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The Ten Myths of Product Liability

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THE TEN MYTHS OF PRODUCT LIABILITY

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Both dreams and myths are important communications from ourselves to ourselves. If we do not understand the language in which they are written, we miss a great deal of what we know and tell ourselves in those hours when we are not busy manipulating the outside world.[1]

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1. Dr. Erich Fromm, NY TIMES, Jan. 5, 1964.

I. INTRODUCTION

Product liability is one of the most widely misunderstood and complicated areas of the law. With the emergence of strict liability claims and their subsequent national acceptance, many believe that product manufacturers are responsible, similar to insurers, for any and all injuries resulting from product-related accidents. While a product manufacturer's responsibility is heightened and the reasonableness of its conduct is closely examined whenever a serious injury has occurred, liability is *not* strict in the absolute sense of the word. Armed with a proper understanding of substantive product liability law, the idiosyncrasies of the law in a particular jurisdiction and the intricacies of individual types of claims, which encompass strict liability, negligence and warranty, a product seller has numerous defenses in its arsenal. The purpose of this article is to identify the primary myths surrounding product liability law and enable counsel to spot issues that are crucial in the proper handling of a product liability case.

II. MYTH NO. 1: YOU CAN RECOVER BASED ON STRICT LIABILITY IN TORT AND IMPLIED WARRANTY FOR THE SAME DEFECT

Strict liability was a theory of recovery initially developed, at least in part, to permit injured users or consumers to avoid the rigors of the privity requirement attendant to warranty claims.[2] Prior to the recognition of strict liability in tort, a party who was injured by a product could be denied recovery if he or she was not in privity with the product seller or manufacturer.[3] The subsequent advent of comparative fault in a majority of jurisdictions has, however, blurred any meaningful distinctions between negligence, strict liability and warranty law. In many jurisdictions all theories of liability, regardless of their formal label, are considered fault[4] The new *Restatement (Third) of Torts: Products Liability* also recognizes that there is little, if any, distinction between the three product liability theories.[5] Although warranty theories may be provide a basis for imposing liability in a product liability case, warranty claims are typically redundant of other available and existing claims. As a result of this overlap, three potential misconceptions should be carefully examined.

A. *Implied Warranty, Strict Liability And Negligence Claims Are Governed By The Same Statute Of Limitations*

Implied warranty claims can be subject to special statutes of limitation based on the Uniform Commercial Code (hereinafter "UCC"), for example, a four-year limitations period.[6] Most impor-

2. Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 899-901 (Cal. 1962); Escola v. Coca-Cola Bottling Co., 150 P.2d 436, 438-40 (Cal 1944). *See generally* Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960); MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916).

3. *See generally Greenman,* 377 P.2d 897; *Henningsen,* 161 A.2d at 80-84, 99-101 (discussing the early common law concepts of privity and then holding that in certain cases the privity requirement is not applicable).

4. *See, e.g.,* IOWA CODE § 668.1(1)(1999); Uniform Comparative Fault Act, §1(b) (1977).

5. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. n (1998).

6. U.C.C., § 2-725; Fell v. Kewanee Farm Equip. Co., 457 N.W.2d 911, 919 (Iowa 1990) (applying five-year statute of limitations to implied warranty actions in Iowa); Carlisle v. Fetzer, 381 N.W.2d 627, 628-29 (Iowa 1986) (applying five-year statute of limitations to implied warranty actions in Iowa). Most jurisdictions recognize two theories of implied warranty liability: 1) implied warranty of merchantability; and 2) implied warranty of fitness for a particular purpose. U.C.C. §§ 2-314 & 2-315; IOWA CODE at §§ 554.2314 (1999) (defining implied warranty of merchantability) & 554.2315 (defining implied warranty of fitness for a particular

tantly, the limitations period commences at the time *tender of delivery* is made, i.e., at time of initial retail sale of the product. "A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A *breach of warranty occurs when tender of delivery is made.*"[7] These statutory provisions may govern product liability claims for personal injuries which are premised upon an alleged breach of warranty.[8] Similar in operation and effect to a statute of repose, these statutes strictly circumscribe warranty liability on older products.

It is a common mistake to assume that the general statute of limitations for personal injury claims (for example, two or three years *from the date of the accident*) applies to a products case grounded on breach of warranty. In many jurisdictions, warranty claims are governed by a distinct limitations period.[9] The UCC statute of limitations for implied warranty claims operates like a statute of repose: a claim must be commenced within a certain time period after the initial product sale, and if not, it is barred.[10] Nevertheless, if the limitations defense is not raised it may be considered waived.[11]

In many cases, the UCC limitations period will eliminate an implied warranty claim. For example, in *Fell*, the product at issue, a

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purpose). The implied warranty of merchantability alleges that the goods were not generally fit for ordinary purposes. Logan v. Montgomery Ward & Co., 219 S.E.2d 685, 687 (Va. 1975); *see also* U.C.C. § 2-314(2). A claim based on implied warranty of fitness for a particular purpose is based on particular communications between the buyer and seller. Specifically, breach of the implied warranty of fitness for a particular purpose requires proof of the following elements: 1) the buyer had a particular purpose, distinct from the ordinary purpose for which the goods are typically used; 2) the manufacturer had knowledge of or reason to know of that particular purpose; 3) the manufacturer knew or had reason to know that the buyer was relying on the manufacturer's expertise to furnish a product that was suitable for the particular purpose; and 4) the buyer specifically relied on the manufacturer's expertise to furnish an appropriate product. *See, e.g.*, Renze Hybrids, Inc. v. Shell Oil Co., 418 N.W.2d 634, 637 (Iowa 1988); Van Wyk v. Norden Lab., Inc., 345 N.W.2d 81, 84 (Iowa 1984); Bergquist v. Mackay Engines, Inc., 538 N.W.2d 655, 658 (Iowa Ct. App. 1995). As will be discussed in section I(b), warranty claims may also be subject to disclaimer and limitation defenses.

7. U.C.C. § 2-725 (emphasis added); IOWA CODE § 554.2725 (emphasis added).

8. *Fell*, 457 N.W.2d at 918-19.

9. *See, e.g.*, Hoffman v. A.B. Chance Co., 339 F. Supp. 1385 (M.D. Pa. 1972); O'Keefe v. Boeing Co., 335 F. Supp. 1104 (S.D.N.Y. 1971); *Fell*, 457 N.W.2d at 918-19.

10. *See, e.g.*, Lowe v. Volkswagen of Am., Inc., 879 F. Supp. 28, 30 (E.D. Pa. 1995); Kern v. Frye Copysystems, Inc., 878 F. Supp. 660, 664-65 (S.D.N.Y. 1995).

11. Ruddock v. First Nat'l Bank, 559 N.E.2d 483, 483 (Ill. App. Ct. 1990).

portable farm elevator, was built and sold in 1966. Plaintiff was not injured until 1986, twenty years later. Though the lawsuit was filed within two years of the accident (the statute of limitations applicable to personal injury actions), the Iowa Supreme Court affirmed the trial court's dismissal of the warranty claim. It found that the warranty action had expired in 1971, five years after the auger was first sold and fifteen years prior to the plaintiff's injury.[12] Other jurisdictions have reached similar results.[13] Consequently, counsel must closely examine the applicable law, in conjunction with the age of the product, to determine if a commercial code statute of limitations completely bars the warranty claim in a products case.

B. Warranty Disclaimers Are Ineffective Or Void In Personal Injury Cases

Many products are sold with express language which disclaims or limits liability for warranty claims and other matters, such as liability for incidental and consequential damages.[14] These terms may be found in operator's manuals, sales agreements, pre-printed invoices, package inserts, or printed on the product itself or its container. The express terms of most manufacturer's written warranties exclude liability for breach of the implied warranties of merchantability or fitness for a particular purpose. Warranty disclaimers can be effective even for personal injury, product liability claims. They are commonly governed by the UCC because, in most instances, the product at issue will satisfy the rather broad definition of a good under the UCC.[15]

To effectively disclaim liability for a defective product based on breach of implied warranty, the disclaimer must satisfy the following standard:

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12. Fell v. Kewanee Farm Equip. Co., 457 N.W.2d 911, 919 (Iowa 1990).

13. *See, e.g.,* Shaw v. Brown & Williamson Tobacco Corp., 973 F. Supp. 539 (D. Md. 1997); Sille v. McCann Constr. Specialties Co., 638 N.E.2d 676 (Ill. App. Ct. 1994); Spieker v. Westgo, Inc., 479 N.W.2d 837 (N.D. 1992).

14. Although not explored in this article, assuming the disclaimer is not contrary to representations made to the purchaser, express warranties are also subject to disclaimer and limitation of remedies. U.C.C. § 2-316; *see also, e.g.,* L.S. Heath & Son, Inc. v. AT&T Info. Sys., Inc., 9 F.3d 561, 563 (7th Cir. 1993); Stauffer Chem. Co. v. Curry, 778 P.2d 1083, 1087 (Wyo. 1989).

15. *See, e.g.,* U.C.C. §§ 2-102 (indicating that U.C.C. "applies to transactions in goods") & 2-105 (defining goods as things "which are movable at the time of" sale); IOWA CODE §§ 554.2102 (indicating that U.C.C. "applies to transactions in goods") & 554.2105 (defining goods as things "which are movable at the time of" sale); *Fell,* 457 N.W.2d at 918 (applying U.C.C. warranty provisions to claim for personal injuries which allegedly resulted during use of grain elevator).

