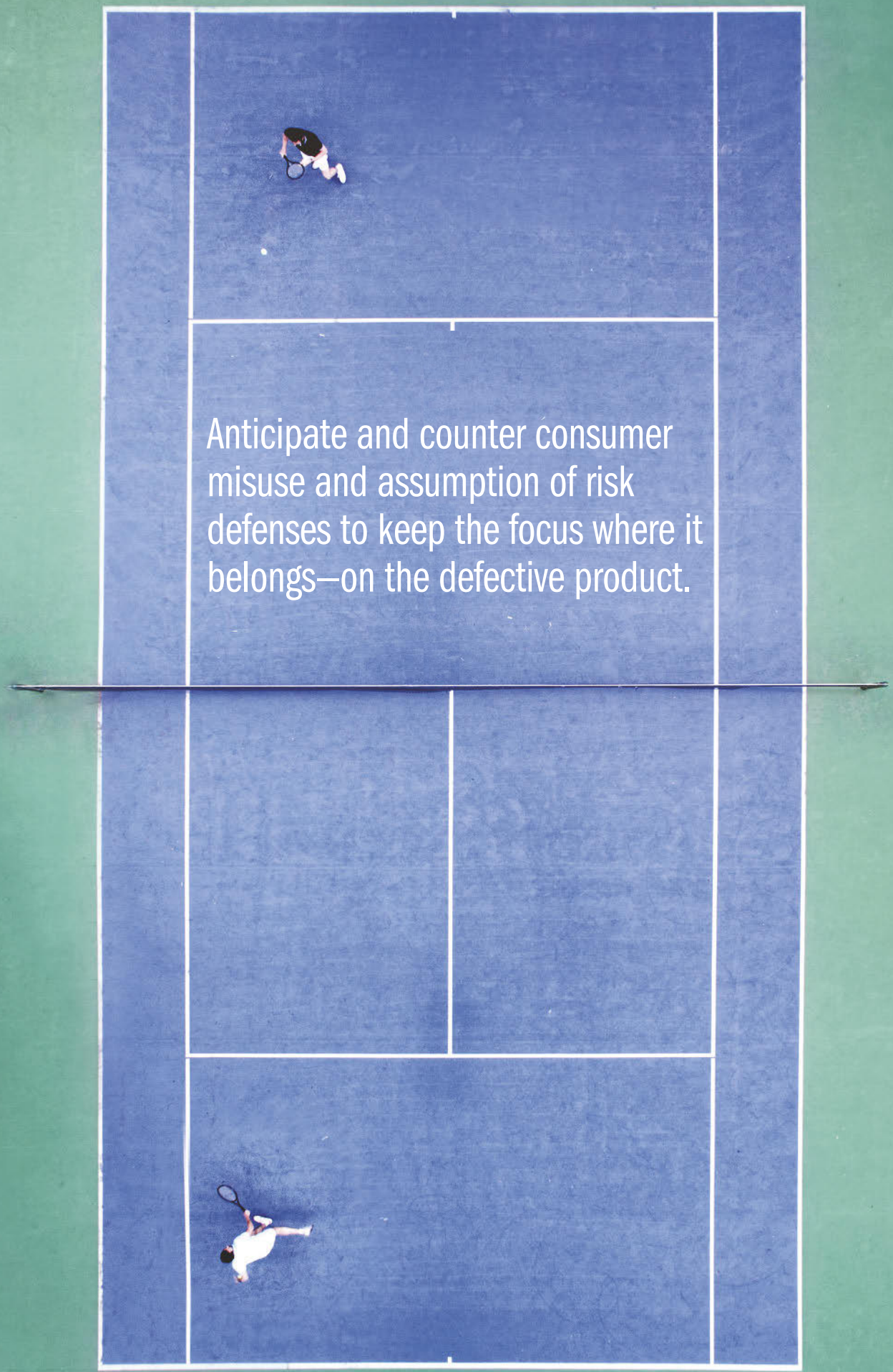

Anticipate and counter consumer misuse and assumption of risk defenses to keep the focus where it belongs—on the defective product.

