Products Liability: A Legal Overview

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Summary

Products liability generally refers to the civil liability of a manufacturer or seller for injury caused by its product to the person or property of a buyer or third party. Legal developments starting in the 1960s, particularly the adoption of strict tort liability, have made it substantially easier for persons injured by defective products to recover for damages. Starting in the 1980s, however, many states enacted tort reform legislation that effectively places limits on an injured party's ability to recover. Advocates for consumers and plaintiffs view strong products liability law as necessary to ensure adequate compensation for injured workers and consumers and to furnish an incentive for the manufacture of safe products. Manufacturers and their insurers, by contrast, contend that many products liability judgments are unwarranted or excessive and that national uniformity in products liability law is needed. They have favored replacing the 50-state products liability laws with one federal law. While bills that are narrowly focused on a particular product or industry have been occasionally considered by Congress, no major products liability bills have been introduced during the 113th Congress. This report will be updated as circumstances warrant.

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Overview of Products Liability

Products liability, which is primarily governed by state law, concerns the civil liability of a manufacturer, seller, or other party along a product's manufacturing or distribution chain for personal or property damages caused by a product to a consumer or third-party user of that product.[1] In a typical products liability lawsuit, a plaintiff brings a claim for damages against a manufacturer for injuries sustained while using the product.[2] Damages that a plaintiff typically seeks are for the recovery of medical expenses, disability, pain and suffering, lost earnings and earning capacity, property damage, emotional harm, and even punitive damages, which are intended to punish a defendant's particularly outrageous conduct.[3] To obtain relief from the courts, the plaintiff bears the burden of proving that she used the product in a reasonable or foreseeable manner, and that the product either contained an unnecessary or unreasonable hazard or was improperly marketed, resulting in the harm.[4] Over time, product defects have been generally grouped into three categories—manufacturing defects, design defects, and warning defects, which are described in more detail below.[5] Various causes of action may be relied upon by a plaintiff who seeks to recover against a manufacturer, seller, or other third-party defendant.[6] The causes of action reviewed in this report include strict liability, negligence, breach of warranty, and tortious misrepresentation.[7]

Manufacturing Defects

A manufacturing defect is a mistake that occurs in the manufacturing process such that the product fails to meet the manufacturer's design specifications, resulting in an error that causes an injury to a consumer or other third party.[8] As demonstrated by the case below, products that are physically flawed, damaged, or incorrectly assembled are common examples of manufacturing

[1] Restatement (Third) of Torts: Products Liability §1 (1998) ("One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.").

[2] *See* David G. Owen, Products Liability Law 3 (2d ed. 2008). Courts may define "product" in a number of ways, but the *Restatement (Third) of Torts: Products Liability* Section 19 provides that "A product is tangible personal property distributed commercially for use or consumption. Other items, such as real property and electricity, are products when the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property." Section 19 excludes from the definition of "product," "services, even when provided commercially," and "human blood and human tissue."

[3] *See generally* Paul Sherman, Products Liability for the General Practitioner 282- 96 (1981) (describing in detail available damages and remedies under various products liability causes of action).

[4] *See* Owen, *supra* note 2, at 3.

[5] *See* Restatement (Third) of Torts: Products Liability §2 (1998) ("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 warning."). *See also* Owen, *supra* note 2, at 36-37. Notably there are special rules applicable for product components, like raw materials, valves or switches that have no capabilities until integrated into other products, as well as prescription drugs and medical devices. *See* Restatement (Third) of Torts: Products Liability §§5-6.

[6] *See,* e.g., Wright v. Brooke Group Ltd., 652 N.W.2d 159, 181 (Iowa 2002) ("[W]hile strict liability, negligence, and breach of warranty are 'distinct theories of recovery, the same facts often give rise to all three claims.'").

[7] *See* Owen, *supra* note 2, at 29-34.

[8] *See* Restatement (Third) of Torts: Products Liability §2(a) (defining a manufacturing defect as a situation in which a "product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product").

defects.[9] There are two key characteristics to a manufacturing defect claim that tend to benefit a plaintiff's case.[10] First, as this type of lawsuit only contests the correct manufacturing of a single unit out of the entire product line, it is commonly less costly to litigate than a design or warning defect claim, where an entire product line may need to be challenged. Second, as most jurisdictions closely adhere to a "strict liability" standard when evaluating a manufacturing defect case, it may be easier for a plaintiff to prevail on her claim because she may likely face a lower burden of proof.[11] The "strict liability" standard is discussed in more detail below (see "Strict Liability"). Because consumers generally expect that the products they purchase will be free of dangerous defects, a manufacturer may be more amenable to settling a case if it is persuaded that a physical flaw in its product injured a claimant.[12] On the other hand, a manufacturer may be more apt to litigate if it believes that the product was not defective; if the plaintiff's harm was caused by something else; or, even if the product did cause the harm, something other than the manufacturer caused the product's defectiveness after it left the manufacturer's control; or the plaintiff's damage claim is unreasonable.[13]

Colon ex rel. Molina v. BIC USA, Inc., provides an example of a plaintiff, acting on behalf of herself and her injured child, who proceeded against the defendant on a manufacturing defect claim, after her child suffered severe burns on his body from playing with a disposable lighter that was manufactured with a "child guard" safety latch.[14] The lighter at issue no longer had the child-resistant safety latch when the police retrieved it. In pursuing her manufacturing defect claim, the court stated that under the applicable state law, a plaintiff must "show that a specific product unit was defective as a result of 'some mishap in the manufacturing process itself, improper workmanship, or because defective materials were used in construction,' and that the defect was the cause of the plaintiff's injury."[15] The court did not dismiss the plaintiff's manufacturing defect claim, finding there was sufficient evidence from which a jury might "reasonably conclude that the subject lighter was a lemon and the safety latch just fell out or was otherwise removable with the slightest tug."[16]

Design Defects

A design defect is a mistake in a product's design that results in undue risk to a consumer or other third party that could have been reasonably prevented by a safety device or other design alternatives.[17] Design defect claims are the most commonly asserted type of products liability

[9] *Id*. at §2, cmt. c.

[10] *See* Owen, *supra* note 2, at 448-49.

[11] *Id*. at 448-49. In addition, manufacturing defect claims may be immune from certain types of requirements, limitations, or defenses applicable to the other categories of product defect claims.

[12] *Id*. at 449.

[13] *Id*. at 449-50.

[14] Colon *ex rel.* Molina v. BIC USA, Inc., 199 F. Supp. 2d 53 (S.D.N.Y. 2001) (applying New York law). The plaintiff also asserted design defect, failure-to-warn, and breach of warranty claims in her suit.

[15] *Id*. at 85. ("In other words, a manufacturing flaw exists when the unit in question deviates in quality and other performance standards from all of the other identical units." *Id*.).

[16] *Id*. at 94-95.