> [T]o exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "[t]here are no warranties which extend beyond the description on the face hereof.[16]

Consequently, any terms attempting to disclaim an implied warranty must be conspicuous. The UCC specifically defines the requirement that the warranty be conspicuous.

> A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals...is conspicuous. Language in the body of a form is conspicuous if it is in larger or other contrasting type or color....Whether a term or clause is conspicuous or not is for decision by the court.[17]

To disclaim liability for merchantability, the language must specifically use the term-of-art "merchantability." To exclude implied warranties of fitness for a particular purpose, the disclaimer must be in writing. Whether a specific warranty disclaimer satisfies these requirements is a question of law for the court.[18]

Most product manufacturer's warranty disclaimers satisfy the conspicuous requirement established by the UCC. For example, many manufacturers set forth the terms of the warranty in the operator's manual for the product. The use of bold type, capital letters or contrasting print or type is common. Courts have consistently held that this mode of presentation is conspicuous.[19] These

16. U.C.C. § 2-316(2) (emphasis added); IOWA CODE at § 554.2316(2) (emphasis added).

17. U.C.C. at § 1-201; IOWA CODE at § 554.1201(10).

18. *Id.*

19. *See, e.g.*, Transp. Corp. of Am. v. IBM, 30 F.3d 953, 959 (8th Cir. 1994) (ruling that disclaimer which utilized capital letters was conspicuous); H.B. Fuller Co. v. Kinetic Sys., Inc., 932 F.2d 681, 689 (7th Cir. 1991) (determining that disclaimer, which contained the only text in capital letters on a page titled "WARRANTY," satisfied the conspicuous requirement and citing additional authority for its conclusion that using capital letters rendered disclaimer conspicuous); Boston Helicopter Charter v. Agusta Aviation Corp., 767 F. Supp. 363, 376 (D. Mass. 1991) (using capital letters for disclaimer was conspicuous); Sealy v. Ford Motor Co., 499 F. Supp. 475, 477 (E.D.N.C. 1980) (using capital letters for disclaimer was conspicuous); Dana Commercial Credit Corp. v. Hanscom's Truck Stop, Inc., 679 A.2d

decisions, interpreting similar or identical UCC provisions from various jurisdictions are entitled to deference in jurisdictions which have adopted the UCC or a comparable variation.[20] Consequently, the trial court may find, as a matter of law, that a manufacturer's written disclaimer completely precludes any recovery based on breach of implied warranty.

In many cases, a claimant will argue that he or she did not read or have actual notice of the disclaimer, and for this reason, it is inoperative. Some courts have found, however, that it is not necessary that a product purchaser or user have *actual knowledge* of a warranty disclaimer in order for the disclaimer to be fully effective.[21] In *Childers,* the court flatly rejected the contention that a warranty disclaimer was ineffective because the provision was not specifically brought to the buyer's attention.[22]

Consequently, when considering a product liability claim based on breach of warranty, it is important that counsel thoroughly review any warranty materials provided by the manufacturer to determine if a warranty theory is subject to summary disposition.

C. *An Implied Warranty Theory Can Be Pursued With Strict Liability Or Negligence Claims As An Alternative Ground Of Liability*

Many courts have held that, absent exceptional circumstances, implied warranty theories of recovery should not be submitted to a jury with a claim based on strict liability in tort.[23] This is consistent with the new *Restatement.*

Regardless of the doctrinal label attached to a particular

570, 571 (N.H. 1996) (incorporating capital letters in bold type face into section heading and disclaimer language was conspicuous, despite relative size).

20. Union Carbide Corp. v. Consumers Power Co., 636 F. Supp. 1498, 1501 (E.D. Mich. 1986); *see also* Quaker Oats Co. v. Cedar Rapids Human Rights Comm., 268 N.W.2d 862, 866 (Iowa 1978) (stating that courts should give deference to decisions from other jurisdictions when interpreting a statute containing similar or identical language).

21. *See, e.g.,* Childers & Venters, Inc. v. Sowards, 460 S.W.2d 343 (Ky. 1970); Architectural Aluminum Corp. v. Macarr, Inc., 333 N.Y.S.2d 818 (N.Y. App. Div. 1972).

22. *Childers,* 460 S.W.2d at 344-45.

23. *See, e.g.,* Brewster v. United States, 860 F. Supp. 1377, 1390 (S.D. Iowa 1994); Hawkeye Sec. Ins. Co. v. Ford Motor Co., 174 N.W.2d 672, 684-85 (Iowa 1970), *appeal after remand,* 199 N.W.2d 373, 381-82 (Iowa 1972) (noting that, in product liability suits for personal injuries, "[O]rdinarily, strict liability in tort is in lieu of one or more of implied warranty theories and both theories should be submitted only in exceptional situations").

> claim, design and warning claims rest on a risk-utility assessment. To allow two or more factually identical...claims to go to a jury under different labels, whether strict liability, negligence, or implied warranty of merchantability, would generate confusion and may well result in inconsistent verdicts.[24]

Plaintiff's counsel obviously desires to submit multiple theories in an attempt to obtain two bites at same the apple, much like defense counsel will try to defend the matter using alternative and multiple defenses. However, instructing the jury with multiple claims which are practically indistinguishable is not legally proper, confuses the court and jury, and unduly emphasizes the plaintiff's theories of recovery. Accordingly, either implied warranty *or* strict liability should be submitted, but *not* both.[25] If a plaintiff elects to proceed on a theory of strict liability, the implied warranty theory should be dismissed, and vice-versa. This result makes sense because the origins of strict liability were, to a large extent, premised upon avoiding the strictures of contractual privity applicable to warranty claims. Since strict liability was intended to supplant warranty in such cases, there is no proper justification to submit both claims in the same case for the same claim of defect.

III. MYTH NO. 2: DESIGN DEFECT CAN BE BASED ON STRICT LIABILITY IN TORT

Defective design claims are often advanced under *both* negligence and strict liability theories, and the argument is often made that the product manufacturer and seller is responsible for both defective (i.e., strict liability in tort) *and* negligent design. This practice, however, has the effect of improperly emphasizing plaintiff's theories for recovery. It can further lead to inconsistent jury verdicts and unnecessary appeals and retrials. As a practical matter, there is no reasoned distinction between design defect claims grounded on strict liability or negligence.[26] Many courts have recognized this fact and, accordingly, will only submit a design defect claim to the jury under a single legal theory of recovery.[27] We be-

24. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. n (1998).
25. *Id.*
26. *Id.* (stating that "[r]egardless of the doctrinal label attached to a particular claim, design...claims rest on a risk-utility assessment").
27. *See, e.g.,* Hillrichs v. Avco Corp., 478 N.W.2d 70, 75-76 (Iowa 1991) (finding that strict liability design defect claim depended on the same elements as neg-

lieve, however, that application of the [applicable] standards to the present fact pattern will make the strict liability claim depend on virtually the same elements of proof as are required to establish the negligence claim. Consequently, we hold that only the negligence claim should be retried.[28] The Iowa Supreme Court in *Hillrichs* recognized the growing acceptance of this position.

> We make this determination [to remand for trial on negligent design only, and not both strict liability and negligence] only with respect to the present case. *We note, however, a growing number of courts and commentators have found that, in cases in which the plaintiff's injury is caused by an alleged defect in the design of a product, there is no practical difference between theories of negligence and strict liability.*[29]

Historically, courts relied upon the so-called "conduct-product" distinction in an attempt to explain the difference between strict liability and negligent design theories. Recently, however, courts have recognized that the conduct-product distinction is "illusory."[30] Such tortuous sophistry no longer justifies submitting *both* strict liability and negligence theories for the same alleged design deficiency.[31] Other courts referred to the type of knowledge held by the seller: in strict liability, knowledge was legally inferred or imputed to the seller, while in negligence cases, the standard was described as "knew or in the exercise of reasonable care, should have known."[32]

Only *one* legal theory for design liability should be submitted in a products case. When it is alleged that a product's design is defective, only a *negligence standard* should apply.[33] "The standard of

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ligence claim); Jones v. Hutchinson Mfg., Inc., 502 S.W.2d 66, 69-70 (Ky. 1973); Prentis v. Yale Mfg. Co., 365 N.W.2d 176, 187 (Mich. 1984); Holm v. Sponco Mfg. Co., 324 N.W.2d 207, 213 (Minn. 1982); Foley v. Clark Equip. Co., 523 A.2d 379, 385-92 (Pa. Super. Ct. 1987).

28. *Hillrichs*, 478 N.W.2d at 75-76 (footnote omitted).

29. *Id.*

30. Olson v. Prosoco, Inc., 522 N.W.2d 284, 289 (Iowa 1994).

31. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. n (1998) (recognizing that design defect claims are governed by an identical standard, whether premised on strict liability or negligence).

32. *Olson*, 522 N.W.2d at 288-89 (citing extensive legal authority). *See, e.g.*, Sita v. Danek Med., Inc., 43 F. Supp 2d 245, 259 (E.D.N.Y. 1999) ("The manufacturer satisfies its duty by 'warn[ing] of all potential dangers in its prescription drugs that it knew, or, in the exercise of reasonable care, should have known to exist.").

