

CALIFORNIA PRODUCT LIABILITY LAW WHITE PAPER

November 17, 2007

Some months ago, on my CalBizLit.com blog, I posted three extended background pieces on the peculiar and nettlesome ways of product liability law in the golden state. People reacted to the posts the way my out-of-state lawyer friends always react when I tell them about how the law works here: “What? That can’t be!”

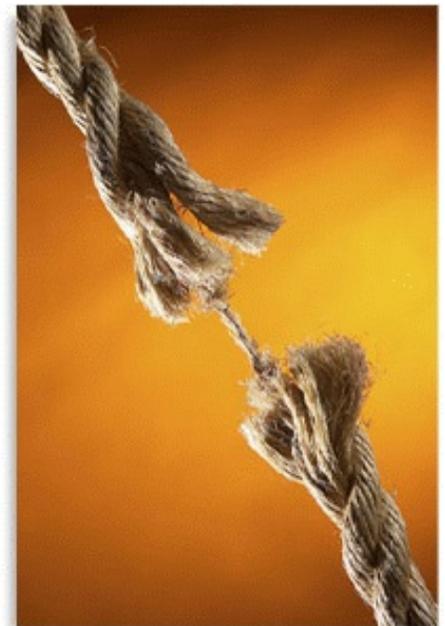
So, in the interests of spreading the incredulity even further, I’ve somewhat modified and expanded the three posts, and consolidated them all into this White Paper. As with all Adams | Nye white papers, everyone is free to do with them whatever they wish, provided they attribute any quotes or whole-sale copying of the document to Adams | Nye¹.

This white paper has three parts. In the first, I talk about the three ways a company can be held liable for manufacturing or selling a defective product. In the second, I talk about what happens when more than one person or company causes an injury. And in the third, I talk about the standards governing expert evidence in California.

So What Makes a Product Defective, Anyway?

Under California law, a product can be defective in three different ways. The first one – a manufacturing defect – is no particular surprise, and kind of a snooze. The second – failure to warn – is likewise not terribly earthshaking. It’s the third one however – defective design – that sets California apart.

First: manufacturing defects. We revised



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our civil jury instructions three years ago so as to base them on plain English and make them more juror-friendly. The current California instruction (CACI 1202) is based on *Jiminez v. Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 383 [93 Cal.Rptr. 769, 482 P.2d 681], and defines a “manufacturing defect” this way: “

A product contains a manufacturing defect if the product differs from the manufacturer's design or specifications or from other typical units of the same product line.

This also tracks section 2(a) of Restatement of the Law, (Torts) Third: Products Liability.

Pretty straightforward: if it's designed one way and manufactured another way, and the discrepancy causes an injury, the manufacturer is strictly liable.

Next, defect by virtue of failure to warn. This is quite a bit more draconian, and does not track the Restatement. The Third Restatement's section 2(c) states that there is a defect in warnings and instructions if the foreseeable risks



. . . could have been reduced or avoided by the provision of reasonable instructions or warnings . . . and the omission of the instructions or warnings renders the product not reasonably safe.

Instead, in California, under *Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1112 [56 Cal.Rptr.2d 162, 920 P.2d 1347], a manufacturer or other seller of a product is liable for failing to warn of dangers which are "knowable in light of the

generally recognized and prevailing best scientific and medical knowledge available."