[17] *See* Restatement (Third) of Torts: Products Liability §2(b) (defining a design defect as occurring "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 [manufacturer] and the omission of the alternative design renders the product not reasonably safe").

claim against a manufacturer.[18] For example, much of automotive products liability litigation challenges the design of motor vehicles.[19] Unlike a manufacturing defect claim, which examines an individual product, a design defect claim may be more problematic for a manufacturer because it examines the safety of an entire product line, which may need to be modified or removed from the market should the court make a declaration against the manufacturer.[20] As even the best-designed product can be dangerous if used incorrectly, an ongoing challenge for courts has been how to best determine what constitutes a design defect.[21] Courts generally evaluate the adequacy of a product's design upon one of two standards, or a combination thereof.[22] The first is a "consumer expectations" test, which asks whether the design meets the safety expectations of users or consumers.[23] The second is a "risk-utility" test, which asks whether the safety benefits of designing away foreseeable danger exceed the resulting costs.[24] Today, most jurisdictions have moved away from the consumer expectations test and, instead, employ some form of the risk-utility or cost-benefit standard.[25] The *Restatement (Third) of Torts: Products Liability* reflects this shift, as it has primarily adopted a cost-benefit liability standard for design defectiveness.[26]

Young v. Pollock Engineering Group Inc., serves as an example of a design defect case.[27] In *Young*, the plaintiff worked as a "die man," whereby he loaded die into a die changer. The plaintiff's coworker accidentally activated the die changer while the plaintiff was loading the die, from which he sustained severe injuries to his left hand. The plaintiff sued the manufacturer of the die changer for design defectiveness, as the plaintiff's employer was able to install a "barrier guard" around the die changer subsequent to the accident.[28] The court stated that under the applicable state law, a plaintiff asserting a design defect claim must establish that the product

[18] *See* Owen, *supra* note 2, at 497. The absence of an adequate safety device is frequently the claim of design defectiveness. *See*, e.g., Thibault v. Sears, Roebuck & Co., 395 A.2d 843 (N.H. 1978) (lack of sufficient housing surrounding a power lawnmower); Burke v. Spartanics, Ltd., 252 F.3d 131 (2d Cir. 2001) (lack of mechanical guard or electrical interlock cut-off device on a dangerous machine); Halliday v. Sturm, Ruger & Co., 792 A.2d 1145 (Md. 2002) (lack of a "safety" on a gun).

[19] *See* Owen, *supra* note 2, at 497.

[20] *Id*. at 499.

[21] *Id*. at 36-37.

[22] *Id*. at 502.

[23] In the 1960s and 1970s, most courts which applied the rule of Section 402A of the *Restatement (Second) of Torts* in products liability cases concluded that design defectiveness should be measured by "consumer expectation," given that the definitions of the product liability standard contemplate the consumer's expectations. Owen, *supra* note 2, 502-03, 508. *See also* Restatement (Second) of Torts §402A, cmt. g (defining "defective condition" as "where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him"); and §402A, cmt. i (defining "unreasonably dangerous" as "the article sold must be 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.").

[24] Owen, *supra* note 2, at 502.

[25] Generally, a "risk-utility" test indicates that a "product's design may be classified as defective if the costs of improving its safety (including dollar costs and any lost utility or increased dangers of other types) are less than the expected safety benefits." *Id*. at 37.

[26] *Id*. at 509. *See also* Restatement (Third) of Torts: Products Liability §2(b) ("A product 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 ..., and the omission of the alternative design renders the product not reasonably safe."). Comment d provides that this subsection "adopts a reasonableness ('risk-utility balancing') test as the standard for judging the defectiveness of product designs."

[27] Young v. Pollock Engineering Group, Inc., 428 F.3d 786 (8th Cir. 2005) (applying Minnesota law). The plaintiff also brought a failure-to-warn claim against the manufacturer of the die changer.

[28] *Id*. at 788.

"was in a defective condition unreasonably dangerous for its intended use."[29] For a court to determine whether there is enough evidence to submit the claim to a jury, the court is required to "balance the likelihood of harm, and the gravity of harm if it happens, against the burden of the precaution which would be effective to avoid the harm."[30] On appeal, the court reversed the lower court's dismissal of the plaintiff's design defect claim, finding that the plaintiff had presented sufficient evidence of a defective design of the product at issue.[31]

Warning Defects

A warning defect is one where a manufacturer fails to provide appropriate information about a product's known hazards and how to avoid them, resulting in undue risks to a consumer that could have been reasonably prevented.[32] A manufacturer's general "duty to warn" can be viewed as encompassing two distinct obligations. One is the "duty to warn," where a manufacturer must inform buyers and users of hidden dangers in a product; the second obligation is the "duty to instruct," where a manufacturer must inform buyers on how to avoid a product's dangers in order to use it safely.[33] Warnings are generally regarded by manufacturers as a relatively inexpensive means through which to improve product safety; this view is perhaps reinforced by plaintiffs, who often raise warning defect claims, viewing them as both less expensive and easier to prove in court than a design defect.[34] However, despite the apparent cost benefits that warning defect claims bring to both manufacturers and plaintiffs, courts do not readily require that manufacturers warn of all product dangers.[35] Rather, a central issue posed by a warning defect claim is "adequacy." Although courts will generally not require a manufacturer to warn about obvious defects that would be apparent to ordinary consumers,[36] whether a warning is adequate may depend on a variety of factors. These may include "the severity of the danger; the likelihood that the warning will catch the attention of those who will foreseeably use the product and convey the nature of the danger to them; the intensity and form of the warning; and the cost of improving the strength or mode of the warning."[37]

In *Carruth v. Pittway Corporation*, for example, the plaintiffs, who were estate administrators for the decedents, brought a warning defect claim against the manufacturer of a smoke detector.[38] In *Carruth*, the plaintiffs had installed a smoke detector in their home two days prior to a fire that

[29] *Id*.

[30] *Id*. at 789. The court further stated that whether there is feasible, safer design alternative is an important factor in this balancing test, and that "[o]nly in rare cases do defective-design claims succeed without showing a safer design." *Id.*

[31] *Id*. at 791.

[32] *See* Restatement (Third) of Torts: Products Liability §2(c) (defining a warning defect as a situation in which "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 [manufacturer] and the omission of the instructions or warnings renders the product not reasonably safe").

[33] *See* Owen, *supra* note 2, at 584.

[34] *Id*.

[35] *Id*. at 584 n. 33 (quoting Killeen v. Harmon Grain Prods., Inc., 413 N.E.2d 767, 770-71 (Mass. App. Ct. 1980) (stating that a duty to warn is not imposed as "a mindless ritual")).

[36] *Id*. at 654-55. This standard aims to prevent consumers from being oversaturated with warnings that lead many of them to simply disregard the manufacturer's safety information. *See id* at 584-86, 656.

