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Products Liability in Alaska — A Practitioner's Overview

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I. INTRODUCTION

Alaska, like most states, has adopted the doctrine of strict products liability. In attaching strict liability to a defective product, Alaska follows the stream-of-commerce approach: "'A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.'"[1] The Alaska Supreme Court has identified several policy justifications for the adoption of strict products liability: (1) the costs can best be borne and distributed throughout society by the manufacturer; (2) manufacturers will be encouraged to develop safer products; and (3) manufacturers' fault is often present but difficult to prove.[2] A

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1. Clary v. Fifth Ave. Chrysler Ctr., Inc., 454 P.2d 244, 247 (Alaska 1969) (quoting Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 900 (Cal. 1962)).

2. Koehring Mfg. Co. v. Earth Movers of Fairbanks, Inc., 763 P.2d 499, 503 n.6 (Alaska 1988) (citing W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 98, at 692-93 (5th ed. 1984)).

manufacturer is not an absolute insurer of his products, however, and cannot be held liable merely because the product causes injury.[3]

Strict liability differs from a negligence theory of liability in that it eliminates the requirement to prove that the manufacturer of the product was negligent. It focuses not on the conduct of the manufacturer but on the product itself and holds the manufacturer liable if the product is deemed defective.

In general, courts have identified three types of product defects. First, there may be a flaw in the manufacturing process, resulting in a product that differs from the manufacturer's intended result.[4] Second, there are products which are "perfectly" manufactured but are hazardous because of a defect in the design or the absence of a safety device.[5] Third, certain products may be defective because they lack adequate warnings or instructions.[6]

The purpose of this article is to provide a practical overview of Alaska products liability law. In Section II, the article will explore the historical basis of strict products liability in Alaska, including an introduction to the court's benchmark decision in *Caterpillar Tractor Co. v. Beck* (*Beck I*).[7] Sections III and IV will examine the two prongs of defect analysis developed in *Beck I*—consumer expectations and risk-benefit analysis. The Alaska Supreme Court's treatment of the failure-to-warn doctrine will be discussed in Section V, with an added focus on warnings in prescription drug cases. Section VI will highlight the various defenses which may be available to manufacturers and retailers of allegedly defective products. Section VII will analyze the manufacturer's responsibility to indemnify because of its position at the head of the chain of commerce.

II. HISTORICAL OVERVIEW

Strict products liability has evolved from two distinct theories: strict liability and breach of warranty. While strict liability is a tort concept, the law of product warranties is based on contract. As these two theories were combined, several policy considerations

3. Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 879 (Alaska 1979) (*Beck I*).
4. *See, e.g.*, Escola v. Coca-Cola Bottling Co., 150 P.2d 436 (Cal. 1944).
5. *See, e.g.*, Barker v. Lull Eng'g Co., 573 P.2d 443, 453 (Cal. 1978).
6. *See, e.g.*, Shanks v. Upjohn, 835 P.2d 1189, 1194 (Alaska 1992).
7. 593 P.2d 871 (Alaska 1979) (*Beck I*).

became apparent.[8] First, courts believed that justice would be better served by eliminating the need for injured plaintiffs to prove fault on the part of manufacturers of defective products. Second, the courts identified the underlying basis of recovery as the product's failure to satisfy consumer expectations. Third, imposing strict liability would provide an incentive for manufacturers to produce safer goods and thereby reduce the incidence of harm from unsafe products. Finally, the risks would be allocated to the manufacturers, forcing them to accept responsibility for defects in their products.

A. The Development of Strict Products Liability in Alaska

The Alaska Supreme Court first adopted strict products liability in *Clary v. Fifth Avenue Chrysler*[9] by promulgating the rule that: "'A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.'"[10] In so holding, the court followed the rationale of the California Supreme Court in *Greenman v. Yuba Power Products, Inc.*[11] and stated that: "The purpose of imposing such strict liability on the manufacturer and retailer is to insure that the cost of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."[12] In adopting the *Greenman* approach, the Alaska Supreme Court modified the plaintiff's burden of proof. The plaintiff is no longer required to demonstrate that the defect made the product "unreasonably dangerous" to the user or that the plaintiff was not aware of the product's defect.[13] Rather, the plaintiff need only prove that the product was defective and that the defect was a legal cause of his injuries.[14]

In following *Greenman*, the court rejected the standard proposed by section 402A of the Restatement (Second) of Torts,

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8. *See generally id.* at 877.

9. 454 P.2d 244 (Alaska 1969).

10. *Id.* at 247 (quoting Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 900 (Cal. 1962)).

11. 377 P.2d 897 (Cal. 1962).

12. *Clary*, 454 P.2d at 248.

13. *See* Butaud v. Suburban Marine & Sporting Goods, Inc., 543 P.2d 209, 214 (Alaska 1975) (*Butaud I*).

14. *Id.*

which requires the plaintiff to demonstrate that the product's defect rendered it "unreasonably dangerous."[15] The court reasoned that requiring an injured plaintiff to prove not only that the product was defective, but that it was "unreasonably dangerous" too, would place an undue burden on the injured party.[16] This added burden was declared to be "a step backwards in the development of products liability" and antithetical to the policy underlying strict liability.[17] The court viewed the purpose of strict liability to be to help the plaintiff overcome the difficulty of proof inherent in negligence actions.[18] Thus, a plaintiff was deemed to have satisfied his burden when he proved the existence of a defect, and that such defect proximately caused his injuries.[19]

In *Bachner v. Pearson*,[20] the court further refined its concept of strict liability. The court held that liability attaches to the manufacturer in a strict products liability case not because the manufacturer was negligent, but because the product itself was defective.[21] The focus in a such a case, reasoned the court, is not upon the conduct of the defendant, but rather on the existence of a defect in the product which causes injuries.[22] For the manufacturer to be liable, the product must have been defective when it left that manufacturer's possession.[23]

The court has also held that strict products liability applies to commercial lease transactions. Since the commercial lessor acts much like a retailer or manufacturer in placing products in the stream of commerce, the court perceived no reason to distinguish between a lease and a sale for purposes of strict products liability.[24] No liability results, however, when the lease is simply an isolated occurrence outside the usual course of the lessor's business.[25]

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15. *Id.* at 213 (citing RESTATEMENT (SECOND) OF TORTS § 402A (1965); *see also* Cronin v. J.B.E. Olson Corp., 501 P.2d 1153 (Cal. 1972).
16. *Butaud I*, 543 P.2d at 214.
17. *Id.*
18. *Id.*
19. *Id.* at 213; *see also Cronin*, 501 P.2d at 1158-62.
20. 479 P.2d 319 (Alaska 1970).
21. *Id.* at 329.
22. *Id.*
23. *Id.*; *see also* Hiller v. Kawasaki Motors Corp., 671 P.2d 369 (Alaska 1983).
24. *Bachner*, 479 P.2d at 328.
25. *Id.*; *see also* Cloud v. Kit Mfg. Co., 563 P.2d 248, 250 (Alaska 1977).