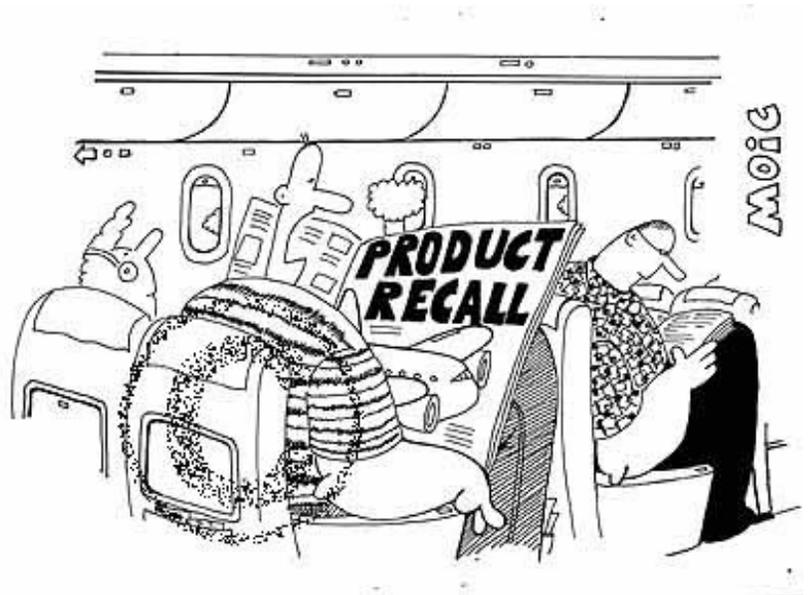
This means that a defendant can be held liable not just for failure to warn of dangers which should be known by similarly situated companies, but of dangers which are known to just about anyone.

But here's the really fun part: the law on defective design. The case that brought us this excitement is *Barker v. Lull Engineering* (1978) 20 Cal.3d 413 [143

Cal.Rptr. 225]. In *Barker*, the California Supreme Court abandoned the concept of "unreasonably dangerous" in strict product liability cases, and held:

- When a plaintiff proceeds on a theory of design defect, he or she may select between two theories: the consumer expectation theory and the risk/benefit theory.
- Under the consumer expectation test, a product is defective if it causes injury after failing to meet a reasonable consumer's expectations.
- Under the risk benefit test, a design is defective if it causes injury, and if, on balance, the risk of the design is not outweighed by the benefits.
- Oh yes, and one more thing: in the rare case where a plaintiff might choose to proceed under the risk benefit test, the defendant has the burden of proving that the benefits of the design outweigh the risk.

Now, let's just think about that for a minute. "Mr. Jones, did you ever for one minute think that the power press design was going to result in your fingers being cut off?" "Gosh and gollies no, I sure didn't." "Mr Smith, did you ever think that



solvent was going to make you sick?" "Absolutely not." Not exactly the world's most difficult burden of proof for the plaintiff.

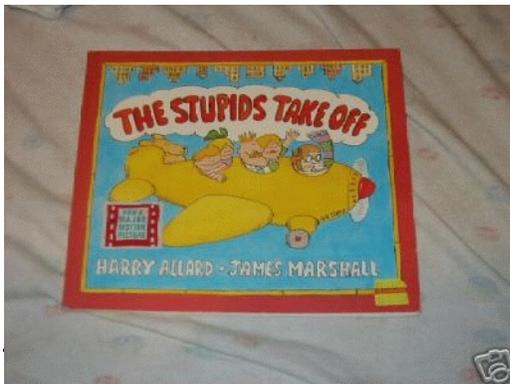
In other words, it all comes down to causation². And the test is so easy, and gives the defense so little to talk about, that plaintiffs rarely want to use the "risk benefit" test, which, unlike the "consumer expectation test," allows defense witnesses to talk about design considerations.

Who Caused That Injury?

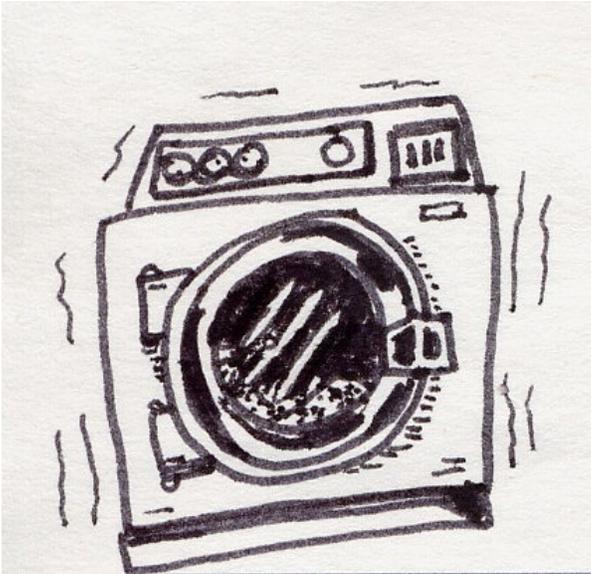
Introduction:

We're going to base this part of the discussion on *The Stupid Family*, with all due respect to Harry Allard and James Marshall, who wrote some of the funniest children's books ever.

