If you have questions regarding Product Liability, please contact Bruce Schoumacher via *bschoumacher@querrey.com*

Querrey & Harrow

www.querrey.com®

© 2012 Querrey & Harrow, Ltd. All rights reserved.

ILLINOIS LAW MANUAL

CHAPTER VI
OTHER CAUSES OF ACTION

B. PRODUCT LIABILITY

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

1. 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) (leading case but overruled on other grounds). Hebel v. Sherman Equipment, 92 Ill. 2d 368 (1982). 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).

a. Analysis

A strict liability action does not require the plaintiff to prove the defendant's negligence. However, a strict liability action does not mean that the defendant is absolutely liable. For example, a plaintiff must prove that:

- the product causing injury was in an unreasonably dangerous and defective condition when it left the manufacturer's control;

or

- the product was defectively designed or manufactured;

or

- the manufacturer, distributor, or retailer failed to warn of the dangerous condition of the product.

A product is defective when it fails to perform in the manner reasonably expected in light of its nature and intended function. A product is not unreasonably dangerous if the injury derives merely from the inherent properties of the product that are obvious to all. Hunt v. Blasius, 74 Ill. 2d 203 (1968); See also Haudrich v. Howmedia, Inc., 169 Ill. 2d 525, 541 (1996). Typically, product liability cases can be classified as either relating to an alleged manufacturing/fabrication defect or a design defect.

Strict liability arises not because of the defendant's legal relationship with the manufacturer or with others in the manufacturing-

marketing system, but because of its participatory connection for its personal profit with the injury-producing product and with the enterprise that created the product's consumer demand. Hebel, 92 Ill.2d at 379. A seller who does not create a defect, but who puts the defective product into circulation, is still responsible in strict liability to an injured user. The seller may either adopt inspection procedures or influence the manufacturer to enhance the product's safety. Crowe v. Public Building Comm'n of Chicago, 74 Ill.2d 10, 13-14 (1978) (citing Restatement (Second) of Torts, Section 402A, Comment (c), at 349-50. Privity is not required in strict liability actions. Garcia v. Edgewater Hosp., 244 Ill. App. 3d 894 (1st Dist. 1993), abrogation on other grounds recognized by Caterpillar, Inc. v. Usinor Industeel, 393 F. Supp. 2d 659 (N.D. Ill. 2005).

2. Breach of Warranty

Based upon contract law rather than tort law, there are two causes of actions under the breach of warranty theory: (1) breach of an implied warranty; and (2) breach of an express warranty.

An implied warranty of merchantability action is another form of a strict liability action. It is implied within a contract of sale if the seller is a merchant with respect to goods of that kind. The implied warranty of merchantability is articulated within the Uniform Commercial Code, 810 ILCS 5/2-314. For goods to be merchantable, they must:

(1) pass without objection in the trade under the contract description;

(2) in the case of tangible goods, be of fair average quality within the description;

(3) be fit for the ordinary purposes for which such goods are used;

(4) run, within the variations permitted by agreement, of even kind, quality, and quantity;

(5) be adequately contained, packaged, and labeled as required by agreement; and

(6) conform to the promises of fact made on the container or label, if any.

An implied warranty of fitness for a particular purpose, on the other hand, does not arise from the sale itself. Instead, the plaintiff must first demonstrate that he or she made known to the seller the purpose for purchasing the good. Second, the purchaser must have relied on the seller's skill or judgment to select or furnish suitable goods. 810 ILCS 5/2-315.

Although privity is not required, 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) (affirming the dismissal of a claim for breach of implied warranty of merchantability because "some form of notice . . . is a prerequisite to recovery."). Direct notice is unnecessary when (1) the seller has actual notice of the defect in a product, or (2) the seller is found to have been reasonably notified by the plaintiff's complaint alleging a breach of warranty. Only a consumer plaintiff who suffered a personal injury may satisfy the UCC notice provisions by filing a complaint alleging the seller's breach of warranty. Maldonado v. Creative Woodworking Concepts, Inc., 296 Ill.App.3d 935, 940 (3rd Dist. 1998). When no personal injuries have been alleged and the plaintiffs are not typical consumers, filing a lawsuit is insufficient to satisfy Section 2-607(3)(a). A.C. and S., Inc., 131 Ill. 2d at 462-463; citing 4 R. Anderson, Uniform Commercial Code §2-607:38, at 142-43 (1983) (commencement of a lawsuit should not be held to satisfy the notice requirement; however, it may be sufficient when a consumer sues for personal injuries).

