Illinois

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PRE-SALE DUTIES

What Is the General Scope of Duty to Warn and Instruct in Illinois?

Relationship between Duty to Warn and Safe Design

A manufacturer has a duty to adequately warn and instruct the consumer/user about the dangers of its product of which it knew, or, in the exercise of ordinary care, should have known, at the time the product left the manufacturer's/other's control. *Woodill v. Parke Davis & Co.,* 79 Ill. 2d 26, 35, 402 N.E.2d 194 (1980); Illinois Pattern Jury Instructions (Civil) 400.07D.

As to the issue of whether or not a product was unreasonably dangerous, Illinois courts have held that products may be unreasonably dangerous because of a failure to warn of a danger or a failure to adequately instruct on the proper use of a product. *Hammond v. N. Am. Asbestos Corp.,* 97 Ill. 2d 195, 454 N.E.2d 210 (1983). However, when a danger is obvious and generally appreciated, there is no duty to warn of that danger. *Sollami v. Eaton,* 201 Ill. 2d 1, 10, 772 N.E.2d 215, 221 (2002) (quoting *McColgan v. Envtl. Control Sys.,* 212 Ill. App. 3d 696, 571 N.E.2d 815 (1st Dist. 1991)). Furthermore, 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. *Byrne v. SCM Corp.,* 182 Ill. App. 3d 523, 538 N.E.2d 796 (4th Dist. 1989) (manufacturer of epoxy paint); *Salvi v. Montgomery Ward & Co.,* 140 Ill. App. 3d 896, 489 N.E.2d 394 (1st Dist. 1986) (air gun manufacturer).

A manufacturer has a non-delegable duty to design reasonably safe products. *Calles v. Scripto-Tokai Corp.*, 224 Ill. 2d 247, 270 (Ill. 2007). The crucial question in a *negligent* design case is whether the manufacturer exercised reasonable care in the design of the product. *Id*. In determining whether a manufacturer's conduct was reasonable, the question is whether in the exercise of ordinary care the manufacturer should have foreseen that the design would be hazardous to someone. *Id*. at 271; American Law of Products Liability 3d §28:48, at 28-66 (1997). A manufacturer has a duty to design against reasonably foreseeable hazards. To show that the manufacturer acted unreasonably based on the foreseeability of harm, the plaintiff must show the manufacturer knew or should have known of the risk posed by the product design at the time of manufacture. *Id*. at 271; 63A Am. Jur. 2d Products Liability §942, at 120 (1997); *Sobczak v. General Motors Corp.,* 373 Ill. App. 3d 910, 923 (1st Dist. 2007).

In a *strict liability* case, the manufacturer's conduct is not at issue; the sole issue is whether or not the product was defective and unreasonably dangerous at the time it left the manufacturer's control, either based on design defect, manufacturing defect or warnings defect. (See below).

Theories of Liability (Including Restatement)

The Restatement (Third) has not been explicitly adopted in Illinois by the Illinois Supreme Court for product liability actions. However, the Illinois Appellate Court, First District, in Modelski, extensively cited the

Restatement (Third) and suggested that it might be considered at some point. Modelski v. Navistar Int'l Transp. Corp., 302 Ill. App. 3d 879, 888, 707 N.E.2d 239, 246 (3d Dist. 1988). See also, Mikolajczyk v. Ford Motor Co., 231 Ill. 2d 516, 532 (2008) (declining to adopt the pro-defendant §2(b) of the Restatement (Third)).

To recover under strict product liability, a plaintiff must prove that an unreasonably dangerous condition or defect existed in the product, that the condition existed at the time the product left the manufacturer's control, and that the condition was the proximate cause of the of the plaintiff's injury or damage. The theory of liability in a products case typically focuses on design defect, manufacturing defect, or warning defect. *Korando v. Uniroyal Goodrich Tire Co.,* 159 Ill. 2d 335, 343, 637 N.E.2d 1020, 1024 (1994); *Suvada v. White Motor Co.,* 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

As to the issue of whether or not a product was unreasonably dangerous, Illinois courts have held that products may be unreasonably dangerous because of a failure to warn of a danger or a failure to adequately instruct on the proper use of a product. *Hammond v. N. Am. Asbestos Corp.,* 97 Ill. 2d 195, 454 N.E.2d 210 (1983). However, when a danger is obvious and generally appreciated, there is no duty to warn of that danger. *Sollami v. Eaton*, 201 Ill. 2d 1, 10 (2002) (quoting *McColgan v. Envtl. Control Sys.,* 212 Ill. App. 3d 696, 571 N.E.2d 815 (1st Dist. 1991)). Furthermore, 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. *Byrne v. SCM Corp.,* 182 Ill. App. 3d 523, 538 N.E.2d 796 (4th Dist. 1989) (manufacturer of epoxy paint); *Salvi v. Montgomery Ward & Co.,* 140 Ill. App. 3d 896, 489 N.E.2d 394 (1st Dist. 1986) (air gun manufacturer).

Who Has a Duty to Warn—Component Part Supplier, Manufacturer, Distributor, Retailer, Supplier

Manufacturer

A manufacturer has a duty to adequately warn and instruct the consumer/user about the dangers of its product of which it knew, or, in the exercise of ordinary care, should have known, at the time the product left the manufacturer's/other's control. *Woodill v. Parke Davis & Co.,* 79 Ill. 2d 26, 35, 402 N.E.2d 194 (1980); Illinois Pattern Jury Instructions (Civil) 400.07D. Similarly, the Illinois Supreme Court has held that a duty to warn exists where there is unequal knowledge, actual or constructive, of a dangerous condition, and the defendant, possessed of such information, knows or should know that harm might or could occur if no warning is given. *Happel v. Wal-Mart Stores, Inc.,* 199 Ill. 2d 179, 186, 766 N.E.2d 1118 (2002). Courts have, however, held that a manufacturer has no duty to warn about dangers the consumer already recognizes. *Sollami v. Eaton,* 201 Ill. 2d 1, 10, 772 N.E.2d 215 (2002).

