

INVESTIGATING AND DEFENDING PRODUCTS LIABILITY AND TOXIC TORT CLAIMS

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FOREWORD

This book, *Investigating and Defending Products Liability and Toxic Tort Claims* was first drafted in early 1995. Then Jardine, Logan & O'Brien, P.L.L.P. Associate Attorney Thomas Dickson and Partner Larry Rocheford wrote up the materials and presented them to the Twin Cities Claims Association annual meeting on April 7, 1995. Dickson is now the Managing Partner at the intellectual property firm Patterson Thuente in Minneapolis, MN. Because she had experience defending lead paint cases and other toxic tort cases, then Jardine, Logan & O'Brien, P.L.L.P. Associate Attorney Karen R. Cote was asked to work on the 2002 edition of the book. Cote is now employed by State Farm defending State Farm insured's throughout Minnesota and Wisconsin. Asbestos litigation has been ongoing for decades. Then Associate Richard J. Leighton wrote the part of the book analyzing asbestos litigation and toxic torts. Richard Leighton practices in Duluth at Johnson, Killen & Seiler. Rich is an accomplished civil litigator with over thirty years of experience. More recently, this book needed to be updated. Recent updates were performed by former Jardine, Logan & O'Brien, P.L.L.P. Law Clerks Dennis C. Anderson, Kyle Schaffer, and John Kuehl. Anderson is now an attorney with the Minneapolis law firm Zelle, LLP. Schaffer is now an attorney with Bakke Norman in Wisconsin.

The Firm thanks these former and present employees for their help and hard work in drafting this book.

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September 30, 2016

I. INTRODUCTION

The phrase “products liability” refers to the liability of a manufacturer, processor, or a non-manufacturing lessor or seller for injury caused by a product to the person or property of a consumer or third party. Depending on the facts, a plaintiff in a products liability suit may assert any of several different theories of recovery. Generally, only a party who suffered an actual injury may assert a claim. The three major types of claims are based on design defects, manufacturing defects, or failure to warn. Depending on the type of claim, these may be brought on the tort theories of negligence or strict liability, or on contract theories of breach of implied or express warranty. Less common claims are based on negligent entrustment or bailments. Some plaintiffs may also assert claims based on state or federal statutes or administrative rules or regulations. For each type of claim, there are particular defenses that may apply. Defense of a products liability action requires the examination of many claims, their elements, relevant statutes, regulations, and associated defenses.

The law of products liability is changing. There are numerous excellent sources to research and explore how the law has evolved over the past several decades. *E.g.*, Mike Steenson, *A Comparative Analysis of Minnesota Products Liability Law and the Restatement (Third) of Torts: Products Liability*, 24 Wm. Mitchell L. Rev. 1 (1998). For an in-depth and up-to-date examination of Minnesota products liability law, see 27 Michael K. Steenson, J. David Prince & Sarah L. Brew, *Minnesota Practice Series: Products Liability Law* (2006). The Minnesota Practice Series also includes jury instruction guides for products liability cases that distill the legal principles into plain English. 4A Michael K. Steenson & Peter B. Knapp, *Minnesota Practice Series: Minnesota Jury Instruction Guides* §§ 75.10-.65 (6th ed. 2014) (cited hereinafter as CIVJIG ____). Additionally, take into consideration these helpful legal blogs:

- <http://product-liability.weil.com/>
- <http://druganddevicelaw.blogspot.com/>
- <http://abnormaluse.com/>

II. THREE PRIMARY PRODUCTS LIABILITY CLAIMS

This section addresses the three major types of product liability claims: design defect, manufacturing defect, and failure to warn. Less common claims, such as bailment, entrustment, and breach of warranty are covered in the next section. In practice, a plaintiff may plead some or all of these claims, but, in some instances, courts will require the plaintiff to choose one legal theory to submit to the jury. Remember, each claim has its own set of elements which must be met to establish liability.

In discussing these claims, various authorities organize the information in different ways. This can lead to confusion when comparing authorities to each other. In 1984, the Minnesota Supreme Court merged the theories of negligence and strict liability for purposes of design defect claims. *Bilotta v. Kelley Co., Inc.*, 346 N.W.2d 616, 622 (Minn. 1984). Most authorities authored or revised since *Bilotta* treat the types of claims (i.e. design defect,

manufacturing defect, and failure to warn) as major organizational divisions, and the theories of recovery (i.e. negligence, strict liability, or breach of warranty) as minor divisions. *See, e.g.*, 27 Michael K. Steenson, J. David Prince & Sarah L. Brew, Minnesota Practice Series: Products Liability Law, chs. 1-4 (2006). For the convenience of readers who may want to study this resource in parallel with others, this treatise follows that organizational scheme.

A. Design Defect Claims

Design defect claims are distinguished from manufacturing defect claims because the alleged defect is traced to the way the product was designed, rather than the way it was manufactured, assembled, inspected, packaged, or tested. In design defect cases, the manufacturer has consciously chosen a design and in doing so, has deliberately determined the composition of the product, presumably making its decision after balancing a variety of factors. Often, the plaintiff's claim is that the design and/or the design factors chosen for the product are inadequate and are the cause of the injury. See generally Rosin v. Int'l Harvester Co., 115 N.W.2d 50, (Minn. 1962). Under this theory, every product manufactured according to the allegedly defective design will be defective. The issue then, is whether the manufacturer used reasonable care in the design of the product.

1. Strict Liability

Historically, design defect claims were asserted on theories of negligence, strict liability, or warranty. In Minnesota law, negligence and strict liability were merged by the Minnesota Supreme Court in 1984. Bilotta v. Kelley Co., Inc., 346 N.W.2d 616, 624 (Minn. 1984).

Some jurisdictions outside of Minnesota have retained a distinction between strict liability defective design and negligent design. This distinction has been defined where strict liability involves the dangerousness of an article which is designed in a particular way, while negligence involves the reasonableness of the manufacturer's actions in designing and selling the article. See e.g., Roach v. Kononen, 269 Or. 457, 525 P.2d 125 (Or. 1974).

Strict liability, also known as liability without fault, originally developed as to protect parties from "ultra hazardous" conditions or activities. In product liability cases, a plaintiff need not show that the supplier or manufacturer was negligent; they need only prove that the product was "unreasonably dangerous."

When a plaintiff brings a strict liability claim, he must also prove certain threshold issues imposed by Minnesota statutes, including that the defendant is in fact a manufacturer, and that the defendant has done one or more of the

following: (1) exercised some significant control over the product, (2) had actual knowledge of the alleged defect, or (3) created the defect. *See* Minn. Stat. §544.41. (See also, *infra*, **Defenses, Middleman Statute**). This statute may be specifically relevant to sellers of used goods as a defense against strict liability claims, and is therefore addressed in detail in the section on Defenses (See Part I).

In addition, a products liability claim must arise from the product or its preparation, container or packaging. Hauenstein v. Loctite Corp., 347 N.W.2d 272, 275 (Minn. 1984). However, it should be noted that the method used to secure a load or product for shipment *is not* part of the package for product liability purposes. Harmon Contract Glazing, Inc. v. Libby-Owens-Ford Co., 493 N.W.2d 146, 149 (Minn. Ct. App. 1992).

Despite the merger of negligence and strict liability for design defect cases, it is helpful to consider how design defect claims were brought under a theory of negligence, because it illustrates the difference between negligence and strict liability, especially regarding the element of duty.

To state a cause of action in a design defect claim based on negligence, the plaintiff had the burden of proving these four elements:

1. That the defendant owed the plaintiff a duty of care;
2. That the defendant breached that duty;
3. That the plaintiff was injured; and
4. That the defendant's breach of duty caused the plaintiff's injury.

Domagala v. Rolland, 805 N.W.2d 14, 22 (Minn. 2011); Hudson v. Snyder Body, Inc., 326 N.W.2d 149, 157 (Minn. 1984) (citing Schmanski v. Church of St. Casimir of Wells, 67 N.W.2d 644, 646 (Minn. 1954)). To succeed on a negligence claim, the plaintiff must prove all four of these elements, and they are of equal importance. Frey v. Montgomery Ward & Co., 258 N.W.2d 782, 787 (Minn. 1977). Proof can be through either direct or circumstantial evidence. *See* Miller v. Hughes, 105 N.W.2d 693, 698 (Minn. 1960) (quoting Hill v. N. Pac. Ry. Co., 297 N.W. 627, 629 (Minn. 1941)); Hagsten v. Simberg, 44 N.W.2d 611, 614 (Minn. 1950). Circumstantial evidence is sufficient if it provides a reasonable basis to infer, beyond speculation and conjecture, that the facts are as the plaintiff claims they are. Miller, 105 N.W.2d at 698 (quoting Hill, 297 N.W. at 629). *See* Block v. Toyota Motor Corp., No. CIV. 10-2802, 2014 WL 1048500 (D. Minn. Mar. 18, 2014) (holding defendant had no duty to warn for alleged design defect of unintended acceleration of a 1996 Camry vehicle).

Under strict liability it is still necessary to prove some form of the second, third, and fourth negligence elements: breach, causation and injury (also commonly called “damages”). But it is not necessary to prove the first element: duty. Under strict liability, the existence of a duty is presumed. In fact, for strict liability design defect claims, there are *two* presumed duties, as reflected in the first part of the Jury Instruction Guide for Design Defect, which reads as follows:

DESIGN DEFECT

Manufacturer’s duty as to product design

A manufacturer has a duty to use reasonable care to design a product that is not in a defective condition unreasonably dangerous to (buyers of) (users of) (those exposed to) (property exposed to) the product when the product:

1. Is used as intended, or
2. Is used in a way that the manufacturer could reasonably have anticipated.

CIVJIG 75.20. Under the theory of negligence, the duty to design a safe product traditionally arose from a contractual relationship. In strict liability, contractual privity is irrelevant. As stated in CIVJIG, the manufacturer must satisfy two duties: (1) to design a product that is not defective and reasonably safe when used as intended; and (2) to design a product that is not defective and reasonably safe when used in an unintended, but reasonably foreseeable manner.

In Drager by Gutzman v. Aluminum Industries Corp., 495 N.W.2d 879 (Minn. Ct. App. 1993), the court addressed the two duties owed by a defendant to the plaintiff. The six-year-old plaintiff had fallen from a second-story window after toppling from a chair and hitting a window screen two feet above the floor. The plaintiff claimed that the screen had dislodged without offering any resistance. He suffered severe injuries.

After analyzing the two duties the defendant owed the plaintiff, the court ruled that the window screen's intended purpose was to allow ventilation while preventing insects from entering and the screen was well within its design limits. As to the foreseeable but unintended use of preventing a child from falling out the window, the court found that the plaintiff fell against the screen by accident and did not make a conscious decision to use the screen in any manner. Therefore, the court held that it could not be said that the plaintiff subjected the screen to a foreseeable but unintended use. Id. at 883.

The Minnesota Supreme Court has held that the duty to design a safe product is not delegable. Bilotta v. Kelley Co., Inc., 346 N.W.2d 616, 624 (Minn.

1984). Based on this case, an optional paragraph may be added to the Jury Instruction, which reads as follows: “[A product manufacturer may not avoid its duty to design a safe product by letting others make decisions affecting the safety of the product.]” CIVJIG 75.20 (brackets in original).

Returning to the four elements of a negligence claim stated above (see page 2) the second element a plaintiff must prove is that the designer breached its duties. Under strict liability, this element must still be proven by showing that a designer failed to act reasonably in adopting a certain design. Bilotta, 346 N.W.2d at 622. For determining whether the designer breached its duty, the Jury Instruction Guide provides this framework:

Evaluating manufacturer’s design choices

A manufacturer must keep up with knowledge and technology in the field.

A manufacturer’s duty must be judged according to the knowledge and technology existing at the time the product was sold.

In deciding whether a product was in a defective condition unreasonably dangerous because of the manufacturer’s design choices, consider all the facts and circumstances, including:

1. The danger presented by the product
2. The likelihood that harm will result from use of the product
3. The seriousness of the harm
4. The cost and ease of taking effective precautions to avoid that harm
5. Whether the manufacturer considered the knowledge and technology in the field
- [6. Other factors].

CIVJIG 75.20. The court adopted a balancing test based on "reasonable care" after rejecting the "consumer expectation" test commonly used in design defect cases. This “reasonable care” balancing test reflects the Supreme Court’s rejection of the old consumer expectation test for design defect cases. Under the old test, drawn from the Restatement (Second) of Torts, a design was considered defective if it produced a product “dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased it, with the ordinary knowledge common to the community as to its characteristics.” Restatement (Second) of Torts §402A, cmt. I (1965). To put it another way, if a consumer did not expect a product to perform safely under

certain circumstances, and in fact it did not perform safely, that lack of expectation militates against finding the manufacturer liable since the product performed as the consumer expected. Under this standard, the burden of evaluating whether a product will perform safely when used for a use not intended by the designer is on the consumer, not the designer. In Bilotta, the court held this standard is appropriate for *manufacturing defect* cases, but rejected it for *design defect* cases. Bilotta, 346 N.W.2d at 622.

In Bilotta, addressing design defect claims, the supreme court replaced the consumer expectation test with a “reasonable care” balancing test reflected in the jury instruction above. The reasonable care test is an elaboration on the “risk-utility standard” famously expressed by Judge Learned Hand in Carroll Towing. United States v. Carroll Towing, 159 F.2d 169 (2d Cir. 1947). Under this test the burden of deciding whether a particular design will be safe when the product is used as intended—or when used in way that is not intended, but is reasonably foreseeable—is *shifted to the designer*. In adopting this test the Bilotta court cited the holding in Holm v. Sponco, in which the court stated:

The manufacturer is obligated to exercise that degree of care in his plan or design so as to avoid any unreasonable risk of harm to anyone who is likely to be exposed to the danger when the product is used in the manner for which the product was intended as well as unintended yet reasonably foreseeable use.

What constitutes “reasonable care” will, of course, vary with the surrounding circumstances and will involve a “balancing of the likelihood of harm, and the gravity of harm if it happens, against the burden of precaution which would be effective to avoid the harm.”

Holm v. Sponco, 324 N.W.2d 207, 212 (Minn. 1982) (quoting Micallef v. Miehle Co., 348 N.E.2d 571, 577–78 (N.Y. 1976)).

The Bilotta court noted that the consumer expectation standard did not adequately reflect a manufacturer's duty of care in claims of defective product design. Bilotta, 346 N.W.2d at 622. For *manufacturing defect* claims, the court said it is appropriate to focus on a product since there is an objective standard—a flawless product—with which to compare the allegedly defective one. Id. In *design defect* cases, however, the manufacturer consciously chooses the design and the focus, the court held, should be on whether the manufacturer’s design decisions struck an acceptable balance among several competing factors. Id.

The reasonable care balancing test examines a series of factors which include:

- (1) The usefulness and desirability of the product;
- (2) The availability of other and safer products to meet the same needs;
- (3) The likelihood of injury and its probable seriousness;
- (4) The obviousness of the danger (here the latent/patent distinction becomes merely a factor in the reasonable care balancing test);
- (5) Knowledge and normal public expectations of the danger (consumer expectation test is thus reduced to one factor in this analysis);
- (6) The avoidability of injury by care in use of the product, including the effect of instructions or warnings; and
- (7) The ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive.

Holm v. Sponco, 324 N.W.2d 207, 212 (Minn. 1982). The Bilotta court assumed that designers balance these factors and that the jury should weigh the same factors and decide whether the designer struck a reasonable risk/utility balance.

The question of the intended use of a product has given rise to the concept of “crashworthiness.” Certain products are inherently hazardous even when used in the way they are intended. The manufacturers of such products are expected to design them with these inherent hazards in mind. “Where a product cannot be used as intended without a known risk of accidents, the manufacturer must design that product with reasonable care so as to minimize the damage or injury arising in the event of an accident.” Wagner v. Int’l Harvester Co., 611 F.2d 224, 231–32 (8th Cir. 1979); Sobolik v. Briggs & Stratton Power Prods. Group, LLC, Civ. No 09-1785 (JRT/LIB), 2011 WL 5374440, at *15–16 (D. Minn. Mar. 30, 2011).

The third element of a negligent design claim, causation, also survived the merger of negligence and strict liability. The relevant Jury Instruction defines causation as follows:

Definition of “direct cause”

A “direct cause” is a cause that had a substantial part in bringing about the (collision) (accident) (event) (harm) (injury).

CIVJIG 75.50. The plaintiff must show that there is a causal link between the alleged design defect and the injury, regardless of whether the action is based on negligence or strict liability. See Hudson v. Snyder Body, Inc., 326 N.W.2d 149, 157 (Minn. 1982) (negligence); Bilotta, 346 N.W.2d at 623 n. 3 (strict liability). In strict liability the focus is on specific causation issues: whether the product, when it reached the consumer, was in a condition consistent with its design, and whether the alleged defect caused the plaintiff's injury. The initial standard for determining the existence of an unreasonably dangerous defect in strict liability was found in this passage from the Restatement (Second) of Torts. Note the italicized language, which highlights these essential causation elements:

- (1) One who sells any product *in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property if:*
 - (a) The seller is engaged in the business of selling such a product, and
 - (b) *It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.*
- (2) The rule stated in Subsection (1) applies although:
 - (a) The seller has exercised all possible care in the preparation and sale of his product, and
 - (b) The user or consumer has not bought the product from or entered into any contractual relation with the seller.

Restatement (Second) of Torts §402A. The Minnesota Supreme Court adopted this formulation when it recognized strict tort liability in McCormack v. Hanksraft Co., 154 N.W.2d 488, 499 (Minn. 1967). In the years since McCormack, the Supreme Court has elaborated on the Restatement's language, going to greater lengths to distinguish between design defects and manufacturing defects, and taking into account the possibility of defects arising from handling or modification of the product by a consumer or middleman. Those elaborations were summarized in Rients v. International Harvester, in which the court of appeals held that to prove a design defect under strict liability, the plaintiff must show:

- (1) That the defendant's product was in a defective condition unreasonably dangerous for its intended use;

- (2) That the product is expected to and does reach the user or consumer without substantial change in the condition in which it was sold;
- (3) That the defect was the proximate cause of the injuries sustained; and
- (4) That the injury was not caused by any voluntary, unusual, or abnormal handling by the plaintiff.

Rients v. Int'l Harvester Co., 346 N.W.2d 359, 361–62 (Minn. Ct. App. 1984) (citing Bilotta v. Kelly Co., Inc., 346 N.W.2d 616, 623 n.3 (Minn. 1984)) (factor 3); Magnuson v. Rupp Mfg., Inc., 171 N.W.2d 201, 206 (1969) (factor 4); McCormack, 154 N.W.2d at 499 (factors 1 and 2).

In Rients, the plaintiff was driving a tractor on a country road when a tie-rod pin jumped out of the front axle. The right wheel fell off, and after 600 feet the tractor left the road and overturned in the ditch. The plaintiff was severely injured. The court had to determine whether the accident was directly caused by a defect as the plaintiff claimed. Rients, 346 N.W.2d at 360-61.

The plaintiff introduced an expert's opinion that the axle was defective because a cotter key was used in the original design to hold the tie-rod pin in place where allegedly safer designs existed. But the record showed numerous modifications and repairs had been made to the relevant parts, and the plaintiff could not show that the allegedly-defective original design still existed on the machine at the time of the accident. In addition, the record showed that the steering gear arm broke at a weld, the brakes were worn, the tie-rod and steering knuckles were bent, and under normal circumstances the tractor would have been able to stop in about sixty-seven feet. Id. at 362. Based on the multitude of other problems with the tractor, the court held it would be sheer speculation for a jury to find that the accident was caused by the design defect alleged by plaintiff, and not by any of the other problems. Id.

Further, if the Minnesota District Court found if an expert's testimony was too speculative, then that party would not prevail on the claims. Thompson v. Zimmer Inc., No. 11-CV-3099, 2013 WL 5406628 at *1 (D. Minn. Sept. 25, 2013)(citing Young v. Pollock Eng'g Grp., Inc., 428 F.3d 786, 790 (8th Cir. 2005)).

In Zimmer, the plaintiff was implanted with an artificial hip that fractured and alleged the defendant failed to warn her; however, the court found that the expert estimated the timing of when the fracture occurred but since no actual facts were presented to support when the fracture actually occurred, the court held it was too speculative and granted summary judgment to the defendant.

As for the fourth negligence element, damages (or injury), the analysis is the same for strict liability cases as for negligence cases.

B. Manufacturing Defect Claims

The Minnesota Supreme Court's decision to merge negligent design claims and strict liability design claims did not extend to claims based on manufacturing defects. As a result, manufacturing defect claims may be based on negligence or strict liability.

1. Negligence

Under this theory, a plaintiff alleges that a product has emerged from the manufacturing process that is not made as the designer intended, and is more dangerous than if the product was made properly. The defect is alleged to have occurred sometime after the design stage, during the machining, assembly, inspection, packaging, or testing stages. The relevant Jury Instruction reads as follows:

LIABILITY OF MANUFACTURER OR SELLER OF GOODS-NEGLIGENCE

Duty of the manufacturer or seller to use reasonable care

A (manufacturer) (intermediary) of a product has a duty to use reasonable care to protect (people who are) (property that is) likely to be exposed to unreasonable risk of harm.

A (manufacturer) (intermediary) must use reasonable care in the (manufacture) (assembly) (inspection) (packaging) (testing) of the product to protect (users or consumers) (users' or consumers' property).

“Reasonable care” is the care a reasonable person would use under the same or similar circumstances.

[A manufacturer must keep up with knowledge and technology in the field. You should decide whether the manufacturer used reasonable care in the light of that duty.]

CIVJIG 75.35; See also Heise v. J. R. Clark Co., 71 N.W.2d 818 (Minn. 1955); Lovejoy v. Minneapolis-Moline Power Implement Co., 79 N.W.2d 688 (Minn. 1956); Rosin v. Int'l Harvester Co., 115 N.W.2d 50 (Minn. 1962).

This duty of reasonable care in manufacturing the product coexists with the manufacturer's duty regarding the product's design.

Note that a manufacturer is not relieved of any duty that he may have had because a third party had a duty to inspect the article before delivery. See Bilotta, 346 N.W.2d at 624-25; Tolbert v. Gerber Indus., Inc., 255 N.W.2d 362 (Minn. 1977). This concept does not mean that the manufacturer is automatically liable for negligence created farther down the chain of distribution. It simply means that the manufacturer may have to establish that he did not breach the duty to inspect. Schweich v. Ziegler, Inc., 463 N.W.2d 722 (Minn. 1990).

A party asserting a negligent manufacturing claim must prove that the negligence was the cause of his injury. Hudson v. Snyder Body, Inc., 326 N.W.2d 149, 157 (Minn. 1982). Absent proof of causation, a negligent manufacturing claim cannot succeed. Because it is very difficult to prove negligence in the manufacturing process, this type of claim is rarely pled or brought to a jury.

Hagen v. McAlpine & Co., No. CIV. 14-1095 DWF/LIB, 2015 WL 321428, at *2 (D. Minn. Jan. 26, 2015) (Negligence claims were dismissed when Plaintiff failed to allege sufficient facts to support negligence claims. Plaintiffs allegations that the Valves had a design defect that made them dangerous were based on speculative and conclusory allegations that leaks could lead to mold or electric shock, even if taken as true, do not support the finding that the Valves were unreasonably dangerous (citations omitted)).

J.D.O. ex rel. Oldenburg v. Gymboree Corp., No. 12-cv-71 (SRN/JSM), 2013 WL 6196970, at *1 (D. Minn. Nov. 27, 2013) (the Minnesota Court of Appeals granted defendant summary judgment in part on both defective manufacture and breach of implied warranty of merchantability claims but denied in part summary judgment; the court held that the plaintiff had valid claims on both claims of design defects and failure to warn on the possibility that the pajamas worn by a minor were flammable).

2. **Strict Liability**

A plaintiff who brings a strict liability manufacturing defect claim is arguing that the product's flaw arose from an inconsistency in the manufacturing process which caused the product to depart from the intended design in a way that made it unsafe. In a *negligent* manufacturing claim, the plaintiff alleges that certain facts demonstrate that the manufacturer failed to exercise reasonable care during the manufacturing process.

In a *strict liability* manufacturing defect claim, the argument is based on a process of elimination: The design may have been safe, but the product was unsafe when it came into the plaintiff's hands, therefore the defect must have arisen during manufacturing, even though the facts do not point to any particular negligence during the manufacturing process. Proof of the manufacturing defect is found not in the manufacturing process, but in the product it produced.

There is a great deal of overlap between the theories underlying strict liability manufacturing defect claims and design defect claims. For instance, the elements a plaintiff must prove are the same. As stated in Rients, they are:

- a. That the defendant's product was in a defective condition unreasonably dangerous for its intended use;
- b. The product is expected to and does reach the user or consumer without substantial change in the condition in which it was sold;
- c. That the defect was the proximate cause of the injuries sustained; and
- d. Plaintiff must show that the injury was not caused by any voluntary, unusual or abnormal handling by the plaintiff.

Rients v. Int'l Harvester Co., 346 N.W.2d 359 (Minn. Ct. App. 1984); see Bilotta v. Kelley Co., Inc., 346 N.W.2d 616, 623, n. 3 (Minn. 1984) (citing Lee v. Crookston Coca-Cola Bottling Co., 188 N.W.2d 426, 432 (Minn. 1971)).

Of these four requirements, there is usually little argument over the first due to objective evidence of the plaintiff's injury. Far more common are disputes over the second element: whether the defect existed when the product left the defendant's control. Where the facts show that the product was used for a period of time before the events that gave rise to the claim, the plaintiff is faced with the challenge of proving that the injury arose from the alleged manufacturing defect, and not from another cause such as alteration, misuse, or improper maintenance. (This is essentially the same challenge the plaintiff in Rients could not overcome, although that case was based on an alleged design defect rather than a manufacturing defect. See Rients, 346 N.W.2d at 363).

The final two elements, direct causation and normal use, are evaluated in the same way for a manufacturing defect strict liability claim as they are for a defective design claim.

The Minnesota Supreme Court has noted the consumer expectation test is well suited for manufacturing flaw cases because "an objective standard exist—the flawless product—by which the jury can measure the alleged defect." Bilotta, 346 N.W.2d at 622. Thus, in cases involving manufacturing flaws, the proper focus is on the condition of the product, and "the manufacturer's conduct is irrelevant." Id.

If the product is dangerous and defective because of a manufacturing flaw, and the product caused the plaintiff's injury, the manufacturer is liable unless the plaintiff appreciated the danger, or grossly misused the product. This is reflected in the Jury Instruction's statement of the consumer expectation test for manufacturing defect cases:

MANUFACTURING DEFECTS

Deciding when a product is defective

A product is in a defective condition unreasonably dangerous to (the ordinary user or consumer) (the ordinary user's or consumer's property) if he or she could not have anticipated the danger the product created.

In deciding if the danger could have been anticipated, assume the user or consumer had the knowledge common to the community about the product's characteristics and common use.

The defect in the product may be caused by the way it was (manufactured) (assembled) (inspected) (packaged) (tested).

[A product is in a defective condition unreasonably dangerous to (the ordinary user or consumer) (the ordinary user's or consumer's property) when the product departs from its intended design, even though all possible care was exercised in the preparation and marketing of the product.]

CIVJIG 75.30. This Jury Instruction also reflects the expansion of the term "manufacturing" to include assembly, inspection, packaging and testing. Manufacturing defect claims based on either strict liability or negligence may point to problems in any of these areas. It is important to note, however, that the method used to secure a load or product for shipment is not part of the

package for product liability purposes. Harmon Contract Glazing, Inc. v. Libby-Owens-Ford Co., 493 N.W.2d 146, 149 (Minn. Ct. App. 1992).

See Yang v. Cooper Tire & Rubber Co., No. A13-0756, 2014 WL 502959 (Minn. Ct. App. Feb. 10, 2014), review denied (Apr. 15, 2014) (the Minnesota Court of Appeals affirmed summary judgment to defendants, but reversed on the district court's decision granting judgment as a matter of law in determining that plaintiff's substantially similar evidence meets the standard; thus, the court remanded for further review in this case of personal injuries from an automobile accident due to alleged tire failure sold by defendants).

See Holverson v. ThyssenKrupp Elevator Corp., No. CIV. 12-2765 ADM/FLN, 2014 WL 3573630 (D. Minn. July 18, 2014) (the court granted defendants' motion for summary judgment and granted in part defendants' motion to exclude the expert testimony of Thomas Branham, but denied the motion to strike Branham's errata sheet since the inconsistent information provided is for the trier of fact to decide in this case of an alleged elevator lurching upwards causing plaintiff to undergo multiple hip surgeries).

C. Failure to Warn Claims

Failure to warn has resulted in considerable litigation in Minnesota courts. Minnesota law recognizes an obligation to provide adequate warnings and instructions at the time the product is manufactured and sold. This duty requires manufacturers and sellers to provide both adequate instructions for the safe use of a product and warnings about dangers inherent in the improper use of the product. See Frey v. Montgomery Ward & Co., 258 N.W.2d 782 (Minn. 1977). Under certain circumstances, there may also be a post-sale duty to warn.

Assessment of failure to warn claims can be difficult because the Minnesota Supreme Court has held that they are a hybrid of strict liability and negligence. The current Jury Instruction Guides are an excellent resource for analyzing these claims. See CIVJIG 75.25.

Whether the defendant manufacturer or supplier had a duty to warn is a matter of law for the court to decide. Germann v. F.L. Smithe Mach. Co., 395 N.W.2d 922, 924 (Minn. 1986). The standards for making that determination are as follows:

[T]he court goes to the event causing the damage and looks back to the alleged negligent act. If the connection is too remote to impose liability as a matter of public policy, the courts then hold there is no duty, and consequently no liability. On the other hand, if the consequence is direct and is the type of occurrence that was or should

have been reasonably foreseen, the courts then hold as a matter of law a duty exists.

Id. If the court decides that there was a duty to warn, and a warning was in fact given, it is for a jury to decide whether the warning given was adequate under the circumstances. Id. at 924-25 (“Other issues such as adequacy of the warning, breach of duty and causation remain for jury resolution.” (citing Christianson v. Chicago St. P., M. & O. Ry. Co., 69 N.W. 640 (1896))).

Typically, the warning a jury must evaluate is communicated in writing, and the jury must consider whether its wording was adequate. But the jury may also have to decide whether the very fact that it was only communicated in writing made the warning inadequate—in other words, whether the warning should have been communicated in some other way *beyond* writing. See In re: Levaquin Products Liability Litigation, Civ. No. 08-5742 (JRT), 2011 U.S. Dist. 2011 WL 6826415, at *7 (D. Minn. Dec. 28, 2011).

The Jury Instructions (reproduced below) may create some confusion because they ask a jury to decide whether a warning needed to be given. These are intended for cases in which no warning or instruction was given, but the court has decided that a duty to give a warning did exist as a matter of law. The jury question in such cases is whether the warning—including the absence of a warning—was adequate *in fact*. They reflect the possibility that jury may decide that under the facts of the case, it was not necessary to give a warning because, for instance, the danger was obvious.

1. Pre-Sale Duty to Warn

In Bilotta, the Minnesota Supreme Court determined that in both design defect and failure to warn cases, the plaintiff could attempt to prove his case either through strict products liability or negligence, or both, but the plaintiff had to choose one and only one theory to submit to the jury. See Bilotta, 346 N.W.2d at 622. The court tried to distinguish between strict liability and negligence by stating that in strict liability cases, knowledge of the condition of the product and the risk involved in that condition will be imputed to the manufacturer, whereas in negligence these elements must be shown. Id. But that distinction has proved unworkable, and the court later determined that an action based upon a failure to warn under strict liability is essentially a negligence action. See Germann, 395 N.W.2d at 926 n. 4.

While formally maintaining a distinction between the two theories, the Minnesota Supreme Court has determined that a party asserting a negligent failure to warn claim *and* a strict liability failure to warn claim may plead both

theories, but must select one theory for submission to the jury. Hauenstein v. Loctite Corp., 347 N.W.2d 272, 275 (Minn. 1984).

In the court's view, when a plaintiff brings a strict liability claim based on a failure to warn, knowledge of the dangerous condition and the risks related to it can be imputed to the manufacturer. But in negligence cases, those elements must be proven. Bilotta, 346 N.W.2d at 622.

Where optional safety equipment is available, Minnesota courts have recognized a limited duty to warn consumers of its availability, but only when multi-use equipment is involved, and where the optional device would impair the equipment's utility when used for purposes where the optional equipment is not necessary. Sobolik v. Briggs & Stratton Power Prods. Group, LLC, Civ. No. 09-1785 (JRT/LIB), 2011 WL 5374440, at *18 (D. Minn. Mar. 30, 2011) (citing Bilotta, 346 N.W.2d at 624). Offering such optional equipment on some models, but not all models, may not negate this duty. Id. at *19.

The proposed jury instruction for duty to warn claims is broken into two parts. The first part concerns whether the warnings or instructions that accompany the product made the product reasonably safe and the second concerns whether warnings should have been given.

The instructions read as follows:

THE DUTY TO WARN (STRICT LIABILITY AND NEGLIGENCE)

PART A

A manufacturer's duty to provide adequate warnings and instructions

A manufacturer has a duty to provide reasonably adequate (warnings) (instructions) for its products to those who use the product when the product:

1. Is used as intended, or
2. Is used in a way that the manufacturer could reasonably have anticipated.

Adequate warning

A manufacturer must keep up with knowledge and technology in the field.

A manufacturer's duty to provide reasonably adequate (warnings) (instructions) must be judged according to the

knowledge and technology that existed at the time the product was sold.

In deciding whether the manufacturer's (warnings) (instructions) were reasonably adequate, consider all the facts and circumstances, including, among others:

1. The likelihood that harm would result from use of the product
2. The seriousness of the harm that would result
3. The cost and ease of providing (warnings) (instructions) to would avoid the harm
4. Whether the (warnings) (instructions) are in a form the ordinary user could reasonably be expected to notice and understand
5. Whether the manufacturer considered the knowledge and technology in the field
6. [Other factors].

A product that is not accompanied by reasonably adequate (warnings) (instructions) is in a defective condition unreasonably dangerous to whoever uses or is affected by the product.

The product must be reasonably safe for use if the (warnings) (instructions) are followed.

PART B

Decide if warnings and instructions had to be provided

A manufacturer has a duty to use reasonable care in deciding whether (to warn of dangers involved in using its product) (to provide instructions for safe use of the product).

Reasonable care

“Reasonable care” is the standard of care you would expect a reasonable person to follow in the same or similar circumstances.

You must decide if a manufacturer using reasonable care would have provided (warnings) (instructions) for the safe use of the product.

A manufacturer has a duty to keep up with knowledge and technology in the field. This duty to provide reasonable (warnings) (instructions) must be judged according to the knowledge and advances that existed at the time the product was manufactured.

In deciding whether the manufacturer should have provided (warnings) (instructions), consider all the facts and circumstances, including, among others:

1. The likelihood that harm would result from use of the product
2. The seriousness of the harm that would result
3. The cost and ease of providing (warnings) (instructions) that would avoid the harm
4. Whether the manufacturer considered the knowledge and technology in the field
5. [Other factors].

A product that is not accompanied by reasonably adequate (warnings) (instructions) is unreasonably dangerous to (whoever uses or is affected) (property placed at risk) by the product.

CIVJIG 75.25.

A product is in an unreasonably dangerous or defective condition if the manufacturer or seller knew or reasonably could have discovered the problem. See CIVJIG 75.20. Note that manufacturers must keep informed of scientific knowledge and discoveries in their fields, and this knowledge will be imputed to manufacturers because it is considered to be reasonably discoverable. Id. (citing Karjala v. Johns-Manville Prods. Corp., 523 F.2d 155 (8th Cir. 1975)).

Of course, a manufacturer has no duty to warn of non-existent dangers, or dangers that are obvious to everyone. See, e.g., Hart v. FMC Corp., 446 N.W.2d 194, 198 (Minn. Ct. App. 1989) (manufacturer under no duty to warn of environmental conditions in which the product was installed when it was not responsible for installation); Mix v. MTD Prods., Inc., 393 N.W.2d 18 (Minn. Ct. App. 1986) (manufacturer under no duty to warn users not to reach under lawn mower while engine was running).

The court in Peppin v. W.H. Brady Co., 372 N.W.2d 369 (Minn. Ct App. 1985), summarized the defense perspective in its observation:

There is certainly no usual duty to warn the purchaser that a knife or an axe will cut, a match will take fire, dynamite will explode, or a hammer may mash a finger.

In Sieber v. Bond Street, Ltd., Civil. No. 10-1728 (JRT/JJK), 2012 WL 619626 (D. Minn. Feb. 27, 2012), a federal court summarized other hazards that have been held by Minnesota courts to be open and obvious: the danger of hot coffee burning (Holowaty v. McDonald's Corp., 10 F. Supp. 2d 1078, 1084 (D. Minn. 1998)); the danger of cleaning a blender when the blender is in operation (Knott v. Amfec, Inc., No. 09-CV-1098 (PJS/AJB), 2010 WL 4116602, at *5 (D. Minn. Oct. 18, 2010)); the danger of fixing a lawn mower motor while the engine is running (Mix v. MTD Prods., Inc., 393 N.W.2d 18, 20 (Minn. Ct. App. 1986)); and the danger of a spring recoiling (Hoeg v. Shore-Master, Inc., No. C9-94-508, 1994 WL 593919, at *1 (Minn. Ct. App. Nov. 1, 1994)). The Sieber court went on to add another obvious hazard: the danger of a bungee cord recoiling. Id. at *4.

Moreover, a great many courts have held that there is no duty to warn a knowledgeable user of a hazard of which he should be aware. See, eg., Travelers Ins. Co. v. Fed. Pacific Elec. Co., 211 A.D.2d 40 (N.Y.A.D. 1 Dept. 1995).

All elements of plaintiff's *prima facie* case except the existence of a duty are resolved by the jury. Balder v. Haley, 399 N.W.2d 77, 81 (Minn. 1987); Krutsch v. Walter H. Collin GmbH Verfahrenstechnik & Maschinenfabric, 495 N.W.2d 208, 212 (Minn. Ct. App. 1993); Westbrook v. Marshalltown Mfg. Co., 473 N.W.2d 352, 358 (Minn. Ct. App. 1991).

To establish causation, a plaintiff arguing inadequacy of the warning must show plaintiff's reliance on that warning. J & W Enters., Inc. v. Econ. Sales, Inc., 486 N.W.2d 179 (Minn. Ct. App. 1992). Reliance on the warning presupposes that the warning was read. Johnson v. Niagara Mach. & Tool Works, 666 F.2d 1223, 1225 (8th Cir. 1981). For example, where plaintiff could not remember reading a warning on a fire extinguisher, he could not argue that the warning was inadequate. J & W Enterprises, 486 N.W.2d at 181. The court granted summary judgment for the defendant because plaintiff could not establish the causal link between the allegedly inadequate warning and the injury. Id.

Minnesota's courts have not adopted a rebuttable presumption that if adequate warnings were provided, the plaintiff would have heeded them. See Kallio v. Ford Motor Co., 407 N.W.2d 92, 99-100 (Minn. 1987). Thus, in Minnesota,

to prove a failure to warn claim, a plaintiff must present evidence establishing that the proposed warning would have been read, that the plaintiff would have relied on it, and that it would have prevented the claimed injury. Young v. Pollock Eng'g Grp., Inc., 428 F.3d 286 (8th Cir. 2005).

In 2012, the Minnesota Supreme Court held that the duty to warn does not include a duty to train users in the use of the product. Glorvigen v. Cirrus Design Corp., 816 N.W.2d 572, 582 (2012). Accurate and thorough instructions for the safe use of the product are sufficient. Id.

See Thompson v. Zimmer Inc., No. 11-CV-3099, 2013 WL 5406628 (D. Minn. Sept. 25, 2013) (the court granted defendant summary judgment on the failure to warn claim and dismissed plaintiff's expert testimony on the design defect claim because the expert's basis of timing when the first fracture occurred after the plaintiff's hip replacement was too speculative).

2. **Post-Sale Duty to Warn**

Under certain circumstances, there may be a post-sale duty to warn. This duty is very similar to the pre-sale duty to warn. Where it exists, it covers both intended uses and uses that are unintended, but reasonably foreseeable, and it requires the manufacturer to use reasonable care in deciding whether to provide a warning. The relevant Jury Instruction reads as follows:

MANUFACTURER'S DUTY TO PROVIDE POST-SALE WARNINGS

Duty of a manufacturer to provide post-sale warnings

A manufacturer has a duty to use reasonable care to provide post-sale warnings of product dangers to (persons who) (property that) may be exposed to harm when the product:

1. Is used as intended, or
2. Is used in a way that the manufacturer could have reasonably anticipated.

Deciding if the manufacturer used reasonable care

"Reasonable care" is the care you would expect a reasonable person to use in the same or similar circumstances.

You must decide if a manufacturer using reasonable care would have provided post-sale (warnings) (instructions) for the safe use of the product.

A manufacturer must keep up with knowledge and technology in the field. The duty to use reasonable care to provide post-sale (warnings) (instructions) must be judged by the scientific knowledge and advances reasonably available between the time the product was manufactured and the date of the injury.

In deciding whether the manufacturer should have provided post-sale (warnings) (instructions), consider all the facts and circumstances, including, among others:

1. The likelihood that harm would result from use of the product
2. The seriousness of the harm that would result
3. The costs and ease of providing post-sale (warnings) (instructions) that would avoid the harm
4. Whether the manufacturer considered knowledge and technology in the field.

CIVJIG 75.40.

