
IN THE SUPREME COURT OF ILLINOIS

DORA MAE JABLONSKI, et al.,)	On Appeal From the Appellate
)	Court of Illinois, Fifth Judicial
Plaintiffs-Appellees,)	District
)	
v.)	
)	No. 5-05-0723
FORD MOTOR COMPANY,)	
)	
Defendant-Appellant,)	There Heard on Appeal From the
)	Circuit Court for the Third Judicial
and)	Circuit, Madison County, Illinois
)	
NATALIE S. INGRAM,)	No. 03-L-2027
)	
Defendant.)	The Honorable A.A. Matoesian,
)	<i>Judge Presiding</i>

**BRIEF OF CATERPILLAR INC. AS AMICUS CURIAE
IN SUPPORT OF APPELLANT**

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July 28, 2010

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INTEREST OF THE AMICUS CURIAE

Amicus curiae Caterpillar Inc. is a leading manufacturer of construction and mining equipment, diesel and natural gas engines, and industrial gas turbines.¹ It is one of the largest private sector employers in Illinois, employing more than 22,000 people in 45 manufacturing plants and offices throughout the State, including in Peoria (where Caterpillar has a large manufacturing facility and its world headquarters), Aurora, Joliet, and Decatur. As a manufacturer headquartered in Illinois, Caterpillar has a deep and abiding interest in the development of Illinois' common law tort rules.

If allowed to stand, the Fifth District's opinion in this case would impose an essentially boundless duty to warn on manufacturers like Caterpillar, both before and after the products in question are sold. The Fifth District's imposition of a novel post-sale duty to warn is of particular concern to Caterpillar because its products are extremely durable and frequently last for decades; indeed, Caterpillar equipment built in the 1960s is still in use today. Over the last 50 years, Caterpillar has sold millions of pieces of equipment to businesses and governmental entities around the world. Caterpillar has no way of knowing today who owns or uses much of this equipment or how to reach them, since customers often move and equipment is often resold, sometimes more than once, and sometimes to buyers in other countries. Thus, as a practical matter, Caterpillar would have no way of discharging an obligation to transmit post-sale warnings to its customers.

Caterpillar submits this *amicus* brief to ensure that the Court is aware of both the practical and legal ramifications of the broad pre- and post-sale duties to warn that were

¹ Caterpillar manufactures and sells more than 300 different products, including tractors, trucks, excavators, graders, backhoe loaders, logging equipment, paving equipment, underground mining equipment, tunnel boring equipment, power generation equipment, and engines for industrial, construction, petroleum, locomotive and agricultural equipment.

imposed by the Fifth District in this case. On the post-sale duty to warn, the issues go beyond the sheer impossibility of transmitting warnings to unknown customers scattered around the globe who are using products made decades earlier. Another problem is the extraordinarily vague nature of the Restatement (Third) of Torts test the Fifth District adopted, under which a jury would decide whether a manufacturer had a post-sale duty to warn based solely on the jury's after-the-fact evaluation of the "reasonableness" of the manufacturer's conduct. This is not only a radical departure from existing Illinois law, which does not recognize a post-sale duty to warn at all, but also a prescription for confusion and perpetual litigation for Illinois manufacturers. No manufacturer will know whether and when to issue post-sale warnings. And all will be at risk of being second-guessed and subject to potentially massive liability for literally decades if any accident occurs that a jury could conclude, in hindsight, should have provoked a warning.

The Fifth District's view of a manufacturer's duty to warn at the time a product is sold would also impose impossible burdens on manufacturers. The court held that a manufacturer is required to design out, guard against, or warn of every potential hazard presented by a product. Op. 26-27. Caterpillar knows from its own long experience that unforeseeable accidents come in all shapes and sizes; there are countless ways in which people may, unfortunately, be injured when using large, complicated pieces of equipment. As a result, it is simply not possible to warn against every accident that might occur. Even if a complete list of all potential dangers could be compiled, there would be so many that customers would be inundated with warnings, and warnings of remote risks would crowd out and overshadow truly useful warnings—a result that would, in the aggregate, provide *less* protection to those who use the products in question.

The Fifth District’s approach to product warnings is not only impractical and wrong as a legal matter, but also bad public policy. Imposing expansive new duties to warn on manufacturers would inevitably hamper the ability of Illinois-based companies like Caterpillar to compete with companies around the world—for little or no benefit. Drowning customers in a sea of additional warnings is not likely to prevent more accidents. But subjecting manufacturers to potentially massive liability for failing to warn of even the most unlikely accidents will hurt Illinois manufacturers and the employees who depend on them. Particularly at a time when economic conditions are difficult and competition worldwide is intensifying, upholding the Fifth District’s ruling would make it even harder for Illinois companies to compete.

