

# *Recreational Products: Legal Liability and Risk Management Issues for Manufacturers and Others in the Chain of Distribution - A Primer*

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## **I. Introduction**

- *Why a Primer?*

Webster's Dictionary defines "primer" as an "elementary textbook; a book covering the basic elements of a subject." If you are reading this, you are probably aware that product related legal issues encompass a wide, highly complex and oftentimes confusing array of issues. At first blush, it is a subject that doesn't seem capable of being "boiled down" into some "basic elements." However, as ORCA President, Dave Secunda and I discussed, all the more reason to make a determined effort to put some of these principles into simpler terms, to assist manufacturers, retailers and distributors of recreational products nationwide in understanding and dealing with these issues in their businesses.<sup>1</sup>

- *How will this benefit me?*

The purpose of this Primer is to provide recreational product manufacturers, distributors, retailers, lessors, dealers, and others in the product "chain of distribution" (Sellers)<sup>2</sup> with an overview of some general legal issues and risk management principles related to product manufacture and sale – a "starting point" for Sellers to understand and address these issues. Sellers can review this document to obtain general information on product liability legal issues and risk management principles.<sup>3</sup> Sellers can then utilize this Primer, in consultation with their legal counsel, to assist in efforts to address these legal issues in their business.

This Primer will outline some basic product liability legal principles, and how the Seller fits into this legal structure.<sup>4</sup> The Primer will discuss the importance of utilizing appropriate risk management tools and principles to proactively address legal issues related to the manufacture and sale of recreational products. **This Primer contains general information only and is not intended to provide specific legal advice. It contains a selection of general legal principles, and is intended only as a reference and as a starting point for Sellers and their legal counsel. Sellers reviewing this information should consult with legal counsel, experienced in recreational product legal issues, to appropriately address these issues in their businesses, consistent with applicable state and federal law and with the Sellers' own particular needs.**<sup>5</sup>

## **II. General Thoughts: Risk Management**

Recreational activities, from skiing and white water rafting to mountain climbing and mountain biking, involve inherent and other risks that provide challenge and excitement, enticing individuals

to participate. The inherently risky nature of recreational activities, our litigious society and individuals' failure to accept responsibility for themselves, are all factors which have made overall risk management practices critical to the viability of those engaged in the business of manufacturing or selling recreational products. Risk management spans all aspects of a business: developing and testing products, drafting brochures, contracts and other documents, obtaining adequate insurance, and a host of other things. Importantly, risk management for Sellers includes understanding some basics about product liability law, and how it affects your day to day business operations.

Unfortunately, thinking about risk management in one's business can be a difficult and unattractive proposition. One can be overcome with the doom and gloom of potential injury and death and the overall goal to simply engage in risk management to avoid liability. However, instead of approaching risk management "running scared" and addressing legal issues simply to attempt to avoid a lawsuit or minimize liability, think about *running a professional operation*. If this is your primary goal in understanding legal issues and addressing risk management in your business, your whole attitude and approach is different. Although it is exciting to developing an outdoor product and contribute to the adventure experience, excitement and fulfillment can also flow from running a professional and ethical business.

Running a professional operation includes quality product development and fundamental fairness to the consumer and to those you engage with in the chain of distribution, while utilizing appropriate risk management practices. If you address risk management from this perspective, you certainly may minimize or reduce actual injuries or accidents, the occurrence of claims or lawsuits, or, your ultimate liability. However, you've done so in a positive way, contributing to a quality outdoor product or adventure experience, while potentially reducing your liability exposure.

### **III. Note on Recreational Activities and Inherent Risks**

A word about inherent risks. As stated, recreational activities involve inherent and other risks that entice individuals to participate. Inherent risks include those risks which 1) are essential characteristics of a recreational activity and those which participants desire to confront: e.g. moguls, steep grades, exciting whitewater; and 2) those undesirable risks which exist and which cannot be controlled, e.g. falling rock or sudden, severe weather changes. Common law (that derived from legal cases) provides that participants may not recover from recreation providers (those providing the service) for injuries that result from the inherent risks of recreational activities. In other words, the provider has no duty to protect the participant from those risks and has no liability for injuries resulting from those inherent risks. (See Part X.A.2.b.).

Note that the inherent risk doctrine applies to the inherent risks of *recreational activities*. A defective product is not an inherent risk of recreational activities. However, it is important for Sellers to understand this concept in the context of recreational products for several reasons. First, Sellers need to understand the risk management issues unique to their (recreational) product niche – people are *drawn* to recreational activities *because* of the risks – those risks create the excitement and adrenaline, drawing folks to participate. The product is not being used in a utilitarian way in an office or kitchen, but for recreational purposes in an outdoor or wilderness setting, infused with inherent risks which cannot be controlled.

Obviously, manufactures cannot “design away” the inherent risks of recreational activities. However, product research and development must be thoughtful, thorough and meticulous, to attempt to produce a product that will function reliably in an adventure setting. Product instructions, labels and warnings must be carefully and thoughtfully drawn to discourage misuse, to advise users of the correct use of the product, and potentially, to advise users regarding the inherent risks of the particular activity (see Part X.A.2.a). The Seller cannot control how the user will ultimately use the product. However, if the Seller has engaged in responsible product development and included appropriate instructions, warnings and information, accidents may be minimized. If accidents do occur in connection with use of a product, it may well be that the injury resulted *not* from a defective product, but from the inherent risks of the activity (see Part X.A.2.b and B.6).

#### **IV. Recreational ‘Products Liability’: Those in the Chain of Distribution**

Under traditional ‘products liability’ law, a user can assert a claim against the Seller via three avenues. The user can urge that: 1) the specific product is defective (one in the line); 2) the entire product line was defectively designed; or 3) the seller failed to warn or instruct (regarding the product).

Many times, a user claiming injury or damage resulting from the use of a recreational product will assert more than one basis for his claim against the Seller (e.g. defective design *and* failure to warn). Compounding this confusion, these multiple charges can be wrapped into any one (or sometimes all) of three *general* “product liability” legal theories and stated as ‘claims’ or ‘counts’ in a lawsuit ‘complaint’. I say *general*, because many states have their own specific statutes, case law varies widely from state to state, and there may be applicable federal laws. These three theories of liability include negligence (failure to exercise reasonable care), strict liability and warranty. Interestingly, unlike earlier product liability theories, the ultimate user of the product need not have any contractual relationship with the Seller in order to seek recovery for damages.

Those individuals or entities engaged in the business of manufacturing, distributing, dealing, retailing and renting a recreational product, are considered within the “chain of distribution” and thus, may be named in any lawsuit, and found potentially liable to the plaintiff/ user under any one (or a combination) of these three theories. All of those within this chain of distribution are considered “Sellers” of the recreational product, because they have dealt with the product in the chain of commerce leading to the ultimate consumer.<sup>6</sup>

As stated, most often an injured user will file a lawsuit and list several different claims embodying multiple charges. As the case proceeds, the court may dismiss some of these claims. In the end, the claims oftentimes “melt together” in the case, making it difficult to distinguish one legal “theory” from another. However, it is valuable for a Seller to understand the basic differences between these legal theories. In this way, the Seller can prepare its documents and run its business in a way that minimizes the potential for injuries and/or lawsuits or claims. Here are the basics:

#### **V. Recreational ‘Products Liability’: Legal Avenues of Recovery Against the Seller**

Below is a summary of the *general* elements and nature of each of the three ‘product liability’ legal theories, based upon the *Restatement of the Law of Torts (Second)* and (*Third*).<sup>7</sup> The Restatement of law is developed by a panel of legal scholars (the American Law Institute) and is viewed as ‘black letter’ law.

Judges have relied upon this law, other legal cases, and applicable state or federal statutes in developing legal decisions or in instructing the jury on legal issues. As a result, law varies significantly between jurisdictions.<sup>8</sup> The *Restatement of Torts* elements have been cited here because this treatise has been a primary source used by the judicial system in developing product liability law.

Importantly, product liability law is currently in flux, because of the changing nature of product liability claims. Historically, products liability law evolved from incidents of specific manufacturing defects – e.g. one in the line. However, as quality control has improved, there are fewer cases of random product line defects, and as a result, more cases alleging defective design or failure to warn. In response to this trend, the American Law Institute has just published the *Restatement of Torts (Third)* which focuses entirely on products liability law. This law summarizes and restates trends in product liability law, and, to some degree supersedes the *Restatement of Torts (Second)*. The *Restatement of Torts (Third)* is an attempt to update products liability law to parallel changes in the industry, and to identify legal theories of recovery better adapted to defective design/failure to warn claims, rather than theories (outlined in the *Restatement of Torts (Second)*) more applicable to isolated manufacturing defects, now a less common occurrence. Much of what is included in the *Restatement of Torts (Third)* is a reflection of judicial trends already outlined in existing product liability legal cases. Accordingly, I have mentioned this new Restatement of the law, where appropriate.

#### A. Negligence (products liability):

- **Definition:** The Seller has a duty to exercise reasonable care not to expose the user to unreasonable risks of harm. The Seller will be liable in tort (legal harm to person or property) to an injured user if he 1) breached a duty of reasonable care with regard to the product; 2) the breach was a proximate (direct) cause of the user's injury; and 3) the user suffered damages as a result of the Seller's breach.<sup>9</sup>

- **Duty:** Generally, a Seller (manufacturer) has been found to have a duty to conduct reasonable inspections and tests, to design and construct a product which is reasonably safe for its intended use, and to provide any necessary warnings and reasonable instructions for use of a product. Under a negligence theory, the manufacturer is generally held to a higher standard of care than others in the chain of distribution, particularly regarding duties to test and design the product. However, those in the chain of distribution may be exposed if they knew or had reason to know of a product's danger, and failed to warn or take other action to protect the user.

- **Basis for Claim:** Users of the product may bring a products liability claim for negligence against those in the chain of distribution. The most common claims are those which allege 1) the product was defectively designed (the whole line); 2) the specific product is defective or 3) the Seller failed to warn of product danger or provided inadequate or inaccurate instructions about the use of the product.

