To: MU Products Class 2017

From: Roger Geary

Date: 12-29-16

Hi Product Liability Class!

We look forward to our class this year. We normally meet Mondays, 11:00 am-12:40 in classroom 4. We will, however, have our first class on Friday, January 13 at 11:00 am. And then our next class will be the beginning of the Monday rotation, Monday, January 23.

Attached is our syllabus – we have divided the class into six units which we call sessions, and we will try to cover a session in each class period. We hope to have additional sessions that will include guest speakers, practical applications and discussions, and perhaps review. We will not use a text book this year for this class – instead please read the cases, statutes and restatement sections that are identified in the syllabus. We would emphasize that it is very important that you read the cases for each session before class, as we will teach the class based on the assumption that you have already read the cases. The assignment for Friday, January 13 is the session 1 material, and the assignment for Monday, January 23 is the session 2 material, and we will go from there. We don’t call on students but the class is more fun when you ask questions and express your views.

As you know, we are adjunct faculty, and are product liability practitioners in Kansas City. We graduated from the law school in 1983, and we have been teaching this class as adjuncts for about the last ten years. Please call us by our first names, Roger and Sandy – and you can reach us by email at the following: rgeary@shb.com and sstigall@shb.com. Our firm is Shook, Hardy and Bacon, and the general phone number there if you need it is (816) 474-6550.

We’ll send out emails from time to time with updates regarding the assignments, and we can also answer any questions you have about the material in between our sessions by responding to your emails, which we are happy to do.

Thanks and see you soon!

Sandy and Roger
Product Liability
2017 Syllabus

Session 1

A. History and Development

- Roman Law
- English Law
  - Chandler v. Lopus, 79 ER 3 (1603)
  - Winterbottom v. Wright, 152 ER 402 (1842)
- UCC/Warranty Law
- Misrepresentation
- American Law
  - Greenman v. Yuba Power Products, 377 P.2d 897 (Cal. 1963)
  - Rest. Torts 2nd §402A

B. Strict Liability Elements

- Elements
- What is a “product” under strict liability?
- Who can be a plaintiff under strict liability?
- Who can be a defendant under strict liability?
- What transactions are subject to strict liability?
  - Sale of used goods?
    - Rest. Torts 3d §3 – minority view.
  - Sale of real estate?
  - Services?

C. Types of Defects

- Manufacturing Defect
— *Welge v. Planters LifeSavers Co.*, 17 F.3d 209 (7th Cir. 1994)

- Design Defects
  - Consumer Expectations Test
  - §402A, Comments (g) and (i)
    - *Gray v. Manitowok Co.*, 771 F.2d 866 (5th Cir. 1985)
    - *Bourne v. Gilman*, 452 F. 3d 632 (7th Cir. 2006)
  - Risk Utility Test
    - *Rest. 3d §2*
Session 2

A. Issues In Design Defect Cases

- Hindsight v. Foresight

- Misuse by plaintiff/defendant’s knowledge of plaintiff’s misuse
  — “Reasonably anticipated use”

- Changes in technology/plaintiff’s tool or defendant’s tool?
  — Is “state of art” a defense for the defendant?
  — Boatland of Houston v. Bailey, 609 S.W.2d 743 (Tex. 1980)
  — Is “safer feasible alternative” part of plaintiff’s burden?

- Rest. 2d 402A Comment k: unavoidably unsafe products
  — Grundburg v. Upjohn Co., 813 P.2d 89 (Utah 1991)

B. Failure to warn/Warning Defects

- Information Torts

- When is there a duty to warn?
  — If danger is open/obvious?
  — If seller does not/could not reasonably know of risk?
  — Rosa v. Taser International, Inc., 684 F.3d 941 (9th Cir. 2012)

- Causation
  — What would have made a difference?
  — Heeding presumption.

- Adequacy of Warning
  — What types of information are required?
  — What about foreseeable misuse?
— *Spruill v. Boyle – Midway, Inc.*, 308 F.2d 79 (4th Cir. 1962)
— *Edwards v. California Chemical*, 245 So.2d 259 (Fla. App. 1971)

- Obvious or Known Dangers
  — Rest 2nd 402A Comment j

- Whom To Warn/Who Can Be A Plaintiff?
  — Users/consumers/bystanders
  — Ultimate users.

- What if there is a learned intermediary?
  — What if a drug company warns the treating doctor, but the doctor does not warn the patient?
  — *State ex rel Johnson & Johnson v. Karl*, 648 S.E.2d 899 (W. Va. 2007)

- Allergies

- Is there a continuing duty to warn?
  — Courts split.
  — Rest. 3d §10
  — Missouri
Product Liability
2017 Syllabus

Session 3

A. Causation in Products Cases

- Tests for causation
  — But for causation
  — Substantial factor causation
  — Missouri Law

- Causation in failure to warn cases
  — 402A Comment j
  — Heeding presumption – some states recognize

- Enhanced injuries
  — Multiple injuries/multiple sources of injuries

- Linking defendant with the product
  — Alternative to causation
  — Mulcahy v. Eli Lilly Co., 386 NW 2d 67 (Iowa 1987)
    — Market share liability

- California view – multiple toxic exposure cases

- Proximate cause/foreseeability
  — Palsgraf v. Long Island Railroad Co., 162 N.E. 99 (NY. 1928)

B. Defenses in 402A cases

- "Contributory negligence" by the plaintiff – historically a complete bar.
• Negligence by the plaintiff in using the product
  — Misuse is a complete bar, where there is abnormal or
  unintended use, but what about collateral negligence, where
  the plaintiff creates unreasonable risks for his own safety?
  Like the foreseeable misuse of driving too fast?
  — *Daly v. General Motors*, 575 P.2d 1162 (Cal. 1978)

• Assumption of the risk – voluntary assuming a risk that is known
  and apparent/appreciated.

