). There was no duty to warn a user of the obvious risk that safety glasses could be knocked askew. *Schroth v. Norton Co.*, 185 Ill.App.3d 575, 541 N.E.2d 855, 133 Ill.Dec. 644 (4th Dist. 1989). A water heater manufacturer had no duty to warn as the danger that hot water could scald was open and obvious. *National Bank of Bloomington v. Westinghouse Electric Corp.*, 235 Ill.App.3d 697, 600 N.E.2d 1275, 175 Ill.Dec. 817 (4th Dist. 1992). The danger that a front-end loader operator's body could collide with low-hanging objects was obvious to an ordinary person driving the loader without a roll bar. *Bates v. Richland Sales Corp.*, 346 Ill.App.3d 223, 803 N.E.2d 977, 281 Ill.Dec. 356 (4th Dist. 2004).

Cases involving athletic and recreational equipment often afford a defense that the alleged danger was open and obvious, negating a duty to warn. A swimming pool manufacturer had no duty to warn of the dangers of diving into its product. *Lederman v. Pacific Industries, Inc.*, 939 F.Supp. 619 (N.D.Ill. 1996). Similarly, a manufacturer had no duty to warn as jumping on a backyard trampoline posed an open and obvious risk to a 15-year-old girl. *Sollami v. Eaton*, 201 Ill.2d 1, 772 N.E.2d 215, 265 Ill.Dec. 177 (2002).

The individual plaintiff's personal knowledge of a potential risk can obviate a duty to warn. There is no duty to warn when the manufacturer and the user have equal knowledge of the alleged danger. Thus, when a particular danger is apparent to a plaintiff through prior use of a machine, there is no unequal knowledge, and the defendant is entitled to a directed verdict. *Weiss v. Rockwell Manufacturing Co.*, 9 Ill.App.3d 906, 293 N.E.2d 375 (1st Dist. 1973). When trial evidence indicated that the plaintiff was aware of the danger of a forklift tipping over due to uneven ground, there could be no liability for a failure to warn, and a verdict in favor of the plaintiff was vacated. *Collins v. Hyster Co.*, 174 Ill.App.3d 972, 529 N.E.2d 303, 124 Ill.Dec. 483 (3d Dist. 1988). When a minor's mother said that she understood the risks caused by a lighting rod used to light a grill, the manufacturer had no duty to add pointless warnings about dangers already recognized by the consumer. *Calles v. Scripto-Tokai Corp.*, 358 Ill.App.3d 975, 832 N.E.2d 409, 295 Ill.Dec. 258 (1st Dist. 2005).

There is no duty to warn when the alleged danger is common knowledge in a particular industry and all laborers, including the plaintiff, possess such knowledge. *Huff v. Elmhurst-Chicago Stone Co.*, 94 Ill.App.3d 1091, 419 N.E.2d 561, 50 Ill.Dec. 453 (1st Dist. 1981). When all people connected with the use of a pile driver were aware of the potential danger arising from possible disconnection of an air hose, a jury could properly conclude that there was no need for a warning. *Ebbert v. Vulcan Iron Works, Inc.*, 87 Ill.App.3d 74, 409 N.E.2d 112, 42 Ill.Dec. 617 (3d Dist. 1980).

The duty on a defendant does not contemplate that the defendant must warn one who is unqualified to use the product of dangers that are apparent to qualified users. Therefore, neither a retailer nor a distributor of a dart game was responsible to a six-year-old who was struck in the eye by a dart thrown by an eight-year-old. *Pitts v. Basile*, 35 Ill.2d 49, 219 N.E.2d 472 (1966). Nor was there a duty to warn an untrained lawn mower operator of obvious dangers apparent to anyone properly trained or qualified in its use. *Denton v. Bachtold Brothers, Inc.*, 8 Ill.App.3d 1038, 291 N.E.2d 229 (4th Dist. 1972).

The element of unequal knowledge in a duty-to-warn case under strict liability also requires an analysis of the manufacturer's knowledge of a particular risk. A manufacturer is not liable for the failure to warn of a danger that would be impossible for the manufacturer to know. For example, the appellate court in *Woodill, supra*, affirmed dismissal of a strict liability claim when a drug manufacturer had no knowledge that use of its drug by pregnant women could result in fatal brain damage. Similarly, in *Presbrey v. Gillette Co.*, 105 Ill.App.3d 1082, 435 N.E.2d 513, 61 Ill.Dec. 816 (2d Dist. 1982), the court held that an antiperspirant manufacturer had no duty to warn an unusually susceptible customer of inherent dangers when the manufacturer did not know or have reason to know that very few users of the product might be injured.

Whether a duty to warn exists is a question of law and not of fact. *Genaust, supra*. Therefore, summary judgment was proper under both strict liability and negligence theories in favor of a "jungle gym" manufacturer. In *Cozzi v. North Palos Elementary School District, No. 117*, 232 Ill.App.3d 379, 597 N.E.2d 683, 173 Ill.Dec. 709 (1st Dist. 1992), the court held that there was no duty to warn an 11-year-old boy that he could fall from the jungle gym and be injured because the risk was obvious. *Moore v. Powermatic, Division of Stanwich Industries, Inc.*, 738 F.Supp. 1188 (N.D.Ill. 1990), was a negligence action against the manufacturer of an electric table saw who failed to warn of dangers of operating the saw without a guard. It was obvious that the more a blade was exposed, the greater its chances of cutting something, whether it be wood or flesh, and therefore there was no duty to warn. *Clark v. Penn Versatile Van*, 197 Ill.App.3d 1, 554 N.E.2d 643, 143 Ill.Dec. 708 (1st Dist. 1990), included a failure-to-warn allegation under both strict liability and negligence claims against a step van manufacturer. The court determined that the claimed defect was an obvious condition of the product and therefore did not constitute a defect. It logically followed that warnings would serve no purpose when the dangers were open and obvious. The court in *Oberg v. Advance Transformer Co.*, 210 Ill.App.3d 246, 569 N.E.2d 50, 155 Ill.Dec. 50 (1st Dist. 1991), held that a fluorescent fixture ballast manufacturer had no duty to warn of the dangerous propensity of increased voltage that could cause electrical shock if the installer failed to turn off the power. However, the court in *Harnischfeger Corp. v. Gleason Crane Rentals, Inc.*, 223 Ill.App.3d 444, 585 N.E.2d 166, 165 Ill.Dec. 770 (5th Dist. 1991), chose

not to follow long-standing authority that there is no duty to warn of the open and obvious danger associated with overhead power lines, believing a warning may have helped a construction worker who momentarily was distracted or forgetful when the crane he was working on came in close proximity to a power line.

*b. [4.21] Post-Sale Duty To Warn*

The RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998) presents a difficult problem for manufacturers with respect to a post-sale duty to warn. Section 10(a) provides that a seller or distributor is liable for failing to provide warnings after sale “if a reasonable person in the seller’s position would provide such a warning.” Section 10(b) lists four factors that must be present for a post-sale warning to be required: (1) the seller knows or reasonably should know of a substantial risk of harm; (2) those who should be warned can be identified and may not be aware of the risk; (3) the warning can be effectively communicated; and (4) the risk of harm justifies the burden of providing the warning. The comments recognize that the post-sale duty to warn under all circumstances would place an unacceptable burden on sellers and distributors. The comments further note that substantial risks alone do not justify the imposition of a post-sale duty to warn.

Under Illinois law, the existence of a duty to warn is determined as of the date of manufacture of the product. A manufacturer is not liable for the failure to warn about dangers that might be revealed later if the manufacturer had no reason to foresee them. *Giles v. Wyeth, Inc.*, 556 F.3d 596 (7th Cir. 2009). The law does not contemplate placing a duty on manufacturers to subsequently warn foreseeable users of a product of better designs or construction not available at the time the product entered the stream of commerce. *Collins v. Hyster Co.*, 174 Ill.App.3d 972, 529 N.E.2d 303, 124 Ill.Dec. 483 (3d Dist. 1988). Therefore, a manufacturer has no duty to issue post-sale warnings or retrofit its products to remedy defects first discovered after a product has left its control. *Modelski v. Navistar International Transportation Corp.*, 302 Ill.App.3d 879, 707 N.E.2d 239, 236 Ill.Dec. 394 (1st Dist. 1999).

*Kempes v. Dunlop Tire & Rubber Corp.*, 192 Ill.App.3d 209, 548 N.E.2d 644, 139 Ill.Dec. 259 (1st Dist. 1989), involved a claim on behalf of an eight-year-old boy against a golf ball manufacturer. Two years after the ball was manufactured and nine years before the incident, according to depositions, the defendant learned that an injury could result from cutting the golf ball center. The court held there is no duty to warn beyond the time a product leaves the manufacturer’s control unless the manufacturer knew at the time of manufacture that the product was defective. Similarly, in *Birchler v. Gehl Co.*, 88 F.3d 518 (7th Cir. 1996), a hay baler manufacturer had no continuing duty to warn of hazards it discovered after the product was manufactured. The court in *Carrizales v. Rheem Manufacturing Co.*, 226 Ill.App.3d 20, 589 N.E.2d 569, 168 Ill.Dec. 169 (1st Dist. 1991), held that a manufacturer had no continuing duty to warn all foreseeable users of hazards associated with the open flame of a water heater.

*c. [4.22] Adequacy of Warning*

When a duty to warn exists, the focus shifts to the adequacy of the warning. Whether a warning is sufficient is to be determined by an objective standard. The court in *Kelso v. Bayer*

*Corp.*, 398 F.3d 640 (7th Cir. 2005), affirmed summary judgment that clear and unambiguous language on the warning of a nasal spray advised that the product should not be used for longer than three days. However, often the issue is resolved by the trier of fact, who can conclude that since the plaintiff was injured, the warning must have been inadequate. Therefore, it may be helpful to have expert testimony. In *LeMarbe v. Dow Chemical Co.*, 102 Ill.App.3d 587, 430 N.E.2d 177, 58 Ill.Dec. 235 (1st Dist. 1981), a defense verdict was affirmed following an expert's testimony that instructions on using a chemical cleaner were adequate and that had they been followed, the incident would not have occurred. Therefore, it is important to analyze the type of warning given with respect to the facts and the incident. In some cases, the warning can be deemed adequate as a matter of law. For example, when a plaintiff was cleaning machines with a product having dangerous vapors and the printed label gave adequate warnings, the defendant was entitled to summary judgment. *Harris v. Solna Corp.*, 16 Ill.App.3d 1039, 307 N.E.2d 434 (4th Dist. 1974). Summary judgment against the plaintiff was also proper when a chemical label contained various warnings, including "May be Fatal if Inhaled" and, in bold type, the words "DANGER" and "POISON." *Schroeder v. Reddick Fumigants Inc.*, 128 Ill.App.3d 832, 471 N.E.2d 621, 624, 84 Ill.Dec. 92 (1st Dist. 1984). A pistol manufacturer is entitled to assume that the user will follow furnished instructions, so a defense summary judgment was properly entered when there were numerous instructions included with the sale of a pistol and a warning to read the instruction manual was roll marked into the steel barrel. *Taylor v. Gerry's Ridgewood, Inc.*, 141 Ill.App.3d 780, 490 N.E.2d 987, 95 Ill.Dec. 895 (3d Dist. 1986).

The duty to warn does not require a manufacturer to compare the safety of its product with similar products in the marketplace. In *Pluto v. Searle Laboratories, Division of G.D. Searle & Co.*, 294 Ill.App.3d 393, 690 N.E.2d 619, 228 Ill.Dec. 860 (1st Dist. 1997), the court affirmed a defense verdict against a plaintiff who had used an IUD as a birth control measure and contracted a sexually transmitted disease. The court rejected the plaintiff's claim that the manufacturer did not warn physicians and patients of the increased risk of sexually transmitted disease compared to other forms of birth control. The court felt the warning that was given was adequate and that the manufacturer had no duty to provide information on other products in the marketplace since such a duty would require drug manufacturers to rely on representations made by competitor drug companies.

*d. [4.23] Lack of Proximate Causation*

Although a duty to warn may exist, lack of proximate causation can afford a defense. In many instances, the plaintiff may have been otherwise warned of the danger and proceeded to use the product in the face of the danger. The failure to warn under these circumstances is not a proximate cause of injury to the plaintiff.

When a plaintiff had received an oral warning concerning the danger of an exposed power shaft in a farm elevator, the failure to attach warning labels was not a proximate cause of the injury. *Willeford v. Mayrath Co.*, 7 Ill.App.3d 357, 287 N.E.2d 502 (4th Dist. 1972). When a lawn mower operator read warnings that the mower should not be used in the vicinity of children and the mower threw a rock that blinded a child in one eye, the alleged inadequate warning was not a proximate cause of the plaintiff's injury. *Dugan v. Sears, Roebuck & Co.*, 113 Ill.App.3d 740, 454 N.E.2d 64, 73 Ill.Dec. 320 (1st Dist. 1983). When a component part purchaser is aware of the danger that allegedly required a warning, there is no proximate cause between the failure to

warn and the plaintiff's injury. *Curry v. Louis Allis Co.*, 100 Ill.App.3d 910, 427 N.E.2d 254, 56 Ill.Dec. 174 (1st Dist. 1981). When a plaintiff would not pay attention to a warning in light of his actual knowledge, no proximate cause relationship existed. *Denton v. Bachtold Brothers, Inc.*, 8 Ill.App.3d 1038, 291 N.E.2d 229 (4th Dist. 1972). Reliance by an experienced carpenter on a portion of an adhesive cement label that indicated to him that the product was nonflammable was unreasonable in light of his familiarity with the label that warned against use near fire or flame. *Borowicz v. Chicago Mastic Co.*, 367 F.2d 751 (7th Cir. 1966). When the plaintiff was aware of the danger of tipping while driving a forklift over an uneven surface, the manufacturer's failure to warn of that possibility was not a proximate cause of the plaintiff's injury. *Collins v. Hyster Co.*, 174 Ill.App.3d 972, 529 N.E.2d 303, 124 Ill.Dec. 483 (3d Dist. 1988). An allegedly inadequate warning on a ladder was not a proximate cause of the accident when the plaintiff admitted he did not read it. *Kane v. R.D. Werner Co.*, 275 Ill.App.3d 1035, 657 N.E.2d 37, 212 Ill.Dec. 342 (1st Dist. 1995).

Manufacturers are entitled to assume that product warnings will be heeded. *Werckenthein v. Bucher Petrochemical Co.*, 248 Ill.App.3d 282, 618 N.E.2d 902, 188 Ill.Dec. 332 (1st Dist. 1993). In defending a failure-to-warn case, it should not be forgotten that the plaintiff bears the burden of establishing proximate causation — not merely a causal relationship between the use of the product and the injury, but a causal relationship between the failure to warn and the injury. Defense counsel is allowed to discover and introduce evidence of the plaintiff's conduct that might ordinarily be excluded in a strict liability action. For example, evidence of the plaintiff's actual knowledge of the danger as well as the plaintiff's actual failure to read or heed a warning should be made part of the defense case.

*e. [4.24] Sophisticated User*

A manufacturer may be relieved of its duty to warn under the “sophisticated user” doctrine. When the user is sophisticated and the product is intended to be used only by a skilled person who would be presumed to know the dangers of the product, there is no duty to warn. *White v. Amoco Oil Co.*, 835 F.2d 1113, 1118 (5th Cir. 1988).

Even though a product may be used on and cause injury to a third person, such as a physician or technician using medical equipment on a patient, the duty to warn is viewed from the perspective of the product user. In other words, there would be no duty to warn a patient of the particular hazards of a surgical drill; rather, the duty is to convey to the physician any necessary warnings. The court in *Proctor v. Davis*, 275 Ill.App.3d 593, 656 N.E.2d 23, 211 Ill.Dec. 831 (1st Dist. 1995), held that a drug manufacturer had no duty to warn of risks known by the medical community. In *Proctor*, the plaintiff was blinded from an unintentional intraocular injection of the defendant's drug during a periocular injection. At trial, the doctor testified that he was aware of the risk of vision loss when the procedure was performed. The court held that a drug manufacturer need not provide warning of risks known to the medical community who use the drug.

The RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §2 (1998) provides that a supplier may, in some cases, rely on a third party to warn the ultimate product users. This most typically would apply when a manufacturer can reasonably be expected to rely on an

employer to warn employees of the dangers of use of the product. In *Cruz v. Texaco, Inc.*, 589 F.Supp. 777 (S.D.Ill. 1984), the court granted summary judgment, holding knowledge on the part of a truck driver's employer of the danger of driving a winch truck too fast removed any duty of the truck seller to directly warn the driver that the truck should not be used at highway speeds when heavy objects were suspended at its rear. However, comment (i) to §3 of the RESTATEMENT (THIRD) cautions that there is no general rule concerning supplying a product for the use of others through an intermediary, but rather the "standard is one of reasonableness in the circumstances."

*f. [4.25] Learned Intermediary*

Illinois adopted the "learned intermediary" doctrine in pharmaceutical failure-to-warn cases in *Kirk v. Michael Reese Hospital & Medical Center*, 117 Ill.2d 507, 513 N.E.2d 387, 393, 111 Ill.Dec. 944 (1987). The Illinois Supreme Court stated:

**The doctor, functioning as a learned intermediary between the prescription drug manufacturer and the patient, decides which available drug best fits the patient's needs and chooses which facts from the various warnings should be conveyed to the patient, and the extent of the disclosure is a matter of medical judgment. *Id.***

I.P.I. — Civil No. 400.07B provides that the manufacturer has a duty to warn only the doctor or other learned intermediary and "has no duty to warn the [consumer] [user] directly." RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §6(d) (1998) recognizes the learned intermediary rule for prescription drug or medical device manufacturers and distributors. It allows liability only when reasonable instructions or warnings regarding foreseeable risks are not provided to "prescribing and other health-care providers who are in a position to reduce the risks of harm in accordance with the instructions or warnings" or when the manufacturer knows that the drug or medical device will be administered without individual evaluation by a healthcare provider.

The court in *Martin v. Ortho Pharmaceutical Corp.*, 169 Ill.2d 234, 661 N.E.2d 352, 214 Ill.Dec. 498 (1996), applied the learned intermediary doctrine despite a federal regulation mandating direct warnings to oral contraceptive users. The court refused to recognize an exception because Congress did not intend for a private right of action under the Federal Food, Drug, and Cosmetic Act, the law under which the federal regulation was promulgated.

The learned intermediary doctrine also applies to pharmacists. In *Leesley v. West*, 165 Ill.App.3d 135, 518 N.E.2d 758, 116 Ill.Dec. 136 (2d Dist. 1988), the court held that neither a drug manufacturer nor a pharmacist had a duty to warn consumers of a prescription drug's side effects. In *Frye v. Medicare-Glaser Corp.*, 153 Ill.2d 26, 605 N.E.2d 557, 178 Ill.Dec. 763 (1992), the court affirmed summary judgment for a pharmacist, holding, inter alia, that the learned intermediary doctrine effectively shielded the pharmacy for failing to warn against the use of the drug with alcohol. The court in *Kasin v. Osco Drug, Inc.*, 312 Ill.App.3d 823, 728 N.E.2d 77, 245 Ill.Dec. 346 (2d Dist. 2000), held that voluntarily listing some side effects of a drug did not bar a pharmacy from invoking the learned intermediary doctrine as a defense.



However, in *Happel v. Wal-Mart Stores, Inc.*, 199 Ill.2d 179, 766 N.E.2d 1118, 262 Ill.Dec. 815 (2002), the court held that a pharmacy that had special knowledge of a customer's medical history and a pharmacist who knew that a prescription would be contraindicated for that customer had a duty to contact the prescribing physician or customer advising that the drug was contraindicated.

The doctrine has been extended beyond pharmaceutical failure-to-warn cases. It has been applied to protect the manufacturer of an IV connection that became disconnected. *Hansen v. Baxter Healthcare Corp.*, 198 Ill.2d 420, 764 N.E.2d 35, 261 Ill.Dec. 744 (2002). The *Hansen* court held that, as a matter of law, the manufacturer had no duty to warn of the propensity of its product to disconnect since doctors, nurses, and hospitals were aware of the danger and risks that it posed. Similarly, the court in *Kennedy v. Medtronic, Inc.*, 366 Ill.App.3d 298, 851 N.E.2d 778, 303 Ill.Dec. 591 (1st Dist. 2006), affirmed summary judgment for a pacemaker manufacturer, holding that it had no duty to warn the patient even when it provided a clinical specialist who was present during the procedure.

g. [4.26] *Federal Preemption by Mandated Warnings or Labeling*

Usually the adequacy of a warning is a question for the trier of fact. However, adequacy can often be summarily determined when a federal statute or regulation defines the extent of a warning that must be provided. When federal law is involved, the federal statute or regulation may preempt both state statutes and state common law.

**Tobacco.** The federal government has increasingly become involved with warning and labeling of various products. When it has done so, it may have preempted state law, and this preemption can afford a defense in a warning case. Illustrative is *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 120 L.Ed.2d 407, 112 S.Ct. 2608, 2619 (1992), which held that the Public Health Cigarette Smoking Act of 1969 preempted state law tort claims with respect to “advertising or promotion” of cigarettes. Therefore, the plaintiff could not assert inadequate warnings as a theory of recovery. However, the Court also held that neither that Act nor the Act it amended, the Federal Cigarette Labeling and Advertising Act, preempted claims alleging that the defendants employed inadequate testing or research procedures or claims based on express warranty, conspiracy, or misrepresentation. See also *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230 (6th Cir. 1988); *Pennington v. Vistron Corp.*, 876 F.2d 414 (5th Cir. 1989).

**Prescription drugs.** In 2006, the Food and Drug Administration issued a major policy proclamation regarding the preemptive effect of FDA approval of prescription drug labeling. The “preemption preamble” provides that “under existing preemption principles, FDA approval of labeling under the Act, whether it be in the old or new format, preempts conflicting state law.” 71 Fed.Reg. 3922 at 3933 – 3934. However, in *Wyeth v. Levine*, \_\_\_ U.S. \_\_\_, 173 L.Ed.2d 51, 129 S.Ct. 1187, 1198 (2009), the U.S. Supreme Court said that federal agencies have no special authority to pronounce on preemption absent delegation by Congress and that the preamble did not merit deference.

**Insecticides.** Another active area of federal preemption of warnings involves the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). *Welchert v. American Cyanamid, Inc.*, 59 F.3d 69 (8th Cir. 1995) (FIFRA preempts warranty claims arising on basis of labeling statement);

*Taylor AG Industries v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995) (FIFRA preempts inadequate warnings claim to extent it requires additional label information); *Lowe v. Sporicidin International*, 47 F.3d 124 (4th Cir. 1995) (FIFRA preempts any state law requiring alteration of EPA-approved warning label); *Bice v. Leslie's Poolmart, Inc.*, 39 F.3d 887 (8th Cir. 1994) (FIFRA preempts inadequate labeling or failure-to-warn claim); *McDonald v. Monsanto Co.*, 27 F.3d 1021 (5th Cir. 1994) (FIFRA preempts state laws that would impose different or additional labeling requirements).

**Other products.** In *Moe v. MTD Products, Inc.*, 73 F.3d 179 (8th Cir. 1995), the plaintiff alleged that the defendant failed to adequately warn users of the possible failure of a brake-control cable on a lawn mower. The cable had frayed, and the blade failed to stop as intended. The defense asserted that regulations promulgated by the Consumer Product Safety Commission (CPSC) in its Safety Standard for Walk-Behind Power Lawn Mowers at 16 C.F.R. pt. 1205 preempted the plaintiff's claim. The court concluded as a matter of law that adherence to the CPSC standard was all the defendant was required to prove.

The court in *Busch v. Graphic Color Corp.*, 169 Ill.2d 325, 662 N.E.2d 397, 214 Ill.Dec. 831 (1996), held that the Federal Hazardous Substances Act and regulations issued thereunder by the Consumer Product Safety Commission preempted a state common-law action based on an inadequate warning label. *Busch* involved a death claim by the estate of a worker who was asphyxiated while using a paint stripper that contained methylene chloride.

*Verb v. Motorola, Inc.*, 284 Ill.App.3d 460, 672 N.E.2d 1287, 220 Ill.Dec. 275 (1st Dist. 1996), was an attempted class action claiming that the cellular telephone industry misled the public by suggesting that cellular telephones were safe when testing for the effects of electromagnetic frequency exposure on users had not been undertaken. The trial court held that the electronic product radiation control provisions at 21 U.S.C. §360kk(a)(1) gave the Food and Drug Administration exclusive control over safety issues surrounding cellular telephone use. No actual FDA regulations focused directly on cellular telephone safety, but the court held that because Congress had reserved that responsibility to a federal agency, it had intended the area to be preempted.

Additional cases finding implied federal preemption in failure-to-warn cases include *Slater v. Optical Radiation Corp.*, 961 F.2d 1330 (7th Cir. 1992) (Medical Device Amendments of 1976 to Federal Food, Drug, and Cosmetic Act (FDCA) protected manufacturer of intraocular lens), and *Moore v. Kimberly-Clark Corp.*, 867 F.2d 243 (5th Cir. 1989) (tampon manufacturer protected from claim of inadequate warnings).

A claim of inadequate warning could be preempted if the danger to be warned about was subject to federal regulation. In *Osman v. Ford Motor Co.*, 359 Ill.App.3d 367, 833 N.E.2d 1011, 295 Ill.Dec. 805 (4th Dist. 2005), the court affirmed summary judgment for a manufacturer against claims that it did not warn that a restraint system was inherently dangerous unless used with a lap belt. It held the manufacturer's duty to warn was preempted under Federal Motor Vehicle Safety Standard 208, 49 C.F.R. §571.208.

## 7. [4.27] Alteration of the Product

It is essential under strict liability that a plaintiff plead and prove that the unreasonably dangerous condition existed at the time the product left the defendant's control. Alteration is not a defense that must be established by the manufacturer but rather a necessary element of the plaintiff's cause of action. *Korando v. Uniroyal Goodrich Tire Co.*, 159 Ill.2d 335, 637 N.E.2d 1020, 202 Ill.Dec. 284 (1994). Thus, when a product has been changed or altered after leaving the defendant's control, the defendant may be relieved from liability. The theory supporting alteration as a bar to a strict liability claim is that when alteration has occurred, there is an absence of proximate causation between the unreasonably dangerous condition and the plaintiff's injury.

Many times the product modification results from the conduct of an employer. For example, when the plaintiff's employer installed a safety device that failed, a directed verdict for the defendant was proper even though the machine had no safety devices when sold. *Rios v. Niagara Machine & Tool Works*, 59 Ill.2d 79, 319 N.E.2d 232 (1974). Similarly, when the plaintiff's employer substituted a different control panel on a machine that allegedly malfunctioned, the manufacturer was entitled to summary judgment. *Coleman v. Verson Allsteel Press Co.*, 64 Ill.App.3d 974, 382 N.E.2d 36, 21 Ill.Dec. 742 (1st Dist. 1978). When a replacement pedal on a punch press malfunctioned, the manufacturer was entitled to summary judgment. *Gasdiel v. Federal Press Co.*, 78 Ill.App.3d 222, 396 N.E.2d 1241, 33 Ill.Dec. 517 (1st Dist. 1979). An employer's removal of a safety device entitled the manufacturer to summary judgment. *DeArmond v. Hoover Ball & Bearing, Uniloy Division*, 86 Ill.App.3d 1066, 408 N.E.2d 771, 42 Ill.Dec. 193 (4th Dist. 1980). Summary judgment was proper when the plaintiff's employer substituted a conductive remote control cable for a nonconductive one on a crane that subsequently came into contact with a power line, causing severe electrical shock. *Augenstine v. Dico Co.*, 135 Ill.App.3d 273, 481 N.E.2d 1225, 90 Ill.Dec. 314 (1st Dist. 1985).

Under certain circumstances, a defendant can be liable if the modification is foreseeable. *Davis v. Pak-Mor Manufacturing Co.*, 284 Ill.App.3d 214, 672 N.E.2d 771, 219 Ill.Dec. 918 (1st Dist. 1996). However, "foreseeability" means that which is objectively reasonable to expect and not what might conceivably occur. *Winnett v. Winnett*, 57 Ill.2d 7, 310 N.E.2d 1 (1974). Therefore, when it required heavy work and resulted in a major alteration of a loader, the manufacturer could not reasonably have expected the plaintiff's employer to remove a roll bar. *Bates v. Richland Sales Corp.*, 346 Ill.App.3d 223, 803 N.E.2d 977, 985, 281 Ill.Dec. 356 (4th Dist. 2004).

Repeated repairs of a product can result in an alteration. For example, a substantial alteration of the product occurred when the defendant's tire, which was manufactured in 1980, had been subjected to three punctures that had been repaired with patches and a plug and the beads had been so damaged that an inner tube was required to retain air. *Korando, supra*.

Another situation is created when the product is later assembled by someone other than the manufacturer. RESTATEMENT (SECOND) OF TORTS §402A(1)(b) (1965) provided that manufacturers were liable only if the product "is expected to and does reach the user or consumer without substantial change in the condition in which it is sold." Therefore, a grain elevator manufacturer was not liable for the absence of a shield over a power takeoff due to its later

assembly by a dealer. *Willeford v. Mayrath Co.*, 7 Ill.App.3d 357, 287 N.E.2d 502 (4th Dist. 1972). Nor was a component part manufacturer liable when its motor, which fell from a drop hammer, had been improperly installed by a later assembler. *Curry v. Louis Allis Co.*, 100 Ill.App.3d 910, 427 N.E.2d 254, 56 Ill.Dec. 174 (1st Dist. 1981).

It is important for the defendant to make an early examination of the product when investigating for an alteration. The defendant's engineer or another person familiar with the condition of the product at the time of manufacture can often discover an alteration that may not be readily apparent to the attorney, or even the plaintiff's expert. If an alteration is discovered that is a proximate cause of the injury, the defendant should move for summary judgment.

### 8. [4.28] State-of-the-Art Evidence

As noted in §4.16 above, the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998) adopts a risk-utility test in determining whether a design defect exists. As the plaintiff must prove the existence of a reasonable alternative design, state-of-the-art evidence should be admissible. This evidence can show that the manufacturer's product design was the safest in use at the time of sale considering the available technology. The defense should be permitted to introduce evidence of industry practice at the time of sale on the issue of whether an alternative design was practical.

Early decisions reached differing results with respect to state-of-the-art evidence. However, in *Rucker v. Norfolk & Western Ry.*, 77 Ill.2d 434, 396 N.E.2d 534, 33 Ill.Dec. 145 (1979), the Illinois Supreme Court held that a railroad car manufacturer should have been permitted to introduce evidence of compliance with specific design standards contained in federal regulations. The court in *Kerns v. Engelke*, 76 Ill.2d 154, 390 N.E.2d 859, 28 Ill.Dec. 500 (1979), reached a similar result for another railway car manufacturer, noting that compliance with federal standards was relevant to whether a product was defective. Thereafter, the Supreme Court again faced the issue of whether to permit evidence of compliance with government safety standards in a strict liability case and in *Moehle v. Chrysler Motors Corp.*, 93 Ill.2d 299, 443 N.E.2d 575, 66 Ill.Dec. 649 (1982), held that a jury should evaluate the importance of safety standard evidence and weigh it along with all other evidence to determine whether a product is unreasonably dangerous.

Evidence relating to drug approval by the Food and Drug Administration (FDA) is admissible. In *Hatfield v. Sandoz-Wander, Inc.*, 124 Ill.App.3d 780, 464 N.E.2d 1105, 80 Ill.Dec. 122 (1st Dist. 1984), the trial court rejected the plaintiff's argument that such evidence should not be admitted because approval of a drug by the FDA is based solely on materials submitted by the manufacturer and not on independent testing by the government agency. It stated that the absence of independent testing by the agency was a matter for argument of counsel and weighing by the jury along with all of the other evidence. The appellate court agreed that the evidence should be admitted. *Accord Malek v. Lederle Laboratories, Division of American Cyanamid*, 125 Ill.App.3d 870, 466 N.E.2d 1038, 81 Ill.Dec. 236 (1st Dist. 1984).

Defense counsel should look beyond government regulation to industry standards. It was held to be error to refuse to permit a riding lawn mower manufacturer to introduce evidence of its compliance with safety specifications of the American Standards Association, American National

Standards Institute (ANSI), and the Consumer Product Safety Commission. *Hubbard v. McDonough Power Equipment, Inc.*, 83 Ill.App.3d 272, 404 N.E.2d 311, 38 Ill.Dec. 887 (5th Dist. 1980). Similarly, it was proper for a defendant to introduce safety standards promulgated by ANSI that suggested that alternative designs advocated by the plaintiff's expert were not required. *Dugan v. Sears, Roebuck & Co.*, 113 Ill.App.3d 740, 454 N.E.2d 64, 73 Ill.Dec. 320 (1st Dist. 1983).