[37] Bloxom v. Bloxom, 512So.2d 839, 844 (La. 1987). *See also* Restatement (Third) of Torts: Products Liability §2(c), cmt. i.

[38] Carruth v. Pittway Corp, 643 So. 2d 1340 (Ala. 1994).

led to the decedents' death.[39] The plaintiffs alleged that the literature accompanying the smoke detector did not properly warn users about the dangers of installing the smoke detector in "dead air space," an area near the top of the wall and corners of a room where smoke will not easily circulate.[40] As a result, the smoke detector was improperly installed and did not properly function during the fire. In addressing the failure-to-warn claim, the court stated that "the law does not require that necessary warnings be conveyed in the best way possible, ... but does require that they not be conveyed in a manner that effectively 'prevents a consumer from reading them and being warned.'"[41] In this instance, the court noted that while the manufacturer's pamphlet referenced the dangers of "dead air space," it did so within a seven-page pamphlet with small and tight print, which included a significant number of warnings but gave little emphasis to specific dangers.[42] The court concluded that the plaintiffs had presented enough substantial evidence from which a jury could find that the warning was inappropriately given, as it was not adequately designed to attract the user's attention.[43]

Causes of Action

A plaintiff may assert a number of causes of action in her products liability lawsuit to support her product defect claim, regardless of whether she is asserting a manufacturing, design, or warning defect claim.[44] Each of these causes of action has a unique set of factors that a plaintiff must prove in order to obtain relief, as well as defenses that may protect a manufacturer from liability.[45] When bringing a products liability lawsuit, a plaintiff must take these factors and defenses into consideration in determining the appropriate claim(s) to assert and the likelihood of success. Although products liability law derives from common law judicial decisions, many states have enacted legislation that codifies causes of action based on different theories of liability and/or that places limits on when or against whom claims are to be asserted.[46] The following section provides a broad overview of the four types of tort claims that a plaintiff may typically assert in her products liability lawsuit.

[39] *Id*. at 1341-42.

[40] *Id*.

[41] *Id*. at 1345 (citation omitted).

[42] *Id*. at 1345-46.

[43] *Id*.

[44] Restatement (Third) of Torts: Products Liability §2, cmt. n.

[45] The significant number of defenses to product liability suits is beyond the scope of this report. In short, however, such defenses can be grouped into three categories: user-misconduct defenses, no-duty defenses and special defenses. David G. Owen, *Special Defenses in Modern Products Liability*, 70 Mo. L. Rev. 1, 1 (2005). User-misconduct defenses—which include doctrines such as contributory negligence, comparative fault, assumption of risk, and unreasonable reliance—remove liability from the manufacturer by alleging that the user improperly used the product. *Id*. No-duty defenses—which can include the obvious risk and sophisticated user doctrines—are defenses that hold that the features of the product or circumstances were such that the manufacturer had no duty to protect the user from the complained danger. *Id*. Special defenses include all other types of defenses and typically apply to specific products, industries, or circumstances. *Id*. at 1-2.

[46] *See, e.g.*, Tenn. Code Ann. §§29-28-101 to 29-28-108 (2012).

Strict Liability

Contemporary products liability litigation is most often associated with the theory of strict liability.[47] Under the doctrine of strict liability, anyone who sells or manufactures an unreasonably dangerous product that causes physical injury or property damage to the consumer will be found liable for those damages, even if the seller or manufacturer took all possible steps to ensure the safety of that product.[48] An action for strict liability does not require the plaintiff to prove negligence or wrongdoing by the seller or manufacturer; instead, the plaintiff simply needs to prove that she purchased the product from the manufacturer or seller and was later injured by the product.[49] As a result, the strict liability standard makes it substantially easier for a plaintiff injured by a defective product to recover damages when compared to other causes of action described below. Advocates of applying a strict liability standard in products liability actions have long argued that this standard ensures adequate compensation for injured consumers, deters manufacturers from producing dangerous or low-quality products, and ensures judicial efficiency by avoiding lengthy litigation.[50]

Following the publication of the treatise *Restatement (Second) of Torts* in 1965, most courts promptly adopted the strict liability standard set forth in Section 402A for nearly all products liability lawsuits in the 1960s and 1970s.[51] However, standards have since shifted, and many courts now apply a strict liability standard to manufacturing defect claims while evaluating design and warning defect claims under a negligence standard.[52] Although the subsequent publication of the *Restatement (Third) of Torts: Products Liability* reflects this approach taken by the courts,[53] many courts continue to cite Section 402A jurisprudence for the proposition that they are applying a "strict" liability standard to product defect claims.[54] It has been observed that "courts have created a disjunction between what they say and what they do," and it appears that "courts for many years will continue to apply principles of negligence to design and warning defect claims while purporting to apply the 'strict' liability doctrine spawned by § 402A."[55]

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[47] *See* Owen, *supra* note 2, at 254.

[48] *Id*. at 266-68. *See also Restatement (Second) of Torts* §402A, which states,

> 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.

This rule applies although (i) the seller has exercised all possible care in the preparation and sale of his product, and (ii) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

[49] *See* Owen, *supra* note 2, at 66.

[50] *Id*. at 288-97.

[51] *Id*. at 33.

[52] *Id*. During the 1970s and 1980s, even though courts broadly extended the new principle of strict liability from Section 402A "beyond manufacturing flaws to design and warning cases, the truly strict consumer expectations test increasingly gave way to the principles of foreseeability and risk-utility balancing that underlie the law of negligence." *Id*.

[53] *Id*. at 33-34.

[54] *Id*. at 34.

[55] *Id*.

Greenman v. Yuba Power Products, Inc., was a landmark case from 1963 where the court "constructed a new doctrine of strict products liability."[56] It is thus illustrative of how a court may evaluate a product defects case under a strict liability standard. In *Greenman*, the plaintiff sustained serious injuries to his forehead when a piece of wood unexpectedly flew out while he was using a power tool as a wood lathe, a use for which the tool had been designed and marketed.[57] Despite the lower court's finding that the manufacturer had not acted negligently or maliciously and that the plaintiff had not given the manufacturer proper notice of the damages he suffered from the power tools—which were necessary elements for liability under the existing state law—the Supreme Court of California held that the manufacturer was liable for the plaintiff's injuries.[58] The court declared, "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."[59] It reasoned that the costs of injuries resulting from defective products should be borne by the manufacturer, regardless of fault, instead of the injured party, who had no means through which to protect himself.[60] According the court, a manufacturer is always liable whenever a plaintiff, while using the product in its intended way, is injured due to a manufacturing defect for which the plaintiff did not receive adequate warning.[61]

Negligence

A classic cause of action under tort law, negligence is defined as a harm to another resulting from a "failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation."[62] While the increased application of a strict liability standard in the 1960s and 1970s displaced the role of negligence as the principal cause of action in products liability litigation, negligence remained as an alternative means through which a plaintiff could recover damages, and it has regained importance since the 1980s.[63] There are four factors that a plaintiff generally needs to prove in a negligence action: (1) the defendant had a legal duty to act; (2) the defendant breached that duty; (3) the breach was both a cause-in-fact and proximate cause to the plaintiff's injuries; and (4) the plaintiff suffered damages which can be recovered in court.[64] In applying these factors to a products liability lawsuit for negligence, a plaintiff generally must prove that (1) the manufacturer produced an unreasonably dangerous product; (2) the unsafe product caused injury to the plaintiff; and (3) the plaintiff suffered damages which can be recovered in court.[65] Because a plaintiff bears the burden of presenting evidence to show that the

[56] Greenman v. Yuba Power Prods. Inc., 377 P.2d 897 (Ca. 1963). The plaintiff also asserted claims for breach of express and implied warranty.

