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Product Liability and Commercial Law Theories Relating to Concussions

INTRODUCTION

THIS ARTICLE EXPLORES LEGAL THEORIES that an athlete who has suffered a concussion might use against an equipment manufacturer or seller. The prevention and treatment of concussions resulting from sports participation has become a topic of national concern.¹ It is an issue that has received extraordinary publicity, with the National Football League (NFL) taking center stage in the controversy.² In late August 2013, the NFL settled the class action lawsuit that had been brought by former players for \$765 million.³ The players' suit alleged that the NFL had concealed its knowledge about the dangers of concussions and other traumatic brain injuries.⁴ The settlement is still pending final judicial approval as of the summer 2014.⁵ One leading sports law treatise has explained that there are a number of legal theories upon which an athlete who has suffered a concussion could rely in bringing a lawsuit against an equipment manufacturer or seller (hereinafter use of either term, "manufacturer" or "seller," is inclusive of both):

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1. See Jon Solomon, *SEC Asks NCAA to Take the Lead on Concussions*, AL.COM (May 31, 2013, 2:55 PM), http://www.al.com/sports/index.ssf/2013/05/sec_asks_ncaa_to_take_the_lead.html (quoting SEC commissioner Mike Slive) ("[P]revention and treatment of concussion injuries is a national concern that needs and deserves a coordinated national effort.").

2. See *In re Nat'l Football League Players' Concussion Injury Litig.*, No 2:12-md-02323-AB, 2014 WL 3054250, at *1 (E.D. Pa. Jan. 14, 2014).

3. See Darren Heitner, *Breaking down the Proposed \$765 Million NFL Concussion Lawsuit Settlement*, FORBES (Aug. 29, 2014, 1:18 PM), <http://www.forbes.com/sites/darrenheitner/2013/08/29/breaking-down-the-proposed-765-million-nfl-concussion-lawsuit-settlement/>.

4. *Id.*

5. See *In re Nat'l Football League*, 2014 WL 3054250, at *12.

PRODUCT LIABILITY AND COMMERCIAL LAW THEORIES

Generally, a person injured by an arguably defective, commercially supplied product has available at least three separate and distinct causes of action: negligence, breach of implied warranty, and strict liability in tort. In some cases, a fourth cause of action, breach of an express warranty, is available.⁶

In two distinct sections, this article examines the relationship of strict product liability (hereinafter product liability) and commercial law theories to concussions.⁷ Also, although many different types of sports equipment may cause an athlete to suffer a concussion, for the sake of simplicity, this article typically—although not categorically—considers helmets in its references, hypotheticals, and illustrations.⁸

I. PRODUCT LIABILITY

A. General

The classic sports law treatise, *The Law of Sports* by Weistart and Lowell, succinctly articulates the general rule regarding sports equipment and product liability: “the suppliers of athletic equipment have a duty to exercise care for the protection of those who use their equipment or who may be endangered by its use.”⁹ Another popular sports law treatise acknowledges that “in any sports-related accident, a products liability suit that puts the sports equipment under scrutiny should at least be considered.”¹⁰ That same treatise explains further:

Under a theory of strict liability in tort, a commercial supplier who sells a product in defective condition unreasonably dangerous to the user or consumer” is subject to liability for harm caused. Liability attaches even if the seller has exercised all possible care and even though the user or consumer has no contractual relation with the seller. The determination of whether a product is defective is made with reference to a reasonable consumer’s expectations. Assumption of risk and misuse of the product are defenses.¹¹

6. LAW OF PROFESSIONAL AND AMATEUR SPORTS § 15:14, at 15-23 (Gary Uberstine et al. eds., 2002); *see also* Douglas Houser et al., *Product Liability in the Sports Industry*, 23 TORT & INS. L. J. 44, 47 (1987) (“Today a person injured by a defective product has a choice of distinct, yet related, theories of recovery upon which to base his action, e.g., strict liability, negligence, or breach of warranty.”).

7. *See infra* Parts I, II.

8. *See infra* Part I.C.2.

9. JOHN WEISTART & CYM LOWELL, *THE LAW OF SPORTS* § 8.09, at 996 (1979).

10. LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 6, §§ 15:23, at 15-33.

11. *Id.* § 15:14, at 15-23–15-24 (footnote omitted).

As a jurisprudential matter, the doctrine of product liability serves broad economic and social purposes.¹² Because fault (i.e., the failure to act like a reasonable person under similar circumstances) is not a criterion for a finding of liability in this context, product liability imposes the costs of injuries caused by their products on manufacturers or sellers (hereinafter defendant companies).¹³ In one sense, defendant companies are in a better position to guard against injury than are the individuals who are hurt by their products.¹⁴ Hence, product liability imposes accident costs on the superior risk bearer.¹⁵ As Thomas Van Flein has stated:

*The touchstone of products liability is risk allocation. Liability imposed against the product manufacturer for economic and non-economic harm caused to consumers transfers the real costs of defective products to the manufacturers and retailers (who profit from the products) rather than the injured consumers or society as a whole.*¹⁶

Athletes use many different types of equipment. Every piece of equipment is, theoretically at least, capable of causing injury.¹⁷ In the United States, the theory of product liability has come to dominate the liability aspects of injuries caused by almost every type of equipment.¹⁸

12. See John Watts, *Fairness and Utility in Products Liability: Balancing Individual Rights and Social Welfare*, 38 FLA. ST. U. L. REV. 597, 615 (2011) (“[T]he evolution and merger of tort and contract law in products liability was motivated by a desire to achieve a balance between fairness and utility.”).

13. See *id.* at 620 (“Enterprise liability forces manufacturers to internalize the cost of accidents caused by defective products and thereby creates incentives for the manufacturer to improve product safety.”); see also *Bouillon v. Harry Gill Co.*, 301 N.E. 2d 627, 630 (Ill. App. Ct. 1973) (“A distinguishing feature of this doctrine, apart from its effect on the requirement of privity, is that it does not depend on proof of negligence. This does not mean, however, that a manufacturer is an insurer in all cases, because there must be proof that the injury or damage resulted from a condition of the product, and that the condition was an unreasonably dangerous one, and that the condition existed at the time the product left the manufacturer’s control.”).

14. See Thomas V. Van Flein, *Allocation of Fault and Products Liability: A Comment on Safety Products and Human Error*, 19 ALASKA L. REV. 141, 144 (2002).

15. See *id.*

16. *Id.* (footnotes omitted).

17. See, e.g., *Hockey Player’s Neck Slashed by Skate*, ABC NEWS.COM (Feb. 11, 2008), <http://abcnews.com/Sports/story?id=4271717> (discussing an incident where a professional ice hockey player’s throat was cut by the blade of an opposing player’s ice skate); David Bown, *Cubs Tyler Colvin Hospitalized After Broken Bat Punctures Chest*, YAHOO!SPORTS.COM (Sept. 19, 2010), http://sports.yahoo.com/mlb/blog/big_league_stew/post/Cubs-Tyler-Colvin-hospitalized-after-broken-bat?urn=mlb-270755 (discussing an incident where a major league baseball player was injured by shards from a broken bat).

18. See Houser, *supra* note 6, at 47 (“Sports involve the use of a large number of products; baseball bats, football helmets, hockey sticks, bicycles, parallel bars, special footwear, sports cars, ski bindings and javelins, to name a few. The sheer number and variety of sports products alone would permit the inference that product liability cases abound in the sports industry. Furthermore, when one considers the context in which these products are used, it becomes quite apparent that a defect is apt to cause injury to the sports participant.”).

PRODUCT LIABILITY AND COMMERCIAL LAW THEORIES

Most American jurisdictions have adopted Section 402A of the Restatement (Second) of Torts for their general definitions and rules regarding products liability.¹⁹ Section 402A provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.²⁰

According to one commentator, “Section 402A imposes strict liability upon one who sells a product in a defective condition which is unreasonably dangerous to the user or consumer. The liability is in tort rather than warranty and therefore the various contract rules, such as notice of breach, do not apply.”²¹ It is common to define a product defect as one of three distinct types: (1) manufacturing defects; (2) design defects; and (3) failures to warn adequately.²² Weistart and Lowell also identify and focus on these separate potential defects:

[A] manufacturer must exercise reasonable care in the manufacture of a product which it should know would involve an unreasonable risk of physical harm, if not carefully made. The manufacturer also has the duty to exercise reasonable care in the adoption of a safe design for its products and

19. *Id.*

20. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

21. Houser, *supra* note 6, at 47. *See infra* Part II for a discussion of commercial law theories.

22. *See, e.g., Van Flein, supra* note 14, at 157 (“Alaska law recognizes three forms of product defect: a manufacturing defect, a design defect, or a failure to contain adequate warnings. If one of these defects is established, the manufacturer will be liable for that product defect if it caused injury, because proof of a defect is tantamount to “fault” in the sense that we will impose legal responsibility for it.”) (footnotes omitted) (quoting Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 889 (Alaska 1979)).

*may be liable for injuries to foreseeable users caused by a design which makes the product dangerous for the uses for which it was manufactured. In addition, the producer has a duty to test for and warn against any hidden dangers.*²³

In a similar fashion, Uberstein explains the doctrine using examples from everyday life:

*A review of case law reveals that there are three basic types of defects: manufacturing flaws, design flaws, and marketing flaws. Manufacturing flaws can be described as individual product imperfections, such as a coffee roll with a pebble in it. Design flaws impugn the entire product line. In litigation concerning the Ford Pinto, it was contended that all the Pintos of a given year were defective because Ford placed the gas tank in a dangerously vulnerable position behind the rear axle. This would be an example of an alleged design defect. Finally, marketing flaws arise when the seller fails to provide needed instructions regarding proper use, or to provide adequate warnings concerning less obvious dangers.*²⁴

Another key component of the definition of a defective product is identifying what renders a product “unreasonably dangerous.” In their article, “Product Liability in the Sports Industry,” Houser, Ashworth, and Clark articulate the accepted general rule:

*A defective product is ‘unreasonably dangerous’ when the product is ‘dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.’ It can be argued that an allegedly defective product used for an extended period of time without injury is prima facie not ‘unreasonably dangerous.’*²⁵

23. WEISTART & LOWELL, *supra* note 9, § 8.09, at 999 (emphasis added) (footnotes omitted) (citing RESTATEMENT (SECOND) OF TORTS §§ 393, 395 (1965)); *see also* McCormick v. Lowe & Campbell Athletic Goods Co., 144 S.W.2d 866 (Mo. Ct. App. 1940).

24. LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 6, § 15:21, at 15-30–15-31 (emphasis added).

25. Houser, *supra* note 6, at 56 (emphasis added) (footnote omitted). The authors further state,

[c]omments g and i [to the Restatement § 402A] suggest that the ordinary expectations of the consumer constitute the standard for determining if these elements are present. These comments have led to the formation of the ‘consumer expectation’ test for establishing a ‘defect.’ Other jurisdictions, however, have either rejected or modified the ‘consumer expectation’ test by adopting risk-benefit approach.

Their suggestion that a product that has been used for a long period of time is *prima facie* not unreasonably dangerous may be especially applicable to helmets used in sports.²⁶ For example, if a school keeps a helmet for several years and many athletes use it, when an athlete wearing it suffers a concussion, arguably it ought not be deemed to have been unreasonably dangerous. But the coaches may still be liable on a theory of negligence for continuing to allow athletes to use it for such an extended and unreasonable period of time.²⁷ Another important aspect of the law of product liability to bear in mind is that courts have gradually expanded the scope of potential plaintiffs to include a variety of bystanders who suffer injuries.²⁸ Thus, for example, a bystander injured when a baseball bat breaks could have a cause of action against a manufacturer under this theory.²⁹

B. Manufacturing Defects & the Importance of Accurate Labeling

Sports equipment such as a helmet or ski bindings may be considered defective and unreasonably dangerous if there is a manufacturing defect.³⁰ A helmet with a crack in it, for example, easily may be deemed a defective, unreasonably dangerous product. Manufacturers today make helmets of high-impact plastic materials.³¹ Helmet manufacturers must meet high standards in order for their helmets to meet

Id. at 57 (footnotes omitted).