33. *See, e.g.*, Whitted v. Gen. Motors Corp., 58 F.3d 1200, 1206 (7th Cir. 1995); Jones v. Hutchinson Mfg., Inc., 502 S.W.2d 66, 69-70 (Ky. 1973); Prentis v. Yale Mfg. Co., 365 N.W.2d 176, 187 (Mich. 1984); Foley v. Clark Equip. Co., 523 A.2d

safety of goods imposed on the seller or manufacturer of a product is essentially the same whether the theory of liability is labeled warranty or negligence or strict tort liability: the product must not be unreasonably dangerous at the time that it leaves the defendant's possession."[34]

A design claim focuses on the manufacturer's care in selecting or adopting a particular design choice.[35] Whether defect is defined in terms of consumer expectations, risk-utility or a hybrid of the two formulations, a negligence analysis is particularly appropriate when a design is at issue. By way of direct analogy, in failure to warn cases, many courts have refused to submit both strict liability and negligence charges to the jury.[36] Warnings physically affixed to products and instructions in an operator's manual are clearly a part of the product's *intended* design. Criticisms of intended warnings or instructions are more closely akin to design defect claims, as opposed to manufacturing defect claims, which involve an *unintended* flaw or defect.

The genesis of strict liability in tort also supports this result. Strict liability was originally premised, at least in part, upon the judicial belief that it was inherently difficult for plaintiffs to prove specific acts of negligence which created a manufacturing flaw that later caused an accident.[37] Strict liability (or so-called "liability without fault") was adopted to allay that concern. Under strict liability, if the product had a flaw, the manufacturer would be held responsible, regardless of the care exercised when manufacturing the product. Accordingly, strict liability in tort is appropriate in the

379, 385-92 (Pa. Super. Ct. 1987); Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 593 (1980); Michael Hoenig, *Product Designs and Strict Tort Liability: Is There a Better Approach?*, 8 SW. U. L. REV. 109, 109 (1976); Keith Miller, *Design Defect Litigation in Iowa: The Myths of Strict Liability*, 40 DRAKE L. REV. 465, 465 (1991); William C. Powers, *The Persistence of Fault in Products Liability*, 61 TEX. L. REV. 777, 797 (1983).

34. Chestnut v. Ford Motor Co., 445 F.2d 967, 968 (4th Cir. 1971).

35. When a jury decides that the risk of harm outweighs the utility of a particular design (that the product is not as safe as it *should* be) it is saying that in choosing the particular design and cost tradeoffs, the manufacturer exposed the consumer to greater risk of danger than he should have. Conceptually and analytically, this approach bespeaks negligence. Prentis v. Yale Mfg. Co., 365 N.W.2d 176, 184 (Mich. 1984).

36. Olson v. Prosoco, Inc., 522 N.W.2d 284, 284 (Iowa 1994).

37. *See, e.g.*, Greenman v. Yuba Power Prod., Inc., 377 P.2d 897 (Cal. 1963); Escola v. Coca-Cola Bottling Co., 150 P.2d 436 (Cal. 1944); Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960).

context of a *manufacturing defect* claim, only.[38] The bedrock public policy concerns which undergird the adoption of strict liability in tort simply do not exist in a design defect case, which involves an appraisal of the product seller's intended design.

The practical dangers of submitting both negligent and strict liability design claims can easily be illustrated by the potential for inconsistent jury verdicts. This most often occurs when the jury allows a recovery based on negligence, yet refuses to find that there was any defect in the product that was causative of the injury. The court need only consider the possibility of an inconsistent jury verdict or contradictory, irreconcilable answers to special verdict questions. These inconsistencies raise the specter of reversible error and a new trial.[39] This circumstance occurred in *Tipton v. Michelin Tire Co.*, and the court was unable to reconcile the two findings.

> At least one court has held that in order to hold a manufacturer liable under either strict liability or

38. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. n (1998). The *Restatement (Third)* makes the following distinction for manufacturing defect claims, the only type of claim that should be permitted under a strict liability theory:

> A different approach may be appropriate for claims based on manufacturing defects, since the rule set forth in Subsection (a) does not require risk-utility assessment while a negligence claim does. That is, the two types of manufacturing defect claims are based on different factual predicates. Negligence rests on a showing of fault leading to product defect. Strict liability rests merely on a showing of product defect. When a plaintiff believes a good claim for the negligent creation of (or failure to discover) a manufacturing defect may be established, the plaintiff may assert such a claim in addition to a claim in strict liability under Subsection (a). The plaintiff in such a case should have the opportunity to prove fault and also to assert the right to recover based on strict liability. However, clearly it would be inconsistent for a trier of fact to find no manufacturing defect on a section 2(a) claim and yet return a verdict of liability because the defendant was negligent in having poor quality control. What must be shown under either theory is that the product in question did, in fact, have a manufacturing defect at time of sale that contributed to causing the plaintiff's harm. Nevertheless, it is still inappropriate to raise or submit to the jury a warranty claim in conjunction with a manufacturing defect claim premised on strict liability or negligence.

Id.

In connection with manufacturing defects, a section 2(a) tort claim and an implied warranty of merchantability claim rest on the same factual predicate–the sale by the defendant of a product that departs from the manufacturer's specifications irrespective of anyone's fault. Thus, these two claims are duplicative and may not be pursued together in the same case.

39. Lambert v. Gen. Motors Corp., 79 Cal.Rptr.2d 657, 659-61 (Cal. Ct. App. 1998) (holding that inconsistencies in special verdict forms on strict liability and negligent design claims required new trial). The jury may find liability based on negligence, but not strict liability (supposedly the easier claim to establish).

facturer liable under either strict liability or negligence, a jury must first find that the product in question was defective.[40] In *Sexton*, the Fourth Circuit stated:

> Although Kentucky also imposes the traditional duty of care on manufacturers to make products reasonably safe, when a product liability claim is based on a *design defect*, the articulation of liability, whether based on negligent breach of a duty of care or on strict liability, reduces to a single question of whether the product was defective.[41]

> In other words, proof of a defective product is essential to the products liability or negligence claim. According to *Sexton*, the distinction between the two claims is of "no practical significance."[42] We agree that the two claims in this case depend on the existence of a defective product. As indicated above, however, the jury found no defective product for purposes of the strict liability claim, but did find that the product was defective for purposes of the negligence claim. That finding, we believe, is legally inconsistent.[43]

Another potential problem involves the application of Federal Rule of Evidence 407 relating to proof of "subsequent remedial measures." In a minority of jurisdictions, subsequent remedial measures are admissible for a strict liability, as opposed to a negligence, claim.[44] If both claims are submitted, confusing limiting instructions regarding the use of this evidence must be utilized. From the product manufacturer's point of view, it is doubtful whether limiting instructions can actually "unring the bell" of improper and prejudicial proof.[45] If only a negligence claim is sub-

40, Sexton v. Bell Helmets, 926 F.2d 331 (4th Cir. 1991), cert. denied, 502 U.S. 820 (1991).

41. *Id.* at 335 (emphasis added).

42. *Id.* at 336 (quoting Jones v. Hutchinson Mfg., Inc., 502 S.W.2d 66, 69-70 (Ky. 1973)).

43. Tipton v. Michelin Tire Co., 101 F.3d 1145, 1150 (8th Cir. 1996).

44. *See, e.g.*, Ford Motor Co. v. Fulkerson, 812 S.W.2d 119, 125 (Ky. 1991); Barnett v. La Societe Anonyme Turbomeca France, 963 S.W.2d 639, 651 (Mo. Ct. App. 1997).

45. Fish v. Georgia-Pacific Corp., 779 F.2d 836, 840 (2nd Cir. 1985) (limiting instruction did not cure error created by admitting evidence of manufacturer's subsequent warnings); Sheehy v. S. Pac. Transp. Co., 631 F.2d 649, 652 (9th Cir. 1980) (limiting instruction did not cure error created by erroneous admission of collateral evidence that court believed would be improperly used by jury); Werner v. Upjohn Co., 628 F.2d 848, 854 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981) (noting that when evidence is admissible for a limited purpose, a party is not free to use it for a forbidden purpose, over objection, and insulate himself from rever-

mitted, however, subsequent remedial measures are inadmissible under Rule 407. If only a single claim based on *negligent* design is submitted to the jury, these complications are easily avoided.

IV. MYTH NO. 3: FAILURE TO WARN CAN BE BASED ON STRICT LIABILITY IN TORT

Product liability claimants and their counsel often request that the trial court submit "failure to warn" claims on *both* strict liability and negligence theories for the same claim of defect. This, however, is no less duplicative than submitting *both* strict liability *and* negligent design theories. As a result, a number of courts have found that submitting such overlapping claims is inappropriate.[46]

In *Olson*, the Iowa Supreme Court specifically held that "failure to warn" claims are based solely on *negligence* rather than strict liability. This is because manufacturers are only required to, and feasibly only can, warn against risks or dangers that were known or should have been known at the time of manufacture.[47] This position is consistent with the *Restatement (Third).*[48] The new *Restatement* also recognizes that a growing number of courts have refused to submit warning and design claims under both negligence and strict liability theories. "A fair number of courts have taken the position that in a design or *failure to warn* case, it is redundant (and thus is inappropriate) to allow the plaintiff to go to the jury on both negli-

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sal by pointing to limiting instruction given at close of case); United States v. Figueroa, 618 F.2d 934, 943 (2nd Cir. 1980) (balancing required by Rule 403 would be unnecessary if limiting instructions always insured that jury would consider evidence only for fixed purpose; thus, court must consider likelihood that jury will not follow a limiting instruction).