While several cases have considered when the post-sale duty to warn exists, no clear consensus has emerged, and outcomes seem to be very fact-specific. For instance, in Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d 826 (Minn. 1988), the Minnesota Supreme Court recognized a post-sale duty to warn where the manufacturer had knowledge that the product was dangerous, continued in the same line of business after gaining that knowledge, continued to advertise the product, and undertook a duty to warn concerning the product's dangers. Id.

However, in Ramstad v. Lear Siegler Diversified Holdings Corp., 836 F. Supp. 1511 (D. Minn. 1993), the U.S. District Court for the District of Minnesota, applying Minnesota law, concluded that there was no post-sale duty to warn where there were few prior accidents, the danger was obvious to users, there were no pre-sale warnings, and the manufacturer had implemented a new design. Id. at 1517.

In 1999, the same federal district court heard a wrongful death case in which the decedent's motorcycle helmet came off during impact, and the plaintiff alleged that it did so because its retention system was defective. McDaniel v. Bieffe USA, Inc., 35 F. Supp. 2d 735, 736 (D. Minn. 1999). An independent safety organization had determined that the hook-and-loop strip on the chin strap of the helmet in question might induce users to attach the chin strap improperly. Id. As a result of its finding, the organization informed the

defendant that it would no longer certify helmets with this type of chin strap. Id. This notification reached the manufacturer after the decedent had purchased the helmet, and the plaintiff asserted a claim for failure to issue a post-sale warning. Id.

The court discussed what factors are determinative in deciding whether to impose a post-sale duty to warn and noted that “[c]ontinued service, communication with purchasers, or the assumption of a duty to update purchasers is a necessary element in determining whether a post-sale duty to warn attaches.” Id. at 741. The court then offered the following guidance:

When a manufacturer of a mass produced, widely distributed product becomes aware that there is a danger associated with the product creating a risk of serious injury or death, the manufacturer may have a duty to take reasonable steps to notify users of that danger. It would be unreasonable to require such a manufacturer to track down every purchaser and user. It may be appropriate in certain circumstances, however, to require a manufacturer to take the steps that are reasonable under the circumstances to disseminate widely notice of the danger. What constitutes reasonable notice is a question of fact.

Id. at 742.

III. LESS COMMON PRODUCT LIABILITY CLAIMS

A. Negligent Entrustment

Negligent entrustment occurs when one party (the entrustor) provides something to another party (the trustee) without exercising reasonable care in the process, and the trustee then uses that thing in negligent manner, causing injury to the trustee or a third party. The most common scenario, which helps illustrate the concept, is when one person loans an automobile to another, who then drives in a way that causes a traffic accident. The Restatement summarizes the claim as follows:

One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to be endangered by its use, is subject to liability for physical harm resulting to them.

Restatement (Second) of Torts § 390 (1977). Minnesota recognizes the tort of negligent entrustment. See Ruth v. Hutchinson Gas Co., 296 N.W. 136 (Minn. 1941). The negligence in entrusting a chattel to someone who is incompetent creates only the *potential* for liability on the part of the supplier. Comment c, Restatement (Second) of Torts § 390. In order for liability to attach to the negligent entrustor, the end-user's negligence must be accompanied by negligence on the part of the trustee. In other words, the negligence of the entrustor must be the proximate cause of the injury.

In Axelson v. Williamson, 324 N.W.2d 241 (Minn. 1982), the supreme court discussed proximate cause in a negligence entrustment case involving a death resulting from a one-car accident. The court agreed with the trial jury's finding that the defendant was negligent for having allowed a fifteen-year-old to drive an automobile, knowing she did not have a license or even a learner's permit. Id. at 242. The defendant's liability was based on the ability to foresee that the fifteen-year-old would operate the car negligently. Id. at 245.

The Axelson court also affirmed the jury's determination that the negligence of the owner in loaning the vehicle combined with the driver's negligent operation to cause her death. Id. at 242. Responding to the defendant's argument that the driver's negligence was an intervening, superseding cause, the court noted that because the young driver's negligence was foreseeable, it was not an intervening, superseding cause. Id. An intervening, superseding cause would have to be something other than the driver's foreseeable negligence. Id. The court noted that "[t]here is no indication in the record that anything other than the decedent's lack of skill caused the car to leave the road and crash." Id.

In the context of products liability, negligent entrustment claims could arise where a design or manufacturing defect is asserted against a manufacturer of a power tool or machinery and that machinery or tool is entrusted by its owner to another, such as an employee. In such cases, the causal fault of the entrustor, the trustee, the manufacturer, and the plaintiff all may need to be considered when determining what caused a given accident.

B. Bailments

The law of bailments is similar to negligent entrustment, but focuses on the condition of the goods and the possibility of injury to the person who receives them.

A bailment is a legal relationship arising upon the delivery of goods without transferring ownership with the express or implied agreement that the goods will be returned. Wallinga v. Johnson, 131 N.W.2d 216, 218 (Minn. 1964); Colwell v. Metro. Airports Comm'n, Inc., 386 N.W.2d 246, 247 (Minn. Ct. App. 1986).

Bailments are created when one party (an auto rental company, for instance) provides property (such as a vehicle) for the use of another (such as a rental customer). The party that provides the property is referred to as the “bailor,” and the recipient is called the “bailee.” When a bailment is created, the bailee assumes a duty to return to goods, which includes a duty to “exercise the degree of care which the nature of the bailment would require from ordinarily prudent persons.” Cent. Mut. Ins. Co. v. Whetstone, 81 N.W.2d 849, 851 (Minn. 1957); Prod. Credit Ass'n of St. Cloud v. Fitzpatrick, 385 N.W.2d 410, 412 (Minn. Ct. App. 1986). In the example of the rental car, this means that the renter assumes a duty to use reasonable care in driving the car. The party who has provided the goods (the “bailor”) assumes duties similar to those of a manufacturer. Thus the rental company, though it did not make the car, has a duty to use reasonable care to ensure that the car is in a safe condition. Like the duties of a manufacturer, the bailor’s duty for the safe condition of the article applies to both intended uses and to unintended but reasonably foreseeable uses.

The Jury Instruction Guide addresses bailments as follows:

BAILMENTS

The duty of a person providing or leasing an article

A person (providing) (leasing) an article for pay must use reasonable care to make sure that the article is safe when the article:

1. Is used as intended, or
2. Is used in a way that could reasonably have been anticipated.

To be safe, the article must be free from:

1. Defects that the (provider) (lessor) knew about, or
2. Defects that he or she would have known about if he or she had done a reasonable inspection of the article, or
- [3. Defects that could have been eliminated by reasonable (preparation) (repair) of the article.]

“Reasonable care” is the care you would expect a reasonable person to use in the same or similar circumstances.

CIVJIG 75.45 (brackets in original).

Claims arising out of bailments are typically based on a theory of negligence. Given the duty of the bailor described by the Jury Instruction, a plaintiff asserting such a claim must prove that the defendant breached that duty, that the plaintiff suffered damages, and that the defendant’s breach caused the injury suffered. Duxbury v. Spex Feeds, Inc., 681 N.W.2d 380 (Minn. Ct. App. 2004).

NOTE: Bailment Strict Liability Claims

There is some uncertainty about whether strict liability might apply to lessors of equipment. In a case involving farm implements and governed by Minnesota law, the Eighth Circuit Court of Appeals applied strict liability to the lessor in the belief that the Minnesota Supreme Court would do the same. Wagner v. Int'l Harvester Co., 611 F.2d 224, 232 n.10 (8th Cir. 1979). The Restatement applies strict liability to lessors. See Restatement (Second) of Torts § 402A. Other states have followed suit. See, e.g., Price v. Shell Oil Co., 466 P.2d 722, 727 (Cal. 1970); Stewart v. Budget Rent-A-Car Corp., 470 P.2d 240, 243 (Haw. 1970); Cintrone v. Hertz Truck Leasing and Rental Service, 212 A.2d 769 (N.J. 1965).

The Minnesota Supreme Court, in cases before and after Wagner, has not applied strict liability to lessors of equipment. Clark v. Rental Equip. Co., Inc., 220 N.W.2d 507, 511 (Minn. 1974); Wegscheider v. Plastics, Inc., 289 N.W.2d 167, 170 (Minn. 1980). In Wegscheider, the plaintiff urged the court to adopt strict liability based on section 402 of the Restatement, but the court declined to address that argument and decided the case on other issues. Wegscheider, 289 N.W.2d at 170.

Wisconsin is among the states that have applied strict liability in bailment claims, though only against parties in the business of leasing products to the general public. In Kemp v. Miller, 453 N.W.2d 872 (Wis. 1990), the Wisconsin Supreme Court held that a commercial lessor of consumer products could be sued in strict liability for damages resulting from a defective product it did not manufacture or sell. Id. at 554-555.

In Kemp, a woman rented a Ford Tempo from Budget Rent-A-Car and was involved in a single car accident, allegedly due to the defective condition of the car. Id. at 874. The plaintiff sued Budget Rent-A-Car without joining Ford as a defendant. Id. at 874-75. Budget Rent-A-Car then brought Ford into the case on a third-party complaint for contribution or indemnification. Id. at 875.

The court reviewed section 402A of the Restatement (Second) of Torts and noted that a number of jurisdictions are beginning to allow plaintiffs to recover against commercial lessors, who are then able to pursue the manufacturers or other potentially responsible parties for contribution or indemnification. Id. at 550. The court reviewed the seminal case of Cintrone v. Hertz Truck Leasing & Rental Service, 212 A.2d 769 (N.J. 1965), where strict liability claim was first applied to commercial lessors, and found its reasoning persuasive. The Kemp court stated:

Like manufacturers and sellers, persons in the business of leasing continually introduce potentially dangerous instrumentalities into the stream of commerce. A commercial lessor is in a far better position than the lessee to distribute the cost of compensating product-related

injuries by purchasing liability insurance and by adjusting the rent paid for the leased product to reflect this cost.

* * *

Further, by placing products into the stream of commerce and by advertising, the commercial lessor impliedly represents to the lessee that those products are safe for use during the term of the lease.

Kemp, 453 N.W.2d at 554-555.

Considering that there does seem to be a trend toward adopting strict liability in bailment cases, and considering that neighboring Wisconsin has followed this trend at least with regard to entities that lease or rent to the general public, it is possible the Minnesota will follow suit at some point in the future.

However, note that in 2013, the Minnesota Court of Appeals declined to extend strict liability to commercial bailors. Lyzhoft v. Waconia Farm Supply, Nos. A12-2237, A12-2238, 2013 WL 3368832 (Minn. Ct. App. Jul. 8, 2013) (the court declined to extend strict liability to commercial bailors and affirmed the district court's dismissal of the plaintiff's strict products-liability claims, but it reversed summary judgment on the negligence claims holding that fact issue existed as to which legal duty applied to the claimed bailor-bailee relationship).

C. Breach of Warranty Claims

A plaintiff in a products liability action may plead claims based on breach of warranty. To establish a warranty claim, the plaintiff must prove: (1) the existence of a warranty, (2) a breach of that warranty, and (3) a causal link between the breach and the alleged harm. See Peterson v. Bendix Home Sys., Inc., 318 N.W.2d 50, 52-53 (Minn. 1982).

Despite their similarities, claims for breach of warranty and those for negligence are separate and distinct. The critical difference is that a plaintiff in a breach of warranty claim is not required to prove that the manufacturer's actions were deficient in any way. See Lee v. Crookston Coca-Cola Bottling Co., 188 N.W.2d 426 (Minn. 1971). The element of *duty*, essential to every negligence claim, is replaced with the element of *warranty*. As a result, instead of proving that the *defendant* failed to fulfill its *duty*, it is only necessary to show that the *product* failed to live up to the *warranty*.

It is important to note that even though warranty remedies are based on contract, there need not be privity between the plaintiff and defendant. What this means is the warranty runs with the product and not necessarily with the buyer. Minn. Stat. §336.2-318 states:

A seller's warranty, whether express or implied, extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section.

There are two basic types of warranties: *implied* warranties and *express* warranties. Express warranties are created by some affirmative act on the part of the seller or manufacturer, such as a statement regarding the expected performance of a product. Express warranties are discussed in detail below.

Implied warranties are created not by specific representations, but by the circumstances of the sale or the nature of the product. For instance, even in the absence of any specific representation by the manufacturer, a baseball bat is presumed to be suitable for the purpose of hitting baseballs.

Because they arise by implication, implied warranties may be disclaimed or excluded by a prominent disclaimer. In Dubbe v. A.O. Smith Harvestore Prods., Inc., 399 N.W.2d 644 (Minn. Ct. App. 1987), a disclaimer clause was upheld because it was prominent, the buyer stated that he had read it, and that he was aware of its implications. See also Masepohl v. Am. Tobacco Co., Inc., 974 F. Supp. 1245 (D. Minn. 1997).

1. Implied Warranty of Merchantability

Implied warranties are imposed by law for the protection of the buyer and arise independent of a contract. They are essentially an equity-based doctrine favored by the courts. See In re Shigellosis Litigation, 647 N.W.2d 1, 11-12 (Minn. Ct. App. 2002); Moosbrugger v. McGraw-Edison Co., 170 N.W.2d 72, 80 (Minn. 1969); Asbestos Prods., Inc. v. Ryan Landscape Supply Co., 163 N.W.2d 767 (Minn. 1968).

An implied warranty of merchantability requires that goods be “fit for the ordinary purposes for which such goods are used.” Minn. Stat. § 336.2-314 (2)(c) (2012). That statute provides other guidelines as well, focusing on whether the goods conform to industry standards. Id.

To prove a breach of an implied warranty of merchantability, a plaintiff must show that the product is defective, and that the plaintiff is a normal buyer making ordinary use of the product. See Bendix, 318 N.W.2d at 53. Conversely, these requirements highlight the applicable defenses to the implied warranty claim. The goal of the defendant is to show that the buyer was somehow abnormal or used the product in a non-ordinary way.

A breach of implied warranty of merchantability may occur even if the merchant is unaware of the defect as shown in Christenson v. Milde, 402 N.W.2d 610 (Minn. Ct. App. 1987). In that case, the defendant building contractor was found liable for supplying a defective waterproofing agent. The court found that because the defendant never checked the waterproofing agent, and the house leaked, a jury could find that the product was clearly not fit for the ordinary purpose of waterproofing. Id. at 613.

Christenson demonstrates the overlap between implied warranty of merchantability and strict liability: Under both theories, defendants may be held liable even in cases where they did not know about the defect. The Introductory Note to the relevant section of the Jury Instruction Guide reads, in part, as follows:

Implied warranty of merchantability theory is merged with strict liability and negligence into a single theory of recovery. However, in cases where the plaintiff in a products liability case asserts products liability theories of recovery, whether the plaintiff's theory of defect is design defect, inadequate warnings, or manufacturing flaw, the plaintiff is entitled in an appropriate case to also assert theories of recovery based on express warranty or implied warranty of fitness for a particular purpose. Those theories rely on statements or representations made by the seller. Those theories are not preempted by products liability theory.

4A Michael K. Steenson & Peter Knapp, Minnesota Practice Series: Jury Instruction Guides—Civil 97-98 (6th ed. 2014) (citations omitted).

It is also important to note that implied warranty provisions do not apply to the sale of services. LeSueur Creamery, Inc. v. Haskon, Inc., 660 F.2d 342, 346 n.6 (8th Cir. 1981). Where a sale involves both services and goods, courts will use a "predominant factor" test to determine whether a transaction was a sale of goods. Valley Farmers' Elevator v. Lindsay Bros. Co., 398 N.W.2d 553 (Minn. 1987) *overruled on other grounds by* Hapka v. Paquin Farms, 458 N.W.2d 683 (Minn. 1990); *see also* McCarthy Well Co., Inc. v. St. Peter Creamery, Inc., 410 N.W.2d 312, 315 (Minn. 1987).

2. **Implied Warranty of Fitness for a Particular Purpose**

Minnesota has adopted the implied warranty of fitness for a particular purpose provision of the Uniform Commercial Code. See Minn. Stat. § 336.2-315. The adoption of this provision is reflected in CIVJIG 22.35 which states:

IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE

Definition of “Implied warranty of fitness for a particular purpose”

There is an implied warranty that the goods are fit for a particular purpose if, at the time of the sale:

1. The seller knew or had reason to know the particular purpose the goods were being used for,
2. The seller knew or had reason to know the buyer would rely on the seller’s skill and judgment in selecting or providing goods suitable for that purpose, and
3. The buyer relied on the seller’s skill or judgment in selecting or providing goods suitable for that purpose.

CIVJIG 22.35.

To prove a breach of the implied warranty of fitness for a particular purpose, it is not necessary to present direct evidence supporting all three elements. All three elements may be proved by the circumstances surrounding the transaction.

For instance, in Willmar Cookie Co. v. Pippin Pecan Co., 357 N.W.2d 111 (Minn. Ct. App. 1984), the first element was proved by direct evidence, but the second and third elements were proved by circumstantial evidence. The plaintiff purchased pecans from the defendant producer in order to package them for retail sale and sued the producer after receiving numerous complaints about the poor quality of the pecans. Id. at 113. The jury found that the defendant had breached the implied warranty of fitness for a particular purpose. Id. On appeal, the court found that there was ample evidence to support that verdict and affirmed it. Id. at 116. The seller’s salesperson testified at trial that when the plaintiff’s president had called to order the pecans, he told her that they were intended for retail sale. Id. at 115. That testimony proved the first element. With regard to the second and third elements, the court said it was reasonable to infer that the seller knew the buyer would rely on the seller’s expertise—and that the plaintiff actually did rely on the seller’s expertise—because the plaintiff had made a similar order for the same purpose in the past. Id.

A potential defense for defeating an implied warranty of particular fitness claim exists when the buyer insists on a particular brand or model. In such a case, the buyer’s insistence may supplant reliance on the seller’s expertise. On

the other hand, the warranty may still exist if the particular article the buyer insisted on was recommended by the seller as adequate for the buyer's purposes. See Uniform Commercial Code §2-315, Comment 5.

Unlike the implied warranty of merchantability, implied warranty of fitness for a particular purpose does not merge with the theory of strict liability. It remains independent because it addresses "the particular purpose for which goods are required." Piotrowski v. Southworth Prods. Corp., 15 F.3d at 751 (citing Minn. Stat. § 336.2-315). In this sense, implied warranty of fitness for a particular purpose is treated like an express warranty.

3. Express Warranty

Minnesota statutory law states that an express warranty may be created by:

- (a) Any affirmation of fact or promise made by the seller to the buyer, which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise;
- (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description; and
- (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

Minn. Stat. § 336.2-313. To show that a particular affirmation of fact, promise, description, sample, or model is "part of the basis of the bargain" the buyer need only establish that it was a factor in the decision to purchase the product. There is no requirement that it be the central aspect of the bargain. Minn. Stat. § 336.2-313.

The Jury Instruction Guide includes the following instruction of express warranty, which can be modified to fit different fact patterns:

EXPRESS WARRANTY

Proof of express warranty by affirmation or promise

An express warranty by affirmation is created if:

- 1. The seller makes an affirmation of fact or promise to a buyer, and
- 2. The affirmation or promise relates to the goods, and

3. The affirmation or promise becomes part of the basis for the bargain.

Definition of “affirmation”

An “affirmation of fact” is a statement of facts relating to the subject matter of the sale.

Basis of the bargain

A statement of facts or promise is part of the “basis of the bargain” if it played a part in the agreement between the seller and the buyer.

Effect of the express warranty by affirmation or promise

With the express warranty by affirmation or promise, the seller warrants to the buyer that the goods will conform to the affirmation or promise.

CIVJIG 22.10.

In other words, in order to prove a claim for breach of warranty, a plaintiff must show an express representation about the product, that the product did not conform to the express representation, and that there was a causal link between the express representation and the buyer’s decision to purchase the product.

Exclusive express warranties provided at the time of the sale may be used to exclude implied warranties. Barclays American/Bus. Credit, Inc. v. Cargill, Inc., 380 N.W.2d 590 (Minn. Ct. App. 1986).

If Plaintiffs are alleging the creation of an express warranty via oral representation or product packaging, Plaintiffs must allege more than a “possibility” of such a warranty and support the allegation with facts. Hagen v. McAlpine & Co., No. CIV. 14-1095 DWF/LIB, 2015 WL 321428, at *3 (D. Minn. Jan. 26, 2015).

Finally, express contractual warranties may be modified by the actions of the seller. In Mattson v. Rochester Silo, Inc., 397 N.W.2d 909 (Minn. Ct. App. 1986), the plaintiff farmer bought a concrete silo from the defendant where the contract included an express warranty *excluding* incidental and consequential damages. After a season, plaintiff complained to defendant of excessive spoilage. Two years after the sale, defendant coated the inside of plaintiff’s silo with a sealing material at no charge to the plaintiff. Id. at 915. The court found that by furnishing an item not ordered, defendant had

modified the provision that excluded liability for spoilage and consequential and incidental loss. Id.

IV. DEFENSES

This section deals with strategies used by the defense to remove or restrict liability depending upon the individual case. Preemption, a special defense that may apply particularly to medical devices, and other products that are subject to a high degree of federal regulation, is addressed in this section, but its application in medical device cases is detailed separately in Section V.

Early and thorough understanding of the facts of a case informs decisions about which defenses may be relevant. But these decisions must often be made on a tactical footing, before the facts are known. This is because some defenses, known as “affirmative defenses,” may be waived if not asserted during the pleading stage, and facts generally become known later, through the discovery process. Still, early fact gathering is important because the early assertion of defense supported by facts may dispose of a claim before the expenses of discovery grow.

A. Statutory Defenses Common to All Products Liability Cases

The applicability of the following two defenses, Statute of Limitations and Notice of Possible Claims, should be analyzed for every products liability suit. These defenses are statutory creations which require plaintiff to perform certain actions within a definite time frame.

1. Statute of Limitations

The first defense to look at is whether the action began within the statute of limitations. This time limit, created by statute, requires a plaintiff to bring an action within a certain period or else be barred from ever commencing suit. For example, under Minnesota law, a plaintiff must file suit for personal injuries on claims of negligence, fraud and misrepresentation within six years after the claim accrues. See Minn. Stat. § 541.05, subd. 1. Statutes of limitations extinguish rights to commence actions and create rights to claim that actions are time-based.

In products liability actions, “the legal theory, rather than the type of injury, dictates the limitation period.” See Mader v. Am. Motors Corp., 611 F. Supp. 877, 881 (D. Minn. 1985).

The court will dismiss claims when it lacks jurisdiction over the subject matter, or if the statute of limitation bars the claim. Strong v. Stryker Corp., 2010 U.S. Dist. LEXIS 126749 (D. Minn., Dec. 1, 2010) (denying defendants’

motion to dismiss plaintiff's complaint because they were not barred by the statute of limitations); Cf. Strong v. Stryker Corp., 2011 U.S. Dist. LEXIS 45341 (D. Minn., Apr. 26, 2011) (holding the Minnesota District Court did not have jurisdiction and transferred this case; the Michigan District Court held the plaintiff proved sufficient facts to meet Minnesota's Statute of Limitations) with Partridge v. Striker Corp., 2010 U.S. Dist. LEXIS 126749 (D. Minn., Dec. 1, 2010) (denying defendants' motion to dismiss plaintiff's complaint because they were not barred by Minnesota's statute of limitations).

a) Negligence Claims: Six Years

For claims based on negligence, the statute begins to run when a plaintiff has suffered some damage as a result of the alleged negligence. In Hildebrandt v. Allied Corp., 839 F.2d 396, 398 (8th Cir. 1987), the court held that a claim involving personal injuries caused by a defective product accrues when two elements are present: (1) A cognizable physical manifestation of the disease or injury, and (2) evidence of a causal connection between the injury or disease and the defendant's product, act or omission. Plaintiff then has six years to commence the action. See Minn. Stat. § 541.05, subd. 1; see also Tuttle v. Lorillard Tobacco Co., 377 F.3d 917 (8th Cir. 2004); Huggins v. Stryker Corp., Civil No. 09-1250 (JRT/JJK), 2013 WL 1191058 (D. Minn. Mar. 25, 2013); see Walsh v. Flint Grp. Inc., No. A13-1771, 2014 WL 3020941 (Minn. Ct. App. July 7, 2014) (the court of appeals affirmed the trial court's holding that the wrongful death claim arising out of the decedent's long-term exposure to benzene was time barred because the statute runs from the last exposure, not at the time when harm manifested).

b) Strict Liability Claims: Four Years

If plaintiff makes a claim based on strict liability arising out of the "manufacture, sale, use or consumption of a product," the action must commence within four years. Minn. Stat. § 541.05, subd. 2.

c) Warranty Claims: Four Years

When plaintiff's cause of action is based on a breach of warranty, then Minn. Stat. § 336.2-725 controls the statute of limitations. Under the statute, a party has four years to commence the action. The time limit may be reduced to not less than one year if the parties agree. A breach of warranty occurs, "when tender of delivery is made." Minn. Stat. § 336.2-725 (2). This is a substantial difference compared with the

accrual under a negligence cause of action. Here, the cause accrues when the product is purchased regardless of whether the plaintiff is aware of the defect.

In most situations, the breach will have occurred at the time of delivery. For a cause of action based on breach of warranty to exist after delivery, there must be an explicit warranty relating to future performance. Because the majority of contracts do not contain such language, the normal statute will begin running at the time of delivery. Further, a cause of action accrues when a breach of contract occurs, “regardless of the aggrieved party’s lack of knowledge of the breach.” Denson Int’l Ltd. v. Liberty Diversified Int’l, Inc., CIV. No. 12-3109 DSD/JSM, slip op. at 5 (D. Minn. July 9, 2014) (holding that breach of contract claim was untimely which warranted the court to grant summary judgment to the defendant in a business relationship dispute on antidumping tax regulation); see also Minn. Stat. § 336.2-725 (2). In Denson, the court also used the predominant purpose test to determine that the contract covered mainly goods rather than services and Minnesota’s UCC applies. Id. Thus, the limitation begins at the breach rather than the party’s knowledge of the breach.

The four year time limit may be increased or tolled if certain facts exist. The statute of limitations may extend longer than four years when (1) the defendant makes a representation of future action that will remedy the situation, (2) the plaintiff relies on that representation, and (3) the plaintiff will be harmed if estoppel is not invoked. Church of the Nativity of Our Lord v. WatPro, Inc., 491 N.W.2d 1, 6-7 (Minn. 1992) overruled on other grounds, Ly v. Nystrom, 615 N.W.2d 302 (Minn. 2000).

In Marvin Lumber & Cedar Co. v. PPG Indus., Inc., 223 F.3d 873 (8th Cir. 2000), the United States Court of Appeals for the Eighth Circuit considered a number of claims and whether they were controlled by the Uniform Commercial Code.

For many years, Marvin treated its wood products with Penta. In the 1970s, Marvin started to use a product called PILT. Marvin claimed that PILT did not meet its expectations in preventing wood rot and deterioration in Marvin’s wood doors and wood windows. It sued PPG Industries, the manufacturer of PILT. Id. at 875.

The decision thoroughly explores the Uniform Commercial Code and the law as it concerns fraudulent concealment and other issues. In part the decision states as follows:

The Uniform Commercial Code (UCC), adopted in Minnesota establishes that Article II, Contract Claims must be brought within four years of their accrual. Ordinary warranty claims generally accrue upon tender of delivery.

Id. at 876 (citations omitted).

There are two ways to get around the four year limitation statute. One is to prove fraudulent concealment of a breach or that the supplier of the goods expressly warranted the future performance of the goods. Id.

The Eighth Circuit concluded that there were fact questions as to the existence of a warranty for future performance and that there were fact questions as to whether Marvin's claims of that breach of the warranty were timely under the limitation statute. Id. at 881–82.

The Eighth Circuit then turned to the Economic Loss Doctrine. The Eighth Circuit dealt with the economic loss doctrine as it existed before the 1991 legislative changes. The Economic Loss Doctrine “precludes a commercial purchaser of a product from recovering economic damages through at least some tort actions against the manufacturer or seller of a product.” Id. at 882.

Given the Economic Loss Doctrine, the Eighth Circuit dismissed Marvin's negligence and strict liability claims. The question remaining was whether the intentional fraud and misrepresentation claims should also be dismissed. Id. at 884.

Ultimately, the Eighth Circuit found that Marvin's general fraud claim is redundant of its warranty claims and would not support an independent tort (for intentional misrepresentation or fraud) in light of the Economic Loss Doctrine. Hence, the Eighth Circuit held that “Such an independent fraudulent concealment claim will not lie where the fraudulent concealment relates to a promisor's duties under the contract.” Id. at 887.

In addition to the UCC claims and the tort claims, Marvin asserted claims under three different Minnesota statutes for unlawful trade practices and false advertising. Ultimately, the Eighth Circuit held that those statutes would not apply to a sophisticated merchant such as Marvin Windows. Id. at 887–88.

d) Wrongful Death Claims: Three Years

If plaintiff brings an action for wrongful death, the statute of limitations is dictated by Minn. Stat. § 573.02. The statute provides that actions for wrongful death must be commenced within three years after the date of death and no more than six years after the act or omission which allegedly caused the death. The statute also requires that all wrongful death actions may only be pursued by a duly appointed trustee. Thus, both the appointment of the trustee and the commencement of the wrongful death action must necessarily take place prior to the expiration of the statute's limitations period. Regie de l'assurance Auto. du Quebec v. Jensen, 399 N.W.2d 85 (Minn. 1987). Under the hierarchical statutory system, the wrongful death action statute takes precedent over the general statute of limitations based on negligence, strict liability or breach of warranty theories. The general rule is that the more specific statute controls. See Minn. Stat. § 645.26, subd. 1.

The statute of limitations for a wrongful death claim arising from an alleged product defect begins to run at the time the alleged wrongdoing occurred, not at that time when the decedent discovered or could have discovered his injury. Lamere v. St. Jude Medical, Inc., 827 N.W.2d 782, 787–88 (2013); Walsh v. Flint Grp. Inc., No. A13-1771, 2014 WL 3020941 (Minn. Ct. App. July 7, 2014) (the court of appeals affirmed the district court's holding that the wrongful death claim arising out of the decedent's long-term exposure to benzene was time barred from the last exposure, not at the time of harm was manifested).

e) Improvements to Real Property: Two Years

The last specific topic under the statute of limitations law deals with causes of action related to the improvements to real property. Minn. Stat. § 541.051 encompasses actions brought based on contract and tort where the action arose from defective or an unsafe condition to an improvement to real property. Under this statute, the action must be initiated within two years of discovery of the injury and no more than ten years after substantial completion of the construction. Id.; Bayside

Holdings, Ltd. V. Viracon, Inc., 709 F.3d 1225, 1228–29 (8th Cir. 2013).

First, to apply this statute, the court must determine what exactly constitutes an improvement to real property. The court has defined an improvement to real property as:

A permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.

Kloster-Madsen, Inc. v. Tafi's, Inc., 226 N.W.2d 603, 607 (Minn. 1975). The Supreme Court tries to follow a common sense approach in determining what is an improvement to real property. See Pac. Indem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548 (Minn. 1977), *superseded by statute as stated in* O'Brien v. U.O.P., Inc., 701 F. Supp. 714 (D. Minn. 1988). However, the Minnesota state appellate and federal courts' interpretations of what constitutes an improvement to real property for purposes of the application of this statute of limitations/statute of repose do not always appear to be consistent. For example, an overhead rail crane in a production building at a mining facility was found to be an improvement to real property. Sartori v. Harnischfeger Corp., 432 N.W.2d 448 (Minn. 1988). However, a steel tube mill in a metal tube manufacturing plant was found not to constitute an improvement to real property. Ritter v. Abbey-Etna Machine Co., 483 N.W.2d 91 (Minn. Ct. App. 1992). A generator at an electrical power plant was found to be an improvement to real property. Hartford Fire Ins. Co. v. Westinghouse Electric Corp., 450 N.W.2d 183 (Minn. Ct. App. 1990). But an electrical utility company's distribution equipment was found not to be an improvement to real property. Johnson v. Steele-Waseca Co-op. Electric, 469 N.W.2d 517 (Minn. Ct. App. 1991). Removable pipes covering a grain auger were found to constitute an improvement to real property. Farnham v. Nasby Agri-Systems, Inc., 437 N.W.2d 759 (Minn. Ct. App. 1989). A water slide designed to be removed for winter storage was found not to constitute an improvement to real property. Massie v. City of Duluth, 425 N.W.2d 858 (Minn. Ct. App. 1988).

The following are additional examples of items found to be improvements to real property:

Printing press (Am. Spirit Graphics Corp. v. Toshiba Mach. Co., Ltd., 27 F.3d 353 (8th Cir. 1994));

Pipeline for wastewater treatment system (W. Lake Superior Sanitary Dist. v. Orfei & Sons, Inc., 463 N.W.2d 781 (Minn. Ct. App. 1990));

Above-ground, backyard swimming pool (Kline v. Doughboy Recreational Mfg. Co. a Div. of Hoffinger Industries, Inc., 495 N.W.2d 435 (Minn. Ct. App. 1993));

Garage door opener (Henry v. Raynor Mfg. Co., 753 F. Supp. 278 (D. Minn. 1990));

A smoke detector (Patton v. Yarrington, 472 N.W.2d 157 (Minn. Ct. App. 1991)); and

Septic system (Sundae v. Kulhanek, No. A11-2250, 2012 WL 5476122 (Minn. Ct. App. Nov. 13, 2012)).

In 1990, the Minnesota Legislature amended Minn. Stat. § 541.051 to exclude the manufacturer or supplier of any “equipment or machinery installed upon real property.” The goal here was to return the statute to its original intent which was to eliminate suits against architects, designers and contractors. See Sartori v. Harnischfeger Corp., 432 N.W.2d 448 (Minn. 1988).

As a final note, the Middleman Statute, Minn. Stat. § 544.41, limits the liability of non-manufacturers, contains language affecting the statute of limitations.

2. Notice of Claim

a) General Claims

For claims of damage arising out of personal injury, death or property damage based on the manufacture, sale, use or consumption of a product, plaintiff's attorney must give notice of the relief sought within six months of entering into the attorney/client relationship. Minn. Stat. § 604.04, subd. 1. (see Appendix 1). This notice must be given to all likely defendants. Id. Note that the plaintiff is not responsible for

tracking down every party in the chain of distribution. Church of the Nativity of Our Lord v. WatPro, Inc., 491 N.W.2d 1, 6 (Minn. 1992); overruled by Ly v. Nystrom, 615 N.W.2d 302 (Minn. 2000). Those defendants receiving notice must advise plaintiff of the identity of others in the chain. Violation of this statute, by either side, may result in a recovery of damages and attorneys' fees. Minn. Stat. § 604.04, subd. 3. Smother v. Ins. Restoration Specialist, Inc., No. A04-1036, 2005 WL 624511 (Minn. Ct. App. March 17, 2005).

b) Breach of Warranty Claims

Similarly, in order to assert a claim for breach of warranty, a plaintiff must notify the seller of the breach within a reasonable time after the breach is, or should have been, discovered. Minn. Stat. § 336.2-607 (3). While notice within two months of delivery may be reasonable, notice six months after discovery of the defect is not. See Stewart v. B.R. Menzel & Co., 232 N.W. 522 (Minn. 1930), Willmar Cookie Co. v. Pippen Pecan Co., 357 N.W.2d 111 (Minn. Ct. App. 1984). Further, note that oral notification is sufficient to satisfy the statute. Church of the Nativity of Our Lord v. WatPro, Inc., 491 N.W.2d 1, 6 (Minn. 1992); overruled by Ly v. Nystrom, 615 N.W.2d 302 (Minn. 2000). Unlike the notice requirement for product liability claims, violation of Minn. Stat. § 336.2-607 (3) bars a buyer from any remedies.

3. Conflict-of-Laws Issues

a) Statutes of Limitations Periods: Procedural or Substantive?

Traditionally, when faced with conflicting statutes of limitations laws between Minnesota and other states, Minnesota courts have held that statute of limitations issues are procedural in nature, and therefore apply the law of the forum state. See In re Daniel's Estate, 294 N.W. 465 (Minn. 1940); Am. Mut. Liab. Ins. Co. v. Reed Cleaners, 122 N.W.2d 178 (Minn. 1963); United States Leasing Co. v. Biba Info. Processing Servs., Inc., 436 N.W.2d 823 (Minn. Ct. App. 1989); and Glover v. Merck & Co., Inc., 345 F. Supp.2d 994, (D. Minn. 2004) (holding that statutes of limitations issues are procedural).

However, there are some exceptions to the foregoing traditional view that statutes of limitations issues are procedural. A limitation period is substantive when it applies to a right created by statute, as opposed to a right recognized at common law. Fredin v. Sharp, 176 F.R.D. 304, 308-09 (D.Minn.1997) (citing In re Daniel's Estate, 294 N.W. at 470

(Minn. 1940)). Where the limitation period is from the statute creating the right, the limitation period is a condition of the right rather than an actual statute of limitations. Id.

The aforementioned traditional approach has not existed without some ambiguity, however. Since 1974, there has been a trend within Minnesota courts to treat statute of limitations issues, within the conflict of laws context, as substantive, and therefore evaluate those issues according to the “choice-influencing consideration” approach. See Myers v. Gov't Employees Ins. Co., 225 N.W.2d 238, 241 (1974) (applying the choice-influencing approach to evaluating the statute of limitations conflicts of laws); Davis v. Furlong, 328 N.W.2d 150, 153 (Minn.1983) (holding statute of limitations issues are procedural, but referencing Myers in a footnote); and Danielson v. Nat'l. Supply Co., 670 N.W.2d 1 (Minn. Ct. App. 2003) (treating statute of limitations conflict as substantive and therefore analyzing under the “choice-influencing consideration” approach).

This modern trend to view limitation periods as substantive, and therefore analyzing the conflict of laws issue with the “choice-influencing consideration” approach, has most recently been articulated by the Minnesota Court of Appeals in Danielson v. Nat'l. Supply Co., 670 N.W.2d 1 (Minn. Ct. App. 2003).

b) Danielson v. Nat'l. Supply Co., 670 N.W.2d 1 (Minn. Ct. App. 2003).

In Danielson, the Court of Appeals departed from the traditional Minnesota courts' decisions that statute of limitations issues, in a choice-of-laws context, are procedural and therefore the law of the forum state applies. Utilizing a “choice-influencing consideration” approach, the Court reversed and remanded the lower court's ruling, and held that Minnesota's statute of limitations should be applied to Danielson's claim, and was therefore not barred under the statute of limitations laws in Texas and Arizona. Further, the Court held that the district court abused its discretion by dismissing Danielson's claim on the grounds of *forum non conveniens*.

Danielson was a Minnesota resident that purchased a step ladder in Texas, and was injured when he fell off the same in Arizona on February 13, 2000. Danielson commenced the subject action on February 13, 2002. Danielson v. Nat'l Supply Co., 670 N.W.2d 1, 4 (Minn. Ct. App. 2003).

Regarding Danielson's cause of action, the statutes of limitations were two years in Texas and Arizona. The statutes of limitations had run in both of those states by the time Danielson commenced his lawsuit. For negligence actions in Minnesota, however, the statute of limitations was six years. Id. Danielson's claim was timely commenced under Minnesota law. Clearly, there was a conflict of the statute of limitations law in the forum state, Minnesota, and the states of Texas and Arizona.

Recognizing the tradition and holdings in In re Daniel's Estate, 294 N.W. 465 (Minn. 1940); Am. Mut. Liab. Ins. Co. v. Reed Cleaners, 122 N.W.2d 178 (Minn. 1963); and United States Leasing Co. v. Biba Info. Processing Servs., Inc., 436 N.W.2d 823 (Minn. Ct. App. 1989) (all holding that statutes of limitations issues are procedural), the Court analyzed the subject statutes of limitations conflict-of-laws under the more modern, "choice-influencing-consideration" approach.

The "choice-influencing-consideration" approach begins by analyzing the following five, choice-influencing considerations: (1) predictability of result, (2) maintenance of interstate order, (3) simplification of judicial task, (4) advancement of the forum's governmental interests, and (5) application of the better rule of law. Under this analysis, the Court determined that Minnesota's six-year statute of limitations should apply because of the factors of advancement of Minnesota's governmental interests and the Court's interpretation that the rule of law was better in Minnesota than Texas and Arizona. Id. at 8–9. The Court declined to evaluate the conflict of statutes of limitations laws in the case by the traditional view that statute of limitations conflicts are procedural, and therefore the law of the forum state automatically applies.

Finally, the Court also ruled that Minnesota was a convenient/appropriate forum. Id. at 9–10. It stated, "There is no ideal forum. Minnesota has a legitimate tie to this case (*Danielson is a Minnesota resident*), and it was an abuse of discretion for the district court to dismiss Danielson's claim on the ground of *forum non conveniens*." Id. at 10 (emphasis added).

B. Product Identification

It is a fundamental principle of products liability law that the plaintiff must prove that the defendant made the product which caused the injury. Bixler by Bixler v. Avondale

Mills, 405 N.W.2d 428 (Minn. Ct. App. 1987). Therefore, it is an absolute defense to the action if plaintiff fails to positively identify the defendant manufacturer as the producer of the product.

The case of Ruiz v. Whirlpool, Inc., 12 F.3d 510, 515 (5th Cir. 1994), makes the importance of product identification plain. The plaintiffs in Ruiz brought a products liability suit alleging that a defective component in a heating and air-conditioning system started a fire and damaged their home. Id. at 512. The plaintiffs sued Whirlpool and other defendants. Whirlpool and Inter-City, another alleged manufacturer of a system component, successfully moved for summary judgment on plaintiff's failure to prove product identification. Id. That determination was upheld on appeal.

