

Appendix A: Proposed instructions**Report No. 13-01 of the Committee on Standard Jury Instructions (Civil)
Products Liability Instructions****Format of Proposed Products Liability Instructions**

The Committee used a slightly different format for the proposed products liability instructions than usual to track the changes from the instructions set forth in the appendix to In re Standard Jury Instructions in Civil Cases—Report No. 09-10 (Products Liability), 91 So. 3d 785, 790-812 (Fla. 2012) (Case No. SC09-1264) (“In re Products Liability”). The former product liability instructions, found in the PL section of the former Florida Civil Jury Instructions book, are shown in strike-through text. The Committee began with the language of the new instructions for the reorganized Florida Civil Jury Instructions book included in the appendix to the In re Products Liability opinion. The Committee removed all underlining from the new products liability instructions. The text that is underlined in these proposed instructions has been added to the instructions as set forth in the appendix to the Court’s opinion.

In the appendix to the In re Products Liability opinion, this Court struck through instructions 403.7 - Strict Liability and 403.16 - Issues on Crashworthiness and “Enhanced Injury” Claims. In re Products Liability, 91 So. 3d at 794-96 & 800-01. In the Committee’s proposed instruction 403.7, the Committee removed the strike-through text found in the appendix to the decision. The underlining and strike-through text in instruction 403.7 shows changes from the language in the Court’s appendix. In instruction 403.16, the Committee retained the strike-through text included in the appendix to the opinion. Then, the Committee drafted a new note on use, shown in underlined text.

The Court preliminarily approved instructions 403.1, 403.3, 403.4, 403.5, 403.6 and 403.10 and the Committee made no revisions to these instructions. The underlining and strike-through text has been removed from these instructions to show that no changes have been made to the language set forth in the appendix to the opinion.

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PL

PRODUCT LIABILITY

Issues

PL-1 **Express warranty**

PL-2 **Implied warranty of merchantability**

PL-3 **Implied warranty of fitness for particular purpose**

PL-4 **Strict liability (manufacturing defect)**

PL-5 **Strict liability (design defect)**

Burden of proof (greater weight of the evidence)

Defense issues

403 PRODUCTS LIABILITY

- 403.1** **Introduction**
- 403.2** **Summary of Claims**
- 403.3** **Greater Weight of the Evidence**
- 403.4** **Express Warranty**
- 403.5** **Implied Warranty of Merchantability**
- 403.6** **Implied Warranty of Fitness for Particular Purpose**
- 403.7** **Strict Liability**
- 403.8** **Strict Liability Failure to Warn**
- 403.9** **Negligence**
- 403.10** **Negligent Failure to Warn**
- 403.11** **Inference of Product Defect or Negligence (reserved)**
- 403.12** **Legal Cause**
- 403.13** **Preliminary Issue (reserved)**
- 403.14** **Burden of Proof on Preliminary Issue**
- 403.15** **Issues on Main Claim**

403.16	Issues on Crashworthiness and “Enhanced Injury” Claims
403.17	Burden of Proof on Main Claim
403.18	Defense Issues
403.19	Burden of Proof on Defense Issues

PL
PRODUCT LIABILITY

NOTE ON USE

~~The instructions in this Part PL PRODUCT LIABILITY do not contain instructions on Negligence. When alternative issues of negligence are to be submitted, use Charge 3.5 on Negligence Issues, as in Model Charge No. 8.~~

~~The issues for your determination on the claim of (claimant) against (defendant) are whether the (describe product) [sold] [supplied] by (defendant) was defective when it left the possession of (defendant) and, if so, whether such defect was a legal cause of [loss] [injury] [or] [damage] sustained by (claimant or person for whose injury claim is made). A product is defective~~

403.1 INTRODUCTION

Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. [You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are (slightly) different from what I gave you at the beginning and it is these rules of law that you must now follow.] When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

NOTES ON USE FOR 403.1

1. When instructing the jury before taking evidence, use instruction 202.1 in lieu of instruction 403.1. ~~See Model Charge 1.~~ Instruction 403.1 is for instructing the jury after the evidence has been concluded. Use the bracketed language in instruction 403.1 when the final instructions are different from the instructions given at the beginning of the case. If the instructions at the end of the case are different from those given at the beginning of the case, the committee recommends that the court point out the differences, with appropriate language in the final instructions, including an explanation for the difference, such as when the court has directed a verdict on an issue.

2. *Fla.R.Civ.P.* 1.470(b) authorizes instructing the jury during trial or

before or after final argument. The timing of instructions is within the sound discretion of the trial judge, to be determined on a case-by-case basis, but the committee strongly recommends instructing the jury before final argument.

3. Each juror must be provided with a full set of jury instructions for use during their deliberations. *Rule* 1.470(b). The trial judge may find it useful to provide these instructions to the jurors when the judge reads the instructions in open court so that jurors can read along with the judge as the judge reads the instructions aloud.

403.2 SUMMARY OF CLAIMS

The claims [defenses] in this case are as follows. (Claimant) claims that the (describe product) [designed] [manufactured] [distributed] [imported] [sold] [or] [supplied] by (defendant) was defective and that the defect in the (describe product) caused [him] [her] harm.

[(Claimant) [also] claims that [he] [she] sustained greater ~~or additional~~ injuries than what [he] [she] would have sustained in the (describe accident) if the (describe product) had not been defective.]

[(Claimant) [also] claims that (defendant) was negligent in (describe alleged negligence), which caused [him] [her] to be injured by (the product).]

(Defendant) denies [that] [those] claim(s) [and also claims that (claimant) was [himself] [herself] negligent in (describe the alleged comparative negligence) , which caused [his] [her] harm]. [Additionally (describe any other affirmative defenses).]

[The parties] [(claimant)] must prove [his] [her] [their] claims by the greater weight of the evidence. I will now define some of the terms you will use in deciding this case.