46. *See, e.g.,* McCullock v. H.B. Fuller Co., 61 F.3d 1038, 1044 (2nd Cir. 1995) (finding that elements of failure to warn claim are identical under negligence and strict liability); Olson v. Prosoco, Inc., 522 N.W.2d 284 (Iowa 1994); *see also* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. n (1998) (allowing two or more factually identical risk-utility claims to go to a jury, whether strict liability or negligence, would generate confusion and possibly result in inconsistent verdicts).

47. *See, e.g.,* Fibreboard Corp. v. Fenton, 845 P.2d 1168, 1175 (Colo. 1993) (finding that manufacturer cannot warn against dangers that were unknown or unknowable under prevailing scientific and technological principles at the time of manufacture); Woodill v. Parke Davis & Co., 402 N.E.2d 194, 198 (Ill. 1980) (requiring that plaintiff demonstrate that manufacturer knew or should have known of danger); *Olson*, 522 N.W.2d at 289 (refusing to impose a duty to warn against unknown or unknowable dangers).

48. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. n (1998) (engaging in substantial research and testing can help to show that a risk was not reasonably foreseeable).

gence and strict liability."[49]

In fact, *Restatement* reporters, Professors Henderson and Twerski, have long criticized courts that apply strict liability in failure to warn cases.[50] Many courts have now adopted this theory, which is logically consistent with the position that design claims should only be submitted under a *negligence* standard. Warnings or instructions, whether physically appended to a product or in an operator's manual, are part of the intended design. Nevertheless, if not properly objected to or contested, plaintiffs will continue to allege redundant and improper warning claims and many courts will submit such claims to the jury, all to the detriment of manufacturing defendants.

At a minimum, a court trying a product liability case should *not* submit to the jury warning claims under *both* strict liability and negligence theories. There is no practical distinction between the theories. Submitting both theories to the jury also creates the potential for an inconsistent jury verdict. Further, as noted in the previous section, in some jurisdictions, submitting both strict liability and negligent claims can be problematic with regard to the admissibility of "subsequent remedial measures" evidence under Federal Rule of Evidence 407. Finally, submitting multiple claims to a jury based on the same conduct acts improperly places undue emphasis on the plaintiff's liability theories and unfairly increases the chances of a plaintiff's verdict.

V. MYTH NO. 4: STRICT LIABILITY APPLIES EVEN IF THE PRODUCT HAS BEEN ALTERED, SO LONG AS THE ALTERATION WAS FORESEEABLE

Under strict liability in tort, a plaintiff must prove that the product had not experienced a "substantial change in its condition" subsequent to the date of sale.[51] Strict liability does not extend to injuries which cannot be traced to the condition of the product as it reached the market.[52] Product sellers are not respon-

49. *Id.* § 2, Reporters' Note, cmt. n.

50. Henderson & Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 271-78 (1990).

51. RESTATEMENT (SECOND) OF TORTS § 402A (1977) (indicating that there must not be a "substantial change in the condition" of the product); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (stating that defect must exist "at the time of sale or distribution").

52. *See, e.g.*, Fell v. Kewanee Farm Equip. Co., 457 N.W.2d 911, 918 (Iowa 1990) (stating that manufacturer is not responsible for subsequent "mishandling,

sible for injuries or damages which result from a defect caused by mishandling or subsequent alteration of a product that was safe when it left the manufacturer's control.[53]

In many cases a plaintiff will be unable to establish this element of their *prima facie* case. In fact, plaintiffs' liability experts will often admit that the condition of the product has been appreciably changed subsequent to the date of manufacture.[54] After such an admission, the court is in a position to rule, as a matter of law, that the strict liability claim should be dismissed. Unfortunately, this result occurs in far too few cases, often because the fundamental nature of this element of strict tort liability is misunderstood.

Many courts have misapplied strict liability, concluding that if a modification is reasonably foreseeable, strict liability is still applicable.[55] This standard, however, confuses strict liability with negligence claims, and confuses the no-substantial-change-in condition element with the reasonably-foreseeable-use element of a 402A strict liability case. Trial courts routinely (and incorrectly) permit the jury to determine: 1) whether it is reasonably foreseeable the product would be changed subsequent to sale; and 2) if it is reasonably foreseeable, whether the manufacturer must guard against that possibility; and 3) whether a substantial change in condition has occurred.[56] This analysis misapplies section 402A of the *Re-*

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alteration, or other cause beyond the seller's or manufacturer's control" which renders a product defective); Duggan v. Hallmark Pool Mfg. Co., Inc., 398 N.W.2d 175, 178 (Iowa 1986); Smith v. Air Feeds, Inc., 519 N.W.2d 827, 830 (Iowa Ct. App. 1994) (requiring in strict liability that the claimant demonstrate that product was not substantially modified or changed after leaving manufacturer's control).

53. *See, e.g.,* Kromer v. Beazer East, Inc., 826 F. Supp. 78, 80-81 (W.D.N.Y. 1993); Hart v. Hytrol Conveyor Co., Inc., 823 F. Supp. 87, 91-93 (N.D.N.Y. 1993); *Fell,* 457 N.W.2d at 918; see also Restatement (Second) of Torts § 402A cmt. g (stating that seller is not liable when product is delivered in a safe condition and subsequent changes or alterations created the dangerous condition).

54. If a change in condition occurred subsequent to the accident as a result of mishandling by the plaintiff, expert witnesses or others outside the control of the manufacturer, the product manufacturer may have a spoliation of evidence defense which could result in an evidentiary presumption against the claimant, dismissal or summary judgment. *E.g.,* Patton v. Newmar Corp., 538 N.W.2d 116, 119-120 (Minn. 1995); Hoffman v. Ford Motor Co., 587 N.W.2d 66, 68 (Minn. Ct. App. 1998).

55. *See, e.g.,* Woods v. Graham Eng'g. Corp., 539 N.E.2d 316, 318-19 (Ill. Ct. App. 1984) (finding that manufacturer is not liable if injury resulted from alteration of product, but stating that liability may be found if change was foreseeable); Davis v. Berwind Corp., 640 A.2d 1289, 1296-99 (Pa. Super. Ct. 1994) (stating that material changes preclude liability for manufacturer, but examining whether change could have been foreseen).

56. *Davis,* 640 A.2d at 1287 (recognizing that unless inferences entirely clear,

statement (Second) of Torts as originally written and intended. Foreseeability has no bearing on plaintiffs' burden to prove that the product "did not undergo a substantial change in its condition" after the time of sale. Instead, in the context of a strict liability claim, foreseeability only relates to whether the product was being used in a reasonably foreseeable manner. Reasonably foreseeable use is a separate element of strict liability and has no relationship to the separate and distinct element that there be no substantial change in the condition of the product. If a product was substantially changed or modified after its sale and the change was not intended by the manufacturer, strict liability should not apply. While a negligence claim may be appropriate, even though a modification has occurred, a strict liability claim contravenes the text and intent of the *Restatement* and should not be countenanced.[57]

In addition, where the product has been modified in such a way as to *cause* the injury, a causation analysis, either superseding cause or sole proximate cause, may be employed to reduce or eliminate liability.[58] Unfortunately, many courts will abdicate the causation question to the jury, even in cases where product modifications clearly caused an accident which would not have otherwise occurred.

Consequently, any substantial change or modification to a product, subsequent to the date of sale, that is causally related to an alleged accident should preclude the application of strict liability in tort.

VI. MYTH NO. 5: A PRODUCT MANUFACTURER'S DUTIES ARE FIXED AT TIME OF SALE

According to traditional notions of strict liability in tort based on *Restatement (Second) of Torts*, Section 402A, the defect that is the subject of the case must exist at time of sale. However, there has

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foreseeability on product liability issues is a jury question).

57. William H. Hardie, *Confronting Foreseeability in Products Litigation*, 36(10) FOR THE DEFENSE 4 (1994); Joseph A. Sherman & Kathryn E. Nichols, *"Foreseeable Product" Modification: A Cloak and Shield for the Defense*, 30(10) FOR THE DEFENSE 18 (1988) (discussing the use and misuse of foreseeability in products cases).

58. *See, e.g.*, Chumbley v. Dreis & Krump Mfg. Co., 521 N.W.2d 192, 194 (Iowa Ct. App. 1993) (finding it proper to argue that an employer's fault was the sole proximate cause of the accident even though the employer was not a party to the case); Woods v. Graham Eng'g Corp., 539 N.E.2d 316, 318-20 (Ill. Ct. App. 1989) (recognizing that modification of product may preclude liability for manufacturing defendant because it was subsequent intervening cause of injury).

been a recent ominous trend toward doing away with this important element under the guise of so-called "post-sale duties." Post-sale duties are troublesome because "hindsight is always 20-20 vision." Most twenty-year-old products cannot withstand the effect of being compared to similar products made in 2000. The intrinsic unfairness which results from judging a product design against subsequent events and technological advances cannot be overestimated. In the last ten years claims for "failure to retrofit," "failure to recall" or breach of the "continuing duty to warn" have been popular. Nevertheless, a clear majority of courts have clearly and unmistakably ruled that there is no legal duty to "recall" or "retrofit."[59]

Notwithstanding the likely success of precluding claims based on the failure to "recall" or "retrofit" a product, plaintiffs can argue that a manufacturing defendant has a "post-sale" or "continuing duty to warn," which is often undefined and virtually limitless.[60] The pervasive danger inherent in post-sale "duty" claims, particularly the post-sale duty to warn, mandates a clear understanding of the salient legal issues and potential defense strategies.