Let's imagine that the Stupid family buys a washer and dryer from a retailer – we'll call it "Home Deebow." The appliances were manufactured by a large American manufacturer – let's call it "General Eclectic Company." Home Deebow installs the appliances in the Stupids' garage in their home in Berkeley, California. The inside lid of the washer is covered with warnings



² Although *Barker* hasn't been greeted with open arms by other states, the rejection hasn't been unanimous. As far as we can tell, the *Barker* definition is presently the law in four states and has been rejected in nine. Although many states adopt what they refer to as a "consumer expectation test," most really incorporate the "unreasonably dangerous" definition of Restatement (Torts) Second §402A. A list of non-California decisions discussing definitions of "defect" in the strict liability sense appears at the end of this white paper.



and instructions, including the following, in 24 point type: "It is unsafe to put fabric containing flammable liquids in this washing machine."

After cleaning his golf balls with gasoline and rags, Mr. Stupid throws the rags into the washing machine and leaves them there. He does not notice and has never read the warning. His niece, Josephine Stupid, who is visiting from Los Angeles, wants to run some laundry of her own. She opens the lid to the washing

machine, smells the gasoline, notes the warning, but decides to nonetheless throw her own clothes in, and starts the machine. As can happen when volatile liquids are placed in clothes washing machines, the machine explodes, resulting in a fire that burns up the garage and adjacent kitchen and causes smoke damage throughout the house. Fortunately, nobody is injured. Damages total \$300,000, the value of a small family home repair in California.

The Stupids' lawyer sues General Eclectic and Home Deebow for strict product liability on two theories discussed in the earlier part of this White Paper. The first is for design defect. The Stupids' contend that under prong one of *Barker v. Lull*, a reasonable consumer would not expect that his dishwasher was going to explode and burn part of his house down, even if he put a little gasoline in it. The second is failure to warn. Although the inside of the door did contain a statement about just this problem, the Stupids will argue that the warning was inadequate – that it was not a sufficient warning of the risks. Presumably, it should have had larger type and said "Danger: Don't Put Flammable Liquids in Here Mr. and Mrs. Stupid or Your House Will Burn Down," or some such.

Home Deebow defends the case on the ground that, even if there was anything wrong with the washing machine's

design, and even if the warning was insufficient, both of these were the responsibility of the manufacturer. General Eclectic, on the other hand, argues that (a) Mr. Stupid was comparatively negligent; (b) the fire was caused by Mr. Stupid failing to read the warning and by Josephine for reading but ignoring it; and (c) the fire was caused not by any defect or failure to warn, but by product misuse on the part of Mr. Stupid and his niece. Here's how these defenses play out:

Comparative Fault and the Fault of Others

First, comparative negligence on Mr. Stupid's part can reduce his recovery, but can't eliminate it.

Back when I started law school – when the earth was starting to cool, and dinosaurs roamed the globe – California law held that any negligence on the part of the plaintiff barred him or her from tort recovery. Then, while I was in my first year at law school, the California Supreme Court decided that California would henceforth be a pure comparative fault state. *Li v. Yellow Cab* (1975) 13 C3d 804[119 Cal.Rptr. 804]. In other words, if the plaintiff is 99% at fault and the defendant is 1% at fault, plaintiff can still recover 1% of his damages from defendant. The same principle applies to product liability cases. *Daly v. General Motors Corp.* (1978) 20 C3d 725 [144 Cal.Rptr. 380]. Now, my first year torts professor seemed to think this was a pretty good idea. Most of my corporate clients since then have disagreed.