B. The Meaning of "Defective": *Caterpillar Tractor Co. v. Beck*

In 1979, the Alaska Supreme Court decided the landmark case of *Caterpillar Tractor Co. v Beck* (*Beck I*).[26] The court adopted the rule that a product may be defective when either of two conditions is satisfied:

> "(1) if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner [the "consumer expectations" test], or
> (2) if the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove . . . that on balance the benefits of the challenged design outweighed the risk of danger inherent in such design [the "excessive preventable danger" test]."[27]

Beck I involved an alleged design defect in a front-end loader. The plaintiff was killed when the Caterpillar front-end loader that he was operating rolled over an embankment. His widow sued Caterpillar for the wrongful death of her husband, alleging that the equipment was defectively designed because it was not equipped with a roll-over protection shield, or "ROPS."[28]

Caterpillar countered that the loader was not defective because roll-bar protective devices were not readily available at the time of design. Caterpillar argued that the loader was intended to be marketed as a basic structure to the user who, in consultation with his dealer, would add auxiliary parts as necessary for his particular use.[29]

Two facts were undisputed at trial: (1) that a ROPS, as developed at the time of the accident, would have saved Beck's life and (2) from a cost and technological standpoint, it was preferable to have a ROPS installed by the manufacturer at the time of production. However, there was significant disagreement about the availability of a ROPS at the time the particular loader was produced. The court found Caterpillar had made a "deliberate

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26. 593 P.2d 871 (Alaska 1979) (*Beck I*).

27. *Id.* at 884 (quoting Barker v. Lull Eng'g Co., 573 P.2d 443, 457-58 (Cal. 1978)).

28. *Id.* at 874-75.

29. *Id.* at 875.

decision" not to install any kind of a protective canopy on the loader model in question as part of its basic design.[30]

After reviewing all of the various tests adopted by courts for determining whether a design was defective, the Alaska Supreme Court adopted the approach enunciated by the California Supreme Court in *Barker v. Lull Engineering Co.*[31] In doing so, the court reaffirmed its decision in *Clary v. Fifth Avenue Chrysler* that the plaintiff satisfies his burden of proof when he proves the existence of a defect and that such defect was a proximate cause of his injury.[32] The court, however, emphasized that a product is not necessarily defective merely because an injury occurred.[33] A manufacturer is not an absolute insurer of its products, and "'defective' means something more than a condition causing physical injury."[34] Likewise, it is not just the absence of any possible safety device which will render a product legally defective.[35] The final assessment of "defectiveness" necessarily requires weighing the diverse factors related to the product's desirability and dangerousness.[36]

III. CONSUMER EXPECTATIONS

The consumer expectations test represents the first prong of the two part standard for defectiveness announced by the Alaska Supreme Court in *Beck I.* The first question is whether the product is being used in an intended or reasonably foreseeable manner.[37] A manufacturer must consider not only the item's intended uses, but reasonably foreseeable ones as well.[38] The second question is whether, given an intended or reasonably foreseeable use per part one of the test, the product performed as safely as an ordinary

30. *Id.* at 876. Approximately four years after the specific loader involved in the case was delivered to the dealer, Caterpillar changed the design of its basic vehicle model and was installing the ROPS as standard equipment on each of its loaders. *Id.*

31. 573 P.2d 443 (Cal. 1978).

32. *Beck I*, 593 P.2d at 878.

33. *Id.* at 879.

34. *Id.*

35. *Id.*

36. *Id.* at 883.

37. *Id.* at 884-85.

38. *Id.* at 885.

consumer would expect.[39] In answering this inquiry, the jury considers the expectations of a hypothetical reasonable consumer, rather than those of the particular plaintiff in the case.[40]

A. Foreseeability

"Foreseeable use" in products liability cases focuses on what is foreseeable to the manufacturer, rather than on the subjective knowledge held by the consumer.[41] "Foreseeable use" refers to the way the product was actually used, regardless of the consumer's knowledge of the defect at the time of the accident.[42]

In determining the foreseeability of certain uses, the court has on several occasions looked to the manufacturer's advertising for guidance. For example, in *Hiller v. Kawasaki Motors Corp.*,[43] the court held an advertisement prepared by Kawasaki would have probative value in demonstrating foreseeability of a particular use.[44] In *Hiller*, the plaintiff was injured when he attempted to jump his Kawasaki snow machine over a three-foot embankment at a speed of approximately thirty-five miles per hour. He sued Kawasaki alleging that the snow machine's defective design and manufacture were ultimately responsible for his injuries. At trial, the plaintiff attempted to introduce into evidence a videotape of a published advertisement in which a person was shown riding a Kawasaki snow machine through the air in the process of jumping an embankment. The trial court excluded the videotape.[45] The supreme court reversed, agreeing with the plaintiff that the advertisement was relevant to establishing the foreseeable use of the snow machine; the advertisement clearly demonstrated Kawasaki's ability to foresee the particular use.[46]

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39. *Id.*

40. *See* Lamer v. McKee Indus., 721 P.2d 611, 615 (Alaska 1986).

41. Hiller v. Kawasaki Motors Corp., 671 P.2d 369, 373 n.2 (Alaska 1983).

42. *Lamer*, 721 P.2d at 615. If the consumer is not only aware of the defect, but also knows of the danger accompanying it, his recovery may be reduced under the doctrine of comparative negligence. *Id.* For a discussion of comparative negligence, *see infra* text accompanying notes 146-156.

43. 671 P.2d 611 (Alaska 1986).

44. *Id.* at 373.

45. *Id.*

46. *Id.*

The court in *Dura Corp. v. Harned*[47] again looked to the manufacturer's advertising as an indicator of foreseeability. The plaintiff was injured when a portable air tank exploded while he was filling it with air.[48] At trial the manufacturer and the injured plaintiff each argued different theories of causation. The plaintiff argued that the tank was too thin when it was manufactured and that corrosion made it even thinner, thus causing the tank's failure. The manufacturer argued that the tank failed due to overuse. According to the manufacturer, the tank was intended only for infrequent emergency utilization.[49]

The supreme court rejected the manufacturer's argument of unforeseeable excessive use.[50] In so doing, the court relied upon the manufacturer's advertising that the tank had "thousands of uses," that it was suitable for a variety of different applications, and that it was "absolutely durable."[51] The court found it to be reasonably foreseeable that the consumer would use the air tank as he had.[52]

The "foreseeable use" required under the first prong of *Beck* considers only the way that the product is physically used, regardless of whether the consumer was aware of the defect at the time of the accident.[53] Such foreseeable use may extend to uses or methods of use which are outside the manufacturer's recommendations. In *Lamer v. McKee Industries*,[54] the plaintiff's son was killed after falling while attempting to repair a garage door. The plaintiff sued McKee Industries, claiming strict liability for the defective manufacture or design of a spring winding plug, part of the mechanism that raises and lowers garage doors.[55] The decedent had been in the business of repairing overhead doors and had substantial experience in working with garage doors' spring winding plugs. When he fell, the decedent was not utilizing the manufacturer's recommended

47. 703 P.2d 396 (Alaska 1985).
48. *Id.* at 399.
49. *Id.* at 400.
50. *Id.* at 407.
51. *Id.*
52. *Id.*
53. Lamer v. McKee Indus., 721 P.2d 611, 615 (Alaska 1986).
54. 721 P.2d 611 (Alaska 1986).
55. *Id.* at 612.

repair approach, but rather followed a method that was much more physically demanding for the repair person, but could save substantial time if successful.[56]

The jury found in favor of the defendant manufacturer, indicating that the winding plug was not defective.[57] On appeal, the supreme court disagreed, rejecting the defendant's argument that it could not be held liable under the consumer expectations prong of *Beck* because the winding plug was not being used in an intended or reasonably foreseeable manner.[58] According to the supreme court, however, merely because the winding plug was not being used in an *intended* manner did not make it unforeseeable.[59] Several witnesses testified that the decedent's use of the winding plug was common in the industry. The court emphasized that the manufacturer must consider not only intended uses of the product, but reasonably foreseeable uses as well. The court reasoned that "[i]t is a matter of common sense that a manufacturer should not be relieved of responsibility simply because it closes its eyes to the way its products are actually used by consumers."[60] Thus, in the context of determining whether a product is defective, "foreseeable use" means the way the product was physically used, regardless of the consumer's actual subjective knowledge of the defect[61] at the time of the accident, and irrespective of whether that use was intended by the manufacturer; so long as the particular use is reasonably foreseeable, the manufacturer may be held strictly liable when the product causes injury.[62]