A. A Manufacturer Has A Legal Duty To Recall Or Retrofit A Product

Frequently, plaintiffs will advance a claim based upon or refer to an amorphous "duty" to "recall or retrofit" the product involved in a case. Perhaps even more insidious is the "professional witness" expert who opines, with an air of authority, that a certain product "should have been recalled years ago." Sometimes the "failure to recall" argument is used in an attempt to garner a verdict of punitive damages. Moreover, when a manufacturer voluntarily institutes its own recall, the rejoinder from plaintiffs is that the manufacturer should have acted more quickly.[61] A more telling example of the old adage, "damned if you do, damned if you don't," is difficult to find.

In a clear majority of jurisdictions, however, courts have found

59. *See, e.g.*, Burke v. Deere & Co., 6 F.3d 497, 503 (8th Cir. 1993), *cert. denied*, 510 U.S. 1115 (1994); Gregory v. Cincinnati, Inc., 538 N.W.2d 325, 333-34 (Mich. 1995).

60. *See generally* Lovick v. Wil-Rich, 588 N.W.2d 688, 695-96 (Iowa 1999) (providing factors circumscribing the scope of post-sale duty to warn).

61. *See, e.g.*, Burke v. Deere & Co., 780 F. Supp. 1225 (S.D. Iowa 1991) (finding manufacturer of combine liable for failing to timely recall product), *reversed*, 6 F.3d 497, 508-09 (8th Cir. 1993) (holding that there is no duty to recall or retrofit a product), *cert. denied*, 510 U.S. 1115 (1994).

that a manufacturer has no duty to retrofit or recall a product.[62] Section eleven of the *Restatement (Third)* also adopts this position, finding that there is no independent duty to recall a product. A manufacturer is liable for failing to recall a product *only* if it fails to: 1) conduct a recall that was mandated by governmental order or legislation; or 2) act reasonably when conducting a voluntary recall.[63] Accordingly, claims that the manufacturer should have "recalled" or "retrofitted" a given product are best contested through motions for partial summary judgment and motions *in limine* preventing any reference to this position (by the lawyers or experts) at trial.

In addition, if claims for post-sale failure to warn are made, the jury must be given a limiting instruction which advises that "there is no duty to recall or retrofit [the product] in this case." Further, it must be explained that having the manufacturer go into the field and physically attach new warnings is a product "retrofit," an action that is not required by law.[64] Otherwise, the jury may improperly speculate regarding possible recall or retrofit actions during deliberations.

B. *A Manufacturer's "Continuing Duty To Warn" Is Limited To The Duty To Exercise Reasonable Care*

A continuing duty to warn claim is troublesome because it is premised on a negligence theory and courts typically do not intrude on the fault findings in negligence cases by the jury. The *Restatement (Third),* however, advocates a post-sale duty to warn only in certain limited circumstances.

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62. *See, e.g.,* Horstmyer v. Black & Decker, Inc., 151 F.3d 765, 773 (8th Cir. 1998); *Burke,* 6 F.3d at 509; Habecker v. Copperloy Corp., 893 F.2d 49, 54 (3d Cir. 1990), *appeal after remand,* 942 F.2d 210 (3d Cir. 1991); Syrie v. Knoll Int'l, 748 F.2d 304, 311-12 (5th Cir. 1984); Zettle v. Handy Mfg. Co., 837 F. Supp. 222, 224 (E.D. Mich. 1992), *aff'd,* 998 F.2d 358 (6th Cir. 1993); Eschenburg v. Navistar Int'l Transp. Corp., 829 F. Supp. 210, 215 (E.D. Mich. 1993); Estate of Kimmel v. Clark Equip. Co., 773 F. Supp. 828, 829-30 (W.D. Va. 1991); Modelski v. Navistar Int'l Transp. Co., 707 N.E.2d 239, 247 (Ill. App. Ct. 1999); *Gregory,* 538 N.W.2d at 336-37; Zychowski v. A.J. Marshall Co., Inc., 590 N.W.2d 301, 302 (Mich. Ct. App. 1998); Morrison v. Kubota Tractor Corp., 891 S.W.2d 422, 429-30 (Mo. Ct. App. 1994). *But see* Romero v. Int'l. Harvester Co., 979 F.2d 1444, 1450 (10th Cir. 1992) (imposing post-sale duty to "remedy the defect" but no imperative duty to retrofit).

63. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 11 (1998).

64. Tabieros v. Clark Equip. Co., 944 P.2d 1279, 1296 (Haw. 1997) (recognizing the distinction between a post-sale warning and a post-sale retrofit which involves actual modifications or physical attachments to the product).

(a) One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to provide a warning after the time of sale or distribution of a product when a reasonable person in the seller's position would provide such a warning.

(b) A reasonable person in the seller's position would provide a warning after the time of sale when:

(1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; *and*

(2) those to whom a warning might be provided can be identified and may reasonably be assumed to be unaware of the risk of harm; *and*

(3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; *and*

(4) the risk of harm is sufficiently great to justify the burden of providing a warning.[65]

Despite acceptance of a post-sale duty to warn theory by the *Restatement (Third) of Torts: Products Liability*, this theory of recovery has not been adopted by every jurisdiction.[66]

When confronted with a post-sale warnings claim, several issues should be kept in mind. First, defense strategies employed when defending failure to warn claims are, in general, equally applicable to post-sale or continuing duty to warn claims. For example, the absence of causation may be a compelling argument. Specifically, numerous decisions have held that a claimant has failed to establish the necessary causal link for a failure to warn claim if: 1) the warning would not have prevented the accident; 2) the claimant was knowledgeable of the danger and would not have modified his or her behavior; or 3) the risk was open or obvious.[67] Second, the duty only arises when a "reasonable" seller would provide a

65. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 10 (emphasis added).

66. *See, e.g.*, Lovick v. Wil-Rich, 588 N.W.2d 688, 696 (Iowa 1999) (adopting post-sale duty to warn as a cause of action in Iowa); Modelski v. Navistar Int'l Transp. Corp., 707 N.E.2d 239, 247 (Ill. App. Ct. 1999) (declining to recognize a post-sale duty to warn); Desantis v. Frick Co., 745 A.2d 624, 631 (Pa. Super. Ct. 1999) (refusing to impose a post-sale duty to warn).

67. *See, e.g.*, Jaurequi v. Carter Mfg. Co., Inc., 173 F.3d 1076, 1084 (8th Cir. 1999); Peitzmeier v. Hennessy Indus., Inc., 97 F.3d 293, 300 (8th Cir. 1996); Ramstad v. Lear Siegler Div. Holdings Corp., 836 F. Supp. 1511, 1516 (D. Minn. 1993); DeLoach v. Rovema Corp., 527 S.E.2d 882, 883 (Ga. Ct. App. 2000); Liriano v. Hobart Corp., 700 N.E.2d 303, 308 (N.Y. 1998).

post-sale warning.[68] To determine if a "reasonable" seller would provide a warning, the court must balance several factors, including the ability to identify and communicate with product owners and users.[69] Third, mere technological advances or safety improvements do not establish a continuing duty to warn.[70]

As discussed with respect to generic warning claims, post-sale duty to warn claims are and should only be considered under a negligence standard.[71] In addition to the prevalent legal authority, this position is supported by the "reasonable" seller standard adopted by sections ten and eleven of the *Restatement (Third) of Torts: Products Liability.*

VII. MYTH NO. 6: OTHER ACCIDENTS, CLAIMS OR LAWSUITS ARE ADMISSIBLE IN A PRODUCT LIABILITY CASE

Evidence of other accidents, claims or lawsuits is frequently injected into product liability cases through the wholesale admission of irrelevant innuendo, hearsay testimony or documentary evidence of questionable validity. In most jurisdictions, evidence of other claims or incidents is only admissible if the circumstances of the other accidents are "substantially similar" to the subject accident.[72] Emphasis should rightly be placed on the term *substantially.* The intent of this term is to insure that, while other proffered incidents need not be identical in each and every respect, they must be intrinsically similar in the critical particulars or the evidence is not relevant and, therefore, not admissible in evidence.[73] Perhaps more to the point, if evidence is provided of accidents that did not occur under "substantially similar" circumstances, the proof is unfairly prejudicial and invites the jury to make its determination based on an improper ground.[74] With the possible exception of

68. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 10.

69. *See, e.g., Lovick,* 588 N.W.2d at 694; Patton v. Hutchinson Wil-Rich Mfg. Co., 861 P.2d 1299, 1314-15 (Kan. 1993); Crowston v. Goodyear Tire & Rubber Co., 521 N.W.2d 401, 409 (N.D. 1994).

70. *See, e.g.,* Williams v. Monarch Mach. Tool Co., 26 F.3d 228, 232 (1st Cir. 1994); *Estate of Kimmel,* 773 F. Supp. at 831; Kolesar v. Navistar Corp., 815 F. Supp. 818, 821 (M.D. Pa. 1991) (holding 1967 tractor not to be defective based on technology available at time of manufacture); *see also Patton,* 861 P.2d at 1311 (finding no duty to notify customers of changes in state of the art).

71. *See, e.g., Lovick,* 588 N.W.2d at 694-95.

72. *See, e.g.,* Joy v. Bell Helicopter Textron, Inc., 999 F.2d 549, 551 (D.C. Cir. 1993); Drabik v. Stanley-Bostitch, Inc., 997 F.2d 496, 499-500 (8th Cir. 1993).

