**ITLA Product Liability Case Law Review, January 27, 2014**
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This outline provides a summary of recent case law in the area of product liability:

## I. DESIGN DEFECT CLAIMS

- **Proven by the "Risk-Utility Test"**
  - A plaintiff may demonstrate that a product was defectively designed in one of two ways: (1) showing that the product failed to perform as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner (the "consumer-expectation test"); or (2) showing that the risk of danger inherent in the product design outweighs its benefits (the "risk-utility test"). *Cappellano v. Wright Med. Group, Inc*., 838 F. Supp. 2d 816 (C.D. Ill. Jan 23, 2012), *citing Calles v. Scripto – Tokai Corp*., 224 Ill. 2d 247, 255-56 (Ill. 2007).
    - **Courts use "hybrid" risk-utility test**: Courts typically consider consumer expectations as a factor within the risk-utility test. *See Mikolajczyk v. Ford Motor Co*., 231 Ill. 2d 516 (Ill. 2008),
  - The Supreme Court has set forth a non-exhaustive list of factors which may be relevant to the risk-utility analysis. *See Jablonski v. Ford Motor Co*., 955 N.E.2d 1138, 1154 (Ill. 2011) (factors include evidence of (1) the availability and feasibility of alternate designs at the time of the product's manufacture; (2) that the design used did not conform to the design standards in the industry, design guidelines provided by an authoritative voluntary organization, or design criteria set by legislation or governmental regulation; (3) the utility of the product to the user and to the public as a whole; (4) the safety aspects of the product including the likelihood that it will cause injury and the probable seriousness of the injury; and (5) the manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility. *See also Mikolajczyk v. Ford Motor Co*.., 231 Ill. 2d 516, 555, (2008) (finding the risk-utility formulation in the Restatement (Third) of Torts: Products Liability § 2, cmt. f, at 23 (1998), to be instructive in a design defect case).

- **Plaintiff's Burden to Withstand Risk-Utility Test; No Burden Shift to Defendant**
  - *Assaf v. Cottrell, Inc*., 2012 U.S. Dist. LEXIS 133571 (N.D. Ill. Sep 19, 2012).
    - Facts: Plaintiff, who was injured in fall from auto hauler trailer, alleged the trailer was defectively designed due to the lack of guardrails, handholds, and a wider catwalk.
    - Holding: District court granted defendant's summary judgment motion on strict liability claim.
    - Relevant analysis:
      - The burden does not shift to the defendant under the risk-utility test. Rather, "the plaintiff bears the burden of presenting evidence that the risks of the design outweigh its benefits." *Id*. at *8.

- Because plaintiff's expert opinions did "not attempt to balance the risks of the trailer's design against its benefits, but relate only to the alleged safety risks of the product," the plaintiff did not satisfy his burden of proving a design defect. *Id*. at *8-9.

- *See also Cappellano*, 838 F. Supp. 2d at 832 (emphasis added): "In order to meet the burden under *Jablonski*, Plaintiff was required to provide evidence that the possibility of neck failure (the risk of the modular prosthesis design) outweighed or was greater than the benefits of the modular design (flexibility and better fit in order to reduce the possibility of the types of failures which have occurred in monolithic prosthesis). **Because Plaintiff has provided this court with no basis for comparing the risk and the benefits, he has not met his burden.** In other words, in order to perform the initial balancing under the risk-utility test to determine if the case should go to the jury, this court must have something to balance. It cannot be enough to show that there is a risk without providing any way to balance the risk against the benefits."

- **Feasible Alternative Design Evidence Not Required to Prove Design Defect**
  - *Baley v. Fed. Signal Corp*., 2012 IL App (1st) 093312
    - Facts: Nine firefighters who suffered hearing loss sued manufacturer of siren alleging the sirens were defectively designed and unreasonably dangerous because they exposed the firefighters to excessive noise. Jury returned verdict for $445,000. Defense filed JNOV based, in part, on fact that plaintiffs failed to prove a feasible alternative design. JNOV denied by trial court.
    - Holding: Appellate court affirmed trial court's denial of JNOV
    - <u>Relevant analysis:</u>
      - **Evidence of a feasible alternative design is a "factor" to consider in a design-defect case, but there is no requirement for plaintiffs to prove a feasible alternative design to prevail in such cases.**
        - "We reiterate the holding of our supreme court that a feasible alternative design is not a required element but merely one of the factors to consider" in strict liability actions based on defective design. *Id*. at ¶67.