In defending a strict liability claim based on an alleged design defect, an attorney should carefully review all applicable design standards. Most often, the best source for these standards will be the engineering department of the defendant manufacturer or an independently retained consultant or expert. Those design requirements or standards of legislative bodies, administrative authorities, or industry associations are admissible evidence for the jury to weigh in reaching its decision as to whether the product is unreasonably dangerous.

### 9. [4.29] Circumstantial Evidence

A plaintiff may prove a product liability case through circumstantial evidence. *Tweedy v. Wright Ford Sales, Inc.*, 64 Ill.2d 570, 357 N.E.2d 449, 2 Ill.Dec. 282 (1976). However, the test to be applied is "whether the circumstances shown were such as to justify an inference of probability as distinguished from mere possibility." *Erzrumly v. Dominick's Finer Foods, Inc.*, 50 Ill.App.3d 359, 365 N.E.2d 684, 687, 8 Ill.Dec. 446 (1st Dist. 1977).

Simply proving that an accident or injury occurred is not sufficient circumstantial evidence to sustain the burden of proof. For example, the mere fact that a tire blew out did not establish a manufacturing defect as opposed to a myriad of other possible causes. *St. Paul Fire & Marine Insurance Co. v. Michelin Tire Corp.*, 12 Ill.App.3d 165, 298 N.E.2d 289 (1st Dist. 1973). Nor did the fact that a soft drink bottle exploded some time after purchase circumstantially prove a defect in the bottle. *Erzrumly, supra*. Circumstantial evidence of a steering defect was not proved merely by establishing that a car went out of control. *Belleville National Savings Bank v. General Motors Corp.*, 20 Ill.App.3d 707, 313 N.E.2d 631 (5th Dist. 1974). The mere occurrence of an accident in a 51-day-old auto did not establish a defect in the throttle. *Silverman v. General Motors Corp.*, 99 Ill.App.3d 593, 425 N.E.2d 1099, 54 Ill.Dec. 882 (1st Dist. 1981).

### C. [4.30] Statutes of Limitation and Repose

One of the first inquiries when reviewing a complaint is to determine whether the action was timely filed. Not only should the obvious dates of injury and filing of suit be determined, but also the dates of manufacture and first sale. If this information is not reflected in the complaint, it should be determined from the defendant through product serial numbers, purchase orders, bills of sale or lading, or similar documentation kept in the course of the defendant's business. If suit is not timely commenced, a motion to dismiss should be filed pursuant to 735 ILCS 5/2-619(a)(5). If the limitation defect does not appear on the face of the complaint, it may be necessary to support the motion with an affidavit from an appropriate employee of the defendant.

When facing a statute of limitations problem, the plaintiff may attempt to invoke the discovery rule. However, most product claims result from a specific accident or event. In such a

situation, the limitation period commences when the injury or damage is caused even if the plaintiff did not realize the defective nature of the product or available remedies in the area of product liability. *Bates v. Little Company of Mary Hospital*, 108 Ill.App.3d 137, 438 N.E.2d 1250, 63 Ill.Dec. 887 (1st Dist. 1982). Similarly, when a plaintiff sustains an immediate personal injury as the result of a sudden traumatic event such as a car accident, the statute of limitations for a product liability suit begins to run at the time of the accident even though a latent injury arose at a later date. *Golla v. General Motors Corp.*, 167 Ill.2d 353, 657 N.E.2d 894, 212 Ill.Dec. 549 (1995).

A manufacturer's failure to place its corporate name on a product does not estop it from asserting a statute of limitations defense. In *Athmer v. C.E.I. Equipment Co.*, 121 F.3d 294 (7th Cir. 1997), the plaintiff was injured due to alleged defects in a truck bed. He sued "C.E.I. Pacer," the name that appeared on the truck bed. After the statute of limitations expired, the plaintiff discovered that that name was merely a brand name and the actual manufacturer was "C.E.I. Equipment Co." The Seventh Circuit affirmed dismissal of the complaint, rejecting the plaintiff's claim that the misnomer statute could be applied.

### 1. [4.31] Two-Year Personal Injury Limitation

735 ILCS 5/13-202 requires that all personal injury actions, including those based on strict liability, must be commenced within two years after the cause of action accrues. Unlike the statute of repose or claims involving breach of warranty, the limitation period begins at the time of the accident or injury. The appellate court in *Lowe v. Ford Motor Co.*, 313 Ill.App.3d 418, 730 N.E.2d 58, 246 Ill.Dec. 378 (1st Dist. 2000), affirmed dismissal of product liability and warranty wrongful death claims, holding that the cause of action accrued at the time of the accident and that suit was not timely when filed four years later. It rejected the plaintiff's claim of fraudulent concealment of alleged defects in the vehicle as the plaintiff should have been aware of the right to sue at the time of the accident.

### 2. [4.32] Five-Year Personal Property Damage Limitation

Pursuant to 735 ILCS 5/13-205, all actions for damage to personal property must be filed within five years of the date the cause of action accrues. In *Pratt v. Sears Roebuck & Co.*, 71 Ill.App.3d 825, 390 N.E.2d 471, 28 Ill.Dec. 304 (1st Dist. 1979), the court affirmed dismissal of strict liability and warranty claims filed against the manufacturer of a water heater that exploded more than five years prior to suit.

### 3. [4.33] Statute of Repose

The statute of repose, 735 ILCS 5/13-213, applies to strict product liability actions by placing specific time limits within which suit may be filed. It provides that a product liability action must be filed within twelve years from the date of the first delivery of the product by the manufacturer, distributor, or seller, or within ten years from the original date of the first sale or delivery to the initial user, whichever period expires earlier. However, if the injury occurs within those time frames, suit can be brought within two years after the date the plaintiff knew or should have known of the existence of the damage but not more than eight years after the occurrence.

If a product was delivered to a retailer more than twelve years prior to the injury, suit will be barred even though the product remained in inventory and was not sold to the consumer until some time within ten years of the accident. The statute of repose cuts off a right or cause of action before its accrual, as opposed to a statute of limitations, which establishes a period of time within which a cause of action must be brought. When damages are claimed to have resulted from an alteration or modification of the product, the statute extends the limitation to ten years from the date of the alteration, modification, or change provided two conditions are satisfied. First, the claim must be against the defendant who made, authorized, or furnished materials for the alteration. Second, the plaintiff must have proof that the alteration introduced a new hazard or risk that did not exist before the modification. The statute specifically provides that replacement of a component part with an identical part is not a sale or modification of the product that would extend the statute. 735 ILCS 5/13-213(e).

The statute also contains express limitation periods. Suits must be commenced within two years from the date plaintiff knew or reasonably should have known of the existence of the injury, but in no event can suit be brought more than eight years after the injury. As with other statutes of limitation, age, imprisonment, or other legal disabilities will toll this provision until the disability is removed. 735 ILCS 5/13-213(d).

The court in *Thornton v. Mono Manufacturing Co.*, 99 Ill.App.3d 722, 425 N.E.2d 522, 54 Ill.Dec. 657 (2d Dist. 1981), refused to toll the repose provisions of the statute during minority, noting that the statute extinguishes the right to bring a suit before the action actually arises. Therefore, as the strict liability claim is extinguished before it arises, a minor's limited capacity to understand and pursue the legal remedies results in no prejudice. In *Kline v. J.I. Case Co.*, 520 F.Supp. 564 (N.D.Ill. 1981), the court dismissed strict liability claims in connection with a combine sold to its first owner in 1941. The court rejected the plaintiff's argument that the statute should apply only to products manufactured after the effective date of the statute, concluding that to do so would defeat the obvious legislative intent. The court in *Delnero v. Rego International, Inc.*, 155 Ill.App.3d 702, 508 N.E.2d 291, 108 Ill.Dec. 130 (1st Dist. 1987), held that the statute of repose applied to a gas tank that had first been sold more than twelve years prior to the accident, rejecting the plaintiff's claim that each time the tank was refilled it had the effect of creating a new product. In *Olson v. Owens-Corning Fiberglas Corp.*, 198 Ill.App.3d 1039, 556 N.E.2d 716, 145 Ill.Dec. 98 (1st Dist. 1990), strict liability claims were dismissed against various asbestos manufacturers and distributors based on the statute of repose. One plaintiff had been exposed to asbestos from 1938 until 1974 and the other from 1948 until 1972.

*Reese v. National Mine Service Co.*, 672 F.Supp. 1116 (S.D.Ill. 1987), involved a claim by a coal miner against a shuttle car manufacturer. The car had been manufactured in 1971 and reconditioned in 1982, and the accident occurred in 1985. The court concluded that reconditioning of the car did not constitute a remanufacture, and the action was barred. *Hayes v. Otis Elevator Co.*, 946 F.2d 1272 (7th Cir. 1991), included a product liability claim against a company that manufactured, installed, and maintained an escalator. The escalator was installed in 1975 and maintained thereafter through the time plaintiff fell in 1986. The statute of repose barred the claim even though the company had performed maintenance on the escalator for many years. The court noted that if a manufacturer replaces a component part with one of similar design, the statute is not tolled. Ordinary maintenance is not intended to extend the time within

which to file suit. In *Masters v. Hesston Corp.*, 291 F.3d 985 (7th Cir. 2002), the court affirmed a summary judgment for the manufacturer of a hay bailer that had been sold twenty-two years before the accident. The plaintiff could not establish that the defendant authorized any prior owner of the machine to reweld a twine tube, and, therefore, the “alteration” exception to the repose statute did not apply.

In *Allstate Insurance Co. v. Menards, Inc.*, 202 Ill.2d 586, 782 N.E.2d 258, 270 Ill.Dec. 64 (2002), the Illinois Supreme Court resolved the conflict among the appellate districts concerning the time within which a property damage action based on strict liability must be filed. The court held that five years was the applicable limitation for strict liability property damage actions brought within the statute of repose. Thus, Allstate could pursue a strict liability property damage subrogation claim filed four and one-half years after the fire in its insured’s home.

### III. DEFENSE OF WARRANTY ACTIONS

#### A. [4.34] In General

Warranty liability may arise when damage is caused by the failure of a product to meet express or implied representations on the part of the manufacturer or other supplier. Product litigation involving warranty continues to be an active theory in the years since *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill.2d 69, 435 N.E.2d 443, 61 Ill.Dec. 746 (1982), in which the Supreme Court determined that the law of sales, as established in the Uniform Commercial Code (UCC), 810 ILCS 5/1-101, *et seq.*, provides a carefully articulated system governing the economic relations between suppliers and consumers of goods, including those situations in which commercial expectations were not met. Thus, it is preferable to limit consumers to contract law rather than tort law for cases involving economic loss. For a more detailed discussion of what constitutes economic loss, see §4.49 below.

The UCC became effective in Illinois on July 1, 1962. Section 2-313 establishes a cause of action for breach of an express warranty, §2-314 creates a cause of action for breach of an implied warranty of merchantability, and §2-315 creates a cause of action for breach of an implied warranty of fitness for a particular purpose. 810 ILCS 5/2-313 through 5/2-315. While each of these warranties is discussed separately in §§4.37 – 4.39 below, bear in mind that principles discussed under one section may be applicable under others.

Warranty cases, whether express or implied, whether for merchantability or for fitness for a particular purpose, will be litigated with greater frequency in coming years. They comprise a group of cases, usually involving damage to property rather than personal injury, for which tort theories may not be appropriate; thus, warranty law is becoming an increasingly important and active field.

Each warranty case requires a sale, certain representations, reasonable reliance on the representations, superior knowledge on the part of the seller, an injury that is a proximate result of the reliance on the representations, notice of the loss, and bringing of the action within the time



required by law. Remember that, as with strict liability, the plaintiff must prove that the defect or breach existed when the product left the defendant's control. *Alvarez v. American Isuzu Motors*, 321 Ill.App.3d 696, 749 N.E.2d 16, 255 Ill.Dec. 236 (1st Dist. 2001).

### B. [4.35] Improper Defendants

Warranty claims do not apply to all who are involved in the sale or distribution of a product. For example, there was no breach of an implied warranty of merchantability in connection with the sale of a pubovaginal sling, sold by a hospital to a patient and that was surgically implanted to treat incontinence, because the transaction was predominantly for medical services. *Brandt v. Boston Scientific Corp.*, 204 Ill.2d 640, 792 N.E.2d 296, 275 Ill.Dec. 65 (2003). Similarly, a dentist is engaged not in the business of selling dentures but in furnishing medical services, and therefore UCC warranty provisions are not applicable. *Carroll v. Grabavoy*, 77 Ill.App.3d 895, 396 N.E.2d 836, 33 Ill.Dec. 309 (3d Dist. 1979). Without separate consideration, a representation made by a doctor that surgery would cure the plaintiff could not constitute an express warranty. *Gault v. Sideman*, 42 Ill.App.2d 96, 191 N.E.2d 436 (1st Dist. 1963). *Accord Rogala v. Silva*, 16 Ill.App.3d 63, 305 N.E.2d 571 (1st Dist. 1973).

It is important to analyze the business or commercial activity of the defendant to determine whether warranty is a valid theory. Warranties of merchantability and fitness for a particular purpose did not apply to a university athletic director, coach, or trainer for an athlete's injury allegedly caused by a defective football helmet because the defendants were not merchants or sellers. *Hemphill v. Sayers*, 552 F.Supp. 685 (S.D.Ill. 1982). Also, a plaintiff truck driver could not assert breach of warranty claims because the contract between the defendant and the plaintiff's employer was formed for services and there was no sale of goods. *Lukwinski v. Stone Container Corp.*, 312 Ill.App.3d 385, 726 N.E.2d 665, 244 Ill.Dec. 690 (1st Dist. 2000). A delivery agreement between a box seller and a delivery company was a contract for services that would not allow an injured delivery service employee to recover under warranty from the box seller. *Id.* Although a sale of gravel was involved, the UCC did not apply because the hauling contract was predominantly for services. *Heuerman v. B & M Construction, Inc.*, 358 Ill.App.3d 1157, 833 N.E.2d 382, 295 Ill.Dec. 549 (5th Dist. 2005).

### C. [4.36] Privity

Counsel defending a warranty claim should not overlook the concept of privity. The Illinois Supreme Court in *Szajna v. General Motors Corp.*, 115 Ill.2d 294, 503 N.E.2d 760, 104 Ill.Dec. 898 (1986), confirmed the concept of privity as a requirement for the recovery of economic loss under a warranty theory. It noted that there was confusion among various states regarding the issue but concluded that recovery for economic loss must be within the framework of contract law pursuant to *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill.2d 69, 435 N.E.2d 443, 61 Ill.Dec. 746 (1982). Therefore, lack of privity barred an implied warranty claim against an auto manufacturer. *Tokar v. Crestwood Imports, Inc.*, 177 Ill.App.3d 422, 532 N.E.2d 382, 126 Ill.Dec. 697 (1st Dist. 1988). Sport utility vehicle purchasers were not in privity with the manufacturer and could not recover for breach of implied warranty even though the vehicles were purchased from authorized dealers. *Connick v. Suzuki Motor Co.*, 275 Ill.App.3d 705, 656 N.E.2d 170, 212 Ill.Dec. 17 (1st Dist. 1995), *aff'd in part, rev'd in part*, 174 Ill.2d 482 (1996).

In analyzing the privity requirement, one must carefully read 810 ILCS 5/2-318, which provides that warranties extend to all natural persons in the family or household of the buyer or who are guests in the buyer's home. In *Miller v. Sears, Roebuck & Co.*, 148 Ill.App.3d 1022, 500 N.E.2d 557, 102 Ill.Dec. 664 (1st Dist. 1986), the court noted that drafters of the Uniform Commercial Code presented three alternative provisions and Illinois adopted the most restrictive of these. Based on that fact, the court concluded that a plaintiff who was injured when an air compressor exploded was not within the class of persons to whom the warranty protections extended. The plaintiff, who was a service station customer waiting for his car, was not within the purview of UCC §2-318. *Whitaker v. Lian Feng Machine Co.*, 156 Ill.App.3d 316, 509 N.E.2d 591, 108 Ill.Dec. 895 (1st Dist. 1987), included warranty claims against the manufacturer, the importer, and the seller of a band saw that cut off three of the plaintiff's fingers at his place of employment. The trial court's dismissal of warranty claims based on lack of privity was reversed by the First District, which held that the provisions of §2-318 extended to any employee of a purchaser who is injured in the use of goods as long as the safety of that employee was either explicitly or implicitly part of the basis of the bargain when the employer purchased the product. *Accord Wheeler v. Sunbelt Tool Co.*, 181 Ill.App.3d 1088, 537 N.E.2d 1332, 130 Ill.Dec. 863 (4th Dist. 1989). However, a delivery service worker injured when pressurized straps on cardboard boxes he was delivering broke did not belong to the class of third-party beneficiaries to whom warranty was an available remedy against the box manufacturer under §2-318. *Lukwinski v. Stone Container Corp.*, 312 Ill.App.3d 385, 726 N.E.2d 665, 244 Ill.Dec. 690 (1st Dist. 2000). *See also Frank v. Edward Hines Lumber Co.*, 327 Ill.App.3d 113, 761 N.E.2d 1257, 260 Ill.Dec. 701 (1st Dist. 2001).