73. FED. R. EVID. 401, 402 & 403.

74. *Drabik,* 997 F.2d at 508-09 (8th Cir. 1993).

subsequent remedial measures or a voluntary product recall, there are few, if any, examples of more unduly prejudicial evidence. As a result, defense counsel must ensure that plaintiffs are held strictly accountable to the proper evidentiary standard.[75]

"Substantial similarity" is a troublesome standard for most trial judges who tend to err on the side of inclusion, as opposed to exclusion of evidence. This, however, is the wrong approach. Evidence of "other accidents" is peculiarly subject to misuse by the jury.[76] Accordingly, in addition to the substantial similarity requirement, Federal Rule of Evidence 403 is a second means to exclude marginally relevant evidence of "other accidents." Error caused by the admission of such evidence cannot be eradicated by the use of limiting instructions.[77]

"Other accident" evidence may also be limited by critically examining the legal grounds for which the evidence is offered. For example, plaintiffs frequently argue that proof of other accidents is relevant to the issue of "notice." If a manufacturing defendant concedes that it had notice, however, proof of the other accidents is no longer necessary because the issue of "notice" is not in controversy. Consequently, when it is questionable that the circumstances surrounding another accident satisfy the substantial similarity requirement, a manufacturer may be able to preclude admission of the evidence by stipulating to notice. Plaintiffs also proffer evidence of other accidents on the issue of "feasibility." If a manufacturer can, under the facts and circumstances, admit the feasibility of alternatives advocated by plaintiff, the evidence may not be admissible on this basis.[78]

When confronted with a plaintiff's attempt to present evidence of other accidents, claims or lawsuits, defense counsel must first at-

75. *See, e.g.*, Robert Sachs, *Other Accident Evidence in Product Liability Actions: Highly Probative or an Accident Waiting to Happen?*, 49 OKLA. L. REV. 257 (1996).

76. *Drabik*, 997 F.2d at 508-09.

77. Fish v. Georgia-Pac. Corp., 779 F.2d 836, 840 (2nd Cir. 1985); Sheehy v. Southern P. Transp. Co., 631 F.2d 649, 652 (9th Cir. 1980); Werner v. Upjohn Co., 628 F.2d 848, 854 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981); United States v. Figueroa, 618 F.2d 934, 943 (2nd Cir. 1980).

78. *See generally* Ross v. Black & Decker, Inc., 977 F.2d 1178, 1185 (7th Cir. 1992) (noting that evidence is not admissible on feasibility issue when feasibility is conceded by the manufacturer); Mills v. Beech Aircraft Corp., 886 F.2d 758, 764 (5th Cir. 1989) (stating that feasibility exception does not apply when manufacturer does not contest feasibility); Wheeler v. John Deere Co., 862 F.2d 1404, 1411 (10th Cir. 1988) (noting that when a manufacturer earlier stipulated to feasibility of design change, the evidence was inadmissible); FED. R. EVID. 401, 402 & 403.

tempt to exclude this evidence through the substantial similarity standard. If this proves unsuccessful, it may be possible to wholly eliminate or, at a minimum, limit the evidence by thoroughly examining the alleged justification for offering the proposed evidence.

VIII. MYTH NO. 7: SUBSEQUENT REMEDIAL MEASURES ARE ADMISSIBLE IN A PRODUCT LIABILITY CASE

Subsequent design changes or warnings added by a manufacturer can be troublesome, since there is "no clearer crystal ball" than one that looks to the past. Several arguments, however, may minimize or eliminate the potentially harmful effect of this evidence.

Federal Rule of Evidence 407 governs the admissibility of subsequent remedial measures. Prior to a 1997 amendment, Rule 407 was generally construed to exclude evidence of remedial measures which occurred subsequent to the design or manufacture of a product.[79] The 1997 amendment to Rule 407, however, established that the relevant point in time to determine whether a change or modification was a subsequent remedial measure was the date of the accident at issue.

> When, *after an injury or harm allegedly caused by an event,* measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.[80]

Consequently, while prior to the amendment which defined the term event, a defendant was generally able to exclude evidence of changes or modifications that occurred subsequent to design or manufacture. While this issue has been clarified in Federal Rule 407, this issue is still subject to debate in state courts.

While the majority of courts apply Rule 407 to exclude evi-

79. *See, e.g.,* Petree v. Victor Fluid Power, Inc., 831 F.2d 1191, 1198 (3rd Cir. 1987).

80. FED. R. EVID. 407 (emphasis added).

dence of subsequent remedial measures in product liability cases,[81] it is important to determine how the particular jurisdiction applies the term "event." In some jurisdictions, a design change is *not* a "subsequent remedial measure" unless it occurred subsequent to the accident at issue.[82] Alternatively, other jurisdictions have found that subsequent remedial measures encompass any change subsequent to product manufacture or design.[83]

Obviously, evidence of subsequent design changes is not excluded if there are other recognized grounds for its admission. Potential grounds for admissibility are set forth in the second sentence of Rule 407 and include ownership, control, feasibility of precautionary measures or impeachment. For example, if feasibility is a contested issue, a subsequent design modification may be admissible solely on the issue of feasibility, but inadmissible on the issue of fault or negligence.

Two recent Iowa cases illustrate the dangers of misapplying Rule 407, even in the non-product liability setting. In *Tucker v. Caterpillar, Inc.*,[84] the Iowa Supreme Court ruled that Rule 407 did not preclude evidence of post-sale design modifications and changes to warnings that occurred before the accident at issue. The *Tucker* court interpreted the term "event" in Iowa Rule of Evidence 407 to mean the date of the accident at issue. Under this interpretation, design changes that occurred subsequent to sale of a product, yet before an accident, are admissible.

In *McIntosh v. Best Western Steeplegate Inn*,[85] the Iowa Supreme Court eviscerated the protection afforded civil defendants, regarding the admissibility of subsequent remedial measures, by Rule 407.

The facts of *McIntosh* were simple. Paul McIntosh, a motel guest, slipped and fell in an icy parking lot.[86] McIntosh filed an action alleging that the motel was negligent, seeking recovery on a premises liability theory.[87] At trial, Plaintiff produced a photo-

81. *In re* Joint E. Dist. & S. Dist. Asbestos Litig., 995 F.2d 343, 345-46 (2nd Cir. 1993); Raymond v. The Raymond Corp., 938 F.2d 1518, 1522-25 (1st Cir. 1991); Hyjek v. Anthony Indus., 944 P.2d 1036, 1037-43 (Wash. 1997).

82. Tucker v. Caterpillar, Inc., 564 N.W.2d 410, 413-14 (Iowa 1997); Dixon v. Jacobsen Mfg. Co., 637 A.2d 915, 924-25 (N.J. Super. Ct.), *cert. denied*, 642 A.2d 1004 (N.J. 1994).

83. *See, e.g.*, Cover v. Cohen, 461 N.E.2d 864, 870-71 (N.Y. 1984); D.L. by Friedrichs v. Huebner, 329 N.W.2d 890, 909 (Wis. 1983).

84. 564 N.W.2d 410 (Iowa 1997).

85. 546 N.W.2d 595 (Iowa 1996).

86 *Id.* at 596.

87 *Id.*

graph, taken by a motel employee one day after the accident, of the parking lot where McIntosh allegedly fell.[88] Although the photograph did not reveal any ice in the area where the fall occurred, Plaintiff's witnesses testified regarding the icy condition of the parking lot.[89] A witness for the defendant testified that the photograph accurately depicted the condition of the parking lot at the time McIntosh allegedly fell.[90]

To impeach testimony given on behalf of the motel, McIntosh proffered evidence that the motel manager ordered the application of a deicing agent subsequent to the accident.[91] The trial court excluded this testimony, finding that it constituted inadmissible evidence of a subsequent remedial measure under Iowa Rule of Evidence 407.[92] On appeal, the Iowa Supreme Court reversed the trial court, ruling that the evidence should have been admitted.[93] Most troubling, however, is the exceedingly broad language in the opinion that, if literally applied, would emasculate Rule 407. Under the new rule established by the court in *McIntosh*, evidence demonstrating that subsequent remedial measures have been performed is admissible as "circumstantial evidence" of conditions existing at the time of an accident. If this is, in fact, the applicable standard, the first sentence of Rule 407, which clearly states that such evidence is inadmissible as proof of negligence or culpable conduct, is rendered a nullity.

The most disturbing aspect of the *McIntosh* decision is that the supreme court's holding was unnecessary to decide the case. Initially, the court found that evidence regarding the application of a deicing agent, after a slip-and-fall incident on an allegedly icy parking lot, was *impeachment evidence* to counter testimony offered by the Defendant that the photograph of a "clean" parking lot demonstrated its condition at the time of the accident. This conclusion cannot be reasonably disputed. Given the facts in *McIntosh* and defendant's testimony, the "subsequent remedial measure" was admissible under the "impeachment" language in the second sentence of Rule 407. Indeed, the Court so found. Thus, it was unnecessary to proceed further and hold, as the court did, that the fact that subse-

88 *Id.*
89 *Id.*
90 *Id.*
91 *Id.*
92 *Id.*
93 *Id.* at 598.

quent remedial measures were undertaken is circumstantial evidence of the condition which existed at the time those measures were taken.