A DANGEROUS BLAME SHIFTING GAME

By || **Anne McGinness Kearse and W. Taylor Lacy**

Products liability defendants often attempt to reduce or eliminate their liability for consumers' injuries by arguing that the consumer misused the product or assumed the risk of its use. For example, while making hamburger patties, a chef uses his hand rather than a supplied metal rod to feed the meat into a meat grinder. His hand becomes stuck in the grinder, and he loses a finger. If the chef was aware of the risks in using his hand to feed the grinder, or if doing so was contrary to the device's unambiguous instructions, his product defect claims could be thwarted by misuse or assumption of risk.[1]

When these defenses are invoked, a serious injury from a defective product can result in a small settlement or no settlement at all. Be aware of the elements of these defenses, know when they apply, and identify who has the burden of proof—and plan your discovery accordingly.

Defendants often assert misuse when a plaintiff's use of a product is "unreasonable and unforeseeable"[2] or contrary to the product's warnings or instructions. Assume, for example, that the chef attempted to cook the hamburgers on a sauna heater, not on a grill, and was injured when a fire ensued—such a use would arguably be unreasonable, unforeseeable, and contrary to the sauna heater's instructions.[3]

Some jurisdictions consider misuse an affirmative defense, so the defendant must plead and prove that the plaintiff's use was neither reasonable nor foreseeable, while others require the plaintiff to show that the product was unsafe during a reasonably foreseeable use.[4] At the outset, determine whether your jurisdiction has form jury instructions on misuse, and if so, identify the specific elements and the party with the burden of proof.

When misuse is raised as an affirmative defense, establish that your client used the product in a reasonable and foreseeable manner. "A product is not 'misused' merely because the manufacturer intended that it be used in a different manner; [rather] the manufacturer must show that the use which caused the injury was not reasonably foreseeable."[5]

For example, while an automaker may not intend for its cars to be involved in collisions, these incidents are foreseeable and often occur even when motorists are driving reasonably. Many courts do not allow a plaintiff's misuse in causing the collision to reduce the manufacturer's liability in crashworthiness cases.[6]

Defendants also may allege the plaintiff failed to "read and heed an adequate warning."[7] This kind of misuse is based on the view that a product cannot be defective or unreasonably dangerous if its warnings make that product "safe for use if . . . followed."[8] To preserve a design defect claim, focus on the warnings' inadequacy or inability to make the product safe.

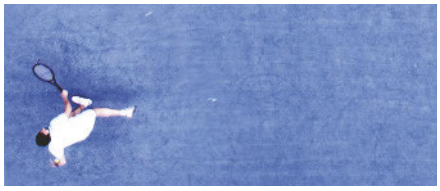
For example, assume a consumer purchased a commercially available sprayable chemical mold remover for a home improvement project. The mold remover's label states "may irritate eyes" and "goggles may offer some protection." He wears goggles when using the remover and does not suffer any eye injuries, but his lungs are damaged from inhaling the product's vapors.

Although the manufacturer knew of the inhalation risk, the product's instructions did not identify that hazard or provide any instructions on how to use

the product to avoid it. As such, the product's warning was both inadequate and incapable of making the remover safe to use. Moreover, many states reject the idea that warnings, even "those determined to be accurate, clear, and unambiguous,"[9] can "insulate manufacturers from their duty of safe design,"[10] as does *The Restatement (Third) of Torts: Products Liability*.[11]

The type of assumption of risk that is often at issue in products liability cases is secondary implied assumption of risk.[12] This common-law implied assumption of risk is a true affirmative defense and may apply if a plaintiff knowingly, voluntarily, and either reasonably or unreasonably encounters a risk created by a defendant's negligence.[13] For example, if someone notices one of his truck's tires is underinflated but drives at excessive speeds during a rainstorm and is subsequently injured when the tire blows out, his claims against the tire manufacturer may be reduced or barred outright.