[57] *Id*. at 898.

[58] *Id*. at 899-902.

[59] *Id*. at 900 (recognizing that this doctrine had been first applied to unwholesome food products but has since been extended to a variety of other products. *Id*.).

[60] *Id*. at 901 ("The purpose of [imposing strict liability on the manufacturer] is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." *Id*.).

[61] *Id*. at 901-02.

[62] Black's Law Dictionary 1133 (9th ed. 2009). *See also* Owen, *supra* note 2, at 60-61; Sherman, *supra* note 3, at 1-3.

[63] Sherman, *supra* note 3, at 1-3.

[64] Prosser, Handbook of Law of Torts, 143 (4th ed. 1971).

[65] *See* Owen, *supra* note 2, at 61.

manufacturer failed to use reasonable care in designing and/or manufacturing the product, the negligence standard may be seen as more favorable to manufacturers than strict liability.[66]

Courts generally determine whether a manufacturer has acted negligently by balancing the cost to the manufacturer of taking additional safety precautions against the benefits provided by those precautions.[67] If the product creates high risks, a manufacturer would likely be required to take greater care in mitigating those risks; whereas if a product creates only small risks, a manufacturer would likely be required to only take minor precautions.[68] Importantly, negligence claims do not require that a manufacturer create a product that is perfectly safe, but only a product that is reasonably safe for its intended purpose.[69]

In *Ford Motor Co. v. Bartholomew*,[70] for example, the plaintiff commenced a negligence suit against the manufacturer of her car after she was severely injured when her car rolled backwards due to a design defect in the car's transmission system.[71] At trial, the plaintiff brought in an expert witness who testified that the plaintiff's car model was manufactured with a defect in the transmission system which, when certain events occurred, would appear to be in the "Park" position, but had not fully engaged.[72] The plaintiff also introduced evidence to demonstrate that the car manufacturer was aware of the defect and had modified it in subsequent models.[73] The jury found in favor of the plaintiff, finding that the transmission system was not safe for its intended use because a reasonably prudent driver would have been led into a "false sense of security" by believing the transmission to be fully engaged in the "Park" position.[74]

Breach of Warranty

A products liability lawsuit where a breach of warranty action is asserted by a plaintiff closely resembles an action for breach of contract.[75] In essence, a products manufacturer has obligations under the law when it makes assertions about a product. If a consumer reasonably relies upon these assertions, the assertions become part of what the consumer bargained for when she purchased the product. As a result, a consumer may bring an action for breach of warranty against the manufacturer if the assertion is proven untrue. Breach of warranty lawsuits are governed by the Uniform Commercial Code ("UCC"), a model statute that was adopted by most state legislatures in the 1950s.[76] The UCC recognizes two principal types of warranties—express and implied.[77] An express warranty is an assertion made directly by the manufacturer or seller about

[66] *Id*. at 65-6.

[67] *Id*. at 30.

[68] *Id*.

[69] *Id*. at 62-63.

[70] Ford Motor Co. v Bartholomew, 297 S.E.2d 675 (Va. 1982). The plaintiff also asserted theories of strict liability, failure-to-warn of a design defect, and breach of implied warranty.

[71] *Id.* at 677-78.

[72] *Id.* at 678.

[73] *Id.* at 678-80.

[74] *Id.* at 680. This holding was upheld on appeal. *Id*. at 684.

[75] *See* Owen, *supra* note 2, at 148-49.

[76] *Id*. at 49-50.

[77] *See* U.C.C. §§2-313, 2-314, 2-315 (2012); *see also* Owen, *supra* note 2, at 148.

the performance, quality, or characteristics of a product.[78] In contrast, an implied warranty is a promise or representation, even if the statement is not directly asserted, about a product's minimal standard of quality that the law attributes to anyone selling a product.[79] Similar to a strict liability action, a plaintiff need not show negligence or wrongdoing by the manufacturer or seller in an action for breach of warranty—whether express or implied.[80] While the specific elements needed to impose liability will vary depending on the type of warranty given, a manufacturer or seller could be held liable so long as the plaintiff demonstrates that a warranty was made, relied upon, and breached.[81]

The plaintiff in *Forbes v. General Motors Corp.*[82] brought a products liability suit claiming breach of an express warranty after being severely injured when her car's air bag failed to deploy during a strong front-end accident.[83] The plaintiff argued that (1) the product breached an express warranty or failed to conform to other express factual representations upon which she relied; (2) the "defective condition" rendered the air bag and car unreasonably dangerous to the plaintiff; and (3) the dangerous condition caused the plaintiff's injuries. At trial, the plaintiff introduced evidence that the car owner's manual stated that the air bag would deploy in an accident and that she paid a higher price for a model equipped with an air bag after a salesman emphasized the importance of this feature during the sales process.[84] Under the state law for breach of express warranty, the plaintiff was not required to present evidence of product defectiveness.[85] Rather, the plaintiff need only demonstrate that the product did not live up to its warranty, that is, that, upon impact, the car's air bag did not deploy.[86] On appeal, the court found that the plaintiff presented sufficient evidence from which a jury could conclude that the car manufacturer was liable for breach of an express warranty.[87]

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[78] *See* Sherman, *supra* note 3, at 44-9.

[79] *See* Black's Law Dictionary 1725 (9th ed. 2009) (defining implied warranty as "[a]n obligation imposed by the law when there has been no representation or promise" or as a "warranty arising by operation of law ... rather than by the seller's express promise").

The UCC codifies two implied warranties: the implied warranty of merchantability and the implied warranty of fitness for a particular purpose. *See* U.C.C. §§2-314, 2-315. The implied warranty of merchantability "requires that goods conform to certain minimum standards ... that of being fit for the ordinary purpose for which such goods are used." Sherman, *supra* note 3, at 54. The implied warranty of fitness for a particular purpose "is an implied promise by the seller that the product sold will meet the buyer's *particular* needs" that is imposed in those situations when the seller is aware of the particular needs for which the product is required. *See* Owen, *supra* note 2, at 181 (emphasis in original).