- **Damages recoverable:** Users may recover compensatory damages for physical harm or property loss, and potentially, those for economic loss. In some states, users may also recover punitive damages, if the judge or jury finds that Seller engaged in intentional or reckless misconduct.

- **Common defenses to claim:** Common defenses to a products liability claim for negligence include: 1) there was no breach (the product did not present an unreasonable risk of harm) (e.g. the Seller complied with the “standards in the industry,” or the product was consistent with the “state of the art”), 2) user did not file a claim within the applicable statute of limitations (legal time limit); 3) the alleged breach was not a direct cause of the user’s damages, 4) the user was contributorily negligent, e.g. misused the product, used the product with knowledge of the risks or altered/modified the product, 5) the user signed an enforceable release of liability (see section X.B.2.b., below). Of course, these defenses will be consistent with the specific claim, e.g. whether the claim is based upon failure to warn, negligent design, or defect in the specific goods.

## B. Strict products liability

### 1. *Restatement (Second) of Torts*, section 402A:

- **Definition:** Under this theory, a Seller has a duty to provide a ‘safe’ product. The *Restatement (Second)* section 402A version provides that a Seller “regularly engaged” in the business of selling a product will be liable (again, in tort) for physical harm or property damage to a user or consumer if: 1) the Seller has sold the product in a defective condition which is unreasonably dangerous to the user; 2) the defect was a proximate (direct) cause of the user’s injury, and 3) there has been no substantial change in the product subsequent to its leaving the Seller’s control. Some states have adopted this version of the legal theory, while other states have adopted the theory, with variations.

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- **Theory:** “Strict” liability is liability not based upon the conduct of the Seller, but upon the condition of the product. Thus, the Seller may be strictly liable, even though he has exercised reasonable care in manufacturing, selling or distributing the product.

- **Basis for claim:** Like product liability claims for negligence, users may bring a claim for strict products liability against those in the chain of distribution. The most common claims are those which allege 1) the product was defectively designed (the whole line); 2) the specific product is defective or 3) the Seller failed to warn of product danger or provided inadequate or inaccurate instructions about the use of the product.

- **Damages recoverable:** A user may recover damages for physical harm or property loss, which may include some forms of economic loss. In some states, users may also recover punitive damages, if the judge or jury determines Seller engaged in intentional or reckless misconduct. Generally, a user may not recover for pure economic loss under a theory of strict products liability.

- **Common Defenses to claim:** Common defenses to a claim of strict products liability include: 1) the product was not defective and/or unreasonably dangerous) (e.g. the Seller complied with the “standards in the industry,” or the product was consistent with the “state of the art”), 2) user did not file a claim within the applicable statute of limitations (legal time limit); 3) the alleged defect was not a direct cause of the user’s damages, 4) the user was contributorily negligent, e.g. misused the product, used the product with knowledge of the risks or altered/modified the product, 5) the user

signed an enforceable release of liability (see section X.B.2.b, below). Of course, these defenses will be consistent with the specific claim, e.g. whether the claim is based upon failure to warn, defective design, or defect in the specific goods.

## **2. *Restatement (Third) of Torts, sections 1 and 2:***

The just published *Restatement (Third)* has taken *Restatement (Second)*, section 402A and logically restructured it to identify different legal theories of recovery depending upon whether the product liability claim is based upon a specific product defect, defective design, or a failure to warn or instruct.

Section 1 states that a Seller (including those in the chain of distribution) engaged in the business of selling products, who sells or distributes a defective product, is liable for harm to persons or property caused by the defect. Section 2 states that a product is defective if at the time of sale or distribution, it contains a manufacturing defect, is defectively designed, or is defective because of inadequate instructions or warnings. A product 1) contains a manufacturing defect if it strays from its intended design, even though all care was exercised in developing the product; 2) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by a reasonable alternative design and the lack of that design renders the product not reasonably safe; 3) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by providing reasonable instructions or warnings, and the omission of those renders the product not reasonably safe.

Importantly, this statement of the law clearly reflects trends in existing case law. As stated, courts have historically treated alleged defective design and failure to warn cases differently than cases alleging a specific product defect. The only truly “strict” liability has been in cases of specific manufacturing defects (in the line). Courts have, to varying degrees, always employed some type of a balancing test, or review of “reasonableness” and risk/utility factors to decide (strict) product liability cases based upon alleged defective design or failure to warn. This new *Restatement* identifies this trend, and advocates that courts consistently use a balancing test to decide cases involving alleged defective design or failure to warn. Liability for product defects (whether in cases alleging specific defect, defective design or failure to warn) is still strict liability, in the sense that liability focuses on the product, and not on the Seller’s conduct in regard to the product.

The basis for a products liability claim, recoverable damages, and common defenses are generally the same as those listed above, under the *Restatement (Second)* section 402A definition of strict products liability. Under the *Restatement (Third)*, a user can bring a claim against anyone in the chain of distribution (those who sell or distribute the product)

Although this new identification of product liability legal theories supercedes the *Restatement (Second)*, various jurisdictions may be slow to change and identify with the new structure. In reality, many jurisdictions already follow (in spirit) the *Restatement (Third)* version. Other courts may truly follow the *Restatement (Third)* analysis, without changing their adherence to the *Restatement (Second)* section 402A structure. In addition, as always, varying state and federal statutes or case law will continue to dictate or influence results in product liability cases across the country.

## C. Warranty:

### 1. Three Different Warranties:

- **Definition:** A warranty is an express or implied representation, made by a Seller, of the character or quality of a good. Unlike negligence and strict products liability, an action for breach of warranty is based on contract law. A Seller's warranty liability arises under a group of laws known as the *Uniform Commercial Code* (UCC).<sup>11</sup> Article 2 of the UCC governs commercial transactions involved with the "sale of goods." Most states have adopted the UCC, with some variations.<sup>12</sup> The code provisions apply to Sellers of goods, and not to those providing a "service."<sup>13</sup>

- **Theory and Basis for Claim:** A Seller can be liable to a user pursuant to three different warranties, as follows:

- **Express warranty:** An express warranty is a statement of fact about the goods or a description of the goods, made by the Seller to the buyer, which forms part of the basis of the bargain.<sup>14</sup> The Seller's express statements or description, warrant that the goods will conform accordingly. An express warranty can include a sample or model that forms a basis of the bargain.

- **Implied Warrant of Merchantability:** An implied warranty of merchantability means that, at a minimum, goods must be fit for their ordinary purpose.<sup>15</sup> Similar to the strict products liability requirement, this warranty is limited to Sellers who are dealers with regard to the specific goods. This warranty can be defined or limited by the course of dealing between the parties, or, the usage of trade (custom in the industry).<sup>16</sup>

- **Implied Warranty of Fitness for a Particular Purpose:** An implied warranty of fitness will apply where a Seller, contracting with a buyer, understands a particular purpose for which goods will be used, and knows that the buyer is relying on Seller's expertise in supplying suitable goods.<sup>17</sup> Again, this warranty can be defined or limited by the course of dealing between the parties or usage of trade (custom in the industry).<sup>18</sup>

### 2. Warranty Particulars Common to all 3 Warranty Claims:

- **Damages recoverable:** Under the UCC, damages recoverable are normally those for economic loss, or, the difference between the value of the goods purchased, and the value they would have been, had they been as warranted. However, damages can include those for personal injuries or property loss.<sup>19</sup>

- **Common defenses to warranty claims:** Each of the three warranties have their specific elements. However, common defenses to warranty claims include: 1) statements made were simply opinions ("puffing") or did not form part of the basis of the bargain – e.g. were not significant (express); 2) disclaimers (*see below*); 3) user's failure to provide notice of the defect (*see below*); 4) lack of required "privity" between the parties 5) in some cases, user's contributory fault – e.g. assumption of risk, misuse, modification.

- **Overlapping:** Warranty claims oftentimes overlap with the two other products liability theories. For example, it has been said that the implied warranty of merchantability is much like the theory of strict liability in tort (although the merchantability warranty doesn't require the product to be "unreasonably dangerous"). In addition, like the other products liability theories, warranty liability focuses on the condition of the product, not the conduct of the Seller. A user claiming harm from a product will oftentimes bring a warranty claim in combination with a claim for negligence and strict liability. Each claim has its difficulties: to prove negligence, one must prove fault (failure to exercise ordinary care), to prove strict liability, one must prove that the product was defective, and to prove breach of warranty, one must get past the stringent notice requirements, potential privity limitations, and any applicable disclaimers.

- **A word about "Privity":** Many of you have no doubt heard of "privity," a term used to describe the formal relationship between contracting or related parties. Most commonly, "privity of contract" describes the relationship between two contracting parties. In times past, a product user had to have a contractual relationship with the product Seller in order to successfully assert any product liability claims, particularly those arising under warranty. The "privity" argument was used to attempt to bar a product user's claim against a Seller, but the defense has deteriorated significantly in recent times. In fact, a user asserting a negligence or strict products liability claim is not required to be in privity of contract with the Seller. The privity argument is still sometimes successful under one or more of the warranty theories, but continues to deteriorate.<sup>20</sup>

- **Disclaimers:** A disclaimer is a Seller's attempt, through words or conduct, to negate a warranty. A Seller can disclaim either of the *implied* warranties, but cannot generally disclaim *express* warranties.<sup>21</sup> Disclaimers are not favored by the courts, and will thus be closely scrutinized. In addition, UCC and varying state code provisions are quite specific on the construction of legitimate disclaimers and are worth careful study when developing this language.

- **UCC notice requirements:** Unlike claims for negligence or strict products liability, a warranty claim requires that the user give Seller notice of a breach. This notice must come within a "reasonable time" after the user discovers or should have discovered the breach.<sup>22</sup> Failure to comply with this notice requirement will bar a plaintiff's claim.