The summary judgment evidence revealed that Inter-City had manufactured some but not all of the Ruiz heating and air-conditioning components. Id. at 513. Experts from Inter-City testified about several design differences between the various Ruiz system components and those Inter-City produces. The court held that this was sufficient to satisfy Inter-City's burden to show an absence of proof on an essential element of the claim. Id. The burden then shifted to the plaintiffs to demonstrate by specific facts that Inter-City built the electric heater, which they could not prove. Id. Moreover, the plaintiff's own experts could only agree that one of two products caused the fire, only one of which was manufactured by Inter-City. Id. at 514. The court then held that there was insufficient evidence to support a rationale non-speculative finding of the cause of the fire. Id.

Finally, as to the plaintiffs' case against Whirlpool, the court again held that Whirlpool had submitted sufficient evidence to demonstrate that it did not manufacture any of the allegedly defective components. Id. at 515. The plaintiff then failed to provide specific facts, as required by Fed.R.Civ.P. 56(e), that Whirlpool manufactured any part of the Ruiz's system. Id.

For other product identification cases, please see the following unpublished decisions:

Roufs v. AG Systems, Inc., No. C0-97-1478, 1998 WL 171438 (Minn. Ct. App. Apr. 4, 1998); Hinze v. Mae Roland, Inc., No. C2-97-1496, 1998 WL 51466 (Minn. Ct. App. Feb. 10, 1998).

C. Market Share, Enterprise and Alternative Liability Theories

The most frequent issue encountered under the product identification defense is when a plaintiff knows that two or more manufacturers make the product but is unable to pinpoint which is the actual manufacturer. In Bixler by Bixler v. Avondale Mills, 405 N.W.2d 428 (Minn. Ct. App. 1987), the plaintiff was severely burned when his

homemade cotton flannel nightshirt ignited. The plaintiff however could not identify which of four textile mills actually manufactured the fabric. Plaintiff unsuccessfully asked the court to recognize and apply the theory of alternative liability. This theory now embodied in the Restatement of Torts states:

Where the conduct of two or more actors is tortuous, and it is proved that harm has been caused to the plaintiff by only one of them but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.

Restatement (Second) of Torts, § 433 B (3) (1965).

The common rebuttal to this theory is that it is unfair to shift the burden which is normally held by the plaintiffs to the defendants to establish their own innocence. Minnesota rejected this theory of alternative liability. Bixler, 405 N.W.2d at 432. In addition, in Souder v. Owens-Corning Fiberglas Corp., 939 F.2d 647, 650 (8th Cir. 1991), the Court of Appeals for the Eighth Circuit held that the doctrine of alternative liability was not available under Minnesota law for an asbestos wrongful death claim. It is possible that the Minnesota courts would recognize a claim under a market share, enterprise, or alternative theory of liability, if the product in question was uniform and intrinsically defective no matter who manufactured it, such as the case with the drug, DES.

D. Subcomponent Manufacturer

This defense, like product identification, requires the identification of what component part of a machine failed and resulted in injury. Furthermore, the plaintiff has to establish that the component part was defective at the time of sale. In re Temporomandibular Joint (TMJ) Implant Products Litigation, 97 F.3d 1050 (8th Cir. 1996). The Minnesota court addressed this issue in Westerberg v. School Dist. No. 792, Todd County, 276 Minn. 1, 148 N.W.2d 312 (Minn. 1967):

If a chattel is sold that is free from defects in manufacture and design and is not dangerous if used as intended, the manufacturer is not liable for results caused by improper use of the chattel or changes made in its construction without the manufacturer's knowledge which makes it dangerous. Nor is there any duty to warn of non-existing dangers, or dangers that are obvious to anyone. If the chattel is safe when sold, a manufacturer is not required to anticipate or foresee that a user will alter its condition so as to make it dangerous, or that he will continue to use it after it becomes dangerous due to alterations in safety devices intended to protect the user from harm.

The subcomponent manufacturer is under no duty to investigate what the ultimate use is or foresee all possible applications of the product. See Childress v. Gresen Mfg. Co., 888 F.2d 45, 49 (6th Cir. 1989) (Under Michigan law component part supplier has no duty to analyze design of completed machine incorporating supplier's non-defective part); Sperry v. Bauermeister, Inc., 4 F.3d 596, 598 (8th Cir. 1993) (Under Missouri law suppliers of non-defective component parts are not responsible for accidents that result when parts are integrated into a larger system that the component part supplier did not design or build). Therefore, it is established law in Minnesota that a manufacturer who merely supplies a component part subsequently assembled by another in a manner creating a dangerous condition is not liable to one injured by the product. Hauenstein v. Loctite Corp., 347 N.W.2d 272 (Minn. 1984).

One common issue that arises when this defense is utilized is whether the product that caused the harm is really a component part. In the Westerberg case, the plaintiff was injured in an accident involving a mechanical power press. The court was looking for evidence that the punch press which caused the injury was really part of a larger system thus within the meaning of component part. Westerberg, 148 N.W.2d at 359. Therefore, affidavits or technical drawings regarding the characteristics of the specific system are needed to prove that a component part is involved in order to remove liability.

E. Comparative Fault

The comparative fault defense is a means to reduce defendant's liability by showing plaintiff's unreasonable conduct contributed to the harm or injury. This defense is applicable against plaintiff's claims of negligence and strict liability. Under the comparative fault principle, plaintiff's recovery is reduced in proportion to the degree of negligence attributable to the plaintiff. Minn. Stat. § 604.01, subd. 1 states:

Contributory fault shall not bar recovery in an action by any person or the person's legal representative to recover damages for fault resulting in death, an injury to person or property, or an economic loss, if the contributory fault was not greater than the fault of the person against whom recovery is sought, but any damages allowed must be diminished in proportion to the amount of fault attributable to the person recovering.

This contributory fault statute means that if plaintiff and defendant are each found 50% at fault, plaintiff will still recover.

It is up to the jury to determine the percentages of fault for the plaintiff and the defendant. Fault is defined by Minn. Stat. § 604.01, subd. 1a (1996), as:

Acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of the risk not constituting an express consent or primary assumption of the risk, misuse of a product and unreasonable failure to avoid injury or to mitigate damages, and defense of complicity under section 340A.801. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault. The doctrine of last clear chance is abolished.

Evidence of unreasonable failure to avoid aggravating an injury or to mitigate damages may be considered only in determining the damages to which the claimant is entitled. It may not be considered in determining the cause of an accident.

The Supreme Court has created one exception to the rule applying comparative fault against plaintiffs in strict liability actions where the only negligence of the plaintiff was failure to inspect the product or to guard against any defect. See Busch v. Busch Const., Inc., 262 N.W.2d 377, 393-94 (Minn. 1977). The court went on to state however that, "[A]ll other types of consumer negligence, misuse, or assumption of the risk must be compared with the defendant's strict liability under the statute." Id. The basis for this exception is that a manufacturer has a duty to provide a safe product to the consumer. See Omnetics, Inc. v. Radiant Tech. Corp., 440 N.W.2d 177, 182 (Minn. Ct. App. 1989). Therefore, while a consumer always has a duty to exercise reasonable care in the use of a product, he does not have a duty to inspect it.

The next subsections will address theories which the defense may argue which affect the percentage of plaintiff's fault.

1. Misuse

This defense concerns misuse of a product by the plaintiff or by any party other than the defendant manufacturer or seller as a defense to a products liability action. Issues to consider include what conduct constitutes misuse and the effect of such misuse.

Evidence of misuse may be used to defeat plaintiff's claim under two theories. First, misuse may be used to argue that a plaintiff's injury was caused not by the product but by the acts of the plaintiff. Establishing lack of proximate cause will defeat plaintiff's claim.

In Magnuson, the plaintiff, a mechanic, removed the cover from a spark plug on his snowmobile. Magnuson v. Rupp Mfg. Inc., 171 N.W.2d 201 (Minn.

1969). Later he had an accident and his knee smashed into the protruding spark plug. A manufacturer or supplier is liable only for the defects existing at the time the product leaves the control of the manufacturer or supplier. The court found that an element of liability involved plaintiff proving that the injury was not caused by any voluntary, unusual or abnormal handling by the plaintiff. Here, plaintiff misused the product by removing the spark plug cover thus relieving defendant from strict liability. Id. at 208.

Second, mishandling by a consumer may also be a factor in determining plaintiff's fault. See Magnuson v. Rupp Mfg. Inc., 171 N.W.2d 201 (Minn. 1969). In Balder v. Haley, 390 N.W.2d 855 (Minn. Ct. App. 1986) rev'd on other grounds Balder v. Haley, 399 N.W.2d 77 (Minn. 1987), the court addressed misuse as factor in determining whether the "defect" posed an identified "unreasonable risk", an essential element of any product's liability action. Here, plaintiff was injured when a water heater he was attempting to repair exploded. The consumer used dental wax to seal a leak, a ball point pen spring to replace a reset spring, and adhesive blocked the shutoff valve. Id. at 863.

The court found that mishandling by the consumer was relevant to the issue of causation. Id. at 862. It determined that evidence of misuse may be used to negate the argument that plaintiff's injury was foreseeable to the seller or manufacturer. For a discussion regarding unreasonable and foreseeable risks determining a manufacturer's or supplier's duty, see Magnuson v. Rupp Mfg. Inc., 171 N.W.2d at 207-08.

Misuse also plays a part as a defense in failure to warn cases, as evidence of unforeseeable behavior. Generally, a manufacturer has a duty to warn the consumer of the dangers of any foreseeable use or misuse of the product. The standard for making the determination as to whether a duty to warn exists are as follows:

The court goes to the event causing the damage and looks back to the alleged negligent act. If the connection is too remote to impose liability as a matter of public policy, the court's then hold there is no duty, and consequently no liability. On the other hand, if the consequence is direct and is the type of occurrence that was or should have been reasonably foreseeable, the courts then hold as a matter of law a duty exists.

Germann v. F. L. Smithe Mach. Co., 395 N.W.2d 922, 924 (Minn. 1986). If the court determines the misuse in question is unforeseeable, then the failure to warn claim is defeated.

2. **Useful Life of the Product**

The Minnesota Legislature enacted Minn. Stat. § 604.03 based on their concern that products liability actions were expanding, and they, therefore, intended to limit the open-ended liability for aging products. The jury instruction for this defense states as follows:

USEFUL LIFE

Definition of “useful life”

The fact that the product may have outlived its useful life should be considered along with all the other evidence in deciding fault.

The “useful life” of a product is not how long it lasts but how long it is reasonably safe for use.

Deciding useful life

Decide the useful life of this product by considering the experience of users of similar products, taking into account:

1. Normal wear and tear
2. Deterioration from natural causes
3. The progress of the art, economic changes, inventions, and developments within the industry
4. The climate and other local conditions peculiar to the user
5. The policy of the user and similar users on repairs, renewals, and replacements
6. The useful life, stated by the designer, manufacturer, distributor, or seller in brochures or pamphlets provided with the product or in a notice attached to the product
7. Any modification of the product by the user.

CIVJIG 75.55.

The leading Minnesota case, Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d 826 (Minn. 1988), involved an accident where an employee was

injured when a truck tire rim assembly exploded. The rim which injured the plaintiff was manufactured in 1955, 26 years before the accident. Id. at 829. After 1955, Goodyear became aware of the danger of this multi-piece rim assembly. By the 1970s, Goodyear was making an attempt to warn users of the danger associated with the repair of this model rim. Id.

The court determined that the expiration of a product's useful life, under the statute, is only a factor to be weighed by the jury in determining the fault of the manufacturer and the fault of the user. Id. at 832. Essentially, the statute has become a part of comparative fault. The court stated, "the statute emphasizes to the trier of fact the importance, in determining comparative liability, of considering whether the product has outlived its useful life." Id.

3. Assumption of the Risk

Assumption of the risk encompasses two theories of relief. In 1971, the Minnesota Supreme Court recognized both primary and secondary assumption of risk. Armstrong v. Mailand, 284 N.W.2d 343 (Minn. 1979). The distinction between the two lies with whether the plaintiff knew of the specific risk, yet still chose to proceed. Despite the enactment of the Comparative Fault Act, Minn. Stat. § 604.01, the doctrine of assumption of risk is still applicable in Minnesota.

a) Secondary Assumption

Secondary assumption of the risk is an affirmative defense to an established breach of duty whereby the plaintiff voluntarily encounters a known and appreciated hazard created by the defendant. Wagner v. Thomas J. Obert Enters., 396 N.W.2d 223, 226 (Minn. 1986) (citing Olson v. Hansen, 216 N.W.2d 124, 127 (Minn. 1974)). The question of plaintiff's contributory negligence thus involves plaintiff's general knowledge and appreciation of the danger created by defendant's negligence. Schneider ex rel. Schneider v. Erickson, 654 N.W.2d 144 (Minn. Ct. App. 2002). Secondary assumption of the risk is a jury issue under the broad definition of fault defined in Minn. Stat. § 604.01, subd. 1a.

b) Primary Assumption

Primary assumption of the risk bars recovery. It indicates that defendant did not owe the plaintiff any duty of care and therefore prevents a finding of negligence. Armstrong v. Mailand, 284 N.W.2d

at 348. Thus, primary assumption of the risk is a defense which preempts the comparative fault issue.

To establish this bar to recovery the court must find (1) that plaintiff had knowledge of the risk, (2) an appreciation of the risk, and (3) a choice to avoid the risk but voluntarily chose to chance the risk. Andren v. White-Rodgers Co., a Div. of Emerson Electric Co., 465 N.W.2d 102, 104 (Minn. Ct. App. 1991).

This principle of no duty applies to only a small segment of cases. In Minnesota, the courts have rarely applied primary assumption of the risk. In Goodwin v. Legionville School Safety Patrol Training Center, Inc., 422 N.W.2d 46 (Minn. Ct. App. 1988), the plaintiff was a volunteer roofer who understood the danger and risks of working on a roof before she fell. In Andren v. White-Rodgers Co., 465 N.W.2d 102 (Minn. Ct. App. 1991), a plaintiff who knew specifically not to light a match when he smelled LP gas, voluntarily undertook the risk by absent-mindedly lighting a cigarette after smelling the gas. Id. at 104.

The classic example of a plaintiff assuming the primary risk involves athletics. When a plaintiff decides to ice skate at a rink some risk of injury is present. The rink management still maintains the duty to safely supervise and maintain the premises in a safe condition. Wagner v. Thomas J. Obert Enters., 396 N.W.2d 223, 226 (Minn. 1986). When the facts are disputed, the jury must decide whether primary or secondary risk applies. Id.

In Walk v. Starkey Machinery, Inc., 180 F.3d 937 (8th Cir. 1999), the United States Court of Appeals for the Eighth Circuit affirmed, with a vigorous dissent, the dismissal of a products liability action based on the claimant's primary assumption of the risk.

In Walk, the claimant was working as a mixer that mixes various types of clay. At the end of each day, the trough was cleaned and excess clay is removed. In order to clean the mixer, Walk would disengage the auger, remove its protective cover, use a scrapper to push excess clay toward a vacuum, would then engage the auger and scrap the residual clay from the auger blades. While cleaning the trough, Walk's hand became entangled in the auger. As a result, his arm needed to be amputated. The Eighth Circuit noted that the sole issue was the trial court's application of the Doctrine of Primary

Assumption of the Risk. As to the rule of law concerning primary assumption of the risk, the Eighth Circuit stated as follows:

Primary assumption of the risk applies when a plaintiff manifests his or her acceptance of the risk and his or her consent to undertake the lookout for himself and relieve the defendant of the duty [Citations omitted]. The doctrine is applicable to inherently risky activities [Citations omitted]. Thus, the classes of cases involving an implied primary assumption of the risk are not many [Citations omitted]. The elements of primary assumption of the risk that the plaintiff 1) knew the risks; 2) appreciated the risk; and 3) voluntarily chose to accept that risk, even though he or she had a choice to avoid it. Walk, 180 F.3d at 939.

In Walk, the plaintiff was experienced. He worked for 10 years in clay production. He watched his co-workers and supervisors use the same cleaning method. He knew the method was dangerous. He was told the method of cleaning was dangerous. He believed the trough could be adequately cleaned with the auger disengaged. Walk further knew the auger was running and that the auger was capable of injuring him. With all of this knowledge and experience, the Eighth Circuit affirmed the district court's decision that Walk assumed the risk.

4. Open and Obvious Dangers

Under this theory, defendant argues that a buyer or user of a product has a duty to discover a defect in the product that should have been discovered by reasonable diligence. When a seller proves that the claimant, while using a product, was injured by a defective condition that would have been obvious to an ordinary reasonable prudent person, the claimant's damages are subject to reduction.

While obviousness is a not a total bar to recovery, it may be considered in determining whether plaintiff acted with reasonable care such that was required under the circumstances. See Holm v. Sponco Mfg., Inc., 324 N.W.2d 207, 212 (Minn. 1982). What constitutes reasonable care will vary with the surrounding circumstances and involve a "balancing of the likelihood of harm, and the gravity of harm if it happens, against the burden of the precaution which would be effective to avoid the harm." Id. (citations

omitted). The goal of the court was to offer manufacturers some relief from open and obvious defects while still discouraging manufacturers from consciously adding open and obvious defects to remove themselves from liability. Thus, the open and obvious danger defense is a balancing test.

The court in Holm laid out the seven factors which are used in balancing the risk and utility of the product: 1) the usefulness and desirability of the product, 2) the availability of other and safer products to meet the same need, 3) the likelihood of injury and its probable seriousness, 4) the obviousness of the danger, 5) common knowledge and normal public expectations of the danger (particularly for established products), 6) the avoidability of the injury by care and use of the product (including the effect of instructions or warnings), and 7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive. Id. at 212.

The reasonable care balancing test is therefore applied under a theory of comparative fault. A defendant would make arguments based on the seven factors listed above as proof that plaintiff should share in the liability of the accident.

5. Employer – Employee Relationship

Employer – Duty to use Reasonable Care to Provide a Safe Place to Work
Employer’s duty: an employer has a duty to use reasonable care to provide a safe place to work for its employees. [An employer cannot transfer its duty to use reasonable care to provide a safe place to work to third parties.]

CIVJIG 55.31; Berg v. Johnson, 252 Minn. 397, 401, 90 N.W.2d 918, 921 (1958).

a) Failure to Maintain

If the creation of a hazardous condition due to alteration of or failure to maintain safety devices is not foreseeable as a matter of law, then there is no duty to warn or instruct. Germann v. F.L. Smithe Mach. Co., 381 N.W.2d 503, 508 (Minn. Ct. App. 1986) aff’d, 395 N.W.2d 922 (Minn. 1986) (the Minnesota Court of Appeals affirmed the trial court’s decision of the manufacturer’s failure to properly maintain safety devices of using a press because it was foreseeable that employee would sustain an injury).

F. Modification or Alteration

A manufacturer or seller may be exonerated from liability when the product is altered or modified after leaving their hands. Modification/alteration is a defense to claims based on negligence, strict liability or warranty. Specifically, the alteration or modification must take place after the product has left defendant's control, but prior to plaintiff's injury. A manufacturer or seller may be relieved of liability where plaintiff's damages are proximately caused by modification or alteration of the product. Am. Law Prod. Liab. 3d., §1.91 (1987).

Under the Restatement, a plaintiff claiming strict liability must show not only a defect causing injury, but also that the product:

Is expected to and does reach the user or consumer without substantial change in the condition in which it was sold.

See Restatement (Second) of Torts § 402A (1966). The key words here are "substantial change." The burden is on the plaintiff to prove that the product arrived without substantial change in the condition in which it was originally sold. Rients v. International Harvester Co., 346 N.W.2d 359 (Minn. Ct. App. 1984).

In Unterburger v. Snow Co., Inc., 630 F.2d 599, (8th Cir. 1980), plaintiff was injured when his left arm became entangled in the main drive shaft of a grain auger manufactured by defendant. The court found that plaintiff's removal of a guard shielding the pulley and drive belt mechanism was not evidence sufficient enough to raise the issue of substantial change. Defendant failed to present evidence that plaintiff's arm became entangled in any of the mechanisms where the shields had been removed. The court denied giving any jury instruction based on modification because the change involved did not cause the accident. But see Hyjek v. Anthony Indus., 133 Wash. 2d 414, 944 P.2d 1036 (1997); Burke v. Deere & Co., 6 F.3d 497 (8th Cir. 1993).

As for breach of warranty and negligence claims, this theory may serve as a defense to either by attacking proximate causation, as an intervening cause, or by attacking the elements of fault (See Misuse, *supra*).

G. Recalls and Retrofits

It is unclear whether a manufacturer has a post-sale duty to remedy a condition that after manufacture is discovered to be unsafe. In Hodder v. Goodyear Tire & Rubber Company, 426 N.W.2d 826 (Minn. 1988), the Minnesota Supreme Court recognized a post-sale duty to warn based on the manufacturer's knowledge that the product was dangerous, that the manufacturer continued in the same line of business after gaining

that knowledge, continued to advertise the product and undertook a duty to warn concerning the product's dangers. Theoretically, a plaintiff could use the same argument to advance a post-sale duty to recall/retrofit. However, as stated above, the Minnesota courts have not recognized such a duty.

Letters of recall do play a part in products liability law in two other ways. First, letters of recall may influence the period of the statute of limitations (See **Statute of Limitations**, *supra*). In Bressler v. Graco Children's Products, Inc., 43 F.3d 379 (8th Cir. 1994), the court found that the parents may not have been aware that the death of their baby was product related until they received the recall letter. Thus, accrual of the action was not tolled until the parents were warned of the product's dangers. *Id.*

Secondly, letters of recall may be entered into evidence to show defects based on certain fact situations. Generally, there are three arguments to exclude recall letters. First, based on a public policy argument that the manufacturers would be discouraged from their post-sale duties if their recall letters would be admitted. This is the same argument used to limit admissible evidence under the theory of subsequent remedial measures. Secondly, letters of recall are not always probative of the case. This means that a letter of recall dealing with the suspension system of a car for example would not be probative if the accident involved was a head-on collision. Third, letters of recall are not admissible to show that the defect stated in the recall existed at the time of the accident in the car in question.

Letters of recall are admissible if they are required by federal law such as 15 U.S.C.S. § 1412. They are also admissible if the defendant can show that the accident was caused by the failure stated in the recall letter. For a discussion of recall evidence, see Pesce v. General Motors Corp., 939 F. Supp. 160 (N.D.N.Y. 1996) (recall letter admitted into evidence after appropriate foundation supplied in defective seat belt case).

H. Subsequent Remedial Measures

The general rule of law in Minnesota is that evidence of subsequent remedial measures are not admissible at trial to prove previous neglect of a duty. This is an evidentiary exclusion rule rather than a true defense but exclusion of such evidence may limit liability. Myers v. Hearth Technologies, Inc., 621 N.W.2d 787 (Minn. Ct. App. 2001), rev. denied March 13, 2001.

Like most general legal rules, however, there is an exception. Minnesota Rules of Evidence, Rule 407 states:

When after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the

subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence which subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures if controverted, or impeachment.

There are two strong public policy reasons for the general rule. First, is to encourage manufacturers to pursue actions to correct perceived design flaws without fear that the corrections will be used by plaintiffs to raise the inference that the manufacturer has admitted the product's defect by altering the product. See Kallio v. Ford Motor Co., 407 N.W.2d 92, 98 (Minn. 1987).

The second policy reason is that many times a remedial measure or change does not go to the negligence but is simply an evolutionary design change in a product. For this reason, the court must also apply Minnesota Rules of Evidence Rule 403 which states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by consideration of undue delay, waste of time or needless presentation of cumulative evidence.

Thus, even evidence that fits within the exceptions listed in Minnesota Rule 407, evidence of subsequent remedial measures still must outweigh the danger of unfair prejudice or the chance of misleading the jury.

In Kallio, a truck owner brought a strict products liability action against the manufacturer, alleging a defect in the automatic transmission. The Supreme Court held that evidence of subsequent remedial actions taken by manufacturers in design defect cases is inadmissible only if the manufacturer concedes that, at the time of the manufacture of the product alleged to be defective, an alternative design was feasible. Id. at 98. The court further stated that:

Unless the concession is made by the manufacturer, the evidence normally will be admissible, but even then it is admissible only for the limited purpose of showing feasibility at the time of manufacture, and then only if a limiting instruction to that effect is given by the court.

Id.

The result of this case is that the manufacturer is forced to make a concession that the subsequent alternative design was feasible. On the other hand, should a manufacturer decide not to make such a concession, the evidence of subsequent remedial measures

may be introduced if that evidence withstands the Rule 403 balancing test. While the Kallio decision requires the judge to give an instruction to the jury considering the use of the subsequent remedial evidence, the outcome is almost as bad as a concession to begin with. The resulting jury instruction sends the jury into deliberation with evidence that the manufacturer could change the design.

Recently, in Ford Motor Co. v. Nuckolls, 894 S.W.2d 897 (Ark. 1995), the Arkansas Supreme Court held that in a products liability action, evidence of activities that may commonly be considered "subsequent remedial measures" was not a "subsequent remedial measure" because the measure was taken by a third party and not the defendant manufacturer. The court continued to recognize that such actions, if taken by the defendant, would be excludable under Rule 407 of the Arkansas Rules of Evidence. See also Myers v. Hearth Techs, Inc., f/k/a Heatilator, Inc., (Minn. Ct. App. 2001).

I. Middleman Statute and Seller Liability: Strict Liability Avoidance

The Middleman Statute, Minn. Stat. § 544.41, is a statutory means to remove a non-manufacturing defendant from a products liability action.

When a products liability action based, in whole, or in part, on a strict liability claim is filed against a non-manufacturing defendant, the non-manufacturing defendant may file an affidavit certifying the correct identity of the manufacturer of the product allegedly causing injury, death or damage. Minn. Stat. § 544.41, subd. 1. (See Appendix 2). Following the filing of a complaint against the manufacturer by the plaintiff, the court shall order dismissal of strict liability claims against the certifying defendant. Minn. Stat. § 544.41, subd. 2.

Exceptions to the dismissal order occur when the plaintiff can show one of the following:

- (1) That the defendant has exercised some significant control over the design or manufacturer of the product or has provided instructions or warnings to the manufacturer relative to the alleged defect in the product which caused the injury, death or damage;
- (2) That the defendant had actual knowledge of the defect in the product which caused the injury, death or damage; or
- (3) That the defendant created the defect in the product which caused the injury, death or damage.

Minn. Stat. § 544.41, subd. 3. In essence, Minn. Stat. § 544.41, subd. 3, requires the non-passive middleman to remain in the case. The court denied liability when the plaintiff was unable to show that defendant seller exercised significant control over design, had knowledge of the defect, or modified the machine. Gorath v. Rockwell Intern., Inc., 441 N.W.2d 128 (Minn. Ct. App. 1989). Note, however, that a middleman will not be liable if his modification does not create the defect which caused injury. Schweich v. Ziegler Inc., 463 N.W.2d 722 (Minn. 1990).

A defendant, even if he is legitimately a non-manufacturing middleman, is not protected by the Middleman Statute if the manufacturer is not subject to the court's jurisdiction. Tousignant v. Kanan Enters., Inc., Civ. No. 09-919 (MJD/JSM), 2011 WL 1868842, at *17 (D. Minn. May 16, 2011). In Tousignant, the middleman satisfied all the requirements of the statute, but because the manufacturer was bankrupt, the court held that the middleman could not be released from the suit. Id. at 16-17.

Even if the application of Middleman Statute results in the dismissal of the strict liability claims against the non-manufacturing defendant, any negligence claims against that defendant still remain. However, Minnesota applies Restatement (Second) of Torts, § 402, to define a seller's duty to inspect any products it sells:

A seller of a chattel manufactured by a third person, who neither knows nor has reason to know that it is, or is likely to be, dangerous, is not liable in an action for negligence for harm caused by the dangerous character or condition of the chattel because of his failure to discover the danger by an inspection or test of the chattel before selling it.

Thus, in Minnesota, sellers have no duty to inspect the products they sell unless they know or have reason to know that the products are dangerous. Gorath v. Rockwell Int'l, Inc., 441 N.W.2d 128, 132 (Minn. Ct. App. 1989). The issue of a seller's duty to warn is a legal question for determination by the court, id. at 133, and is governed by the same considerations discussed previously in section I(c), "Failure to Warn Claims", on page 15.

J. *Res Ipsa Loquitur*

The Latin phrase "*res ipsa loquitur*" translates roughly, "the thing speaks for itself." As a legal doctrine, it is used to try to prove liability in cases where the plaintiff cannot identify the cause of the injury. That definition may sound very broad, but in fact the doctrine is used sparingly.

Res ipsa loquitur is not exactly a defense. Rather it “is merely another way of characterizing the minimal kind of circumstantial evidence which is legally sufficient to warrant an inference of negligence.” Stelter v. Chiquita Processed Foods, LLC, 658 N.W.2d 242, 246 (Minn. Ct. App. 2003). In other words, *res ipsa loquitur* refers to situations where the circumstances are such that negligence seems to be the only reasonable explanation for an accident. Whether the doctrine applies depends on the characteristics of the accident, not on the characteristics of the product.

To apply this doctrine, a plaintiff must establish three elements: (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff. Spannaus v. Otolaryngology Clinic, 242 N.W.2d 594, 596 (Minn. 1976).

In Pape v. Macks, LLC, No. A10-1417, 2011 WL 1466433 (Minn. Ct. App. April 19, 2011), the court held that *res ipsa loquitur* did not apply in a case where the plaintiff was injured by a broken glass from a shower door, because the plaintiff was operating the door at the time it broke. Id. at *4. This fact defeated the plaintiff's efforts to establish the second and third required elements, because the door was under his control at the time of the accident, and his own actions could have caused it. Id. Thus the characteristics of the door did not even come into it.

Another example: a plaintiff was injured when his front headlight exploded after he tapped the center of the light three or four times. W. Sur. & Cas. Co. v. Gen. Elec. Co., 433 N.W.2d 444 (Minn. Ct. App. 1988). Plaintiff's expert was unable to state that a defect in the headlight existed. Furthermore, because plaintiff could not prove a defect, he could not prove causation. Id. at 448.

Based on the three requirements necessary to apply *res ipsa loquitur*, the court has consistently limited the application to cases where the cause of injury is reasonably certain. Raines v. Sony Corp. of Am., 523 N.W.2d 495 (Minn. Ct. App. 1994).

In Raines, the plaintiff's home burned to the ground allegedly based on faulty wiring in their Sony television set. The television was destroyed by the fire and was unavailable for examination. Id. at 497. At trial, defendants presented expert testimony that their television could not have caused the fire. They argued that the house was wired in the 1950s and therefore that was just as likely a cause as the television. Therefore, because the accident could reasonably be attributable to one or more causes for which defendant is not responsible, the doctrine does not apply. Id. at 498.

K. Preemption

The doctrine of preemption, though not technically a defense, may defeat a claim brought under state law if the court determines that the claim is governed by federal laws that are intended to supersede state laws.

The Supremacy Clause of the United States Constitution provides that the federal laws are the supreme law of the land. Case law has established the principle that any state law that conflicts with a federal law is without effect. E.g. M'Culloch v. State, 17 U.S. 316, 427 (1819). For purposes of preemption analysis, "state law" is defined to include not only state statutory laws, but also case law. See Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 521 (1992); Midwest Motor Exp., Inc. v. Int'l Bhd of Teamsters, 512 N.W.2d 881, 887–89 (Minn. 1994). This simply means the decision of a state court, if it establishes a legal rule contrary to federal law, may also be preempted.

There are two general types of preemption: express preemption and implied preemption.

1. Express Preemption

Express preemption applies where Congress, in the language of a particular law, has explicitly stated the intent to preempt. For example, in 1976, Congress passed the Medical Device Amendments (MDA) to the federal Food, Drug and Cosmetics Act (FDCA). The MDA includes an express preemption provision which provides that states may not impose any requirements that are "different from, or in addition to, any requirement . . . under [the MDA] and which relates to the safety or effectiveness of [a medical device]." 21 U.S.C. § 360k(a) (2006).

2. Implied Preemption

Implied preemption arises where explicit preemptory language is absent, but Congressional intent to preempt is established by the nature of the federal provision, the circumstances of its enactment, or other evidence. Implied preemption takes two forms. The first, known as "field preemption," occurs where federal law so thoroughly occupies a legislative field "as to make reasonable the inference that Congress left no room for the States to supplement it." Engvall v. Soo Line Rwy. Co., 632 N.W.2d 560 (Minn. 2011); see also Hillborough Cnty., Fla. v. Automated Med. Labs, Inc., 471 U.S. 707, 712–13 (1985).

The second type of implied preemption is "conflict preemption," which arises where compliance with both federal and state law is impossible, or when

compliance with state law would frustrate the achievement of an end Congress intended. Hillborough Cnty., Fla. V. Automated Med. Labs, Inc., 471 U.S. 707, 712–13 (1985). For example, in 1913 the United States Supreme Court struck down a Wisconsin law that banned labeling required by the Food and Drug Administration, reasoning that it was preempted by virtue of its conflict with the FDA requirements, which embodied an end that Congress intended to achieve. McDermott v. Wisconsin, 288 U.S. 115 (1913).

3. Preemption Cases (not including medical device)

In products liability law, preemption is often applied to cases involving medical devices and pharmaceuticals. Part V below discusses this application in detail. But preemption is also applicable to other types of suits. For example, the Courts have analyzed the express preemption provisions of the National Traffic and Motor Vehicle Safety Act with regard to air bags and antilock brakes. See Myrick v. Freuhauf Corp., 13 F.3d 1516 (11th Cir. 1994). Claims involving pesticide exposure and labeling may be preempted by operation of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). See Bice v. Leslie's Poolmart, Inc., 39 F.3d 887 (8th Cir. 1994).

In Moe v. MTD Products, Inc., 73 F.3d 179 (8th Cir. 1995) the United States Court of Appeals for the Eighth Circuit considered preemption issues, failure to warn, defective design, and causation issues in a lawn mower products liability case. In Moe, 17 year old Moe was mowing his neighbor's lawn with a walk behind self-propelled mower. The mower became clogged with wet grass and Moe stuck his hand into the side grass chute to unclog it. The blade brake/clutch ("BBC") was to stop the rotation of the cutting blade within 3 seconds of release of the control lever. When he was about to reach his hand into the mower, the blade brake/clutch system did not stop the blade from rotating. Apparently the cable that would disengage the cutting blade could become frayed, according to the claimant, based on design.

At the trial court level, the trial court ruled that all of Moe's claims were preempted by the Consumer Products Safety Commission Act, 15 U.S.C. § 2053. On appeal, the plaintiff argued that the CPSA preemption clause did not preempt their failure to warn and design defect claims. The purpose of the preemption, in part, is to develop "[u]niform safety standards for consumer products and to minimize conflicting state and local regulations." Moe, 73 F.3d at 183. The Eighth Circuit found that the tort claim "[b]ased on the defective design of an installed BBC would not create a different standard for more safety or impose additional requirements on the manufacturer. Instead it would create an incentive for manufacturers to install a BBC that works and is properly designed, and thus insure that the federal standard has meaning.

The most defective claim is not preempted by the CPSA and should not have been dismissed on that ground.” Id. at 183.

The Eighth Circuit affirmed the dismissal of the preempted claims but reversed the dismissal of the design defect claim and remanded the case for proceedings consistent with its decision.

In Scholtz v. Hyundai Motor Company, 557 N.W.2d 613 (Minn. Ct. App., 1997) the Court of Appeals of Minnesota held that the common law crashworthiness claim against a car manufacturer was preempted by federal law and that Minnesota seatbelt gag rule barred crash worthiness claim based on manufacturer’s failure to install lap belts. The purpose of the federal statute is to create “Uniform Motor Vehicle Safety Standard.” When a state law claim conflicts with the federal statute, it is preempted. The court concluded that the claimant’s claims were preempted because “[a] court decision creating the common law liability for Hyundai’s failure to install lap belts would, in effect, force manufacturers to choose a lap belt option over other options approved under federal law.” Id. at 617. The court also concluded that “[t]he plain language of the seatbelt gag rule bars crashworthiness actions grounded on the installation or failure of installation of seatbelts. . . .” Id. at 618.

The U.S. Supreme Court has held that state-law design defect and failure-to-warn claims involving locomotive equipment are preempted by the federal Locomotive Inspection Act, 49 U.S. C. § 20701. Kurns v. Railroad Friction Prods. Corp., 132 S.Ct. 1261, 1267 (2012).

See also Geier v. Am. Honda Motor Corp., Inc., 529 U.S. 861, 120 S. Ct. 1913 (2000); Harris v. Great Dane Trailers, Inc., 234 F.3d 398 (8th Cir. 2000); Netland v. Hess & Clark, Inc., 140 F. Supp. 2d 1011 (D. Minn. 2001); Anker v. Little, 541 N.W.2d 333 (Minn. Ct. App., 1995);

L. Fire Cases

As stated in the previous section certain fact situations raise specific legal issues. When plaintiff’s injury is caused by a fire, the plaintiff must satisfy specific burdens to prove the case. The leading Minnesota case concerning fire damage is Rochester Wood Specialties, Inc. v. Rions, 176 N.W.2d 548 (Minn. 1970). Here, the court stated that in an action for fire loss the burden of proof is on the plaintiff to establish the origin of the fire. Id. at 552. As to establishing the cause, the court stated:

Liability for the fire must be based on inferences reasonably supported by the evidence and not upon speculation based solely on the occurrence of the fire.

Id.; see also *Dalager v. Montgomery Ward & Co., Inc.*, 350 N.W.2d 391, 393 (Minn. Ct. App. 1984). *Harvest States Coop v. Phillips & Temro Indus., Inc.*, No. C1-99-1784, 2000 WL 760423 (Minn. Ct. App. 2000).

Note that the plaintiff does not have to possess the actual component that caused the fire. In *Illinois Farmers Ins. Co. v. Brekke Fireplace Shoppe, Inc.*, 495 N.W.2d 216 (Minn. Ct. App. 1993), the insurer brought suit for damages caused by a defective space heater. In reviewing the sufficiency of the evidence supporting plaintiff's theory of the fire's origin, the court held:

Because a large-scale destructive fire tends to consume the evidence of its origin, it is inherently difficult to establish with certainty that it was caused by negligence or the negligence of particular persons; inferences must necessarily be drawn from circumstantial evidence. The inference must, nevertheless, be reasonably supported by the available evidence; sheer speculation is not enough and the inference of negligent causation must outweigh contrary inferences.

Id. at 221 (quoting *Raymond v. Baehr*, 163 N.W.2d 54 n.2 (Minn. 1968)). Even though plaintiff's expert was unable to test the fitting that allegedly caused the fire, he did review descriptions of the fire, the reports of the fire inspector and the origin and cause experts, the manufacturer's components and construction techniques, and the physical remains of similar heaters. *Id.* The evidence was sufficient to support the jury's verdict because the plaintiff's expert eliminated all other causes of the fire. *Id.*

In *Raines v. Sony Corporation of America*, 523 N.W.2d 495 (Minn. Ct. App. 1994), the Court of Appeals of Minnesota held that it was error to submit a products liability case on the theory of *res ipsa loquitur*. The court limited "application of *res ipsa loquitur* to cases where the cause of injury is reasonably certain." *Id.* at 497.

Because a fire rekindled, destroying the television, experts were unable to have evidence to closely examine whether the fire was the result of defective wiring in the television set, careless cigarette smoking or some other cause.

Werth v. Hill-Rom, Inc., 856 F. Supp. 2d 1051 (D. Minn. 2012) (the district court granted defendant's motion to exclude expert testimony due to the danger of misleading the jury where the hospital and parents of newborn, who sustained severe burns in an incubator, sued manufacturer of baby warmer for strict products liability, breach of warranty, and negligence).

Associated Milk Producers, Inc. v. Compressor Servs., Ltd., Nos. A12-0276, A12-0435, 2012 WL 4052864 (Minn. Ct. App. Sept. 17, 2012), review denied (Nov.

27, 2012) (the Minnesota Court of Appeals affirmed the district court's holding that the plaintiff failed to prove the defendant's negligence was the proximate cause of the fire that nearly destroyed plaintiff's production facility).

M. Compliance with Standards

The standards created by the American National Standard Institute (ANSI) and the Occupational Safety and Health Administration (OSHA) are not substitutes for the court determining the existence of a legal duty. Westbrook v. Marshalltown Mfg. Co., 473 N.W.2d 352 (Minn. Ct. App. 1991). However, the standards are admissible under a variety of theories.

In Bilotta v. Kelley Co., Inc., 346 N.W.2d 616 (Minn. 1984), the court addressed the implications of an employer violating OSHA standards. The defendant manufacturer attempted to relieve himself of liability by arguing that the violations were a "superseding cause." Id. However, a defendant remains liable if the superseding cause is foreseeable. Id. (citing W. Prosser, Handbook of the Law of Torts § 44 at 272 (4th Ed. 1971)). Here, the manufacturer admitted that safety education was difficult to maintain because of high employee turnover. Id. Therefore, if a manufacturer can foresee an employer violating standards with regards to its product, the manufacturer will not find refuge in arguing the existence of a superseding cause. See Westbrook v. Marshalltown Mfg. Co., 473 N.W.2d 352 (Minn. Ct. App. 1991).

Standards may also be admitted under the comparative negligence statute, Minn. Stat. §604.01. If violation of a standard is evidence of conduct constituting negligence, such evidence should be submitted to the jury. Johnson v. Niagara Mach. & Tool Works, 666 F.2d 1223, 1226 (8th Cir. 1981).

Some violations of a statute may be used to establish the negligence of the defendant. For example, in 1990, Minnesota adopted the federal OSHA regulations by statute. Minn. Stat. § 182.65, subd. 2(f). It is well established in Minnesota that a breach of a statute may constitute negligence per se. Pacific Indem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548 (Minn. 1977); Zorgdrager v. State Wide Sales, Inc., 489 N.W.2d 281 (Minn. Ct. App. 1992); but see Banovetz v. King, 66 F.Supp.2d 1076 (D. Minn. 1999).

