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Hunt v. Blasius: A Gap in the Application of the Illinois Strict Products Liability Theory

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Hunt v. Blasius: A Gap in the Application of the Illinois Strict Products Liabilty Theory

INTRODUCTION

Traditionally all parties in a product's chain of distribution are potentially liable defendants in strict products liability suits.[1] However, several recent court decisions may have significantly altered this general doctrine by considering equitable principles in allocating liability among defendants.[2] In particular, one Illinois Appellate

1. The RESTATEMENT (SECOND) OF TORTS, §402A (1965), states that any person engaged in the business of selling products for use or consumption can be held strictly liable for damages proximately caused by those products if they are unreasonably dangerous when they leave the seller's control. *See* notes 9 through 14 *infra* and accompanying text for a discussion of the effect of the §402A provisions. All "sellers" of a product are described as being within the "chain of distribution" of the product as it passes through commerce to the injured user or consumer.

Since the adoption by Illinois of §402A in Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965), the courts have shifted in their analysis from a focus on the chain of possession of a product to the consideration of the commercial nature of all transactions involved in a product's distribution to the general public. This shift was demonstrated recently in the Illinois Supreme Court's decision in Connelly v. Uniroyal, Inc., 75 Ill.2d 393, 389 N.E.2d 155 (1979). In *Connelly*, the court held that a trademark licensor who was totally outside the chain of distribution of a product could be held strictly liable for injuries caused by a product bearing his trademark. The court reasoned that the public policy considerations underlying its decision in *Suvada* applied to a trademark licensor as well as a distributor. In particular, the court noted that trademarks play an integral role in the marketing of a product, thereby helping to reap profit from the public. *Id.* at 411-12, 389 N.E.2d at 163. *See* notes 7 and 8 *infra* for a discussion of the public policy considerations referred to by the *Connelly* court.

2. The Illinois Supreme Court permitted actions for contribution by manufacturers joined in strict product liability actions in several cases. Skinner v. Reed-Prentice Division Package Machinery Co., 70 Ill. 2d 1, 374 N.E. 2d 437 (1978); Stevens v. Silver Manufacturing Co., 70 Ill. 2d 41, 374 N.E. 2d 455 (1978); and Robinson v. International Harvester Co., 70 Ill. 2d 47, 374 N.E. 2d 458 (1978).

Each of these decisions occasioned a strong dissent by the late Justice Dooley. Because the effect of these decisions is to allocate loss according to relative fault, a concept alien to strict liability, Justice Dooley felt that Suvada v. White Motor Co. and all strict products liability cases following *Suvada* had been "implicitly overruled". *See* Skinner v. Reed-Prentice Div. Pkge. Mach. Co., 70 Ill. 2d at 22-41, 374 N.E.2d at 446-455. (Dooley, J., dissenting). However, it is not clear that these decisions will totally upset the traditional path of strict liability. The majority in *Skinner* suggested that any action for apportionment will arise only after initial liability has been found. "When the economic loss of the user has been imposed on a defendent in a strict liability action the policy considerations of *Suvada* are satisfied and the ordinary equitable principles governing the concepts of indemnity or contribution are to be applied." 70 Ill. 2d at 14, 374 N.E.2d 437, 443. *See* Comment, *Skinner v. Reed-Prentice Division Package Co.: Adoption of Contribution in Illinois*, 9 LOY. CHI. L.J. 1015 (1978); Appel and Michael, *Contribution Among Joint Tortfeasors in Illinois: An Opportunity for Legisla-*

Court has significantly limited the potential liability of a manufacturer who acts as an independent contractor.

In *Hunt v. Blasius*,[3] the court provided an independent contractor who manufactured specific non-consumer goods acording to governmental designs with a new defense to a strict products liability suit.[4] By balancing equitable considerations, this new defense restructures the rules governing liability in actions arising from injuries caused by products made unreasonably dangerous by design defects.[5]

This article will briefly outline the origins of strict products liability in Illinois and the growing application of equitable principles to this once rigid area of the law. In this context, the *Hunt* decision will be analyzed in detail, and the implications of the new independent contractor defense will be discussed.

Strict Products Liability in Illinois

The landmark Illinois Supreme Court decision, *Suvada v. White Motor Co.*[6] expanded the concept of strict liability to non-food products liability actions. The court reasoned that the "public interest in human life and health, the invitations and solicitations to purchase the product and the justice of imposing the loss on the one creating the risk and reaping the profit"[7] compelled the imposition of strict liability on the sellers of unreasonably dangerous products.[8] Accordingly, the court adopted section 402A of the Second Restatement of Torts.[9] That section[10] provides that sellers[11] of unreasonably

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tive and Judicial Cooperation, 10 Loy. Chi. L.J. 169 (1979) for a more complete discussion on the effect of these three cases on future strict product liability actions.