An express warranty is, conversely, based on a written contract or actual representations. It extends only to the parties to the contract. The language of the contract governs. Express warranties, or promises made by the seller of a product that it is of a particular quality or will perform in a certain manner, are outlined in Section 5/2-313 of the UCC. The test of such warranties is whether the seller asserts a fact about the product of which the buyer is ignorant, or

merely opines or recommends regarding the value of the goods. Felley v. Singleton, 302 Ill. App. 3d 248, 255-256 (1999). See also 810 ILCS 5/2-313(2).

3. Negligence

Unlike warranty actions, which focus on the product itself, negligence 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); Eaves v. Hyster Co., 244 Ill. App. 3d 260 (1993). As with strict liability, privity is not a requirement in negligence actions. Lindroth v. Walgreen Co., 407 Ill. 121 (1950).

Comparing negligence and strict product liability:

Negligence	Strict Liability
The foreseeability of harm of the product is a fact question.	The harm of the product may be assumed.
The inability of defendant to foresee the harm is a defense.	The inability of defendant to foresee the harm may not be a defense.
Plaintiff must prove that the defendant was negligent by not exercising ordinary care.	Plaintiff need not prove negligence, but must prove that the product was defective or unreasonably dangerous.

4. Defenses

a. Comparative Negligence

Comparative negligence may serve as a defense to a negligence action but not a strict liability claim. A defendant in a strict product liability action may plead only the affirmative defenses of misuse and assumption of the risk. Contributory negligence that does not rise to the level of misuse or assumption of the risk is not a defense. Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 425 (1970).

The Illinois comparative liability statute indicates that "contributory" fault may be used as a defense to a product liability action based on strict tort liability. 735 ILCS 5/2-1116. The Public Act 89-7, entitled "Tort Reform Act of 1995," amended Section 2-1116 and rewrote the section limiting recovery in tort actions based on negligence, or product liability based on strict tort liability, to limit recovery to all actions in which recovery is predicated upon fault. But Best v. Taylor Machine Works, 179 Ill.2d 367 (1997), held P.A. 89-7 to be unconstitutional in its entirety. As a result, section 2-1116 reverted to the original language of the 1986 version, *i.e.,* the language in effect prior to the adoption of P.A. 89-7. Ready v. United/Goedecke Services, Inc., 232 Ill.2d 369, 381 (2008). Under the 1986 statute, the type of fault that the jury could consider was to be the same for both strict liability and negligence cases. See Gratzle v. Sears, Roebuck & Co., 245 Ill. App. 3d 292, 613 N.E.2d 802 (2d Dist. 1993).

Although the statute implies that contributory negligence may be used as a defense, the courts have limited application of the Act, holding that only misuse and assumption of the risk may be used as defenses in strict product liability cases.

Id. Ordinary contributory negligence, such as the failure to discover a defect, is not a defense. Coney v. J. L. G. Industries, Inc., 97 Ill. 2d 104, 454 N.E.2d 197 (1983). See also, IPI (Civil) Section 400.00, pp. 601-604.

b. Misuse

Misuse refers to an abnormal use of a product for a purpose that is not reasonably foreseeable, based on an objective test, considering the nature and function of the product. Augenstine v. Dico Co., 135 III.App.3d 273 (1985); see also Korando v. Uniroyal Goodrich Tire Co., 159 Ill. 2d 335, 345 (1994) (pertaining to substantial alteration of a product). However, the plaintiff's conduct must be more than ordinary negligence and not reasonably foreseeable. If the plaintiff's misuse of the product is 50 percent or less of the total fault that caused his or her injuries, then the plaintiff's damages are reduced by that percentage. If the plaintiff's misuse of the product is more than 50% of the

cause of his or her injuries, then the plaintiff's recovery is completely barred. 735 ILCS 5/2-1116. See also Coney, 97 Ill. 2d at 119; Malen v. MTD Products, Inc., 628 F.3d 296, 313 (C.A.7 2010).