NOTE ON USE FOR 403.2

Use the second paragraph for crashworthiness claims. See instruction 403.16. Use the first bracketed phrase in the fourth paragraph when there is a claim of comparative negligence. Use the second bracketed sentence where there are additional affirmative defenses.

403.3 GREATER WEIGHT OF THE EVIDENCE

“Greater weight of the evidence” means the more persuasive and convincing force and effect of the entire evidence in the case.

NOTES ON USE FOR 403.3

1. *Greater or lesser number of witnesses.* The committee recommends that no instruction be given regarding the relationship (or lack of relationship) between the greater weight of the evidence and the greater or lesser number of witnesses.
2. *Circumstantial evidence.* The committee recommends that no instruction generally be given distinguishing circumstantial from direct evidence. See *Nielsen v. City of Sarasota*, 117 So.2d 731 (Fla. 1960).

PL / express warranty

403.4 EXPRESS WARRANTY

A product is defective if it does not conform to representations of fact made by (defendant), orally or in writing, in connection with the [sale] [transaction] on which (name) relied in the [purchase and] use of the product. [The representation must be one of fact, rather than opinion.]

~~PL 2 implied warranty of merchantability~~

403.5 IMPLIED WARRANTY OF MERCHANTABILITY

A product is defective if it is not reasonably fit for either the uses intended or the uses reasonably foreseeable by (defendant).

~~PL 3 implied warranty of fitness for particular purpose~~

403.6 IMPLIED WARRANTY OF FITNESS FOR PARTICULAR PURPOSE

A product is defective if it is not reasonably fit for the specific purpose for which (defendant) knowingly sold the product and for which, in reliance on the judgment of (defendant), the purchaser bought the product.

PL 4 strict liability (manufacturing defect)

~~if by reason of a manufacturing defect it is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product]* and the product is expected to and does reach the user without substantial change affecting that condition.~~

~~A product is unreasonably dangerous because of a manufacturing defect if it does not conform to its intended design and fails to perform as safely as the intended design would have performed.~~

PL 5 strict liability (design defect)

~~if by reason of its design the product is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product]* and the product is expected to and does reach the user without substantial change affecting that condition.~~

~~A product is unreasonably dangerous because of its design if [the product fails to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer] [or] [the risk of danger in the design outweighs the benefits].~~

~~If the greater weight of the evidence does not support the claim of (claimant), your verdict should be for (defendant).~~

~~[However, if the greater weight of the evidence does support the claim of (claimant), then your verdict should be for (claimant) and against (defendant)].~~
~~**[However, if the greater weight of the evidence does support the claim of (claimant), then you shall consider the defense raised by (defendant). On the defense, the issues for your determination are (state defense issues)].~~

~~“Greater weight of the evidence” means the more persuasive and convincing force and effect of the entire evidence in the case.~~

NOTES ON USE

~~If it is determined that a Negligence instruction is appropriate in addition to~~

~~a Product Liability (PL) instruction, use charge 3.5 on Negligence Issues as in Model Charge No. 8.~~

~~In cases involving claims of both negligence and defective design, submission of both claims may result in an inconsistent verdict. See, e.g., *Consol. Aluminum Corp. v. Braun*, 447 So. 2d 391 (Fla. 4th DCA 1984); *Ashby Div. of Consol. Aluminum Corp. v. Dobkin*, 458 So. 2d 335 (Fla. 3d DCA 1984). See also *Moorman v. American Safety Equip.*, 594 So. 2d 795 (Fla. 4th DCA 1992); *North American Catamaran Racing Ass'n. v. McCollister*, 480 So. 2d 669 (Fla. 5th DCA 1985).~~

~~*When the injured person is a bystander, use the language in the second pair of brackets. See *West v. Caterpillar Tractor Co., Inc.*, 336 So.2d 80 (Fla. 1976), and *Sanchez v. Hussey Seating Co.*, 698 So.2d 1326 (Fla. 1st DCA 1997).~~

~~**When defense issues are to be submitted, use the charge contained within this second pair of brackets. In other cases, use the first bracketed sentence instead.~~

COMMENT

~~1. *Privity*. These charges on product liability issues presuppose that any question of privity has been resolved in favor of the claim. For the effect of strict liability doctrine on claims of warranty previously requiring privity, see § 672.318, Fla. Stat. (1987), and *Kramer v. Piper Aircraft Corp.*, 520 So.2d 37, 39 & n. 4 (Fla. 1988). Should it be necessary to submit to the jury a factual issue on privity, the committee recommends that it be submitted in the style of a preliminary charge on status or duty as in SJH 3.2.~~

~~2. *Strict liability (Restatement of Torts 2d § 402A)*. Charge PL 4, derived from § 402A as adopted in *West v. Caterpillar Tractor Co., Inc.*, 336 So.2d 80 (Fla. 1976), is appropriate for a strict liability claim against the manufacturer based on an alleged manufacturing flaw in the product. In response to *Ford Motor Co. v. Hill*, 404 So.2d 1049, 1052 n. 4 (Fla. 1981), directing the committee to improve its product liability charge, the committee recommends PL 5 for design defect cases, stating standards for determining when a product is “unreasonably dangerous” because of design.~~

~~PL 5 defines “unreasonably dangerous” both in terms of consumer expectations, see comment i to § 402A of the Restatement, and in terms weighing the design risk against its utility. These concepts are discussed in *Radiation Tech.*~~

~~*Inc., v. Ware Constr. Co.*, 445 So.2d 329, 331 (Fla. 1983); *Cassisi v. Maytag Co.*, 396 So.2d 1140, 1143–45 (Fla. 1st DCA 1981); *Adams v. G. D. Searle & Co.*, 576 So.2d 728, 733 (Fla. 2d DCA 1991). Absent more definitive authority in Florida, the committee recommends neither test to the exclusion of the other and expresses no opinion about whether the two charges should be given alternatively or together. PL 5 provides language suitable for either standard, or both, determined by the trial court to be appropriate.~~

