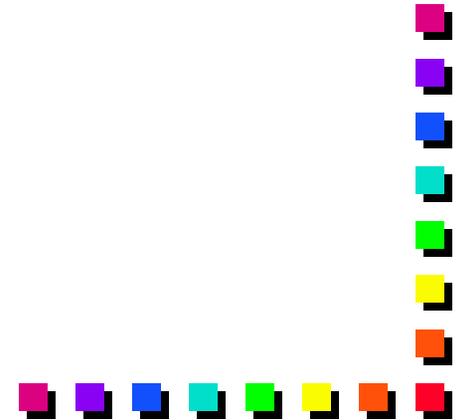


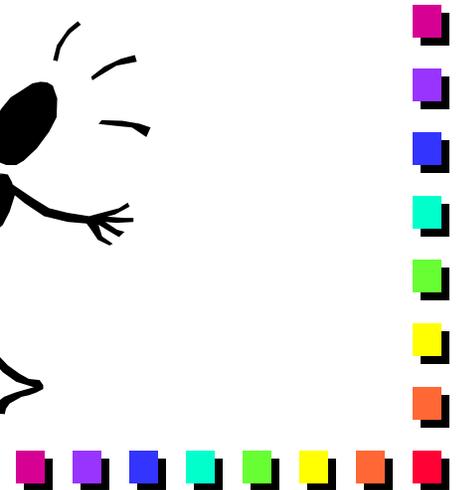
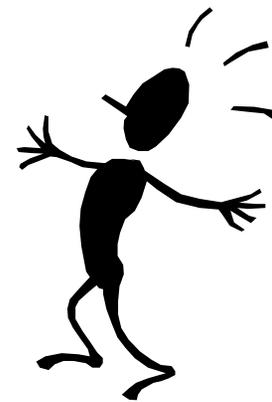
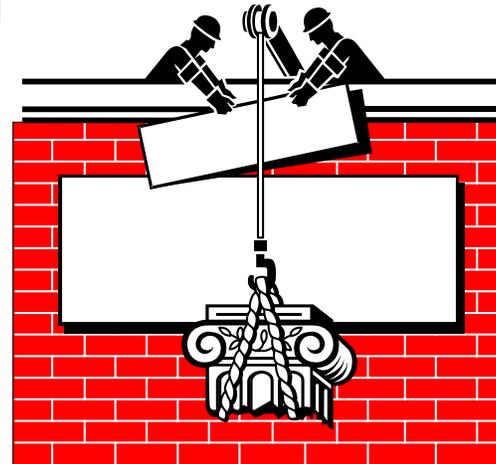
# BUSINESS TORTS & PRODUCT LIABILITY

## Chapter 8



# Torts in the Business Setting

- There is no such thing as a “business tort”
- By definition, this means torts that *concern* businesses
- Often cases with businesses are settled out of court
- There are usually big awards, as plaintiffs view businesses as “deep pockets”





# The Types and Costs of Business Torts

## ■ Types of Torts

- Intentional
- Negligence
- Strict Liability
- Torts are traditionally common law
- More and more statutes are playing an important role in this area of the law

## ■ Costs of Torts

- Direct costs range from \$40-150 billion per year
- Businesses lobby for statutory limits on tort liability
- Pain & suffering and punitive damages place a high “sticker price” on certain behavior

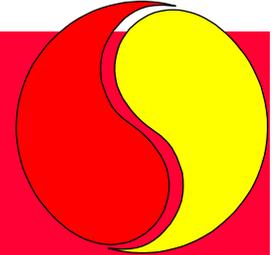
# Torts Particular To Businesses

- **Misrepresentation**
- **Interference With Contractual Relations**
- **Interference With Prospective Advantage**  
(putting a person in front of door).
- **Premises Liability**
- **Product Liability**
- **Consumer Products & Negligence**
- **Consumer Products & Strict Liability**
- **Ultrahazardous Activity**





# Product Liability



- Liability of producers and sellers of goods re: defective products
- General term applied that deals primarily in tort law
- Involves some contract law
- Involves some statutory law

## “Is Japan Really Different?”

- It is said that Japan has less litigation and far fewer lawyers
- Some analysts say this makes Japan more competitive
- In fact, the U.S. and Japanese tort systems are similar in outcome (even if the rules are different)



# Types of Product Liability

- Contract Warranties (Promises)
- Negligence in tort (Actions)
- Strict Liability in tort (Actions)