## VI. Additional Liability exposure for those in the "Chain"

In addition to potential liability exposure pursuant to the three traditional "products liability" legal theories, a Seller may be exposed to liability for misrepresentation, or pursuant to the Consumer Product Safety Act.<sup>23</sup> In addition, law provides a limited basis for claims against Sellers for post-sale failure to warn about or recall a product. Here are the basics:

### A. Misrepresentation:

- **Definition:** If a Seller misrepresents a material fact in regard to goods, he can be held liable to a consumer for personal injury or property loss resulting from the consumer's reliance on that misrepresentation. The elements of a claim for misrepresentation include: 1) a Seller engaged in the business of selling the goods, 2) Seller makes a *fraudulent, negligent or innocent* misrepresentation of material

fact about the goods, 3) consumer relies on the misrepresentation, 4) consumer suffers physical harm resulting from his reliance on the misrepresentation.<sup>24</sup>

- ***Basis for claim:*** This tort claim is similar to the contract based express warranty claim. In both cases, the Seller is responsible, regardless of fault (whether or not the misrepresentation was innocent). Unlike strict liability in tort, the consumer need not prove that the product was defective or unreasonably dangerous in order to recover damages. However, like a claim for strict liability in tort, the Seller must be engaged in the business of selling goods (not an isolated sale). Innocent misrepresentations are usually those that have been directed to the public (e.g. through advertising, brochures, etc.). Intentional or fraudulent misrepresentations can be directed to an individual, or to the public. A consumer need not have any contractual relationship with the Seller in order to seek recovery for misrepresentation.

- ***Damages recoverable:*** A consumer may recover damages for physical harm or property loss. In some states, consumers may also recover for punitive damages, if the judge or jury determines Seller engaged in intentional or reckless misconduct. Generally, a user may not recover for pure economic loss under this theory.

- ***Common Defenses to claim:*** 2) user did not file a claim within the applicable statute of limitations (legal time limit); 3) the alleged misrepresentation was not a direct cause of the user's damages, 4) the misrepresentation was not material; 5) user's reliance was not justified; 6) user was contributorily negligent; 7) the user signed an enforceable release of liability (see section X.B.2.b, below).

## **B. Consumer Product Safety Act:**

The federal Consumer Product Safety Act (CPSA) was enacted, in part, to protect consumers against “unreasonable risks of injury” associated with consumer products.<sup>25</sup> Under the Act, product sellers (manufacturers, distributors, retailers, etc.) are required to notify the Consumer Product Safety Commission (CPSC) if a consumer product 1) fails to comply with a consumer product safety rule, 2) contains a defect which could create a *substantial product hazard*, or 3) creates unreasonable risk of serious injury or death. After the CPSC receives notification, the CPSC will develop a “corrective action plan” for the seller regarding the product. This may require seller to: 1) give appropriate notice (re: the defect or the failure to comply) to a) the public b) each entity in the chain of distribution, c) individuals who have purchased the product (if possible); 2) agree to repair or replace the product, provide for a refund, or, bring the product into compliance with a CPS rule.<sup>26</sup>

Failure to comply with the CPSA notice requirements, or, failure to take mandated corrective action will subject Sellers to potentially substantial penalties.<sup>27</sup> In addition, some courts have held that the CPSA provides consumers with a private right of action against a Seller who knowingly violates a consumer product safety rule, or violates the provisions of the Act.<sup>28</sup> Specifically, some courts have held that Sellers are liable to consumers (pursuant to the Act) for failing to disclose known product defects, if a consumer can prove that the failure to disclose was the cause of his/her injury.<sup>29</sup> Lastly, failure to comply with the Act may expose a Seller to independent suits by consumers for failure to warn or recall a product, if the consumer can prove that his injuries were caused by the failure to warn or recall (see Part VI., C. and D., below).

### C. Post-Sale Failure to Warn:

- **Definition:** In some jurisdictions, Sellers have a limited duty to provide a post sale warning about a product, and will be liable for harm to persons or property caused by a post-sale failure to warn. A Seller engaged in the business of “selling or otherwise distributing” products, is required to provide a post-sale warning if a reasonable person in the Seller’s position would do so. A reasonable Seller should do so if: 1) Seller knows or reasonably should know that the product poses a substantial risk of harm; 2) those who might benefit from the warning can be identified and are reasonably assumed to be unaware of the risk; 3) a warning can be effectively communicated and acted upon by affected users; and, 4) the risk of harm is serious enough to justify Seller’s burden of providing a warning.<sup>30</sup>

- **Basis for Claim:** This newly identified claim is based on growing case law which recognizes a Seller’s duty to provide this limited post-sale warning to users. The standard to determine liability is objective: would a reasonable person in the Seller’s position provide a warning? Practically speaking, the manufacturer is more exposed to this type of claim than a retailer or distributor. However, even remote Sellers may come into possession of post sale information which can expose them to liability for this type of claim.

- **Damages Recoverable:** A consumer may recover damages for harm to person or property, including related economic loss. In some states, consumers may also recover for punitive damages, if the judge or jury determines Seller engaged in intentional or reckless misconduct.<sup>31</sup>

- **Defenses to claim:** 1) user did not file a claim within the applicable statute of limitations (legal time limit); 2) the failure to warn was not a proximate cause of the user’s harm; 3) the risk of harm to users was not substantial, there was no practical way to communicate a warning, or the class of users to be alerted in a post sale warning were already aware of the risks, thus negating a duty to warn.

### D. Post-Sale Failure to Recall:

- **Definition:** In some jurisdictions, Sellers have a duty regarding post-sale product recalls and will be liable for harm to persons or property caused by a failure to conduct the recall. A Seller engaged in the business of “selling or otherwise distributing” products, is required to conduct a post-sale recall if 1) a statute or other governmental regulation requires the Seller to recall the product (e.g. the CPSA); or, 2) the Seller, in the absence of a legal recall requirement undertakes to recall and fails to act as a reasonable person in conducting the recall.<sup>32</sup>

- **Basis for claim:** This claim compliments the federal requirements around product recalls, and evolving case law defining duties related to product recalls. The specific statute or regulation, e.g. the CPSA, may also allow for an injured user’s claims against Seller for failure to conduct a mandatory recall.

- **Damages recoverable:** The same types of damages recoverable for a failure to provide post-sale warnings.

## VII. State and Federal Products Liability Laws

**A. Trend in State Statutes:** Note that many states have modified strict products liability to soften the blow to Sellers. These state statutes modify the Restatement view to (e.g.): 1) provide for shortened time periods within which to file a claim; 2) provide that compliance with “state of the art” at the time of sale is an absolute defense to a products liability claim; 3) in certain circumstances, immunize non-manufacturing sellers from strict liability.<sup>33</sup> Check the law in your jurisdiction to identify these variations.

**B. Federal Products Liability Legislation:** There is increasing pressure from the industry to implement federal products liability laws to reduce or at least quantify manufacturers and other Sellers’ product liability exposure. Such legislation might (e.g.) put caps or limits on potential damages recovery or shorten products liability statutes of limitation. In 1997, President Clinton vetoed products liability reform legislation. Legislation has re-surfaced, and President Clinton has recently indicated he will support a proposed products liability reform bill if it passes the legislature. ORCA is playing an active role in monitoring activity in Washington, but representatives believe it is unlikely that a bill will pass in 1998. Have someone in your organization keep apprised of these issues.

## VIII. Comparative Fault Laws and Damages: Apportioning Liability

**A. What is “comparative fault?:** Most states have adopted comparative fault laws which provide, in varying degrees, that liability for damages will be “apportioned” between defendant(s) and the plaintiff user.<sup>34</sup> Prior to comparative fault laws, a plaintiff’s contributory negligence or fault (e.g. secondary assumption of risk), if proven by defendant, could actually bar the claim. With the advent of comparative fault laws, if a claim goes to the jury, the jury determines all parties’ comparative fault (percentages) and damages are determined accordingly.

When a user files a ‘products liability’ suit against multiple parties and designates multiple claims; e.g., for negligence, strict liability and warranty, liability gets complicated. Jurisdictions vary on whether they will allow a percentage fault comparison between negligence and strict liability or warranty claims. Some courts urge that comparing percentages of fault for these types of claims is like comparing apples with oranges. Other jurisdictions will allow for a combination fault comparison and allocation. It will be important for Sellers to understand their particular jurisdictions’ position on this issue, as different approaches can have a substantial impact on ultimate liability, in the event damages are awarded.

### **B. A note on “damages”:**

A quick word about “damages.” There are a plethora of terms floating around, developed to describe various elements of a plaintiff’s potential recoverable damages, allowed under different legal theories. Many of these terms are repetitive, and become quite confusing when a Seller is trying to determine his potential liability. Here is a general interpretation of some of those terms:

- **General damages:** Oftentimes synonymous with the terms **compensatory** or **actual** damages. The damages which flow directly from a plaintiff’s injury or loss; as opposed to damages which may indirectly result from the loss. Damages intended to compensate the plaintiff for his actual damages.

- **Compensatory damages:** As just stated, sometimes synonymous with **general** damages. Other courts divide compensatory damages into two categories: **general** and **special** damages. General damages are those described above; special damages are those which flow directly from the injury, but result from special circumstances. Special damages must be separately proven; e.g. damages for “pain and suffering.” Compensatory, general and special damages are usually referred to in the context of tort theories.

- **Consequential damages:** Damages which do not flow directly from a wrongful act, but which flow from the consequences or results of the wrongful act. This term is oftentimes used when dealing with contract damages, e.g. those consequential damages resulting from a breach of (UCC) warranty.<sup>35</sup> However, sometimes courts will use this term in the tort context, synonymous with the concept of **special** damages.

- **Incidental damages:** Again, the term incidental damages is usually used when dealing with contract damages.<sup>36</sup> Incidental damages are additional damages which flow “incidentally” from a breach of contract or warranty, e.g. commercial charges or expenses connected with return, resale, storage, transportation of the goods.

- **Punitive Damages:** Synonymous with the term **exemplary** damages. Unlike compensatory damages (intended to compensate plaintiff for his actual loss), punitive damages are damages intended to punish a defendant for his wrongful conduct. Plaintiff must specifically prove a basis for the award of these types of damages. Such damages are awarded (*in addition to* compensatory or general damages) where the defendant’s wrongful act involves e.g., willful, intentional, outrageous, reckless, wanton or malicious conduct.