#### D. [4.37] Express Warranty

Actions for breach of express warranty are provided by 810 ILCS 5/2-313. The principal basis for creating liability for breach of an express warranty is that the purchaser relied on an express representation made by the seller that became a basis of the bargain. The express warranty does not extend beyond the parties to the contract. *Paul Harris Furniture Co. v. Morse*, 10 Ill.2d 28, 139 N.E.2d 275 (1956); *Gibbs v. Procter & Gamble Manufacturing Co.*, 51 Ill.App.2d 469, 201 N.E.2d 473 (5th Dist. 1964). The express warranty must be made by the seller or the seller's agents in order to be binding. *Overland Bond & Investment Corp. v. Howard*, 9 Ill.App.3d 348, 292 N.E.2d 168 (1st Dist. 1972). Thus, if an express warranty is made by someone other than the seller or if the representation is not made to the plaintiff, no liability will attach under this theory. In a breach of express warranty action, the plaintiff bears the burden of proof of an affirmation of fact or promise that was part of the basis of the bargain. Express warranties are contractual in nature, and the language of the warranty is what controls the obligations and rights of the parties. *Hasek v. DaimlerChrysler Corp.*, 319 Ill.App.3d 780, 745 N.E.2d 627, 253 Ill.Dec. 504 (1st Dist. 2001).

Statements of opinion by a seller do not constitute an express warranty. Thus, statements that a product was of good quality and that good results would be obtained did not establish an express warranty. *Olin Mathieson Chemical Corp. v. Moushon*, 93 Ill.App.2d 280, 235 N.E.2d 263 (4th Dist. 1968). Similarly, a seller's statement that a product could be used in a certain manner without fear of getting hurt was merely a false statement of opinion rather than an express warranty. *Weiss v. Rockwell Manufacturing Co.*, 9 Ill.App.3d 906, 293 N.E.2d 375 (1st Dist.

1973). A kennel's representation that a dog was docile did not create an express warranty. *Whitmer v. Schneble*, 29 Ill.App.3d 659, 331 N.E.2d 115 (2d Dist. 1975). Sales talk that related only to the value of the goods or the seller's personal opinion was considered "puffing" and did not create an express warranty. *Redmac, Inc. v. Computerland of Peoria*, 140 Ill.App.3d 741, 489 N.E.2d 380, 382, 95 Ill.Dec. 159 (3d Dist. 1986). A statement that a product was "just as good as" similar products did not establish an express warranty. *Bimex Corp. v. Elite Plastic Services, Inc.*, 200 Ill.App.3d 589, 558 N.E.2d 299, 301, 146 Ill.Dec. 336 (1st Dist. 1990). Therefore, it is extremely important to analyze the alleged express warranty in detail in the context of the factual situation involved.

Significant reliance by the buyer on its own examination of the product prior to the sale indicates a lack of reliance by the buyer on the seller's affirmations or descriptions that can preclude the creation of an express warranty. Thus, when a purchaser's skilled inspector examined a used crane, no express warranty was made that it could lift a certain weight despite its identification in the sale contract as a 75-ton crane. *Alan Wood Steel Co. v. Capital Equipment Enterprises, Inc.*, 39 Ill.App.3d 48, 349 N.E.2d 627 (1st Dist. 1976). Similarly, no express warranty was created by a seller's statement that used trucks were in good condition when the buyer had inspected and worked on the trucks prior to purchase. *Janssen v. Hook*, 1 Ill.App.3d 318, 272 N.E.2d 385 (2d Dist. 1971).

It should also be noted that an express warranty warrants the condition of the product at the time of sale, and a later breakdown will not create liability. Thus, a plaintiff must prove that the defect warranted against existed at the time of sale. *Blade v. Sloan*, 108 Ill.App.2d 397, 248 N.E.2d 142 (3d Dist. 1969). However, evidence may show that the product was not in the condition warranted at the time of sale. *Sullivan v. Berardi*, 80 Ill.App.3d 417, 399 N.E.2d 708, 35 Ill.Dec. 642 (3d Dist. 1980).

Federal preemption may also afford a defense to a state law claim for breach of an express warranty. *Welchert v. American Cyanamid, Inc.*, 59 F.3d 69 (8th Cir. 1995), held that the Federal Insecticide, Fungicide, and Rodenticide Act preempted express warranty claims based on a federally required and approved labeling statement.

#### **E. [4.38] Implied Warranty of Merchantability**

Claims based on the implied warranty of merchantability provisions of 810 ILCS 5/2-314 have similar considerations to those in strict liability cases. However, there are certain additional principles that should be considered.

The plaintiff's evidence must be examined carefully to determine that there was, in fact, a warranty of merchantability, that this warranty was broken, and that the breach of warranty was a proximate cause of the loss sustained. *Federal Insurance Co. v. Village of Westmont*, 271 Ill.App.3d 892, 649 N.E.2d 986, 208 Ill.Dec. 626 (2d Dist. 1995). An implied warranty of merchantability applies only to the condition of goods at the time of sale, not to their future performance. *Cosman v. Ford Motor Co.*, 285 Ill.App.3d 250, 674 N.E.2d 61, 220 Ill.Dec. 790 (1st Dist. 1996). It is always a defense that the loss resulted from some event other than the alleged breach of warranty. *Van Winkle v. Firestone Tire & Rubber Co.*, 117 Ill.App.2d 324, 253

N.E.2d 588 (3d Dist. 1969). Therefore, summary judgment is appropriate when a plaintiff fails to establish that a defect existed at the time the product left the seller's control. *Oggi Trattoria & Caffè, Ltd. v. Isuzu Motors America, Inc.*, 372 Ill.App.3d 354, 865 N.E.2d 334, 310 Ill.Dec. 10 (1st Dist. 2007).

It is important to discover and examine the conduct of the buyer following the buyer's examination of the goods, particularly in those cases in which the examination may prove fatal to a plaintiff's case. UCC Comment 13, 810 ILCS 5/2-314. Thus, when a purchaser examined the products, rejecting some and accepting some, and the examination disclosed the defects, there was no warranty of merchantability. *Willis v. West Kentucky Feeder Pig Co.*, 132 Ill.App.2d 266, 265 N.E.2d 899 (4th Dist. 1971).

810 ILCS 5/2-316 expressly provides for disclaimer of an implied warranty of consequential damages. However, the disclaimer will not be enforced if it is unreasonable. 810 ILCS 5/2-302(1). Careful reading of §§2-316(2) and 2-317 is imperative. Disclaimers of implied warranties are not favored and are strictly construed against sellers. *Admiral Oasis Hotel Corp. v. Home Gas Industries, Inc.*, 68 Ill.App.2d 297, 216 N.E.2d 282 (1st Dist. 1965). However, when a disclaimer is sufficiently conspicuous, it will be enforced. *Walter E. Heller & Co. v. Convalescent Home of First Church of Deliverance*, 49 Ill.App.3d 213, 365 N.E.2d 1285, 8 Ill.Dec. 823 (1st Dist. 1977). Further, a valid limited express warranty "in lieu of all other warranties expressed or implied" will exclude an implied warranty. *Construction Aggregates Corp. v. Hewitt-Robins, Inc.*, 404 F.2d 505, 510 (7th Cir. 1968). There was no implied warranty of merchantability when a used car dealer had a sign that said the car was "sold as is," as that is generally understood to mean that the buyer is purchasing the goods in the present condition with whatever faults may exist. *Pelc v. Simmons*, 249 Ill.App.3d 852, 620 N.E.2d 12, 13, 189 Ill.Dec. 353 (5th Dist. 1993). Dismissal was appropriate when the disclaimer was the only text on a page and was printed in all capital letters clearly disclaiming implied warranties. *R.O.W. Window Co. v. Allmetal, Inc.*, 367 Ill.App.3d 749, 856 N.E.2d 55, 305 Ill.Dec. 523 (3d Dist. 2006).

Limitations may be placed on warranties pursuant to 810 ILCS 5/2-316. Thus, a company policy appearing on an invoice expressly limiting liability to loss occurring within seven days of delivery was proper. *Willis, supra*. Also, a prominently displayed provision limiting the seller's warranty liability to repair and replacement of defective parts and excluding incidental or consequential damages was enforceable. *R & L Grain Co. v. Chicago Eastern Corp.*, 531 F.Supp. 201 (N.D.Ill. 1981).

Federal preemption may afford a defense to a claim of implied warranty of merchantability. The court in *Lynnbrook Farms v. Smithkline Beecham Corp.*, 79 F.3d 620, 623 (7th Cir. 1996), held that the Virus-Serum-Toxin Act preempted a claim of breach of an implied warranty of merchantability against a cattle vaccine manufacturer. Similarly, in *Malone v. American Cyanamid Co.*, 271 Ill.App.3d 843, 649 N.E.2d 493, 208 Ill.Dec. 437 (4th Dist. 1995), the court held that the Federal Insecticide, Fungicide, and Rodenticide Act preempted an implied warranty of merchantability cause of action to the extent the claim relied on inadequate labeling or packaging of the defendant's herbicide. In *Slater v. Optical Radiation Corp.*, 961 F.2d 1330, 1331 (7th Cir. 1992), the Seventh Circuit affirmed dismissal of negligence, strict liability, and breach

of implied warranty claims against the manufacturer of an intraocular lens, holding that the Food and Drug Administration “investigational-device exemption” regulations preempted suits based on state law.

#### **F. [4.39] Implied Warranty of Fitness for Particular Purpose**

An implied warranty of fitness for a particular purpose is provided in 810 ILCS 5/2-315. In this type of action, it is essential for the plaintiff to show that the buyer did, in fact, make known the purpose for which the goods were being acquired. The plaintiff must further prove that the buyer relied on the seller’s skill and judgment in selecting the goods. Failure of either of these elements is fatal to the plaintiff’s case. *Knab v. Alden’s Irving Park, Inc.*, 49 Ill.App.2d 371, 199 N.E.2d 815 (1st Dist. 1964).

While a warranty may arise from the use of descriptive terms in the sales negotiation, or even by the nature of the product itself, the warranty may not become effective when there was a properly conducted inspection by the purchaser that would have disclosed the defect. *Grass v. Steinberg*, 331 Ill.App. 378, 73 N.E.2d 331 (1st Dist. 1947). Also, even if a seller may be aware of a particular use but that use is not different from the ordinary use of the product, no warranty for a particular purpose exists. *Janssen v. Hook*, 1 Ill.App.3d 318, 272 N.E.2d 385 (2d Dist. 1971). If a buyer experiments with a product after purchase in a way that would be unfamiliar to the seller, there is no reasonable reliance on any implied warranty. *Frost v. Van Cleef*, 291 Ill.App. 363, 9 N.E.2d 977 (1st Dist. 1937). For example, when a tractor was sold for use in ordinary farming work, it was not covered by an implied warranty of fitness for the particular purpose of heavy-duty plowing. *Wilson v. Massey-Ferguson, Inc.*, 21 Ill.App.3d 867, 315 N.E.2d 580 (4th Dist. 1974). There was no warranty of fitness for a particular purpose when the buyer did not inform the seller of the product’s anticipated use. *Bimex Corp. v. Elite Plastic Services, Inc.*, 200 Ill.App.3d 589, 558 N.E.2d 299, 146 Ill.Dec. 336 (1st Dist. 1990).

There can be no implied warranty of fitness for a particular purpose unless it can be shown that the seller asserted some knowledge superior to that of the plaintiff’s. Also, it must be shown that there was reliance on this superior knowledge that induced the plaintiff to enter into the transaction. In *Midland Supply Co. v. Ehret Plumbing & Heating Co.*, 108 Ill.App.3d 1120, 440 N.E.2d 153, 64 Ill.Dec. 601 (5th Dist. 1982), no implied warranty of fitness for a particular purpose existed when an experienced heating contractor relied on his own judgment and merely told the seller he wanted two gas-fired boilers and gave technical specifications for the products. Further, it must be proved that the seller’s statement was a misrepresentation of the product’s fitness and that this breach was a proximate cause of the loss. Evidence of proximate cause must not be overlooked. In *Van Winkle v. Firestone Tire & Rubber Co.*, 117 Ill.App.2d 324, 253 N.E.2d 588 (3d Dist. 1969), it was held that an implied warranty of fitness for a particular purpose existed by virtue of the nature of the product itself, *i.e.*, that a retreaded tire was warranted for use on the automobile on which it was installed without any express representations. However, the fact that a blowout occurred did not establish a breach of the warranty.

### G. [4.40] Warranty Disclaimers and Express Limitations

Exclusions and modifications of warranties can be made pursuant to 810 ILCS 5/2-316. Contractual modifications or limitations of warranty are permitted under 810 ILCS 5/2-719. However, disclaimers of implied warranties are not favored and are strictly construed against sellers. *Admiral Oasis Hotel Corp. v. Home Gas Industries, Inc.*, 68 Ill.App.2d 297, 216 N.E.2d 282 (1st Dist. 1965). When a disclaimer is sufficiently conspicuous, it will be enforced. *Walter E. Heller & Co. v. Convalescent Home of First Church of Deliverance*, 49 Ill.App.3d 213, 365 N.E.2d 1285, 8 Ill.Dec. 823 (1st Dist. 1977). Issues confronting defense counsel in attempting to enforce these provisions relate to conscionability and conspicuity. Therefore, the relationship of the seller and the purchaser and the manner in which the disclaimer or limitation is communicated are important. The appellate court in *R.O.W. Window Co. v. Allmetal, Inc.*, 367 Ill.App.3d 749, 856 N.E.2d 55, 305 Ill.Dec. 523 (3d Dist. 2006), affirmed dismissal of implied warranties of merchantability and fitness for a particular purpose when the disclaimer was prominently displayed, the plaintiff had been the defendant's customer for several years, and all invoices contained the disclosures. Therefore, it is incumbent on defense counsel to obtain copies of and analyze all documents relating to the sale of the involved product.

A disclaimer in a turret punch machine lease-purchase agreement providing that "LESSOR MAKES NO EXPRESS OR IMPLIED WARRANTY WHATSOEVER OF TITLE, MERCHANTABILITY, FITNESS FOR ANY PURPOSE OR OTHERWISE" effectively barred implied warranties. *Bowers Manufacturing Co. v. Chicago Machine Tool Company, Division of F.J.M. Corp.*, 117 Ill.App.3d 226, 453 N.E.2d 61, 65, 72 Ill.Dec. 756 (2d Dist. 1983). When bottling equipment was sold under a conditional sales contract "as is, where is," there was a disclaimer of any implied warranties. *Crown Cork & Seal Co. v. Hires Bottling Company of Chicago*, 254 F.Supp. 424, 425 (N.D.Ill. 1966), *rev'd on other grounds*, 371 F.2d 256 (7th Cir. 1967). When a disclaimer was in larger type size than other provisions within a two-page agreement, the disclaimer was sufficiently conspicuous. *Walter E. Heller & Co.*, *supra*. An auto purchaser who signed an agreement providing that he "acknowledges delivery, examination and acceptance of said car in its present condition" was barred from asserting both express and implied warranties. *First National Bank of Elgin v. Husted*, 57 Ill.App.2d 227, 205 N.E.2d 780, 784 (2d Dist. 1965). A disclaimer on an auto purchase form captioned "Disclaimer of Warranties," which was heavily underlined and located close to the purchaser's signature, was conspicuous and effective. *Lytle v. Roto Lincoln Mercury & Subaru, Inc.*, 167 Ill.App.3d 508, 521 N.E.2d 201, 206, 118 Ill.Dec. 133 (2d Dist. 1988). There is no implied warranty when an auto is sold "as is" because that is generally understood to mean that the buyer is purchasing the goods in their present condition regardless of what faults may exist. *Pelc v. Simmons*, 249 Ill.App.3d 852, 620 N.E.2d 12, 189 Ill.Dec. 353 (5th Dist. 1993). Similarly, the purchasers of a used auto could not recover under breach of an implied warranty of merchantability when the purchase contract stated "AS IS." *Mitsch v. General Motors Corp.*, 359 Ill.App.3d 99, 833 N.E.2d 936, 938, 295 Ill.Dec. 730 (1st Dist. 2005).