• Missouri law – Mo. Rev. Stat. § 537.765

• State of the art
  — Where is it allowed/what are its limitations?
  — Defendant must plead and prove - where it is allowed

• Statute of Limitations
  — What starts running of the statute.

C. Statutes and Safety Regulations

• Effect of defendant’s non-compliance

• Effective of defendant’s compliance with safety regulations.

• Federal preemption
  — US Constitution/Supremacy Clause
  — Express preemption
  — Implied preemption
Product Liability
2017 Syllabus

Session 4

A. Evidence in products cases

- How is defect proven?
  — Can it be proven circumstantially without an expert?
    — Rest. 3d §3
    — Smoot v. Mazda, 469 F.3d 675 (7th Cir. 2006)

- Industry Standard/State of the Art
  — Bruce v. Martin Marietta Corp., 544 F.2d 442 (10th Cir. 1976)

- Post Accident/Subsequent Remedial Measures
  — FR Evid. 407

- Similar occurrences
  — Can plaintiff offer evidence of other failures?

- Expert Witness Testimony
  — When is it allowed?
  — Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)
  — FR. Evid 702
  — Best v. Lowes Home Center, Inc., 563 F.3d
    — Missouri rule

B. Compensatory Damages in Products cases

- Must have damage to person, or to property other than just to the product

- Compensatory/economic damages
— Medical, past and future
— Wages, past and future
— Property damage

• Compensatory/non-economic
  — Pain and suffering
  — Emotional distress?
  — State caps on damages?

• What about pure harm to the product?

• What about pure economic loss?

• What about pure mental distress?

• Non-injured bystanders with pure emotional distress?

C. Punitive damages in products cases

— Purpose
— Conduct
— Most states, as a matter of state law, require clear and convincing evidence as burden of proof.
  — *Acosta v. Honda Motor Company*, 717 F.2d. 828 (3rd Cir. 1983)

D. Constitutional limits to punitive damages

— Due process clause
— Punitive damages may not be excessive/ratios
— May not be based on dissimilar conduct by the defendant/conduct by the defendant must have nexus to injury
• Can't be based on defendants harm to others
  — But can be used to calculate the amount of punitive damages

• State caps on punitives

• Bifurcation

• Motions in limine
Product Liability
2017 Syllabus

Session 5

A. Complex Litigation

- What options are available when there are many plaintiffs?
  — F.R. Civ. P. 42 Consolidation
  — Requirements
  — F.R. Civ. P. 23 Class Actions
  — Requirements
  — Types of class actions
  — How created
  — Effect
  — Valentino v. Carter Wallace, Inc., 97 F.3d 1227 (9th Cir. 1996)
  — In re Rhone-Poulenc Rorer Pharmaceuticals, Inc., 51 F.3d 1293, (7th Cir. 1995)
  — Multi district litigation 28 USC §1407
  — Requirements/how created
  — Effect

- Issue Preclusion/Collateral Estoppel
- Is a jury finding in trial 1 against a defendant binding in favor other plaintiffs against the same defendant in other cases?
- Issue preclusion
  — Requirements
  — 1)party to be estopped previously litigated the issue and lost;
  — 2)final judgment entered against the losing party;
  — 3)Resolution of that issue was necessary to the judgment against the party.
  — Offensive non-mutual collateral estopped by new plaintiffs.
  — Hardy v. Johns-Manville Sales Corp. 611 F.2d 334 (5th Cir. 1982)
Session 6

A. Development of Strict Liability
   • Keener v. Dayton Electric, 445 SW 2d 362 (Mo. 1969)
   • Nesselrode v. Executive Beachcraft, 707 SW 2d 371 (Mo. 1986)
   • Rodriguez v. Suzuki, 996 SW 2d 47 (Mo. 1999)

B. Missouri Statutes and Instructions
   • Missouri Product Liability Statute
   • MAI 25.04 (Strict Liability – Defect)
   • MAI 25.05 (Strict Liability – Failure to Warn)
   • MAI 25.09 (Negligent Manufacture/Design)
   • MAI 25.10A (Negligence/Failure to Warn)

C. Defenses
   • State of the Art – Mo. Rev. Stat. § 537.764
     — Failure to Warn
     — Design Defect
   • Plaintiff’s comparative fault – Mo. Rev. Stat § 537.765
     — Assumption of Risk
     — Comparative Fault
   • Dismissal of Mere Seller Mo. Rev. Stat. § 537.762
   • Statute of Limitations
D. Evidence/Issues

- Expert Opinion
  - Mo. Rev. Stat. § 490.065
- Subsequent Remedial Measures
- Similar Occurrences
- Continuing Duty to Warn

E. Actual Damages

F. Punitive Damages

- Burden of proof
- Constitutional issues
- Statutory cap – Mo. Rev. Stat. § 510.265
- State lien of 50% Mo. Rev. Stat. § 537.675
- Bifurcation/Credit Mo. Rev. Stat. § 510.263

G. Effect of Settlement

- Mo. Rev. Stat. § 537.060