[80] Owen, *supra* note 2, 154 n.8, 171, 188 (stating that liability for breach of an express warranty is "truly strict[,]" that liability for breach of the implied warranty of merchantability is a "form of 'strict' liability[,]" and that liability for breach of the implied warranty of fitness for a particular purpose can be found "even if the product is entirely merchantable and 'nondefective[,]'" respectively).

[81] *Id.* at 152-53, 172-74, 182. *See also* U.C.C. §§2-313, 2-314, 2-315.

[82] Forbes v. General Motors Corp., 935 So.2d 869 (Miss. 2006).

[83] *Id.* at 871-72.

[84] *Id.* at 874-75.

[85] *Id*. at 879. The Mississippi provision under which the plaintiff sued "does not require that the product be defective, but simply requires a failure of the product to perform as warranted." *Id*.

[86] *Id*. at 877-78 ("We do not intend for today's holding to become a strict rule that no expert testimony is ever needed in any products liability case involving an automobile's air bag. The nature of these fact-driven actions is such that we must approach them on a case-by-case basis.").

[87] *Id.* at 881-82. The Supreme Court of Mississippi allowed the plaintiff's claim to be heard on remand because it reversed the decision of the lower court, which had granted a motion in favor of the defendant car manufacturer.

In contrast, the plaintiff in *Morrison v. Sears, Roebuck & Co*.[88] asserted a products liability claim for breach of an implied warranty. The plaintiff brought suit against the seller and manufacturer of a pair of high heels that collapsed the second time the plaintiff wore them. She suffered a serious injury that required surgery to correct.[89] Under the state's law, a plaintiff is required to prove that (1) the goods bought and sold were subject to an implied warranty of merchantability; (2) the goods did not comply with the warranty in that the goods were defective at the time of sale; (3) the plaintiff's injury was due to the defective nature of the goods; and (4) damages were suffered as a result.[90] During trial, the plaintiff introduced evidence that the heels of the shoe were made of plastic without any interior support and could easily give way when excessive pressure was applied.[91] On appeal, the court concluded that this evidence could lead a reasonable jury to conclude that the seller and manufacturer had breached an implied warranty, as the shoes did not appear to be suitable for the purpose for which they were designed and were defective at the time sold.[92]

Tortious Misrepresentation

Tortious misrepresentation is another cause of action by which a plaintiff can recover when harmed by reasonably relying on a manufacturer's representation about a product that is later shown to be false.[93] Tortious misrepresentation cases usually fall within one of two categories: (1) intentional or fraudulent misrepresentation—that is, cases where the manufacturer *knows* that the assertion is false—or (2) negligent misrepresentation—that is, cases where the manufacturer *should have known* that the statement was false.[94] A plaintiff bears the burden of proving the various elements of her fraudulent or negligent misrepresentation claim.[95] Misrepresentation claims generally do not require a plaintiff to show that the product was defective at the time of sale.[96] However, due to the somewhat subjective nature of these elements, such as demonstrating that the manufacturer was aware of the falsity of his statement and that the plaintiff's reliance on the statement was reasonable, it may be difficult for a plaintiff to succeed in her case.[97] Furthermore, a plaintiff often faces a heightened standard for her pleading requirement to the court, and must satisfy a "clear and convincing evidence" standard when bringing a fraudulent misrepresentation claim.[98] As a result, it appears that a plaintiff rarely attempts to recover

[88] Morrison v. Sears, Roebuck & Co., 354 S.E.2d 495 (N.C. 1987). The plaintiff also asserted a claim of failure-to-warn.

[89] *Id.* at 496.

[90] *Id*. at 301 (referencing N.C. Gen. Stat. §25-2-314).

[91] *Id.* at 497-98.

[92] *Id.* at 497-98, 305. The Supreme Court of North Carolina reversed the decision of the lower court to grant summary judgment in favor of the defendants—the retail store and shoe manufacturer.

[93] *See* Owen, *supra* note 2, at 31. *See also* Restatement (Third) of Torts: Products Liability §9. A number of jurisdictions have also recognized liability for innocent misrepresentation as stated in *Restatement (Second) of Torts* §402B.

[94] *Id*. at 113. These elements, sometimes condensed the courts, generally include (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; and (9) his consequent and proximate injury. *Id*. at 114.

[95] *Id. at* 115, 133.

[96] Restatement (Third) of Torts: Products Liability §9, cmt d.

[97] *See* Owen, *supra* note 2, at 114-138 (detailing the judicial requirements plaintiffs must meet to prove claims for tortious misrepresentation).

[98] *Id*. at 116-17.

damages under tortious misrepresentation, especially if the products liability claim can be pursued through another cause of action.[99]

An example of a products liability case brought under a tortious misrepresentation cause of action is *First National Bank v. Brooks Farms*.[100] The plaintiffs in *Brooks Farm* were a group of dairy farmers who had purchased a silo that failed to adequately preserve cattle feed, leading to a number of economic losses because milk production from the cattle decreased. At trial, the plaintiffs introduced evidence of the manufacturer's promotional material, which indicated that the silos would prevent oxygen from contacting the feed and preserve the feed's nutritional value. The plaintiffs also demonstrated that the manufacturer had knowledge that these representations were false by submitting the manufacturer's internal memoranda as well as testimony from the manufacturer's engineers, which confirmed its knowledge.[101] On appeal, the court affirmed the jury's finding that the manufacturer intentionally misrepresented information about the product upon which the plaintiffs relied and subsequently suffered damages.[102]

Federal Government Action in Products Liability Law

Federal involvement in the products liability area can be traced back to the Interagency Task Force on Product Liability (Task Force) begun by the Ford Administration in 1976.[103] The Task Force's final report in 1977 found a dramatic increase in costs of products liability and sparked various working groups that examined the issue of products liability and tort reform throughout the 1970s and 1980s.[104]

[99] *Id*. at 116-17, 132. Fraudulent misrepresentation claims have figured prominently in litigation against cigarette manufacturers. *See generally* Motley and Player, *Issues in "Crime Fraud" Practice and Procedure: The Tobacco litigation Experience*, 49 S.C. L. Rev. 187 (1998).

[100] First Nat'l Bank v. Brooks Farms, 821 S.W.2d 925 (Tenn. 1991).

[101] *Id.* at 927-27.

[102] *Id.* at 926-27, 931.

[103] Victor E. Schwartz & Mark A Behrens, *The Road to Federal Product Liability Reform*, 55 Md. L. Rev. 1363, 1363 (1996).

[104] *Id.*

As products liability has traditionally been an area governed by state law (see "Overview of State Action" **Text Box** below), federal reform efforts have raised questions on the propriety of federal legislation in the area. Current jurisprudence suggests that products liability legislation would be permissible so long as it falls within Congress's power to regulate interstate commerce.[110] Nonetheless, it may be unconstitutional for Congress to enact products liability legislation that does not substantially affect interstate commerce.[111] For a more in-depth analysis of the constitutionality of federal products liability and other tort-reform legislation, *see* CRS Report 95-797, *Federal Tort Reform Legislation: Constitutionality and Summaries of Selected Statutes*, by (name redacted).