In *Ross Laboratories v. Thies*,[63] the court expanded the concept of foreseeability of misuse in holding the manufacturer to a rigid standard. *Ross Laboratories* involved injuries to an infant. Ross Laboratories manufactured Polycose, a dietary supplement for adults that can be dangerous to infants if it is not sufficiently diluted

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56. *Id.* at 614.
57. *Id.* at 613.
58. *Id.* at 615.
59. *Id.*
60. *Id.*
61. The user's subjective knowledge may be relevant to the issue of comparative negligence, but not to the issue of defect. *Id.* For a discussion of comparative negligence, *see infra* text accompanying notes 146-156.
62. *See Lamer*, 721 P.2d. at 615.
63. 725 P.2d 1076 (Alaska 1986).

before consumption. The infant in *Ross Laboratories* became severely dehydrated when she was fed Polycose by her mother. The manufacturer argued it should not be liable because Polycose was not intended to be a product for infants. However, the retailer selling the product had mistakenly placed Polycose on its baby products shelf.[64]

The supreme court ruled that Ross Laboratories should have foreseen that Polycose would mistakenly be fed to infants.[65] The label contained no warning that the product was dangerous if not sufficiently diluted, and the product was sold in nipple-ready bottles. Ross Laboratories marketed other products for consumption by infants in similar bottles.[66] According to the court, "[t]he nipple-ready bottle, taken together with the similarity in name, label, and contents with recognized baby products, required Ross Laboratories to foresee that some consumers would mistakenly believe that Polycose was a product to be fed to infants."[67] Accordingly, the manufacturer's duty to foresee extends beyond only careful uses,[68] as the court reasoned that "[m]istake, inadvertence, and negligence are everyday occurrences."[69]

B. Failure to Satisfy Consumer Expectations

In assessing whether a product meets a consumer's expectations, the second part of the *Beck* test, the Alaska Supreme Court has noted several ways in which those expectations may be frustrated:

(1) The product fails to perform its intended function (e.g., brakes that fail);
(2) The product creates a danger against which it was supposed to guard (e.g., polio vaccine that causes polio);
(3) The product performs its intended function but creates a bad side effect (e.g., cigarettes that cause cancer);
(4) The product fails to minimize avoidable consequences in the event of an accident (e.g., automobile without head rest).[70]

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64. *Id.* at 1078.
65. *Id.* at 1078-799.
66. *Id.* at 1078.
67. *Id.*
68. *Id.* at 1079.
69. *Id.*
70. Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 882 n.33 (Alaska 1979) (*Beck*

In many cases, however, it is difficult to determine whether a manufacturing or design defect is involved. The Alaska Supreme Court has recognized that the distinction between manufacturing and design defects is not clear and that overlap between the two categories is unavoidable.[71] In fact, the court has stated that rigid delineation is neither necessary nor desirable.[72] Furthermore, the categories not only overlap, but may also operate simultaneously or be alleged in the alternative.[73] Accordingly, while the court recognizes that it may be useful to describe products liability claims in terms of design and manufacturing defects, it also believes that a plaintiff who successfully establishes that a product is defective should not be subject to the additional burden of proving whether or not the precise cause of a defect was the product's design or manufacture.[74] The court seeks to avoid creating the battleground for clever lawyers as foreseen by the California Supreme Court, which stated that: "'It is difficult to prove that a product ultimately caused injury because a widget was poorly welded—a defect in manufacture—rather than because it was made of inexpensive metal difficult to weld . . . —a defect in design.'"[75] Thus, an injured plaintiff proceeding under the consumer expectations prong of *Beck* need not prove whether the defect was caused by the product's manufacture or design.

An important question under *Beck's* consumer expectations prong is who is considered the "ordinary consumer" of the product. The Alaska Supreme Court has noted the problematic nature of this issue on several occasions.[76] In *Keogh v. W.R. Grasle, Inc.*,[77] the court held that the expectations of the ordinary consumer must be determined by an objective test. The court stated, "[i]f the defendant knew that one individual consumer could not safely use

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I) (citing Reed Dickerson, *The ABC's of Products Liability*, 36 TENN. L. REV. 439, 454 (1969)).

71. Colt Indus. v. Frank W. Murphy Mfr., 822 P.2d 925, 930 (Alaska 1991).

72. *Id.*

73. *Id. See also Beck I*, 593 P.2d at 878 n.15.

74. *Colt Indus.*, 822 P.2d at 930 n.5 (citing Cronin v. J.B.E. Olson Corp., 501 P.2d 1153, 1162-63 (Cal. 1972)).

75. *Id.* (quoting *Cronin*, 501 P.2d at 1163).

76. *See, e.g.*, Keogh v. W.R. Grasle, Inc., 816 P.2d 1343, 1351 n.17 (Alaska 1991).

77. 816 P.2d 1343 (Alaska 1991).

its product, that defendant may be negligent. That defendant will not be strictly liable under the first prong of *Beck*, however, unless the product fails to meet the safety expectations of the ordinary consumer."[78]

Keogh involved strict liability claims made by a municipal employee who was shocked and severely injured while working on an electrical system that the defendant corporation had upgraded. The trial court had refused to instruct the jury "that the employees of [the municipality] were the exclusive users . . . or consumers of the upgrade system," and had ruled instead that determination of the "ordinary consumer" was within the jury's province.[79]

On appeal, the supreme court held that the ordinary consumer standard is necessarily an objective one.[80] Accordingly, the trial court was correct to refuse the limitation proposed by the plaintiff.[81] In the context of the electrical distribution system at issue in the case, the court held it was correct to permit each party to argue its theory of "the ordinary consumer" to the jury.[82]

By contrast, in *Lamer v. McKee Industries*,[83] a case also decided under the consumer expectations prong of *Beck*, the court accepted the parties' characterization that the ordinary consumer of garage door winding plugs should be the "professional garage door repairperson."[84] This determination was largely based on a safety warning label attached by the manufacturer to the garage door. The label cautioned that repairs and adjustments should be performed only by qualified door service people.[85] The *Lamer* court stated that the "inquiry must focus on the evidence concerning the expectations of experts in the overhead garage door business."[86] In discussing the evidence, the court concluded that winding plug failure was a surprise to "professionals in the overhead garage door

78. *Id.* at 1352.

79. *Id.* at 1351. The court assumed, but did not decide, that the electrical system was a product for purposes of product liability law. *Id.* at 1345.

80. *Id.* at 1351-52.

81. *Id.* at 1352.

82. *Id.* at 1351 n.17.

83. 721 P.2d 611 (Alaska 1986). For discussion of the facts of the case, *see supra* text accompanying notes 54-62.

84. *Id.* at 616.

85. *Id.*

86. *Id.* (emphasis added).

business," and that "an experienced garage door repairperson expects a winding plug to be able to withstand any force applied through a hand-held winding bar."[87]

Finally, in some instances, the expectations of the "ordinary consumer" may be nearly impossible to determine or irrelevant to the imposition of strict liability. In *Shanks v. Upjohn Co.*,[88] the Alaska Supreme Court recognized this to be the case when dealing with prescription drugs.[89]

The court supported its declaration with several observations. A prescription drug's performance safety depends on many factors, including the nature of the drug, the patient's medical history, dosage, and its combination with other medications. This complex interplay is beyond the understanding of the ordinary consumer. In addition, since a drug manufacturer's duty to warn is satisfied if it provides adequate warnings to the prescribing physician, it is doubtful that the average consumer has the information necessary to form a reasonable expectation concerning the performance safety of most prescription products.[90] Consequently, if the consumer expectations test were applied rigidly to prescription drugs, a drug manufacturer might be held strictly liable when the drug performed in a way that was unexpected by the "ordinary consumer," even though the drug performed in a manner which was well within the expectations of the prescribing physician and the manufacturer.