Component Part Manufacturer

Generally, a manufacturer of a component part has no control over that part once it is sold and no control over its use in the final assembly of the product. *Loos v. Am. Energy Savers, Inc.,* 168 Ill. App. 3d 558, 563 522 N.E.2d 841 (4th Dist. 1988). Therefore, a component part manufacturer is not obligated to anticipate how a non-dangerous part may become unreasonably dangerous as used in the final assembly. *Id.* However, where the assembler makes no substantial change in the component part and where that injury is directly attributable to a defect in that part, liability can exist. *Kokoyachuk v. Aeroquip Corp.,* 172 Ill. App. 3d 432, 437, 526 N.E.2d 607 (1st Dist. 1994); *Pasquale v. Speed Products Engineering,* 166 Ill. 2d 337, 351 (1995).

When a party can reasonably foresee that its product will be used as an integral component of a defective and unreasonably dangerous product, there is a duty upon that party to undertake corrective action to alleviate, if possible, the hazard; the duty is simply to use reasonable care in dealing with the hazard, including a duty to warn. *Adams v. N. Illinois Gas Co.,* 211 Ill. 2d 32, 809 N.E.2d 1248 (2004). While the court recognizes that "the growth and adaptation of the common law to our contemporary concerns should not impose impractical burdens or impossible duties," it is "equally clear that 'reasonable care is not a standard beyond the reach of any enterprise.'" *Id.* at 53-54 (quoting *Hensley v. Montgomery Co.,* 25 Md.App. 361, 367, 334 A.2d 542 (1975)). The court in *Adams* reasoned that the defendant's duty of reasonable care consisted only of warning and not of inspection, and it was a question for the trier of fact as to whether the defendant's conduct met the standard of care required of it under the circumstances. *Adams*, 211 Ill. 2d at 54.

Ultimately, a duty to warn for component manufacturers hinges on whether the component manufacturer could anticipate or control whether its component parts would present a danger as assembled into a finished product. *See Sparacino v. Andover Controls Corp.,* 227 Ill. App. 3d 980, 986, 592 N.E.2d 431 (1st Dist. 1992). Seventh Circuit federal courts have held that where a manufacturer only produces a component part, and where that part could be a serious hazard if it were incorporated into a machine without certain safety precautions taken, that manufacturer owed to all who might come into contact with that part a duty to warn those who would assemble any machine in which its part was included that the completed machine should not be installed without the inclusion of such necessary safety precautions. *DeSantis v. Parker Feeders, Inc.,* 547 F.2d 357 (7th Cir. 1976).

Distributor

Even if a product is not found to be defective, liability on a strict liability in tort theory can be imposed on the distributor of a product since a duty to warn exists where there is unequal knowledge, actual or constructive, and the defendant, possessed to such knowledge, knows or should know that harm might or could occur if no warning is given. *Robinson v. Deck*, 33 Ill. App. 3d 71, 79 (1st Dist. 1975).

A distributor is entitled to a conditional dismissal of a strict liability count (but not negligence counts) against it upon the filing of an affidavit certifying the correct identity of the manufacturer of the product *if and as long as* the manufacturer is amenable to suit and able to pay any judgment or settlement. The distributor may be reinstated in the action if it exercised control over the design or manufacture of the product, had actual knowledge of the defect, or created the defect. 735 ILCS 5/2-621. *See Lamkin v. Towner,* 138 Ill. 2d 510, 531, 563 N.E.2d 449, 458 (1990); *Logan v. W. Coast Cycle Supply Co.,* 197 Ill. App. 3d 185, 553 N.E.2d 1139 (2d Dist. 1990).

Retailer

Illinois courts have addressed the duty to warn requirements of retailers in *Mealey v. Pittman,* where the court held that the retailer had no duty to warn of the dangers of nunchuks, as these products had an open and obvious propensity to harm if used to strike another person in the face or eye. 202 Ill. App. 3d 771, 559 N.E.2d 1173 (3d Dist. 1990).

Supplier

"Numerous decisions have held that 'one supplying a chattel for another must warn of the dangerous conditions, 'if, but only if he has no reason to expect that those for whose use the chattel is supplied will discover

its condition and realize the danger involved.' *See, e.g.*, *Kirkman v. Kirkman*, 195 Ill. App. 3d 393, 397, 141 Ill. Dec. 914, 552 N.E.2d 282 (4th Dist. 1990) (quoting Restatement (Second) of Torts §388, comment k, at 306 (1965)). *French v. Barber-Greene Co.*, 215 Ill. App. 3d 1025, 1028-29, 576 N.E.2d 193, 196 (1st Dist. 1991); *Quinton v. Kuffer*, 221 Ill. App. 3d 466, 473 (2d Dist. 1991). See *Baylie v. Swift & Co.*, 27 Ill. App. 3d 1031, 1042, 327 N.E.2d 438, 447 (1st Dist. 1975) (discussing comment k of Restatement (second) of Torts providing that the supplier has a duty to warn only when he has no reason to believe the person receiving the chattel will perceive the danger).

Was the Warning or Instruction Adequate?