26. See *infra* note 27 and accompanying text.

27. See, e.g., LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 6, § 15:21, at 15-30–15-31. Ueberstein writes,

The determination of whether a product is in a defective condition unreasonably dangerous depends on whether a reasonably prudent consumer would expect the defect to be present. By way of illustration, a cherry pie with a cherry pit in it would not be regarded as in a defective condition unreasonably dangerous. The reasonable consumer would expect to find a pit in a cherry pie every now and then.

Id.

28. See Houser, *supra* note 6, at 48–49 (“Around 1965, the definitions of ‘user’ and ‘consumer’ began to broaden gradually so that today an injured plaintiff may bring an action in strict liability even though he was not literally ‘using’ the product. Examples of the relaxation of this requirement include a bystander who was injured by the explosion of a shotgun, the driver of a car struck by another car, and a bystander injured by the explosion of a beer keg.”) (footnotes omitted).

29. See *id.*

30. See *id.*; see also RESTATEMENT (SECOND) OF TORTS § 402A (1965).

31. See *Impact Resistant Plastics Helps Make Sporting Goods Stronger*, DUPONT, <http://www.dupont.com/products-and-services/plastics-polymers-resins/thermoplastics/uses-and-applications/impact-resistant-plastic-for-sporting-goods.html> (last visited Sep. 10, 2014) (noting that DuPont outfits their helmets with impact resistant plastic).

certain uniform criteria for helmet safety.³² And manufacturers affix various informational and warning labels on their helmets prior to sale.³³

As was suggested above, a manufacturing defect such as a crack in a helmet would likely be considered defective and unreasonably dangerous under the Restatement rule. But perhaps more importantly, a helmet that is mislabeled as, for example, an off-road motorcycle helmet when it should have been labeled as a road helmet would be a manufacturing defect which probably also would render a helmet defective and unreasonably dangerous.³⁴

C. *Design Defects*

1. *Introduction*

According to Uberstein,

*The modern products liability case often revolves around a claim that the product is defectively designed. In such a case, the plaintiff impugns the conscious design choice of the manufacturer and attempts to show a safer, economically feasible design. In determining whether the manufacturer's choice of design renders the product in a "defective condition unreasonably dangerous," courts have been unable to agree on a single standard.*³⁵

Indeed, the issues concerning allegedly defective product designs may be especially troublesome as they relate to sports equipment, especially protective gear such as helmets.³⁶

2. *Helmets as an Example*

Today, manufacturers have developed sophisticated methods for manufacturing helmets.³⁷ It is even common for manufacturers to seek patent protection for

32. NOCSAE Board Approves First Helmet Standard to Address Concussion Forces, NOCSAE (June 20, 2014), <http://nocsa.org/wp-content/uploads/2011/10/NOCSAE-June-Board-Meeting-release-FINAL-6-20-14.pdf> (describing the adoption of new helmet standards to address concussion forces).

33. Ken Belson, *Warning Labels on Helmets Combat Injury and Liability*, N.Y. TIMES, Aug. 5, 2013, at D1.

34. See *Bell Sports, Inc. v. Yarusso*, 759 A.2d 582, 585, 594–95 (Del. 2000) (affirming Plaintiff's jury verdict regarding, among others, a claim that a helmet manufacturer breached the implied warranty of merchantability when it sold a helmet designed for on-road use as an off-road helmet).

35. LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 6, § 15:15, at 15-24–15-25.

36. See Daniel Siegal, *Riddell Helmet Led to Football Player's Brain Injury, Jury Told*, LAW 360 (Feb. 28, 2014), <http://www.law360.com/articles/514414/riddell-helmet-led-to-football-player-s-brain-injury-jury-told> (discussing claims against helmet maker Riddell, Inc. for unsafe and defective helmet design).

37. See generally, *POC Research & Innovation*, POC SPORTS, <http://www.pocsports.com/en/content/view/protective-concepts#helmetconceptssnow> (last visited Sept. 15, 2014) (displaying and explaining several sophisticated designs for their helmets).

innovative helmet designs.³⁸ Many sports require that participants wear protective helmets, and courts have on many occasions considered the issue of whether helmet manufacturers and sellers should be liable for head injuries.³⁹ It is certainly conceivable that a helmet design could be considered defective and unreasonably dangerous. For example, if a helmet were designed in such a manner that it became brittle or unstable over time, it might be considered a defective, unreasonably dangerous product.⁴⁰ Presumably, such a design would be considered defective due to the manufacturer's choice of materials, choice of manufacturing process, choice of bonding of the plastics, or whatever factor caused the brittleness or instability.⁴¹ Similarly, if a helmet were designed in such a manner that it had an insufficient amount of interior padding or an interior protective material that failed to disperse impact forces adequately, those design flaws too could be considered defective and unreasonably dangerous.⁴² Arguably either insufficient interior padding or interior protective material that fails to disperse impact forces adequately would render a helmet more dangerous than an average helmet consumer would anticipate (and,

38. See, e.g., *POC Unveils the Skull Orbic Comp*, POC SPORTS, <http://news.pocsports.com/2013/10/25/poc-unveils-the-skull-orbic-comp-helmet/> (last visited Sept. 11, 2014).

39. See, e.g., Alexander Hecht, *Legal and Ethical Aspects of Sports-Related Concussions: The Merrill Hoge Story*, 12 SETON HALL J. SPORT L. 17, 31–32 (2002) (“Sports-related concussions also arise in a traditional product liability framework, usually involving a football helmet manufacturer’s liability to a player who suffers a concussion. In *Lister v. Bill Kelley Athletic, Inc.*, an Illinois appellate court held that the ‘inherent danger’ of football precluded a duty by the helmet manufacturer to warn a user of a possible head injury. The court denied recovery to a high school football player who was paralyzed in a helmet-to-helmet collision.” (footnotes and citations omitted)); John Helyar, *Helmets Preventing Concussion Seen Quashed by NFL-Riddell*, BLOOMBERG (Mar. 18, 2013, 12:01 AM), <http://www.bloomberg.com/news/2013-03-18/helmets-preventing-concussion-seen-quashed-by-nfl-riddell.html> (discussing the siege of liability lawsuits during the 1970s and 1980s where courts awarded injured football players \$46 million in damages, causing Rawling Sporting Goods Co to leave the helmet making business); see also Brian Mills, *Football Helmets and Products Liability*, 8 SPORTS LAW. J. 153, 157–58 (2001) (“As football helmet standards were created and helmet design improved, liability suits drove numerous football helmet manufacturers out of business. . . . Most of the companies like Wilson, Spalding, Rawlings, and Hutch all dropped out of the helmet manufacturing business due to ‘[s]oaring insurance premiums, exploding litigation expenses and the threat of excessive judgments.’ . . . [F]ifty percent of the cost of the football helmet is a ‘hidden tort tax.’” (footnotes omitted)).

40. See Houser, *supra* note 6, at 48 (“A defect in a piece of protective sports equipment is more apt to make that product ‘unreasonably dangerous’ because its sole purpose is to protect the user.”).

41. See James A. Henderson, Jr., *Judicial Review of Manufacturers’ Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1543–44 (1973) (“Generically dangerous products may be further subdivided into products that are unusually dangerous because of the manufacturer’s inadvertent design errors and those that are dangerous because of a conscious choice in the product’s design.”).

42. See *Bell Sports, Inc. v. Yarusso*, 759 A.2d 582, 585 (Del. 2000). The express warranty stated: “[t]he Moto-5 [helmet] is designed to absorb the force of a blow first by spreading it over as wide an area of the outer shell as possible, and second by the crushing of the non-resilient inner liner.” *Id.* The Delaware Supreme Court emphasized that “[a] pivotal factual issue at trial was whether the helmet liner properly crushed, as designed, at the time Yarusso’s head impacted the ground after his fall.” *Id.*

thus, render it a defective, unreasonably dangerous product).⁴³ As Houser, Ashworth, and Clark note:

*The nature of sports, however, is such that a great many of the products used serve the sole purpose of protecting the user. Face masks, batting helmets, releasable ski bindings, knee pads and braces, football helmets, goggles, railings, floor pads, mouthpieces, roll bars and shoulder pads are a few examples of such protective products. A defect in a piece of protective sports equipment is more apt to make that product “unreasonably dangerous” because its sole purpose is to protect the user.*⁴⁴

D. *Failure to Adequately Warn*

Even novice athletes know that sports equipment such as helmets may occasionally break.⁴⁵ *Nissen Trampoline Co. v. Terre Haute First Nat’l Bank*⁴⁶ illustrated the legal importance of an adequate warning on sports equipment.⁴⁷ In *Nissen*, the plaintiff was severely injured when he tried to bounce off a device called an Aqua Diver.⁴⁸ The Aqua Diver was basically a mini-trampoline that used elastic cables attached to a circular frame to support a smaller inner “bed” from which someone could bounce to dive into a pool or lake.⁴⁹ Although *Nissen*’s pre-market testing had shown that a would-be-diver might injure herself by entangling her foot or leg in the suspension cables, *Nissen* did not include any warning labels or warnings in its product literature to alert users to this potential risk.⁵⁰ The court succinctly summarized the applicable legal doctrine as follows:

[I]t is well established that a product, although virtually faultless in design, material, and workmanship, may nevertheless be deemed defective so as to impose liability upon the manufacturer for physical harm resulting from its use, where the manufacturer fails to discharge a duty to warn or instruct with respect to potential dangers in the use of the product. Generally, the

43. See *id.*; see also Houser, *supra* note 6, at 56 (“A defective product is ‘unreasonably dangerous’ when the product is ‘dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.’” (footnote omitted)).

44. Houser, *supra* note 6, at 48 (emphasis added).

45. See *Schutt Helmet Fitting Instructions*, SCHUTTSPORTS, http://www.schuttsports.com/userdocs/products/09_FB_Fitting_Instructions.pdf (last visited Sept. 15, 2014) (depicting the instruction manual that comes with every helmet sold, warning of cracks and advising users to inspect for cracks prior to use).

46. 332 N.E.2d 820 (Ind. Ct. App. 1975).

47. *Id.* at 825 (discussing the manufacturer’s duty to provide adequate warning).

48. *Id.* at 821.

49. *Id.*

50. *Id.* at 822.

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*duty to warn arises where the supplier knows or should have known of the danger involved in the use of its product, or where it is unreasonably dangerous to place the product in the hands of a user without a suitable warning. However, where the danger or potentiality of danger is known or should be known to the user, the duty does not attach.*⁵¹

The court explained its reasoning further:

*[T]he law should supply the presumption that an adequate warning would have been read and heeded, thereby minimizing the obvious problems of proof of causation. We find such an approach to be meritorious, workable, and desirable. Comment j of Restatement (2d) Torts, § 402A (1965), provides a presumption protecting the manufacturer where a warning is given: “Where warning is given, the seller may reasonably assume that it will be read and heeded; . . .” However, where there is no warning, as in the case at bar, the presumption of comment j that the user would have read and heeded an adequate warning works in favor of the plaintiff user. In other words, the presumption of causation herein is that [the plaintiff] would have read an adequate warning concerning the danger of a user’s foot slipping between the elastic cables of Aqua Diver and heeded it, resulting in his not using the Aqua Diver.*⁵²

Houser, Ashworth, and Clark emphasize two important points regarding the adequacy of product warnings. First, “[t]here is, of course, no duty to warn of dangers that could have been readily recognized by the ordinary user.”⁵³ Furthermore,

51. *Id.* at 825 (citations omitted); see also Houser, *supra* note 6, at 51 (“A manufacturer has a duty to instruct users as to the safe use of the product, and to warn of the dangers associated with using the product, even if the product has no manufacturing or other design defect. Users of the product need this information to determine whether to expose themselves to the risks involved. The standard used to determine whether such a warning need be given is based upon what is reasonable under the circumstances. Some factors to be considered include the normal expectations of the consumer, the degree of simplicity or complexity of the operation or use of the product, the nature and magnitude of the danger to which the user is exposed, the likelihood of injury, and the feasibility and beneficial effect of including the information. Gymnastic equipment and trampolines are examples of sports products that often require warnings and instructions.” (footnote omitted)); LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 6, § 15:20, at 15-30–15-31 (“Although the analysis of the evidence revealed no defect in design or manufacture, the court of appeals asserted that Nissen’s failure to warn of the known dangers in the use of the Aqua Diver supported a strict liability action. Aqua Diver was a ‘defective product’ dangerous to the user without a warning within the purview of § 402A. The appellate court also noted that the problem of proof of causation in failure to warn cases should be minimized by the presumption that an adequate warning would be read and followed.” (footnotes omitted)).