3. 55 Ill. App. 3d 14, 370 N.E.2d 617 (1977), *aff'd on other grounds*, 74 Ill. 2d 203, 384 N.E.2d 368 (1978).

4. *Id.*

5. *See* note 29 *infra* and accompanying text.

6. 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

7. *Id.* at 619, 210 N.E.2d at 186.

8. *Id.*

9. *Id.* at 622-23, 210 N.E.2d at 187.

10. The Restatement (Second) of Torts §402A (1965), provides that:

> (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

dangerous or defective products[12] may be held liable for injuries incurred by a user or consumer[13] of their product.

Four essential elements must be proved to establish a prima facie case of strict liability. First, a defendant must be shown to have been a seller[14] of the product. Second, the product must be unreasonably dangerous. Third, the product must have been unreasona-

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contractual relation with the seller.

Before the decision in *Suvada*, only food product manufacturers were subject to strict products liability actions in Illinois. *See, e.g.*, Patagias v. Coca-Cola Bottling Co., 332 Ill. 117. *Suvada* extended strict liability to manufacturers and component part manufacturers of non-food products. By adopting §402A, the court eliminated the requirement of privity of contract between parties, which had plagued the courts since its inception in Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842).

11. A party is subject to strict liability if that person is "engaged in the business of selling products for use or consumption." RESTATEMENT (SECOND) OF TORTS §402A, Comment f (1965). However, the rule does not extend to a party who is only an "occasional seller" of a product which is at issue in a strict liability action. *See* note 84 *infra* for a discussion of the limited liability of "occasional sellers".

The recent decision in Connelly v. Uniroyal, Inc., 75 Ill. 2d 393, 389 N.E. 2d 155 (1979) demonstrates that the test employed in determining whether a party is a "seller" is not rigid in its application. *See* note 1 *supra*.

12. The determination of whether a product is "unreasonably dangerous" does not rest upon a finding that there is some element of danger involved in the use of a product. Rather, the test is whether the product is more dangerous than would be contemplated by a foreseeable user of the product. RESTATEMENT (SECOND) OF TORTS §402A, Comment i (1965).

There are a number of defects which may make a product unreasonably dangerous. *See* notes 29 through 34 *infra* and accompanying text.

13. The RESTATEMENT (SECOND) OF TORTS §402A, Comment l (1965), defines a "user or consumer" as follows:

> In order for the rule stated in this Section to apply, it is not necessary that the ultimate user or consumer have acquired the product directly from the seller, although the rule applies equally if he does so. He may have acquired it through one or more intermediate dealers. It is not even necessary that the consumer have purchased the product at all. He may be a member of the family or the final purchaser, or his employee, or a guest at his table, or a mere donee from the purchaser. The liability stated is one in tort, and does not require any contractual relation, or privity of contract, between the plaintiff and the defendant.
>
> "Consumers" include not only those who in fact consume the product, but also those who prepare it for consumption; and the housewife who contracts tularemia while cooking rabbits for her husband is included within the rule stated in this Section, as is also the husband who is opening a bottle of beer for his wife to drink. Consumption includes all ultimate uses for which the product is intended, and the customer in a beauty shop to whose hair a permanent wave solution is applied by the shop is a consumer. "User" includes those who are passively enjoying the benefit of the product, as in the case of passengers in automobiles or airplaines, as well as those who are utilizing it for the purpose of doing work upon it, as in the case of an employee of the ultimate buyer who is making repairs upon the automobile which he has purchased.

A "user or consumer" can also be an innocent bystander who is injured by another person's use of an unreasonably dangerous product. *See, e.g.*, White v. Jeffery Galion, Inc., 326 F. Supp. 751 (E.D. Ill. 1971); Mieher v. Brown, 3 Ill. App. 3d 802, 278 N.E.2d 869 (1972).

14. *See* note 11 *supra*.

bly dangerous when it left the seller's control.[15] Finally, the plaintiff's injuries must have been proximately caused by the condition which made the product unreasonably dangerous.[16]

Potential Defendants

In a strict liability action, the plaintiff may join as a defendant almost every party who had a commercial interest in the production and distribution of the product.[17] Thus, potential defendants may include manufacturers,[18] component part manufacturers,[19] sales representatives,[20] wholesalers,[21] packagers,[22] bailors-lessors,[23] maintenance contractors,[24] retailers,[25] brokers,[26] and licensors.[27] Plaintiffs may, under proper circumstances, recover damages for personal injury or harm to their property caused by unreasonably dangerous products from any or all of these parties.[28]

The number of defendants a plaintiff may join in a strict liability action is dependent on the type of product defect alleged. Illinois

15. If a condition that made a product unreasonably dangerous arose *after* a particular seller passed the product on through commerce, then generally, that seller cannot be held strictly liable for the injuries caused by that condition. *See generally* Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965); St. Paul Fire & Marine Ins. Co. v. Michelin Tire Corp., 12 Ill. App. 3d 165, 298 N.E.2d 289 (1973). Further, the fact that a product has undergone a substantial change or alteration before it reached the user may protect a seller. *See* Whitmer v. Schneble, 29 Ill. App. 3d 659, 331 N.E.2d 115 (1975).