- **Nominal Damages:** An insignificant and often “symbolic” award of damages. Nominal damages are awarded to a plaintiff where he has proven a breach or wrong, but where he has either failed to prove a particular amount of damages, or there are literally insubstantial damages resulting from the wrong.

## IX. The Role of Agencies & Commissions

Agencies and commissions play an important role in developing standards and regulations around products. These standards or regulations can relate to product research, development or quality control, product warnings or instructions, product recall or retrofit, or a variety of other issues. Some of these organizations are state or federal – e.g. the Federal Consumer Product Safety Commission<sup>37</sup>; others are private – e.g. the American Society for Testing & Materials.

It is critical that your organization be informed about relevant agencies or commissions, like these, that play a role in either establishing mandatory requirements or standards, or in voluntarily developing industry standards. In many cases, a Seller’s failure to comply with mandatory standards or regulations can establish liability, or provide evidence of negligence or other liability.<sup>38</sup> In addition, be careful: proof of compliance with applicable regulations does not necessarily get the Seller off the hook. (See section X.A.3. and 8.).

## **X. Risk Management Tips for Recreational Product Sellers (those in the Chain)**

In light of the variety of claims that can be brought against those engaged in the manufacture, distribution or sale of recreational products, here are some general risk management tips. Section A includes those tips which apply regardless of whether a lawsuit is underway. Section B includes risk management general considerations following the filing of a lawsuit or claim. These collective considerations are by no means exclusive. Application of these concepts is of course dependent on the Seller's specific role, applicable state or federal law(s) and a variety of other factors.

### **A. Whether or Not a Lawsuit is Filed:**

#### **1. Inspection and Testing:**

Thorough and professional product research, product testing and inspection is critical to any professional operation. Testing should include both field and laboratory testing, and should be meticulously documented. If needed, documented procedures will verify that the manufacturer "did what it says it has done." Any product returns, whether based upon alleged defect or otherwise, should be carefully documented.

Importantly, consider analyzing product risks and potential harm in connection with product use, potential misuse and modification/alteration at this stage in product development. Examine whether potential risks can be minimized or eliminated by a design change, a safety or guarding device or simply appropriate warnings or instructions. This will involve weighing and balancing risk/utility factors quite similar to those used by a court or jury in determining the presence of a product defect.<sup>39</sup>

Lastly, verify research, testing and supporting documentation for any goods or component parts received from *other* suppliers. Competent legal counsel should determine whether there are applicable state or federal laws which regulate the type or manner of testing for particular products, and any applicable standards should be followed. In most products liability litigation, manufacturers are held to the standard of experts in the field, and should conduct their operations accordingly.

#### **2. Written Documents and Information:**

Sellers must exercise care in the development, wording, design and distribution of any written documents or information concerning recreational products. This includes brochures, instructions for use, warnings or advertisements and disclaimers or releases. Oftentimes there is an internal company "tension" between marketing and legal and warranty concerns. It is critical that all segments of the company work together to achieve a consistent and integrated balance in effectively marketing the product, as well as addressing legal concerns and complying with all applicable laws. Legal counsel, experienced in recreational product legal issues, should review product documents and other information for consistency, accuracy and compliance with applicable laws. Particularly, documents should be reviewed to determine there are no conflicts between warnings issued (e.g. in product instructions) and statements made in advertisements and brochures.

- *Three specific areas are worth highlighting:*

**a. Product warnings and labels/instructions for use vs. obvious danger:**

Labeling products and providing appropriate instructions for use is critical to any professional operation engaged in the manufacture or sale of recreational products. Warnings should be included, if appropriate.<sup>40</sup> The manufacturer will usually develop these labels, instructions and warnings. In preparing this type of information, be sure legal counsel examines any applicable laws or standards defining the nature of information required, or physical requirements for affixing it to the product.<sup>41</sup>

Should the manufacturer always warn or instruct the user, or are some warnings/instructions more appropriately given to the intermediary (e.g. the retailer/lessor or component part manufacturer)? Unfortunately, there are no black and white answers. Factors to consider include: 1) the nature of the warning/instruction and the ability of the user to comprehend the warning; 2) the gravity of risks posed by the product; 3) the likelihood that the intermediary will relay relevant information to the user.

Remember that a product can be found defective or unreasonably dangerous because it does *not* contain adequate warnings or instructions. Of course, under negligence and strict products liability, Sellers are generally not liable for “obvious” dangers - those dangers open and obvious to the average user.<sup>42</sup> Unfortunately, the law around obvious dangers can present Seller with a “double edged sword.” Case law continues to portray the consumer as “dumber and dumber” as courts decrease the window around what is legally “obvious,” putting pressure on the manufacturer to warn about every conceivable danger. Have legal counsel review the law in your jurisdiction.

In addition, do not remain insular in your focus. Look to industry groups, trade associations or other organizations to see what is being done in the industry. For example, ORCA’s Climbing Sports Group has developed the ‘climbsmart’ public information program and the Trade Association for Paddlesports has developed a standard warning to include with paddlesports equipment. See what is out there as you develop this written material, and be sure to review and update your written material on a regular basis.

**b. Releases of liability and related documents:**

Except in the case of alpine ski bindings, manufacturers or other Sellers in the distribution chain rarely use these documents vis a vis the ultimate user/consumer.<sup>43</sup> In many cases, courts refuse to enforce documents attempting to release Sellers from strict liability for product defects.<sup>44</sup> However, retailers or other entities that organize outdoor activities, have in store climbing walls or classes, or rent recreational equipment do use these documents. In addition, Sellers who conduct product field-testing, or engage in product demo use at trade shows or other events, may use these documents. For those reasons, here are some brief thoughts.<sup>45</sup>

Release language refers to that portion of a document wherein an entity (or individual) attempts to shift responsibility for negligence to another party (in the recreational context, the participant). In other words, the language basically excuses the entity from liability for injuries or death resulting from the entity’s or its employees’ ordinary negligence (negligence meaning generally, a failure to exercise ordinary or reasonable care). This is sometimes referred to as an “exculpatory clause.”

The majority of states, pursuant to case law, do recognize the validity of releases excusing recreation providers from liability for their own ordinary negligence, in the recreational context. (In most jurisdictions, a written document is not effective to transfer liability for gross negligence or reckless or intentional misconduct.) In most states, courts will strictly review these documents, because of their intent to release providers from liability for their negligent conduct. \*Please note that many Sellers attempt to release themselves from their potential strict products liability to the user, in these documents. Jurisdictions are mixed on whether they allow Sellers to release themselves from this type of liability, and legal counsel should review applicable law.<sup>46</sup>

The reality is that this type of document is usually more than simply a release of liability. The document can identify the risks, inherent or otherwise, involved with participating in the activities or in using the equipment, or identify liability already allocated by law. Such documents can provide participants with a variety of information which will allow them to further understand the nature of the activity (or the equipment) and its attendant risks, so that they can make informed choices about whether to participate. These documents can also contain information to assist participants in understanding their own responsibilities and liability. In addition, the document can contain a participant's agreement to indemnify (an agreement to reimburse an entity, by payment or otherwise, for any claims brought against the entity relating to the participant's participation) the provider. Thus, the document can be labeled (e.g.) "Participation, Assumption of Risk, Release & Indemnity" to reflect its combined purpose.

A word about inherent risks. As stated earlier, common law (that derived from legal cases) provides that participants may not recover from recreation providers for injuries that result from the inherent risks of recreational activities. In other words, the provider has no duty to protect the participant from those risks and has no liability for injuries resulting from those inherent risks. Many states have codified the "inherent risk" doctrine in legislation that spans a broad variety of recreational activities.<sup>47</sup> (As noted in Part III, the inherent risk doctrine applies to the inherent risks of *recreational activities*. A defective product is not an inherent risk of recreational activities.)

In light of applicable state statutes and common law, participants generally do not need to be informed about specific inherent risks in order to be held responsible for injuries resulting from those risks. However, including a written description of common inherent risks, and a provision outlining a participant's responsibility and assumption of those risks, relays accurate and important information to the participant. In addition to listing inherent risks, providers can include a list of other risks in the document. (These "risk" descriptions should be non-exclusive, e.g. "including, but not limited to"). This serves to broadly inform the participant of the risks, inherent or otherwise, associated with the particular activity.

Should applicable laws or the provider's written document fail to assist in obtaining dismissal of a claim, a court or jury can review a participant's assumption of risks in determining participant's legal contributory fault. This contributory fault can decrease or possibly eliminate the provider's liability for damages. In addition, the existence of a signed document which includes a release for provider negligence may discourage disputes over this issue, and possibly, the filing of frivolous claims.

The written document can thus be viewed, not just as a ‘release,’ ‘indemnification’ or ‘assumption of risk’ intended to avoid or limit liability, but, more comprehensively, as a vehicle which provides participants with information concerning the activity, and the risks associated with the activity.<sup>48</sup> Note that these documents are a useful risk management tool, but of course, should not be used in place of a professional and well run operation. Again, law varies from state to state and Sellers should consult with legal counsel, experienced in recreational legal issues, in developing these types of documents.

- *Releases and related documents - issues with minors:*

Law varies from state to state, and you should consult with legal counsel in your particular jurisdiction in regard to written documents and minors. However, generally, contracts, including documents intending to release individuals or entities from liability for their own negligence, cannot be enforced against minors signing the document. A minor may ratify such a document after reaching the age of majority (usually age 18 or 21), thus making the document binding and enforceable. Although ratification is not likely with this type of agreement, it can sometimes occur if the child continues to participate and receive the services of the provider after reaching the age of majority.

Despite questions around the enforceability of the release, minors, (particularly older minors) are oftentimes asked to sign the document. Another alternative is to have the child sign a document providing information about the activities to be engaged in, the risks of the activities, and other information. This type of a document is sometimes referred to as an “acknowledgment and assumption of risk” or an “agreement to participate (and can be combined in the same document as the release form). Even if the child's release is later found invalid, these types of documents can constitute a written warning and may be important evidence at trial that the child was informed of, and assumed the risks prior to engaging in the activity (forming a basis for assessing a child’s “comparative fault”). In the case of inherent risks, the document can strengthen the basis for dismissal of a claim against a minor. Importantly, the “inherent risk” doctrine applies to minors as well as adults, and recreation providers have no duty to protect *any* participant from the inherent risks of a particular recreational activity. A written document underlining this legal policy may well assist in efforts to dismiss the claim.