52. *Nissen*, 332 N.E.2d at 826.

53. Houser, *supra* note 6, at 52.

[T]he appropriate standard for determining sufficiency of a warning would seem to be whether an ordinary consumer could read and understand the warnings so as to be able to take the necessary precautions. “Whether or not a given warning is adequate depends upon the language used and the impression that it is calculated to make upon the mind of an average user of the product.”⁵⁴

This is one reason why helmet manufactures routinely affix warning labels on their helmets, and provide instruction manuals directing users to inspect helmets prior to use and not to use a helmet that has a crack or other defect.⁵⁵ Clearly, the newer the helmet, the more likely it is, as a factual matter, that such a crack will be attributable to a manufacturing defect or to damage in transit from seller to buyer.⁵⁶ The older the helmet (i.e., the more use it has gotten), the more likely it is that, as a matter of fact, a defect such as a crack will be attributable to someone having dropped it, stepped on it, or the like, through ordinary use and normal wear and tear.⁵⁷ Therefore, in a cause of action premised on product liability against a sports helmet manufacturer, there is likely to be a very difficult and complex factual inquiry relating to the *actual cause* of a defect or a helmet’s break.⁵⁸ In addition to this factual difficulty of proof of causation, and in light of the fact that athletes generally know that helmets may break, a jury would have to consider whether a helmet that breaks is more dangerous than that contemplated by the ordinary consumer: “To determine whether a product is unreasonably dangerous . . . a product ‘must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.’”⁵⁹

Like protective helmets, baseball bats commonly break during ordinary use.⁶⁰ Also, like helmets, when a baseball bat breaks, it poses a significant risk to

54. *Id.* (quoting *Shell Oil Co. v. Gutierrez*, 581 P.2d 271, 279 (Ariz. App. 1978)).

55. *See, e.g., Helmet Safety Booklet*, CASCADE LACROSSE, <http://www.cascadehelmets.com/Helmet-Safety-Booklet> (last visited Sept. 10, 2014) (warning players to inspect helmets before use); *Schutt Helmet Fitting Instructions*, SCHUTT SPORTS, http://www.schuttsports.com/userdocs/products/09_FB_Fitting_Instructions.pdf (last visited Sept. 10, 2014) (warning users to frequently inspect before use and including a checklist for inspection).

56. *Cf. Brumley v. Firestone Tire & Rubber Co.*, 459 So.2d 572, 575–76 (La. Ct. App. 3d Cir. 1984) (finding that proof that an automobile tire was relatively new along with other facts was sufficient to prove defective design of the tire).

57. *Cf. Quirk v. Ross*, 476 P.2d 559, 562 (Or. 1970) (finding insufficient evidence of defective design because the alleged brake failure occurred after 39,500 miles of wear).

58. *See, e.g., Mosley v. Metro. Gov. of Nashville & Davidson County*, 155 S.W.3d 119, 124 (Tenn. Ct. App. 2004) (observing that the first inquiry would be whether the defective helmet was a cause of the injury).

59. *Vautour Co. v. Body Masters Sports Indus., Inc.*, 784 A.2d 1178, 1182 (N.H. 2001) (citation omitted).

60. *See Felicity Barringer, Science Lowers Shattering Risk at Home Plate*, N.Y. TIMES, Jul. 26, 2013, at A1 (observing that scientists made great effort to lower the shattering rate of baseball bats but bats still shatter).

participants.⁶¹ In one case involving a player who was injured when a softball bat broke during play, the Kentucky Court of Appeals said: “It is common knowledge that bats frequently break, and we think it is immaterial that a properly made bat ordinarily will splinter with the grain while one made of defective wood may break across the grain. The risk of injury is not materially [altered].”⁶² It seems unlikely, though, that a court would hold that helmet breakage due to a manufacturing defect should be considered the functional equivalent of helmet breakage due to an inadvertent nick caused by a careless athlete who failed to take proper care of the helmet.⁶³

But the risk of breakage is only one type of risk that today’s helmet manufacturers warn against. For example, one warning label for a popular snow ski helmet reads as follows:

MEETS NF EN 1077:2007, ASTM F2040 standards

WARNING: Helmets for Alpine skiers and snowboarders – class B. No helmet can protect against all possible impacts. Serious injury or death can occur even while wearing this helmet. This helmet may be easily penetrated by sharp objects and cannot protect the user from injuries to the neck, spine or other body parts. To maximize protection, this helmet must fit snugly and in accordance with the manufacturer’s instructions.

CLEAN AND STORAGE: Clean this helmet only with mild soap and water. The helmet can be damaged by cleaners, chemicals, and some hair care products. Keep your helmet away from heat sources and out of direct sunlight. Do not leave your helmet in a hot car.

DAMAGE AND REPLACEMENT: Replace this helmet immediately if it has been subjected to any impact, even if no damage is visible. Any impact may damage the internal structure of the helmet and reduce its ability to

ordinarily); Ken Belson, *BATS; Reminder of Broken Bats’ Danger*, N.Y. TIMES, Sept. 21, 2010, at B17 (illustrating the high risk of broken bats).

61. See Barringer, *supra* note 60.

62. James v. Hillerich & Bradsby Co., 299 S.W.2d 92, 94 (Ky. 1957).

63. See Sexton ex. rel. Sexton v. Bell Helmets, Inc., 926 F.2d 331, 339 (4th Cir. 1991) (holding that although negligence of an injured rider arguably may have been a contributing cause of accident, the contributory negligence defense was unavailable absent evidence of the rider’s negligence in using the helmet).

*protect the user from further impacts. Any helmet that has been subjected to damage should be destroyed or returned to the manufacturer.*⁶⁴

To be sure, this warning label goes well beyond merely alerting a user to the possibility of breakage and injury.⁶⁵ In addition to warning users of the risks of breakage, this label calls attention to the fragility of the helmet due to a number of important factors that affect the integrity and safety of the helmet, such as cleaners, sunlight, and heat.⁶⁶ In fact, it is probably unreasonable to ask manufacturers to put a great deal more information on their warning labels. As a practical matter, if a manufacturer were to put much more information on its warning labels, it actually might induce a user just to tune out the warnings due to an information overload.⁶⁷

A product liability case involving a trampoline, however, suggests that there may be a significant problem with the warning labels that manufacturers currently affix to helmets.⁶⁸ In *Pell v. Victor J. Andrew High School*,⁶⁹ a 16-year-old high school student was injured during physical education class while attempting to somersault using a mini-trampoline.⁷⁰ The equipment manufacturer, AMF, had affixed a detailed, “heat-laminated” warning label to the bed of the mini-trampoline that read:

*Caution. Misuse and abuse of this trampoline is dangerous and can cause serious injuries. Read instructions before using this trampoline. Inspect before using and replace any worn, defective, or missing parts. Any activity involving motion or height creates the possibility of accidental injuries. This unit is intended for use only by properly trained and qualified participants under supervised conditions. Use without proper supervision can be dangerous and should not be undertaken or permitted.*⁷¹

64. See generally *Snell K98 Helmet Standard*, SNELL MEMORIAL FOUNDATION, <http://www.smf.org/standards/k98/k98std> (last visited Oct. 2, 2014) (describing other issues, besides breakage, that helmet manufacturers often notify consumers about which helmet manufacturers often notify consumers).

65. See *supra* text accompanying note 55 (explaining that the warning label informs the user how to maintain the helmet and how the user should treat the damaged helmet).

66. See Brian James Mills, *Football Helmets and Products Liability*, 8 SPORTS LAW. J. 153, 156 (2001) (“[T]he expected life of a helmet depends on numerous factors such as temperature, humidity, altitude, pollution, sunlight, storage, maintenance, the player’s position.”).

67. *Drury v. Am. Honda Motor Co., Inc.*, 93-1414 (La. App. 1 Cir. 12/24/94); 659 So. 2d 738, 765 (finding that the product was not defect based on the expert’s testimony that overloaded warning is ineffective).

68. *Pell v. Victor J. Andrew High Sch.*, 462 N.E.2d 858 (Ill. App. Ct. 1984).

69. 462 N.E.2d 858 (Ill. App. Ct. 1984).

70. *Id.* at 861.

71. *Id.*

But the manufacturer's warnings were in vain because "when the mini-tramp was assembled by a faculty member at the high school, the bed was placed . . . [in such a manner] that the caution label was on the bottom, facing the floor, as opposed to the top where it would be visible to a performer."⁷²

It strains credulity to posit that an equipment manufacturer should be required to provide instructions that tell an assembler to make sure that the warning label faces upward so that it may be visible. Yet, in affirming the jury's finding of liability, the Appellate Court of Illinois articulated a rule that warning labels may be inadequate "if they do not reach foreseeable users."⁷³ And the court noted: "Plaintiff presented evidence that the assembly instructions failed to specify that the warning label should be placed in such a manner that it would be clearly visible to a gymnast. As a result, the warning label on the 'bed' was placed underneath, facing the floor."⁷⁴

Another matter of concern to helmet manufacturers is the court's ruling regarding the warnings that AMF had printed on the frame of the mini-tramp: "There were printed warnings also on the frame of the mini-tramp, however they were covered by frame pads on each of the four sides."⁷⁵ According to the court, "[t]he warnings on the sides of the metal frame were also ineffective because they were covered by frame pads."⁷⁶ This holding is pertinent to helmet manufacturers because helmet manufacturers currently affix the warning labels directly on their helmets in a position where some athletes may not notice them.⁷⁷

In addition, the *Pell* court noted that a warning could also be considered inadequate if it failed to "specify the risk presented by the product."⁷⁸ That said, the court characterized the plaintiff's evidence as "sufficient" in part because "the [defendant's] warnings did not specify the risk of severe spinal cord injury which would result in permanent paralysis during somersaulting off the mini-tramp if performed without a spotter or safety harness."⁷⁹ Given that AMF's warning label had advised that the product was "dangerous," could "cause serious injuries," and that "[a]ny activity involving motion or height creates the possibility of accidental injuries,"⁸⁰ it seems unreasonable that a court could impose liability on the

72. *Id.*

73. *Id.* at 862–63.

74. *Pell v. Victor J. Andrew High Sch.*, 462 N.E.2d 858, 863 (Ill. App. Ct. 1984).

75. *Id.* at 861.

76. *Id.* at 863.

77. See G. Larry Sandefer, *College Athletic Injuries: Does the Buoniconti Case Create a Duty of an Athlete Not to Play?*, 63 FLA. B.J. 34, 35 (citing *Pell v. Victor J. Andrew High Sch.*, 462 N.E. 2d 858 (Ill. App. 1984)) (examining a helmet defect case and noting that the failure to warn theory has resulted in substantial verdicts); Ken Belson, *Warning Labels on Helmets Combat Injury and Liability*, N.Y. TIMES, Aug. 5, 2013, at D1.

78. *Pell*, 462 N.E.2d at 862.

79. *Id.* at 863.

80. *Id.* at 861.

equipment manufacturer merely because it failed to list every possible anatomical part that might suffer injury while using a mini-tramp.⁸¹ The term “serious injuries” ought to be sufficiently cautionary without the need for greater specificity.⁸² The court’s holding on this issue appears arbitrary and capricious.

