This book would not exist but for the work of Keith Gerrard, now Of Counsel at Perkins Coie. Keith has been and remains an invaluable mentor, colleague, and partner. This edition is dedicated to him.
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Preface to Third Edition

Much has changed on the product liability scene since we first published this book in 1991. Laws and litigation practices are in constant flux. The tactics and strategies of plaintiffs’ counsel evolve. Electronic discovery was unknown. Caps or limitations on punitive damages were merely a gleam in manufacturers’ eyes. Federal preemption victories came few and far between. These and other developments spurred this third edition. Undoubtedly, changes will require a fourth edition in another 10 years—if not sooner.
Foreword

We are lawyers who defend manufacturers in product liability lawsuits. We have written this guide because our experience has taught us this very important lesson—

Manufacturers are hurt in product liability litigation in the United States because their key employees do not understand the law and the legal process used to obtain damage awards from their employers. Because they lack this information, these employees in their day-to-day actions commit errors that lose lawsuits and increase the amount of damages awarded.

This primer provides basic information about product liability laws and legal procedures in product liability lawsuits in the United States. It also suggests measures that you can take to reduce your product liability exposure.

This book is intended to be read by your nonlegal personnel. It can be used as a source for a product liability prevention program or as the syllabus for a more extensive corporate program. We have simplified where possible, but product liability is not a simple subject. This guide will yield its maximum benefit if studied carefully.

We conduct product liability educational seminars for our manufacturing clients because we know that product liability exposure is reduced when the type of information contained in this primer is provided to employees—particularly to managers and other key decision makers. These are the people who make design decisions, determine what product literature or placards are called for, evaluate in-service experience, and adopt or reject product improvements. These are also the people who will be called on to testify in American courts in defense of your products. This primer was written for them.
Introduction

Over the past four decades, there has been a marked increase in lawsuits in the United States brought by people who claim to have been injured by defective products. All too often the manufacturers against whom these suits are brought lose and end up paying large damage awards. Damage awards in excess of $1 million have become common. Even if a manufacturer successfully defends a product in court, the burdens of time and expense imposed by lawsuits are substantial.

The laws are astonishingly tough. To many they seem unfair. Courts order manufacturers to pay for injuries suffered by consumers who were careless or who misused products. In one such case, a man who was injured while improperly operating a cotton-picking machine recovered a substantial sum of money from the machine’s manufacturer. He had tried to dislodge a rock caught in the machine’s picking mechanism by kicking it out with his foot. In doing so, he disobeyed the manufacturer’s clear instructions to shut off the machine before removing obstructions. As the man dislodged the rock, he caught his foot in the cotton picker’s moving parts and was severely injured. He sued the manufacturer and argued in court that the cotton picker should have been equipped with emergency power cut-off switches above each of its several picking mechanisms, so that an operator who misused the machine, as he had, could turn it off before becoming too entangled. The manufacturer pointed out that this alteration, quite apart from its cost, would only encourage other operators to repeat the man’s mistake. The court, however, agreed with the operator and awarded the man significant damages.

Many managers and employees of manufacturers are dismayed by the results of such lawsuits. Yet because they do not understand the legal standards used to decide whether a manufacturer must pay for a consumer’s injuries, they fail to take steps during the development and production of their products that could reduce the likelihood of future claims or make it easier to defend them. For example, a manufacturer may have to pay for a consumer’s injury even though the consumer used the product carelessly. This means that manufacturers have to try to anticipate likely ways in which their products may be misused and then design or label them to discourage misuse or at least minimize its hazardous effects.

Most manufacturing employees also understand little about lawsuits and, through ignorance, often take actions that harm their employer’s ability to defend itself. They may not know that courts give consumers the power to force a manufacturer to disclose vast quantities of documentation and make its employees available for questioning under oath. An employee who does not realize the extent of such disclosure requirements might write a memo after an incident has occurred using language that could later be misinterpreted as admitting the existence of a product defect.

Any effective program to avoid product liability lawsuits and to minimize the impact of the lawsuits that inevitably occur requires a manufacturer’s nonlegal personnel to have a basic understanding of product liability law and the litigation process. Chapter 1 of this primer describes basic concepts of product liability law. Chapter 2 outlines the structure of product
liability lawsuits. Chapter 3 discusses specific steps that a manufacturer can take to reduce its product liability exposure.

At the back of the book is an Appendix that includes samples of jury instructions on liability, a document freeze memorandum, requests for production, and a jury instruction on spoliation. Also, there is a glossary of terms that recur in the text. These terms are italicized where they first appear. An index and instructions on how to obtain additional copies of the primer complete this edition.
Product Liability Law

There is really no such thing as “United States product liability law.” The 50 states, the District of Columbia, and the various territories that make up the United States, each have their own rules defining the liability of a manufacturer for injuries caused by their products. Typically these rules have been developed by the courts in each state. In addition, many state legislatures have enacted statutes that also affect product liability law. On some questions, “federal” law—law enacted by the United States Congress or developed by the United States Supreme Court and other federal courts—will govern. Federal law may govern certain aspects of a case even though other aspects of the case are controlled by the law of one or more of the states.

The laws of the various states differ, sometimes in ways critical to the outcome of a case. As will be discussed at the end of this chapter, deciding which law will apply is often difficult. Nevertheless, the laws of virtually all states have enough in common that some generally applicable concepts do exist. In describing these concepts, we make frequent use of the term plaintiff. As discussed in Chapter 2, the plaintiff is the person who brings a lawsuit seeking an award of money for an injury. In a product liability lawsuit, the plaintiff can be anyone injured by a product, including the consumer who purchased the product, somebody else who is using it, or a bystander (such as a pedestrian struck by an automobile). If an accident results in death, the plaintiff may be a representative of the deceased person’s estate or surviving family members. The defendant is the party the plaintiff sues. When a court finds that a defendant is liable to the plaintiff, it means that the defendant is legally responsible for the plaintiff’s injuries and must pay compensation for them.

Legal Theories of Liability

Negligence All states hold a manufacturer responsible for injuries caused by its employees’ negligence. This means that a manufacturer is liable when its employees fail to exercise reasonable care for the safety of potential users of the manufacturer’s product. For example, an electrical appliance manufacturer whose employee carelessly fails to connect a grounding wire during manufacture will be liable to a user injured by an electrical shock caused by the ungrounded condition.

Under this negligence theory the manufacturer is treated no differently than other defendants in other types of lawsuits. The surgeon who carelessly performs an operation can be liable to an injured patient. The automobile driver who carelessly injures a pedestrian can also be liable. Similarly, any carelessness or negligence by the manufacturer or its employees that results in an injury can be the basis for liability.

Breach of Warranty All states also hold a manufacturer liable if a product that it says will meet certain standards falls short of those standards and causes injury. The injured person in such cases can often sue for breach of warranty. There are several ways in which a warranty can be created. To begin with, many manufacturers provide a written warranty with each product sold or
include a warranty provision in the contract for the sale of the product. A warranty can also be implied by law or by the circumstances of the sale. The usual warranty implied by law is that the product is suitable for the ordinary purposes for which it is used. This includes an implied promise that the product does not have any defects that would render it dangerous. A warranty can also be created by representations contained in advertisements promoting the product.

Forty years ago, breach of warranty claims were common, and many courts allowed such claims to be asserted against a manufacturer with whom the plaintiff had never had any direct dealings. The plaintiff did not have to prove that the manufacturer had been careless, but only that the product had failed to perform as promised by the manufacturer’s express or implied warranty. Because of this easier standard of proof, a breach of warranty claim was, from the plaintiff’s standpoint, generally preferable to a negligence claim. There were some potential disadvantages, however, such as the requirement in most states that a breach of warranty lawsuit had to be brought within four years from the date of sale.

Today, breach of warranty is a much less important theory. With the adoption of the legal doctrine of strict liability, discussed below, many courts have come to recognize that breach of warranty should be reserved for claims between parties to contracts for the sale of goods in which the buyer has suffered commercial losses. Nevertheless, product liability lawsuits by injured consumers routinely include a separate claim for breach of warranty.

**Strict Liability** In addition to negligence and warranty law, nearly all states have adopted a standard commonly called *strict liability* for the sale of defective products. The most common model for strict liability is a standard proposed in 1964 by the American Law Institute, a group of legal scholars, lawyers, and judges. The ALI, as it is commonly known, publishes summaries of the rules that prevail in the United States for various subject areas of the law. These summaries, which are entitled “Restatements,” in some instances do not simply restate the preponderant rule of law but propose a new rule for adoption by the states. Strict liability was one such new rule. When the ALI proposed it, only a few states had a comparable rule. After a decade, a majority of states had adopted the ALI’s proposed standard. That standard is commonly called “Section 402A” because that is how it was designated in the ALI’s Second Restatement of the Law of Torts. “Torts” is the common name for the area of the law that deals with the rights of parties who have been injured by the wrongful conduct of others. Section 402A states:

**Special Liability of Seller of Product for Physical Harm to User or Consumer**

(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
To hold a manufacturer responsible on a strict liability claim, the plaintiff must prove that (a) the product was defective, (b) the defect existed at the time the manufacturer delivered the product, and (c) the defect caused the plaintiff’s injuries.

Although strict liability evolved from breach of warranty law, it offers a plaintiff significant advantages by eliminating defenses that had been applied by some courts in breach of warranty cases; for example, the requirement that there be a contractual relationship between the plaintiff and the manufacturer and the requirement that warranty claims be brought typically within four years from the date of sale of the product. Thus, a pedestrian injured in an automobile accident can sue the manufacturer directly, and the manufacturer does not have defenses based on the fact that it sold the automobile to someone else or that the sale took place more than four years before the lawsuit.

Strict liability also offers the plaintiff significant advantages over the negligence standard because it relieves the plaintiff of the burden of proving that the defendant or its employees acted without due care. As stated in Section 402A, it is no defense to a consumer’s strict liability lawsuit that the manufacturer exercised all possible care. If a jury believes that the product delivered by the manufacturer was defective, the manufacturer will be liable for any injury caused by the product, no matter how careful it was to avoid the defect.

Types of Defects

Under any of the three theories of liability discussed above, the plaintiff generally can recover damages only if the product is found to be defective. There are three different types of defects that a product may have: defects in manufacturing, in design, and in warning or instruction.

Manufacturing Defects The concept of a manufacturing defect is the easiest to explain. A product has a manufacturing defect when it is not built according to its specifications and, as a result, is unsafe. For example, during manufacture an employee might forget to tighten a nut, or there might be a hidden flaw in the metal from which the product is made. These would be manufacturing defects.

Design Defect A design defect is much more difficult to define because there is no clear standard against which the product can be evaluated. (As explained in later sections, compliance with government and industry design standards is usually not enough to avoid liability for design defects, but violation of such standards is likely to result in liability.) A few courts have said that the concept of “design defect” is no more than negligent design. According to those courts, the question in a design case is whether the manufacturer used reasonable care in designing the product.

Most courts reject that approach and say that defective design is something different from (and generally easier to prove than) negligent design. These courts generally say that a product is
defectively designed if the benefits of the product’s design do not outweigh its risks or, in some states, if the product is more dangerous than an ordinary consumer would expect. For example, if a power lawnmower is sold without a guard to protect the user from being struck by ejected items, the mower might be considered defective either because risk-benefit considerations dictate that a guard should have been installed or because the lawnmower fails to meet consumer expectations about how safe such a product will be. The extreme subjectivity of the consumer expectations test makes it especially difficult for manufacturers of products that can cause injuries to predict whether the design of their products will be found to be defective in litigation.

Warning and Instruction Defects A warning or instruction defect exists when the product’s manual, instruction booklet, packaging, labels, or placards fail to provide adequate warnings of possible dangers associated with the product or instructions regarding its safe use. For example, a drug may be defective despite its beneficial effects if the manufacturer fails to issue adequate warnings to consumers regarding adverse side effects. In a defective warning case, a court will determine whether the manufacturer’s warning reasonably advised the user of the hazards associated with the product. Many courts say that it is not a defense that the manufacturer did not know of the hazard. The manufacturer may be held liable even if, because of technological limitations, the hazard was unknowable at the time of manufacture. In addition, a manufacturer is required to warn not only about hazards associated with the intended uses of its products, but also about hazards that might arise from any misuse that the manufacturer knows about or should know about. For example, a ladder might be found to be defective if it lacks warnings against using it on an unstable, sloped, or slippery surface; standing on the top rung; failing to maintain a handhold; ascending or descending while facing away from the ladder; or leaning out from the ladder while using it.

A different rule about warnings exists for prescription drugs and devices. Their warnings must be conveyed only to the prescribing physician, not to the actual consumer. The reason for this rule is that if medical professionals understand the risks and benefits of a prescription therapy, they have the training and knowledge necessary to evaluate any risks and convey them to the patient. This qualification to the general rule about warnings is commonly called the learned intermediary rule. The learned intermediary rule is not accepted in all states, however, and it has been eroded in some cases involving manufacturers who advertise their prescription drugs or devices directly to the public.

The Third Restatement

In 1998, the ALI published a new restatement focused on product liability. This Third Restatement covers a broad range of product liability issues. Most significantly, the authors reject consumer expectations as an independent test for design defects. Instead, the new restatement proposes that to prove that a product has a design defect, a plaintiff must show that a reasonable alternative design would have reduced the product’s foreseeable risks and made it reasonably safe. The authors recognize this as a specific application of the negligence standard. Given the nearly universal acceptance of the Second Restatement’s Section 402A, the Third Restatement may be similarly influential. This could result in a reduction of the prevalence and importance of the consumer expectations test and its replacement with a test that requires a more objective evaluation of a product’s design.
It must be remembered, however, that the restatements are not themselves law, and the rule of the Third Restatement has to be adopted by the courts or legislatures of the states before it becomes law. States that have enacted the consumer expectations test by statute have not amended those statutes to remove the test. Several state supreme courts have also declined to adopt the Third Restatement’s abandonment of the consumer expectations test. This resistance to changing the law is probably due to a perception that doing so would be a regressive curtailment of consumers’ rights. Other courts, however, have adopted the Third Restatement’s requirement that plaintiffs present a feasible alternative design in design defect cases.

**Proof of Defect**

A plaintiff suing a manufacturer normally must prove that the manufacturer’s product was defective, that the defect existed at the time of manufacture, and that the defect caused injury to the plaintiff. However, following the lead of California, a frequent innovator in product liability law, a few states require the manufacturer to prove the adequacy of the product’s design if the plaintiff can show that some aspect of that design caused the injury being sued for.

A plaintiff typically can use several types of evidence to try to prove a product’s defective condition.

**Expert Opinions** Frequently, a plaintiff will hire a technical expert to testify about the defective characteristics of a product. Such expert witnesses are readily available in the United States. In fact, offering opinions in product liability lawsuits has become the principal business of hundreds of technical experts. It is shameful and discouraging, but nevertheless true, that a plaintiff’s attorney can always find a university professor, medical doctor, engineer, or other industry expert to testify that a given product is defective. Most courts are very liberal in permitting such “experts” to testify, although some courts have begun to scrutinize the substance of and foundation for an expert’s opinion before letting the expert testify. Following several decisions by the United States Supreme Court, federal judges exclude expert testimony when that testimony is not based on proper scientific method, research, or knowledge. This scrutiny is not limited to scientific issues, but also is given to testimony on subject areas such as accident reconstruction, technical explanation of how a product works, or other kinds of testimony that are based largely on the expert’s own experience. More liberal standards of admissibility still prevail in many state courts. A manufacturer’s best response to a plaintiff’s expert is to retain highly qualified experts to rebut the expert’s testimony and to educate its defense attorney so well that the errors or outright dishonesty of the plaintiff’s “expert” can be demonstrated on cross-examination.

**Manufacturer’s Employees and Records** A plaintiff will often use a manufacturer’s own records or the testimony of a manufacturer’s current or former employees to prove a product defect. Evidence that the manufacturer’s own employees expressed concerns about a product’s safety coupled with evidence that those concerns were not properly addressed can be extremely persuasive in showing that a product defect existed.

**Government and Industry Standards** Government agencies and industry associations issue standards applicable to the design and labeling of various types of products. Evidence that a
manufacturer’s product violates such a standard can be compelling proof of the existence of a defect. Violation of a mandatory government regulatory standard results in an automatic finding of negligence in most states.

**Similar Incidents** A plaintiff may try to show that a product has caused other similar accidents. The courts have wide discretion in deciding whether to allow evidence of other accidents to be presented at trial. In theory, the burden is on the plaintiff to show substantial similarity between the accidents, but in practice it may become the manufacturer’s burden to show that the other accidents were not similar to the plaintiff’s.

**Government Reports** Another type of evidence that a plaintiff may use is a government report commenting on the safety of the product. In most courts, reports setting forth the “factual findings” of an official investigation are admissible as evidence. In federal courts, a statement by a government investigator that most people would view as an “opinion” may be admissible as a factual finding.

**Post-Accident Product Changes** A plaintiff may attempt to present evidence of a change in design or warning made by a manufacturer as a result of the plaintiff’s injuries or similar injuries. Such changes may be considered evidence that the original design or warnings were deficient. An unsophisticated jury is certainly likely to draw that inference. There is substantial disagreement among the courts about whether evidence of a post-accident corrective measure should be admissible as evidence. The rule in many federal and state courts is that this evidence should not be allowed to prove negligence or the existence of a product defect—the rationale being that admitting this evidence would discourage manufacturers from making needed safety changes. However, these courts may permit the evidence to be admitted for other purposes, such as to show the feasibility of alternative designs. In addition, a number of other courts have concluded that in a strict liability case this evidence should be admitted to prove the existence of a product defect as well as for other purposes.