A seller may also place limitations on warranties. 810 ILCS 5/2-317(c) provides that express warranties may displace inconsistent implied warranties except fitness for a particular purpose. Therefore, a valid limited express warranty "in lieu of all other warranties expressed or implied" excluded an implied warranty. *Construction Aggregates Corp. v. Hewitt-Robins, Inc.*, 404 F.2d

505, 510 (7th Cir. 1968). A company policy appearing on an invoice that expressly limited liability to loss occurring within seven days of delivery was proper. *Willis v. West Kentucky Feeder Pig Co.*, 132 Ill.App.2d 266, 265 N.E.2d 899 (4th Dist. 1971). A prominently displayed provision limiting the seller's warranty liability to repair and replacement of defective parts and excluding incidental or consequential damages was enforceable. *R & L Grain Co. v. Chicago Eastern Corp.*, 531 F.Supp. 201 (N.D.Ill. 1981). An auto manufacturer's express written limited warranty that was effective for 12 months or 12,000 miles and included a disclaimer that any implied warranty was limited to the same duration was reasonable and appropriate. *Szajna v. General Motors Corp.*, 130 Ill.App.3d 173, 474 N.E.2d 397, 85 Ill.Dec. 669 (1st Dist. 1985). Sport utility vehicle purchasers who alleged a propensity for rollover could not recover for breach of express warranty when the warranty was expressly limited to 12 months or 12,000 miles, whichever came first, and the purchasers did not learn of the allegedly dangerous propensities until more than 12 months after purchase. *Connick v. Suzuki Motor Co.*, 275 Ill.App.3d 705, 656 N.E.2d 170, 212 Ill.Dec. 17 (1st Dist. 1995). An express warranty that stated that it was "EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS" barred implied warranties even though the plaintiff claimed it never returned a warranty certificate card on which the limiting language appeared. *Bell Fuels, Inc. v. Lockheed Electronics Co.*, 130 Ill.App.3d 940, 474 N.E.2d 1312, 1314, 86 Ill.Dec. 115 (1st Dist. 1985). An auto manufacturer's 12-month or 12,000-mile warranty limitation was not unconscionable and barred claims by the owner of an 18-month-old auto having 17,729 miles on the odometer. *Norman v. Ford Motor Co.*, 160 Ill.App.3d 1037, 513 N.E.2d 1053, 1055, 112 Ill.Dec. 444 (1st Dist. 1987). See also *Tokar v. Crestwood Imports, Inc.*, 177 Ill.App.3d 422, 532 N.E.2d 382, 126 Ill.Dec. 697 (1st Dist. 1988). An auto dealer's sales contract that said in three separate places that it was disclaiming all warranties, express or implied, including any implied warranties of merchantability or fitness for a particular purpose, barred UCC claims but not those under the Magnuson-Moss Warranty — Federal Trade Commission Improvement Act. *Rothe v. Maloney Cadillac, Inc.*, 142 Ill.App.3d 937, 492 N.E.2d 497, 97 Ill.Dec. 61 (1st Dist. 1986), *aff'd in part, vacated in part*, 119 Ill.2d 288 (1988).

Although the Uniform Commercial Code disfavors contractual provisions that leave a non-breaching party without a remedy, it does not disfavor limits on recoverable damages. *Cole Energy Development Co. v. Ingersoll-Rand Co.*, 8 F.3d 607, 611 (7th Cir. 1993). 810 ILCS 5/2-719 permits a seller to limit a buyer's remedy to return of the goods and repayment of the purchase price or replacement of nonconforming goods. It also permits a seller to limit or eliminate consequential damages in non-personal injury cases. Therefore, a provision that "[i]n no event will the Company be responsible for consequential damages of any nature whatsoever" barred a claim for lost profits and other consequential damages resulting from malfunctioning deep fat fryers. *KKO, Inc. v. Honeywell, Inc.*, 517 F.Supp. 892, 894 (N.D.Ill. 1981). An express warranty limitation limiting the purchaser of stainless steel pipe to replacement of the pipe was enforced against a purchaser who also sought recovery of \$200,000 in installation costs. *Intrastate Piping & Controls, Inc. v. Robert-James Sales, Inc.*, 315 Ill.App.3d 248, 733 N.E.2d 718, 248 Ill.Dec. 43 (1st Dist. 2000). See also *V-M Corp. v. Bernard Distributing Co.*, 447 F.2d 864 (7th Cir. 1971); *J.D. Pavlak, Ltd. v. William Davies Co.*, 40 Ill.App.3d 1, 351 N.E.2d 243 (1st Dist. 1976); *Northern Illinois Gas Co. v. Energy Cooperative, Inc.*, 122 Ill.App.3d 940, 461 N.E.2d 1049, 78 Ill.Dec. 215 (3d Dist. 1984); *Cognitest Corp. v. Riverside Publishing Co.*, 107 F.3d 493 (7th Cir. 1997).

It is important to bear in mind when dealing with disclaimer or limitation situations that all three UCC sections discussing the subject matter intertwine. Therefore, a careful reading of 810 ILCS 5/2-316, 5/2-317, and 5/2-719 is imperative in analyzing the appropriate defense.

## H. Statutes of Limitation and Repose

### 1. [4.41] Two-Year Personal Injury Limitation

735 ILCS 5/13-202 requires that all personal injury actions must be commenced within two years after the cause of action accrues. Unlike the statute of repose, the limitation period commences at the time of the incident forming the basis of the litigation. Thus, if a plaintiff fails to file a personal injury suit within two years of the accident, the claim is barred. *Berry v. G.D. Searle & Co.*, 56 Ill.2d 548, 309 N.E.2d 550 (1974). However, while the two-year personal injury limitation barred a personal injury claim filed two and one-half years after an accident, the plaintiff could proceed under a breach of warranty theory under the four-year repose provisions of the Uniform Commercial Code, 810 ILCS 5/2-725. *Sille v. McCann Construction Specialties Co.*, 265 Ill.App.3d 1051, 638 N.E.2d 676, 202 Ill.Dec. 808 (1st Dist. 1994).

### 2. [4.42] Five-Year Personal Property Damage Limitation

Typically, the four-year limitation on warranty claims under the UCC (see §4.43 below) will make reliance on the five-year personal property damage limitation of 735 ILCS 5/13-205 unnecessary. However, the five-year limitation would apply to a warranty claim and can afford an additional basis for dismissal of a tardy lawsuit under appropriate circumstances.

### 3. [4.43] UCC Four-Year Repose Provision

The Uniform Commercial Code contains a special repose statute. An action based on breach of warranty must be commenced within four years after the cause of action has accrued pursuant to 810 ILCS 5/2-725. For purposes of this provision, the cause of action accrues at the time of delivery of the product, regardless of whether the incident occurred on some later date. The four-year UCC limitation commences at initial delivery and not when the product is returned after repairs. *Ridle v. Sprayrite Manufacturing Co.*, 198 Ill.App.3d 597, 555 N.E.2d 1272, 144 Ill.Dec. 753 (3d Dist. 1990).

When a press failed four years after delivery and suit was filed three years after failure, claims under the UCC were barred. *Gates Rubber Co. v. USM Corp.*, 508 F.2d 603 (7th Cir. 1975). Similarly, the manufacturer of steel grain storage tanks sold to the plaintiff in 1966 had no liability under warranty claims when cracks developed twelve years later. *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill.2d 69, 435 N.E.2d 443, 61 Ill.Dec. 746 (1982). No breach of warranty suit could be filed in 1977 for a water heater that exploded in 1971. *Pratt v. Sears Roebuck & Co.*, 71 Ill.App.3d 825, 390 N.E.2d 471, 28 Ill.Dec. 304 (1st Dist. 1979). When suit was filed eight years after the birth of a handicapped child, warranty claims were barred against the manufacturer of a drug taken by the mother during pregnancy. *Hagen v. Richardson-Merrell, Inc.*, 697 F.Supp. 334 (N.D.Ill. 1988). The four-year limitation applies to personal injury warranty claims. *Sille v. McCann Construction Specialties Co.*, 265 Ill.App.3d 1051, 638 N.E.2d 676, 202 Ill.Dec. 808 (1st Dist. 1994).



The “discovery rule” does not apply to this limitation statute. Thus, when suit was filed more than four years after delivery of the product but less than four years from discovery of the defect, the claim was barred. *Nelligan v. Tom Chaney Motors, Inc.*, 133 Ill.App.3d 798, 479 N.E.2d 439, 88 Ill.Dec. 826 (2d Dist. 1985); *Tomes v. Chrysler Corp.*, 60 Ill.App.3d 707, 377 N.E.2d 224, 18 Ill.Dec. 71 (1st Dist. 1978). See also *Wilson v. Massey-Ferguson, Inc.*, 21 Ill.App.3d 867, 315 N.E.2d 580 (4th Dist. 1974); *Beckmire v. Ristokrat Clay Products Co.*, 36 Ill.App.3d 411, 343 N.E.2d 530 (2d Dist. 1976); *LaPorte v. R.D. Werner Co.*, 561 F.Supp. 189 (N.D.Ill. 1983); *Tivoli Enterprises, Inc. v. Brunswick Bowling & Billiards Corp.*, 269 Ill.App.3d 638, 646 N.E.2d 943, 207 Ill.Dec. 109 (2d Dist. 1995); *Zielinski v. Miller*, 277 Ill.App.3d 735, 660 N.E.2d 1289, 214 Ill.Dec. 340 (3d Dist. 1995).

In an attempt to circumvent the four-year limitation on warranty claims, a purchaser may attempt to suggest that the seller extended its warranties to future performance. UCC §2-725(2) provides that if a warranty “explicitly” extends to future performance, the cause of action accrues when the breach was or should have been discovered. However, this exception has been narrowly applied, as the extension for future performance must be explicit. Under the UCC, the term “explicit” has been defined to mean “that which is so clearly stated or distinctly set forth that there is no doubt as to its meaning.” *Harney v. Spellman*, 113 Ill.App.2d 463, 251 N.E.2d 265, 266 (4th Dist. 1969). For example, sales literature stating that many of the seller’s roofs were still performing after forty years did not warrant future performance. *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*, 626 F.2d 280 (3d Cir. 1980).

Many times a defendant is faced with defending both warranty and negligence claims. With a warranty claim, the cause of action accrues upon delivery. However, in a negligence claim, the cause of action accrues at the time of failure or accident. Thus, a warranty claim may be barred in certain circumstances when a negligence claim is not. *Chicago & Southern Airlines, Inc. v. Volpar, Inc.*, 54 Ill.App.3d 609, 370 N.E.2d 54, 12 Ill.Dec. 431 (1st Dist. 1977).

The four-year UCC limitation is not applicable to an implied indemnity claim. The court in *Maxfield v. Simmons*, 96 Ill.2d 81, 449 N.E.2d 110, 70 Ill.Dec. 236 (1983), reversed dismissal of an indemnity claim by a contractor against a supplier of roof trusses that had been delivered more than four years prior to the original plaintiff’s action and more than six years prior to the third-party action. The determination was that indemnity claims are not economic losses that would be governed by the UCC but rather are based on tortious conduct. *Accord Anixter Bros., Inc. v. Central Steel & Wire Co.*, 123 Ill.App.3d 947, 463 N.E.2d 913, 79 Ill.Dec. 359 (1st Dist. 1984).

#### 4. [4.44] Notice Requirement

Plaintiffs are often unaware of or ignore the notice requirements necessary for a claim under the Uniform Commercial Code. 810 ILCS 5/2-607(3)(a) requires that a buyer must give notice to the seller within a reasonable amount of time after he or she discovers or should have discovered a breach “or be barred from any remedy.” The reasonableness of the time of notice can differ from case to case. However, a delay of fifteen months from discovery of the manufacturer has been held to be fatal. *Branden v. Gerbie*, 62 Ill.App.3d 138, 379 N.E.2d 7, 19 Ill.Dec. 492 (1st Dist. 1978). When a defect was obvious upon delivery of the goods but the purchaser did not examine the goods until six months later and immediately notified the seller, the delay in

discovery was not reasonable. *Wilke Metal Products, Inc. v. David Architectural Metals, Inc.*, 92 Ill.App.2d 265, 236 N.E.2d 303 (1st Dist. 1968). When the plaintiff learned that a contraceptive device failed in 1972 and she delivered a stillborn baby in 1973 but did not serve notice to the manufacturer for thirty months thereafter, suit was properly barred for failure to give timely notice. *Wagmeister v. A.H. Robins Co.*, 64 Ill.App.3d 964, 382 N.E.2d 23, 21 Ill.Dec. 729 (1st Dist. 1978). Dismissal of UCC warranty claims was proper when the plaintiffs failed to give notice of the alleged breach prior to filing suit against an auto manufacturer. *Connick v. Suzuki Motor Co.*, 174 Ill.2d 482, 675 N.E.2d 584, 221 Ill.Dec. 389 (1996). A federally mandated recall notice did not fulfill the notice provision, and the automobile buyers' failure to allege sufficient notice was fatal to claims under the UCC. *Perona v. Volkswagen of America, Inc.*, 292 Ill.App.3d 59, 684 N.E.2d 859, 225 Ill.Dec. 868 (1st Dist. 1997). However, the court in *Arcor, Inc. v. Textron, Inc.*, 960 F.2d 710 (7th Cir. 1992), held that a buyer was not required to notify a seller that the machine's performance was deficient to fulfill the notice requirement prior to suit.

Lack of notice is not an affirmative defense because notice is part of the plaintiff's burden of proof. *Carey v. I.J. Kayle & Associates*, 122 Ill.App.2d 403, 259 N.E.2d 304 (1st Dist. 1970). It is important to remember that a plaintiff must comply with both the reasonable notice requirement and the four-year statute of repose in order to pursue a breach of warranty claim. Failure to do so may be fatal and should be raised immediately in a dismissal motion.

## IV. DEFENSE OF NEGLIGENCE CASES

### A. [4.45] In General

At times, the distinction between strict liability and negligence cases becomes blurred. However, from a defense perspective, the preparation and trial of a negligence case are quite different from the preparation and trial of a strict liability case. In a strict liability case, the focus is on the condition of the product. In a negligence case, the focus is on the actor's conduct with respect to reasonable care. The analysis to be employed in a product liability negligence action falls within the framework of negligence principles. *Blue v. Environmental Engineering, Inc.*, 215 Ill.2d 78, 828 N.E.2d 1128, 1140, 293 Ill.Dec. 630 (2005). Thus, the injury must be related to some specific misconduct in the design, manufacture, or distribution of the product. For example, testimony from the plaintiff's expert concerning design defects was not sufficient to establish breach of a standard of care in a negligence claim. *Cornstubble v. Ford Motor Co.*, 178 Ill.App.3d 20, 532 N.E.2d 884, 127 Ill.Dec. 55 (5th Dist. 1988).

In a claim involving a manufacturing defect, the defendant may show due care by offering evidence of an inspection or quality control program. If the defendant's manufacturing procedures are determined to be reasonable by a jury, the plaintiff may be defeated even if there is no question of the existence of a defect. Additionally, the defense may offer evidence of a lack of other accidents to establish the validity of the manufacturing and inspection procedures. The obvious argument is then that the product in litigation contained a defect in spite of the existence of reasonable care in its manufacture.

In a negligent design case, the risk-utility test is not applicable. *Blue, supra*. A plaintiff must establish that the defendant deviated from the standard of care of other manufacturers at the time the product was designed. 828 N.E.2d at 1141. The defendant may want to introduce evidence of the hours spent and number of people involved with the development and design of the product as well as testing and other efforts that may have been employed. Similarly, compliance with government or industry standards, regulations, or guidelines may be important.

Whether dealing with strict liability or negligence, it is important to bear in mind that sole proximate cause remains a viable defense approach to defeating a product liability claim. If it can be established that the sole proximate cause of the injury is attributable to the conduct of the plaintiff or some third party, liability will not attach regardless of whether issues revolve around assumption of the risk in a strict liability context or comparative negligence in a negligence action. *Dugan v. Sears, Roebuck & Co.*, 113 Ill.App.3d 740, 454 N.E.2d 64, 73 Ill.Dec. 320 (1st Dist. 1983).

