

This paper was prepared by a Warshauer Law Group attorney, for an audience of lawyers, as part of a ~ Legal Education program or for publication in a professional journal. If presented as part of a Continuing Legal Education program, the presentation included a speech and possibly a PowerPoint or Keynote presentation. An audio or video recording of the speech might be available from the sponsor of the program. This paper does not constitute legal advice; and readers are cautioned that because the law is continuously evolving that all or portions of this paper might not be correct at the time you read it.

AN OVERVIEW OF GEORGIA PRODUCT LIABILITY LAW

June 8, 2008

By: Michael J. Warshauer

I. INTRODUCTION

Product liability law imposes on manufacturers the risks and costs of injury to humans caused by defective products. A careful attorney will consider the potential for a product liability action in just about every case where a person is injured while using a machine, a consumer or industrial product, or even consuming a food or beverage. This is because “[p]roducts liability is concerned with injuries caused by products that are defectively manufactured, processed, or distributed.”¹ Too often, a potential products case is thought of too late, after the product has been destroyed, lost or put back into use, or the applicable time limit has expired. This paper provides an overview of the subject so that counsel who want to handle a first products case have a good start. It is also intended to educate lawyers who are not interested in the exhaustive work, and the potentially incredible expense associated with product liability actions, so they identify the claim and insure that the injured party is made aware of his or her rights.

¹ *Products Liability*, Noel & Phillips (1991) p. 1.

“Products liability is an area of law of immense importance to manufacturers, retailers and consumers, for it defines their rights and duties with regard to the production, sale and consumption of goods.”² Potential sources of product liability actions are almost limitless. Consider the typical workplace injury. The opportunities for a product liability action include everything from the machine on which the worker was working, the car or truck he was driving, and the chemicals to which he was exposed. “In times of mass production, new technology, modern advertising, high consumer demand, and a large volume of business activity, products liability has become a field of major importance.”³ Indeed, product liability actions are everywhere. This is not to say that all potential claims are economically viable or that economically viable claims should be prosecuted when an easier avenue is available. However, competent counsel will always at least consider the issue. Obviously this cannot be accomplished without some basic information on this huge topic.

A. Basic History of Product Liability Law

The product liability law we now have began before the industrial revolution when express warranty, as a contract theory, was first recognized in the 1600’s, followed by the recognition of implied warranty over the next one hundred years.⁴ “The law of warranty is the historical basis of all modern products liability law. Indeed, it has been said that a strict tort liability claim is nothing more than an implied warranty claim that is not subject to traditional contract defenses.”⁵ When commerce changed from consisting of individual sales of hand made products to large scale sales of mass produced products, a system was needed for the protection of humans from dangerous products. No longer was it possible for either the buyer or the seller

² *Eldridge's Georgia Products Liability*, McIntosh (1987), preface.

³ *Id.* at 1.

to individually inspect every product. Additionally, products increasingly sophisticated in their manufacture, and dangerous in their propensities, were being sold to distant markets affecting a wider variety of consumers.

Originally, privity of contract and some sort of express warranty were required to recover damages arising from the use of a defective product. It was thought that to allow otherwise would open the flood gates and every person injured by a product could file an action. These concerns were expressed by the English Court in what is thought to be the first product liability action seeking personal injury damages.⁶ This limitation proved unworkable; and the expectations of limitless claimants have proved unfounded because the concept of foreseeability has been used to limit the potential number of claimants. Furthermore, society has simply decided, over time, that between the innocent victims and the manufacturer, it is the manufacturer who should bear the burden and risk associated with dangerous products. The manufacturer is best able to control the dangers by proper design, manufacturing, and warnings. We now see some effort to shift back. In particular, manufacturing concerns have convinced Congress seemingly year after year to consider a national products liability act that would limit products liability actions in some states and broaden them in others. Such a national act would nationalize products liability laws with the primary goals being to eliminate joint and several liability, impose both a national statute of limitations and statute of repose, reduce punitive and perhaps general damages, and limit liability to manufacturers, among other things. We are seeing this same kind of legislation proposed and, to a lesser degree enacted, in our Georgia legislature. Yet, these kinds of cases represent a very small percentage of civil litigation. A

⁴ *Chandler v. Lopus*, 1 Jac. 1, 79 Eng. Rep. 3 (1625); *Gardner v. Gray*, 4 Camp. 144, 171 Eng. Rep. 46 (1815).

⁵ *Products Liability Practice Guide*, Vargo, §6.02 p.6-6

United States Department of Justice survey of civil legal cases in the 75 largest counties in the United States for the year 1992 noted:

In all, there were 761,919 cases disposed of by the legal system in those 75 counties. This includes all types of civil cases -- contract, real estate, and tort (i.e., the causing of damage or injury to third parties). Of that total, only 1.6% were traditional products liability cases.^[2] By comparison, 36% of the cases involved automobile accidents, and 48% involved alleged breaches of contract.

Of the 761,919 total cases, 12,026 (1.5% of the total) were decided by jury trials.^[3] Only 360 of those jury trials (.005% of the total) involved products liability.

Another argument for products liability reform is that plaintiffs win large awards unfairly. This does not appear to be supported either.

The DOJ Report states that defendants in products liability cases won about 60% of the jury trials. Of the cases won by the plaintiff, 50% of the final awards were less than \$250,000; only 15% were more than \$1 million. The total amount awarded to product liability plaintiffs (\$103 million) was 3.8% of the amount awarded in all of the cases decided by juries (\$2.7 billion). By contrast, awards in automobile cases amounted to 18.6% of the total (\$502 million), and awards in contract cases amounted to 30.3% of the total (\$820 million).

Reformers also argue that punitive damage awards in products liability cases are out of control and unjust. In fact, the DOJ Report found that of the 364 cases in which punitive damages were awarded, only 3 were products liability

⁶ *Winterbottom v. Wright*, 10 Meeson & Welsby 109, 152 Eng. Rep. 402 (ex. 1842).

cases. The total amount awarded in those 3 cases was \$40,000. By contrast, more than \$169 million was awarded as punitive damages in contract cases.⁷

There is no reason to believe that these statistics have changed in any material way as the number of civil actions is down in general.

The first products to be subject to what is essentially the modern rule of product liability were food and drug products. At the turn of the century, medicines and unwholesome foods were causing too many injuries. Accordingly, the law evolved - first by eliminating the privity requirement for actions involving dangerous foods and drugs.⁸ The next products to be subject to modern product liability law were dangerous machines that were starting to be sold on a wide spread scale. In particular, the manufacturers of those machines that were "imminently dangerous to life and limb",⁹ were held liable for defects in their machines. The real landmark case in product liability in this country, as we all remember from law school, is *MacPherson v. Buick Motor Co.*¹⁰, which eliminated the necessity of privity and thus allowed a plaintiff who did not purchase the particular dangerous product to nevertheless hold its manufacturer liable for the injuries it caused. And this was not a machine that was overtly dangerous to life and limb - it was simply a defective machine. Now we are seeing ever more sophisticated drugs and chemicals that cause more subtle and difficult to prove injuries. Now, however, the Courts seem to be making it ever harder for consumers to prevail by making the requirements for proof all the more difficult.¹¹ And, as the law has evolved, the courts, have removed some products, such as blood, from strict liability as a matter of public policy.¹²

⁷ This quotes the web site of the electric power producers which cites the Bureau of Justice Statistics Special Report, "Civil Jury Cases and Verdicts in Large Counties", United States Department of Justice, Office of Justice Programs, NCJ-154346, July, 1995 as its source.

⁸ E.g., *Thomas v. Winchester*, 6 N.Y. 397, 57 Am Dec. 455 (1852).

⁹ *Eldridge's Georgia Products Liability*, McIntosh (1987) p. 6.; e.g., *Huset v. J.I. Case Threshing Mach. Co.*, 120 F. 865 (8th Cir. 1903).

¹⁰ 217 N.Y. 382, 111 N.E. 1050 (1916).

¹¹ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993).and *General Electric v. Joiner*, 522 U.S. 136, 118 S.Ct. 512 (1997) which allows a trial judge to strike a party's expert testimony without any real fear of appellate review. *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167 (1999), which extends *Daubert* to all experts including engineers, and *Weisgram v. Marley Co.*, 528 U.S. 440, 120 S.Ct.

Privity had been a requirement because the only way to recover under the law at the turn of the century was to rely on the concept of breach of implied or express warranty. Early courts that allowed cases, without direct privity, to proceed simply stretched the implied warranty to the user. Warranty, after all, had a fairly long history and the courts were comfortable with it. It grew as a necessity out of commercialism, large scale sales, and transactions between strangers. Fortunately, this stretch of the law of warranty proved unwieldy and eventually the concept of strict liability was created wherein “a manufacturer is strictly liable in tort when the article he places on the market, knowing that it will be used without inspection for defects, proves to have a defect that causes injury to a human being.”¹³ With the advent of strict liability, the concept of warranty as a remedy in product liability cases, though still relevant, is of very little practical significance in most cases in which human beings are caused bodily injury. As a result, “relatively few lawsuits in Georgia rely solely on the breach of express or implied warranty theories.”¹⁴

“The Georgia courts have followed the national trends in the area of products liability generally.”¹⁵ Georgia has not allowed its consumers to go without remedy. At the turn of the century, Georgia was actually a little ahead of some states by abandoning privity as a requirement in cases involving consumable products such as medicines and foods.¹⁶ However, Georgia has never veered away from the requirement of privity for claims based on warranty except as to members of the purchaser’s household and guests in his home. Of course, with statutorily codified strict liability, this adherence to the requirement of privity has not limited the remedy available to Georgians.

1011 (2000) which makes it clear that a federal appellate court can, if it feels like it, ignore the discretion supposedly vested in courts by *Joiner* to take away a plaintiff’s case.

¹² *Johnson v. American National Red Cross*, 2003 WL 396354 (Ga. 2/24/03)

¹³ *Escola v. Coca-Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 150 P.2d 436 (1944).

¹⁴ *Georgia Products Liability*, 2nd Ed. Maleski, p. 1.

¹⁵ *Eldridge’s Georgia Products Liability*, McIntosh (1987) p. 10.

¹⁶ *Blood Balm Co. v. Cooper*, 83 Ga. 457, 10 S.E. 18 (1989); *Watson v. Augusta Brewing Co.*, 124 Ga. 121, 52 S.E. 152 (1905).

Georgia, like every state, has developed a unique body of product liability law that is now undergoing its most dramatic changes of the last several decades. The public policy of this state is to place the burden on manufacturers. Recent court decisions indicate that this burden on manufacturers of dangerous products is growing heavier instead of lighter. Georgia's public policy is to shift the cost of dangerous products to the manufacturers and to encourage, through the imposition of these costs, the continual effort, including follow-up warnings, to decrease the risks associated with manufactured products.¹⁷

The manufacturer is made liable for a new product that is defective when it leaves his hands and is the proximate cause of injury. Reasonable care in inspecting, designing and manufacturing a product is not a defense because the language creating the tortious misconduct is manufacturing a defective product, and this high burden of care is demanded to safeguard the life and person from injury as a matter of public policy. [Cit.] *Ford Motor Co. v. Carter*, 141 Ga. App. 371, 372, 233 S.E.2d 444 (1977).¹⁸

II. CAUSES OF ACTION

There are a variety of legal avenues available to a plaintiff who is injured by a defective product. In a bodily injury case, the plaintiff can rely on negligence, strict liability, and warranty theories. In a property damage case, the plaintiff can rely only on negligence and warranty theories. It must be one or the other – a mere accident without damages to body or property does not give rise to a products liability action.¹⁹ This paper will focus only on those actions involving bodily injury to human beings. “In any products liability case, the plaintiff has the

¹⁷ See, e.g., *Alexander v. General Motors Corp.*, 219 Ga. App. 660, 662, 466 S.E.2d 607 (1995).

¹⁸ *Alexander v. General Motors Corporation*, 267 Ga. 339, 478 S.E.2d 123 (1996).