While *McIntosh* was a negligence case grounded on a premises liability theory, its importance to the application of Rule 407 should not be underestimated. For example, in a product liability case based on failure to warn, subsequent changes to the product's warnings are not ordinarily admissible because they may be considered as proof of "negligence or culpable conduct." In most jurisdictions and under the *Restatement (Third) of Torts: Products Liability*, however, product cases alleging failure to warn are grounded in negligence only. As a result, based on the unnecessary *dicta* and confusing language in *McIntosh*, any changes may be admissible as "circumstantial proof" that the warning, in its condition at the time of the accident, was the byproduct of a negligent act. This result abolishes the protection afforded by Rule 407.

IX. MYTH NO. 8: THERE IS A DUTY TO "REMIND" USERS OR CONSUMERS OF KNOWN, UNDERSTOOD OR OBVIOUS PRODUCT DANGERS

In many cases, although a particular plaintiff was aware of the hazard presented or the danger was open and obvious, expert witnesses will often "volunteer" testimony that the defendant should have given a warning to "remind" the plaintiff of the danger. As a closely-related corollary to this argument, the expert will explain that one legitimate purpose for on-product warnings is to "remind" users of any dangers presented. Obviously, experts and consultants must not be permitted to opine regarding a manufacturer's "duty." This is a legal question for the court.

Further, there is no legal duty to remind a plaintiff of that which is already known or of dangers that are open and obvious.[94] A manufacturer's obligation to provide warnings and instructions is governed by a negligence standard. The applicable standard is

94. Billiar v. Minn. Mining & Mfg. Co., 623 F.2d 240, 243 (2nd Cir. 1980) (stating that "no one needs notice of that which he already knows"); Sowles v. Urschel Lab., Inc., 595 F.2d 1361, 1365 (8th Cir. 1979) (quoting McIntyre v. Everest & Jennings, Inc., 575 F.2d 155, 159 (8th Cir. 1978) ("no one needs notice of what he knows or reasonably may be expected to know")); Eimers v. Honda Motor Co., 785 F. Supp. 1204, 1213 (W.D. Pa. 1992) (concluding that "[k]nowledge is equivalent to prior notice"); Arnold v. Ingersoll-Rand Co., 834 S.W.2d 192, 194 (Mo. 1992) (finding that there is no breach of the duty to warn if a warning would not have provided *additional* information).

provided by section 388 of the *Restatement (Second) of Torts*.[95] There is no duty, under that standard, to provide warnings respecting conditions or dangers that were known by and obvious to a claimant. "Where risks are known and obvious, there is no need for a warning under the standards provided in Section 388."[96]

The purpose of a warning or instruction is to impart additional knowledge or information to a product user.[97]

Requiring a warning as a reminder is also contrary to the prima facie elements of a warning claim. As an element of a failure to warn claim, Plaintiffs must establish that a warning, if provided, would have prevented the accident.[98] There is no duty to provide a warning for a danger that is known to a particular product user.[99] If a plaintiff subjectively knows of the danger involved, any failure to warn will not be a proximate cause of the injury.[100] "Where the plaintiff knows of a danger, a warning cannot increase his awareness of its presence, and where a warning would not have prevented the harm, a failure to warn cannot be the proximate cause of the injury."[101]

While it may be difficult to prevent plaintiff's expert from opining that one purpose of a warning is to serve as a reminder, the trial court should not instruct the jury that the manufacturer has a legal duty to remind a product user of known dangers. Further, when such evidence or testimony has been presented, defense counsel should seek a limiting instruction advising the jury that there is no obligation to provide warnings or reminders against known or obvious dangers.

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95. Rowson v. Kawasaki Heavy Indus., 866 F. Supp. 1221, 1232 (N.D. Iowa 1994); Nichols v. Westfield Indus., Ltd., 380 N.W.2d 392, 401 (Iowa 1985).

96. *Id.* at 401 (citing additional authority); *see also* Garnes v. Gulf & W. Mfg. Co., 789 F.2d 637, 640 (8th Cir. 1986).

97. *Billiar*, 623 F.2d at 243; *Sowles*, 595 F.2d at 1365; *Eimers*, 785 F. Supp. at 1213; *Arnold*, 834 S.W.2d at 194.

98. *Eimers*, 785 F. Supp. at 1213; *Arnold*, 834 S.W.2d at 194 (noting that a plaintiff must demonstrate "that a warning would have altered the behavior of the individuals involved in the accident").

99. *See, e.g., Billiar*, 623 F.2d at 243 (ruling that a defendant cannot be held liable for a failure to warn when product user is aware of the danger upon which the claim is premised); *Sowles*, 595 F.2d at 1366 (finding that there is no breach of duty to provide a warning when plaintiff has knowledge of the alleged danger); *Neri v. John Deere Co.*, 621 N.Y.S.2d 227, 229 (N.Y. App. Div. 1995) (holding that there is no duty to warn when a warning would not impart greater knowledge than that already possessed from the plaintiff's observations and experience).

100. Arnold v. Ingersoll-Rand Co., 834 S.W.2d 192, 194 (Mo. 1992).

101. Eimers v. Honda Motor Co., 785 F. Supp. 1204, 1213 (W.D. Pa. 1992).

X. MYTH NO. 9: IN A FAILURE TO WARN CASE, THERE IS A PLAINTIFF'S HEEDING PRESUMPTION AND CAUSATION DOES NOT HAVE TO BE PROVEN

The heeding presumption originated in comment (j) to the *Restatement (Second) of Torts*, Section 402A and was intended to relieve manufacturers from liability for any perceived dangers or defects that were the subject of warnings. "Where warning is given, *the seller may reasonably assume that it will be read and heeded*; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous."[102] Many courts, however, have mistakenly applied the heeding presumption to eliminate the requirement that a plaintiff prove causation in a failure to warn case.[103] This argument is contrary to the original intent and purpose of the heeding presumption.[104] Applying the language from comment (j), which was clearly intended to shield manufacturers who provide adequate warnings with their products, in this manner permits Plaintiffs to omit a crucial element in a failure to warn claim, *causation.* The drafters of the *Restatement (Third) of Torts: Products Liability* have nullified this inequity by eliminating the heeding presumption altogether.[105]

When confronted with the argument that it is presumed the plaintiff would have read and followed a proposed product warning, the following steps are recommended. First, the language of comment (j), the source of this presumption, should be addressed. Comment (j) neither mentions nor creates a presumption that a warning would have been followed.[106] In fact, the language in comment (j) is wholly devoid of any causation analysis, but instead only provides a basis for concluding that a manufacturer who has

102. RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1977) (emphasis added).

103. *See, e.g.*, Reyes v. Wyeth Lab., 498 F.2d 1264, 1272 (5th Cir.1974), *cert. denied*, 419 U.S. 1096 (1974) (heeding presumption favors manufacturer when warning is present and user when no warning is present); Rowson v. Kawasaki Heavy Indus., Ltd., 866 F. Supp. 1221, 1231 (N.D. Iowa 1994) (proving that a warning was absent or inadequate permits presumption that plaintiff would have heeded an adequate warning).

104. RESTATEMENT (SECOND) OF TORTS § 402A cmt. j; Henderson & Twerski, *supra* note 50, at 279 (noting that the "heeding presumption" was intended to establish that a manufacturer which provided an adequate warning had discharged its duty and could not be held responsible on a failure to warn claim).

105. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, cmt. l (1998); Delaney v. Deere & Co., 999 P.2d 930, 937-38 (Kan. 2000) (no heeding presumption adopted by the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY).

106. RESTATEMENT (SECOND) OF TORTS § 402A cmt. j.

provided an adequate warning has discharged its duty to warn.[107] Further, the language contained in comment (j) has be purposefully eliminated from the *Restatement (Third) of Torts: Products Liability.* Second, the presumption may be defeated with case specific evidence that the proposed warning was not feasible or that the plaintiff, because of his or her own behavior patterns, would not have followed the warning.[108] Finally, several recent cases have refused to recognize a presumption favoring the plaintiff based upon the logical fallacy of relying upon the language of comment (j).[109]

XI. MYTH NO. 10: THE FAILURE TO USE A SEAT BELT IS INADMISSIBLE EVIDENCE, EVEN IN A CRASHWORTHINESS CASE

Many jurisdictions have adopted legislation that precludes or strictly limits evidence of a plaintiff's failure to wear an available seat belt (the seat belt defense) as a basis for comparative fault.[110] It is often argued that this prohibition, which is usually contained within mandatory seat belt use legislation, precludes defendants from reducing their responsibility for accidents because of an injured party's failure to engage in conduct (i.e., wear a seat belt) that is not recognized as a legal duty.[111] These evidentiary restrictions, however, are subject to attack on several grounds.

First, the dual evidentiary and damage limitations are contrary to established law. Mandatory seat belt legislation was adopted, pursuant to federal edict, in an effort to save lives and reduce accident related injuries and transactional costs.[112] The federal legisla-

107. Henderson & Twerski, *supra* note 50, at 279.

108. *See, e.g.,* Meyerhoff v. Michelin Tire Corp., 852 F. Supp. 933, 944 (D. Kan. 1994), *aff'd,* 70 F.3d 1175 (10th Cir. 1995); Graves v. Church & Dwight Co., 631 A.2d 1248, 1256 (N.J. Super. Ct.), *cert. denied,* 636 A.2d 523 (N.J. 1993); Reynolds & Casini, *Confronting the Heeding Presumption in Failure to Warn Cases,* 37(10) FOR THE DEFENSE 6 (1995).