**Who Is Liable for a Product Defect?**

In most states any person engaged in the business of selling or leasing products for use or consumption can be held liable for distributing a defective product. Thus, liability extends to everyone in the chain of distribution from the manufacturer to the retailer. The defendant must have been in the business of selling the product for strict liability to apply; it does not apply to occasional sellers who do not market the product as an ordinary part of their business. But even these occasional sellers can be held liable for their own negligence in selling a product if they knew or should have discovered that the product had a dangerous defect.

A number of states have enacted statutes that make strict liability applicable only to manufacturers. Under such statutes retailers and other product sellers are liable only for their own negligence or breach of warranty.

In some instances a plaintiff may have been injured by a generic product, such as a drug, but is unable to identify which of several manufacturers actually made the product that caused the injury. In these rare cases, a few courts have held that all sellers of a defective generic product
are liable to the plaintiff and that the award to the plaintiff should be allocated among members of the industry in proportion to their market shares at the time the product was purchased.

**Defenses to Liability**

The best way to defend a product liability claim successfully at trial is to convince the judge or jury that the product is not defective or that the product did not cause the plaintiff’s injury. However, there are also **affirmative defenses**—defenses that, if proven by the manufacturer, eliminate or lessen the manufacturer’s liability regardless of whether the product has been or could be shown to be defective.

Although the liability standards are generally similar from state to state, the affirmative defenses available to a manufacturer vary considerably. The four most important categories of defenses are discussed below.

**Plaintiff’s Carelessness or Misuse of the Product** There is wide variation among the laws of different states regarding whether the plaintiff’s own careless conduct is a complete or partial defense. The same is true with respect to the plaintiff’s misuse of the product, a term which refers to any use of the product that is not in accord with the manufacturer’s intended use. In a few states, any careless conduct or misuse by the plaintiff is a complete defense for the manufacturer, without regard to whether the claim is based on negligence, warranty, or strict liability. In most states, whether and to what extent the careless conduct or misuse by the plaintiff is a defense depends on the nature of the plaintiff’s conduct and the theory of liability asserted against the manufacturer.

If a consumer sues a manufacturer for negligence and the consumer’s own negligence contributed to causing the injury, the consumer’s recovery will be reduced or eliminated, depending on the state. Under the rule of **contributory negligence** (which historically had widespread application and today survives in some states), any negligence by the plaintiff that helped cause the injury will bar all recovery from the defendant, regardless of the degree to which it may also be at fault.

Over the past several decades, most states have abandoned contributory negligence and have adopted a rule of **comparative negligence**, under which the jury assigns percentages, totaling 100 percent, to the negligence of the plaintiff and each defendant that caused the injury. Recovery is then reduced based on the plaintiff’s percentage. If the plaintiff is 40 percent responsible for the injury, the recovery from the negligent defendants will be reduced by 40 percent. Some states provide that a plaintiff whose negligence is greater than 50 percent cannot recover anything; other states allow some recovery no matter how high the plaintiff’s percentage of the total negligence.

When a plaintiff proceeds on a warranty or strict liability theory, there are also varying approaches to whether the plaintiff’s own negligence will affect the ability to recover. In some states, any lack of care by the plaintiff will reduce or eliminate the manufacturer’s liability. In other states, the plaintiff’s recovery is reduced or eliminated only if the plaintiff used a defective product while aware of its defective state or misused the product in a manner unforeseeable to
the manufacturer; any other form of negligence by the plaintiff is not a defense. This means that a plaintiff’s misuse that is reasonably foreseeable by the manufacturer is not a complete defense. A manufacturer that sells a chair with casters may not intend for anyone to stand on it, but a jury could easily conclude that such a misuse is reasonably foreseeable. Finally, in several states negligence of the plaintiff is simply not a defense in a strict liability case and will neither reduce nor eliminate the plaintiff’s recovery.

**Allegation or Misuse by Someone Other Than the Plaintiff** An injury may occur because of the alteration or misuse of a product by persons other than the manufacturer or the plaintiff. In the past, most courts agreed that any such alteration or misuse eliminated the manufacturer’s liability. Now many courts say that such an alteration will defeat liability only if it was not reasonably foreseeable by the manufacturer and could not have been prevented by a different design or a warning. Some courts hold the manufacturer liable even when the alteration is the only reason for the defect—removing a safety guard originally installed by the manufacturer, for example. In such a case, the manufacturer must make the guard difficult to remove and must warn of the dangerous consequences of removing it.

Alterations can be viewed as one type of misuse of the product. Other forms of misuse by persons other than the plaintiff are usually analyzed using the same foreseeability approach.

**Passage of Time** An injured consumer does not have unlimited time to claim damages. The legislatures of every state have enacted *statutes of limitations* to protect defendants against stale claims. These statutes impose deadlines, which vary from state to state and typically range from one to six years. Normally, in negligence and strict liability cases, the time period begins to run on the date the plaintiff was injured. In some cases, though, a plaintiff may not immediately become aware of an injury or the cause of the injury. In such cases, many states provide that the time period does not start to run until the plaintiff discovers or reasonably should have discovered the injury and its cause. In such states, if the discovery does not occur until decades after the plaintiff is harmed by the product—as may be the case with some pharmaceutical and chemical products—the consumer can still bring a product liability claim.

Statutes of limitations that start to run on or after the date of injury give little protection to manufacturers whose products are in use long after they were delivered. Claims with respect to industrial machinery frequently arise from injuries suffered 40 or 50 years after the product was sold. Although such a claim is certainly “stale” in terms of the manufacturer’s ability to defend its design decisions, it will not be barred by the statute of limitations as long as the lawsuit is brought within the time limit after the date of the injury.

In response to this situation, a few states have enacted *statutes of repose*. Under such laws a manufacturer is not liable for injuries occurring more than a specified length of time after it first delivered the product. The time period is typically 10 years or more. Some states do not specify a time period but require instead that the jury determine the “useful safe life” of the particular product. The future of these statutes of repose is uncertain. Several courts have declared that such statutes violate constitutional rights by depriving plaintiffs of their claims. One federal statute of repose limits product liability claims against manufacturers of small airplanes.

As noted previously, statutes of limitations applicable to warranty claims typically start to run
when the product is delivered and expire after four years.

**Contract Provisions** Some manufacturers include provisions in their contracts of sale purporting to disclaim or limit any liability for defects in the product. Contractual disclaimers will not prevent a consumer from recovering for personal injuries, but they can bar claims for property damage or commercial loss. The precise circumstances under which disclaimers are enforceable when personal injury is not involved are complex and highly variable from state to state.

Another defense based on contract provisions may apply when the manufacturer supplied the product to the federal government under a contract that included design specifications. This defense is called the government contractor defense. Although the federal government can be liable for personal injuries caused by the negligence of government employees in certain circumstances, it is immune from liability for its discretionary decisions in specifying the design of products it purchases. As a result, courts have decided that the manufacturer should not be liable for personal injuries caused by design defects in the product if (a) the federal government approved reasonably precise specifications for the product, (b) the product conformed to those specifications, and (c) the manufacturer warned the government about any dangers in the use of the product that were known to the manufacturer but not to the government. The scope of this defense is still being defined by the courts. For example, one court has said that although the defense bars a design defect claim, it does not bar a claim that the manufacturer should have warned ultimate users of the product about a hazard by means of appropriate labeling. Another issue regarding applicability of this defense arises where the government purchases a product that is based on one previously developed for the nongovernment market.

**Government Standards and Federal Preemption** Although compliance with government contract specifications can be a defense to liability, compliance with government regulations is generally not a defense. Courts traditionally have viewed such regulations as establishing minimum standards and have left it to juries to decide whether the manufacturer should have exceeded the regulatory standard.

In certain instances, however, compliance with federal law may be a defense to liability. For example, when a federal statute or regulation has required that a product be manufactured with a particular design or warning or when the product has received close scrutiny and approval by a designated federal agency, some courts have ruled that a plaintiff may not claim that the federally mandated or federally approved design or warning is defective or inadequate under state law. Those courts reason that a finding of defect in such a case would impermissibly allow state law to contradict federal law. This overriding of state tort law by federal regulatory law is called federal preemption.

**Damages**

**Compensatory Damages for Personal Injury and Death** When a manufacturer is found liable, the plaintiff is entitled to an award of money as compensation for the losses resulting from the plaintiff’s injuries. This is called an award of compensatory damages. Until recently, the uniform practice in all American courts was to award damages in a lump sum for all losses, both those incurred before trial and those anticipated after trial. Recently, a handful of states have enacted
When the plaintiff is an individual suing for personal injury, the recovery generally will have three elements. First, the plaintiff may recover any lost earnings, past and future, caused by the injury. Those losses may result from a complete inability to work or from a diminished capacity to work. Second, the plaintiff may recover the expenses that have been or will be incurred as a result of the injury, including the cost of medical treatment and the cost of replacement labor for home services that the plaintiff is unable to perform because of the injury. These first two categories of damages are commonly called economic losses because they represent actual out-of-pocket expenses and other measurable monetary losses that have been or will be incurred by the plaintiff. The third element of damages that the plaintiff may recover is for mental and physical pain and suffering, inconvenience, disfigurement, emotional distress, and humiliation that have been or will be experienced by the plaintiff (and sometimes by the plaintiff’s spouse or other family members). The award of damages for these hardships attempts to translate human pain and suffering into an amount of money. This necessarily an arbitrary procedure, and the amounts awarded in different cases vary significantly. The law provides no guidance about appropriate amounts to award for these damages, and the amounts can be influenced by a jury’s anger at a manufacturer’s perceived misconduct. This third category of damages is called noneconomic losses because it represents unmeasurable, nonmonetary losses. Some state legislatures have attempted to limit the maximum amount that can be awarded for noneconomic losses. Several of these statutes have been declared unconstitutional by the courts. In a final category of noneconomic loss, the spouse of an injured person can recover for damage to the marital relationship caused by the physical or mental impairment arising from the injury. This type of damage is commonly called loss of consortium. For each of the three categories of damages, the plaintiff is compensated for past and anticipated future losses.

When a person dies of injuries caused by a product, most states provide two distinct rights of action against the manufacturer. The first is a survival action, consisting of any claims that the person could have brought up to the time of death but did not. For example, the estate of a person who dies of food poisoning 30 days after eating contaminated food may recover for the lost earnings, medical expenses, and pain and suffering experienced by the person during the time between injury and death. Many states permit a recovery for pain and suffering even though the deceased lived only for a few minutes after sustaining the injury. In some states a recovery can be had for mental pain and suffering in contemplation of impending death.

The second action that can be brought is a wrongful death action, in which the measure of recovery is the economic (and, in most states, noneconomic) losses that surviving family members and other heirs have suffered or will suffer as a result of the death. The major item of damages in such an action is the amount that the heirs would have received in economic support from the deceased if death had not occurred. Lost economic support is typically calculated in this way:
Other economic losses include funeral expenses, the value of the services that the deceased provided to other family members—and, in some states—any lost inheritance. In states that allow the heirs to recover noneconomic damages, the usual award is for loss of the deceased’s “society and companionship.” In addition, the decedent’s spouse can recover for loss of consortium caused by the decedent’s absence. In a few states, the heirs may recover for their own mental anguish caused by the death.

In suits for personal injury or wrongful death, an increasing number of states reduce an award for lost earnings or support by considering taxes that the deceased would have had to pay on lost earnings. This is appropriate because damage awards in the United States usually are not subject to income taxes even though the earnings they are intended to replace would have been taxable.

Frequently a plaintiff obtains other compensation for an injury. Examples are proceeds from health and life insurance policies, pensions, workers’ compensation awards, and Social Security. In virtually all states, damages are not reduced because of the amounts the plaintiff has received from these collateral sources. Rather, the manufacturer must pay the full amount of the damages that the plaintiff has suffered. A well-insured plaintiff can wind up with a substantial economic windfall.

The prevailing party in a lawsuit in the United States generally does not recover any compensation for money paid to the lawyers hired to bring or defend the lawsuit. A prevailing party may recover some court costs, usually a small portion of the entire legal bill. In some states, if the plaintiff’s suit is found to be clearly frivolous, the defendant may recover its full expenses, but this rarely occurs in a product liability lawsuit.

**Compensatory Damages for Property Damage** Product liability lawsuits sometimes seek compensation for damage to property caused by a defective product. Claims for property damage may be joined with claims for personal injury or wrongful death, or they may be brought separately by a plaintiff who suffered no personal injury. The recovery for property damage has four possible elements. First, a plaintiff may recover the cost to repair the damage or, if repair is not feasible, the cost to replace the damaged item, usually equated with its fair market value. Second, if the item is repaired, the plaintiff may be able to recover the difference between the item’s value before it was damaged and its value after the repair. Third, the plaintiff may recover the cost of procuring a temporary replacement while the item is being repaired or replaced. Fourth, if the item is used for a business purpose, the plaintiff may be able to recover any lost profits attributable to the absence of the item, as long as the plaintiff has made reasonable efforts to obtain a replacement, whether temporary or permanent, or to have the item repaired. This fourth element is more likely to be recoverable in actions for breach of warranty than in actions for negligence or strict liability.
In many states, a plaintiff may not recover under strict liability or negligence for property damage when the only property damaged is the allegedly defective product itself. Plaintiff’s only recourse is whatever rights exist under the manufacturer’s warranty. In one case, for example, the plaintiff bought a crane whose counterweight broke loose and crushed the operator’s cab. Plaintiff sued the manufacturer of the crane for strict liability. The court, however, ruled that plaintiff’s sole basis for recovery was whatever warranty rights the manufacturer had provided. States that adopt this rule reason that the plaintiff’s claim is really for the product’s failure to meet customer expectations, and the claim should therefore be decided from the warranty only. Other states permit strict liability claims even when the sole property damaged is the product with the claimed defect—especially if the defect poses a hazard to people or other property.

**Punitive Damages** In addition to compensatory damages, most states permit an award of *punitive damages* in certain situations. Punitive damages, as the term indicates, are intended to punish the defendant for the actions on which its liability was based and to deter the defendant and others from acting similarly in the future. Consistent with this purpose, a number of states provide that defendants, *not* their insurers, must pay punitive damage awards.

Most jurisdictions permit punitive damage awards only if the defendant’s acts are proven to be particularly egregious, deceitful, wanton, willful, or recklessly indifferent to their consequences. Punitive damages are most typically awarded against a manufacturer when the plaintiff can show that the manufacturer knew about a safety hazard and did little or nothing about it.

The amount of punitive damages is determined by considering both the nature of the defendant’s misconduct and the amount necessary to punish the defendant. Consequently, evidence of the defendant’s net worth and income often is considered relevant. In response to punitive damage awards that were perceived to be arbitrary and unreasonably large, the United States Supreme Court has fashioned a three-part test for evaluating whether punitive damage awards are so unfair as to violate constitutional standards. Applying this test, a court must consider (a) the ratio between the punitive damages and the compensatory damages awarded (punitive damages should rarely be more than nine times compensatory damages); (b) the reprehensibility of the defendant’s conduct, but only insofar as it affected the plaintiff; and (c) the civil penalties that could be imposed for similar conduct.

The possibility of punitive damage awards has become a matter of deep concern to manufacturers. Although punitive damage awards still occur in only a few cases, plaintiffs’ attorneys have become increasingly adept at portraying even good faith business decisions as instances of willful disregard for the safety of consumers. Because punitive damage awards are often substantially larger than compensatory damage awards, the potential of a punitive damage award may significantly raise the settlement value of a case. The possibility of receiving a punitive damage award might even lead a plaintiff to pursue a case in which the potential compensatory damages are not large. One particularly troubling aspect of punitive damages is the risk of multiple awards, when the same conduct results in multiple injuries and multiple lawsuits.

**Sample Verdicts** Because many product liability lawsuits involve multiple claims and several defendants, jury verdicts can range anywhere from a verdict in favor of all the defendants on all claims to one against all the defendants on all claims. A plaintiff could also prevail on some but
not all claims against only one, more than one, or all of the defendants.

When the defendant prevails on all claims, the plaintiff is not entitled to any recovery. A prevailing plaintiff is awarded sums of money for compensatory and, if warranted, punitive damages. Damage awards vary greatly from place to place. Generally speaking, awards are higher in large urban areas where the cost of living and salaries are high. Judges and juries in rural areas generally give lower awards than their urban counterparts for similar injuries. There are, of course, many exceptions to this rule of thumb. More important in determining the amount of damages is the nature of the injury in question, the plaintiff’s age, and—if the injury impairs the plaintiff’s ability to pursue a profession—the plaintiff’s earning potential and the extent to which other persons depend on the plaintiff for support. The amount of punitive damages, if any, depends on the nature of the defendant’s conduct and finances.

The following are a few sample verdicts and settlements that are included to show not only the possible size of American jury verdicts, but also the factors that may have influenced them:

- $38,000,000 settlement in favor of a young woman who suffered severe burns, had both legs amputated, and lost her husband as a result of a helicopter crash at a popular tourist destination. The lawsuit was filed in the Southwest United States.

- $3,100,000 verdict in favor of a 51-year-old heavy equipment operator who suffered a back injury because of a faulty seat in the equipment he operated. He claimed that the seat had broken suddenly. The court was in a rural county in the Southeast.

- $8,280,000 verdict for a couple who alleged that the medicine prescribed to the husband to treat Parkinson’s disease caused him to become a compulsive gambler and lose $260,000. The wife was found 8% responsible, with the remaining 92% attributed to the drug manufacturers. $7,800,000 of the verdict was for punitive damages. The verdict was rendered by a jury in a large midwestern city.

- $4,280,000 verdict in favor of a 36-year-old woman whose leg became caught between a boat’s bow and the seawall. The homemaker’s left leg was amputated in the middle of her thigh. She alleged that a cable had been improperly installed by the manufacturer, and that this caused the boat’s transmission to stick in forward gear during docking. The verdict was rendered by a jury in a rural county on the West Coast.