In most states, a parent cannot waive the rights of a minor child. When dealing with minors, an alternative is to have the parent sign the document with the minor, and, within the document, include the parent(s) indemnification and release, and covenant not to sue agreement. This is an agreement, by the parent, not to sue the provider for any claim the parent might have, and to reimburse the provider by payment or otherwise, in regard to liability that may arise in connection with injury or death to the child. For example, the child (through an appointed guardian or other family member) can assert claims against the provider for injuries or death to the child. Indemnity agreements, signed by the parent, can require the parent to reimburse the provider for claims brought by the minor or others, as a result of the incident. Unfortunately, there is little case law on the enforceability of these types of agreements in the recreational context.

Importantly, prior to settling any claim involving a minor, counsel should check applicable state law to determine whether or not court approval (or other formal action) is required to secure a valid release of a minor's claims, in return for settlement.

**c. Warranty disclaimers:**

Implied warranties (and in some cases, express warranties) can be disclaimed in states that have adopted a version of the UCC.<sup>49</sup> Legal requirements for the content and scope of disclaimers are quite specific and may vary from state to state. Federal law (the Magnuson Moss Act) requirements may also regulate the contents of the disclaimer. Like releases, disclaimers will be scrutinized closely by the court, against the drafter, as such documents intend to negate the manufacturers' code liability. As always, Sellers should consult with legal counsel, experienced in recreational product legal issues, when developing these types of documents for their organization.

**3. Compliance with and effect of standards:**

State or federal law may define product standards, and, as discussed in IX., above, federal or state agencies or commissions may develop applicable mandatory regulations. Industry groups or organizations may also voluntarily develop industry standards (for example, ASTM and CE marks define certain standards for recreational products). Standards can relate to product research, development or quality control, product warnings or instructions, product recall or retrofit, or other issues. Sellers should adhere to legal standards, and to other recognized standards in the industry. Complying with standards is consistent with running a professional organization. In addition, compliance can assist in minimizing legal exposure.<sup>50</sup> However, Sellers need to exercise caution. Compliance with standards in the industry is not always an absolute defense to a products liability claim. For example, in cases alleging defective design, courts have found that the entire industry is lagging. If you are a retailer, satisfy yourself that your manufacturers are adhering to appropriate standards.

Assist in the development and evolution of standards in your product niche. Take the time to understand what is out there, and how you can contribute to the development of accurate and well thought out standards. If you think you are the best in the business, you certainly want to be contributing to the development of any applicable standards.

**4. Educating the public:**

Many trade associations and other manufacturer groups are getting together to develop information to educate the public about the use and care of recreational products and the specific risks related to engaging in recreational activities. Not only does this provide the consumer with important information, but it can emphasize to the consumer that he has responsibilities as a participant. Again, Orca's "Climbsmart" public information campaign is an excellent example of how groups in an industry niche can unite to provide positive information to the ultimate user. Consider how your organization can contribute to this type of effort.

**5. Known defects or problems:**

It is important to say a word about a manufacturer's knowledge of defects. This can involve knowledge of potential design or product line defects, or suspicion that instructions/warnings are inadequate. Seller may gradually glean this information from reports of consistently similar injuries resulting from use of the product. In most cases it is important that the manufacturer take action to correct the problem. Taking these measures is not only the sign of a professionally run operation, but is oftentimes legally required! Seller may be required to comply with CPSA disclosure or corrective action requirements (e.g. providing notification, post-sale warnings, recalls and/or repairs, or other important measures).<sup>51</sup> In addition, continuing to produce a product (or sell a product) with knowledge of a defect of any kind, if proven, may lead to an award of punitive damages against the Seller. Make sure your legal counsel is fully aware of the CPSA and/or applicable state legal requirements for taking corrective action around product defects.

Sellers may be hesitant because they do not want product improvements or changes to be revealed in a trial, for fear such changes will be viewed as proof that the product was defective. Again, sellers should understand that failure to correct known problems or defects may expose them to liability, potentially including punitive damages! Furthermore, state and federal rules of evidence generally provide that evidence of subsequent changes cannot be introduced as proof that the product was unsafe.<sup>52</sup>

## **6. Agency law:**

There are so many connected contractual relationships when dealing with the manufacture, distribution and sale of a recreational product. Manufacturers are tied to distributors, wholesalers, vendors, retailers or dealers and all of those parties are oftentimes connected with each other! As we've discussed, all those in the chain of distribution are potentially liable to the user under products liability theories. Generally though, different parties in the chain may be liable in varying degrees. In addition, parties in the chain can, to a certain degree, vary these duties and transfer liability by agreement (see Part X.A.7).

In addition, pursuant to "agency" principles, parties in the chain may *expand their duty of care and consequently, their ultimate liability*, if they hold themselves out to the public in different ways. For example, vendor basically holds itself out to the public as the manufacturer if vendor sells a manufacturer's product, but labels the product as its own, with all instructions and warnings bearing vendor's name. In any products liability lawsuit, vendor may likely be held liable as if he were the manufacturer (and may even assume the liability of the manufacturer).<sup>53</sup> As a result, think consciously about how you present your organization to the public, and how you structure your contractual relationship with those in the chain. Make sure it is clear to those purchasing from you what role you play in the chain of distribution.

## **7. Relationship with those in the chain:**

Each member of the distribution chain may enter into a myriad of contractual relationships in efforts to distribute and sell a particular product. These relationships are critical. As exciting as it is to develop a revolutionary product, it is important that relationships with those in the chain be made thoughtfully and pragmatically, so that the product can flow smoothly to the ultimate consumer.

Agreements entered into with those in the chain of distribution should be carefully drafted. Legal counsel, experienced in products issues, should draft these agreements with a thorough understanding of the various rights and duties of those in the chain. Counsel should understand the types of duties/liabilities that can be transferred or shifted, and how that can be accomplished in the written documents. Specifically, counsel should carefully evaluate any release or indemnity provisions, and other key contractual provisions.<sup>54</sup>

#### **8. Evaluation of and compliance with applicable state/federal law:**

Most Sellers operate in more than one state. Have your legal counsel review and actively monitor applicable state and federal case law governing the contents and structure of written documents, including advertisements, releases, disclaimers and insurance contracts. In addition, make every effort to comply with applicable statutes and regulations governing, e.g., product warnings, disclosure, recall and retrofit requirements, as well as those laws governing the development and distribution of recreational products. Failure to comply with applicable law may create liability, whether or not someone is hurt in the process.<sup>55</sup> In addition, understanding applicable laws will assist you in determining how to develop, test and market your products while simultaneously reducing your potential legal exposure.

#### **9. Insurance:**

Sellers should also take the time to thoroughly evaluate their insurance needs, and to understand the role insurance plays in allocating risk between those in the chain. Sellers must take the time to understand their insurance needs and to find an insurance company that understands their business and is able to assist in securing an appropriate policy with adequate coverage (both in dollar amount and type of coverage). This is critical to assure the continued financial viability of any organization engaged in the manufacture, sale or distribution of recreational products. An experienced insurance representative can assist you in developing effective and precise coverage for your operation.

Sellers should include both legal counsel and the insurance representative in an analysis of Seller's business, including a review of specific liability issues and risks, in order to accurately evaluate liability insurance needs. This risk evaluation will allow legal and insurance representatives to assist Seller in developing the outline and specifications for the insurance policy Seller will purchase. Make an effort to select legal counsel and an insurance company that understand recreational products and are experienced in dealing with recreational product insurance and legal issues. Issues for review include:

- What type of coverage to buy (e.g. "occurrence" versus "claims made" liability insurance) and what policy form to use (e.g. standard Commercial General Liability policies versus non-standard "manuscript" policies);
- The amount of liability insurance to be purchased;
- The "coverage territory" provisions included within the policy;
- The "coverage exclusions" within the policy;

- Sellers' need to provide others with "Certificates of Liability Insurance" or the need for additional insured endorsements;
- Sellers' need to consider risk transfer: e.g.: obtaining additional insured status from product suppliers, or including contractual indemnity or release provisions in their agreements with those in the chain of distribution;
- Understanding any insurance company "risk management" requirements; e.g. required use of a release;
- Understanding the insurance company's protocol for making a policy claim.

#### **10. Solid product:**

All in all, it is important to have a solid product; one that has been adequately tested, inspected, complies with applicable standards, and contains adequate instructions and warnings.

#### **B. If a Lawsuit is Filed:**

##### **1. When is a product "defective and unreasonably dangerous" when dealing with strict liability in tort?**

In order for a product Seller to be strictly liable to a user, the product must be found defective and unreasonably dangerous. Recent trends state that the product must be found defective and "not reasonably safe."<sup>56</sup> But what do these terms mean, and how are they evaluated? Importantly, if a manufacturing defect occurs to a product in the line, proof of defect is usually more clear cut than in the case of alleged defective design or failure to warn. In addition, failure to comply with a product safety statute or regulation can provide a basis for establishing that a product is defective.<sup>57</sup> In most cases, courts have used an "objective" test to weigh various factors in making this determination. Unfortunately, different courts can reach different conclusions and normally tie their decisions to the specific facts of the case. In addition, analysis will vary depending upon whether the basis of the claim is an alleged design defect, specific product defect, or a failure to warn.