However, a defendant is not automatically liable for violating a statute. Whether a violation of statute constitutes negligence per se is a question of law for determination by the court. Mervin v. Magney Constr. Co., 416 N.W.2d 121, 123-124 (Minn. 1987). The applicable two part test examines whether:

- (1) The persons harmed by that violation are within the intended protection of the statute; and

(2) The harm suffered is of the type the legislation was intended to prevent.

Pacific Indem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d at 558. If the court determines that the statute was enacted for the benefit of plaintiff, the issue is passed to the jury to determine whether, in fact, defendant violated the statute. See Zorgdrager v. State Wide Sales, Inc., 489 N.W.2d 281, 284 (Minn. Ct. App. 1992). Note that plaintiff must still establish proximate cause and damages.

The existence of ANSI and OSHA standards may be introduced so a jury may determine whether a product was sold in a defective condition unreasonably dangerous when put to reasonably anticipated use. In Miller v. Yazoo Mfg. Co., 26 F.3d 81 (8th Cir. 1994), the introduction of the ANSI standard, which specified the stop time for a lawn mower blade, was found to be relevant for it helped the jury determine whether the lawn mower was unreasonably dangerous.

When standards are used by an expert witness to support testimony as in Miller, the manner of the presentation of the standards is controlled by the rules of evidence. If a judge finds such evidence relevant, Minn. R. Evid. 803 (18) states "the statements may be read into evidence but may not be received as exhibits." Therefore, the jury applies the standard in their deliberations based only on their personal recall of the testimony.

Lastly, these standards, if adopted after the sale of a product, may be relevant evidence concerning plaintiff's claim of a continuing duty to warn. Am. Law Prod. Liab. § 1.66 3d.

N. Learned Intermediary Defense

In general, a manufacturer's duty is to warn the end users of its products. But prescription drugs and medical devices present a special case because a medical professional serves a conduit—a "learned intermediary"—between the manufacturer and the user. Under these circumstances, the manufacturer's duty is to warn the medical professionals, who are trusted to pass on the relevant warnings to their patients. Thus, when an end user of a prescription drug or medical device asserts a failure-to-warn claim, the learned intermediary doctrine may protect the manufacturer from liability.

The doctrine may even protect a manufacturer who does not adequately warn a medical professional, if that professional is aware of the risks associated with the product from some other source. The Minnesota Supreme Court has concluded that "the failure of a drug manufacturer to warn a physician of the dangers of a drug was not the proximate cause of the injury to the patient where the physician acknowledged

that he was fully aware of its potentially dangerous effects.” Gray v. Badger Mining Corp., 676 N.W.2d 268, 276 (Minn. 2004) (citing Mulder v. Parke Davis & Co., 181 N.W.2d 885 (1970)).

The concept of learned intermediary has been extended to design professionals such as architects. Gray, 676 N.W.2d at 276. The basis for distinguishing physicians as intermediaries and industrial employers as intermediaries has been summarized by the Minnesota Supreme Court and the Eighth Circuit Court of Appeals. Gray, 676 N.W.2d at 276, n. 5. Thus far, the Minnesota Supreme Court has declined to extend the learned intermediary defense to the employer/employee relationship in the industrial context. Simply put, a manufacturer or other party subject to strict products liability claims will not exculpate itself from liability arguing learned intermediary where the learned intermediary is an employer in the industrial context. Such defense has been extended to the pharmaceutical area and design professional area only.

The learned intermediary doctrine has been successfully used to excuse drug manufacturers, and in some circumstances, chemical manufacturers from a duty to warn end users of their products. Officer v. Teledyne Republic/Sprague, 870 F. Supp. 408, 409 (D. Mass., 1994). The rationale for this defense lies in special fact situations, where a consumer may only obtain the product through a qualified professional. Donahue v. Phillips Petroleum Co., 866 F.2d 1008, 1013 n.9 (8th Cir. 1989). Gray v. Badger Mining Corp., 676 N.W.2d 268 (Minn. 2004). A prescription drug, for example, must be prescribed and only persons trained in medicine, who are licensed and regulated by the state, are permitted to write prescriptions. Officer, 870 F. Supp. at 410.

Comment n to Restatement (Second) of Torts § 388 (1965), addresses when a supplier's duty to warn an ultimate consumer can be discharged by a warning given to an intermediary. Stuckey v. N. Propane Gas Co., 874 F.2d 1563, 1568 (11th Cir. 1989). To determine whether a supplier can reasonably rely on the intermediary's knowledge regarding the potential risk of the product, section 310 of the Restatement provides this five-part balancing test:

- (1) The burden of requiring a warning;
- (2) The likelihood that the intermediary will provide a warning;
- (3) The likely efficacy of such a warning;
- (4) The degree of danger posed by the absence of a warning; and
- (5) The nature of the potential harm.

Id. The supplier's duty to warn turns on whether the intermediary's knowledge was sufficient to protect the ultimate user. Id.

In Mozes v. Medtronic, Inc., 14 F. Supp. 2d 1124 (D. Minn. 1998), the United States District Court for the District of Minnesota granted a summary judgment to the defendant manufacturer of a pacemaker. A patient brought negligence, strict liability, and failure to warn claims which were dismissed with prejudice. This case concerned a man who had a Medtronic pacemaker and ventricular lead implanted in 1991. In 1993 the pacemaker and lead manufacturer Medtronic issued a “Health Safety Alert” which was sent to the patient’s physician and to some patients but not to this plaintiff. The alert advised that insulation failure in leads would occur. In 1994, more than a year after the defendant pacemaker issued its alert, the patient was hospitalized and all of the 1991 implanted leads were replaced. Id. at 1126.

The federal district court noted that it “was not aware of any Minnesota case law requiring the use of expert testimony in products liability cases” Id. at 1128. In this case, however, the standard of care would not be within the general knowledge and experience of lay persons and, accordingly, “the standard of care that a medical manufacturer must exercise in designing a pacemaker lead and the various risks that must be balanced in exercising the standard of care are not within the general knowledge and experience of lay people. Without expert testimony, a jury would be forced to speculate” Id. at 1128.

In Mozes, the plaintiff did not produce the conventional engineering expert to testify as to the standard of care owed by the pacemaker lead manufacturer. Id. at 1128. Ultimately, the federal court found that the doctrine of *res ipsa loquitur* was not applicable. It dismissed the plaintiff’s products liability claims brought under the theories of strict liability and negligence. That left the remaining claim for failure to warn. The federal court noted that:

[U]nder Minnesota law, a manufacturer has a duty to warn users of its products of all dangers associated with those products of which it has actual or constructive knowledge. Failure to provide such a warning will render the product unreasonably dangerous and will subject the manufacturer to liability for damages under strict liability and tort. The question of whether a duty to warn exists is a question of law for the court.

Id. at 1129 (citations omitted).

Here it was clear that Medtronic had issued the “Health Safety Alert” and had provided that alert to the plaintiff’s physician. The defendant pacemaker lead manufacturer took the position that under the “learned intermediary doctrine” its

obligation to warn was discharged when it advised the plaintiff's physician with the Health Safety Alert. The federal district court agreed. Id. at 1130.

O. Sophisticated User

The Minnesota Supreme Court has recognized that under the sophisticated user defense, "A supplier has no duty to warn the ultimate user if it has reason to believe that the user will realize its dangerous condition." Gray v. Badger Mining Corp., 676 N.W.2d 268, 276 (Minn. 2004).

The Minnesota Supreme Court cited Comment k to § 388 of the Restatement (Second) of Torts as follows:

. . . a dangerous condition may be one which only persons of special experience would realize to be dangerous. In such case, if the supplier, having special experience, knows that the condition involves danger and has no reason to believe that those who use it will have such special experience as will enable them to perceive the danger, he is required to inform them of the risk of which he himself knows and which he has no reason to suppose they will realize.

Gray, 676 N.W.2d at 277.

The sophisticated user defense, in the employer/employee context is difficult to prove. Too often, the employer may have more knowledge of a given product than its employee. Hence, while the employer may be somewhat more sophisticated or have more knowledge, its employee's knowledge may be inferior to that of the employer.

P. Sophisticated Intermediary

The Minnesota Supreme Court has defined the sophisticated intermediary defense but has not decided the full applicability or scope of the sophisticated intermediary defense. Gray, 676 N.W.2d at 278.

The sophisticated intermediary defense is defined as follows:

. . . a products supplier has no duty to warn the ultimate user where either of two situations is present: (1) the end user employer already has a full range of knowledge of the dangers, equal to that of the supplier or (2) supplier makes the employer knowledgeable by providing adequate warnings and safety instructions to the employer.

Gray, 676 N.W.2d at 277-78.

For this defense to apply, the supplier must show that it used reasonable care in relying upon the intermediary to give the warning to the end user. Id. Determining whether reasonable care has been exercised requires:

- consideration of the purpose for which the product is to be used;
- the magnitude of the risk;
- the burden of providing direct warnings to the end users; and
- the reliability of the intermediary as a conduit.

Because of the significant burden on the bulk supplier to give a warning directly to end users, some courts have recognized the sophisticated intermediary defense. Hegna v. E. I. DuPont de Neomours & Co., 806 F. Supp. 822 (D. Minn. 1992).

The Minnesota Supreme Court has ruled that “a drug manufacturer is not relieved of a duty to warn the patient when its instructions to the physician are inadequate.” Lhotka v. Larson, 238 N.W.2d 870, 873–74 (1976) (cited in Gray, 676 N.W.2d at 279).

Q. Bulk Supplier Defense

The bulk supplier defense is a specialized version of the sophisticated intermediary defense and is based on the Restatement (Second) of Torts § 388. “Because of the difficulty in reaching the end user, a supplier of material that is delivered in bulk can discharge its duty to warn the end user by warning the buyer of the dangerous condition of the materials.” Gray, 676 N.W.2d at 280. This bulk supplier defense is overcome by arguing that the warnings provided by the bulk supplier to the sophisticated intermediary were inadequate. (See Part V Section A, Bulk Supplier Defense)

R. Raw Materials/Components Products Supplier

A supplier of raw material may be exculpated from liability when its raw material is integrated as a component into a finished product if its raw material or component itself is not dangerous. The defense is stated as follows:

When a sophisticated buyer integrates a component into another product, the component seller owes no duty to warn either the immediate buyer or the ultimate consumers of dangers arising because the component is *unsuited* for the special purpose to which the buyer puts it.

Gray, 676 N.W.2d at 281.

Another court stated the doctrine, and the primary exception, this way:

Under the Component Part Supplier Doctrine, a manufacturer of a non-defective, multi-use component part is generally not liable for injuries caused by the finished product when its parts are integrated into a larger system. . . . [But] a component part supplier may be liable if the supplier exercised some control over the design of the final product.

Venmar Ventilation, Inc. v. Von Weise USA, Inc., Civ. No. 07-1314 (JRT/FLN), 2009 WL 799610, at *6 (D. Minn. Mar. 24, 2009) (citations and quotation omitted).

As with many learned intermediary and sophisticated user defenses, the adequacy of a warning to the ultimate purchaser is usually a fact question precluding summary judgment.

S. Restatement (Second) § 402A, Comment k

Plaintiffs asserting strict liability claims may cite § 402A of the Restatement (Second) of Torts as the foundation for their claims. That section states:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
 - (a) The seller is engaged in the business of selling such a product, and
 - (b) It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

However, in Comment k to this section, Dean Prosser recognizes that some products are necessarily and inherently dangerous even when properly manufactured, distributed and labeled. That section may therefore be used as a shield in a defending against strict liability products claims.

See *McCarthy v. Sturm, Ruger & Co., Inc.*, 916 F. Supp. 366, 371 (S.D.N.Y. 1996); *Allison v. Merck & Co.*, 878 P.2d 948 (Nev. 1994); *Tansy v. Dacomed Corp.*, 890 P.2d 881 (Okla., 1994); *Artiglio v. Superior Court*, 22 Cal. App. 4th 1388, 27 Cal. Rptr. 2d 589 (Cal. App. 4 Dist. 1994).

T. Spoliation of Evidence

Spoliation is the destruction of evidence. Spoliation was addressed in the strict liability products-case of Patton v. Newmar Corp., 538 N.W.2d 116 (Minn. 1995). In Patton, the owners of a motor home destroyed by fire brought suit against the manufacturer of the motor home on a defective design theory. Id. at 117.

In 1988, while the plaintiffs were traveling across California, they experienced a fire in the motor home during which Mrs. Patton allegedly injured her back exiting the vehicle. Id. After the fire, the vehicle was towed to an auto salvage yard in Arizona. Id. Approximately six months later, plaintiffs' counsel retained a fire expert who examined the vehicle, took photographs, and removed and retained several unidentified components. Id. The Patton's later filed suit in 1991 alleging that the manufacturer was strictly liable for their damages due to a negligently designed fuel system. Id. at 119.

When the defendant asked to inspect the vehicle, plaintiffs stated that the location of the motor home was unknown. Id. at 118. The defendant was further informed that the unidentified components that had been removed and retained by plaintiffs' expert had been lost. Id.

In response, the defendant then moved for summary judgment on several grounds and argued (1) that by virtue of lost or missing evidence, the plaintiffs could not demonstrate that the vehicle was in an unreasonably dangerous condition at the time it left the defendant's control; (2) that there was insufficient evidence that any defect or negligence caused the injuries alleged; (3) that either the action should be dismissed as a sanction for spoliation of the evidence or that any testimony of the plaintiffs' expert based upon his investigation of the misplaced or destroyed motor home and its parts should be precluded. Id.

The defendant's motion for summary judgment was granted. The trial court held that the plaintiffs knew or should have known that the remains of the vehicle were important and other important evidence should have been preserved. Id. The trial court excluded all evidence derivative of the plaintiffs' expert investigation because of the prejudice to the defendant caused by its inability to perform crucial and necessary tests on all of the evidence. Id.

On its review, the Minnesota Supreme Court upheld the trial court's decision and stated that trial courts are "vested with considerable inherent judicial authority" in this area. Id. at 119. It then held that the prejudice to the opposing party should dictate the appropriate sanction to apply in a spoliation of evidence situation. Id. (citing Dillon v. Nissan Motor Co., Ltd., 986 F.2d 263 (8th Cir. 1993)).

Patton reinforces the well-established rule in Minnesota that evidence of an incident during use of a product is insufficient by itself to prove that the product was defective. Lee v. Crookston Coca-Cola Bottling Co., 188 N.W.2d 426, 432 (Minn. 1971).

A party's destruction of evidence may be excused when the party has a legitimate need to destroy it and has given the other side notice of the claim and a full and fair opportunity to inspect the evidence. Miller v. Lankow, 801 N.W.2d 120, 129 (Minn. 2011). The party in custody of the evidence need not give "actual notice of the nature and timing of any action that could lead to the destruction of evidence. Rather, a custodial party must provide sufficient notice and a full and fair opportunity to inspect the evidence so that the noncustodial parties can protect their interests" Id. at 133–34. Whether sufficient notice has been given should not be decided by a rigid set of factors, but by the "totality of the circumstances." Id. at 133.

In addition to Patton and Lankow, parties asserting spoliation claims should also look at other applicable case law. See Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc., 456 N.W.2d 434 (Minn. 1990); Himes v. Woodings-Verona Tool Works, Inc., 565 N.W.2d 469 (Minn. Ct. App. 1997); Hoffman v. Ford Motor Co., 587 N.W.2d 66 (Minn. Ct. App. 1998), Wajda v. Kingsbury, 652 N.W.2d 856 (Minn. Ct. App. 2002).

See also Cincinnati Ins. Co. v. Automatic Blanket Plant, 750 F. Supp. 280 (S.D. Ohio 1989); Allstate Ins. Co. v. Sunbeam Corp., 53 F.3d 804 (7th Cir. 1995).

U. Failure to Mitigate Damages

Because of advances in medical technology, if a plaintiff is injured by a defective product, they have a duty to mitigate damages by acting reasonably in obtaining treatment for their injury. Couture v. Novotny, 297 Minn. 305, 211 N.W.2d 172 (1973). The mitigation-of-damages rule limits damages to those the plaintiff would have suffered if they had acted reasonably. Id. at 309. If a plaintiff fails to act reasonably and chooses not to get a surgery, this can be viewed as contributory negligence, and juries should be asked to consider a reduction in damages

MITIGATION OF DAMAGES (PERSON)

Duty to act reasonably in caring for an injury:

A person who is injured has a duty to act reasonably in getting treatment and care for his or her (injury) (harm).

He or she is limited to those damages that he or she would have experienced if he or she had acted reasonably in getting treatment and care, [including a surgical operation that a reasonable person would undergo].

[If you find that:

1. Surgery would improve (name)'s injuries, and
2. A reasonable person would have had surgery in these circumstances,

take these facts into account in deciding the amount of damages.]

CIVJIG 91.45.

In Jensen v. Walsh, 623 N.W.2d 247 (Minn. 2001), the Minnesota Court of Appeals held that the plaintiff may seek punitive damages in an action where houseboat owners sued their neighbors. The plaintiffs alleged intentional infliction of emotional distress and intentional damage to property. Id. See Indep. Sch. Dist. No. 622 v. Keene Corp., 511 N.W.2d 728 (Minn. 1994) overruled by Jensen v. Walsh, 623 N.W.2d 247 (Minn. 2001) (the Minnesota Supreme court held no punitive damages allowed where the school district brought products liability action against manufacturer of asbestos-containing fireproofing material used in school building).

V. Estoppel, Waiver and Laches

Minnesota's Rule of Civil Procedure 8.03 allows for affirmative defenses in estoppel, laches, and waiver. Minn. R. Civ. P. 8.03. Waiver and estoppel are affirmative defenses which must be pleaded. Swanson v. Domning, 251 Minn. 110, 86 N.W.2d 716 (Minn. 1957) (the Minnesota Supreme Court reversed the court of appeal's holding that the trial court's instruction to the jury about the agent's employee knowledge of such representation to be false was appropriate so long as the jury believed it; but estoppel and waiver must be pleaded in order to be raised in court).

Lyons v. Philip Morris Inc., 225 F.3d 909 (8th Cir. 2000) (holding where the Minnesota Court of Appeals affirmed the district court's decision that trustees' state claims were preempted by ERISA; trustees waived their objection to district court's jurisdiction over their claims when they amended their complaint; trustees lacked standing to bring claims against tobacco companies under federal antitrust laws and RICO; and the district court lacked personal jurisdiction over English, holding company, jurisdiction of England).

V. MEDICAL DEVICES: PREEMPTION

In cases involving medical devices the basic principles of products liability are the same as in other areas. But those principles are overshadowed—one could even say eclipsed—by the doctrine of preemption. Federal regulation of these products is so pervasive, and the federal

government so aggressively protects its sole right to bring claims, that very little room is left for private litigants to assert civil tort claims. As a result, litigation of state-law claims involving medical devices is dominated by the issue of whether preemption applies. Where preemption does apply, it is often impossible for a private litigant to bring a tort claim, because the law also provides (with very limited exceptions) that claims brought against the makers of products that fall within FDA regulations must be brought by the federal government.

Though Part IV above briefly touched upon the general concepts of preemption, that discussion is repeated and expanded here for the convenience of the reader. This section then explains the multi-track process of FDA approval for medical devices. That discussion is followed by analysis of the case law framework for preemption analysis, focusing on three key United States Supreme Court cases and one recent decision from the Federal District Court for the District of Minnesota. Finally, this section summarizes the current state of preemption in this area, highlighting where manufacturers may still be exposed to liability.

A. General Background

The Supremacy Clause of the United States Constitution provides that federal laws are the supreme law of the land, “anything in the Constitution or laws of any state to the contrary notwithstanding. U.S. Const., art. VI, cl. 2. Early in its history, the U.S. Supreme Court determined that any state law that conflicts with a federal law is “without effect.” M’Culloch v. State, 17 U.S. 316, 427 (1819). Courts have consistently upheld this principle. See, e.g. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992); Maryland v. Louisiana, 451 U.S. 725, 746 (1981). Because preemption is a creature of federal law, this is an area in which federal law is particularly relevant to the defense of claims in Minnesota; the majority of the citations in this section are to federal cases and regulations.

Under our Federalist system, the powers of the federal government are limited, and most police powers—including control over laws affecting public health and safety—have traditionally been in the hands of the states. This historical perspective establishes a general presumption against preemption. Medtronic v. Lohr, 518 U.S. 470, 485 (1996). But this presumption is in tension with the Supremacy Clause, and federal law supersedes state law when it can be determined that preemption is the clear and manifest purpose of Congress. Cipollone, 505 U.S. at 516 (citation omitted). The major exception to the presumption against preemption is where there is a specific federal agency that regulates a particular entity. Buckman Co. v. Plaintiff’s Legal Comm., 531 U.S. 341, 347 (2001).

It makes intuitive sense that the Supremacy Clause would bar a state legislature from passing a law which conflicts with a federal law passed by Congress. But it is not immediately apparent how preemption would bar claims based on state case law. The U.S. Supreme Court has held that, for purposes of preemption analysis, “state law”

includes both a state's statutory laws and its case law precedents. *See Cipollone*, 505 U.S. at 521. The Minnesota Supreme Court has acknowledged this principle. *See Midwest Motor Exp., Inc. v. Int'l Bhd of Teamsters*, 512 N.W.2d 881, 87–89 (Minn. 1994).

There are two general types of preemption: *express preemption* and *implied preemption*.

1. Express Preemption

Express preemption applies where Congress, in the language of a particular law, included language explicitly stating the intent to preempt. For example, in 1976, Congress passed the Medical Device Amendments (MDA) to the federal Food, Drug and Cosmetics Act (FDCA). The MDA includes an express preemption provision which provides that states may not impose any requirements that are “different from, or in addition to, any requirement . . . under [the MDA] and which relates to the safety or effectiveness of [a medical device].” 21 U.S.C. § 360k(a) (2006). This express preemption provision is discussed in greater detail below.

Where the federal law in question includes express preemption language, the initial question of Congressional intent is simplified. But case law is highly nuanced as to the extent of the preemption, and the finer points of whether and to what extent a state provision is truly in conflict with a federal one.

2. Implied Preemption

Implied preemption arises where explicit preemptory language is absent, but the intent to preempt is established by the nature of the federal provision, the circumstances of its enactment, or other evidence. Implied preemption takes two forms. The first, known as “field preemption,” occurs where federal law so thoroughly occupies a legislative field “as to make reasonable the inference that Congress left no room for the States to supplement it.” *Engvall v. Soo Line Rwy. Co.*, 632 N.W.2d 560 (Minn. 2011); *see also Hillborough Cnty., Fla. v. Automated Med. Labs, Inc.*, 471 U.S. 707, 712–13 (1985).

The second type of implied preemption is “conflict preemption,” which arises where compliance with both federal and state law is impossible, or when compliance with state law would frustrate the achievement of an end Congress intended. *Hillborough Cnty., Fla. v. Automated Med. Labs, Inc.*, 471 U.S. 707, 712–13 (1985). For example, in 1913 the United States Supreme Court struck down a Wisconsin law that banned labeling required by the Food and Drug Administration, reasoning that it was preempted by virtue of its conflict

with the FDA requirements, which embodied an end that Congress intended to achieve. McDermott v. Wisconsin, 288 U.S. 115 (1913).

See In re Levaquin Prods. Liab. Litig., 2011 U.S. Dist. LEXIS 23208 (D. Minn., Mar. 8, 2011) (holding where defendant failed to provide adequate warning on risks associated with the drug Levaquin and preemption did not apply here to a brand name manufacturer); See In re Levaquin Products Liab. Litig., 700 F.3d 1161 (8th Cir. 2012) (holding where defendant failed to warn patient on risks associated with the drug Levaquin but the Minnesota Court of Appeals affirmed the district court's denial of OMJP's motions for judgment as a matter of law, or a new trial on Schedin's claim for compensatory damages, and reversed the denial of OMJP's motion for judgment as a matter of law on punitive damages).

But see J&W Enters. v. Econ. Sales, 486 N.W.2d 179, 181 (Minn. Ct. App. 1992) (the court granted summary judgment finding that a failure to read a warning precludes a claim that warning was inadequate).

Note, the district court held that the plaintiff's strict liability/manufacturing defect, negligent manufacturing, negligence per se, and negligence *res ipsa loquitur* claims were preempted under 21 U.S.C. § 360k(a). The district court granted in part summary judgment to the defendant and denied in small part on the claim that defendant did not comply with state laws requiring sterilization on the Riata defibrillation leads implanted in the plaintiffs. Pinsonneault v. St. Jude Med., Inc., 953 F. Supp. 2d 1006 (D. Minn. 2013).

3. Bulk Supplier Defense

For prescription drugs, FDA regulations exempt bulk suppliers from liability for failure to warn claims if the packaging for the bulk product contains certain language indicating that the contents are for use in manufacturing, processing, or repacking, and/or is for prescription use only. 21 C.F.R. § 201.122 (2008). The statement in the label would include "Caution: For manufacturing, processing, or repacking"; and if in substantially all dosage forms in which it may be dispensed it is subject to [the prescription drug provisions] of the act, the statement "Rx only." Id.

B. The FDA Approval Process

As a general rule, the more extensive federal regulations of a product are, the more likely it is that preemption will apply to suits involving that product. To understand

how the doctrine of preemption applies to medical devices in practice, it is necessary to understand the basic framework of the FDA approval process for those devices.

The federal Food, Drug and Cosmetics Act (FDCA) gives the Food and Drug Administration the authority to regulate prescription drugs and medical devices. See 21 U.S.C §§ 301–395 (2006). In 1976, Congress passed the Medical Device Amendments (MDA), which created a set of procedures by which the FDA approves medical devices and pharmaceuticals. Pub. L. No. 94-295, 90 Stat. 539 (1976) (codified as amended in scattered sections of 21 U.S.C.). Every medical device falls into one of three categories, which are defined by statute. 21 U.S.C. § 360(c). In the U.S. Supreme Court case Riegel v. Medtronic, Justice Scalia succinctly explained the three classes:

Class I, which includes such devices as elastic bandages and examination gloves, is subject to the lowest level of oversight: “general controls,” such as labeling requirements. Class II, which includes such devices as powered wheelchairs and surgical drapes, is subject in addition to “special controls” such as performance standards and post market surveillance measures.

The devices receiving the most federal oversight are those in Class III, which include replacement heart valves, implanted cerebella stimulators, and pacemaker pulse generators. In general, a device is assigned to Class III if it cannot be established that a less stringent classification would provide reasonable assurance of safety and effectiveness, and the device is “purported or represented to be for a use in supporting or sustaining human life or for a use which is of substantial importance in preventing impairment of human health,” or “presents a potential unreasonable risk of illness or injury.”

Riegel v. Medtronic, Inc., 552 U.S. 312, 316–17 (2008) (citations omitted). As noted in Riegel, devices are categorized as Class III unless the manufacturer, through an approval process, provides the FDA with enough information to classify a device under Class I or Class II. 21 U.S.C. § 360c(a)(1)(C).

The overwhelming majority of recent medical device litigation has involved Class III devices. As a general rule, these are subject a process called “premarket approval” (PMA), under which the burden is on the manufacturer to show that the device is safe and effective for its proposed use. See 21 U.S.C. §§ 360e(d)(2)(A), (B). Under the rigorous PMA process, the FDA spends an average of 1200 hours scrutinizing every aspect of a Class III device before allowing the manufacturer to market it. See Riegel, 552 U.S. at 318; Medtronic, Inc. v. Lohr, 518 U.S. 470, 477 (1996). But the law carves out certain exceptions under which a Class III device may come to market outside of the full PMA process. These exceptions are so broad that, in practice, the majority of

Class III devices brought to market fall within them; very few go through the intensive PMA process. See Peter B. Hutt, Richard A. Merrill, & Lewis A. Grossman, Drug & Device Law 992 (3d ed. 2007).

1. Exception for “Grandfathered” Devices

PMA is waived for most devices that were on the market before the MDA went into effect in 1976. 21 U.S.C. § 360e(b)(1)(A). This allows devices that predated the MDA to remain on the market unless and until the FDA promulgates, with notice and comment, a regulation requiring devices in this group to go through the full PMA process. 21 U.S.C. §§ 360c(f)(1), 360e(b)(1); Riegel, 552 U.S. at 317. Because this exception applies only to devices on the market prior to the passage of the MDA, new devices cannot come to market through this exception. But this exception does set a standard of comparison used to define the most commonly used exception, which analyzes whether a new device is “substantially equivalent” to a grandfathered device.

2. Exception for “Substantially Equivalent” Devices

To diffuse the competitive advantage available to devices grandfathered under the first exception, the MDA provides an abbreviated approval process for devices that are “substantially equivalent” to pre-MDA devices. 21 U.S.C. § 360c(f)(1)(A). This process has become known as “premarket notification” or “510(k) application” (after the section of the congressional enactment that originally described it). Under the 510k process, a new device that operates on the same general principles and technology as a specific grandfathered device is deemed “substantially equivalent” to the grandfathered device, and is subject to a much lower level of scrutiny. In comparison to the 1200 hours the FDA typically spends on a full PMA, the 510(k) review typically takes just twenty hours. Kemp v. Medtronic, Inc., 231 F.3d 216, 221–22 (6th Cir. 2000).

As noted above, the great majority of new devices come onto the market through one of the exceptions to the PMA process. Of the three exceptions, 510k is by far the most common. See Riegel, 552 U.S. at 317; Peter B. Hutt, Richard A. Merrill, & Lewis A. Grossman, Drug & Device Law 992 (3d ed. 2007).

3. Exception for Experimental Devices

The third exception applies to experimental devices, and is known as the “investigation device exemption” or “IDE.” 21 U.S.C. § 360e(a). The

primary purpose of IDE is to enable clinical research trials of a new device in order to accumulate data in support of a PMA application. See 21 C.F.R. § 812.1 (2012). The statutory language states that IDE is intended to allow “optimum freedom for scientific investigators” for the “discovery and development of useful devices intended for human use” 21 U.S.C. § 360j(g)(1).

C. Post-Approval Controls

After a manufacturer brings a new device to market, whether through the PMA process, the 510k exception, or the IDE, the FDA has continuing authority to regulate the device. Like the FDA’s prior approval processes, these post-approval controls may also preempt state law suits brought by consumers.

1. Approval of Alterations

If a manufacturer wants to change anything about the device—design, labeling, instructions for use, packaging, manufacturing process, etc.—that might affect safety or effectiveness, it must first submit a supplemental PMA application and secure FDA approval of the change. 21 U.S.C. § 360e(d)(6)(A)(i); 21 C.F.R. § 814.39(c). Supplemental PMA applications are evaluated under standards generally the same as those applied to initial applications. Riegel, 552 U.S. at 319.

FDA authority over changes to devices and drugs already on the market preempts most claims on a theory of post-sale failure to warn. This is because manufacturers cannot, for instance, change a product’s label to include a new warning, without getting approval from the FDA first.

2. Reporting Requirements

Manufacturers are also required to comply with reporting requirements that apply after an approved device enters the market. 21 U.S.C. § 360i (2006 & Supp. 2011). They must report the results of any new clinical studies, incidents in which the device may have caused an injury or death, and any malfunctions of the device that might cause injury or death if they happened again. 21 C.F.R. § 814.84(b)(2) (2012) (requiring reporting of new clinical studies); 21 C.F.R. § 803.50(a) (2012) (requiring reporting of deaths, injuries, and malfunctions). If the FDA determines, based on data reported under these requirements, that a device is unsafe or ineffective, it must withdraw approval of the device. 21 U.S.C. §§ 360e(e)(1), 360h(e).

Minnesota state law failure-to-warn patients and physicians claims as well as design-defect claims impose general requirements that are different from federal device-specific requirements and are therefore preempted by 21 U.S.C. § 360k(a) (2014). Claims based on failure to warn the FDA of adverse effects and Minnesota State law express warrant claims impose parallel requirements to federal device-specific requirements and are not preempted by 21 U.S.C. § 360k(a). Angeles v. Medtronic, Inc., No. A14-1149, 2015 WL 1757924, at 1 (Minn. Ct. App. Apr. 20, 2015).

3. Manufacturing Standards

The FDA also has the power to govern manufacturing practices, and does so through “current good manufacturing practice requirements” (CGMP) defined by statute and regulation. 21 U.S.C. § 306j(f); 21 C.F.R. §§ 820.1–820.250. The CGMP governs “the methods used in, and the facilities and controls used for, the design, manufacture, packaging, labeling, storage, installation, and servicing of all finished devices intended for human use.” 21 C.F.R. § 820.1(a)(1). While that mandate is broad, it would be impractical for the CGMP to prescribe how a manufacturer should produce a specific device because the CGMP applies to so many different devices of varying types. Instead, the GCMP serves as “an umbrella quality system, providing general objectives medical-device manufacturers must seek to achieve” and allowing the manufacturers to determine how to achieve them. In re Medtronic, Inc. Sprint Fedelis Leads Products Liab. Litig., 592 F. Supp. 2d 1147, 1157 (D. Minn. 2009) (quotations omitted).

D. Preemption in Practice: The Leading Cases

When Congress passed the MDA in 1976, it added an express preemption provision to the FDCA which reads as follows:

[N]o state or political subdivision of a state may establish or continue in effect with respect to a device intended for human use any requirement -

- (1) Which is different from, or in addition to, any requirement applicable under this chapter to the device, and
- (2) Which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.

21 U.S.C. § 360k(a). Under FDA interpretative regulations, “any requirement” established by a state includes any state court decision that would impose liability

different from, or in addition to, liability imposed by FDA regulations. 21 C.F.R. § 808.1(b). The FDA interprets § 360k(a) as providing:

State . . . requirements are preempted only when the [FDA] has established specific counterpart regulations or there are other specific requirements applicable to a particular device under the [MDA] . . . making any existing divergent state . . . requirement applicable to the device different from, or in addition to, the specific [FDA] requirements.

21 C.F.R. § 808.1(d). This interpretation is consistent with Supreme Court precedent, which has held that the word "requirement," in the context of an express preemption provision, includes claims based on state common law. Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 521 (1992).

1. **Medtronic v. Lohr: Express Preemption of Claims Involving 510k Devices**

The plaintiff in Lohr had received emergency surgery when her pacemaker failed, allegedly as a result of a defective component manufactured by Medtronic. Medtronic, Inc. v. Lohr, 518 U.S. 470, 480–81 (1996). The component at issue was a Class III device and had entered the market through the 510k process because it was “substantially equivalent” to similar pacemaker components that were on the market before the passage of the MDA. Id. at 480. When the plaintiff sued in Florida state court, Medtronic removed the case to federal district court and argued that her negligence and strict liability claims were expressly preempted by the preemption provision in section 360k(a) of the MDA. Id. at 481. The district court initially held that the claims were not preempted, but later reconsidered its decision and decided that they were. Medtronic, Inc. v. Lohr, 56 F.3d 1335, 1340–41 (11th Cir. 1995).

Lohr appealed. Her case eventually reached the Supreme Court, which held that her claims were not preempted. Medtronic, Inc. v. Lohr, 518 U.S. 470, 495. The court reasoned that the MDA’s express preemption provision only applies where related state requirement is different from or in addition to the federal requirements *and relates to the safety and effectiveness of the device*. Id.; see 21 U.S.C. § 360k(a). The Court reasoned that because the FDA does not, under the 510k process, review for safety and effectiveness per se, but only for substantial equivalence to a grandfathered device, state law regulating a 510k device’s safety does not conflict with any FDA determinations about that device. Id.

Noting the presumption against preemption, the Court observed that it would be “difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct, and it would take language much plainer than the text of § 360k to convince us that Congress intended that result.” Lohr, 518 U.S. at 484 (quoting Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251 (1984)).

Finally, the Court made a statement that spawned a great deal of debate: Even if there were FDA safety standards for a particular device, said the Court, “[n]othing in § 360k denies [States] the right to provide a traditional damages remedy for violations of common-law duties when those duties parallel federal requirements.” Lohr, 518 U.S. at 495. The conclusion that such claims are not preempted has been the focus much attention as litigants, their attorneys and the courts have struggled to define what constitutes a so-called “parallel claim.”

2. **Buckman Co. v. Plaintiffs’ Legal Committee: Fraud-on-the-FDA Claims Impliedly Preempted**

Just as the Lohr decision leaves open the possibility of bringing state tort claims in suits related to 510k devices, it also leaves open the possibility of such suits based on something other than traditional state-law tort claims. Some courts took the position that injuries caused by material misrepresentations in the approval process, brought in the form of “fraud-on-the-FDA” claims, were not preempted. See, e.g., Goodlin v. Medtronic, Inc., 167 F.3d 1367, 1375 (11th Cir. 1999). But a 2001 Supreme Court decision closed that door for the most part.

In Buckman Co. v. Plaintiffs’ Legal Committee, plaintiffs injured by orthopedic bone screws brought suit not against the manufacturer of the screws, but against a regulatory consultant who had helped the manufacturer bring the screw to market through the 510k process. Buckman Co. v. Plaintiff’s Legal Comm., 531 U.S. 341, 341 (2001). The plaintiffs alleged that the consultant had made fraudulent representations to the FDA, and that the FDA would not have approved the screws if the defendant had not done so. Id. Thus the suit did not fit the model addressed in Lohr, because the claim was not based on a traditional area of state tort law.

Though the language of § 360k (quoted above in section D, Preemption in Practice) might appear to *expressly* preempt this type of claim, the Riegel Court based its decision on an *implied* preemption analysis instead. Id. at 348, 328 n.2 (holding that plaintiffs’ claims were impliedly preempted by federal

law, and stating that the Court was expressing no view on whether they were expressly preempted under 21 U.S.C. § 360k).

The Court's reasoning focused first on the presumption against preemption, which applies with regard to area of the law that the states have traditionally occupied. Because "[p]olicing fraud against federal agencies is hardly 'a field which the States have traditionally occupied,'" the court reasoned that the presumption did not apply in this case. *Id.* at 384 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Furthermore, said the Court, "the relationship between a federal agency and the entity it regulates is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law." *Id.* (citation omitted).

"Given this . . . framework," the Court concluded, "we hold that the plaintiffs' state-law fraud-on-the-FDA claims conflict with, and are therefore impliedly pre-empted by, federal law." *Id.* (Thus the preemption found in this case was implied conflict preemption rather than conflict field preemption. See discussion of the two types of implied preemption above.

In the last few paragraphs of the *Buckman* opinion, the Court suggested that its preemption analysis should not extend beyond fraud-on-the-FDA claims to claims relying on traditional state tort laws. *Id.* at 353. *Medtronic v. Lohr*, the Court said, "can be read to allow certain state-law causes of actions that parallel federal safety requirements." *Id.* Thus the Court left the door open for so-called "parallel claims." But the Court also suggested that parallel claims would have to rely on "traditional state tort law which . . . predated the federal enactments in question" and not rely on federal enactments as "a critical element" of the case. *Id.*

After the Supreme Court issued its *Buckman* opinion in February of 2001, courts split over just what those last few paragraphs meant. While the Supreme Court was considering *Buckman*, the Minnesota Court of Appeals was considering fraud-on-the-FDA claims for the first time. *Flynn v. Am. Home Products Corp.*, 627 N.W.2d 342, 346 (Minn. Ct. App. 2001) (identifying fraud-on-the-FDA claims as "an issue of first impression in Minnesota appellate courts."). The plaintiff in the case had brought a fraud-on-the-FDA claim, alongside state tort claims of fraudulent misrepresentation, negligent misrepresentation, and violation of Minnesota consumer fraud statutes. *Id.* at 346. After reviewing the history of pre-*Buckman* fraud-on-the-FDA cases brought in other jurisdictions, the court noted that "some states have declined to recognize fraud-on-the-FDA as a cause of action under state tort law." *Id.* at 347.

The court then turned its attention to Buckman. Noting that the Supreme Court had issued its opinion just a few days after the Flynn oral arguments, the court held that fraud-on-the-FDA claims were “preempted by federal law and not actionable in Minnesota.” Id. at 349. But the court did not address whether the state law claims themselves were preempted. Instead, the court analyzed those claims—and found that they failed on the merits—under Minnesota common law. Id.

Plaintiffs have continued to bring claims that can be characterized as variations on the type brought in Buckman and Flynn, and courts have continued to split on the outcome. One variation has been a suit alleging state law tort claims based on, and using as evidence, a manufacturer’s failure to comply with FDA requirements. In Hughes v. Boston Scientific, the Fifth Circuit decided that such a suit was not preempted. 631 F.3d. 762, 770 (5th Cir. 2011). The court noted that in Buckman, the suit was brought as a federal cause of action, whereas the Hughes plaintiff had based her claim on the underlying state duty to warn about the dangers or risks of [a] product. Id. at 775. The court was not concerned by the fact that to prove her claim, the plaintiff relied on evidence that the manufacturer had violated FDA regulations. Id.

In August of 2011, the Federal District Court for the District of Minnesota reached a similar conclusion in Rossum v. I-Flow. In Rossum, the plaintiff brought claims of negligent misrepresentation and fraud, alleging that the defendant had “misled the medical community and the general public, by making false representations about the safety of their [device.]” Rossum v. I-Flow Corp., Civil No. 09-3714 (JNE/LIB), 2011 WL 3274080, at *1 (Aug. 1, 2011). The claim in Rossum was distinguishable from the claim in Buckman because it alleged false representations to the plaintiff’s doctor, not to the FDA.

The FDA has power to regulated manufacturers’ disclosures to doctors, but the Rossum decision did not discuss whether the plaintiff proposed to bring evidence of failure to meet such FDA requirements in support of her claim. It is important to note that other courts have held that bringing any such evidence would be fatal to a claim of this type, because doing so would bring the claim within the preemption described in Buckman. See Se. Laborers Health & Welfare Fund v. Bayer Corp., 444 Fed. App’x 401, 407 (11th Cir. 2011). The rationale behind that position is that if the proof of a claim depends on evidence of the violation of FDA regulations, the claim itself depends on the existence of the FDA regulations, and that claim is therefore not a parallel claim at all, but rather a federal cause of action—like the one the Supreme Court held preempted in Buckman—repackaged as a state law claim.

