REMINGER
RESULTS. PERIOD.

INDIANA PRODUCTS LIABILITY

I. INTRODUCTION

Illinois products liability law is governed by 735 ILCS 5/2-621. However, the current version of the statute includes provisions which were added via Illinois' "Tort Reform Act of 1995" that was subsequently held to be unconstitutional. Accordingly, much of the language of the statute is obsolete and the current state of Illinois products liability law is based primarily in relevant case law.

II. PRODUCTS LIABILITY CLAIMS

In Illinois, there are three possible theories of liability in a product liability case: (1) strict liability, (2) breach of warranty, and (3), negligence.

Strict Liability

Strict liability applies to the sale or lease of any product which, if defective, may be expected to cause physical harm to the consumer or user. Restatement (Second) of Torts, Section 402A, Comment (b). The purpose of strict liability is to assure that the costs of injuries resulting from defective products are borne by those who manufacture and market such products. *Suvada v. White Motor Co.,* 32 Ill. 2d 612 (1965). The elements of a strict liability action are: (1) the plaintiff was injured by the product; (2) the plaintiff's injury was caused by a defective and unreasonably dangerous condition of the product; and (3) the defect existed when the product left the defendant's hands. See Restatement (Second) of Torts, Section 402A. See also *Haudrich v. Howmedia, Inc.,* 169 Ill. 2d 525, 540 (1996).

i. Defective Products

There are two tests that may be used to establish a design defect. The first, is known as the "consumer expectation" test. Under this test, the danger must go beyond that which would be contemplated by the ordinary consumer with ordinary knowledge common to the community as to its characteristics. Restatement (Second) of Torts §402A Comment (I) (1965); *Riordan v. Int'l Armament Corp.*, 477 N.E.2d 1293 (Ill. App. Ct. 1985).

The second test is known as the "risk-utility" test. Under this test, a product is unreasonably dangerous, if the design is a cause of the injuries and if the benefits of the challenged design are outweighed by the design's inherent risk of danger. *Lamkin v. Towner,* 563 N.E.2d 449 (1990).

ii. Failure to Warn

A product also may be unreasonably dangerous because of a failure to adequately warn of a danger or a failure to adequately instruct on the proper use of the product. *Hammond v. N. Am. Asbestos Corp.*, 454 N.E.2d 210 (Ill.1983). However, there is no duty to warn of dangers which are "obvious and generally appreciated." *McColgan v. Envtl. Control Sys., Inc.,* 571 N.E.2d 815 (Ill. App. Ct. 1991).

The plaintiff must also plead and prove an additional element in failure to warn cases. The plaintiff must prove that the "knew or should have known of the product's dangerous propensity in cases where failure to warn is alleged." *Byrne v. SCM Corp.,* 538 N.E.2d 796 (Ill. Ct. App. 1989). Accordingly, a defendant has no duty to warn of risks of which it neither knew nor should have known at the time the product was manufactured.

Breach of Warranty

Products liability actions brought under breach of warranty are based upon contract law rather than tort law. There are two causes of action under the breach of warranty theory: (1) breach of an implied warranty; and (2) breach of an express warranty.

Breach of the implied warranty of merchantability is another form of strict liability action and applies to the sale of any goods when the seller is a merchant of such goods. It does not require privity of contract between the parties, but the buyer or consumer must notify the seller within a reasonable time after he discovers, or should have discovered, any breach or be barred from recovery. 810 ILCS 5/2-607(3)(a); see *Board of Education v. A.C. and S., Inc.,* 131 Ill. 2d 428 (1989). Breach of express warranty is based upon a written contract between the parties and/or actual representations made by the seller. The law of the contract will govern such claims.

Negligence

A plaintiff may also bring a products liability action under a theory of negligence. This theory involves whether or not a manufacturer, distributor, or seller exercised ordinary care in the design, production, and/or distribution of a product, which subsequently causes injury to the plaintiff. The elements of a negligence action include: (1) duty; (2) breach of duty; and (3), damages to the plaintiff proximately caused by the defendant's negligence. *Sanchez v. Bock Laundry Machine Co.,* 107 Ill. App. 3d 1024 (1982).

The primary differences between strict liability and negligence actions are that (1) the foreseeability of harm of the product is a question of fact rather than an assumption; (2) the defendant's inability to foresee the harm caused is a defense to the action; and (3) the plaintiff must prove that the defendant failed to exercise

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ordinary care (as opposed to strict liability actions where the plaintiff need only prove that harm occurred).

