

# CHAPTER 10

## Warranties and Products Liability

This chapter addresses (1) warranties and (2) products liability law. The first topic arises under contract law (which is the topic of Chapter 9), the second under tort law. We are concerned here with the civil liability that manufacturers and sellers of goods incur to buyers, users, and bystanders for damages or injury caused by defective goods. This is an area in which proactive management, such as careful planning during the design, manufacturing, and labeling processes, can substantially reduce, though not eliminate, the likelihood of litigation and the potential liability that a company might face. Liability for product defects can extend beyond manufacturers to a number of additional parties in the supply chain (including retailers, wholesalers, and suppliers of raw materials and component parts), so marketers of goods, as well as manufacturers, need to be aware of the law regarding products liability and warranties.

### Overview

Originally, the law provided little protection for purchasers when goods turned out to be defective in some manner. In the nineteenth century, product sales were governed by the notion of *caveat emptor* (“let the buyer beware”). Sellers and manufacturers were not held liable for product defects unless they had behaved wrongfully toward or had breached a specific promise made to the buyer with whom the manufacturer had contracted to sell goods. This state of affairs evolved for a number of reasons, including the general notions of *laissez-faire* and economic individualism that prevailed at that time. Because buyers and sellers typically were of relatively equal size and bargaining ability, courts believed that the parties should be permitted to negotiate the transaction themselves, without interference from the law. The buyer often purchased directly from the manufacturer, and the long lines of distribution that we see today did not exist. Goods were typically uncomplicated, and purchasers could more easily examine them for defects prior to purchase. Finally, the courts wanted to promote the industrialization process by protecting infant industries from lawsuits.

By the twentieth century, however, commerce had changed dramatically. Lines of distribution had become long, and buyers seldom dealt directly with manufacturers. Large corporations evolved, which meant that sellers often had far more bargaining power than buyers. The increased complexity of the goods being sold made it more difficult for consumers to identify defects in products they were about to purchase, and the growth in consumer goods was accompanied by a growth in consumer injuries. Ultimately, as a matter of public policy, the courts determined that sellers and manufacturers could best bear the costs of product defects because they could spread those costs throughout society by increasing prices if necessary. There was a rapid growth in

products liability law in the 1960s and the 1970s, and some commentators now argue that the governing rule is *caveat venditor* (“let the seller beware”).

Today, the law seeks to protect consumers and purchasers, who are typically the weaker parties in the sales relationship. This goal is accomplished through *warranties*, which are contractual obligations created and enforced under the Uniform Commercial Code (UCC), and through *products liability law*, which imposes tort liability upon manufacturers and sellers of defective products for the injuries caused by their products. Warranties and products liability law protect not only buyers who are individual consumers but also buyers who are businesses. Thus, companies involved in business-to-business sales must be aware of these legal rules as well as those involved in consumer sales.

This chapter first examines the contractual obligations of warranty law, then turns to the tort liabilities created by products liability law.

## Warranties

A *warranty* is a contractual promise by a seller or lessor that the goods that he sells or leases conform to certain standards, qualities, or characteristics. Warranties are primarily governed by state law—in particular, by the UCC. Warranties are made to purchasers and users of the product and possibly to third parties injured in their person or property by the goods. The UCC applies to the sale of goods, but does not extend to the sale of services, real estate transactions, or bailments.

Sellers of goods are generally not required to warrant their goods and may disclaim or modify warranties provided they undertake the necessary steps in doing so. Article 2 of the UCC recognizes four types of warranties: (1) warranties of title; (2) express warranties; (3) implied warranties of merchantability; and (4) implied warranties of fitness for a particular purpose. The last three are known as warranties of quality. All of these warranties (or any combination thereof) may arise in a single sale. Under the UCC, all warranties are to be construed as cumulative and consistent to the extent possible.

### Warranty of Title

Under UCC Section 2-312, the seller of goods automatically warrants that: (1) the title conveyed is good; (2) the seller has the right to convey the title; and (3) the goods are free from any security interest or other lien upon them of which the buyer was not aware at the time of the sale. This warranty arises automatically in most sales; no special action by the seller or buyer is required to create it (see Case Illustration 10.1). If the seller is a *merchant*,<sup>1</sup> the seller also automatically warrants that the goods are free from any rightful claims of patent, trademark, or similar infringement by any third party. If the buyer provided the specifications to the seller for the goods, however, the buyer must hold the seller harmless for any infringement claims arising out of the seller’s compliance with those specifications.

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<sup>1</sup>Recall from Chapter 9 that a “merchant” is defined under UCC Section 2-104 as “a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.”

## CASE ILLUSTRATION 10.1

***CURRAN v. CIARAMELLI, REPORTED IN NEW YORK LAW JOURNAL, NOV 10, 1998, P. 25.***

**FACTS** In March 1998, Plaintiff purchased a Corvette from Defendant for the sum of \$8,500 in cash. In April, 1998, after consulting with the local police department, he discovered that the car's vehicle identification number had been altered and that the vehicle had been reported stolen in March, 1992. The car was seized by the police and Plaintiff brought suit against Defendant for breach of the warranty of title.

Defendant testified that she did not know of the alleged theft at the time she sold the car to Plaintiff. She had purchased the car from Vincent Garofala in July, 1997, who in turn had purchased the car from Bright Bay Lincoln Mercury in June, 1994. Garofala had a copy of a Retail Certificate of Sale and a copy of a New York title issued to Gail M. DiFede by the New York Department of Motor Vehicles, which was apparently Bright Bay's source of title to the car. Defendant argued she was not liable for breach of warranty of title because she had received good

title from Garofala, who had received good title from Bright Bay, who had received good title from DiFede.

**DECISION** The court rejected Defendant's argument, stating:

*[A] thief cannot pass title to stolen goods and mere delivery of the goods does not relieve the seller of the obligation of warranty of title. By transferring a stolen vehicle to the Plaintiff, irrespective of whether or not she had knowledge of the theft, the Defendant breached the warranty of title codified in section 2-312(1)(a) of the Uniform Commercial Code. One who sells a stolen automobile is liable to the buyer thereof for breach of warranty of title.*

The court thus awarded the Plaintiff the purchase price of \$8,500 plus \$709.68 he had spent on repairs on the car.

### Express Warranties

If the seller expressly represents that her goods have certain qualities and the goods do not have those qualities, the buyer may sue for breach of *express warranty*. This is true even if the seller believed that the representation was true and had no way of knowing that it was not true and even if the seller had no intention of creating an express warranty. Express warranties may be written or oral and may be formed by the conduct of the seller as well as by words.

UCC Section 2-313 states two requirements for creating an express warranty. First, the seller must: (1) make an affirmation of fact or promise regarding the goods; or (2) provide a description of the goods; or (3) furnish a sample or model of the goods. Second, that statement or promise, description, or sample or model must be "part of the basis of the bargain" that the buyer made. All statements by a seller are considered to be part of the basis of the bargain unless the seller can demonstrate that the buyer did not rely upon them (see Case Illustration 10.2).

Only statements of fact create an express warranty; statements of opinion do not. Sellers are permitted to "puff their wares." Thus, the statement "this computer is capable of running any software program in the marketplace" creates an express warranty, but the statement "this is an excellent computer" does not. It is often hard to tell whether a particular statement is one of fact or opinion, e.g., "this computer is well designed." In such instances, the courts often consider the relative knowledge of the parties involved. If the buyer is not knowledgeable about the seller's goods, the courts are more likely to treat the statement as one of fact that creates an express warranty. If the buyer knows as much or almost as much about the goods as the seller, the courts are more likely to treat the statement as one of opinion that does not create an express warranty.

↔ See Discussion Case 10.1.

## CASE ILLUSTRATION 10.2

### **KOLARIK v. CORY INT'L CORP., 721 N.W.2D 159 (IOWA 2006)**

**FACTS** Plaintiff fractured a tooth while biting down on an olive from a jar of pimento-stuffed green olives that had been imported and sold at wholesale by Defendant.

Plaintiff sued, arguing that the words “minced pimento stuffed” on the label of the jar of olives created an express warranty that the olives had been pitted. The trial court granted summary judgment for Defendants, and Plaintiff appealed.

**DECISION** The appellate court affirmed the trial court’s ruling. UCC§ 2-313 provides that an express warranty can be created by a description of the goods. However, comment 7 to UCC§ 2-313 qualifies this provision by stating:

*Of course, all descriptions by merchants must be read against the applicable trade usages with the general rules as to merchantability resolving any doubts.*

Defendant’s vice president of quality control testified in his deposition that olives must be pitted in order to be stuffed. He further testified:

*[T]here’s a reasonable expectation that most of the pits would be removed, and there’s some expectation that it’s not a perfect world, and some of the pits or fragments may not be removed .... When the olives go into those machines, the machines do very well,*

*but, you know, the olives have different shapes. And the reason they don’t get pitted right all the time is because of the different shapes of the olives.*

Because pitted olives are processed and received in bulk, no practical method of inspection exists. The United States Department of Agriculture standards for pitted olives allow 1.3 pits or pit parts per 100 olives.

The appellate court thus concluded:

*“[E]xpress warranties ... must be read in terms of their significance in the ... trade and relative to what would normally pass in the trade without objection under the contract description.” Given the evidence of how the defendants receive and resell these olives, it is unrealistic to impart to the description “minced pimento stuffed” the meaning that defendants are guaranteeing that the olives in the jar are entirely free of pits or pit fragments. It is much more realistic to interpret the description as only warranting that the particular jar of olives contains pimento-stuffed, green olives that would pass as merchantable without objection in the trade. Plaintiff has provided no evidence that the contents of the jar, taken as a whole, did not live up to this warranty.*

The trial court’s decision was affirmed.

**Implied Warranty of Merchantability** Under UCC Section 2-314, a seller who is a merchant in the type of goods being sold impliedly warrants that the goods are of merchantable quality, i.e., that they are fit for the ordinary purpose for which they are being sold. The *implied warranty of merchantability* would apply, therefore, to sales of bicycles by a bike shop owner but not to sales of furniture by that same individual at a yard sale. Similarly, an individual selling even a brand-new bike at a yard sale would not create an implied warranty of merchantability because he would not be a merchant of bicycles. The implied warranty of merchantability arises automatically in every sale of goods by a merchant unless expressly disclaimed by the seller as discussed below.

Any merchant seller of goods, including a retailer or wholesaler, impliedly warrants the merchantability of goods, even if the seller did not manufacture the goods. For goods to be “merchantable,” they must: (1) pass without objection in the trade under the contract description; (2) in the case of fungible goods, be of fair, average quality; (3) be fit

for the ordinary purpose for which such goods are sold; (4) be of even kind, quality, and quantity within each unit and among all units; (5) be adequately contained, packaged, and labeled; and (6) conform to any promises or affirmations of fact made on the container or label. For example, Toys “R” Us was held liable for breach of the implied warranty of merchantability when the right pedal snapped off of a fully assembled bicycle it had sold to an individual, causing the rider to fall and be injured. Expert testimony established that the pedal had been improperly threaded onto the crank arm, and that the pedal would not have dislodged had it been properly threaded.<sup>2</sup>

Under UCC Section 2-314(1), the implied warranty of merchantability extends explicitly to “the serving for value of food or drink to be consumed either on the premises or elsewhere.” It is not clear whether this warranty extends to used goods, however, even where the seller deals regularly in goods of that kind (e.g., used car dealers or second-hand merchandise stores).

↔ **See Discussion Cases 10.1, 10.2.**

**Implied Warranty of Fitness for a Particular Purpose** Under UCC Section 2-315, an implied warranty of fitness for a particular purpose arises when: (1) the seller has reason to know of the particular purpose for which the buyer intends to use the goods; (2) the seller has reason to know that the buyer is relying upon the seller’s skill or judgment to select or furnish suitable goods; and (3) the buyer actually relies upon the seller’s skill or judgment in selecting or furnishing the goods. The seller does *not* have to be a merchant for this implied warranty to arise, although the seller must have some sort of expertise in the goods.

The distinction between the implied warranty of merchantability and the implied warranty of fitness for a particular purpose is an important one. Suppose that a buyer informs an appliance store that she is seeking an oven for use in her commercial bakery. The store sells her a nondefective oven that is designed for residential use but is not capable of handling commercial baking applications. The appliance store has not breached the implied warranty of merchantability because the oven is fit for its ordinary purpose—residential baking. The store has breached the implied warranty of fitness for a particular purpose, however.

↔ **See Discussion Cases 10.1, 10.2.**

## Privity

*Privity of contract* is a requirement that the plaintiff demonstrate that he contracted directly with the defendant in order to bring a cause of action. Historically, the doctrine of privity was applied in warranty actions in such a way as to prevent plaintiffs from suing manufacturers or other parties within the chain of distribution with whom the plaintiff had not directly contracted. Rather, the “vertical” privity requirement limited the plaintiff to suing his immediate seller. Similarly, only the buyer who had purchased the goods could sue the seller; family members, guests, and bystanders who were injured by the product had no right to recover for breach of warranty because they lacked “horizontal” privity.

The 1960 decision of the New Jersey Supreme Court in *Henningsen v. Bloomfield Motors, Inc.*, radically changed the law regarding privity in warranty actions (see Case Illustration 10.3).

<sup>2</sup>*Hyatt v. Toys “R” Us, Inc.*, 2007 Del. Lexis 300 (Del. July 9, 2007).

## CASE ILLUSTRATION 10.3

**HENNINGSEN v. BLOOMFIELD MOTORS, INC.,  
161 A.2D 69 (N.J. 1960)**

**FACTS** Chrysler Corporation manufactured a car with a defective steering mechanism. Claus Henningsen purchased the car from Bloomfield Motors, a Chrysler dealer, and gave the car to his wife, Helen. Helen Henningsen was injured when the steering mechanism failed with 468 miles on the odometer. She sued both Bloomfield Motors and Chrysler Corp. for breach of the implied warranty of merchantability.

**DECISION** Helen Henningsen clearly was not in privity with Chrysler Corp. because: (1) the actual purchase was made by her husband, Claus, and (2) he had purchased the car from Bloomfield Motors, a dealer, and not Chrysler Corp. directly. Nonetheless, the New Jersey Supreme Court held that as a matter of public policy, the doctrine of privity ought not to be allowed to act as a bar to Helen Henningsen's recovery from Chrysler. The court stated:

*The limitations of privity in contracts for the sale of goods developed their place in the law when marketing conditions were simple, when maker and buyer frequently met face to face on an equal bargaining plane and when many of the products were*

*relatively uncomplicated and conducive to inspection by a buyer competent to evaluate their quality. With the advent of mass marketing, the manufacturer became remote from the purchaser, sales were accomplished through intermediaries and the demand for the product was created by advertising media. In such an economy it became obvious that the consumer was the person being cultivated. Manifestly, the connotation of "consumer" was broader than that of "buyer." He signified such a person who, in the reasonable contemplation of the parties to the sale, might be expected to use the product.*

The court thus concluded: "[W]here the commodities sold are such that if defectively manufactured they will be dangerous to life or limb, then society's interests can only be protected by eliminating the requirement of privity between the maker and his dealers and the reasonably expected ultimate consumer." Because Helen Henningsen was "a person who, in the reasonable contemplation of the parties to the warranty, might be expected to become a user of the automobile," she was protected by the warranty.