- **Consumer Expectations Evidence Only Relevant When Product Used as Intended or in Foreseeable Manner**
  - *Ferraro v. Hewlett-Packard Corp*., 2012 U.S. Dist. LEXIS 13842 (N.D. Ill. Feb 6, 2012)
    - Facts: Woman who fell asleep and suffered burn injuries from the power adapter of her HP laptop brought strict liability action against manufacturer (HP) alleging design defects and failure to warn.

- Consumer expectation analysis:
    - Plaintiff's argument "that an ordinary consumer would not expect that the adapter would cause a burn under any set of conditions including if the user maintains contact with the adapter at 50° Celsius for around 50 minutes, which could cause a second-degree burn" *does not satisfy the consumer-expectations test* because that is neither a use for which it was intended (powering the laptop and charging the battery) nor is it "foreseeably similar" to its intended use. *Id*. at *19, *citing Lamkin v. Towner*, 138 Ill. 2d 510 (Ill. 1990) *and Mikolajczyk*, 901 N.E.2d at 336.

- **Societal Cost is a Relevant Consideration**
    - *Stollings v. Ryobi Techs., Inc.*, 725 F.3d 753 (7th Cir. 2013).
        - Facts: Plaintiff lost a finger in a table saw accident and sued manufacturer for defective design for failing to equip saw with either of two safety features. Trial court excluded plaintiff's expert from testifying regarding the cost to society of saw accidents as irrelevant and unreliable. Jury returned verdict for defendant.
        - Holding: 7th Circuit reversed, holding (in part) that an allegedly defectively designed product's costs to society is a relevant consideration in the risk-utility analysis.
            - **"We believe Illinois courts would consider the costs of a category of accidents to society a relevant consideration in a product liability suit."** *Id*. at 767.
            - Plaintiff should have been permitted to elicit expert testimony that saws lacking the particular safety feature "cost society an average of $753 in accident costs over the lifetime of the average saw." *Id*. at 764.

## II. STRICT LIABILITY FOR SELLERS OF USED PRODUCTS

- *Whelchel v. Briggs & Stratton Corp*., 850 F. Supp. 2d 926 (N.D. Ill., 2012)
    - Facts: Wife of man killed in lawn mower roll-over accident sued the manufacturer and distributor that sold the mower to her husband in a used condition.
    - Holding: Distributor of used lawn mower could be held strictly liable.
    - Relevant analysis:
        - **There is no blanket preclusion of strict liability for sellers of used products.** *Id*. at 838.
        - In *Peterson v. Lou Bachrodt*, 61 Ill. 2d 17 (1975), the Court expressed the concern of holding sellers of used products liable when the defects were caused by intervening consumers outside the chain of destruction. However, there are two "*Peterson* exceptions" for extending strict liability to re-sellers: (1) allegations that the defects existed when the product left the

control of the manufacturer; or (2) allegations that the defects were created by the re-seller.

- In *Whelchel*, the Court found that the plaintiff alleged that the defect (absence of roll-over protection system) existed when the product left the control of the manufacturer. Therefore, the distributor (re-seller of used lawn mower) could be found strictly liable.

- *But see*: "[A] retailer who sells used products exclusively, and has no trade relationship with the manufacturers of its products, appears not to implicate the policy rationale for holding retailers liable for defects attributable to the manufacturer." *Whelchel*, 850 F. Supp. 2d at 939.
  - In *Whelcher*, the distributor (re-seller of used equipment) was found to have a "significant trade relationship" with the manufacturer: It sold both new and used mowers, was an authorized dealer of the type of mower involved, and attended training sessions sponsored by the manufacturer. *Id*.