The general trend with regard to fraud-on-the-FDA claims (and variations of those claims) tends toward preemption of such claims. But courts remain split on the this issue, and the Rossum case suggests that, at least in the District of Minnesota, there may be some room for at least the unique variations presented in that case.

A collateral effect of Buckman is to eliminate negligence per se claims brought under Minnesota law. Failure to comply with FDA regulations does not constitute negligence per se under Minnesota law because such claims are preempted under Buckman. Kapps v. Biosense Webster, Inc., 813 F. Supp. 2d 1128, 1152 (2011) (citing Riley v. Cordis Corp., 625 F. Supp. 2d 769, 777 (D. Minn. 2009)).

3. **Riegel v. Medtronic: Claims Involving PMA Devices Expressly Preempted**

In 2008 the Supreme Court considered a case involving a medical device that had come to market through the full PMA process, and held that though the parallel claims the Lohr court alluded to are not expressly preempted with regard to 510k devices, they are preempted as to state-law tort claims involving PMA devices. Riegel v. Medtronic, Inc., 552 U.S. 312 (2008). This decision, the Court explained, is supported by the fact that the FDA, through the PMA process, makes an expert judgment that balances the beneficial effects of a device against the risks associated with its use. Id. at 325. If a state jury were to impose liability for a device that had gone through the PMA process, it would interfere with the FDA's ability to make that balancing judgment. Id.

Following on the reasoning of the Lohr court, the Riegel court also reasoned that the PMA process requires the FDA to make determinations regarding the device's safety and effectiveness; therefore, any state-law claim based on deficiencies in the safety and effectiveness of the device would be in conflict with the FDA regulations applied to that device. Id. at 323. The Riegel court restated that the critical distinction between 510k-process devices and PMA-process devices is that the former are reviewed for equivalence to pre-MDA devices, while the latter are review specifically for safety:

While § 510(k) is focused on *equivalence*, not safety, premarket approval is focused on safety, not equivalence. While devices that enter the market through § 510(k) have never been formally reviewed under the MDA for safety or efficacy, the FDA may grant premarket approval [PMA] only

after it determines that a device offers a reasonable assurance of safety and effectiveness. And while the FDA does not require that a device allowed to enter the market as a substantial equivalent take any particular form for any particular reason, the FDA requires a device that has received premarket approval to be made with almost no deviations from the specifications in its approval application, for the reason that the FDA has determined that the approved form provides a reasonable assurance of safety and effectiveness.

Id. (quotations and citations omitted).

The Riegel decision may appear at first blush to establish a complete bar to traditional state-law tort claims against the makers of medical devices brought to market through the full PMA process. While it is true that such suits are generally preempted under Riegel, the next section describes how such claims might be able to proceed anyway.

4. PLIVA, Inc. v. Mensing: Federal Implied Preemption Generic Drug:

The Minnesota Supreme Court held that federal law preempted state laws for any updates to the warning claims in the labeling for generic drugs. PLIVA, Inc. v. Mensing, 131 S. Ct. 2567, 180 L. Ed. 2d 580 (2011). In Mensing, generic manufacturers produced the drug named Reglan. Id. at 2572. The warning labels for the drugs were updated several times over the course of five years to include the risks of tardive dyskinesia, a severe neurological disorder; however, the labels were not updated in the generic drug labels sold to plaintiffs. The plaintiffs alleged that the manufacturers were liable under state tort law for failing to provide adequate warning labels on the updated risks. Id. at 2573. The manufacturers argued that they could not comply with both federal law and state law, which would have required the manufacturers to use a different label in order to comply “impossibly” simultaneously with both laws. The court held that federal law did in fact preempt states’ labeling requirements.

Further, Mutual Pharm. Co. v. Bartlett supports the court’s holding in Mensing, 133 S. Ct. 2466, 186 L. Ed. 2d 607 (2013). Bartlett clarified that any approved drugs, whether brand-name or generic, through the FDA will prohibit the manufacturer from making any major changes to the “qualitative or quantitative formulation of the drug product, including active ingredients, or in the specifications provided in the approved application.” Id. at 2471. Unilateral changes by generic drug manufacturers were also prohibited.

Finally, in Abict v. PLIVA, Inc., there is no private right of action under federal law. Abict v. PLIVA, Inc., 2013 WL 141724 (D. Minn. Jan. 9, 2013).

See Moretti v. Mut. Pharm. Co., 852 F. Supp. 2d 1114 (D. Minn. 2012) *aff'd*, 518 F. App'x 486 (8th Cir. 2013) (the Minnesota District Court held that consumer's state law claims on the sale of generic drug was premised on the theory of failure to warn were preempted by federal labeling regulations).

See also Caldwell v. Janssen Pharm., Inc., Nos. 2012-C-2447, -2466, *slip op.* (La. Jan. 28, 2014) (the state attorney general failed to prove violation pursuant to a claim made against the medical assistance program funds, payments to health care providers or other persons to which the health care providers or other persons were not entitled to, and the Louisiana Supreme Court reversed \$300 million plus state Medicare verdict).

E. “Parallel Claims,” the “Narrow Gap” and Riley v. Cordis

The analysis above demonstrates that many private lawsuits involving medical devices are effectively barred by federal preemption. The cases most clearly in that category are so-called “fraud-on-the-FDA” claims which, under Buckman, can only be brought by the FDA. At the other end of the continuum, manufacturers' greatest exposure is for devices brought to market through the 510k process, because that process does not directly evaluate the safety of a device. In the middle fall claims involving devices brought to market through the PMA process. After Riegel, it is clear that these claims are generally preempted. However, in Riley v. Cordis Corporation., 625 F. Supp. 2d 769, 783 (D. Minn. 2009) the Minnesota District Court described how a “parallel claim” might theoretically escape preemption if it fits into what the court called a “narrow gap” between Buckman and Riegel.

Riley v. Cordis Corporation involved a stent intended to improve blood flow in a patient's coronary artery, and the patient sued after he had a heart attack resulting from a blood clot that had formed at the site where the stent was implanted. Riley v. Cordis Corp., 625 F. Supp. 2d at 773. The stent had come to market through the PMA process. *Id.* at 774. The plaintiff's complaint asserted many different legal theories—so many that the court described it as “the quintessential ‘kitchen-sink’ complaint, [asserting] just about every conceivable legal theory” *Id.* at 780 n.5.

Moving for judgment on the pleadings, the defendant argued that the plaintiff's claims were all preempted by FDA regulations. *Id.* at 773. The plaintiff countered that his claims did not impose any requirements above and beyond those required by the FDA, and that they were therefore merely parallel to those requirements. *Id.* at 781. The

court denied all of the plaintiff's claims, but held that only some of them were barred by preemption. The others failed not because they were preempted, but because the plaintiff's complaint had not given enough details to permit the court to decide whether they were preempted. Id. at 773.

Though the Riley court denied the plaintiff's claims, it suggested that future "parallel claims" involving PMA devices might succeed. "Riegel and Buckman," the court explained, "create a narrow gap through which a plaintiff's state-law claim must fit if it is to escape express or implied preemption." Id. at 777. First, under Riegel, it must be the case that the state-law claim is based on the breach of a state-law duty that is the same as a duty imposed by FDA regulations. Id. at 776. Then, under Buckman, it must *not* be the case that the plaintiff is in essence suing for violation of FDA regulations, because only the FDA can enforce those regulations. Id. at 776–77. The court summarized its reasoning in these words:

The plaintiff must be suing for conduct that *violates* the FDCA (or else his claim is expressly preempted by § 360k(a)), but the plaintiff must not be suing *because* the conduct violates the FDCA (such a claim would be impliedly preempted under Buckman). For a state-law claim to survive, then, it must be premised on conduct that both (1) violates the FDCA, and (2) would rise to a recovery under state law even in the absence of the FDCA.

Id. at 777.

Thus, the Riley decision left open the possibility of future plaintiffs bringing state law claims related to devices brought to market through the PMA process. But the "narrow gap" the court described has proven to be very narrow. In spite of many attempts, post-Riley plaintiffs have had very little success at running the Riegel/Buckman gauntlet.

For a detailed study of Riley and the challenges plaintiffs face as they try to avoid preemption, see J. David Prince, *The Puzzle of Parallel Claims, Preemption, and Pleading the Particulars*, 39 Wm. Mitchell. L. Rev. (forthcoming May 2013).

F. Other Cases & Jurisdictions:

- **Choice of Law:** Williams v. Novartis Pharm. Corp., 2014 U.S. Dist. LEXIS 55352 (S.D. Ohio Apr. 21, 2014); Sherfey v. Johnson & Johnson, No. 12-4162, 2014 U.S. Dist. LEXIS 10690 (E.D. Pa. Jan. 29, 2014);
- **Class Action:** Plumlee v. Pfizer, Inc., No. 13-CV-00414-LHK, 2014 LEXIS 23172 (N.D. Cal. Feb. 21, 2014);

- **Design defect/ Manufacturer Defect:** Dilley v. C.R. Bard, Inc., No. 2:14-cv-01795-ODW (ASx), slip op. (C.D. Cal. May 21, 2014) (“*Dilley IP*”); Mack v. Stryker Corp., 2014 WL 1876124 (8th Cir. 2014); Brown v. Janssen Pharm., Inc., No. 3:12-oe-40003, 2014 U.S. Dist. LEXIS 57319 (N.D. Ohio Apr. 24, 2014); Palermo v. LifeLink Found., Inc., No. 2012-CA-01228-COA, 2014 WL 114531 (Miss. Ct. App. 2014), reh'g denied (May 20, 2014);
- **Discovery/Daubert/Motion in Limine:** In re Pradaxa (Dabigatran Etextilate) Prods. Liab. Litig., No. 2385, 3:12-md-02385-DRH-SCW, 2014 U.S. Dist. LEXIS 62664 (S.D. Ill. May 1, 2014); Messick v. Novartis Pharm. Corp., No. 13-15433, 2014 U.S. App. LEXIS 6257 (9th Cir. Apr. 4, 2014); Boehm v. Eli Lilly & Co., 747 F.3d 501 (8th Cir. 2014); In re Ethicon, Inc., 2014 U.S. Dist. LEXIS 14088 (S.D.W Va. Feb. 5, 2014); H.R. ex rel. Reuter v. Medtronic, Inc., 2014 WL 554454 (S.D. Ohio Feb. 13, 2014);
- **Failure to Warn:** Kruszka v. Novartis Pharms. Corp., 2014 U.S. Dist. LEXIS 68439 (D. Minn. May 19, 2014); Parkinson v. Novartis Pharm. Corp., No. 3:12-cv-02089, 2014 U.S. Dist. LEXIS 36677 (D. Or. Mar. 20, 2014); Yates v. Ortho-McNeil-Janssen Pharms., Inc., No. 1:09 oe 40023, 2014 U.S. Dist. LEXIS 47722 (N.D. Ohio Apr. 7, 2014); Winter v. Novartis Pharm. Corp., 739 F.3d 405 (8th Cir. 2014);
- **Fraud/Misrepresentation:** Anastasi v. Wright Medical Tech., 2014 U.S. Dist. LEXIS 58467 (E.D. Mo. Apr. 28, 2014); Khasin v. Hershey Co., No. 5:12-CV-01862 EJD, 2014 U.S. Dist. LEXIS 62070 (N.D. Cal. May 5, 2014); Harris v. Medtronic, Inc., 2014 WL 866063 (Cal. Super. Feb. 27, 2014);
- **Generic/Branded Preemption:** Eckhardt v. Qualitest Pharm., Inc., No. 13-40151, at 4-5, 5 (5th Cir., May 13, 2004) (Slip Op.); In re: Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig. (Gannon), No. 3:13-cv-10143-DRH-PMF, 2014 U.S. Dist. LEXIS 56862 (S.D. Ill. Apr. 24, 2014); Thompson v. Allergan USA, Inc., 2014 WL 308794 (E.D. Mo. Jan. 28, 2014); Guenther v. Novartis Pharm. I Corp., 2013 WL 4648449 (M.D. Fla. Aug. 29, 2013); See Cassel v. ALZA Corp., 2014 WL 856023 (W.D. Wis. Mar. 5, 2014); Lashley v. Pfizer, Inc., No. 12-60861, 2014 WL 661058 (5th Cir. Feb. 21, 2014);
- **Learned Intermediary/Breach of Warranty:** Barba v. Carlson, 2014 Del. Super. LEXIS 198 (Del. Super. Apr. 8, 2014); Dilley v. C.R. Bard, Inc., 2014 U.S. Dist. LEXIS 47066 (C.D. Cal. Apr. 3, 2014); Boehm v. Eli Lilly & Co., 747 F.3d 501 (8th Cir. 2014);

- **Off-label Use:** Zeltiq Aesthetics, Inc. v. BTL Indus., 2014 U.S. Dist. LEXIS 40402 (N.D. Cal Mar. 25, 2014);
- **Parallel Violation:** Williamston v. Medtronic, Inc., 2014 U.S. Dist. LEXIS 68083 (W.D. La. May 15, 2014); Cline v. Advanced Neuromodulation Sys., Inc., 2014 U.S. Dist. LEXIS 56669 (N.D. Ga. Mar. 31, 2014);
- **Preemption:** Zogenix, Inc. v. Patrick, No. 14-11689-RWZ, 2014 WL 1454696 (D. Mass. Apr. 15, 2014); Oralabs, Inc. v. The Kind Group LLC, 2014 U.S. Dist. LEXIS 49704 (D. Col. Mar. 10, 2014); Beavers-Gabriel v. Medtronic, Inc., 2014 U.S. Dist. LEXIS 50030 (D. Haw. Apr. 10, 2014); Brady v. Medtronic, Inc., 2014 U.S. Dist. LEXIS 52151 (S.D. Fla. Apr. 8, 2014); Simoneau v. Stryker, Corp., No. 3:13-CV-1200, 2014 U.S. Dist. LEXIS 43137 (D. Conn. Mar. 31, 2014); Stengel v. Medtronic, Inc., 704 F.3d 1224 (9th Cir. 2013); Lilly v. ConAgra Foods, Inc., 2014 U.S. App. LEXIS 3159, at *2 (9th Cir. Feb. 20, 2014); Ortho-McNeil-Janssen Pharm., Inc. v. State, 2014 Ark. 124 (2014), reh'g denied (Apr. 24, 2014); See In re Fosamax (Alendronate Sodium) Prods. Liab. Litig., No. 3:08-cv-00008-JAP-LHG, slip op. (D.N.J. Mar. 26, 2014); In re Fosamax Prods. Liab. Litig., 951 F. Supp.2d 695 (D.N.J. June 27, 2013); Hunt v. McNeil Consumer Healthcare, 2014 WL 1116358 (E.D. La. Mar. 11, 2014); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011); Williamson v. Mazda Motor, Inc., 131 S. Ct. 1131 (2011); See Arizona v. United States, 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012); Rodriguez v. American Medical Systems, No. 7:12-CV-330, 2014 U.S. Dist. LEXIS 13803 (S.D. Tex. Feb. 4, 2014); Starks v. Coloplast Corp., 2014 U.S. Dist. LEXIS 19611 (E.D. Pa. Feb. 18, 2014);
- **Safe Harbor:** Marcus v. Forest Laboratories, Inc., No. 13-11343-NMG, 2014 WL 866571 (D. Mass. Mar. 5, 2014);
- **Spoliation/Res Ipsa:** Ross v. American Red Cross, 2014 U.S. App. LEXIS 1827 (6th Cir. Jan. 27, 2014);
- **Third Party Payor RICO/State Laws:** Indiana/Kentucky/Ohio Regional Council of Carpenters Welfare Fund v. Cephalon, Inc., No. 13-7167, 2014 U.S. Dist. LEXIS 69526 (E.D. Pa. May 21, 2014); Sergeants Benev. Ass'n Health & Welfare Fund v. Sanofi-Aventis U.S. LLP, No. 08-CV-0179 SLT RER, 2011 WL 824607 (E.D.N.Y. Feb. 16, 2011) report and recommendation adopted sub nom. Sergeants Benev. Ass'n Health & Welfare Fund v. Sanofi-Aventis U.S., LLP, No. 08-CV-0179 SLT RER, 2011 WL 1326365 (E.D.N.Y. Mar. 30, 2011); Aaron v. Abubakar Atiq Durrani, M.D., et al., 2014 U.S. Dist. LEXIS 32693 (S.D. Ohio March 12, 2014).

VI. FOOD-RELATED CLAIMS

In food cases, the plaintiff usually brings claims based on simple negligence, negligence per se, strict liability in tort, and breach of warranty. Warranty theories range from breach of implied warranty of fitness for particular purpose (such as digestion) to breach of warranty of merchantability. Most claims are brought under common law, but could, in certain circumstances, be based upon the Uniform Commercial Code. These claims are not commonly brought on contract theories.

Food claims generally concern prepackaged food goods that are sold to the customer who later opens the package and discovers some sort of defect or problem with the food. Other common claims may involve a customer who is served a meal in a restaurant and encounters a problem ranging from food poisoning to foreign objects in the food.

Until 2005, Minnesota law in this area was out of step with most jurisdictions. Until that time, food and food products could be defective because of manufacturing defects, design defects, failure to warn or statutory violations. There were two prevailing tests, the “foreign-natural” test and the “reasonable expectation” test. The majority of jurisdictions use some formulation of the reasonable expectation test. But no Minnesota appellate court had ruled on which test should be used, so district courts were free to apply either one.

The foreign-natural test drew a distinction between the “foreign” and “natural” characteristics of a food product ingredient. Under the test, if an object or substance in a food product was natural to any of the ingredients of the product, there was no liability for injuries caused. But if the object or substance was foreign to all of the ingredients, the seller or manufacturer of the product could be liable for an injury caused by the foreign object or substance.

The reasonable expectation test focused on what a reasonable consumer could expect about what would be a food product at the time the product is served. The reasonable expectation test is related to the foreseeability of harm on the part of the defendant. That is, the defendant who prepares the food has a duty of ordinary care to eliminate or remove any harmful substance that the consumer of the food would not reasonably expect to be in the food. For instance, a consumer of fried chicken would reasonable expect that there would be chicken bones in the product, and can be expected to guard against any risks associated with their presence. But because the same consumer would not reasonably expect to find bits of metal in his meal, the preparer has a duty of ordinary care to ensure that there are none.

In Shafer v. JLC Food Systems, Inc., 695 N.W.2d 570 (2005), the Minnesota Supreme Court rejected the so-called “foreign-natural” test and adopted the majority “reasonable expectation” test for determining whether a food product is defective. The court followed the Restatement (Third) of Torts: Products Liability § 7 (1998), which reads:

One engaged in the business of selling or otherwise distributing food products who sells or distributes a food product that is defective under § 2, § 3 or § 4 is subject to liability for harm to persons or property caused by the defect. Under § 2(a), a harm-causing ingredient of the food product constitutes a defect if a reasonable consumer would not expect the food product to contain that ingredient.

The Minnesota Supreme Court explained its position as follows:

Having considered the two tests and the approach taken by the Restatement, we conclude that the reasonable expectation test is the more appropriate test to follow. Instead of drawing arbitrary distinctions between foreign and natural substances that caused harm, relying on consumers' reasonable expectations is likely to yield a more equitable result. After all, an unexpected natural object or substance contained in a food product, such as a chicken bone in chicken soup, can cause as much harm as a foreign object or substance, such as a piece of glass in the same soup. Therefore, we agree with the majority view and expressly adopt the reasonable expectation test as the standard for determining defective food products liability claims in Minnesota. Accordingly, when a person suffers injury from consuming a food product, the manufacturer, seller, or distributor of the food product is liable to the extent that the injury-causing object or substance in the food product would not be reasonably expected by an ordinary consumer. Whether the injury causing object or substance in the food product is reasonably expected by an ordinary consumer presents a jury question in most cases.

Shafer, 695 N.W.2d at 575-76.

Since Shafer, Minnesota provides that a food product is in a defective condition and unreasonably dangerous if an ordinary consumer would not reasonably expect the food product to contain the object or substance that caused the harm. CIVJIG 75.60.

The primary issue in Schafer, however, concerned the problem of proof in food cases. The plaintiff ate a piece of a muffin at a restaurant and when she swallowed she felt a sharp pain in her throat and a choking sensation. The scratch on her throat led to an infection. The court concluded that, consistent with its prior decisions (see Lee v. Crookston Coca-Cola Bottling Co., 188 N.W.2d 426, 433 (1971); Holkestad v. Coca-Cola Bottling Co., 180 N.W.2d 860, 865 (1970)) and section 3 of the Restatement (Third) of Torts: Products Liability (1998), circumstantial evidence MAY be used to establish a *prima facie* defective food product case when the specific object or substance that caused the harm cannot be identified. Schafer, 695 N.W.2d at 576. But the court noted that there are limitations on the use of circumstantial evidence:

[W]e hold that in defective food products cases a plaintiff may reach the jury, without direct proof of the specific injury-causing object or substance, when the plaintiff establishes by reasonable inference from circumstantial evidence that: (1) the injury-causing event was of a kind that would ordinarily only occur as a result of a defective condition in the food product; (2) the defendant was responsible for a condition that was the cause of the injury; and (3) the injury-causing event was not caused by anything other than a food product defect existing at the time of the food product's sale. In order to forestall summary judgment, each of the three elements must be met.

Id. at 577.

A failure to warn claim is separate and distinct from a design defect claim. Huber v. Niagara Mach. & Tool Works, 430 N.W.2d 465, 467 (Minn. 1988). There is no duty to warn if the user knows or should know of a potential danger. Where the alleged danger is open and obvious, Minnesota courts do not require a warning. Holowaty v. McDonald's Corp., 10 F. Supp. 2d 1078, 1084 (D. Minn. 1998). In Holowaty, plaintiffs injured by spilled coffee contended that “a duty to warn exists if the foreseeable risk of injury is more severe than a reasonable person would anticipate, even if the risk of a less severe injury of the same type is open and obvious.” Id. at 1085. The federal district court noted that the Minnesota Supreme Court would likely reject this argument because “an alleged difference in the anticipated degree of danger does not make the risk associated with the use of the product any less obvious.” Id. In the same case, a failure to warn claim failed as well because the plaintiffs failed to present any testimony that they would have acted differently had they been warned that this coffee was especially hot. Id.

The remaining two claims of the Holowaty plaintiffs were for negligence and implied warranty of merchantability. Because Minnesota has blended strict liability and negligence claims for design defects, dismissing the strict liability design defect claims concomitantly dismissed the negligence claims. Id. 1086. As to the implied warranty of merchantability claim, the court stated the law as follows:

The implied warranty of merchantability requires that goods be “fit for the ordinary purpose for which such goods are used.” The implied warranty of merchantability is breached when a product is defective to a normal buyer making ordinary use of the product. A defect is “any condition not contemplated by the user which makes the product unreasonably dangerous to him.” A product is not defective when it is safe for normal handling and consumption.

Id. (citations omitted). The plaintiffs failed to prove the food product was defective. Therefore, all of the plaintiffs' claims were dismissed with prejudice.

The Minnesota Supreme Court adopted the concept of strict tort liability against the *manufacturer* of a defective product in McCormack v. Hanksraft Co., 154 N.W.2d 488, 497–98 (1967). Three years later, the court clarified that an injured person may also maintain an action for strict liability in tort against the *commercial seller* of a defective product, even if the seller has no active fault or negligence. Farr v. Armstrong Rubber Co., 179 N.W.2d 64, 68 (1970) ((citing Restatement (Second) of Torts § 402A 91965) (stating commercial seller who sells defective product is liable for physical harm even if seller is not negligent and not in privity with the injured person)).

Strict liability in tort developed from strong public-policy considerations to protect consumers from harm caused by defective products and to impose the cost of defective products on the maker, who presumably profits from the product. See McCormack, 154 N.W.2d at 500; Lee v. Crookston Coca-Cola Bottling Co., 188 N.W.2d 426, 431–32 (1971). A key rationale for strict liability in tort is a “risk bearing economic” theory in which merchants and manufacturers have the capacity to distribute their losses among the many purchasers of the product.

The practical effect of strict-liability principles is to hold a faultless seller jointly and severally liable for the causal fault of the manufacturer. But the faultless seller can seek and recover indemnity from the defect-causing party in the product’s chain of distribution. See Farr, 179 N.W.2d at 72 (noting a passive-middleman retailer may recover indemnity from the manufacturer who furnished the defective product); see also Tolbert, 255 N.W.2d at 366–67 (noting common law indemnity shifts entire loss from a party who has no personal fault, but is nevertheless liable in tort, to the at-fault party).

The seller’s-exception statute, Minn. Stat. § 544.41, tempers the harsh effect of strict liability as it applies to passive sellers, while ensuring that a person injured by a defective product can recover from a viable source. The seller’s-exception statute permits dismissal of strict-liability claims against a seller of a defective product who certifies the correct identity of the manufacturer, but only after a complaint is filed against the manufacturer. Minn. Stat. § 544.41, subds. 1, 2. The seller may not be dismissed, however, if it has played an active role in creating the product defect or had actual knowledge of the defect. Id. at subd. 3(a–c); Gorath v. Rockwell Int’l, Inc., 441 N.W.2d 128, 131–32 (Minn. Ct. App. 1989). The seller’s exception statute sets forth a specific procedure. The plain language of the seller’s-exception statute requires that the identified manufacturer *be served with process* prior to dismissal of strict-liability claims against the passive seller. Id. at subd. 2. And it further requires that, before dismissal, the manufacturer must have responded or have the obligation to respond. Dismissal is not appropriate if the plaintiff’s action cannot reach a manufacturer or the manufacturer is insolvent. Bastian v. Wausau Homes, Inc., 638 F. Supp. 1325, 1327 (N.D. Ill. 1986) (applying similar Illinois statute). The evident purpose of the seller’s-exception statute is to ensure the manufacturer can be joined in the lawsuit before the passive sellers are dismissed from strict-liability claims.

The statutory language contemplates that: (1) a seller will certify the correct identity of the manufacturer; (2) the plaintiff (i.e. the affected consumers) or the certifying defendant will join the identified manufacturer; and (3) strict-liability claims will be dismissed against the certifying defendant. Minn. Stat. § 544.41, subds. 1, 2. The seller's-exception statute allows a non-manufacturing defendant who did not contribute to the alleged defect to defer strict liability to the manufacturer, but it does not permit the seller to avoid responsibility when the manufacturer cannot be sued.

VII. SUCCESSOR LIABILITY

Since the early days of products liability litigation, courts and legislatures have struggled with liability of a successor entity for actions based on a defective product manufactured, distributed or sold by a predecessor. This struggle originates, in part, from the conflict between the traditional rules of successor liability arising out of corporate law and the relatively new tort law principles of strict liability. Because the traditional corporate law rules were established prior to the advent of modern products liability law, its emphasis on successor non-liability contradicts modern strict liability theory, which favors shifting the costs associated with defective products from injured consumers to manufacturers. David B. Hunt, Tort Law—Towards a Legislative Solution to the Successor Products Liability Dilemma, 16 Wm. Mitchell L. Rev. 581 (1990).

Minnesota follows the traditional approach to corporate successor liability. The general rule is that a corporation that acquires all or part of the assets of another corporation does not acquire the liabilities and debts of the predecessor. Niccum v. Hydra Tool Corp., 438 N.W.2d 96, 98 (Minn. 1989) (citing J. F. Anderson Lumber Co. v. Myers, 206 N.W.2d 365 (Minn. 1973)); State Bank of Young Am. v. Vidmar Iron Works, Inc., 292 N.W.2d 244, 251 (Minn. 1980); Standal v. Armstrong Cork Co., 356 N.W.2d 380, 382 (Minn. Ct. App., 1984).

Minnesota Courts have recognized exceptions to the general rule where:

- (1) The purchaser expressly or impliedly agrees to assume such debts;
- (2) The transaction amounts to a consolidation or merger of the corporation;
- (3) The purchasing corporation is merely a continuation of the selling corporation;
and
- (4) The transaction is entered into fraudulently in order to escape liability for such debts.

Niccum, 438 N.W.2d at 98.

A. Express or Implied Agreement to Assume Debt

The first general exception deals with an expressed or implied agreement to assume the debt. Evaluation of this exception begins by examining any contracts between the

successor and predecessor corporation for language that evidences an agreement to assume debts. Plaintiffs have argued that a successor corporation's agreement to honor the warranties of the predecessor is an assumption of debts, but courts have generally found this argument insufficient. See, e.g., Schwartz v. McGraw-Edison Company, 14 Cal. App.3d 767 (Cal. App. 2 Dist. 1971) (overruled on other grounds). (See discussion, infra., regarding Minnesota non-adherence to the "product line" exception).

B. De Facto Merger

Under the second exception, liability will be found where a merger or consolidation has occurred. In T.H.S. Northstar Associates v. W.R. Grace & Co., 840 F. Supp. 676 (D. Minn. 1993), the court applied the de facto merger doctrine to determine if the successor merged with the predecessor. The elements of a de facto merger are:

- (1) Continuity of management, personnel, assets, and operations;
- (2) Continuity of shareholders which result from the purchasing corporation paying for the acquired assets with shares of its own stock;
- (3) The seller ceasing operations, liquidating, and dissolving as soon as legally and practically possible; and
- (4) The purchasing entity assumes the obligations of the seller necessary for uninterrupted continuation of business operations.

Niccum, 438 N.W.2d at 98.

Recent court decisions are consistent with Niccum. In Costello v. Unipress Corp., No. C6-95-2341, 1996 WL 106215 (Minn. Ct. App. Mar. 12, 1996), the Minnesota Court of Appeals refused to assess successor liability on the basis of the de facto merger exception even though the successor corporation acquired the predecessor partnership's product lines, customer lists, good will, physical assets, some employees, managers, and trademark. Id. at *1. Rejecting the plaintiff's argument that there was a de facto merger, the court stated that the plaintiff presented no evidence that the owners of the predecessor partnership remained owners of the successor corporation. Id. Without this "key element of shareholder continuity," the plaintiff failed to present a genuine issue of material fact showing that the transfer of assets constituted a de facto merger. Id.

C. Continuation of the Entity

The third exception concentrates on continuation of the entity. Pursuant to the Minnesota Supreme Court in Niccum, under the traditional rule, mere continuation

“refers principally to a ‘reorganization’ of the original corporation under federal bankruptcy law or through state statutory devices.” Niccum, 438 N.W.2d at 99 (citation omitted). The court went on to say:

Continuity of business name, and management alone, is not, we think, sufficient basis for holding a transferee liable for the debts of the transferor. If there is no continuation of the corporate entity—shareholders, stock, and directors—the successor corporation is not liable.

Id. (emphasis added); see also *Schultz v. Wing Enters, Inc.*, No. C5-94-1302, 1995 WL 2227 (Minn. Ct. App. Jan. 3, 1995); *Andersen v. N. Hydraulics, Inc.*, No. CX-96-476, 1996 WL 453611 (Minn. Ct. App. Aug. 13, 1996).

Unfortunately, a traditional application of the "mere continuation" exception was not before the Minnesota Supreme Court in Niccum. Instead, the appellant sought to have the court expand the mere continuation exception to include cash-for-asset sales. Niccum, 438 N.W.2d at 99.

Expansion of the “mere continuation” exception focuses on the continuity of the business operation, not the corporate entity. Id. However, the court specifically declined to expand the mere continuation exception to include cash for asset sales, noting that eight other states had also declined to do so. The other states’ reasons, which the court found compelling, were:

- (1) The successor corporation did not create the risk by putting the defective product on the market;
- (2) Any profit realized on the product is only received in a remote way; and
- (3) The predecessor has not represented to the public the safety of the predecessor's product.

Id.

Because the Minnesota Supreme Court has not specifically made an analysis of what constitutes continuity of the business entity for purposes of successor liability, case law from other jurisdictions adopting the Niccum exceptions provide useful guidance in making such an analysis. Wisconsin courts have held that there must be a common identity of directors, officers, and shareholders in the buying and selling of corporations. The question to be asked is whether it is the same business organization as the predecessor corporation. Fish v. Amsted Indus., Inc., 376 N.W.2d 820, 824 (Wis. 1985). Iowa Courts have determined that a mere intermingling of officers and

directors alone does not mean a mere continuation exception exists. Weaver v. Nash Intern., Inc., 562 F. Supp. 860, 863 (S.D. Iowa 1983).

Therefore, under the “mere continuation” exception, the Minnesota Supreme Court in Niccum concluded that there must be a continuation of the corporate entity-shareholders, stock, and directors.

D. The “Product Line” Exception

In Niccum, the Minnesota Supreme Court also expressly rejected the imposition of the product line exception which was adopted by the California Supreme Court in Ray v. Alad Corp., 560 P.2d 3 (Cal. 1977). Under the product line theory, a successor corporation which continues to manufacture a product of the business it acquires, regardless of the method of acquisition or any possible attribution of fault, assumes strict liability for products manufactured and sold before the change of ownership. Niccum, 438 N.W.2d at 99.

The Niccum court followed the lead of the majority of other courts which had examined this theory, rejecting it for three reasons. First, the exception is inconsistent with elementary products liability principles (and strict liability principles in particular) because it results in an imposition of liability without a corresponding duty. Second, the exception threatens small successor businesses with economic annihilation due to the difficulty of obtaining insurance for potential defects of predecessor products. Finally, and perhaps most importantly, the “product line” exception represents a radical departure from the traditional principles of corporate law. Id. The court decided that whether to adopt the “product line” exception is a decision for the legislative branch, because it would be a major change in Minnesota law. Id.

E. Successor Duty to Warn

The remaining issue of concern to a successor corporation is the duty to warn. The challenge for the courts is to decide whether the relationship between a successor and its predecessor imposes on the successor a duty to warn about products brought to market by the predecessor. To make that decision, courts focus on the actual or potential economic advantage to the successor corporation. Am. L. Prod. Liab. 3d § 7:33 (2006).

To discern whether the successor has a duty to warn, Minnesota courts have stated that relevant considerations include whether the successor: (1) took over its predecessor's service contracts; (2) was contracted to perform or actually performed service of the product at issue; (3) knew of defects in the machine at issue; and (4) knew the location or owner of the product at issue. Costello v. Unipress Corp, Inc.,

No. C6-95-2341, 1996 WL 106215 at *1 (Minn. Ct. App. Mar. 12, 1996) (citing Niccum, 438 N.W.2d at 100). Otherwise stated, if the successor entity has no knowledge of defects and no knowledge of the location of the machine, there is no known entity to warn and nothing to warn against. Id. (citing Travis v. Harris Corp., 565 F.2d. 443, 449 (7th Cir. 1977)).

F. Minnesota Business Corporations Act, Minn. Stat. §§ 302A.727 and 302A.781

Minnesota Statutes section 302A.727 (which replaced section 302A.729) establishes the procedure and requirements a corporation may follow when providing notice to its creditors and claimants regarding its dissolution.

Pursuant to subd. 3(c) of this statute, a creditor or claimant to whom notice is given, who fails to file a claim according to the procedures set forth by the corporation on or before the date set forth in the notice, is barred from suing on that claim or otherwise realizing upon or enforcing it, except as provided in section 302A.781. Minn. Stat. § 302A.727 subd. 3(c) (2006).

Exceptions to this bar are found in section 302A.781. A creditor or claimant may bring a claim against a dissolved corporation: (1) within one year after the corporation files its articles of dissolution, and demonstrates good cause for the delay in bringing the claim; or (2) prior to the applicable limitations period expiring, against the officers or shareholders for all known contractual debts, obligations or liabilities the corporation incurred in the course of winding up the corporation's affairs. Minn. Stat. § 302A.781, subd. 3 (2006). In 2003, Minnesota Court of Appeals helped define "liabilities incurred during dissolution proceedings" in Podvin v. Jamar Co., 655 N.W.2d 645 (Minn. Ct. App. 2003).

1. Podvin v. Jamar Co., 655 N.W.2d 645 (Minn. Ct. App. 2003)

Podvin involved asbestos-related tort and contractual claims against two corporations that voluntarily dissolved sixteen years before the suit was filed. The court held that the claims were barred by the Minnesota Business Corporations Act, and that they did not fall under the exception contained section 302A.781, for liabilities incurred during a corporations dissolution proceeding. Podvin v. Jamar Co., 655 N.W.2d 645 (Minn. Ct. App. 2003).

In December 2001, Podvin filed a complaint for negligence, products liability, and breach of warranty against two manufacturings, "Jamar II" and "Walker Jamar." Id. at 647. The defendants had filed articles of dissolution in 1985. The defendants argued that service of process could not be accomplished because the claims against dissolved corporations were barred under the then-applicable 1984 version of section §§ 302A.729 and .781. Id. at 646.

The court's decision hinged on its interpretation of what constituted "liabilities incurred in the course of winding up the corporations affairs." The court limited the application of this phrase by stating, "...the language 'liabilities incurred' plainly applies to a debt or obligation that the obligor was legally obligated to pay at the time of the dissolution proceedings, *rather than to an unmatured tort or contract claim.*" Id. at 650 (emphasis added).

The Court decided that the Minnesota Legislature

. . . intended to limit corporate liability under this provision to matured claims that corporations could identify during the dissolution process, so that payment could be made and the winding up of corporate affairs could proceed in an orderly and definite fashion. To hold otherwise would create lingering liability for claims arising after dissolution that could conceivably extend corporate accountability in perpetuity.

Id. at 651 (citing Onan Corp. v. Indus. Steel Corp., 770 F. Supp. 490, 493–95 (D. Minn.1989)).

VIII. EXPERTS, EXPERT OPINIONS, AND LAY WITNESSES

A. General Discussion

In products and toxic tort cases, opinion testimony from lay persons and experts is very important. In many cases, expert testimony is absolutely necessary. Lay opinions based on personal observation or experience that are helpful to a jury are admissible. Expert opinions from qualified witnesses that assist a fact finder in the areas of scientific, technical, or other specialized knowledge are also admissible. Fireman's Fund Ins. Co. v. Canon U.S.A., Inc., 394 F.3d 1054 (2005).

The persuasive value of expert witness testimony can hardly be underestimated. A defense expert who is qualified, articulate, and adept on the witness stand makes a positive impression on a jury, and that positive impression tends to make a defendant's entire case more persuasive. Such expert testimony is often the key to winning a case.

This section discusses the use of lay witnesses, expert witnesses, and expert opinions. As a general rule, both lay and expert witnesses may testify about facts when they have first-hand knowledge of those facts. Expert witnesses may also offer the opinions they form. Expert opinions are generally admissible provided that they are based on reasonable inferences from objective facts. The opinions of lay witnesses may also be admissible under certain circumstances, but the courts view lay opinion testimony with a more skeptical eye.

This section also discusses the disclosure requirements that must be met in order to present expert materials at trial.

1. Expert Witness Disclosures

Expert witnesses can testify at trial only after their identities, opinions, conclusions, reports, and other information have been disclosed in keeping with court rules that set general guidelines applicable to all cases. Such disclosures must also comply with any court orders that set specific deadlines and other requirements for a particular case. The timing of expert witnesses and their opinions is critical, and the requirements governing these disclosures are generally inflexible, particularly if an infraction has a negative impact on the other party. Failure to make timely expert disclosures is a basis for barring that expert from testifying. Dennie v. Metropolitan Medical Center, 387 N.W.2d 401 (Minn. 1986); Fritz v. Arnold Mfg. Co., 232 N.W.2d 782 (Minn. 1975); Norwest Bank Midland v. Shinnick, 402 N.W.2d 818 (Minn. Ct. App. 1987); Vaughn v. Love, 347 N.W.2d 818 (Minn. Ct. App. 1984); see also, Minn. R. Civ. P. Rule 26.05.

In determining whether to admit or suppress late-disclosed expert testimony, the trial court will consider the following factors:

1. The extent of preparation required by an opposing party in preparing for cross-examination or rebuttal of expert witnesses;
2. When the expert agreed to testify;
3. When the party calling the expert notified the opposing party of the expert's availability;
4. When the attorney calling the expert assumed control of the case;
5. Whether a party intentionally and willfully failed to disclose the existence of a trial expert; and
6. Whether the opposing party sought a continuance or other remedy.

Dennie, 387 N.W.2d at 406.

The trial court has broad discretion to decide whether to admit expert testimony. "The question of whether to admit or exclude evidence rests within the broad discretion of the trial court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of

discretion." Uselman v. Uselman, 464 N.W.2d 130, 138 (Minn. 1990) (citing Reinhardt v. Colton, 337 N.W.2d 88, 93 (Minn. 1983)).

The importance of timely disclosures is illustrated by Trost v. Trek Bicycle Corp., 162 F.3d 1004 (8th Cir. 1998). In Trost, the Eighth Circuit Court of Appeals considered the late disclosure of the opinion of a metallurgical engineer hired by the plaintiff to inspect a bicycle. The trial court had excluded the expert's opinion based solely on untimeliness, and the issue on appeal was whether the trial court had abused its discretion by doing so. Id. at 1008. The plaintiff could not explain why the disclosure had been untimely, could not justify the untimeliness, and could not show that the late disclosure was harmless to the defendant. The Eighth Circuit affirmed the trial court's decision. Without that expert's evidence, the plaintiff did not have sufficient competent evidence to withstand summary judgment, and the case was dismissed. Id. at 1008–09.