Today, UCC Section 2-318 offers states a choice of three positions regarding privity (with the result that the UCC is not particularly uniform in this regard). *Alternative A* provides that if the final purchaser is a beneficiary of a warranty, express or implied, any member of her household and any houseguest are also covered by the warranty "if it is reasonable to expect that such person may use, consume or be affected by the goods" and if such person is personally injured as a result of the breach. Most states have officially adopted this alternative, although in many states the courts have interpreted the language more broadly in their case law.

*Alternative B* provides that warranty protection extends "to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty." Thus, this alternative gives a cause of action for breach of warranty to parties such as employees or passersby who suffer personal injury as a result of the breach. Even if a state has not officially adopted *Alternative B*, its products liability case law may well provide for the same result that would be reached under this statutory language.

*Alternative C* extends breach of warranty protection even further by allowing artificial persons (such as corporations) to recover as well as natural persons and by allowing recovery for property damage as well as personal injury.

## Warranty Disclaimers

Warranty disclaimers are permitted, but not favored, under the UCC. The courts also tend to be hostile to attempts by manufacturers or sellers to disclaim express or implied warranties. Any ambiguities as to whether a disclaimer was made generally are construed against the seller. As a general rule, sellers should make their disclaimers explicit, unequivocal, and conspicuous.

The UCC imposes specific requirements for disclaiming each of the warranties described above. It is easier for the parties to disclaim or limit implied warranties than it is to disclaim or limit express warranties. The UCC specifically notes, for example, that implied warranties can be excluded or modified by course of dealing or course of performance or usage of trade.<sup>3</sup> This means that if the parties actually do or reasonably should understand as a result of their prior dealings with each other or as a result of common knowledge within the trade that no implied warranties are contemplated by the transaction, none arise.

Warranty disclaimers limit only the plaintiff's warranty claim, which arises in contract. Disclaimers do not affect any claims that the plaintiff might have in tort (e.g., negligence or strict products liability claims) for personal injury or property damage that might have occurred as a result of the product defect. These tort actions are discussed below.

**Warranty of Title** A warranty of title can be disclaimed only by specific language in the contract or by special circumstances surrounding the transaction that clearly indicate to the buyer that the seller is not claiming title or is only purporting to sell whatever title the seller might have. For example, a statement such as “I convey only such right and title as I have in the goods” would suffice to disclaim the warranty of title. The buyer could not later complain if it turns out that the seller did not have good title to convey. Similarly, goods sold pursuant to a judicial sale carry no warranty of title, as the circumstances of the sale should make it clear to the buyer that the seller has no way of knowing or guaranteeing whether title is good.

**Express Warranty** It is difficult to disclaim an express warranty. Sellers are better off simply not creating such a warranting in the first place rather than attempting to disclaim it after the fact. Express warranties can be excluded or modified but only by clear and unambiguous language of the parties. The courts do not like sellers giving a warranty with one hand and then taking it back with the other through a disclaimer, so they tend to view disclaimers of express warranties with a harsh eye.

**Implied Warranty of Merchantability** Under UCC Section 2-316(2), disclaimers of the implied warranty of merchantability must mention the word “merchantability.” The disclaimer may be oral, but, if it is made in writing, it must be conspicuous (e.g., capital letters, larger type, contrasting typeface or color) (see Case Illustration 10.4).

◀ See Discussion Case 10.2.

**Implied Warranty of Fitness for a Particular Purpose** The implied warranty of fitness for a particular purpose can be disclaimed only in writing, and the disclaimer must be conspicuous. The disclaimer need not mention the word “fitness.” In fact, the UCC notes that the statement that “[t]here are no warranties which extend beyond

<sup>3</sup>UCC § 2-316(3)(c).

## CASE ILLUSTRATION 10.4

**BAKER v. BURLINGTON COAT FACTORY,  
175 MISC. 2D 951, 673 N.Y.S.2D. 281 (1998)**

**FACTS** Plaintiff Catherine Baker purchased a fake fur coat for \$127.99 from defendant Burlington Coat Factory Warehouse in Scarsdale, New York. She returned the coat two days later after it began shedding profusely. She demanded a refund of her \$127.99 cash payment. Burlington offered either a store credit or a new coat of equal value, but refused to issue a cash refund. Baker filed suit, alleging, among other things, breach of contract, and breach of the implied warranty of merchantability.

Burlington noted that it displayed several large signs in its store, which stated: “Warehouse policy: Merchandise, in New Condition, May be Exchanged Within 7 Days of Purchase for Store Credit and Must Be Accompanied by a Ticket, and Receipt. No Cash Refunds or Charge Credits.” In addition, the front of Baker’s sales receipt stated: “Holiday Purchases May Be Exchanged Through January 11th, 1998 In House Store Credit Only No Cash Refunds or Charge Card Credits.” The back of the receipt stated: “We Will Be Happy to Exchange Merchandise In New Condition Within 7 days When Accompanied By Ticket and Receipt. However, Because Of Our Unusually Low Prices: No Cash Refunds or Charge Card Credits Will Be Issued. In House Store Credit Only.” Baker stated that she had not read this language and was not aware of Burlington’s “no cash refunds” policy.

**DECISION** The court found for Baker, stating:

*Under most circumstances retail stores in New York State are permitted to establish a no cash and no credit card charge refund policy and enforce it.*

*Retail store refund policies are governed, in part, by General Business Law § 218-a, which requires conspicuous signs on the item or at the cash register or on signs visible from the cash register or at each store entrance, setting forth, its refund policy*

*including whether it is “in cash, or as credit or store credit only”. \* \* \**

*\* \* \* Although plaintiff professed ignorance of defendant’s refund policy; the court finds that defendant’s signs and the front and back of its sales receipt reasonably inform consumers of its no cash and no credit card charge refund policy.*

*Notwithstanding its visibility the defendant’s no cash and no credit card charge refund policy as against the plaintiff is unenforceable. Stated, simply when a product is defective as was the plaintiff’s ... shedding Fake Fur, the defendant cannot refuse to return the consumer’s payment whether made in cash or with a credit card.*

*UCC§ 2-314(2)(c) mandates that “a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind .... (2) Goods to be merchantable must be ... (c) ... fit for the ordinary purposes for which such goods are used.”*

*Should there be a breach of the implied warranty of merchantability then consumers may recover all appropriate damages including the purchase price in cash. The court finds that defendant sold plaintiff a defective and unwearable Fake Fur and breached the implied warranty of merchantability. The plaintiff is entitled to the return of her purchase price of \$127.99 in cash and all other appropriate damages.*

The court specifically noted that the UCC’s provisions regarding the implied warranty of merchantability preempt any contrary provisions in General Business Law Section 218-a permitting a no-cash-refund policy. If the coat had not been defective and Baker had simply had a change-of-heart about her purchase, Section 218-a would have applied and Baker would not have been entitled to a refund. Because the coat was defective, however, the limitations in the exchange policy did not apply.

the description on the face hereof” is sufficient to disclaim all implied warranties of fitness.<sup>4</sup>

**“As Is”** Selling goods “as is” or “with all faults” (or with “other language which in common understanding calls the buyer’s attention to the exclusion of warranties and

<sup>4</sup>UCC § 2-316(2).



makes plain that there is no implied warranty<sup>5</sup>) disclaims *all* implied warranties, including the implied warranty of merchantability, even if the word “merchantability” is not used. This language does not disclaim any express warranties that the seller might have made, however, nor does it relieve the seller of products liability based in tort. A number of states will not allow consumer products to be sold “as is.”

### The Buyer’s Obligations in Warranty Actions

As mentioned in Chapter 9, the UCC gives the buyer the right to inspect the goods. If the buyer refuses to examine the goods, or if the buyer actually examines the goods (or a sample or model) as fully as the buyer desires before entering into the contract, there is no implied warranty with respect to defects that a reasonable examination would disclose. Refusal or failure to inspect does not affect any express warranties that might have been made.

In addition, the buyer must give the seller written or oral notice of a breach of warranty within a reasonable time after the breach should have been discovered. If the buyer fails to provide notice of the breach, the buyer will not be permitted to recover from the seller in a warranty action. The requirement of notice protects the seller’s right to cure, if cure is appropriate or possible under the circumstances. “Cure” is discussed in Chapter 9.

### Remedies and Defenses

If the breach of warranty occurs before the buyer has accepted the goods, the buyer’s remedies are the same as they would be in any other breach of contract situation: the buyer may reject the goods, demand specific performance, cover, or recover damages in accordance with various UCC formulas. These remedies are discussed in Chapter 9.

If the buyer has accepted the goods, the buyer’s damages for breach of warranty are generally calculated as *the difference between the value of the goods as warranted and the value of the goods as accepted, plus consequential and incidental damages*.<sup>6</sup> Recall from Chapter 9 that *incidental damages* include any costs or expenses directly associated with the seller’s delay or delivery of defective goods, such as storage or inspection charges, costs of return shipping, or costs of cover. *Consequential damages* include personal or property damage arising from the breach of warranty. The seller is liable for consequential damages for economic losses, such as loss of profits from the anticipated resale of the goods or loss of goodwill or business reputation, only where the seller at the time of the contract had reason to know of such losses. This foreseeability requirement does not apply to consequential damages claims for noneconomic losses, such as personal injury (including medical expenses and recovery for pain and suffering) and property damage. Punitive damages generally are not available in breach of warranty claims.

The seller may raise a number of defenses to warranty actions, including misuse or abuse of the product by the plaintiff, failure to follow instructions, improper maintenance, or ordinary wear of the product. These defenses often arise in the products liability context as well and are discussed more fully below.

It is very common for sellers to try to limit their liability for the quality of their goods by limiting the remedies that are available to the buyer in the event of a breach. The UCC permits the parties to specify the remedy available in the event of the breach and

<sup>5</sup>UCC § 2-316(3)(a).

<sup>6</sup>UCC § 2-714(2) and (3).

to make that remedy exclusive.<sup>7</sup> Sellers often use a contractual provision that limits the seller's liability to the repair or replacement of the defective goods. The UCC does not permit the limitation of consequential damages where the plaintiff has suffered personal injury as a result of defective consumer goods. Limitation of "commercial" damages (i.e., economic losses in a business setting) is permitted. State or federal legislation (such as the Magnuson-Moss Federal Warranty Act, discussed below) may also restrict the ability of sellers to limit the remedies available in the event of a breach of warranty. Warranty actions have been on the decline in recent years, as plaintiffs have increasingly turned to the strict liability cause of action discussed below under Products Liability Law.

◀ See Discussion Case 10.1.

### The Magnuson-Moss Federal Warranty Act

The UCC's provisions regarding warranty protection for buyers of consumer goods have been supplemented by both federal and state legislation. The *Magnuson-Moss Federal Warranty Act*<sup>8</sup> applies to *written* warranties on *consumer products*. The Act does not address oral warranties, nor does it apply to products sold for resale or for commercial purposes. Congress' goals in passing the Act were to: (1) ensure that consumers could get complete information about warranty terms and conditions; (2) ensure that consumers could compare warranty coverage prior to purchase; (3) promote competition on the basis of warranty coverage; and (4) strengthen incentives for companies to perform their warranty obligations and resolve consumer disputes quickly and without unnecessary expense to consumers.

The Act does not require sellers to make any warranties on consumer products. It does provide, however, that, if a seller makes a written warranty on a consumer product, that warranty must be conspicuously labeled as either a *full warranty* or a *limited warranty* and must contain specific information. The Act also provides that if the seller makes any written warranty, the seller is prohibited from disclaiming the implied warranties of merchantability and fitness for a particular purpose. The warranty information must be provided in a single, easy-to-read document and must be available to consumers prior to purchase.

A *full warranty* entitles the consumer to free repair of the product within a reasonable time period or, after a reasonable number of failed attempts to fix the product, entitles the consumer to choose either a full refund or replacement of a defective product. A full warranty also prevents the warrantor from placing any time limit on the warranty's duration; rather, full warranties last for a reasonable time period. (What is reasonable is a question of fact.) Finally, a full warranty prevents the warrantor from excluding or limiting consequential damages for breach of warranty unless such exclusions are conspicuous on the face of the warranty.

A *limited warranty* is anything less than a full warranty. Under a limited warranty, liability for implied warranties cannot be disclaimed altogether but may be limited in duration if the time period stated is reasonable and if the limitation is conspicuously disclosed.

Under rules promulgated by the Federal Trade Commission (FTC) under the Act, all warranties must answer five basic questions: (1) What does the warranty cover or not cover? (2) What is the period of coverage? (3) What will the company do to correct

<sup>7</sup>UCC § 2-719(l)(b).

<sup>8</sup>15 U.S.C. §§ 2301 *et seq.* The Act took effect in 1975. The Federal Trade Commission's (FTC's) "A Business person's Guide to Federal Warranty Law" is available online at [www.ftc.gov/bcp/conline/pubs/buspubs/warranty.shtml](http://www.ftc.gov/bcp/conline/pubs/buspubs/warranty.shtml)

problems? (4) How can the customer obtain warranty service? and (5) How will state law affect consumers' rights under the warranty?<sup>9</sup> Because of the difficulty that national sellers of goods could have in answering the last question, the FTC permits companies to use the following “boilerplate” language:

This warranty gives you specific legal rights, and you may also have other rights which vary from state to state.

Consumers who successfully sue for breach of the Magnuson-Moss Act may recover legal and equitable relief and may receive costs and reasonable attorney's fees.

Several states also have consumer protection statutes that provide additional protection to purchasers of consumer goods. This legislation may prohibit or limit the use of disclaimers, specify that warranties last for a reasonable time period, require that the seller provide reasonable service and repair facilities, or expand the remedies available to consumers. Marketers thus need to inform themselves of the specific laws that apply in each state in which they market their goods.

Note that a consumer uses the Magnuson-Moss Act and implied and/or express warranties to obtain satisfaction when the good purchased disappoints the consumer and is not worth the price paid. In such a situation, both the seller and the consumer are bound by whatever limitations or disclaimers exist, provided such limitations or disclaimers are allowed by the law. When a product causes physical injury, however, the injured party turns to products liability law and many of the rules discussed above do not apply.