# Sales

## Warranties

- **Warranty of Title**--good title will be transferred free of claims against it; stolen and copyright infringe.
- **Express Warranties**--created by seller's promise as to quality, safety, performance or durability of goods. May be created:
  - from sample or model
  - by description of attributes
  - by seller's statements or promises; affirmation of fact or promise
    - Includes advertising and brochures.
    - Contract limitations.
  - Expressions of value or seller's commendations – not warranty
- **Warranties may be disclaimed, but *disclaimers* must be specific to the type of warranty and must be conspicuous.**



# Question

- A warranty of title means:
- a. a buyer's goods are fit for a particular purpose
- b. a buyer's goods are merchantable
- c. a seller is the rightful owner of the goods being sold
- d. a buyer is legally capable of owning the goods for sale
- e. either c or d



# Question

- 20. An express warranty may be created by all but which of the following:
- a. a seller's promise about goods being sold
- b. a seller's guarantee regarding the safety of a good
- c. the sample the buyer received from the seller
- d. the guarantee the buyer reasonably expects for the product
- e. any of the above



# Sales Warranties

## Implied Warranties

- **Merchantability - for sales by merchants**
  - goods must be of quality generally acceptable in trade
  - must be able to do what is expected
  - must be safe – test on inconspicuous part of body.
  - **Examples;**
    - Freezer does not freeze;
    - Riding lawnmower does not carry anyone over 120 lbs;
    - Pool table, cd, dvd is warped
    - Automatic film rewinder tears film
    - Feed supplement case.
- **Seller may make disclaimers; language may need to be specific and the disclaimer must be conspicuous.**



# Question

Under the UCC, merchantable means that goods must be of a quality comparable to:

- a. that generally acceptable in that line or trade
- b. the median standard of industry
- c. the highest recent quality of the trade
- d. defect-free goods in the industry
- e. none of the above



# Merchantability – Food Safety

- Two tests:
- Foreign / Natural test;
  - Clam chowder
  - Hostess fruit pies.
- Reasonable expectations test.

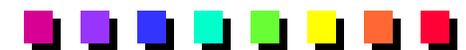


- **Implied Warranty of Fitness for a Particular Purpose**
  - **buyer communicates to seller, or seller “had reason to know” buyer’s particular needs;**
  - **buyer relies on seller’s expertise; then may have warranty**
    - **Paint for stucco**
    - **Hydraulic oil; transmission fluid**
- **Seller may make disclaimers; language may need to be specific and the disclaimer must be conspicuous.**



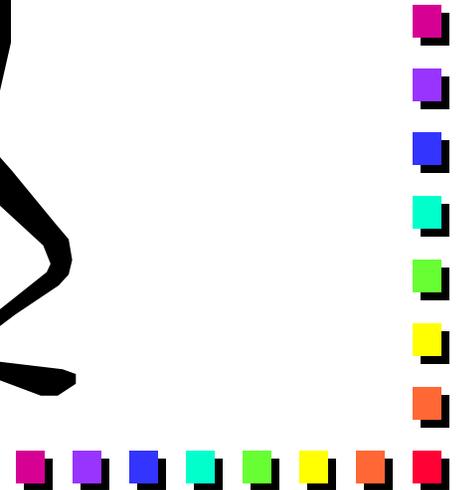
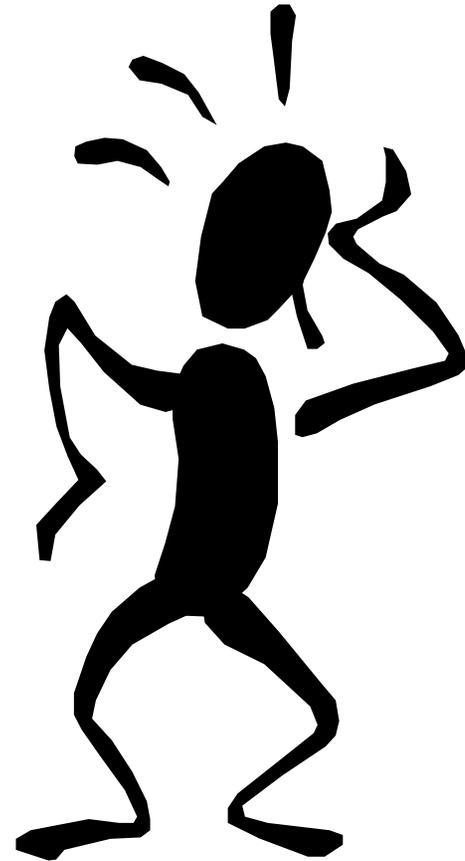
needs and says he is concerned about chipping and peeling. The seller recommends Pitts Exterior, which the company advertises as good for such use. If Miller buys Pitts based on the recommendation, and it chips and peels immediately, with respect to fitness for a particular purpose, there is:

- a. a breach of implied warranty; Miller relied on the maker's judgment and claims
- b. no breach of implied warranty; sellers are not obligated to supply high quality goods
- c. no breach of implied warranty; the maker did not have reason to know of Miller's particular use for the paint
- d. no breach of implied warranty; there were not written warranty terms
- e. none of the above



# History of Consumer Products and Negligence

- In the 19th century there was the privity of contract requirement--a contractual relationship with the manufacturer was needed
- Burden on consumer
- If there was no relationship, *caveat emptor* applied—"Let the buyer beware"
- This changed with *MacPherson v. Buick*





# **THE NEW STANDARD: NEGLIGENCE**

- **Manufacturer must exercise reasonable care under the circumstances**
- **Were the dangers foreseeable?**
- **Care must be taken to avoid misrepresentation**
- **Defects and dangers must be revealed**
- **Causal connection must be present between the product or the design defect and the injury**
- **By the 1960s, courts began to apply the strict liability doctrine to manufactured products**



# Product Liability – Neg. & S.L.

- The same general types of actions apply to both negligence and strict liability.  
The difference is that:
- Negligence: must show the specific act that led to the injuries;
- Strict Liability: Need only show that product was defective, the defect made the product unreasonably dangerous, and that the defect caused the injury.



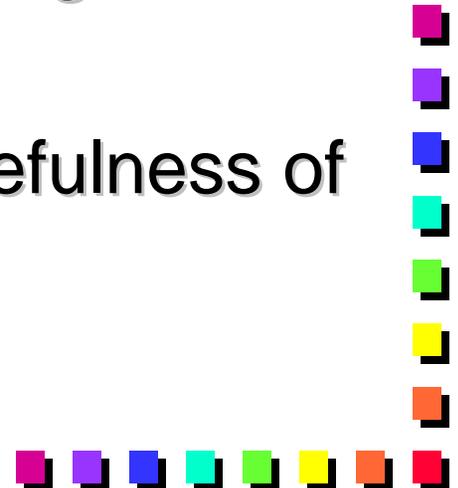
# Elements of Strict Liability for Products.

- One who sells any product
- In a defective condition
- Unreasonably dangerous to the user ...
- Liable for physical harm
- Seller is engaged in the business of selling such a product,
- Product is sold w/o substantial change



# Unreasonably Dangerous

- More dangerous than an ordinary consumer would expect;
- or
- Benefits of design do not outweigh inherent risk.
  - So juries weigh (balance) the usefulness of any product with its risks.



# Improper Manufacture, Handling or Inspection.

- McPherson vs. Buick.
- Lincoln wheel case, if manufacturer.
- Mice in soft drinks.
- Frog in taco at Taco Bell (fraud)



# Failure to Warn

- Manufacturer must warn about all dangers that it knew or s/h/knew about, if the user might not appreciate the risk.
  - Foreseeable dangers need be warned.
  - Foreseeable misuse must be warned.
  - Need not warn of obvious dangers.
  - A warning will not make an unreasonable dangerous product safe.
- Examples
  - Ladders, Chain saws, Medicines (external use, don't mix, test on inconsp. part first.)
  - Forklift driver, Garbage truck,
  - Sears' Lawn Mower, McDonald's coffee case.





# Strict Liability and the Failure To Warn Standard

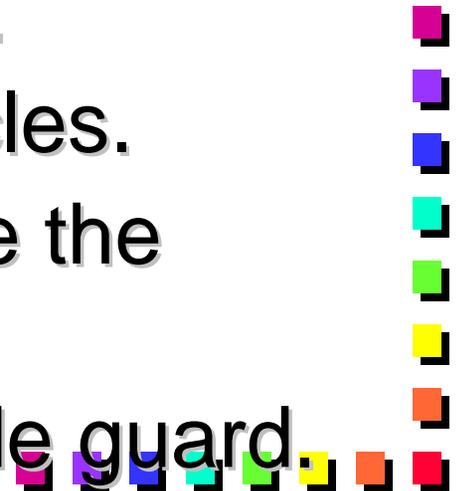
*(Manufacturers wonder how far the laws will go)*

- Gun mfr. is liable for failure to warn of possible damage to users' hearing from long-term exposure to gun fire.
- Diet-food producer is liable for failure to warn about using adult diet food as baby food.
- Commercial pizza dough roller machine mfr. liable when worker sticks hands in machine to clean it & machine is on.
- Campho-Phenique (external medicine) states: "Keep out of reach of children." "For external use." "In case of ingestion- seek medical help & call poison center." Not strong enough to explain dangers.
- Johnson & Johnson pays \$8.85 million to a liver transplant patient due to the fact years of drinking & taking Tylenol had destroyed his liver. Company knew drinking & taking regular doses of Tylenol could damage liver.