ARGUMENT

I. The Fifth District’s New Post-Sale Duty To Warn Should Be Rejected Because It Would Impose An Impossible Burden On Manufacturers.

A. Despite Claiming Otherwise, The Fifth District Adopted Section 10 Of The Restatement (Third) Of Torts.

The Fifth District upheld a massive judgment against Ford for negligence, including a punitive damages award, on the theory that the jury could have concluded that Ford should have warned plaintiffs nearly a decade after they bought their car about the risk that an object placed in a certain way in the trunk might pierce the fuel tank in a high-speed rear-end collision and should have provided them with recommendations about how that risk could be avoided. Op. at 36-48. In reaching that decision, the court disclaimed any “need to determine whether Illinois should adopt a postsale duty to warn of hazards not discovered until after a product leaves the manufacturer’s control” and thus purported to “offer no opinion” on whether Illinois should adopt the particular version of a post-sale duty to warn set forth in section 10 of the Restatement (Third) of

Torts: Product Liability (1998). *Id.* at 42. Instead, the Court purported to affirm on the theory that the jury could have found that Ford should have discovered (and warned about) the claimed hazard *before* the 1993 Lincoln Town Car was sold.

Notwithstanding its protestations to the contrary, however, it is clear that the Fifth District did adopt the post-sale duty to warn set forth in section 10. It did so by approving a jury instruction that was not only “patterned after Section 10,” as the opinion says at 44, but is in fact *virtually identical* to section 10. The instruction—which was designed “to guide the jury in determining if Ford was negligent in failing to give a postsale warning” (*id.*)—provided that a seller of a product is ““subject to liability”” for not ““provid[ing] a warning after the time of sale or distribution of a product”” if:

“The seller knows or reasonably should know that the product poses a substantial risk of harm to persons; and

“Those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and

“A warning can be effectively communicated to and acted on by those to whom a warning might be provided; and

“The risk of harm is sufficiently great to justify the burden of providing a warning.”

Op. at 44-45 (quoting the instruction). Compare Restatement (Third) of Torts: Product Liability § 10.²

² Section 10 of the Restatement (Third) provides:

(a) One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller’s failure to provide a warning after the time of sale or distribution of a product if a reasonable person in the seller’s position would provide such a warning.

(b) A reasonable person in the seller’s position would provide a warning after the time of sale if:

Inexplicably, the Fifth District stated that this instruction did not “suggest[] that Ford was required to warn of hazards it should not have discovered before the 1993 Lincoln Town Car left its control.” Op. at 45. But that is exactly what the jury must have understood the instruction to say. There is nothing that limited liability to hazards that should have been discovered before the product left the seller’s control. Indeed, that is the whole point of section 10. It imposes liability when “new information is brought to the attention of the seller, after the time of sale,” of a “hitherto unknown risk,” and the seller then fails to warn its customers. Restatement § 10 cmt. c. And that is exactly what the Fifth District did: it affirmed the jury’s verdict because Ford did not tell the plaintiffs about new safety improvements that were not developed until almost a decade after the 1993 Lincoln Town Car was manufactured and sold.

B. The Fifth District’s Ruling Is Squarely At Odds With Well-Settled Illinois Law.

The Fifth District’s *de facto* adoption of section 10 as a basis for liability, and the creation of a new post-sale duty to warn, is clearly inconsistent with longstanding Illinois law. *See Modelski v. Navistar Int’l Transp. Corp.*, 302 Ill. App. 3d 879, 887-88 (1st Dist. 1999) (there is no “obligation to issue post-sale warnings of dangers which were not known, nor should they have been known, at the time the product left the manufacturer’s

(1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and

(2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and

(3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and

(4) the risk of harm is sufficiently great to justify the burden of providing a warning.