◀ See Discussion Case 10.2.

## Products Liability Law

*Products liability* refers to the liability incurred by a seller of goods when the goods, because of a defect in them, cause personal injury or property damage to the buyer, a user, or a third party. In recent years, products liability has been stretched to reach beyond tangible goods to include items such as electricity, natural gas, pets, and real estate.

Products liability is based in tort law, while warranties are based in contract law. Although products liability claims can be brought under a number of different tort theories, including misrepresentation and fraud, this chapter focuses on the two most common theories: negligence and strict liability.

Products liability law is state, not federal, law. Although it originally started out as a form of common law, several states have enacted comprehensive products liability statutes that supplement or supplant various aspects of the common law.

### Negligence

Many products liability claims are based in negligence. The basic notion behind *negligence* is a failure on the part of the defendant to exercise “due care.” If the defendant's conduct imposes an unreasonable risk of harm to another person that results in an injury to that person or to his property, the defendant is liable for negligence. The Delaware Supreme Court described the difference between warranty and negligence actions as follows: “A claim for breach of warranty, express or implied, is conceptually distinct from a negligence claim because the latter focuses on the manufacturer's conduct, whereas a breach of warranty claim evaluates the product itself.”<sup>10</sup>

<sup>9</sup>The FTC has issued a document, “Writing Readable Warranties,” which is available online at [www.ftc.gov/bcp/online/pubs/buspubs/writwarr.shtml](http://www.ftc.gov/bcp/online/pubs/buspubs/writwarr.shtml)

<sup>10</sup>*Bell Sports, Inc. v. Yarusso*, 759 A.2d 582 (Del. 2000).

Generally, to prove negligence, the plaintiff must show that: (1) the defendant owed a legal duty to the plaintiff; (2) the defendant failed to comply with this legal duty (i.e., failed to exercise due care); (3) the defendant's failure to exercise due care was the "proximate" (legal) cause of plaintiff's harm; and (4) the plaintiff suffered actual damages as a result of the defendant's actions. In judging whether the defendant's behavior posed an unreasonable risk of harm, the courts apply the "reasonable person" standard: Would a reasonable person of ordinary prudence behave as the defendant did under the circumstances?

◀ **See Discussion Case 10.3.**

Historically, a manufacturer's duty was limited to those who were in privity of contract with the manufacturer; i.e., an injured plaintiff could sue in negligence only if she had contracted directly with the manufacturer for the purchase of the good. In a famous 1916 case, *MacPherson v. Buick Motor Co.*,<sup>11</sup> the New York Court of Appeals rejected the notion of privity in cases where negligently made products caused personal injury. All of the other states have since adopted the holding of *MacPherson*, and it is now the rule that a party who has negligently manufactured a product is liable for personal injuries proximately caused by her negligence, regardless of whether privity is present. A manufacturer's duty now extends to remote purchasers of products, as well as to users and bystanders, provided they are foreseeable plaintiffs. Moreover, a manufacturer can be liable in negligence for property damage as well as for physical injury.

The range of potential defendants is broad. Manufacturers of component parts, assembly manufacturers, wholesalers, retailers, bailors, and other suppliers all potentially may be held liable in negligence for product defects if it can be shown that they acted carelessly toward the plaintiff. The *manufacturer* owes the broadest duty of care of any category of potential defendant. The manufacturer of a product must exercise "due care" in making the product so that it is safe to be used as intended. This means that the manufacturer must exercise due care in: (1) designing the product; (2) selecting the materials; (3) using the appropriate production processes; (4) assembling, testing, and inspecting the product; (5) placing adequate warnings on the label informing the user of the dangers of which an ordinary person might not be aware; (6) packaging, handling, and shipping the product; and (7) inspecting and testing component parts used in the final product.

Plaintiffs often find it difficult to hold a wholesaler or retailer liable for negligence. The wholesaler or retailer is not held liable for merely selling a negligently designed or manufactured product, as that party might have no duty to inspect or might have no reasonable opportunity to discover the defect even upon inspection. The seller has no duty to inspect goods packaged in sealed containers that are not to be opened before sale to the consumer, for example. The seller may be held liable for negligence, however, if the defect is obvious or if the seller has received other defective goods from the manufacturer in the past and has failed to inspect the current goods. The seller may also be liable for negligence if he knows or should know that the product is dangerous and fails to warn his customers; if the seller fails to use due care in selling the product to a person incapable of using it safely (e.g., selling explosives to a child); or if the seller has done something negligent with the product, such as carelessly assembling it or otherwise preparing it for final sale.

Sellers and manufacturers have a duty to warn buyers and users of *foreseeable* risks of harm associated with their products, but they do not have duty to warn of every risk that might be associated with a product. For example, a Louisiana appellate court held that

<sup>11</sup>111 N.E.1050 (N.Y. 1916).

the manufacturer and the seller of a portable propane tank were not liable for failure to warn when a teenager died after filling a plastic bag with propane and sniffing it with the expectation of getting high. The court found that the teenager's use of the product was neither reasonable nor reasonably anticipated by the manufacturer and seller.<sup>12</sup>

### Strict Products Liability

Since the 1960s, the courts have been fashioning a new kind of relief for plaintiffs in products liability actions—*strict liability*. The objective of strict products liability is to encourage manufacturers and sellers to produce and sell safer products and to spread the costs of injuries caused by defective products among all consumers, rather than forcing random victims to bear the full cost of their injuries. Strict liability is the leading legal theory in products liability actions today.

How does strict liability differ from negligence in products liability cases? First, strict liability focuses on the product itself: Was the product unreasonably dangerous? If so, the seller may be held liable even if the seller was as careful as possible in the preparation and sale of the product. Negligence, on the other hand, focuses on the defendant's behavior: Did the defendant fail to exercise its duty of care? Second, under strict liability, the injured plaintiff has a claim against anyone in the chain of distribution, including the immediate seller, the wholesaler, the manufacturer, and the manufacturer of component parts, regardless of fault. Under negligence, the plaintiff has a claim only against the party or parties whose lack of due care caused the injury.

**The Restatements** As discussed in Chapter 1, a Restatement is a compilation of common law principles drafted by the American Law Institute (ALI), which is a group of distinguished scholars and practitioners. Restatements are not legally binding law, although courts often adopt the principles contained within the various Restatements as binding rules within their jurisdictions.

Strict products liability law was originally based upon the *Restatement (Second) of Torts*, which was adopted in 1965. In the decades since then, virtually all states have accepted the theory of strict liability for dangerously defective products, and most have incorporated some form of Section 402A as part of their common law. In 1997, the ALI adopted the Restatement (Third) of Torts: Products Liability as part of its periodic review and updating process. Although some courts have adopted the Restatement (Third), so far Section 402A of the Restatement (Second) remains the prevailing legal rule on strict products liability.

**The Restatement (Second) of Torts** The foundation for modern strict products liability is Section 402A of the Restatement (Second) of Torts, which provides:

§ 402A. *Special Liability of Seller of Product for Physical Harm to User or Consumer.*

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or the consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
  - (a) the seller is engaged in the business of selling such a product, and
  - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
  - (a) the seller has exercised all possible care in the preparation and sale of his product, and

<sup>12</sup>*Kelley v. Hanover Insurance Co.*, 722 So.2d 1133 (La. App. 1998).

- (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.<sup>13</sup>

Section 402A of the Restatement (Second) thus provides that a seller engaged in the business of selling a particular product is liable for physical harm or property damage suffered by the ultimate user or consumer of that product *if* the product was in a defective condition unreasonably dangerous to the user or the consumer or to her property. Section 402A applies to all commercial sellers of products, whether manufacturers, wholesalers, or retailers, but does not apply to casual, onetime sellers (see Case Illustration 10.5).

In addition, the strict liability doctrine does *not* make the seller an insurer of the product. Sellers are held liable only for products that are both defective and unreasonably

#### CASE ILLUSTRATION 10.5

### ***McANANY v. CASE, INC.*, 2007 PA. DIST. & CNTY. DEC. LEXIS 384, 83 PA. D. & C.4TH 449 (PENN. CT. COMMON PLEAS 2007)**

**FACTS** Defendant, a paving company, traded in a skid steer loader to Southeastern Equipment Co., Inc., for a new loader. Shortly after the trade-in, Plaintiff's employer, Cade Paving, purchased the used loader from Southeastern "as is." Plaintiff, an experienced loader operator, was severely injured while using the loader to remove excess gravel and debris from a driveway.

The trial court granted Defendant summary judgment on Plaintiff's strict liability claim. Plaintiff appealed.

**DECISION** The appellate court affirmed the grant of summary judgment to Defendant.

The Restatement (Second) of Torts § 402A provides:

- (1) *One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if*
- (a) *The seller is engaged in the business of selling such a product, and*
- (b) *It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.*

The court explained the rationale behind strict liability: "public policy demands that liability be fixed where it will be most effective at reducing the peril to life and health which arise from the selling of defective products." Specifically, "[t]he policy behind strict liability is to ensure costs of injuries sustain[ed from]

purchasing defective products are paid by the manufacturers who put the products on the market and not by the injured persons themselves."

The appellate court found that Defendant was not a "seller engaged in the business of selling such a product." There are situations in which a seller of used goods can be liable for selling defective merchandise, such as where the seller not only sold both new and used motorcycles produced by the same manufacturer but the seller and the manufacturer maintained a close business relationship. Here, however:

*Defendant merely traded-in the used loader to purchase a new one. Although, Defendant has done this a number of times in the past, selling skid steer loaders or any other equipment remains outside of Defendant's business.... Defendant clearly does not deal in selling items created by one manufacturer. Although Defendant has made 12 transactions either selling or trading in equipment, it does not sell equipment on a normal basis; it is in the business of paving.*

*\*\*\* It is apparent that Defendant merely trades-in its equipment to get new equipment in order to render a service, not as an act of selling or distributing them as a business venture. Defendant is not engaged in the business of selling paving equipment and should not be expected to assume liability injuries sustained by equipment they previously owned.*

Thus, Defendant was not strictly liable for Plaintiff's injuries.

<sup>13</sup>Restatement (Second) of Torts § 402A.

dangerous; they are not held liable for every injury to a user of a product. Under Section 402A, the plaintiff must show that the defect existed at the time that the product left the defendant's hands and that the defect was not the result of a subsequent modification or alteration by another party. It can be hard for a plaintiff to show this against a manufacturer if the product passed through several intermediate suppliers before reaching the plaintiff.

Courts applying Section 402A generally use either the consumer expectations test or the risk-utility test to determine whether a product is defective. Comment i of Section 402A states that a product is considered to be "in a defective condition unreasonably dangerous" if it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."<sup>14</sup> Under this *consumer expectations test*, if a plaintiff, applying the knowledge of an ordinary consumer, sees a danger and can appreciate that danger, the plaintiff cannot recover for any injury she incurs as a result of that danger.

Most courts have moved away from the consumer expectations test and have embraced the *risk-utility test* instead. Under this test, a product is "unreasonably dangerous" if a reasonable person would conclude that the danger, whether foreseeable or not, outweighs the utility of the product. However, if a product is *unavoidably unsafe* but its benefits outweigh its dangers, the seller is not held strictly liable for any injuries that occur. The Restatement recognizes, for example, that the rabies vaccine carries a risk of severe side effects. The Restatement also notes, however, that "since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous."<sup>15</sup>

#### ◀ See Discussion Cases 10.3, 10.4.

**The Restatement (Third) of Torts: Products Liability** The Restatement (Second) focused primarily on products with manufacturing defects and did not directly address two other major categories of defects: defective warnings and defective design. Many commentators argued that strict liability was inappropriate for these two categories of defects because it was unfair that manufacturers should be held liable for failure to warn of unknowable risks or failure to make their products safer than was technologically feasible.

The Restatement (Third) sets forth 21 black-letter rules for products liability. In particular, Section 2 of the Restatement (Third) provides explicit rules for the three categories of product defects: (1) manufacturing defects; (2) design defects; and (3) inadequate warnings. The Restatement (Third) maintains the strict liability standard for manufacturing defects adopted in the Restatement (Second) but moves toward a fault-based (i.e., negligence) standard for design and warning defects. Section 2 provides:

#### **Section 2 Categories of Product Defect**

A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:

- (a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;

<sup>14</sup>Restatement (Second) of Torts § 402A, comment i.

<sup>15</sup>Restatement (Second) of Torts § 402A, comment k.

- (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or by a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;
- (c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.<sup>16</sup>

### CASE ILLUSTRATION 10.6

## **MATHEWS v. UNIVERSITY LOFT CO., 903 A.2D 1120 (N.J. SUPER. CT. 2006)**

**FACTS** Plaintiff, a 21-year-old college senior at Stockton State College, lived in a campus apartment. He slept in a new “loft bed,” which was six feet off the floor. About a month after he began sleeping on the loft bed, Plaintiff was startled awake, fell off the bed, and injured his shoulder.

Plaintiff continued sleeping in the loft bed, but made a point of sleeping “all the way against the wall,” as far as possible from the open edge of the bed. There were no warning labels on the bed, and Plaintiff testified that it had never “cross[ed his] mind” or “occurred to” him that he could fall or that the bed was dangerous in any way. He stated that if he had seen a warning, he would have been “aware of the hazard that was present” and would have slept closer to the wall in the first place.

Plaintiff was awarded \$179,001 at trial on a claim “based on lack of warning.” Defendant University Loft Co., the manufacturer of the bed, appealed.

**DECISION** The appellate court ruled that Plaintiff’s failure-to-warn claim should have been dismissed, and reversed the judgment for Plaintiff.

Under the New Jersey Products Liability Act, a plaintiff can prove a product was defective by showing it was: (1) defectively manufactured; (2) defectively designed; or (3) “failed to contain adequate warnings or instructions.” A manufacturer can avoid product liability caused by failure to warn by showing that the product has an adequate warning or instruction.

As the court noted, however, adequacy of a warning becomes an issue only where there is duty to warn in the first place. Here, Defendant had no duty to warn against the danger of falling from the loft bed because the danger was “open and obvious.” Under the Restatement (Third) of Torts: Products Liability § 2, a product

*is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.*

The court went on to quote Comment j of the Restatement:

*In general, a product seller is not subject to liability for failing to warn or instruct regarding risks and risk-avoidance measures that should be obvious to, or generally known by, foreseeable product users. When a risk is obvious or generally known, the prospective addressee of a warning will or should already know of its existence. Warning of an obvious or generally known risk in most instances will not provide an effective additional measure of safety. Furthermore, warnings that deal with obvious or generally known risks may be ignored by users and consumers and may diminish the significance of*

*(Continued)*

<sup>16</sup>Restatement (Third) of Torts: Products Liability § 2.



warnings about non-obvious, not-generally-known risks. Thus, requiring warnings of obvious or generally known risks could reduce the efficacy of warnings generally ... (emphasis added).