E. Defenses

As is true in all litigation, it is generally useful to distinguish between direct defenses and affirmative defenses.⁸³ A direct defense relies on an argument that directly refutes an element of a plaintiff’s *prima facie* case.⁸⁴ For example, in a product liability suit, one element that a plaintiff must prove by a preponderance of the evidence is that the product in question was a defective, unreasonably dangerous product.⁸⁵ Therefore, one direct defense in a product liability suit is for a defendant to marshal facts and reason that they tend to show that the product is not more dangerous than a reasonable consumer expects (i.e., is not a defective, unreasonably dangerous product).⁸⁶ An affirmative defense, on the other hand, is an argument that does not attempt to refute an element of the plaintiff’s *prima facie* case, but instead, seeks to show an alternative explanation for the plaintiff’s injury or justification for the defendant’s conduct.⁸⁷

One very important direct defense to product liability that is available to some defendants is very simple: they are not “sellers” as that term is used in Section 402A. For example, courts have held that coaches and schools are not “sellers” for purposes of the Restatement rule.⁸⁸ Courts have also held that neither high school athletic associations nor non-profit organizations that establish safety standards for athletic equipment are “sellers.”⁸⁹

81. Kenneth Ross & Matthew Adams, *Legally Adequate Warning Labels: A Conundrum for Every Manufacturer*, FOR THE DEFENSE, Oct. 1998, available at <http://www.productliabilityprevention.com/images/6-LegallyAdequateWarningLabelsAConundrumforEveryManufacturer.pdf> (explaining that symbols can be used to replace words on warning labels, meaning an exhaustive list of dangers is not required).

82. See *id.* (explaining that pictures are sufficient explanations for warning labels, which makes the term “serious injury” also seem sufficient).

83. Rebecca Lefler, *Lack of Proof Versus Affirmative Defenses*, DISPOSITIVELY (Jan. 6, 2013), <http://dispositively.com/2013/01/06/lack-of-proof-versus-affirmative-defenses/>.

84. *Civil Cases- The Basics*, FINDLAW, <http://litigation.findlaw.com/filing-a-lawsuit/civil-cases-the-basics.html> (last visited Oct. 5, 2014).

85. Kathleen Michon, *Proving a Defective Product Liability Claim*, NOLO, <http://www.nolo.com/legal-encyclopedia/proving-defective-product-liability-claim-29531.html> (last visited Oct. 5, 2014).

86. See LAWRENCE M. ROCHEFORD, INVESTIGATING AND DEFENDING PRODUCTS LIABILITY AND TOXIC TORT CLAIMS 45 (2006), available at http://www.jlolaw.com/wp-content/uploads/2009/10/Products_Liability_and_Toxic_Tort_Claims.pdf.

87. Gerard N. Hill & Kathleen T. Hill, *Affirmative Defense*, THE FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/Affirmative+Defense> (last visited Oct. 5, 2014).

88. See Houser, *supra* note 6, at 49–50 (citing *Hemphill v. Sayers*, 552 F. Supp. 685 (S.D. Ill. 1982)).

89. See, e.g., *Wissel v. Ohio High Sch. Athletic Ass’n*, 605 N.E.2d 458, 462–63 (Ohio Ct. App. 1992).

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In a product liability lawsuit, defendants commonly raise five different (but in some cases related) affirmative defenses: (1) plaintiff misused the product or used the product in a manner that the manufacturer/seller did not intend (but the plaintiff's misuse must not have been reasonably foreseeable);⁹⁰ (2) defendant provided proper instructions or warnings regarding the product's use which the plaintiff failed to heed (and if plaintiff heeded those warnings the product would have been safe);⁹¹ (3) use or normal wear and tear over time have significantly changed the product from the condition that it was in when it left the defendant's control;⁹² (4) plaintiff assumed the risk of injury;⁹³ (5) unforeseeable superseding conduct by a third party (e.g., a coach's negligence) was the proximate cause of the plaintiff's injury, not the defendant's product.⁹⁴

1. Plaintiff misused the product or used the product in a manner that the defendant did not intend (but the plaintiff's misuse must not have been reasonably foreseeable)

Arguably, this rule should shield an equipment manufacturer, for example, in the event that a person were to use a bicycle helmet when horseback riding. The rule also ought to relieve a manufacturer from liability in situations where a user has altered a piece of equipment, for example, by removing a foam inner-liner and substituting another material inside a helmet.

In addition, however, "[i]n order for misuse to operate as a defense, the defendant must ordinarily show that the use was not reasonably foreseeable."⁹⁵

The *Wissels* have cited no cases in which voluntary, non-profit organizations similar to NOCSAE, OHSAA, and the National Federation have been held to be 'sellers' for the purposes of Section 402A, and we choose not to be the first to do so, as we are not convinced that strict liability was ever intended to apply to such organizations. The trial court's grant of summary judgment to the appellees on the *Wissels*'s strict-liability causes of action is therefore affirmed.

Id. at 464.

90. See Houser, *supra* note 6, at 55.

91. See WEISTART & LOWELL, *supra* note 9, § 8.10, at 1001.

92. See Houser, *supra* note 6, at 56 ("It can be argued that an allegedly defective product used for an extended period of time without injury is *prima facie* not 'unreasonably dangerous.'"); see also *id.* at 57 ("Sports equipment is especially susceptible to change through use.").

93. There is considerable debate regarding the role of contributory negligence in this analysis. See Houser, *supra* note 6, at 53.

94. See LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 6, § 15:17, at 15-26-15-28 ("According to well established tort principles, intervening acts of negligence do not supersede the liability of the original wrongdoer. Courts view such acts as foreseeable. On the other hand, intervening acts that can be characterized as grossly negligent or intentional ordinarily do supersede the liability of the wrongdoer." (footnotes omitted)); *Id.* at § 15:22, 15-31-15-32 (specifically suggesting that "bad coaching or faulty training practices," assumption of risk, and product misuse might qualify as the types of conduct that would be considered superseding causes).

95. LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 6, § 15:22, at 15-32.

Foreseeability is typically a question of fact reserved for the jury.⁹⁶ Thus, we can anticipate that jurors will be called upon to determine whether it is foreseeable that a person, for example, might wear an ice hockey helmet while riding a bicycle or a lacrosse helmet while playing baseball.⁹⁷ Such uses of helmets designed for one sport yet being used for others would also open the door to the second affirmative defense; namely, that the plaintiff failed to follow properly-given instructions and/or warnings.⁹⁸

2. *Defendant provided proper instructions or warnings regarding the product's use which the plaintiff failed to heed (and if plaintiff had heeded those instructions/warnings the product would have been safe)*

Weistart and Lowell articulate this rule as follows: "The seller may avoid liability by giving proper instructions and warnings which, if followed, will make the product safe. The seller may also reasonably assume that such directives will be read and followed."⁹⁹ Helmet manufacturers routinely provide instructions and warnings regarding appropriate use.¹⁰⁰

Quite clearly, athletes who fail to follow the instructions or who fail to heed the warnings on the labels affixed to helmets ought not, as a general rule, be successful in a lawsuit against a helmet manufacturer.¹⁰¹

3. *Use or normal wear and tear over time have significantly changed the product from the condition that it was in when it left the defendant's control*

Protective helmets take a lot of abuse.¹⁰² Football helmets are a good example. Not only do they withstand the stresses placed on them by repeated impacts with the helmets of other players and the ground, but they also get banged around during transportation to and from practices and games.¹⁰³ People drop them accidentally.

96. See Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 WAKE FOREST L. REV. 1247 (2009).

97. Russ VerSteeg, *Perspectives on Foreseeability in the Law of Contracts and Torts: The Relationship Between "Intervening Causes" and "Impossibility,"* 2011 MICH. ST. L. REV. 1497, 1501 (2012).

98. See *infra* Part I.E.2.

99. WEISTART & LOWELL, *supra* note 9, § 8.10, at 1001 (citing RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965)).

100. See *supra* Part I.D.

101. C. Dewayne Lonas et al., *Misuse: Do Warnings Preclude the Availability of a Misuse Defense*, DRITODAY (June 28, 2013), <http://dritoday.org/feature.aspx?id=572>.

102. Tom Foster, *The Helmet That Can Save Football*, POPULAR SCIENCE (Dec. 18, 2012, 12:07 PM), <http://www.popsci.com/science/article/2013-08/helmet-wars-and-new-helmet-could-protect-us-all>.

103. See *How to Care for Your Helmet*, DICK'S SPORTING GOODS, <http://m.dickssportinggoods.com/info/index.jsp?categoryId=455706&infoPath=222978> (last visited Oct. 5, 2014) (explaining the importance of proper travel care, the daily wear and tear that can impact helmet performance, and the need to replace helmets after they experience impact).

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They occasionally strike goalposts and even walls.¹⁰⁴ Ski, snowboard, and skateboard helmets also routinely hit ice, compacted snow, concrete, asphalt, and unyielding metallic objects.¹⁰⁵ Given these factors, it is not surprising that occasionally helmets break. This is especially true after several years of normal use.¹⁰⁶ Simply because a helmet gets scratched or nicked and then breaks during use does not render it a “defective, unreasonably dangerous product.”¹⁰⁷ Thus, if athletes use a helmet consistently for a season or two, any breakage after that may be attributable to a nick, crack, scratch, or gradual/cumulative loss of structural integrity (i.e., normal wear and tear).¹⁰⁸ Obviously, structural engineers could inspect the pieces of a broken helmet to try to ascertain whether it had any nicks, cracks, or scratches that might have contributed to its failure.

4. *Plaintiff assumed the risk of injury (but was not contributorily negligent)*

Sports in which participants are required to or normally wear helmets are typically such dangerous sports that participants may be deemed to have assumed certain risks.¹⁰⁹ Substantial and recurrent impacts to helmets occur in many sports such as ice hockey, lacrosse, football, skiing, and luge.¹¹⁰ These are the realities of many sports. But assumption of risk as that concept relates to the legal theory of negligence is distinctly different from assumption of risk as that concept relates to strict product liability.¹¹¹ In order to assume risk for product liability, a plaintiff must know of a product’s defect and must use it voluntarily in the face of that knowledge.¹¹²

104. See *id.* (discussing the incidental contact that helmets endure in non-sports settings).

105. See generally Marc Peruzzi, *The Sally Francklyn Story*, OUTSIDE MAG., Dec. 2013, available at <http://www.outsideonline.com/fitness/injury-prevention/After-the-Crash.html> (discussing helmets and their use in winter sports).

106. See *When to Replace Your Bicycle Helmet*, XSPORTS PROTECTIVE, <http://www.xsportsprotective.com/when-to-replace-bicycle-helmet.html> (last visited Sept. 7, 2014) (explaining that normal wear and tear, from dents and dings, for instance, damages helmets).

107. See *id.*

108. *Id.*

109. See J. Russell VerSteeg, *A Case For a Bill Recognizing Primary Assumption of Risk as Limiting Liability for Persons and Providers Who Take Part in Sports & Recreational Activities*, 36 U. ARK. LITTLE ROCK L. REV. 56, 89 (2013).

110. See Foster, *supra* note 102.

111. BLACK’S LAW DICTIONARY 121 (7th ed. 1999).

112. See WEINSTART & LOWELL, *supra* note 9, § 8.10, at 1001 (“Under the strict liability rule, there is no defense for contributory negligence to the extent that the negligence consists of the mere failure to discover the defect or guard against its existence, though the doctrine of assumption of risk, as well as other forms of contributory negligence, will be fully applicable.” (citations omitted)). See also LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 6, § 15:22, at 15-32 (“For an assumption of risk defense to be effective, the defendant must ordinarily show that the plaintiff recognized the specific danger associated with the use of the product but nevertheless voluntarily chose to be exposed to it.”); Houser, *supra* note 6, at 54 (“[A]ssumption of

*Moore v. Sitzmark Corp.*¹¹³ provides an apt illustration of assumption of risk in the context of sports equipment product liability. In *Moore*, the plaintiff broke her leg when her ski binding failed to release during a fall.¹¹⁴ Although the plaintiff had signed a waiver of liability and although she was aware that skiing was a dangerous activity, in order to determine whether she had assumed the risk of a defective design, the court quoted the applicable statute for the proposition that she would have to have actually known of the defect in the ski bindings and persisted in skiing on them, notwithstanding that knowledge: “It is a defense that the user or consumer bringing the action knew of the *defect* and was aware of the danger and nevertheless proceeded unreasonably to make use of the product and was injured by it.”¹¹⁵ The court explained further:

*[Defendants] merely argue Moore knew her bindings would not release under all circumstances. Absent the threshold showing that Moore knew of a defect in the bindings, neither Salomon nor Sitzmark is entitled to summary judgment on the grounds of incurred risk. The trial court’s grant of summary judgment on Moore’s strict liability theory was improper.*¹¹⁶

Although courts generally recognize this rather limited application of the doctrine of assumption of risk as a defense to a product liability action, courts split on whether contributory negligence may also operate as a defense.¹¹⁷ Illinois has

the risk will seldom, if ever, be a valid defense against a product liability claim by an athlete because the risk of dangerously defective equipment is not a risk normally associated with sports.” (footnote omitted). This is also distinctly different from the doctrine of “primary assumption of risk.” See J. Russell VerSteeg, *supra* note 109, at 94.