control”); *Carrizales v. Rheem Mfg. Co.*, 226 Ill. App. 3d 20, 32-35 (1st Dist. 1991) (Illinois law does “not...impose a continuing duty to warn against a hazard discovered subsequent to the time [the product] left the manufacturer’s control” or “plac[e] a duty on manufacturers to subsequently warn all foreseeable users of products by reason of a better design or construction not available at the time the product entered the stream of commerce”); *Kempes v. Dunlop Tire & Rubber Corp.*, 192 Ill. App. 3d 209, 218 (1st Dist. 1989) (a failure to warn is not actionable unless the manufacturer “knew or should have known of the danger that caused [the] injury...at the time of manufacture”); *Collins v. Hyster Co.*, 174 Ill. App. 3d 972, 977 (3d Dist. 1988) (“Certainly the law does not contemplate placing the onerous duty on manufacturers to subsequently warn all foreseeable users of products based on increased design or manufacture expertise that was not present at the time the product left its control”); *Birchler v. Gehl Co.*, 88 F.3d 518, 520-21 (7th Cir. 1996) (“the law in Illinois is generally that there is no continuing duty to warn after a product has been manufactured and sold”).

These decisions are grounded in this Court’s ruling in *Woodill v. Parke Davis & Co.*, 79 Ill. 2d 26 (1980), which held that a manufacturer has no duty to warn unless it knew or should have known of the danger “*at the time of sale.*” *Id.* at 34 (emphasis added); *see id.* at 30-31, 37. *See also Modelski*, 302 Ill. App. 3d at 888; *Kempes*, 192 Ill. App. 3d at 218 (both discussing *Woodill*); Illinois Pattern Jury Instruction No. 400.07D (“The manufacturer has a duty to adequately warn the consumer about the dangers of its product of which it knew, or in the exercise of ordinary care, should have known, *at the time the product left the manufacturer’s control*”) (emphasis added).

The section 10 instruction that the Fifth District approved is directly contrary to all of these decisions precisely because it does not limit the duty to warn to information

that was known at the time of the sale. The Appellate Court did not cite any basis in Illinois law for that instruction. Nor is there any.³

C. The Post-Sale Duty To Warn Created By The Fifth District Would Impose An Impossible Burden On Illinois Manufacturers.

Besides being squarely inconsistent with well-settled Illinois law, the creation of a new post-sale duty to warn would wreak havoc on Illinois-based manufacturers like Caterpillar. For a host of reasons, this Court should reverse the Fifth District's endorsement of Section 10 of the Restatement (Third) of Torts.

1. The first problem is that imposing on a manufacturer a post-sale duty "to warn its...customers" (Op. at 46) assumes that the manufacturer can *identify* the current users of its products. But there are very real "practical difficulties of identifying customers." Joel H. McNatt, *Oklahoma Manufacturers' Products Liability: Engaging Particular Who, What and How Restatement (Third) Issues, With a Little Help From My Friends*, 28 OKLA. CITY L. REV. 385, 402 (2003). Caterpillar is a good example. Caterpillar typically sells its products through independent dealers and therefore must rely on those dealers to identify the original purchasers and then to report any subsequent warranty claims. After the warranty period expires, Caterpillar's knowledge about the

³ Illinois is hardly alone in refusing to impose a post-sale duty to notify customers of safety improvements, or warn against hazards that were unknown at the time a product was manufactured. *E.g.*, *McLennan v. American Eurocopter Corp.*, 245 F.3d 403, 430 (5th Cir. 2001) ("Texas courts generally do not recognize any post-sale duty to warn of product hazards arising after the sale"); *Anderson v. Nissan Motor Co.*, 139 F.3d 599, 602 (8th Cir. 1998) ("Nebraska would not impose...a post-sale duty to warn"; Nebraska cases "limit[] the state's products liability law to actions or omissions which occur at the time of manufacture or sale"); *DeSantis v. Frick Co.*, 745 A.2d 624, 631 (Pa. Super. Ct. 1999) (refusing to adopt section 10 because, contrary to Pennsylvania law, "Section 10 eliminates the requirement that a plaintiff must demonstrate evidence of a defect at the time of sale"); *Boatmen's Trust Co. v. St. Paul Fire & Marine Ins.*, 995 F. Supp. 956, 962 (E.D. Ark. 1998) (there is "no cause of action under Arkansas law involving any post-sale duty to warn").

ownership of products it sold becomes even more tenuous, since dealers often lose track of where the equipment is and who currently owns it. Caterpillar makes products that remain in use for decades all over the world and are often resold, sometimes on several occasions. Even when Caterpillar equipment remains with its original purchasers, they often do not notify either the dealer or Caterpillar when they move. As a result, Caterpillar has no knowledge of the identity or location of hundreds of thousands of customers who are currently using its products, no practical means of learning that information, and thus no way of notifying many customers of new safety improvements that did not exist when Caterpillar first sold those products, or of warning them about potential hazards that were unknown at the time of manufacture.