Nevertheless, many jurisdictions have codified variations of implied assumption of risk: Some reduce a plaintiff's recovery,[14] while others bar recovery.[15] Analyzing a plaintiff's knowledge and awareness of a product's risks usually "involves a *subjective* inquiry into the plaintiff's state of mind," not an assessment of "what a



reasonable or normal person would or should have known and understood in similar circumstances."[16]

Look to see whether your jurisdiction has form jury charges on assumption of risk, and then consider how the plaintiff's education, training, or experience with the product may show a lack of awareness. Keep in mind that "the assumption of risk determination is peculiarly one of fact for a jury to resolve."[17]

Case Intake and Pleadings

To determine whether assumption of risk or misuse may be at play in your products liability case, as part of your case intake analysis, be sure to:

1. Locate the product, send an evidence preservation letter, and request a prompt presuit inspection.
2. Obtain any witness statements and reports from investigating authorities. Contact witnesses who are not represented by counsel.
3. Review manufacturer websites for product labels and any hazard identification or cautionary statements, and search government websites for prior complaints or incidents involving the same product.

ASSERT THAT YOUR CLIENT'S USE OF THE PRODUCT WAS REASONABLE UNDER THE CIRCUMSTANCES, FORESEEABLE TO THE DEFENDANT, AND CONSISTENT WITH THE PRODUCT'S LABELING.

4. Retain experts based on product type and conduct a presuit inspection. Carefully document any evidence related to the client's product use (for example, in a seat belt defect case, it is crucial to document "witness marks," the faint yet discernable physical signs on a latch plate, retractor, or the belt itself that indicate seat belt usage).
5. Review post-incident medical records. While positive clinical test results for drugs or alcohol may be deemed irrelevant to misuse or assumption of risk,[18] challenging such results often requires extensive expert and third-party discovery and briefing.[19]

If you decide to move forward, address misuse and assumption of risk proactively in the complaint. Regardless of who has the burden of proof, allege facts showing no misuse or assumption of risk.[20] Assert that your client's use of the product was reasonable under the circumstances, foreseeable to the defendant, and consistent with the product's labeling. Also allege that the plaintiff was unaware of the product's dangers. Even if these allegations are

denied, you can inquire about the factual bases for those denials later in discovery.

Review the defendant's answer for allegations of misuse or assumption of risk. The Federal Rules of Civil Procedure and certain state counterparts deem assumption of risk a waivable affirmative defense.[21] Some jurisdictions similarly categorize misuse as an affirmative defense.[22] Courts have not consistently applied the heightened plausibility pleading standards imposed in *Ashcroft v. Iqbal* and *Bell Atlantic Corp. v. Twombly* for affirmative defenses,[23] and they may dismiss or strike misuse or assumption of risk if they are not adequately pleaded. Then, frame your discovery requests related to user conduct accordingly.

Discovery

Once you've identified which defenses may be asserted, tailor your discovery plan accordingly.

Protective orders. Avoid restrictive protective orders that can limit your access to pertinent evidence.[24] While defendants want to prevent disclosure of sensitive information to their competitors, their

PREVIOUS SPREAD AND THIS PAGE: ORBON ALIJA/GETTY IMAGES

proposed protective orders usually do far more. Orders may broadly define "confidential" material, prohibit disclosure of information both to plaintiff attorneys with similar cases and to government agencies with oversight authority, and require destruction of those documents at the end of the case.

To avoid such provisions, proactively circulate a sharing protective order with your initial discovery.[25] This puts the burden of establishing a need for more restrictive terms on the defendant and preempts any eleventh-hour claim that the defendant cannot respond without a nonsharing order.