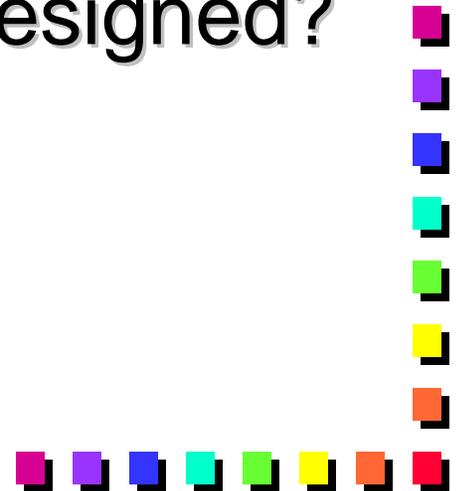
# Design Defects – Design makes products dangerous.

- Yuba Power tools – inadequate set screws. 1963; 1<sup>st</sup> S.L. product case.
- Pinto case.
- American Airlines DC-10.
- BIC lighter
- Weak roofs and seats in autos.
- Three-wheeled all terrain vehicles.
- Manufacturers need not reduce the utility of their products.
- Table saw with removable blade guard.



# Design Defects (cont.)

- Drunken driver in a one car accident sues auto manufacturer for defective design. No one disputes he caused the accident, but were his injuries worse because the auto was poorly designed?
- Held a jury question.





# Strict Liability & Design Defects

- Worker receives \$750,000. Co-worker removes metal plate & covers machine with cardboard (failing to put plate back). Worker falls into machine and loses his leg. It is a manufacturing design defect that machine can run when the metal plate is removed.
- Restaurant employee badly burned. He tries to retrieve an item that fell from his shirt pocket into French Fry machine.
- Child pushed emergency stop button on an escalator, causing person to fall, and be injured. It's a design defect to make a button red--kiddies might like it and push it!
- A man drives a riding mower up a steep hill, mower rolls over & he is cut by the blades. Manufacturer should design it to shut off automatically when it leaves ground.



# Latent Defect – Failure to test.

- Asbestos case.
- IUD's.
- Silicon breast implants.
- Thalidomide.
  - Problem was that they were not tested long enough to determine long-term safety.



# Strict Liability and Unknown Hazards or Latent Defects

- Dangers not known at the time of the product's manufacture
- Hazard associated with the product is not learned for many years
- *Consumer Expectation* standard used by courts
  - What is the expectation of an ordinary customer regarding safety of a product?
- Claims are often class action suits
- Asbestos Industry-- has paid billions of dollars to tens of thousands of plaintiffs in claims over a 30-year period
- Injuries caused by IUDs have been in the courts for years
- Manufacturers must have recalls or warnings when hazard is detected



# Review – Areas of Negligence / Strict Liability

- Failure to Manufacture Properly:  
Improper Handling, Inspection,  
Packaging
- Failure to Warn Properly
- Failure to Design Properly
- Failure to Test Properly (Latent Injuries)





# ***Morales v. American Honda***

- **9-year-old Gary drove Honda Motorcycle into path of pick up truck as he left an unpaved farm road; instructions said “off-the-road use only” and other warnings**
- **Driver of pickup was not at fault--her view of the road was obstructed & she had the right of way**
- **Severe injuries to Gary, including permanent brain damage; medical expenses were more than \$320,000**
- **Trial court grants summary judgment for Honda**
- **Question: Were the warnings given with the motorcycle a contributing cause of the accident because not adequate?**
- **Held: This is a question that should be presented to the jury for determination.**