Accordingly, in *Shanks* the court concluded that the ordinary consumer's expectations regarding prescription drugs are in most cases irrelevant to whether strict liability should be imposed.[91] Because of the problems inherent in imposing the ordinary consumer expectations test upon prescription drugs, the supreme court in *Shanks* developed a new test. The relevant inquiry is now the doctor's expectation, not that of the patient, regarding the performance and safety of a prescription drug. Consequently, the following test is applied in the case of prescription drugs: "[A] prescription drug is defectively designed and strict liability should be imposed on its manufacturer if the prescription drug failed to

87. *Id.*
88. 835 P.2d 1189 (Alaska 1992).
89. *Id.* at 1194-95.
90. *Id.*
91. *Id.* at 1195.

perform as safely as an ordinary doctor would expect, when used by the patient in an intended and reasonably foreseeable manner."[92] The court did, however, recognize that there are certain types of prescription drugs (such as contraceptives), for which the physician's involvement is minimal and the courts have traditionally held that manufacturers have a duty to warn patients directly. In such cases, it is appropriate to apply the "ordinary consumer" expectations test rather than the "ordinary doctor" expectations test.[93]

IV. RISK-BENEFIT ANALYSIS

There are certain cases in which liability would not be imposed under the consumer expectations test despite the fact that the purposes of the rule would be best served by holding the manufacturer liable. If the consumer expectations test were the only basis for imposing strict liability, plaintiffs would be more likely to recover when the danger was hidden than when it was patent or obvious.[94] There are also many products about which the consumer has limited safety expectations, because he would be unaware if the item could be produced in a fashion that would yield a safer good. In addition, the consumer expectations test would operate as a shield against strict liability where the product does not fall below the ordinary consumer's expectations as to the product's safety.[95] The supreme court was particularly concerned that two purposes of strict liability, risk allocation and risk avoidance, would be ill-served if manufac-turers were to escape liability when the dangerous characteristics of the product are open and obvious.[96]

The court adopted the second prong of the *Beck* defectiveness test for those situations, such as the lack of a safety device, where the product satisfies ordinary consumer expectations as to its general

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92. *Id.*

93. *Id.* at 1195 n.7.

94. The Alaska Supreme Court has rejected the distinction between patent and latent defects because it is viewed as unnecessarily restrictive to plaintiffs. *See* Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 882 (Alaska 1979) (*Beck I*); Butaud v. Suburban Marine & Sporting Goods, Inc., 543 P.2d 209, 214 (Alaska 1975) (*Butaud I*).

95. *Beck I*, 593 P.2d at 882.

96. *Id.* at 882 n.34.

use, but is still defective because its design exposes the user or bystander to *excessive preventable danger.*

> Under the second *Beck* test, the plaintiff must establish a *prima facie* case by introducing sufficient evidence to permit a jury to find that the product's design features were a proximate cause of plaintiff's injury. Once the plaintiff has made this showing, the burden of proof shifts to the defendant. After the burden of proof shifts, the defendant may choose to offer evidence relevant to a risk-benefit evaluation of its product's design or it may attempt to refute the plaintiff's theory of causation.[97]

Since it is the manufacturer who seeks to avoid liability for an injury proximately caused by the product's design on a risk-benefit theory, it is the manufacturer who bears the burden of persuading the jury that its product should not be judged defective.[98]

According to the supreme court, the primary policy justification for shifting the burden of proof to the manufacturer is that it places the responsibility of producing the relevant complex and technical evidence on the party who is most familiar with and has the better access to it.[99]

In those cases where the excessive preventable danger prong of *Beck* is the appropriate test, the plaintiff's burden is simply to show that the product's design proximately caused the injuries. The product's design will be deemed the proximate cause of the plaintiff's injury if the defective product was more likely than not a substantial factor in bringing about the plaintiff's injury.[100] The "substantial factor" test has been defined as follows: "'[I]f two forces are operating to cause the injury, one because of the defendant's [product] and the other not, and each force by itself is sufficient to cause the injury, then the defendant's [product] may be found to be a substantial factor in bringing about the harm.'"[101]

The issue of proximate cause is normally a question of fact for the jury to determine and becomes a matter of law only where

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97. Dura Corp. v. Harned, 703 P.2d 396, 406 (Alaska 1985) (citation omitted).

98. *Beck I*, 593 P.2d at 885 (citing Barker v. Lull Eng'g Co., 573 P.2d 443, 455 (Cal. 1978)).

99. Keogh v. W.R. Grasle, Inc., 816 P.2d 1343, 1347 n.5 (Alaska 1991); *see also Beck I*, 593 P.2d at 886.

100. *Keogh*, 816 P.2d at 1347 (quoting *Dura Corp.*, 703 P.2d at 406).

101. *Dura Corp.*, 703 P.2d at 406 (quoting State v. Abbott, 498 P.2d 712, 727 (Alaska 1972)) (first alteration in original).

reasonable minds cannot differ.[102] Once the plaintiff meets his burden of establishing proximate cause, the manufacturer (or retailer) may attempt to refute the plaintiff's theory of causation or offer evidence relevant to a risk-benefit evaluation of its product's design.[103]

In the risk-benefit analysis the jury balances the risk of harm and the social utility of the product. The balancing necessarily requires the weighing of various factors. Among them are the following considerations: (1) the gravity of danger posed by the design, (2) the likelihood that such danger would occur, (3) the mechanical feasibility of an alternative design, (4) the financial cost of an alternative design and (5) adverse consequences to the product and consumer resulting from an alternative design.[104] The jury may also consider technological infeasibility, but mere conformity with industry practices will not protect a manufacturer.[105]

In *Ross Laboratories v. Thies*,[106] the court applied the risk-benefit portion of the *Beck* test, holding *as a matter of law* that the risks of product misuse outweighed the benefits of the product's labeling and design. As discussed above,[107] after holding that a retailer's mistake of stocking the adult dietary supplement on the infant products shelf should have been foreseeable to the manufacturer as a matter of law, the court addressed the risk-benefit analysis that would be required under the second prong of *Beck:*

> In our view, no such cost benefit analysis is required. The cost of giving an adequate warning is usually so minimal, i.e., the expense of adding more printing to a label, that the balance must always be struck in favor of the obligation to warn where there is a substantial danger which will not be recognized by the ordinary user.[108]

The court took a further step in *Shanks v. Upjohn Co.*,[109] when it refused to exempt a manufacturer of prescription drugs

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102. *Id.*
103. *Id.*
104. Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 885-86 (Alaska 1979) (*Beck I*).
105. *Id.* at 887.
106. 725 P.2d 1076 (Alaska 1986).
107. *See supra* text accompanying notes 63-69.
108. *Ross Labs.*, 725 P.2d at 1079.
109. 835 P.2d 1189 (Alaska 1992).

from the application of risk-benefit analysis. In *Shanks*, the trial court held that it would contravene public policy to apply the risk-benefit test of *Beck* to prescription drugs.[110] However, the supreme court rejected this approach in holding that the manufacturer of prescription drugs will bear the same burden of demonstrating that the benefits of its particular drug outweigh the inherent risks.[111] In so ruling, the court refused to recognize a class of products which are inherently unsafe or unavoidably dangerous. The trial court had followed the rationale of the California Supreme Court in *Brown v. Superior Court*.[112] The *Brown* court recognized that, despite the potential for serious risks, because drugs can save lives and reduce pain, there is a social utility and public interest that supports encouraging pharmaceutical companies to introduce and develop new products.[113] In reversing, the Alaska Supreme Court held that public policy concerns underlying the doctrine of strict liability must be balanced against, rather than yield to, the public interest in the availability and affordability of safe prescription drugs.[114]