III. AFFIRMATIVE DEFENSES

a. Plaintiff's Contributory Fault

In Illinois products liability actions, ordinary contributory negligence is not a defense. *Coney v. J. L. G. Industries, Inc.,* 454 N.E.2d 197 (Ill. 1983). Rather, plaintiff's fault is a defense only if it rises to the level of assumption of the risk. Id. Essentially, a consumer's unobservant, inattentive, ignorant, or awkward failure to discover the defect is insufficient to constitute a defense to a manufacturer; the plaintiff must have known of the specific product defect, understood and appreciated the risk of injury from that defect, and nevertheless used the product in disregard of the known danger. *Williams v. Brown Mfg. Co.,* 45 Ill.2d 418, 426-427 (1970).

If the plaintiff did assume the risk, "modified" comparative fault principles will apply, meaning that a plaintiff who is greater than 50% at fault may not recover. If the plaintiff's is less than 50% at fault, their recovery will be proportionally diminished by the degree of fault allocated to them.

b. Statute of Limitations

The statute of limitations for filing a products liability claim is 2 years if based on personal injury, and 5 years if based on property damage. 735 ILCS 5/2-621(b). There is also a statue of repose which requires that suit is filed by earlier of (1) 10 years from the date of first sale/lease/delivery or possession to the initial consumer/user; or (2) 12 years from the date of first sale/lease/delivery or possession by a seller. 735 ILCS 5/13-213.

c. Misuse

Misuse refers to an abnormal use of a product for a purpose that is neither intended nor reasonably foreseeable, based on an objective test, considering the nature and function of the product. *Augenstine v. Dico Co.*, 481 N.E.2d 1225 (Ill. Ct. App. 1985). Both the person using the product and the use to which it is being put must be reasonably foreseeable. *Winnett v. Winnett,* 310 N.E.2d 1 (Ill. 1974).

While misuse was historically considered a complete bar to recovery, Illinois courts have now concluded that unforeseeable misuse constitutes comparative fault, a damage-reducing factor. Accordingly, if a plaintiff is found to have misused the product in an unforeseeable manner, modified comparative fault rules will apply.

d. Modification or Alteration of Product

A manufacturer is not liable to an injured user of a product where there has been an unforeseeable alteration. However, the manufacturer may be liable, even if the plaintiff altered the product, if the alteration was reasonably foreseeable. *Cleveringa v. J.I.* Case Co., 595 N.E.2d 1193, 1204 (Ill. App. Ct. 1992).

e. Unavoidably Unsafe Products

Products that are unavoidably unsafe may require warnings that inform that harm sometimes results from their use, and if these warnings are adequate, consumers proceed to use these products at their own risk. *Byrne v. SCM Corp.,* 538 N.E.2d 796 (Ill. App. Ct. 1989).

f. Innocent Seller Statute

Under 735 ILCS 5/2-621, a non-manufacturing defendant must be dismissed from a strict liability action once it files an affidavit certifying that: (1) it had no actual knowledge of the defect in the product that caused the injury; (2) it was not a manufacturer of the product that caused the injury; (3) it exercised no significant control over the design or manufacture of the product and did not provide instructions or warnings to the manufacturer regarding the alleged defect in the product; and (4) it has certified the correct identity of the manufacturer of the product allegedly causing injury.

However, the non-manufacturing defendant may be brought back into the case if the plaintiff is otherwise unable to recover from the manufacturer. *Cherry v. Siemans Medical Systems, Inc.,* 206 Ill. App. 3d 1055 (1990).

c. State of the Art

This is no defense to a strict product liability action. However, evidence of the technological and economic feasibility of a safer design alternative may be presented to the trier of fact to determine if the product was defective and unreasonably dangerous. Likewise, a party may introduce evidence of compliance with established standards. *Rucker v. Norfolk & Western Railway Co.,* 77 Ill. 2d 434 (1979).

IV. DAMAGES

Illinois has no statutory caps on damages for products liability actions. This lack of caps extends to punitive damages as well, which are also available in products liability actions. That said, all products liability actions are governed by the "Moorman" doctrine, which states that a plaintiff cannot recover in tort for solely economic losses. *Moorman Mfg. Co. v. Nat'l Tank Co.,* 435 N.E.2d 443 (Ill. 1982). The Moorman doctrine applies even in the absence of an alternative remedy in contract. *Anderson Elec., Inc. v. Ledbetter Erection Corp.,* 503 N.E.2d 246 (1986).