The adequacy of a warning is usually a question of fact for the jury to determine. *Palmer v. Avco Distrib. Corp.,* 82 Ill. 2d 211, 221 (1980); *Hernandez v. Schering Corp.,* 2011 IL App (1st) 093306 (1st Dist. 2011). However, the sufficiency of a warning can be a question of law when the "warning is clear, accurate, and unambiguous." *Hernandez*, 2011 IL App (1st) 093306 (1st Dist. 2011).

Factors to Consider

Generally, Illinois courts have held that to decide if a warning is adequate, the court must find that the warning is adequate to perform the intended function of risk reduction. *Palmer v. Avco Dist. Corp.,* 82 Ill. 2d 211, 222, 412 N.E.2d 959 (1980); *Hernandez v. Schering Corp.,* 2011 IL App (1st) 093306, 958 N.E.2d 447, 455 (1st Dist. 2011). Such warnings may be found to be inadequate if the warnings fail to specify the risk presented by the product, if the warnings are inconsistent with how the product is being used, if they fail to advise of the reason for the warnings, or if the warnings do not reach the foreseeable users. *Collins v. Sunnyside Corp.,* 146 Ill. App. 3d 78, 81 496 N.E.2d 1155 (1st Dist.1986).

In a case involving a pharmaceutical company's warning labels on its drugs, Illinois courts looked to (1) the role of the physician as recipient of drug warnings, and (2) the form, content and intensity of the warnings to determine whether a defendant has satisfied its duty to warn of potential adverse effects. *Mahr v. G.D. Searle & Co.,* 72 Ill. App. 3d 540, 561 390 N.E.2d 1214 (1st Dist. 1979). The court held that it was "imperative that the communication of the warnings be given in a manner reasonably calculated to reach the medical profession." *Id.* More specifically, "these warnings must be given in such a form that it could be reasonably expected to catch the attention of the reasonably prudent individual in the circumstances of its use (in this case members of the medical community), the content of the warning must be of such a nature as to be comprehensible to the average (physician) and to convey a fair indication of the nature and extent of the danger to the mind of the reasonably prudent (physician). The question of whether or not a given warning is legally sufficient depends upon the language used and the impression that such language is calculated to make upon the mind of the average user of the product." *Id.* at 562 quoting *Bristol-Meyers Co. v. Gonzalez,* 548 S.W.2d 416 (Tex. Civ. App. 1976).

Location of Warning (On Product or Instructions)

Illinois courts have held that a failure-to-warn cause of action can be upheld in some instances when a plaintiff has not read the warning because of the location of the warning. See *Elam v. Lincoln Elec. Co.*, 362 Ill. App. 3d 884, 889 (5th Dist. 2005) (held that the evidence showing the location of the warning on a product prevented it from being seen and the content not being directed at all foreseeable users was sufficient to establish a failure-to-warn cause of action). "A plaintiff who does not read an allegedly inadequate warning

cannot maintain a negligent-failure-to-warn action unless the nature of the alleged inadequacy is such that it prevents him from reading it." *Id.* at 889, citing *Kane v. R.D. Werner Co.*, 275 Ill. App. 3d 1035, 657 N.E.2d 37, 212 Ill. Dec. 342 (1995), (quoting *E.R. Squibb & Sons, Inc. v. Cox*, 477 So. 2d 963, 971 (Ala. 1985)). *See also, Solis v. BASF Corp.,* 2012 IL App (1st) 110875 (1st Dist. 2012)

Content of Message—Conspicuity

A manufacturer is not required to produce a product incapable of causing injuries, but where an unavoidably unsafe product is manufactured, then the manufacturer may be required to warn potential users. *Byrne v. SCM Corp.*, 182 Ill. App. 3d 523, 546, 538 N.E.2d 796 (4th Dist. 1989). If the warning is adequate, the consumer would proceed to use the product at the consumer's own risk. *Id.* In order to decide if the warning is adequate, the courts must find it is adequate to perform the intended function of risk reduction. *Id.* citing *Palmer v. Avco Distributing Corp.*, 82 Ill. 2d 211, 222, 412 N.E.2d 959 (1980). Whether there was a duty to warn is, in the first instance, a question of law and, for the purpose of determining the existence of such a duty, the manufacturer is held to the degree of knowledge and skill of the experts. *Byrne*, 182 Ill. App. 3d at 547.

Such warnings may be found to be inadequate if the warnings fail to specify the risk presented by the product, if the warnings are inconsistent with how the product is to be used, if they fail to advise of the reason for the warnings, or if the warnings do not reach the foreseeable users. *Id.* citing *Collins v. Sunnyside Corp.*, 146 Ill. App. 3d 78, 496 N.E.2d 1155 (1986).

Obvious Hazards

The plaintiff's subjective knowledge is immaterial to the antecedent determination of an open and obvious danger. *Id.* A duty to warn is not required where the possibility of injury results from the common propensity of the product which is open and obvious. *Fanning v. LeMay,* 38 Ill. 2d 209, 212, 230 N.E.2d 182 (1967); *Clark v. Penn Versatile Van,* 197 Ill. App. 3d 1, 8, 554 N.E.2d 643 (1st Dist. 1990); *Sollami v. Eaton*, 201 Ill. 2d 1, 7, 772 N.E.2d 215 (2002); *Bates v. Richland Sales Corp.,* 346 Ill. App. 3d 223, 233, 803 N.E.2d 977 (4th Dist. 2004). Since the purpose of a warning is to apprise the party of a danger of which he is not aware and thus enable him to protect himself against it, nothing of value is added by a warning when a danger is fully obvious and generally appreciated. *McColgan v. Envtl. Control Sys., Inc.,* 212 Ill. App. 3d 696, 701, 571 N.E.2d 815 (1st Dist. 1991); *West v. Deere & Co.,* 201 Ill. App. 3d 891, 559 N.E.2d 511 (2d Dist. 1990). The obviousness of a danger is only one of several features that should be considered when determining whether a duty exists. *Harnischfeger v. Gleason Crane Rentals, Inc.,* 223 Ill. App. 3d 444, 585 N.E.2d 166 (5th Dist. 1991).