Thus, in the special case of prescription drugs, the jury should consider the following factors in determining whether the risks of the particular drug outweigh its benefits: (1) the severity of the side effects or reactions posed by the drug, (2) the likelihood that such side effects or reactions will occur, (3) the feasibility of an alternative design that would eliminate or reduce the side effects or reactions without effecting the performance of the drug and (4) the harm to the consumer in terms of any reduced efficacy and new side effects or reactions that would result from an alternative design.[115] In *Shanks*, the court framed the test as follows:

> In evaluating the benefits, the fact finder should be permitted to consider the seriousness of the condition for which the drug is indicated. . . . What the trier of fact should determine in balancing these factors is whether the drug confers an important benefit and whether the interest in its availability outweighs the

110. *Id.* at 1194.
111. *Id.* at 1196.
112. Brown v. Superior Court, 751 P.2d 470 (Cal. 1988).
113. *Shanks*, 835 P.2d at 1194 (citing *Brown*, 751 P.2d. at 478-80).
114. *Id.* at 1196.
115. *Id.* at 1196-97.

> interest in promoting the enhanced accountability which strict products liability design defect review provides.[116]

In its *Shanks* decision, the court declined to follow the majority of states that have considered the issue and adopted comment k to section 402A of the Restatement (Second) of Torts.[117] Comment k defines certain products as unavoidably unsafe, especially in the field of drugs. Such products, when properly prepared and accompanied by proper directions and warnings, are not considered defective and are not unreasonably dangerous. Comment k recognizes that the seller of such products should not be held strictly liable "for unfortunate consequences attending [the product's] use, merely because [it] has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk."[118] While the Alaska Supreme Court looked at the "soundness of the policy underlying comment k," it refused to adopt it for three reasons: (1) comment k has contributed to the confusion which permeates products liability law and blurs the distinction between negligence and strict liability principles, (2) other courts are unable to agree on the comment's scope and (3) the *Beck* test's risk-benefit analysis offers the manufacturers of those products intended to be protected by comment k an opportunity to avoid responsibility for strict liability claims based on a design defect theory.[119]

In deciding *Shanks*, the court held that decisions about the social utility of certain products will be left to the jury. Rather than allowing experts to decide the issue, juries will now be required to sort through the myriad social and scientific issues related to the risks and benefits of a particular drug. This position effectively creates a disincentive for manufacturers to produce and distribute, in Alaska, drugs with benefits that balance or possibly outweigh any potential serious dangers.

In *Shanks*, the court also specifically rejected the manufacturer's suggestion that courts should defer to determinations of the Food and Drug Administration as to the safety and efficacy of a particular drug. "[S]uch deference," reasoned the court, "in the face of

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116. *Id.* at 1197.
117. *Id.*
118. RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965).
119. *Shanks*, 835 P.2d at 1197-98.

allegations of serious injuries caused by FDA-approved drugs would amount to an abdication of judicial responsibility."[120]

V. FAILURE TO WARN

Even if there is no ascertainable flaw in a product's manufacture or design, and the item is precisely what it is intended to be, Alaska law may treat a product as defective if a manufacturer fails to give adequate and timely warnings about the hazards that may result from use.[121] A manufacturer's failure to warn necessarily involves some overlap between concepts of negligence and strict products liability. The Alaska Supreme Court has recognized this redundancy but has held that in strict liability cases, the need for and the sufficiency of a warning should be evaluated without reference to negligence principles.[122] Although an injured plaintiff may frequently plead both negligent and strict liability failure-to-warn claims, the jury must be instructed separately on each count. In *Patricia R. v. Sullivan*,[123] the court quoted with approval the Washington Supreme Court:

> "[T]he objective of the rule of strict liability with respect to dangerous products is defeated if a plaintiff is required to prove that the defendant was negligent, or the latter is allowed to defend upon the ground that he was free of negligence. It is the adequacy of the warning which is given or the necessity of such a warning, which must command the jury's attention, not the defendant's conduct."[124]

Accordingly, as in all strict products liability claims, the focus must be on the product, and here the warning accompanying it, and not upon the manufacturer's conduct.

In *Prince v. Parachutes, Inc.*,[125] the court adopted the following statement of the duty-to-warn concept in the context of strict products liability: "A product is defective if the use of the product in a manner that is reasonably foreseeable by the defendant involves a substantial danger that would not be readily recognized by the

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120. *Id.* at 1197 n.10.

121. *See* Prince v. Parachutes, Inc., 685 P.2d 83, 88 (Alaska 1984).

122. Patricia R. v. Sullivan, 631 P.2d 91, 102 (Alaska 1981).

123. 631 P.2d 91 (Alaska 1981).

124. *Id.* (quoting Little v. PPG Indus., 594 P.2d 911, 914 (Wash. 1979) (alteration in original)).

125. 685 P.2d 83 (Alaska 1984).

ordinary user of the product and the manufacturer fails to give adequate warning of such danger."[126] It is the knowledge of the *ordinary* user of the product that is relevant to the duty to warn, rather than the knowledge of the *actual* user.[127] The injured party's actual subjective knowledge is irrelevant to the determination of whether the manufacturer owed a duty to warn to the *ordinary user* of the product.[128]

In *Prince*, the alleged defect was a parachute manufacturer's failure to warn users that one of its models should be used only by the most experienced jumpers.[129] The fact that the injured plaintiff had used the parachute model at issue on previous occasions and experienced difficulty was ruled irrelevant to the plaintiff's strict liability failure-to-warn claim.[130]

The plaintiff had learned to parachute using a standard military round-canopy parachute. After making twenty-nine jumps using the military round canopy, the plaintiff was offered the use of the triangular canopy model manufactured by the defendant. He was aware that there were variations in parachutes and was instructed to obtain the permission of a U.S. Parachute Association area safety officer before using this more advanced equipment.[131]

Prior to the accident, the plaintiff jumped five times using the defendant's parachute and experienced difficulty landing on each occasion. During his sixth jump, as he was maneuvering to land, the plaintiff collided with another parachutist, and, as a result, fell thirty feet to the ground.[132]

The trial judge granted summary judgment for the manufacturer, holding there was no duty to warn of the flight characteristics of the parachute in question, since the plaintiff had actual knowledge of the parachute's dangerous characteristics. The trial judge also concluded that the manufacturer was entitled to summary judgment

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126. *Id.* at 88; *See also Patricia R.*, 631 P.2d at 102 (product is required to have warnings only as to hazards or dangers that would not be readily recognized by ordinary user of product).

127. *Prince*, 685 P.2d at 88.

128. *Id.*

129. *Id.* at 86.

130. *Id.* at 88 (plaintiff's prior use of the parachute was, however, relevant to the manufacturer's defense of comparative negligence).

131. *Id.* at 85.