- $557,000 verdict in favor of a man who inhaled ammonia gas for an hour while he slept, causing reactive airway dysfunction syndrome. The leak came from a hotel room’s minibar as a result of negligent installation and maintenance. The verdict was rendered by a jury in a large city on the West Coast.

- $3,500,000 verdict for the death of a 14-year-old boy who was ejected from a sport utility vehicle during a rollover accident. The family asserted that the truck was defectively designed because its high center of gravity made it too likely to roll over. The verdict was issued in the Southeast United States.

- $13,600,000 settlement for the death of a three-year-old girl after eating tainted meat at a restaurant. The manufacturer contended that it had followed federal regulations in handling
the meat. The verdict was issued by a jury in a large northern city.

- $960,000 verdict in favor of 66-year-old consultant who fell off his bicycle and suffered a fractured hip, nerve damage in his foot, and aggravation of a preexisting knee condition. He alleged that the chain on the brand-new bicycle came loose, jammed the bicycle, and locked the pedals. The verdict was issued in a West Coast court.

- $10,600,000 verdict in favor of a 12-year-old girl who suffered a severe form of inflammatory bowel disease after taking medicine used to treat teen acne. Although there was no warning of this potential side effect, the jury was presented with internal memoranda of the manufacturer that recognized this specific risk. The verdict was issued in a metropolitan area in the Northeast.

### Joint and Several Liability

A basic concept of American law is the rule of joint and several liability. This phrase means, simply, that each person who contributes to an injury is responsible for the entire sum awarded as damages. Even when several people have contributed to the plaintiff’s injury, the plaintiff can recover the entire award from any one of them. The rule of joint and several liability is sometimes called the “deep pocket” rule because it encourages the plaintiff to find a defendant with adequate financial resources or insurance—deep pockets full of money—who can be shown to have some share of the fault for the injury.

Perhaps more than any other factor, the rule of joint and several liability has been responsible for the proliferation of product liability lawsuits. Under this rule, a plaintiff who can show that a manufacturer had some responsibility for the plaintiff’s injuries may recover the entire value of those injuries from that manufacturer, even if its responsibility was small compared to that of others. This rule is a great benefit to the plaintiff because the manufacturer is often the only party potentially responsible for the plaintiff’s injury who has any significant financial resources or who is not immune from liability.

If a court requires such a manufacturer to pay the entire amount of a judgment, the manufacturer may have a remedy against other parties responsible for the accident. This remedy is called contribution. It is useful only if the other parties have resources to satisfy the award or are not immune from suit. In addition, in most states, if a responsible party has already settled with the plaintiff, it may not be sued for contribution.

The following example illustrates the burden the rule of joint and several liability places on the manufacturer. An automobile driver is injured in a collision with another automobile. The jury finds the injured driver 20 percent responsible for the accident, the other driver 75 percent responsible, and the manufacturer of one of the vehicles 5 percent responsible. In that situation, the injured driver may, in many states, collect 80 percent of the damages suffered from the manufacturer, even though the plaintiff was four times as responsible for the loss. The manufacturer is left with a claim for contribution against the driver of the other car, who may have no assets to satisfy that claim. In some states, the 20 percent responsibility attributed to the injured driver does not result in any reduction in recovery on a strict liability claim against the
manufacturer. In those states, the injured driver may then recover 100 percent of the total damages suffered from the manufacturer, which was only 5 percent responsible for the accident.

On-the-job injuries present another common situation in which the joint and several liability rule encourages lawsuits against manufacturers. Workers’ compensation laws generally prohibit employees from suing their employers or fellow employees for on-the-job injuries. In place of the right to sue the employer, the employee has the right to a guaranteed payment in the event of a workplace accident. Often these workers’ compensation payments are small in relation to the amount of damages that could be recovered in a lawsuit.

Although workers’ compensation laws prohibit injured employees from suing employers and fellow employees, suits against all other persons responsible for the injury are allowed. Accordingly, injured workers frequently bring product liability suits against the manufacturers of products involved in the accidents that caused their injuries to supplement the amount received from workers’ compensation. Under the rule of joint and several liability, a manufacturer that is 10 percent responsible for a worker’s injuries will have to pay 100 percent of the damage award even though the employer was 90 percent responsible for failing to maintain the product or train its employees.

Immunity rules vary from state to state, but in most states the employer is immune from contribution suits in this situation. Indeed, the insurance company that pays the workers’ compensation award usually has a lien on any employee recoveries from other parties. Consequently, the manufacturer ends up reimbursing the employer’s own insurer for injuries that were mostly the employer’s fault. In a few states employers are not immune from contribution lawsuits even though they are immune from suit directly by the injured employees.

Product manufacturers and other target defendants (e.g., governmental entities), along with their insurers, have sought to have this unfair rule of joint and several liability abolished or modified by statute. Some of those efforts have succeeded, and in a few states the rule has been totally abolished. In others, the rule has been modified or abolished when the plaintiff’s own conduct contributed substantially to causing the accident. Still others have abolished joint and several liability for noneconomic damages.

**Conflicting State Laws**

The manufacture, sale, and use of products often involve activities that take place in a number of different states, each with its own product liability law. A court hearing a lawsuit over such a product must choose a rule of law from the rules of the involved states. These laws may differ or even contradict one another.

For example, a Delaware driver, who purchased his car from a dealer in Maryland, might hit a careless woman pedestrian from New York while she is illegally crossing a street in Pennsylvania because the car, which was manufactured in Michigan, has defective brakes that made it impossible for the driver to stop. Each of these states may have different legal rules that apply to the various issues involved in a subsequent product liability suit. If the pedestrian’s injuries were caused in part by her own carelessness, one state’s rule might bar the claim,
another’s might allow full recovery, and a third’s might reduce the recovery by the pedestrian’s proportionate share of the fault. Consequently, the outcome of the lawsuit will be greatly influenced by the choice of applicable law.

Each state has its own rules for choosing which state’s law to apply in this kind of situation. In the past, most states applied the law of the place where the injury occurred; in our example, the law of Pennsylvania, where the accident took place, would have been applied even though it might be a place with little other connection to the parties or the product.

More recently, most states have adopted new rules that try to apply the law of the state with the greatest connection with the parties and the strongest “interest” in determining a particular issue in the lawsuit. That state is frequently said to be the one with “the most significant relationship” to the occurrence and the parties. The purpose of these new rules is to apply the law of the state whose public policies and interests will be advanced by the application of its law. Conversely, the new rules seek to avoid the application of the law of a state whose policies and interests either are irrelevant to the occurrence or would be thwarted by the application of its law. The laws of different states may be applied to different issues in the same lawsuit.

These new choice-of-law rules give a court broader discretion in deciding which state’s law to apply, and the court’s decision is often difficult to predict. States likely to have an interest in an occurrence leading to a product liability lawsuit include (a) the state where the injury occurred; (b) the state where the conduct causing the injury occurred; (c) the state(s) where the parties have their domicile, residence, nationality, place of incorporation, and place of business; and (d) the state where the relationship, if any, between the parties is centered.

In our example, it is difficult to select one state as having the most significant relationship to the occurrence and the parties. To apply the new rules, a court would first determine the relevant laws and interests of the involved states. Assume that Michigan, where the car was manufactured, and New York, where the pedestrian lives, both have comparative negligence laws that would reduce the pedestrian’s recovery in strict liability by her proportionate share of fault. Assume further that the law of Pennsylvania, where the accident occurred, does not reduce the recovery of a strict liability claimant for the claimant’s own negligence.

Under the logic of the new rules, it might be inferred that the purpose of Pennsylvania’s law is to ensure full compensation for injuries. But because the pedestrian lives in New York, Pennsylvania will not be affected by the degree of compensation paid to her and really has no significant interest in the application of its law to this case. Conversely, Michigan and New York are, respectively, home to the manufacturer, which will pay for the injuries, and the pedestrian, who will be paid. These states have the greatest interest in the degree of recovery allowed. Michigan is interested in the continued financial well-being of its resident manufacturer. New York is interested in seeing that its resident recover enough so as not to be a burden on the state’s resources. Moreover, Michigan and New York are interested in deterring both the carelessness of pedestrians and the manufacture of defective automobiles. Application of the rule of comparative fault will accomplish all of these ends because the rule creates disincentives both for the pedestrian, whose recovery will be reduced if she is found to have been negligent, and for the manufacturer, which will still have to pay for part of the pedestrian’s injuries if it is found to have sold a defective car. If the law of Pennsylvania were followed, by contrast, the only
disincentive would be for the manufacturer, and there would be none for the pedestrian. In this case, therefore, a court would probably apply the rule of law followed by Michigan and New York, even though the accident occurred in Pennsylvania.

If this case involved a manufacturer from a foreign country, the same type of choice-of-law analysis would be applied, but a judge in this country is likely to experience greater difficulty determining the laws and interests of a foreign country as opposed to another state within the United States.

Modern choice-of-law rules have added an element of uncertainty to product liability lawsuits. And their application generally has not been kind to manufacturers. In many cases, the court reasons that the primary purpose of product liability law is to compensate injured persons and to deter manufacturers from selling defective products, and it therefore chooses the law that simultaneously enhances the plaintiff’s recovery and is most stringent against the manufacturer.
SAFETY INSTRUCTIONS

1.0 For use by adults only.
Do not allow children to play near or with machine.

1.1 User Manual.
Do not use appliance without first studying the user manual.

1.2 Power Cord.
Never use an appliance with a faulty power cord. The machine should be plugged into a suitable electrical outlet only.

1.3 Location of Machine
Place machine on stable flat surface. Do not place machine near hot surfaces or open flames. For indoor use only.
The Product Liability Lawsuit

In American courts, product liability lawsuits proceed in essentially the same manner as other types of lawsuits. Although the various state and federal courts each have their own unique rules of procedure, the rules have much in common, and all product liability lawsuits progress through the following typical stages.

**Initiation of the Lawsuit**

A lawsuit typically begins with the filing of a document called a *complaint*—or, less commonly, a petition—in the court where the plaintiff has chosen to sue. For ease of reference, the document will be uniformly referred to in this chapter as a complaint. The complaint names all parties seeking recovery (the plaintiffs) and all parties from whom they seek recovery (the defendants). The complaint also contains a brief statement explaining the claim. In a product liability case, this statement will include the date, location, and nature of the accident; the injuries alleged; and the product involved. The complaint usually states a defendant’s relationship to the product (such as manufacturer or seller) and identifies the legal theories by which the plaintiff seeks to establish liability (strict liability, negligence, or breach of warranty). The complaint may or may not state the sum of money the plaintiff seeks to recover.

In addition to filing the complaint with the court, the plaintiff must also arrange for the complaint to be formally presented to each defendant, together with a *summons* with instructions to the defendant. This formal presentation is called *service* of the summons and complaint. In many jurisdictions all that is required to serve a summons and complaint is to mail them to the defendant, usually with the requirement that delivery be by certified or registered mail. When the defendant is a foreign citizen, international treaties may control the method of service. Filing and service of the complaint set the legal process in motion.

Most product liability lawsuits are brought by a single plaintiff. However, some product-related accidents result in injuries to more than one person, and in such a situation the injured parties can join together, hire one lawyer, and file a single lawsuit. In some limited instances, one plaintiff may be allowed to represent a group of other similarly situated persons, called a class, in a *class action*. In this type of lawsuit, the representative plaintiff’s case is used to decide issues common to the class, such as a manufacturer’s negligence or the existence of a product defect.

**Location of the Lawsuit**

**Federal and State Courts** Each state has its own system of courts in which product liability suits may be brought. The procedures followed by these courts are governed by the state’s own rules. The federal government also administers a system of courts. These federal courts are located in every state, but they all operate under the same federal procedures. In addition, each federal court has local rules governing its own procedures.
Most state trial courts are authorized to decide all types of cases, including product liability cases. Federal courts, however, cannot hear a product liability case unless the lawsuit falls within one of the categories of cases that federal courts are authorized by statute to hear. Such authority to hear a case is called **subject matter jurisdiction**.

Most product liability claims in federal court are based on a statute that gives the court **jurisdiction** to hear disputes between a plaintiff from one state and a defendant from a different state or from a foreign country, as long as the value of the plaintiff’s claims exceeds $75,000. Jurisdiction under this statute is called **diversity jurisdiction** because there is diversity of citizenship between the plaintiff and the defendant.

In the exercise of its diversity jurisdiction, a federal court may decide, for instance, a claim for $100,000 brought by an injured New York citizen against a Japanese automobile manufacturer, a California automobile distributor, and an Oregon automobile retailer. If the injured plaintiff lived in Oregon, there would be no diversity jurisdiction over the claim because the plaintiff would be from the same state as one of the defendants. The plaintiff would be able to bring a case in federal court only by not joining the Oregon defendant. When a federal court hears a matter within its diversity jurisdiction, it generally applies state law to the substantive legal issues in the case, although it applies its own rules governing court procedure.

If a case brought in state court could have been brought in federal court because of diversity of citizenship, the defendants—if they act promptly—can usually have the case transferred to federal court. This transfer is called **removal**. Whether removal is a good idea in a particular case depends on many considerations of trial and pretrial strategy.

In addition to claims within the federal courts’ diversity jurisdiction, there is one other type of product liability claim commonly tried in federal courts, and that is a claim within the courts’ **admiralty jurisdiction**. This jurisdiction empowers federal courts to hear product liability claims arising out of accidents that occur on navigable waters when the alleged wrong bears a significant relationship to traditional maritime activity. State courts generally can hear these claims too. When a claim can be brought in federal court under the admiralty jurisdiction, federal law typically applies to all issues presented by that claim, although there are some partial exceptions to this rule, such as certain claims for deaths occurring in state territorial waters, which are governed at least in part by state law. In recent years the federal courts have fashioned a body of product liability law very similar to the law followed in the majority of states.

**Personal Jurisdiction, Venue, and Inconvenient Forum** The plaintiff decides the state in which the action will be brought and whether it will be filed in state or federal court. It is then up to the defendant to decide whether to contest the plaintiff’s choice. There are several grounds for such a contest.

The first possible argument is that the court lacks **personal jurisdiction** over the defendant. Under the doctrine of personal jurisdiction, a court does not have the power to decide the legal rights and responsibilities of the defendants who are not residents of the state in which the court sits and who have not engaged in purposeful activities either in or directed at that state. Only the defendants who have maintained some minimum level of connection with the forum state and who have benefited from the protections of the state’s laws may reasonably be called on to
defend against claims filed in that state. The United States Constitution protects defendants, be they individuals or companies, from having to defend claims brought in a distant or inconvenient forum with which they have no substantial relationship.

The United States Supreme Court has said that to satisfy the constitutional test, a defendant must have “minimum contacts” with the forum state, so that forcing the defendant to appear in a lawsuit in that state does not offend “traditional notions of fair play and substantial justice.” Lower courts have disagreed about what kinds of activities by a manufacturer will be considered sufficient to establish minimum contacts. Some courts have held that a manufacturer that is aware that its finished product is being marketed in the forum state cannot claim to be surprised when it is sued in that state. For example, personal jurisdiction was exercised over a Japanese automobile manufacturer that sold completed vehicles to an American corporation in Tokyo. The manufacturer had no direct contacts with any of our states, but the American corporation sold those vehicles throughout the United States. The court held that the manufacturer’s sales to the American corporation, its efforts to put the vehicles into the “stream of commerce,” and its encouragement of those sales and receipt of the resulting revenue all evidenced its affirmative intent that the vehicles reach the individual states. It therefore should reasonably have anticipated being sued in a state where one of its vehicles caused injury.

Besides the constitutional limitations on a court’s personal jurisdiction, most states have passed laws called long-arm statutes that list the kinds of contacts a nonresident defendant must have with the state before its courts will exercise personal jurisdiction. Common examples of these contacts are transacting any business in the state directly or by agent; regularly doing or soliciting business in the state; owning, using, or possessing real estate within the state; and causing an injury by an act or omission within the state. Under long-arm statutes, the plaintiff’s claim must relate to whatever category in the statute is being used to get jurisdiction over the defendant. Personal jurisdiction is a defense that a foreign manufacturer should always consider asserting when sued, particularly when the plaintiff has selected a forum that is not the defendant’s place of operation or the place where the plaintiff’s injury occurred.

In addition to the requirement of personal jurisdiction, state and federal statutes frequently place other limitations on where actions can be brought. These statutes dictate the proper place, or venue, for a lawsuit, and they embody rules designed to ensure that lawsuits proceed in a forum reasonably related to the parties or their dispute. Typical venue provisions permit suit to be brought where the plaintiff resides, where all the defendants reside or are licensed to do business, or where the incident giving rise to the lawsuit occurred.

Although a plaintiff generally has the right to bring a lawsuit before any court that has proper jurisdiction and venue, the court may dismiss the action if trial in the chosen forum would be unduly burdensome for the court and the parties. This is called a forum non conveniens dismissal. With rare exceptions, a court will dismiss for forum non conveniens only when there is another more convenient court available to the plaintiff, either in the United States or in a foreign country. If the lawsuit is in a federal court and the court determines that the lawsuit could more conveniently be heard in the federal court of a different state, it may simply transfer the action. Otherwise, the usual remedy is to dismiss the action and give the plaintiff an opportunity to refile the claim in the more convenient forum.
The forum non conveniens doctrine focuses on the convenience of the parties, the witnesses, and the court. The action will be retained in the forum chosen by the plaintiff unless the defendant can make the requisite showing that trial in that forum would be unnecessarily burdensome. If the court dismisses the action on forum non conveniens grounds, it may require the defendant to submit to certain conditions, such as a waiver of any applicable statute of limitations in the alternative forum or an agreement not to contest personal jurisdiction in the alternative forum. Forum non conveniens dismissals are most commonly granted in suits brought by foreign plaintiffs for injuries that have occurred outside the United States. In such cases, much of the necessary evidence is located in a foreign country, making litigation in the United States inconvenient for the court, the witnesses, and the parties.