Also, a manufacturer was not negligent as a matter of law when a hydraulic hose burst on a 33-year-old machine, spraying the plaintiff with oily hydraulic fluid. The defendant was not required to use hoses that were impervious to cuts and the wear and tear of old age. *Oquendo v. Teledyne Pines*, 235 Ill.App.3d 463, 602 N.E.2d 56, 176 Ill.Dec. 749 (1st Dist. 1992).

In a negligence case, liability will not attach by merely being in the distributive chain. Rather, the defendant's liability is judged by its own misconduct and not vicariously from that of another. A typical example of this situation is the contract manufacturer who fabricates a product pursuant to another's design. If the claim is predicated on dangerous design, no liability will attach to the fabricator. In *Hunt v. Blasius*, 74 Ill.2d 203, 384 N.E.2d 368, 23 Ill.Dec. 574 (1978), the Illinois Supreme Court affirmed summary judgment for a contractor who manufactured a highway signpost pursuant to state-mandated specifications. The opinion noted:

**An independent contractor owes no duty to third persons to judge the plans, specifications or instructions which he has merely contracted to follow. If the contractor carefully carries out the specifications provided him, he is justified in relying upon the adequacy of the specifications unless they are so obviously dangerous that no competent contractor would follow them.** 384 N.E.2d at 371.

It has also been held that a retailer has no duty to inspect or discover a defect in a product it sells. The court in *Rahn v. Gerdts*, 119 Ill.App.3d 781, 455 N.E.2d 807, 74 Ill.Dec. 378 (3d Dist. 1983), affirmed dismissal of a negligence claim against the commercial seller of a used recreational vehicle that later burned. Similarly, a forklift distributor had no duty to pass on information about safety improvements made by the manufacturer, notwithstanding the manufacturer's encouragement to do so. *Rogers v. Clark Equipment Co.*, 318 Ill.App.3d 1128, 744 N.E.2d 364, 253 Ill.Dec. 82 (2d Dist. 2001).

## **B. [4.46] Comparative Negligence**

Illinois follows modified comparative fault, which provides that a plaintiff would be barred from recovering damages if the trier of fact finds that the plaintiff's contributory fault is more

than 50 percent of the proximate cause of the injury. If the plaintiff's fault was less than 50 percent of the combined fault, the damages are reduced in proportion to the amount of fault attributable to the plaintiff. I.P.I. — Civil No. B10.03.

When analyzing a plaintiff's comparative negligence, the focus is on the plaintiff's conduct in relation to the plaintiff's use of the product. Unlike assumption of the risk in a strict liability claim, which is judged by a plaintiff's own subjective knowledge of the risk, under negligence, the plaintiff's conduct is judged against a "reasonable man" standard.

A historical analysis of product cases involving contributory negligence is helpful. For example, it is incompatible with the exercise of due care for one's own safety to expose oneself to dangers of which one should be aware. *Fore v. Vermeer Manufacturing Co.*, 7 Ill.App.3d 346, 287 N.E.2d 526 (3d Dist. 1972); *Bitner v. Lester B. Knight & Associates, Inc.*, 16 Ill.App.3d 857, 307 N.E.2d 136 (3d Dist. 1974). When a plaintiff placed his hand in an open corn picker, he was guilty of contributory negligence as a matter of law. *Francis v. Francis*, 9 Ill.App.3d 90, 291 N.E.2d 857 (3d Dist. 1973). See also *Wills v. Paul*, 24 Ill.App.2d 417, 164 N.E.2d 631 (3d Dist. 1960). When the plaintiff's decedent voluntarily touched an exposed electrical wire, he may have been guilty of contributory negligence. *Cratsley v. Commonwealth Edison Co.*, 38 Ill.App.3d 55, 347 N.E.2d 496 (1st Dist. 1976).

### C. Statutes of Limitation

#### 1. [4.47] Two-Year Personal Injury Limitation

As with strict liability and warranty claims, 735 ILCS 5/13-202 requires that suit be commenced within two years of the personal injury.

#### 2. [4.48] Five-Year Personal Property Damage Limitation

All claims for personal property damage must be filed within five years of accrual of the cause of action pursuant to 735 ILCS 5/13-205.

## V. DAMAGES

### A. [4.49] Recovery of Economic Loss

The RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998) follows Illinois and the majority of jurisdictions in providing that economic loss is generally not recoverable under strict liability or negligence. Section 21 provides for the recovery of economic loss only if there is harm to "(a) the plaintiff's person; or (b) the person of another when harm to the other interferes with an interest of the plaintiff protected by tort law; or (c) the plaintiff's property other than the defective product itself." Therefore, a disappointed consumer must seek remedies under the Uniform Commercial Code rather than tort theories. *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill.2d 69, 435 N.E.2d 443, 61 Ill.Dec. 746 (1982).

In analyzing a case, consideration must be given to whether the damages being sought are economic or contractual in nature, thereby limiting a plaintiff to remedies under the Uniform Commercial Code. *Moorman* gives some guidance as to what constitutes “economic loss.” “Economic loss” is that damage that occurs when the defect is qualitative in nature and the harm relates to a consumer’s expectation that the product is of a particular quality so that it is fit for ordinary use. 435 N.E.2d at 451. Consideration must be given to the nature of the defect and the manner in which the damage occurred. When the incident involves some violence or collision, the resulting loss is most likely property damage recoverable under a tort theory. However, when the damage to the product results from deterioration, internal breakage, or non-accidental causes, it is to be treated as non-tortious economic loss.

While the concept of economic loss seems relatively simple, its application can be difficult, involving various factors. Allegedly defective siding leading to premature deterioration involved purely economic damages. *Foxcroft Townhome Owners Ass’n v. Hoffman Rosner Corp.*, 96 Ill.2d 150, 449 N.E.2d 125, 70 Ill.Dec. 251 (1983). Similarly, a disappointed purchaser of a house could not recover under a tort negligence theory for premature deterioration caused by inferior workmanship. *Redarowicz v. Ohlendorf*, 92 Ill.2d 171, 441 N.E.2d 324, 65 Ill.Dec. 411 (1982). Nor could a computer purchaser recover lost profits, salary, office supplies, and accounting and legal expenses incurred as a result of the failure of the computer system to function as expected. *Black, Jackson & Simmons Insurance Brokerage, Inc. v. International Business Machines Corp.*, 109 Ill.App.3d 132, 440 N.E.2d 282, 64 Ill.Dec. 730 (1st Dist. 1982). Lost business and profits could not be recovered under a negligence theory following a spill of flammable liquid that blocked access to the plaintiff’s business during cleanup efforts. *Dundee Cement Co. v. Chemical Laboratories, Inc.*, 712 F.2d 1166 (7th Cir. 1983). An electrical subcontractor’s claim for additional costs in redoing work involved purely economic losses, precluding recovery under a tort theory. *Anderson Electric, Inc. v. Ledbetter Erection Corp.*, 115 Ill.2d 146, 503 N.E.2d 246, 104 Ill.Dec. 689 (1986). The purchaser of a dry-ice crusher seeking to recover lost profits, lost business, and damage to reputation and goodwill resulting from defects in the machine that led to the contamination of the purchaser’s bakery products could not proceed under a negligence theory as it sought to recover only economic damages. *Cloverhill Pastry-Vend Corp. v. Continental Carbonics Products, Inc.*, 214 Ill.App.3d 526, 574 N.E.2d 80, 158 Ill.Dec. 286 (1st Dist. 1991).

#### **B. [4.50] Recovery for Mental Anguish and Emotional Distress**

Emotional distress damages are frequently sought by plaintiffs in product liability cases. The Illinois Supreme Court has overruled the impact requirement for recovery of emotional distress damages by adopting the “zone-of-physical-danger rule.” *Rickey v. Chicago Transit Authority*, 98 Ill.2d 546, 457 N.E.2d 1, 5, 75 Ill.Dec. 211 (1983). A bystander who is in a zone of physical danger and has reason to fear for his or her safety because of the defendant’s negligence has a right of action for personal injury or illness resulting from emotional distress. Although the rule does not require the bystander to suffer a physical impact or injury at the time of the occurrence, it does require the plaintiff to have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk of physical impact to the plaintiff. However, the court applied the rule only to a negligence action and not to strict liability. Following the logic of *Woodill v. Parke Davis & Co.*, 79 Ill.2d 26, 402 N.E.2d 194, 37 Ill.Dec.

304 (1980), the court in *Rickey* determined that strict liability should not be extended to include a recovery for emotional distress and mental anguish. Similarly, the court in *Rahn v. Gerdts*, 119 Ill.App.3d 781, 455 N.E.2d 807, 74 Ill.Dec. 378 (3d Dist. 1983), affirmed dismissal of strict liability claims when the only damages sought related to emotional and psychological injuries. The Supreme Court again addressed the issue in *Pasquale v. Speed Products Engineering*, 166 Ill.2d 337, 654 N.E.2d 1365, 1373, 211 Ill.Dec. 314 (1995), and held that there could be no recovery for emotional distress in a strict liability case. It noted that fault is an “indispensable element” of a claim for emotional distress, but the doctrine of strict liability is founded not on fault but rather on the defendant’s being in the distributive chain of a product. *Id.*

### C. [4.51] Punitive Damages

Occasionally, plaintiffs may seek punitive damages in a product liability case. However, pursuant to 735 ILCS 5/2-604.1, in all actions on account of bodily injury or physical damage to property based on negligence or product liability based on strict tort liability, no complaint can be filed with a prayer seeking punitive damages. Rather, the plaintiff must file a pretrial motion and the court must conduct a hearing to see if there is “a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages.” *Id.* The motion is to be made not later than 30 days after the close of discovery.

Punitive damages are not intended as compensation or supplementary awards but rather are intended to punish defendants and to deter others from similar behavior. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L.Ed.2d 789, 94 S.Ct. 2997 (1974). Punitive damages are not favored in the law, and Illinois courts recognize that they should not be unwisely awarded. *Proctor v. Davis*, 291 Ill.App.3d 265, 682 N.E.2d 1203, 225 Ill.Dec. 126 (1st Dist. 1997). The willful or wanton standard for imposition of punitive damages requires that a plaintiff establish “the defendant’s intent to inflict injury or a ‘callous disregard for whether injury will occur.’” *In re Salmonella Litigation*, 198 Ill.App.3d 809, 556 N.E.2d 593, 599, 144 Ill.Dec. 915 (1st Dist. 1990), quoting *Del Muro v. Commonwealth Edison Co.*, 124 Ill.App.3d 473, 464 N.E.2d 772, 778, 79 Ill.Dec. 868 (1st Dist. 1984). It cannot logically be asserted that the defendant’s intent or callous disregard exists when it complied with applicable government standards or guidelines. Some illustrations from other jurisdictions are *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496 (8th Cir. 1993) (pneumatic nailer complied with industry standard); *Boyette v. L.W. Looney & Son, Inc.*, 932 F.Supp. 1344 (D. Utah 1996) (polyurethane foam complied with OSHA standards); *Chrysler Corp. v. Wolmer*, 499 So.2d. 823 (Fla. 1986) (auto complied with federal motor vehicle safety standards regarding fuel system integrity); *Brand v. Mazda Motor Corp.*, 978 F.Supp. 1382 (D.Kan. 1997) (compliance with federal motor vehicle safety standards relating to seat belts); and *Miles v. Ford Motor Co.*, 922 S.W.2d 572 (Tex.App. 1996) (compliance with federal motor vehicle safety standards related to restraint system), *aff’d in part, rev’d in part on other grounds*, 967 S.W.2d 377 (Tex. 1998).

*Loitz v. Remington Arms Co.*, 138 Ill.2d 404, 563 N.E.2d 397, 150 Ill.Dec. 510 (1990), illustrates the caution employed by Illinois courts when facing punitive damage issues. In *Loitz*, the Illinois Supreme Court held that the defendant’s knowledge of 94 prior accidents did not establish a flagrant indifference to public safety or willful and wanton misconduct. In reversing a punitive damage award, it noted that conduct justifying punitive damages must approach the degree of moral blame associated with intentional harm.

The U.S. Supreme Court has become increasingly restrictive with respect to punitive damages. In *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 134 L.Ed.2d 809, 116 S.Ct. 1589 (1996), the Court announced three considerations for determining whether the size of a punitive damage award violates the U.S. Constitution: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and the amount of the punitive damage award; and (3) the difference between the punitive damage award and the civil penalties authorized or imposed in comparable cases. Thereafter, in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 149 L.Ed.2d 674, 121 S.Ct. 1678 (2001), the Court modified the analysis by giving appellate courts expanded authority of de novo review of punitive damage awards. The Court also held that there could be a constitutional basis for challenging a punitive damage award in the excessive fines clause of the Eighth Amendment. Although not involving a product liability claim, the Court also vacated a \$145 million punitive damage award as unconstitutionally excessive in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 155 L.Ed.2d 585, 123 S.Ct. 1513 (2003). *State Farm* discusses the relationship between compensatory and punitive damages, suggesting that single-digit multipliers of compensatory damage awards might be more constitutionally sound than the 145:1 ratio in that case.

## VI. SPECIAL SITUATIONS

### A. [4.52] Spoliation of Evidence

Damage to or destruction of evidence has been an increasingly active area of product liability litigation. It typically involves either loss or alteration of the allegedly defective product or an important component part. When it is done by the plaintiff or an opposing expert, the defendant may be entitled to dismissal or summary judgment in its favor if substantial prejudice can be established.

Spoliation of evidence is not an independent tort but can establish the basis of a negligence action. *Boyd v. Travelers Insurance Co.*, 166 Ill.2d 188, 652 N.E.2d 267, 209 Ill.Dec. 727 (1995), involved a claim by a man injured in an explosion caused by propane gas escaping from a heater manufactured by the defendant. After the plaintiff received workers' compensation benefits, his employer's carrier took possession of the heater for inspection and testing. When the plaintiff asked the carrier to return the heater, it could not be located. The plaintiff then sued the carrier for negligent and intentional spoliation of evidence. The Supreme Court recognized that there is a duty to preserve evidence when a reasonable person should foresee that it would be material to a potential action. The case was remanded with directions to proceed on a negligence theory and try the spoliation issue concurrently with the underlying case so one jury could resolve all claims fairly and consistently.

*Allstate Insurance Co. v. Sunbeam Corp.*, 865 F.Supp. 1267 (N.D.Ill. 1994), was a subrogation product liability action against a gas grill manufacturer following a fire at the plaintiff's insured's house. An adjuster told the insured to throw everything away except a gas tank attached to the grill that was believed to have been the cause of the fire. However, a defense expert testified that it was impossible to determine the origin of the fire from the parts that were

preserved. As the carrier knew that subrogation against the manufacturer was a possibility, dismissal was warranted. Similarly, *American Family Insurance Co. v. Village Pontiac GMC, Inc.*, 223 Ill.App.3d 624, 585 N.E.2d 1115, 166 Ill.Dec. 93 (2d Dist. 1992), resulted in an order barring the plaintiff from presenting evidence concerning the cause of a car fire due to its destruction of evidence. As the plaintiff was unable to establish a prima facie case, summary judgment was entered for the defendants. The court noted that an expert should not be permitted to destroy evidence and then substitute the expert's own description of it. Similarly, the court in *Graves v. Daley*, 172 Ill.App.3d 35, 526 N.E.2d 679, 122 Ill.Dec. 420 (3d Dist. 1988), affirmed dismissal of a subrogation action against a furnace manufacturer and seller following a fire when the plaintiff's expert prepared a report implicating the furnace three or four months after the fire and thereafter destroyed the furnace. Suit was filed five months later. See also *Ralston v. Casanova*, 129 Ill.App.3d 1050, 473 N.E.2d 444, 85 Ill.Dec. 76 (1st Dist. 1984), in which the court affirmed summary judgment for the defendant after the plaintiff's attorney performed destructive testing.