Overview of Federal Government Action on Product Liability, 1970s-1980s

1977—Federal Interagency Task force on Product Liability, directed by the Department of Commerce, issued a final report finding a dramatic increase in costs of products liability insurance that made it difficult for small businesses to obtain insurance.[105]

1978—In April, the Department of Commerce released an Options Paper that included a model bill titled "Product Liability Self-Insurance Act of 1978."[106] In July, the Carter Administration unveiled its program to manage product liability concerns, which closely followed the proposals suggested in the Department of Commerce's Options Paper, and directed that a model uniform product liability law be prepared to add stability to products liability law.

1979—The Department of Commerce published a Model Uniform Product Liability Act.[107] While intended for enactment by the states, both the draft and final versions of the act were introduced in the 96th Congress, but were not enacted.

1981—Congress enacted the Product Liability Risk Retention Act,[108] which sought to lower insurance costs by permitting businesses to form self-insurance pools.[109]

1985—The Tort Policy Working Group, consisting of representatives of 10 federal agencies and the White House, was established.

1986—The Tort Policy Working Group issued a report titled "Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis of Insurance Availability and Affordability." The report made eight recommendations, including the elimination of joint and several liability and of the collateral source rule, a $100,000 cap on noneconomic damages, and 25% cap on the first $100,000 in a lawyer's contingent fees.

1987—The Tort Policy Working Group issued another report, "An Update on Liability Crisis."

[105] *See id.* at 1365. The report also concluded that the rise in costs could be attributed to irrational premium setting procedures by insurance companies and the uncertainty of products liability litigation. *See id.* at 1365-66.

[106] *See* "Options Paper on Product Liability and Accident Compensation Issues," 43 *Fed. Reg.* 14612, April 6, 1978. The Department of Commerce also published a summary of more than 300 comments submitted to it on its Options Paper in September 1978. *See* Dep't of Commerce, 43 *Fed. Reg.* 40438, Sept. 11, 1978.

[107] *See* 44 *Fed. Reg.* 2996, Jan. 12, 1979, for the draft version and 44 *Fed. Reg.* 62714, October 31, 1979, for the final version.

[108] Product Liability Retention Act of 1981, P.L. 97-45, *codified at* 15 U.S.C. §§3901-3906.

[109] *See* Schwartz & Behrens, *supra* note 103, at 1365.

[110] The United States' Constitution grants Congress the power "To regulate Commerce with foreign nations, and among the several States[.]" U.S. CONST. art. I, §8, cl. 3. *See also* Gonzalez v. Raich, 545 U.S. 1, 26 (2005) (holding that Congress could regulate the manufacture and possession of marijuana as marijuana is a commodity with "an established, lucrative and interstate market" and "[p]rohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product").

[111] *See* United States v. Lopez, 514 U.S. 549, 561 (1995) (holding that Congress cannot regulate possession of a firearm within a school zone through the Gun-Free School Zones Act of 1990 as such an act has "nothing to do with 'commerce' or any sort of economic enterprise [and] is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated").

Federal tort reform bills have generally been limited in scope, many of which have been principally aimed at protecting those who sell particular types of products or commit particular types of negligence.[112] This trend has been particularly apparent since 1996, when Congress did not override President Clinton's veto of broad products liability legislation (H.R. 956, 104th Congress).

Consumer representatives and plaintiffs' attorneys generally oppose measures that would effectively limit an injured party's ability to recover in products liability suits. They consider the tort system necessary to provide incentives for the manufacture of safe products and to ensure adequate compensation for injured workers and consumers. Conversely, insurance companies and product manufacturers have supported federal products liability reform, hoping to reduce the amounts paid due to products liability lawsuits, and seeking national uniformity in products liability law.

Overview of State Action

In response to the liability insurance "crisis," which was characterized by a sudden increase in liability premiums, many states enacted tort reform during the 1980s.[113] Some states limited the right of the plaintiff to sue product sellers other than the manufacturer; some states permitted awards of punitive damages only upon proof by "clear and convincing" evidence, or required that a portion of punitive damages be paid to a state fund; some states enacted caps on punitive damages or on noneconomic damages; some states limited or eliminated joint and several liability or the collateral source rule; and some enacted a statute of repose. (See the **Appendix** for an explanation of these terms.) State reforms continued to be enacted through the 1990s and to the present day.

A federal statute could bring about national uniformity with respect to some products liability issues. For example, past proposals would have included a federal statute of limitations or a federal statute of repose for products liability suits. The possibility of national uniformity, however, should not be overestimated. For instance, other past proposals, such as one that would establish a standard of conduct for the award of punitive damages, could likely be subject to varying interpretations by every federal and state court absent a Supreme Court decision establishing a national interpretation. Even if the Supreme Court issues such an interpretation, such a provision's application to the facts of particular cases may vary among jurisdictions.

Preemption of Tort Claims

When Congress wants to create standards or regulate in the area of products liability, it sometimes will enact laws that bar liability for certain causes of action by having a federal law "preempt" state law. Preemption doctrine has its constitutional basis in the Supremacy Clause of the U.S. Constitution, which establishes that federal statutes enacted in accordance with the Constitution "shall be the supreme Law of the Land."[114] The Supreme Court has long held that, under the Supremacy Clause, a state law interfering with or running contrary to a federal law is preempted by it and is thus invalid.[115] The Court has further concluded that federal statutes can

[112] For a list of federal tort reform statues, see CRS Report 95-797, *Federal Tort Reform Legislation: Constitutionality and Summaries of Selected Statutes*, by (name redacted). For a list limited to products liability statutes, see section below, "Federal Statutes Enacted."

[113] *See*, e.g., Handbook of Insurance 243-301 (Georges Dionne ed., 2000).

[114] U.S. Const. art. VI, cl. 2.