~~The committee notes, however, that the two issue rule may be implicated if both tests of design defect are used. *Zimmer Inc. v. Birnbaum*, 758 So.2d 714 (Fla. 4th DCA 2000).~~

~~The committee is of the view that, in Florida, the ultimate burden of persuasion in cases submitted to the jury remains with the plaintiff. *West*, 336 So.2d at 87; but see *Barker v. Lull Engineering Co.*, 20 Cal.3d 413, 143 Cal.Rptr. 225, 573 P.2d 443, 455–56 (1978), quoted in *Cassisi*, 396 So.2d at 1145. PL 5 therefore allocates that burden to the plaintiff. The charge is not intended to control issues of the burden of proof or sufficiency of the evidence for directed verdict purposes.~~

~~Pending further development of Florida law, the committee reserved the question of whether there can be strict liability for failure to warn and, if so, what duty is imposed on the manufacturer or seller.~~

~~3. *Obvious defects, opportunity to inspect, disclaimers.* These concepts are not covered by the standard charges. See *Auburn Machine Works Co., Inc. v. Jones*, 366 So.2d 1167 (Fla. 1979).~~

~~4. *Uniform Commercial Code.* There are many open questions concerning the meaning and application in Florida personal injury litigation of certain U. C. C. provisions. Compare *Schuessler v. Coca-Cola Bottling Company of Miami*, 279 So.2d 901 (Fla. 4th DCA 1973), with *Ford Motor Co. v. Pittman*, 227 So.2d 246 (Fla. 1st DCA 1969), *cert. denied*, 237 So.2d 177 (Fla. 1970). Accordingly, the committee has not undertaken to express U. C. C. concepts, as such, in these jury charges. A U. C. C. provision which is held to be applicable may be read or appropriately paraphrased for the jury. In order to avoid undue emphasis, the committee recommends that the provision read or paraphrased not be identified as a statute.~~

~~5. *Comparative negligence.* Comparative negligence is a defense to strict liability claims if based on grounds other than the failure of the user to discover the~~

defect or to guard against the possibility of its existence. *West v. Caterpillar, supra* n. 2. Model charge 7 illustrates the defense of comparative negligence in a negligence/express warranty action against a retailer and model charge 8 illustrates the same defense in a negligence/strict liability action against a manufacturer and retailer.

6. The committee takes no position regarding whether the injured bystander must be foreseeable. See *West v. Caterpillar Tractor Co., Inc.*, 336 So.2d 80 (Fla. 1976).

7. Pending further development of Florida law, the Committee takes no position on the sufficiency of these instructions in cases in which the *Cassisi* inference applies. See *Cassisi v. Maytag Co.*, 396 So.2d 1140 (Fla. 1st DCA 1981); *Gencorp, Inc. v. Wolfe*, 481 So.2d 109 (Fla. 1st DCA 1985); see also *Parke v. Scotty's, Inc.*, 584 So.2d 621 (Fla. 1st DCA 1991); *Miller v. Allstate Ins. Co.*, 650 So.2d 671 (Fla. 3d DCA 1995).

403.7 STRICT LIABILITY

~~(Reserved)~~

a. Manufacturing defect

A product is defective ~~if it is~~ because of a manufacturing defect if it is in a condition unreasonably dangerous when it leaves the possession of the [manufacturer] [seller] [distributor] [supplier] [importer] [defendant] to [the user] [a person in the vicinity of the product] and the product is expected to and does reaches the user or consumer without substantial change affecting that condition.

A product is unreasonably dangerous because of a manufacturing defect if it is different from its intended design and fails to perform as safely as the intended design would have performed.

b. Design defect

A product is defective because of a design defect if it is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product] and the product is expected to and does reach the user without substantial change affecting that condition.

A product is unreasonably dangerous because of its design if [the product fails to perform as safely as an ordinary consumer would expect when used as intended or when used in a manner reasonably foreseeable by the { manufacturer} [seller] [distributor] [supplier] [importer]] [and] [or] [the risk of danger in the design outweighs the benefits].

NOTES ON USE FOR 403.7

1. ~~A claimant is not required to plead or prove whether the defect in the product came from its manufacture or design. *Ford Motor Co. v. Hill*, 404 So.2d 1049 (Fla. 1981); *McConnell v. Union Carbide Corp.*, 937 So.2d 148 (Fla. 4th DCA 2006). In cases involving a claim of a manufacturing defect in the product, to clarify the issue for the jury, this instruction can be modified by adding the following language in the second paragraph after “if [the product”: “was not built according to its intended design [or] because the product” The risk/benefit test~~

does not apply in cases involving claims of manufacturing defect. See *Cassisi v. Maytag Co.*, 396 So.2d 1140, 1146 (Fla. 1st DCA 1981). Instruction 403.7a retains the definition of manufacturing defect found in former instruction PL 4. The minor changes from the definition found in PL 4 are intended to make this instruction more understandable to jurors without changing its meaning.

2. *Foreseeability of injured bystander.* Strict liability applies to all foreseeable bystanders. When the injured person is a bystander, use the language “a person in the vicinity of the product” instead of “the user.” Strict liability does not depend on whether the defendant foresaw the particular bystander’s presence. See *West v. Caterpillar Tractor Co. Inc.*, 336 So.2d 80, 89 (Fla. 1976) (“Injury to a bystander is often feasible. A restriction of the doctrine to the users and consumers would have to rest on the vestige of the disappearing privity requirement.”). See also *Sanchez v. Hussey Seating Co.*, 698 So.2d 1326 (Fla. 1st DCA 1997). When there is an issue regarding whether the presence of bystanders was foreseeable, additional instructions may be needed.