16. An unreasonably dangerous product is not properly the subject of a strict liability action unless it has caused some injury or damgage. The mere risk of an injury is not sufficient to hold a seller strictly liable. *See* Mink v. University of Chicago, 460 F. Supp. 713 (N.D. Ill. 1978); Bouillon v. Harry Gill Co., 15 Ill. App. 3d 45, 301 N.E.2d 627 (1973).

17. *See* note 1 *supra.*

18. *See, e.g.*, Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

19. *Id. See, e.g.*, Sipari v. Villa Olivia Country Club, 63 Ill. App. 3d 985, 380 N.E.2d 819 (1978); Wright v. Massey-Ferguson, Inc., 68 Ill. App. 2d 70, 215 N.E.2d 465 (1966).

20. *See, e.g.*, Little v. Maxam, Inc., 310 F. Supp. 875 (S.D. Ill. 1970).

21. *See, e.g.*, Peterson v. Lou Bachrodt Chevrolet Co., 61 Ill. 2d 17, 329 N.E.2d 785 (1975), *appealed after remand*, 61 Ill. App. 3d 898, 378 N.E.2d 618 (1978); Dunham v. Vaughn & Bushnell Mfg. Co., 42 Ill. 2d 339, 247 N.E.2d 401 (1969).

22. *See, e.g.*, Genaust v. Illinois Power Co., 62 Ill. 2d 456, 343 N.E.2d 465 (1976). *But cf.* Restatement (Second) of Torts § 402A, Comment h (1965). (Although the Restatement drafters believe defective packaging is a basis for liability, they regard the packaging as an integral part of the whole product.)

23. Profilet v. Falconite, 56 Ill. App. 3d 168, 371 N.E.2d 1069 (1977); Galluccio v. The Hertz Corp., 1 Ill. App. 3d 272, 274 N.E. 2d 178 (1971).

24. Nowakowski v. Hoppe Tire Co., 39 Ill. App. 3d 155, 349 N.E.2d 578 (1976).

25. *See, e.g.*, Peterson v. Lou Bachrodt Chevrolet Co. 61 Ill. 2d 17, 329 N.E.2d 785 (1975)

26. *See, e.g.*, Texaco, Inc. v. McGrew Lumber Co., 117 Ill. App. 2d 351, 254 N.E.2d 584 (1969).

27. *See, e.g.*, Connelly v. Uniroyal, Inc., 75 Ill. 2d 393, 389 N.E.2d 155 (1979).

28. As parties having an economic interest in the manufacture and sale of a product, all of these "sellers" are potentially liable for injuries sustained by a user or consumer. *See* note 1 *supra.*

case law recognizes six types of defects which may render a product unreasonably dangerous: design,[29] manufacture,[30] packaging,[31] warning,[32] installation,[33] and maintenance.[34] Of these, the design defect creates the broadest range of potential denfendants, because the designer of a product is the first person in the chain of distribution. Thus, the design defect exists when the product leaves the control of every subsequent seller and the plaintiff can join everyone in the "chain", from designer to ultimate seller.[35]

However, mere joinder of all sellers in a strict liability action arising from a defectively designed product does not make any of the defendants absolute insurers.[36] Although it is difficult for the defendant to totally escape liability, a number of paths are available to a seller to absolve himself of liability and/or the burden of paying a judgment. First, a defendant can demonstrate that the plaintiff has not met his burden of proof.[37] Second, a seller can show that the plaintiff had assumed the risk in using the allegedly dangerous product.[38] Finally, and of greater importance, defendants found lia-

29. *See, e.g.*, Kuziw v. Lake Engineering Co., 586 F.2d 33 (7th Cir. 1978); Nanda v. Ford Motor Co., 509 F.2d 213 (7th Cir. 1974); Coleman v. Verson Allsteel Press Co., 64 Ill. App. 3d 974, 382 N.E. 2d 36 (1978); Stahl v. Ford Motor Co., 64 Ill. App. 3d 919, 381 N.E. 2d 1211 (1978); Martinet v. International Harvester Co., 53 Ill. App. 3d 213, 368 N.E.2d 496 (1977); Allen v. Kewanee Mach. & Conveyor Co., 23 Ill. App. 3d 158, 318 N.E.2d 696 (1974).

30. *See, e.g.*, McKee v. Brunswick Corp., 354 F.2d 577 (7th Cir. 1965); Dunham v. Vaughan & Bushnell Mfg. Co., 42 Ill. 2d 339, 247 N.E.2d 401 (1969); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965); Spotz v. Up-Right, Inc., 3 Ill. App. 3d 1065, 280 N.E.2d 23 (1972); Noncek v. Ram Tool Corp., 129 Ill. App. 2d 320, 264 N.E.2d 440 (1970).