c. Assumption of Risk

When the plaintiff knows of the dangerous condition of the product, appreciates the risk of injury, and nevertheless proceeds without regard for the danger, the plaintiff then assumes the risk. Sweeney v. Max A.R. Mathews & Co., 46 Ill. 2d 64, 66 (1970). Determination of this defense is based on the plaintiff's subjective knowledge. Courts consider the specific plaintiff's knowledge, understanding, and appreciation of the danger. J. I. Case Co. v. McCartin-McAuliffe Plumbing and Heating, Inc., 118 Ill. 2d 447 (1987). See Restatement (Second) of Torts, Section 496D, Comment (c)). Assumption of the risk is not automatically a complete defense to a strict liability claim. If the plaintiff's assumption of the risk is 50 percent or less of the total fault which caused his or her injuries, then the plaintiff's damages are reduced by that percentage. If the plaintiff's assumption is more than 50 percent of the cause of his or her injuries, then the plaintiff's recovery is completely barred. 735 ILCS 5/2-1116. See Simpson v. General Motors Corp., 108 Ill. 2d 146 (1985); Illinois Pattern Jury Instructions No. B400.03 (2005 ed.).

d. The "Seller's" Exception

Section 5/2-621 of the Illinois Code of Civil Procedure allows a strict liability claim against a non-manufacturing defendant to be dismissed, once the non-manufacturing defendant has certified 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.

735 ILCS 5/2-621.

On the other hand, a non-manufacturing defendant may be brought back into the case on a strict liability claim that was previously dismissed if:

(1) the manufacturer successfully raises a statute of limitations statute of repose defense;

(2) the identity of the manufacturer given to the plaintiff by the certifying defendant was incorrect;

(3) the manufacturer no longer exists or cannot be subject to service of process; or

(4) the manufacturer is unable to satisfy any judgment or reasonable settlement agreement.

Cherry v. Siemans Medical Systems, Inc., 206 III. App. 3d 1055 (1990); see also Root v. JH Industries, Inc., 277 Ill. App. 3d 502, 509 (1995).

Section 2-621 was also amended by P.A. 89-7, which substituted "on any theory or doctrine" for "on the doctrine of strict liability" and deleted "strict liability" preceding "cause of action". But, as Best v. Taylor Machine Works, 179 Ill.2d 367 (1997), held P.A. 89-7 to be unconstitutional, Section 2-621 reverts to its language prior to the adoption of P.A. 89-7, allowing the seller's exception on any product liability action based on the doctrine of strict liability.

e. Statute of Limitations

A two-year statute of limitations period applies to any personal injury action arising out of a product liability claim. 735 ILCS 5/13-202. The exception

to the two-year limitation period is commonly known as the "discovery rule." The "discovery rule" applies in product liability cases when a plaintiff cannot discover the cause of the injury until some period of time later than two years from the inception of the injury. The "discovery rule" commonly arises in chronic exposure cases. Once the injury or its cause is discovered, the "discovery rule" requires the plaintiff to bring a personal injury suit within two years after the date on which the plaintiff knew, or through the use of reasonable diligence should have known, of the existence of the personal injury. See 735 ILCS 5/13-213(d).

f. Statute of Repose

The statute of repose bars a product liability action based on the doctrine of strict liability in tort that is not commenced within 12 years from the date of the first sale, lease, or delivery of possession by a seller, or 10 years from the date of the first sale, lease, or delivery of possession to its initial user, consumer, or other non-seller (whichever period expires earlier) of any product unit that is claimed to have injured or damaged the plaintiff. 735 ILCS 5/13-213(b). For example, if a product is delivered by the manufacturer to a retailer more than 12 years before the injury and remains unaltered, or if the product remains in inventory and is not sold to the consumer until sometime within ten years before the injury, then the plaintiff's strict liability claim is barred.

P.A. Act 89-7 also amended this Section in 1995 and substituted “any theory or doctrine” for “the doctrine of strict liability in tort” in four places. This amendment made the statute apply to all product liability theories, not just strict liability. But two years later, when the Illinois Supreme Court held that P.A. 89-7 was unconstitutional in Best, 179 Ill.2d 367 at 467, it again reverted back and the statute only applies to strict liability cases. It does not apply to negligence and breach of warranty actions.

g. 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 (e.g., industry or governmental). Rucker v. Norfolk & Western Railway Co., 77 Ill. 2d 434 (1979); Moehle v. Chrysler Motors Corp., 93 Ill. 2d 299 (1982).