3. This instruction retains the consumer expectations test and the risk/benefit test for product defect, both of which previously appeared in PL 5. Florida recognizes the consumer expectations test. See *McConnell v. Union Carbide Corp.*, 937 So.2d 148, 151 n.4 (Fla. 4th DCA 2006); *Force v. Ford Motor Co.*, 879 So.2d 103, 107 (Fla. 5th DCA 2004); *Adams v. G. D. Searle & Co.*, 576 So.2d 728, 733 (Fla. 2d DCA 1991); *Cassisi v. Maytag Co.*, 396 So.2d 1140, 1145–46 (Fla. 1st DCA 1981). Other decisions have relied upon the RESTATEMENT (THIRD) OF TORTS: *Products Liability* to define a product defect. See *Union Carbide Corp. v. Aubin*, 97 So.3d 886 (Fla. 3d DCA 2012); *Agrofollajes, S.A. v. E.I. DuPont de Nemours & Co.*, 48 So.3d 976 (Fla. 3d DCA 2010). One decision held that in a design defect case, the jury should be instructed only on the risk/benefit test and not the consumer expectations test. See *Agrofollajes*, 48 So.3d at 997. Pending further development in the law, the committee takes no position on whether the risk/benefit test is a standard for product defect that should be included in instruction 403.7 or an affirmative defense under instruction 403.18. The risk/benefit instruction is provided in both this instruction and the defense instruction, 403.18, to illustrate how it is used in either case. See Instruction 403.18(b) and the corresponding Note on Use. If a court determines that the risk/benefit test is a test for product defect, the committee takes no position on whether both the consumer expectations and risk/benefit tests should be given alternatively or together. The committee notes, however, that the two-issue rule may be implicated if both tests of design defect are used. *Zimmer Inc. v. Birnbaum*, 758 So.2d 714 (Fla. 4th DCA 2000).

4. In *Force v. Ford Motor Co.*, 879 So.2d 103, 107 (Fla. 5th DCA 2004), the parties agreed to a risk/benefit instruction based on section 2(b) of the RESTATEMENT (THIRD) OF TORTS, *Products Liability*. ~~Florida has not adopted this provision of RESTATEMENT (THIRD) OF TORTS, *Products Liability*. *Liggett Group Inc. v. Davis*, 973 So.2d 467 (Fla. 4th DCA 2008); certifying question, 973 So.2d 684 (Fla. 4th DCA 2008); discharging jurisdiction, ___ So.2d ___, 33 FLW S963 (Fla. 2008). See also *Force* at 107. While the committee has cited *Force* in other contexts, it does not approve the risk/benefit instruction that is set forth in *Force*. The decision in *Force* did not directly address the correctness of these instructions. As discussed above in note 3, pending further development in the law, the committee takes no position on this issue.~~

5. When strict liability and negligence claims are tried together, to clarify differences between them it may be necessary to add language to the strict liability instructions to the effect that a product is defective if unreasonably dangerous even though the seller has exercised all possible care in the preparation and sale of the product. RESTATEMENT (SECOND) TORTS, § 402A(2)(a). In cases involving claims of both negligence and defective design, submission of both claims may result in an inconsistent verdict. See, e.g., *Consolidated Aluminum Corp. v. Braun*, 447 So.2d 391 (Fla. 4th DCA 1984); *Ashby Division of Consolidated Aluminum Corp. v. Dobkin*, 458 So.2d 335 (Fla. 3d DCA 1984). See also *Moorman v. American Safety Equip.*, 594 So.2d 795 (Fla. 4th DCA 1992); *North American Catamaran Racing Ass'n v. McCollister*, 480 So.2d 669 (Fla. 5th DCA 1985).

6. ~~See instruction 403.13 when a distributor, importer, or intermediate seller never had physical possession of the product but nevertheless played a role in placing the product into the chain of distribution. In some cases, it may be appropriate to instruct the jury that, in addition to the designer and manufacturer, any distributor, importer, or seller in the chain of distribution is liable for injury caused by a defective product. *Samuel Friedland Family Enterprises v. Amoroso*, 630 So.2d 1067 (Fla. 1994); *Rivera v. Baby Trend, Inc.*, 914 So.2d 1102 (Fla. 4th DCA 2005); *Porter v. Rosenberg*, 650 So.2d 79 (Fla. 4th DCA 1995).~~

403.8 STRICT LIABILITY FAILURE TO WARN

A product is defective when the foreseeable risks of harm from the product could have been reduced or avoided by providing reasonable instructions or warnings, and the failure to provide those instructions or warnings makes the product unreasonably dangerous.

NOTES ON USE FOR 403.8

1. The following cases recognize strict liability for a failure to warn of defects. *Union Carbide Corp. v. Aubin*, 97 So.3d 886, 898 (Fla. 3d DCA 2012); *McConnell v. Union Carbide Corp.*, 937 So.2d 148, 151–52 (Fla. 4th DCA 2006); *Union Carbide Corp. v. Kavanaugh*, 879 So.2d 42, 45 (Fla. 4th DCA 2004); *Scheman-Gonzalez v. Saber Manufacturing Co.*, 816 So.2d 1133 (Fla. 4th DCA 2002); *Ferayorni v. Hyundai Motor Co.*, 711 So.2d 1167 (Fla. 4th DCA 1998).

2. When strict liability and negligent failure to warn claims are tried together, to clarify differences between them it may be necessary to add language to the strict liability instruction to the effect that a product is defective if unreasonably dangerous even though the seller has exercised all possible care in the preparation and sale of the product. RESTATEMENT (SECOND) TORTS, § 402A(2)(a).