If the defendant does not agree to your proposal, bring the issue before the court immediately. Note that sharing orders promote proportionality and just, speedy, and inexpensive case resolution and that the "overwhelming consensus" is that discovery sharing "is appropriate and does indeed increase court efficiency."[26] Also note that the *Manual for Complex Litigation* says that "relevant discovery already completed should ordinarily be made available to litigants in the other cases"[27] and that both the Consumer Product Safety Commission and the National Highway Traffic Safety Administration oppose nonsharing orders as contrary to public safety.[28]

The Federal Rules of Civil Procedure allow you to probe the facts supporting misuse and assumption of risk defenses. Rule 26(a) requires a defendant to initially disclose the witnesses, the documents, and the electronically stored information (ESI) it "may use to support its claims or defenses." Rule 26(b)(1) authorizes discovery on nonprivileged, proportional matters "relevant to any party's claim or defense."[29]

Courts also have found that "interrogatories which seek opinions or contentions that call for the application of law to facts are proper"[30] and that "there is no substantive, meritorious reason for not allowing 'contention' requests for production."[31] The plaintiff may request disclosure of "the 'material' or 'principal' facts that support each defense."[32] But be specific: Seek materials relating to the plaintiff's reasonable and foreseeable use, such as the defendant's promotional materials, market surveys, studies on the effectiveness of the product's labeling, and consumer complaints or lawsuits stemming from prior injuries.

The client depo. When contesting assumption of risk and misuse, the most important deposition is likely your client's. Discuss the asserted user conduct defense in advance, including claims that your client knew of the risks and acted unreasonably in using the product. Talk through how to best respond to overly broad propositions defense counsel might raise, such as: "Would you agree that a reasonable person inspects a product before using it?"

Deposing defendants' representatives and experts. A "Rule 30(b)(6) notice of deposition that seeks the factual bases for another party's claims or defenses is proper,"[33] as is "inquiry regarding a corporation's legal positions."[34] A well-crafted Rule 30(b)(6) notice accompanied by a Rule 30(b)(2) subpoena helps identify and debunk allegations of user misconduct by establishing that the defendant was aware of prior instances when other consumers were injured while using the same product in similar circumstances, undercutting the defense argument that your client's use of the product was unforeseeable or unreasonable.

Deposing a defense expert about prior testimony for the defendant in similar cases may help refute the supposed unforeseeability and unreasonableness of your client's conduct. For example, if the expert has previously investigated and opined on prior similar incidents involving the defendant's product, he or she may be forced to concede that your client's product use was neither unforeseeable nor unreasonable. But plan to depose defense experts *after* the Rule 30(b)(6) deposition—then the corporation's position on the plaintiff's misuse and assumption of risk cannot be contradicted by its experts later.[35]

Offensive Summary Judgment Motions

Under Rule 56(a), a plaintiff is entitled to summary judgment on each affirmative defense[36] and can prevail by showing that the defendant's evidence is insufficient to establish an essential element of that defense.[37] At the conclusion of discovery, assess whether evidence shows that the defendant knew of prior incidents of people being harmed while using similar products in the same manner. If so, your client's use should not be considered unforeseeable, rendering a misuse defense subject to summary judgment. And when the defendant has asserted assumption of risk but lacks admissible evidence to establish the user's subjective awareness of the defect or of the dangers it posed, summary judgment may be warranted.

Excluding Evidence on User Conduct

Regardless of whether you prevail on an offensive summary judgment motion targeting the defendant's assumption of risk or misuse defenses, move to exclude certain evidence about user conduct.

In many jurisdictions, an alleged failure to heed a product's putatively adequate warnings is irrelevant to the plaintiff's ability to establish a design defect claim, so such evidence should be barred.[38] Similarly, without an exhaustive factual foundation, a defendant should not be allowed to introduce evidence about the alleged absence of prior incidents to support arguments that the plaintiff's specific conduct was unreasonable or unforeseeable.[39]

If a defendant tries to introduce circumstantial evidence about what the plaintiff must have known about a

product's hazard, counter that assumption of risk is fundamentally a subjective test, so supporting circumstantial evidence "must be sufficient to permit an inference that . . . the plaintiff was willing to take his or her chances."[40] Defense experts' opinions about the plaintiff's conduct defying "common sense" are insufficient.[41] Move to exclude a defendant's assumption of risk evidence if it fails to address the plaintiff's subjective knowledge about the product and its hazards.