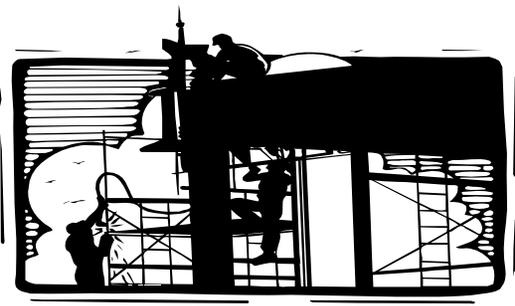


# ***No Safer Alternative***

## ***Hollister v. Dayton Hudson***

- **Hollister is student at Northwestern; she returns to her apartment at 2:00 a.m., drunk; reaches across hot stove; shirt catches fire; she has extensive burns; over \$1 million in reconstructive surgery**
- **She sues Dayton Hudson, claiming shirt was defective because it was flammable; expert witness testify to this**
- **District court rules for Dayton. She appeals.**
- **HELD: There is no cause of action based on design defect.**
- **Expert failed to show that alternative materials were reasonable substitutes to use in shirts**
  - **Suit may proceed on failure to warn of flammability, but likelihood of success not high.**
- **Remember table saw case with removable guard.**
- **Unguarded boat motor propellers.**





# *Borel v. Fibreboard Paper Products Corp.*

- Borel is exposed to asbestos from 1936-69 as he worked on insulation jobs; 1969, is diagnosed w/pulmonary asbestosis
- Has lung cancer in 1970 and lung is removed; he sues against 11 manufacturers; dies soon thereafter; heirs continued litigation; 4 suits settled; one was dismissed; six, including Fibreboard and Manville are left; jury finds them liable under strict liability; manufacturers appeal
- **Held: Manufacturers Petition for Rehearing is denied**
- **No manufacturer ever warned of the dangers of inhaling asbestos dust; is their responsibility to inform user or consumer of risks**
- Here there is failure to give adequate warning
- **Manufacturers must keep up with scientific knowledge; have a duty to test and inspect their products**
- Bear ultimate burden regarding their conduct and duty

# Strict Liability – Liability Without Fault??

- For Strict Liability to apply, the product:
  - Must be defective, and
  - unreasonably dangerous.
- Clearly the manufacturer is at fault. If the manufacturer is not held liable, then the injured consumer bears the whole cost.
- Spreading of risks: Hold the man. Liable and let him buy insurance; spread the risks among all users of the product, like all other business expenses.



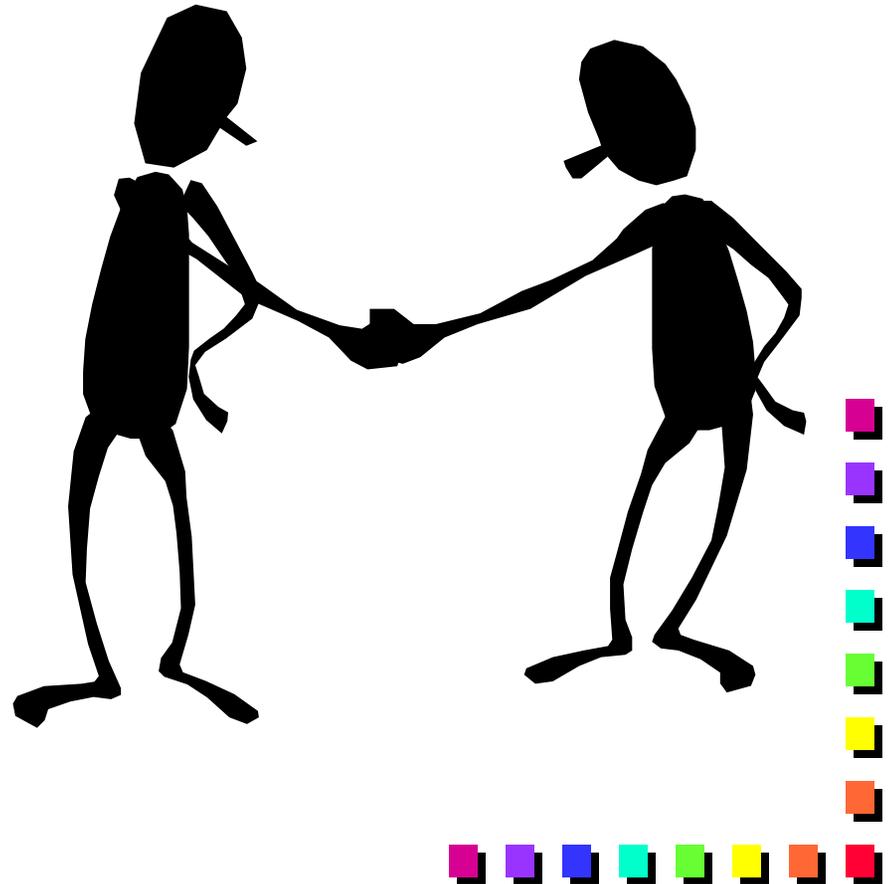
# Market Share Liability or Enterprise Liability