Reasonably Foreseeable Misuse

A manufacturer may be liable for damage caused by a non-intended use of a product if the use is one which may be reasonably foreseen. *Jonescue v. Jewel Home Shopping Service*, 16 Ill. App. 3d 339, 344, 306 N.E.2d 312 (2d Dist. 1973). If a product is not reasonably safe for a use that may be expected to be made of it and no adequate warning is given of its dangerous propensities, the manufacturer or seller of such a product may be liable even though the product itself is faultlessly made. *Id.* However, manufacturers are not required to warn against every injury that may result from misuse of the product. *Id.* at 345. Dangers that are fully obvious and appreciated do not require a warning because warnings are designed to inform consumers about unknown dangers. *Id.* at 345.

Foreign Language or Use of Pictorials

Illinois has yet to develop a body of law specific to warnings relative to foreign language or the use or pictorials. Generally, Illinois courts have held that to decide if a warning is adequate, the court must find that the warning is adequate to perform the intended function of risk reduction. *Palmer v. Avco Dist. Corp.,* 82 Ill. 2d 211, 222, 412 N.E.2d 959 (1980).

Effect of Promotion

The practice of publicizing unapproved uses of drugs, when sponsored by the pharmaceutical company, is not approved by the FDA as proper advertising; it results in continuing, unapproved, potentially dangerous use. *Proctor v. Davis*, 291 Ill. App. 3d 265.

Overwarning

There does not appear to be any case law in Illinois specifically addressing "overwarning." Generally, Illinois courts have held that to decide if a warning is adequate, the court must find that the warning is adequate to perform the intended function of risk reduction. *Palmer v. Avco Dist. Corp.,* 82 Ill. 2d 211, 222, 412 N.E.2d 959 (1980).

Who Do You Have to Warn?

Bystanders

In one Illinois case the plaintiff was an electrician who was exposed to asbestos on several job sites. *Hartman v. Pittsburgh Corning Corp*., 261 Ill. App. 3d 706, 711-712, 634 N.E.2d 1133 (5th Dist. 1994). He worked around asbestos products at the job site but the record does not indicate that he was an asbestos product-user. *Id*. at 712. The court held that, since a box containing asbestos did not contain a warning label, this was evidence of "defendant's failure to warn potential users and bystanders of the dangers of exposure to the product." *Id*. at 725.

Allergic Persons

Where a product contains an ingredient to which a substantial number of the population is allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has actual or constructive knowledge thereof. *Presbrey v. Gillette Co.,* 105 Ill. App. 3d 1082, 1092, 435 N.E.2d 513 (2d Dist. 1982); *Woodill v. Parke Davis & Co*., 79 Ill. 2d 26, 32, 402 N.E.2d 194; Restatement (Second) of Torts sec. 402A, comment j.

Conversely, a manufacturer is entitled to a complete defense if it did not know nor had no reason to know that a small number of product-users are unusually susceptible to injury by the product. *Presbrey,* 105 Ill. App. 3d at 1091. In the latter cases, the proximate cause of the injury is then attributed to the idiosyncratic nature of the allergy and not the defendant's failure to warn. *Id*.

Sophisticated Users

Suppliers have no duty to warn where the plaintiff's employer is a "sophisticated user" of the product and is in the best position to warn employees of the product's danger; the supplier remains under a duty to warn

end-users, but it can rely on a knowledgeable employer to convey the warnings of the hazard. *See* Restatement (Second) of Torts, §388 cmt. n (1965). Illinois courts have held that bulk suppliers can rely on the expertise of middlemen or assemblers to warn remote users, primarily because they have little after-sale control. *See Manning v. Ashland Oil Co.,* 721 F.2d 192, 194-95 (7th Cir. 1983); *Venus v. O'Hara,* 127 Ill. App. 3d 19, 25, 468 N.E.2d 405 (1st Dist.1984).

Bulk Suppliers

As for bulk suppliers, Illinois courts held in *Jackson v. Reliable Paste & Chem. Co.,* that a supplier of methanol did not owe a duty to warn a repackager of the dangers of methanol, as the repackager was fully aware of the flammable and explosive qualities of methanol. 136 Ill. App. 3d 766, 483 N.E.2d 939 (1st Dist. 1985).