Thus, the appellate court held that:

*the obviousness of the danger is an absolute defense to plaintiff's failure to warn action in this case. [W]arnings would lose their efficacy and meaning if*

*they were placed on every instrument known to be dangerous, such as a knife, scissor, glass, bat, ball, bicycle, or other product that poses a generally-known risk of injury if misused, dropped, or fallen from.... The risks are so obvious here that we fail to see what a college student would or could have done differently while asleep to protect himself from falling, or what a warning could have advised in addition to the obvious.*

Perhaps the most controversial provision of the Restatement is the requirement that a plaintiff suing a manufacturer over a defectively designed product must show that a reasonable alternative design (RAD) would have prevented the harm, a standard that many commentators believe tilts the law in favor of the manufacturer and away from the consumer. Section 402A of the Restatement (Second) did not require the plaintiff to show the existence of a RAD but, rather, found that a product that is “unreasonably dangerous to the user or consumer or to his property” is defective even if there is no way to eliminate that danger.

**Issues Raised by Strict Products Liability** Strict products liability raises a number of unique legal issues.

**Subsequent Remedial Design** Plaintiffs often try to show that the defendant redesigned the product after the plaintiff's injury in order to make it safer, arguing that the redesign indicates that the original design was defective and that a safer design was available and should have been used. Traditionally, most courts have not allowed this evidence in to prove that the product was defective on the public policy grounds that admitting such evidence would discourage manufacturers from engaging in redesign and from producing safer products.

**Latent Defects** Plaintiffs in several mass products liability class actions have attempted to argue that the product has some sort of latent defect such that it might fail under certain circumstances and cause injury, even though no plaintiff has suffered actual injury yet. Most of these claims have involved automotive defects, such as child seats, passive restraints, tires, and transmissions, but cases have also been brought involving cell phones and heart valves.

The heart valve cases illustrate the conflicting policy concerns that such cases can raise. Shiley, Inc., a subsidiary of Pfizer, Inc., had manufactured and sold the Bjork-Shiley Concavo-Convex heart valve from 1979 to 1986. The heart valves had been marketed in several sizes worldwide. The heart valves were withdrawn from the market in 1986 after a number of recipients died from sudden failure of the valves. The valves failed without warning and seemingly at random, making it impossible for doctors to pinpoint which patients would be likely to incur a problem with the valves. Unless the patient received open heart surgery to replace the valve within several hours of the failure, the patient would die.

A study indicated that the overall cumulative failure rate for the size of valve sold in the United States was 4.2 percent over eight years. Over 500 failures had occurred worldwide, killing about two-thirds of the patients involved. Removal and replacement of the valves entails open heart surgery, which itself carries a mortality risk of 5 percent, which is higher than the failure rate associated with the valves.

In a settlement of a class action suit brought against it, Pfizer agreed to pay \$75 million to a patient fund; \$80 million to \$130 million for medical and psychological consultations, depending upon the number of claims; \$500,000 to \$2 million to each recipient whose heart valve breaks; and \$10 million to patients' spouses.<sup>17</sup>

A number of heart valve recipients who had not suffered valve failure attempted to bring suits based upon the latent defects in the valves and their fears that their valves might fail in the future. The courts uniformly rejected their claims.<sup>18</sup> In *Farsian v. Pfizer*,<sup>19</sup> for example, the plaintiff, who had had a Bjork-Shiley heart valve implant in 1981, sued Pfizer, arguing that the manufacturer had engaged in fraudulent conduct by marketing the valve even though the manufacturer knew of serious manufacturing problems that directly related to the fracture problem in the valve. Although the plaintiff's heart valve was functioning properly at the time of suit, he argued that the higher rate of fracture and risk of death associated with the valve reduced the value of the valve and that he had suffered mental anguish and emotional distress since he learned of the fraud. The Alabama Supreme Court rejected his claim, finding that the plaintiff had no cause of action where he had not suffered an injury-producing malfunction of the product. A fear of failure of a product, absent a failure itself, is insufficient to support a products liability claim.

**Liability for Misrepresentations** Section 9 of the Restatement (Third) also imposes liability upon commercial product sellers and distributors for harm to persons or property caused by misrepresentations of material fact, whether fraudulent, negligent, or innocent. Thus, a seller could be held liable for written or oral statements about a product made by salespersons or advertisements. Moreover, under this section, it does not matter if the product was nondefective, if the seller honestly believed that the representation was accurate, or if the plaintiff did not actually see or rely upon the misrepresentation.

Section 402B of the Restatement (Second) contains a similar provision, though it requires that the plaintiff show that he had "justifiably" relied upon the misrepresentation.

Marketers should be alert to the liability created by these sections and should take care to ensure that salespersons and advertising agencies do not make inaccurate representations about their products.

**Market Share Liability** Generally, the plaintiff bears the burden of showing that the defendant caused the plaintiff's injury. Causation can be difficult to show in many instances, however. For example, many women who suffered injury as result of their mothers' taking the drug DES during their pregnancies 20 or more years earlier were unable to demonstrate which of over 300 manufacturers made the precise pills that their mothers took.<sup>20</sup> Each manufacturer used the identical formula in producing the drug.

In such instances, where several manufacturers produced a similar product with a common defect and where the plaintiff is unable to demonstrate which manufacturer in particular was the cause of her injury, many (but not all) courts are willing to impose *market share liability*. Under this approach, liability is apportioned among all of the

<sup>17</sup>See generally Ben L. Kaufman, "Flat-Rate Fees Denied for Class-Action Lawyers," *The Cincinnati Enquirer*, Jan. 11, 1998, p. B04; Milt Freudenheim, "Pfizer Settles Suit Over Heart Valve," *The New York Times*, Late Edition-Final, Sept. 3, 1993, sec. D, p. 3; "FDA Suggests Removal of Heart Valve," *Facts on File World News Digest*, Apr. 2, 1992, p. 233; Gina Kolata, "Heart Valve Called So Risky Its Removal Must Be Considered," *The New York Times*, Late Edition-Final, Mar. 13, 1992, Sec. A, p. 1.

<sup>18</sup>See *Angus v. Shiley, Inc.*, 989 F.2d 142 (3d Cir. 1993); *Walus v. Pfizer, Inc.*, 812 F. Supp. 41 (D.N.J. 1993); *Spuhl v. Shiley, Inc.*, 795 S.W.2d 573 (Mo. App. 1990); *Brinkman v. Shiley, Inc.*, 732 F. Supp. 33 (M.D. Pa.), *aff'd without op.*, 902 F.2d 1558 (3d Cir. 1989).

<sup>19</sup>682 So. 2d 405 (Ala.), *dismissed*, 97 F.3d 508 (11th Cir. 1996).

<sup>20</sup>See *Sindell v. Abbott Laboratories*, 607 P.2d 924 (Cal. 1980).

firms in the industry that might have produced the product that caused the plaintiff's injury. In such an instance, most courts give each defendant the opportunity to prove that it did not produce the product that injured that particular plaintiff. Some courts, however, do not permit defendants to exculpate themselves in this way. For example, the New York Court of Appeals stated in a 1989 case: "[B]ecause liability here is based on the over-all risk produced, and not causation in a single case, there should be no exculpation of a defendant who, although a member of the market producing DES for pregnancy use, appears not to have caused a particular plaintiff's injury."<sup>21</sup>

**Successor Liability** A corporation that purchases or acquires the assets of another corporation may well find it has purchased or acquired liability for product defects as well. Traditionally, a corporation purchasing or acquiring the assets of another may be held liable for the obligations and liabilities of the seller if: (1) the purchaser expressly or impliedly agreed to assume such obligations or liabilities; (2) the transaction is in effect a consolidation or merger of the seller and the purchaser; (3) the purchaser is merely a continuation of the seller; or (4) the transaction is a fraudulent attempt to escape liability for such obligations or debts.

Some modern courts also impose liability on the acquiring corporation where: (1) the purchaser continues the manufacture of the product line of the seller; or (2) the purchaser continues the enterprise of the seller. The Restatement (Third) rejects these new theories of successor liability and adopts only the four traditional categories.<sup>22</sup>

**Remedies** In most states, a plaintiff must suffer an "economic loss" in order to recover in tort. This doctrine requires that the product defect cause personal injury or physical damage to property other than the defective product itself. Remedies available in products liability actions include recovery for personal injury, property damage, and possibly punitive damages. Indirect economic loss (such as lost profits and loss of business goodwill) and basis-of-the-bargain damages are difficult to recover in tort but are available in breach of warranty actions.

Thus, the type of remedy that the plaintiff wishes to recover often guides the plaintiff's decision as to which theory (warranty or tort liability) to sue under. Plaintiffs need not necessarily choose a single cause of action, however. A plaintiff may, and usually does, sue for breach of warranty, negligence, and strict liability all arising out of a single sale and injury, for example.

Manufacturers and sellers frequently try to limit the remedies available to purchasers of their products, often by excluding recovery for consequential damages or by limiting recovery to repair or replacement of the defective good. The courts are unlikely to uphold such limitations in tort actions involving ordinary consumers but may well do so in actions involving buyers who are businesses or other sophisticated consumers of relatively equal bargaining power.

Similarly, manufacturers or sellers often insert a disclaimer of liability for negligence or strict liability within their sales contracts. The courts are reluctant to allow manufacturers or sellers to disclaim their liability for their own negligence or strict liability in consumer cases, however, and rarely give effect to such disclaimers in that setting. The courts are more likely to allow such disclaimers when the parties are of equal bargaining power, as in a business-to-business transaction.

**Defenses to Products Liability Actions** There are several defenses that a defendant may attempt to raise in a products liability action: (1) contributory or comparative

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<sup>21</sup>*Id.* at 1072.

<sup>22</sup>Restatement (Third) of Torts: Product Liability § 12.

negligence; (2) voluntary assumption of risk; (3) misuse or abuse of product; (4) the state-of-the-art defense; (5) compliance with government standards; and (6) the learned intermediaries and sophisticated purchasers rules. Each is discussed below.

**Contributory/Comparative Negligence** *Contributory negligence* was once the majority rule but today applies only in a minority of states, and even then often only in limited circumstances. This doctrine provides that if both the plaintiff and the defendant were negligent and the plaintiff's negligence is *a* (though not necessarily the *sole*) proximate cause of her injuries, the plaintiff receives no recovery. Some states apply this doctrine in some types of strict liability cases, such as those involving product misuse or abuse, as well as in negligence cases.

*Comparative negligence* (also known as comparative fault) applies in the majority of states. This doctrine provides that if the plaintiff and the defendant were both negligent, plaintiff's recovery will be reduced by his relative degree of fault. Thus, if the plaintiff was 30 percent at fault and the defendant 70 percent at fault, the plaintiff will recover 70 percent of his damages but will not recover for the 30 percent of his damages attributable to his own lack of due care. In a *pure* comparative fault system, the plaintiff will always recover for the portion of the injury attributable to the defendant. In a *mixed* comparative fault system, the plaintiff will recover nothing if the plaintiff is more than 50 percent at fault for his injuries. As you can imagine, it can be very difficult factually to assign relative degrees of fault to the plaintiff and defendant. Typically, much time and effort are devoted to this issue during the trial stage of the litigation.

In jurisdictions that have adopted comparative negligence, the defense always applies in negligence actions, and some courts apply it in strict liability actions as well.

◀ See Discussion Case 10.4.

**Voluntary Assumption of Risk** *Voluntary assumption of risk* occurs when the plaintiff knew of the risk of harm presented and voluntarily and unreasonably chose to encounter it. Historically, voluntary assumption of risk operated as a complete bar to the plaintiff's recovery. However, the doctrine has fallen into disfavor with many courts. Where it is still followed, this defense may apply in both strict liability and negligence cases, as well as in warranty actions.

The defense typically applies only where it is clear beyond question that the plaintiff voluntarily and knowingly proceeded in the face of an obvious and dangerous condition and only where it is clear from the circumstances that the plaintiff willingly accepted the risk. Mere contributory negligence does not show a voluntary assumption of risk.

In addition, many courts reject the doctrine in the employment context, finding that "an employee does not voluntarily and unreasonably assume the risk of danger during the course of employment because 'the competitiveness and pragmatism' of the real world workplace compels employees to either perform risky tasks or suffer various adverse employment consequences, ranging from termination to more subtle sanctions."<sup>23</sup> These courts generally continue to apply comparative negligence in such cases, however, so that an employee cannot completely abdicate responsibility for her own safety.

**Misuse or Abuse of Product** *Misuse or abuse of product* differs from voluntary assumption of risk in that misuse or abuse includes actions that the injured party did not know to be dangerous, while assumption of risk does not. This defense is only available to the seller where the misuse or abuse is not reasonably foreseeable. If it is foreseeable, the seller must take reasonable actions to guard against the misuse or abuse. Where the

<sup>23</sup>*Staub v. Toy Factory, Inc.*, 749 A.2d 522, 532 n.11 (Pa. Super. Ct. 2000) (citation omitted).

defense is available to the seller, however, it is a defense to both negligence and strict liability actions, as well as warranty actions (see Case Illustration 10.7).

**State-of-the-Art Defense and Post-Sale Duties to Warn** Generally, in determining whether a product is “in a defective condition unreasonably dangerous” to the consumer or user or to his property, the courts consider the state of human knowledge at the time that the product was sold, not at the time that products liability case is heard. The seller should be held liable only for what it reasonably could have known at the time the product was sold. Many states have statutes that specifically provide that a product is not defective if it is designed and sold in a manner consistent with industry customs or the state of the art at the time of sale<sup>24</sup> (see Case Illustration 10.8).

Some states that apply the state-of-the-art defense require only that the manufacturer conform to industry standards.<sup>25</sup> The problem with such an approach, of course, is that

#### CASE ILLUSTRATION 10.7

### **MECURIO v. NISSAN MOTOR CORP., 81 F. SUPP. 2D 859 (N.D. OHIO 2000)**

**FACTS** Roy Mercurio drove his Nissan Altima into a tree at a speed of between 30 and 40 miles per hour. At the time, his blood alcohol content was at least .18 percent. When the car struck the tree, the passenger compartment collapsed and Mercurio suffered a severe closed head injury. Mercurio’s wife brought a products liability action against Nissan, the car’s manufacturer, claiming that the car was not crashworthy.