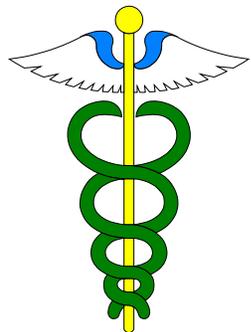
- Used when, because of latent effect, plaintiffs do not know the specific manufacturer
- Arose in response to DES drug suits
- May sue any or all of the manufacturers in question
- Manufacturers share liability according to their share of the market for the drug



# Joint and Several Liability

- Plaintiffs may sue any or all manufacturers to share the liability created
- Any of the defendant-manufacturers may be held responsible for all damages
- Some states have abolished it
- The tendency is to use “market share liability” (though that term is not actually used by courts)





# ***Collins v. Eli Lilly Co.***

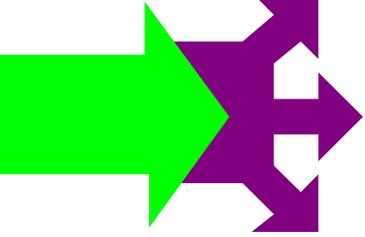
## **Market Share Liability**

- **Collin's mother took DES during pregnancy**
- **Drug later banned due to cancer risks to adult female offspring of women who took the drug during pregnancy**
- **Collins develops ovarian cancer; has radical cancer surgery**
- **Mother didn't know exactly who manufactured the DES she took; sues a dozen manufacturers who produced it**
- **Held:** She can sue any of them--they pay proportion of damages based on the share of the market they had at time of the injury



# Defenses

- **Product Misuse or Abuse**
- **Assumption of Risk**
  - **Tobacco and alcohol use are controversial areas; so far courts haven't applied the defense to users**
- **Sophisticated Purchaser or Knowledgeable Purchaser**
  - **i.e. another mgfr.**
  - **or Air Force employees who handle certain chemicals**
- **State of the Art / No Safer Alternative**
- **Statues of Repose – 20 yrs. In Indiana.**
- **Obvious risks.**
- **Government Preemption – cigarette warnings.**



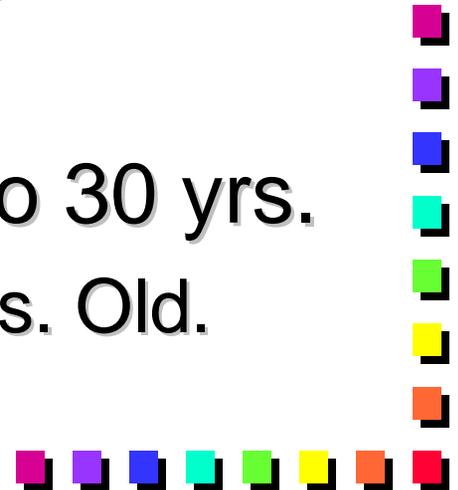
# Product Liability Reform

- **Setting caps on awards**
- **Limiting or abolishing punitive damage awards**
- **Abolishing joint and several liability**
- **Manufacturers argue liability costs make American products less competitive**
  - **Threat of liability forces good products off the market**
- **Free market economists say the market will adjust as to which products are “good” or not**
- **Trial lawyers argue for no changes in the present system**
- **Some middle ground may be the outcome of opposing views**
- **See *Should Companies Take a Hard Stand?***
  - **Some companies that used to settle are now “drawing a line in the sand” against dubious/frivolous suits.**



# Statutes of Limitations

- Contract – Breach of Warranty – 4 yrs.  
From time cause of action accrues.
  - Usually accrues at delivery, but future performance: Paint guaranteed for 30 yrs.
- Tort – Usually two yrs. But time does not start until cause of action is discovered.
- Statutes of Repose – from 20 to 30 yrs.
  - Table saw case – saw was 30 yrs. Old.



# Warranty Disclaimers - Contracts only

- Title Warranty: May be disclaimed by using specific language.
- Implied Warranties: May be disclaimed by using specific language, or “as is”, or “with all faults”.
- Express Warranties:
  - Best way is not to give express warranties.



# Express Warranties – cont.

- Disclaimers and warranties are interpreted as consistent, if possible.
- If not possible, the disclaimer is NOT effective.
- Cannot give warranties in one paragraph, and take away in another.
- But, you can limit express warranties to what is written in the contract.