Learned Intermediary

In *Kirk v. Michael Reese Hospital*, 117 Ill. 2d 507, 513 N.E.2d 387 (1987), the Illinois Supreme Court adopted the learned intermediary doctrine. Under that doctrine, "manufacturers of prescription drugs have a duty to warn prescribing physicians of the drugs' known dangerous propensities, and the physicians, in turn, using their medical judgment, have a duty to convey the warnings to their patients." *Kirk*, 117 Ill. 2d at 517, 513 N.E.2d at 392. The doctrine's rationale is that a doctor is considered in the best position to prescribe drugs and monitor their use because he is knowledgeable of the propensities of the drugs he is prescribing and the susceptibilities of his patient. *Kirk*, 117 Ill. 2d at 518, 513 N.E.2d at 392; *see Happel v. Wal-Mart Stores, Inc.*, 199 Ill. 2d 179, 193, 766 N.E.2d 1118, 1127 (Ill. 2002). Consequently, in selling prescription drugs, the manufacturer is only required to warn the prescribing doctor, who then acts as a "learned intermediary" between the manufacturer and the consumer. *Kirk*, 117 Ill. 2d at 518, 513 N.E.2d at 392. However, doctors who have not been sufficiently warned of the harmful effects of a drug cannot be considered "learned intermediaries" and the adequacy of warnings is a question of fact, not law, for the jury to determine, as it did in the instant case. *Proctor v. Davis*, 291 Ill. App. 3d 265, 283, 225 Ill. Dec. 126, 138 (1st Dist. 1997) (citing *Tongate v. Wyeth Laboratories*, 220 Ill. App. 3d 952, 963 (1st Dist. 1991); *Batteast v. Wyeth Laboratories, Inc.*, 137 Ill. 2d 175, 192-94 (1990)).

Law Regarding Drugs and Devices

Pursuant to the [learned intermediary] doctrine, there is no duty on the part of the manufacturer of prescription drugs to directly warn patients. *Martin by Martin v. Ortho Pharmaceutical Corp.*, 169 Ill. 2d 234, 238-239, 661 N.E.2d 352 (1996) (citing *Kirk v. Michael Reese Hospital & Medical Center*, 117 Ill. 2d 507, 519, 111 Ill. Dec. 944, 513 N.E.2d 387 (1987)). The learned intermediary doctrine requires manufacturers to warn prescribing doctors about the risks of the prescription drugs they manufacture. *Martin*, 169 Ill. 2d at 238. In turn, the doctor is supposed to warn the patient about the risks of the prescription drug and the manufacturer cannot be held strictly liable for failure to directly warn the patient. *Id*. The reasoning behind the learned intermediary doctrine is that the physician is a medical expert that can take into account the patient's specific susceptibilities with the propensities of the drug. Id. citing *Kirk*, 117 Ill. 2d at 518, quoting *Stone v. Smith, Kline & French Laboratories*, 731 F.2d 1575, 1579 (1984). In *Hansen v. Baxter Healthcare Corp.*, 198 Ill. 2d 420, 764 N.E.2d 35 (Ill. 2002), the Illinois Supreme Court held that the learned intermediary doctrine applies to medical devices as well as to drugs. To date, Illinois has limited the application of the learned intermediary doctrine to physicians and drug/medical device manufacturers.

Is It Always Necessary to Warn?

A manufacturer has a duty to warn when the product possesses dangerous propensities, there is unequal knowledge with respect to the risk of harm, and the manufacturer, possessed of such knowledge, knows or should know that harm may occur absent a warning. *Sollami v. Eaton*, 201 Ill. 2d 1, 7, 772 N.E.2d 215, 265 Ill.Dec. 177 (2002). A manufacturer, reasonably aware of a dangerous propensity of its product, has a duty to warn foreseeable users when there is unequal knowledge, actual or constructive, and it knows or should know that harm might or could occur if no warning is given. *Modelski v. Navistar International Transportation Corp.*, 302 Ill. App. 3d 879, 877, 707 N.E.2d 239, 236 Ill.Dec. 394 (1st Dist. 1999), see also *Carrizales v. Rheem Manufacturing Co.*, 226 Ill. App. 3d 20, 32-33, 589 N.E.2d 569, 168 Ill.Dec. 169 (1st Dist. 1991)(no post-sale duty to warn). Failure to warn under such circumstances can expose the manufacturer to liability in strict liability or negligence. *Modelski*, 302 Ill. App. 3d at 877-878.

Is There a Heeding Presumption in This State?

Some states apply a "heeding presumption" in learned intermediary cases. In these cases, a court "presumes a warning, if given, will be heeded and followed and medical practitioners will act competently." *Mahr v. G.D. Searle & Co.,* 72 Ill. App. 3d 540, 390 N.E.2d 1214, 1233 (1st Dist. 1979) (applying Texas law). At least one federal district judge in the Northern District of Illinois has found that the heeding presumption doctrine applies in Illinois. *Erickson v. Baxter Healthcare, Inc.,* 151 F.Supp.2d 952, 962 (N.D.Ill. 2001). The Illinois Supreme Court, however, has not spoken clearly on this issue, but has held that when a drug company fails to warn doctors sufficiently, doctors "cannot be considered 'learned intermediaries' and the adequacy of the warnings is a question of fact, not law, for the jury to determine." *Hanson v. Baxter Healthcare Corp.,* 198 Ill. 2d 420, 432, 764 N.E.2d 35, 43 (Ill. 2002).

What Defenses Are Available to those within the Chain of Distribution?

The Restatement (Third) of Torts, in discussing product liability, provides:

> A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:
>
> (a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;
>
> (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial *chain of distribution,* and the omission of the alternative design renders the product not reasonably safe;
>
> (c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor, or a *predecessor in the commercial chain of distribution,* and the omission of the instructions or warnings renders the product not reasonably safe." *Restatement (Third) of Torts, Products Liability §2,* at 14 (1998) (emphasis added).

The liability of a manufacturer encompasses only those individuals to whom injury from a defective product may reasonably be foreseen, and only those situations where the product is being used for the purpose for which it was intended, or being used in a manner, although unintended, that is reasonably foresee-

able. *Winnett v. Winnett,* 57 Ill. 2d 7, 11, 310 N.E.2d 1, 4 (1974). The issue of foreseeability in products liability cases is generally for the jury to decide, but it may be decided as a matter of law, if facts demonstrate that the plaintiff could never recover damages. *Kempes v. Dunlop Tire & Rubber Corp.,* 192 Ill. App. 3d 209, 214, 548 N.E.2d 644 (1989).