109. Odom v. G.D. Searle & Co., 979 F.2d 1001, 1003 (4th Cir. 1992); Thomas v. Hoffman-LaRoche, Inc., 949 F.2d 806, 813 (5th Cir. 1992), *cert. denied,* 504 U.S. 956 (1992); *Meyerhoff,* 852 F. Supp. 933, 947; Ramstad v. Lear Siegler Diversified Holdings Corp., 836 F. Supp. 1511, 1520 (D. Minn. 1993); Riley v. American Honda Motor Co., 856 P.2d 196, 200 (Mont. 1993); *Graves,* 631 A.2d at 1257; Dresser Indus., Inc. v. Lee, 880 S.W.2d 750, 755 (Tex. 1993); Gen. Motors Corp. v. Saenz, 873 S.W.2d 353, 359 (Tex. 1993).

110. *See, e.g.,* IOWA CODE § 321.445, subd. 4(b) (1999).

111. *See, e.g.,* Hutchins v. Schwartz, 724 P.2d 1194, 1197 (Alaska 1986); Law v. Superior Court, 755 P.2d 1135, 1137 (Ariz. 1988); Waterson v. Gen. Motors Corp., 544 A.2d 357, 367-68 (N.J. 1988); Amend v. Bell, 570 P.2d 138, 143 (Wash. 1977).

112. State v. Hartog, 440 N.W.2d 852, 859 (Iowa 1989), *cert. denied,* 493 U.S. 1005 (1989).

tion which encouraged the adoption of mandatory use laws endorsed state legislation with the following features: 1) imposition of a penalty for violating mandatory use laws; 2) mitigation of personal injury damages in civil actions; and 3) implementation of a program encouraging seat belt usage.[113] Further, the limitations undermine the purpose and intent of comparative fault.[114] Moreover, mandatory use legislation is generally applicable only to front seat occupants.[115] As a result, based solely on an occupant's location in an automobile, a rear seat occupant may receive disparate treatment.

Second, it may be possible to challenge the limitations based on constitutional due process and equal protection grounds. While some attempts have been, to date, unsuccessful,[116] few (if any) cases have explored the constitutionality of the limitations as applied to a manufacturer in the crashworthiness context.

Finally, it may be argued that the limitations are not applicable to crashworthiness or enhanced injury claims. This may be accomplished in two ways. First, even in jurisdictions that do not permit evidence of seat belt non-use for comparative fault purposes, seat belt evidence may be admissible on the issue of *causation.*[117] Causation is a key issue in any product liability case and a *prima facie* element of plaintiff's case, whether based on strict liability, negligence or warranty. While not expressly recognized by the statute, evidence regarding a plaintiff's failure to wear a seat belt, to demonstrate sole proximate cause, has been admitted in jurisdictions that

113. MacDonald v. Gen. Motors Corp., 784 F. Supp. 486, 494 (M.D. Tenn. 1992) (citing pertinent C.F.R. provisions).

114. Prior v. United States Postal Serv., 985 F.2d 440, 442-43 (8th Cir. 1993) (comparative fault is designed to equitably distribute financial responsibility for damages amongst negligent parties in proportion to their causal fault); *see also* LaHue v. Gen. Motors Corp., 716 F. Supp. 407, 415-16 (W.D. Mo. 1989) (noting that it is contrary to the premise of comparative fault to hold automobile manufacturers responsible for injuries directly attributable to a plaintiff's failure to use an available seat belt); *Hutchins,* 724 P.2d at 1198 (admitting evidence regarding claimant's failure to wear a seat belt comports with purpose of comparative fault; defendants should only be responsible for damages resulting directly from their negligence); *Law,* 755 P.2d at 1139 (admitting seat belt evidence promotes the goals of comparative fault, apportionment of damages in proportion to culpability).

115. IOWA CODE, § 321.445(2) (1999).

116. *See, e.g.,* Duntz v. Zeimet, 478 N.W.2d 635 (Iowa 1991); Ullery v. Sobie, 492 N.W.2d 739 (Mich. Ct. App. 1992); Bendner v. Carr, 532 N.E.2d 178 (Ohio Ct. App. 1987).

117. *MacDonald,* 784 F. Supp. at 499-500; *LaHue,* 716 F. Supp. at 416; Gen. Motors Corp. v. Wolhar, 686 A.2d 170, 175 (Del. 1996).

limit or restrict the use of seat belt evidence.[118] A manufacturer should not be held responsible for injuries that result from the plaintiff's, as opposed to the manufacturer's, negligent acts.[119]

> Under the permitted theory of alternate cause, i.e., plaintiff's carelessness, evidence of such actions may be admitted. Even though plaintiff may not have had a duty to wear a seat belt . . . a defendant may attempt to prove that the injuries were caused by something other than an alleged design defect. If evidence shows that all or part of the injury is attributable to something other than a design defect, the critical element of causation is missing. In that instance, the defendant is not, and should not be, liable for harm which that defendant did not cause by way of a design defect.[120]

Excluding evidence demonstrating that the claimant's injuries resulted from the failure to wear a seat belt is akin to the imposing absolute liability, rendering the manufacturer an insurer of its product.[121] Accordingly, seat belt evidence should be admissible to demonstrate that the claimant's nonuse of a seat belt was the sole proximate cause of his or her injuries. When this occurs, however, the court may require a limiting instruction advising the jury that the evidence should be considered solely for the purpose of determining proximate causation.[122]

Alternatively, the failure to use an available seat belt may be admissible on the issue of fault in a crashworthiness case because most mandatory use legislation limits the evidence in the context of claims related to the use or operation of an automobile.

> In any action to recover damages arising out of the *ownership, common maintenance or operation of a motor vehicle*, failure to wear a safety belt in violation of this section shall not be considered evidence of comparative negligence. Failure to wear a safety belt in violation of this section may be admitted to mitigate damages, but only under [limited] circumstances.[123]

An enhanced injury claim against a motor vehicle manufac-

118. *See, e.g., MacDonald*, 784 F. Supp. at 499-500 (construing Tennessee statute); *LaHue*, 716 F. Supp. at 416 (reviewing Missouri statute).

119. MacDonald v. Gen. Motors Corp., 784 F. Supp. 486, 499-500 (M.D. Tenn. 1992); *LaHue*, 716 F. Supp. at 416.

120. LaHue v. Gen. Motors Corp., 716 F. Supp. 407, 416 (W.D. Mo. 1989).

121. *MacDonald*, 784 F. Supp. at 499-500 (citing *LaHue*, 716 F. Supp. at 416).

122. *Id.* at 500.

123. MO. REV. STAT., § 307.178.3 (1994) (emphasis added).

turer, however, does not arise out of the use or operation of the vehicle, but instead, out of the design of the automobile and its safety features.[124] Evidentiary and damage limitations, similar to those adopted by both Iowa and Missouri, limit the amount that a plaintiff's damages may be reduced in actions arising from the ownership or operation of a motor vehicle, but do not apply, by their specific terms, to product liability actions.

> The legislature clearly specified the sorts of cases in which evidence of failure to use seat belts was inadmissible.
>
> Conspicuously absent is any reference to the *design or construction* of a motor vehicle. Even the most liberal interpretation of the words ownership, common maintenance and operation cannot stretch far enough to include design and construction. The plain meaning of the statute compels a conclusion that it was not intended to prevent evidence of failure to use seat belts in a products liability case.
>
> Acting within this context [with knowledge of the existence of products liability and crashworthiness claims], the legislature must be presumed to know it could have included products liability cases in the statute if it intended to restrict evidence in those cases. Inasmuch as the statute does not apply to the case at hand, the one-percent limit on reduction of damages also does not apply.[125]

This finding is in accord with other courts which have determined that a plaintiff's failure to utilize an existing seat belt is inherently relevant when damages are sought pursuant to a crashworthiness claim.[126]

Consequently, when defending a crashworthiness or enhanced injury claim, where the claimant was not wearing a seat belt *and* the use of a passenger restraint may have reduced or entirely eliminated the injuries sustained, a manufacturing defendant should raise this issue as a defense, regardless of any existing statutory damage limitations.

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124. *See, e.g., LaHue*, 716 F. Supp. at 412.

125. *Id.* (emphasis in original).

126. Dahl v. Bayerische Motoren Werke, 748 P.2d 77, 79 (Or. 1987); Maskrey v. Volkswagen Werke Aktiengesellschaft, 370 N.W.2d 815, 820 (Wis. Ct. App. 1985); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 16 cmt. f (1998).

XII. CONCLUSION

Frequently, and most likely because of their novel nature, product liability claims and the requirements for recovery are misunderstood. Depending upon the degree and nature of this misunderstanding, product liability law may be improperly applied. When this occurs, responsible product sellers are unjustifiedly held responsible for injuries and damages which were not the result of negligent or improper conduct. This exacts a toll on society as a whole through, among other things, price increases and the unavailability of beneficial and useful products. The first step toward proper application of and responsibility under product liability law is a thorough understanding of general principles and the elimination of prevalent misconceptions. While this responsibility extends to both the judiciary and legal practitioners, trial counsel is the first line of defense for a product manufacturer and must be knowledgeable to protect the manufacturer's interests. This knowledge must include a general understanding of product liability concepts, the law in a particular jurisdiction and an appreciation of common misconceptions. Consequently, it is important that defense counsel be prepared to assist the court in properly eliminating redundant or inappropriate claims, instructing the jury on the applicable law and in ensuring proper operation of the tort system with the attainment of just results.