# Other Contractual Limitations

## ■ Liquidated Damages

- Agreed to before breach; proportionate.

## ■ Limitation of Damages

- Disclaim consequential damages (lost profits);
- Cannot disclaim personal injury damages on a consumer product.

## ■ Limitation of remedies

- Repair or replace;
- Not effective if limitation “fails of its essential purpose”. – Lemon laws



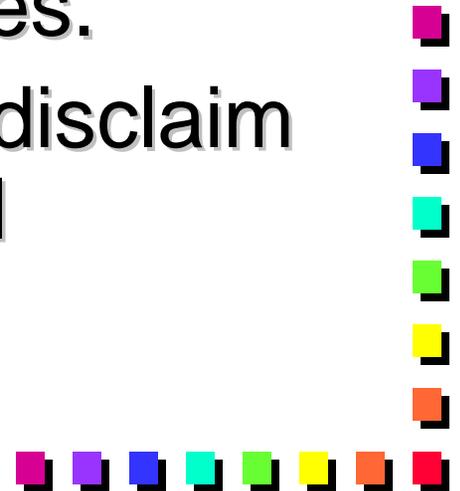
# Indiana Lemon Law

- Applies only to dealers;
- Covers lesser of 18 months or 18,000 miles, starting with date of delivery.
- 4 attempts to correct a single nonconformity, and not corrected, or
- Out of service cumulatively for 30 days for any nonconformity (ies), and not corrected.
- Remedy is replacement or refund, at buyer's option.



# Magneson-Moss Warranty Act

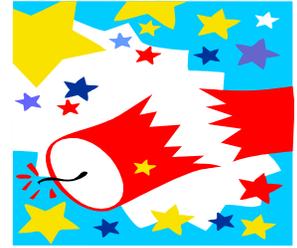
- Does not require ANY warranty.
- However, if a written warranty is given, it must be designated Full or Limited.
- If Full, the seller may NOT disclaim, modify or limit implied warranties.
- If Limited, the seller may NOT disclaim or modify, but may limit implied warranties.



# End of Chapter 8



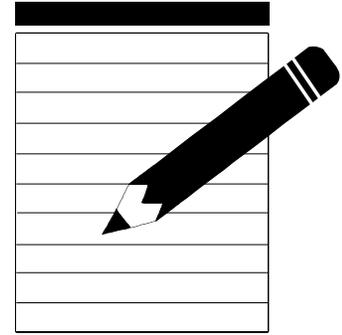
# ***Ried v. Eckerds Drugs, Inc.***



- Ried purchased spray can of deodorant from Eckerds Drugs. After spraying his neck and chest, he lit a cigarette. The alcohol in the product ignited causing severe burns.
- The trial court found the warning on the product's can was sufficient and found for Eckerds.
- Ried appealed.
- **HELD:** The Court of Appeals found that the maker breached an implied warranty of merchantability and an implied warranty of fitness for a particular use. This means that no negligence by the maker need be shown.
- Judgement reversed and remanded



# Strict Liability Created Through Warranties Under Contract Law



- *Implied Warranty of safety*
- Implied AT LAW-- whether manufacturer wants the warranty for the product or not

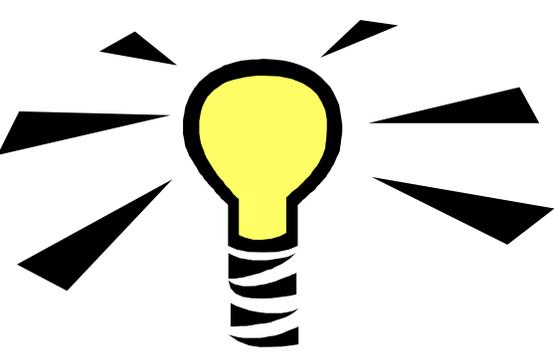
- Express Warranty
  - Guarantee of safety or performance
  - By model
  - By statement
  - By contract
  - By Advertising



# ***Baxter v. Ford Motor (1932)***

- **Baxter buys Model A**
- **Printed material states “Triple Shatter-Proof Glass”--*“will not fly or shatter under the hardest impact. . .it eliminates the danger of flying glass”***
- **Rock hits windshield-  
Baxter loses left eye**
- **Trial court did not allow advertising to be admitted in evidence; said there was no privity of contract**
- **Baxter appeals**
- **Held: The case should go to the jury.**
- **Representations of Ford were false and Baxter relied on them—an express warranty of safety**