Potential defenses available to all parties in the distributive chain in product liability actions include: the assumption of risk; comparative fault/contributory fault; failure to use, misuse of product; unanticipated, unforeseeable or unintended use; alteration of product; unavoidably unsafe products; dangerous or obviously unsafe conditions; informed intermediary; sealed containers; fault of others; preemption; compliance with standards; government contractor defense; state-of-the-art defense; privity of contract; disclaimers of liability; failure to mitigate damages; damage to property/product itself without bodily injury or consequential injury; statutes of limitations; statutes of repose; and, useful safe life.

Assumption of Risk

To claim an assumption of risk defense, the defendant must show that the plaintiff voluntarily and reasonably proceeded to encounter a known danger, and the test here is a subjective test. *Boland v. Kawasaki Motors Mfg. Corp.,* 309 Ill. App. 3d 645, 653, 772 N.E.2d 1234 (2000). In order for the assumption of risk defense to apply, it is necessary that the plaintiff have a viable election to accept the risk. This defense does not bar recovery in product liability cases, but it is misconduct that will be a factor in the apportionment of damages. *Calles v. Scripto-Tokai Corp.,* 224 Ill. 2d 247, 262, 864 N.E.2d 249, 259 (2007) (citing *Coney v. J.L.G. Industries Inc.,* 97 Ill. 2d 104, 119, 454 N.E.2d 197 (1983)).

Comparative Fault

In all actions filed after November 1986, a plaintiff is barred by statute from recovery where the plaintiff's own contributory fault is more than 50 percent of the proximate cause of the injury or damages. If the plaintiff's contributory fault is less than or equal to 50 percent, any damages are diminished in proportion to the amount of fault attributable to the plaintiff. 735 ILCS 5/2-1116. In strict liability actions, the plaintiff's actions must constitute misuse or assumption of risk to be contributory fault. *See Hansen v. Baxter Healthcare Corp.,* 309 Ill. App. 3d 869, 885, 723 N.E.2d 302, 314 (1999). Illinois law provides for comparative fault only as between the plaintiff and the defendants, and between defendants/third party plaintiffs and third party defendants in contribution, if any.

Misuse

Misuse of a product for a purpose neither intended nor reasonably foreseeable by the defendant based upon an objective standard does not bar recovery in product liability actions; however, misuse of a product will be a factor in the apportionment of damages. *Coney,* 97 Ill. 2d at 104, 454 N.E.2d at 204; *Byrne v. SCM Corp.*, 182 Ill. App. 3d 523, 553–54, 538 N.E.2d 796 (4th Dist. 1989).

Alteration

A manufacturer is not liable to an injured user of a product where there has been an unforeseeable alteration, but may be liable if the alteration was reasonably foreseeable. *Cleveringa v. J.I. Case Co.,* 230 Ill. App. 3d 831, 846, 595 N.E.2d 1193, 1204 (1992); *Bates v. Richland Sales Corp.*, 346 Ill. App. 3d 223, 231, 281 Ill. Dec. 356, 803 N.E.2d 977 (2004). To escape liability, the defendant should show that the alteration was relevant to the

cause of the injury. *See Korando v. Uniroyal Goodrich Tire Co.,* 159 Ill. 2d 335, 346, 202 Ill. Dec. 284, 289, 637 N.E.2d 1020, 1025 (1994) (citing *Gowler v. Ferrell-Ross Co.,* 206 Ill. App. 3d 194, 563 N.E.2d 773, 777 (1990)).

Unavoidably Unsafe Product

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,* 182 Ill. App. 3d at 546, 538 N.E.2d at 811.

Open and Obvious

There is no duty to warn against risks that are obvious to the community at large. *Sollami v. Eaton,* 201 Ill. 2d 1, 7, 772 N.E.2d 215, 219 (2002).

Learned Intermediary Doctrine

The "learned intermediary doctrine," which requires manufacturers of prescription drugs to warn only the prescribing physicians of the inherent dangers of their products, applies to product liability claims against drug manufacturers and retailers. *Happel,* 199 Ill. 2d at 193, 766 N.E.2d at 1127. This defense has not been applied in a non-medical context.

Sealed Container

There is no sealed container defense in Illinois. The fact that an injury occurred as a result of the consumption of food sold in a sealed container creates no presumption or inference that will allow the consumer to recover against a manufacturer for product liability. *Warren v. Coca-Cola Bottling Co. of Chicago,* 166 Ill. App. 3d 566, 572, 519 N.E.2d 1197, 1201 (1988).

Contribution

Contribution, or the fault of others, is available as a defense against any joint tortfeasors, including employers, pursuant to the Illinois Contribution Act, 740 ILCS 100/5; *Doyle v. Rhodes,* 101 Ill. 2d 1, 461 N.E.2d 382 (1984). Contribution from the plaintiff's employer, however, is limited to the amount of the employer's statutory liability under the Worker's Compensation Act, unless the employer contractually waives this limitation. *Kotecki v. Cyclops Welding Corp.,* 146 Ill. 2d 155, 158, 585 N.E.2d 1023 (1991).

Preemption

The preemption defense should be examined in a case-by-case basis. Some strict liability actions, such as those arising out of damages from the use of blood products, are effectively preempted by an Illinois statute. 745 ILCS 40/2.