[115] *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 212 (1824). A federal law may either expressly preempt state law by explicitly stating so in the language of the federal statute, or preemption may be implied depending on the federal statute's structure or purpose. *See* Gade v. Nat'l Solid Waste Mgmt. Ass'n, 505 U.S. 88, 98 (1992) ("Pre-emption may be either expressed or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'"). The Supreme Court has recognized two types of implied preemption: field preemption—which occurs when a state law attempts to regulate a field in which Congress (continued...)

impose requirements that potentially conflict with state common law, which includes much of product liability law, thus warranting an analysis under the preemption doctrine.[116]

Examples of federal laws that have been found by the Supreme Court to preempt state law include the Federal Cigarette Labeling and Advertising Act (FCLAA) and the Federal Food Drug and Cosmetics Act (FFDCA). Under the FCLAA, Congress provided that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of [the] Act[.]"[117] The Supreme Court held that the FCLAA preempted state "failure to warn" and "fraudulent misrepresentation" claims that were based on cigarette advertising or promotion when the product manufacturer complied with the required federal regulations.[118] Similarly, the FFDCA forbids states from establishing requirements for medical devices that are "different from, or in addition to" those established by the act and "which relate to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under [the] Act."[119] The Supreme Court held that the federal regulations for catheters, enacted pursuant to the FFDCA, preempted a state law claim alleging that the catheter was "designed, label[ed] and manufactured in a manner that violated ... New York common law."[120]

Federal Statutes Enacted

While Congress enacted a number of products liability laws in the 1980s and 1990s, there has been little legislation in recent years. The following section provides a brief overview of federal products liability statutes enacted from the 97th Congress through the present. For specific terms related to tort, see the **Appendix**.

During President Reagan's Administration, the 97th Congress enacted the Product Liability Risk Retention Act of 1981.[121] This act sought to lower insurance costs by permitting businesses to form self-insurance pools.[122] Subsequently, the 98th Congress enacted the Clarification of the Product Liability Risk Retention Act of 1981.[123] This statute was intended to permit "product manufactures, sellers, and distributors to purchase … insurance on a group basis or to self-insure

(...continued)

intended federal regulation to be exclusive—and conflict preemption—which occurs when it is impossible to comply with both federal and state law at the same time or when a state law presents an obstacle to executing the entire scope of Congress's purpose and objectives. *See* Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963); *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947) (noting that congressional intent to occupy a field may be inferred where federal regulation is so "pervasive" or "so dominant" that it can be assumed federal law did not intend for state and local laws to supplement it).

[116] *See* Riegal v. Medtronic, Inc., 552 U.S. 312, 321-22 (2008); *see also* Medtronic, Inc. v. Lohr, 518 U.S. 470, 512 (1996).

[117] Federal Cigarette Labeling and Advertising Act, P.L. 89-92, 79 Stat. 282 (1965) (codified at 15 U.S.C. §§1331 et seq.).

[118] *See* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 524-29 (1992).

[119] 21 U.S.C. §360k(a).

[120] *Riegel*, 552 U.S. at 320, 330.

[121] P.L. 97-45 (1981)

[122] *See* Schwartz & Behrens, *supra* note 103, at 1365.

[123] P.L. 98-193 (1983).

through insurance cooperatives called 'risk retention groups.'"[124] Federal legislation was necessary to accomplish this because many states have laws that would make the formation of such groups impractical on an interstate basis. The federal statute therefore exempts purchasing groups and risk retention groups from most regulation by states other than ones in which they are chartered. Furthermore, the 99th Congress enacted the Risk Retention Amendments of 1986,[125] which expanded the scope of Product Liability Risk Retention Act of 1981 to enable risk retention groups and purchasing groups to provide all types of liability insurance, not only products liability insurance. It renamed the act the Liability Risk Retention Act of 1986.[126]

The 99th Congress also enacted the National Childhood Vaccine Injury Act of 1986.[127] As amended, the act requires most persons suffering vaccine-related injuries, prior to filing a tort action, to file a claim in the U.S. Court of Federal Claims for no-fault compensation through the National Vaccine Injury Compensation Program established by the act. Under the program, compensation for pain and suffering is limited to $250,000. A party not satisfied with the compensation awarded under the program may file a tort action under state law, but subject to some limitations. Although recovery under the program is limited, it was hoped that "the relative certainty and generosity of the system's awards [would] divert a significant number of potential plaintiffs from litigation."[128]

During President Clinton's Administration, the 103rd Congress in 1994 enacted the General Aviation Revitalization Act,[129] which established an 18-year statute of repose for planes with fewer than 20 seats that are not used in scheduled service at the time of the incident. With exceptions, this law prevents civil actions against the manufacturers of such an aircraft or aircraft components to be brought if any of their products are 18 years or older at the time of the accident.[130] The 104th Congress also enacted the Bill Emerson Good Samaritan Food Donation Act,[131] which limits civil liability for a person or gleaner ("a person who harvests for free distribution to the needy"), except in cases of gross negligence or intentional misconduct, who donates apparently wholesome food or an apparently fit grocery product "in good faith to a non-profit organization for ultimate distribution to needy individuals." It also limits liability of the nonprofit organization that receives the donation, except in cases of gross negligence or intentional misconduct. In addition, the 104th Congress passed H.R. 956, the Product Liability Fairness Act of 1995, but President Clinton vetoed it.

During the remainder of Clinton's tenure, other laws passed include the Biomaterials Access Assurance Act of 1998[132] during the 105th Congress. This act limits the products liability under

[124] S.Rept. 97-192 (1981).

[125] P.L. 99-563 (1986).

[126] 15 U.S.C. §§3901 et seq.

[127] P.L. 99-660 (1986); 42 U.S.C. §§300aa-1 et seq.

[128] H.Rept. 99-908, pt. 1, at 13 (1986). For more information on the National Childhood Vaccine Injury Act of 1986, *see* CRS Report R41538, *The National Childhood Vaccine Injury Act and Preemption: An Overview of Bruesewitz v. Wyeth*, by (name redacted).

[129] P.L. 103-298 (1994) *codified* at 49 U.S.C. §40101 note.

[130] In other words, a claim must be filed within the first 18 years that the aircraft is first delivered to the purchaser or lessee, or the individual engaged in buying the aircraft. However, the statute of repose appears to begin again if a component is replaced by the manufacturer. Therefore, it could be possible for a 20-year old aircraft to be the object of a successful lawsuit if it contains manufacture modifications or parts installed within the last 18 years.

[131] P.L. 104-210 (1996).

[132] P.L. 105-230 (1998).

state law of biomaterials suppliers, which it defines as an entity that supplies a component part or raw materials for use in the manufacture of an implant. In 1999, the 106th Congress enacted the Y2K Act,[133] which limits contractual and tort liability under state law in suits, other than those for personal injury or wrongful death, "in which the plaintiff's alleged harm or injury arises from or is related to an actual or potential Y2K failure…."

During President George W. Bush's Administration, the 107th Congress enacted the Homeland Security Act of 2002,[134] three sections of which limit the products liability of various defendants. Section 304 immunizes manufacturers and administrators of smallpox vaccine from liability. Section 863 limits the liability of sellers of antiterrorism technology, and Sections 1714-1717 limit the liability of manufacturers and administrators of the components and ingredients of vaccines.[135] Sections 1714-1717 of this act were repealed when the 108th Congress enacted the Consolidated Appropriations Resolution, 2003, Division L, Section 102.[136]

In 2005, the 109th Congress enacted the Protection of Lawful Commerce in Arms Act[137] (PLCAA). It prohibits "a civil action or proceeding or an administrative proceeding," except in six circumstances, against a manufacturer or seller of a firearm or ammunition, or a trade association, for damages "resulting from the criminal or unlawful misuse" of a firearm or ammunition. Section 5 of the PLCAA is a separate provision called the Child Safety Lock Act of 2005. With exceptions, it requires a "secure gun storage or safety device" (as defined in 18 U.S.C. §921(a)(34)) on handguns, and provides that a person who has lawful possession and control of a handgun, and who uses such a device, is entitled to the same immunity as granted to gun manufacturers, sellers, and trade associations by the PLCAA.