Though the timeliness requirements for expert evidence are generally inflexible, failure to designate a witness as an expert and to provide answers to expert witness interrogatories might not completely bar that witness' testimony. Evidentiary Rule 701 allows some non-expert witnesses to offer "lay" opinions, conclusions, and inferences, and it may be possible under certain circumstances to have an expert's testimony admitted via this rule. One author described the rule as follows:

Rule 701 may serve as a route for expert testimony otherwise barred. For example, if the expert was not included on the list of expert witnesses complying with a pretrial order, this witness may still give a "lay" opinion based on personal perception.

Lane's Goldstein Trial Techniques § 14.29 (3d Ed.). See also, Teen-Ed, Inc. v. Kimball Int'l., Inc., 620 F.2d 399 (3rd Cir. 1980) (an accountant's personal knowledge of a party's balance sheet satisfy the requirements of Evidentiary Rule 701); United States v. Kelley, 615 F.2d 378 (5th Cir. 1980) (bank officials should be allowed to testify that documents at issue may influence the loan decision of the bank); Brown v. J. C. Penney Co., Inc., 667 P.2d 1047 (Or. App. 1983) (lay witnesses may testify to personality changes in the plaintiff); City of Hartford v. Anderson Fair Oaks, Inc., 510 A.2d 200 (Conn. App. 1986) (witnesses were allowed to testify as "fact witnesses" without giving any expert opinion, after the court had disallowed their testimony as experts).

An expert's testimony is not always required, but it is for some products liability claims such as elevators, the trier of fact will not generally know how the design of the electronic and mechanical systems will work; thus, forcing the average juror to speculate. Holverson v. ThyssenKrupp Elevator Corp., No. CIV. 12-2765 ADM/FLN, 2014 WL 3573630, slip op. at 6-7 (D. Minn. July 18, 2014) (the court granted defendants' motion for summary judgment and granted in part defendants' motion to exclude the expert testimony of Thomas Branham, but denied the motion to strike Branham's errata sheet since the inconsistent information provided is for the trier of fact to decide in this case of an alleged elevator lurching upwards causing plaintiff to undergo multiple hip surgeries).

B. Witness Selection

Products and toxic tort cases can be expensive to try. However, when properly prosecuted or defended, they offer tremendous rewards. The first step in investigating is the location and identification of witnesses and the preservation of those witnesses' observations for later use at trial. Unfortunately, these cases frequently require several "liability" and "damage" experts. Many persons, including eyewitnesses, technical experts, and medical experts should be consulted.

C. Lay Witnesses

Whether a person is competent to be a witness is a legal question. Minn. R. Evid. 104. If a lay witness lacks personal knowledge of a fact of consequence, that lay witness may not testify as to that fact. Minn. R. Evid. 602. "Expert witnesses provide the only exception to the rule that witnesses must testify from firsthand knowledge." Id. cmt. (1977)

The requirement that a witness must testify from firsthand, personal knowledge allows some lay witnesses to offer opinions, conclusions and inferences. Minn. R. Evid. 701. Lay witnesses may testify in the form of opinions, conclusions or inferences when those opinions, conclusions or inferences are:

Rationally based on the perception of the witness, and

Helpful to a clear understanding of the witness' testimony or to the determination of a fact of consequence.

Minn. R. Evid. 701.

For example, while a lay witness may not be able to testify as to the cause of a fire, a lay person may offer testimony critical to determining a fire's origin or origins and to

a determination of causation. The person who discovered the fire, and who has personal, firsthand knowledge of a fire, who saw and perceived the flames of the fire or explosion, saw the color of its smoke and smelled its burning, heard the explosion, and so on, should be allowed to testify as to those facts, the areas involved in the fire or explosion, what the fire, smoke, and explosion looked like, what the fire, explosion, and smoke smelled like, whether the fire was slow burning or rapidly spreading. These are all things that a person could "rationally perceive" and that would be helpful to the jury.

There are numerous cases that discuss what opinions, conclusions or inferences, rationally based and helpful to a jury, are allowed:

- In Brandt Distributing Co., Inc. v. Fed. Insurance Co., 247 F.3d 822 (8th Cir. 2001), the U.S. Court of Appeals for the Eighth Circuit held that it *was not* error for the trial court to allow the testimony of a St. Louis fire department captain that a fire was a "fraud fire." The fire captain's name and his report had been disclosed. The fire captain was not retained as an expert by either side. The discovery rules regarding the identity of persons and experts were not violated.
- In Meuhlhauser v. Erickson, 621 N.W.2d 24 (Minn. Ct. App. 2000), the Minnesota Court of Appeals considered whether it was appropriate to limit the testimony of a lay witness. The opinion testimony was not allowed because the lay person only briefly saw the vehicles involved.
- In Children's Broadcasting Corporation v. The Walt Disney Company, 245 F.3d 1008 (8th Cir. 2001), the Eighth Circuit Court of Appeals held that it was improper to exclude the testimony of an accounting expert because that expert applied an "[u]ncontroversial accounting method called Discounted Cash Flow."
- In Daltex, Inc. v. Western Oil & Fuel Co., 148 N.W.2d 377 (Minn. 1967), the Minnesota Supreme Court ruled that employees who were in a building prior to a fire could testify that they detected a warm, metal smell emitting from an air register, that the duct work above the register would get warm on cold days, and that when the register was first hooked up it blew dust all over the building (supporting the inference that the duct work may not have been a cold air return but was actually a heating duct).
- The Daltex court also held that a city fire marshal employed by a fire department for twenty-two years, who attended seminars concerned with the techniques for detection of fire causes, who had personally

observed the fire and had elicited information from employees concerning combustible materials being near a forced air duct had foundation to offer an opinion on causation. Id. at 381.

- An experienced police officer trained in drug recognition protocol, who personally observed and arrested a defendant, and, who, prior to the arrest, had gone through a recognition protocol, may offer an opinion as to whether a person is "under the influence" of some drug. State v. Klawitter, 518 N.W.2d 577 (Minn. 1994). Klawitter stated, in part, as follows:

The state urges abandonment of the Frye standard in favor of the standard articulated in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993). Because we affirm the determination that the Frye standard has been met here, we do not address the effect of the Daubert decision on the use or application of the Frye rule in Minnesota.

Klawitter, 518 N.W.2d at 585, n. 3.

- Experienced firemen may state their opinion, based on what they observed when they arrived during the early stages of a fire, that some flammable substance "other than that of which the building was constructed or which it contained contributed to the manner and speed with which the fire burned and spread [and] that appeared to burn and spread like a 'boosted' fire." State v. Lytle, 7 N.W.2d 305 (Minn. 1943).
- In State v. Post, 512 N.W.2d 99 (Minn. 1994), the Minnesota Supreme Court ruled that it is error to not allow a witness to testify as to who was the observed "aggressor" in a shooting incident. The Post decision thoroughly discusses Minnesota Rule of Evidence 701, stating "the emphasis is not on how a witness expresses himself or herself—i.e., whether in the form of an opinion or a conclusion—but on whether the witness personally knows what he or she is talking about and whether the testimony will be helpful to the jury." Id. at 101.
- A lay witness may also render an opinion regarding someone's handwriting. State v. Glidden, 459 N.W.2d 136, 142 (Minn. Ct. App. 1990); Minn. R. Evid. 901 (b)(2).

- Where, subsequent to an accident, a witness acquires the experience and other foundation necessary to offer an opinion on liability facts, the decision as to whether the witness has sufficient foundation for the admission of a lay opinion is for the trial court to decide. Marsh v. Henriksen, 7 N.W.2d 387 (Minn. 1942).
- A witness must have personal knowledge of his own property before testifying as to its value or the damages sustained. Foot v. Yorkshire Fire Ins. Co., 286 N.W. 400 (Minn. 1939).
- A person may offer his own testimony as to the diminished value of property. LaValle v. Aqualand Pool Co., Inc., 257 N.W.2d 324, 328 (Minn. 1977).
- A close friend of a plaintiff may testify that he or she saw the plaintiff almost daily for four years prior to the accident and that the plaintiff's health was good. Van House v. Canadian N. Ry. Co., 192 N.W. 493 (Minn. 1923).
- A state official and former employee of the defendant may offer their opinions about what the real estate developer knew or intended to do based on their past experiences with him, where both the state official and former employee knew from their professional dealings, discussions, and experience with the real estate developer that the developer never intended nor ever followed through with promises he made to others regarding real estate development. Winant v. Bostic, 5 F.3d 767, 772 (4th Cir. 1993).
- Evidence of common practices, customs, and standards, described by persons with knowledge of those customs, is admissible. Schmidt v. Beninga, 173 N.W.2d 401, 408 (Minn. 1970).

In sum, witnesses who have firsthand, personal knowledge of facts of consequence may testify as to those facts of consequence in the form of an opinion, conclusion, or inference, provided that their testimony is helpful to the jury.

D. Minnesota Rules of Evidence Regarding Experts

Rules 702, 703, 704, 705, and 706 of the Minnesota Rules of Evidence deal with expert witnesses. It is important to note that until recently, these rules were nearly identical to the Federal Rules of Evidence with the same numbers. But that does not mean that the application of the federal and state rules is identical. This is true because federal rules of evidence are not binding on state courts. Thus Minnesota courts are

free to interpret and apply Minnesota rules as they see fit. This is particularly important with regard to Rule 703, on which the Minnesota Supreme Court takes an approach that differs from the United States Supreme Court's interpretation of the federal rules. Federal Rule 703 was amended in 2000 to follow the U.S. Supreme Court's interpretation, while Minnesota's comparable rule remained the same.

Rule 702 has been interpreted as a threshold inquiry as to whether expert testimony will assist the jury and whether the expert is qualified to offer an opinion. Rule 703 concerns the bases of expert testimony and whether the expert's bases may be received in evidence. Rule 704 addresses whether an expert may testify as to the ultimate fact question to be determined by the jury. Rule 705 talks about whether an expert may testify as to opinion, conclusion, or inference, without first detailing the bases for that opinion, conclusion, or inference.

This section discusses these rules in numerical order. It is important to note that the bases of expert testimony may be a contested issue, especially in case where an expert bases his or her opinion on novel scientific evidence or methods. Minnesota is arguably outside of the mainstream on this issue; the tests Minnesota courts use on this point are different from those adopted by the United States Supreme Court and the majority of states. This issue is addressed below in connection with Rule 703.

1. Rule 702: Helpfulness and Qualifications

"Expert witnesses may testify to assist trier of fact in understanding the evidence." State v. Helterbride, 301 N.W.2d 545, 547 (Minn. 1980). Normally, for example, in strict products liability cases an expert must testify. Peterson v. Crown Zellerbach Corp., N.W.2d 922 (Minn. 1973). Generally speaking, if the subject matter and/or the facts of consequence, are outside the knowledge or experience of lay people, expert testimony may be allowed. However, there are cases where expert testimony is not needed. Sherbert v. Alcan Aluminum Corp., 66 F.3d 965 (8th Cir. 1995); Dahlbeck v. DICO Co., Inc., 355 N.W.2d 157 (Minn. Ct. App. 1984).

Where a plaintiff had knowledge of escaping gas and knew that igniting a cigarette could cause the gas to explode but chose to light the cigarette in the presence of gas anyway, no expert would be needed to show that the plaintiff had primarily assumed a risk. Andren v. White-Rodgers Co., 465 N.W.2d 102, 104 (Minn. Ct. App. 1991).

Under Rule 104 and 702 of the Minnesota Rules of Evidence, evidentiary determinations of the qualifications of an expert witness are reviewed using an abuse of discretion standard. Fairview Hosp. and Health Care Servs. v. St. Paul Fire & Marine Ins. Co., 535 N.W.2d 337, 341 (Minn. 1995). District

courts' decisions about whether expert testimony will be helpful and whether an expert is qualified to testify are reviewed primarily under an "abuse of discretion" standard, but case law also indicates that these decisions may be reversed if based on an erroneous view of the law or if plainly not justified by the evidence. Hueper v. Goodrich, 263 N.W.2d 408, 411 (Minn. 1978). In Hueper, the Minnesota Supreme Court stated:

It is generally not necessary that an expert witness be the most qualified person in his field in order to render his opinions at trial. All that is necessary is that he has some specialized knowledge or training which will be of some assistance to the jury.

Id.

The expert ought to possess some practical knowledge or experience in the area of expertise. Fiedler v. Spoelhof, 483 N.W.2d 486 (Minn. Ct. App. 1992).

Great deference will be accorded to the trial court's determination as to whether an expert's opinion should be excluded. Benson v. N. Gopher Enters., Inc., 455 N.W.2d 444, 445–46 (Minn. 1990).

If the expert's testimony is speculative or lacks foundation, it should not be admitted. Kwapien v. Starr, 400 N.W.2d 179, 183 (Minn. Ct. App. 1987). In this regard, if the expert has the requisite qualifications, testimony pertinent to the lawsuit which can be provided to a reasonable degree of probability, should be allowed. Block v. Target Stores, Inc., 458 N.W.2d 705 (Minn. Ct. App. 1990).

2. **Rule 703: Basis for Expert Opinion**

a) **In general**

Experts may base their opinions on many things—experience, training, learned treatises, and so on—but the trial court should scrutinize some of these bases outside the hearing of the jury if they are irrelevant, misleading, or confusing. Finchum v. Ford Motor Co., 57 F.3d 526, 530–32 (7th Cir. 1995). For example, safety standards and manuals recognized by an expert as learned treatises are valid bases for an expert's opinions, and may be read to the jury, but they may not be received in evidence as exhibits. Ramstad v. Lear Siegler Diversified Holdings Corp., 836 F. Supp. 1511 (D. Minn. 1993).

An expert's testimony may be based on circumstantial evidence, provided that the expert's inferences are reasonably supported by that circumstantial evidence. For instance, in a case involving the failure of a boom hoist, expert testimony that a switch may have been contaminated was admissible even there was no direct evidence on that point. The experts based their opinions on an inspection of the accident site and on inspections of similar switches, though not the actual switch involved, and their testimony was admitted because it was reasonably supported by this indirect evidence. Dahlbeck v. DICO Co., Inc., 355 N.W.2d 157, 164 (Minn. Ct. App. 1984).

Minnesota has attempted to restrict the use of inadmissible, underlying bases for an expert's opinion by adding Rule 703(b), which states as follows:

Underlying expert data must be independently admissible in order to be received upon direct examination; provided that when good cause is shown in civil cases and the underlying data is particularly trustworthy, the court may admit the data under this rule for the limited purpose of showing the bases for the expert's opinion

This rule means, in essence, that if the bases of the expert's opinion are inadmissible and unreliable, those bases should not come into evidence at all.

See Johnson v. Mead Johnson & Co., LLC, 2014 WL 2535324 (Minn. Ct. App. June 6, 2014) (the Minnesota Court of Appeals reversed and remanded the district court's ruling on excluding plaintiff's expert witnesses holding that the expert's methods for determining an opinion was scientifically valid and reliable to assist the trier of fact on possible causes for plaintiffs' infant child who suffered severe permanent brain damage as a result of using contaminated Enfamil formula).

Rule 1006 of the Minnesota Rules of Evidence and its federal counterpart allow the admission of summaries of voluminous data. Experts frequently utilize such summarized information as a basis, in part, for their opinions.

b) Novel scientific evidence: “Frye,” “Frye-Mack” and “Daubert” tests

As ongoing scientific and technological developments lead to new sources of evidence, the courts are repeatedly faced with the challenge of how to consider expert evidence based on these new developments. The basic question is this: are these new developments reliable bases of expert evidence and testimony that can help fact-finders make reasoned decisions, or are they “junk science” that should be excluded from the courtroom?

Courts considering a new scientific method or technology have historically considered the degree to which that method or technology has gained acceptance in the scientific community. This approach, called the “Frye test,” takes its name from a 1923 case before the Court of Appeals for the District of Columbia Circuit, Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). The Frye test was generally accepted for more than seventy-five years. But in 1993, the United States Supreme Court held the trial judge is responsible to decide questions of admissibility, and that acceptance in the scientific community is only one factor in that decision. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593–94.

Since Daubert, state courts have been divided on what test to apply. This division is significant, because different jurisdictions are generally free to use different tests to determine the admissibility of evidence. Minnesota has developed a variation of the Frye test known as the “Frye-Mack” test. If a case is brought in a Minnesota state court, the Frye-Mack will apply. But if the same case is brought in the Federal District Court for the District of Minnesota, the federal rules will apply. This fact has tactical implications. When a party anticipates using or opposing the use of novel scientific evidence, the rules governing the admissibility of such evidence may factor into the decision about where to file the suit, and whether to try to remove a suit to a different court.

(1) The “Frye test”

In Frye, the court was faced with whether to admit the results of a polygraph test. The court rejected the polygraph evidence, and explained its decision in terms that have come to be known as the “Frye test.”

[W]hile courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle of discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Frye, 293 F. at 1014. This test, under which the courts essentially defer to the scientific community, was used in the federal system for more than seventy years, and is still in use in many jurisdictions.

Proponents of the Frye test argue that it allows the courts to draw on the expertise of scientists in the relevant field, rather than charging a judge (who is surely well-trained in the law, but not likely well-trained in the relevant science) with the challenge of evaluating a new scientific method. But critics point out that strict adherence to the Frye test bars all evidence based on new scientific methods simply because such methods are new, and have not been subjected to the scrutiny of the scientific community.

(2) Minnesota variation: The “Frye-Mack” test

Minnesota has developed a variation on the Frye test that has come to be known as the “Frye-Mack” test. The line of cases through which this test developed is somewhat muddled, and the test has been unclear at times. But in recent years, the Minnesota Supreme court has provided needed clarification.

In 1971, the Minnesota Supreme Court considered the admissibility of voice identification evidence based on the use of a spectrogram, which purports to measure certain characteristics of a person’s voice in order to confirm the connection between a particular voice and a particular person. State ex. rel. Trimble v. Hedman, 192 N.W.2d 432, 437–41 (1971). Spectrograms were not generally accepted in the scientific community at the time, which would seem to make spectrogram evidence inadmissible under the Frye test. But the trial court admitted the evidence anyway. The Supreme Court affirmed the trial court’s decision to admit the spectrogram evidence, apparently based on the trial court’s

view of their reliability (rather than the prevailing view of the scientific community) and on the court's confidence that the jury would be able to understand and weigh the spectrogram evidence in comparison to other evidence. Id. The Trimble decision seems to suggest that acceptance in the scientific community is a factor in the admissibility decision, but not a dispositive one.

In State v. Mack, the Minnesota Supreme Court considered whether to admit testimony about memories "revived" by hypnosis. State v. Mack, 292 N.W.2d 764, 771 (Minn. 1980). As with the spectrograph evidence considered in Trimble, the use of hypnosis in this way was not generally accepted in the scientific community. Under the Frye test, that would suggest that the evidence would be inadmissible, but under Trimble, it might still be admitted if the court was satisfied that the evidence was reliable, notwithstanding the opinion of the scientific community. Amid this ambiguity, the Mack court rejected the hypnotically "enhanced" testimony.

The Mack decision arguably confused the issue because while the court seems to have followed the Trimble court's focus on whether the court—not the scientific community—was persuaded, the Mack court asserted that the Trimble court in fact applied the Frye test. Mack, 292 N.W.2d at 768.

In State v. Schwartz, the Supreme Court, considering admissibility of DNA evidence analyzed under a certain process, again voiced its affirmation of the Frye test, treating acceptance in the scientific community as a threshold requirement. State v. Schwartz, 447 N.W.2d 422, 424 (Minn. 1989). The court held that the DNA evidence analyzed in this particular way was generally accepted in the scientific community, and therefore admissible under the Frye test. The court then rejected the DNA evidence in this particular case based on unique facts: the experts had not complied with relevant laboratory standards and the prosecution declined to produce testing data. Id.

The case law up to this point left Minnesota's standard unclear. The opinion of the scientific community was at least a significant factor in the determination, and that maybe even a threshold issue. But the analysis seemed open to other factors

as well, like whether the jury will be able to understand and weigh the evidence, and whether the trial court is persuaded of the value of the evidence regardless of what the scientific community thought.

Note that in Doe v. Archdiocese of St. Paul, the Minnesota Supreme Court held the plaintiff's expert testimony on the theory of repressed memory and recollection was not foundationally reliable to establish the plaintiff's disability, claiming it delayed the plaintiff from bringing this cause of action. Doe v. Archdiocese of St. Paul, 817 N.W.2d 150, 154 (Minn. 2012). The Court stated the evidence inadmissible under Minn. R. Evid. 702 because it lacked foundational reliability. Thus, it found the plaintiff's claims as untimely.

(3) The “Daubert” test

In 1993, the United States Supreme Court took up the admissibility of novel scientific evidence and rendered a decision that departed from the Frye test. The Court decided that Federal Rule of Evidence 702, which was adopted years after Frye, requires the trial judge to act as a “gatekeeper” to ensure that evidence is reliable, and will be helpful to the jury before admitting it. Daubert v. Merrell Dow Pharms., 509 U.S. 579, 583–85 (1993). The trial court had rejected certain evidence after applying the Frye test and the appellate court had affirmed that decision. But the Supreme Court remanded the case to the trial court with instructions to apply a new test defined by the Court.

Under Daubert, a judge is required to assess the validity of scientific evidence, and should consider several factors. The Frye test's standard—whether the technique or methodology has gained general acceptance in the scientific community—is a factor, but not a dispositive one, and must be weighed against other factors. Other factors include whether the underlying science has been or can be tested, whether it has been subjected to peer review and publication, and the estimated error rates. Id. at 593–94. This list is not exclusive. Id.

The Daubert court also emphasized that the trial court must consider relevance, which it described as whether the evidence is “sufficiently tied to the facts in the case so as to be helpful

to the trier of fact.” Id. at 591. When the remanded case found its way back to the Ninth Circuit Court of Appeals, that court took advantage of the non-exclusive nature to the new test and considered an additional factor: whether the scientific research in question was conducted for the purposes of litigation. Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1317 (9th Cir. 1995).

Since Daubert, the Supreme Court has explained and expanded the new standard in a line of cases. In General Electric v. Joiner, 522 U.S. 136 (1993) the Court made clear that a trial court’s application of Daubert may be overturned only on a finding of abuse of discretion. Id. at 146. In Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137 (1999), the Court held that the gatekeeping function described in Daubert applies not only to novel scientific evidence, but to all expert evidence.

The Daubert test is somewhat limited at the stage of class certification to guarding against certification that is based on an experts opinion from a methodology so apparently flawed that it is inadmissible as a matter of law. Ebert v. Gen. Mills, Inc., No. CIV. 13-3341 DWF/JJK, 2015 WL 867994, at *6 (D. Minn. Feb. 27, 2015) (citations omitted). The Court uses a less stringent analysis to determine the nature of the evidence that would be sufficient, if plaintiff’s general allegations were true, to make out a *prima facie* case of class liability. Id. at *7; Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 611 (quoting Blades v. Monsanto Co., 400 F.3d 562, 567 (8th Cir. 2010)).

(4) Minnesota’s resistance to Daubert: Clarifying Frye-Mack

In the years after Daubert, there were several cases in which the Minnesota Supreme Court reacted ambiguously to that decision. But in 2000, the court clearly rejected Daubert and retained the Frye-Mack test. In the process, the court offered a clearer statement of the Frye-Mack test:

[W]hen novel scientific evidence is offered, the district court must determine whether it is generally accepted in the relevant scientific community. In addition, the particular scientific evidence in each case must be shown

to have foundational reliability [meaning that] the proponent of a test [must] establish that the test itself is reliable and that its administration in the particular instance conformed to the procedure necessary to ensure reliability.

Goeb v. Tharaldson, 615 N.W.2d 800, 814 (Minn. 2000) (quotation omitted). The court went on to say that the trial court must also determine that the evidence is relevant, is given by a qualified expert witness, and that it be helpful to the trier of fact, in keeping with other Minnesota evidentiary rules. Id.

The Goeb court rejected Daubert for several reasons. One was that the Daubert approach could lead to one judge rejecting a new scientific theory while another judge, more effectively convinced of its validity, accepts it. Another reason is that Daubert requires judges trained in law to make decisions on issues outside their area of training and expertise.

Daubert takes from scientists and confers upon judges uneducated in science the authority to determine what is scientific. A key assumption to this approach is that judges can . . . resolve disputes among qualified scientists who have spent years immersed in their field of study. . . . By comparison, the Frye general acceptance standard ensures that the persons most qualified to assess scientific validity of a technique have the determinative voice.

Id. at 812–13.

In the years since Goeb, Minnesota courts have offered more concise statement of the test, such as this one: “The proponent of scientific evidence must establish that the scientific theory is generally accepted in the relevant medical or scientific community ‘and that the principles and methodology used are reliable.’” Zandi v. Wyeth, Inc., No. A08-1455, 2009 WL 2151141, at *5 (Minn. Ct. App. July 21, 2009) (quoting McDonough v. Allina Health Sys., 685 N.W.2d 688, 694 (Minn. Ct. App. 2004).

3. Rule 704: Expert's Opinion on Ultimate Issue

In certain instances, an expert may give an opinion on an ultimate issue to be decided by the jury. Questions seeking such opinions may be objectionable on the grounds that the expert would be "invading the province of the jury." In some instances, that objection will be sustained. Conover v. N. States Power Co., 313 N.W.2d 397, 403 (Minn. 1981).

In fact, Minnesota has had a long tradition of excluding expert opinions and conclusions on ultimate fact issues, whether offered through live testimony or through the public records exception of the hearsay rules. Barnes v. Nw. Airlines, Inc., 47 N.W.2d 180, 193 (Minn. 1951); Dahlbeck v. DICO Co., Inc., 355 N.W.2d 157, 164 (Minn. Ct. App. 1984); see also Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988). Regardless of whether an expert is allowed to testify on the ultimate fact issues, the jury is not required to accept the expert's opinions. Stahlberg v. Moe, 166 N.W.2d 340, 345 (Minn. 1969).

4. Rule 705: Disclosure of Bases of Expert Opinion

In Minnesota, an expert may express opinions, conclusions, or inferences without stating the basis for those opinions, conclusions, or inferences. Minn. R. Evid. 705 cmt. (1989).

Where there has been inadequate disclosure of an expert's opinions, the trial court may require an expert to detail the basis of his or her conclusions, opinions, and inferences before testifying as to those conclusions, opinions, or inferences.

IX. TOXIC TORT CLAIMS

A. Lead Paint Claims

1. Common Law Negligence: Landlord Liability

Generally, lead paint cases involve minor children as the allegedly injured parties. This may be because children are more vulnerable to the effects of lead and are more likely to ingest paint chips or contaminated soil in "hand-to-mouth" behavior.

Cases against landlords regarding lead paint generally contain claims for common-law negligence and negligence *per se* based upon Minnesota Statutes and City Ordinances.

a) Historical Overview

In Minnesota, a landlord's liability is limited. Historically, a tenant took over possession of the rental premises at his or her own risk:

This rule of caveat emptor required a tenant to investigate the premises in order to determine their adaptability to the purpose for which they had been rented. Likewise, in the absence of fraud, misrepresentation or deceit, a landlord was not responsible to his tenant for injuries resulting from the defective condition of the premises.

Meyer v. Parkin, 350 N.W.2d 435, 437 (Minn. Ct. App. 1984).

Currently, Minnesota follows the majority of jurisdictions recognizing that a landlord is not an insurer against defects on the premises. See Hanson v. Roe, 373 N.W.2d 366, 370 (Minn. Ct. App. 1985); Oakland v. Stenlund, 420 N.W.2d 248, 251–52 (Minn. Ct. App. 1988). In Michigan, for example:

The common law duty [of a landlord] is predicated upon the concept that a lease is equivalent to a sale. The lessor, absent agreement to the contrary, surrenders possession and holds only a reversionary interest. Under such circumstances, he is under no obligation to look after, keep, and repair premises over which he has no control. . . .

Lipsitz v. Schechter, 377 Mich. 685, 142 N.W.2d 1, 2 (Mich. 1966).

b) Exceptions Creating Limited Duty

In Broughton v. Maes, 378 N.W.2d 134 (Minn. Ct. App. 1985), the court held that in order to impose liability upon a landlord, a plaintiff must establish that one of the following four circumstances exist:

- (1) There is a hidden dangerous condition on the premises of which the landlord is aware, but the tenant is not;
- (2) The land is leased for purposes involving admission to the public;

- (3) The premises are still in the control of the landlord; and
- (4) The landlord negligently repairs the premises.

The first exception was discussed in Johnson v. O'Brien, 105 N.W.2d 244, 247 (1960), where the court held that a landlord may be held liable for injuries sustained by a tenant as a result of a defect only when the landlord knew of the danger, or had information that would lead a reasonably prudent person to suspect the danger, and when the tenant exercising due care would not discover it for himself. Id.

c) Generally: No Duty Owed by Landlord

The Johnson case, and others like it, created the general rule in Minnesota: a landlord's only duty to his tenant is to warn of a defective condition if the landlord knows or should know the danger and if the tenant, while exercising due care, would not discover it. See Broughton v. Maes, 378 N.W.2d 134, 136 (Minn. Ct. App., 1985).

Absent a written lease agreement, a landlord owes no duty to repair the premises. Johnson, 105 N.W.2d at 244. If a written lease agreement exists, that agreement specifies the various duties of the parties. In many lead paint cases, there are no express agreements, written or verbal, between the landlord and the plaintiff to repair the premises.

Moreover, there is no affirmative duty under Minnesota law for a landlord to continually inspect inhabited premises for existing dangerous conditions. Id. In fact, just the opposite is true. Under common-law, the lease of property inherently includes the covenant of quiet enjoyment for the benefit of the lessee. See Wilkinson v. Clauson, 12 N.W. 147, 148 (1882). As a result, the tenant's right to enjoyment of the property prevents the landlord from entering onto the property to investigate whether repairs are necessary or to actually make those repairs unless there is an express or implied agreement to do so between the landlord and tenant. See Fjellman v. Weller, 7 N.W.2d 521, 528 (1943); Paine v. Gamble Stores, Inc., 279 N.W. 257 (1938).

Minnesota courts have consistently declined to expand the common-law duties of a landlord:

The rule in Minnesota, as to defective conditions of the premises, is that a landlord who has not agreed to repair the leased premises has only a duty to warn a tenant of a defective condition that the landlord knows or should have known of the danger, and that the tenant, given due care, would not discover it.

Broughton v. Maes, 378 N.W.2d at 136. See also Bills v. Willow Run I Apartments, 547 N.W.2d 693, 695 (Minn. 1996).

(1) Duty to Guests and Others

A residential landlord's duty to the guests of a tenant or others on the residential rental premises is no greater than the duty owed to the tenant. Johnson, 105 N.W.2d at 246, n. 1.

(2) No Duty Where Parents Are Aware

An argument can be made that landlords owe no duty to children to warn them of or to remove a dangerous condition when the children are being watched by their parents, or entrusted persons, in supervision. See generally Sirek by Beaumaster v. State, Dept. of Natural Res., 496 N.W.2d 807 (Minn. 1993).

In Sirek, the Minnesota Supreme Court held that the State owed no duty to the Sireks and their minor child as a matter of law when the child crossed a highway to the State park and was struck by a van. The Sireks brought suit against the State Department of Natural Resources (DNR), and the driver of the vehicle. The DNR moved for summary judgment asserting that it was immune from liability pursuant to Minn. Stat. § 3.736, subd. 3(h) (1992). The trial court denied the motion finding material fact questions regarding the DNR's breach of a statutory duty of care under either the child trespasser standard or the adult standard. Id. at 809. The DNR appealed as a matter of right. The Court of Appeals affirmed the trial court and held the child trespasser standard applied. The Minnesota Supreme Court reversed.

The Minnesota Supreme Court noted that this was the first opportunity for the court to definitively determine "whether trespassing children accompanied by adults in State parks can

avail themselves of the heightened standard owed to ‘child trespassers’ under section 339 of the Restatement or whether they are instead limited to the general trespasser standards of section 335.” Id. at 809–10. The respondent argued that the presence or absence of parents should not affect the court's analysis of the landowner's duty to trespassing children. The Supreme Court disagreed, noting that the cases the Sireks relied on were distinguishable because in those cases, the child wandered away from parents in business places where their unsupervised presence could reasonably be anticipated.

The court held that the DNR owed no duty as a matter of law. Id. at 811. Noting persuasive precedent from an Illinois court, the court reasoned that when children are under the supervision of their parents or other adults, a landowner's duty to warn the children of hazards, or to remove the hazards, is relieved because “if a child is too young chronologically or mentally to be at large, the duty to supervise that child as to obvious risks lies primarily with the accompanying parent.” Sirek, 496 N.W.2d at 811 (quotations and citations omitted).

Holding that the trespassing standard for children did not apply, the Sirek court held that since there was no evidence that the Sireks failed to discover the highway, the DNR did not owe any duty to the Sireks or their minor child, as a matter of law. Id. at 812.

In Sirek, the Minnesota Supreme Court cited Illinois law with approval. Illinois cases have also addressed the issue of a landowner's duty to minor children when in the care of their parents in the landlord tenant context, holding for example that the landlord is not liable for injuries to a tenant's child when the landlord had no knowledge of the defect and the child was supervised by the parent. See Best v. Services for Coop. & Condo. Cmty., 629 N.E.2d 123, 195 (Ill. Ct. App. 1993).

In Best, the plaintiff's son sustained injuries when he fell through an open-screened window. In affirming the trial court and the Illinois Court of Appeals, the Illinois Supreme Court held that the defendant owed no duty to the plaintiff as a matter of law. The court summarized other Illinois Appellate opinions concluding that a landlord owes no duty to maintain any window in an apartment he leases to tenants which is

sufficiently strong to support the weight of a tenant's minor child leaning against the screen. Id. 629 N.E.2d at 123–24.

Ultimate responsibility for the child lies with the parent. As stated by the Illinois Court of Appeals in Gengler v. Herrington, 579 N.E.2d 412 (Ill. App. 2 Dist. 1991), "The primary responsibility for preventing injury to very young children must be placed on the parents or those who are entrusted with the children's supervision." Wier by Wier v. Ketterer, 479 N.E.2d 416 (Ill. App. 5 Dist. 1985).

"[T]he law should not impose a duty on the landlord to ensure the safety of a toddler who is left free to roam and give vent to his curiosity." Id.; see also Shull v. Harristown Township, 585 N.E.2d 1164 (Ill. App. 4 Dist. 1992) (property owner relieved of liability for minor child's injuries to obviousness of danger to both parents and child); Stevens v. Riley, 580 N.E.2d 160 (Ill. App. 2 Dist. 1991) (property owner relieved of liability for injury to minor child due to parents' knowledge of obvious danger); Strode v. Becker, 564 N.E.2d 875 (Ill. App. 4 Dist. 1990) (property owner relieved of liability for injury to minor child because child was under parent's supervision); Salinas v. Chicago Park District, 545 N.E.2d 184 (Ill. App. 1 Dist. 1989) (city park relieved of liability for injury to minor child because danger was obvious to parents and child was under parent's supervision).

d) Causation

Proof of a causal connection between the alleged negligence and resulting damages must be something more than merely consistent with the Plaintiff's theory of the case. Bernloehr v. Central Livestock Order Buying Co., 208 N.W.2d 753, 755 (1973).

Where expert testimony must be solely relied on to show the causal connection between the alleged cause and the subsequent result, disability or injury, the plaintiff must show more than a mere possibility, suspicion, or conjecture that such a causal connection exists. Otherwise, the expert's testimony lacks proper foundation for a finding of causal connection. Bernloehr, 208 N.W.2d at 755.

The Minnesota Supreme Court described the proper foundation necessary for finding causal a connection in Saaf v. Duluth Police Pension Relief Ass'n., 59 N.W.2d 883, 886 (1953):

[I]n order to have a proper foundation for a finding of causal connection, in cases where such connection must be established solely by expert testimony, the medical expert must upon an adequate factual foundation testify not only in his professional opinion the injury in question might have caused or contributed to the subsequent death of the injured person but further that such injury did cause or contribute to his death, but such medical testimony may not be couched in any particular words.

In Anderson v. City of Coon Rapids, 491 N.W.2d 917 (Minn. Ct. App. 1992), the trial court granted summary judgment for the defendants on the grounds that the plaintiffs failed to produce evidence establishing that inhalation of nitrogen dioxide caused their lung problems to the exclusion of other possible causes. The Court of Appeals affirmed this decision.

Canada v. McCarthy, 567 N.W.2d 496 (Minn. 1997), was a lead poisoning personal injury case in which a young girl was diagnosed with lead poisoning at about age two. She lived in a couple of different apartments as of the time of her diagnosis. In one of the apartments, there had been an attempt to remove lead paint and to warn tenants, pregnant women and children to not be in the apartment building during paint removal.

Proximate cause can be proven by direct or circumstantial evidence. Id. at 506. An argument was made that the negligence of the grandmother was a superseding cause of injury. The Minnesota Supreme Court held that the mother's and grandmother's negligence was not an intervening, superseding cause of the lead poisoning.

The defendant wanted to apportion damages for the lead poisoning between two events or time periods. The burden was on the defendant to present competent apportionment evidence. Id. at 508.

e) **Breach and Damages**

Breach of any duty is generally considered to be a fact question dependent upon the circumstances of the case. Therefore, breach must be analyzed on a case by case basis. A plaintiff's damages will generally rely heavily upon expert testimony. It is therefore subject to attack that it is based on speculation, conjecture, or unsound scientific principles.

2. **Negligence *Per Se*: Landlord Liability**

Whether a violation of a particular statute or ordinances constitutes negligence *per se* is a question of law. Mervyn v. Magney Constr. Co., 416 N.W.2d 121, 123–24 (Minn. 1987). When determining whether negligence *per se* should apply, the courts generally follow a two part test: (1) have the plaintiffs demonstrated that they are members of a particular class of persons which the ordinance was designed to protect?; and (2) are the injuries sustained resulting from hazards which the ordinance is specifically designed to avoid? Johnson v. Farmers & Merchants State Bank of Balaton, 320 N.W.2d 892, 897 (Minn. 1992).

Although ordinances and other local laws that define specific duties of care can form the basis for a negligence *per se* claim, when the result is to alter the common law duties, those provisions should be carefully scrutinized for legislative intent. See, e.g., Mattson v. Flynn, 13 N.W.2d 11, 16 (Minn. 1944) (public policy of the state is determined by the legislature). Absent clear legislative intent, a statutory duty should not give rise to negligence *per se* actions. "The obvious conclusion must be that when a legislature said nothing about it, they either did not have the civil suit in mind at all, or deliberately omitted to provide for it." W. Page Keaton, Prosser & Keaton On the Law of Torts § 36 at 221 (5th ed. 1984).

Finally, it can be argued that after the Minnesota Supreme Court's decision in Bills v. Willow Run I Apartments, 547 N.W.2d 693, 695 (Minn. 1996), a plaintiff alleging negligence *per se* must prove that: (1) the landlord or owner knew or should have known of the code or statutory violation; (2) the landlord or owner failed to take reasonable steps to remedy the violation; (3) the injury suffered was the kind the Code was meant to prevent; and (4) the violation was the proximate cause of the injury or damage.

a) **Minn. Stat. § 504.18**

Plaintiffs in lead paint cases have asserted negligence *per se claims* by alleging that a landlord's failure to comply with Minn. Stat. § 504.18 (1992) is negligence *per se*. Subdivision 1 of that statute states:

In every lease or license of residential premises, whether in writing or parol, the lessor, or licensor covenants:

- (1) That the premises and all common areas are fit for the use intended by the parties.
- (2) To keep the premises in reasonable repair during the term of the lease or license, except when the disrepair has been caused by the willful, malicious, or irresponsible conduct of the lessee or licensee or a person under the direction or control of the lessee or licensee.
- (3) To maintain the premises in compliance with the applicable health and safety laws of the state, including weatherstripping, caulking, storm window, and storm door energy efficiency standards for renter-occupied residences prescribed by section 216C.27, subdivisions 1 and 3, and of the local units of government where the premises are located during the term of the lease or license, except when violation of the health and safety laws has been caused by the willful, malicious, or irresponsible conduct of the lessee or licensee or a person under the direction or control of the lessee or licensee.

The parties to a lease or license of residential premises may not waive or modify the covenants found in this section.

While this subdivision of Minn. Stat. § 504.18 seems to alter the common-law duties of a landlord, the legislature and courts of Minnesota have clearly stated that the statute was not intended to alter a landlord's common law duties. Indeed, Minn. Stat. § 504.18 states "Nothing contained herein shall be construed to alter the liability of the lessor or licensor of a residential premises for injury to third parties." See also Meyer v. Parkin, 350 N.W.2d 435 (Minn. Ct. App. 1984).

The Court of Appeals interpreted Minn. Stat. § 504.18 in Meyer, where the plaintiff brought a claim against a landlord and asserted liability based upon violation of Minn. Stat. § 504.18 after one of plaintiff's children developed a neurological illness, which experts found was caused by toxic poisoning from formaldehyde in the apartment. The trial court granted summary judgment in favor of the defendant, holding that the landlord is not strictly liable under Minn. Stat. § 504.18 for conditions which he may well not be able to monitor. Id. at 436.

On appeal, the Minnesota Court of Appeals affirmed, stating that:

The legislature did not intend to eliminate the element of scienter from the rule that a lessor has a duty to warn a lessee of a concealed defect the lessor knew or should have known existed.

Greer v. Greer, 350 N.W.2d 439 (Minn. Ct. App. 1984).