¹⁹ *Busbee v. Chrysler Corp.*, 240 Ga. App. 664; 524 S.E.2d 539 (1999)

burden of proving: (1) that the product was defective, (2) his injury, (3) the causal connection between the defect and the injury, and (4) that the defendant was responsible for the defect.”²⁰

A. RECOGNIZING A CLAIM

“When counsel for either the plaintiff or defendant begins the analysis of a product liability case, there are two basic questions to be answered. First, is the claim meritorious? Second, is the client’s position provable, and if so, how?”²¹ (A checklist set out below will assist counsel in answering these questions.) Careful counsel will always have product liability in mind when assisting an injured client.

There are numerous sources for assistance in determining whether a particular fact situation or product may be one that should be considered as the basis of a product liability case. First, it is always worth doing a Westlaw or similar search to see if there has been reported litigation involving the product in the past. Other sources such as AAJ (f/k/a ATLA) and its product litigation groups and networks are very helpful. Members of AAJ can, for less than five hundred dollars, get a complete work-up on a case including similar events, experts, and the names of other counsel who have handled similar cases in the past. This author has successfully used AAJ for product information from everything from PCB’s to water heaters. Advertisements in AAJ’s *The Advocate* and listings on AAJ list serves are also very useful. A brief consultation with an expert in the field is almost essential and can often provide a satisfactory answer to the question of whether a product is defective in some fashion²². Additionally, it is worth looking at the web sites maintained by Consumer Reports, Public Citizen, OSHA, the Consumer Product Safety Commission, and plain old Google searches. It is virtually impossible to know too much about the product at issue as well as similar products from other manufacturers.

²⁰ *Products Liability, Second Edition*, Madden, §12.1, p. 487

²¹ *The Preparation of a Product Liability Case*, Baldwin, Hare, McGovern, 2d Ed. p. 11.

²² In some jurisdictions there is a move to require an expert’s affidavit with the filing of a product liability suit similar to Georgia’s O.C.G.A. §9-11-9.1 requirement.

B. STRICT LIABILITY: O.C.G.A. §51-1-11 IS THE BASIS FOR MOST CLAIMS

While common law developments are an important source of product liability law, the most important source for product liability law in Georgia is the product liability statute.

O.C.G.A. §51-1-11(b)(1) establishes Georgia's rule regarding a manufacturer's strict liability for an injury caused by one of its products:

The manufacturer of any personal property sold as new property directly or through a dealer or any other person shall be liable in tort, irrespective of privity, to any natural person who may use, consume, or reasonably be affected by the property and who suffers injury to his person or property because the property when sold by the manufacturer was **not merchantable and reasonably suited to the use intended**, and its condition when sold is the proximate cause of the injury sustained.

(emphasis added)²³

Note that this statute is not identical to 402A of the Restatement (Second) of Torts. In Georgia, unlike states that have adopted the Restatement as the basis for strict liability, a product does not have to be unreasonably dangerous before imposition of strict liability.²⁴ Instead, the focus is on consumer expectations of safety and danger. This appears to be true even after the *Banks v. ICI Americas, Inc.*²⁵ opinion which added a risk utility analysis as *one* of the measures of product defectiveness²⁶. While §402A of the Restatement (Second) of Torts is not identical to Georgia law, comment "i" is instructive and provides: "The article sold must be dangerous to an extent

²³ This imposition of strict liability is important to Georgia as a matter of public policy. An illustration of this can be found in the recent decision of *Alexander v. General Motors Corp.*, 267 Ga. 339 (1996) in which it was held that strict liability would be imposed as a matter of public policy even though the injury occurred in a state which did not recognize strict liability.

²⁴ *Firestone Tire Co. v. King*, 145 Ga. App. 840, 244 S.E.2d 905 (1978).

²⁵ *Banks v. ICI Americas, Inc.*, 266 Ga. 607 (1996)

²⁶ Restatement (Third) of Torts: Products Liability §2, Reporter's Notes to comment c, Tentative Drft No. 2, 1995 notes this which is consistent with the history of Georgia products liability law.

beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.”

Additionally, though not yet adopted in Georgia, it must be noted that Georgia law may be modified by the Restatement (Third) of Torts²⁷ which seems to require that an alternative design be shown by the plaintiff in order to recover in a defective design case. The likelihood of this new interpretation of products liability law being eventually adopted in Georgia is bolstered by the Georgia Supreme Court’s decision in *Banks v. ICI Americas, Inc.*²⁸ that makes risk utility analysis part of the determination of whether a product is defective. This is because part of presenting a case under a risk benefit analysis is accomplished by looking at alternative designs in order to show the lack of benefit or utility of a particular design when weighed against its risks. Again, although this is not yet the law by virtue of either statute or court opinion, in practice the courts and many lawyers act as if it already is.

(i) Elements of a Strict Liability Claim

Simplified, the basic requirements for a strict liability cause of action are:

- a. The product must be sold as new, tangible property; (A used product can be the subject of a strict liability claim, as this element relates to the liability of the initial manufacturer having sold the product as new.)
- b. The product must be defective at the time it leaves the control of the manufacturer; (The defect can arise later provided the conditions that caused the defect existed at the time of manufacture.)
- c. The product must be the proximate cause of an injury to a human.²⁹

C. NEGLIGENCE CAN ALSO SERVE AS THE BASIS OF A CAUSE OF ACTION

²⁷ Restatement (Third) of Torts: Products Liability §2

²⁸ 264 Ga. 732, 45 S.E.2d 671, 672 (1994)

²⁹ *Ellis v. Rich's, Inc.*, 233 Ga. 573, 212 S.E.2d 373 (1975); *Ford Motor Co. v. Cantor*, 23 Ga. 657, 238 S.E.2d 361 (1971).

Although the strict liability statute is the source for most product liability actions in Georgia, basic negligence law must also be considered. The concepts of strict liability have not completely eliminated negligence as a cause of action. Negligence principles are often applicable in determining whether a product is defective - that is, **not merchantable and reasonably suited to the use intended**, as that phrase is used in O.C.G.A. §51-1-11(b)(1). In fact, “[p]roducts liability law in Georgia has evolved primarily as a cause of action in negligence.”³⁰ This is not to say that the two theories are identical. The important decision by the Supreme Court of Georgia in *Banks v. ICI Americas, Inc.*³¹ recognizes that strict liability and negligence claims remain distinct and continue to have different, although sometimes only minimal, elements.

Negligence concepts such as reasonable care and diligence are especially relevant in design defect cases. However, in a manufacturing defect case in which the product simply did not work as it was supposed to because of some assembly or material problem, the concept of strict liability is the primary theory of recovery. In manufacturing defect cases, manufacturers are not allowed to escape liability by showing that their quality control procedures were reasonable and appropriate – in such cases negligence principles are irrelevant.

D. WARRANTY IS ALSO RELEVANT, THOUGH, IN MOST CASES, NOT PARTICULARLY HELPFUL

As noted above, the product liability law that we have today is rooted in warranty law. This law is an offshoot of commercial transactions and has as its primary goal to ensure that sales transactions between merchants are consummated in a fair and efficient fashion. Concepts such as notice and opportunity to cure make sense among merchants but are hardly practical when the injury is to a human being. Certainly, pain and suffering as an element of damages was not a relevant consideration in the context in which warranty law was created. “Due to the restricted recovery of damages under warranty theory the use of warranty theory in product

³⁰ Georgia Products Liability, 2nd Ed. Maleski, p. 3.

³¹ 264 Ga. 732, 45 S.E.2d 671, 672 (1994).

liability is of limited utility. There are some economic damages, however, that are only available under this theory.”³² Accordingly, this body of law, while still widely pled as one of the counts in many product liability actions, adds little to the value of most cases. However, it must be kept in mind that “warranty theory may be the only way to obtain recovery where the plaintiff has only sustained economic loss including damage to the product itself without any additional property damage or personal injury.”³³

Privity of contract is required in all claims based on warranties. There is no one definition of privity that is applicable to all cases. According to *Black’s Law Dictionary*, privity is defined as “that connection or relationship which exists between two or more contracting parties.”³⁴ “In its broadest sense, privity ‘denotes mutual or successive relationship to the same right of property.’”³⁵ For an implied warranty claim, a plaintiff must have purchased the product either directly from the manufacturer or from some other person such as a wholesaler or retailer.³⁶

(i) Express Warranties.

Express warranties are, as the name implies, express promises of performance. An action based on the breach of such a warranty requires reference to the wording of the particular promise involved. An express warranty is “[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain . . .”³⁷

In cases involving express warranties which give the manufacturer a right to repair the products, there can be no claim under the warranty until the manufacturer has been given an opportunity to repair the product, then failed to do so.³⁸ Express warranties rarely have practical

³² *The Preparation of a Product Liability Case*, Baldwin, Hare, McGovern, 2d Ed. p. 199.

³³ *The Preparation of a Product Liability Case*, Baldwin, Hare, McGovern, 2d Ed. p. 199-200.

³⁴ *Decatur North Association v. Builders Glass, Inc.*, 180 Ga. App. 862, 350 S.E.2d 795 (1986).

³⁵ *Rawson v. Brosnan*, 187 Ga. 624, 627 (1939).

³⁶ *Whitaker v. Harvell-Kilgore Corp*, 418 F.2d 1010 (5th Cir. 1969).

³⁷ *Eldridge’s Georgia Products Liability*, McIntosh (1987) p.149 ; O.C.G.A. §11-2-313.

³⁸ *DeLoach v. General Motors*, 187 Ga. App. 159, 369 S.E.2d 484 (1988).

application in bodily injury cases. However, keep in mind that an express warranty is a representation, which might serve as the basis for a fraud action.

(ii) Implied Warranties.

Implied warranty and strict liability are related concepts. O.C.G.A. §11-2-314 creates an implied warranty of merchantability in sales transactions where the seller is a merchant with respect to goods of that kind. In the product liability context, the claim is that the product was not fit for the ordinary purpose for which it was intended.³⁹ By definition, a product that is not fit for the ordinary purposes for which it is intended involves issues of defectiveness and must be considered in conjunction with tort claims brought pursuant to O.C.G.A. §51-1-11.⁴⁰ According to *Black's Law Dictionary*, “goods, to be merchantable, must be fit for the ordinary purposes for which such goods are to be used.” The very same language is used in the applicable statute, O.C.G.A. §11-2-314(c), and Georgia case law.⁴¹

An implied warranty of merchantability exists unless such a warranty is expressly, or from the nature of the transaction, excepted.⁴² A waiver of the implied warranty must be clear and certain, in writing, and cannot be inconspicuous.⁴³ An implied warranty remains effective for a reasonable time.⁴⁴ Privity is necessary in an implied warranty claim.⁴⁵

III. CHECKLIST FOR CASE EVALUATION

A. A SIMPLE CHECKLIST FOR THE LEGAL ELEMENTS

The plaintiff must prove the following:

³⁹ O.C.G.A. §11-2-314(2)(c).

⁴⁰ See *Parzini v. Center Chemical Co.*, 134 Ga. App. 414, 214 S.E.2d 700, *rev'd on other grounds*, 234 Ga. 868, 216 S.E.2d 580 (1975).

⁴¹ See, e.g., *Giordano v. Ford Motor Co.*, 165 G. App. 644, 645, 299 S.E.2d 897 (1983) (“not merchantable and reasonably suited to the use intended . . . means defective.”).

⁴² *Wilson v. Eargle*, 98 Ga. App. 241, 105 S.E.2d 474 (1958).

⁴³ *BCS Financial Corp. v. Sorbo*, 213 Ga. App. 259, 261, 444 S.E.2d 85 (1994).

⁴⁴ *Wood v. Hubb Motor, Co.*, 110 Ga. App. 101, 137 S.E.2d 674 (1964).

⁴⁵ *Lamb v. Georgia-Pacific Corp.*, 194 Ga. App. 848, 392 S.E.2d 307 (1990).