31. *See* note 23, *supra*.

32. *See, e.g.*, Knapp v. Hertz Corp., 59 Ill. App. 3d 241, 375 N.E.2d 1349 (1978); Woodill v. Parke Davis & Co., 58 Ill. App. 3d 349, 374 N.E.2d 683 (1978); Ostendorf v. Brewer, 51 Ill. App. 3d 1009, 367 N.E.2d 214 (1977); Stanfield v. Medalist Indus., Inc., 34 Ill. App. 3d 635, 340 N.E.2d 276 (1975).

33. *See, e.g.*, Woodrick v. Smith Gas Serv., Inc., 87 Ill. App. 2d 88, 230 N.E.2d 508 (1967).

34. *See, e.g.*, Galluccio v. Hertz Corp., 1 Ill. App. 3d 272, 274 N.E.2d 178 (1971).

35. In comparison, if an installer *creates* an unreasonably dangerous condition, his liability lies for his own acts, and not those of any previous sellers. Because the installer sits at the "bottom" of a chain of distribution, he is the only person subject to strict liability. *See, e.g.*, Woodrick v. Smith Gas Serv., Inc., 87 Ill. App. 2d 88, 230 N.E.2d 508 (1967).

36. Since the §402A strict products liability theory provides a plaintiff with a powerful weapon, there existed apprehension that sellers would be considered absolute insurers of their products. The supreme court's decision in *Suvada* dispelled this misplaced apprehension. Although strict liability is "liability without fault", there are still certain essential facts which must be proved before liability can attach. Thus, "[t]he plaintiffs must prove that their injury or damage resulted from a condition of the product, that the condition was an unreasonably dangerous one and that the condition existed at the time it left the manufacturer's control." Suvada v. White Motor Co., 32 Ill. 2d at 623, 210 N.E.2d at 188.

37. For a plaintiff to establish a prima facie case, he must meet the burden of proving the essential elements of a strict products liability action. *See* notes 11 through 16 *supra* and accompanying text.

38. Assumption of the risk inherent in the use of a product involves a subjective determi-

ble can attempt to "pass on" liability to another party.

Until recently, an indemnification[39] action was the primary, if not only, method by which a defendant could pass on liability. In such an action, a defendant can seek indemnity from any party who was "upstream"[40] in the chain of distribution of the product. In this way, the defendant, though held liable, can relieve his duty to pay a judgment. Thus, the financial burden of the plaintiff's injury properly falls on the party originally responsible for the defect.[41] In addition, the Illinois Supreme Court has recently sanctioned another method to pass on liability: "downstream"[42] contribution.[43]

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nation as to whether an injured party made a conscious voluntary decision to proceed in the face of danger. *See* Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970); Barr v. Rivinius, Inc. 58 Ill. App. 3d 121, 373 N.E.2d 1063 (1978); Doran v. Pullman Standard Car Mfg. Co., 45 Ill. App. 3d 981, 360 N.E.2d 440 (1977); Bittner v. Wheel Horse Products, Inc., 28 Ill. App. 3d 44, 328 N.E.2d 160 (1975).

Inasmuch as the decision to use a product known or suspected to be dangerous must be voluntary, assumption of risk does not apply to those plaintiffs who are exposed to dangerous products as a condition of their employment. *See* Court v. Grzelinski, 72 Ill. 2d 141, 379 N.E.2d 281 (1978); Coty v. U. S. Slicing Mach. Co., Inc., 58 Ill. App. 3d 237, 373 N.E.2d 1371 (1978).

Further, in order to determine whether a plaintiff had appreciated the risk, certain factors, including age, experience, knowledge, and understanding, must be examined. Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970); Karabatsos v. Spivey Co., 49 Ill. App. 3d 317, 364 N.E.2d 319 (1977).

39. "Indemnity" as applied in strict liability differs from the concept as applied in negligence actions. In negligence, one defendant is able to totally reallocate loss to another if the former party was "passively" negligent while the latter was "actively" negligent. However, under a strict liability theory, "fault" is not an element in a cause of action. Indemnity in strict liability actions involves passing on the loss to a party originally responsible for creating the unreasonably dangerous condition.

See Liberty Mutual Insurance Co. v. Williams Mach. & Tool Co. 62 Ill. 2d 77, 82, 338 N.E.2d 857, 860 (1975), *quoting with approval,* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY, § 16A (4)(b)(1).

40. "Upstream" refers to the direction in which a product travels in a chain of distribution. It means, "against the flow of commerce within the chain, i.e., purchaser-seller-manufacturer. Downstream directly correlates to the flow of the goods through commerce. Courts allowed recovery through indemnification when the action was upstream." Note: *Skinner v. Reed-Prentice Division Package Co.: Adoption of Contribution in Illinois,* 9 LOY. CHI. L.J. 1015, 1024 n. 54 (1978).