In cases involving alleged defective design or failure to warn or instruct (and sometimes in cases of specific product defect), courts generally use a balancing test to make this determination of "defect."<sup>58</sup> The trend is to determine – both in the case of warnings or potential alternative design -- what was "reasonably foreseeable" *at the time* of manufacture and distribution. In addition, in cases of alleged defective design, the trend is to require a plaintiff to prove there was a "reasonable alternative design" at the time of manufacture.<sup>59</sup> Commonly, a "risk-utility" balancing test is used. The risk-utility test weighs such factors as: 1) the usefulness and desirability of the product; 2) the likelihood of injury and its probable severity; 2) the availability (at the time of manufacture) of other safer designs to meet the same needs; 3) whether the danger could have been avoided by alternative instructions or warnings; 4) the ability to eliminate the risk without impairing the utility of the product; 5) the obviousness of the danger;

6) public expectations of the danger; 7) the cost of the safer alternative. If the risk and probable frequency of harm is great, and the burden on Seller (to alter the design or provide a warning) was minimal, chances are greater the Court will impose liability. Have your legal counsel be familiar with your jurisdictions' case law in this area. Of course, compliance with legal standards, consistency with industry practices, appropriate warnings and instructions, and adequate research, testing and inspection, will greatly assist the Seller in deflecting a strict liability claim.

## **2. What is a “breach” of a duty when dealing with negligence (products liability)?**

As stated, negligence and strict liability claims are often made simultaneously. An injured user may urge that a product was defectively designed and alternatively, that the Seller failed to effectively warn about the product dangers. These allegations may be incorporated into claims based upon both strict liability *and* negligence. Not surprisingly, many jurisdictions analyzing a negligence (products liability) claim use risk/utility balancing factors to determine whether a Seller breached a duty to the user. These factors are almost identical to those used by the court to evaluate whether a product is defective for purposes of strict liability (see X.B.1., above). Logically, it is tough to distinguish the two claims.

## **3. Use, misuse and product modification/alteration:**

Sellers can attempt to deflect a products liability claim by urging that the user misused the product or modified the product. Evidence of misuse and product modification/alteration can be important in three areas, to determine: 1) whether the Seller breached a duty or, whether the product is “defective”<sup>60</sup>; 2) whether the alleged defect legally caused plaintiff’s harm, and 3) plaintiff’s potential comparative fault. Different courts will view this evidence in different ways, depending upon the particular jurisdiction and the specific facts of the case.<sup>61</sup> The bottom line is that sometimes this evidence can be sufficient to dismiss a products liability claim (under 1) or 2)); other times it is simply evidence which can result in reducing a Seller’s ultimate liability (under 3), by assigning a portion of the fault to the plaintiff.<sup>62</sup>

Although product misuse and product modification/alteration are valuable defenses to a product liability claim, be careful. The defenses may not be effective if the court or jury determines that the misuse/modification was “foreseeable.” Foreseeability is determined on a case by case basis. For example, if a Seller is aware of certain types of product misuse, it may be important to include instructions or warnings with the product, advising against such use, and/or describing the intended use of the product. This is particularly true if the Seller has knowledge of accidents or near accidents resulting from product misuse, or simply knowledge of repeated misuse.<sup>63</sup>

## **4. Obvious dangers:**

As mentioned under Part X.A.1.a., above, a seller will generally not be held liable for a products liability claim if the danger causing injury is determined to be an *obvious danger*.<sup>64</sup> A seller has no duty to warn the user about these dangers, or to design a product that protects the user from these obvious dangers. Although an “objective” test is used (what would a reasonable person in the community consider “obvious”) case law is quite inconsistent in this area, and it is hard to rely on what a court might

consider “obvious” in each circumstance. In some cases, the obviousness of the danger is just a factor the court reviews in determining whether or not the product is defective. It is wise to simply take care in drafting appropriate warnings and instructions for your product.

#### **5. Effect of user’s knowledge and assumption of risk:**

In most states, a plaintiff user’s (secondary) assumption of risk is an element of his potential contributory fault.<sup>65</sup> If a user understands and appreciates the particular risks or the alleged defect and voluntarily proceeds to use the product anyway, it may form a basis for reducing plaintiff’s recoverable damages (by his percentage of comparative fault). Plaintiff’s assumption of risk can also be grounds for dismissal of the claim if 1) plaintiff’s contributory fault exceeds that of the defendant Seller; or 2) the court/jury determines that, because of plaintiff’s assumption of risk, any alleged defect was not a legal cause of plaintiff’s harm. For example, an injured user alleges a product is defective because Seller failed to warn of product dangers. The injured user brings a products liability claim based upon the Seller’s “failure to warn.” The Seller discovers that the injured user was fully aware of the dangers he claimed he should have been warned about. Seller can urge that the warnings would not have assisted the user, and the “failure to warn” was not a cause of his injury.

#### **6. Direct “legal” cause:**

Remember that Sellers are only liable for negligence and strict products liability if the alleged defect was a direct (proximate) *cause* of the user’s injury. As noted above, plaintiff’s misuse, modification/alteration, and assumption of risk can affect causation. (See example, Part X.B.5., above). Another example: an injured user brings a product liability claim based upon alleged defective design. However, investigation reveals that the user’s injuries were caused, not by the alleged defective design, but from user’s modification of the product.

Also, remember that participants may not recover for injuries that result from the inherent risks of recreational activities. In other words, the recreation provider has no duty to protect the participant from those risks, and has no liability for injuries resulting from those inherent risks. A user making product liability claims (on top of claims against the recreation service provider) may in reality, have a situation where the injury resulted from an inherent risk of the *recreational activity*. The alleged product defect (e.g. failure to warn) is irrelevant because it was not the cause of the injury. Have your legal counsel examine these causal issues carefully when defending against a products liability claim.

#### **7. Statutes of limitations and notice:**

A statute of limitations is the legal time limit within which an injured party has to file a lawsuit. Some claims, like those for breach of warranty, also have additional notice deadlines. Both federal and state law can prescribe time limits for the filing of claims. Your legal counsel should be aware of the “length” of your liability and analyze legal issues accordingly. In addition, if your company is named in a products liability lawsuit, be certain the limitations periods for different claims are carefully checked. If plaintiff has filed his/her claim after the running of an applicable statute of limitations or notice period, it can be grounds for dismissing the claim.

## **8. State of the art:**

Sellers often use “State of the art” as a defense in cases alleging defective product design. The term generally means that the product design was consistent with industry design and custom (or standards) existing at the time the product was manufactured and that the product design reflects the most advanced technology available at the time of manufacture. The defense is often raised with older products; those that have been in consumers’ hands for a significant time.

Many state products liability statutes now designate proof of compliance with “state of the art” standards as an absolute defense to certain products liability claims. This assists Sellers in cases where the product complied with older standards, but does not comply with current standards. In other cases, courts view “state of the art” as a factor in determining whether a product is defective (it can serve as evidence of whether or not an alternative design was feasible. (See discussion, Part X.B.1.). However, be careful with this defense, as its strength varies between jurisdictions. Some courts have determined in defective design cases that an entire industry falls short – e.g. a reasonable alternative design was feasible, even though no manufacturers were using such a design at the time.

## **XI. Related Issues for Retailer Sellers**

### **A. Retailer - Recreational Activities/Class Offerings:**

A growing number of retailers are offering both in-store and outdoor recreational activities and classes for consumers. Sometimes, retailers actually have on site recreational activities, such as climbing walls. Retailers’ employees may conduct in store education (e.g. first aid training, bicycle maintenance) classes, or arrange to take individuals on trips to locations outside the store, to engage in recreational activities. Retailers may also “sponsor” an outdoor activity, but arrange for an outside organization to conduct the activity/class.

These types of activities generally do not raise the products liability issues discussed in this Primer. The retailer is instead acting more in the position of a service provider (with the exception of equipment rental, see below). A full discussion of the legal considerations vis a vis these types of retailer services is beyond the scope of this Primer. However, retailers offering these types of activities should carefully consider both the potential risks to participants and those to the organization, and develop risk management policies and procedures accordingly. Risks to participants include those inherent or other risks of recreational activities, or, potential negligence on the part of the organization, both of which can lead to injury, death or property loss. Risks to the organization include accidents or injuries that may lead to the organization’s exposure to suit, financial loss, tarnished reputation, etc.

***Retailer should choose legal counsel, experienced in recreational legal issues, to be involved in all aspects of the analysis and development of risk management policies and procedures, including written documents (discussed below).***

Consider the following:

1. Think about conducting a ‘who, what, where, how’ risk analysis before offering in-store or outside activities. E.g., *what* you are offering, *where* will it take place, *who* will likely attend, and *how* the activity will be conducted. Will children or older adults attend? Will there likely be experts or beginners? What are the risks of harm/potential for injury? Will an organizational employee conduct the activity, or will the organization simply sponsor the activity, but hire an outside organization to conduct the activity? If the frequency and severity of potential harm is great, retailer might consider an alternate activity, a way to minimize the harm, or, use of an outside organization to conduct the activity.
2. Consider having your legal counsel develop an acknowledgment and assumption of risk/release agreement for participants to sign. These documents provide participants with important information so they can understand the activities, risks and their resulting responsibilities. In addition, these documents provide retailer with limited protection from liability.<sup>66</sup> The type of document used may vary, depending upon the type of activity, where the activity will occur (on site or outdoors) and whether the retailer will be providing or simply sponsoring the activity.
3. If retailer plans to sponsor the activity, but have an outside organization conduct the activity, have your legal counsel assist you in developing an appropriate written agreement to clearly outline the rights and responsibilities of retailer and the outside organization. Carefully select the outfit you plan to use. Consider contract provisions which include: 1) designation of the outside organization as an “independent contractor<sup>67</sup>”; 2) an agreement by the outside organization to indemnify (reimburse, by payment or otherwise) and defend retailer, should retailer be brought into any legal actions resulting from injuries/accidents occurring on the trip; 3) a provision regarding insurance coverage, including addition of retailer as an additional insured under the outside organization’s policy. Develop an appropriate risk/release form, or, require that the outside organization add retailer as an additional released party on outside organization’s risk/release form. There are many important reasons for having a clear, concise agreement between retailer and the outside organization.
4. Involve your insurance carrier in this process. If retailer is new to offering these types of in-store or outdoor activities, make sure you have thoroughly discussed these issues with your insurance representative. Insurance representatives may have constructive information to share with you. Verify that you have appropriate insurance coverage -- both type and amount of coverage. Make sure you are fulfilling any insurance company ‘requirements’ for coverage (e.g. the use of a risk/release form; see Part X.A.9.).
5. Consider developing appropriate emergency procedures and guidelines, depending upon the location and nature of the activity.
6. Develop appropriate forms for e.g.: registration, documenting accidents or incidents, medical information.
7. Maintain equipment, which may be used in the activity. Retailers may be using their own rental equipment for use on a store-conducted outing. If so, retailer should already have an appropriate maintenance program in place for its rental equipment.