Defendants may argue that the plaintiff was impaired or violating occupational regulations when using the product. If defendants present medical records or investigative reports to support claims that a plaintiff was impaired, look for any issues in sampling, chain of custody, testing, or interpretation of results, and move to exclude such evidence. And if the defendant alleges that the plaintiff's actions violated occupational regulations, counter that "OSHA regulations are not relevant to the liability of a manufacturer to an employee of an industrial consumer,"[42] so evidence that the plaintiff violated such standards should be excluded.

A finding that your client misused a product or assumed the risk of their injury could be fatal to the case, so identifying potential affirmative defenses and countering them early can be crucial. Deflect a defendant's victim-blaming, and keep the focus of your litigation where it belongs: on the unreasonably dangerous condition of the product that injured your client.


Anne McGinness Kearse *is a partner and* **W. Taylor Lacy** *is an associate at Motley Rice in Mt. Pleasant, S.C. They can be reached at akearse@motleyrice.com and wlacy@motleyrice.com.*

Notes

1. For a similar example, *see Green v. Sanitary Scale Co.,* 431 F.2d 371 (3d Cir. 1970) (Pa. law).
2. *See* Daniel Dell'Osso, *Avoiding the 'Misuse' Defense in Products Cases*, Trial 68 (Feb. 2002). The elements of misuse vary depending on which restatement your jurisdiction follows. The *Restatement (Second) of Torts*, while not addressing the "unforeseeability" issue, does shield defendants from strict liability for injuries resulting from "mishandling," "over-consumption," or "consumption in excessive quantity" of a product. Restatement (Second) of Torts §402A cmts. g, h, i, j (Am. Law Inst. 1965). Under the *Restatement (Third) of Torts: Products Liability*, strict liability claims arising from "the foreseeable risks of harm posed by the product" are explicitly allowed. Restatement (Third) of Torts: Products Liability §2(b), (c) (Am. Law Inst. 1998).
3. *See Cigna Ins. Co. v. Oy Saunatec, Ltd.,* 241 F.3d 1 (1st Cir. 2001).
4. *Compare Reott v. Asia Trend, Inc.*, 55 A.3d 1088, 1101 (Pa. 2012), *Bookhamer v. Sunbeam Prods., Inc.*, 913 F. Supp. 2d 809, 816–17 (N.D. Cal. 2012), and *Smith v. Cent. Mine Equip. Co.*, 876 F. Supp. 2d 1261, 1270–71 (W.D. Okla. 2012) (all deeming misuse an affirmative defense on which the defendant bears the burden) *with Jurado v. Western Gear Works*, 619 A.2d 1312, 1317 (N.J. 1993), and *Hughes v. Magic Chef, Inc.*, 288 N.W.2d 542, 546 (Iowa 1980) (finding that the absence of misuse is part of the plaintiff's burden). *See also* 63A Am. Jur. 2d *Prods. Liab.* §1285. Alternatively, some courts treat misuse as germane to both the plaintiff's prima facie case and a defendant's affirmative defenses. *See* 109 Am. Jur. Proof of Facts 3d 183 §4 (2009).
5. *See Magic Chef, Inc. v. Sibley*, 546 S.W.2d 851, 856 (Tex. Civ. App. 1977).
6. *See, e.g., Donze v. Gen. Motors, LLC*, 800 S.E.2d 479, 485 (S.C. 2017); *see also Shipler v. Gen. Motors Corp.*, 710 N.W.2d 807, 829–30 (Neb. 2006); *Andrews v. Harley Davidson, Inc.*, 796 P.2d 1092, 1095 (Nev. 1990).