41. *See* note 39 *supra.*

42. "Downstream" refers to the direction in which a product passes through commerce. *See* note 40 *supra.*

43. Skinner v. Reed-Prentice Div. Pkge. Mach. Co., 70 Ill. 2d 1, 374 N.E.2d 437 (1978). In addition, the Illinois legislature has just enacted a contribution statute. ILL. ANN. STAT. ch. 70, §301 *et seq.* (Smith-Hurd).

Skinner was an action in strict products liability. The plaintiff, by her mother and next friend, alleged that the injection molding machine which she had been using was unreasonably dangerous and the proximate cause of her injuries. She sued the manufacturer of the machine to recover damages for her personal injuries. The manufacturer then filed a third party action against the plaintiff's employer, seeking contribution from the employer for its alleged negligence which was claimed to have contributed to the plaintiff's injury.

Thus, downstream parties who have negligently contributed to the plaintiff's injury may be subject to a contribution action by other defendants.

Although upstream indemnification totally reallocates the economic loss to the party originally responsible for the unreasonably dangerous product,[44] contribution apportions the loss among parties according to relative fault.[45] However, both actions involve the application of equitable principles to reallocate loss *after* liability has been established.[46]

HUNT V. BLASIUS

Recently, in *Hunt v. Blasius*,[47] an Illinois Appellate Court applied the equitable principles underlying contribution and indemnity prior to a finding of liability. It thereby established a new, complete defense to a strict liability action. Specifically, the court held that under certain circumstances an independent contractor will not be held liable for injuries resulting from design defects when the design is supplied by a governmental entity.[48] The pivotal rationale for this new defense stems from the independent contractor's complete lack of control over the design of the product which he manufacturers.[49]

In *Hunt*, the plaintiff's car struck a sign pole located two feet from the shoulder of an Illinois highway, resulting in the death of two of the car's occupants and serious injury to three other passengers. The plaintiffs brought an action on both negligence and strict liability grounds, alleging that defendant's sign pole was defective in design, construction and installation. Specifically, plaintiff claimed the pole failed to conform to modern standards of highway construction,

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The employer moved to dismiss the third party complaint. The trial court denied this motion. Both the appellate court and supreme court affirmed, thereby apparently permitting actions for contribution for actions arising out of occurrences on and after March 1, 1978. *See also* cases cited at note 2 *supra*.

44. *See* note 39 *supra*.

45. As the court stated in Skinner v. Reed-Prentice Div. Pkge. Mach. Co., 70 Ill. 2d 1, 374 N.E.2d 437 (1978):

> For the purposes of the motion to dismiss, the allegations of fact in the third-party complaint must be taken as true . . ., and on these facts the governing equitable principles require that ultimate liability for plaintiff's injuries be apportioned on the basis of the relative degree to which the defective product and the employer's conduct proximately caused them.

Id. at 14, 374 N.E.2d at 442 (citations omitted). *See also* notes 2 and 43 *supra*.

46. *See* note 2 *supra*.

47. 55 Ill. App. 3d 14, 370 N.E.2d 617 (1977), *aff'd on other grounds*, 74 Ill. 2d 203, 384 N.E.2d 368 (1978).

48. 55 Ill. App. 3d at 17, 370 N.E.2d at 620.

49. *Id.* at 19-20, 370 N.E.2d 617, 621.

because the pole was not designed to break away on impact.[50]

The defendant argued that since he was an independent contractor manufacturing a product in strict compliance with a design mandated by the State of Illinois he could not be held liable for any defects in that design.[51] The trial court agreed and granted the defendant's motion for summary judgment.[52] This decision was affirmed by the appellate court, which held that the contractor, who had complied with strict governmental specifications and had no control over the product's design, could assert a complete defense to a strict products liability action.[53]

Central to the court's analysis was the status of the independent contractor. Analogizing to traditional negligence concepts, the status of the independent contractor was deemed dispositive[54] because the defendant was a "mere conduit."[55] In reaching this conclusion, the appellate court relied heavily on the decision in *Littlehale v. E.I.DuPont de Nemours & Co., Inc.*[56] There, on basically the same probative facts,[57] the court determined that a manufacturer who

50. The original complaint was filed against four parties; however, an amended complaint named only the manufacturer-installer, Fosco Fabricators, 55 Ill. App. 3d at 15, 370 N.E.2d at 618.

The plaintiffs alleged that the defendant was negligent in failing to follow "modern methods of highway construction" which included the erection of "breakaway" poles, and otherwise negligently constructing, designing and controlling the pole. The strict liability count alleged that the pole was unreasonably dangerous because it was not of a "breakaway" design and because it was anchored in concrete within three feet of the roadway. *Id.*

51. *Id.*

52. *Id.* Summary judgment was granted on both the negligence and strict liability counts. For the purpose of this article, except where specifically noted, only the strict liability count and the new defense generated by it will be discussed.