Minnesota courts have already held that Minn. Stat. § 504.18 does not create an independent cause of action for personal injuries. In Meyer, the court held that violations of the covenants of habitability set forth in Minn. Stat. § 504.18 only provided a defense for a tenant in an unlawful detainer action rather than a private and independent action for damages. Meyer, 350 N.W.2d at 439. The Meyer court reasoned that to hold otherwise would be to "impose a type of strict liability upon the landlord." Id. at 438 (citing Fritz v. Warthen, 213 N.W.2d 339 (1973)). See also Hanson v. Roe, 373 N.W.2d 366 (Minn. Ct. App. 1985).

b) Uniform Building Code Violations

In Bills v. Willow Run I Apartments, 547 N.W.2d 693 (Minn. 1996), the plaintiff brought suit against his landlord under a negligence *per se*/strict liability theory, claiming that violations of the Uniform Building Code ("UBC") caused his injuries. Plaintiff slipped and fell on his apartment landing when he left for work during the height of a sleet storm. Id. at 693. He was aware of the storm and admitted that the exit was well-lit. Id. Nevertheless, he claimed that the lack of handrails and non-compliant risers in the apartment stairway, violations of the UBC, caused his fall. Id. at 694.

The trial court granted the Willow Run's motion for directed verdict at the close of the plaintiff's case in chief, and held that the plaintiff failed to show that Willow Run had either actual or constructive knowledge of the allegedly defective condition and UBC violation. Id. The trial court also expressed an opinion that the accident probably would have happened regardless of the alleged violations due to the inclement weather. Id.

On appeal, the violation of the UBC was found to be negligence *per se* because it created a "hidden or unanticipated danger[]." See Willow Run, 534 N.W.2d at 290. The court of appeals held that there was sufficient evidence to present a question of fact as to the proximate cause of the plaintiff's injuries. Id.

The Supreme Court of Minnesota reversed the court of appeals. Willow Run, 547 N.W.2d at 694. It then reinstated the trial court's determinations that the common-law standards of landlord liability apply. Id. The supreme court stated "[w]e disagree with the court of appeal's decision that a UBC violation impliedly creates hidden or unanticipated dangers, thus somehow imputing knowledge to the landlord and owner." Id. It then restated the common-law formula regarding landlord liability relating to UBC or other code violations:

A landlord or owner is not negligent *per se* for a violation of the UBC unless (1) the landlord or owner knew or should have known of the Code violation; (2) the landlord or owner failed to take reasonable steps to remedy the violation; (3) the injury suffered was the kind the Code was meant to prevent; and (4) the violation was the proximate cause of the injury or damage.

Id. at 695.

The Willow Run decision was consistent with a number of cases in which negligence *per se* in landlord-tenant cases involving code violations has been rejected. See, e.g., Broughton v. Maes, 378 N.W.2d 134 (Minn. Ct. App., 1985); Oakland v. Stenlund, 420 N.W.2d 248 (Minn. Ct. App., 1988).

The Willow Run decision is also consistent with cases from other jurisdictions which have specifically addressed lead paint ordinances and refused to find that a violation of an ordinance alters the landlord's

common law liability. See Winston Props. v. Sanders, 565 N.E.2d 1280 (Ohio Ct. App. 1989) (landlord cannot be held liable under a negligence *per se* theory where the existence of lead-based paint on the premises where the landlord did not know about the presence of lead paint and the tenant did not inform the landlord of the specific problem); Garcia v. Jiminez, 539 N.E.2d 1356 (Ill. App. 2 Dist. 1989) (no strict liability for violation of lead paint ordinance absent a showing that the landlord had knowledge of the presence of the violation).

c) **City Ordinances**

The decision in Willow Run, 547 N.W.2d at 695, would require the landlord to know or have reason to know of the violation and still fail to remedy the violation before a *prima facie* case of negligence *per se* could be presented.

Even if the plaintiff is able to meet the Willow Run standards, he would have more requirements to satisfy before he could recover in a negligence *per se* claim based on ordinances. The plaintiff must prove that the injury suffered was of the type the ordinance was meant to prevent (discussed below) and that the ordinance violation was the proximate cause of the injury.

Chapters 240 and 244 of the Minneapolis Housing Code specifically relate to lead poisoning prevention. A defendant faced a negligence *per se* claim based on the Minneapolis Housing Code should argue that Chapter 244 of the Minneapolis Housing Code does not provide a basis for negligence *per se* in lead poisoning cases because it lacks an express intent to protect children from lead poisoning.

In § 240.10, the Minneapolis City Council found that lead "is a toxic element that does not naturally occur in the human body at high levels" and that "excess lead in the human body is harmful and impairs biochemical reaction which can result in neurobehavioral and growth defects, negative metabolic effects, central nervous system function impairment...." Minneapolis Housing Code, § 240.10. This section acknowledges that children and fetuses are the most susceptible to physiological damage. This section, however, does not state that excess lead only presents a health hazard to children. The findings note several potential health hazards to "the human body"; adult or children. Based on these findings, the City Council sets forth

procedures for abatement when the lead paint is at a toxic level and in deteriorated condition.

Other provisions contained in those ordinances specifically state "the purpose of the housing maintenance code is to protect the public health, safety, and welfare." Minneapolis Housing Maintenance Code § 244.20. Because ordinances and statutes that are intended to protect the general public do not create a duty to each individual comprising that public, there is no duty to an individual minor plaintiff. See Sternitzke v. Donahue's Jewelers, 249 Minn. 514, 83 N.W.2d 96 (1957).

A defendant could argue that if chapters 240 and 244 of the Minneapolis Housing Code were intended to prevent children from being exposed to lead based paint, the ordinances would require all premises where children reside to be lead free. There is no such requirement. Nothing in the ordinances prevents children from residing in premises known to have lead based paint. Nor do the ordinances require landlords to remove all lead based paint. Instead, the ordinances merely require a landlord to repair or remove paint containing a toxic level of lead that is "blistered, cracked, flaked, or chalked away." See Minneapolis Housing Code § 244.510. Therefore, it can be argued that the individual minor plaintiff's reliance on the Minneapolis Housing Code is insufficient to satisfy the two-part test set forth in Johnson v. Farmers & Merchants State Bank of Balaton, 320 N.W.2d 892 (Minn. 1992).

3. Defenses

a) Statutes of Limitation/Repose

Statutes of limitations and repose are justified by necessity and practicality and are needed to protect the court system from the litigation of stale claims. Chase Securities Corp. v. Donaldson, 325 U.S. 304, 65 S.Ct. 1137 (1945). Minnesota Statute § 541.051 provides the applicable statute of limitations and repose relating to improvements to real property:

Subd. 1. (a) Except where fraud is involved, no action by any person in contract, tort, or otherwise to recover damages for injury to property, real, or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to

real property, nor any action for contribution or indemnity for damages sustained on account of the injury, shall be brought against any person performing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property or against the owner of the real property more than two years after discovery of the injury, nor in any event shall such a cause of action accrue more than ten years after substantial completion of the construction.

This statute of limitations places the burden of discovery of injuries and litigation of claims upon plaintiffs. The Rivers v. Richard Schwartz/Neil Weber, Inc., 459 N.W.2d 166 (Minn. Ct. App. 1990). The statute applies to all actions of any type based on unsafe and defective improvements to real property, Appletree Square 1 Ltd. Partnership v. W.R. Grace & Co., 29 F.3d 1283 (8th Cir. 1994), and is not subject to equitable tolling. Concordia College Corp. v. W.R. Grace & Co., 999 F.2d 326 (8th Cir. 1993).

In Pacific Indemnity Co. v. Thompson-Yaeger, 260 N.W.2d 548 (Minn. 1977), superseded by statute as stated in O'Brien v. U.O.P., Inc., 701 F.Supp. 714 (D. Minn. 1988), the court explained its common-sense definition of an improvement to real property as follows:

An improvement to real property is a permanent addition to or betterment of real property that changes its capital value and that involves the expenditure of labor and money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.

Id. at 554 (quoting Kloster-Madsen v. Tafi's Inc., 303 Minn. 59, 226 N.W.2d 603 (1975)). See also, Lourdes High School of Rochester, Inc. v. Sheffield Brick & Tile Co., 870 F.2d 443 (8th Cir. 1989). Materials otherwise considered to be improvements to real property remain improvements to real property even though they have a finite useful life. Thorp v. Price Bros. Co., 441 N.W.2d 817 (Minn. Ct. App. 1989).

Minnesota courts have held that a variety of materials are improvements to real property. See, e.g., Thompson-Yaeger (furnace); Patton v. Yarrington, 472 N.W.2d 157 (1991) (smoke

detector), O'Connor v. M. A. Mortenson, 424 N.W.2d 92 (Minn. Ct. App. 1988) (temporary stairway); Citizens Sec. Mut. Ins. Co. of Red Wing v. Gen. Elec. Corp., 394 N.W.2d 167 (Minn. Ct. App. 1986) (light fixture).

It can be argued that the paint that covered the surfaces of a defendant landlord's property was an improvement to real property. Paint is costly, requires an expenditure of labor and money and makes the property more useful and valuable. Accordingly, the two year statute of limitations from the date the injury was discovered and the ten year statute of repose also applies. However, some trial courts have found that paint is merely repair and maintenance.

Finally, in most lead paint cases, the rental premises are located in older buildings. Often, all of the plaintiff's claims are barred by the statute of repose governing improvements to real property. Minn. Stat. § 541.051 provides that in no event shall a claim be brought more than ten years from the date of substantial completion of the construction. The Minnesota Court of Appeals held in Boyum v. Main Entree, Inc., 535 N.W.2d 389 (Minn. Ct. App. 1995), that Minn. Stat. § 541.051 bars negligence *per se* claims under the Uniform Building Code for the violations originating more than 10 years prior to the injury. Generally speaking, lead paint application was done before 1977, the year in which lead paint was banned by the Consumer Products Safety Division.

b) Parents' Own Negligence

Where the parents cause harm to their children through their own negligence, they may be held liable. Anderson v. Stream, 295 N.W.2d 595 (Minn. 1980); Romanik v. Toro Co., 277 N.W.2d 515, 518–20 (Minn. 1979). See also Silesky v. Kelman, 281 Minn. 431, 161 N.W.2d 631 (Minn. 1968), overruled by Anderson v. Stream, 295 N.W.2d 595 (Minn. 1980); see also Broadwell by Broadwell v. Holmes, 871 S.W.2d 471 (Tenn. 1995); Eiynek v. Sabrowsky, 524 N.W.2d (Minn. Ct. App. 1994); Bell v. Schwartz, 422 F.Supp. 257 (D. Minn. 1976). Where the minor's parents were aware of the presence of lead paint and their child's elevated lead levels, their lack of supervision of the child may constitute a superseding intervening cause relieving the landlord from any liability. See Medved v. Doolittle, 19 N.W.2d 788 (Minn. 1945), overruled in part by Strobel v. Chicago, 96 N.W.2d 195 (Minn. 1959).

B. Asbestos and Other Claims

Minnesota has statutes governing the harmful substances such as formaldehyde, Minn. Stat. §§ 144.495 and 325F.18 and asbestos, Minn. Stat. § 325F.01 (banning use or sale of powdered asbestos or triable asbestos products since August 1, 1973). Claims for injuries related to formaldehyde, asbestos, and similar substances are commonly pleaded in negligence, strict liability, and failure to warn as well as breach of express and implied warranties of merchantability and fitness for a particular purpose. The defenses discussed in earlier portions of this document would also be applicable in cases involving claims of exposure to asbestos or other toxic substances. See, e.g., Zimprich v. Stratford Homes, Inc., 453 N.W.2d 557 (Minn. Ct. App. 1990) (negligence and strict liability personal injury claims based on urea-formaldehyde insulation). However, with respect to actions for removal or abatement of asbestos from buildings, the Minnesota Legislature eliminated the statute of limitations defense that otherwise would have barred any such actions not asserted before July 1, 1990. (Minn. Stat. § 541.22).

Since December of 1987, all asbestos-related claims filed in Minnesota State courts have been assigned to a single judge appointed by the Minnesota Supreme Court for handling all pre-trial and trial proceedings. A Case Management Order issued by that judge governs all phases of pleading, discovery, motions, settlement, and trial. The Case Management Order also provides for an Inactive Docket for protection for "pleural disease" cases from a possible statute of limitations defense. Since there is no case law in Minnesota indicating whether Minnesota would allow separate actions for separate diseases arising out of the same exposure to asbestos or other toxic substances, e.g., asbestos-related pleural disease and mesothelioma, the existence of the Inactive Docket combined with the fact that plaintiffs' counsel in Minnesota asbestos cases frequently attempt to include cancer waivers in settlement negotiations for asbestos claims, lead to the conclusion that in the absence of an express ruling on the issue, a properly documented settlement of one disease claim could very well bar the assertion of a second disease claim arising out of the same toxic substance exposure.

In Sopha v. Owens-Corning Fiberglass Corp., 601 N.W.2d 627 (Wis. 1999), the Wisconsin Supreme Court was considering whether a surviving spouse could bring a wrongful death action for death caused by a spouse's mesothelioma after that spouse had previously brought suit for a nonmalignant condition and had settled such claim. Id. at 630. The Wisconsin Supreme Court held that "a person who brings an action based on a diagnosis of nonmalignant asbestos-related condition may bring a subsequent action upon a later diagnosis of a distinct asbestos-related condition. The diagnosis of a malignant asbestos-related condition creates a new cause of action and the statute of limitations governing the malignant asbestos-related condition begins

when the claimant discovers, or with reasonable diligence should discover, the malignant asbestos-related condition.” Id.

Consolidated trials of asbestos cases have been approved by the Minnesota Supreme Court. Minnesota Personal Injury Asbestos Cases v. Keene Corp., 481 N.W.2d 24 (Minn. 1992).

Toxic tort cases also present unique circumstances of a plaintiff's comparative fault, due to the disease processes involved. For example, a plaintiff's smoking history can be considered in allocating fault to the plaintiff in certain toxic exposure cases, such as asbestos or TDI, when lung diseases are claimed to result from the exposure.

C. Unique Damage Claims In Toxic Tort Cases

Beyond the usual damage claims of personal injury cases, including the costs of medical treatment, past and future wage loss, permanent disability, and past and future pain and suffering, toxic tort claims present some unique forms of damage claims, due to the latency of the disease processes involved.

1. Fear Of Cancer

"'Fear of cancer' is a term generally used to describe a present anxiety over developing cancer in the future." Potter v. Firestone Tire and Rubber Co., 863 P.2d 795, 804 (Cal. 1993). In essence, it is an emotional distress claim.

Proof of some form of physical injury is still required for emotional distress claims in Minnesota, either as a direct result of negligent conduct, or as a physical manifestation of the emotional distress. Langeland v. Farmers State Bank of Trimont, 319 N.W.2d 26, 31 (Minn. 1982). Thus, in State by Woyke v. Tonka Corp., 420 N.W.2d 624, 627 (Minn. Ct. App. 1988) *rev. den.* (May 4, 1988), the Minnesota Court of Appeals upheld a trial court's dismissal of a negligent infliction of emotional distress claim arising out of exposure to hazardous waste in the absence of objective medical evidence establishing physical manifestation of emotional distress.

In Werlein v. United States, 746 F. Supp. 887 (D. Minn., 1990), vacated in part, 793 F. Supp. 898 (D. Minn. April 21, 1992), the plaintiffs, users of water allegedly polluted by chemical discharges from the Twin Cities Army Ammunition Plant, claimed damages for emotional distress caused by increased risk of future disease. Judge Renner, purporting to apply Minnesota law, allowed the claim, concluding that the subcellular harm to the plaintiffs caused by the toxic exposure constituted a sufficient physical injury to allow the emotional distress claim to survive. Id. at 906. The parties subsequently

settled the case and the defendants moved to vacate Judge Renner's earlier class certification ruling. Judge Renner granted the motion to vacate that ruling. Werlein, 793 F.Supp. at 900 (D. Minn. 1992).

The Minnesota Supreme Court considered an emotional distress claim arising out of fear of future disease in a case involving fear of AIDS. K.A.C. v. Benson, 527 N.W.2d 553 (Minn. 1995), involved a claim against a physician for emotional damages allegedly suffered upon learning that the physician had performed two gynecological procedures upon the plaintiff when the physician was HIV positive. The Minnesota Supreme Court restated the Minnesota law requiring a plaintiff claiming negligent infliction of emotional distress in the absence of a contemporaneous physical injury to show: (1) placement within the zone of danger of physical injury; (2) reasonable fear for safety; and (3) severe emotional distress with attendant physical manifestation. The court held that the plaintiff's failure to establish actual exposure to HIV precluded the plaintiff from meeting the zone of danger requirement. The decision is of little significance to fear of cancer claims resulting from toxic substance exposure, because the potential means of actual exposure to HIV are so limited. Exposure to other toxic substances, which in some cases can be accomplished simply by inhaling ambient air, present a far different analysis.

Thus, it appears that Minnesota courts will require a showing of a physical injury to sustain a fear of cancer claim, either as a direct result of the toxic exposure, or as a manifestation of the emotional distress if established objectively by medical evidence. Whether the Minnesota courts will adopt Judge Renner's conclusion in the Werlein case—that subcellular damage caused by the toxic exposure is a sufficient injury to meet that requirement for an emotional distress claim—is at this point uncertain. Notably, in Metro-North Commuter Railroad Co. v. Buckley, 521 U.S. 424 (1997), the United States Supreme Court decision arguably limited to FELA actions, the Court held that a railroad worker exposed to asbestos but without any symptoms of disease, could not assert an emotional distress claim for his fear of cancer allegedly caused only by his exposure to asbestos. Thus, this decision supports the position that a physical injury is required for assertion of a fear of cancer claim.

Consequently, the defense of a fear of cancer claim depends in part on the plaintiff's theory of physical injury. If the claim is a physical injury caused by the toxic exposure, medical expert testimony will be required to contest the allegation of an actual physical injury. In addition, a legal argument raising the issue of what constitutes a physical injury may be advisable, especially when it is debatable whether the plaintiff has suffered any present impairment.

See, e.g., In re Hawaii Fed. Asbestos Cases, 734 F. Supp. 1563, 1567–70 (D. Haw. 1990) (pleural plaques or pleural thickening caused by asbestos exposure without functional impairment not sufficient physical injury to allow emotional distress claim). On the other hand, if the plaintiff claims a physical manifestation of the emotional distress, the focus of the defense should be on the Woyke requirement of objective medical evidence establishing that physical manifestation.

Beyond the physical injury requirement of the emotional distress claim, defense counsel should address the extent of plaintiff's actual fear by establishing through discovery: plaintiff's failure to seek counseling for the emotional distress; the failure to discuss the emotional distress with the plaintiff's treating physician; the absence of any significant changes in plaintiff's lifestyle; the lack of any noticeable change in plaintiff's work performance or home life; plaintiff's ability to maintain social relationships; and the absence of an adverse impact on plaintiff's physical activities as a result of the emotional distress. Defense counsel should also look in plaintiff's medical or employment records for any health questionnaires completed after the lawsuit was commenced, in which plaintiff failed to identify the physical injuries, the physical manifestations of emotional distress, or the emotional distress that plaintiff claims to be suffering from in support of the fear of cancer claim.

A plaintiff's smoking history is a critical component of the defense. Counsel should emphasize that a plaintiff who smoked after the Surgeon General's warnings appeared on cigarette packages in the mid-1960s, voluntarily ingested a known carcinogen without any fear. This undercuts the credibility of a present fear of cancer from exposure to some other substance. Such a defense can backfire in asbestos cases, however, since studies demonstrate a synergistic impact of the combination of smoking and asbestos exposure on an individual's risk of developing lung cancer. See Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1138–39 (5th Cir. 1985). However, counsel can still assert that fear tends to be greater among those who are at passive risk, e.g., a risk created by unknown and involuntary toxic exposure, than those who engage in active risk behaviors, such as smoking, excessive drinking, and avoiding regular checkups for cancer. Those individuals engaged in such active risk behaviors are actually managing their cancer fears by denying or ignoring the risks. W. Reid, A Psychiatrist Looks at Fear-of-Cancer Claims, 6–7 (appearing in written materials for DRI Defense Practice Seminar "Asbestos Medicine" (1990)).

Defense counsel should also consider retaining expert witnesses to assist in defending fear of cancer claims. Experts should include a psychiatrist with

experience in the treatment of stress who can testify that stress is a frequent occurrence for all individuals. An oncologist who can educate the jury on the vast number of Americans that get cancer, which creates a fear of that disease among the general population, not just those exposed to toxic substances, is also helpful to the defense of fear of cancer claims. Recent statistics indicate that one-half of all men and one-third of all women will develop cancer. American Cancer Society, Cancer Facts & Figures (1997) at 1.

Finally, defense counsel should use every opportunity to create the impression that the true source of the plaintiff's emotional distress is not the exposure to the toxic substance, but the plaintiff's attorneys and medical experts and the lawsuit itself.

[O]ne should assume that plaintiff's attorneys and the litigation process often exacerbate fears and anxieties in persons at risk of cancer. Each time topics of the likelihood of cancer, recurrence of cancer, pain, mutilation, or dying are brought up, the patient's internal coping mechanisms must come down a bit. The repression necessary to unconscious defense mechanisms is breached, and the less-effective ignoring, avoiding, or activity-based coping must take its place. At the same time, the patient's ignoring or avoiding activities are breached as well. The wound is necessarily reopened.

W. Reid, *supra*, at 8, (emphasis original).

The defense of a fear of cancer claim essentially requires only a specialized version of the traditional defense approach of addressing every element of the claim. Defense counsel should focus on the following: (1) whether there is an actual physical injury; (2) the actual extent of the fear; (3) the reasonableness of the fear; and (4) the true cause of the fear.

See also, Bryson v. Pillsbury Co., 573 N.W.2d 718 (Minn. Ct. App. 1998).

2. Increased Risk of Cancer

In contrast to the fear of cancer claim, the increased risk of cancer claim asserts no present injury, but only the increased risk of developing a future injury in the form of cancer. Relying on the general prohibition against awarding damages for future harm because such damages are speculative, the courts have been much more reluctant to allow claims for the increased risk of cancer than for the fear of cancer or medical monitoring claims. This is somewhat curious in light of the general acceptance of future risk claims in other

contexts, such as claims of increased risk of arthritis in bone and joint injury cases.

In Minnesota, there appears to be some conflict as to whether increased risk of cancer claims is recognized. However, this conflict is more apparent than real. In State by Woyke v. Tonka Corp., 420 N.W.2d at 625, the Minnesota Court of Appeals noted that the trial court rejected the plaintiffs' request to include an increased risk of cancer claim, "because Minnesota does not recognize this claim." Although this statement by the Court of Appeals was dicta, Judge Renner cited Woyke to support the proposition that Minnesota law does not recognize a cause of action for increased risk of cancer. Werlein, 746 F. Supp. at 901.

Notwithstanding the comments in Woyke and Werlein, in Herbst v. Northern States Power Co., 432 N.W.2d 463 (Minn. Ct. App. 1988), the Minnesota Court of Appeals upheld an award to a burn victim for, among other things, an increased risk of skin cancer. The court based its decision on medical testimony that it was generally well-accepted in medical literature that recurrent breakdown in skin may cause an increased risk of skin cancer and that the plaintiff had recurrent breakdown in skin covering her elbows. The court cited Dunshee v. Douglas, 255 N.W.2d 42 (Minn. 1977), to support its finding that this testimony was sufficient foundation for a compensable claim. In Dunshee, it was claimed that the plaintiff had an increased risk of a stroke or aneurysm as a result of a scar formation on the carotid artery. The Minnesota Supreme Court held that the plaintiff must establish, to a reasonable degree of medical certainty, that plaintiff suffered a present injury, and as a result of that injury, the plaintiff had an increased risk of a stroke. The court explained:

In so holding, we do not retreat from the requirement that injuries be proven to a reasonable medical certainty. The injury in this case is not a stroke, but scar formation in the artery. Dr. Hauser's testimony was sufficient to prove to a reasonable medical certainty that there was scar formation and that as a result the plaintiff runs an increased risk of stroke or aneurysm.

Dunshee, 255 N.W.2d at 47.

Dunshee and Herbst indicate that under Minnesota law, a claim for increased risk of a future separate disease, such as cancer, requires proof of a present physical injury and further proof, to a reasonable degree of medical certainty, that as a result of that injury, the plaintiff is at an increased risk of developing

another medical problem in the future. In addition, it has been held in Minnesota asbestos cases that communication by a medical expert to the plaintiff of an increased susceptibility to cancer as a result of the asbestos disease contracted is a prerequisite for fear of cancer and increased risk of cancer claims. Anderson v. Amchem Products, Inc., et al, Dakota County Court File No. 103740. Thus, the same issues with respect to whether the plaintiff is suffering from a present physical injury that were addressed in the context of fear of cancer claims also arise in claims for increased risk of cancer, and should be defended in the same manner.

In addition, to the extent appropriate, defense counsel should retain expert witnesses to demonstrate the absence of a connection between the cancer the plaintiff is claiming to be at increased risk of developing and the plaintiff's present physical injury. For example, in asbestos cases, evidence can be presented that non-cancerous asbestos diseases and cancers are entirely separate and distinct disease processes. See, e.g., Pierce v. Johns-Manville Sales Corp., 464 A.2d 1020, 1025 (Md. 1983) ("[A]sbestosis and lung cancer are separate and distinct latent diseases that are not medically linked.")

Defense counsel should further argue for a heightened standard of proof for an increased risk of cancer claim. Counsel should consider filing a motion in limine to preclude plaintiff's expert from testifying on chemical causation or to give a specific opinion that plaintiff has an increased risk of cancer in the absence of a specific quantification of that increased risk.

Defense counsel should also focus on plaintiff's exposures to other carcinogens, e.g., smoking, to shift the attention away from the toxic substance the defendant was responsible for to other toxic substances that could be more responsible for any increased risk of cancer. For example, in Potter v. Firestone Tire & Rubber Co., 863 P.2d at 825, the California Supreme Court noted that cigarette smoke contains 40,000 to 60,000 parts per billion of benzene, which was more than 2,500 times the concentration detected in plaintiffs' well water.

3. Medical Monitoring

"In the context of a toxic exposure action, a claim for medical monitoring seeks to recover the cost of future periodic medical examinations intended to facilitate early detection and treatment of disease caused by a plaintiff's exposure to toxic substances." Potter v. Firestone Tire & Rubber Co., 863 P.2d at 821. As the Court of Appeals for the Third Circuit stated in In re Paoli R.R. Yard PCB Litig., 916 F.2d 829, 849–50 (3rd Cir. 1990):

Medical monitoring is one of a growing number of non-traditional torts that have developed in the common law to compensate plaintiffs who have been exposed to various toxic substances. Often, the diseases or injuries caused by this exposure are latent. This latency leads to problems when the claims are analyzed under traditional common law tort doctrine because, traditionally, injury needed to be manifest before it could be compensable.

Id. at 849–50 (footnote omitted).

Although a medical monitoring claim is treated as separate and distinct from an increased risk of cancer claim, proof of increased risk of cancer appears to be integral to a medical monitoring claim. In Herber v. Johns-Manville Corp., 785 F.2d 79 (3rd Cir. 1986), the Court of Appeals for the Third Circuit stated:

It is, of course, impossible to demonstrate that greater than normal monitoring for cancer will be necessary in the future without presenting evidence that the plaintiff has a greater than average risk of contracting cancer.

Id. at 83. In that case, although the court rejected the claim for increased risk of cancer, the court allowed evidence of the increased risk to support the medical monitoring claim. Id. In In re Paoli R.R. Yard PCB Litig., 916 F.2d 829 (3rd Cir. 1990), the Court of Appeals for the Third Circuit distinguished the claim of medical monitoring from the increased risk claim by concluding that the claim for medical monitoring is much less speculative, since the issue for the jury is the less conjectural question of whether the plaintiff needs medical surveillance. Id. at 850–51.

One of the leading cases on medical monitoring claims is Ayers v. Jackson Township, 525 A.2d 287 (N.J. 1987). That case involved claims arising out of well water contamination by toxic chemicals. The New Jersey Supreme Court refused to recognize the claims for increased risk of disease, but upheld an award of over \$8.2 million for future medical surveillance. The court concluded that recognition of the medical surveillance claim was not necessarily dependent on recognition of the enhanced risk claim. In upholding the award for medical surveillance, the New Jersey Supreme Court cited Reserve Mining Co. v. Environmental Protection Agency, 514 F.2d 492 (8th Cir. 1975), to support the proposition that the public health interest may justify judicial intervention even when the risk of disease is problematic. Ayers, 525 A.2d at 312. The court listed several factors to consider when determining the reasonableness of a medical monitoring claim, including the likelihood of

disease, the significance and extent of plaintiff's exposure to chemicals, the toxicity of the chemicals, the seriousness of the diseases for which individuals are at risk, and the value of early diagnosis. Id.; but see Nat'l Audubon Soc. v. Dept. of Water, 869 F.2d 1196 (9th Cir. 1988).

In Ball v. Joy Technologies, Inc., 958 F.2d 36 (4th Cir. 1991), the Court of Appeals for the Fourth Circuit held that in the absence of a showing of present physical injury, the plaintiffs were not entitled to medical monitoring relief. The court affirmed the reasoning of the trial court which held that the physical injury requirement created a necessary line for the allowance and disallowance of medical monitoring claims, and that any redrawing of that line should be done by the state legislature. In that connection, the trial court observed:

There is little doubt that millions of people have suffered exposure to hazardous substances. Obviously, allowing individuals who have not suffered any demonstrable injury from such exposure to recover the costs of future medical monitoring in a civil action could potentially devastate the court system as well as defendants. * * * Allowing today's generation to exposed but uninjured plaintiffs to recover may lead to tomorrow's generation of exposed and injured plaintiff's [sic] being remediless. * * * This basic dilemma has plagued tort law since its inception. Because of it, lines, sometimes arbitrary, have been drawn, and will continue to be drawn, to limit and delineate the when's and if's individuals will be allowed recovery for a wrong committed against them.

Ball v. Joy Mfg. Co., 755 F. Supp. 1344, 1372 (S.D.W.Va. 1990). The United States Supreme Court recently followed this same line of reasoning in denying a medical monitoring claim by a railroad worker exposed to asbestos but without any symptoms of disease, holding that in the absence of a compensable injury, there was no basis for the medical monitoring claim. Metro-North Commuter Ry. Co. v. Buckley, 521 U.S. 424, 438 (1997).

The only case purporting to apply Minnesota law to a medical monitoring claim is Werlein, which, as previously discussed, is of dubious value in determining the status of Minnesota law on this issue. For whatever its value, Judge Renner held that the plaintiffs were entitled to recover the costs of future medical monitoring as tort damages under the common law:

Assuming that a given plaintiff can prove that he has present injuries that increases his risk of future harm, medically

appropriate monitoring is simply a future medical cost, which is certainly recoverable.

Werlein, 746 F. Supp. at 904.

The absence of Minnesota appellate decisions addressing medical monitoring claims in toxic tort cases leaves the door open to defense counsel to assert the absence of a legal basis for such a claim. In making such arguments, defense counsel should point out that alleged tort victims in all other areas of the law, e.g., traffic accidents, product defects, or slip and fall cases, are required to incur their own medical expenses, and can only recoup those expenses after proving fault, causation, and injury. Further, defense counsel should use the policy argument found in the Supreme Court's Buckley decision to contend that, at the very least, a showing of a present physical injury is required for a medical monitoring claim.

It should be noted that the requirement of showing a present physical injury is not universal. For example, the Maryland Court of Appeals (which is Maryland's highest court) recently recognized a cause of action for medical monitoring by *presently uninjured* plaintiffs. Exxon Mobil Corp. v. Albright, 71 A.3d 30, 2013 WL 673738, at *26, 31 (Md. Feb. 26, 2013). But the Maryland court limited the cause of action by setting a high bar, requiring a plaintiff to prove "that medical monitoring is, *to a reasonable degree of medical certainty*, necessary in order to diagnose properly the warning signs of disease." Id. (emphasis in original).

Alternatively, defense counsel should address the issue of whether medical monitoring would have any productive value in the particular case being defended. For example, the Mayo Clinic conducted a study to see if medical monitoring for lung cancer should be implemented for smokers. The study concluded that the clinical outcome of monitored patients was not better than those not monitored. The results of that study have been used to justify the decision not to monitor smokers for lung cancer. See S. Fontana et. al., Lung Cancer Screening: The Mayo Program, J. Occup. Med. 28 at 746–750 (1986).

Other jurisdictions refuse to create a new tort cause of action for medical monitoring. New York rejects medical monitoring claims where the plaintiffs allege no physical injury. Caronia v. Philip Morris USA, Inc., 748 F.3d 454 (2d Cir. 2014). In this case, the New York Court of Appeals dismissed claims by plaintiffs, longtime heavy smokers, who alleged that cigarettes contained unnecessarily dangerous levels of carcinogens. Here, the plaintiffs did not have any lung cancer or injury. Thus, the court held that the plaintiffs did not

have independent equitable cause of action for medical monitoring under New York law.

In addition, defense counsel may wish to consider whether expert testimony could be used to contend that the potential harm from medical monitoring could outweigh its value. For example, periodic x-rays could cause a greater risk than the original carcinogenic exposure. Defense counsel should also address the issue of whether the necessary and reasonable medical monitoring required for plaintiff is anything more than would be reasonably recommended for the general population, regardless of toxic exposure. See Potter v. Firestone Tire & Rubber Co., 863 P.2d at 825.

As a final alternative defense to a claim for a lump sum award for medical monitoring, defense counsel should, in the interest of limiting the amount of potential liability, propose a court-supervised, actuarially sound fund, to which the plaintiffs could apply in the future for the costs of medical surveillance. Such a court-supervised fund was recommended by the New Jersey Supreme Court in Ayers, 525 A.2d at 313 and by the California Supreme Court in Potter, 863 P.2d at 825 n.28. In addition, the Arizona Court of Appeals in Burns v. Jaquays Mining Corp., 752 P.2d 28 (Ariz. Ct. App. 1987), actually approved such a court-supervised fund in lieu of a lump sum award. In support of a court-supervised fund, the California Supreme Court in Potter stated:

[I]n contrast to a lump-sum payment, a fund remedy will encourage plaintiffs to spend money to safeguard their health by not allowing them the option of spending the money for other purposes. The fund remedy will also assure that medical monitoring damages will be paid only to compensate for medical examinations and tests actually administered, thus serving to limit the liability of defendants to the amount of expenses actually incurred. In turn, this should tend to reduce insurance costs, both to potential defendants and the general public alike.

Potter, 863 P.2d at 825 n.28 (citation omitted). Other advantages of such a court-supervised fund include the provision of a method for offsetting a defendant's liability by payments from collateral sources, the provision of a convenient method for establishing credits in the event insurance benefits were available for some, if not all of the plaintiffs, and limiting the liability of the defendant to the amount of expenses actually incurred. Ayers, 525 A.2d at 314.

One further item to note includes the Affordable Care Act (ACA). The effects of the ACA on medical monitoring could help defense counsel by minimizing tort claims. See generally James M. Beck, *Bad Ideas Whose Time has Passed, Drug and Device Law* (Oct. 7, 2013, 1:01 PM), <http://druganddevicelaw.blogspot.com/2013/10/bad-ideas-whose-time-has-passed.html>; see 42 U.S.C. § 300gg-13. Potential future actions with ACA could cause medical monitoring claims to be archaic, which is something to pay attention to.

D. CASE MANAGEMENT: LONE PINE ORDERS

In mass toxic tort cases, case management is a major challenge. Lone Pine orders are a type of case management order requiring plaintiffs in toxic tort lawsuits to produce basic evidence supporting a *prima facie* case early in the discovery process. Cases in which defendants can persuade a court to enter a Lone Pine order typically have multiple plaintiffs and occasionally multiple defendants. The orders generally require plaintiffs to identify their injuries and produce some evidence of causation. As a result, these orders help courts organize claims and focus on key issues early in litigation. Courts may rely on either their inherent authority to control their dockets or applicable rules of civil procedure to issue these case management orders.

While most jurisdictions have not considered Lone Pine orders, their use appears to be spreading as plaintiffs' attorneys continue to push the edge of the class action envelope with new and unproven claims. From a defendant's perspective, the beauty of a Lone Pine order is that the information typically required is not easy for a plaintiff to produce, and producing it may require significant expense, including the use of experts.

Lone Pine orders take their name from Lore v. Lone Pine Corp., No. L-33606-85, 1986 WL 637507 (S.C.N.J. Nov. 18, 1986). In Lone Pine, multiple plaintiffs sued 464 defendants, alleging personal injuries and property damage from a landfill. The proceedings became so unwieldy that the court ordered the plaintiffs to produce at least enough information to establish a *prima facie* case for their claims. For claimants claiming physical injuries, this meant (1) an affidavit stating the facts of their exposure to the alleged toxic substances and (2) reports of treating physicians or other experts in support of a causal connection between the alleged injury and the substances at issue. Plaintiffs who were claiming damage to the value of their property had to provide (1) his or her address and (2) expert reports establishing the claim for diminution in value. The case was dismissed when the plaintiffs failed to produce the information as ordered.

Lone Pine orders are not common, but some jurisdictions are beginning to use them in an effort to manage multi-district litigation. The Federal District Court for the

District of Minnesota issued a Lone Pine order in 2004, but in a multidistrict litigation pharmaceutical case. See In re Baycol Products Liability Litigation, No. MDL 1431 MJD/JGL, 2004 WL 626866 (March 18, 2004).

For an in-depth analysis of Lone Pine orders, see James P. Muehlberger & Boyd S. Hoekel, *An Overview of Lone Pine Orders in Toxic Tort Litigation by Requiring Plaintiffs to Produce Early in Discovery the Specifics of Their Claims, Judicial Resources Are Preserved and Contentions Sharpened*, 71 Def. Couns. J. 366 (2004)

X. PERSONAL JURISDICTION

When a defendant challenges personal jurisdiction, the burden is on the plaintiff to prove that sufficient contacts exist with the forum state. Dent-Air, Inc. v. Beech Mountain Air Servs., Inc., 332 N.W.2d 904, 907 n.1 (Minn. 1983). The plaintiff's allegations and supporting evidence are taken as true. Id. In Minnesota, the issue of whether there is personal jurisdiction over a foreign defendant requires a two-part analysis. First, the facts must satisfy the requirements of the Minnesota long-arm statute. Minn. Stat. § 543.19. Second, the exercise of long-arm personal jurisdiction must comply with the Due Process requirements of the United States Constitution. Kreisler Mfg. Corp. v. Homstad Goldsmith, Inc., 322 N.W.2d 567, 569 (Minn. 1982).

Under Minnesota's long-arm statute, Minnesota may assert personal jurisdiction over a foreign corporation if the corporation:

- (a) owns, uses, or possesses any real or personal property situated in this state; or
- (b) transacts any business within the state; or
- (c) commits any act in Minnesota causing injury or property damage; or
- (d) commits any act outside Minnesota causing injury or property damage in Minnesota, subject to the following exceptions when no jurisdiction shall be found:
 - (1) Minnesota has no substantial interest in providing a forum; or
 - (2) the burden placed on the defendant by being brought under the state's jurisdiction would violate fairness and substantial justice; or
 - (3) the cause of action lies in defamation or privacy.

Minn. Stat. § 543.19. The Minnesota Supreme Court has stated that, under Minn. Stat. § 543.19, Minnesota may exercise personal jurisdiction over the defendant to the full extent of federal due process. Domtar, Inc. v. Niagara Fire Ins. Co., 533 N.W.2d 25, 29 (Minn. 1995); Valspar Corp. v. Lukken Color Corp., 495 N.W.2d 408, 410–11 (Minn. 1992).

Due process requires that the defendant have “certain minimum contacts” with the forum state and that the court’s exercise of jurisdiction over the defendant in maintaining the suit “does not offend traditional notions of fair play and substantial justice.” Int’l Shoe Co. v. Wash., 362 U.S. 310, 316 (1945) (quotation omitted). In general, to support personal jurisdiction there must be “some act by which the defendant purposely avails itself of the privilege of conducting activities within the foreign state, thus invoking the benefits and protections of its laws.” Hanson v. Denckla, 357 U.S. 235, 253 (1958). It is vital that the defendants “conduct in connection with the foreign state are such that he should reasonably anticipate being haled into court there.” World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

Personal jurisdiction may be general or specific. Marshall v. Inn on Madeline Island, 610 N.W.2d 670, 674 (Minn. Ct. App. 2000) (citing Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 nn.8–9 (1984)). General jurisdiction exists when the defendant has “continuous and systematic” contacts with the forum state. Id. (citing Helicopteros, 466 U.S. at 415-16). Specific jurisdiction exists when the cause of action is related to or arises out of the defendant’s contacts with a forum. Id. (citing Helicopteros, 466 U.S. at 414 n.8). A single contact with the forum can give rise to specific jurisdiction if the cause of action arose out of that contact. Id. (citing McGee v. Int’l Life Ins. Co., 355 U.S. 220, 223 (1957); Marquette Nat’l Bank v. Norris, 270 N.W.2d 290, 295 (Minn. 1978)).

When a nonresident defendant has limited contacts with the state, Minnesota uses a five-factor test for determining whether the exercise of jurisdiction over a defendant is consistent with due process. Juelich v. Yamazaki Mazak Optonics Corp., 682 N.W.2d 565, 570 (Minn. 2004). The five factors include:

- (1) the quantity of contacts with the forum state;
- (2) the nature and quality of those contacts;
- (3) the connection of the cause of action with these contacts;
- (4) the interest of the state providing a forum; and
- (5) the convenience of the parties.

Id. (quoting Hardrives, Inc. v. City of LaCrosse, Wis., 307 Minn. 290, 294, 240 N.W.2d 814, 817 (1976)). “The first three factors determine whether minimum contacts exist and the last two factors determine whether the exercise of jurisdiction is reasonable according to traditional notions of fair play and substantial justice.” Id. “[I]n doubtful cases, courts should lean toward finding jurisdiction.” Nat’l City Bank of Minneapolis v. Ceresota Mill Ltd. P’ship, 488 N.W.2d 248, 252 (Minn. 1992) (citation omitted).