7. *See* David G. Owen & Mary J. Davis, 2 Owen & Davis on Prod. Liab. §13:22 (4th ed.).
8. *See* Restatement (Second) of Torts §402A cmt. j.
9. Robert S. Adler & Andrew F. Popper, *The Misuse of Product Misuse: Victim Blaming at Its Worst*, 10 Wm. & Mary Bus. L. Rev. 337, 359–60 (2019).
10. *See* David G. Owen & Mary J. Davis, 1 Owen & Davis on Prod. Liab. §6:3 (4th ed.) (citing *Delaney v. Deere & Co.*, 999 P.2d 930, 942 (Kan. 2000); *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 335–37 (Tex. 1998); *Rogers v. Ingersoll-Rand Co.*, 144 F.3d 841, 844 (D.C. Cir. 1998)). *But see Hickerson v. Yamaha Motor Corp., U.S.A.*, 882 F.3d 476, 484 (4th Cir. 2018) (predicting South Carolina's high court would find that "an adequate warning operates to 'cure' a product's alleged design defects").
11. *See* Restatement (Third) of Torts: Products Liability §2(b), cmt. l ("Warnings are not . . . a substitute for the provision of a reasonably safe design.").
12. *Primary* implied assumption can apply if a plaintiff implicitly assumes risks inherent to an activity, such as being "injured in a collision during [a] football drill." *Davenport v. Cotton Hope Plantation Horizontal Prop. Regime*, 508 S.E.2d 565, 570 (S.C. 1998) (citing *Fortier v. Los Rios Cmty. Coll. Dist.*, 45 Cal. App. 4th 430 (1996)). Primary assumption of risk "is not a true affirmative defense but is another way of stating there is no duty to the plaintiff," *Cole v. S.C. Elec. & Gas, Inc.*, 608 S.E.2d 859, 863 (S.C. 2005), and has "rarely been applied in products liability cases." 119 Am. Jur. Proof of Facts 3d 203, at I(A) §5 (2011).
13. *Davenport*, 508 S.E.2d at 571; *see also* Restatement (Second) of Torts §402A, cmt. n (stating that plaintiff's conduct must be unreasonable).
14. *See* Owen & Davis, *supra* note 7, §13.2 (identifying Alaska, Arizona, Arkansas, Colorado, Idaho, Iowa, Kansas, Minnesota, Missouri, Montana, New York, North Dakota, Utah, and Washington (citing Woods & Deere, Comparative Fault §6:11, at 145–46 (3d ed. 1996))).
15. *See, e.g.,* Miss. Code Ann. §11-1-63(d) (2014); N.C. Gen. Stat. Ann. §99B-4(2) (1996); S.C. Code Ann. §15-73-20 (1976).
16. *See* Owen & Davis, *supra* note 7, §13.14. *See also Yamaha Motor Corp., USA v. McTaggart*, 720 S.E.2d 217, 219 (Ga. Ct. App. 2011); *Sheehan v. N. Am. Mktg Corp.*, 610 F.3d 144, 151 (1st Cir. 2010) (R.I. law); *Krajewski v. Enderes Tool Co., Inc.*, 469 F.3d 705, 709 (8th Cir. 2006) (Neb. law); *Warner Fruehauf Trailer Co., Inc. v. Boston*, 654 A.2d 1272, 1275 (D.C. 1995); *Jackson v. Harsco Corp.*, 673 P.2d 363, 366 (Colo. 1983).
17. Owen & Davis, *supra* note 7, §13:13.
18. *See Donze v. Gen. Motors, LLC*, 800 S.E.2d 479, 486 (S.C. 2017).
19. *See Jamison v. Morris,* 684 S.E.2d 168, 174 (S.C. 2009).
20. *See Whetstine v. Gates Rubber Co.*, 895 F.2d 388, 393 (7th Cir. 1990).
21. *See* Fed. R. Civ. P. 8(c)(1); *see also* S.C. R. Civ. P. 8(c); N.C. R. Civ. P. 8(c).
22. *See Reott v. Asia Trend, Inc.*, 55 A.3d 1088, 1101 (Pa. 2012); *Bookhamer*, 913 F. Supp. 2d, at 816–17; *Black v. M & W Gear Co.*, 269 F.3d 1220, 1234 (10th Cir. 2001) (Okla. law);

Sears, Roebuck and Co. v. Harris, 630 So. 2d 1018, 1028 (Ala. 1993), *as modified on denial of reh'g* Jan. 7, 1994.

23. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *See Tippman Eng'g, LLC v. Innovative Refrigeration Sys., Inc.*, 2020 WL 1644985, at *1–2 (W.D. Va. Apr. 2, 2020).

24. For more on protective orders, *see* April Strahan et al., *Break Through Protective Orders*, Trial 20 (Oct. 2018).

25. *See, e.g.*, Public Justice, Sample Protective Order, *in* Collaboration for Research Integrity & Transparency, Yale University, *Preventing the Use of Courts to Shield Essential Health Information* 41 (2018), https://law.yale.edu/sites/default/files/area/center/crit/crit_report.final_.pdf.

26. *See* Dustin B. Benham, *Proportionality, Pretrial Confidentiality, and Discovery Sharing*, 71 Wash. & Lee L. Rev. 2181, 2199–200 (2014).

27. *See* Manual for Complex Litigation, Fourth §20.14, at 228 (2004).

28. *See* CPSC Litigation Guidance and Recommended Best Practices for Protective Orders and Settlement Agreements in Private Civil Litigation, 81 F.R. 87023-01, 2016 WL 7013605 (Dec. 2, 2016); NHTSA Enforcement Guidance Bulletin 2015-01: Recommended Best Practices for Protective Orders and Settlement Agreements in Civil Litigation, 81 F.R. 13026-02, 2016 WL 913020 (Mar. 11, 2016).

29. *See* Fed. R. Civ. P. 26(a)(1)(A)(i), (ii); (b)(1).

30. *Mach. Sols., Inc. v. Doosan Infracore Am. Corp.*, 323 F.R.D. 522, 528 (D.S.C. 2018) (quoting *Moses v. Halstead*, 236 F.R.D. 667, 674 (D. Kan. 2006)); *see also* Fed. R. Civ. P. 33(a)(2).

31. *See JP Morgan Chase Bank, N.A. v. Winget*, 2010 WL 11691473, at *1 n.2 (E.D. Mich. May 21, 2010).

32. *Mach. Sols., Inc.*, 323 F.R.D. at 528.

33. *See Smith v. Gen. Mills, Inc.*, 2006 WL 7276959, at *3 (S.D. Ohio Apr. 13, 2006); *see also Sec. Ins. Co. of Hartford v. Trustmark Ins. Co.*, 218 F.R.D. 29, 33–35 (D. Conn. 2003).

34. *See Canal Barge Co. v. Commonwealth Edison Co.*, 2001 WL 817853, at *2 (N.D. Ill. July 19, 2001).

35. *See United States v. Taylor*, 166 F.R.D. 356, 362 (M.D.N.C. 1996), *aff'd*, 166 F.R.D. 367 (M.D.N.C. 1996).

36. *See* Fed. R. Civ. P. 56(a). Moreover, if misuse or assumption of risk is deemed an affirmative defense in your venue but was not pleaded as such, you may succeed in moving to strike those defenses under Rule 12(f). *See, e.g.*, Fed. R. Civ. P. 8(c)(1); 12(f).

37. *See FDIC v. Giammettei*, 34 F.3d 51, 54 (2d Cir. 1994).

38. *See* Restatement (Third) of Torts: Products Liability §2(b), cmt. l. If your jurisdiction follows the minority view that §402A, comment j, of the second restatement allows a warning to trump a design defect claim, identify evidence showing that the warning provided was inadequate, ambiguous, or otherwise did not make the product safe for use if followed. *See* Restatement (Second) of Torts §402A, cmt. j.

39. *See Forrest v. Beloit Corp.*, 424 F.3d 344, 358 (3d Cir. 2005).

40. *See* 63A Am. Jur. 2d Prod. Liab. §1254.

41. *See EEOC v. Freeman*, 778 F.3d 463, 471 (4th Cir. 2015).

42. *See Davis v. Hebden, Schilbe & Smith, Inc.*, 52 F.3d 320, at *1 (4th Cir. 1995) (unpublished opinion).