53. Hunt v. Blasius, 55 Ill. App. 3d 14, 370 N.E.2d 617 (1977).

54. Traditionally a party acting as a conduit was found liable, but was allowed to seek indemnity from a party further up in the chain of distribution. *See, e.g.*, Sam Shainberg Co. of Jackson v. Barlow, 258 So. 2d 242 (Miss. 1972) However, the conduit in *Hunt* was allowed to escape liability *totally*. Rather than force the contractor to seek indemnification for judgments entered, the contractor was permitted to raise a complete defense to the action.

55. It is unclear to what extent the Court may have been influenced by the Illinois' immunity statute, ILL. REV. STAT. ch. 127, §801 (1178). Under this statute, any claim against the State of Illinois can only be filed with the Court of Claims under the provisions of ILL. REV. STAT. ch. 37, §§ 439.1 *et seq* (1978). It is possible that the court did not want to subject the manufacturer to the jurisdiction limitations of the Court of Claims. ILL. REV. STAT. ch. 37, § 439.8(d) (1978). If the manufacturer in *Hunt* could have obtained indemnity from the State, its recovery would have been limited to $100,000.)

56. 268 F. Supp. 791 (S.D.N.Y. 1966), *aff'd*, 380 F.2d 274 (2d Cir. 1967).

57. In *Littlehale*, the plaintiffs were civilian employees of the United States Navy. They were injured by blasting caps which had been manufactured thirteen years earlier according to specifications supplied by the war department. In the course of the litigation, the plaintiffs abaondoned a negligence claim. Instead, they based their action exclusively upon a strict liability theory for a failure to warn of the nature of the product. The court granted summary judgment for the defendant, holding that the defendant owed the plaintiffs no duty to warn

controls the production of goods is distinct from one who contracts to provide a unique product for a specific purchaser. Thus, the *Littlehale* court reasoned, when a specific purchaser demands strict compliance with his own plans and specifications, the manufacturer should be held to a different standard of liability.[58]

Further, the *Hunt* court also adopted the *Littlehale* "ordinary prudent manufacturer" standard of liability for the independent contractor.[59] Under this rule, an independent contractor who manufacturers a product according to another's designs will escape liability unless those designs are so glaringly or patently insufficient that an ordinary and prudent manufacturer would not follow them.[60]

The *Hunt* appellate court decision essentially carves out an exception to the strict liability principles enumerated in *Suvada*. The court examined the policy rationales of *Suvada*, but it found them inapplicable.[61] Specifically, the court noted that the product was not produced with the intention of soliciting the public to purchase or use it, nor were representations concerning the safety of the product made to the general public.[62] Thus, the manufacturer was not directly enriched at the expense of the public.[63] In addition, the contractor was not responsible for and could not alter the product's injurious design.

The Illinois Supreme Court affirmed the appellate court's ruling,

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because the product was not manufactured for sale or resale to the general public and was known to be dangerous. Furthermore, the defendant had no discretion in selection of methods of manufacture, design, or use of materials. 268 F. Supp. at 801-802.

58. The *Littlehale* court stated:

> Thus it seemed that the duty imposed in these situations is somewhat less than the duty imposed where the manufacturer does the work as he desires, not being bound by specifications of another. For if the duty where he has control were the same as the duty where he is controlled by another, the general ordinary prudent man test would be applicable without the limitation imposed by the "glaring, obvious or patent" adjectives which appear to lessen his duty and impose liability on the manufacturer in only the extreme case.

Id. at 802 n.16.

See also, Challoner v. Day & Zimmerman, Inc., 512 F.2d 77 (5th Cir. 1975); Sanner v. Ford Motor Co., 144 N.J. Super. 1, 364 A.2d 43 (1976); *But cf.* Donham v. United States, 536 F.2d 765 (8th Cir. 1976). *Contra,* Foster v. Day & Zimmerman, Inc., 502 F.2d 867 (8th Cir. 1974).

59. Hunt v. Blasius, 55 Ill. App. 3d 14, 18, 370 N.E.2d 617, 621 (1978).

60. *Id. See* note 58 *supra.*

61. *Id.*

62. The court stated, "In Illinois, *Suvada* made clear that all persons in the chain of distribution from the manufacturer on down have potential liability, but *Suvada* was concerned with products designed and sole [sic] for use by the general public and not for use by a governmental entity and to its specifications." Hunt v. Blasius, 55 Ill. App. 3d 14, 19, 370 N.E.2d 617, 621 (1978). The policy considerations underlying *Suvada* are discussed in the text accompanying notes 7 and 8 *supra.*

63. 55 Ill. App. 3d at 19, 370 N.E.2d at 621.

but upon the ground that the plaintiff failed to prove that there was a design defect.[64] In basing its decision on the plaintiff's failure to meet their burden of proof, the supreme court failed to address the merits of the independent contractor defense as articulated by the appellate court. Yet, since the new defense was neither expressly overruled nor affirmed the defense would seem to be good law; however, its application remains uncertain.