Given these realities of its business, how is a company like Caterpillar supposed to provide post-sale warnings to everyone currently operating a piece of Caterpillar equipment? Should it, as one commentator stated facetiously, “[t]ake out ads in newspapers?” Charles H. Moellenberg, Jr., *Post-Sale Duty to Warn: An Uncertain Future*, 10-Fall KAN. J.L. & PUB. POL’Y 94, 95 (2000). Even if that were a serious suggestion, newspaper ads would hardly be an effective means of communicating with, say, a construction company operating in a rural Chinese province, or even with a logger in an Oregon forest. And no matter what a manufacturer does to attempt to provide unknown customers with post-sale warnings, a plaintiff who does not receive a particular warning can always claim that the manufacturer did not do enough.⁴

⁴ Section 10 of the Third Restatement requires warnings to be given only to those owners who can be identified. But, under the Fifth District’s ruling, it would be up to the jury to evaluate plaintiffs’ contentions “that a program that was not successful in warning them was not reasonable.” Kenneth Ross & J. David Prince, *Post-Sale Duties: The Most Expansive Theory in Products Liability*, 74 BROOK. L. REV. 963, 968 (2009).

The fact is that it is not possible for a company like Caterpillar to even identify, much less notify, all of the current owners of Caterpillar products that are still in use, several decades after being manufactured, all over the world. Courts should not impose impossible burdens on manufacturers and leave them at the whim of a jury when, inevitably, they cannot satisfy those burdens.

2. Even if Caterpillar could somehow identify all of its current product owners, the costs of keeping track of them and providing them with post-sale warnings would be extremely high since they are located in every state in the Union and dozens of countries around the world. “Establishing a means of tracing the product to identifiable consumers takes planning, considerable effort, and substantial cost” in the best of circumstances. McNatt, *Oklahoma Manufacturers’ Products Liability*, 28 OKLA. CITY L. REV. at 402 n.66 (citing Kenneth Ross, *Post-Sale Duty to Warn: A Critical Cause of Action*, 27 WM. MITCHELL L. REV. 339, 348-49 (2000)). When a company’s customers are not only located in all 50 states and every corner of the globe, but the customers also resell the company’s products in private transactions 20 or 30 years after they were manufactured, the difficulties and costs of setting up and running an effective tracing system increase exponentially. To make matters worse, under the Fifth District’s ruling, Caterpillar would have to notify each of its customers of each safety improvement that is invented, or each new hazard of which it learns, for the entire decades-long life span for each of its hundreds of products. Because “post-sale duties to warn apparently last for the life of the product,” that “actually works to punish a manufacturer for product durability.” McNatt, *Oklahoma Manufacturers’ Products Liability*, 28 OKLA. CITY L. REV. at 402. The longer the product’s lifespan, the greater the responsibilities placed on the manufacturer.

Thus, even if it were possible for companies like Caterpillar to have effective tracing and warning systems, the enormous costs of those programs would surely outweigh the dubious benefits of flooding customers with warnings year after year. *See infra* at 19 (issuing too many warnings will cause customers to simply ignore all of them, including genuinely useful warnings). Even then, as noted earlier, a plaintiff could always assert that the company's tracing efforts were not enough, or that the warnings actually given were insufficient. And, under the Fifth District's ruling, those claims would be decided by a jury exercising 20/20 hindsight. Ross & Prince, *Post-Sale Duties*, 74 BROOK. L. REV. at 971 ("The question of whether a particular defendant's actions are 'reasonable'" in establishing and operating a tracing system "will be case-specific and decided by the jury").

Until now, Illinois courts have rejected the imposition of an "onerous duty on manufacturers" to provide post-sale warnings to "all foreseeable users of products." *Modelski*, 302 Ill. App. 3d at 888 (quoting *Collins*, 174 Ill. App. 3d at 977). This Court should reaffirm that position.

3. Because the post-sale duty to warn postulated by the Fifth District would last for the entire useful life of a product, and would impose liability because of safety improvements invented or hazards discovered long after the product was sold, manufacturers would face "open-ended, never-ending liability." McNatt, *Oklahoma Manufacturers' Products Liability*, 28 OKLA. CITY L. REV. at 403 (quoting Moellenberg, *Post-Sale Duty to Warn*, 10-Fall KAN. J.L. & PUB. POL'Y at 96). This would pose particular difficulties for companies like Caterpillar, whose products last for many years, and it would be inconsistent with longstanding Illinois precedent. As this Court has held,

a logical limit must be placed on the scope of a manufacturer's liability.... To hold a manufacturer liable for failure to warn of a danger of which it would be impossible to know based on the present state of human knowledge would make the manufacturer the virtual insurer of the product, a position rejected by this court.