- a. That the product was manufactured by the defendant; (There are claims against refurbishers and sellers, and even renters, of used products but the basis for liability is negligence.⁴⁶)
- b. That the product was new property when first sold (or leased) for human use;
- c. That the product was defective in its:
 - i. manufacture, and/or
 - ii. design, and/or
 - iii. warnings/marketing/packaging;
- d. That the defect was the proximate cause of the injury to a human;
- e. That in most cases the injury occurred, and suit was filed, within ten years of the first retail sale of the product⁴⁷;
- f. That the product was not substantially altered or modified or abused in an unforeseeable manner;⁴⁸
- g. If a warranty theory is relied upon, that there is privity; and
- h. If a warranty theory is relied upon, that notice has been given to the defendant.

B. ADDITIONAL CHECKLIST FOR PRACTICAL ELEMENTS

- i. Appropriate testimony, usually by experts, can be obtained to prove the case; (Keep in mind that the *Daubert* rule can make this challenging.)
- j. The plaintiff is sufficiently injured to justify the expense;
- k. Counsel has sufficient financial resources to prosecute the case.

C. DISCUSSION OF CHECKLIST ELEMENTS

(i) The Product was Manufactured by the Defendant.

⁴⁶ *Dozier Crane & Machinery, Inc. v. Judge, et. al.* 284 Ga. App. 496, 644 SEd 333 (2007)

⁴⁷ O.C.G.A. §51-1-11(c) specifically excludes products causing slowly manifesting diseases such as asbestos and products which cause birth defects from the ten year statute of repose. Additionally, if the defendant's conduct was willful and wanton, it loses the protection of the statute of repose.

⁴⁸ T. Alexander, "Products Liability in Georgia, An Updated Overview," p. 7. Insurance Law Institute, ICLE in Georgia 1985.

The first question to be answered in this portion of the checklist is whether the targeted defendant is subject to strict liability or whether only negligence and warranty theories will be available. Only **manufacturers** can be held strictly liable under O.C.G.A. §51-1-11.1(b). O.C.G.A. §51-1-11.1(b) provides that:

For purposes of a product liability action based in whole or in part on the doctrine of strict liability in tort, a product seller is not a manufacturer as provided in O.C.G.A. §51-1-11 and is not liable as such.

Merely fixing a label on a product manufactured by another entity does not make a seller a manufacturer.⁴⁹ However, if the product at issue was manufactured, assembled, and packaged according to the defendant's specifications, the defendant is not a mere product seller but is, instead, a manufacturer - subject to being held strictly liable if the product proves to be defective.⁵⁰ It is unclear exactly how much assembly of component parts is necessary to cause a seller to become an ostensible manufacturer subject to the dictates of strict liability. Certainly, there are cases which predate O.C.G.A. §51-1-11.1(b) which seem to still support the proposition that such an assembler can be subject to strict liability.⁵¹ Another important point is that only the entity that manufactured the product is liable - successor corporations that do not still manufacture the product will not be subject to liability. In this regard, the Georgia Supreme Court recently held:

In Georgia, strict liability applies only to the "manufacturer of any personal property sold as new property," and not to a "product seller." OCGA 51-1-11(b)(1), 51-1-11.1. However, a successor corporation can be held strictly liable as a "manufacturer," if it is a mere continuation of the predecessor corporation which actually manufactured the product. *Bullington v. Union*

⁴⁹ *Alltrade, Inc. v. McDonald*, 213 Ga. App. 758, 445 S.E.2d 856 (1994); *Buford v. Toys R' Us, Inc.*, 217 Ga. App. 565, 458 S.E.2d 373 (1995).

⁵⁰ *Nelson v. C.M. City, Inc.*, 218 Ga. App. 580, 463 S.E.2d 902 (1995); reversed on other grounds *NEC Technologies, Inc. v. Nelson*, 267 Ga. 390 (1996).

⁵¹ *Yeager v. Stith Equip. Co.*, 177 Ga. App. 835, 837, 341 S.E.2d 492, 494 (1986); *Pierce v. Liberty Furniture Co.*, 141 Ga. App. 175, 179, 233 S.E.2d 33, 37 (1977).

Tool Corp., supra at 284, 328 S.E.2d 726. "In Georgia, the common law continuation theory has been applied where there was some identity of ownership. [Cits.]" *Bullington v. Union Tool Corp., supra at 284, 328 S.E.2d 726.*

...

If, however, the successor corporation merely continues the general business of the predecessor corporation, then it will not be "in a position to improve the quality of the product in question or to reflect the possible defects in the cost of the product." *Bullington v. Union Tool Corp., supra at 285, 328 S.E.2d 726.*

...

Unless and until the General Assembly acts, strict liability is an available remedy only against a "manufacturer." Because Farmex did not continue the manufacture of the allegedly defective hitch pin, "it never produced the product, [and the continuation] rationale does not apply." *Bullington v. Union Tool Corp., supra at 285, 328 S.E.2d 726.*⁵²

Note that sellers can be held liable for negligence even if not subject to being strictly liable. To prevail, a plaintiff will have to show that the retailer had some duty to inspect or warn, for example, and breached this duty. "If a product normally passes through the retailers' hands in an open and exposed condition [that is, not sealed] and the defect is of such a nature as to reasonably attract the attention of the prudent retailer, the retailer may be liable for failure to discover the defect."⁵³ A seller can be held liable for breach of warranty, and this theory should be considered even if the product is in a sealed container.⁵⁴ Georgia law also recognizes that

⁵² *Farmex Incorporated v. Wainwright, et. al.*, 269 Ga. 548, 501 S.E.2d 802 (1998)

⁵³ *Georgia Products Liability*, 2nd Ed. Maleski, p. 176.

⁵⁴ *Pierce v. Liberty Furniture Co.*, 141 Ga. App. 175, 179, 233 S.E.2d 33, 37 (1977).

even an independent contractor “may be liable for damages resulting from the work which he has performed or failed to perform in connection with which he has been employed.”⁵⁵

Normally it is not hard to determine what constitutes a “manufacturer” and who manufactured a particular product. However, this most important step cannot be taken for granted. Care must be taken to insure that the actual manufacturer is identified as opposed to only its parent or holding company. However, suing the holding or parent company is rarely fatal, from a statute of limitations point of view, so long as appropriate steps are taken to correct the problem in a timely fashion - if it can be shown that the proper corporate entity did have knowledge and should have known of the misnomer. Most of the time counsel can look to the label on the product to identify the manufacturer.

Sub component part manufacturers and raw material suppliers can also be held liable. However, naming every possible party should always be carefully considered because the hassle of dealing with multiple defendants is not always justified by the additional value they may or may not bring to the case. Additionally, the component part may be perfectly well made but its selection by the manufacturer of the product in which it is assembled is the real cause of the danger. That having been said, the component part manufacturer is not liable for a defect in the product unrelated to the component part it manufactured.⁵⁶

While finding out who made the product is usually not too difficult, sometimes it is the most difficult aspect of the case. It seems that there is a real correlation between shoddy and unlabeled products. Companies who make really dangerous products apparently are not proud of them and do not usually place identifying labels on them. Even if the product is properly marked, it is often in the hands of some third party who is not interested in helping the plaintiff by allowing an inspection of the product that caused the injury. In these circumstances, there are several ways to identify the manufacturer.

⁵⁵ *Barry v. Stevens Equipment Co.*, 176 Ga. App. 27, 29, 335 S.E.2d 129 (1985) (emphasis in original).

⁵⁶ *Davenport et al v. Cummins Alabama, Inc.*, _____ Ga. App. _____, _____ SE2d. _____ WL 926051 (2007)

If the product can't be inspected, the best course of action is to file suit against "John Doe Product Manufacturer". Then use a subpoena and the inspection power incumbent in the pending lawsuit to go on the premises of the entity that controls the machine/product in question, with an expert, to inspect it and discover the manufacturer. This is usually successful and efficient. Often the workers compensation carrier, who has an interest in subrogation pursuant to O.C.G.A. § 34-9-11.1, will assist in this process. If they refuse to do so, there is an argument that they should lose their right to subrogation which is an equitable right and therefore requires "clean hands".

If the product can be obtained and/or inspected, experts in the field can often identify the product simply by looking at it. Sometimes plaintiffs can flip through various trade catalogs and publications to try and match a photograph to the product. Asbestosis lawyers use huge books of photographs to help plaintiffs identify the defendants with whose products they worked. This same practice is often used in other product liability cases.

(ii) That the Product was New Property When First Sold (or Leased) for Human Use.

Being able to prove that the product was new when first sold by the defendant is essentially imperative. If the plaintiff does not own the product and if the owner is not cooperative, this can be accomplished through discovery to the owner by subpoenaing its purchasing records. This requirement does not mean that the injured party had to purchase the product when it was new. All that is required is that the party who is sought to be held liable, sold the property as new (as opposed to used). There is no privity requirement. Product liability law absolutely applies to used products (but only against the manufacturer of the product who first sold it as new). The most important aspect of this part of the strict liability statute is the concept of when the product was sold for use by human consumers. That it may contain recycled parts is not determinative of whether it is new or not so long as it was marketed as new property.

Strict liability principles apply to leased products if the lease is similar to a sale.⁵⁷

The law is unclear as to how much rebuilding might be done to a product to transform it from being a used product into new one. There is certainly an argument that some level of rebuilding by the original manufacturer can make what was considered a used product a new one for purposes of application of the strict liability statute. While there is no Georgia law directly on point, it makes sense that:

Any reconstruction or reconditioning (as distinct from a mere repair - a familiar distinction in other areas of law, see e.g., *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336 (1961)) which has the effect of lengthening the useful life of a product beyond what was contemplated when the product was first sold starts the statute of repose running anew. [Cits]. Otherwise the statute would create an inefficient incentive to reconstruct or recondition old products rather than build new ones, in order to reduce expected liability costs; for under such a regime a product rebuilt after ten years would be immunized from liability.⁵⁸

However, this is not the norm and usually rebuilders and remanufacturers are not held to the requirements of the strict liability statute. This does not mean that they can escape all liability - only that liability premised on O.C.G.A. §51-1-11 is not available to the plaintiff. Negligence and warranty theories might still be available.⁵⁹

(iii) That the Product was Defective in Either its Manufacture, and/or Design and/or Warnings/Marketing/Packaging.

This element of the checklist is the meat of a product liability claim. Without a defect, there is nothing to complain about. “Inherent features of a product, necessary to its function, are

⁵⁷ *Advanced Computer Sales, Inc. v. Sizemore*, 186 Ga. App. 10, 366 S.E.2d 303 (1988).

⁵⁸ *Richardson v. Gallo Equipment Co.*, 990 F.2d 330, 331 (7th Cir. 1993) (citation omitted).

⁵⁹ *Dozier Crane & Machinery, Inc. v. Judge, et. al.* 284 Ga. App. 496, 644 SEd 333 (2007)

not defective. The sharp edge of a knife, for example, is not a defect, and no strict liability attaches to the knife design.”⁶⁰ Without anything to complain about, there is no lawsuit and no chance of recovery for the plaintiff. “There are three general categories of product defects: manufacturing defects, design defects, and marketing/packing defects.”⁶¹ The strict liability statute does not even use the words “defect” or “defective”. Instead it uses a phrase which has the same meaning. “[N]ot merchantable and reasonably suited to the use intended’ as used in this statute means ‘defective.’”⁶² “The existence of a defect is crucial, because a manufacturer is not an insurer against all risks of injury associated with its product.”⁶³ However, the inability to specify the exact nature of the defect that is alleged to cause the injuries is not fatal to the case.⁶⁴ “[T]he existence of a manufacturing defect in a products liability case may be inferred from circumstantial evidence.”⁶⁵ The product does not have to be being used for the purpose intended at the time it causes an injury. Instead, it can be just sitting there as was the NordicTrack machine that had a sharp exposed metal part that caused injury to the plaintiff when she tripped and fell onto it.⁶⁶

Negligence law is relevant. In designing a product to be used by the consumer, a manufacturer has a duty to exercise reasonable care under the circumstances.⁶⁷ In establishing uses for the product, the manufacturer must consider both the uses for which it intends the

⁶⁰ *The Products Liability Resource Manual*, O'Reilly & Cody, §2.06 p. 7

⁶¹ *Banks v. ICI Americas, Inc.*, 264 Ga. 732, 450 S.E.2d 671, 672 (1994).