8. Staffing and staff training are important considerations. Take care in selecting employees to oversee or lead in-store or outdoor activities. Develop training programs that parallel the activities offered. Make sure appropriate employees are trained on retailers' procedures for utilizing releases, engaging the services of outside organizations to conduct recreational activities, and related issues. Develop written guidelines that will assist employees in following consistent policies on these issues.
9. Develop guidelines for relaying important information to participants for in-store or outdoor store conducted activities. Consider a pre-trip talk or video describing the activities, and the risks inherent in the activities. Have participants read and sign an acknowledgment of risk/release form. Provide a balanced description of your offered activities in written materials or brochures. In addition to describing the activity as fun and exciting, include information about possible inclement weather, inherent risks and the like.
10. Consider issues around screening and supervising participants.

These are all general considerations, and retailers should certainly consult with their legal counsel and insurance representatives, as well as brainstorm in their industry niche to assist in formulating class and activity offerings and appropriate risk management policies.

#### **B. Retailer - In Store Rentals:**

A large variety of retail stores, in addition to offering new recreational products for sale, offer a variety of rental products for use by consumers. Items such as skis, bikes, kayaks, canoes, and rafts are popular rental items. Generally, as discussed in Parts I-X above, retailers who rent recreational equipment on a regular basis are considered within the 'chain of distribution' and, like manufacturers, distributors, etc., can be subject to products liability claims by users. Retailers may be subject to additional claims for failure to adequately maintain the product, or failure to properly adjust the product to fit the customer (e.g. in the case of ski bindings). Implement and monitor consistent equipment maintenance and rental policies. Train employees to properly fit and maintain equipment, consistent with manufacturers' directions and specifications. *Again, involve your legal counsel in all aspects of the analysis and development of risk management policies and procedures related to rentals (discussed below).*

Generally, retailers renting recreational equipment to users have the user sign some form of an acknowledgment of risk/release document (discussed in Part X.A.2.b.). Frequently, the manufacturer or distributor requires the retailer to use a risk/release document, and name manufacturer and others in the chain of distribution as released parties. These release documents may be effective to release retailer and others in the chain from a variety of claims, but may not be effective to release those in the chain from liability for product defects (see discussion, Part X.A.2.b.). Manufacturers, distributors, retailers or other sellers connected with the rental agreement should take care to consult with legal counsel regarding the scope and limits of any risk/release document used by the retailer when renting the product. In addition, Sellers involved in product rentals should take care in developing agreements and in evaluating insurance considerations vis a vis others in the chain of distribution (See Part X.A., 7. and 9.).

Retailers should give rental users basic instruction on how to use a product and provide them with product instructions, if appropriate. However, retailers should avoid providing extensive instruction in use. Giving rental users detailed instructions on use, unless in the context of a store conducted or sponsored training class (see XI.A, above), may expose the retailer to additional liability.

Retailers should have some mechanism for determining a users' ability level, if appropriate. This may impact the type of equipment rented, or gauge necessary adjustments for the equipment (e.g. ski bindings). To a certain extent, retailers need to rely on the users' representations of his/her ability level. Risk/release documents can identify users' responsibility for relaying this information to the retailer and limit retailers' liability regarding these representations.

Should retailers renting equipment give users advice on where to take the equipment – e.g. where to ski, climb, hike? Such advice, particularly if coupled with attempting to evaluate renters' skill for handling (e.g.) a particular slope, rapid or trail, can potentially expose retailer to increased liability. However, many retailers have in store resources such as books, tapes or videos that provide a multitude of information on destinations, terrain or river difficulty, etc. Retailer can refer rental users to these resources. In addition, retailer can provide information on destinations for activities for various ability levels (e.g. in newsletters, etc.) but include appropriate disclaimer language, to clarify that retailer is not making specific representations for individuals. Legal counsel should review any such statements retailer chooses to include in its brochures, on line, or in any other promotional materials, and assist in developing appropriate disclaimer language.

### **XIII. Conclusion:**

This Primer is intended to give those engaged in the manufacture, sale or distribution of recreational products a summary of important products liability concepts to understand and consider. It also contains some risk management thoughts and tips to assist organizations in proactively addressing legal issues before a lawsuit occurs.

The key focus should be on running a professional operation. This focus includes notions of fundamental fairness to the ultimate consumer, and to those you engage with in the chain of distribution. If a company runs a professional operation e.g., complies with applicable laws and standards, keeps accurate records, engages in ongoing product research and development, conducts thorough inspection and testing and contributes positively to the industry, it will certainly sell products, and will likely become a leader in the industry. In the process, it may well reduce the occurrence of injuries or claims, minimize its potential liability and/or be in a better position to defend any products liability claims which may arise.

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<sup>1</sup> This primer follows another ORCA document focusing on legal principles affecting the recreation industry, published in 1995 (updated in 1998) and entitled: *Developing Releases and Related Documents: Guidelines for Recreation Providers, Outdoor Programs, Outfitters & Guides*. The *Guidelines* document, drafted by this author with assistance from other members of the ORCA Summit ‘Tort Reform’ working group, also contains a practical focus. The document is targeted to those providing recreational services to the public and contains a comprehensive discussion of both state and federal legal issues around the use and development of releases and related documents. The *Guidelines* document is available through the ORCA office in Boulder, Colorado and is published on the internet at <http://www.orca.org>.

<sup>2</sup> See *Restatement of the Law of Torts (Third)*, section 20: Subject to state law variations, “one who sells or otherwise distributes a product” is generally included in the chain of distribution, and potentially exposed to products liability suits.

<sup>3</sup> For excellent references discussing recreational products issues, *see generally*, Jeffrey D. Wittenberg, *Products Liability: Recreation and Sports Equipment*, (1997); Betty van der Smissen, *Legal Liability and Risk Management for Public and Private Entities*, Volume II, chap. 21 (1990); Jeffrey K. Riffer, *Sports and Recreational Injuries*, chap. 7 (1985, supp. 1997).

<sup>4</sup> This primer only addresses some select legal principles related to those engaged in the manufacture, sale or distribution of a recreational product, and touches on some issues related to retailers’ provision of recreational activities and product rental. Issues and liability related to manufacture or sale of a recreational product and (e.g.), 1) antitrust, 2) sale of used products, 3) specific issues regarding component parts, 4) use of the internet, and certainly other related subjects are critical issues, but are beyond the scope of this publication.

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<sup>5</sup> Sellers should consult with legal counsel, experienced in product liability law, to determine which state or federal laws should be analyzed as they work to develop documents and risk management tools to address recreational product legal issues in their businesses. For Sellers operating nation or region wide, a variety of state and federal laws will likely come into play.

<sup>6</sup> See text and note 2. Of course, a particular Seller's liability is subject to varying state statutes and case law. See *discussion*, Part VII.

<sup>7</sup> *Restatement of the Law of Torts (Second)*, published in 1964; *Restatement of the Law of Torts (Third) Products Liability*, published in 1998.

<sup>8</sup> The Restatement is intended, to some degree, to reflect common trends in legal cases and then literally "restate" the law. Jurisdictions are then free to cite to the Restatement as the basis for decisions in legal cases. It is important to check particular states' products liability statutes, as well as individual state case law. State statutes can vary on e.g., applicable statutes of limitations (for filing claims), elements of a claim, and damages recoverable (see *discussion*, Part VII.A.).

<sup>9</sup> See, e.g. *Restatement of Torts (Second)* sections 388, 395, and 398. Keep in mind that a products liability negligence claim targets those in the chain of distribution, and focuses on the condition of the product. A products liability negligence claim differs from a negligence claim that might be brought against a recreation (service) provider; e.g. one who provided inappropriate or improperly maintained equipment as part of an outdoor course or trip. In this type of claim, liability is principally focused on the conduct/fault of the employee, rather than the condition of the product. Such claims are legitimate, but outside the scope of this publication (See the ORCA *Guidelines* document, *supra* note 1, for more information concerning legal issues for recreation service providers).

<sup>10</sup> As stated, the *Restatement of Torts (Third)* updates the elements of this legal theory to more accurately address defective design and failure to warn cases. See Part V.B.2. Again, it is important to check particular states' products liability statutes, as well as individual state case law for variations.

<sup>11</sup> Liability may also arise under federal law; the Magnuson-Moss Warranty Act, 15 USC 2301-2312.

<sup>12</sup> It is important to check the commercial code and case law in each applicable state. Codes may vary in subtle ways, and case law interpreting code provisions varies from state to state.

<sup>13</sup> If there is a dispute, courts will often utilize the "predominant factor" test, to analyze whether the predominate element of the transaction was a sale of goods or a service, to determine application of the code.

<sup>14</sup> See UCC section 2-313.

<sup>15</sup> See UCC section 2-314; the code section defines additional grounds for finding that the goods are "merchantable."

<sup>16</sup> See UCC sections 1-205 and 2-316(3)(c).

<sup>17</sup> See UCC section 2-315.

<sup>18</sup> See *supra* note 16.

<sup>19</sup> See UCC sections 2-714 - 2-715.

<sup>20</sup> See UCC section 2-318. Many state statutory equivalents have further weakened privity requirements.

<sup>21</sup> See UCC section 2-316 and comment 4. Express Warranties may be disclaimed in some instances, however, it is more difficult to do so. See *discussion*, Wittenberg, note 3 at pp. 5-35-36.

<sup>22</sup> See UCC section 2-607.

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<sup>23</sup> See 15 USC 2051, et. seq.

<sup>24</sup> See *Restatement of Torts (Third)* section 9; See also, *Restatement of Torts (Second)*, sections 310, 311 & 402B.