**Defendant’s Answer to Plaintiff’s Complaint**

When the plaintiff’s complaint is served, the summons that accompanies it contains instructions to the defendant about how it must respond to the complaint. The defendant has a certain amount of time (usually 20 to 60 days) within which it is required to respond to the complaint. In most courts a defendant can respond to the complaint with either an **answer** or a **motion to dismiss** the complaint. Either response must be filed with the court and a copy delivered to the plaintiff.

If the plaintiff properly serves the defendant and the defendant does not respond within the required time period, the plaintiff can attempt to obtain a **default judgment** against the defendant. Under this procedure, the plaintiff asks the court to grant judgment against the defendant in the amount requested because the defendant has not responded in the required time and therefore has not contested the plaintiff’s allegations. Because of the availability of default, it is important that a defendant served with a summons and complaint act quickly to respond. The best way to see that this happens is to develop procedures in advance for handling lawsuit papers so that they are transmitted immediately to the proper person within the company, and then to the company’s insurer and/or lawyers.

The answer filed by a defendant is a formal statement of the defendant’s position and requires no action by the court. In federal court and in many states, the defendant’s answer must respond point by point to the allegations in the plaintiff’s complaint, by admitting any allegations it knows to be true (or, through reasonable inquiry, could determine to be true) and denying those it believes to be false. If the defendant cannot determine the truth of an allegation because of insufficient information, it can so indicate (after having made a reasonable inquiry into the facts) and, on this basis, deny the allegation. In some states, a defendant’s answer can consist of a simple general denial of the plaintiff’s claims.

In federal court and in most states, the answer should then set forth any affirmative defenses the defendant may have. As discussed in Chapter 1, an affirmative defense is a legal basis for avoiding or reducing the defendant’s liability. Examples of affirmative defenses include:

- **The plaintiff’s own fault caused or contributed to the accident, thus barring or reducing the plaintiff’s recovery from the defendant.**

- **The case was filed after the time limit set forth in the applicable statute of limitations had**
expired.

• The court lacks jurisdiction over the action or the defendant.

• Service of the summons on the defendant was not made properly.

• The same claim has already been litigated and resolved between the same parties in a past proceeding (a defense called res judicata).

• The contract between the plaintiff and the defendant contains a provision that limits or disclaims liability.

There are many other affirmative defenses a defendant might assert in response to a plaintiff’s complaint.

As an alternative to filing an answer, the defendant can file a motion to dismiss the complaint. A motion to dismiss is a way to raise a defense easily presented, such as lack of jurisdiction, at the outset of the lawsuit. In the federal courts, every defense that can be raised by a motion can also be inserted in the answer and brought to the court for resolution at a later time. In some states, though, certain defenses—typically lack of personal jurisdiction over the defendant—must be raised by a motion before filing the answer, or those defenses will be waived.

In its answer, the defendant can also assert claims against other parties to the litigation. Such claims when asserted against the plaintiff are called counterclaims and when asserted against a codefendant are called cross-claims. For example, an automobile manufacturer, when sued by a driver and a passenger in a single lawsuit, might assert a counterclaim against the driver that states that if the manufacturer is liable to the passenger, the driver is in turn liable to the manufacturer for all or part of the passenger’s damages.

If in the same suit, the plaintiffs had also sued a component manufacturer, the automobile manufacturer could bring a cross-claim for contribution against this codefendant. A claim by a defendant against a person or company who is neither a plaintiff nor a codefendant in the lawsuit is called a third-party claim, and the person against whom the claim is asserted is called a third-party defendant.

Whether to assert a cross-claim against a codefendant or to name a third-party defendant is a matter of strategy. Certainly, when the other party is the manufacturer’s own component supplier, the manufacturer will want to consider whether the assertion of such a claim has the effect of making it appear that there is more substance to the plaintiff’s claim than there really is. There is also the risk that two defendants attempting to establish each other’s liability will help the plaintiff’s case against one or both defendants. If the plaintiff has neglected through oversight to name a third party, the defendant may want to bring the identity of that third party to the plaintiff’s attention before the statute of limitations expires on the plaintiff’s direct claim. If the plaintiff elects not to sue the third party directly, the defendant may need to file a third-party claim before the statute of limitations expires.
Pretrial Discovery

After the complaint is filed, and generally after all answers are filed, the lawsuit proceeds to the discovery phase. During this phase, each party attempts to discover facts, identify witnesses, and obtain documents that support its position in the dispute; it may also learn about its opponent’s case and weaknesses in its own case. Court rules typically provide several methods for each party to get information from other parties in the lawsuit and from nonparties. The purpose of these rules is to allow the parties to gather all the relevant facts before trial begins. When evidence is located outside the United States, international treaties may control whether it can be obtained and, if so, how.

In courts in this country, the scope of what can be sought in discovery is extremely broad. In federal courts and most state courts, parties are allowed by the discovery rules to seek not only relevant evidence, but also any information and materials that might lead to the discovery of relevant evidence. This extremely broad formulation creates a strong preference for requiring disclosure of any information with even a tangential relation to the lawsuit, and it can make resisting disclosure difficult.

Interrogatories In most courts, one party can ask another party written questions called interrogatories. A plaintiff typically asks manufacturers questions about the design or manufacture of the product involved, warnings provided with the product, how the product works, the identities of employees knowledgeable about the product, the existence and contents of documents relevant to the product, the defendant’s knowledge of the accident, and whether the product has been involved in any similar accidents. Typical questions posed by the defendant to the plaintiff include inquiries about the manner in which the accident occurred, the identities of eyewitnesses, the facts supporting the plaintiff’s theories of liability against the defendant, the extent of the plaintiff’s actual injuries, and the amount of money lost by the plaintiff because of those injuries (this will involve questions about past income, projected future income, and dependent family members).

A party served with interrogatories must answer them in writing and under oath within a certain amount of time (usually 20 to 30 days) or object to the questions if there is a valid reason not to answer them. In practice, the parties frequently take longer to answer. Often lawyers develop very extensive “form” interrogatories, sometimes including dozens of complex questions. Answering these form questions can impose a large burden, and as a result many courts now limit the number of interrogatories that a party can ask.

Because answers to interrogatories are almost invariably written or edited by lawyers, they are not particularly useful for obtaining candid, spontaneous answers to difficult questions. On the other hand, they can be an inexpensive way to get background information. Some questions, such as those that call for the collective knowledge of a corporate party, can be more effectively asked by interrogatory than by questions posed to individual witnesses.

Requests for Production of Documents and Things Discovery rules permit each party to request and inspect documents and other tangible items from other parties. These requests for production are submitted in writing. Like answers to interrogatories, requested documents must be produced for inspection within a specific amount of time after a party receives the request (usually 20 to 30 days). Examples of documents a product liability plaintiff typically requests
from a defendant include investigative reports on the accident, design or manufacturing drawings and specifications, notes or minutes from meetings, and reports of similar accidents or prior problems with the product. Examples of documents generally requested from the plaintiff are photographs or other documents concerning the accident, income tax statements to verify income, medical records concerning the treatment of plaintiff’s injuries, and any other documents supporting the plaintiff’s contentions. The rule also permits parties to examine tangible items, such as the allegedly defective product. Requests for production can require the location and production of just about any tangible thing, including personal notes, desk diaries, appointment calendars, photographs, tape recordings, films, videotapes, and computerized and electronically stored data.

Many companies are astonished at the extent to which they can be required to open their engineering and service files for inspection by a plaintiff’s lawyer. As discussed in Chapter 3, the best way for a company to deal with it is to educate its employees to be conscious of the potential implications of what they write.

**Electronic Discovery** Manufacturers create and receive most information today in electronic formats. The amount of electronically stored information retained by manufacturers on servers, hard drives, and other media dwarfs the volume of traditional paper files. Collecting, reviewing, and producing electronic information in response to requests for production is a significant part of the cost of modern litigation. Unfortunately for manufacturers, the burden of *electronic discovery* is usually one-sided. The typical product liability plaintiff has few if any documents to produce, and most of them will be in a paper format. Further, courts are reluctant to impose upon plaintiffs the costs incurred by a manufacturer in producing electronic documents. Accordingly, plaintiff’s attorneys often seek a broad scope of electronic discovery, at times extending even to backup information stored by manufacturers.

In order to reduce these costs, manufacturers’ legal and information technology departments should work closely with outside counsel to assist them in negotiating appropriate limits on the
scope of electronic discovery.

**Spoliation of Evidence** Spoliation of evidence is the legal term used to refer to the destruction, loss, or alteration by a party of something that another party could reasonably be expected to obtain during the discovery process. A good example is a manufacturer’s deletion of emails that discuss the cause of a product failure or operational problems with a particular model of a product. Another example is the disassembly of a product that was involved in an accident without notice to an interested party. Sometimes it may be difficult for a manufacturer to know when it is at risk for spoliation. The duty to preserve potential evidence arises from the particular circumstances of each case because potential evidence must be preserved once it is reasonable to anticipate that litigation may arise. For example, if a pleasure boat’s mast breaks and the boat sinks with loss of life, it can fairly be expected that the boat builder may be sued even though the builder believes that its boat is not at fault.

When a manufacturer should know that it is reasonably likely that it will be sued for a product failure, it should take immediate steps to issue a document freeze memorandum to prevent the destruction of documents and things. The manufacturer’s document retention policy should be suspended for documents and things that are likely to be the subject of discovery requests, and all destruction of such materials should be halted. The order to preserve documents and things should be comprehensive and expressly include electronic information, such as emails, digital photos, electronic documents, spreadsheets, and databases. In addition to existing materials, employees should be advised to preserve all new documents and things as they are created, including emails, that are relevant to the alleged product failure.

Court-imposed penalties for spoliation can hurt a manufacturer’s ability to defend itself. The penalty is often the exclusion of testimony or evidence favorable to the manufacturer or an instruction to the jury that it may infer that the destroyed evidence would have been harmful to the manufacturer’s defense. Monetary sanctions may also be imposed. In cases in which it is clear that a manufacturer willfully destroyed evidence in order to keep the jury from learning about it, the penalty for spoliation might be entry of judgment against the manufacturer. Finally, some courts allow a separate claim against a manufacturer for negligently or intentionally destroying evidence.

**Physical and Mental Examinations** Discovery rules also permit examination of a party whose physical or mental condition is at issue in a lawsuit. The most common use of this rule in a product liability action is to have a physician who has been selected by the defendant examine the plaintiff to determine the actual extent of the plaintiff’s injuries. The only disadvantage is that any report written as a result of the examination must be made available to the plaintiff.

**Requests for Admissions** Any party may serve another party with written requests to admit particular allegations. The party on whom such requests are served must admit or deny the allegations or state why the allegations cannot be admitted or denied. If the party fails to answer within the time required by court rules (usually 20 to 30 days), it will be deemed to have admitted the requests. These admissions will be binding on the party during the rest of the lawsuit. If a party unreasonably refuses to admit an allegation, it can later be charged the cost incurred by the requesting party to prove it.
In most circumstances, requests for admission are not particularly useful because courts are often reluctant to punish a party’s unreasonable refusal to admit an obviously true fact. On the other hand, if the other party does admit a request for admission, that response is more binding than either an interrogatory answer or deposition testimony because many courts will not allow a party to contradict an earlier response to a request to admit.

**Initial Disclosures** In 1993, the federal courts adopted new discovery rules that require the disclosure of certain categories of information within a short period after the defendants’ answering of the complaint. This information includes: (a) the name, address, and telephone number of each person likely to have information relevant to specific factual issues raised by the complaint; (b) a copy of, or a description of, all documents in the custody of the disclosing party that are relevant to the same specific factual issues raised by the complaint; (c) a computation of any category of damages claimed by the disclosing party, with supporting documentation; and (d) a copy of any insurance policy providing coverage to a defendant for damages that might be awarded in the case. A number of federal courts have waived or relaxed these requirements under their local rules. A number of state courts have adopted similar disclosure requirements in their court rules.

**Depositions** Any party may demand that another party to the lawsuit or any other person appear for a *deposition*. A deposition is a proceeding in which the person required to appear (the *deponent*) can be asked questions by attorneys for any of the parties and must answer under oath. The questions and answers are recorded by a stenographer, who makes a verbatim transcript of the proceeding. Some depositions are also videotaped. The videotape or the typed transcript may be used at trial if the deponent is unavailable. They also may be used at trial to discredit a deponent whose trial testimony conflicts with prior deposition testimony. Finally, the deposition testimony of a party or an employee of a party can be used at trial regardless of whether the deponent is available to testify in person.

The plaintiff will typically take the depositions of people who are familiar with the design, testing, or manufacture of the product or who investigated the accident or similar accidents. The plaintiff can obtain the names of these employees from the defendant’s answers to interrogatories or from the documents produced. Or the plaintiff can simply ask the defendant to designate an employee who can testify about a particular subject matter.

The defendant will typically take the depositions of the plaintiff and any eyewitnesses to the injury. The defendant will also depose the plaintiff’s expert witnesses. As discussed in Chapter 1, these are individuals who claim particular expertise in some field relevant to the issues in the lawsuit. The plaintiff consults these experts in the expectation of using them at trial to support the claim that the product was defective or to substantiate the extent of the plaintiff’s injuries or damages. For example, the plaintiff could hire an engineer as an expert witness on the design of the product, a doctor as an expert witness on the plaintiff’s injuries, or an economist as an expert witness on the amount and present value of the income lost by the plaintiff. The defendant may also hire expert witnesses to defend the design of the product, to contest the extent of the plaintiff’s injuries, or to dispute the plaintiff’s damages. All parties generally depose the other parties’ experts prior to trial.

**Objections to Discovery/Privilege** Under the discovery rules, parties may seek information
about any matter either directly relevant to the subject matter of the lawsuit or reasonably likely to lead to the discovery of relevant information, unless the information is privileged. If the discovery request seeks irrelevant or privileged material, the party from whom discovery is sought may respond by objecting rather than by answering.

The most common privileges invoked in discovery objections are for attorney-client communications and attorneys’ work product. Most communications between a party and its lawyer are privileged and need not be disclosed during discovery or trial. This attorney-client privilege is designed to encourage full and frank disclosures between lawyers and their clients by securing a cloak of confidentiality for those communications. The work-product doctrine protects from disclosure the preparation done by or for a lawyer in anticipation of litigation. However, this protection is incomplete because a court may require disclosure upon a showing of substantial need by another party. One example of such a showing is when one party has had the opportunity to interview a critical witness who—whether because of death, disappearance, incapacity, or other reason—is no longer available to be interviewed by other parties, despite their diligence. In that situation, a court is likely to require the first party to disclose the results of its interview to the others.

Objections may also be made to the form of discovery requests. For example, it is common to object to discovery requests that are unduly burdensome, vague, or confusing. These types of discovery requests can be clarified and narrowed through negotiations between the parties’ lawyers.

**Protective Orders** American discovery rules are abused frequently. It is easy for a lawyer to describe by category and ask for what may turn out to be hundreds of thousands of documents. When the plaintiff’s counsel attempts such abuse, the defendant should object to the discovery request and may also want to consider seeking a protective order. Protective orders may be sought when the plaintiff’s discovery request seeks patently irrelevant information or when the plaintiff tries to make discovery as expensive as possible for the defendant to obtain an attractive settlement. Protective orders can also prevent the disclosure of proprietary information, trade secrets, or sensitive data.

**Orders to Compel Discovery and Sanctions** If a party fails to respond adequately to discovery requests, the requesting party may ask the court for appropriate relief. If the court agrees that an adequate response to a discovery request has not been made, it may order compliance with the request and impose a variety of sanctions. One example of such a sanction is for the court to order that certain contested facts will be deemed to have been admitted by the sanctioned party and that that party will pay the expenses (including attorneys’ fees) incurred by the opposing party in obtaining the order to comply. For extreme discovery violations, the court may enter judgment against the sanctioned party.

In other words, a manufacturer could lose a lawsuit for failure to comply with a discovery request. It is therefore important to take discovery requests very seriously. In one case in which a manufacturer’s refusal to produce documents resulted in entry of a judgment of liability, a plaintiff had been severely burned while wearing a garment produced by the manufacturer. The plaintiff had requested copies of all complaints and communications concerning injuries or deaths allegedly caused by the burning of nightwear manufactured or marketed by the defendant,
a very large American company. The defendant failed to make a timely objection to the discovery request. It later offered as its only justification for not complying its practice of indexing claims alphabetically by claimant rather than by product or type of injury. Rejecting this justification, the court noted that a defendant may not avoid production by using a system of recordkeeping that conceals rather than discloses relevant records. The court felt entry of a default judgment was appropriate, given what it perceived to be the defendant’s pattern of continuous, flagrant, and willful violation of the discovery rules. Such severe sanctions are increasing in frequency as courts become impatient with discovery squabbles and parties who are not forthcoming in their discovery responses.

Summary Judgment

In most jurisdictions, if the facts needed to resolve the parties’ entire dispute (or any distinct portion of it) are established or cannot reasonably be contested, the judge can make a decision without a trial. In such an instance, the judge applies the law to the undisputed facts. In most courts this procedure is called a summary judgment.

A summary judgment resolving an entire case is generally more likely for the defendant than for the plaintiff in a product liability case. It is rare for a court to grant summary judgment on issues like the existence or nonexistence of negligence or a product defect. On the other hand, a defendant will sometimes have a defense appropriate for disposition by summary judgment, such as statute of limitations or contractual disclaimer. The issue of causation is also sometimes appropriate for disposition by summary judgment.