# Consumer Products and Strict Liability

- **Manufacturers are strictly liable for defective products**
- **The courts ask:**
  - **Was the product defective?**
  - **Did the defect create an unreasonably dangerous product or instrumentality?**
  - **Was the defect a proximate cause or substantial factor of the injury?**
  - **Did the injury cause damages?**
  - **It is not a defense that the maker used all possible care and the highest quality in making the good.**
- **The EU uses the strict liability standard involving defective consumer goods; Japan moving that direction**

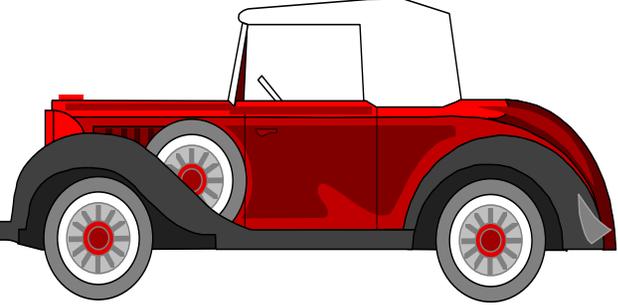


# Strict Liability in Tort Law-- *Greenman v. Yuba Power (1963)*



- Wife buys husband power tool
- 2 years later wood flies out of machine, striking Greenman's head
- He alleges breaches of warranties and negligence
- S. Ct. of Calif. affirms trial court decision in favor of Greenman and says that the maker is "strictly liable in tort"
- *By mid-1970s every state supreme court had adopted strict liability rule*



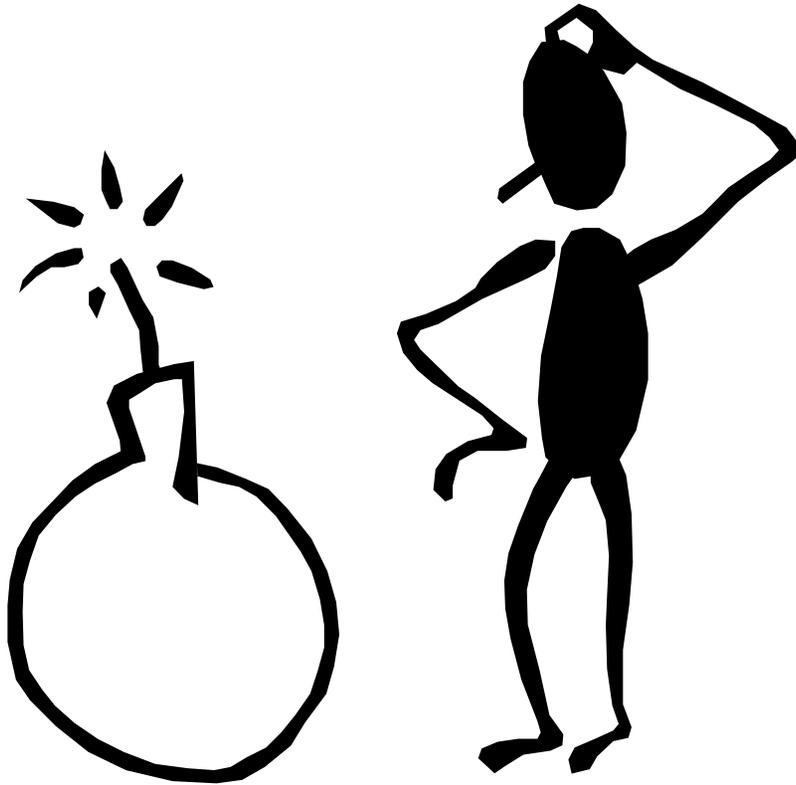


## ***MacPherson v. Buick Motor Co. (1916 landmark case)***

- Buick sells cars to dealers
- NY dealer sells car to MacPherson
- Wheels made by another company; wheel collapses, causing accident that results in injury to MacPherson
- He files negligence suit; Buick says it has no privity with him; trial court holds that privity is not required. Buick appeals.
- NY Court of Appeals (high court) holds primary manufacturer has control over product safety
- Defects could have been discovered by reasonable inspection, which was omitted
- Buick is responsible for the finished product
- Judgment affirmed



# Ultra-hazardous Activity



- **Common law rules developed about uncommon activities where utmost care is needed**

- **i.e. use of explosives, transport of dangerous chemicals, crop dusting**

- **See *Old Island Fumigation* (in text)**

