

- Interference with prospective advantage or prospective economic advantage is an unreasonable interference in another party's business dealings so as to prevent an ongoing relationship from succeeding.
- The rule of negligence in tort dominated product liability the first half of the twentieth century. Still good law, it requires producers to take the care of a reasonable person when making products to prevent foreseeable injury. The reasonable person is held to the skill of an expert in the industry.
- Strict liability for defective products began in contract law based on implied warranty inferred by the courts from a review of the parties' dealings or based on express warranty about the quality of a product.
- Strict liability in tort became widely accepted after the 1963 *Greenman* decision in California. Section 402A of the *Restatement (Second) of Torts* imposes strict liability on the manufacturer when a "product in a defective condition unreasonably dangerous to the user or consumer or to his property" is sold. Besides a flaw in the product at the time of manufacture, strict liability is imposed for failure to warn of hazards in using the product and for defects in the design of the product that make it less safe than it could reasonably be.
- The newer *Restatement (Third) of Torts*, Section 2, regarding product defects, moves away from a distinction between strict liability and negligence. In assigning liability, it encourages the use of a risk-utility analysis for products that are defective at the time of manufacture as a result of poor design or failure to warn of dangers.
- Many strict liability suits have concerned unknown hazards, such as those associated with asbestos, where the danger did not become known until many years later. When claims of thousands of persons exceed the funds of the defendants, the courts strive to find fair ways to allocate money among claimants. When many companies have made the same product, they may be held jointly and severally liable, potentially requiring all producers to pay compensation.
- A defense that may be raised in product liability suits is negligence by the user, which can include product misuse. There also can be assumption of risk by the consumer, especially for products, such as medicinal drugs, that are beneficial but have unavoidable side effects and products, such as tobacco and alcohol, that are legal but have bad effects. Producers do not have to constantly warn sophisticated buyers, such as producers, about all dangers in products.
- Strict liability is imposed on those who engage in ultrahazardous activities, such as using explosives, and on those who handle unusually dangerous substances, such as toxic chemicals. If the party involved in the ultrahazardous activity causes an injury to an innocent party, regardless of the degree of care taken to prevent harm, liability is imposed.

## TERMS TO KNOW

You should be able to define the following terms:

|                                         |                      |                             |
|-----------------------------------------|----------------------|-----------------------------|
| fraud                                   | product liability    | failure to warn             |
| intentional misrepresentation           | privity of contract  | design defect               |
| misstatement                            | <i>caveat emptor</i> | unknown hazard              |
| material fact                           | reasonable care      | joint and several liability |
| scienter                                | strict liability     | bulk-supplier doctrine      |
| privity                                 | warranty             | sophisticated user          |
| damages                                 | express warranty     | ultrahazardous activity     |
| interference with contract              | implied warranty     |                             |
| interference with prospective advantage | misrepresentation    |                             |

## DISCUSSION QUESTION

Refer to Section 402A of the *Restatement (Second) of Torts*: What does "the seller is engaged in the business of selling such a product" mean? Who is excluded by this? What does "it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold" mean? What situations does this cover? What is the difference between the idea that the rule applies although "the seller has exercised all possible care in the preparation and sale of his product" and the rule of negligence? What does "the user or consumer has not bought the product from or entered into any contractual relation with the seller" mean?

## CASE QUESTIONS

1. The buyers of residential property mistakenly believed that the 3.5 acres of land included a well, which they later found out was not on the property. The previous owner and the real estate agent had pointed out the well, but had not stated that it was on the property. The buyers did not examine the existing survey of the property, nor did they order a new survey done. Did the buyers have a basis for a suit for fraud? [*Crawford v. Williams*, 375 S.E.2d 223, Sup. Ct., Ga. (1989)]
2. Eating bags of microwave popcorn for years is claimed to cause "popcorn" lung from inhalation of the flavoring used on the popcorn. Plaintiffs with the medical problem sued the popcorn makers and the maker of the flavoring. The flavoring maker asserted it was not liable under the bulk-supplier defense. Would that apply? [*Daughette v. Chr. Hansen, Inc.*, 960 F.Supp.2d 849, N.D. Iowa (2013)]
3. Overstock and SmartBargains (SB) both sold brand-name products through their websites. Overstock sued SB, complaining that pop-up ads for SB appeared when customers accessed Overstock's website. Overstock contended the ads were a tortious interference with prospective economic advantage. Was there a tort? [*Overstock.com v. SmartBargains*, 192 P.3d 858, Sup. Ct., Utah (2008)]
4. Florida land developer Lehigh would show prospective buyers Lehigh Acres and have the buyers stay at its motel. Competitor Azar would watch for the buyers, contact them at the motel, tell them that under federal law they had three days to cancel any contract with Lehigh, and then show them less expensive property that he was selling. What tort could apply in this circumstance? [*Azar v. Lehigh Corp.*, 364 So.2d 860, Dist. Ct. App., Fla. (1978)]
5. Woeste ate raw oysters at a restaurant and died a week later from the bacteria *Vibrio vulnificus*. The bacteria naturally occur in oysters from warm water. *Vibrio* has no effect on most people, but can be fatal to people with a weak immune system—as Woeste had as a result of hepatitis C and cirrhosis of the liver. The restaurant menu warned of the danger of eating raw oysters, especially for persons with "chronic illness of the liver." Woeste ordered without reading the menu warning. His estate sued the restaurant and the Texas company that harvested the oysters for negligence and strict liability. Would they have a good case? [*Woeste v. Washington Plaforn Saloon*, 836 N.E.2d 52, Ct. App., Ohio (2005)]
6. Some crimes involve the use of cheap handguns. Sellers of such handguns know that some of these guns will be used in crimes by the purchaser or by a criminal who steals the gun. Could the producers and retailers of such handguns be held liable for the injuries suffered by persons shot during a crime? That is, could such a producer be held strictly liable or negligent for selling a "defective" product in that one of its known end uses is crime? [See *Patterson v. Rohm Gesellschaft*, 608 F.Supp. 1206, N.D. Tex. (1985)]
7. Wilspec and DunAn both produce parts for air conditioning (AC) units. Wilspec contracted with DunAn, a Chinese corporation, for it to make certain parts for AC units sold in North America. The DunAn parts were to be sold under the Wilspec name, and Wilspec would be the exclusive distributor in North America. Wilspec claimed that DunAn then solicited the sale of products to Wilspec's customers in North America and made disparaging remarks to Wilspec's customers about its ability to perform. What tort might there be? [*Wilspec Technologies v. DunAn Holding Group*, 204 P.3d 69, Sup. Ct., Okla. (2009)]
8. A 4-year-old child used a Bic lighter to start a house fire that killed a 2-year-old child. The lighter had a warning: "KEEP OUT OF REACH OF CHILDREN." The dead child's parents sued Bic for strict liability based on inadequate warning and because the lighter was unreasonably dangerous. What was the result? [*Todd v. SocieteBic*, 21 F.3d 1402, 7th Cir. (1994)]
9. Gish, a trucker, was to pick up a load of fertilizer. His truck had a trailer made by Timpte—an open-top hopper loaded from above. Because the downspout would not go into place into the hopper, Gish climbed on top of the trailer, scooted along a thin rail to where the downspout was, and fell to the ground, suffering serious injury. He sued for design defect, contending that the top of the trailer was not safe to be on and should have been designed more safely. Do you think his argument held? [*Timpte Industries v. Gish*, Sup. Ct., TX, 86 S.W.3d 306 (2006)]
10. Old Island Furnigation pumped poison into two of the three buildings in a condominium complex to