The attitude of trial judges toward summary judgment varies from place to place. Historically, many courts took a very cautious attitude toward summary judgment, but this attitude is softening as trial courts look for ways to ease their congested dockets. Because of the historic reluctance of many courts to use the summary judgment device, defense attorneys are sometimes unwilling to go to the expense of filing such a motion. This is often a mistake. Many meritorious summary judgment motions are denied because the party making the motion failed to demonstrate to the court that there really was no factual dispute or that proof of some essential element of the plaintiff’s case did not exist. In other words, most summary judgment motions lose because they are not well-conceived and well-prepared. A carefully planned motion may succeed, especially if the plaintiff overconfidently responds with a hurried, poorly written opposition. In any case, as long as the motion is not frivolous, it is frequently useful to file a summary judgment motion where the defense is strong, just to indicate to the plaintiff and the judge the strength of the defendant’s case. It is not unusual for a plaintiff facing a strong summary judgment motion to settle the claim on a reasonable basis or even to surrender completely.

Bifurcation and Consolidation

Normally, a single lawsuit results in a single trial. There are exceptions. In some lawsuits, certain claims or issues are tried separately. This is called bifurcation. To hold separate trials on liability
and damages is the most common bifurcation, although in most jurisdictions the court may order separate trials on any issue or group of issues that can conveniently be tried separately. Whether the same jury will be used for the separate trials is decided by the trial court, as is whether to hold the trials one right after another or to allow a lapse of time between them.

Conversely, separate lawsuits pending in the same court may be consolidated for certain purposes, including trial. Sometimes several suits may be consolidated for a single trial on liability, followed by separate trials on each party’s damages claim, should liability be found.

Whether a product liability defendant should seek consolidation or bifurcation is a question of strategy that depends on the facts of the particular case. The following rules of thumb may be useful:

- Consolidation of several cases for pretrial proceedings is generally useful for the defendant if different lawyers are involved for various plaintiffs because most courts will require the plaintiffs to coordinate pretrial discovery, which reduces the defendant’s burden.

- Consolidation of several cases for trial is generally in the defendant’s interest if all claims arise out of the same occurrence. If the cases are consolidated for one liability trial, all plaintiffs are bound by the outcome. On the other hand, if the cases are not consolidated, the rule in most jurisdictions (unfair as this may sound) is that while none of the other plaintiffs is bound by a decision adverse to the first plaintiff, the defendant may be bound in all other cases by the outcome of the first-tried case if the defendant loses.

- Consolidation of several cases for trial should generally be avoided if the claims arise out of separate accidents. A single trial of such claims will present to the jury the fact that the product was involved in multiple accidents, which is likely to prejudice the defense.

- Separate trials of liability and damages work to the advantage of the defendants in most cases. Bifurcation can be particularly beneficial to the defendant if the plaintiff’s liability case is weak and the injuries are severe. On the other hand, there may be times when a defendant will want the jury hearing the liability evidence to hear the damage evidence as well, especially if the plaintiff appears to be a malingerer or the damage claim is obviously exaggerated.

**Trial**

The purpose of a trial is to resolve the factual and legal disputes between the parties. Although trial procedures vary among jurisdictions, the basic features are the same.

**Judge and Jury** One aspect of the American judicial system that evokes substantial curiosity on the part of foreign manufacturers is the jury system. In virtually all product liability cases (the only significant exception being cases heard under the admiralty jurisdiction of the federal courts), the parties are entitled to have the case determined by a jury.
Juries in product liability cases typically consist of either six or twelve people. In federal court, the jury is usually six people, whose decision on all issues must be unanimous. Most states use twelve-person juries, but unanimity is generally not required. In most courts, one of the parties must file a timely jury demand, or the right to a jury trial will be waived. In the federal courts, a jury must be demanded in the very early stages of the proceedings. The plaintiff typically includes a jury demand in the complaint. If the plaintiff does not demand a jury trial, the defendant can.

Whether a manufacturer is better off trying the case before a judge or before a jury is in each case a judgment to be based on such factors as who the assigned judge is, the likely composition of the jury, and whether there are aspects of the case that are likely to arouse strong emotions.

In a trial without a jury (called a bench trial), the judge makes all legal rulings governing trial procedures and also decides the factual disputes at issue in the action. In a jury trial, the judge presides over the trial and makes all legal rulings, but the jury decides the factual issues. Except for the obvious difference that in a bench trial there is no jury selection, jury instructions, or jury deliberation, the trial format is generally the same for both bench trials and jury trials.

**Jury Selection** The first step in a jury trial is to select the jury members. A panel of prospective jurors randomly selected from the community is asked questions by the judge or the lawyers or both. This process is frequently referred to as voir dire. Its purpose is to ascertain the jurors’ backgrounds, possible biases and prejudices, and other information designed to determine their impartiality concerning the issues in the lawsuit. Prospective jurors whose answers indicate that they could not be impartial are dismissed from the panel. A request by a lawyer to dismiss a juror on such a basis is known as a challenge for cause. In addition, many judges are willing to dismiss people whose jobs or personal circumstances make long jury service difficult. As a result, juries frequently have a disproportionate number of unemployed and retired persons and homemakers, although in some places there is a trend toward requiring jury service from all citizens.

In addition to dismissals for cause, the lawyers for each side may remove a specified number of prospective jurors from the jury panel without giving any explanation whatsoever. These are known as peremptory challenges. Each side is typically permitted three peremptory challenges. In the past, a party could use any basis for selecting jurors to be removed by peremptory challenge. Following several decisions by the United States Supreme Court, a party may no longer use peremptory challenges for the sole purpose of removing jurors of a particular race or gender, and if it is suspected that a party is doing that, the judge will inquire into the reasons for the party’s challenges.

The people not dismissed for cause or peremptorily are then empaneled as the jury. In long cases, the court may also empanel a number of alternate jurors, who attend and watch the trial just as the regular jurors do. If a member of the regular jury becomes ill or cannot complete jury service for other reasons, an alternate can then substitute. Depending on the court’s rules, the alternates who have not been substituted for jurors at the end of the trial are either excused and do not participate in the jury’s deliberations or they do participate as regular jurors.
Opening Statements The trial begins with the presentation of opening statements. Opening statements give the jury and the judge a preview of the evidence to be presented during trial. They are supposed to be factual and not argumentative. The plaintiff makes the first opening statement. The defendant may make an opening statement immediately after the plaintiff is finished or wait until all of the plaintiff’s evidence has been presented. Ordinarily the defendant will make its opening statement before the plaintiff’s evidence is presented, but if there is more than one defendant with similar interests, it can be effective for one defendant to wait until the plaintiff’s case has been completed.

Presentation of Evidence After opening statements, the plaintiff presents evidence first. The plaintiff has the burden of proof, which means that the jury must conclude from all the evidence presented to it that it is more likely than not that the plaintiff’s position is correct. This standard is commonly called proof by a preponderance of the evidence. Evidence can be presented through the testimony of witnesses and the use of physical exhibits such as documents. It can also be presented through the deposition testimony of unavailable witnesses and through stipulations of undisputed facts, which are simply read aloud in court.

Evidence of a witness is elicited by questions asked by the parties’ lawyers, which the witness then answers. This is known as direct examination. Following direct examination, the opposing party’s lawyer may cross-examine the witness. This is an opportunity to undermine the witness’s testimony by asking further questions about the subjects covered during direct examination. The cross-examining attorney may also ask questions designed to show the witness’s bias or lack of knowledge. In many jurisdictions, the judge may ask the witness questions. Jurors are not allowed to ask questions, but a few judges allow them to write out suggested questions for the judge to ask.

During witness examination, the lawyer not asking questions may object to any improper question. The judge rules then on whether the question should be answered. That ruling depends on whether the question calls for an answer that would be admissible evidence. For example, the court may prevent a party from trying to prove a fact through hearsay—the repetition by a witness of something said by another person or of a statement in a document. Of course, a lawyer may not wish to object to inadmissible evidence when it is favorable to the lawyer’s client. A lawyer may also object to the introduction of improper exhibits.
After the plaintiff’s presentation of evidence, the plaintiff rests. At this time, the defendant may ask the judge for a directed verdict if the plaintiff has failed to introduce sufficient evidence for the jury to find against the defendant. Such requests are seldom granted. The judge usually reserves decision on the request until after the jury has reached a decision or finds that the plaintiff has presented enough evidence, and the trial proceeds.

The defendant then presents its evidence. If there are multiple defendants, they present their cases in an agreed order. The procedures for presentation of the defendants’ cases are identical to those for the plaintiff’s case, except that the defense lawyer conducts the direct examination and the other lawyers, including those of the codefendants, conduct the cross-examination.

Once all the evidence is in, the defense attorneys may again ask the judge for a directed verdict. If the judge believes that, based on the evidence, reasonable individuals could differ on the proper outcome of the case, the motion will be denied.

Closing Arguments If the directed verdict motion is denied, the lawyers present closing arguments. During this phase each lawyer addresses the jury directly and summarizes the evidence, argues for the correct interpretation of it, and urges a finding in favor of the lawyer’s client. Normally, the plaintiff’s closing argument is presented first, followed by arguments for each defendant. The plaintiff may then present a brief rebuttal argument. In some jurisdictions, the plaintiff argues only once, generally after the defendants.

Jury Instructions and Verdicts After closing arguments, the judge gives the jurors instructions on the law. In a product liability case, they are given instructions on the applicable standards for manufacturer liability discussed in Chapter 1. (There is a sample set of jury instructions in the Appendix.)

After hearing the judge’s instructions, the jurors retire to a private jury room where they deliberate until they agree on a verdict. A verdict is simply a statement of the jury’s findings of fact. There are two kinds of verdicts. A general verdict states the jury’s overall conclusion, such as “The plaintiff has not proved the claims in the complaint, and the defendant owes nothing,” or “The plaintiff has proved some or all claims and should recover $200,000 from the defendant.”

In a special verdict, the jury answers specific questions submitted by the judge. These questions are usually proposed by the parties and ask about disputed factual issues. Some examples of questions that might be asked in a product liability case are as follows:

• Did the defendant negligently design the product?

• Was the manufacture of the product defective?

• If both the plaintiff and the defendant were at fault in causing the plaintiff’s injury, what percentage of fault is attributable to each?

The questions should be devised so that the appropriate overall outcome of the case can be readily deduced from the answers.

The jury typically decides questions such as whether the product caused the accident or injury,
whether the product was defective or unsafe, and how much compensation, if any, the defendant should pay to the plaintiff. In product liability cases these questions often require the jury to evaluate highly technical testimony about product design, function, and performance. The judge instructs the jury to decide these questions based solely on the evidence presented at trial and the legal standards explained by the judge. The jury is not required to explain the basis for its decision, and its discussions are held in private. The verdict, however, is announced in open court.

Jurisdictions differ over the number of jurors who must agree on the verdict. Some (including all federal courts) require a unanimous decision, while others permit agreement by a supermajority of jurors (usually 5 out of 6 or 10 out of 12). If the required number of jurors cannot agree on a verdict after a reasonable amount of time, the jury is dismissed, and the case must be retried.

In a bench trial, the judge may either render a decision immediately or “take the case under advisement” and announce a decision at a later date. The court will frequently ask the parties for post-trial briefs, which summarize their contentions, before rendering a decision.

**Appeal**

If a party wishes to challenge a final judgment entered by a trial court, that party may appeal to an *appellate court*. An appellate court can either affirm the judgment of the trial court, reverse that judgment and send the case back to the trial court with instructions on how to proceed further, or reverse the result reached in the trial court and enter a different judgment. An appellate court usually will reverse a judgment only if the trial court has made a significant error in its legal rulings or if there is essentially no evidence to support its decision. If the trial was free of material legal error and the appellate court believes that reasonable minds could reach different conclusions based on the factual evidence, it will affirm the judgment of the trial court, even though it might have reached a different result if it had made its own factual determinations.

Most states have two levels of appellate courts: an intermediate court of appeals and a supreme court. Appeals from trial courts in product liability cases are almost always directed initially to the intermediate appellate court. The result reached by that court can usually be reviewed by the state’s supreme court. In most states, an appeal to the higher appellate court will be considered only if that court agrees to hear the appeal. Generally, those courts accept only cases that will resolve unsettled issues of law or change the law in a given area.

A judgment from a federal district court can be appealed to the federal court of appeals for the region in which the district court is located. There are twelve such intermediate federal appellate courts. A party can then ask that the decision of the federal appeals court be reviewed by the United States Supreme Court. The Supreme Court hears only a small percentage of the cases filed with it.

Where federal law is involved in a case tried in a state court, it is also possible to seek review of a state appellate decision in the United States Supreme Court. The Supreme Court rarely reviews state court decisions in product liability cases. As a practical matter in product liability cases,
whether they are heard in state or federal court, the possibility of review by the Supreme Court is more theoretical than real.

Depending on the jurisdiction, an appeal can take from a few months to several years to resolve. The parties’ arguments are presented to the appellate court through written petitions called briefs. The party appealing, known as the appellant, files the first brief. Responding parties, appellees or respondents, then file their briefs, which the appellant may answer with a reply brief. An oral argument for the case is usually then scheduled. At this hearing, the lawyers argue their positions before a panel of appellate judges and answer any questions the judges ask. After oral argument, the judges confer and vote to determine the outcome. Once a majority of the panel agrees on an outcome, one of the judges writes an opinion explaining the panel’s decision. Other judges may write additional opinions agreeing or disagreeing with the majority.
Reducing Product Liability Exposure

There are many steps a manufacturer should consider taking to minimize its product liability exposure. Some of these reduce the likelihood of product liability claims by reducing the likelihood of product-related injuries. Others improve the manufacturer’s ability to defend its products if an injury does occur, by limiting the plaintiff’s ability to make distorted claims. Still other techniques deal with the handling of accidents, claims, and lawsuits.

This chapter will discuss an approach to product liability prevention that integrates measures that can be taken at various steps of the manufacturing and litigation processes, from the earliest design phase of a product through trial of an actual claim. We should point out, however, that there are many ways to skin a cat, and manufacturers have varying approaches to their product liability problems. The suggestions made below may be useful for some manufacturers but not for others. At the very least they should stimulate thinking on the subject.

The Product Liability Prevention Manager

An important step you as a manufacturer can take to reduce your product liability exposure is to charge a specific manager with that responsibility and give that person sufficient authority and independence to do the job. Ideally, for a large manufacturer, product liability prevention should be the sole responsibility of this person, who should report directly to senior management to ensure that recommendations and concerns are not easily overruled or avoided by other managers.

Management should make it clear that this is an important job—not a “dead end” or a “final pasture.” An ideal candidate would be a rising middle manager with a broad engineering background and exposure to other departments, such as sales and marketing, manufacturing and quality control, testing, customer service, publications, legal, and insurance. It would be very useful for this manager to have had some legal training.

The product liability prevention manager should have direct responsibility for all of the pre-accident and post-accident programs described below and should also have direct involvement in any product liability litigation.

Pre-Accident Measures

Product Liability Education Programs If you are a product liability prevention manager, your most important responsibility is to alert your fellow employees to your company’s product liability exposure, to make them sensitive to product liability concerns, and to instruct them about what they should and should not do. To be effective, this education program usually should be continuing and pervasive, reaching all employees in sensitive positions, including the highest levels of management.
There are a number of ways of reaching employees. Written materials, such as Chapters 1 and 2 of this primer, can be distributed to key personnel. Some manufacturers conduct periodic product liability lectures for their employees at which attendance is mandatory. These lectures can last from an hour to a full day. Their primary purposes are to remind employees of the importance of product safety and reliability, to point out potential problems that might arise within the company, and to identify the types of employee conduct that can lead to trouble and complicate the company’s legal defense. It is helpful to have these lectures presented by lawyers who have defended the company in product liability litigation and who can draw from actual experiences to illustrate their advice. These lectures are often of intense interest to the audience and generate questions from employees regarding specific matters on which they are working. These questions frequently reveal potential problem areas that can then be addressed by the product liability prevention program. These lectures should be repeated at least annually.

Written Records As product liability prevention manager, another responsibility you have is to make sure that your company creates and retains the kinds of records likely to be useful in defending your products in any litigation that may occur. Product liability claims frequently arise years after a product was designed and delivered. Knowledgeable personnel retire or change jobs, and memories fade. Contemporaneous written records therefore become a key element of proof in any product liability trial. You and your coworkers should retain the following types of documentation:

- Records that document the design and configuration history for each model of product you make;
- Records of prototype testing, engineering analysis, design reviews, certification by outside consultants, and other developmental work that resulted in the product’s final design;
- Manufacturing records that describe each individual product’s condition and configuration when it left the company and show that it was properly inspected and tested and met industry or government standards;
- Records that show that customers were given (a) instructions regarding the proper use of the product, (b) warnings regarding the product’s hazards, and (c) notice of the availability of design options and improvements;
- An archive of each version that you have distributed of the instruction, maintenance, and other manuals for your products;
- Service bulletins, recall letters, and other communications to your customers concerning remedial action that you have recommended for your products, a record of whom each was sent to, and a record of any response or customer compliance that you receive back;
- Records that contain disclaimer and indemnity agreements with suppliers, subcomponent manufacturers, and purchasers (i.e., records that will help you prove that legal responsibility for an injury should be borne by someone else);
- Any insurance policies that may provide coverage for future product liability claims; and
• If you are a military contractor, all records of communications with the military about the
design of your procured products, all drawings and specifications for those products, all
proposals to change the design or operating instructions for the products, all procurement
contracts, and all documents evidencing military approval of the products’ designs.

You should also recognize that some perfectly appropriate and valuable writings can be harmful
if they are susceptible to being misused by a plaintiff’s attorney to suggest that a product was
defective when in fact it was not. We cannot list all the different examples of such writings, but a
few illustrations may be helpful.

Cost-benefit analyses It is extremely damaging when a manufacturer’s own documents are
written in such a way that a skillful lawyer can argue that they demonstrate that the manufacturer
believed that it would be cheaper to pay for injuries than to fix a product. There have been cases
in which manufacturers have expressly assigned monetary values to potential deaths and injuries
and compared those amounts with the cost of corrective action. Such cost-benefit analyses are
not likely to sit well with a typical American jury.