Compliance with Standards

Evidence of a product's compliance with governmental standards is admissible on the issues of defect and unreasonably dangerous condition. *Rios v. Navistar Int'l Transp. Corp.,* 200 Ill. App. 3d 526, 534, 558 N.E.2d 252, 259 (1990). Any violation of a safety standard may be *prima facie* evidence of negligence if two conditions are fulfilled: the law must be designed to protect the class to which the plaintiff belongs; and, the injury

must have a direct and proximate connection with the regulation. *Batteast v. Wyeth Labs., Inc.,* 137 Ill. 2d 175, 560 N.E.2d 315, 323 (1990).

Government Specifications

A party who manufactures a product to government specifications shares in the government's immunity from suit. *See Boruski v. U.S.,* 803 F.2d 1421, 1429 (7th Cir. 1986).

State-of-the-Art

State-of-the-Art is not a defense to a strict liability action, though is a factor that can be considered in determining if a product is defective and unreasonably dangerous. However, evidence of feasible alternate designs available at the time of the product's manufacture is relevant and admissible in strict liability and negligence actions and may be offered by a plaintiff to support a claim that the product at issue was defective in its design. *See Murphy v. Chestnut Mountain Lodge, Inc.,* 124 Ill. App. 3d 508, 515, 464 N.E.2d 818, 823 (1984); *Jackson v. Nestle-Beich, Inc.,* 147 Ill. 2d 408, 413, 168 Ill. Dec. 147, 150, 589 N.E.2d 547, 550 (1992).

Privity

Lack of privity is not a defense in a tort action against a manufacturer. *See Gray v. Am. Radiator & Standard Sanitary Corp.,* 22 Ill. 2d 432, 176 N.E.2d 761 (1961). Sellers can be liable in strict liability not just to those to whom they sell their products, but also to the ultimate user or consumer. *Hammond v. N. Am. Asbestos Corp.,* 97 Ill. 2d 195, 206, 454 N.E.2d 210, 216 (1983).

Disclaimers

Disclaimers, or exculpatory clauses, will not shield a product manufacturer from liability to a user or consumer. *See, e.g., Sipari v. Villa Olivia Country Club,* 63 Ill. App. 3d 985, 990, 380 N.E.2d 819, 823 (1978). See also *Diedrich v. Wright,* 550 F. Supp. 805 (N.D. Ill. 1982) (concluding that parachute center's release form that was signed by the injured plaintiff cannot exonerate the defendant from liability for any injuries based on strict liability).

Failure to Mitigate Damages

Failure to mitigate damages is an affirmative defense which must be pleaded and proved by the defendant. *Illiana Mach. & Mfg. Corp. v. Duro-Chrome Corp.,* 152 Ill. App. 3d 764, 769, 504 N.E.2d 974, 977 (1987).

Purely Economic Loss

A plaintiff may not recover in strict liability for solely economic losses, which include costs of repair or replacement of the product itself. *Moorman Mfg. Co. v. Nat'l Tank Co.,* 91 Ill. 2d 69, 85, 435 N.E.2d 443, 450 (1982); *Westfield Ins. Co. v. Birkey's Farm Store, Inc.,* 399 Ill. App. 3d 219, 231, 924 N.E.2d 1231 (3d Dist. 2010).

Statute of Limitations

The two year statute of limitations on most personal injury actions and wrongful death actions typically applies to product liability actions; product liability claims in such instances must be filed within two years after the plaintiff knows or reasonably should know that an injury has occurred and that it is wrongfully caused. *LaManna v. G.D. Searle & Co.,* 204 Ill. App. 3d 211, 561 N.E.2d 1170 (1990); *Healy v. Owens-Illinois,*

Inc., 359 Ill. App. 3d 186, 833 N.E.2d 906 (1st Dist. 2005), 833 N.E.2d 906 (2005). An action for damage to property based on oral contracts must be commenced within five years. 735 ILCS 5/13-205. Actions on written contracts are barred after ten years. 735 ILCS 5/13-206. Defunct corporations must be sued within five years of dissolution. 805 ILCS 5/12.80.

Statute of Repose

Strict liability actions must be commenced within 12 years of the date of the first sale, lease or delivery by seller, or within ten years from the date of the first sale, lease, or delivery to the initial user, consumer or other non-seller, whichever expires first. 735 ILCS 5/13-213(b). Exceptions to this statute of repose may apply when the product has been altered or modified subsequent to the first sale (5/13-213(c)), or when the "discovery rule" may apply (5/13-213(d)). The defective condition which precipitates a product's unreasonably dangerous condition need not manifest itself immediately. The extent of a product's normal useful life is a jury question. *Larson v. Thomashow,* 17 Ill. App. 3d 208, 219, 307 N.E.2d 707, 717 (1974); *Babich v. River Oaks Toyota*, 377 Ill. App. 3d 425, 428, 879 N.E.2d 420 (1st Dist. 2007).

Bulk Suppliers

As for bulk suppliers, Illinois courts held in *Jackson v. Reliable Paste & Chem. Co.,* that a supplier of methanol did not owe a duty to warn a repackager of the dangers of methanol, as the repackager was fully aware of the flammable and explosive qualities of methanol. 136 Ill. App. 3d 766, 483 N.E.2d 939 (1st Dist. 1985). Similarly, suppliers have no duty to warn where the plaintiff's employer is a "sophisticated user" of the product and is in the best position to warn employees of the product's danger; the supplier remains under a duty to warn end-users, but it can rely on a knowledgeable employer to convey the warnings of the hazard. *See* Restatement (Second) of Torts, §388 cmt. n (1965). Illinois courts have held that bulk suppliers can rely on the expertise of middlemen or assemblers to warn remote users, primarily because they have little after sale control. *See Manning v. Ashland Oil Co.,* 721 F.2d 192, 194-95 (7th Cir. 1983); *Venus v. O'Hara,* 127 Ill. App. 3d 19, 25 (1984).