**DECISION** The defendant first argued that evidence of Mercurio’s blood alcohol content should be admitted into court to show that Mercurio had engaged in unforeseeable misuse of the car. The court rejected the defendant’s argument, stating that “[t]he fact that a collision may have been caused by the driver’s intoxication, as opposed to another form of negligence, does not reduce the manufacturer’s duty to provide a reasonably safe vehicle.”

The court noted that “although the intended purpose of automobiles is not to participate in collisions, it is foreseeable that the collisions do occur, and an automobile manufacturer is under an obligation under Ohio law to use reasonable care in the design of its vehicle to avoid subjecting the user to an unreasonable risk of injury in the event of a collision.” The court concluded that “[r]egardless of the cause of Mercurio’s

accident, the type of accident that is at issue in this case—a frontal collision with a stationary object at thirty to forty miles per hour—is foreseeable.” Thus, evidence of Mercurio’s blood alcohol content was not admissible to demonstrate unforeseeable misuse of the car.

The defendant next argued that by driving under the influence of alcohol, Mercurio voluntarily assumed the risk of whatever injuries he suffered. Under Ohio law, a plaintiff assumes the risk of an unreasonably dangerous condition when: (1) he knows of the condition; (2) the condition is patently dangerous; and (3) he voluntarily exposes himself to the condition.

Here, the court found, the dangerous condition that Mercurio allegedly assumed was the alleged uncrashworthiness of the car, not the risk of an accident generally. The defendant had not alleged, however, that Mercurio knew that the vehicle’s subfloor posed a risk of buckling or that the subfloor was patently dangerous, or that Mercurio voluntarily exposed himself to the dangers of driving in a vehicle that was not crashworthy. Under these facts, the defendant could not raise the defense of assumption of risk.

Thus, the court granted the plaintiff’s motion to exclude any reference to Mercurio’s consumption of alcohol on the night of his automobile accident.

<sup>24</sup>See, e.g., Ariz. Rev. Stat. Ann. § 12-681 *et seq.*; N.H. Rev. Stat. Ann. § 507:8-g; Tenn. Code Ann. §§ 29-28-104-105.

<sup>25</sup>See, e.g., *Beech v. Outboard Marine Corp.*, 584 So.2d 447 (Ala. 1991).

## CASE ILLUSTRATION 10.8

**ANDERSON v. OWENS-CORNING FIBERGLAS CORP., 810 P.2D 549 (CAL. 1991)**

**FACTS** Carl Anderson filed a suit in strict liability against Owens-Corning Fiberglas Corp. and other manufacturers of products containing asbestos, alleging that he had contracted asbestosis and other lung ailments through exposure to asbestos and asbestos products while working at a naval shipyard from 1946 to 1976. His complaint alleged that the defendants were liable in strict liability for failing to warn the users of the risk of danger associated with asbestos and asbestos-containing products. The defendants responded by raising the state-of-the-art defense; i.e., “that even those at the vanguard of scientific knowledge at the time the products were sold could not have known that asbestos was dangerous to users in the concentrations associated with defendants’ products.”

**DECISION** The California Supreme Court ruled that: “Exclusion of state-of-the-art evidence, *when the basis*

*of liability is a failure to warn*, would make a manufacturer the virtual insurer of its product’s safe use, a result that is not-consonant with established principles underlying strict liability.” The court stated that public policy grounds supported such an outcome: “[I]f a manufacturer could not count on limiting its liability to risks that were known or knowable at the time of manufacture or distribution, it would be discouraged from developing new and improved products for fear that later significant advances in scientific knowledge would increase its liability.”

Thus, the court held that “a defendant in a strict products liability action based upon an alleged failure to warn of a risk of harm may present evidence of the state of the art, i.e., evidence that the particular risk was neither known nor knowable by the application of scientific knowledge available at the time of manufacture and/or distribution.”

an entire industry may be lax in requiring safety devices or in developing safer technologies. Other states go to the opposite extreme, requiring that the manufacturer conform to cutting-edge technology within its industry.<sup>26</sup> An intermediate, third approach, which was adopted in the Restatement (Third),<sup>27</sup> requires the manufacturer to act reasonably in keeping up with technological advances within its industry and in including safe components and safety devices.<sup>28</sup> In a few states, the manufacturer is held liable for the harm caused by a defect even if discovery of the defect was scientifically and/or technically impossible at the time the product was marketed.

In some instances, the manufacturer may have no reason to know of a defect at the time of sale but may later discover a defect. The state-of-the-art defense would not have required a warning at the time of sale. The question then becomes whether the manufacturer must issue a warning at the time the defect is discovered.

<sup>26</sup>See *Fibreboard Corp. v. Fenton*, 845 P.2d 1168 (Colo. 1993).

<sup>27</sup>Restatement (Third) of Torts: Products Liability § 2(b) and (c). These subsections provide that a product:

- (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;
- (c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could not have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

<sup>28</sup>See *Vassallo v. Baxter Healthcare Corp.*, 696 N.E.2d 909 (Mass. 1998).

Many states, through their common law or statutes, require manufacturers to provide a *post-sale warning* in such instances. The Restatement (Third) also imposes such a duty on manufacturers. Section 10 states:

- (a) One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to provide a warning after the time of sale or distribution of a product if a reasonable person in the seller's position would provide such a warning.
- (b) A reasonable person in a seller's position would provide a warning after the time of sale if
  - (1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and
  - (2) those to whom a warning might be provided can be identified and can reasonably assume to be unaware of the risk of harm; and
  - (3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and
  - (4) the risk of harm is sufficiently great to justify the burden of providing a warning.<sup>29</sup>

Other states reject a post-sale duty to warn if the product met standards of reasonableness when it was sold.<sup>30</sup>

Does a seller have a duty to monitor products post-sale to discover defects? Comment c to the Restatement (Third) says no, because such monitoring would be too burdensome for manufacturers. Rather, “[a]s a practical matter, most post-sale duties to warn arise when new information is brought to the attention of the seller, after the time of sale, concerning risks accompanying the product’s use or consumption.”<sup>31</sup>

In addition, there is no general duty to *recall* defective products. The Restatement (Third) imposes liability for a post-sale failure to recall a product upon commercial product sellers and distributors only if: (1) a government directive has been issued specifically requiring the recall or (2) the seller or distributor voluntarily undertakes such a recall but then does not act reasonably in recalling the product.<sup>32</sup> This limited duty to recall is not as broad as the duty to provide post-sale warnings of defects; i.e., there are situations in which a manufacturer has a duty to issue post-sale warnings but does not have a duty to undertake a recall.

Manufacturers, distributors, and retailers of consumer products who discover information that a product violates applicable consumer product safety rules or contains a defect that would create a substantial hazards have a duty to immediately inform the Consumer Product Safety Commission. This topic is discussed further in Chapter 8.

**Compliance with Government Standards** Suppose that the seller’s product is regulated and that the state or federal government has set standards for it. If the seller is in compliance with those standards, does the seller have an automatic defense for products liability actions? The answer is no. Government standards generally set *minimum* requirements, and compliance with those standards does not automatically shield the manufacturer or seller from liability, though it may be considered as evidence by the judge or jury that the product is not defective. Several states do have statutes that make

<sup>29</sup>Restatement (Third) of Torts: Products Liability § 10.

<sup>30</sup>See, e.g., *Campbell v. Gala Indus., Inc.*, 2006 U.S. Dist. Lexis 26606 (D.S.C. Apr. 20, 2006); *Flax v. Daimler Chrysler Corp.*, 2006 Tenn. App. Lexis 822 (Dec. 27, 2006).

<sup>31</sup>Restatement (Third) of Torts: Product Liability § 10 comment c.

<sup>32</sup>Restatement (Third) of Torts: Product Liability § 11 comment c.

regulatory compliance a defense in certain situations. New Jersey, for example, has such a statute for FDA-approved drugs and drug labels.

The Restatement (Third) creates a rule of absolute liability for *noncompliance* with safety statutes or regulations, stating that where the person injured is in the class of persons whom the statute or regulation was intended to protect and the danger is one against which the statute or regulation was intended to protect, the noncompliance renders the product defective.<sup>33</sup>

**The Learned Intermediaries and Sophisticated Purchaser Rules** In some instances, a manufacturer or supplier may satisfy its duty to warn by providing warnings to a “learned intermediary,” as opposed to the end user of the product. For example, drug manufacturers may provide doctors with adequate information of the risks and hazards associated with drugs; the prescribing or treating physician then intervenes between the manufacturer and the consumer.<sup>34</sup> This rule has also been used to shield a cobalt manufacturer who informed an employer (who was a sophisticated cobalt user) but not the employee of the risks of dust inhalation,<sup>35</sup> and a supplier of naphtha who warned an employer of the chemical’s combustibility but did not warn the worker who was ultimately injured in an explosion.<sup>36</sup> The theory behind this defense is that the learned intermediary or sophisticated user is better able to make an “informed choice” and to tailor the warnings to meet the end user of the product.

The doctrine has come under fire in recent years, however, as drug manufacturers increasingly advertise their products to consumers. For example, the New Jersey Supreme Court ruled that if a manufacturer markets its products directly to consumers, it has a duty to warn consumers directly of the foreseeable risks associated with the drug.<sup>37</sup>

**Statutes of Limitation/Statutes of Repose** *Statutes of limitation* require that a cause of action be brought within a certain time period (usually measured in a matter of a few years). Thus, if the plaintiff delays too long in filing the suit, she will be prevented by law from doing so. Breach of warranty actions are subject to the statute of limitations for contract claims. Generally, breach of warranty actions must be brought within four years after the cause of action has accrued, which is ordinarily the date at which the seller delivers the goods to the buyer.

In tort actions, the statute of limitations is usually two or three years. It does not begin to run, however, until the time of the injury or until the defect was or should have been discovered by the plaintiff. This may be many years after the purchase of the product. Thus, despite being shorter, the tort statute of limitations can actually be more favorable to the plaintiff than the breach of warranty statute of limitations in many instances.

*Statutes of repose* are state statutes that limit manufacturer and/or seller liability for defective goods to a specific time period. Most such statutes provide that the seller or manufacturer cannot be held liable for defects that manifest themselves after a certain time period, usually 10 to 12 years after purchase of the goods by the consumer. Thus, these statutes relieve sellers and manufacturers of liability for defects in older goods.

**Products Liability Reform** Tort reform in general, and products liability reform in particular, have been hot topics before state and federal legislatures for the past several years. In virtually every legislative session for the past two decades, a products liability

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<sup>33</sup>Restatement (Third) of Torts: Products Liability § 4.

<sup>34</sup>Restatement (Second) of Torts § 402A.

<sup>35</sup>*Tasca v. GTE Prods. Corp.*, 438 N.W.2d 625 (Mich. App. 1988).

<sup>36</sup>*Whitehead v. Dycho Co.*, 775 S.W.2d 593 (Tenn. 1989).

<sup>37</sup>*Perez v. Wyeth Laboratories, Inc.*, 734 A.2d 1245 (N.J. 1999).



reform bill has been introduced in Congress, though none has been successful. These bills would reform existing products liability law by providing for measures such as:

- making it more difficult to obtain punitive damage awards;
- capping the amount of punitive damages awarded in any one case; and
- shielding sellers from liability for manufacturing defects.

Many states have passed their own tort reform measures. These state laws generally limit recoveries (often by capping them at \$250,000 or \$500,000) for non-economic losses, such as pain and suffering or mental or emotional distress. About two-thirds of the states restrict or limit the recovery of punitive damages. Some states also have statutes limiting the liability of non-manufacturers.

***International Products Liability Laws*** Products liability laws typically develop in nations with economies marked by both mass production and mass consumption. In such settings, older, more traditional negligence standards cease to function well because they impose a difficult burden of proof on injured consumers. In the United States, with its common law tradition, the inequities that resulted from the negligence standard were reformed primarily through judicial decisions and the development of an extensive body of case law of products liability, including strict liability. In civil law nations, the movement from a products liability system based on negligence to one based on strict products liability has developed more commonly through legislation.

## DISCUSSION CASES

### 10.1 Warranties—Express and Implied; Warranties—Remedies

#### *Dunleavy v. Paris Ceramics USA, Inc.*, 57 U.C.C. Rep. Serv. 2d (Callaghan) 653 (Super. Ct. Conn. 2005)

On three separate occasions during the year of 2001, the plaintiff, Anne Dunleavy d/b/a Unique Interiors, an interior designer, ordered a combined total of 3,280 square feet of French Antique Bourgogne stone from the Bourgogne region of France from the defendant, Paris Ceramics USA, Inc., a stone retailer, at a cost of \$124,693.33. The stone was needed to renovate the deck area around the outdoor pool of Dunleavy's client, Terrance McClinch. Paris Ceramics' agent represented to Dunleavy that the stone was suitable for exterior use in Fairfield, Connecticut.

Dunleavy resold the stone to McClinch at a markup of \$50,900. The stone was installed by C.A. Sanzaro, Inc., the contractor hired by John Desmond Builders, Inc., McClinch's general contractor. The installation of the stone was completed around September 2001. Between November 2001 and January 23, 2002, approximately 40–50% of the stone had flaked and broken off rendering the entire deck area unsuitable for use. On January 23, 2002, a meeting was held

between Dunleavy, Richard Abbot (Paris Ceramics' vice-president of operations), McClinch, Desmond, and Caesar Sanzaro (C.A. Sanzaro, Inc.'s principal), in which all agreed that the stone had to be completely replaced. Abbott stated that Paris Ceramics would do whatever was necessary to correct the situation at its own cost. Following the meeting, Dunleavy asked Paris Ceramics for a refund of \$124,693.33. Paris Ceramics requested for an opportunity to remedy the situation by supplying the replacement stone. During the Spring of 2002, however, the patio stone was replaced at the McClinch residence with stones supplied by another stone retailer. Subsequently, Dunleavy was informed that McClinch would no longer be using her services.

On August 26, 2002, Dunleavy filed a complaint against Paris Ceramics alleging ... breach of warranty .... \* \* \*

\* \* \*

## II. Breach of Warranty

Dunleavy ... claims that Paris Ceramics breached (1) an implied warranty for a particular purpose, (2) an implied warranty of merchantability, and (3) an express warranty created by a description of the goods, by a sample or by a model.

“Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under [UCC § 2-316] an implied warranty that the goods shall be fit for such purpose.” “To establish a cause of action for breach of the implied warranty of fitness for a particular purpose [therefore], a party must establish (1) that the seller had reason to know of the intended purpose and (2) that the buyer actually relied on the seller.”