⁶² *Giordano v. Ford Motor Company*, 165 Ga. App. 644, 645, 299 S.E.2d 897 (1983) (quoting *Center Chem. Co. v. Parzini*, 234 Ga. 868, 869 (1975)).

⁶³ *Giordano*, 165 Ga. App. at 645 (quoting *Hunt v. Harley-Davidson Motor Co.*, 147 Ga. App. 44 (1978)).

⁶⁴ *Westinghouse Electric Corp. v. Williams*, 173 Ga. App. 118, 122, 325 S.E.2d 460 (1984).

⁶⁵ *Id.* (quoting *Firestone Tire & Rubber Co. v. King*, 145 Ga. App. 840 (1978)).

⁶⁶ *Jones v. NordicTrack, Inc.*, 274 Ga. 115; 550 S.E.2d 101 (2001)

⁶⁷ *Greenway v. Peabody Int'l Corp.*, 163 Ga. App. 698, 294 S.E.2d 541 (1982).

product to be used as well as any foreseeable misuses.⁶⁸ Additionally, because a risk-utility standard is used as a test for a defect in all cases except manufacturing defect cases, there is a good argument that negligence concepts are relevant when analyzing whether a product is defective even if the plaintiff relies on strict liability.⁶⁹

a. Manufacture

Manufacturing defects are the easiest cases to prove. In this type of case, the defect is unintentional. The product simply was not made the way the manufacturer intended it to be made. This is the classic type of product liability case that came into existence when quantities of goods began to change hands in such volume that it was impossible for the seller or purchaser to inspect every item. It was determined as a matter of public policy that the risk for defects in mass produced products should fall on the manufacturer.

Manufacturing defects are the easiest to prove because usually one needs only to compare the defective and dangerous product to another sample to determine that the product did not turn out the way the manufacturer intended. This kind of defect is called a production defect. For whatever reason, quality control failed and the result was a defective product. “[P]roduction flaws tend to be random” failures of the production process.⁷⁰ One way of looking at this type of case is to compare it to the definition of what is not defective. The leading case on this concept is *Center Chemical Co. v. Parzini*,⁷¹ which held that a product that is “properly prepared, manufactured, packaged and accompanied with adequate warnings and instructions . . . can not be said to be defective.”⁷² Do not read *Parzini* for guidance in design defect cases - it has never

⁶⁸ *Ford Motor Co. v. Stubblefield*, 171 Ga. App. 331, 335, 319 S.E.2d 470 (1984).

⁶⁹ *Banks v. ICI Americas, Inc.*, 264 Ga. 732, 450 S.E.2d 671 (1994); *Product Liability Desk Reference*, Daller Ed., 1996 p. 86.

⁷⁰ *Products Liability*, 3rd Ed. Phillips, 1988 p. 5.

⁷¹ 234 Ga. 868, 218 S.E.2d 580 (1975).

⁷² *Id.* at 870(4), 218 S.E.2d 580.

addressed such cases, and, to the extent that it has been interpreted to have applicability to such cases, it has been overruled by *Banks*.⁷³

b. Design

It is in this area that Georgia law has dramatically changed in the last couple of years. Under the old law, if a product did what its manufacturer intended, in a more or less safe fashion, it was not, as a matter of law, defective. If the defect complained of was open and obvious, i.e., known to the manufacturer, the product was simply not defective as a matter of law. A plaintiff was not even allowed to compare the design in question to other designs or propose alternative designs that would have performed the same function without unnecessary risk to life and limb. The plaintiff was barred from showing that a reasonable and prudent manufacturer would have chosen a different design to satisfy the utilitarian purposes of the product without unnecessary risk.

The law has changed. Since 1994, in product liability design defect cases, a risk-utility analysis is the appropriate test for concluding that a product's design specifications were partly or totally defective.⁷⁴ The risk-utility analysis is essentially a balancing test where the risks inherent in a product design are weighed against the utility or benefit derived from the product. Although the risk-utility test is a new approach to defective design cases in Georgia, it still incorporates the concept of "reasonableness," which requires the trier of fact to consider "whether the manufacturer acted reasonably in choosing a particular product design, given the probability and seriousness of the risk posed by the design, the usefulness of the product in that condition, and the burden on the manufacturer to take the necessary steps to eliminate the risk."⁷⁵

The "adoption of a risk-utility analysis increases a defendant's burden on summary judgment to show that a product as designed is not defective."⁷⁶ In *Banks*, the Georgia Supreme

⁷³ 264 Ga. 732, 450 S.E.2d 671, 672 (1994).

⁷⁴ *Banks v. ICI Americas, Inc.*, 264 Ga. 732, 450 S.E.2d 671 (1994).

⁷⁵ 264 Ga. at 734.

⁷⁶ *Raymond*, 925 F. Supp. at 1577.

Court explicitly overruled *Center Chemical Co. v. Parzini*,⁷⁷ and *Mann v. Coast Catamaran Corp.*⁷⁸ But, there is also an argument that the adoption of this standard has also increased the plaintiff's burden to show an alternative design which will score a superior grade when subjected to a risk-utility analysis. However, as noted above, the inability to specify the exact nature of the defect which is alleged to cause the injuries is not fatal to the case.⁷⁹

The issue of negligent design is fundamentally a jury question, requiring a weighing of the credibility of witnesses and of the sufficiency of the evidence by the trier of fact.⁸⁰ In each case the court is required to keep in mind “[w]hether defendant's conduct in this instance amounted to negligence is for the trier of fact.”⁸¹ Where a product fails under conditions under which an average consumer could have fairly definite expectations, then the jury has a basis for making an informed judgment upon the existence of a defect. The consideration of a design defect must include “common knowledge and the expectation of danger . . .”⁸²

An interesting point in this area is that even though design work normally includes work performed by “professionals” as that term is defined by O.C.G.A. §9-11-9.1 no affidavit is needed in a suit sounding in product liability.⁸³

c. Marketing/Warning/Packaging

Because this category of defect includes warnings and instructions, it differs substantially from the manufacture and design defect causes of action. Packaging defects such as claims that a closure device on a bottle was defective can be resolved by reference to the manufacture and design theories. Either the closure device was defectively manufactured (it did not perform as the defendant intended) or it was not properly designed (using a risk-benefit analysis as required by *Banks*, the closure device was inadequate and defective). Packaging as used in the context of

⁷⁷ 234 Ga. 868, 218 S.E.2d 580 (1975).

⁷⁸ 254 Ga. 201, 326 S.E.2d 436 (1985).

⁷⁹ *Westinghouse Electric Corp. v. Williams*, 173 Ga. App. 118, 122, 325 S.E.2d 460 (1984).

⁸⁰ *Beam v. Omark Industries, Inc.*, 143 Ga. App. 142, 237 S.E.2d 607 (1977).

⁸¹ 143 Ga. App. at 145.

⁸² *Banks v. ICI Americas, Inc.*, 264 Ga. 732, 736, n.6, 450 S.E.2d 671 (1994).

⁸³ *SK Hand Tool Corp. v. Lowman*, 223 Ga. App. 712, 479 S.E.2d 103 (1996).

this subset of product defects refers to warnings, labels, and instructions. For most purposes, these concepts are synonymous. Importantly, as is discussed below, claims based on failure to warn are not subject to the statute of repose, and summary judgment is often less of a risk.

In Georgia, under both negligence and strict liability claims, a manufacturer has a duty to warn the purchaser of hazards that are reasonably foreseeable.⁸⁴ With respect to the nature of the warning required, Georgia has essentially adopted the language from the Restatement:

A product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling . . . the seller is not liable. Where, however, he has reason to anticipate that danger may result from a particular use . . . he may be required to give adequate warning of the danger . . . and a product sold without such warning is in a defective condition.⁸⁵

The manufacturer is required to have a reasonable knowledge of its product and the associated risks with its use. The ultimate consumer is presumed to have less knowledge about the risks than the manufacturer. The product's warnings should be viewed as a means to provide the consumer with the information necessary to use the product safely. If the manufacturer advises its purchaser of a danger, that warning may not be sufficient to satisfy its obligations. Instead, it will be up to a jury to determine if that effort was sufficient.⁸⁶ Where an employee was injured by a yarn cutter which had been recalled by its manufacturer, and the employee's employer was aware of the recall, a jury question was presented regarding the reasonableness of the recall and the foreseeability of whether the employer would comply with it.⁸⁷

Whether the duty to warn exists depends upon "the foreseeability of the use in question, the type of danger involved, and the foreseeability of the user's knowledge of the danger."⁸⁸ If

⁸⁴ *Talley v. City Tank Corp.*, 158 Ga. App. 130, 279 S.E.2d 264 (1981).

⁸⁵ *Hunt v. Harley-Davidson Motor Co., Inc.*, 147 Ga. App. 44, 45, 248 S.E.2d 15 (1978).

⁸⁶ *Ontario Sewing Machine Co., Ltd. v. Smith*, 275 Ga. 683, 572 S.E.2d 533 (2002)

⁸⁷ *Id.*

⁸⁸ *Giordano v. Ford Motor Company*, 165 Ga. App. 644, 645, 299 S.E.2d 897 (1983).

a court can see that any one of the three issues cannot be resolved as matter of law, then summary judgment for a manufacturer is inappropriate.⁸⁹ “Such matters generally are not susceptible to summary adjudication and should be resolved by a trial in the ordinary manner.”⁹⁰

In Georgia, “[t]he failure to use reasonable care in design or knowledge of a defective design gives rise to the reasonable duty on the manufacturer to warn of this condition.”⁹¹ “Whether adequate efforts were made to communicate a warning to the ultimate user or whether the warning is communicated was adequate are uniformly held questions for the jury.”⁹² Georgia law specifically imposes this burden on the manufacturer, even after the original sale of the product.⁹³ The learned intermediary defense does exist in Georgia and allows a manufacturer to rely on a learned intermediary to transmit warnings in certain circumstances⁹⁴. However, it is not a perfect defense and the duty to transmit a warning to the ultimate consumer will be determined by balancing: (1) the burden of requiring a warning, (2) the likelihood that the intermediary will provide the warning, (3) the likely efficacy of such a warning, (4) the degree of danger posed by the absence of such a warning, and (5) the nature of the potential harm.⁹⁵ Manufacturers will often claim that as a matter of law the lack of warnings is irrelevant as this defect was not a cause of the incident. This argument should not usually prevail as the adequacy of the warnings and the connection to the injury are usually questions for the jury.⁹⁶

⁸⁹ See also *Collins v. Newman Machine Company, Inc.*, 190 Ga. App. 879, 380 S.E.2d 314 (1989) (factual questions remained as to whether defendant manufacturer had reason to anticipate that danger might result from the use to which the product was put).

⁹⁰ 165 Ga. App. at 646.

⁹¹ *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1344 (5th Cir. 1978), (quoting *Larson v. General Motors Corp.*, 391 F.2d 495, 505 (8th Cir. 1968)).

⁹² *Stapleton v. Kawasaki Heavy Industries, Ltd.*, 608 F.2d 571, 573 (5th Cir. 1979), modified on other grounds, 612 F.2d 905 (5th Cir. 1980).

⁹³ See O.C.G.A. §51-1-11(c); *Chrysler Corp. v. Batten*, 2264 Ga. 723, 727, 452 S.E.2d 94 (1994).