113. 555 N.E.2d 1305 (Ind. Ct. App. 1990).

114. *Id.* at 1306.

115. *Id.* at 1306–07 (citing IND. CODE § 33-1-1.5-4(b)(1)).

116. *Id.* at 1307–08.

117. Van Flein describes an alternative approach:

The Ninth Circuit followed the Alaska Supreme Court’s lead and held “that comparative fault (i.e., contributory negligence) concepts can be applied to the doctrine of strict products liability.” Subsequently, the Alaska Supreme Court recognized in *Dura Corp. v. Harned* and *Caterpillar Tractor Co. v. Beck*, two types of comparative negligence in products liability cases: product misuse and unreasonable and voluntary assumption of risk. The court in *Ingersoll-Rand* changed its reasoning by concluding that as of 1986, with the enactment of the first statutory tort reform legislation, even “ordinary negligence” is an affirmative defense in a products liability action.

Van Flein, *supra* note 14, at 155 (citations and footnotes omitted).

Moreover, he explains:

Some courts and commentators have characterized the attempt as involving “apples and oranges.” A more accurate analysis might characterize the effort as an attempt to measure the amount of water in an empty glass. I find it simply illogical to attempt to quantify fault where admittedly none exists. Notwithstanding the doctrinal conflict, the Alaska Supreme Court has

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taken a complex but apparently workable stance on this issue. In *Pell v. Victor J. Andrew High School*, the court explained,

*[i]n Coney v. J.L.G. Industries, Inc., our supreme court upheld the principle that contributory negligence is not a defense in a strict product liability tort action. Comparative fault is applicable to strict liability cases, the court determined, but only insofar as the defenses of misuse and assumption of the risk are concerned. Moreover, these defenses no longer preclude recovery in such actions. Thus, once a defendant's liability is established, and where both the defective product and the plaintiff's misconduct contribute to cause the damages, the comparative fault principle will operate to reduce the plaintiff's recovery by that amount which the trier of fact finds him at fault. In the case at bar, AMF failed to establish that plaintiff's alleged negligence rose to the level of misuse of the mini-tramp or that she assumed the risk of injury.*¹¹⁸

Thus, under the Illinois rule, an athlete who either misuses a product or who assumes the risk (e.g., by knowingly using a helmet with a crack in it) would be able to recover damages on a strict product liability theory, but his recovery would be decreased by his proportion of fault (i.e., by the percentage that the jury determines that his misuse or assumption of risk contributed to his/her injuries).¹¹⁹ But like the

traditionally allowed comparative negligence in products liability cases, noting that "it would be anomalous in a products liability case to have damages mitigated if the plaintiff sues in negligence, but allow him to recover full damages if he sues in strict liability." The court stated that "the public policy reasons for strict product liability do not seem to be incompatible with comparative negligence. The manufacturer is still accountable for all the harm from a defective product, except that part caused by the consumer's own conduct."

Id. at 156 (citations and footnotes omitted).

118. 462 N.E.2d 858, 864–65 (citations omitted) (discussing *Coney v. J.L.G. Indus., Inc.*, 454 N.E.2d 197 (Ill. 1983)).

Another defense applicable to products liability claims is that of 'misuse.' This defense is akin to contributory and comparative fault and may in fact be described as derivative of those principles. The underlying idea is that a seller is entitled to expect that his product will be put to the use normally intended for it.

Houser, *supra* note 6, at 55.

119. See Houser, *supra* note 6, at 53 ("In comment n of Section 402A, the drafters explained that contributory negligence is not an available defense to a strict liability claim, while assumption of risk is. . ."). As Houser explains:

[T]his Section . . . is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see § 524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand, the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known

limited application of assumption of risk principles, this limited application of comparative negligence should not be confused with ordinary comparative negligence.¹²⁰

5. *Unforeseeable superseding conduct by a third party (e.g., a coach's gross negligence) was the proximate cause of the plaintiff's injury, not the defendant's product*

Theoretically, if a third party's conduct intervenes in an unforeseeable manner, that third party's unforeseeable act may relieve a defendant equipment manufacturer or seller of liability for injury caused by a defective product.¹²¹ For example, if a high school coach were to recognize that a new helmet had a defect (e.g., a crack) but nevertheless, with knowledge of that defect, still instructed an athlete to use it, arguably such irrational conduct on the coach's part would be considered "grossly negligent" or "extraordinarily negligent."¹²² As a rule, extraordinary negligence by a

danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. The rule laid out in Section 402A comment n may be abbreviated to say "that failure to discover a defect is not a defense, but that use after discovery of a defect is. Prosser notes that several cases have recognized and applied this distinction. At any rate, the defense of contributory negligence has been properly criticized for its harshness and most states have abandoned it in favor of comparative negligence principles.

Id. (footnotes omitted).

Additionally:

It has been said that, 'the major distinction drawn between contributory negligence and assumption of risk is that the former is tested by an objective standard, i.e., whether the person failed to act as a reasonable person, while the latter is tested for a subjective standard, i.e., whether this plaintiff actually understood and voluntarily accepted the risk of danger.' Although the defense of assumption of risk has been limited or abolished in several states, where it is still viable it has been held to be a proper defense to a strict liability claim. Furthermore, there is a traditional line of thought that participants in athletic events and spectators at those events . . . [are] held to have assumed the risks of injury normally associated with the sport.

Id. at 53–54 (footnotes omitted); *see also id.* at 55 ("It is generally felt that the application of comparative liability principles to strict products liability will result in a much fairer allocation of damages than under the harsh, all-or-nothing rule of contributory negligence.").

120. *See* Houser, *supra* note 6, at 54 ("Although a majority of the jurisdictions which have faced this issue have ruled in favor of some kind of comparison between plaintiff's misconduct and the defendant's defective product, some courts have refused to allow a comparative negligence defense in such an action." (footnote omitted)); Carol A. Mutter, *Moving to Comparative Negligence in an Era of Tort Reform: Decisions for Tennessee*, 57 TENN. L. REV. 199, 294–303 (1990) (discussing the role that comparative fault plays in strict liability).

121. *See* RESTATEMENT (SECOND) OF TORTS § 442(d); e.g., *Olsen v. Shell Oil Co.*, 365 So.2d 1285, 1293 (La. 1978) ("[F]ault of a 'third person' which exonerates a person from his own obligation importing strict liability . . . is that which is the sole cause of the damage, of the nature of an irresistible and unforeseeable occurrence.").

122. *See* DAN B. DOBBS, *THE LAW OF TORTS* § 147, at 348, 350–51 (2000) (describing extraordinary negligent as, "[a] high, though unspecified degree of negligenc[t] . . . conduct that is appreciably more risky, or less beneficial, than conduct qualifying as ordinary negligence").

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third party is considered unforeseeable.¹²³ An act is considered unforeseeable if it is such that a reasonable person would not have anticipated it.¹²⁴ Therefore, arguably, a reasonable person would not anticipate that a high school coach would knowingly instruct an athlete to use a cracked helmet.¹²⁵ Lawyers use a term of art to describe unforeseeable intervening acts. We label such acts by a third party which are unforeseeable as “superseding” acts.¹²⁶ Acts by a third party which are unforeseeable and therefore “superseding” are said to “break the chain of causation,” and thereby would legally supersede an equipment manufacturer’s liability (i.e., a superseding act relieves a manufacturer of liability).¹²⁷ Hence, it is likely that a helmet manufacturer would be relieved of liability for injury caused by a cracked helmet if a coach were to have knowingly instructed an athlete to use it.¹²⁸ The coach’s conduct would be considered a superseding cause, relieving the helmet manufacturer or seller of liability.¹²⁹

II. COMMERCIAL LAW THEORIES

A. General

In addition to strict product liability, an athlete who has suffered a concussion may also (or in the alternative) look to commercial law; specifically the Uniform Commercial Code (“UCC”) for legal theories of recovery against manufacturers or sellers. Under the UCC, one theory of legal liability available to plaintiffs is warranty

123. See RESTATEMENT SECOND OF TORTS § 447(c) cmt. g (explaining that “the negligence of the act may be so great or the third person’s conduct so reckless as to make it appear an extraordinary response to the situation created by the actor and therefore a superseding cause of the other’s harm”).

124. See DOBBS, *supra* note 122; see also Pell v. Victor J. Andrew High Sch., 462 N.E. 2d 858, 863 (Ill. App. Ct. 1984) (“Foreseeability means that which is objectively reasonable to expect not what might conceivably occur.”) (citations omitted).

125. See RESTATEMENT (SECOND) OF TORTS § 283 cmt. b (identifying a reasonable person as “a person exercising those qualities of attention, knowledge, intelligence, and judgment which society requires of its members for the protection of their own interests and the interests of others.”).

126. See *id.* § 440.

127. See *id.* §§ 440–42.

128. See *id.* § 442(e) (considering “the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him”); *id.* § 449 (stating that, “[i]f the likelihood that a third person may act in a particular manner in the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby”); see also *id.* § 449 cmt. a (clarifying that § 449 applies “only where the actor is under a duty to the other, because of some relation between them, to protect him against such misconduct, or where the actor has undertaken the obligation of doing so, or his conduct has created or increased the risk of harm through the misconduct, that he becomes negligent”).

129. See *id.* § 440 (“A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.”).

law. Every jurisdiction in the United States except Louisiana has adopted Article 2 of the UCC.¹³⁰ Article 2 provides at least three different warranties that are likely to apply in the sale of most helmets and other sporting goods equipment.¹³¹ Specifically, the most obvious warranty theories are breach of: (1) express warranty;¹³² (2) implied warranty of merchantability;¹³³ and, (3) implied warranty of fitness for a particular purpose.¹³⁴ In addition to these, another commercial law theory that an injured plaintiff should keep in mind arises under the warranties created pursuant to the Magnuson-Moss Warranty Act.¹³⁵ The UCC warranties may apply to the various types of equipment and apparatus used by athletes which constitute “goods” as that term is defined in the UCC,¹³⁶ including items such as helmets, skateboards, snowboards, bicycles, skis, and many other implements commonly used in a variety of sports and recreational activities.¹³⁷

B. Express Warranty

According to § 2-313 of the UCC, a seller may create an express warranty in a number of ways.

§ 2-313 Express Warranties by Affirmation, Promise, Description, Sample.

130. U.C.C. Table of Jurisdictions Wherein Code Has Been Adopted 1 U.L.A. 1, 1–2 (Supp. 2012).

131. See U.C.C. § 2-313 (2012) (“Express Warranties by Affirmation, Promise, Description, Sample.”); U.C.C. § 2-314 (2014) (“Implied Warranty: Merchantability; Usage of Trade.”); U.C.C. § 2-315 (2014) (“Implied Warranty: Fitness for Particular Purpose.”).

132. U.C.C. § 2-313 (2012).

133. *Id.* § 2-314.

134. *Id.* § 2-315. Sellers may, however, exclude or modify these warranties by employing the “exclusion or modification of warranties” machinery in U.C.C. § 2-316 (2012). See *infra* Part II.E.2.

135. See Magnuson-Moss Federal Trade Commission Improvement Act, 15 U.S.C. § 2301 *et seq.* (2012). A potential stumbling block in applying the warranties defined in the Magnuson-Moss Act is that it applies only to sales of a “consumer product.” *Id.* § 2301(6). “Consumer product” is defined as “any tangible personal property which is distributed in commerce which is normally used for personal, family, or household purposes.” *Id.* § 2301(1). Whether sporting goods or apparatus would be considered a “consumer product” as defined by Magnuson-Moss has not yet been determined by statutory interpretation. A related issue is whether sporting goods should be considered “consumer goods” as that term is used in the UCC. See U.C.C. § 9-102(1)(w) (2012) (defining “consumer goods” as “goods that are used or bought for use primarily for personal, family, or household purposes”). For more on the potential applicability of the Magnuson-Moss Act see *infra* Part II.F.