“A warranty of merchantability is implied in any sale of goods by a merchant seller; the statutory standards for merchantability include, under [UCC § 2-314(2)(c)], that the goods be fit for the ordinary purpose for which such goods are used.” “[UCC] § 2-314 imposes warranty liability for the protection of buyers. The purpose behind ... § 2-314 is to hold a merchant seller responsible when inferior goods are passed along to an unsuspecting buyer. Thus, whether or not the defects could, or should, have been discovered by the merchant seller, the merchant seller is liable to the buyer whenever the goods are not, at the time of delivery, of a merchantable quality .... The Uniform Commercial Code is designed to protect the buyer from bearing the burden of loss where merchandise does not live up to normal commercial expectations ....”

“In the case of the implied warranty of merchantability, there is liability without fault. Although the goods must be nonconforming [for a breach to occur], no distinction is made in terms of the fault of the defendant. The implied warranty of merchantability is breached whether or not the seller could have prevented the nonconformity.... The only practical and logical conclusion is that the warrantor is made liable, although free from moral or personal fault, because society for one reason or another wants to place the burden of harm resulting from nonconforming products upon the warrantor rather than upon the buyer....”

[UCC § 2-313] provides that “(1) express warranties by the seller are created as follows: (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall

conform to the affirmation or promise. (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description. (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.”

It is an uncontested fact that Paris Ceramics knew that Dunleavy ordered French Antique Bourgogne stone to be installed on the exterior patio of the McClinches’ residence. The evidence also shows that Dunleavy relied on the expertise of Paris Ceramics’ agent in making her decision to use French Antique stone for the project, and that the stone failed for its particular purpose within a few months of its installation. Dunleavy ... has established that Paris Ceramics knew of her intent to use the stone for an exterior patio, and that she relied on Paris Ceramics’ agent in choosing an appropriate stone for the job. Dunleavy has, therefore, established that Paris Ceramics breached an implied warranty for a particular purpose as to Dunleavy’s purchase of the French Antique Bourgogne stone.

The court also finds that Paris Ceramics breached an implied warranty of merchantability and an express warranty when it sold the French Antique stone to Dunleavy. Dunleavy ordered the stone to be used on the exterior of the McClinches’ residence. As mentioned above, the evidence shows that the stone was not fit for exterior use. It is also an uncontested fact that Paris Ceramics is a stone retailer that has been in the business for more than ten years. Whether or not the defect of the stone could have been discovered by Paris Ceramics is irrelevant as to whether or not it should be held responsible for breaching an implied warranty of merchantability. In addition, the evidence shows that Paris Ceramics’ agent explicitly told Dunleavy that the stone would be suitable for exterior use. The court, therefore, finds that Paris Ceramics breached an implied warranty of merchantability and an express warranty.

### 1. Mitigation of Damages

The Supreme Court has often held that “in the contracts and torts contexts ... the party receiving a damage award has a duty to make reasonable efforts to mitigate damages.... What constitutes a reasonable effort under the circumstances of a particular case is a question of fact for the trier.... Furthermore, [the court has] concluded that the breaching party bears the burden of proving that the nonbreaching party has failed to mitigate damages.”

Paris Ceramics claims that Dunleavy failed to mitigate her damages. In her defense, Dunleavy claims that she had no control or authority over the McClinch's residence. The court finds that although Paris Ceramics was willing to replace the stone at its own expense, the decision to allow Paris Ceramics to replace the stone was not Dunleavy's decision to make, but rather McClinch's decision. Although Dunleavy may not have done her best in order to try to convince McClinch to take up Paris Ceramics' offer to replace the patio stone, the evidence shows that McClinch was aware that Paris Ceramics was willing to replace the failed stone. Because McClinch did not accept Paris Ceramics' offer and decided to use another stone supplier, the court finds that Dunleavy should not be held responsible for McClinch's decision. Accordingly, the court finds that Dunleavy did not fail to mitigate her damages.

\* \* \*

#### IV. Damages

"The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount." [UCC § 2-714.] "In a proper case any incidental and consequential damages under the next section [UCC § 2-715] may also be recovered." "The UCC provides remedies to one who purchases defective goods, including incidental and consequential damages caused by a seller's breach. Such remedies are defined in [UCC § 2-715.]"<sup>8</sup>

<sup>8</sup>(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and (b) injury to person or property proximately resulting from any breach of warranty.

[UCC § 2-715.]

Dunleavy paid Paris Ceramics \$114,636 for the stone and \$10,327.33 for shipping. As evidenced by her invoice, she charged McClinch \$50 per square foot, which yields \$49,364 in profit. She also charged McClinch \$9,840 in taxes. As per Dunleavy and McClinch's mediation agreement, she also had to pay him back \$74,536 for the installation of the patio and McClinch's general contractor's overhead cost and profit. In addition, the cost of removing the damaged patio was \$11,543.40. Wherefore, Dunleavy is owed \$270,246.73 for Paris Ceramics' breach of warranty.<sup>10</sup>

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#### QUESTIONS FOR DISCUSSION FOR CASE 10.1

1. What types of warranties were formed here? What behavior on the part of the defendant led to the creation of each of those types of warranties?
2. The defendant's argument that the plaintiff failed to meet her duty to mitigate her damages failed. Why? Do you think this outcome was fair to the defendant?
3. How does the court calculate the damages owing to the plaintiff? Do you feel the plaintiff was fully compensated for her losses? Why or why not?

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<sup>10</sup>\* \* \* In addition, she claims that she is owed an extra \$395,071.10, which allegedly represents money the McClinch's owe her. She claims that Paris Ceramics should pay her for that amount because if it wasn't for the failure of the stone, McClinch would not have fired her and would have given her at least two more projects. In his deposition testimony presented at trial, however, McClinch testified to having other disputes with Dunleavy besides the failing of the stone. He also testified that he probably would not have continued to use Dunleavy's services even if the problem with the stone had never happened. The court finds, therefore, that Dunleavy did not prove beyond a preponderance of the evidence that "but for" Paris Ceramics' breach, McClinch would have paid her the \$395,071.10.

## 10.2. Warranties—Disclaimers; Magnuson-Moss Federal Warranty Act *Thomas v. Micro Center, 875 N.E.2d 108 (Ohio App. 2007)*

Plaintiff-appellant C. Douglas Thomas appeals from a summary judgment rendered in favor of defendant-appellee Micro Center, Inc. on his claims for breach of warranties relating to a defective laptop computer he purchased from Micro Center. \* \* \* We affirm in part and reverse in part. \* \* \*

### I

\* \* \*

Appellant purchased a Toshiba computer from Micro Center on January 2, 2004. The Micro Center purchase receipt stated that “NOTEBOOK/LAPTOP COMPUTERS \*\*\* MAY BE RETURNED OR EXCHANGED WITHIN 7 DAYS OF PURCHASE \*\*\*.”

Toshiba provided a one-year, limited warranty against defects in materials and workmanship, and further warranted that the computer would conform to the factory specifications in effect at the time the computer had been manufactured.

Appellant also purchased a three-year, “TechSaver Protection Plan.” The plan specifically stated that “coverage begins on the date of purchase of the covered equipment and is inclusive of the manufacturer’s warranty. During the manufacturer’s warranty period, any parts and labor covered by that warranty are the sole responsibility of the manufacturer.” The plan stated that it was an agreement between Butler Financial Solutions, LLC and the purchaser.

The computer began to malfunction just three weeks after purchase. Appellant spoke with Toshiba’s customer service, and then brought the computer back to Micro Center. Appellant stated that the problem had “something to do with the programming.” Micro Center accepted the computer back and reinstalled the operating system to get the computer working.

The computer worked correctly for only one month after that. Sometime in March or April 2004, the computer began malfunctioning. Appellant said that he called Toshiba customer service about eight times at that point. He could not recall the exact nature of the problems he experienced, but said that Toshiba “carried me through and it started working again.” These fixes lasted for only two or three weeks, though. Toshiba told appellant that he had a broken “recovery disk.” It sent him a new disk and the computer began working again.

In July 2004, the computer again stopped working. Toshiba diagnosed the problem as a “hard drive problem” and replaced the hard drive. Appellant received the computer back in August 2004, but it would not “boot.” Toshiba told appellant to take the computer to a local repair facility. That facility again replaced the hard drive along with some other components, but these repairs did not fix the problems. It told appellant that it could not repair his computer. Appellant again contacted Toshiba and said that he wanted a replacement computer. Toshiba told appellant to contact Micro Center because it was “not their policy to replace computers.” Micro Center told appellant that it had no obligation to replace the computer because the computer was still under warranty with Toshiba. Appellant contacted Toshiba’s legal department by mail to demand a replacement computer, but his letter went unanswered.

Appellant filed a complaint against both Toshiba and Micro Center that asserted three claims: (1) breach of contract based on the express warranty issued by Toshiba and the TechSaver Protection Plan extended warranty purchased through Micro Center, (2) breach of implied warranties of merchantability and fitness ..., and (3) violation of the Magnuson-Moss Warranty Act. Micro Center filed a motion for summary judgment on all three claims, arguing that it did not issue any warranties to appellant, that appellant’s claims related to a time period in which Toshiba has warranted the computer, and that the Magnuson-Moss Act was inapplicable to commercial transactions .... The court granted summary judgment without opinion.

### II

Appellant first argues that Micro Center is liable to him [under UCC § 2-314] because it imposes implied warranties of merchantability and fitness for a particular purpose. He maintains that, regardless of what Toshiba may have disclaimed, these implied warranties applied to Micro Center.

[UCC § 2-314] states in pertinent part:

(A) Unless excluded or modified as provided in [UCC § 2-316], a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.

The implied warranty of fitness for a particular purpose is set forth in [UCC § 2-315], which states:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under [UCC § 2-316] an implied warranty that the goods shall be fit for such purpose.

[UCC § 2-316] governs the exclusion of implied warranties. That section states:

(B) Subject to division (C) of this section, to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states for example, that "There are no warranties which extend beyond the description on the face hereof."

Micro Center is a "merchant" as defined by [UCC § 2-104(1)].

The record contains no evidence to show that Micro Center excluded its warranties under [UCC § 2-316]. The sales receipt shows that Micro Center limited the return or exchange of laptop computers to seven days after purchase, but this did not constitute a valid exclusion of warranties. To be effective, the exclusion of a warranty must mention merchantability and, in the case of fitness for a particular purpose, must be conspicuous. The receipt offered into evidence contained none of these requirements.

\* \* \*

Toshiba's exclusion of implied warranties does not apply to Micro Center. In *Barazzotto v. Intelligent Sys., Inc.* (1987), 40 Ohio App.3d 117, 119-120, 532 N.E.2d 148, the [court stated]:

When the manufacturer sells the goods to a dealer who resells the goods to the ultimate purchaser, the latter cannot sue the manufacturer if the manufacturer ha[s] made a disclaimer of warranties that satisfies UCC § 2-316. The fact that the manufacturer is thus protected from liability does not protect the dealer who resells without making this [sic] own disclaimer of warranties. That is, the manufacturer's disclaimer of warranties does not run with the goods

so as to protect any subsequent seller of them. To the contrary, each subsequent seller must make his own independent disclaimer in order to be protected from warranty liability.

\* \* \*

Micro Center presented no evidence to show that it excluded any warranties when it sold the computer to appellant. We therefore find that the court erred by granting summary judgment to Micro Center on appellant's claims for breach of implied warranties of merchantability and fitness for a particular purpose.

### III

Appellant based his second claim under the Magnuson-Moss Warranty Act.

The Act requires manufacturers and sellers of consumer products who provide written warranties to consumers to give detailed information about their warranty coverage. In addition, it affects both the rights of consumers and the obligations of warrantors under written warranties. It is important to understand that the Act applies only to written warranties. [The Act] states in part:

Full and conspicuous disclosure of terms and conditions; additional requirements for contents. In order to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products, any warrantor warranting a consumer product to a consumer by means of a written warranty shall, to the extent required by rules of the Commission, fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty. \*\*\*

There is no evidence that Micro Center offered any warranties on the Toshiba computer. The only evidence of a written warranty consists of the Toshiba warranty and the TechSaver extended warranty. Micro Center did state its return policy on the receipt that it printed at the time of the transaction. That policy, however, is not required by law and does not constitute a written warranty for purposes of the Act. The receipt did not contain any written information relating to the performance or workmanship of the computer. The return policy is nothing more than a courtesy to its customers and not a warranty.

It follows that with no written warranty issued by Micro Center, appellant could not, as a matter of law,

prevail on any Magnuson-Moss warranty claim directed against Micro Center. The court did not err by granting summary judgment to Micro Center on appellant's Magnuson-Moss warranty claim.

\* \* \*

#### IV

This cause is affirmed in part, reversed in part and remanded to the lower court for further proceedings consistent with this opinion.

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#### QUESTIONS FOR DISCUSSION FOR CASE 10.2

1. This case illustrates the complexities that the distribution chain can cause for consumers. Which party or parties issued a warranty to this consumer? What warranties were issued?
  2. How does a seller effectively disclaim warranties? What type of language is required?
  3. Why does it matter whether Micro Center is a "merchant"?
  4. Why does the court find that Micro Center is not liable under the Magnuson-Moss Act? Procedurally, what will happen next in this case?
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### 10.3 Products Liability—Negligence, Strict Liability

#### *Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613 (10th Cir. 1998)

Individuals injured by the April 19, 1995, bombing of the Alfred P. Murrah Federal Building ("Murrah Building") in Oklahoma City, Oklahoma, filed suit against the manufacturers of the ammonium nitrate allegedly used to create the bomb. \* \* \* The district court dismissed the complaint for failure to state a claim upon which relief may be granted, and the plaintiffs appealed. We affirm.

\* \* \*

#### Background

On April 19, 1995, a massive bomb exploded in Oklahoma City and destroyed the Murrah Building, causing the deaths of 168 people and injuries to hundreds of others. On May 10, 1995, plaintiffs filed this diversity action, on behalf of themselves and all persons who incurred personal injuries during, or may claim loss of consortium or wrongful death resulting from, the bombing, against ICI Explosives ("ICI"), ICI's parent company, Imperial Chemical Industries, PLC, and another of Imperial Chemical's subsidiaries, ICI Canada.

ICI manufactures ammonium nitrate ("AN"). Plaintiffs allege that AN can be either "explosive grade" or "fertilizer grade." According to plaintiffs, "explosive-grade" AN is of low density and high porosity so it will absorb sufficient amounts of fuel or diesel oil to allow detonation of the AN, while "fertilizer-grade" AN is of high density and low porosity and so is unable

to absorb sufficient amounts of fuel or diesel oil to allow detonation.