Woodill, 79 Ill. 2d at 37. Contrary to *Woodill*, the Fifth District's decision would transform manufacturers into virtual insurers of their products, no matter how long ago the products were made. In contrast, existing Illinois law recognizes that it is inappropriate to impose liability on a manufacturer for not providing post-sale warnings concerning a product sold decades earlier. *See Modelski*, 302 Ill. App. 3d at 881, 887-88 (Navistar had no duty to provide post-sale warnings concerning a tractor manufactured in 1957, sold in 1983, and bought by the plaintiff in another sale in 1989).

4. Yet another problem is that the section 10 standard that the Fifth District approved makes it impossible for a manufacturer to know, in advance, what kind of new information will trigger a post-sale duty to warn. The standard is vague and amorphous, depending on whether a "reasonably careful person in the seller's position would provide a warning after the time of sale." *Op.* at 45. *See Ross & Prince, Post-Sale Duties*, 74 BROOK. L. REV. at 968 ("The four factors of section 10(b) are fact-based, making the reasonableness of supplying a post-sale warning the key to establishing a post-sale duty"). Moreover, whether the standard is satisfied is treated as a question of fact for the jury to decide, thus making it even harder to predict whether and when a post-sale duty to warn arises under the facts of any particular case.

Apart from the uncertainty this standard creates, the notion that a jury should decide the scope of a manufacturer's duty is inconsistent with long-standing Illinois law. This Court has made clear that "the existence of a duty turns in large part on public policy considerations." *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 151 (1990). The "legal

concept of ‘duty’ is...an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection.” *Carrizales*, 226 Ill. App. 3d at 29. Thus, it is well settled that whether the defendant had a “duty” is “a question of law to be determined by the court.” *Martin v. Ortho Pharm. Corp.*, 169 Ill. 2d 234, 240 (1996) (holding that a manufacturer had no duty to warn the plaintiff). *See also, e.g., Genaust v. Illinois Power Co.*, 62 Ill. 2d 456, 466 (1976) (“The determination of whether a duty to warn exists is a question of law and not of fact”); *Collins*, 174 Ill. App. 3d at 977 (“The question of whether the facts in any given circumstances establish the existence of a duty is determined as a matter of law”). Indeed, in *Birchler*, the Seventh Circuit even held that “there is no need to consider the specific facts of the[] case” because whether there is a duty to warn in Illinois is decided “as a matter of law.” 88 F.3d at 520.

There is no basis in Illinois law for giving jurors the power to decide the quintessentially legal question of whether there is a post-sale duty to warn. A jury has no way of weighing the public policy considerations Illinois courts are supposed to consider in making the legal judgment of whether a duty to warn exists. Delegating that decision to a jury with the only guidance being what they think a “reasonable” manufacturer would have done under the circumstances would inevitably result in a decision based on emotion and 20/20 hindsight—just as it did here. *See Moellenberg, Post-Sale Duty to Warn*, 10-Fall KAN. J.L. & PUB. POL’Y at 95 (the reasonableness standard in section 10 will “var[y] from person to person and jury to jury” and will “obviously subject[]” manufacturers “to a risk of second guessing”).⁵ Among other

⁵ The risk that the jury will be improperly influenced by hindsight bias is enormous. It is human nature to assume that anything that has happened in the past was reasonably

things, that type of *ad hoc* approach would deprive manufacturers of the certainty they need to operate their businesses efficiently.

5. Illinois courts also have recognized that requiring manufacturers to notify customers of post-sale safety improvements “might well ‘discourage manufacturers from developing safer products.’” *Modelski*, 302 Ill. App. 3d at 888 (quoting *Carrizales*, 226 Ill. App. 3d at 35). *See also Carrizales*, 226 Ill. App. 3d at 35 (It is “unreasonable to place a continuing duty to warn” upon manufacturers when “state-of-the-art technology ...continually evolves to reduce hazards”). If every time a manufacturer like Caterpillar develops a new type of safety device, it has to consider whether the device could be adapted to arguably reduce the risks associated with using other types of equipment sold years (and even decades) earlier, the manufacturer is going to think twice about whether incremental design changes are worth the candle. *See* Victor E. Schwartz, *The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine*, 58 N.Y.U. L. REV. 892, 900-01 (1983) (if manufacturers, “by developing new and safer products,” are “exposed to liability for harm caused by an older product made and sold before the safety improvements were developed,” that “may discourage the very conduct society seeks to foster”— “[p]rogress and innovation should not be penalized by attaching to them a duty to go out into the marketplace to find and fix old products”).