403.9 NEGLIGENCE

Negligence is the failure to use reasonable care, which is the care that a reasonably careful [designer] [manufacturer] [seller] [importer] [distributor] [supplier] would use under like circumstances. Negligence is doing something that a reasonably careful [designer] [manufacturer] [seller] [importer] [distributor] [supplier] would not do under like circumstances or failing to do something that a reasonably careful [designer] [manufacturer] [seller] [importer] [distributor] [supplier] would do under like circumstances.

NOTES ON USE FOR 403.9

~~1. An unreasonably dangerous condition in a product can result in a variety of ways, for example, from latent characteristics in the product, which create an unexpected danger, from failure to meet industry standards in the design or manufacture of the product, or from an unsafe design choice for the product. See, e.g., *Royal v. Black & Decker Mfg. Co.*, 205 So.2d 307 (Fla. 3d DCA 1967). A product can also be unreasonably dangerous because it was adulterated, such as with foreign materials in foodstuffs or pharmaceuticals. See, e.g., *Food Fair Stores of Florida, Inc. v. Macurda*, 93 So.2d 860 (Fla. 1957); *E.R. Squibb & Sons Inc. v. Stickney*, 274 So.2d 898 (Fla. 1st DCA 1973).~~

~~2. If a product fails under circumstances precluding any other reasonable inference other than a defect in the product, a plaintiff is not required to pinpoint any specific defect in the product. See, e.g., *Armor Elevator Co. v. Wood*, 312 So.2d 514 (Fla. 3d DCA 1975); *Ford Motor Co. v. Cochran*, 205 So.2d 551 (Fla. 2d DCA 1967).~~

~~2. 3.~~ In order to clarify the differences between strict liability and negligence when the two claims are tried together, it may be necessary to add language to the strict liability instructions to the effect that a product is defective if unreasonably dangerous even though the seller has exercised all possible care in the preparation and sale of the product. RESTATEMENT (SECOND) TORTS, § 402A(2)(a).

403.10 NEGLIGENCE FAILURE TO WARN

[Negligence is the failure to use reasonable care, which is the care that a reasonably careful [designer] [manufacturer] [seller] [importer] [distributor] [supplier] would use under like circumstances.] Reasonable care on the part of (defendant) requires that (defendant) give appropriate warning(s) about particular risks of (the product) which (defendant) knew or should have known are involved in the reasonably foreseeable use(s) of the product.

NOTE ON USE FOR 403.10

The cases recognize a claim for negligent failure to warn. *Ferayorni v. Hyundai*, 711 So.2d 1167 (Fla. 4th DCA 1998). When strict liability and negligent failure to warn claims are tried together, to clarify differences between them it may be necessary to add language to the strict liability instruction to the effect that a product is defective if unreasonably dangerous even though the seller has exercised all possible care in the preparation and sale of the product. RESTATEMENT (SECOND) TORTS, § 402A(2)(a).

403.11 INFERENCE OF PRODUCT DEFECT OR NEGLIGENCE

~~(Reserved)~~

NOTES ON USE FOR 403.11

1. F.S. 768.1256 provides for a rebuttable presumption in the event of compliance or noncompliance with government rules. The statute does not state whether the presumption is a burden-shifting or a vanishing presumption. See F.S. 90.301–90.304; *University Insurance Co. of North America v. Warfel*, 82 So.3d 47 (Fla. 2012); *Birge v. Charron*, 107 So.3d 350 (Fla. 2012). Pending further development in the law, the committee offers no standard instruction on this presumption, leaving it up to the parties to propose instructions on a case-by-case basis.

2. *Cassisi v. Maytag Co.*, 396 So.2d 1148 (Fla. 1st DCA 1981), held that when a product malfunctions during normal operation, a legal inference of product defectiveness arises, and the injured plaintiff has thereby established a prima facie case for jury consideration. Pending further development of Florida law, the committee takes no position on the sufficiency of these instructions in cases in which the *Cassisi* inference applies. See *Gencorp, Inc. v. Wolfe*, 481 So.2d 109 (Fla. 1st DCA 1985); see also *Parke v. Scotty's, Inc.*, 584 So.2d 621 (Fla. 1st DCA 1991); *Miller v. Allstate Insurance Co.*, 650 So.2d 671 (Fla. 3d DCA 1995).

403.12 LEGAL CAUSE

a. Legal cause generally:

[A defect in a product] [Negligence] is a legal cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [loss] [injury] [or] [damage], so that it can reasonably be said that, but for the [defect] [negligence], the [loss] [injury] [or] [damage] would not have occurred.

b. Concurring cause:

In order to be regarded as a legal cause of [loss] [injury] [or] [damage], [a defect in a product] [negligence] need not be the only cause. [A defect in a product] [Negligence] may be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] if the [defect] [negligence] contributes substantially to producing such [loss] [injury] [or] [damage].

c. Intervening cause:

**Do not use the bracketed first sentence if this charge is preceded by the charge on concurring cause:*

***[In order to be regarded as a legal cause of [loss] [injury] [or] [damage], [a defect in a product] [negligence] need not be its only cause.] [A defect in a product] [Negligence] may also be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] occurring after the [product defect] [negligence] occurs if such other cause was itself reasonably foreseeable and the [product defect] [negligence] contributes substantially to producing such [loss] [injury] [or] [damage] [or] [the resulting [loss] [injury] [or] [damage] was a reasonably foreseeable consequence of the [product defect] [negligence] and the [product defect] [negligence] contributes substantially to producing it].**

NOTES ON USE FOR 403.12

1. Instruction 403.10a12a (legal cause generally) is to be given in all cases.

Instruction 403.40b12b (concurring cause), to be given when the court considers it necessary, does not set forth any additional standard for the jury to consider in determining whether negligence was a legal cause of damage but only negates the idea that a defendant is excused from the consequences of his or her negligence by reason of some other cause concurring in time and contributing to the same damage. Instruction 403.40e12c (intervening cause) is to be given only in cases in which the court concludes that there is a jury issue as to the presence and effect of an intervening cause.