Plaintiffs allege that ICI sold explosive-grade AN mislabeled as fertilizer-grade AN to Farmland Industries, who in turn sold it to Mid-Kansas Cooperative Association in McPherson, Kansas. Plaintiffs submit that a "Mike Havens" purchased a total of eighty 50-pound bags of the mislabeled AN from Mid-Kansas. According to plaintiffs, "Mike Havens" was an alias used either by Timothy McVeigh or Terry Nichols, the two men tried for the bombing. Plaintiffs further allege that the perpetrators of the Oklahoma City bombing used the 4000 pounds of explosive-grade AN purchased from Mid-Kansas, mixed with fuel oil or diesel oil, to demolish the Murrah Building.

\* \* \*

#### Analysis

\* \* \*

##### I. Negligence

Plaintiffs allege that ICI was negligent in making explosive-grade AN available to the perpetrators of the Murrah Building bombing. Under Oklahoma law, the three essential elements of a claim of negligence are: "(1) a duty owed by the defendant to protect the plaintiff from injury, (2) a failure to properly perform that duty, and (3) the plaintiff's injury being proximately

caused by the defendant's breach." The district court held that ICI did not have a duty to protect plaintiffs and that ICI's actions or inactions were not the proximate cause of plaintiffs' injuries. Although causation is generally a question of fact, "the question becomes an issue of law when there is no evidence from which a jury could reasonably find the required proximate, causal nexus between the careless act and the resulting injuries." Because we determine that there is a failure of causation as a matter of law, we need not discuss whether under Oklahoma law defendants owed plaintiffs a duty of care.

\* \* \* Under Oklahoma law, "the causal nexus between an act of negligence and the resulting injury will be deemed broken with the intervention of a new, independent and efficient cause which was neither anticipated nor reasonably foreseeable." Such an intervening cause is known as a "supervening cause." To be considered a supervening cause, an intervening cause must be: (1) independent of the original act; (2) adequate by itself to bring about the injury; and (3) not reasonably foreseeable. "When the intervening act is intentionally tortious or criminal, it is more likely to be considered independent."

"A third person's intentional tort is a supervening cause of the harm that results—even if the actor's negligent conduct created a situation that presented the opportunity for the tort to be committed—unless the actor realizes or should realize the likelihood that the third person might commit the tortious act." If "the intervening act is a reasonably foreseeable consequence of the primary negligence, the original wrongdoer will not be relieved of liability." \* \* \*

Oklahoma has looked to the Restatement (Second) of Torts § 448 for assistance in determining whether the intentional actions of a third party constitute a supervening cause of harm. Section 448 states:

The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

Comment b to § 448 provides further guidance in the case before us. \* \* \* [U]nder comment b, the criminal

acts of a third party may be foreseeable if (1) the situation provides a temptation to which a "recognizable percentage" of persons would yield, or (2) the temptation is created at a place where "persons of a peculiarly vicious type are likely to be." There is no indication that a peculiarly vicious type of person is likely to frequent the Mid-Kansas Co-op, so we shall turn our attention to the first alternative.

We have found no guidance as to the meaning of the term "recognizable percentage" as used in § 448, comment b. However, we believe that the term does not require a showing that the mainstream population or the majority would yield to a particular temptation; a lesser number will do. Equally, it does not include merely the law-abiding population. In contrast, we also believe that the term is not satisfied by pointing to the existence of a small fringe group or the occasional irrational individual, even though it is foreseeable generally that such groups and individuals will exist.

We note that plaintiffs can point to very few occasions of successful terrorist actions using ammonium nitrate, in fact only two instances in the last twenty-eight years—a 1970 bombing at the University of Wisconsin-Madison and the bombing of the Murrah Building. Due to the apparent complexity of manufacturing an ammonium nitrate bomb, including the difficulty of acquiring the correct ingredients (many of which are not widely available), mixing them properly, and triggering the resulting bomb, only a small number of persons would be able to carry out a crime such as the bombing of the Murrah Building. We simply do not believe that this is a group which rises to the level of a "recognizable percentage" of the population.

As a result, we hold that as a matter of law it was not foreseeable to defendants that the AN that they distributed to the Mid-Kansas Co-op would be put to such a use as to blow up the Murrah Building. Because the conduct of the bomber or bombers was unforeseeable, independent of the acts of defendants, and adequate by itself to bring about plaintiffs' injuries, the criminal activities of the bomber or bombers acted as the supervening cause of plaintiffs' injuries. Because of the lack of proximate cause, plaintiffs have failed to state a claim for negligence.

\* \* \*

### III. Manufacturers' Products Liability

Plaintiffs assert that ICI is strictly liable for manufacturing a defective product. We read their complaint as alleging both that the AN was defectively designed

because, as designed, it was more likely to provide explosive force than an alternative formula, and that ICI failed to issue adequate warnings to Mid-Kansas that the AN was explosive grade rather than fertilizer grade so that Mid-Kansas could take appropriate precautions in selling the AN.

“In Oklahoma, a party proceeding under a strict products liability theory—referred to as manufacturer’s products liability—must establish three elements: (1) that the product was the cause of the injury, (2) that the defect existed in the product at the time it left the manufacturer, retailer, or supplier’s control, and (3) that the defect made the product unreasonably dangerous.” “Unreasonably dangerous” means “dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.” A product may be unreasonably dangerous because it is defectively designed or manufactured, or because it is not accompanied by the proper warnings regarding use of the product.

As the basis of their defective design claim plaintiffs contend that ICI could have made the AN safer by using an alternate formulation or incorporating additives to prevent the AN from detonating. Plaintiffs’ suggestion that the availability of alternative formulas renders ICI strictly liable for its product contradicts Oklahoma law. “Apparently, the plaintiff would hold the manufacturer responsible if his product is not as safe as some other product on the market. That is not the test in these cases. Only when a defect in the product renders it less safe than expected by the ordinary consumer will the manufacturer be held responsible.” The “ordinary consumer” is “one who would be foreseeably expected to purchase the product involved.” As plaintiffs acknowledge, the ordinary consumer of AN branded as fertilizer is a farmer. There is no indication that ICI’s AN was less safe than would be expected by a farmer.

Similarly, plaintiffs have failed to state a claim regarding ICI’s alleged failure to warn Mid-Kansas that the AN was explosive grade rather than fertilizer grade. “Under Oklahoma law, a manufacturer may have a duty to warn consumers of potential hazards which occur from the use of its product.” If the manufacturer does not fulfill this duty, the product may be unreasonably dangerous. Interpreting Oklahoma law, this court has held that the duty to warn extends only to “ordinary consumers and users of the products.” Under this rationale, defendants had no duty to warn the suppliers of its product of possible criminal misuse.

### Conclusion

We AFFIRM the dismissal of plaintiffs’ complaint for failure to state a claim upon which relief may be granted.

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### QUESTIONS FOR DISCUSSION FOR CASE 10.3

1. Products liability typically arises under state law. Why is this case being heard in federal court? What law does the court apply—federal or state?
  2. The court determines that the defendant is not liable in negligence because there is no proximate causation between the plaintiff’s injury and the defendant’s breach. Explain.
  3. The court also determines that the defendant is not strictly liable for the plaintiff’s injuries. Why?
  4. What two types of strict liability claims does the plaintiff allege?
  5. If the use of a fertilizer as an explosive device is widely published on the Internet, do you think that such a use would then be reasonably foreseeable? If a manufacturer’s product is used by a third party in a way that was unforeseen and someone is injured as a result, do you think that the manufacturer loses the defense that the use was unforeseeable in future lawsuits involving similar conduct by other third parties?
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## 10.4 Strict Liability—Consumer Expectations; Risk-Utility Test

### *Higgins v. Intex Recreation Corp.*, 99 P.3d 421 (Wash. Ct. App. 2004)

This is a suit for personal injury damages based on product liability. To make a case, the plaintiffs had to show that the product was not reasonably safe as designed. Ultimately our disposition here turns on

whether the plaintiffs’ showing at trial was sufficient to send the question of the product’s (a snow tube) safety to the jury. The plaintiffs submit that the snow tube went too fast, had no means for the rider to



control it, and turned the rider into a fixed backward position. The product distributor responds essentially that this is what the tube was designed to do and therefore the product performed as designed and was not defective, as a matter of law. We conclude that the plaintiffs' showing was sufficient to submit the question whether the snow tube was *not* reasonably safe as designed to the jury. And we therefore affirm the judgment for the plaintiffs.

## Facts

Intex Recreation Corporation distributes a vinyl, inflatable tube called Extreme Sno-Tube II. Dan Falkner bought one and used it sledding that same day. He described his first run with the tube as fast. And the tube took him farther than other sliding devices he had used. During Mr. Falkner's second run, the tube rotated him backward about one-quarter to one-third of the way down the hill. A group of parents, including Tom Higgins, stood near the bottom of the hill. Mr. Higgins heard a noise, looked, and saw seven-year-old Kyle Potter walking in the path of Mr. Falkner's speeding Sno-Tube:

The size of the person on the sled and the little boy walking, I could see that their heads were going to hit so I took off as fast as I could and I grabbed him and, as I grabbed him to lift him, the tube, I misjudged the speed of the tube. It was going a lot faster than I thought, and it clipped me in the ankle, and I threw Kyle and my feet went straight up into the air and I landed on my forehead and snapped my head back.

The impact severed Mr. Higgins's spinal cord and left him a quadriplegic.

Mr. Higgins and his family sued Intex Recreation Corporation for damages based on negligence and strict liability. He also sued Dan Falkner, Curt Potter, and Kyle Potter for negligence. Curt Potter is Kyle's father; he was present at the hill at the time of the accident.

Much of the testimony at trial focused on the design of the Sno-Tube and specifically its speed and the lack of any way to direct it. Before Mr. Higgins's accident, Intex had prepared a hazard inventory. It evaluated hazards for each Intex product, and classified them by likelihood of the hazard and severity of any injury. Intex ranked the Sno-Tube 1-A, that is, most likely to involve collisions with severe injuries resulting. Intex recognized that a problem with the Sno-Tube is that

"[u]sers may believe that these products have a steering mechanism and [may] misjudge their ability to control them." Speed is a function of the Sno-Tube. Intex's Sno-Boggan goes just as fast but does not rotate. The only way to stop the Sno-Tube is to bail out. Competitors sell inflatable sledding devices with ridges that assist the rider in directing them. But the general position of Intex was that if the Sno-Tube did not go fast and rotate it would not be a Sno-Tube.

The plaintiffs put on ample expert testimony that Sno-Tubes in general carry a higher risk of injury because the rider can easily wind up going over 30 miles per hour downhill backwards with no way to direct or stop the tube. Those same experts concluded that ridges on the bottom of the Sno-Tube would have stopped the rotation and assisted the rider in directing it.

Intex moved for directed verdict at the close of the plaintiffs' case and for judgment as a matter of law following the jury's verdict. It predicated both motions on its view that the plaintiffs had not presented sufficient evidence of a design defect—essentially the Sno-Tube performed as designed. The court denied both motions.

A jury found Dan Falkner not negligent. It found Curt Potter negligent and responsible for 60 percent of the plaintiffs' damages. It found Kyle Potter negligent and responsible for 5 percent. And it found the Sno-Tube was not reasonably safe as designed and held Intex strictly liable for 35 percent of the damages.

Intex appeals.

## Discussion

### Product Liability—Design Defect

#### Washington's Product Liability Act—RCW 7.72.030

(a) A product is not reasonably safe as designed if, at the time of manufacture, the *likelihood that the product would cause the claimant's harm* or similar harms, and the *seriousness of those harms, outweighed the burden on the manufacturer to design a product that would have prevented those harms and the adverse effect that an alternative design that was practical and feasible would have on the usefulness of the product* ....

....

(3) In determining whether a product was not reasonably safe under this section, the trier of fact shall consider whether the product was *unsafe to an extent beyond that which would be contemplated by the ordinary consumer*.

RCW 7.72.030(1)(a), (3) (emphasis added). There are two tests then for determining whether a product is defective.

The *risk-utility test* requires a showing that the likelihood and seriousness of a harm outweigh the burden on the manufacturer to design a product that would have prevented that harm *and* would not have impaired the product's usefulness. RCW 7.72.030(1)(a). The *consumer-expectation test* requires a showing that the product is more dangerous than the ordinary consumer would expect. RCW 7.72.030(3). This test focuses on the reasonable expectation of the consumer. A number of factors influence this determination including the intrinsic nature of the product, its relative cost, the severity of the potential harm from the claimed defect, and the cost and feasibility of minimizing the risk.

Intex argues that the Sno-Tube did exactly what it was designed to do and exactly what consumers expected it to do—go fast and rotate. So any design that eliminated the tube's ability to rotate and go fast eliminated the characteristics that differentiate the Sno-Tube from other sledding products. Intex also argues that sledding—on *any* device—carries the risk of severe injury. And the reasonable consumer understands or should understand this.

We are passing upon the court's denial of a directed verdict and its refusal to grant judgment as a matter of law. Both decisions turn on whether we find substantial evidence in this record to support the jury's finding that this product is unreasonably dangerous under the two tests set out in the statute.

### Risk-Utility Test

We look first at the arguments Intex advances under the risk-utility test. Intex argues that under the risk-utility test, the Sno-Tube, as a matter of law, was reasonably safe as designed. In its view, there is no feasible alternative design with this function—a function sought by the consumer.

A plaintiff can satisfy its burden of proving an alternative design by showing that another product “more safely serve[s] the same function as the challenged product.” There is evidence in this record from which a jury could conclude that the placement of ribs or ridges on the bottom of the Sno-Tube, like those used on Intex's Sno-Boggan, would keep the rider facing downhill. The rider could then see obstacles and direct the tube. All this could be done without significantly sacrificing speed. This is enough ... to prove an alternative safer design.

Intex argues essentially that some products are un-avoidably and inherently unsafe. And while that may be true, [a previous case] suggests some guidelines for evaluating when that is an excuse: “[T]he ... manufacturer of a challenged product would have to demonstrate that an inherently dangerous product is also ‘necessary regardless of the risks involved to the user.’” The focus is on the product and its relative value to society.

Now, the ride down a snow-covered hill backward at 30 miles per hour may be a thrill. But it has very little social value when compared to the risk of severe injury. We do not think the Sno-Tube is a product that is “‘necessary regardless of the risks involved to the user.’”

Intex relies on our case of *Thongchoom v. Graco Children's Products, Inc.*, 71 P.3d 214 (2003), for the proposition that a design change would result in a product that does not do what this one does and, therefore, it would be a fundamentally different product. *Thongchoom* is distinguishable. The function of the product there (a baby walker) was baby mobility. And the only proposed alternative eliminated that essential function—mobility. The product could not be described as inherently unsafe. It simply enabled a baby to move about.