In the past, Minnesota courts have identified the first three factors as primary, while giving less consideration to the factors of state interest and convenience of the parties. See Dent-Air, Inc., 332 N.W.2d at 907. But the supreme court recently stated:

Although distinct, there is an interplay between the minimum contacts factors and the reasonableness factors because they all trace their origin to the holding of International Shoe, that a court cannot subject a person to its authority where maintenance of the suit would offend “traditional notions of fair play and substantial justice.”

Juelich, 682 N.W.2d at 570 (quoting Int’l Shoe, 326 U.S. at 316). The supreme court further elucidated this interplay by quoting the First Circuit Court of Appeals, which stated:

We think ... the reasonableness prong of the due process inquiry evokes a sliding scale: the weaker the plaintiff’s showing on [minimum contacts], the less a defendant need show in terms of unreasonableness to defeat jurisdiction. The reverse is equally true: an especially strong showing of reasonableness may serve to fortify a borderline showing of [minimum contacts].

Id. at 570–71 (quoting Ticketmaster-New York, Inc. v. Alioto, 26 F.3d 201, 210 (1st Cir. 1994)).

XI. DAMAGES

A. Personal Injury Damages

The jury instruction guides include detailed instructions on personal damage, wrongful death, property damage, and punitive damages. See 4A Michael K. Steenson & Peter B. Knapp, Minnesota Practice Series: Minnesota Jury Instruction Guides §§ 75.10–.65 (6th ed. 2014) (cited hereinafter as CIVJIG ____).

The plaintiff has the burden of proving damages caused by a defendant and the proof must be by a fair preponderance of the evidence. CIVJIG 90.15. Normally, the plaintiff will seek damages up to the date of the trial and into the future which will include damages for pain, disability, and emotional distress and may also include damages for disfigurement and/or embarrassment. CIVJIG 91.10. The plaintiff may also seek damages for medical supplies, hospitalization, health care services of every kind for past and future damages. CIVJIG 91.30.

In Sanchez v. U.S. Airways, Inc., 202 F.R.D. 131 (E.D. Pa. 2001) the plaintiff brought a wrongful termination action and claimed emotional damages. It was disclosed that the plaintiff had sought counseling for stress and other issues. In order to take the emotional distress damages out of the case, the plaintiff amended all of his discovery responses so as to preclude discovery of psychotherapist records. The trial court ruled that the privilege was waived and the records were discoverable. Very simply, the trial court ruled that the claimant’s had waived patient/psycho-therapist’s privilege by

putting their emotional state into issue. See also Schoffstall v. Henderson, 223 F.3d 818 (8th Cir. 2000); Fritsch v. City of Chula Vista, 187 F.R.D. 614 (S.D. Cal. 1999).

In Haynes v. Anderson, 304 Minn. 185, 232 N.W.2d 186 (1975), the Minnesota Supreme Court held that a physician conducting an independent medical examination of a claimant may administer the Minnesota Multiphasic Personality Inventory (MMPI) provided select answers to the questions would not be used to embarrass or intimidate the claimant.

B. Damage to Property

Property damages are described in the jury instructions and may also be influenced by unpublished case law. See CIVJIG 92.10; see also Indep. Sch. Dist. 441 v. Bunn-O-Matic Corp., No. C0-96-594, 1996 WL 689768 (Minn. Ct. App. Dec. 23, 1996). In a property damage case, determining the proper measure of damages requires consulting relevant case law and relevant jury instructions.

C. Economic Loss Doctrine

The basic purpose of the economic loss doctrine is to uphold contractual allocations of risk by barring tort claims that might otherwise arise out of certain kinds of transactions. That traditional rationale was that for sophisticated buyers and sellers of goods, the risk associated with the products they bought and sold were purely economic, and that such buyers and sellers should be free to agree between themselves how risks will be allocated. Where those allocations are expressed in contracts, the parties should be limited to contractual remedies when things go wrong. To allow tort claims in such cases would undermine the agreed-upon allocations of risk on which the parties relied. Thus, the economic loss doctrine limited the remedies available to “merchants” (i.e. sophisticated buyers and sellers involved in commercial transactions) to the contractual sources of recover provided by the Uniform Commercial Code.

The Minnesota Supreme Court commented on this purpose in Hapka v. Paquin Farms, 458 N.W.2d 683 (Minn. 1990).

There is no . . . reason in cases of property damage arising out of commercial transactions to keep tort theories of negligence and strict products liability atop those remedies already provided by the UCC If the code is to have any efficacy, parties engaged in commercial activities must be able to depend with certainty on the exclusivity of the remedies provided by the code in the event of a breach of their negotiated agreements.

Id. at 688.

The economic loss doctrine has a long and tortured history in Minnesota, in which the legislature has reacted to court rulings by passing different versions of an economic loss statute. For a detailed look at the history, See 27 Michael K. Steenson, J. David Prince & Sarah L. Brew, Minnesota Practice Series: Products Liability Law § 13.15 (2006).

In 1999, the legislature enacted a new version of the economic loss statute. The effective date of that statute was August 1, 2000, but it is not retroactive. As a result, two versions of the statute are now in effect. The newer version, section 604.101, governs claims arising from transactions that occurred on or after August 1, 2000. Minn. Stat. § 604.101, subd. 6. The older version, section 604.10, applies to transactions that occurred before that date. Id.

Because the older version governs only transactions that occurred more than twelve years ago as of this writing, that version is not discussed in detail here. For detailed examinations of the differences between the old and new statutes, see Jonathan M. Bye & Eric J. Peck, New Windows on Tort Claims: Minnesota's Economic Loss Doctrine, Bench & Bar of Minnesota, May/June 1998, at 40; Daniel S. Kleinberger, Linda J. Rusch & Alan I. Silver, Building a New Foundation: Torts, Contracts and the Economic Loss Doctrine, Bench & Bar of Minnesota, Sept. 2000, at 25.

As for the newer version of the statute, this passage expresses its basic outline:

A buyer may not bring a product defect tort claim against a seller for compensatory damages unless a defect in the goods sold or leased caused harm to the buyer's tangible personal property other than the goods or to the buyer's real property. In any claim brought under this subdivision, the buyer may recover only for:

- (1) loss of, damage to, or diminution in value of the other tangible personal property or real property, including, where appropriate, reasonable costs of repair, replacement, rebuilding, and restoration;
- (2) business interruption losses, excluding loss of good will and harm to business reputation, that actually occur during the period of restoration; and
- (3) additional family, personal, or household expenses that are actually incurred during the period of restoration.

Minn. Stat. § 604.101, subd. 3 (2012).

The statute begins with several definitions intended to clarify when the doctrine bars tort claims and when it does not. In general terms, the statute applies when both buyer and seller are in the chain of product distribution, but does not apply to claims by third parties. When it does apply, the statute bars claims based on negligence, strict liability for product defect, and negligent misrepresentation. But it does not bar claims of intentional or reckless misrepresentation, or claims brought under consumer protection statutes.

The statute explicitly bars claims for damages to the goods involved in the transaction, but permits claims for “harm to the buyer’s tangible personal property other than the good or to the buyer’s real property.” Thus the most frequently litigated issue under the statute is whether a defect in the product resulted in damage to “other property.”

Where a defect in a product creates merely the potential for damage, but not actual damage, the economic loss statute may bar recovery. In McGregor v. Uponor, Inc., Civil No. 09-11136 ADM/JJK, 2010 WL 55985 (D. Minn., Jan. 4, 2010), homeowners brought a negligence suit against a manufacturer of brass plumbing fittings because defects in the fittings created the potential for water leaks, compelling the plaintiffs to replace all of the fittings in their home. The federal district court for the district of Minnesota concluded that because no damage to other property occurred their negligence claim was barred by the statute. Id. at *8.

When actual damage to “other property” does occur, all plaintiffs may recover the cost to repair the property, businesses may recover business profits lost during the time required for repair of the property, and non-business plaintiffs may recover “family, personal, or household expenses” incurred during the repairs. Minn. Stat. § 604.101 subd. 3.

1. Public Nuisance

Public Nuisance has occasionally been brought up in products liability lawsuits involving tobacco, firearms, and lead paint. The American Law Institute (ALI) has commented in a Preliminary Draft 2 and their position remains that public nuisance should be addressed through legislation because “the common law of public nuisance is an inapt vehicle for addressing the conduct at issue.” James M. Beck, *Bad Ideas Whose Time has Passed*, *Drug and Device Law* (Oct. 7, 2013, 1:01 PM), <http://druganddevicelaw.blogspot.com/2013/10/bad-ideas-whose-time-has-passed.html> (citing ALI, *Restatement of the Law Third, Torts: Liability for Economic Loss*; Preliminary Draft No. 2, § 8, comment g (Sept. 3, 2013)).

Most courts have rejected the theories surrounding liability on a public nuisance claim that involve economic losses suffered by plaintiffs. Id.

Minnesota addresses public nuisance under statute section 609.74:

Whoever by an act or failure to perform a legal duty intentionally does any of the following is guilty of maintaining a public nuisance, which is a misdemeanor:

- (1) maintains or permits a condition which unreasonably annoys, injures, or endangers the safety, health, morals, comfort, or repose of any considerable number of members of the public; or
- (2) interferes with, obstructs, or renders dangerous for passage, any public highway or right-of-way, or waters used by the public; or
- (3) is guilty of any other act or omission declared by law to be a public nuisance and for which no sentence is specifically provided.

Minn. Stat. § 609.74 (2012). But see, e.g., City of Duluth v. 120 E. Superior St., Duluth, Minnesota, No. A13-0027, 2013 WL 5022523 (Minn. Ct. App. Sept. 16, 2013) (the court of appeals affirmed the district court's decision to grant a partial temporary injunction in the sale of synthetic drugs creating a public nuisance).

D. Punitive Damages

1. Pleading and Processes for Punitive Damages

Punitive damages may not be initially pled in the complaint. Instead, by operation of Minnesota Statutes sections 549.191–549.20, a party must request leave of the court to pursue punitive damages by motion to amend the complaint. Case law shows that punitive damages must be accompanied by a tort claim. See, e.g., Jacobs v. Farmland Mut. Ins. Co., 352 N.W.2d 803 (Minn. Ct. App. 1984) aff'd in part, rev'd in part, 377 N.W.2d 441 (Minn. 1985).

The procedure of the motion to amend the complaint is set forth in section 549.191:

The motion must allege the applicable legal basis under Minn. Stat. § 549.20 or other law for awarding punitive damages in the action and must be accompanied by one or more affidavits

showing the factual basis for the claim. At the hearing on the motion, if the court finds *prima facie* evidence in support of the motion, the court shall grant the moving party permission to amend the pleadings to claim punitive damages.

Next, plaintiff must make a *prima facie* case that at trial, he will be able to show by clear and convincing evidence that the actions of the defendant evidence “deliberate disregard” for the rights or safety of others.

A defendant has acted with deliberate disregard for the rights or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:

- (1) Deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury of the rights or safety of others; or
- (2) Deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

Minn. Stat. § 549.20, subd. 1(b).

This procedure has been interpreted to mean that during the motion, plaintiff must show that he will be able at trial to present clear and convincing evidence that defendants acted with deliberate disregard for the decedent's rights or safety. McKenzie v. N. States Power Co., 440 N.W.2d 183, 184 (Minn. Ct. App. 1989). At this stage, the court's inquiry is limited to whether plaintiff will be able to present clear and convincing evidence at trial. Ulrich v. City of Crosby, 848 F. Supp. 861, 867 (D. Minn. 1994); but see Hammond v. Northland Counseling Ctr, Inc., No. CIV.5-96-353MJD/RLE, 1998 WL 315333 (D. Minn. Feb. 27, 1998).

To be "clear and convincing," the evidence must be sufficient to permit the jury to conclude that it is highly probable that the defendant acted with deliberate disregard for the rights or safety of the plaintiff. Weber v. Anderson, 269 N.W.2d 892, 895 (Minn. 1978). "Deliberate disregard" has been interpreted to mean malicious, reckless, or knowing disregard of the movant's rights. Bougie v. Sibley Manor, Inc., 504 N.W.2d 493, 500 (Minn. Ct. App. 1993) (citing Wirig v. Kinney Shoe Corp., 461 N.W.2d 374 (Minn. 1990)). In this context, '*prima facie*' simply means that the evidence, if unrebutted, would support a judgment in the plaintiff's favor. McKenzie, 440 N.W.2d at 184; Swanlund v. Shimano Inds. Corp., Ltd., 459 N.W.2d 151, 154 (Minn. Ct. App. 1990).

Minnesota Rule of Civil Procedure 15.01 provides that leave to amend a pleading “shall be freely given when justice so requires.” But the courts have recognized that punitive damages are extraordinary. The court in Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan, 494 N.W.2d 261, 268 (Minn. 1992), stated that a “mere showing of negligence is not sufficient.” (citing Cobb v. Midwest Recovery Bureau Co., 295 N.W.2d 232, 237 (Minn. 1980)). “Punitive damages may only be awarded when a defendant's conduct reaches a threshold level of culpability.” Ulrich v. City of Crosby, 848 F. Supp. 861, 867 (1994) (citation omitted). “The mere existence of negligence or gross negligence does not rise to the level of willful indifference so as to warrant a claim for punitive damages.” Id. at 868 (citation omitted).

The punitive damages statute provides that a principal may be held liable for punitive damages based upon the conduct of his agent. Minn. Stat. § 549.20, subd. 2. It requires that liability for compensatory and punitive damages be determined in separate proceedings. Id. at subd. 4. Bifurcation allows a manufacturer to introduce evidence of other parties' exposure to the harm during the punitive portion of the trial to limit potential punitive damages. Without bifurcation, the manufacturer might be forced to introduce such potentially damaging evidence during the product liability stage of the trial, which would prejudice the defendant's liability case. See, e.g., Kociemba v. G.D. Searle & Co., 707 F. Supp. 1517 (D. Minn. 1989).

2. Statutory Standards for Assessing and Analyzing

The Minnesota punitive damages statute lists nine factors for measuring the amount of punitive damages. Minn. Stat. § 549.20, subd. 3. Those factors are:

- (1) The seriousness of the hazard to the public arising from the defendant's misconduct;
- (2) The profitability of the misconduct to the defendant;
- (3) The duration of the misconduct and any concealment of it;
- (4) The degree of defendant's awareness of the hazard and of its excessiveness;
- (5) The attitude and conduct of the defendant upon discovery of the misconduct;
- (6) The number and level of employees involved in causing or concealing the misconduct;
- (7) The financial condition of the defendant;

- (8) The total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons;
- (9) The severity of any criminal penalty to which the defendant may be subject.

Minn. Stat. § 549.20, subd. 3. These statutory factors are non-exclusive, meaning that jurors may consider other factors as well. Kociemba, 707 F. Supp. at 1536 n.18.

Trial courts in Minnesota have broad discretion to put aside or reduce punitive damage awards. Mrozka v. Archdiocese of St. Paul & Minneapolis, 482 N.W.2d 806, 813 (Minn. Ct. App. 1992). Appellate courts also exercise control over punitive damages, which are subject to strict scrutiny because of their "open-ended and volatile nature." Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d 826, 837 (Minn. 1988). The statute directs all courts to review punitive damage, stating that they "shall be measured" by the nine statutory factors listed above. Minn. Stat. § 549.20, subd. 3.

3. **BMW v. Gore Decision**

A recent national decisions regarding punitive damages is found in BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996). In BMW/Gore, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment placed a limit on states from imposing "grossly excessive" punitive damage awards against tortfeasors. The Court vacated a \$4 million punitive damage award against BMW in Alabama state court for failing to disclose that some "new" cars had been repainted. The buyer's compensatory damages were \$4,000.

The Court noted that BMW's nondisclosure of the repainting, which was prohibited by Alabama law, was legal in other states. The Court ruled that the jury improperly based its award upon BMW's conduct in other states, which had no impact on the rights of Alabama's residents. Besides injecting this "state sovereignty" principle into the punitive damages analysis, the Court affirmed that Due Process requires that a punitive damage award take into consideration (1) the reprehensibility of the defendant's conduct, (2) the ratio between the injury suffered and the dollar amount awarded, and (3) other sanctions imposed.

Minnesota already has a punitive damage statute and case law limitations against grossly excessive awards. As a result, the effect of the Gore decision may be slight except to suggest that an excessive award should be challenged on both the United States and Minnesota Constitutions.

E. Apportionment of Damages: Minn. Stat. § 604.02

In general, when two or more defendants have acted jointly, concurrently, or successively and are found liable for plaintiff's injury, the defendants are individually and jointly responsible for the entire damage award. Hosley v. Armstrong Cork Co., 383 N.W.2d 289 (Minn. 1986). See Michael K. Steenson, Joint and Several Liability Minnesota Style, 15 Wm. Mitchell L. Rev. 969 (1989). Traditionally, this meant that if one defendant had declared bankruptcy, the other defendant would have to pay the full judgment.

Until 1978, Minnesota law on joint and several liability was governed by the common law. In 1978, the legislature adopted a loss allocation provision that applied to parties in the chain manufacturing and distribution. The legislature expanded and modified that law several times over the last thirty-five years.

Today, two different statutes are technically in force. The current statute, passed in 2003, “applies to claims arising from events that occur on or after August 1, 2003.” Minn. Stat. § 604.02, subd. 1 (2012). The older version, passed in 1988, applies to all other claims. Both versions include three subdivisions. The second and third subdivisions are the same in both versions. But subdivision 1 of the new statute is radically different from the same subdivision in the old statute. Because the great majority of claims based on events occurring before the cutoff date are now barred by statutes of limitation, the older subdivision 1 is not discussed here. But the reader should be aware that if a claim arises out of events that occurred before August 1, 2003, the older statute will apply. For a detailed discussion of that statute, see 27 Michael K. Steenson, J. David Prince & Sarah L. Brew, Minnesota Practice Series: Products Liability Law, § 7.12 (2006).

1. Joint and Several Liability

Subdivision 1 of the statute, “Joint Liability,” provides:

When two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that the following persons are jointly and severally liable for the whole award:

- (1) a person whose fault is greater than 50 percent;

- (2) two or more persons who act in a common scheme or plan that results in injury; [or]
- (3) a person who commits an intentional tort

Minn. Stat. § 604.02, subd. 1 (2012) (emphasis added).

Under this statute, several liability is the norm, and joint & several liability applies only under the enumerated exceptions. (Note that the law includes a fourth paragraph, which applies when liability arises under specific statutory provisions not relevant to this discussion.)

As in the common law and the earlier statute, the current law is predicated on the concept of indivisible injury, meaning that fault of a single injury must be apportioned to at least two entities in order for the statute to operate.

In 2012, the Minnesota Supreme Court addressed the 2003 revision for the first time in Staab v. Diocese of St. Cloud, 813 N.W.2d 68 (2012). The case was brought by a woman who was injured when her husband pushed her wheelchair off of a five-inch step on the premises of a parish school. The woman fell forward out of the chair, and suffered a serious injury. She sued the owner of the property, the diocese, but did not sue her husband.

The jury apportioned fifty percent of fault to the diocese and fifty percent to the husband, even though he was not a party to the suit. The court held that under these facts, the husband's fault could not be reallocated to the diocese. Focusing on the statute's use of the word "persons," the court held that it refers not only parties to the lawsuit, but to parties to the transaction that gave rise to the suit. Id. at 75. Thus it was proper for the jury to consider the fault of the husband. Because he was assigned fifty percent of the fault, and the diocese the other fifty percent, the diocese could not be considered "a person whose fault is greater than 50 percent," and was therefore jointly liable, not severally liable. Id. at 77.

2. Reallocation

Subdivisions 2 and 3 of the statute provides for reallocation of damages when a liable party cannot satisfy the judgment against it. This most commonly happens when the party is bankrupt. Reallocation can only be applied where there is more than one person against whom judgment can be entered. Schneider v. Buckman, 433 N.W.2d 98, 103 (Minn. 1988) (no reallocation where two of the three tortfeasors were not parties due to lapse of statute of limitations).

The general rule, as defined in subdivision 2, is that when the amount due from one party is uncollectible, the court may reallocate that amount among the other at-fault parties “according to their respective percentages of fault.” Minn. Stat. § 604.02, subd. 2. In cases where the claimant shares in the fault, the claimant is included in the reallocation pool.

For example, suppose that a plaintiff construction worker is injured by a defective hand tool, and the jury apportions fifty percent of fault to manufacturer, thirty percent to the employer who provided the tool for the worker’s use, and twenty percent the plaintiff, who used the tool in a negligent manner. If the manufacturer is bankrupt, the manufacturer’s liability can be redistributed to the employer and the employee in proportion to their degrees of fault.

Subdivision 3 states a reallocation provision that applies specifically to products liability cases. The provision states:

In the case of a claim arising from the manufacture, sale, use or consumption of a product, an amount uncollectible from any person in the chain of manufacture and distribution shall be reallocated among all other persons in the chain of manufacture and distribution but not among the claimant or others at fault who are not in the chain of manufacture or distribution of the product.

Minn. Stat. § 604.02, subd. 3.

This provision means that if any at-fault party cannot satisfy the judgment against it—for instance, when the party is bankrupt—the amount of that judgment will be apportioned to other at-fault parties who are in the chain of manufacturer and distribution, but not to any private parties who are also at fault. In cases where the claimant is found to have contributed to his own injury, these amounts are not apportioned to the claimant either.

The Minnesota Court of Appeals applied these two subdivisions in Marcon v. K-mart Corporation, 573 N.W.2d 728 (Minn. Ct. App. 1998), holding a seller strictly liable for damages caused by a product that was defective due to a failure to warn. Twelve-year-old Marcon was sledding on a hill near his parents’ home. His sled struck a bump, stopped and Marcon was thrown forward, landing face down in the snow, fracturing his neck and leaving him a quadriplegic. Id. at 729–30. Marcon sued the manufacturer and K-Mart. The

jury attributed one-hundred percent the fault to the manufacturer, but the manufacturer was bankrupt and could not satisfy the judgment.

The Court of Appeals of Minnesota recited the law on strict products liability stating as follows:

Minnesota courts...subject manufacturers to strict liability for injuries resulting from a defect in design or failure to warn. Minnesota courts have also extended this liability to persons who sell products that are in a defective condition and harm a user, even if the seller was not negligent...

Id. at 730.

The court then noted that “a non-manufacturer defendant in a strict liability action can be absolved of its strict liability for injuries caused by a product defect over which it had no control [but] it cannot be absolved (and therefore remains strictly liable) if the manufacturer of the defective product is unable to satisfy a judgment.” Id. at 731–32. Because Marcon was a products liability case, and because the manufacturer was bankrupt, subdivision 3 came into play. K-Mart, as the next entity in the chain of distribution, was forced to assume the manufacturer’s liability.

Note that subdivision 3 also exempts from reallocation “a person whose fault is less than the claimant is liable to the claimant only for that portion of the judgment which represents the percentage of fault attributable to the person whose fault is less.” Minn. Stat. § 604.02, subd. 3. This was the operative provision in Tester v. American Standard, Inc., 590 N.W.2d 679 (Minn. Ct. App. 1999). In Tester, an asbestos-related products liability action, the plaintiff was assigned a greater degree of fault than two of the defendants. When those two defendants could not satisfy the judgments against them, the plaintiff wanted to reallocate their portions of the verdict to other defendants. But the court of appeals rejected the attempt, because the plaintiff’s degree of fault was greater than that of the two defendants in question.

In Staab v. Diocese of St. Cloud, the Minnesota Supreme Court reversed an earlier ruling by the Court of Appeals that allowed a court to require a defendant to pay the share of fault even where a non-party tortfeasor had contributed fault. In reversing the Court of Appeals, the Supreme Court held: “a party who is severally liable under Minn. Stat. § 604.02, subd. 1, cannot be ordered to contribute more than that party's equitable share of the total damages award under the reallocation-of-damages provision in Minn. Stat. §

604.02, subd. 2.” Staab v. Diocese of St. Cloud, 853 N.W.2d 713, 722 (Minn. 2014).

3. Allocation In Lambertson Context

a) Application of § 176.061, subd. 6(c) Formula

Minnesota Statutes section 176.061, subdivision 6, provides an allocation formula for dividing the proceeds from a judgment when an injured employee recovers against a third-party tortfeasor (an entity other than his employer for employment-related injuries). See Albert v. Paper Calmenson Co., 524 N.W.2d 460 (Minn. 1994).

First, it should be noted that the amount of damages attributed to the employee's own fault are not recoverable and are eliminated “off the top” from the damage award. Next, the “reasonable costs of collection”—including reasonable attorney’s fees—are deducted from the gross recovery. Then, one-third of the net recovery is paid to the plaintiff-employee.

At this point, the employer is reimbursed from the remaining net recovery for workers' compensation benefits paid to the employee (based upon its subrogation interests), less a proportionate amount of the costs of collection. This figure is the costs of collection divided by the total proceeds received by the employee from the third-party tortfeasor multiplied by all benefits paid by the employer.

Finally, any net recovery remaining is paid to the employee, and the employer receives a future credit for any benefits for which the employer is obligated to pay but has not yet paid. Minn. Stat. § 176.061, subd. 6(d). The employer's recovery of the future credit is also reduced by his share of the collection costs calculated as below. See, e.g., Kealy v. St. Paul Housing & Redevelopment Authority, 303 N.W.2d 468, 475 (Minn. 1981).

XII. COLLATERAL SOURCE

A. Collateral Source Rule

To prevent plaintiffs from double recovery in tort claims, the Minnesota Legislature enacted Minnesota Statute section 548.251. The statute defines “collateral sources” as payments related to the injury or disability alleged by a plaintiff, or on the plaintiff's behalf up to the date of the verdict, by or pursuant to:

(1) a federal, state, or local income disability or Workers' Compensation Act; or other public program providing medical expenses, disability payments, or similar benefits;

(2) health, accident and sickness, or automobile accident insurance or liability insurance that provides health benefits or income disability coverage; except life insurance benefits available to the plaintiff, whether purchased by the plaintiff or provided by others, payments made pursuant to the United States Social Security Act, or pension payments;

(3) a contract or agreement of a group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental or other health care services; or

(4) a contractual or voluntary wage continuation plan provided by employers or any other system intended to provide wages during a period of disability, except benefits received from a private disability insurance policy where the premiums were wholly paid for by the plaintiff.

Minn. Stat. § 548.251, subd. 1 (2012); See Imlay v. City of Lake Crystal, 453 N.W. 2d 326, 331 (Minn. 1990).

Further, negotiated discounts are considered collateral source under the meaning of the statute. Swanson v. Brewster, 784 N.W.2d 264, 266 (Minn. 2010). In Swanson v. Brewster, the plaintiff brought an action for personal injuries in a motor vehicle accident against Brewster. The plaintiffs recovered \$62,259.30 for past medical expenses. The defendants appealed and argued that the amount awarded to plaintiff should have been reduced by the discount HealthPartners secured for the plaintiff through negotiations with plaintiff's medical providers. The defendants argued that the negotiated discount is considered a collateral source defined by Minnesota's statute § 548.251. In this appeal, the Minnesota Supreme Court reviewed the court of appeal's decision. It determined that the discounts applied were a benefit to the plaintiffs and the discounts were considered a payment made on behalf of plaintiff to a health insurance policy. Thus, the Supreme Court held that the negotiated discount is a collateral source under the statute and reversed and remanded for further review.

XIII. MULTIDISTRICT LITIGATION (MDL)

A. Federal statute 28 U.S.C. § 1407

The Judicial Panel on Multidistrict Litigation (MDL Panel) has the authority to consolidate and transfer civil actions pending in different federal districts that involve common questions of fact to a federal district for coordinated or consolidated pretrial proceedings. 28 U.S.C. § 1407(a) (2012).

B. General Information

The following cases involve multidistrict litigation.

Winter v. Novartis Pharm. Corp., 739 F.3d 405 (8th Cir. 2014) (the United States District Court of Appeals for the Western District of Missouri affirmed in part that adequate warnings existed, vacated in part on the judgment of costs to plaintiff, and remanded on apportionment on multidistrict cases).

Cisson v. C.R. Bard, Inc., 2013 WL 5700513 (S.D.W. Va. Oct. 18, 2013); and,

In re Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig., 2014 WL 505234 (S.D.W. Va. Feb. 5, 2014);

Other resources:

See generally Eldon E. Fallon, et al., Bellwether Trials in Multidistrict Litigation, 82 Tulane L. Rev. 2324-25 (2008).

XIV. INVESTIGATION CHECKLIST

A. Personal Background Information

Name, alias, maiden name, name changes, address, age.

Present and past marital status.

Present and past roommates.

Name, business occupation, and address of spouse and former spouses.

If divorced, in what court and when was the judgment final.

Name and ages of children.

Present occupation, earnings.

Education.

Effect of injury on occupation, earnings.

Name and address of closest relative.

B. Medical Information

Nature and extent of injuries, pictures, if possible.
Nature and extent of permanent injuries.
Names and addresses of all treating physicians.
Names and addresses of all hospitals, clinics, with dates of admission.
Names and addresses of all nurses or therapists involved.
Obtain copies of medical bills, hospital records, and doctor's reports.
Names of prescriptions or other medical devices, date, and price.
Names, addresses and agents of any personal, medical, hospital, or homeowners insurance applicable.

C. Knowledge of Product Before Purchase

When did you first become familiar with the product?
How did you first become familiar with the product?
Did you see any advertisements or literature regarding the product prior to the purchase immediately preceding the injury?
Had you used the product prior to the pre-injury purchase?
If you used the product prior to the pre-injury purchase, were you then aware of any representations or statements as to its use or quality displayed on the product's label or on its package?
For what purpose did you purchase the product?
Was the product requested sought by model or brand name?

D. History of Acquisition of Product

How did you acquire the product?
a. Purchased?
b. Borrowed?
c. Furnished by employer?
d. A gift?
e. Acquired with premiums?
What was the date of purchase?
Where was the product purchased?
At what type of store was the product purchased?
How was the product displayed at the time of your purchase?
Were a number of competing products available?
Why did you select the particular product?
Was a sales person present?
If so, what did the sales person say?
a. Did the sales person instruct you as to its use?
b. Did he or she warn or advise of its proper use?

- c. Did he or she represent the product in any way, such as, “safe,” “foolproof,” “the best there is,” “needing no attention,” “highly recommended by the store”?

Did you disclose to the seller your intended use for the product?

How was the product packaged?

- a. Did the package bear any directions or instructions for use?
- b. Were any pamphlets or other informative materials included with the product?
- c. Was the product inspected before you left the store?
- d. Was the product received in a sealed container?

E. Use of Product Prior to Injury

When did you first open the product’s package?

Was there anything in the package other than the product?

If so, what?

- a. Were any instructions booklets, guarantees, or warranties in the package?
- b. Was any advertising literature in the package? If so, what was its content?

Did you inspect the package?

Did you inspect the product?

What was the product’s general appearance?

Describe your use of the product:

- a. When did you first use the product?
- b. What did you observe about it?
- c. How did you use it?
- d. For what purpose did you use it before the injury?
- e. How long did you use it before the injury?
- f. How frequently did you use the product?
- g. Did you have any difficulties with the product prior to injury? If so, what were they?
- h. Did you follow the directions for use, if any?

F. Circumstances of Injury

When did the accident occur?

Where were you at the time of the injury?

How did the accident occur?

- a. How was the product being used?
- b. Was the product in normal use at the time of the accident?
- c. Was it being used in the manner different from that recommended by the manufacturer?

G. Client's Conduct After Accident

Is the product still available?

If so, where is it?

Is the original container still available?

Are the directions and other accompanying material available?

In what condition is the product at the present time?

a. Is there an obvious defect in it at this time?

b. Does the product still operate?

Have you used the product since the injury?

a. Where?

b. When?

c. With what result?

How did you advise the seller of the accident?

a. How?

b. When?

Did you advise the manufacturer of your injuries?

a. How?

b. When?

H. Recommendations to Client

Secure the product, its original container, and all accompanying literature.

Locate any and all advertisements and all other material at your home that you saw prior to purchasing the product.

I. Information Concerning Industry Producing Product

Age of industry producing the type of product involved.

Is defendant company a newcomer or pioneer in the field?

List other firms producing similar products.

Similarities and differences between defendant's product and those of industry generally.

Claims made against industry generally or defendant's competitors.

Standard texts or references used in industry.

Standards relating to industry.

a. Published by industry

b. Published by other organizations but with reference to industry.

c. Is there any industry "bible"?

Criticisms of industry and its products.

a. Who made the criticism?

b. Where were they made?

- c. Were the criticisms published?
- d. If published, are copies available?
- e. Is defendant company aware of the criticism?

J. The Defendant Company

Company was founded _____, _____.

The company was founded by _____.

General nature of company's business when founded.

General nature of company's business at present.

Is the product in question the principal product manufactured by defendant or a sideline product?

Company's general position in industry at present in terms of size.

Number of products manufactured by company.

Are defendant company's products primarily consumer or industrial products?

Number of persons employed by defendant.

Percentage of defendant's employees engaged in research, development and testing.

Percentage of defendant's budget earmarked for research, development and testing.

Percentage of defendant's budget earmarked for advertising.

K. The Product

Identification of product.

Size, shape, color, and description of product generally.

Characteristics distinguishing product in question from similar products.

Product was manufactured on _____, _____.

Presence on product of any codes or symbols indicating date of manufacture, descriptive words, lettering or directions.

Is product patented?

Ingredients or composition of product.

Specifications of finished product.

Industry or other standards followed in manufacturer of product.

Was product in question approved by a testing agency?

Changes made in product since approval given by testing agency?

Ranges of speed, heat, pressure, etc., that product is designed to withstand.

Safety features or devices incorporated into product.

Ultimate limits of product's performance before failure.

Persons or class of persons for whom product was designed.

Anticipated uses of product:

- a. Class or type of person normally expected to buy and use product.
- b. Anticipated manner of use by average consumer.

- c. Abnormal uses anticipated.
- d. Experience regarding normal or expected life of product.
- e. Conditions and uses known to shorten life of product or cause failures.
- f. Effect of heat, moisture, time, sunlight, etc., on product.

Proper method of installing and using product.

Application of federal, state, or local statutes, regulations, or ordinances, such as:

- a. Federal Trade Commission's regulations.
- b. Flammable Fabric Act (15 USCS §§ 1191 et seq.)
- c. Food, Drug and Cosmetic Act (21 USCS §§ 301 et seq.)
- d. Clean Air Act (47 USCS §§ 1857 et seq.)
- e. Consumer Product Safety Act (15 USCS § 2051)
- f. Federal Boat Safety Act (46 USCS §§ 1451–1489)
- g. Federal Coal Mine Health and Safety Act.
- h. Federal Food, Drug, and Cosmetic Act and Medical Device Statutes.
- i. Federal Metal and Non-metallic Mine Safety Act.
- j. Federal Hazardous Substances Act (15 USCS §§ 1261–1274)
- k. Federal Railroad Safety Act (45 USCS § 433)
- l. Flammable Fabrics Act (15 USCS §§ 1191–1204)
- m. Highway Safety Act.
- n. Magnuson-Moss Warranty, Federal Trade Commission Improvement Act (15 USCS §§ 2301–2312)
- o. National Traffic and Motor Vehicle Safety Act (15 USCS §§ 1391–1431)
- p. Occupational Safety and Health Act
- q. Poison Prevention Packaging Act (15 USCS §§ 1471–1476)
- r. Radiation Control for Health and Safety Act (42 USCS § 263)
- s. Refrigerator Safety Act (15 USCS §§ 1211–1214)

Existence and nature of warranties and disclaimers.

L. Production and Distribution

Nature of manufacturing process.

- a. Source of all raw materials.
- b. Source of all component parts.
- c. Subcontractors or sub-assemblers.
- d. Quality control on material and parts.
- e. Pre-testing procedures.
- f. Nondestructive testing engaged in by industry.
- g. Destructive testing engaged in by industry.
- h. Description of physical and chemical process used.
- i. Heat, time, pressure, etc., of processes used.

Nature of product inspection

- a. Description of inspection process.

- b. Names of inspectors and identification of records.
- c. Equipment used in inspection.
- d. Is each item inspected or is a spot check relied on?
- e. Types of defects that can be checked.
- f. Types of defects that cannot be checked.

Methods of distribution.

- a. Nature of franchise agreements, if any.
- b. Location of franchises.
- c. Manner of shipment.

M. Instructions and Warnings

Existence of written instructions on or accompanying product.

Persons who prepared instructions.

Were instructions approved by engineering department?

Anticipation by defendant company that consumer would rely on instructions.

Existence of warnings respecting product dangers.

Reason for warnings.

Did warnings accompany products as originally conceived?

If so, did those warnings differ from the present ones?

If present warnings differ, why?

N. Advertising

Nature of advertising.

Percentage of budget devoted to advertising.

Publications in which advertising appears.

Does defendant company engage in cooperative advertising with its retailers, distributors and jobbers?

Name of advertising agency responsible for advertising content.

Does defendant company maintain an advertising file?

Names of persons primarily responsible for advertising content.

Nature and existence of all sales literature distributed to salesmen, distributors, and jobbers.

Persons responsible for sales literature.

O. Other Accidents and Injuries

Company policy on adjustments for defective products.

Percentage of products returned.

Location of records concerning adjustments.

Types of failures observed.

Existence and location of records of consumer injuries.

Number of prior injuries resulting from product's use.
How injuries occurred.
When company received notice of injuries.
Type of notice given.
Did defendant company investigate injuries?
Result of such investigations, if any.
Has defendant company been previously sued for product injury?
If so, by whom?
Names of attorneys who represented plaintiffs in each earlier suit.
Results of suits.

P. Design Changes

Has defendant company redesigned product since its original conception?
Date of design change.
How does redesigned product, if any, differ from original product?
Causal relation between change and notices of injury.
Defendant's awareness of product criticism.
Cost differences, if any, resulting from change.
Could new design have been incorporated in product originally?

Q. Specific Product and Accident

Identification of specific product.
When and where was product manufactured?
Existence and nature of any and all records, correspondence, etc., pertaining to manufacture, inspection, sale and shipment of particular product.
Place where sale occurred.
Name and function of all persons or organizations owning, possessing, or controlling product from time it left defendant's hands to time plaintiff acquired possession.
Nature of any first-hand knowledge by witness of facts surrounding accident.

R. Tests and Findings

Were any tests performed on product?
Nature of tests, if any.
Persons who performed tests, if any.
Findings resulting from tests.

American Law of Products Liability 3d Practice Aids (Lawyers Co-op Bancroft-Whitney) §§ 9 and 11 (1999).

CODES AND STANDARDS SOURCES OF INFORMATION

National Safety Council
424 N. Michigan Avenue
Chicago, Illinois 60611
WEB SITE: www.nsc.org

American National Standards Inst.
1430 Broadway
New York, NY 10018
WEB SITE: www.ansi.org

American Society for Testing and
Materials Standards
1916 Race Street
Philadelphia, Pennsylvania 19103
WEB SITE: www.astm.org

Underwriters Labs, Inc.
207 East Ohio Street
Chicago, Illinois 60611
WEB SITE: www.ul.com

Consumer Product Safety Commission
Washington, D.C. 20204
WEB SITE: www.cpsc.gov

Technical Reference Board
National Highway Traffic Safety Adm.
400 7th Street S.W.
Washington, D.C. 20590
Food and Drug Administration
Department of H.H.S.
Washington, D.C. 20204
WEB SITE: www.fda.gov

National Transportation Safety Board
800 Independence Avenue S.W.
Washington, D.C. 20591
WEB SITE: www.nts.gov

Office of Defects Investigation
National Highway Traffic Safety Adm.
Room 5326
400 7th Street S.W.
Washington, D.C. 20590
WEB SITE: www.nhtsa.dot.gov

A.A.J.
777 6th Street, N.W.
Washington, D.C. 20007
WEB SITE: www.justice.org
The Exchange
WEB SITE: <http://exchange.alt.org/>

(To obtain current fee and list of resources
available.)

Appendix 1 – Notice of Claim (Products Liability)

NOTICE OF CLAIM

TO: _____

CLAIMANT: _____

NOTICE OF CLAIM

Pursuant to Minn. Stat. §604.04, you are hereby given NOTICE that on _____, **(date)**
at approximately _____, the claimant was injured by a _____ which
(time)

(describe event causing injury)

The claimant seeks the damages for injury to person/property.

Note that pursuant to the statute any person in the chain of manufacture and distribution is obligated to promptly furnish to the undersigned the names and addresses of all persons the person knows to be in the chain of manufacture and distribution. Failure to provide this information may subject you to personal liability.

Appendix 3 – Letter Regarding Freedom of Information Act

Who Whom It May Concern:

Under the Freedom of Information Act, we request the following:

Copies of all releasable documents from all case files for the following employer at the following site:

Employer:

Site:

In addition to the above-named employer, we request copies of all releasable documents from all case files which include an investigation of a fatality, catastrophe, accident or injury, for any and all employer(s) on the above-named site regardless of the reason such inspection was initiated or whether such inspection was programmed or unprogrammed.

These requests specifically include, but are not limited to:

- All Citations and Notifications of Penalty
- All Settlement Agreements
- Original prints of all photographs and/or slides
- Photocopies of all Photo Mounting Worksheets, OSHA Form No. 89
- Copies of all videotapes
- Documentation of Abatement

In the event a specific case is currently under Contest or where the 15 working day Contest Period has not yet elapsed, we request that the Citations and Notifications of Penalty be forwarded to us immediately. Please maintain a copy of this FOIA request in each respective case file and forward all other requested documents to us as soon as they become available.

Very truly yours,

Appendix 4 – Letter Regarding Freedom of Information Act

Who Whom It May Concern:

Under the Freedom of Information Act, we request the following:

Please send us a copy of the IMIS Report summarizing the inspection and citation history on a national scope for the following employer:

Employer:

Very truly yours,