The 109th Congress also enacted the Public Readiness Emergency Preparedness Act (PREP Act).[138] Division C of the PREP Act limits liability with respect to pandemic flu and other public health countermeasures upon a declaration by the Secretary of Health and Human Services of a public health emergency or the credible risk of such emergency. In lieu of suing, victims may accept payment under the "Covered Countermeasure Process Fund" if Congress appropriates money for this fund.[139]

[133] P.L. 106-37 (1999).

[134] P.L. 107-296 (2002).

[135] *See* CRS Report RL31649, *Homeland Security Act of 2002: Tort Liability Provisions*, by (name redacted).

[136] P.L. 108-7 (2003).

[137] P.L. 109-92 (2005). *See also* CRS Report R42871, *The Protection of Lawful Commerce in Arms Act: An Overview of Limiting Tort Liability of Gun Manufacturers*, by (name redacted).

[138] P.L. 109-148 (2005).

[139] *See* CRS Report RS22327, *Pandemic Flu and Medical Biodefense Countermeasure Liability Limitation*, by (name r edacted).

Appendix. Glossary of Terms

The extent to which each of the following concepts is applicable in particular products liability lawsuits depends upon the relevant state law.

Alteration of product. A possible contributing cause to an injury that may be performed by a plaintiff or a third party, such as a plaintiff's employer; it may reduce or eliminate a defendant's liability.

Assumption of risk. A form of contributory fault by a plaintiff; it may reduce or eliminate a defendant's liability.

Breach of warranty. A basis for liability that permits the defendant to raise certain contract law defenses to avoid liability, but does not require the plaintiff to prove that the defendant was negligent.

Collateral source. A source, such as an insurance company or governmental entity, that compensates an injured party for the injury, and may, through subrogation, be entitled to recover such compensation paid out to the injured party.

Collateral source rule. The rule that a plaintiff's damages will not be reduced by amounts she recovered from sources other than the defendant, such as health insurance benefits.

Comparative negligence. The rule that plaintiff's recovery will be reduced in proportion to the degree that her own negligence (or other fault) was responsible for his injury. In its modified form, recovery is barred if the plaintiff's responsibility exceeds a specific degree, such as 50%.

Contributory negligence. Negligence (or other fault) on the part of the plaintiff that is wholly or partially responsible for his injury. In a few states, any degree of contributory negligence will totally bar recovery.

Design defect. A defect resulting from a product that, although manufactured as it had been designed, was not designed as safely as it should have been.

Economic damages. Out-of-pocket expenses incurred by the plaintiff, such as medical bills or loss of income.

Failure to warn. A defect consisting of the defendant's failure to provide adequate warnings or instructions regarding the use of its product.

Government contractor defense. A rule established by the Supreme Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), that enables a defendant whose product complied with federal government contract specifications to avoid liability in some cases.

Government standards defense. A rule in a few states enabling a defendant whose product complied with government safety standards to avoid liability or to establish a presumption that its product was not defective.

Joint and several liability. The rule that each defendant who contributes to causing a plaintiff's injury may be held individually liable for the total damages.

Lawyers' contingent fees. Fees payable only upon recovery of damages, based upon a percentage of the recovery.

Manufacturing defect. A defect resulting from a product's not having been manufactured as it had been designed. Compare with "Design defect," *supra*.

Market share liability. Liability for the percentage of a plaintiff's damages equal to the defendant's market share of the injury-causing product; a few cases have held market share liability applicable where a plaintiff cannot prove that a particular defendant manufactured the injury-causing product.

Misuse of product. A form of contributory fault by a plaintiff; it may reduce or eliminate a defendant's liability.

Negligence. Breach of a duty to exercise duty care; it is the traditional nonintentional tort standard in cases not based upon strict liability.

No-fault recovery. Recovery permitted in the absence of fault; it is not the law in any state with respect to products liability. If adopted in the products liability context, it would permit recovery in the absence not only of negligence (as strict tort liability does), but in the absence of a product defect.

Noneconomic damages. Damages payable for items other than out-of-pocket expenses such as pain and suffering or punitive damages. Statutory caps on noneconomic damages, however, are generally distinct from statutory caps on punitive damages.

Patent danger rule. The rule that a manufacturer is not liable for an injury caused by a design defect if the danger should have been obvious to the product user.

Periodic payments of future damages. Payments by a defendant for a plaintiff's future expenses on a periodic basis rather than in lump sum.

Post-manufacturing improvements. Improvements in a product's design that occur after an injury and which plaintiffs seek to introduce in court as evidence that an injury-causing product was defective.

Punitive damages. Damages awarded, in addition to economic damages and other noneconomic damages, to punish a defendant for willful or wanton conduct. (Also called "exemplary damages.")

Restatement (Second) Torts. A statement of tort law written by legal scholars; Section 402A, which provides for strict tort liability for injuries caused by defective products, has been adopted by most states. On May 20, 1997, the American Law Institute adopted *Restatement of the Law (3d), Torts: Product Liability*, which is intended to replace section 402A.

State of the art defense. The defense that permits a defendant to avoid liability in a design defect case if at the time of manufacture there was no feasible safer design available, or in a failure-to-warn case if at the time of manufacture there was no reasonable way that the defendant could have known of the danger he failed to warn against.

Statute of limitations. A statute specifying the number of years after injury occurs, or is discovered, or its cause is discovered, within which suit must be filed.

Statute of repose. A statute specifying the number of years after a product is first sold or distributed within which suit must be filed; it supplements the statute of limitations. Manufacturers favor statutes of repose because they preclude recovery when products are old; consumers oppose them because they result in suits being barred before injuries even occur.

Strict tort liability. Liability established if a plaintiff proves that a product defect caused an injury; the plaintiff need not prove that the defendant was negligent.

Subrogation. The right of a collateral source, such as an insurance company or governmental entity, that compensates an injured party to recover the amount paid to injured party by taking over the injured party's right to recover from the person who caused the injury.

Useful life limitation. A period of time set forth by statute after which a product's useful life is deemed over and suit is barred or a presumption that the product was not defective is created; this is similar to a statute of repose.

Workers' compensation. Statutes in every state providing for limited no-fault compensation against employers by workers injured on the job. Receipt of such compensation ordinarily precludes an employee from suing his employer; it does not preclude him from suing a product manufacturer.

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