

# Welcome

The “Emerging Trends & Developments in Products Liability Law & Litigation” Webinar will begin shortly...

In order to prevent static and interruptions to the presentation, webinar participants will be muted upon entry. If you have questions at any time during the webinar, please use the chat function and submit them to Derek Hoeft. Questions will be responded to at the end of the presentation. Thank you.

*Whose Product Is It  
Anyway?*

***EMERGING TRENDS & DEVELOPMENTS IN  
PRODUCTS LIABILITY LAW & LITIGATION***

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Primerus Defense Institute  
Products Liability Practice Group  
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# Purpose and Scope of Webinar

## Overall Purpose

Raise awareness of issues (legal and factual) to consider when the product has possibly been altered/modified or abused/misused, or is a component or is made of components

## Scope

- Show commonality of “same condition” essential element and discuss burden of proof and evidentiary issues to contemplate
- Discuss various treatments/interpretations of “same condition” essential element with several case illustrations
- Discuss liability theories/defenses relating to component parts, as well as how to avoid pitfalls when a component is involved

# Commonality

## “Same Condition” Requirement

### Restatement (Second) of Torts: § 402A

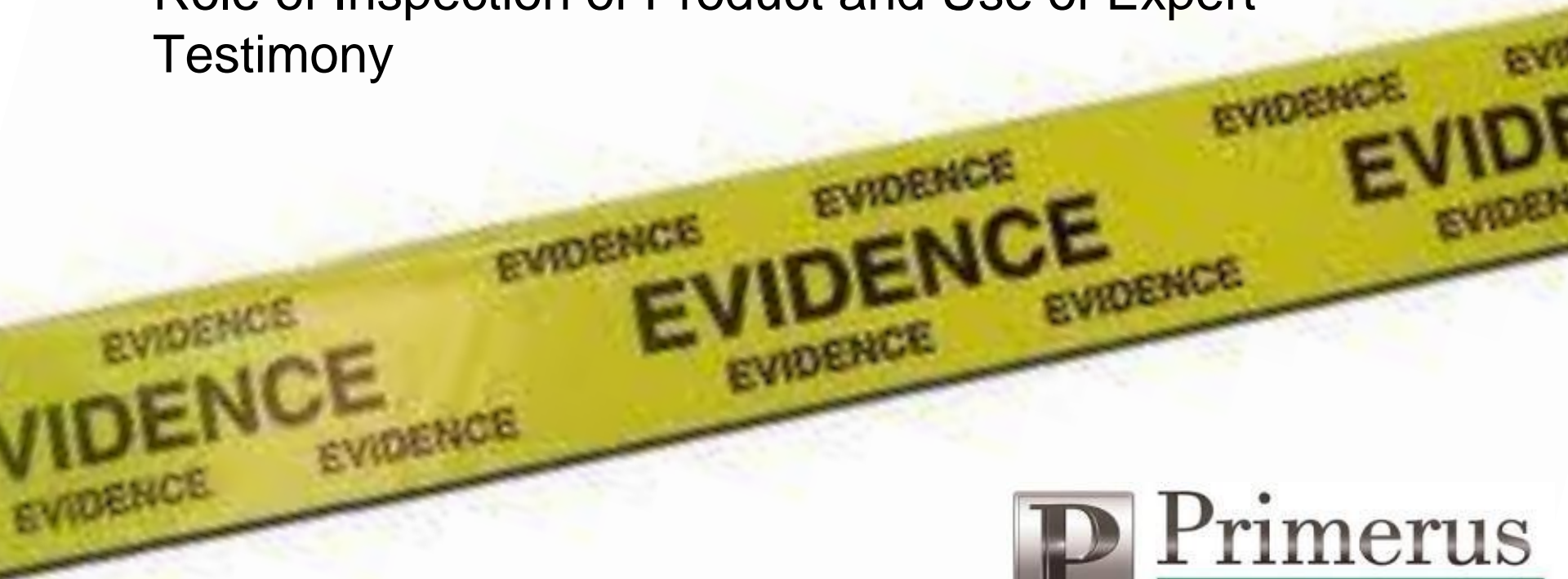
- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability . . . , if
  - (a) the seller is engaged in the business of selling such a product, and
  - (b) it is expected to and does reach the user or consumer **without substantial change in the condition in which it is sold.**

### Restatement (Third) of Torts: Products Liability § 2

A product is defective when, **at the time of sale or distribution**, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings.