132. *Id.*

on the issue of causation.[133] The supreme court reversed, agreeing with the plaintiff that there should be objective criteria to determine the existence of a duty to warn.[134]

Once again, the court emphasized that the focus in a strict liability case must be on the condition of the product itself. The knowledge and acts of the plaintiff are irrelevant to a determination of whether the parachute was defective in not containing adequate warnings.[135] Accordingly, whether an ordinary parachutist would readily recognize that the triangular canopy parachute should be used only by an experienced individual is a question of fact. The plaintiff's subjective awareness was relevant only to the manufacturer's defense of comparative negligence.[136]

In *Keogh v. W.R. Grasle, Inc.*,[137] the supreme court again found a jury question as to whether the "manufacturer," here of the upgrade to an electrical distribution system, had an obligation to warn of the dangers present.[138] As discussed above,[139] in addition to design defect claims, the plaintiff argued that defendant had failed to warn him of the dangers of electricity inherent in the upgraded system. The trial court refused to direct a verdict in favor of the plaintiff on his strict liability claim, which was based on the manufacturer's failure to warn. The jury found in favor of the manufacturer.[140] The supreme court ruled that it was proper to submit a failure-to-warn claim to the jury.[141] The court reasoned that the facts of the case sufficiently created "a jury issue on the adequacy of the warnings, especially given the well-known dangers of high voltage electricity."[142]

Finally, in *Shanks v. Upjohn Co.*,[143] the court identified for the first time the factors necessary for a warning to be considered

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133. *Id.* at 87.
134. *Id.* at 87-88.
135. *Id.*
136. *Id.* at 89. For a discussion of comparative negligence *see infra* text accompanying notes 146-156.
137. 816 P.2d 1343 (Alaska 1991).
138. *Id.* at 1348.
139. *See supra* text accompanying notes 77-82.
140. *Keogh*, 816 P.2d at 1345.
141. *Id.* at 1348.
142. *Id.* at 1348 n.9.
143. 835 P.2d 1189 (Alaska 1992).

adequate. The warning should "(1) clearly indicate the scope of the risk or danger posed by the product, (2) reasonably communicate the extent or seriousness of the harm that could result from the risk or danger, and (3) be conveyed in such a manner as to alert the reasonably prudent person."[144] In enumerating these factors, the court reemphasized that a strict liability failure-to-warn claim should not be presented to the jury in negligence terms. The court elaborated that:

> Under a strict liability failure to warn theory, if the plaintiff proves that the product as marketed posed a risk of injury to one who uses the product in a reasonably foreseeable manner and the product is marketed without adequate warnings of the risk, the product is defective. If such a defect is the proximate cause of the plaintiff's injuries, the manufacturer is strictly liable unless the defendant manufacturer can prove that the risk was scientifically unknowable at the time the product was distributed to the plaintiff.[145]

VI. DEFENSES TO STRICT LIABILITY CLAIMS

Several defenses to strict liability have been litigated since the Alaska Supreme Court's *Beck I* decision. Principal among these is the extent to which a plaintiff's comparative negligence may affect the strict liability of the manufacturer. Other defenses that have been raised with some success include scientific unavailability, superseding or intervening cause, subsequent modification of the product, and mere repairs (versus manufacture) of an item. In addition, the court has distinguished between property damage and economic loss in permitting recovery of damages in a strict liability action.

A. Comparative Negligence

The defense of comparative negligence may apply in personal injury cases based on strict liability in tort.[146] A plaintiff's comparative negligence will not defeat a claim for personal injuries in a strict products liability case. Rather, a plaintiff's comparative negligence will only serve to reduce any award of damages in his

144. *Id.* at 1200.
145. *Id.* at 1199-1200 (citation omitted).
146. Prince v. Parachutes, Inc., 685 P.2d 83, 88 (Alaska 1984).

favor.[147] Before the jury can consider whether the plaintiff was comparatively negligent, it must first find the product was defective and that such defect was a proximate cause of the plaintiff's injuries.[148]

The defense is not limited to those cases where the plaintiff uses the product with knowledge of the defective condition. It also extends to those cases in which the plaintiff misuses the product and such misuse is a proximate cause of his or her injuries.[149] The Alaska Supreme Court has emphasized that the manufacturer is still accountable for all harm caused by a defective product, except for the portion caused by the consumer's own negligence.[150] However, mere use of the product with knowledge of the lack of a safety device will not qualify as misuse, as the court has stated that:

> We do not believe that a consumer who uses a product as it was intended to be used, and who knows or should know of the lack of a safety device, can be deemed to have misused the product within the meaning of *Butaud II*. If a jury finds that a product is defective by virtue of its lack of a safety feature, plaintiff's failure to install such a device will not reduce his recovery based upon his mere knowledge of the inadequate safety features of the product.[151]

Accordingly, in those cases where the design defect is the lack of a safety device, the defense of comparative negligence is essentially one of assumption of the risk. The court should instruct the jury on comparative negligence only if the plaintiff (1) knowingly uses a defective product and (2) voluntarily and unreasonably encounters the known risk.[152] An injured party's failure to exercise simple ordinary care is not sufficient to raise a jury question on the issue of comparative negligence in a strict products liability case.[153]

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147. *Id.* at 89 n.3 (Alaska 1984).

148. *Id.*

149. Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42, 46 (Alaska 1976) (*Butaud II*), modifying Butaud v. Suburban Marine & Sporting Goods, Inc., 543 P.2d 209 (Alaska 1975) (*Butaud I*).

150. *Id.* at 46

151. Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 890-91 (Alaska 1979) (*Beck I*).

152. *Id.* at 892.

153. Dura Corp. v. Harned, 703 P.2d 396, 405 n.5 (Alaska 1985).

The manufacturer bears the burden of proving the plaintiff's actual knowledge of the defect if it is part of its affirmative defense.[154] However, a sophisticated scientific understanding of the mechanism of the defect is not a prerequisite to the defense of comparative negligence.[155] The knowledge component of the affirmative defense may be satisfied by awareness of the *effect* of the defect, as opposed to knowledge of the precise technical source or cause of that effect.[156]

B. Scientific Unknowability

Where the risk of the particular danger involved is scientifically unknowable when the product is marketed, the manufacturer generally will not be held liable in strict products liability.[157] Therefore, in certain circumstances, a scientific knowability instruction to the jury is proper.

For example, in *Heritage v. Pioneer Brokerage & Sales*,[158] the supreme court approved of a scientific knowability instruction based on evidence suggesting that exposure to certain concentrations of formaldehyde was "not known scientifically to cause permanent deep lung damage of the type suffered" by one of the plaintiffs.[159] Conversely, on appeal after remand in *Caterpillar Tractor Co. v. Beck* (*Beck II*),[160] the court rejected the use of a scientific knowability instruction because the manufacturer had made a "deliberate decision" not to install the particular safety device at issue.[161] According to the court, such a decision could not have been made without some recognition of the dangers involved. The court also reasoned that the particular risk that a person could be injured in a

154. *Id.* at 404.
155. Brinkerhoff v. Swearingen Aviation Corp., 663 P.2d 937, 941 (Alaska 1983).
156. *Id.*
157. Caterpillar Tractor Co. v. Beck, 624 P.2d 790, 792 n.3 (Alaska 1981) (*Beck II*).
158. 604 P.2d 1059 (Alaska 1979).
159. *Id.* at 1063.
160. 624 P.2d 790 (Alaska 1981) (*Beck II*).
161. *Id.* at 792-93. For discussion of the facts of the case, *see infra* text accompanying notes 26-36.

front-end loader that overturns was too apparent to raise a scientific knowability issue.[162]

The jury may balance the scientifically knowable danger inherent in the product at the time it was sold and the utility of the product.[163] The defense is limited to those cases where "the knowability" of the dangerous character of the product is at issue,[164] and when it applies, the burden of establishing scientific unknowability falls upon the manufacturer.[165]

C. Superseding Cause

The defense of superseding cause applies in strict products liability cases, but it is available only in extraordinary circumstances. A superseding cause occurs where "'[a]fter the event and looking back from the harm to the actor's negligent conduct, it appears to the court *highly extraordinary* that [the conduct] should have brought about the harm.'"[166] A finding of superseding cause means the manufacturer's duty to prevent harm to someone because of its defective product shifts to a third party, but only in "exceptional cases."[167]

In *Dura Corp. v. Harned*,[168] the trial court denied the defendant's request for a superseding cause instruction. As noted earlier,[169] on appeal, the manufacturer argued that overuse of an air tank led to its fatigue and subsequent explosion.[170] The supreme court rejected the suggestion that the overuse constituted a superseding cause because it was not "highly extraordinary" that a consumer would frequently use the equipment.[171]

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162. *Id.*
163. *Heritage*, 604 P.2d at 1064.
164. *Id.*
165. *Beck II*, 624 P.2d at 793 n.4.
166. Dura Corp. v. Harned, 703 P.2d 396, 402 (Alaska 1985) (quoting Yukon Equip., Inc. v. Gordon, 660 P.2d 428, 433 n.4 (Alaska 1983) (quoting RESTATEMENT (SECOND) OF TORTS § 435 (1965), *rev'd on other grounds*).
167. *Id.* at 402-03 (citing Osborne v. Russell, 669 P.2d 550, 558 (Alaska 1983)).
168. 703 P.2d 396 (Alaska 1985).
169. *See supra* text accompanying notes 47-51.
170. *Dura Corp.*, 703 P.2d at 400.
171. *Id.* at 403.