If he's smart, the attorney for the Stupids will argue that, sure, his client was negligent –even foolish – but that he was only 50% at fault, and that the great big corporations aren't going to get off the hook that easily.

Second, negligence on the part of the niece may do the defendants no good at all. The principles that apply here relate to what is called "joint and several liability" and "several liability." Under a law enacted by California voters in 1986 ("Proposition 51"), an individual defendant is jointly and severally liable for "economic" damages – that is, out-of-pocket damages – but only severally liable for "non-economic" damages such as pain and suffering. Put

differently, in a case such as this one where all of the damages are “economic,” it does no good for the two defendants to point their finger at the niece for her boneheaded obliviousness to the warning unless they can prove that they were not responsible at all. Otherwise, even if she contributed to the fire, they are jointly and severally liable, meaning that Mr. Stupid may enforce his entire judgment against Home Deebow and General Eclectic.

Indeed, the jury will be instructed as follows:

A person's negligence may combine with another factor to cause harm. If you find that [name of defendant]'s negligence was a substantial factor in causing [name of plaintiff]'s harm, then [name of defendant] is responsible for the harm. [Name of defendant] cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing [name of plaintiff]'s harm.

Of course, the two companies can “cross-complain”³ against the niece for contribution, but this won’t keep Stupid from recovering everything from them.

Incidentally, “misuse” by the Stupids and their niece will not prevent Mr. Stupid from recovering. When a plaintiff in a product liability suit has done something idiotic, I frequently have out-of-state clients and counsel tell me we should be able to get out of the case because of his or her “misuse.” Sadly, it usually doesn't work that way. Manufacturers and retailers have a duty to give sufficient warning of the knowable risks of all foreseeable uses, including foreseeable misuses. *Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzer Co.* (2004) 129 Cal.App.4th 577 [28 Cal.Rptr.3d 744].

³ In California, we call both a complaint by the defendant against a plaintiff and a complaint by the defendant against either another defendant or a third party a “cross-complaint.”

Liability As Between Home Deebow and General Eclectic

In most of our product liability cases, the manufacturer indemnifies and defends the retailer, whether as a matter of contract, good business relations, or both, and that is as it should be. But what if there is some independent basis of liability on the part of the retailer? And suppose the manufacturer settles separately with the plaintiff? Can't the retailer argue that most of the fault is with the manufacturer?

Nope. Doesn't work that way. Under *Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618 [65 Cal.Rptr.2d 532], there is NO apportionment of fault between the manufacturer and the retailer. They are both strictly liable to the plaintiff, and the liability is joint and several.

Now don't get me wrong – the law in this state may be a little goofy, but the jurors aren't all nuts. In all likelihood, *Stupid vs. General Eclectic* would result in a defense verdict simply because the jury would conclude that the Stupids were all idiots and didn't deserve anything. But the defendants would not get out of the case based on any defenses based on the plaintiff's, or somebody else's, stupidity. The defendants would have to win the battle over whether the appliances were, or were not defective.

THE ROLE OF EXPERTS

After I tell my out-of-state friends and clients that all of their arguments about state of the art and risk benefit aren't going to work here, and the fact that somebody else was largely responsible for the accident isn't going to be much of a defense, they often turn next to questions of admissibility of evidence. Something along the lines of "Well, the court will never allow the plaintiff's expert to say [fill in blank with ridiculous testimony here], will it?"

Uh, sorry. California is what's known as a non-Daubert state. And after that, things get worse.

Since a little bit of history is worth a ton of theory, here's some history: Way back in 1976, in a case called *People v.*

Kelly (1976) 17 Cal.3d 24 [130 Cal.Rptr. 144], the California Supreme Court adopted the standard set forth in the District of Columbia Circuit's decision way, way back in 1923. The standard, established by *Frye v. United States*, 293 F. 1013 (DC Cir. 1923) is as follows:

while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Much of the rest of the world followed this standard until 1993, when the United States Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Between *Daubert* and *Kumho Tire v. Campbell*, 526 U.S. 137 (1999) it became clear that the Federal trial judges were to act as gate-keepers; before admitting scientific testimony, the trial judge must determine whether the testimony's underlying methodology or reasoning is scientifically valid. *Daubert* has been adopted in many, but not all states.