## III. CIVIL CONSPIRACY

- *Gillenwater v. Honeywell Int'l, Inc*., 2013 IL App (4th) 120929
  - Facts: $96 million verdict in mesothelioma case alleging "civil conspiracy" of several manufacturers to conceal the respiratory dangers of asbestos. Trial court granted JNOV in favor of three defendants (and entered judgment against 4th defendant for $8.4 million). Plaintiff appealed granting of JNOV.
  - Holding: Court affirmed trial court's JNOV, finding **insufficient evidence of a conspiracy.**
  - Relevant analysis:
    - **To prove civil conspiracy, plaintiff must show more than just "parallel conduct," but must also show "plus factors."**
    - "[I]n an effort to prove, circumstantially, that defendants had 'planned, assisted, or encouraged' Owens-Corning's wrongdoing against Gillenwater, plaintiffs adduced only evidence of parallel conduct, *i.e.* evidence that Owens-Corning and defendants both had been concealing the dangers of their own asbestos-containing products, and plaintiffs did not adduce any valid **plus factors*, i.e.* 'additional evidence that reasonably tend[ed] to exclude the possibility that' Owens-Corning and defendants 'were acting independently' in their parallel conduct."** *Id*. at ¶123.
      - "[I]n the absence of a plus factor, it would be speculation to posit a conspiracy on the basis of consciously parallel conduct that is in each company's economic interest; and tort liability cannot rest on speculation." *Id*. at ¶141.

## IV. *FORUM NON CONVENIENS*

- *Pendergast v. Meade Elec Co*., 2013 IL App (1st) 121317
  - Facts: Action arising out of a traffic accident in Kendall County between three Kendall County residents. Plaintiff, administrator of estate, filed suit in Cook County asserting product liability claims for defective design and manufacture of the traffic signal equipment used at the intersection. Defendants moved to transfer case to Kendall County based on doctrine of *forum non conveniens*. Trial court denied motion.
  - Holding: Court affirmed denial of motion to transfer to Kendall County.
  - Relevant analysis:
    - **Accident location is "less significant" factor in product liability cases:**
      - Location of the underlying accident is a "less significant" private and public interest factor in the *forum non conveniens* analysis "because defective products in the stream of commerce can affect the residents of many counties." *Id*. at ¶33-34.
    - **Plaintiff's choice of forum entitled to deference, even though plaintiff was administrator of the estate:**
      - Plaintiff's status as administrator of the estate does not affect the presumption that a plaintiff's choice to litigate his cause of action in his home forum is entitled to deference and must not be disturbed unless the other factors strongly favor transfer. Plaintiff-administrator was a resident of Cook County. *Id*. at ¶27.

- *Taylor v. Lemans Corp*., 2013 IL App (1st) 130033:
  - Facts: Product liability action filed in Cook County arising out of motorcycle accident in Bureau County by resident of Fulton County.
    - Holding: The totality of the circumstances did not strongly favor transfer of venue based on *forum non conveniens*.
    - Relevant analysis:
      - **Foreign plaintiff's choice of forum entitled to less deference, rather than no deference**:
        - Even though plaintiff was not a resident of Cook County and the accident did not occur in Cook County, "the deference accorded [to the plaintiff] is only less as opposed to none." *Id*. at ¶18.
      - **Affidavits of witnesses/parties can be important in convenience analysis**:
        - Court found it important that defendants "have not obtained any affidavits from witnesses [or defendant] stating that Cook County would be an inconvenient forum." *Id*. at ¶27.

## V. STATUTE OF LIMITATIONS

- *Solis v. BASF Corp*., 2012 IL App (1st) 110875
  - Facts: Plaintiff claimed his workplace exposure to chemical, diacetyl, injured his lungs. He brought claims for failure to warn and defective design against BASF, a distributor of the chemical. The trial court entered a directed verdict in favor of the plaintiff on BASF's statute of limitations defense. The jury returned a verdict of $32 million. BASF appealed.
  - Holding: Court held the trial court erred in directing a verdict in favor of the plaintiff on the statute of limitations defense, and remanded for a new trial on both liability and damages.
  - Relevant "discovery rule" analysis:
    - **An "official diagnosis" of a condition is not required to trigger the running of the statute of limitations.** *Id*. at ¶31.
      - Court held that jury could have concluded that plaintiff should have known his "lung problems" were wrongfully caused even before an official diagnosis, which would bar plaintiff's claim based on the 2-year statute of limitations.
  - Subsequent remedial measures analysis:
    - **Post-remedial measure evidence properly allowed for impeachment purpose:**
      - Court held it was proper to allow evidence of post-remedial changes to the MSDS, which warned that over-exposure to diacetyl could cause lung damage, **solely for purposes of impeaching** defense medical expert who denied any proven link between diacetyl and lung damage. *Id*. at ¶77-78.
    - *See also* below analysis of Ill. R. Evid. 407 (reserved).