Distributors

A distributor is entitled to a conditional dismissal of a strict liability count (but not negligence counts) against it upon the filing of an affidavit certifying the correct identity of the manufacturer of the product if and as long as the manufacturer is amenable to suit and able to pay any judgment or settlement. The distributor may be reinstated in the action if it exercised control over the design or manufacture of the product, had actual knowledge of the defect, or created the defect. 735 ILCS 5/2-621. *See Lamkin v. Towner,* 138 Ill. 2d 510, 531, 563 N.E.2d 449, 458 (1990); *Logan v. W. Coast Cycle Supply Co.,* 197 Ill. App. 3d 185, 553 N.E.2d 1139 (1990).

Is an Expert Required on Warning Issues?

An expert is not necessarily required on warning issues because the manufacturer is charged with the knowledge of experts. The manufacturer possesses a duty to warn if an expert in the field would have known of the product's inherent dangers.

"A manufacturer, reasonably aware of a dangerous propensity of its product, has a duty to warn foreseeable users where there is unequal knowledge, actual or constructive, and it knows or should know that

harm might or could occur if no warning is given. Failure to warn under such circumstances can expose the manufacturer to liability for negligence." *See Carrizales v. Rheem Manufacturing Co., Inc.*, 226 Ill. App. 3d 20, 31-34, 168 Ill.Dec. 169, 589 N.E.2d 569 (1991). Manufacturers are charged with the knowledge of experts. *Anderson v. Hyster Co.*, 74 Ill. 2d 364, 368, 24 Ill.Dec. 549, 385 N.E.2d 690 (1979). Given that presumed degree of knowledge, a manufacturer's subjective understanding of the dangers associated with the use of its products, while relevant, is not determinative of its obligation to warn. Rather, it is sufficient to impose a duty to warn if an expert in the field would have known of the product's dangerous propensity and foreseen injury in the absence of a warning. Under such circumstances, the duty to warn may well be continuous. *See Proctor v. Davis*, 291 Ill. App. 3d 265, 278, 225 Ill.Dec. 126, 682 N.E.2d 1203 (1997). *Modelski v. Navistar Int'l Transp. Corp.*, 302 Ill. App. 3d 879, 888, 707 N.E.2d 239, 246 (3d Dist. 1988).

Has the Duty to Warn Been Preempted with Respect to any Product in Illinois?

The duty to warn has been preempted with respect to blood products. 745 ILCS 40/2 (2007) provides that the furnishing, distribution, or use of blood products is a service rather than a sale of goods for purposes of liability in tort or contract. In *Poole v. Alpha Therapeutic Corp.*, 698 F.Supp. 1367 (N.D. Ill. 1988), the Federal District Court barred the plaintiff's strict liability claim after the decedent contracted AIDS from a blood factor. The Court held that 745 ILCS 40/2 preempted any product liability claims because the statute re-categorized blood products as a service as opposed to a product. *See Evans v. Northern Illinois Blood Bank, Inc.*, 13 Ill. App. 3d 19, 298 N.E.2d 732 (2d Dist. 1973) (held that doctrine of strict liability did not apply against hospital or blood bank which furnished wholesome but incompatible blood); *see Advincula v. United Blood Services*, 274 Ill. App. 3d 573, 654 N.E.2d 644 (1st Dist. 1995), *rev'd* 176 Ill. 2d 1, 678 N.E.2d 1009 (Ill. 1997) (held that the Blood and Organ Transaction Liability Act (Blood Liability Act, 745 ILCS 40/3 (2007)) limited the liability of blood banks to cases of negligence or willful misconduct).

POST-SALE DUTIES

Is There a Post-Sale Duty to Warn?

Generally, no. "[A] manufacturer is under no duty to issue post-sale warnings or to retrofit its products to remedy defects first discovered after a product has left its control." *Modelski v. Navistar Int'l Transp. Corp.*, 302 Ill. App. 3d 879, 890, 707 N.E.2d 239, 247 (3d Dist. 1988); *See Rogers v. Clark Equipment Co.*, 318 Ill. App. 3d 1128, 1136-37, 744 N.E.2d 364 (2d Dist. 2001). However, the Fifth District Illinois Court of Appeals' opinion in *Jablonski v. Ford Motor Co.*, 398 Ill. App. 3d 222, 256-257 (5th Dist. 2010), *may* suggest a subtle shift in the way that Illinois courts will treat post-sale duties in Illinois going forward. There, the Illinois Appellate Court held that manufacturers have a continuing duty to warn of hazards of which they are aware that are present at the time the product was manufactured, which includes using reasonable care to inform foreseeable users of product developments designed to eliminate the hazards of their product. *Id*. at 257. However, the Illinois Appellate court declined to offer an opinion on whether manufacturers should have a duty to warn about hazards discovered after the product leaves the manufacturers control. *Id*. at 257-258. In reviewing the lower court decision, the Illinois Supreme Court, in *Jablonski v. Ford Motor Co.*, 2011 Ill. LEXIS 1136, declined, at least for now, the creation of a post-sale duty to warn in Illinois. However, the Court did not foreclose the possibility that such a duty will be enforced in the future.

AUTHOR

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