

## **A Claim Barred by Repose, By Any Other Name, is Just as Sweet Re: Product Manufacturing Defects**

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As the Jennifers, Stephanies, and Monicas of my generation will tell you, names are a fleeting thing in our society. Just try to find a Mildred, Agnes, or Bertha among today's throng of Katelyns, Taylors, and Drews. Names go away for various reasons, including trends and not so flattering societal imagery -- see Monica.

The law is no different with names. In the 1960s, while the Jennifers and Stephanies were born, the law came up with a new name for claims involving products -- strict liability. It sounded onerous and tough.

After all, if a parents were called "strict," as mine were, curfews were the 11th Commandment. If the branch of the legal family tree with the sur name Liability named its new child Strict -- it meant business, likely driving around with bumper stickers saying "My Child, Strict, Can Beat Up Your Honor Student, Negligence."

Strict liability was originally intended to address manufacturing defects (not design defects) and to pass the burden of costs of injuries onto the manufacturer -- for instance, if the Mars bar with a hypodermic needle buried within injured the unsuspecting chocoholic.

You had the greatest quality control in the world at the Mars plant? So what. You're liable, and not just run-of-the-mill liability, but strictly liable. The plaintiff only had to prove the product was unreasonably dangerous, he used it in a normal manner, and it caused his damages. Basically, strict liability took one key and sometimes difficult-to-prove element away in a case involving a defectively manufactured product -- negligence.

But sometimes people claimed to be injured by a product that was not defectively manufactured. It was designed that way and every single widget was the same, built per the same specifications. The existing law required that design plaintiff to prove that the manufacturer was negligent in its design in some way, unlike if he had a manufacturing defect claim.

Courts and commentators thought this wasn't fair and therefore held that strict liability also applied to design-defect claims. Plaintiffs did not have to prove the designer was negligent, just that the design was unreasonably dangerous and defective.

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But unlike the manufacturing defect case, where you could look at the offending product and say, "I don't think that mouse was supposed to be in my bag of Doritos," design defect claims posed a problem: How do we determine the design is "unreasonably dangerous and defective?"

Courts and the Restatement folks came up with a way to determine defectiveness known as the "consumer expectation test." Basically, if you're a knife juggler, buy three Crocodile Dundee razor sharp daggers for your act, and slice off your fingers, the consumer expectation test would say, "Duh, knives are sharp. That's what you as a consumer expected." The manufacturer would win.

But courts began thinking that was not right. We want to encourage manufacturers to make products as safe as possible, and just because someone buys a knife and expects it to be sharp, is it feasible to design it safer, say with a cover or sheath? Thus, what became known as the risk-utility test was born for determining whether a product is defective.

The risk-utility test is what it sounds like. The jury or judge balances the inherent risks in the product (How many people have been injured? How much would it cost to correct that risk? What do the industry standards say? What do consumers expect? Is there a feasible design alternative?) versus the affect such potential design changes would have on "utility" or "usefulness" of the product (Would the changes make it cost prohibitive? Would an unsharp knife be able to cut something?).

After balancing these factors, courts and juries decide if the design is defective. The application of the risk-utility test to strict liability claims differentiated strict liability from negligent design defect claims. In fact, the Illinois Supreme Court held in 2005 that the risk utility test did not apply to negligent design defect claims.

There thus remained a distinction between a claim named strict liability and a claim named negligence.

In the interim, many state legislatures determined that it was unfair to the manufacturer to subject it to the onerous burdens strict liability for an unlimited time period after it sold the product. After all, designs change over time, as does the state of knowledge.

They attempted to fix that concern by enacting statutes of repose to protect manufacturers -- usually stating that claims filed after 10 years or so after sale would be barred.

Illinois enacted its statute of repose in 1979, and it applied specifically to design, warning and manufacturing defect claims filed more than 10 years after sale to the first user. Key to the point of this blog, it only applied, however, to strict liability claims, not negligence claims.

In 1995, the Illinois legislature, as part of tort reform legislation, changed the repose statute to apply to all product liability claims, including those based on strict liability and negligence. In 1997, however, the Illinois Supreme Court declared the entire statute calling for tort reform unconstitutional. It did not hold, however, that the specific portion of tort reform modifying the repose statute was unconstitutional. It was just considered to be part and parcel of the whole tort reform package and was thus struck down.

Thus, the statute of repose continued to apply to only product liability claims based on strict liability, not those based on negligence. And, as mentioned, there remained a distinction in the test applicable for the two claims.

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That history regarding the distinction between negligent design defect claims and strict liability design defect claims -- including the separateness of the risk-utility test -- sets the stage for the naming issue that started this blog.

In its 2011 opinion in *Jablonski v. Ford*, The Illinois Supreme Court changed things by first holding -- rejecting its previous 2005 decision -- that the same risk utility test, discussed above, applied to not only claims named strict liability design defect, but also to those named negligent design defect. It specifically referenced many articles and authorities over the years recognizing that in design defect cases there really is no difference between strict liability and negligence. Both are really looking at the reasonableness of the designer's decisions with regard to the product.

The Supreme Court stated that the difference between the claims was really one of "semantics" in determining whether the product is "unreasonably dangerous." It then held that the risk-utility test applied to both claims, regardless of what the plaintiffs' attorney decided to name them.

So, if there is no longer a distinction in Illinois between strict liability design defect and negligent design defect, and only a name or "semantics" distinguishes the two, then what about the statute of repose applying to only strict liability claims? Does it also apply to negligent design defect claims filed more than 10 years after the initial sale?

Is it fair to a manufacturer, if only a name distinguishes the two, to allow a plaintiff to file a design defect claim more than 10 years after the sale and have it proceed by merely naming it "negligent design defect?"

This will be an issue of first impression for any court applying Illinois design defect law after *Jablonski* was issued in 2011.

Legislative interpretation in Illinois would suggest that the claims for negligent design defect, which are now indistinguishable from strict liability design defect claims, should now be barred. Illinois statutory interpretation guidelines require that a statute not be interpreted such that a provision is "meaningless."

In this scenario, if a plaintiff were able to avoid the statute of repose by merely labeling or naming his claim as one for negligent design defect, the statute of repose would be rendered "meaningless." Importantly, the existing test for strict liability, which claims are subject to the statute of repose, was merged into negligence claims that were not barred, not vice versa. The Illinois Supreme Court ostensibly made this decision with full knowledge of the statute of repose.

Thus, if you are faced with a claim in Illinois involving a product that was sold more than 10 years ago, and the plaintiff has alleged negligent design defect, you will want to include statute of repose as an affirmative defense for all claims, including negligence, not just strict liability.

A mutilation of Shakespeare comes to mind: Illinois product liability claims subject to a repose (Strict liability), by any other name (Negligence), may be just as sweet (for manufacturers anyway).

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