136. U.C.C. § 2-105 (2012) (defining “goods” as “all things (including specifically manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action”).

137. See *id.*; see also *Jarstad v. Takoma Outdoor Recreation, Inc.*, 10 P.2d 278, 282 (Okla. 1974) (finding that sports equipment is a “good” as defined in the UCC).

PRODUCT LIABILITY AND COMMERCIAL LAW THEORIES

(1) *Express warranties by the seller are created as follows:*

(a) *Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.*

(b) *Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.*

(c) *Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.*

(2) *It is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.*¹³⁸

Any affirmation of fact or promise that relates to the goods creates an express warranty.¹³⁹ For example, the BELL “Adrenaline” bicycle helmet is sold with an attached cardboard label that states: “customized comfort easy strap adjustment for a cool ride for a seamless finish sun protection no pinch buckling.”¹⁴⁰ The label also states: “SpinAction Fit offers the ability to customize fit. Simply pinch center of fit belt and turn dial.”¹⁴¹ And on the same label there is a separate rectangular section that affirms: “COMPLIES WITH US CPSC SAFETY STANDARD FOR BICYCLE HELMETS FOR PERSONS AGE 5 AND OLDER.”¹⁴² On the interior of the BELL “Adrenaline” helmet itself, a sticker is attached which repeats the CPSC compliance.¹⁴³ That sticker states, in part, “[c]omplies with US CPSC safety standard for Bicycle Helmets for persons 5 and older.”¹⁴⁴

138. U.C.C. § 2-313 (2012).

139. *Id.* § 2-313(1)(a) (2012); *see also* LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 6, § 15.14, at 15-23–15-24 (discussing express warranty and tortious misrepresentation).

140. Helmet Label, Bell Sports, Features for Adrenaline Bicycle Helemet (2011) (on file with author).

141. *Id.*

142. CPSC Label, Consumer Prod. Safety Comm’n, External CPSC Saftey Warning (on file with author); *see also* *Bicycle Helmets for the 2011 Season*, BICYCLE HELMET SAFETY INSTITUTE, <http://www.helmets.org/helmet11.htm> (last visited Oct. 5, 2014).

143. Internal Saftey Label, Bell Sports, CPSC Saftey Warning on Inside of Adrenaline Bicycle Helmet (2011) (on file with author).

144. *Id.*; 16 C.F.R. § 1203 (2012).

The statements on the cardboard label contain language that creates express warranties.¹⁴⁵ They claim that the helmet's characteristics provide several benefits for a user, including protection from the sun as well as being easy to adjust the fit.¹⁴⁶ The CPSC language on both the cardboard and interior also create an express warranty that the helmet meets the standards established by the United States Consumer Product Safety Commission.¹⁴⁷

Most of the information on the cardboard label and the interior sticker is factual, and thus constitutes language that creates express warranties. There is very little, if any, language that is too insubstantial to be considered a warranty.¹⁴⁸ Such statements may be considered "puffing" and "merely an expression of seller's opinion" rather than an affirmation of fact, rising to the level of an express warranty.¹⁴⁹ The statement that may come closest to puffing is "Camlocks offer easy strap adjustment."¹⁵⁰ The word "easy" is perhaps so subjective that it may not create an express warranty.¹⁵¹

Similarly, any sample or model of the goods also creates an express warranty that the goods will conform to the sample or model.¹⁵² Thus, the photographs of bikers wearing helmets on both the front and back of the cardboard label constitute an express warranty that the helmet purchased by the buyer will look like the helmet represented on the cardboard label picture (i.e., model).¹⁵³

145. See U.C.C. § 2-313(1)(b) (2012) (stating that "any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description").

146. See *Helmet Label*, *supra* note 140.

147. See *Bicycle Helmets for the 2011 Season*, *supra* note 142.

148. U.C.C. § 2-313(2) (2012) (clarifying that "an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty").

149. *Id.* § 2-213. See also *id.* § 2-313 cmt. 8 (2014) ("Concerning affirmations of value or a seller's opinion or commendation under subsection (2), the basic question remains the same: What statements of the seller have in the circumstances and in objective judgment become part of the basis of the bargain."). The Fifth Circuit ruled that non-actionable "puffery" comes in two forms: 1) an exaggerated, blustering, and boasting statement upon which no reasonable buyer would be justified in relying; or 2) a general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion. *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 497 (5th Cir. 2000).

150. See U.C.C. § 2-313(2) (2012); see also David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395, 1411-16 (2006) (discussing "puffing" under the UCC).

151. See *Carlay Co. v. FTC*, 153 F.2d 493, 496 (7th Cir. 1946) (finding that words such as easy, perfect, amazing, prime, wonderful, excellent are regarded in the law as mere puffing); see also *Presidio Enter., Inc. v. Warner Bros. Distrib. Corp.*, 784 F.2d 674, 686 (5th Cir. 1986) (citing *Carlay*, 153 F.2d at 496); *Kesling v. Hubler Nissan, Inc.*, No. 49D12-0901-CT-002954, 2011 WL 8000411, at *1, *7 (Ind. Super. Feb. 24, 2011), *aff'd*, 997 N.E.2d 327 (2013) (citing *Carlay*, 153 F.2d at 496).

152. U.C.C. § 2-313(1)(c) (2012) ("Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.").

153. See U.C.C. § 2-313 cmt. 5 (2012) (explaining, "a description need not be by words. Technical specifications, blueprints and the like can afford more exact description than mere language and if made part of

C. *Implied Warranty of Merchantability*

Section 2-314 of the UCC contains the general rules regarding the implied warranty of merchantability.¹⁵⁴

§ 2-314. Implied Warranty: Merchantability; Usage of Trade.

(1) *Unless excluded or modified (§ 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . .*

(2) *Goods to be merchantable must be at least such as*

(a) *pass without objection in the trade under the contract description; and*

(b) *in the case of fungible goods, are of fair average quality within the description; and*

(c) *are fit for the ordinary purposes for which such goods are used; and*

(d) *run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved; and*

(e) *are adequately contained, packaged, and labeled as the agreement may require; and*

(f) *conform to the promise or affirmations of fact made on the container or label if any.*

(3) *Unless excluded or modified (§ 2-316) other implied warranties may arise from course of dealing or usage of trade.*¹⁵⁵

For this warranty to apply, the seller must be a ‘merchant;’ a term of art in the UCC.¹⁵⁶ Suffice it to say that a sporting goods store, a hockey supply catalogue

the basis of the bargain goods must conform to them”); *see also* *Sylvestri v. Warner & Swasey Co.*, 398 F.2d 598, 602 (2d Cir. 1968) (finding that the photographic representations made by defendant created an express warranty); *Ford Motor Co. v. Lemieux Lumber Co.*, 418 S.W.2d 909, 911 (Tex. Civ. App. 1967) (concluding that a manufacturer should be “held responsible for advertising done by it regardless of the medium”); *Schumacher Immobilien Und Beteiligungs AD v. Prova, Inc.*, No. 1:09CV18, 2010 WL 2867603, at *1, *11 (M.D.N.C. July 21, 2010) (holding that photos provided by defendant created an express warranty).

154. *See* U.C.C. § 2-314 (2012).

155. *Id.*

company, and manufacturing companies themselves will generally be considered “merchants” for purposes of this rule.¹⁵⁷ In order to be considered a “merchant,” triggering § 2-314, a seller must regularly deal in goods of the kind.¹⁵⁸ A coach, a school, another athlete, or an occasional eBay seller will ordinarily not come within the scope of the “merchant” rule for purposes of § 2-314.¹⁵⁹

According to § 2-314, in order to be merchantable, goods must “pass without objection in the trade under the contract description . . . [be] fit for the ordinary purpose for which such goods are used . . . [and] conform to the promise or affirmations of fact made on the container or label.”¹⁶⁰ Certainly, a helmet with a latent crack in it or a helmet that is mislabeled¹⁶¹ would fail to be merchantable.¹⁶² Such a helmet would neither “pass without objection in the trade” nor be “fit for its ordinary purpose.”¹⁶³ The language requiring that goods “conform to the promise or affirmations of fact made on the container or label” gives a buyer a valid cause of action for breach of the implied warranty of merchantability against a helmet manufacturer for a mislabeled helmet.¹⁶⁴ This is a very important warranty. It protects consumer expectations by subjecting manufacturers and sellers to liability when their products fail to perform in a manner that such products are supposed to perform.¹⁶⁵ In any circumstance where an item of sports equipment fails to function in its ordinary manner and thereby causes injury, such as a concussion, it will be likely that there has been a breach of the implied warranty of merchantability.¹⁶⁶

156. U.C.C. § 2-314 (2012); see U.C.C. § 2-104(1) (2012) (“Merchant means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction.”). In Section 2-314 on the warranty of merchantability, such warranty is implied only “if the seller is a merchant with respect to goods of that kind.” *Id.* § 2-314(1). Obviously this qualification restricts the implied warranty to a much smaller group than everyone who is engaged in business and requires a professional status as to particular kinds of goods. *Id.* § 2-104 cmt. 2.

157. See Russ VerSteeg, *Pole Vault Injuries: Product Liability and Commercial Law Theories*, 5 TEX. REV. ENT. & SPORTS L. 237, 282 (2004). See generally Douglas Newell, *The Merchant of Article 2*, 7 VAL. U. L. REV. 307 (1973) (analyzing different definitions of “merchant” under the UCC).

158. U.C.C. § 2-104(1) (2012) (“‘Merchant’ means a person who deals in goods of the kind. . .”).

159. See *id.* § 2-314 cmt. 3 (2012) (“A person making an isolated sale of goods is not a ‘merchant’ within the meaning of the full scope of this section and, thus, no warranty of merchantability would apply.”). See also *Wissel v. Ohio High Sch. Athletic Ass’n*, 605 N.E.2d 458, 462, 464 (Ohio Ct. App. 1992) (stating that coaches are not sellers within the scope of section 402A).

160. U.C.C. § 2-314(2)(a),(c),(f) (2012).

161. See *supra* note 34 and accompanying text.

162. See U.C.C. § 2-314(2)(a),(c) (2012).

163. See *id.*

164. See *id.* § 2-314(2)(f) (2012); see also *Bell v. Yarusso*, 759 A.2d 582, 585–86, 595 (Del. 2000) (affirming a superior court and trial court holding that helmet manufacturer breached its implied warranty of merchantability where a helmet was sold as an off-road helmet but was designed to function for “on-road” use).

165. *Bell*, 759 A.2d at 585–86, 595.

166. *Id.*

D. *Implied Warranty of Fitness for a Particular Purpose*

U.C.C. § 2-315 (“Implied Warranty: Fitness for a Particular Purpose”) states:

*Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is . . . an implied warranty that the goods shall be fit for such purpose.*¹⁶⁷

This warranty could pose some rather thorny issues for many retail sports equipment sellers. A novice coach or novice athlete may contact a seller, describe an athlete’s experience level and physical characteristics to the seller, and then rely on the seller to recommend equipment suitable for the athlete. Without a doubt, many equipment retailers have greater experience in equipment selection than many school coaches (a number of whom may have limited experience).¹⁶⁸ In circumstances such as these, arguably, sellers create an implied warranty of fitness for a particular purpose, thereby potentially subjecting such sellers to significant liability.¹⁶⁹

This warranty may be especially troublesome for sellers who sell helmets for use by athletes. Presumably, many athletes are tempted to use a helmet specifically designed for one sport while engaging in a different sport.¹⁷⁰ Manufacturers generally are very specific regarding the lack of suitability of football, lacrosse, bicycle, motorcycle, skateboard, ice hockey, and other helmets for use by athletes while participating in different sports.¹⁷¹ Sellers who recommend a helmet designed for one sport to buyers who intend to use it in a different sport could, conceivably, subject themselves to liability under a theory of a breach of the warranty of fitness for a particular purpose.

167. U.C.C. § 2-315 (2012).

168. See, e.g., POP WARNER, POP WARNER COACHES RISK MANAGEMENT HANDBOOK (2013), available at <http://www.cdprw.org/CoachRiskMgt2013.pdf> (suggesting that coaches should always follow manufacturers’ recommendations for sizing when selecting equipment).