The evidence here was of the obvious—speeding backward at 30 miles per hour down a crowded snow-covered hill is not safe, at least according to this jury. Again, reasonable inferences here are that the user cannot watch for others in his or her path. And, bystanders cannot always move fast enough to avoid the tube. There was ample evidence that an alternative design would permit the user to see what is in his or her path and avoid collisions by either bailing out or by using some minimal steering.

We find ample evidence to support this verdict, applying the risk-utility test.

### Consumer-Expectation Test

We next take up Intex's assertion that the tube was not “unsafe to an extent beyond that which would be contemplated by the ordinary consumer.” RCW 7.72.030(3). Again, we find ample evidence in this record to support the plaintiffs' assertion to the contrary.

Intex's Vice President, William Frank Smith, testified that Sno-Tube users “may believe that these products have a steering mechanism and [may] misjudge their ability to control them.” And a reasonable jury could easily infer that the average consumer may

expect the Sno-Tube to rotate. But he or she might not expect that it would continue in a backward position.

The trier of fact was instructed on and was entitled to consider a number of factors:

In determining the reasonable expectations of the ordinary consumer, a number of factors must be considered. The relative cost of the product, the gravity of the potential harm from the claimed defect and *the cost and feasibility of eliminating or minimizing the risk may be relevant in a particular case. In other instances the nature of the product or the nature of the claimed defect may make other factors relevant to the issue.*

Here, the Sno-Tube is inexpensive. But so is Intex's Sno-Boggan. And the Sno-Boggan provides a fast ride but not a blind high-speed ride. A jury could then find that a reasonable consumer would expect that a snow

sliding product would not put him or her in a backward, high-speed slide.

We find ample evidence in favor of the plaintiffs applying the consumer-expectation test.

\* \* \*

We affirm the judgment.

#### QUESTIONS FOR DISCUSSION FOR CASE 10.4

1. Why does the court apply both the risk-utility test and the consumer expectation test in this case?
2. How should the manufacturer alter its behavior in response to this case?
3. If the manufacturer has to alter its product as a result of this case, it may end up producing a product that is less attractive to potential consumers. Does the court view this as a problem? Why or why not?

## DISCUSSION QUESTIONS

1. Donald Josue Jr. was rendered paraplegic as a result of a single-vehicle accident in which he was ejected from the bed of an Isuzu pickup truck. Josue sued Isuzu, the manufacturer of the truck, asserting, among other things, that Isuzu was liable for (1) negligent failure to warn and (2) strict liability for failure to warn. Both claims were based on the allegation that the pickup truck was defectively designed because it did not contain a warning label informing users of the truck of the dangers associated with riding in the bed of the truck. How does negligent failure to warn differ from strict liability failure to warn? How should the court rule in this case?
2. David Weiner was transporting a 54-inch long, 180-pound canister of nitrous oxide (to use in inflating balloons), which he took to rock concerts in his girlfriend's two-door, hatchback Acura. Weiner flipped down the back of the rear seats to make room for the canister. He suffered personal injuries when he hit a guardrail and the unrestrained canister slid into the back of the driver's seat, pinning him between the seat and the shoulder harness. Weiner sued the manufacturers and sellers of the Acura on two strict liability theories: (1) design defect (because the front seats could not withstand the impact of a 180-pound object and because no restraints were provided to secure the cargo) and (2) failure to warn. How should the court rule on these claims?
3. Werner Co. manufactures an eight-foot aluminum stepladder, which passed the safety standards of the ANSI and the Underwriter's Laboratory, two independent organizations that evaluate stepladders. Daniel Gawenda was injured when he fell from one of these ladders. He sued Werner, alleging that Werner's failure to build more rigid rear rails into the stepladder constituted negligent design. Gawenda offered no evidence of a stepladder that used more rigid rear rails than Werner's, nor did his expert present evidence describing the feasibility of alternative designs. How should the court rule on Werner's negligence claim?
4. Mr. and Mrs. Holowaty, a Canadian couple, stopped at McDonald's for breakfast while traveling through Rochester, Minnesota. Mr. Holowaty purchased a cup of coffee containing the warnings "HOT!" and "CAUTION: CONTENTS HOT" on both the lid and the cup. McDonald's requires its franchises to serve their coffee at between 175 and 185 degrees in containers carrying such warnings. Mrs. Holowaty sat in the passenger seat with the beverage tray on her lap. While exiting the parking lot, the coffee tipped and spilled half its contents on Mrs. Holowaty, causing second-degree burns to her thighs and permanent scars. Mr. and Mrs. Holowaty sued McDonald's as the franchisor, alleging that the coffee was defective because it was excessively hot

and because McDonald's failed to provide adequate warnings about the severity of burns that could result. Although the Holowatys admitted that they knew that the coffee would be hot and could cause burns, they argue that reasonable consumers would not anticipate second-degree burns. How should the court rule on their claim?

5. K2 Corporation, a subsidiary of Anthony Industries, marketed the "Dan Donnelly XTC," a snowboard without predrilled holes for bindings. Without such a pattern, purchasers could install their choice of any bindings by simply screwing them into a fiberglass retention panel in the snowboard's core. Hyjek purchased this model and was injured in March 1991 when his binding came loose from the snowboard, striking him inside his left ankle. In 1993, he sued Anthony Industries, claiming that the design was not reasonably safe and the system of threaded screws was a foreseeably inadequate and unsafe binding retention method. In 1992, K2 had begun to design a new system involving "through-core inserts" molded into the snowboard. Fine threaded screws were then screwed into the inserts to hold the bindings in place. Hyjek sought to enter into evidence K2's subsequent change in design to support his claim for design defect. Should the judge allow the evidence into trial?
6. Larry Moss purchased a Crosman 760 Pumpmaster BB gun from a local Kmart store for his seven-year-old son Josh. Larry saw a warning on the box that stated "May cause death or injury" but thought that it might refer just to birds or small animals. The box also contained the following warning, which Larry did not read:

WARNING: NOT A TOY. ADULT SUPERVISION REQUIRED. MISUSE OR CARELESS USE MAY CAUSE SERIOUS INJURY OR DEATH. MAY BE DANGEROUS UP TO 475 YARDS (435 METERS). THIS AIR GUN IS INTENDED FOR USE BY THOSE 16 YEARS OF AGE OR OLDER. FOR COMPLETE OPERATING INSTRUCTIONS, REVIEW OWNERS MANUAL INSIDE BOX BEFORE USING THIS AIR GUN.

Additional warnings and flyers were contained inside the box, but Larry did not read them before allowing Josh to use the gun. Larry's instructions to Josh on the proper use of the gun indicated that Larry was aware that the gun could be dangerous if misused, however.

Josh and his cousin Tim were playing with the gun in the woods. Josh hid behind a tree about 15 feet in front of Tim and stuck his head out from behind the tree just as Tim fired. The BB pierced Josh's eye, entered his brain, and killed him. Josh's parents brought a suit against Crosman Corp. and Kmart Corp., alleging that the defendants caused Josh's death by failing to provide adequate warnings detailing the dangers associated with the gun. How should the court rule on this claim?

7. Greg Presto's mental illness was being treated with Clozaril, an antipsychotic medication manufactured by Sandoz Pharmaceuticals Corp. Because Clozaril can damage a patient's immune system, pharmacists and nurses at Caremark, Inc., a distributor of the drug, dispensed the medicine, drew Greg's blood each week, monitored the results of those tests, and provided the results to Dr. Warren, the prescribing physician. The Clozaril helped Greg's condition, but it had undesirable side effects. Greg and his mother requested that Greg be taken off the medication, and Dr. Warren allegedly agreed. In August, 1991, Greg stopped taking the medication, but he failed to heed the warning included in the drug's packaging to gradually reduce the dosage over a one- or two-week period lest the patient's psychotic symptoms recur. Greg committed suicide. The Prestos sued Sandoz, alleging that the manufacturer failed to warn Greg of the dangers he faced if he discontinued use of the drug suddenly. What defense might Sandoz raise? How should the court rule on this claim?
8. In early October, 1989, Sandra Ruffin purchased "Compelling Everglade" carpet, manufactured by Salem Carpet Mills, Inc. The store manager told Ruffin that the carpet "was a higher quality carpet than what she brought in [to the store]" and that she was getting "a very good grade of material." Ruffin alleges that shortly after she purchased the carpet and had it installed, she and her minor daughter began experiencing physical symptoms such as nosebleeds, rashes, extreme sweating, chills, sleeplessness, and racing of the heart. After repeated complaints, the store removed the carpet from her home less than a month after its installation. Ruffin alleges that she and her daughter have suffered severe toxic injuries as a result of the chemicals in the carpet installed in her house and asserts a claim for breach of express warranty. Has an express warranty been created?

9. Skip Wright, a firefighter with 13 years' experience, was operating a Stang deck gun attached to a fire engine while extinguishing a fire. During the course of the fire, the water reaching the water cannon had to be routed from the hydrant through the truck's water pump. The extreme pressure created an unusual force, called a "water hammer," where the force of the water is four to six times greater than normal, detaching the water cannon from the truck and throwing Wright into the air. He landed on the ground with the water cannon falling on top of him. Wright brought suit under a failure-to-warn theory. Stang argued that anyone familiar with fire apparatus would recognize the risk of a water hammer. Stang did not produce evidence to the court that it had provided any warnings regarding the potential hazards of a water hammer. How should the court resolve this dispute?
10. The Black Talon bullet, designed and manufactured by Olin Corp., is a hollow-point bullet designed to bend upon impact into six, ninety-degree-angle, razor-sharp petals or "talons" that increase the wounding power of the bullet by stretching, cutting, and tearing tissue and bone. On December 7, 1993, Colin Ferguson opened fire on the passengers of a commuter train departing from New York City. Ferguson, using the Black Talons in a 9mm semi-automatic handgun, killed six people, including Dennis McCarthy, and injured nineteen, including Kevin McCarthy. Their injuries were enhanced because the bullets performed as designed. Kevin McCarthy and the estate of Dennis McCarthy sued Olin Corp. under design-defect theories based in negligence and strict liability. How should the court resolve this dispute?
11. Ronald Anderson Jr. is a self-employed construction contractor from New York. While working on a project in Connecticut, Anderson purchased lumber from a Home Depot in Danbury, Connecticut. Wishing to protect the lumber from the rain, Anderson also purchased a tarp and bungee stretch cords to cover the lumber that sat in the bed of his pickup. The bungee cords came in an assortment pack of various lengths. Anderson purchased the cords after examining the package, noticing two statements: "Made in the U.S.A. We Make Our Products Where We Make Our Home[s]—America" and "Premium Quality." He failed, however, to read the warnings on the package regarding proper use, including the importance of wearing protective eye wear while using the cords, the maximum stretching capacity of the cords, and admonitions against stretching the cords toward or away from one's body.
 

After Anderson strapped the tarp over the bed of his truck, one of the hooks on the cords became dislodged, hitting him in the left eye. Anderson alleges that the manufacturer, Bungee Int'l Mfg. Corp., breached an express warranty created by the "Made in the U.S.A." and "Premium Quality" statements as well as the drawings showing proper usage. Anderson alleged that the "Made in the U.S.A." and the "Premium Quality" labeling on the packaging, along with the five drawings showing recommended uses, caused him to believe that the cord was "a good, strong, top notch American-made product suitable for numerous uses." The hooks on the cord were made in Taiwan, but the product was assembled in the United States and under federal regulations could be advertised as "Made in the U.S.A." Has there been a breach of express warranty?
12. In 1994, Daniel Scoggin hired Broward Marine for \$5,000 to perform a "bottom job" on his 77-foot sailboat, the "Jubilem." A "bottom job" is a final paint job involving sandblasting the hull to the bare metal and applying a protective coat that prevents barnacles from attaching to the hull of the ship. New Nautical Coatings, Inc., manufactured the paint used on the Jubilem. New Nautical's products contained an express warranty that, if used properly, the paint would protect the hull for one year, and a booklet contained detailed instructions as to use.
 

Three months after the paint job, the coating began to peel. New Nautical determined that this was because Broward had not properly sandblasted the boat, as prescribed by the detailed instructions, and supplied replacement paint at no cost. Once again, the boat was not sandblasted because Scoggin did not want to pay the extra cost. Broward applied a test patch to the boat, and a representative of Nautical approved the new paint job, saying "yeah, go ahead and apply it and [Nautical] would warranty it." The coating did not last. Scoggin sued for breach of an express warranty. Has there been a breach of express warranty?
13. In an attempt to save on utility costs, Metro National Corp. decided to construct a thermal-energy-storage system to replace its central-air-conditioning system at Memorial City Medical Center. Metro contacted Morris & Associates about purchasing three of its ice harvesters (which are

essentially industrial icemakers). Dunham-Bush manufactured a specially engineered compressor, the 1216SE, for use in the Morris harvesters. Hoping to enter this burgeoning market, Dunham-Bush assured Morris that the compressors were specially designed, reliable, and suitable for use under the predicted field conditions. In addition, Dunham-Bush extended its usual one-year warranty to a five-year one on the 1216SE. On several occasions, Morris assured Metro that the compressors were extremely reliable, and Dunham-Bush quickly replaced a compressor that immediately failed. Metro ordered two more units later that year. The compressors experienced a 70 percent failure rate. Metro gave up on the Morris systems and purchased instead a new 200-ton central-air-conditioning system. If Metro were to sue Dunham-Bush for breach of warranty, what warranties should they allege were breached? Should the court find that the warranties had been breached?

14. Reliance Granite Company, run by James R. Noggle, manufactures gravestone monuments for monument dealers. Willis Mining, Inc., quarries granite, cuts it into blocks, and sells it to such manufacturers. Noggle purchased blocks from Willis,

created monuments, and sold them. Within 18 months, the monuments sold by Noggle became discolored, forcing Noggle to replace them. When Noggle sought reimbursement from Willis, Willis refused to pay. Noggle brought this suit against Willis alleging, among other claims, breach of an implied warranty of merchantability. Willis claims that no breach occurred because Noggle inspected the blocks and selected them with monument manufacturing in mind. How should the court resolve this dispute?

15. Scott Gebo's hand was crushed at work in the rollers of a paper embossing machine when a protective guard system failed. Gebo filed a products liability suit against Filtration Sciences, Inc. Filtration Sciences had originally purchased the embosser in 1966 and it had modified the machine by designing and installing the guard system. Three years prior to Gebo's injury, Filtration Science sold its paper mill and all the machinery contained therein, including the embosser, to Knowlton Specialty Papers, Inc.

Should Filtration Sciences be held strictly liable for Gebo's injuries? What public policy implications does this case raise?