Future of the Independent Contractor Defense

Although the supreme court did not rule on the new strict liability defense, the recent Illinois cases which have accepted contribution among joint tortfeasors may indicate a more receptive attitude to the application of equitable principles in strict liability actions.[65] It is conceivable, therefore, that the Illinois Supreme Court will endorse this new defense when confronted with an appropriate fact situation.[66]

As with any innovation in the law, this new defense presents both potential problems and benefits. The primary benefit stems from the fact that manufacturers of *sui generis*[67] products are instrumen-

64. Hunt v. Blasius, 74 Ill. 2d 203, 384 N.E.2d 368 (1979). In its treatment of the strict liability count, the supreme court held that the plaintiffs' complaint did not allege a distinct defect, but only a "preference for break-away posts." 74 Ill. 2d at 212, 384 N.E.2d at 372. *See also* note 50 *supra*.

Therefore, because the plaintiffs failed to meet their burden of proof, the court was able to dispose of the strict liability count without directly addressing the merits of the appellate court arguments supporting the independent contractor defense.

In regard to the negligence count, the court expressed its agreement with other jurisdictions which have held that an independent contractor is not liable in negligence to third persons, under a rationale similar to the one applied by the appellate court to the strict liability count. *Id.* at 210, 384 N.E.2d at 371-72.

It is this author's opinion that the same rationale would apply to a strict liability action. Unfortunately, however, the Court disposed of the action without the necessity of deciding the applicability of such a standard in strict liability.

65. *See* note 2 *supra* and accompanying text.

66. An appropriate fact situation would, obviously, be an action in which the plaintiffs plead properly and succeeded in meeting their burden of proof. In addition, this issue is ripe for consideration by the Illinois legislation. The prospects of such action are heightened in light of the recent enactment of the contribution among joint tortfeasors statute. Ill. Ann Stat ch. 70, §§ 301 *et seq.* (1979).

Tennessee has recently come close to offering a statuatory defense to manufacturers that comply with governmental specifications. 1978 Tenn. Pub Acts §23-3704 provides:

> Compliance by a manufacturer or seller with any federal or state statutes or administrative regulations existing at the time a product was manufactured and prescribing standards for design, inspection, testing, manufacture, labeling, warning or instructions for use of a product, shall raise a rebuttable presumption that the product is not in an unreasonably dangerous condition in regard to matters covered by these standards.

67. "*Sui generis*" is defined, "of its own kind or class; i.e., the only one of its kind;

tal in producing goods and machines that are used in new industrial processes and techniques.[68] Since the defense eliminates one theory by which an independent contractor can be held strictly liable,[69] it may encourage independent contractors to enter into the manufacture of *sui generis* products. Any resulting promotion of new industrial techniques, of course, will benefit both industry and society as a whole.[70]

One problem with this defense is that it diminishes the availability of compensation to an injured party who pursues a strict liability action. Since the defense is premised upon the limited distribution of a unique product,[71] there will be fewer potential sellers to join as defendents. Thus, even if a plaintiff succeeds in obtaining a judgment he will be unable to seek recovery against the broad range of parties typically available in the chain of distribution. Instead, a plaintiff's recovery will most often be limited to the product's designer.[72] In certain instances the designer may be judgment proof or, in the case of a governmental entity, immune from suit.[73] However, this would not be the first theory by which an otherwise deserving plaintiff would be denied recovery in a strict liability suit; recovery also is denied against occasional sellers of unreasonably dangerous products.[74]

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peculiar." BLACK'S LAW DICTIONARY 1602 (4th ed. 1968).

68. It is envisioned that in many instances where a new industrial process is invented, new machinery for the effectuation of the process will have to be designed. If a patent holder or licensee of the patent holder, for example, supplies the plans and specifications for the new machine to an independent contractor who is hired to produce the machine, the patent holder or his licensee, not the independent contractor, should bear the burden of defending a strict tort liability action if a person is injured because of a design in that machine.

69. For a discussion of the defects which can render a party strictly liable, *see* notes 29 through 34 *supra* and accompanying text.

70. Several courts in other jurisdictions have recently adopted a test which balances the risks of a product against its utility. *See* Dorsey v. Yoder Co., 331 F. Supp. 753 (E.D. Pa. 1971); Byrns v. Riddell, Inc., 550 P.2d 1065 (Ariz. 1976); Phillips v. Kimwood Mach. Co., 269 Ore. 485, 525 P.2d 1033 (1974).

In this author's opinion, a consideration of a product's utility to society as a whole will better serve the general public than a blind examination of a product's dangerous nature. *See generally* INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, U.S. DEP'T OF COMMERCE II-8-10 (1979), and authorities cited therein.

71. *See* note 62 *supra* and accompanying text.