169. See, e.g., *Golden v. Den-Mat Corp.*, 276 P.3d 773, 800 (Kan. App. 2012) (“[A] pair of shoes sold to a person requesting footwear for mountain climbing may have a claim for breach of warranty for a particular purpose if they fall apart halfway up Denali.”).

170. See *Helmets for Many Activities*, BICYCLE HELMET SAFETY INSTITUTE, <http://www.helmets.org/other.htm> (last visited Sept. 9, 2014) (noting that the US Consumer Product Safety Commission recommends that ice skaters use bicycle, ski or skateboard helmets).

171. See, e.g., *Product FAQ*, BELL, <http://www.bellhelmets.com/product-faq/> (last visited Sept. 9, 2014) (emphasizing that each Bell helmet is certified for a specific activity and should only be used for that sport, these include cycling, skating, motorcycling, and auto racing); *Terms & Conditions*, RIDDELL, <http://www.riddell.com/> (last visited Sept. 9, 2014) (stating that “any use other than the playing of American football” would void the helmet’s warranty).

Helmets that comply with the standards established by various national and international entities such as ASTM International, National Operating Committee on Standards for Athletic Equipment (NOCSAE), and the Consumer Product Safety Commission will have a higher likelihood of being considered as fit for the particular purpose of any given sport for which those helmets are designed (i.e., being considered *not* to breach the implied warranty of fitness for a particular purpose).¹⁷² Nevertheless, manufacturers and sellers must understand that “the mere fact that a product meets or exceeds the requirements of the industry is not conclusive of reasonable safety.”¹⁷³

E. Liability for Personal Injury

A manufacturer’s/seller’s breach of any warranty—express (§ 2-313), implied merchantability (§ 2-314), or implied fitness for a particular purpose (§ 2-315)—could easily subject him/her to liability for injuries to an athlete pursuant to §§ 2-715(2)(b) and 2-719(3).¹⁷⁴ As shown below:

§ 2-715 Buyer’s Incidental and Consequential Damages

(2) *Consequential damages resulting from the seller’s breach include . . .*

(b) *injury to person or property proximately resulting from any breach of warranty.*¹⁷⁵

§ 2-719 Contractual Modification or Limitation of Remedy

(3) *Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.*¹⁷⁶

172. See, e.g., News Release, CPSC, CPSC Issues New Safety Standard for Bike Helmets (Feb. 1, 1999) available at <http://www.cpsc.gov/en/Newsroom/News-Releases/1998/CPSC-Issues-New-Safety-Standard-for-Bike-Helmets/> (quoting CPSC Chairman saying, “[b]ecause of this new statement, families will know that the bike helmets they buy meet stringent federal requirements aimed at preventing head injuries”).

173. WEISTART & LOWELL, *supra* note 9, § 8.09, at 1000 (citing *Dudley Sports Co. v. Schmitt*, 279 N.E. 2d 266, 276 (Ind. Ct. App. 1972)).

174. See U.C.C. § 2-215(2)(b) (2012) (stating that injury to person or property proximately resulting from any breach of warranty are included in buyer’s consequential damages resulting from the seller’s breach); see also U.C.C. § 2-719(3) (2012).

175. U.C.C. § 2-715(2)(b) (2012).

176. *Id.* § 2-719(3) (2012); see also *infra* note 225 and accompanying text.

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Comment 4 to § 2-715 suggests that an athlete injured by, for example, a mislabeled helmet (i.e., breach of both express and implied warranties) could have valid grounds for recovery against a seller for his or her medical expenses, loss of income (if any), loss of future income, pain, and suffering.¹⁷⁷ Comment 4 also states:

*The burden of proving the extent of loss incurred by way of consequential damage is on the buyer, but the section on liberal administration of remedies rejects any doctrine of certainty which requires almost mathematical precision in the proof of loss. Loss may be determined in any manner which is reasonable under the circumstances.*¹⁷⁸

F. *The Magnuson-Moss Warranty Act*

The Magnuson-Moss Warranty Act provides another potential legal theory upon which an injured athlete might rely for recovery against a supplier of sports equipment.¹⁷⁹ The primary advantages to using Magnuson-Moss are the possibility of winning attorneys' fees¹⁸⁰ and the fact that, if the seller has created a "written warranty,"¹⁸¹ he cannot legally (i.e., validly) disclaim either the implied warranty of merchantability or fitness for a particular purpose.¹⁸²

In order to invoke Magnuson-Moss, the product in question must be a "consumer product" and a "supplier" or "warrantor" must have made a "written warranty."¹⁸³ As a general rule, most manufacturers and retail sellers of sporting

177. See U.C.C. § 2-715 cmt. 4 (2012).

178. *Id.*

179. See 15 U.S.C. § 2310(d)(1) (2012) (stating that under the Magnuson-Moss act "a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract" can file suit for damages).

180. See *id.* § 2310(d)(2) (asserting that a plaintiff who "prevails in any action . . . may be allowed by the court to recover as part of the judgment . . . expenses (including attorneys' fees based on actual time expended)").

181. See *id.* § 2301(6)(A) ("Any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time.").

182. See *id.* § 2308(a) ("No supplier may disclaim . . . any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product, or (2) at the time of the sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.").

183. See *id.* § 2301(1) (defining "consumer product": "[t]he term 'consumer product' means any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed"); *id.* § 2301(4) (defining "supplier": "[t]he term 'supplier' means any person engaged in the business of making a consumer product directly or indirectly available to consumers"); *id.* § 2301(5) (defining "warrantor": "[t]he term 'warrantor' means any supplier or

goods will meet the definition of a “supplier” and “warrantor.”¹⁸⁴ Many kinds of sporting goods—but certainly not all—will come within the scope of a “consumer product.”¹⁸⁵ And, generally speaking, whenever a manufacturer or retailer makes a § 2-313-type express warranty in writing, that express warranty will come within the scope of the Magnuson-Moss Act’s definition of a “written warranty.”¹⁸⁶ Therefore, given the potential benefits (i.e., attorneys’ fees and invalidity of disclaimers of implied warranties), it will often be worthwhile for plaintiffs to consider using Magnuson-Moss as part of their litigation strategy.¹⁸⁷

G. *Defenses to Warranty Actions*¹⁸⁸

1. *Lack of Privity*

A lack of privity may be one legal obstacle that could prove difficult for some plaintiffs.¹⁸⁹ Traditionally, at common law, a person who was injured by a product was barred from bringing a contract action against a seller unless he (i.e., the plaintiff) was in privity of contract with the seller.¹⁹⁰ Although the common law has relaxed this privity rule somewhat,¹⁹¹ and although the UCC has a specific provision,

other person who gives or offers to give a written warranty or who is or may be obligated under an implied warranty.”); *id.* § 2301(6) (defining “written warranty”: “[t]he term ‘written warranty’ means—(A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or (B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking, which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product”).

184. See, e.g., *Jones v. Cranman’s Sporting Goods*, 237 S.E. 2d 402, 406 (Ga. Ct. App. 1977) (finding that sporting goods store could be liable to plaintiff for defective rifle).

185. See, e.g., *Najran Co. v. Fleetwood Enters., Inc.*, 659 F. Supp. 1061, 1101 (S.D. Ga. 1986) (explaining that whether an item is a consumer product is a factual determination).

186. See *Businessperson’s Guide to Federal Warranty Law*, FTC BUREAU OF CONSUMER PROTECTION BUSINESS CENTER, <http://www.business.ftc.gov/documents/bus01-businesspersons-guide-federal-warranty-law> (last visited Sept. 10, 2014) (stating that U.C.C. § 2-313 covers express warranties both written and oral, and that written warranties fall under the Magnuson-Moss Warranty Act).

187. See *supra* notes 179–183 and accompanying text.

188. In addition to the defenses discussed in this section, Uberstein also claims that “assumption of risk, misuse of the product, and failure to follow directions can defeat a breach of warranty claim.” *LAW OF PROFESSIONAL AND AMATEUR SPORTS*, *supra* note 6, § 15:14, at 15-23.

189. See, e.g., *Chaurasia v. Gen. Motors Corp.*, 126 P.3d 165, 171 (Ariz. Ct. App. 2006) (noting that privity of contract is required to maintain an action for breach of an implied warranty).

190. See generally E. ALLAN FARNSWORTH, *CONTRACTS* (2d ed. 1990) (discussing common law procedure).

191. *Id.*

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§ 2-318, designed to address the issue,¹⁹² the rule may present special problems in the context of sporting goods liability.¹⁹³ Section 2-318 defines the scope of both plaintiffs and defendants contemplated by Article 2 for personal injury.¹⁹⁴

§ 2-318 Third Party Beneficiaries of Warranties Express or Implied

Note: If this Act is introduced in the Congress of the United States this section should be omitted. (States to select one alternative).

Alternative A

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative B

A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative C

A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.¹⁹⁵

On the issue of potential plaintiffs, § 2-318 offers three different alternatives, gradually progressing from very restrictive to very expansive. Alternative A

192. See U.C.C. § 2-318 (2012).

193. See, e.g., *Hegglom v. John Wanamaker* N.Y., 36 N.Y.S.2d 777, 779–80 (N.Y. Sup. Ct. 1942) (finding no breach of warranty where plaintiffs were injured by an exercise band that broke but plaintiffs did not allege that they purchased the exerciser from the defendant thus there was no privity of contract between plaintiffs and the defendant).

194. See, e.g., LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 6, § 15:14, at 15-23–15-24 (raising issues related to U.C.C. § 2-318).

195. U.C.C. § 2-318 (2012).

provides, in part, that a seller's warranty "extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use . . . or be affected by the goods and who is injured in person by breach of the warranty."¹⁹⁶ For purposes of illustration, assume that an athlete is injured by a helmet. Even this most restrictive alternative would provide standing for an individual who purchases his/her own helmet (or if a parent, for example, purchases a helmet for a son/daughter). A more tricky question is whether Alternative A would provide a cause of action for an athlete whose school, college, university, or club purchases equipment for use by students or club members.¹⁹⁷ In that instance, the putative plaintiff is clearly a natural person but the buyer is an entity (e.g., a school or club), not a natural person.¹⁹⁸ Is a student deemed to be "in the family or household" of the school or, alternatively, is a student considered a "guest in the home" of a school? Presumably, the answer to these questions is "no."¹⁹⁹ These same issues would apply to injuries caused by many different types of defective sporting goods, such as goalposts, hockey sticks, balance beams, parallel bars, and the like.²⁰⁰

Alternatives B and C are far less restrictive in terms of potential plaintiffs.²⁰¹ Both Alternative B and Alternative C would clearly give standing to any athlete who is injured by an article of sporting goods equipment or apparatus under most normal circumstances.²⁰² Alternative B grants standing to "any natural person who may reasonably be expected to use . . . or be affected by the goods and who is injured in person by breach of the warranty."²⁰³ Alternative C is even broader than Alternative

196. *Id.*

197. *See id.* (providing only that family, household members, and houseguests come within the scope of Alternative A).

198. *See, e.g.,* *Armstrong v. NEWVA Enters.*, 23 Va. Cir. 352 (Va. Cir. Ct. 1991) (stating that, unless otherwise defined by statute, the term "natural person" means just that—a natural person).

199. *See generally* William Stallworth, *An Analysis of Warranty Claims Instituted by Non-Privity Plaintiffs in Jurisdictions That Have Adopted Uniform Commercial Code Section 2-318 (Alternative A)*, 24 PEPP. L. REV. 1215 (1993). *But see* *Reed v. City of Chicago*, 263 F. Supp. 2d 1123 (N.D. Ill. 2003) (holding that the mother of a prison inmate who committed suicide while incarcerated was not barred from a warranty claim against the company that manufactured and designed the prison gown that allegedly failed to tear away when the prisoner hanged himself with it).

200. *See generally* William L. Stallworth, *supra* note 199, at 1249, 1260 (noting the most important concern with other defective sporting goods is whether the plaintiff non-purchaser is a member of the purchaser's family, household, or house guest).