In *Keogh v. W.R. Grasle, Inc.*,[172] the court expanded upon its *Dura Corp.* holding. In *Keogh*, the court reasoned that not every intervening cause will supersede the defendant's conduct to the extent that such cause will be deemed the proximate cause of the plaintiff's injury.[173] If an intervening cause "'lies within the scope of the foreseeable risk, or has a reasonable connection to it, [it] is not a superseding cause.'"[174] The court further reasoned that the jury should be permitted to decide the question of a superseding cause only if it concludes that the product is defective and that such defect proximately caused the plaintiff's injuries.[175]

D. Subsequent Modification of the Product

In several cases, the Alaska Supreme Court has emphasized that for strict products liability to attach the product must be defective at the time it leaves the manufacturer's possession or control.[176] A design defect, for example, must be measured by the knowledge and information that existed when the product left the hands of the manufacturer.[177] It may also be a defense for the manufacturer that the item had been substantially altered after it left the plant, as "a substantial change in the product after it leaves the manufacturer's hands will ordinarily defeat a claim based on strict tort liability."[178] The rule has been stated as follows: "[T]o the extent that an injury, caused by a substantially altered product is the result of the product's alteration and not a result of a product 'defect' existing at the time of manufacture, the manufacturer is not liable for the injuries."[179]

The manufacturer bears the burden of proving that the product was substantially altered after leaving its possession.[180] But before

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172. 816 P.2d 1343 (Alaska 1991). For discussion of the facts of the case, *see supra* text accompanying notes 77-82.

173. *Keogh*, 816 P.2d at 1350.

174. *Id.* (quoting *Dura Corp.*, 703 P.2d at 402).

175. *Id.* at 1350 n.13.

176. *See e.g.*, Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 886 n.52 (Alaska 1979) (*Beck I*); Hiller v. Kawasaki Motors Corp., 671 P.2d 369, 372 (Alaska 1983).

177. *Beck I*, 593 P.2d at 886 n.52.

178. Caterpillar Tractor Co. v. Beck, 624 P.2d 790, 793 (Alaska 1981) (*Beck II*).

179. *Hiller*, 671 P.2d at 372.

180. *Id.*

the manufacturer is put to the "trouble and expense" of establishing alteration of its product, the plaintiff must first establish that the product was defective at the time that it left the manufacturer's possession.[181] The manufacturer may then introduce evidence of substantial subsequent alteration to "rebut or overcome" the plaintiff's showing that his injuries resulted from the manufacturer's defect.[182]

E. Used Products and Repairs

Strict liability generally applies to products and not to services such as repair work.[183] The seller of used products may be held strictly liable, however, if the products have undergone extensive repair, inspection, and testing at the seller's hands prior to re-sale.[184] It is not enough that the sellers repaired or even "rebuilt" the product. The seller would "have to do something more than sell an attachment for [a] vehicle, agree to put it on, and agree to repair the part of the vehicle that eventually breaks" in order to be held strictly liable for selling a defective product.[185]

F. Property Damage versus Economic Loss

The Alaska Supreme Court has limited the scope of recovery in strict products liability claims by refusing to find liability for mere "economic loss," or lost profits.[186] The court has elected to "preserve '. . . the well developed notion that the law of contract should control actions for purely economic losses and that the law of tort should control actions for personal injuries.'"[187] The court has reasoned that application of strict products liability to pure economic losses would interfere with the contractual remedies

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181. *Id.*

182. *Id.*

183. Swenson Trucking & Excavating v. Truckweld Equip. Co., 604 P.2d 1113, 1116-17 (Alaska 1980).

184. Kodiak Elec. Ass'n v. DeLaval Turbine, Inc., 694 P.2d 150, 154 n.6 (Alaska 1984).

185. *Swenson Trucking*, 604 P.2d at 1117; *see also Kodiak Elec.*, 694 P.2d at 154.

186. Morrow v. New Moon Homes, Inc., 548 P.2d 279, 286 (Alaska 1976).

187. *Id.* at 291 (Alaska 1976) (quoting Terrance A. Turner, Comment, *The Vexing Problem of the Purely Economic Loss in Products Liability: An Injury in Search of a Remedy*, 4 SETON HALL L. REV. 145, 175 (1972)) (omission in original).

enacted by the legislature in adopting the Uniform Commercial Code.[188] However, where the claim is one for property damage rather than mere economic loss, strict products liability will apply.[189]

Problems arise, however, because the dividing line between economic loss and property damage is not always easy to discern. This is particularly true where the plaintiff seeks compensation for loss of the product itself. The court emphasized in *Cloud v. Kit Manufacturing Co.*[190] that it would not establish an all-inclusive rule to distinguish between the two categories,[191] but opined that claims for direct property damage will ordinarily be characterized by "sudden and calamitous damage."[192] By contrast, economic loss will be characterized by "deterioration, internal breakage and depreciation."[193]

Subsequent cases have attempted to refine this distinction, but with little success. In *Northern Power & Engineering Corp. v. Caterpillar Tractor Co.*,[194] the court stated that:

> [W]hen a defective product creates a situation potentially dangerous to persons or other property, and loss occurs as a result of that danger, strict liability in tort is an appropriate theory of recovery, even though the damage is confined to the product itself. In order to recover on such a theory plaintiff must show (1) that the loss was a proximate result of the dangerous defect and (2) that the loss occurred under the kind of circumstances that made the product a basis for strict liability.[195]

In other words, where the harm to the product or other property occurs as a result of some circumstance in which there is a significant potential for personal injury, the court will likely conclude that strict products liability should apply.[196] For exam-

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188. *Id.* at 286.

189. Cloud v. Kit Mfg. Co., 563 P.2d 248, 250 (Alaska 1977) (reasoning that there is no policy reason for distinguishing between personal injuries and property damage in products liability litigation).

190. 563 P.2d 248 (Alaska 1977).

191. *Id.* at 251.

192. *Id.*

193. *Id.*

194. 623 P.2d 324 (Alaska 1981).

195. *Id.* at 329 (Alaska 1981) (footnotes omitted).