Sometimes an employee creates writings of this nature quite innocently. A typical scenario might
involve unverified and disputed claims that the product has injured several consumers. The
employee writes a memo suggesting an improvement that could prevent such injuries. The
suggestion is rejected because the expense is very great and the actual improvement doubtful.
Moreover, management doubts or at least is not convinced that any product defect exists at all.
Subsequently, a consumer is injured, and the plaintiff’s lawyer uses the rejection of the employee
suggestion to argue that the company willfully and wantonly gambled with the consumer’s
safety. Punitive damage awards arise from facts like these.

“CYA” memos The acronym “CYA” is widely understood. Typically the memo writer wishes to
create a record to show in advance that someone else is responsible for some undesired event that
either has occurred or may occur. For example, “I told those guys in manufacturing for weeks
that the pinion gear would fail unless they increased the torque on the retaining nut.” There may
in fact be a real question whether the gear failed because of improper torque or because the
consumer ran the machine above its red line. A plaintiff’s lawyer who has the CYA memo will
have an easier time convincing a jury that torque is the problem.

Computer printouts of service difficulties Most manufacturers receive feedback from consumers,
distributors, agents, and others about problems with their products. The feedback is frequently
unverified and often wrong. For example, an automotive mechanic troubleshooting a rough-
engine problem may replace the fuel injectors when in fact the problem lies in an intermittent
short in the wiring harness. The fuel injector replacement is reported to its manufacturer. A
computer operator then enters it as a fuel injector problem in the company’s reliability records,
where it gets lumped with all sorts of other fuel injector problems—some real, others
 nonexistent. With enough of these questionable or downright erroneous entries, a plaintiff’s
lawyer can argue that the company’s own records show that the product is unreliable or at least
that the company had notice of a potential problem and failed to take effective action.

Cryptic notes After an airplane accident, an engineer at the home plant makes notes during a
telephone conversation with the company’s on-the-scene investigator. The investigator says,
“The airline believes a structural failure occurred because they see no evidence of a bomb.” The engineer quickly jots down “structural failure—no bomb.” Years later in litigation between a plaintiff (who insists that there was a structural failure) and the manufacturer (which believes that a bomb was involved), the cryptic note is turned over to the plaintiff’s lawyer. The engineer who wrote the note is—take your choice—dead, senile, or disgruntled and therefore unavailable to explain it. At trial the plaintiff’s lawyer reads the document (as often as possible) to the jury and argues, “Look what the airplane company was saying about the cause of the accident before they knew they were going to be sued.”

Rough drafts A service engineer writes a first draft of a recall letter suggesting that a product be modified by December of that year. For good reason, the effective date of the recall is changed in the final draft to July of the following year. The first draft languishes forgotten in the service engineer’s desk—until it is produced for a plaintiff’s lawyer whose client was injured in May. You can predict that the lawyer will argue that the service engineer got it right the first time and was overruled by managers willing to risk safety rather than deal with a tighter schedule.

The Range of Documentary Evidence Because court rules permit plaintiffs to gain access to documents of all kinds—reports, correspondence, memoranda, notes—your prevention program should apply to any type of tangible or intangible record, including data stored by computer and communications by electronic mail. This last form of information storage needs particular attention, since email is frequently used for casual, unguarded, and sloppy discourse. Employees’ “personal work files” should also be included. Virtually every product liability defense lawyer has at least one story about an engineer who shows up to be deposed with a personal file full of documents that the lawyer has never seen before (and may have represented to opposing counsel did not exist).
Avoiding the Creation of Bad Documents As product liability prevention manager, you should educate employees to be sensitive to product liability implications whenever they write anything. It is obvious, however, that it is necessary for employees to create new writings to make new products, improve old ones, and solve problems. It is important not to chill that process with
excessive concern over product liability exposure. Indeed, a manufacturer that has no records of its design and manufacturing activities is likely to be criticized for having taken a superficial approach to product design and for having missed important steps in the design process.

Employees should be advised: “Write what you must write, but write with an appreciation that what you are writing may someday be read to a judge or jury by an unfriendly lawyer who may use it out of context or attempt to give it a meaning that you never intended.” Normally, the closer the author sticks to facts known first-hand, the less chance there is of creating a harmful document. If necessary information is not known personally and its accuracy cannot be confirmed, then the author should describe the source of the information (e.g., “A customer reported that . . .”). Adherence to this guideline will ensure that at trial your company is not deemed to have admitted the accuracy of facts reported by a customer that turn out to have been incomplete, inaccurate, or even intentionally misleading.

Similarly, conclusions should be qualified if they are based, even in part, on information of unknown or questionable reliability (e.g., “If this information is accurate . . .” or “Based on this preliminary information, it appears that . . .”). Pursuing hunches and speculating are frequently desirable in the design of products and the investigation of accidents, but it may not be necessary to document these activities. If it is, the resulting documents should indicate the preliminary, tentative, and inconclusive nature of the observations recorded.

It is natural when working on product development or improvement to experience frustration or anger, particularly when under a deadline. All too often those feelings get vented in writing that is emotional, exaggerated, faultfinding, and inaccurate. It is easier for a plaintiff’s lawyer to make a jury angry at you and your product decisions if your own employees feel that way. It can be equally damaging when an employee tries to add some humor to a product design document or, even worse, an accident investigation document. Judges and jurors who are faced with an injured plaintiff will think this inappropriate or even offensive.

Some words have established unfavorable meanings in product liability law. For example, the words “defect” and “failure” should be avoided if possible. Instead, the condition should be described factually. It is more precise, more accurate (and less legally dangerous) to say, “The product stopped operating when the connecting rod fractured,” than to say, “The product failed because of a defect in the connecting rod.”

If an employee writes a document that proposes an alternative course of action, such as a design change, and management decides not to follow the recommendation, a second document should be created to explain the reasons for that decision and thereby complete the written record. This is commonly called “closing the loop.” Many times the individual making the recommendation will not have had access to all relevant information when the recommendation was made. That individual can then close the loop by writing a second document acknowledging the wisdom of the final decision. If not, the decision maker should create the loop-closing document. Failure to close the loop on a proposed, unadopted design change can give a plaintiff’s lawyer a valuable weapon. Your company will find it much easier to convince a jury that a written suggestion was unworkable when it has a contemporaneous (i.e., pre-accident) loop-closing document explaining why the suggestion was not accepted.
**Document Retention Policies** A document retention policy identifies how long various types of documents will be maintained and, equally importantly, when those documents will be destroyed. A document retention policy should be based on legal requirements to preserve records. Such requirements can be based on federal or state law. The policy also should preserve documents needed to defend the company against future lawsuits, such as those listed above. It needs to account for all of the various forms and systems that the manufacturer uses to prepare and preserve information. The policy also must plan for the orderly destruction of documents and for stopping destruction when a document freeze memorandum is issued. Given the increased cost of discovery, especially electronic discovery, and the risk of penalties for spoliation of evidence, manufacturers should develop and implement effective document retention policies.

**Design, Instructions, and Warnings** One of your jobs, as product liability prevention manager, may be to check that the engineers who design new products and product improvements and who write instructions and warnings do so in a manner that emphasizes product safety and reliability. When a new product is being developed, the manufacturer should have in mind the entire distribution chain for the product, the various types of uses and users of the product, and the environments in which the product will be used. If the product is likely to be altered by someone in the distribution chain before it reaches the consumer or user, this possibility should be considered during product development. The skills, training, intelligence, literacy, and language of end-users should also be evaluated.

Early in the product development phase, it is a good idea to research and compile all potentially applicable government or industry regulations, standards, and practices governing product design, manufacturing, and instructions or warnings. Foreign government regulations should also be consulted, both because they may be more up to date than their United States counterparts and because you may have to comply with them if you intend to export your product. It is difficult to manufacture a product that is not covered, at least in part, by one or more detailed industry standards. Those standards can contain useful information that is based on the experience of other producers, and you can expect to be criticized for deviations from such standards in later litigation. You may also discover useful features in the products of your competitors, and any of their features that are safer than yours can be used by the plaintiffs’ lawyers as examples of feasible alternative designs.
Failure to comply with government regulations or to incorporate safety features used by your competitors may result in liability. If you are unaware of applicable regulations, standards, or practices, you are more likely to produce something not in compliance with them.
As the design progresses, you should try to predict the potential hazards that may arise during the product’s use, including the likelihood that those hazards will occur and the severity of the consequences when they do. This analysis should be done not only with respect to the intended uses of the product but also with respect to reasonably foreseeable misuses. Available resources on injuries arising from existing products can contain useful object lessons for product design and instructions. These resources include government injury databases, product recall notices, industry publications, reported and unreported litigation, information within the insurance industry on claims, and Internet web sites, web logs, and news lists. Some manufacturers find it feasible and useful to do a failure mode and effects analysis (FMEA). An FMEA will attempt to look at each way in which each product component could possibly fail during use and misuse, the probabilities of each such failure, and the consequences or effects. The idea is to have a design that either eliminates the significant hazards that might arise from failures or reduces the probability of a particular failure mode so that it is unlikely to occur during the life of the product. Other methods for evaluating product designs and hazards exist, such as system safety engineering and hazard analysis, and they may assist in the development and evaluation of safer product designs. You may also want to consider having an independent testing consultant evaluate a prototype of the product. Such external evaluations may turn up hazards that you overlooked, and if they pass the prototype, they provide evidence of an unbiased, favorable evaluation of the design.

The development of product instructions and warnings needs particular attention. To avoid product liability, a manufacturer must consider not just the 95 percent of consumers who will use the product competently and safely, but also the 5 percent who will not. Engineers and manual writers must provide clear, understandable instructions for the intended uses of the product. They must also anticipate the likely ways in which the products they design might be misused and then design, instruct, and/or warn to eliminate or minimize hazards associated with such misuse.

Once you identify a hazard that should be warned against, you must write the text of the warning. Warnings should state not only how to use the product, but in many cases how not to use it and the consequences of failing to heed the warning. If you fail to describe the consequences of product misuse, an injured consumer can claim not to have understood the seriousness of the risk created by the product. Incredible as it sounds, some silver-tongued plaintiff’s lawyer may be able to convince a jury that it is not enough merely to tell the user not to operate an electrical product around water without also stating that a resulting shock could cause serious injury or death.

A plaintiff will have a difficult time convincing a jury that your warning was overlooked if it is conveyed in a way that will grab the user’s attention. Many industries and individual manufacturers use warning captions such as DANGER, WARNING, or CAUTION. Such hazard intensity labels are generally a good idea as long as their use is clearly defined and consistently followed. The American National Standards Institute (ANSI) has published a standard for product safety signs and labels and, more recently, a newer standard for instruction manuals, both of which summarize well the common practice for selecting which of these words to use. The label DANGER is used for imminent hazards that, if not avoided, will result in serious injury or death. The label WARNING is used for potential hazards that, if not avoided, will result in serious injury or death. The label CAUTION is used for potential hazards that, if not avoided, may result in moderate or less serious injury or property damage. The use of DANGER
or WARNING where the potential hazard is minimal leaves you susceptible to the claim that your warnings were not credible and could reasonably be ignored.

The ANSI standards also address the format and size of warning labels and warning texts in instructional materials and should be consulted when preparing such warnings. Other standards exist and should be considered. Some of these may be required by law, such as those issued by the Consumer Product Safety Commission under the Federal Hazardous Substances Act. Also, it often helps to intensify a written warning to add a pictorial that depicts the hazard (e.g., flames for a fire hazard, a jagged line for an electrical hazard). For information that is important to the correct functioning of a product but does not implicate safety, it is common to use a label such as NOTE or INFORMATION, which has no safety implications, to highlight information.

It is also desirable that you be aware of what your competitors are using as warnings on similar products. It is difficult to defend your warnings successfully if the jury hears that everyone else in the industry uses more precise or more strongly worded warnings.

**Marketing the Product** You should also be cognizant of your company’s product marketing activity. As explained in Chapter 1, representations that a company makes about a product (such as through advertising or a guarantee) may be construed by a court as an express warranty. Breach of an express warranty results in liability for any injury caused by the breach. In addition, overpromotion of a product may diminish the effectiveness of any warnings given for the product. All good product liability programs include the mandatory review of all advertising and promotional materials from a product liability perspective.

**Contracts With Suppliers and Purchasers** Work with your company’s lawyers to ensure that company contracts with suppliers and purchasers address product liability issues in ways that limit the company’s exposure.

Contractual terms with suppliers can have an important bearing on product liability. If product components are manufactured by other companies, contracts with those suppliers should deal with the question of allocation of potential losses from product liability claims and the responsibility for obtaining insurance against such losses. Few things will make your lawyer happier than your producing, at the outset of the lawsuit, a contract between you and the supplier of the allegedly defective component requiring the supplier to indemnify you and provide insurance coverage for all losses arising out of any defects in the component. Depending on the relative bargaining power of the parties, such provisions may be easy to obtain, and they can eliminate or greatly reduce your exposure in the event of a lawsuit.

Contractual terms in agreements with purchasers of your product can also have an important impact on your product liability exposure. As noted in Chapter 1, contractual provisions disclaiming liability for personal injuries caused by a defective product are regarded as unenforceable throughout the United States. However, if the product is sold to a commercial user, a contract for sale may include terms establishing the allocation of losses or terms that disclaim all liability or limit the purchaser’s remedies. It is frequently possible, by including a carefully written disclaimer in a sales contract, to limit liability to a commercial buyer for defects in the product sold under the contract. In our experience, most manufacturers’ disclaimers are poorly drafted and, as a result, only sporadically effective. Frequently manufacturers do not
obtain an effective disclaimer from purchasers because of pressure from their sales force, who fear that a disclaimer will put the manufacturer at a competitive disadvantage. Although this is often a valid concern, manufacturers sometimes too easily surrender this important advantage.

The effectiveness of these contractual limitations varies from state to state. It is unwise, therefore, to rely solely on the effectiveness of such provisions. But it is an even greater mistake to fail to make use of them when they might be effective.

All contractual limitations should be in writing and part of the contract of sale. Disclaimers that the buyer never sees until after delivery of the product are always looked on by the courts with disfavor.

The typeface used for the disclaimer should be larger than that used in the rest of the document or should otherwise stand out. The disclaimer provision should have a large-type heading with language that clearly announces its purpose, such as DISCLAIMER OF WARRANTY, WAIVER OF LIABILITIES, AND LIMITATION OF REMEDIES. The language of the provisions should be unambiguous and inclusive. If the intention is to write as broad a disclaimer as possible, then the warranty of fitness for a particular purpose, warranty of merchantability, all other implied warranties, and some forms of tort liability—ordinary negligence and strict liability—should be mentioned explicitly. Under the laws of many states, disclaimers of more blameworthy forms of tort liability—such as extreme negligence, willful and wanton disregard of known dangers, and the intentional causing of harm—cannot be disclaimed, and their inclusion in a disclaimer may invalidate the entire clause. It is therefore a good idea to include a severability provision, under which the parties agree that if one part of the agreement is found to be invalid, the rest will remain enforceable.

There is a federal warranty statute, the “Magnuson-Moss Warranty–Federal Trade Commission Improvement Act,” that is applicable in all states and limits a manufacturer’s power to disclaim implied warranties for consumer goods. The Act also requires the inclusion of specified boilerplate language in the warranty. If you plan to use disclaimers in connection with consumer goods, you should have a knowledgeable product liability lawyer review your proposed disclaimers before use.

Production Even the best-designed product may prove defective if the production process permits faulty construction. As product liability prevention manager, you should make sure that the company inspects the product at appropriate points in the manufacturing process and makes and preserves a record of those inspections. For those defects not readily ascertainable through visual inspection, testing procedures may be appropriate.

Your company is the best judge of how and how often one of its products needs to be inspected and tested to see that it conforms to the quality expected. Lawyers can help, however, by ensuring that quality control measures are adequately documented so that the benefits created by a strong quality control program are available to the manufacturer in litigation. Typically, this will involve creating a form that is signed or stamped at various stages of the process. For some products, quantitative measurements may be appropriate. You may want to consider whether qualitative assessments other than “approved” or “passed” should be used. The procedures developed should be simple and straightforward enough so that the forms will be completed
correctly. It may be better to have no records at all than to have records that are deficient. Thus, your records should be checked for accuracy.

**After Delivery of the Product** Under the laws of many states, a manufacturer must continue to exercise reasonable care to warn consumers of hazards discovered by the manufacturer after its product is delivered. This can be true even if the manufacturer no longer manufactures the product line.

You will reduce your company’s exposure to product liability claims by having in place an effective system to accomplish some or all of the following:

- **Review the in-service history of the product as learned from user communications or from observations by your representatives in the field;**
- **Monitor information about the service history of similar products; and**
- **Follow changes that may occur in relevant government or industry regulations, standards, or practices.**

If information received after delivery of the product leads you to conclude that its original instructions or warnings did not adequately advise users of a particular hazard, you should issue updated information using appropriate means to communicate with product users. It is important to have a system to facilitate this communication. Many manufacturers of machinery have service bulletin or service letter procedures to accomplish this. They may also have bulletin or revision services for instructional manuals that describe how to operate and maintain the product. For many manufacturers, especially those that produce consumer goods, the most difficult aspect of developing such a system for issuing post-delivery warnings is keeping track of the identity of the users of the product. Many manufacturers include with the product’s instructions a postcard that the purchaser can use to provide the company with certain information, including the user’s name and address. If you maintain such records, be sure they are used if a potential hazard is discovered.