- *Mistsias v. I-Flow Corp*., 2011 IL App (1st) 101126
  - Facts: Plaintiff initially brought medical malpractice suit in 2003 arising out of shoulder surgery in 2001, resulting in destruction of cartilage in the joint. During plaintiff's treating physician's deposition in 2007, the doctor testified as to a link between the use of Macaine pain pumps and destruction of cartilage in the shoulder joint. Plaintiff dismissed the action and re-filed in 2009 with negligence and strict products liability causes of action against manufacturers of the pain pump. Trial court granted defendants' motion to dismiss based on the 2-year SOL.
  - Holding: Appellate court reversed and remanded. Plaintiff's product liability action was not barred based on SOL.
  - "Discovery Rule" analysis:
    - **Different causes of action may have different triggering dates for the statute of limitations, depending on the fact scenario.**
    - Even though plaintiff was put on notice of an injury that was wrongfully caused (by medical negligence), only the SOL for the medical malpractice

cause of action was triggered, but not for the product liability cause of action.

- Because the scientific community was not aware of the dangers associated with pain pumps until the summer of 2007, the SOL on a products liability action did not begin to run before then. Plaintiffs "should not be 'held to a standard of knowing the inherently unknowable.'" *Id*. at ¶29.

## VI. SPOLIATION

- *Martin v. Keeley & Sons, Inc*., 2012 IL 113270
  - Facts: Plaintiffs were injured on construction site caused by a collapsed I-beam. The day after the accident, the general contractor, Keeley, destroyed the I-beam. Plaintiffs brought negligent spoliation action against Keeley, alleging that the destruction caused them to be unable to prove their underlying product liability action against other defendants for negligent design and manufacture of the I-beam.
  - Supreme Court holding: Keeley had no duty to preserve the I-beam as evidence. Summary judgment granted.
  - Spoliation "Duty to Preserve" analysis:
    - **"Affirmative steps" required to show "voluntary undertaking":**
      - Keeley never took any "affirmative steps to preserve the I-beam as evidence," such as testing of the beam or moving the beam from the place where it fell.
    - **Possession/control and status as employer or potential litigant not sufficient to trigger "special circumstances" exception:**
      - Possession and control not enough to trigger duty to preserve evidence: "It is clear from the context of the *Dardeen* decision that something more than possession and control are required, such as a request by the plaintiff to preserve the evidence and/or the defendant's segregation of the evidence for the plaintiff's benefit." *Id*. at ¶45.
      - Defendant's status as plaintiff's employer and as a potential litigant is not enough to impose a duty to preserve evidence. *Id*. at ¶47-51.
  - ***Practical takeaway*:** Consider making an immediate written request to preserve evidence and/or seek a protective order if there is a concern that key evidence may be tampered with or disappear.

## VII. PLAINTIFF'S ALTERATION OF PRODUCT AS INTERVENING CAUSE

- *Perez v. Sunbelt Rentals, Inc*., 968 N.E.2d 1082 (2d Dist. 2012)
  - Facts: Plaintiff who fell off scissor lift while working as a painter on construction site brought suit against manufacturer for negligence and strict products liability. Plaintiff had removed the guard gate, designed to allow access to the lift but prevent the user from falling from the lift. Trial court granted summary judgment for

defendant, holding that removal of the guard gate acted as an intervening cause shieling the defendant from liability.