<sup>25</sup> See 15 USC 2064. Note that some states may have state consumer product safety laws, providing Seller with additional responsibilities/liabilities. Have your legal counsel examine applicable state laws.

<sup>26</sup> See 15 USC 2064. The generic term “recall” is not used, but is clearly synonymous with many types of corrective action described in this section. (Discussion with CPSC attorney, Office of General Counsel, Washington, D.C., June 9, 1998).

<sup>27</sup> See 15 USC 2068-69.

<sup>28</sup> Again, case law varies, and it is important to review specific case law to determine a particular jurisdiction’s interpretation of a consumer’s rights under the CPSA.

<sup>29</sup> See 15 USC section 2064. Note that the *Restatement of Torts (Third)* has recently identified this legal theory in section 10 (discussed in Part VI.C.).

<sup>30</sup> The *Restatement of Torts (Third)* has recently identified this claim in section 10. The claim is based upon evolving case law recognizing this cause of action against Sellers.

<sup>31</sup> See *Restatement of Torts (Third)*, section 21.

<sup>32</sup> The *Restatement of Torts (Third)* has recently identified this claim in section 11. The claim is based upon evolving case law recognizing this cause of action against Sellers. As discussed, the CPSA mandates federal recall requirements, and an injured user may have a private cause of action under that statute for Seller’s failure to recall a product (see discussion, Part VI.B.). A comprehensive discussion of legal issues around product recalls is beyond the scope of this document.

<sup>33</sup> See *Restatement of Torts (Third)*, section 1, comments, p. 8-9; see also, van der Smissen, *supra* note 3, p. 327.

<sup>34</sup> States vary on the scope and effect of comparative fault legislation and how those laws work to apportion liability in a particular case. Your legal counsel can review applicable jurisdictions for variations. See discussion, *Restatement of Torts (Third)*, comments, section 17.

<sup>35</sup> See UCC section 2-715(2).

<sup>36</sup> See UCC section 2-710.

<sup>37</sup> See Part VI.B. for an explanation of the Commission’s authority vis a vis product repair, recall, etc.

<sup>38</sup> See, for example, *Restatement of Torts (Third)* sections 4 and 11. Section 4 provides that proof of noncompliance with an applicable safety statute or regulation *renders the product defective* with respect to the specific risks intended to be reduced by the statute or regulation. Section 11 imposes liability upon the Seller for failure to conduct a legally required post sale recall. See also Part VI.B., discussing CPSA requirements.

<sup>39</sup> See discussion, Part X.B.1.

<sup>40</sup> Usually, if use of the product includes the risk of serious injury or death, this warning should be prominent and included at the top of the list. Statutes may offer guidance on the placement of these types of warnings.

<sup>41</sup> Take these statutory requirements seriously. For example, California law requires specific warnings be included if the product contains a hazardous substance. Make sure suppliers of your

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accessory lines, e.g. those supplying paints, glues, cleaners -- are aware of and are complying with these laws. *See also* discussion, text and note 38.

<sup>42</sup> *Restatement of (Torts) (Third)* takes the position (as do some jurisdictions) that the obviousness of the danger is not grounds for dismissal, but (whether in cases of alleged defective design or failure to warn) should simply be a factor the court considers in determining liability. *See* comments, section 2. Many jurisdictions continue to take the position that Sellers have no duty or obligation to warn users about obvious product dangers (in negligence (products liability) claims – no duty was breached; in strict products liability claims – an obvious danger renders the product not defective). *See discussion*, Wittenberg, *supra* note 3, section 1.04, p. 3-40 & section 4.01(4), p. 4-8; van der Smissen, *supra* note 3, section 21.1113, p. 339.

<sup>43</sup> Alpine ski rental is the one area where these documents are used regularly. However, this involves rental products, rather than the sale of new products. In addition, release and indemnity provisions are commonly used in agreements entered into between those in the chain of distribution (see Part X.A.7.).

<sup>44</sup> Again, the law varies on whether Sellers can release themselves from strict products liability. The majority of jurisdictions appear to disallow these types of releases, and do so on public policy grounds. *See, Olsen v. Breeze, Inc.*, Cal. 1996), where a California court clarified that although ski rental equipment lessors can utilize releases of liability, releasing sellers from their liability for negligence, those documents *cannot* include a release of sellers' potential strict liability for defective products. *See also Restatement of Torts (Third)*, section 18; Laura Horton, *Releases and Product Liability Claims*, Outdoor Network Newsletter (Fall 1997), p. 10.

<sup>45</sup> Please refer to the ORCA *Guidelines* document, *supra* note 1, for a comprehensive discussion of releases and related documents.

<sup>46</sup> *See Horton* article, *supra* note 44, specifically discussing these issues. *See also, Restatement of (Torts) (Third)*, section 18.

<sup>47</sup> *See* Catherine Hansen-Stamp, *Recreational Injuries and Inherent Risks: Wyoming's Recreation Safety Act – An Update*, 33 Wyo. Land & Water Law Review 249 (1998), for an extensive discussion of the inherent risk doctrine and recreational activities. The article also discusses Wyoming and other states' inherent risk legislation.

<sup>48</sup> *See* Catherine Hansen-Stamp, *Risk Management: A Different Perspective*, Outdoor Network Newsletter (Fall 1997), p. 1, for further discussion of these issues.

<sup>49</sup> *See* text and note 21.

<sup>50</sup> In some cases, failure to follow statutes or regulations can expose the Seller to legal liability *See* part X.A.8., and text and notes 38 and 55 for further discussion.

<sup>51</sup> Failure to comply can expose Seller to substantial penalties pursuant to the CPSA. Sellers may also be exposed to liability for post sale failure to warn or recall a product. *See discussion*, Part VI.B.,C. and D.

<sup>52</sup> Evidence of subsequent remedial measures is generally not admissible at trial to prove a seller's (defendant's) fault or negligence – e.g. to prove that a particular product was defective. The courts have cited public policy reasons, including the desire not to discourage subsequent repairs. However, this type of evidence *is* generally admissible to prove other things, e.g. ownership, control, feasibility of precautionary measures (legal counsel can check state/federal laws for variations). Therefore, a seller may be faced with this evidence coming into a trial. In light of legal exposure and

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potential exposure to punitive damages, sellers should commit to subsequent repair, where appropriate, even with knowledge the evidence may possibly end up entering into a legal proceeding.

<sup>53</sup> See *Restatement of Torts (Third)*, section 14; *Restatement of Torts (Second)*, section 400. Although every seller in the chain of distribution is potentially exposed to liability for defective products, state statutes and case law vary, thus making agency principles important in certain cases.

<sup>54</sup> Although public policy concerns may prevent Sellers from contracting away their (products) liability to users, courts generally allow those within the chain of distribution to enter into indemnity and release agreements with each other. Of course, such agreements would be closely scrutinized under applicable law and enforced on a case by case basis. See *Restatement of Torts (Third)*, section 18, comment a.

<sup>55</sup> See *Restatement of Torts (Third)*, sections 4 and 11. Under these sections and a variety of case law, failure to comply with applicable product safety or mandatory recall statutes or regulations, will expose a seller to liability. See also discussion, Part VI.B., C. and D. and text and notes 38 and 50.

<sup>56</sup> See *Restatement of Torts (Third)* section 2.

<sup>57</sup> See *Restatement of Torts (Third)* section 4.

<sup>58</sup> See Comments to *Restatement of Torts (Third)* section 2.

<sup>59</sup> See Comments to *Restatement of Torts (Third)* section 2. In rare cases, proof of a reasonable alternative design is not necessary if the product is shown to be extremely dangerous and to possess little if any social utility.

<sup>60</sup> The general idea is this: A Seller has no duty to protect users from unforeseeable misuse. Therefore, if user is injured because of his/her unforeseeable misuse of a product, seller has breached no duty to user, and a negligence (products liability) claim should fail. In a strict liability context, a seller need not protect the user from injuries resulting from user's unforeseeable misuse. A user injured because of his/her unforeseeable misuse cannot therefore claim that the product is "defective." Dismissal is thus justified in either case. See *Restatement of Torts (Third)*, comments, pp. 109-110.

<sup>61</sup> See *Restatement of Torts (Third)*, pp. 257-59.

<sup>62</sup> See *Restatement of Torts (Third)*, section 17, comments a and c.

<sup>63</sup> Of course, with this knowledge may come a post sale duty to warn. See discussion, Part VI.C.

<sup>64</sup> See text and note 42 for discussion, and exceptions to this rule.

<sup>65</sup> This type of assumption of risk is referred to as "secondary" assumption of risk and, with the advent of comparative fault laws, is generally a form of plaintiff's contributory fault. (Note that some courts hold that plaintiff's (secondary) assumption of risk serves as a complete bar to any strict products liability claim). To be distinguished is the inherent risk doctrine, discussed in Parts III. and X.A.2.b., a "primary" assumption of risk doctrine outlining that a provider of recreational activities has no duty to protect participants from the inherent risks of those recreational activities.

<sup>66</sup> See Part X.A.2.b. and ORCA *Guidelines* document, *supra* note 1, providing an in-depth discussion of these types of documents.

<sup>67</sup> The term "independent contractor" is a legal term used to describe an individual or entity that controls the scope and details of how it conducts its work. A retailer might use an 'independent contractor' provision when contracting with outside organizations to perform recreational services, so that, if a participant is injured, retailer will not be held liable for the acts of the outside organization.

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However, note that in most jurisdictions, courts view the issue of ‘independent contractor’ status on a case by case basis. Even if retailer has a contract outlining that outside organization is an independent contractor, the court will oftentimes look to a variety of factors, including the words and conduct of the parties, to determine whether the outside organization actually *acted* independently. Therefore, even if retailer has included an ‘independent contractor’ provision in its contract, retailer should exercise care in dealing with the outside organization so that it is truly acting independently. Furthermore, verify that retailer is accurately described as a sponsor, and not as a service provider, in any promotional materials or other documents developed by retailer or the outside organization. It is important that prospective participants understand that the outside organization alone will organize and control the conduct of the trip/activity. Again, your legal counsel should be well versed in these issues and should review applicable state law for variations in the doctrine.