In some instances, a newly discovered hazard may prompt you to make a change in the product’s design to eliminate the hazard or reduce the possibility of its occurrence or the severity of its consequences. In such a case it may be wise to make current product users aware of the design improvement and to offer a retrofit kit with which they can make the change to their product. Depending on the circumstances and the industry involved, a recall of the product may be the appropriate course of action. A recall typically involves the return of the product for replacement, modification, or refund. Because recalls often require swift action, you should have a recall plan in place and be ready to execute it. You may also be required by law to report information that you learn about hazards in your products to certain federal and state government agencies. These reporting requirements generally have short deadlines and can carry significant fines and penalties for failing to make a timely report.

When new hazards are discovered after delivery of the product, consultation with your legal counsel is important to determine your company’s obligations and to formulate the appropriate response.
Insurance  The precautions discussed in the preceding sections cannot guarantee that you will not eventually be faced with a product liability lawsuit. For this reason, most manufacturers secure some type of product liability insurance coverage.

This type of insurance is designed to protect a business that designs, manufactures, and/or sells a product against claims that a defect in the product has harmed a user. Product liability insurance is available from a variety of sources inside and outside the United States and comes in a variety of forms. Advice on how to obtain appropriate insurance coverage on the best terms is far beyond the scope of this primer. What can be done here is to suggest some questions you should ask to be sure that your coverage is tailored to the particular risks you face, and that any limitations on the policy coverage are acceptable in light of those risks:

- Are the policy’s liability limits and the insurer’s obligation to provide a defense adequate to protect you in the event a tragic accident occurs while your product is in use? A small component part supplier of a bus can have huge exposure if the bus has a catastrophic accident because of a defect in the part. Defense costs alone in such a case can easily be in the hundreds of thousands of dollars and may total in the millions.

- Does the policy exclude any type of liability that you are likely to face? Geographic limitations are found in some policies. A manufacturer engaged in export activities generally needs worldwide coverage.

- Does the policy cover punitive damages? Some policies expressly exclude punitive damages, while others never address the question.

- Does the policy give you a voice in the selection of counsel? Many American companies have found it useful to appoint law firms as national or regional trial counsel for specific product lines or areas of the country. The advantage is that the lawyers develop expertise in your product, come to know your key employees, and do not need to traverse a learning curve with every new claim. This system also ensures that you are represented by competent counsel.

It is advisable to review insurance coverages, particularly liability limits and exclusions, on a regular basis to ensure that the protection afforded continues to be adequate and comprehensive as your business grows and changes over time. Sound insurance planning carried out before a claim arises can be one of the most important assets of your defense in a product liability lawsuit.

Between Accident and Lawsuit

Learning of Accidents  Ideally, you should have knowledgeable people investigate each significant accident involving your product soon after the accident occurs and before the physical evidence has been destroyed. But before you can investigate an accident, you first have to learn that it has occurred. Depending on what kind of product you make, learning of accidents involving your products can range from very easy to very difficult.

In aviation, for example, governments have programs for investigating most aircraft accidents
and incidents, and airframe and engine manufacturers generally learn of serious accidents involving their products within hours of the occurrence. In many industries, however, it is usually difficult to obtain timely notice about product-related accidents unless they capture headlines.

Consider what kind of system is best for learning about serious accidents involving your company’s products. Newspaper clipping services are available, and so are distributor and dealer networks. Government regulatory agencies, such as the Consumer Product Safety Commission, the National Highway Traffic Safety Administration, the Food and Drug Administration, and the Federal Aviation Administration, collect and assemble reports of incidents involving the products they regulate. Typically those reports are available to the public. Whatever system you select for learning of accidents, it must be tailored to your company’s circumstances.

If you make a product regulated by certain federal or state agencies—including those identified in the preceding paragraph—you may have an obligation to report to them the information that you learn about certain kinds of injury-causing incidents involving your product. These reporting requirements are established by statute, and failure to comply with them can result in civil or even criminal penalties.

There is no reason to have a system for learning of accidents if you do not also have a system for constructively using the knowledge you obtain. If your intelligence-gathering activities result only in the creation of files and databases full of third-hand, negative reports about the performance of a product under unspecified conditions, all that has been accomplished is the collection of documents that plaintiffs will use against you in their lawsuits. In addition, attorneys have been known to contact persons involved in such reported incidents to solicit their claims.

Investigation If you decide to investigate serious accidents involving your products, you need trained investigators with the following qualities:

• *Familiarity with the product;*

• *A good common-sense understanding of what is important in determining how an accident occurred;*

• *Sufficient familiarity with lawsuits to be sensitive to evidentiary problems;*

• *Personality characteristics conducive to being a good witness because the investigator will undoubtedly be called to testify on behalf of the company on many occasions; and*

• *Most importantly, a high energy level and a strong sense of commitment to the product and the company.*

Accident investigators should be selected carefully. In some companies the job has been regarded as a dead end. It should not be. In pay, status, and career opportunities, management should make it clear that accident investigators are valuable employees. People who are simply putting in their time until retirement are not likely to exhibit the creativity and energy needed in a good accident investigator. Beyond that, because the job involves working closely with lawyers,
it is important to have people who can and will work well with them.

There are two primary purposes of an early investigation. First, and more importantly, your company must learn what caused the accident to see whether there is a product problem that needs to be remedied. Second, the facts and circumstances of the accident should be documented so that a record can be preserved for later use in defending a lawsuit. Always be careful, however, that the investigation is not handled in such a way that it precipitates a claim that would not otherwise have been made.

Also consider how best to document the results of an investigation. Some companies create two reports: information needed for the company’s purposes is reported through normal company channels, and information gathered for litigation purposes goes directly to the company’s lawyers and is not distributed within the company. This lets you deal with any product problems that may have been detected during the investigation and ensure that attorney-client or work-product privilege protects documentation containing the litigation-related information.

**Informal Claim Handling** Sometimes claims with the potential for developing into lawsuits can be resolved appropriately and fairly at an early stage. Compared to the costs of litigation, there are many things that your company might offer an informal claimant that would prove cost-effective in the long run. The key is an informal claim-handling program staffed with people who are cordial and diligent, so that a claimant does not develop a sense of frustration and anger that could instigate avoidable litigation.

**When Lawyers Are Involved** When a claimant’s lawyer is involved in presenting the claim, the opportunities for a quick, reasonable settlement can sometimes be diminished but not necessarily eliminated. The initial claim may come from a lawyer who is a friend or business acquaintance of the claimant and who has not entered into a contingent-fee agreement with the claimant. A contingent-fee lawyer is one who takes a plaintiff’s case on the basis of being paid a percentage (usually 30 to 40 percent) of the amount received by the plaintiff, which means that if the plaintiff recovers nothing, the lawyer receives no fee. If there is no contingent-fee agreement, you may be able to show the claimant the value of settling the claim early so that the claimant will get to keep the entire recovery (minus modest hourly charges by the lawyer), rather than having to share 30 or 40 percent of the award with a contingent-fee lawyer.

Sometimes a lawyer representing an injured person in litigation with a third party asks a manufacturer for information about its product to use in that litigation. Dealing with such requests is a tricky problem. If you are uncooperative and tell the lawyer that you will provide no assistance, this may result in your company’s being named as a party in the lawsuit. But it is generally not a wise policy to turn over access to company documents and personnel without restriction. When this situation arises, the best course may be to start off by simply asking the attorney directly if the plaintiff is considering asserting a claim against the company. If the lawyer indicates that a claim is not being considered, you should ask for a release in exchange for your cooperation.

Whenever the claimant or potential claimant has involved a lawyer, you should have one involved on behalf of the company. Most nonlawyers cannot be expected to understand the legal system well enough to avoid getting into trouble when negotiating with lawyers.
Defending Lawsuits

Receipt of the Complaint Your company should have a system for dealing with a complaint promptly when it is received. Litigation papers cannot be allowed to gather dust on someone’s desk or travel from office to office in search of a final resting place. There are a number of reasons why this is important. First, as previously discussed, the company can be in default if it fails to answer the complaint within the time period established by the court. A court may excuse a default entered as a result of the company’s inability to get the complaint to the right people in time to file an answer, but the adverse consequence of a default judgment is so great that you cannot afford to take the chance that the court will not be so lenient. Second, a right to remove the action from state to federal court may be lost if the complaint is not dealt with promptly. If there is more than one defendant, usually all must join in the removal notice, and it requires some advance planning to do that in a timely manner. Finally, a long delay in dealing with the complaint may restrict your ability to hire the lawyer you want. In small communities, there may be only a few lawyers capable of representing you adequately in product liability litigation. A delay in reacting to the complaint may result in the best lawyers’ having been hired by others.

Reliance on Insurers Most product liability insurance policies have provisions giving the insurer the right to control the defense, including the choice of defense counsel. If your policy has such provisions, one question that you should address is whether the insurer will consult with you when choosing counsel. The most successful product liability prevention programs are those in which the company is deeply involved in cooperation with the insurer, even in activities that the insurance company has a right to control. In cases involving serious accidents or significant financial exposure, you may want to recommend a lawyer or law firm to your insurers, choosing them not because they are the insurance company’s favored firm where the lawsuit is pending, but rather because they have the ability and track record in handling complicated product liability matters. When serious litigation is on the horizon, you should choose your defense lawyers the same way you would choose a brain surgeon—very carefully.

If your company and its insurers are confronted with many product liability suits, it may be advisable to have a single law firm coordinate claims on a national basis. Use of national counsel avoids the difficulties of educating many local lawyers again and again about technical issues relating to your product.

Litigation Support An important part of any product liability program is assisting your lawyers in defending product liability litigation. This assistance generally has two aspects. First, the company should have a “litigation support” staff to gather documents, find witnesses, and generally help your lawyers respond to discovery and prepare the case for trial. Generally the qualities that should be looked for in litigation support personnel are resourcefulness, thoroughness, imagination, and knowledge about the company and its products. Of these, the first three are clearly the most important because knowledge can be acquired over time. Each of those selected must be a “can-do” type of person who will respond promptly and completely to your lawyers’ requests for assistance and who can make helpful suggestions to them about what information that would be useful to the defense might be available. People whose normal reaction to a request for assistance is to explain why the request cannot be complied with are not appropriate for this work.
The litigation support people may be the same people who investigate accidents. Although this is typically the case, there are some disadvantages to this system. The investigators will undoubtedly have their depositions taken during the pretrial discovery phase. If they also provide litigation support, they may have substantially more information about the case than simply what they learned from their investigation activities. The results of their investigation will generally be discoverable by the plaintiff, but much of the litigation support work done at the request of the lawyers will not be. The disadvantage of having the same people perform both functions arises because it is difficult to restrict a witness to testifying only about the knowledge acquired through an accident investigation in the remote past and not about the full range of present knowledge, including information acquired through litigation support activities. In other words, using the same people for investigation and litigation support may result in the disclosure of information developed for your lawyers and provide plaintiffs some insight into your defense strategy.

Even more important than having people whose formal duties include litigation support is having, throughout your entire organization, a clearly understood policy of doing what is needed to support your company’s litigation efforts. Many companies do not adequately support their lawyers. Invariably, they learn the hard way that product liability claims are extremely important and their outcomes can have not only direct monetary consequences, but a significant impact on how the public views their products.

**Settling Cases** Most product liability claims are settled before they get to trial. As a general rule, plaintiffs’ lawyers working on a contingent-fee basis find it more profitable to settle cases than try them, for the simple reason that they can settle multiple claims in the time it takes to complete one trial. If it is likely that a defect in your product caused a claimant’s injury, it usually makes sense for you to seek an early settlement too.

In spite of this, lawsuits drag on for years, frequently to settle on the courthouse steps after significant legal fees and expenses have accumulated. There are many reasons for last-minute settlements, including inertia, overwork, procrastination, unrealistic assessment of liability or damages, competing egos, and greed. Manufacturers who remain active in the defense of claims can minimize or overcome these factors and thereby reduce the total cost of their liability risk.

Many books have been written about negotiating settlements. Here are a few useful rules that we have learned:

- **The value of cases escalates over time.** If it is probable that a product defect caused a claimant’s injury, you will probably save money by settling early, and you will certainly save legal fees and the disruption of your business caused by litigation.

- **One reason cases take a long time to settle is that the lawyers for one or more of the parties do not understand the merits (or lack of merit) of their cases. Therefore it is often useful to educate your opponent to lead to an informed review of the merits of the plaintiff’s case. A motion for summary judgment often has this therapeutic effect even if the motion is ultimately denied.**

- **Lawyers are gladiators; they like to fight. That may be what you want them to do, but often**
it is not. At an early date you should make clear to your lawyer what your goals are. This may sound obvious, but it often does not happen. Many lawyers go after each other with hammer and tongs because the manufacturer or insurer has failed to tell anyone that it would be very happy with a nice, quiet, reasonable, prompt settlement.

• Egos frequently get in the way of settlements. Sometimes a lawsuit develops a life of its own unrelated to the objectives of the parties. It is useful from time to time to pause and examine whether egos and combative instincts are prolonging the battle.

• It is important to get a handle on the facts of the case as soon as possible. If you have a problem in a lawsuit (for example, some bad documents) and your lawyer learns of the problem early on, before the plaintiff’s lawyer does, it may be possible to negotiate a more reasonable settlement than it will be once the problem becomes public knowledge. Again, this may sound obvious, but we have seen many lawsuits in which a manufacturer failed to inform its lawyer of soft spots in its defense until it was too late.

• The strength of a defense changes over time, and it is important not to be blinded by your early assessment of the merits of your case. It is valuable to reassess the case periodically. As the discovery process proceeds and new facts come to light, it may be time to reevaluate what you are willing to pay in settlement. You do not have to wait until you get to the courthouse steps to abandon that early optimistic assessment.

• It is best to litigate each case as aggressively as you can right up to the day it settles. You will achieve most good settlements simply by being better prepared and getting your side into a position in the litigation that is superior to the other side’s.
Conclusion

Our purpose in writing this guide was not to help manufacturers of defective products win lawsuits. Those claims are best settled early and fairly. However, many manufacturers have been burned by the American product liability system in cases in which they knew, in their heart of hearts, that their product was not defective and that they had not done anything wrong.

Our experience defending product liability lawsuits and working closely with manufacturers on product liability prevention programs convinces us that manufacturers can lessen their product liability exposure significantly in such cases by properly educating their employees. This guide can be used to provide employees with an understanding of the basics of product liability law (Chapter 1), the procedures involved in product liability lawsuits (Chapter 2), and the preventive measures that can be taken to reduce product liability exposure (Chapter 3). We hope that it will reduce the number of instances in which the legal system backfires and a manufacturer is punished undeservedly.

Appendix

Sample Jury Instructions on Liability

*(Drawn from standard California jury instructions. These instructions, together with others, will be read by the judge to the jury at the close of the case.)*

In this case the plaintiff seeks to recover damages against the defendant on one or more of three different claimed bases of recovery.

Strict Liability

The first is the claim that the product in question was defective. I will now instruct on the law as it relates to the claim of a defective product. A product may be defective because of a defect in manufacture or design or a failure to adequately warn the consumer of a hazard involved in the foreseeable use of the product.

Manufacturing Defect

The manufacturer of a product is liable for injuries a cause of which was a defect in the product’s manufacture that existed when it left the possession of the manufacturer, provided that the injury resulted from a use of the product that was reasonably foreseeable to the manufacturer.
A defect in the manufacture of a product exists if the product differs from the manufacturer’s intended result or if the product differs from apparently identical products from the same manufacturer.

**Design Defect**

The manufacturer of a product is liable for injuries a cause of which was a defect in the product’s design that existed when it left the possession of the manufacturer, provided that they resulted from a use of the product that was reasonably foreseeable to the manufacturer.

A product is defective in design if it fails to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or if there is a risk of danger inherent in the design which outweighs the benefits of that design.

In determining whether the benefits of the design outweigh such risks you may consider, among other things, the gravity of the danger posed by the design, the likelihood that such danger would cause damage, the mechanical feasibility of a safer alternate design at the time of manufacture, the financial cost of an improved design, and the adverse consequences to the product and the consumer that would result from an alternate design.

**Warning Defect**

The manufacturer of a product is liable for injuries a cause of which was a defect from failure to warn, provided that they resulted from a use of the product that was reasonably foreseeable to the manufacturer.

A product is defective if the use of the product in a manner that is reasonably foreseeable by the defendant involves a substantial danger that would not be readily recognized by the ordinary user of the product, this danger was known or knowable in light of the generally recognized and prevailing best scientific knowledge available at the time of the manufacture and distribution, and the manufacturer failed to give an adequate warning of that danger.

**Negligence**

The second claimed basis of recovery is the claim that the defendant was negligent in the manufacture of the product in question. I will now instruct you on the law as it relates to the claim of negligence in the manufacture of a product.

The manufacturer of a product is liable for injuries a cause of which was the manufacturer’s negligence.

The manufacturer of a product that is reasonably certain to be dangerous if negligently made has a duty to exercise reasonable care in the design, manufacture, testing, and inspection of the product and in the testing and inspection of any component parts made by another so that the
product may be safely used in a manner and for a purpose for which it was made.

A failure to fulfill that duty is negligence.

**Breach of Warranty**

The third claimed basis of recovery is the claim that the defendant breached a warranty with respect to the product in question. I will now instruct you on the law as it relates to the claim of breach of warranty. A breach of warranty may be established without proof of negligence on the part of the defendant.

The manufacturer of a product is liable for injury, damage, loss, or harm caused by its breach of an express or implied warranty for a product that it sold.

One of the elements of a sale of a product may be an affirmation of fact or promise by the manufacturer that the product possesses certain characteristics. This affirmation of fact or promise is called a warranty. It may be made expressly in so many words by the seller or it may be implied from the circumstances of the sale.

The term “affirmation of fact” means a positive assertion of a fact or statement concerning the subject matter of a transaction, which might otherwise be only an expression of opinion, which is affirmed as an existing fact material to the transaction and reasonably induces the other party to rely upon it as fact.