⁹⁴ *Presto v. Sandoz Pharmaceuticals Corp.*, 226 Ga. App. 547 (1997)

⁹⁵ *Carter v. E.I. Du Pont de Nemours and Company, Inc.*, 217 Ga. 139 (1995)

⁹⁶ *Ford Motor Co. v. Gibson*, __ Ga. __, 659 SE2d 346 (2008)

Because of the change in the law enunciated in *Banks v. ICI Americas, Inc.*⁹⁷, it makes sense that there is now a duty to warn, even of open and obvious dangers, unless the utility of failing to do so outweighs the risk the lack of warnings presents to the user.⁹⁸

As noted, the statute of repose does not apply to warnings claims. This raises an interesting question. If, after the ten year statute of repose has passed, whether strict liability applies to the failure to warn or not. On the one hand there seems to be case law suggesting that strict liability does not apply.⁹⁹ However, such a reading is too narrow. Instead, whether the manufacturer failed to warn or not is a question of negligence. But, once it is determined that the manufacturer carelessly failed to warn, it will be strictly liable and the plaintiff's own negligence will be irrelevant.

(iv) That the Defect was the Proximate Cause of the Injury to a Human.

Product liability law in Georgia only protects human beings. Thus property loss caused by a defective product, though recoverable, cannot be prosecuted in reliance on the strict liability standards. Instead, negligence and warranty theories will have to be relied upon.

Proximate cause issues are essentially the same as in the general tort law. That is to say, “[t]he pre-existing defect in the product must be the proximate cause of injury in strict liability as well as in negligence or in warranty cases before liability is imposed.”¹⁰⁰ The manufacturer is not relieved of liability because the person injured is other than the one it expected would be injured.¹⁰¹ Causation reaches to the limits of the “but for” test and a manufacturer may be held liable for any injury caused by an event which would not have occurred “but for” the defect in its product. For example, a defective alternator that leaves a truck stranded in the roadway, the driver of which is, sometime later, hit by another vehicle while he is attempting to flag traffic

⁹⁷ 264 Ga. 732, 450 S.E.2d 671 (1994).

⁹⁸ “The ‘Open and Obvious’ Defense After *Banks v. ICI Americas*: Is It Alive and Well?”, 2 Georgia Bar Journal 20 (1996), Strain and Sleppy.

⁹⁹ *Allison v. McGhan Medical Corp.*, 184 F3d 1300 (11th Cir. 1999)

¹⁰⁰ *Eldridge’s Georgia Products Liability*, McIntosh (1987) p. 210.

¹⁰¹ *General Motors Corp. v. Davis*, 141 Ga. App. 495, 233 S.E.2d 825 (1977).

around his stalled vehicle, can be considered the proximate cause of the driver's death.¹⁰² Similarly, a manufacturer of a paint ball gun can be a proximate cause of injury even though there is an intervening cause when the gun is aimed and fired at the victim.¹⁰³

Of interest is the concept of injury enhancement by a particular defect. "Once the plaintiff has proved the existence of an injury-enhancing defect, the burden falls on the defendant to prove the degree of injury attributable to other causes," regardless of how difficult this might be.¹⁰⁴

(v) That in Most Cases, the Injury Occurred, and Suit was Filed, Within Ten Years of the First Retail Sale of the Product.

It is imperative to move rapidly in a potential product liability suit. Do not think that the two year statute of limitations for tort actions is the only time limit applicable. Except in cases involving minors, the two year statute is the absolute longest a plaintiff has within which to file suit. In fact, because of the statute of repose, the time within which suit may be filed can be surprisingly short. Georgia's statute of repose operates as a complete bar to strict liability actions filed more than ten years from the date of sale of a product. O.C.G.A. § 51-1-11(b)(2) states:

No action shall be commenced pursuant to this subsection with respect to an injury after ten years from the date of the first sale for use or consumption of the personal property causing or otherwise bringing about the injury.¹⁰⁵

This statute operates even where the injury occurred less than ten years after the first sale if the suit is filed more than ten years after the first sale.¹⁰⁶ A recent decision of the Georgia Court of Appeals exhibits a bizarre confusion as to the definition of "first sale" as used in O.C.G.A. § 51-

¹⁰² *Id.*

¹⁰³ *Pearson v. Tippmann Pneumatics, Inc.*, 281 Ga. 740, 642 SE2d. 691 (2007)

¹⁰⁴ *Ford Motor Co. v. Tippins*, 225 Ga. App. 128, 131 (1997)

¹⁰⁵ O.C.G.A. §51-1-11(b)(2) (1995).

¹⁰⁶ *Hatcher v. Allied Products Corp.*, 256 Ga. 100, 101, 344 S.E.2d 418 (1986) (responding to a certified question presented in *Hatcher v. Allied Products Corp.*, 782 F.2d 926 (11th Cir. 1986)).

1-11(b)(2) by holding that the statute of repose relating to a defective light switch in an automobile began to run when Ford installed the switch on the assembly line, as opposed to when the automobile was actually purchased by an end user for use as a mode of transportation.¹⁰⁷ This means that we must be all the more diligent in getting cases for products that are approaching ten years in age filed without delay.

This ten year statute of repose applies to strict liability and negligence actions. O.C.G.A. §51-1-11(c) states, in pertinent part:

The limitation of paragraph (2) of subsection (b) of this Code section regarding bringing an action within ten years from the date of the first sale for use or consumption of personal property shall also apply to the commencement of an action claiming negligence of a manufacturer as the basis of liability. . . .¹⁰⁸

Subsection (c) thus extends the ten year statute of repose to negligence actions.¹⁰⁹

Surprisingly to this author, the statute of repose has been found to be constitutional.¹¹⁰ More shockingly, if a suit is filed within the statute of repose, but dismissed after the ten years has expired and then refiled within the time for renewal, the statute of repose will then serve to bar the suit.¹¹¹

It should be noted that in certain circumstances there may be a way around this time limit. In *Gantes v. Kason Corporation*,¹¹² plaintiff's counsel was extraordinary clever. The injury in question involved a death at a chicken processing plant in Georgia and was caused by a machine which was more than ten years old and probably manufactured in New Jersey. Aware that the statute of repose effectively barred recovery, plaintiff's counsel filed the case in New

¹⁰⁷ *Johnson v. Ford Motor Co.*, 281 Ga. App. 166, 637 SE2d 202 (2006).

¹⁰⁸ O.C.G.A. §51-1-11(c).

¹⁰⁹ *Chrysler Corp. v. Batten*, 264 Ga. 723, 725, 450 S.E.2d 208 (1994).

¹¹⁰ *Love v. Whirlpool Corp.*, 264 Ga. 701, 449 S.E.2d 602 (1994); *Hatcher v. Allied Products Corp.*, 796 F.2d 1427 (11th Cir. 1986).

¹¹¹ *Id.*

¹¹² 145 N.J. 478, 679 A.2d 106 (1996).

Jersey state court. The defendant manufacturer, as expected, argued that under the choice of law rules, Georgia's substantive law should apply and serve to bar the action as it was brought too late. As the quoted language below illustrates, sometimes justice can indeed be found at the local forum shop¹¹³.

In 1978, the Georgia legislature enacted its statute of repose, O.C.G.A. §51-1-11(b)(2), as an amendment to its strict products-liability statute. *Daniel v. American Optical Corp.*, 251 Ga. 166, 304 S.E.2d 383, 384 (Ga. 1983). In *Love v. Whirlpool Corporation*, 264 Ga. 701, 449 S.E.2d 602 (1994), the Georgia Supreme Court explained that its legislature adopted the statute of repose to serve the dual purposes of stabilizing insurance underwriting and eliminating stale claims. In so concluding, the court indicated that the statute of repose was the legislature's response to a 1978 report of the Senate Products Liability Study Committee that addressed insurance-industry problems generated by the open-ended liability of manufacturers, and recommended "that a ten-year statute of repose be enacted." *Id.* at 605. Just one month after its decision in *Love*, the Georgia Supreme Court again had occasion to address the statute of repose.

Chrysler Corp., *supra*, 450 S.E.2d at 211-13. There the court reiterated: "The ten-year statute of repose was enacted in order to address problems generated by the open-ended liability of manufacturers so as to eliminate stale claims and stabilize products liability underwriting." *Id.* at 212.¹¹⁴

¹¹³ This author is presently involved in a case in which a 20 year old product caused an injury in Georgia. The product was manufactured outside of Georgia. Suit was filed in the foreign jurisdiction of the manufacturer and when the answer was filed alleging as an affirmative defense Georgia's statute of repose a motion for summary judgment was filed to strike the defense as the jurisdiction in which the suit is pending treats statutes of limitations as procedural this rule should serve to bar the defense as irrelevant.

¹¹⁴ 145 N.J. 478, 485; 679 A.2d 106, 109.

The courts below acknowledged that, in this case, the only New Jersey interest implicated by its contacts with the parties is that derived from the status of the defendant as a domestic manufacturer. That interest is in deterring the manufacturing of unsafe products within its borders.

However, both the trial court and Appellate Division majority determined that a deterrent interest is not significant enough to warrant the application of New Jersey's limitations law. 278 N.J. Super. at 478-49; 276 N.J. Super. at 589-90. We conclude that this State has a strong interest in encouraging the manufacture and distribution of safe products for the public and, conversely, in deterring the manufacture and distribution of unsafe products within the state. That interest is furthered through the recognition of claims and the imposition of liability based on principles of strict products-liability law.¹¹⁵

The answer is clear. Georgia has no contacts with the defendant manufacturer or with this lawsuit. Hence, its special policy concerns over the impact of "open-ended liability" on its insurance industry and stale claims on its courts do not, in the context of this litigation, give rise to a governmental interest that must be protected by applying its statute of repose to foreclose this suit in New Jersey.¹¹⁶

This same logic has been applied by an Iowa court that refused to apply a statute of repose that would have barred the claim at the location where the incident occurred.¹¹⁷

¹¹⁵ 145 N.J. 478, 487; 679 A.2d 106, 110.

¹¹⁶ 145 N.J. 478, 494; 679 A.2d 106, 113.

¹¹⁷ *Jones v. Winnebago Industries*, 460 F.Supp.2d 953 (N.D. Iowa 2006)

Additionally, if the defendant was willful, reckless, or wanton in its disregard of life or property the statute of repose does not apply. Properly documented, this can bar summary judgment.¹¹⁸

(vi) That the Product was not Substantially Altered or Modified or Abused in an Unforeseeable Manner.

Manufacturers are only liable for the dangers they cause. Accordingly, they are not liable for defects caused by the user or others.¹¹⁹ However, manufacturers can be held liable when the misuse is foreseeable. For example, it is a misuse of an automobile to crash it but “[a] manufacturer must use reasonable care in [a product’s design] to avoid subjecting users to enhanced injuries.”¹²⁰

(vii) If a Warranty Theory is Relied Upon, Then There is Privity.

Privity requires that the plaintiff actually purchase the defective product from the defendant. There are exceptions - anyone in the family or household of the buyer or a guest in the home of the buyer.¹²¹

(viii) If a Warranty Theory is Relied Upon, Notice Must be Given to the Defendant.

“Generally speaking, the buyer must within a reasonable time after he discovers or should have discovered any breach of warranty, notify the seller of the breach or be barred from any remedy.”¹²²

(ix) Appropriate Testimony, Usually by Experts, can be Obtained to Prove the Case.

Particularly with the advent of the risk-utility analysis required by *Banks v. ICI*,¹²³ expert testimony is going to be virtually mandatory in product defect cases. Experts can provide helpful

¹¹⁸ *Batten v. Chrysler Corp.*, 211 Ga. app. 173 (1993).

¹¹⁹ *Giordano v. Ford Motor Company*, 165 Ga. App. 644, 299 S.E.2d 897 (1983).

¹²⁰ *Product Liability Desk Reference*, Daller Ed., 1996 p. 87; *Friend v. General Motors Corp.*, 118 Ga. App. 763, 165 S.E.2d 734 (1968).

¹²¹ O.C.G.A. §11-2-318.