- Holding: Appellate court reversed, holding that triable issue remained whether the removal of the guard gate was reasonably foreseeable.
- Relevant analysis:
  - **Manufacturer is liable for injuries resulting from foreseeable alterations.**
    - Although a manufacturer of a product is not liable for injuries resulting from unforeseeable alterations to its products, it is liable for "objectively reasonable" foreseeable alterations.
      - "If a product is capable of easily being modified by its operator, and if the operator has a known incentive to effect the modification, then it is objectively reasonable for a manufacturer to anticipate the modification . . . Conversely, if the alteration of the product requires special expertise, or otherwise is not accomplished easily, then it is not objectively reasonable for a defendant to foresee the modification." *Id*. at 1085.
  - In *Perez*, when it left the control of the defendant manufacture, the guard gate was affixed to the railing with a bolt and nut that could be removed with a screwdriver and wrench. Because no "special expertise" was required to make the modification, the Court held genuine issue of material fact existed as to the foreseeability of the modification.

## VIII. PERSONAL JURISDICTION

- *Russell v. SNFA*, 2013 IL 113909
  - Facts: Plaintiff filed a product liability action in the circuit court of Cook County against various defendants arising out of a fatal helicopter crash in Illinois. The defendant, a French manufacturer of custom-made bearings for the aerospace industry, moved to dismiss based on lack of personal jurisdiction under section 2-301 of the Code of Civil Procedure.
  - Supreme Court holding: Defendant was subject to specific personal jurisdiction in Illinois under the Illinois long-arm statute, section 2-209 of the Code of Civil Procedure.
  - Relevant analysis:
    - **Defendant had sufficient minimum contacts with Illinois to be subject to Illinois jurisdiction**:
      - "We find that defendant has the requisite minimum contacts with Illinois for purposes of specific personal jurisdiction. . . Defendant knowingly used a distributor, Agusta and AAC, to distribute and market its products throughout the world, including the United Sates and Illinois. Defendants' distributor has made multiple sales of its products in Illinois. In addition, defendant has a business

relationship with a division of Hamilton Sunstrand in Rockford, Illinois, for defendant's custom-made bearings used in airplanes." *Id*. at ¶85.

## IX. EVIDENCE OF PRE-INJURY, POST-MANUFACTURE DESIGN IMPROVEMENTS

- **Illinois appellate courts are split on whether evidence of pre-injury, post-sale/manufacture design changes are admissible as an exception to the general rule prohibiting evidence of subsequent remedial measures.**
    - Circuit split:
        - Pre-injury, post-manufacture design improvements held **inadmissible** in *Carrizales v. Rheem Manufacturing Co*., 226 Ill. App. 3d 20, 41 (1st Dist. 1991) ("[A]llowing evidence of pre-injury remedial measures would have a chilling effect on the incentive to improve safety in such widely-used products"); *Davis v. Int'l Harvester Co*., 167 Ill. App. 3d 814, 822 (2d Dist. 1988) ("[A] defendant's incentive to adopt safety measures will be reduced if evidence of those measures [taken pre-injury, post-manufacture] is admissible to establish liability").
        - Pre-injury, post-manufacture design improvements held **admissible** in *Jablonski v. Ford Motor Co.*, 398 Ill. App. 3d 222, 266 (5th Dist. 2010), *rev'd on other grounds* ("We do not believe that the trial court abused its discretion in admitting evidence of Ford's preinjury, postsale safety improvements to the Panther platform Police Interceptor on the issue of Ford's continuing duty to warn of a hazard that existed at the time of sale. . . . [W]e do not agree that the same policy considerations that bar the admission of *postaccident* remedial measures [namely, that a defendant not be punished for postaccident remedial measures] apply equally to *preinjury, postsale* safety measures . . . of which the defendant was aware and could have implemented before the accident.")
- **Illinois Rule of Evidence 407 was drafted to resolve this issue; however, it was withdrawn** after the Supreme Court, in *Jablinski v. Ford Motor Co*., 2011 IL 11096, chose not to address the issue of whether the trial court erred in admitting evidence related to post-sale remedial measures.
    - IRE 407 as originally drafted, before it was withdrawn, stated as follows:
        - "When, (1) after an injury or harm allegedly caused by an event, or (2) after manufacture of a product but prior to an injury or harm allegedly caused by that product, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is *not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction.* This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures or design, if controverted, or for purposes of impeachment."