In 1994, the California Supreme Court considered whether to adopt *Daubert* in this state, and decided against it. In *People v. Leahy* (1994) 8 Cal.4th 587 [34 Cal.Rptr.2d 663], the Court held that *Daubert*, being based on the Federal Rules of Evidence, was not the law in California. In this state, courts must apply the Kelly/Frye rule. Indeed, in a 2002 decision, the California Supreme Court even challenged the logic of *Daubert*:

[t]he admissibility of evidence obtained by use of a scientific technique does not depend upon proof to the satisfaction of a court that the technique is scientifically reliable or valid. . . . Because courts are ill suited to make such determinations, admissibility depends upon whether the technique is

generally accepted as reliable in the relevant scientific community.

People v. Bolden (2002) 29 Cal.4th 515, 546 [127 Cal.Rptr.2d 802]

While the *Kelly / Frye* rule is often understood to apply to expert testimony generally, it is actually much narrower than that. As the California Supreme Court noted in *People v. Stoll* (1989) 49 Cal.3d 1136, 1156 [265 Cal.Rptr. 111], the rule is limited to “new scientific techniques,” which are new to science and the law, and which provide “some definitive truth which the expert need only accurately recognize and relay to the jury.” In fact, in *Roberti v. Andy’s Termite & Pest Control, Inc.* (2003) 113 Cal.App.4th 893 [6 Cal.Rptr.3d 827], a trial judge was reversed for excluding expert testimony that pesticides caused autism, in part on the ground that medical theories of causation were not “new scientific technique” and not subject to *Kelly/Frye*.

The closest thing there is to a “gatekeeper” requirement for expert testimony in California is Evidence Code section 801(b), allowing expert testimony that is:

Based on matter . . . that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

Trial courts have enormous discretion to determine what matter “is of a type that reasonably may be relied upon by an expert,” and when courts have discretion, that usually means there is no right to appeal if they allow evidence in error. On the other hand, in *Roberti*, a trial court was reversed for bootstrapping an 801(b) analysis into a *Daubert*-type analysis.

So this is why defendants in California now want to remove to federal court. They get the benefit of *Daubert*. (On the other hand, once removal is accomplished, they also now

get the burden of e-discovery which they really don't have in California state courts. So pick your poison.)

The real action in this area is presently in the 2005 Court of Appeal case of *Lockheed Litigation Cases*, formerly published in 126 Cal.App.4th 271. (Note to you out-of-state readers: because the California Supremes have granted a hearing on this case, the appellate decision is not citeable as authority for anything.)

Lockheed is a mass-tort case involving "chemical soup" type exposures and disease claims by a large number of former Lockheed workers against a host of chemical and oil companies. The case has been going on at the trial level for years, and has resulted in a variety of appellate decisions on a variety of subjects.

On the subject we are interested in, the trial court excluded the testimony of Dr. Daniel Teitelbaum, a well-traveled plaintiff toxicologist.⁴ Teitelbaum had found causation based on epidemiology studies, animal studies and case reports. After something that looked an awful lot like a *Daubert* hearing, the trial court excluded his testimony on the ground that the studies and reports did not provide a reasonable basis for his opinions, and the Court of Appeal affirmed. Most recently, the Supreme Court dismissed its grant of review, which means that the case remains unpublished and unciteable, but there will not, at least for the present, be any Supreme Court ruling on this critical issue.

⁴ Dr. Teitelbaum's testimony was found wanting in the case eventually heard by the United States Supreme Court as *General Electric Co. v. Joiner* (1997) 522 U.S. 136. Our office has been tangling with Dr. Teitelbaum for more than fifteen years.

Appendix "Defective Design" In Other States

- * Indicates cases specifically adopting *Barker*.
- ** Indicates cases specifically rejecting *Barker*.