¹²² “Plaintiff’s Prima Facie Case”, Cathey, Products Liability Institute, ICLE 1990.

testimony describing the difference between the way the product should have turned out and the way it in fact ended up. Expert testimony will probably be essential to prove that a superior design should have been chosen. Expert witnesses come in a variety of flavors. There are experts who have acquired their expertise by virtue of hands-on experience. There are experts who have acquired their expertise by virtue of formal study. Care needs to be taken to choose the right expert, or combination of experts, for the particular product and case. The rules on what an expert can testify no longer materially differ between state and federal courts. Both are governed by the *Daubert* case and its progeny.

Additionally, one must exercise care to insure that the expert is basing his opinions on evidence that is not protected by a confidentiality order he might have entered in another case. If he violates such an order, he could be held in criminal contempt.¹²⁴

a. Federal Courts

Federal Rules of Evidence, Rule 704 provides that “testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” “As a general rule, questions relating to the basis and sources of an expert’s opinion affect the weight to be assigned that opinion rather than its admissibility, and should be left for the jury’s consideration.”¹²⁵ A “witness qualified as an expert of knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”¹²⁶ “The inquiry envisioned by Rule 702 is, we emphasize, a flexible one.”¹²⁷ “The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.”¹²⁸

¹²³ 264 Ga. 732, 450 S.E.2d 671 (1994).

¹²⁴ *In re Friedman*, 257 Ga.App. 688, 572 S.E.2d 48 (2002)

¹²⁵ *Viterbo v. Dow Chemical Company*, 826 F.2d 420, 422 (5th Cir. 1987).

¹²⁶ Fed. R. Evid., Rule 702.

¹²⁷ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, ___ U.S. ___, 113 S. Ct. 2786, 2797 (1993) (footnotes omitted).

¹²⁸ *Id.*

In all cases involving expert witnesses in Federal Courts, the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,¹²⁹ the controlling precedent in the Eleventh Circuit Court of Appeals¹³⁰, and the Federal Rules of Evidence, establish the standards by which a federal court is to judge the question of admissibility of expert opinion evidence. *Daubert* identified the relevant rules of evidence as Federal Rules of Evidence, Rules 102, 104, 401, 403, 702, and 703. Under *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167 (1999), the gate keeping duties identified in *Daubert* now apply to all experts.

In determining whether the expert can testify under the Federal Rules of Evidence, in addition to satisfying itself that the expert is qualified, a trial court must determine whether:

the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology . . . properly can be applied to the facts in issue.¹³¹

The Supreme Court has suggested that courts faced with this issue consider the following:

1. [W]hether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (or has been) tested.¹³²
2. Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication.¹³³
3. Additionally, in the case of a particular scientific technique, the court should consider the known or potential rate of error . . .¹³⁴
4. Finally, “general acceptance” can yet have a bearing on the inquiry. A “reliability assessment does not require, although it does permit, explicit

¹²⁹ 113 S. Ct. 2786 (1993).

¹³⁰ *Joiner v. General Electric*, 73 F.3d 1441 (11th Cir. 1996), reversed and remanded ____ U.S. ___, 118 S. Ct. 512 (1997)

¹³¹ *Id.* at 2796 (footnotes omitted).

¹³² *Id.* at 2796.

¹³³ *Id.*

¹³⁴ *Id.*

identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community.”¹³⁵

“Pertinent evidence based on scientifically valid principles will satisfy those demands.”¹³⁶ When attempting to use expert testimony in federal court, focus on the fact that the methodology used is appropriate and accepted.

One of the most important aspects of the *Daubert v. Merrill Dow* decision is enunciated in *General Electric v. Joiner*,¹³⁷ in which the Supreme Court held that the trial court’s decision to exclude or admit expert testimony under *Daubert v. Merrill Dow* can only be reviewed by an appellate court for abuse of discretion. This is true regardless of the effect the ruling has on the case - even if it ends the case. This gives trial courts tremendous power and makes forum shopping very important as a hostile judge cannot be reversed.

One of the significant differences between federal and state practice is that under the federal rules of evidence, the expert is allowed to recite the opinions of other experts upon which he relied - even if those experts’ opinions are not in evidence and those experts are not available for cross examination.¹³⁸ In Georgia, such testimony would be hearsay.¹³⁹

b. State Courts

Georgia law provides that the opinion of an expert on “any question of science, skill, trade, or like questions shall always be admissible; and such opinions may be given on the facts as proved by other witnesses.”¹⁴⁰ “[A]n expert witness may be qualified when it is shown that he has education, training, or experience in a field and that his opinions are his own although they may be based on facts related by others.”¹⁴¹ An expert may give an opinion when it falls

¹³⁵ *Id.* at 2797.

¹³⁶ *Id.* at 2799.

¹³⁷ ____ U.S. ___, 118 S. Ct. 512 (1997)

¹³⁸ Fed. R. Evid. Rule 703.

¹³⁹ *Southern Bell Tel. & Tel. Co. v. Franklin*, 196 Ga. App. 474, 475 (1990).

¹⁴⁰ O.C.G.A. §24-9-67.

¹⁴¹ Robert A. Falanga, *Laying Foundations and Making Objections in Georgia*, (1988) § 11-5, p. 146.

within the profession and business or calling which the expert pursues.¹⁴² Formal training is not a pre-requisite for expert status.¹⁴³

It is not necessary that an expert have a formal training in order to be qualified as an expert. In fact, informal training or experience is sufficient to qualify an expert in the field in which the person is experienced.¹⁴⁴

An expert may give his opinion without stating the reasons therefore, but one who is not an expert may give his opinions only when accompanied by the reasons.¹⁴⁵ However, an expert should be allowed to state the facts upon which he bases his opinion and it is error to refuse to permit him to do so.¹⁴⁶

An expert may give his opinion on the ultimate issue where the conclusion of the expert is one which the jurors would not ordinarily be able to draw for themselves - a conclusion which is beyond the knowledge of an average layman.¹⁴⁷ An expert may not serve as the conduit for the opinions of other experts.¹⁴⁸ Often, physicians are called upon to read the opinions of other health providers under the guise that the report containing the opinion is a business record of the testifying doctor and is thus admissible. The law does not allow this.¹⁴⁹ In short, Dr. Jones, the family physician, cannot testify that Dr. Smith, the radiologist, read the MRI and believes that the plaintiff has a ruptured disc.

For the testimony of an expert witness to be received, his qualifications as such must first be proved.¹⁵⁰ This is addressed by the sound discretion of the trial court.¹⁵¹ All of the above is

¹⁴² *Southern Ry. v. Cabe*, 109 Ga. App. 432 (1964).

¹⁴³ *Brown v. State*, 245 Ga. 588 (1980).

¹⁴⁴ *Brick & Block Company v. Meadow*, 92 Ga. App. 338, 330 (1955).

¹⁴⁵ *Wallace v. State*, 204 Ga. 676 (1949).

¹⁴⁶ *McDaniel v. Department of Transportation*, 200 Ga. App. 674 (1991).

¹⁴⁷ *Smith v. State*, 247 Ga. 612, 619 (1981).

¹⁴⁸ *Southern Bell Tel. & Tel. Co. v. Franklin*, 196 Ga. App. 474, 475 (1990).

¹⁴⁹ *Id.*

¹⁵⁰ *Knudsen v. Duffee Freeman, Inc.*, 95 Ga. App. 872 (1957).

¹⁵¹ *Clary v. State*, 8 Ga. App. 92 (1910); *Hines v. Hendricks*, 25 Ga. App. 682 (1920).

somewhat at issue because Georgia law is still in a state of flux since the tort reform of February 2005 known as SB3 codified at O.C.G.A. § 24-9-67.1

(x) The Plaintiff is Sufficiently Injured to Justify the Expense.

Product liability cases are difficult and expensive. The defendants typically are prepared to go to the wall in defense of their products. This is particularly true in design cases where an entire product line is called into question. Plaintiff's counsel must be prepared to expend a considerable amount of energy handling the case. This energy can only be justified if the plaintiff is sufficiently injured to warrant a large settlement or verdict. Typically, if the injury is not worth at least \$300,000.00, the case will not be a profitable one to handle except in the obvious defective product cases. Dreams of huge punitive damage awards are, in the real world, just that - dreams. In the vast majority of cases, the manufacturer did not even think about causing an injury and without proof of some conscious awareness of the dangers of its product, punitive damages are not going to be obtainable. Further proof of this is that in Georgia a portion of the punitive damages has been assigned to the State for several years but the state has yet to collect the first dime of punitive damages.

(xi) Counsel has Sufficient Financial Resources to Prosecute the Case.

As noted above, these cases are expensive. Occasionally, a case can indeed be prepared for trial for under ten thousand dollars. But again, in the real world, experts, models, travel, etc. eat up money fast. When preparing for a product liability case, assume a minimum of \$40,000.00 for plaintiff's expert - even more if the expert is out of state or travels with an entourage. Assume another \$10,000.00 for depositions of various doctors and experts. Assume at least \$8,000.00 for product testing. Assume at least \$8,000.00 for design work, if necessary. Assume a minimum of \$9,000.00 for good demonstrative models and exhibits. Assume \$15,000.00 for computer simulations, if necessary. If absorbing this kind of risk is impossible, then ask another firm to help. Whatever you do, do not go into one of these cases unable to see it through to conclusion.

IV. DEFENSES

Prior to accepting any product liability case and sinking a fortune in expense money and time into it, counsel should be very careful to consider the defenses available to the manufacturer.

A. ASSUMPTION OF RISK

Assumption of risk is a valid defense in negligence and strict liability cases.¹⁵²

Assumption of risk occurs when a plaintiff knowingly encounters a present danger with an appreciation of the danger.¹⁵³ Note that this defense is often confused with “open and obvious”. There is a difference. Under the law as it existed prior to *Banks v. ICI*,¹⁵⁴ and *Ogletree v. Navistar*¹⁵⁵, a product was simply not defective if the defect which caused the injury was “open and obvious”. A plaintiff could be barred from recovery by the open and obvious nature of the defect even if he did not have actual awareness of the particular risk that caused his injury. If the danger was open and obvious, the product was not defective and no cause of action existed.

Assumption of the risk can be a defense even if the product is defective, but the plaintiff must actually be aware of the danger (either awareness of the defect or of the potential injury even if not aware that the product was defective)¹⁵⁶ and choose to accept it as a risk of using the product.

B. COMPARATIVE NEGLIGENCE

In a claim based on strict liability, the plaintiff’s negligence is not relevant because the defense of comparative fault is not available.¹⁵⁷ Under Georgia law “contributory negligence is **not a defense** to a claim of strict liability for product caused harm.”¹⁵⁸ The usual rules of comparative negligence will apply to cases founded on negligence principles.

¹⁵² *Deere & Co. v. Brooks*, 250 Ga. 517, 299 S.E.2d 704 (1983).

¹⁵³ *Weatherby v. Honda Motor Co.*, 195 Ga. App. 169, 171 (1990).

¹⁵⁴ 264 Ga. 732, 450 S.E.2d 671 (1994).

¹⁵⁵ 269 Ga. 443, 500 S.E.2d 570 (1998).

¹⁵⁶ *Gill v. Westinghouse Electric Corp.*, 714 F.2d 1105 (11th Cir. 1983).

¹⁵⁷ *Ford Motor Co. v. Carter*, 239 Ga. 657, 661 n.3, 238 S.E.2d 361 (1977); *Deere & Co. v. Brooks*, 250 Ga. 517, 299 S.E.2d 704 (1983).