*Express Warranty*

Any affirmation of fact made by the seller to the buyer which relates to the product and becomes part of the basis of the bargain creates an express warranty that the product shall conform to the affirmation or promise. An affirmation or promise may be oral or in writing.

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.

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.

No particular word or form of expression is necessary to create an express warranty, nor is it necessary that the seller use formal words such as “warrant” or “guarantee” or that the seller have a specific intention to make a warranty.

No affirmation of the value of the goods shall be construed to create a warranty. No statement purporting to be merely the seller’s opinion or commendation of the goods shall be construed to create a warranty.

There is a breach of warranty when the goods sold do not reasonably conform to the expressly warranted or promised quality, characteristic, or performance.
Implied Warranty

Where the seller at the time of the sale has reason to know any particular purpose for which the product is required and that the buyer is relying on the seller’s skill or judgment to select or furnish a suitable product, there is an implied warranty that the product shall be fit for such purpose. This warranty is known as the implied warranty of fitness. There is a breach of the implied warranty of fitness if the product sold was not reasonably fit for the purposes for which it was sold.

In a sale of a product such as that which occurred in this case, there is an implied warranty that the product shall be merchantable. This implied warranty means that the product is at least fit for the ordinary purposes for which such products are used; is adequately contained, packaged, and labeled; and conforms to the promises or affirmations of fact made on the container or label, if any. This warranty is referred to as the implied warranty of merchantability. There is a breach of the implied warranty of merchantability if the product sold was not reasonably suitable for the ordinary purposes for which that product is used or it did not reasonably conform to the promises or affirmations made on the container or label.

Effect of Improper Use

Any warranty of the product involved in this case was based on the assumption that it would be used in a reasonable manner appropriate to the purpose for which it was intended. If you should find that whatever injury or damage the plaintiff suffered in this case resulted solely from the plaintiff’s improper use of the product involved, then the plaintiff cannot recover damages for breach of warranty.

Cause

The law defines cause in its own particular way. A cause of injury, damage, loss, or harm is something that is a substantial factor in bringing about an injury, damage, loss, or harm.

Sample Document Freeze Memorandum

(This is a simple example of a document freeze memorandum for illustrative purposes only and should not be used as a template. Instead, consult legal counsel to craft a memorandum appropriate for the particular situation.)

TO: All Company Employees
FROM: General Counsel
RE: Preservation of Documents Relevant to Accident

On January 1, 2001, an accident occurred in Seattle, Washington, that involved the Company’s
Product. No lawsuits have been filed yet against the Company in connection with this accident, but it is possible that litigation will result. This memorandum provides guidelines for complying with the Company’s obligations to preserve materials that could be relevant in potential litigation.

**The duty to preserve these materials supersedes and overrides any document retention policies that the Company currently has in place that might otherwise cause the disposal of such materials.** You must take this obligation seriously. Failure to preserve these materials can result in legal liability for the Company and individual employees and can lead to disciplinary action, including termination.

**Materials to Preserve**

1. All documents relating to the design of the Product.
2. All documents relating to the accident or any investigation of it.
3. All documents relating to the manufacture and sale of the Product.

**Guidelines for Preservation**

The term “materials” as used above is not limited to formal Company documents. Any form of information recorded by any means, whether handwritten, printed, electronic, photographic, video, or other means, is included. This also includes any material generated or received by the Company.

With respect to electronic records, the records must be preserved from the operation of any routine processes for the destruction or elimination of such records.

The duty to preserve material includes preserving newly created material, if the material falls within the categories listed above.

**Sample Requests for Production of Documents and Things**

**Instructions**

The term “document” includes all originals, copies, nonidentical copies (because of notations on the copies), drafts, revisions with and without annotations and editing of the following:

All written, recorded, printed, typed and/or other graphic matter and/or data, however produced or reproduced, stored or filed, including but not limited to, correspondence, telegrams, telex, mailgrams, memoranda, notations of telephone conversations, diaries, calendars, time records, time sheets, expense accounts, payroll records, personnel records, reports, worksheets, cost and feasibility studies, projections, summaries, offers, proposals, estimates, agreements, contracts, memoranda of understandings, bids, bid packages, quotes, purchase orders, stocks, bonds, equity
ownership records, promissory notes, guarantees, deeds, trusts, mortgages, charts, books, procedures manuals, construction logs, invoices, statements, statements for services, certificates of payments, checks, vouchers, certificates of completion, licenses, permits, photographs, x-rays, slides, videotapes, films, movies, pictures, sound recordings, computer printouts, computer memory banks, microfilm, microfiche, depositions, trial or hearing transcripts, affidavits, statements, advertising, press releases, corporate minutes, and any other means of recording information for retrieval.

With respect to any document maintained or stored electronically, please harvest it in a manner that maintains the integrity and readability of all data, including all metadata. Please produce all documents maintained and stored electronically in native, electronic format with all relevant metadata intact and in an appropriate and useable manner.

Encrypted or password-protected documents should be produced in a form permitting them to be reviewed. Documents stored as electronic data on magnetic, optical, or other storage media as “active” or “backup” files shall be produced in their native formats with any associated metadata.

Please organize electronic documents produced for inspection in the same manner that you store them (e.g., if maintained by a custodian, such as email residing on an email server, please organize documents for production by custodian; if maintained in a subfolder of “My Documents” on a custodian’s hard drive, please organize documents for production by custodian with path information preserved, etc.).

Definitions

“Accident” means the incident in which the plaintiff was injured, as set forth in the plaintiff’s Complaint.

“Product” means the type of product involved in the Accident at issue in this lawsuit.

“You” and “Your” refer to the entity or entities, respectively, to whom these Requests for Production are directed and shall be deemed to include your attorneys, agents, investigators, servants, employees, experts, consultants, and representatives, and your insurers and their representatives, all whether appointed by you or acting on your behalf, or as authorized or required by operation of law.

Requests for Production

REQUEST FOR PRODUCTION NO. 1: Produce all documents in any way related to the design, manufacture, assembly, and/or fabrication of the Product.

REQUEST FOR PRODUCTION NO. 2: Produce all analyses, test reports, quality control documents, memoranda, photographs, sketches, or other documents relating to any testing, analysis, and/or the safety of the Product or any of its component parts, including, but not limited to, such documents made or generated after the date of the Accident.
REQUEST FOR PRODUCTION NO. 3: Produce all documents reflecting or relating to any failures, in-service or maintenance concerns, problems, difficulties, or deficiencies concerning the Product.

REQUEST FOR PRODUCTION NO. 4: Produce the master design drawings for the Product.

REQUEST FOR PRODUCTION NO. 5: Produce all reports, analyses, and other documents concerning or relating to the Accident involving the Product.

REQUEST FOR PRODUCTION NO. 6: Produce all documents in which alternate designs, materials, construction, or placement of components utilized in the Product were discussed, considered, or recommended by You for use in any Product models manufactured or distributed by You.

REQUEST FOR PRODUCTION NO. 7: Produce current organizational charts for Your company.

REQUEST FOR PRODUCTION NO. 8: Produce all documents, including, but not limited to, all policies, protocols, or schedules, relating to Your document retention policy.

**Sample Jury Instruction on Spoliation**

*(Drawn from North Carolina jury instructions.)*

Evidence has been received which tends to show that certain evidence was in the exclusive possession of the defendant and has been lost, misplaced, suppressed, destroyed, or corrupted even though the defendant was aware of the plaintiff’s claim. From this you may infer, though you are not compelled to do so, that such evidence would be damaging to the defendant. You may give this inference such force and effect as you think it should have under all of the facts and circumstances. You are permitted this inference even though there is no evidence that the defendant acted intentionally, negligently, or in bad faith. You should not make this inference if you find that the evidence was equally accessible to both parties or if there is a fair, frank, and satisfactory explanation of what happened to the evidence.
Glossary

This glossary provides simplified definitions of various terms as they are used in the context of product liability lawsuits.

Admiralty jurisdiction The power of the federal courts to hear cases related to maritime commerce

Affirmative defense A defense that must be asserted in the defendant’s answer and that, if proven, will eliminate or lessen defendant’s liability to the plaintiff

Answer The document in which the defendant responds to the plaintiff’s complaint

Appellant The party bringing an appeal

Appellate court A court that reviews decisions of a trial court

Appellee The party against whom an appeal is brought

Bench trial A trial without a jury

Bifurcation Separate trials of different issues in the same lawsuit, such as liability and damages

Breach of warranty Violation of a warranty

Brief A document containing in written form the arguments of a party to an appeal (also used for written submissions to trial courts)

Burden of proof The obligation of a party to a lawsuit to persuade the jury (or the judge in a bench trial) that a fact is more likely true than not true

Challenge for cause A request that a prospective juror not be allowed to be a member of the jury because of specified reasons

Class action A lawsuit in which the plaintiff asserts claims on behalf of a class of similarly situated people

Closing argument The final statements made by the lawyers to the jury (or to the judge in a bench trial)

Collateral source Compensation for an injury received by the plaintiff from a source wholly independent of the defendant

Comparative fault Relative fault of those who caused the plaintiff’s injury

Comparative negligence Relative negligence of those who caused the plaintiff’s injury
**Compensatory damages** Damages to compensate the plaintiff for economic and noneconomic losses

**Complaint** The document that describes the plaintiff’s claims and is filed with the court and delivered to the defendant in order to start a lawsuit

**Consolidation** Combination of several lawsuits into one action for the purpose of trial or pretrial proceedings

**Contingent fee** A percentage (usually 30 to 40 percent) of the amount awarded the plaintiff that is paid to the lawyer who successfully argued the case

**Contribution** The right of one who has paid a common liability to recover a portion of the payment from another who is also liable

**Contributory negligence** Negligence of the plaintiff that was a cause of the plaintiff’s own injury

**Counterclaim** A claim by a defendant against the plaintiff

**Cross-claim** A claim by one defendant against another defendant

**Cross-examination** Questioning of a witness by the lawyer for a party opposed to the one who called the witness to testify at trial

**Damages** The monetary compensation that may be awarded by a court to a person who has suffered an injury

**Default judgment** A judgment entered against a defendant who has failed to respond to the plaintiff’s complaint

**Defendant** The party to a lawsuit from whom the plaintiff seeks to recover damages

**Deponent** A witness who testifies at a deposition

**Deposition** A method of pretrial discovery in which a person is questioned orally under oath and a record is made of the questions and answers

**Direct examination** Questioning of a witness by the lawyer for the party that called the witness to testify at trial

**Directed verdict** A verdict ordered by the judge because the plaintiff failed to present sufficient evidence for the jury to find against the defendant

**Disclaimer** A contract provision in which one party renounces its right to make certain claims against another party to the contract

**Discovery** The pretrial procedures by which a party to a lawsuit can obtain information from another party to the lawsuit or from others
Diversity jurisdiction Jurisdiction of federal courts to hear cases between citizens of different states or between a citizen of one state and a citizen of a foreign country

Document freeze memorandum A memorandum distributed to a company’s employees intended to preserve potential evidence and halt the routine destruction of documents or electronically stored information pursuant to a company’s document retention program

Economic losses Monetary losses and out-of-pocket expenses such as lost earnings and medical expenses

Electronic discovery Discovery of electronically stored information, such as emails, documents, databases, and other information stored on computer systems

Expert witness A witness who by reason of education or experience possesses scientific, technical, or other specialized knowledge that will assist the jury in understanding the evidence or determining a factual issue

Federal preemption A doctrine under which plaintiffs may not claim that a product design or warning is defective because (a) a federal statute or regulation requires that the product be manufactured with the design or warning at issue or (b) the product has received close scrutiny and approval by a designated federal agency

FMEA Failure mode and effects analysis that identifies all possible failures of a product and determines the consequences of each

Forum non conveniens The discretionary power of a court to decline jurisdiction over a lawsuit when the convenience of parties and witnesses and the ends of justice would be better served if the lawsuit were brought and tried in another state or nation

General verdict A verdict in which the jury finds for either the plaintiff or defendant in general terms

Government contractor defense A defense under which manufacturers who sell to the federal government are not liable for personal injuries caused by design defects in their product if (a) the federal government approved reasonably precise specifications for the product, (b) the product conformed to those specifications, and (c) the manufacturer warned the government about any dangers in the use of the product that were known to the manufacturer but not to the government

Hazard intensity labels Words such as DANGER, WARNING, or CAUTION that appear on warning labels to alert users to the level of potential hazard associated with a product

Interrogatories A method of pretrial discovery in which one party to the lawsuit asks questions in writing of another party to the lawsuit

Joint and several liability The liability of two or more persons who caused the plaintiff’s injury to pay the entire amount of damages awarded

Judgment The final decision of the court resolving a lawsuit and determining the rights and
obligations of the parties

**Jurisdiction** The power of a particular court to decide a case because it has authority over the parties to and the subject matter of the lawsuit

**Jury** The group of citizens who hear evidence and decide disputed facts in a lawsuit

**Jury demand** A request by a party to a lawsuit to have a trial by jury

**Learned intermediary** A medical professional who receives warnings about prescription drugs and uses training and knowledge to provide necessary information to a patient

**Liability** An obligation to pay damages

**Liable** Obligated to pay damages

**Litigation** A lawsuit

**Long-arm statute** A law that lists the kinds of contacts a nonresident defendant must have with a state before its courts will exercise personal jurisdiction over the defendant

**Loss of consortium** Damage to the marital relationship caused by the physical or mental impairment of one spouse for which the other spouse may recover damages

**Misuse** Use of a product that is not in accord with the manufacturer’s intended use

**Motion to dismiss** An alternative to filing an answer and a way to raise a defense easily presented, such as lack of jurisdiction, at the outset of the lawsuit

**Negligence** The failure to exercise the degree of care that a reasonable person would exercise under the same circumstances

**Noneconomic losses** Nonfinancial hardships, such as pain and suffering

**Objection** A statement by a lawyer that a question to a witness or a request during discovery is improper

**Opening statement** The initial statements by the lawyers to the jury (or to the judge in a bench trial) describing the nature of the lawsuit and the anticipated proof

**Oral argument** An argument made in person to the judges of an appellate court by counsel for the parties

**Peremptory challenge** The right to excuse a prospective juror without giving a reason

**Personal injury** Harm to one’s person

**Personal jurisdiction** The power of a court over a defendant who resides or engages in purposeful activity in the court’s territory
**Plaintiff** The party to a lawsuit who seeks an award of damages from the defendant and who starts the lawsuit by filing a complaint.

**Privilege** A protection against forced disclosures of confidential communications between lawyers and clients and between others in certain protected relationships.

**Product liability** The liability of the manufacturer or others in the chain of distribution of a product to a person injured by the use of the product.

**Protective order** A court order protecting a party to a lawsuit from an improper request during pretrial discovery.

**Punitive damages** Damages awarded not to compensate the plaintiff but to punish the defendant and deter the defendant and others from future misconduct.

**Rebuttal evidence** Evidence presented during trial by a party after it has rested its case and after the opposing party has rested in order to contradict the opposing party’s evidence.

**Removal** A transfer of a lawsuit from state court to federal court.

**Request for production** A request by one party during pretrial discovery to inspect and/or copy documents or other tangible items in the possession, custody, or control of another party.

**Respondent** The party against whom an appeal is brought.

**Rests** Finishes presenting evidence at trial, either finally or subject to a right to present rebuttal evidence.

**Service** Delivery of court papers.

**Special verdict** A verdict in which the jury answers specific questions.

**Spoliation of evidence** The destruction, loss, or alteration by a party of something that another party could reasonably be expected to want to obtain during the discovery process.

**Statute of limitations** A law that fixes the length of time after an injury during which a lawsuit may be filed.

**Statute of repose** A law that fixes the length of time after initial delivery of the product during which a lawsuit may be filed.

**Strict liability** Liability of the manufacturer or others in the chain of distribution of the product to a person injured as a result of a defective condition in the product.

**Subject matter jurisdiction** The power of a particular court to decide a lawsuit because it has authority over the subject matter of the lawsuit.

**Summary judgment** Resolution of a lawsuit (or a portion of it) by the judge without a trial where there is no dispute regarding the facts.
**Summons** A document delivered to the defendant to give initial notice that the lawsuit has been started and that the defendant must respond to the plaintiff’s complaint by filing an answer.

**Survival action** A lawsuit for claims that a deceased person could have made up to the time of death but did not.

**Third-party claim** A claim by a defendant against a person who is neither a plaintiff nor another defendant in the lawsuit.

**Third-party defendant** The person against whom a third-party claim is made.

**Torts** The area of the law that deals with the rights of parties who have been injured by the wrongful conduct of others.

**Venue** The district or political subdivision in which a court with jurisdiction may hear and determine a lawsuit.

**Verdict** The decision of the jury.

**Voir dire** Questioning of prospective jurors by the judge and lawyers to determine their qualifications and suitability to serve as jurors.

**Warranty** An express or implied promise that the product sold has certain qualities.

**Wrongful death action** A lawsuit by or on behalf of surviving family members and other heirs for losses they have suffered or will suffer as a result of a death.
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From the Foreword

“Manufacturers are hurt in product liability litigation in the United States because their key employees do not understand the law and the legal process used to obtain damage awards from their employers. Because they lack this information, these employees in their day-to-day actions commit errors that lose lawsuits and increase the amount of damages awarded. . . . This primer was written for them.”

Perkins Coie is an international law firm offering a full spectrum of legal services. With more than 900 lawyers in 19 offices across the United States and Asia, the firm serves great companies ranging in size from start-ups to Fortune 50 companies. The Product Liability team at Perkins Coie represents manufacturers of aviation, automotive, chemical, consumer, industrial, pharmaceutical, recreational and other products. The firm is national and regional trial counsel for several manufacturers and conducts the defense of lawsuits throughout the nation and in foreign countries.