2. The jury will properly consider instruction 403.40a12a not only in determining whether defendant's negligence is actionable but also in determining whether claimant's negligence contributed as a legal cause to claimant's damage, thus reducing recovery.

3. Instruction 403.40b12b must be given whenever there is a contention that some other cause may have contributed, in whole or part, to the occurrence or resulting injury. If there is an issue of aggravation of a preexisting condition or of subsequent injuries or multiple events, instruction 501.2h(1) or (2) should be given as well. See *Hart v. Stern*, 824 So.2d 927, 932–34 (Fla. 5th DCA 2002); *Marinelli v. Grace*, 608 So.2d 833, 835 (Fla. 4th DCA 1992).

4. Instruction 403.40e12c (intervening cause) embraces two situations in which negligence may be a legal cause notwithstanding the influence of an intervening cause: (1) where the damage was a reasonably foreseeable consequence of the negligence although the other cause was not foreseeable, *Mozzer v. Semenza*, 177 So.2d 880 (Fla. 3d DCA 1965); and (2) when the intervention of the other cause was itself foreseeable, *Gibson v. Avis Rent-A-Car System Inc.*, 386 So.2d 520 (Fla. 1980).

5. “*Probable*” results. The committee recommends that the jury not be charged that the damage must be such as would have appeared “probable” to the actor or to a reasonably careful person at the time of the negligence. In cases involving an intervening cause, the term “reasonably foreseeable” is used in place of “probable.” The terms are synonymous and interchangeable. See *Sharon v. Luten*, 165 So.2d 806, 810 (Fla. 1st DCA 1964); Prosser, TORTS (3d ed.) 291; 2 Harper and James, THE LAW OF TORTS 1137.

6. The term “substantially” is used throughout the instruction to describe the extent of contribution or influence negligence must have in order to be regarded as a legal cause. “Substantially” was chosen because the word has an acceptable

common meaning and because it has been approved in Florida as a test of causation not only in relation to defendant's negligence, *Loftin v. Wilson*, 67 So.2d 185, 191 (Fla. 1953), but also in relation to plaintiff's contributory negligence, *Shayne v. Saunders*, 129 Fla. 355, 176 So. 495, 498 (Fla. 1937).

403.13 PRELIMINARY ISSUE

(Reserved)

403.14 BURDEN OF PROOF ON PRELIMINARY ISSUE

If the greater weight of the evidence does not support (claimant's) claim on this issue, then your verdict [on this issue] [on the claim of (claimant)] should be for (defendant) [and you should decide the other issues on (claimant's) claim].

~~If, however,~~ However, if the greater weight of the evidence supports (claimant's) claim [on this issue], then you shall decide whether (the product) was defective [and also decide the other issues on (claimant's) claim].

NOTE ON USE FOR 403.14

The bracketed language is for use if claimant makes alternative claim(s) of liability.

403.15 ISSUES ON MAIN CLAIM

The [next] issues you must decide on (claimant's) claim against (defendant) are:

a. Express Warranty:

whether (the product) **failed to conform to representations of fact made by** (defendant), **orally or in writing, in connection with the [sale] [transaction], on which** (name) **relied in the [purchase and] use of the product, and, if so, whether that failure was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent, or person for whose injury claim is made).

b. Implied Warrant of Merchantability:

whether (the product) **was not reasonably fit for either the uses intended or the uses reasonably foreseeable by** (defendant) **and, if so, whether that lack of fitness was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent, or person for whose injury claim is made).

c. Implied Warranty of Fitness for Particular Purpose:

whether (the product) **was not reasonably fit for the specific purpose for which** (defendant) **knowingly sold** (the product) **and for which** (claimant) **bought** (the product) **in reliance on the judgment of** (defendant) **and, if so, whether that lack of fitness was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent, or person for whose injury claim is made).

d. Strict Liability — Manufacturing Defect:

whether (the product) ~~[was not built according to made differently than its intended design and thereby failed to perform as safely as the intended design would have performed] [and] [or] [(the product) failed to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer]~~ **and** (the product) **reached** (claimant) **without substantial change affecting the condition in which it was sold** **and, if so, whether that failure was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent, or person for whose injury claim is made).

e. Strict Liability — Design Defect:

whether [(the product) failed to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer] [and] [or] [the risk of danger in the design of the product outweighs the benefits of the product] and (the product) reached (claimant) without substantial change affecting the condition and, if so, whether that failure was a legal cause of the [loss] [injury] or [damage] to (claimant, decedent, or person for whose injury claim is made).

f.e. Strict Liability — Failure to Warn:

whether the foreseeable risks of harm from (the product) could have been reduced or avoided by providing reasonable instructions or warnings and the failure to provide those warnings made (the product) unreasonably dangerous and, if so, whether that failure was a legal cause of the [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).

g.f. Negligence:

whether (defendant) was negligent in (describe alleged negligence), and, if so, whether that was a legal cause of the [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).

h.g. Negligent Failure to Warn:

whether (defendant) negligently failed to warn about particular risks involved in the use of (the product), and, if so, whether that failure to warn was a legal cause of the [loss] [injury] [or] [damage] to (claimant, decedent, or person for whose injury claim is made).

NOTE ON USE FOR 403.15

Instruction 403.15(e) retains the consumer expectations test and the risk/benefit test for product defect, both of which previously appeared in PL 5. See Instruction 403.7(b) and Note on Use 3. Pending further development in the law, the committee takes no position on whether the consumer expectations and risk/benefit tests should be given alternatively or together.