This case illustrates the point. Ford created a modification kit and crafted warnings specifically for police vehicles, which faced special risks because of the unique

foreseeable. Furthermore, the jury may be confused and the defendant might be significantly prejudiced on the question of whether the product was defective at the time of sale if (as in this case) evidence is allowed in concerning subsequent safety measures. *See* Ross, *Post-Sale Duty to Warn*, 27 WM. MITCHELL L. REV. at 350 (“A plaintiff might argue that the original product is defective without the safety improvement and use the improvement as proof of a time-of-sale defect”).

types of equipment that police vehicles carry, including ammunition, rifles, flares, batons and the like. Plaintiffs prevailed on the theory that Ford was required to provide the same warnings and information with respect to *other* vehicle types even though there were no examples of civilian vehicles suffering the same kind of accident. The Fifth District did not even attempt to explain how or why a manufacturer in Ford's position would have understood that it owed a duty to provide such warnings.

This aspect of the Fifth District's opinion is particularly troubling to Caterpillar because it has a product support process through which it issues safety and other information to dealers about Caterpillar products that are currently in use. Such programs should be encouraged. But the Fifth District's decision is bound to have the opposite effect. By suggesting that Ford had a duty to broadly warn owners of all vehicles with a fuel tank behind the rear axle because it provided information to some owners of such vehicles, the Fifth District created a disincentive to issue *any* post-sale warnings or information at all, lest the group warned be deemed (in hindsight) too small.

6. Yet another problem with the Fifth District's opinion is that it creates an impermissible end-run around the statute of repose, which bars strict liability claims filed after 10 or 12 years based on a "warning or instruction regarding any product." 735 ILCS 5/13-213(b) (1994).⁶ Although strict liability claims seeking damages on the theory that a product was defective because of a failure to warn would be barred, under the Fifth District's view, the very same claim could be made under a negligence rationale for as long as the product was in use. This would undermine the central purpose of the

⁶ Because the 1995 amendments to the statute of repose were part of legislation that this Court held was unconstitutional and void in its entirety in *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 468-71 (1997), the prior version of that statute remains in effect. *Unzicker v. Kraft Food Ingredients Corp.*, 203 Ill. 2d 64, 71 n.1 (2002) ("The effect of *Best* was to leave the law in force as it was before the adoption of the amendment").

Illinois statute of repose: to cut off liability with respect to products after a definite period of time. See *Ferguson v. McKenzie*, 202 Ill. 2d 304, 311 (2001) (“A statute of repose...is intended to terminate the possibility of liability after a defined period of time”). Instead, Illinois manufacturers would be threatened for decades with potentially massive liability for products with long life expectancies.

7. Whatever the merits might be of imposing post-sale duties to warn on a *prospective* basis, there is no justification for imposing such a duty *retroactively*, as the Fifth District did against Ford. The Restatement Third test focuses on whether a manufacturer acted reasonably in not issuing post-sale warnings. Under the Illinois case law described above, however, Ford and other manufacturers had no duty as a matter of law to issue warnings based on information that became available and events that occurred after the product was sold. Thus, by definition, it was reasonable for a manufacturer to conclude that it had no obligation to issue post-sale warnings.

8. If the Fifth District’s ruling were upheld, Illinois likely would become a magnet for similar lawsuits. That is particularly true in light of the Fifth District’s affirmance of a \$15 million punitive award based at least in part on Ford’s decision to warn and provide safety improvements only with respect to police vehicles and not with respect to other vehicles with a fuel tank behind the rear axle. One commentator has hypothesized that punitive damages may be easier to obtain in cases like this where plaintiffs can “argue for further discovery of post-sale actions and greater admissibility of post-sale accidents.” See Ross & Prince, *Post-Sale Duties*, 74 BROOK. L. REV. at 967 & n.29 (“[r]esearchers analyzing punitive damages cases have found almost 75% of such awards to be based on the failure of a manufacturer to take appropriate post-sale actions”). Recognizing a post-sale duty to warn would (as in this case) provide a basis

for plaintiffs to argue that evidence about post-sale accidents should be admitted, thus increasing plaintiffs' chances of obtaining a significant punitive award.