Alaska

**Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 882 (Ala. 1979);
1979 Alas. LEXIS 502 (accepts consumer expectation test)

** *Vineyard v. Empire Mach. Co.*, 119 Ariz. 502, 581 P.2d 1152
(Ariz. Ct. App. 1978) (rejects burden shifting)

Arizona

Brady v. Melody Homes Mfr., 121 Ariz. 253, 257 (Ariz.App. 1978);
589 P.2d 896

Lunt v. Brady Mfg. Corp., 475 P.2d 964, 970 (Ariz.App. 1970); 13
Ariz. App. 30

Maas v. Dreher, 460 P.2d 191, 194 (Ariz.App. 1969); 10 Ariz. App.
52.

Colorado

** *Armentrout v. FMC Corp.*, 819 P.2d 522 (1991); CCH Prod. Liab.
Rep. P13,039;

Heath v. Ortho Pharm Corp., 722 P.2d 410 (Colo. 1986); 413; CCH
Prod. Liab. Rep. P11,169.

Connecticut

Giglio v. Connecticut Light & Power Co., 180 Conn. 230; 429 A.2d
486 (1980)

Potter v. Chicago Pneumatic Tool Co., 241 Conn. 199 (1987), 215;
694 A.2d 1319, CCH Prod. Liab. Rep. P14, 967

Slepski v. Williams Ford, Inc., 170 Conn. 18, 22 (1975); 364 A.2d
175

Florida

Cassisi v. Maytag Co., 396 So. 2d 1140, 1144 (Fla. App. 1981);
CCH Prod. Liab. Rep. P8943

Georgia

** *Banks v. ICI Ams.*, 264 Ga. 732, 736 (1994) ; 450 S.E.2d 671

Hawaii

**Ontai v. Straub Clinic & Hosp.*, 66 Haw. 237, 241 (1983); 659 P.2d
734; CCH Prod. Liab. Rep. P9591

Idaho

Rojas v. Lindsay Mfg. Co., 108 Idaho 590, 701 P.2d 210, 212
(Idaho 1985)

Kansas

***Lester v. Magic Chef, Inc.*, 230 Kan. 643, 653 (1981); 641 P.2d
353

Kentucky

** *Nichols v. Union Underwear Co.*, 602 S.W.2d 429, 432 (Ky.
1980); 1980 Ky. LEXIS 246

Illinois

Calles v. Scripto-Tokai Corp., 224 Ill. 2d 247, 255 (2007); 864
N.E.2d 249;

**Lamkin v. Towner*, 138 Ill. 2d 510, 528 (1990); 563 N.E.2d 449;
Wortel v. Somerset Indus., 331 Ill. App. 3d 895, 902 (1st Dist.
2002); 770 N.E.2d 1211

Kansas

Lester v. Magic Chef, 230 Kan. 643, 641 P.2d 353 (Kan. 1982) .

Maryland

Halliday v. Sturm, Ruger & Co., 138 Md. App. 136 (2001); 770 A.2d
1072; CCH Prod. Liab. Rep. P16,134

Phipps v. General Motors Corp., 278 Md. 337, 344 (1976); 363 A.2d

955;

Massachusetts

Back v. Wickes Corp., 375 Mass. 633, 642 (1978); 378 N.E.2d 964;
** *Hayes v. Ariens Co.*, 391 Mass. 407, 413 (1985); 462 N.E.2d
273; 41 A.L.R.4th 1

Nebraska

Rahmig v. Mosley Machinery Co., 226 Neb. 423 (1987); 412 N.W.2d
56

Minnesota

** *Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 95 (Minn. 1981); CCH
Prod. Liab. Rep. P11,374

Missouri

** *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371, 377
(Mo. 1986); CCH Prod. Liab. Rep. P10,970

Michigan

** *Prentis v. Yale Mfg. Co.*, 421 Mich. 670, 688 (1984); 365 N.W.2d
176, 184.

Nevada

Ginnis v. Mapes Hotel Corp., 86 Nev. 408, 413 (1970); 470 P.2d
135; 42 A.L.R.3d 769;