**403.16 ISSUES ON CRASHWORTHINESS AND “ENHANCED INJURY” CLAIMS
(RESERVED)**

~~[In addition, there is a second set of issues you must also decide in this case.]*
(Claimant) [next] claims [he] [she] suffered [greater] [or] [additional] injuries in
the accident than [he] [she] would have otherwise suffered if (describe the alleged
crashworthiness defect) had not been defective. (Claimant) does not claim that
(describe the alleged crashworthiness defect) caused the accident.**~~

~~*Use the bracketed language when there are other defect claims in the case.~~

~~**The defendant is entitled to have the jury instructed on this last sentence
“when appropriate.” D’Amario v. Ford Motor Co., 806 So.2d 424 (Fla. 2001).~~

~~The issues you must decide on this claim are whether (describe the alleged
defective part of the product) was defective and, if so, whether that defect was a
legal cause of [loss] [injury] [or] [damage] to (claimant, decedent, or person for
whose injury claim is made) that was [greater than] [or] [additional to that which]
[he] [she] would have suffered if (describe the alleged defective part of the
product) had not been defective.~~

~~A product is defective if it is unreasonably dangerous when it leaves the
possession of the [manufacturer] [seller] [distributor] [supplier] [importer]
[defendant] and the product reaches the user or consumer without substantial
change affecting that condition.~~

~~A product is unreasonably dangerous to [the user] [a person in the vicinity of
the product]* if [the product fails to perform as safely as an ordinary consumer
would expect when used as intended or when used in a manner reasonably
foreseeable by the [manufacturer] [seller] [distributor] [supplier] [importer]].~~

~~*When the injured person is a bystander, use the language in the second set of
brackets. See West v. Caterpillar Tractor Co., Inc., 336 So.2d 80 (Fla. 1976), and
Sanchez v. Hussey Seating Co., 698 So.2d 1326 (Fla. 1st DCA 1997). See 403.7
note 2.~~

~~Normally a defendant is responsible for only [loss] [injury] [or] [damage]
caused by its product and not the actions of others. If you find that the (describe the
alleged defective part of the product) was defective and that defect caused [loss]~~

~~[injury] [or] [damage] to (claimant) that was [greater than] [or] [additional to that which] would have resulted from the accident if (describe the alleged defective part of the product) had not been defective, you should try to separate the damages caused by (describe the alleged defective part of the product), determine what part of (claimant's) [loss] [injury] [or] [damage] resulted from (describe the alleged defective part of the product), and the actions of others and award (claimant) money only for those damages caused by (describe the alleged defective part of the product). However, if you cannot separate some or all of the damages, you must award (claimant) any damages that you cannot separate as if they were all caused by (defendant).~~

NOTES ON USE FOR 403.16

~~1. The term “enhanced injury” is not used in this instruction. Although cases use that term, the committee believes that “enhance” has a connotation not appropriate for describing traumatic injuries. More appropriate terms might be “aggravated,” “increased injury,” or “separate injury.” For that reason, the committee has used quotation marks for the term “enhanced injury” in the title to this instruction. Although many of these claims involve motor vehicles, there is no reason the same principle would not apply to any “enhanced injury” claim regardless of the product involved.~~

~~2. Use this instruction for “crashworthiness” claims instead of instruction 403.15. But instruction 403.15 should be used together with this instruction when there is also a defect claim that does not involve a claim of an “enhanced injury.” In cases in which there is a claim that one defect caused the accident but a different defect caused an “enhanced injury,” it may be necessary to identify the separate defects.~~

~~3. It is not necessary to repeat the definition of defectiveness in paragraph 2 of this instruction if it has already been given as part of earlier instructions.~~

~~4. This instruction retains the risk/benefit test for product defect, which previously appeared in PL 5. As noted in Note 3 to instruction 403.7, pending further development in the law, the committee takes no position on whether the risk/benefit test is a standard of product defect or an affirmative defense. See 403.7, 403.18. The risk/benefit test is provided in both instructions to illustrate how it is used in either case. If a court determines that the risk/benefit test is a test for product defect, the committee takes no position on whether both the consumer expectations and risk/benefit tests should be given alternatively or together.~~

In 2011, the legislature amended F.S. 768.81 to state that in a products liability case in which the plaintiff claims that a defect in the product increased the injury, the defendant should be treated the same as all other defendants for the purposes of apportionment of fault. The legislative history states that the legislature intended this amendment to overrule the decision in *D'Amario v. Ford Motor Co.*, 806 So.2d 424 (Fla. 2001). See Ch. 2011-215, §2, Laws of Fla. As explained in the note on use to instruction 402.3, the summary of claims in a crashworthiness case should explain that the plaintiff claims to have sustained greater injuries than would have been sustained if the product were not defective. Otherwise, the standard instructions applicable in other cases should be given in crashworthiness cases.

403.17 BURDEN OF PROOF ON MAIN CLAIM

If the greater weight of the evidence does not support [one or more of] (claimant's) claim[s], your verdict should be for (defendants) [on [that] [those] claim(s)].

[However, if the greater weight of the evidence ~~does~~ supports [one or more of] (claimant's) claim[s], then your verdict should be for (claimant) and against (defendant) [on [that] [those] claim(s)].

[However, if the greater weight of the evidence supports (claimant's) claim against one or [both] [more] of the defendants], then you should decide and write on the verdict form the percentage of the total fault of [both] [all] defendants that was caused by each of them].

NOTE ON USE FOR 403.17

Use the first paragraph in all cases. If there is an affirmative defense to the claim, do not use either of the bracketed paragraphs; instead turn to instruction 403.18. If there is no affirmative defense, use the first or second bracketed paragraph depending on whether there is one defendant or more than one.

403.18 DEFENSE ISSUES

If, however, the greater weight of the evidence supports [(claimant's) claim] [one or more of (claimant's) claims], then you shall consider the defense[s] raised by (defendant).