72. Since a *sui generis* product is manufactured for the benefit of a single purchaser, who is also the designer, the "chain of distribution" is limited to those two parties. If the manufacturer has the protection of the defense raised in *Hunt*, an injured third person, such as a bystander or employee of the manufacturer, could only pursue a strict liability action against the designer-purchaser.

73. Actions against the State of Illinois, for example, are limited by the sovereign immunity statute discussed at note 70 *supra*.

74. The RESTATEMENT (SECOND) OF TORTS, §402A Comment f (1965) states, in pertinent part:

Occasional sellers are not held strictly liable because they are not within the category of persons in the business of selling products to the public and because purchasers are not forced to rely upon the safety of an occasional seller's product.[75] Similarly, an independent contractor manufacturing a specific, non-consumer product according to a designer's specifications is not in the business of selling that product to the public. Further, the purchaser of that product is not forced to rely on the contractor. In fact, the purchaser has sought out the contractor to do its work. Thus, although an injured plaintiff may be quite limited in recovery if an independent contractor is able to use this new defense, the rationale of the imposition of strict liability simply does not apply to the contractor manufacturing a specific, non-consumer product according to governmental design.

In addition, although Illinois recognition of this defense extends only to designs supplied by governmental entities,[76] at least one other court has applied the defense to a manufacturer who complied with a private party's specifications.[77] Since the equities inherent in

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> The rule does not, however, apply to the occasional seller of food or other such products who is not engaged in that activity as a part of his business. Thus it does not apply to the housewife who, on one occasion, sells to her neighbor a jar of jam or a pound of sugar. Nor does it apply to the owner of an automobile who, on one occasion, sells it to his neighbor, or even sells it to a dealer in used cars, and this even though he is fully aware that the dealer plans to resell it. The basis for the rule is the ancient one of the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods. This basis is lacking in the case of the ordinary individual who makes the isolated sale, and he is not liable to a third person, or even to his buyer, in the absence of his negligence.

75. *See, e.g.,* Luna v. Rossville Packing Co., 54 Ill. App. 3d 290, 369 N.E. 2d 612 (1977) (sale of a conveyor constructed by cannery for its own use held to be an isolated sale not subject to strict liability) Siemen v. Alden, 34 Ill. App. 3d 961, 341 N.E. 2d 713 (1975) (sawmill selling a used saw held not to be in the business of selling saws.) *See also* Delta Refining Co. v. Procon, Inc., 552 S.W.2d 387 (Tenn. App., 1975) (general contractor who contracted to purchase and install a pump according to the specifications of the plaintiff's licensor was held not to be in the business of selling such pumps and was not strictly liable for a fire proximately caused by a design defect.)

The application of this preclusion from liability rests upon a determination of what a party sells in the usual course of his business. Thus, while a hospital may be in the business of selling blood for transfusions (Cunningham v. MacNeal Memorial Hospital, 47 Ill. 2d 443, 266 N.E.2d 897 (1970)), a sawmill owner is not in the business of selling a used saw (Siemen v. Alden, 34 Ill. App. 3d 961, 341 N.E.2d 713 (1975)).

76. The appellate court in *Hunt* specifically declined to decide the issue of compliance with private designs because the matter was not before it. Hunt v. Blasius, 55 Ill. App. 3d 14, 19, 370 N.E. 2d 617, 621 (1977).

77. Spangler v. Kranco, Inc., 481 F. 2d 373 (4th Cir. 1973). In *Spangler,* the plaintiff was a pipefitter who was struck by an overhead crane which was manufactured by the defendant in accordance with the plans and specifications of the plaintiff's employer. The plaintiff

permitting an independent contractor to assert this defense when it has dealt with the government are the same as when it has contracted with a private party, the *Hunt* defense should not be limited to governmental design cases.

CONCLUSION

The independent contractor defense adopted by the appellate court in *Hunt v. Blasius* represents a reasonable limitation on Illinois strict products liability actions. By protecting the independent contractor of *sui generis* products, this defense does not contravene the public policy considerations discussed in *Suvada v. White Motor Co.* Rather, it recognizes that those considerations do not apply to every product and every manufacturer or seller. The new defense also considers the equitable principles of protecting parties not originally responsible for creating an unreasonably dangerous product. Of course, the spectre of the uncompensated plaintiff is disturbing. However, the equities underlying the defense and its potential societal benefits compel the defense's complete recognition by the Illinois Supreme Court.

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alleged negligence on the part of the manufacturer for failing to provide a bell or warning device, the absence of which made the crane unreasonably dangerous. The district court judge directed a verdict for the manufacturer, which order was affirmed on appeal.

Although *Spangler* was a negligence action, the plaintiffs asked the court on review to consider a strict liability theory as an alternative basis for finding the defendant liable. The court stated that the independent contractor defense was a complete defense to a strict liability theory as well as a negligence theory. *Spangler* resulted, then, in the expansion of the *Littlehale* defense to include those independent contractors/manufacturers who comply with non-governmental designs.