The expansive post-sale duty adopted by the Fifth District would encourage suits to be filed in Illinois for accidents that occurred elsewhere: Caterpillar, for example, would be more likely to be sued in Illinois for an accident that occurred in another state or another country, based on the theory that its Illinois headquarters should have issued a post-sale warning concerning equipment manufactured a quarter of a century earlier.

9. All of this would hurt Caterpillar and other Illinois-based manufacturers in competing with companies elsewhere in the United States and around the world that are not subject to similarly lenient liability standards. To no good purpose, since inundating owners of products with post-sale warnings about remote risks is not likely to result in a reduction in accidents. But it would hurt Illinois manufacturers. As economic conditions have deteriorated over the past few years, competition has become increasingly fierce. The potential for enormous liability from accidents involving products sold decades ago would serve only to harm Illinois manufacturers—and the tens of thousands of people who work for them—in competing for business against companies that face no such threat.

II. This Court Should Reject The Fifth District's Expansive View Of The Duty To Warn At The Time Of Sale.

The Fifth District concluded that the judgment in favor of plaintiff could also be affirmed on the ground that Ford had a duty to warn when the Lincoln Town Car was sold about the danger that objects in the trunk could puncture the fuel tank in a high-speed, rear-end collision. The Fifth District reached that conclusion based on its assumption that the “general engineering standard of care” requires an engineer to take

into account every “potential hazard in a product.” Op. at 26. The court held that once a potential hazard has been identified, the engineer must either redesign the product to eliminate it, create a guard or shield to eliminate or reduce the risk, or if that is impossible, warn the consumer about the hazard. *Id.* The court held that a manufacturer has a continuing duty to warn of hazards it knew about at the time of sale and that this duty included an obligation to update warnings when new information became available.

The Fifth District concluded that Ford had a continuing duty to warn in this case because the jury could have found that Ford knew in 1993, when the Lincoln Town Car at issue here was sold, that there was a risk that items in the trunk could puncture the fuel tank and cause a catastrophic fire in the event of a high-speed, rear-end collision. There was no evidence that such an event had ever occurred on *any* vehicle of *any* kind prior to 1993. R1773-74; 1876-77; 2247-49; 2721. Between 1993 and 2003, when the accident occurred, there were a handful of incidents in which police cars built on the same “Panther” platform as the Lincoln Town Car experienced a punctured fuel tank because of objects in the trunk as a result of a high-speed, rear-end collision. R1686-87; 1823; 2708; 2761-62; Ex. P-96. But until the accident at issue here, there were no such incidents involving a civilian vehicle built on the same platform. Nevertheless, the court cited two facts in support of its conclusion that Ford had knowledge of a potential puncture hazard in the Lincoln Town Car in 1993: (i) as early as 1970, Ford design engineers took the possibility of punctures from objects in the trunk into account in deciding the fuel tank location in its automobiles, and (ii) Ford was aware of a “substantial number” of accidents before 1993 in which the fuel tank had ruptured—although none of those accidents was identified as involving a puncture caused by an object in the trunk. Op. at 42.

There are a number of problems with the way in which the Fifth District articulated its version of the “continuing duty” to warn and the way it was applied to the facts of this case. First, the law in Illinois has never been that a manufacturer has a duty to design or warn against every “potential hazard” the manufacturer could have identified. Instead, the duty is triggered only if the manufacturer “should have foreseen that the design would be hazardous to someone.” *Calles v. Scripto-Tokai Corp.*, 224 Ill. 2d 247, 271 (2007). That means that “the plaintiff must show the manufacturer knew or should have known of the risk posed by the product at the time of manufacture.” *Id.* “In order to find that the manufacturer should have known of the danger inherent in the product, it must be objectively reasonable to expect the user of the product to be injured in the manner in which the plaintiff was injured.” *Sparacino v. Andover Controls Corp.*, 227 Ill. App. 3d 980, 986 (1st Dist. 1992). “It is not enough that the injury was merely conceivable.” *Id.* See also *Winnett v. Winnett*, 57 Ill. 2d 7, 12-13 (1974) (“Foreseeability means that which is objectively reasonable to expect, not merely what might conceivably occur”).