The destruction of evidence need not be intentional. In *Argueta v. Baltimore & Ohio Chicago Terminal R.R.*, 224 Ill.App.3d 11, 586 N.E.2d 386, 166 Ill.Dec. 428 (1st Dist. 1991), the court barred admission of a metallurgical report analyzing a spindle pin that fractured and caused a railroad car wheel to come off. Although the pin was inadvertently lost, the railroad was aware of the impending lawsuit, and the trial court had discretion to conclude that other parties were prejudiced by the inability to conduct their own tests. The court in *Stegmiller v. H.P.E., Inc.*, 81 Ill.App.3d 1144, 401 N.E.2d 1156, 37 Ill.Dec. 63 (1st Dist. 1980), affirmed dismissal of a wrongful death claim as a discovery sanction because the plaintiff's attorney lost the allegedly defective swimming pool filter when he moved his office to a new location. In *Stinnes Corp. v. Kerr-McGee Coal Corp.*, 309 Ill.App.3d 707, 722 N.E.2d 1167, 243 Ill.Dec. 98 (5th Dist. 1999), the court permitted a manufacturer to sue an injured worker's employer for negligent spoliation of evidence for failing to preserve certain parts of the machine involved in the accident. The court in *Schusse v. Pace Suburban Bus Division of Regional Transportation Authority*, 334 Ill.App.3d 960, 779 N.E.2d 259, 268 Ill.Dec. 645 (1st Dist. 2002), permitted an employee and the defendant manufacturer to sue the plaintiff's employer for spoliation after it discarded a bus seat five months after the accident.

*Marrocco v. General Motors Corp.*, 966 F.2d 220 (7th Cir. 1992), was a consolidated appeal of two product liability cases. In *Marrocco*, the plaintiffs claimed that a defective rear axle broke and thereby caused the accident, while the manufacturer claimed that the broken axle was a result of the impact. Despite a protective order, the plaintiffs' experts dismantled the rear axle bearing assembly, which permanently altered its condition. The trial judge's dismissal of the case as a sanction was affirmed. In the companion case (*Jones v. Goodyear Tire & Rubber Co.*), the manufacturer violated a pretrial protective order when a side ring on a truck rim was lost during shipment to its headquarters, where the ring was to be examined. The court held that sanctions are not limited solely to situations in which the noncompliance is willful or deliberate.

In *Kambylis v. Ford Motor Co.*, 338 Ill.App.3d 788, 788 N.E.2d 1, 272 Ill.Dec. 697 (1st Dist. 2003), the court affirmed a summary judgment against the plaintiff, who had failed to take steps to avoid destruction of a Ford Escort that was a subject of the product liability suit. After a rear-end accident in which the plaintiff alleged that the vehicle's airbags failed to deploy, the City of



Chicago impounded the vehicle and served notice on the plaintiff's mother that it would be destroyed if not retrieved from the impound lot. Nothing was done, and the car was destroyed. Since the plaintiff knew where the evidence was located and had authority to prevent its destruction, the plaintiff breached his duty to preserve the evidence.

#### **B. [4.53] Nonmanufacturing Defendants in Strict Liability**

Pursuant to 735 ILCS 5/2-621, a nonmanufacturing defendant may certify by affidavit the manufacturer or manufacturers of a particular product. After the manufacturer has or is required to have answered or pleaded, a certifying nonmanufacturing defendant will be dismissed from the suit unless that defendant exerted significant control over the product design or manufacture; provided product warnings or instructions to the manufacturer relative to the alleged defect in the product that resulted in death, injury, or damage; had actual knowledge of the defect; or created the defect. A plaintiff may reinstate a certifying nonmanufacturing defendant upon a showing that (1) the applicable statute of repose or limitation against the manufacturer expired; (2) the manufacturer is no longer existent, cannot be subject to the jurisdiction of Illinois courts, or is not amenable to the service of process; or (3) the manufacturer would not be able to satisfy a judgment or reasonable settlement. The statute is considered substantive law and therefore applies to cases in federal court. *LaRoe v. Cassens & Sons, Inc.*, 472 F.Supp.2d 1041 (S.D.Ill. 2006); *Farris v. Satzinger*, 681 F.Supp. 485 (N.D.Ill. 1987).

*Miller v. Dvornik*, 149 Ill.App.3d 883, 501 N.E.2d 160, 103 Ill.Dec. 139 (1st Dist. 1986), included strict liability and negligence claims against a motorcycle retailer and manufacturer. The retailer moved to dismiss the strict liability claim based on the certification procedures and on the grounds that it had no duty under a negligence theory to install crash bars or warn of patent risks. The First District affirmed dismissal of both theories. Even if the retailer knew that there were no crash bars on the motorcycle, that fact would not prevent dismissal pursuant to the certification procedures. Also, as an adult is expected to know the hazards of riding a motorcycle, the plaintiff failed to allege a defect, and the retailer could not be liable under a negligence theory. Similar logic was employed in *Murphy v. Mancari's Chrysler Plymouth, Inc.*, 381 Ill.App.3d 768, 887 N.E.2d 569, 320 Ill.Dec. 425 (1st Dist. 2008), in which a plaintiff attempted to avoid certification by alleging that the defendant car dealer was aware that the car did not have a roll bar. The court held that the allegation said only that the defendant had knowledge of a physical characteristic of the product but not knowledge that the characteristic made the product unreasonably dangerous.

In *Saieva v. Budget Rent-A-Car of Rockford*, 227 Ill.App.3d 519, 591 N.E.2d 507, 169 Ill.Dec. 334 (2d Dist. 1992), certification was applied to a van rental agency. The Illinois Supreme Court in *Lamkin v. Towner*, 138 Ill.2d 510, 563 N.E.2d 449, 150 Ill.Dec. 562 (1990), held that a window frame and screen retailer was entitled to dismissal after the manufacturer answered the complaint as there was no issue as to the retailer's actual knowledge or creation of the alleged defect. In *Thomas v. Unique Food Equipment Inc.*, 182 Ill.App.3d 278, 537 N.E.2d 1375, 130 Ill.Dec. 906 (1st Dist. 1989), the court refused to allow a plaintiff to add a nonmanufacturing defendant when the manufacturer could not be sued due to the expiration of a statute of limitations because the nonmanufacturing defendant was not timely sued.

The dismissal motion of a non-manufacturer requires only certification of the manufacturer's identity. It does not need to affirmatively state lack of knowledge or control or that the non-manufacturer did not create the defect. *Logan v. West Coast Cycle Supply Co.*, 197 Ill.App.3d 185, 553 N.E.2d 1139, 143 Ill.Dec. 153 (2d Dist. 1990), included strict liability, negligence, and breach of warranty claims against the distributor and manufacturer of a bicycle. The plaintiff initially obtained service on the retailer but not on the manufacturer, and the retailer invoked the protection of §2-621 of the Civil Practice Law. Thirty-nine months later, and nineteen months after the statute of limitations had expired, service was obtained on the manufacturer, who was dismissed based on lack of diligence in serving summons. The trial court held that it would not penalize the defendant retailer for the plaintiff's failure to timely obtain service, and it was properly dismissed by certifying the manufacturer's correct identity.

### C. [4.54] Distributors and Middlemen

A middleman or distributor can be responsible under strict liability even though the product passed unopened through its warehouse. *Dunham v. Vaughan & Bushnell Mfg. Co.*, 42 Ill.2d 339, 247 N.E.2d 401 (1969). Strict liability can also attach even if the middleman or distributor did not actually ever have the product within its possession. *Little v. Maxam, Inc.*, 310 F.Supp. 875 (S.D.Ill. 1970).

Negligence actions are rarely applicable against retailers or middlemen. While all suppliers must exercise reasonable care to prevent foreseeable dangers, difficulties of proof are formidable. Rarely has a middleman been in a position in which it knew or should have known of a danger and been able to effect a change. Neither the Illinois Supreme Court nor any appellate court has gone so far as to place a duty to inspect or discover defective conditions of products on distributors or middlemen. *Rahn v. Gerdts*, 119 Ill.App.3d 781, 455 N.E.2d 807, 74 Ill.Dec. 378 (3d Dist. 1983). Similarly, there is no common-law duty on a product distributor to give notice of safety improvements for products that were not defective or unreasonably dangerous as built. *Rogers v. Clark Equipment Co.*, 318 Ill.App.3d 1128, 744 N.E.2d 364, 253 Ill.Dec. 82 (2d Dist. 2001).

Negligence claims are rarely applicable to parties other than the manufacturer or other entity that created the danger. *Bittler v. White & Co.*, 203 Ill.App.3d 26, 560 N.E.2d 979, 148 Ill.Dec. 382 (1st Dist. 1990), included strict liability and negligence claims against the manufacturer, the designer, and the exclusive sales agent of a truck-mounted vacuum loader. It was held that the sales agent could be liable under strict liability but not under a negligence theory.

### D. [4.55] Jurisdiction over Foreign Manufacturers

The world continues to move toward a global economy. This growing international economic interchange has subjected foreign corporations to litigation in the United States at a dramatically increasing level. However, not all products that reach Illinois will make a foreign corporation subject to our jurisdiction. Although 735 ILCS 5/2-209, the "long-arm statute," can reach worldwide, there must be sufficient minimum contacts with Illinois to accord due process to a defendant. In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 62 L.Ed.2d 490, 100

S.Ct. 559 (1980), the Supreme Court held that a defendant that did not avail itself of the privileges and benefits of the forum state's law was not subject to the state's jurisdiction. *See also Asahi Metal Industry Co. v. Superior Court of California, Solano County*, 480 U.S. 102, 94 L.Ed.2d 92, 107 S.Ct. 1026 (1987); *Gould v. P.T. Krakatau Steel*, 957 F.2d 573 (8th Cir. 1992).

*Wiles v. Morita Iron Works Co.*, 125 Ill.2d 144, 530 N.E.2d 1382, 125 Ill.Dec. 812 (1988), involved a claim against a Japanese company that manufactured a machine sold to a New Jersey corporation that had an industrial plant in Illinois. The plaintiff was injured on the machine at the Illinois plant. Service was obtained on the manufacturer in Japan, and the trial court quashed service and dismissed the case. The Illinois Supreme Court held that there was insufficient contact with Illinois to subject the Japanese corporation to its jurisdiction. The defendant did nothing to avail itself of the privilege of conducting activities in Illinois and, therefore, would not be subject to jurisdiction. Similarly, the court in *Morris v. Halsey Enterprises Co.*, 379 Ill.App.3d 574, 882 N.E.2d 1079, 317 Ill.Dec. 923 (1st Dist. 2008), held that the Taiwanese manufacturer of a ceiling fan was not subject to jurisdiction in Illinois even though it sold its product directly to an Illinois corporation that distributed it nationally. In *Dickie v. Cannondale Corp.*, 388 Ill.App.3d 903, 905 N.E.2d 888, 329 Ill.Dec. 50 (1st Dist. 2009), the appellate court affirmed dismissal of a Taiwanese manufacturer of clipless bicycle pedals who sold them to a Taiwanese trading company and had no control or knowledge regarding distribution of the pedals.

#### **E. [4.56] Real Estate and Products Incorporated Therein**

Strict liability in tort is not applicable to personal injuries or damages caused by defects in real estate even if the real estate is used for commercial purposes. Thus, a plaintiff who fell from the window of a shelter care facility could not recover under a strict liability theory. *Immergluck v. Ridgeview House, Inc.*, 53 Ill.App.3d 472, 368 N.E.2d 803, 11 Ill.Dec. 252 (1st Dist. 1977). Nor did strict liability apply when a customer fell from a commercial parking garage deck (*Lowrie v. City of Evanston*, 50 Ill.App.3d 376, 365 N.E.2d 923, 8 Ill.Dec. 537 (1st Dist. 1977)), to condominiums or their component parts (*Heller v. Cadral Corp.*, 84 Ill.App.3d 677, 406 N.E.2d 88, 40 Ill.Dec. 387 (1st Dist. 1980)), or against a vendor of real estate for an allegedly defective stairway (*Chapman v. Lily Cache Builders, Inc.*, 48 Ill.App.3d 919, 362 N.E.2d 811, 6 Ill.Dec. 176 (3d Dist. 1977)).

If a product is subsequently incorporated into a building and becomes an indivisible part of the entire building structure, it will not be considered a separate product for purposes of strict liability. Thus, the manufacturer of a guardrail was not responsible under strict liability in a claim by a worker who fell at a construction site. *Walker v. Shell Chemical, Inc.*, 101 Ill.App.3d 880, 428 N.E.2d 943, 57 Ill.Dec. 263 (1st Dist. 1981). A specially manufactured overhead rail crane was considered an improvement to real estate rather than a product, and therefore strict liability and negligence claims were dismissed on the basis of the four-year repose statute applicable to real estate improvements. *Witham v. Whiting Corp.*, 975 F.2d 1342 (7th Cir. 1992). An escalator manufacturer was able to invoke the construction repose statute in a product liability negligence action for injuries sustained when the escalator suddenly stopped, throwing the defendant down. *Adcock v. Montgomery Elevator Co.*, 274 Ill.App.3d 519, 654 N.E.2d 631, 211 Ill.Dec. 169 (1st Dist. 1995). However, the construction repose statute did not apply to standard building products generally available to the public. *Illinois Masonic Medical Center v. AC & S*, 266 Ill.App.3d 631, 640 N.E.2d 31, 203 Ill.Dec. 604 (1st Dist. 1994).

When defending a case involving a product incorporated into real estate, counsel should be aware of 735 ILCS 5/8-1801. This statute provides that if any work or service on real estate or any product incorporated therein does not cause injury or property damage within six years, this will be “presumptive proof” that the work or service was properly performed, manufactured, or designed. There is some question as to the meaning of “presumptive” as used in the statute, but the statute is in effect and should be considered in an applicable case.

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §19 (1998) defines a “product” as “tangible personal property.” Real property would be considered a “product” only when the context of distribution and use is sufficiently analogous to the distribution and use of personal property that the rules might apply. Therefore, if adopted, this provision should not change existing Illinois law.

#### **F. [4.57] Federal Preemption**

The doctrine of federal preemption is based on the Supremacy Clause of the United States Constitution, art. VI, cl. 2. The doctrine allows Congress to address problems of national scope by enacting comprehensive legislation that prevents state regulation in a given area. The preemption may be expressly provided in the legislation or may be implied through a determination of congressional intent. In the absence of explicit statutory language, Congress implicitly may indicate an intent to occupy a given field to the exclusion of state law. Understandably, preemption appears in those areas in which Congress has been most active, including drugs, medical devices, cigarettes, automobiles, and chemicals. Congress may also authorize federal administrative agencies to preempt state laws by the promulgation of administrative regulations. Once promulgated, those regulations have no less preemptive effect than federal statutes.

It is important to remember that federal preemption is in the nature of an affirmative defense rather than jurisdictional. Therefore, it must be raised at an appropriate time at the trial level. The Illinois Supreme Court in *Haudrich v. Howmedica, Inc.*, 169 Ill.2d 525, 662 N.E.2d 1248, 215 Ill.Dec. 108 (1996), refused to allow the manufacturer of an allegedly defective knee prosthesis to assert preemption by the Medical Device Amendments of 1976 to the Federal Food, Drug, and Cosmetic Act, specifically, 21 U.S.C. §§351 – 360, because the doctrine had not been raised at trial.

**Motor vehicles.** The National Traffic and Motor Vehicle Safety Act of 1966, 49 U.S.C. §30101, *et seq.*, has been held to preempt state law in a number of areas involving automobile design. In *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), the court affirmed summary judgment for an auto manufacturer against a claim that its vehicle was defective for failing to install air bags or some other passive restraint. Similar results were reached in *Cox v. Baltimore County*, 646 F.Supp. 761 (D.Md. 1986), *Vanover v. Ford Motor Co.*, 632 F.Supp. 1095 (E.D.Mo. 1986), and *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989). The court in *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir. 1990), held that the plaintiff’s no-air-bag claim was preempted but that her claim that a police van was defective because it did not contain window netting was not barred. The court reasoned that there was no federal standard that directly conflicted with this design claim. In *Hurley v. Motor Coach Industries, Inc.*, 222 F.3d 377 (7th Cir. 2000), the court held that a claim that a passenger bus was unreasonably dangerous

was preempted by federal crashworthiness standards. In *Hilst v. General Motors Corp.*, 305 Ill.App.3d 792, 713 N.E.2d 99, 238 Ill.Dec. 853 (3d Dist. 1999), the court held that federal preemption applied in a claim against an auto manufacturer that did not have an air bag in its vehicle. Similarly, the U.S. Supreme Court held in *Geier v. American Honda Motor Co.*, 529 U.S. 861, 146 L.Ed.2d 914, 120 S.Ct. 1913 (2000), that an air bag claim was preempted as it conflicted with the Department of Transportation's standards. In *Mejia v. White GMC Trucks, Inc.*, 336 Ill.App.3d 702, 784 N.E.2d 345, 271 Ill.Dec. 127 (1st Dist. 2002), the court affirmed a partial summary judgment for the defense. The plaintiff had alleged that a truck was unreasonably dangerous because the door was flimsy and had an exposed handle. The court noted that the federal safety standards prescribed pursuant to the National Traffic and Motor Vehicle Safety Act specify requirements for door locks and related equipment, and, therefore, the plaintiff's common-law tort claim was implicitly preempted because it conflicted with the provisions of the Act.