196. *See* Kodiak Elec. Ass'n v. DeLaval Turbine, Inc., 694 P.2d 150, 153 (Alaska

ple, in *Kodiak Electric Ass'n v. DeLaval Turbine, Inc.*,[197] the court held that strict liability should be applied where an electrical fire caused damage to an electrical generating unit because "there was evidence of arcing, which presented a serious danger to persons."[198] However, in *Northern Power*, strict liability was determined to be inapplicable not only because there was no evidence presented of any other danger, but also because the damage was limited to the electrical generator engine itself.[199]

VII. INDEMNITY ISSUES

Under Alaska law, both the manufacturer and the retailer of a defective product may be held strictly liable when the product causes injury.[200] In general, a retailer who is held liable on the theory of strict products liability may obtain indemnity from the manufacturer, provided that the retailer was not negligent and did not contribute to the defect.[201] The manufacturer is responsible for indemnification "not because of its culpability, but because of its position at the head of the product distribution chain."[202]

The manufacturer's obligation to indemnify may extend to both attorney's fees and any judgment.[203] If the retailer is without fault, in that it simply sold a product that was defective before reaching the retailer's hands, the manufacturer will owe the retailer both the cost of defense and a general indemnity.[204]

1984).

197. 694 P.2d 150 (Alaska 1984).

198. *Id.*

199. 623 P.2d at 329-30. The United States Supreme Court criticized *Morrow*, *Cloud*, and *Northern Power*, in *East River S.S. Corp. v. Transamerica Delaval, Inc.*, stating that where the damage is limited to the product itself, the purchaser has merely failed to receive the benefits of the bargain, the traditional concern of contract law alone. 476 U.S. 858, 870 (1986).

200. Koehring Mfg. Co. v. Earthmovers of Fairbanks, 763 P.2d 499, 503-04 (Alaska 1988).

201. *Id.*; *see also* Fairbanks N. Star Borough v. Kandik Constr., 823 P.2d 632, 638 (Alaska 1991) (indemnitor jointly liable in tort with indemnitee may recover implied indemnity only if the indemnitee is not in any degree jointly at fault).

202. *Koehring*, 763 P.2d at 503.

203. *Id.*

204. D.G. Shelter Prods. v. Moduline Indus., 684 P.2d 839, 841 n.5 (Alaska 1984).

Before the manufacturer is required to indemnify, it must have introduced a defective product into the stream of commerce. This requires a factual finding of liability on the part of the manufacturer.[205] Settlement of the underlying products liability case does not preclude indemnification.[206]

The Alaska Supreme Court addressed this requirement in *D.G. Shelter Products v. Moduline Industries*.[207] Two persons were injured when their mobile home caught fire, releasing toxic formaldehyde fumes from the interior panelling. The plaintiffs sued Moduline, the retailer, alleging strict products liability for marketing a defective item. Prior to trial, Moduline brought a third-party claim against D.G. Shelter, the manufacturer of one of the component parts of the mobile home. Moduline, Shelter and other third-party defendants eventually settled with the plaintiffs.[208] In discussing Moduline's indemnity claim against D.G. Shelter, the Alaska Supreme Court stated:

> *Whether [D.G.] Shelter supplied a defective product must be resolved before liability for attorney's fees can be determined.*
>
> If the trial court determines that [D.G.] Shelter did supply a defective product, the trial court must then decide Moduline's liability. . . . [I]f Moduline is simply an innocent party in the chain of commerce, having only passed on an already defective product, then Moduline would be entitled to indemnity and its attorney's fees, provided [D.G.] Shelter was given proper notice of the pending litigation and an adequate opportunity to undertake the defense of the case.[209]

The Alaska Supreme Court has implicitly reaffirmed its *D.G. Shelter* holding in several subsequent pronouncements.[210]

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205. *Id.* at 841.

206. *Id.*

207. 684 P.2d 839, 841 (Alaska 1984).

208. *Id.* at 840.

209. *Id.* at 841 (emphasis added) (footnote omitted).

210. Ross Labs. v. Thies, 725 P.2d 1076, 1081 (Alaska 1986) ("a retailer who is liable on a theory of strict liability may obtain indemnity from a manufacturer, provided that the retailer was not negligent."); Koehring Mfg. Co. v. Earthmovers of Fairbanks, 763 P.2d 499, 504 (Alaska 1988) ("a retailer or lessor found liable on a strict product liability theory may obtain indemnity from the manufacturer, provided the retailer or lessor was not independently negligent."); Fairbanks N. Star Borough v. Kandik Constr., 795 P.2d 793, 803 (Alaska 1990) ("[a]n innocent party who merely passes on an already defective product in the stream of commerce is entitled to implied noncontractual indemnity from the product producer . . . .").

The court's *D.G. Shelter* decision conflicts to a certain degree with its earlier holding in *Heritage v. Pioneer Brokerage & Sales, Inc.*,[211] which led many observers to assume that whether or not a product was defective, the retailer had an automatic right to indemnity from the manufacturer.[212] In *Heritage*, the manufacturer was required to indemnify the retailer for its attorney's fees incurred in its *successful* defense of a products liability suit.[213] In reaching this decision, the court provided the following dictum:

> If the right to costs and attorney's fees for defending the lawsuit is made contingent on losing on the merits of that action, in every case the indemnitee would be put in the difficult position of attempting to show lack of his own culpability at the same time that he is aiding the plaintiff's case by attempting to prove the liability of his indemnitor. Such a situation certainly would be contrary to both the indemnitee's and indemnitor's interests in many instances, and we decline to create an incentive for accomplishing that result.[214]

However, a reading of *Heritage* that indicates a manufacturer must indemnify the retailer regardless of whether the product is defective overlooks the critical limiting aspect of the court's holding:

> *[W]here indemnification is required*, and the indemnitor has been given proper notice of the pending litigation and an adequate opportunity to undertake its duty to defend, the indemnitee is entitled to recover full costs and attorney's fees for the expenses of its successful defense of the action giving rise to the claim for indemnity.[215]

Heritage states the rule that applies when the right to indemnity has *already* been determined. In *Heritage* a directed verdict against the manufacturer was not appealed.[216] Thus, under *Heritage*, if the manufacturer has an obligation to indemnify the retailer in the first instance, then the retailer is entitled to be indemnified for its costs and attorney's fees incurred in defending the suit.[217] The Alaska

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211. 604 P.2d 1059 (Alaska 1979); *see also* Hanover, Ltd. v. Cessna Aircraft Co., 758 P.2d 443, 448 n.1 (Utah App. 1988) (recognizing conflict between *D.G. Shelter* and *Heritage*).

212. *See Hanover, Ltd.*, 758 P.2d at 448 n.1.

213. *Heritage*, 604 P.2d at 1067.

214. *Id.*

215. *Id.* (emphasis added).

216. *Id.* at 1067 n.25.

217. *Id.*

Supreme Court has recognized this limited holding of *Heritage* in subsequent opinions.[218]

VIII. CONCLUSION

In Alaska, the manufacturer or retailer of a product will be held strictly liable in tort when it places a product on the market knowing that it is to be used without inspection for defects, and the product proves to have a defect that causes injury. The defect may be either one of manufacture, design, or the failure to provide adequate warnings. In determining the existence of a defect, the injured party must prove either 1) that the product failed to satisfy the ordinary consumer's expectations or 2) that its design proximately caused injury, and the manufacturer failed to show that the benefits outweighed the risks of harm inherent in the design. Several affirmative defenses are also available including comparative negligence, scientific unknowability, superseding cause, and subsequent modifications.

218. Vertces Corp. v. Reichhold Chems., Inc., 661 P.2d 619, 622-23 (Alaska 1983) (citing *Heritage* and stating that given manufacturer duty to indemnify retailer, manufacturer also has duty to defend retailer, who may recover costs and attorney's fees); D.G. Shelter Prods. v. Moduline Indus., 684 P.2d 839, 841 (Alaska 1984) (where indemnity is required of manufacturer, retailer's right to recover costs and attorney's fees seems axiomatic); Fairbanks N. Star Borough v. Roen Design, 727 P.2d 758, 761 (Alaska 1986) (as policy matter, the right to attorney's fees is determined by the right to indemnity).