Here, the test the Fifth District employed required the manufacturer to design or warn against “what might conceivably occur” rather than what is “objectively reasonable to expect.” That is apparent not only from the court’s statement that Ford was required to warn against every “potential hazard” but also from the evidence the court relied upon in concluding that Ford had a continuing duty to warn. That Ford designers knew generally that the possibility of a puncture is a factor to be considered in determining the location of a fuel tank is not evidence that it was “objectively reasonable” for Ford to “expect” that objects laid in a certain direction in the Lincoln Town Car would cause a puncture in an accident. And the fact that fuel tanks had ruptured and caused fires in the past says

nothing about *why* those ruptures occurred. Without some evidence that Ford knew that the particular design of the Lincoln Town Car was such that it was “objectively reasonable to expect” that objects laid a certain way in the trunk could cause a rupture by puncturing the fuel tank, there is no basis for concluding that Ford had a duty either to design or warn against the risk of such punctures.

To hold otherwise would subject manufacturers to an impossible standard of care, under which they would have to anticipate *all* potential hazards and either find a way to prevent or warn against them. Requiring manufacturers to warn against all “potential hazards,” however, creates a serious risk that manufacturers will over-warn, inundating buyers with information they are unable or unwilling to read or digest. *See* Lars Noah, *The Imperative to Warn: Disentangling the “Right to Know” From the “Need to Know” About Consumer Product Hazards*, 11 YALE J. ON REG. 293, 296 (1994) (a duty to warn of “all sorts of risks” includes a duty to warn of “trivial risks”). That would leave buyers worse off, by reducing the likelihood that they will read and absorb the important information that will ensure that they use products in as safe a manner as possible. *See id.* at 296, 374-75 (there are “substantial costs associated with the overuse of warnings, particularly the twin dangers of diluting the impact of more serious warnings and prompting counterproductive consumer behavior in response to overly alarming warnings about relatively insignificant risks”; thus, even if it were possible to warn “about every potential hazard..., it would be undesirable to do so”).

Apart from the negative consequences of information overload, the Fifth District’s “continuing duty” approach uses sleight-of-hand to create a post-sale duty to warn. For all of the reasons outlined above, under Illinois law manufacturers do not and should not have a duty to warn product owners of hazards that are not discovered until

after the product is sold. The Fifth District’s approach effectively abolishes that rule by defining “potential hazards” so broadly that subsequent information and events will almost always be deemed to relate back to some “potential hazard” that the manufacturer knew or should have known about at the time the product was sold.

Once again, the way the Fifth District used the evidence in the case before it proves the point. As noted above, in the decade following the sale of the vehicle at issue here, Ford became aware of a number of incidents in which the fuel tanks of Crown Victoria police vehicles ruptured because they were punctured by objects in the trunks that had been positioned in a particular manner. That information may have triggered a duty to warn police departments that purchased new Crown Victoria vehicles of the puncture risk. (Caterpillar has no view as to whether these reports triggered a duty to warn subsequent buyers of civilian vehicles). But to say, as the Fifth District did, that Ford should have known of the puncture risk even *before* any of these accidents occurred would effectively require it to be clairvoyant. Again, that Ford knew in the abstract that there was a hypothetical risk that objects in a trunk could puncture a fuel tank in a collision does not mean that it was “objectively reasonable” for Ford to “expect” that such an accident would happen even in police vehicles—let alone in civilian vehicles like the Lincoln Town Car at issue here.

Triggering a duty to warn based on a vague suspicion of potential risk at the time the product was sold and then stacking on top a duty to keep product owners informed of subsequent events that bear in some way on that risk would impose the same kinds of impossible burdens on manufacturers that a post-sale duty to warn would entail. Indeed, the test the Fifth District adopted to define the duty to warn at the time of sale is even *more* burdensome because it would require a manufacturer to warn against purely

theoretical risks that might never materialize. For all of the reasons outlined above, imposing such a duty on Illinois corporations would yield no benefit and would serve only to weaken their ability to succeed in an increasingly competitive world.

CONCLUSION

For the foregoing reasons, Caterpillar urges the Court to reject the Fifth District's conclusion that Ford had and breached a post-sale duty to warn or a continuing duty to warn by not advising plaintiffs of the risk of punctures from objects positioned in a particular way in the trunk of their 1993 Lincoln Town Car.

July 28, 2010

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CERTIFICATE OF COMPLIANCE WITH SUPREME COURT RULE 341

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 21 pages.

Michele Odorizzi

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on July 28, 2010, she caused three copies of the foregoing **BRIEF OF CATERPILLAR INC. AS AMICUS CURIAE IN SUPPORT OF APPELLANT** to be served on all counsel of record by causing said copies to be sent via courier for overnight delivery on July 28, 2010 to:

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