New Hampshire

** *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 395 A.2d 843,
846 (N.H. 1978).

North Dakota

Stillwell v. Cincinnati, Inc., 336 N.W.2d 618, 624 (N.D.,1983); CCH
Prod. Liab. Rep. P9710

Ohio

Leichtamer v. American Motors Corp., 67 Ohio St. 2d 456, 466; 424 N.E.2d 568 (Ohio 1981)
Knitz v. Minster Machine Co., 69 Ohio St. 2d 460, 466 (Ohio 1982); 432 N.E.2d 814,

Oregon

** *Wilson v. Piper Aircraft Corp.*, 282 Or. 411 (1978); 579 P.2d 1287

Pennsylvania

Lewis v. Coffing Hoist Div., Duff-Norton Co., 515 Pa. 334, 340; 528 A.2d 590 (Pa. 1987) CCH Prod. Liab. Rep. P11,497

Oregon

Phillips v. Kimwood Machine Co., 525 P.2d 1033; 269 Ore. 485 (Or. 1974)

Puerto Rico

Aponte-Rivera v. Sears Roebuck, Inc., 432 F.3d 379 (1st Cir. 2005); 97 Fair Empl.Prac.Cas. (BNA) 199.
Collazo-Santiago v. Toyota Motor Corp., 937 F. Supp. 134; 1996 U.S. Dist. LEXIS 12256, CCH Prod. Liab. Rep. P14,868
Punsoda-Diaz v. Ford Motor Co., 206 Fed. Appx. 4 (1st Cir. 2007); Prod. Liab. Rep. P17,680

Rhode Island

Ritter v. Narragansett Elec. Co., 109 R.I. 176, 283 A.2d 255, 263
(R.I. 1971)

Tennessee

Ray by Holman v. BIC Corp., 925 S.W.2d 527, 530 (Tenn.1996);
Prod. Liab. Rep. P14,697

Washington

Gates v. Std. Brands, 43 Wn. App. 520, 531 (1986); 719 P.2d 130; A.L.R.5th 987
Seattle-First Nat'l Bank v. Tabert, 86 Wn.2d 145, 155 (1975); 542 P.2d 774

West Virginia

** *Morningstar v. Black & Decker Mfg. Co.*, 162 W. Va. 857, 887 (1979); 253 S.E.2d 666

Wisconsin

** *Vincer v. Esther Williams All-Aluminum Swimming Pool Co.*, 69 Wis. 2d 326, 230 N.W.2d 794, 798 (Wis. 1975)

Federal Cases

Aetna Casualty & Surety Co. v. Jeppesen & Co., 463 F. Supp. 94 (D. C. Nev., 1978); 15 Av. Cas. (CCH) P17,607

Bruce v. Martin-Marietta Corp., 544 F.2d 442 (10th Cir. 1976); 20 UCC Rep.Serv. 39

Castro v. QVC Network, 139 F.3d 114, 118 (2nd Cir.1998); 34 U.C.C. Rep. Serv. 2d (Callaghan) 946; CCH Prod. Liab. Rep. P15,169

Greeno v. Clark Equipment Co., 237 F. Supp. 427, 429 (D.C. Ind. 1965); 1965 U.S. Dist. LEXIS 6462.

** *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1274; 762 F.2d 1250 (5th Cir. 1985); CCH Prod. Liab. Rep. P10,566

Shetterly v. Crown Controls Corp., 719 F. Supp. 385, 387 (W.D. Pa.1989); 1989 U.S. Dist. LEXIS 8067

** *Singleton v. International Harvester Co.*, 685 F.2d 112, 114 (4th Cir. 1981); Prod. Liab. Rep. P9007; CCH Prod. Liab. Rep. P9455 (4th Cir. 1981)

Venezia v. Miller Brewing Co., 626 F.2d 188 (1st Cir. 1980); 29 U.C.C. Rep. Serv. (Callaghan) 487; CCH Prod. Liab. Rep. P8850

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Wood v. General Motors Corp., 673 F. Supp. 1108, 1120
(D.Mass., 1987); 1987 U.S. Dist. LEXIS 3924; CCH Prod. Liab. Rep.
P11,438

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