¹⁵⁸ *Continental Research Corp. v. Reeves*, 204 Ga. App. 120, 128, 419 S.E.2d 48 (1992) (emphasis added), citing *Deere & Co. v. Brooks*, 250 Ga. 517, 518, 299 S.E.2d 704. See also *Parzini v. Center Chemical Co.*, 136 Ga. App. 396, 399, 221 S.E.2d 475 (1975); *Ford Motor Co. v. Carter*, 239 Ga. 657, 661, 238 S.E.2d 361 (1977) (noting that

C. SOPHISTICATED INTERMEDIARY

There are three separate and distinct situations in which, as a matter of Georgia law, a manufacturer/supplier has no duty to warn the ultimate consumer of any dangers associated with its product, but may, instead, rely on a learned intermediary/sophisticated distributor to warn the consumer of any such dangers. Those situations are (1) where the danger is commonly known in the industry (*Eyster v. Borg-Warner Corp.*, 131 Ga. App. 702, 206 S.E.2d 668 (1974); (2) where the distributor is presumed to have knowledge of the danger as a matter of law (*Stiltjes v. Ridco Exterminating Co.*, 178 Ga. App. 438, 343 S.E.2d 715, *aff'd*, 256 Ga. 255, 347 S.E.2d 568 (1986); or (3) where the distributor has actual knowledge of the danger (*Stuckey v. Northern Propane Gas Co.*, 874 F.2d 1563 (11th Cir. 1989)) (applying Georgia law)."¹⁵⁹

A physician, even though a learned intermediary, does not have the sole responsibility of advising the patient of dangers associated with a defective spinal plate¹⁶⁰. Instead, the manufacturer can be held liable when it fails to provide the learned intermediary with truthful or complete information.

D. SOPHISTICATED USER

“Where the product is vended to a particular group or profession, the manufacturer is not required to warn against risks generally known to such group or profession.”¹⁶¹ A simplistic way of understanding this concept is that a bug poison product, for example, might be defective in its warnings or instructions if sold at K-Mart, but it might be perfectly reasonable if sold only to licensed pest control applicators.

generally contributory negligence is not a defense to a strict liability claim according to the weight of authority throughout country)

¹⁵⁹ 6th Annual Product Liability Institute, “The Bulk Supplier Doctrine: An Expansion of the Learned Intermediary/Sophisticated User Defense,” Carpenter, ICLE p. 5-002.

¹⁶⁰ *McCombs v. Synthes*, 277 Ga. 252, 587 SE2d 594 (2003))

¹⁶¹ *Eyster v. Borg-Warner Corp.*, 131 Ga. App. 702, 206 S.E.2d 668 (1974).

E. SPOILIATION OF EVIDENCE

This defense is relevant in a product liability action if the plaintiff destroys the product, or loses the product, before the defendant manufacturer has an opportunity to inspect it. The defense provides that whoever spoils or loses evidence is subject to having a presumption raised against them that the evidence so spoiled would have aided the other side.¹⁶² Accordingly, great care must be taken to avoid destructive testing until the defendant has had an opportunity to examine the product. Additionally, the product at issue must be carefully stored so that its condition is not spoiled. This requires that automobiles, for example, be stored in closed garages not just under a ragged tarp in a muddy junkyard. While losing a product is a serious problem to the prosecution of a case, it is not fatal so long as a reasonable explanation for the loss is available.¹⁶³ If the plaintiff destroys the product, that does not necessarily end his case, but he may find himself unable to use expert testimony and be required to rely solely on photographic evidence to even the field with the defendant.¹⁶⁴

A recent decision on spoliation of evidence, involving a situation in which an elevator was repaired prior to state inspection, described the doctrine as follows:

Spoliation or destruction of evidence creates the presumption that the evidence would have been harmful to the spoliator. *Greer v. Andrew*, 138 Ga. 663, 664, 75 S.E. 1050 (1912); *Bennett v. Assoc. Food Stores, Inc.*, 118 Ga. App. 711, 716, 165 S.E.2d 581 (1968). Proof of such conduct would raise a rebuttable presumption against Montgomery that the evidence favored Lane, a fact rendering summary judgment inappropriate. *American Casualty v. Schafer*, 204 Ga. App. 906, 909, 420 S.E.2d 820 (1992).¹⁶⁵

¹⁶² *Glynn Plymouth v. Davis*, 120 Ga. App. 475, 170 S.E.2d 848 (1969).

¹⁶³ *Chicago Hardware and Fixture Co. v. Letterman, et. al.*, 199 WL 8319, (A98A1753, Ga. App. January 18, 1998); *Figgle International v. Rose*, 229 Ga. App. 848, 495 S.E.2d 77 (1997)

¹⁶⁴ *Bridgestone/Firestone North American Tire, LLC v. Campbell*, 574 SE2d 923 (Ga. App. 2002)

¹⁶⁵ *Lane v. Montgomery Elevator Co.*, A96A1942, 1997 Ga. App. LEXIS 246 (February 24, 1997).

This case in which the defendant repaired an elevator before the state had an opportunity to inspect it makes it clear that this defense is also applicable to the defendant in the right circumstances.

But note this: If a third party destroys the product, it is not tortious for it to have done so. There is no duty absent a contract for the employer or other third party to protect and preserve the injury causing product.¹⁶⁶

F. STATE OF THE ART AND INDUSTRY CUSTOM

“Although the practice of other manufacturers in the industry is not conclusive, it is appropriate for the jury to consider such evidence in determining whether a particular defendant has met the standard of ordinary care.”¹⁶⁷ A product must be designed to operate safely in the foreseeable circumstances in which the product will used.¹⁶⁸ Even if a defendant manufacturer does comply with industry standards, compliance with such standards does not eliminate conclusively a manufacturer’s liability for its design of an allegedly defective product.¹⁶⁹ Consideration of a design defect necessarily includes “common knowledge and the expectation of danger. . .”¹⁷⁰

One method of avoiding this defense is to show that the defendant was aware of prior similar incidents. However, “evidence of other problematic incidents involving a product may be relevant and admissible in product liability actions, without a showing of substantial similarity, the evidence is irrelevant as a matter of law.”¹⁷¹

G. OPEN AND OBVIOUS

Consistent with the Georgia Supreme Court’s opinion in *Banks v. ICI Americas, Inc.*, 264 Ga. 732, 450 S.E.2d 671 (1994), the court recently ruled in *Ogletree v. Navistar International*¹⁷²,

¹⁶⁶ *Owens v. American Refuse Sys., Inc.*, 244 Ga. App. 780; 536 S.E.2d 782 (2000)

¹⁶⁷ A Crash Course in Product Liability, Tactical Defenses for the Manufacturer, Partain, Daily Report (1992).

¹⁶⁸ *Ford Motor Co. v. Stubblefield*, 171 Ga. App. 331, 319 S.E.2d 470 (1984).

¹⁶⁹ *Banks v. ICI Americas, Inc.*, 264 Ga. 732, 450 S.E.2d 671 (1994).

¹⁷⁰ 264 Ga. at 736, n.6.

¹⁷¹ *Karoly v. Kawasaki Motors Corp., U.S.A.*, WL 124766 (Ga. App. 2003)

¹⁷² 269 Ga. 443, 500 S.E.2d 570 (1998)

that “[t]he open and obvious nature of the danger in a product is logically only one of many factors which affect the product’s risk and, therefore, making that single factor dispositive is not consistent with this court’s mandate in *Banks* that the product’s risk must be weighed against its utility.” This reverses a long line of cases including *Smith v. Garden Way, Inc.*, 821 F. Supp. 1486, 1490 (N.D. Ga.), aff’d 12 F.3d 1220 (11th Cir. 1993), *Weatherby v. Honda Motor Co.*, 195 Ga. App. 169, 171 (1990) and *Wansor v. George Hantscho Co.*, 595 F.2d 218 (5th Cir. 1979). Thus, the open and obvious nature of a danger in a product is no longer a slam dunk defense for the manufacturer of a dangerous product.¹⁷³ However, it remains an additional factor pertinent to the analysis in a design defect case.¹⁷⁴

Although, the defense is no longer perfect, an understanding of its foundations is necessary. Under the open and obvious defense, the manufacturer essentially concedes that its product is in fact dangerous, but that the danger is so open and obvious to anyone that the product is not defective as a matter of law. This defense was a favorite as a basis for summary judgment. In essence, it is an assumption of risk argument measured from the point of view of the reasonable user as opposed to the actual user. *Banks v. ICI Americas, Inc.*, 264 Ga. 732, 450 S.E.2d 671 (1994) was the basis for the end of the open and obvious defense because in that case the court held that Georgia:

no longer accept[s] the position that a manufacturer cannot be liable for injuries proximately caused by a product that functions for its intended use, regardless of the risks associated with the product and its utility to the public or the plaintiff’s ability to adduce evidence that a feasible alternative design, which could have prevented or minimized the

¹⁷³ This change in Georgia law was not entirely unexpected after the *Banks v. ICI Americas, Inc.* decision. In fact, in the 1997 and 1998 versions of this same paper, the author argued that Banks v. ICI Americas, Inc. demanded this same result as the defense was “implicitly overruled by *Banks* . . .” and that, at a minimum, the open and obvious defense was relegated to a very narrow application.

¹⁷⁴ *Cornish v. Byrd Welding Serv. Inc.*, 252 Ga. App. 793; 557 S.E.2d 432 (2001)

plaintiff's injury, was available at the time the manufacturer made its design, manufacturing, and marketing decisions.¹⁷⁵

H. REGULATORY COMPLIANCE/FEDERAL PREEMPTION

Like the open and obvious rule, this too is an area of Georgia product liability law that has recently changed in favor of holding manufacturers liable for defective products. In this defense, the manufacturer argues that its compliance with federal regulations is, as a matter of law, compliance with its duties of reasonable care and that any such complying product cannot be defective as a matter of law.

The Supremacy Clause of the United States Constitution dictates that federal law preempts inconsistent state law. U. S. Const., Art. VI, cl. 2. Pre-emption may be either express or implied, and is 'compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.' *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Fidelity Federal Savings & L. Assn. v. de la Cuesta*, 458 U.S. 141, 152 (102 S. Ct. 3014, 73 L. Ed. 2d 664) (1982).¹⁷⁶

This defense is commonly raised when the product touches on the such laws as the National Traffic and Motor Vehicle Safety Act; the Federal Food, Drug and Cosmetic Act; and the Federal Insecticide, Fungicide and Rodenticide Act, among others. Usually preemption cases involve failure to warn, and/or failure to label claims.

In the absence of preemption, compliance with a federal safety regulation by the defendant is not a bar to a claim that the product is defective. In *Doyle v. Volkswagenwerk Akteingesellschaft*,¹⁷⁷ it was held that

¹⁷⁵ 264 Ga. at 737.

¹⁷⁶ *Ploney v. Tambrands*, 260 Ga. 850, 412 S.E.2d 526 (1991).

¹⁷⁷ No. S96Q1529 (Sup. Ct. of Ga. March 3, 1997).

Georgia common law permits a Georgia citizen to sue an automobile manufacturer despite the manufacturer's compliance with the standards established by the National Automobile Safety Act.¹⁷⁸

This is a significant departure from previous law which provided that because "the Georgia standard of duty does not exceed the federal, Georgia would mandate only that federal standards be met."¹⁷⁹ The reason for this change in law is that with the adoption of the risk-utility standard in *Banks v. ICI*¹⁸⁰, a manufacturer is no longer able to rely on boiler plate defenses and must show that the dangers presented by its product have a utility that outweighs the risks associated with them. Preemption remains a very strong defense, but the barricade it used to create is steadily falling at the state level but growing at the federal level.¹⁸¹ The author's paper titled Proper Pleading Prevents Preemption Problems is worth reading.¹⁸²

I. FAILURE TO PROVE THE CASE

Plaintiffs cannot simply sit on their hands in a product liability case. The burden is on the plaintiff to prove that the product is defective. The res ipsa loquitur "doctrine does not apply to mechanical devices because they get out of working order, and sometimes become dangerous and cause injury without negligence on the part of anyone."¹⁸³ Manufacturers will do everything in their power to stand in the way of discovery, to limit access to other counsel with helpful information through the use of confidentiality orders, and to move for summary judgment if it appears that the plaintiff has not taken steps to prepare his case. Accordingly, when filing a product liability suit, discovery, including a 30(b)(6) notice of deposition should almost always be served with the complaint. Have a plan of action, including a retained expert, before you file suit.