Preemption can also have an effect on the admissibility of evidence. In *Hilst, supra*, it was alleged that the plaintiff's injuries were caused by the lack of an air bag, the failure of a seat belt, and an alleged defective steering wheel. The manufacturer received summary judgment on the air bag claim as federal regulations in effect at the time of manufacture did not require them. The case went to trial on the remaining issues, and the manufacturer successfully moved in limine to preclude the plaintiff from arguing airbags were a feasible alternative design. The trial court's ruling was affirmed.

**Medical devices.** *Riegel v. Medtronic, Inc.*, \_\_\_ U.S. \_\_\_, 169 L.Ed.2d 892, 128 S.Ct. 999 (2008), involved a design-defect claim concerning a Class III medical device that was approved for marketing by the FDA after an extensive pre-market review process. The Court found that the Medical Device Amendments of 1976 to the Federal Food, Drug and Cosmetic Act expressly preempted the suit. Following this precedent, the court in *McCutcheon v. Zimmer Holdings, Inc.*, 586 F.Supp.2d 917 (N.D.Ill. 2008), affirmed summary judgment on a claim against an artificial knee device manufacturer, holding that the plaintiff's claims were preempted. *See also Horn v. Thoratec Corp.*, 376 F.3d 163 (3d Cir. 2004); *Martin v. Medtronic, Inc.*, 254 F.3d 573 (5th Cir. 2001); *Gomez v. St. Jude Medical Daig Division Inc.*, 442 F.3d 919 (5th Cir. 2006); *Brooks v. Howmedica, Inc.*, 273 F.3d 785 (8th Cir. 2001); *Kemp v. Medtronic, Inc.*, 231 F.3d 216 (6th Cir. 2000); *Mitchell v. Collagen Corp.*, 126 F.3d 902 (7th Cir. 1997).

**Insecticides.** In *Traube v. Freund*, 333 Ill.App.3d 198, 775 N.E.2d 212, 266 Ill.Dec. 650 (5th Dist. 2002), the court held that "section 136v(b) of [the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §136, *et seq.*,] expressly preempts any state-law claim that directly or indirectly challenges the adequacy of the warnings or other information on a pesticide's approved product label," in this case, an agricultural pesticide that ran off a nearby field and contaminated the plaintiff's lake, resulting in a fish kill. This Act is a comprehensive federal statute that regulates the use, sale, and labeling of pesticides and requires the registration with the Environmental Protection Agency of all pesticides sold in the United States.

**Other products.** Preemption has also been found to apply to a number of other areas, including cigarette warnings (*Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 120 L.Ed.2d 407, 112 S.Ct. 2608 (1992)), tampon warnings (*Cornelison v. Tambrands, Inc.*, 710 F.Supp. 706 (D.Minn. 1989); *Moore v. Kimberly-Clark Corp.*, 867 F.2d 243 (5th Cir. 1989); *Stewart v. International Playtex, Inc.*, 672 F.Supp. 907 (D.S.C. 1987)), and chemicals in paint stripper (*Busch v. Graphic Color Corp.*, 169 Ill.2d 325, 662 N.E.2d 397, 214 Ill.Dec. 831 (1996)).

Additional cases involving successful federal preemption claims include *Lindquist v. Tambrands, Inc.*, 721 F.Supp. 1058 (D.Minn. 1989) (tampons); *Poloney v. Tambrands, Inc.*, 260 Ga. 850, 412 S.E.2d 526 (1991) (same); *King v. E.I. DuPont de Nemours & Co.*, 996 F.2d 1346 (1st Cir. 1993) (herbicides); *Taylor AG Industries v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995) (same); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 959 F.2d 158 (10th Cir.), *vacated*, 113 S.Ct. 314 (1992), *adhered to on remand*, 981 F.2d 1177 (10th Cir. 1993) (pesticides); *Shields v. Outboard Marine Corp.*, 776 F.Supp. 1579 (M.D.Ga. 1991) (absence of boat propeller guards); *Mowery v. Mercury Marine, Division of Brunswick Corp.*, 773 F.Supp. 1012 (N.D. Ohio 1991) (same); *Bice v. Leslie's Poolmart, Inc.*, 39 F.3d 887 (8th Cir. 1994) (swimming pool chemical).

#### **G. [4.58] Federal Government Contractor Defense**

Each year, the United States government spends billions of dollars purchasing a vast variety of military products from the private sector. Many of these products are fabricated pursuant to federal government specifications with which the contractor must comply. When a member of the armed forces sustains injury while using military products, plaintiffs' attorneys may attempt to seek recovery from the government contractor.

In 1950, the United States Supreme Court ruled that the federal government could not be subject to liability under the Federal Tort Claims Act to a member of the military who sustains an injury while on active duty. *Feres v. United States*, 340 U.S. 135, 95 L.Ed. 152, 71 S.Ct. 153 (1950). In 1977, governmental immunity was extended to insulate the United States from a contribution claim by a manufacturer who had to pay damages to a member of the armed forces injured during military service, allegedly due to defective equipment. *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 52 L.Ed.2d 665, 97 S.Ct. 2054 (1977). Government contractors were thus put in the untenable position of being subject to liability to an injured serviceman while having no ability to recover contribution or indemnity from the federal government for furnishing improper design specifications, failing to properly maintain the equipment, improperly training military personnel, or committing a number of other acts that may have contributed to cause an accident. Recognizing this dilemma, the government contractor defense was developed to protect manufacturers from product liability claims by on-duty military personnel.

*McKay v. Rockwell International Corp.*, 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 711 (1984), established criteria to be employed in strict liability design-defect cases against suppliers of military equipment: (1) the United States is immune from liability; (2) the supplier must show that the United States established or approved reasonably precise specifications for the allegedly defective military equipment; (3) it must be shown that the equipment conformed to

those specifications; and (4) the supplier must have warned the United States about patent errors in the government's specifications or about dangers known to the supplier but not to the United States. 704 F.2d at 451. *McKay* barred claims by widows of two United States Navy pilots killed while ejecting from a disabled RA-5C jet aircraft, allegedly due to defective ejection components.

In *Bynum v. General Motors Corp.*, 599 F.Supp. 155 (N.D.Miss. 1984), the manufacturer was granted summary judgment based on the government contractor defense to shield against strict liability, negligence, or breach of warranty. In *Bynum*, a National Guard trainee was injured when the Army cargo carrier in which he was riding fell from a bridge into a creek bed. The court in *Tillett v. J.I. Case Co.*, 756 F.2d 591 (7th Cir. 1985), applied the government contractor defense in a claim by the widow of a soldier who was killed while operating a front-end loader incident to his military service. In *Boyle v. United Technologies Corp.*, 487 U.S. 500, 101 L.Ed.2d 442, 108 S.Ct. 2510 (1988), the United States Supreme Court held there was no liability for design defects against the manufacturer of a helicopter furnished pursuant to a government procurement contract. In *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311 (11th Cir. 1989), the court denied recovery to the estate of a pilot of an F-16A fighter that crashed in South Korea due to alleged design defects.

In *Smith v. Xerox Corp.*, 866 F.2d 135 (5th Cir. 1989), the appellate court affirmed summary judgment on behalf of a weapons manufacturer when an Army private was injured in a training exercise when a weapons simulator manufactured by the defendant misfired. The court in *Kleemann v. McDonnell Douglas Corp.*, 890 F.2d 698 (4th Cir. 1989), affirmed summary judgment for an aircraft manufacturer whose landing gear was manufactured in accordance with reasonably precise specifications. In *Maguire v. Hughes Aircraft Corp.*, 912 F.2d 67 (3d Cir. 1990), the court affirmed summary judgment in favor of the defendant helicopter manufacturer in an action claiming a defect related to the helicopter rotor system. In *Tate v. Boeing Helicopters*, 140 F.3d 654 (6th Cir. 1998), the Sixth Circuit affirmed dismissal of design defect and failure-to-warn claims against a helicopter manufacturer that had an allegedly dangerous tandem hook system. In *Stout v. Borg-Warner Corp.*, 933 F.2d 331 (5th Cir. 1991), summary judgment was affirmed against an Army air-conditioning repair technician who was injured because of contact with an exposed fan blade in an air-conditioning unit ordered pursuant to a government contract and manufactured pursuant to precise specifications.

The government contractor defense has been extended to nonmilitary contractors. For example, it may be applicable to vaccine situations in which the FDA prescribed each stage of a vaccine's production if the manufacturer complied with regulations and warned the FDA of known dangers regarding the vaccine. The court in *Burgess v. Colorado Serum Co.*, 772 F.2d 844 (11th Cir. 1985), applied the concept to brucellosis vaccine.

#### **H. [4.59] Government Contracts**

When applicable government standard specifications are requirements for the sale of a product to a governmental entity, there is no liability when the manufacturer builds a product in compliance with those standards. In *Hunt v. Blasius*, 55 Ill.App.3d 14, 370 N.E.2d 617, 12 Ill.Dec. 813 (4th Dist. 1977), *aff'd*, 74 Ill.2d 203 (1978), the defendant's summary judgment was affirmed in a strict liability and negligence design claim against a government contractor who had

complied with state specifications in the manufacture of a highway signpost. Similarly, the appellate court in *Wha Ja Yu v. Neenah Foundry Co.*, 164 Ill.App.3d 975, 518 N.E.2d 635, 116 Ill.Dec. 13 (1st Dist. 1987), affirmed summary judgment in favor of a sewer grate manufacturer who followed government specifications. In *Mitchell v. Wayne Corp.*, 180 Ill.App.3d 796, 536 N.E.2d 241, 129 Ill.Dec. 557 (2d Dist. 1989), the court affirmed summary judgment under strict liability and negligence claims for the manufacturer of a school bus warning device manufactured in compliance with specifications established by the State of Illinois.

#### **I. [4.60] Unavoidably Unsafe Products**

A product may be dangerous regardless of careful design, formulation, or assembly by the manufacturer and cautious use by a consumer. Typically, this issue arises in relation to drug and medical equipment manufacturers. In order to employ the defense that a product is unavoidably unsafe, adequate warnings of the potential danger must have been given to the consumer, and the injury must have been within the purview of that warning. Although a danger may exist and be known to the user, the drug may not be taken off the market because the potential side effects may be less dangerous than not using the product at all.

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §6 (1998) concerns liability for defective prescription drugs and medical devices. It recognizes that a plaintiff can bring a claim against a manufacturer, but it makes the path more difficult. A plaintiff advancing a design-defect claim involving prescriptions or a medical device must prove that the foreseeable risk of harm was so great, in relation to the foreseeable therapeutic benefits, that a reasonable healthcare provider “would not prescribe the drug or medical device for any class of patients.” RESTATEMENT (THIRD) OF TORTS §6(c). Consequently, a drug or medical device that benefits one class of patients is not defective even if it is harmful to other patients. However, the First District rejected §6 in *Mele v. Howmedica, Inc.*, 348 Ill.App.3d 1, 808 N.E.2d 1026, 283 Ill.Dec. 738 (1st Dist. 2004), because it eliminated appraisal of the consumer’s expectations from a determination of whether a hip replacement device was unreasonably dangerous.

#### **J. [4.61] Human Blood, Organs, or Tissue**

Illinois, as did many jurisdictions, enacted a statute to protect suppliers of human blood, organs, tissues, or similar biomedical products, commonly known as the “blood shield” statute. Pursuant to the Blood and Organ Transaction Liability Act, 745 ILCS 40/0.01, *et seq.*, it is against the public policy of Illinois to impose legal liability without fault against persons or organizations involved in supplying human blood, organs, or tissue. Furnishing these necessary materials, whether or not remuneration is received, is expressly declared to be not a sale and not subject to any warranty other than due care, nor is the supplier subject to strict liability in tort. 745 ILCS 40/2. The only basis for liability is the supplier’s failure to exercise due care in following the current state of medical art. 745 ILCS 40/3. In essence, rather than applying traditional product liability concepts, the approach is similar to that of a medical malpractice case. *Advincula v. United Blood Services*, 176 Ill.2d 1, 678 N.E.2d 1009, 223 Ill.Dec. 1 (1996).

Based on the statutory provisions, strict liability did not apply against a hospital and a blood bank that furnished incompatible blood, causing the plaintiff to have a transfusion reaction. *Evans v. Northern Illinois Blood Bank, Inc.*, 13 Ill.App.3d 19, 298 N.E.2d 732 (2d Dist. 1973). A



complaint seeking to impose strict liability for allegedly defective blood that caused the plaintiff to contract serum hepatitis had to be dismissed. *Glass v. Ingalls Memorial Hospital*, 32 Ill.App.3d 237, 336 N.E.2d 495 (1st Dist. 1975). Nor were hospitals liable under strict liability or warranties of merchantability and fitness for a particular purpose by supplying blood containing hepatitis virus. *Bingham v. Lutheran General & Deaconess Hospitals*, 34 Ill.App.3d 562, 340 N.E.2d 220 (1st Dist. 1975). *Accord Hill v. Jackson Park Hospital*, 39 Ill.App.3d 223, 349 N.E.2d 541 (1st Dist. 1976). Strict liability did not apply to alleged failure to screen and heat-treat factor VIII antihemophilic medication with the result that the recipient acquired AIDS. *Poole v. Alpha Therapeutic Corp.*, 698 F.Supp. 1367 (N.D.Ill. 1988). However, the Act did not protect a hospital from warranty claims based on the sale of a defective prosthetic heart valve used in a surgical procedure. *Garcia v. Edgewater Hospital*, 244 Ill.App.3d 894, 613 N.E.2d 1243, 184 Ill.Dec. 651 (1st Dist.), *appeal denied*, 152 Ill.2d 558 (1993).

The RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998) follows the Illinois approach, excepting human blood and tissue from its definition of a “product.” Section 19(c) provides that “[h]uman blood and human tissue, even when provided commercially, are not subject to the rules of this Restatement.”

#### **K. [4.62] Animals**

Inherent in the concept of product liability is the requirement that the item sold be characterized as a “product.” The court in *Whitmer v. Schneble*, 29 Ill.App.3d 659, 331 N.E.2d 115 (2d Dist. 1975), held that strict liability would not apply to the sale of a dog. Similarly, in *Anderson v. Farmers Hybrid Cos.*, 87 Ill.App.3d 493, 408 N.E.2d 1194, 42 Ill.Dec. 485 (3d Dist. 1980), the court determined that commercially raised pigs were not products but rather living creatures.

Since 1982, the Illinois Uniform Commercial Code has expressly excluded certain farm animals from warranty liability. 810 ILCS 5/2-316(3)(d) provides that “implied warranties of merchantability and fitness for a particular purpose do not apply to the sale of cattle, swine, sheep, horses, poultry and turkeys, or the unborn young [thereof, if] the seller has made reasonable efforts to comply with State and federal regulations pertaining to animal health.”

#### **L. [4.63] Firearms**

In 2005, Congress enacted the Protection of Lawful Commerce in Arms Act (PLCAA), 15 U.S.C. §7901, *et seq.* Subject to certain exceptions, it provided that if a firearm “functioned as designed and intended” and a shooting was the result of “criminal or unlawful misuse,” shooting victims cannot sue the manufacturer. 15 U.S.C. §7901(b)(1). Therefore, the estate of a boy shot by a 13-year-old who did not realize a bullet remained in the chamber of a semiautomatic pistol after the clip had been removed could not maintain a claim against the weapons manufacturer. *Adames v. Sheahan*, No. 105789, 2009 WL 711297 (Ill. Mar. 19, 2009).

**VII. [4.64] CONCLUSION**

Reflective of society's ongoing technical evolution, product liability litigation continues to be an active area of litigation. This area of law lends itself to very specific rules applicable to all cases. Each case must be judged on its own facts, and the principles must be applied to those facts with logic and common sense. While manufacturers and sellers of products must be responsible citizens, they are not required to be insurers for all injuries that might occur through the use of their products. When the rules are reasonably interpreted and carefully applied, the results will be fairness for both the consumer and the producer. The purpose of this chapter is to create an awareness of the areas in which the plaintiff has the responsibility and burden of proof and to alert defense counsel to various defenses that may be available.