201. *See* William L. Stallworth, *An Analysis of Warranty Claims Instituted by Non-Privity Plaintiffs In Jurisdictions That Have Adopted Uniform Commercial Code Section 2-318 (Alternatives B & C)*, 27 AKRON L. REV. 197, 203 (1993) ("Alternative B, Alternative C, and various 'nonstandard' versions of section 2-318 go beyond Alternative A in weakening the lack of privity defense.").

202. *Id.* Potential plaintiffs under Alternatives B and C include non-purchasers. *Id.* Thus, the injured athlete in the example above will normally have standing, unless, for example, the manufacturer could not reasonably expect the athlete to use the product. *Id.*

203. U.C.C. § 2-318 (2012).

B, expanding standing to “any person,” not merely any “natural person” and even adds: “A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.”²⁰⁴ Thus, all three Alternatives to § 2-318 will in many instances include most typical athletes within the scope of plaintiffs contemplated.

Comment 3 to § 2-318 addresses the issue of “vertical privity.”²⁰⁵ Comment 3 provides, in part: “the section . . . is neutral and is not intended to enlarge or restrict the developing case law on whether the seller’s warranties, given to his buyer who resells, extend to other persons in the distributive chain.”²⁰⁶ Hence, § 2-318 makes it a matter of state law, for example, whether a plaintiff-buyer may sue a wholesaler or a manufacturer—in addition to a direct retailer from whom he bought the product.²⁰⁷ As a rule, the majority of American jurisdictions permit a plaintiff to sue a wholesaler or manufacturer despite a technical lack of vertical privity between those entities and the typical buyer.²⁰⁸

2. *Limitation or Exclusion of Liability*

To be sure, sellers may exclude or modify express and implied warranties by employing the mechanics of § 2-316.²⁰⁹ In particular, § 2-316(2) states in pertinent part:

*[T]o exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that “There are no warranties which extend beyond the description on the face hereof.”*²¹⁰

And § 2-316 (3)(a) provides in addition:

[U]nless the circumstances indicate otherwise, all implied warranties are excluded by expressions like “as is”, “with all faults” or other language

204. *Id.*

205. *See id.* § 2-318 cmt. 3.

206. *Id.*

207. *Id.* § 2-318 (permitting states to choose among alternatives A, B, and C).

208. *See* Michael K. Steenson et al., *Vertical Privity*, 27 MINNESOTA PRACTICE SERIES: PRODUCTS LIABILITY LAW § 5.19 (2014) (“The vast majority of authority now holds that express warranties in a product’s advertising and packaging run directly to the ultimate purchaser and that lack of privity does not bar such claims.”).

209. *See* U.C.C. § 2-316 (2012).

210. *Id.* § 2-316(2).

*which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty. . . .*²¹¹

But, apparently, at present, it is not common practice for merchants who sell sporting goods and equipment to do so.²¹² Consequently, if a manufacturer wishes to minimize its exposure to liability for breach of warranty, manufacturers may wish to incorporate language such as the following:

WARRANTY DISCLAIMER: THE MANUFACTURER EXPRESSLY DISCLAIMS ANY EXPRESS OR IMPLIED WARRANTIES, INCLUDING THE WARRANTY OF MERCHANTABILITY AND/OR THE WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE. SALESPERSONS MAY HAVE MADE ORAL OR WRITTEN STATEMENTS ABOUT THE MERCHANDISE WHICH IS THE SUBJECT OF THIS SALE. THE MANUFACTURER HAS NOT AUTHORIZED SUCH STATEMENTS AND SUCH STATEMENTS DO NOT CONSTITUTE WARRANTIES, SHALL NOT BE RELIED ON BY THE BUYER, AND ARE NO PART OF THE CONTRACT FOR SALE.²¹³

This disclaimer must be clearly labeled as a “Warranty Disclaimer” (so that a reasonable consumer should recognize that it is not “hidden” within a purported warranty).²¹⁴ Also, in order to be valid, it must be “conspicuous,” which the UCC defines as:

*so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is “conspicuous” or not is a decision for the court.*²¹⁵ *Conspicuous terms include the following:*

211. *Id.* § 2-316(3)(a).

212. See, e.g., *Company Policies*, HANDMADE BASEBALL GLOVES, <http://handmadebaseballgloves.com/policies.html> (last visited Sept. 10, 2014) (failing to include a disclaimer on baseball gloves); *Terms and Conditions*, KETTLER USA, <http://www.kettlerusa.com/homePage/termsAndConditions?division=kettler+usa> (last visited Sept. 10, 2014) (lacking a disclaimer for bicycles); *Terms and Conditions*, SKI ESSENTIALS.COM, <http://www.skiessentials.com/terms> (last visited Sept. 10, 2014) (missing a disclaimer on snow skis).

213. JAMES J. WHITE & ROBERT S. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 434–46 (2d ed. 1980) (noting that one should “print all disclaimer language in bold-face capitals of a contrasting color[,]” exclude the possibility of oral warranties, and use the word merchantability).

214. *Id.* at 440–44.

215. That is, it is a question of law for the judge to decide, not a question of fact for the jury to decide. See U.C.C. § 1-201(10) (2012).

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(A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and

(B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the language.²¹⁶

Thus, it should be written prominently in a manner that calls attention to it; such as a contrasting color or typeface (ALL CAPS or **BOLDFACE** should suffice). Note that although the exclusionary language purports to disclaim any express warranty, § 2-316(1) of the UCC creates a rule which, as a matter of fact, makes it virtually impossible to disclaim express warranties.²¹⁷

§ 2-316 Exclusion or Modification of Warranties

*Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other . . . negation or limitation is inoperative to the extent that such construction is unreasonable.*²¹⁸

According to the rule of § 2-316(1), when faced with this issue, courts will compare the language which the plaintiff argues creates an express warranty with the language that the defendant claims excludes an express warranty.²¹⁹ Then, to the extent that the court considers the two to be inconsistent, the court construes that inconsistency as rendering the purported exclusion void.²²⁰ The standard treatise on commercial law takes the position that courts should enforce language in a

216. *Id.*

217. Vincent A. Wellman, *Essay: The Unfortunate Quest for Magic in Contract Drafting*, 52 WAYNE L. REV. 1101, 1107 (2006) (“In other words, any attempt to disclaim an express warranty [under U.C.C. § 2-316] should be assumed to be inoperative and ineffective.”).

218. U.C.C. § 2-316(1) (2012).

219. *See* Wellman, *supra* note 217.

220. *Id.* (“Both the Code and standard maxims of contract interpretation require that the disclaimer must be read together with the warranty and the two must be understood together in the most reasonable way possible under the circumstances.”). Thus, when reasonable, the warranty and disclaimer should be read together. *Id.* Absent such reasonable accommodation, however, an attempt to disclaim the warranty will fail. *Id.*

warranty disclaimer that nullifies unauthorized verbal or written statements made by salespeople such as that suggested.²²¹

But even if courts are unwilling to enforce a warranty disclaimer of this type, occasionally language such as this will deter a lawsuit because a consumer will read the warranty disclaimer and assume that it is valid and binding.²²² If a disclaimer prevents even one lawsuit against a manufacturer or seller, it will be cost effective.²²³

Section 2-715 of the UCC provides that a seller may limit or exclude liability for consequential damages.²²⁴ Many sellers in today's marketplace commonly do just this sort of thing by stating, for example, "[i]n no event shall seller be liable for incidental or consequential damages. Seller's liability is limited to refund, repair, or replacement of defective goods."²²⁵ However, when the consequential loss complained of is personal injury, sellers have a much more difficult task in making such an exclusion or limitation stand up in court. Subsection (3) of § 2-719 states: "Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of *consumer goods* is prima facie unconscionable. . . ."²²⁶

An unresolved question, then, is whether sporting goods equipment and other apparatus are considered "consumer goods." The General Definitions section of the UCC (§ 1-201) does not define "consumer goods" but it defines "consumer" as "an individual who enters into a transaction primarily for personal, family, or household purposes."²²⁷ Although Article 2 does not define "consumer goods," Article 9 defines "consumer goods" as "goods that are used or bought for use primarily for personal, family, or household purposes."²²⁸ It would be strange to think that whether this type of exclusionary language is considered "*prima facie* unconscionable" may depend on the specific facts of each case (i.e., whether the actual buyer purchases the goods on an individual basis or for an institution, such as a school or club).²²⁹ For example, if a school were to purchase helmets for its athletes, arguably, those helmets would *not* come within the definition of

221. See White, *supra* note 213, at 435 ("[I]f a party includes a clause in his contract which states that the written contract is the 'complete and exclusive agreement of the terms of the agreement,' the most likely legal consequence will be to exclude from evidence the proof of any oral warranty.").

222. See U.C.C. § 2-316 cmt. 1 (2012). Section 2-316 was enacted in response to these types of misunderstandings. *Id.*

223. See Rosemary E. Williams, *Warranties Under Contract*, 19A MARYLAND LAW ENCYCLOPEDIA: SALES OF PERSONALTY § 40 (2014). The purpose of a disclaimer is to limit one's liability; thus, any avoided litigation is cost effective. *Id.*

224. U.C.C. § 2-715 (2012).

225. See *id.* § 2-719.

226. *Id.* § 2-719(3) (emphasis added).

227. *Id.* § 1-201(11).

228. *Id.* § 9-102(23).

229. *Id.* § 2-719(3).

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“consumer goods,” whereas if an individual athlete or athlete’s parent were to purchase the same helmet, it *would* be considered “consumer goods.” It simply seems unreasonable that the burden of proving unconscionability might depend on the status of who happens to purchase any given article of sporting goods equipment.

SUMMARY

An injured athlete may have a viable strict product liability theory of recovery against a seller or manufacturer, based on a manufacturing defect, a design defect, or a failure to warn.²³⁰ In addition to direct defenses, an equipment manufacturer may best defend such a suit by arguing: (1) that the plaintiff misused the product; (2) that the plaintiff failed to heed properly-given warnings or instructions; (3) that the product simply deteriorated over time through normal wear and tear; (4) that the plaintiff assumed the risk; or, (5) that an unforeseeable, superseding act by a third party was the proximate cause of plaintiff’s injury rather than defendant’s product.²³¹

An injured athlete may also have viable commercial law theories of recovery against a seller and/or manufacturer, based on express warranty, implied warranty of merchantability, and implied warranty of fitness for a particular purpose.²³² The UCC’s restrictions regarding a seller’s ability to exclude or limit liability for personal injury make these theories especially attractive.²³³

Manufacturers may take several proactive steps to reduce their risks of liability by continuing their research, development, and testing efforts aimed at achieving product design safety.²³⁴ They ought to continue careful manufacturing and inspection techniques and protocols in order to prevent product defects (including mislabeling).²³⁵ For the warning labels, it would be prudent: (1) to expressly advise consumers not to remove or cover the labels; (2) to add a warranty disclaimer directly on each piece of equipment’s label, expressly stating:

**WARRANTY DISCLAIMER: THE MANUFACTURER EXPRESSLY
DISCLAIMS ANY EXPRESS OR IMPLIED WARRANTIES,
INCLUDING THE WARRANTY OF MERCHANTABILITY AND/OR
THE WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE.
SALESPERSONS MAY HAVE MADE ORAL OR WRITTEN**

230. See *supra* Part I.A.

231. See *supra* Part I.E.

232. See *supra* Part II.A.

233. This may be particularly true in some circumstances, given that the UCC has a four-year statute of limitations. See U.C.C. § 2-725 (2012).

234. See *supra* Part I.A.

235. See *supra* Part I.A–B.

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STATEMENTS ABOUT THE MERCHANDISE WHICH IS THE SUBJECT OF THIS SALE. THE MANUFACTURER HAS NOT AUTHORIZED SUCH STATEMENTS AND SUCH STATEMENTS DO NOT CONSTITUTE WARRANTIES, SHALL NOT BE RELIED ON BY THE BUYER, AND ARE NO PART OF THE CONTRACT FOR SALE.

and, (3) to advise consumers on the warning label affixed to each product to never use sporting goods equipment which has sustained damage due to contact with a hard surface.²³⁶ A sharp blow against any hard object can structurally damage the equipment and cause breakage during subsequent use.²³⁷

236. See *supra* Parts I.D., II.G.2.

237. See *supra* Part I.D.