¹⁷⁸ *Id.*

¹⁷⁹ *Honda Motor Co. v. Kimbrel*, 189 Ga. App. 414 (1988)

¹⁸⁰ 264 Ga. 732, 450 S.E.2d 671 (1994).

¹⁸¹ *Volkswagen of America, Inc. v. Gentry*, 254 Ga.App. 888, 564 S.E.2d 733 (2002); *Duren v. Paccar, Inc.*, 249 Ga. App. 758; 549 S.E.2d 755 (2001); *Ferrari v. American Home Products Corp.*, 286 Ga. App. 305, 650 SE2d 585 (2008); but see recent U.S. Supreme Court cases on preemption – particularly in drug and medical device cases.

¹⁸² *Proper Pleading Prevents Preemption Problems*, TRIAL May, 2007 p. 68, Warshauer, Michael

¹⁸³ *Miller v. Ford Motor Co.*, 287 Ga. App. 642, 653 SE2d 82 (2007) (cites omitted)

As noted above, except as to the issue of allocating responsibility that is seemingly required by SB3, O.C.G.A. § 51-12 -53 the plaintiff does not have the burden of proving how much of his injuries were caused by the defendant's product. Instead, the burden is on the defendant whose product enhanced the plaintiff's injuries to show, as a defense, the portion of the injuries attributable to his actions.¹⁸⁴

(i) Subsequent Remedial Measures

While evidence of subsequent remedial repairs is not admissible to prove negligence, it is admissible in state court to prove a product defect under strict liability¹⁸⁵. However, it is not admissible in federal court - even to establish strict liability.¹⁸⁶

J. INHERENTLY DANGEROUS PRODUCTS

Some products are unavoidably dangerous to use. This does not mean that these products are defective. The manufacturer is not liable for a defective product unless it markets the unavoidably dangerous product without an adequate warning.¹⁸⁷ This assumes, of course that the standard engineering practices of first designing the product to be safe, and then guarding anything that cannot be safe, have been satisfied. If proper engineering has not been applied, then the product is not "unavoidably unsafe" and is, instead defective in its design.

Manufacturers uniformly take the position that they are not required to warn of open and obvious dangers. This argument certainly carried the day for many years. In the post *Banks v. ICI* era, it should not be as effective.

K. MISHANDLING

A manufacturer is not liable for injuries that result from the plaintiff's mishandling of a product.¹⁸⁸ A manufacturer has no duty to warn of about the dangers associated with an unforeseeable use of its product.¹⁸⁹

¹⁸⁴ *Ford Motor Co. v. Tippins*, 225 Ga. App. 128, 131 (1997)

¹⁸⁵ *General Motors Corp. v. Mosely*, 213 Ga. App. 875 (1994)

¹⁸⁶ Federal Rule of Evidence Rule 407

¹⁸⁷ *Walker v. Merck & Co.*, 648 F. Supp. 931 (M.D. Ga. 1986).

¹⁸⁸ See, e.g., *Center Chemical Co. v. Parzini*, 234 Ga. 868, 869, 218 S.E.2d 580 (1975).

¹⁸⁹ *Talley v. City Tank Corp.*, 158 Ga. App. 130, 279 S.E.2d 264 (1981).

V. TIME LIMITS

There are two kinds of time limits applicable to a product liability action. The statute of limitations is the same tort statute of limitations that applies in any bodily injury claim. The other, the statute of repose, is unique to product liability actions and can completely bar an action before even the fastest counsel can get a lawsuit filed.

A. THE STATUTE OF LIMITATIONS FOR BODILY INJURY IS TWO YEARS

Claims based on negligence or strict liability must be brought within two years.¹⁹⁰ This is the same statute applicable to most bodily injury claims in Georgia. The discovery rule applies and serves to toll the statute of limitations until such time the plaintiff knew, or through the exercise of reasonable care, should have known of the (a) extent of this injury and (b) the connection between his injury and the defective product.¹⁹¹

B. THE STATUTE OF REPOSE IS TEN YEARS

O.C.G.A. §51-1-11(c) sets forth a ten year statute of repose as follows:

No action shall be commenced pursuant to this subsection with respect to an injury after ten years from the date of the first sale for use¹⁹² or consumption of the personal property causing or otherwise bringing about the injury.

Originally, there was some confusion about the applicability of the statute of repose to negligence claims. Any such confusion was eliminated by the amendment to the statute in 1987 which provided that the:

bringing of an action within ten years from the date of the first sale for use or consumption of personal property shall also apply to the

¹⁹⁰ O.C.G.A. §9-3-33.

¹⁹¹ *Welch v. Celotex Corp.*, 951 F.2d 1235 (11th Cir. 1992).

¹⁹² Statute of repose begins to run from first sale of product for use. *Dorsey Trailers v. Knight.*, A00A1985. A00A1986. A00A1987 (Ga. App. 2001)

commencement of an action claiming negligence of a manufacturer as the basis of liability....

However, the statute of repose does not apply to claims against products “which cause a disease or birth defect” or claims that the manufacturer’s conduct was willful, reckless, or with wanton disregard for life or property¹⁹³.

Lastly, Georgia’s statute of repose at O.C.G.A. §51-1-11(a)(2) does not apply to claims based on the manufacturer’s duty to warn of dangers relating to the use of a product it manufactures once that danger becomes known to the manufacturer.¹⁹⁴ In this regard, the statute of repose provides that “[n]othing contained in this subsection shall relieve a manufacturer from the duty to warn of a danger arising from use of a product once that danger becomes known to the manufacturer.”¹⁹⁵ Failure to warn cases are:

outside the ambit of the statute of repose, thereby precluding use of the statute to relieve manufacturers of their liability for failing to warn of a danger arising from the use of a product whenever that danger becomes known to the manufacturers.¹⁹⁶

There is no requirement that the manufacturer have actual knowledge of a particular danger for it to be liable for its failure to warn. Constructive knowledge, that is, knowledge that the manufacturer reasonably should know, gives rise to the duty to warn.¹⁹⁷ Georgia law further provides that while there may be a factual overlap between an allegation that a product is negligently manufactured and an allegation that a product is defective for lack of warnings, the two theories are not coexistent as one claim can be legally barred and the other will still survive for resolution.¹⁹⁸

¹⁹³ O.C.G.A. §51-1-11(c).

¹⁹⁴ O.C.G.A. §51-1-11(c); *Chrysler Corp. v. Batten*, 264 Ga. 723, 452 S.E.2d 94 (1994).

¹⁹⁵ O.C.G.A. §51-1-11(c).

¹⁹⁶ *Chrysler Corp. v. Batten*, 264 Ga. 723, 452 S.E.2d 94 (1994).

¹⁹⁷ *Id.*; *Ford Motor Co. v. Stubblefield*, 171 Ga. App. 331, 225, 319 S.E.2d 470 (1984); *Stiltjes v. Ridco Exterm. Co.*, 192 Ga. App. 778, 780, 386 S.E.2d 696 (1989).

¹⁹⁸ *Chrysler Corp. v. Batten*, 264 Ga. 723, 724, 452 S.E.2d 94 (1994); cf. e.g. *Banks v. ICI Americas*, 264 Ga. 732, 450 S.E.2d 671 (1994).

C. WARRANTY IS FOUR OR SIX YEARS

Usually the plaintiff will have four years after tendering the product back to the manufacturer within which to file suit on a warranty claim.¹⁹⁹ This period can be shortened by agreement to one year but cannot be extended.²⁰⁰ If an express warranty is outside the ambit of the Uniform Commercial Code, it is subject to the six year time limit for contract actions.²⁰¹

VI. VENUE AND JURISDICTION ISSUES

The usual venue and jurisdiction issues apply in product liability cases. However, there is often some incentive to forum shop in product liability cases. As noted above, the right jurisdiction might allow avoidance of the statute of repose. Additionally, there is still some truth to the argument that a case based on failure to warn has a better chance of reaching the jury in federal court than in state court.²⁰²

VII. DAMAGES

The usual suite of damages available in a bodily injury tort action are available in a product liability case. A successful plaintiff can recover general, special, and punitive damages. A unique aspect of product liability damages arises in crash worthiness cases. In these cases, once the plaintiff shows that the design defect was a substantial factor in causing additional damages to be suffered, which exceeded the damages which he would have suffered had the product been designed properly, the burden shifts to the defendant manufacturer to demonstrate a rational basis for apportioning the damages between the cause of the initial injury and its conduct which enhanced the damages.²⁰³

A. PUNITIVE DAMAGES

Punitive damages are appropriate where the plaintiff establishes by clear and convincing evidence that the defendant's misconduct was willful, malicious, fraudulent, wanton, oppressive,

¹⁹⁹ O.C.G.A. §11-2-725(1).

²⁰⁰ *Id.*

²⁰¹ O.C.G.A. §9-3-24.

²⁰² See, *A Warning Claim: The Differing Treatment of Georgia Product Liability Actions in State and Federal Courts*, THE ATLANTA LAWYER, Summer, 1898, North, Richard

²⁰³ *Polston v. Boomershine Pontiac-GMC Truck, Inc.*, 262 Ga. 616, 423 S.E.2d 659 (1992).

or exhibited a “want of care which would raise the presumption of conscious indifference to consequences.”²⁰⁴ The trier of fact, based on evidence produced at trial, decides whether to award punitive damages.²⁰⁵

Even if punitive damages are awarded, only the first plaintiff to recover them is entitled to them under the punitive damages statute.²⁰⁶ Additionally, 75% of the award goes to the state. This statute, though never considered from the point of view of the second plaintiff who seeks punitive damages, has been upheld as constitutional with respect to the money going to the state.²⁰⁷ It is improper for the trial court to tell the jury that 75% of the punitive damages will go to the state.²⁰⁸

B. LOSS OF CONSORTIUM DAMAGES

A loss of consortium claim is recognized in a product liability claim.²⁰⁹ Under Georgia law, the only facts which a consortium claimant must prove, aside from the facts that the injured spouse must prevail in his or her personal injury claim, is the existence of the marital relationship and damage to the rights of consortium.²¹⁰

VIII. CONCLUSION: SPECIAL CONSIDERATIONS AND STUPID MISTAKES

Product liability law is an area that should be avoided by the squeamish. The defendants fight over everything. Experts are expensive. Models are expensive. Travel to distant manufacturers and experts is expensive. Reading volumes of documents and becoming an expert on a particular product is time consuming. The law is convoluted and confusing. The trials often take a long time.

On the other hand, these cases can be great fun. Occasionally, industry reacts to a product liability case by making the product safer. If this happens, there is a real sense of

²⁰⁴ O.C.G.A. §51-12-5.1(b).

²⁰⁵ O.C.G.A. §51-12-5.1(d).

²⁰⁶ O.C.G.A. §51-12-5.1.

²⁰⁷ *State v. Moseley*, 263 Ga. 680, 436 S.E.2d 632 (1992).

²⁰⁸ *Ford v. Uniroyal Goodrich Tire Co.*, 267 Ga. 226 (1996)

²⁰⁹ *Timmons v. Allsteel Press Co.*, 520 F.Supp. 1147 (N.D. Ga. 1981).

²¹⁰ *Jones v. Beasley*, 476 F. Supp. 116, 118 (M.D. Ga. 1979).

accomplishment which is much more satisfying than one could ever hope to obtain from a car wreck or malpractice action.

Additionally, everyone who believes that the manufacturers of unsafe products should compensate the victims of their dangerous products should keep a watchful eye on Congress as there are greedy manufacturers who constantly encourage Congress to put their desire for profit above the rights of states to protect their citizens from dangerous products. Additionally, Section 402(A) of the Restatement (Second) of Torts apparently is going to be changed with the Third Restatement. While Georgia has not adopted the Restatement, it is nevertheless an influential summary of the law upon which Georgia courts have long relied. Most authorities believe this change will make it more difficult to bring a small to medium case because of the expense of having to show an alternative design.