On the [first]* defense, the issue[s] for you to decide [is] [are]:

*The order in which the defenses are listed below is not necessarily the order in which the instruction should be given.

a. *Comparative Negligence:*

whether (claimant or person for whose injury or death claim is made) was [himself] [herself] negligent *in (describe alleged negligence) and, if so, whether ~~sue~~that negligence was a contributing legal cause of the injury or damage complained of to (claimant).

*If the jury has not been previously instructed on the definition of negligence, instruction 401.4 should be inserted here.

b. *Risk/Benefit Defense:*

whether, on balance, the [benefits] [or] [value] of (the product) outweigh the risks or danger connected with its use.

NOTE ON USE FOR 403.18b

In a strict liability defective design case, a defendant may be entitled to an affirmative defense based on the risk/benefit test. See *Force v. Ford Motor Co.*, 879 So.2d 103, 106 (Fla. 5th DCA 2004); *Adams v. G. D. Searle & Co.*, 576 So.2d 728, 733 (Fla. 2d DCA 1991); *Cassisi v. Maytag Co.*, 396 So.2d 1140, 1145–46 (Fla. 1st DCA 1981). Pending further development in the law, the committee takes no position on whether the risk/benefit test is a standard for product defect that should be included in instruction 403.7 or an affirmative defense under instruction 403.18. The court should not, however, instruct on risk/benefit as both a test of defectiveness under 403.7 and as an affirmative defense under 403.18.

c. *Government Rules Defense:*

No instruction provided.

NOTE ON USE FOR 403.18c

~~Florida Statutes section~~ F.S. 768.1256 provides for a rebuttable presumption in the event of compliance or noncompliance with government rules. The statute does not state whether the presumption is a burden-shifting or a vanishing presumption. See *F.S. 90.301–90.304*; *Universal Insurance Co. of North America v. Warfel*, 82 So.3d 47 (Fla. 2012); *Birge v. Charron*, 107 So.3d 350 (Fla. 2012). Pending further development in the law, the committee offers no standard instruction on this presumption, leaving it up to the parties to propose instructions on a case-by-case basis.

d. State-of-the-art Defense:

In deciding the issues in this case, you shall consider the state-of-the-art of scientific and technical knowledge and other circumstances that existed at the time of (the product's) manufacture, not at the time of the loss or injury.

NOTE ON USE FOR 403.18d

Instruction 403.~~7~~18d applies only in defective design cases. *F.S. 768.1257*.

NOTES ON USE FOR 403.18

1. Comparative negligence is a defense to strict liability claims if based on grounds other than the failure of the user to discover the defect or to guard against the possibility of its existence. *West v. Caterpillar Tractor Co.*, 336 So.2d 80, 90 (Fla. 1976). ~~Model Instruction 7 illustrates the defense of comparative negligence in a negligence/express warranty action against a retailer, and Model Instruction 8 illustrates the same defense in a negligence/strict liability action against a manufacturer and retailer.~~

2. The “patent danger doctrine” is not an independent defense but, to the extent applicable (see note 1), it is subsumed in the defense of contributory negligence. *Auburn Machine Works Inc. v. Jones*, 366 So.2d 1167 (Fla. 1979).

403.19 BURDEN OF PROOF ON DEFENSE ISSUES

If the greater weight of the evidence does not support (defendant's) defense[s] and the greater weight of the evidence supports (claimant's) [claim] [one or more of (claimant's) claims], then [your verdict should be for (claimant) in the total amount of [his] [her] damages.] *[you should decide and write on the verdict form what percentage of the total damages [negligence] [fault] of [both] [all] defendants was caused by each defendant.]

**Use the second bracketed language when there is more than one defendant.*

If, however, the greater weight of the evidence shows that both (claimant) and [(defendant)] [one or more of the defendants] [and] [(identify additional person(s) or entit(y)(ies))] were [negligent] [at fault] and that the [negligence] [fault] of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by (claimant), you should decide and write on the verdict form ~~the total amount of the damages and what percentage of the total damages is chargeable to each party~~ what percentage of the total [negligence] [fault] of [both] [all] parties to this action was caused by each of them.

Use the following instruction in cases with a comparative negligence defense and an apportionment of a non-party defense:

[If, however, the greater weight of the evidence shows that (claimant) and [(defendant)] [one or more of (defendants)] [and] [(identify additional person(s) or entit(y)(ies))] were [negligent] [at fault] and that the [negligence] [fault] of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by (claimant), you should decide and write on the verdict form what percentage of the total [negligence] [fault] of [both] [all] parties to this action [and] [(identify additional person(s) or entit(y)(ies))] ~~is chargeable to~~ was caused by each of them.]

Use the following paragraph in cases without a comparative negligence defense but with an apportionment of non-party defense:

[If, however, the greater weight of the evidence shows that [(defendant)] [one or more of (defendants)] and [(identify additional person(s) or entit(y)(ies))] were [negligent] [at fault] and that the [negligence] [fault] of each contributed as a legal cause of [loss] [injury] [or] [damage] sustained by (claimant), you should decide and write on the verdict form what percentage of the total

[negligence] [fault] of [(defendant(s))] [and] [(identify additional person(s) or entit(y)(ies))] ~~is chargeable to~~ was caused by each of them.

NOTE ON USE FOR 403.19

Preemptive ~~charges~~ instructions on defense issues. If a preemptive ~~charge instruction~~ for claimant is appropriate on a defense issue, as when comparative negligence or assumption of risk has been brought to the jury's attention on voir dire or by opening statements or argument and is now to be withdrawn, an ~~charge instruction~~ in the form of instruction 401.13 should be given immediately following instruction 403.15. If a preemptive ~~charge instruction~~ for defendant is required on some aspect of a defense, as when, for example, the court holds that any comparative negligence of the driver will reduce claimant's recovery, a preemptive ~~charge instruction~~ announcing the ruling should be given immediately after framing the defense issues (instruction 403.17~~18~~).