# Burden of Proof and Evidentiary Issues

- Absence of Presumption of “Same Condition”
- Burden of Proof on Plaintiff
- Evidence Required to Prove “Same Condition”
- Role of Inspection of Product and Use of Expert Testimony



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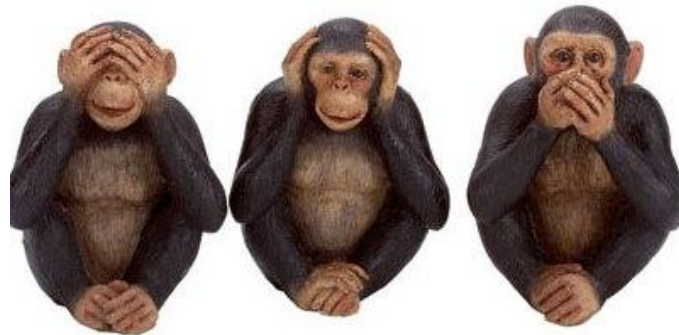
# Change of Condition

Origins in Common Law

Restatement (Second) of Torts: § 402A

*“[W]ithout substantial change in the condition...”*

Restatement (Third) of Torts: Products Liability § 2



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# Change of Condition

What Exactly is “Substantial Change?”







# Change of Condition

## What Exactly is “Substantial Change?”



- Restatement (Second) of Torts: § 402A, cmt. g: “...subsequent mishandling or other causes...”
- “[A]ny change which increases the likelihood of a malfunction, which is the proximate cause of the harm complained of, and which is independent of the expected and intended use to which the product is put.”  
Kobza v. Gen. Motors Corp., 580 N.E.2d 47, 49 (Ohio Ct. App. 1989).

# Change of Condition

## What Exactly is “Substantial Change”



- “[T]he configuration or operational characteristics of the product are changed or altered by affirmative conduct of some person in a manner that the defendant could not have reasonably foreseen would occur in the intended or foreseeable use of the product.”

USX Corp. v. Salinas, 818 S.W.2d 473, 489 n.16 (Tex. Ct. App. 1991).

- “[A] change in the design, function or character of the product linked to the accident.”

Hiner v. Deere & Co., 131 F. Supp.2d 1279, 1292 (D. Kan. 2001).

# Change of Condition

## “Subsequent Mishandling”



- Summary judgment granted in chair collapse case where crack may have been due to subsequent mishandling. Jackson v. Bermuda Sands, Inc., 677 S.E.2d 612 (S.C. Ct. App. 2009).
- Grant of manufacturer’s post-trial motions based on “deplorable condition” of machine from subsequent mishandling. Holman v. Mark Industries, Inc., 610 F. Supp. 1195 (D.C. Md.1985).
- Liability in spite of the fact that bottle was found in landfill, subjected to weather. Gatlin v. Coca-Cola Co., 461 So.2d 452, 454.

# Change of Condition

“Modification,” “Alteration,” “Substantial Change”



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# Change of Condition

## Lapse of Time



- Summary judgment granted in slip and fall case involving burst of pipe from “old age.”

Oquendo v. Teledyne Pines, 602 N.E.2d 56 (Ill. App. 1992).

- Defect notwithstanding lapse of time in case involving impalement on gear shift.

Mickle v. Blackmon, 166 S.E.2d 173 (S.C. 1969).

- Impact on warnings claims.
- Implications for statute of repose.

# Change of Condition

## Maintenance



- Summary judgment granted because age of hoses and maintenance by user could not be ruled out as cause of hose detachment.  
Oglesby v. General Motors Corp., 190 F.3d 244 (4th Cir. 1999).
- Summary judgment granted based on improper maintenance of safety plug on pressure cooker.  
Perez v. National Presto Industries, Inc., 431 So.2d 667 (Fla. Ct. App. 1983).
- Directed verdict for defendant based on improper maintenance and repair of commercial washer-extractor. Rogers v. Unimac Co., Inc., 565 P.2d 181 (Ariz. 1977).

# Change of Condition

## Key Words and Concepts



- “Subsequent mishandling”
- “Change in condition”
- “Lapse of time”
- “Years”
- “Age”
- “Worn”
- “Maintenance”
- “Modification”
- “Alteration”
- “Removal” and “safety” or “guard”

# Change of Condition

Imposition of Liability in Spite of Change



Foreseeability



Proximate Causation



# Component Part Conundrum

Whose Product Is It?



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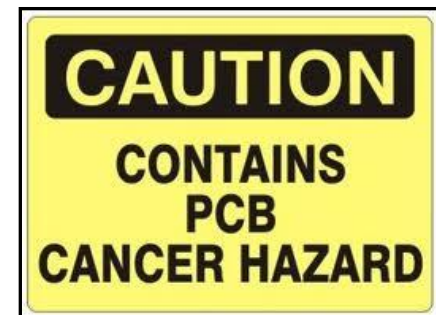
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# Component Parts

It Is Your Product



- Original Design Includes A Defective Component Part – It was Designed That Way
- Original Design Contemplates Replacement - A Defective Component Part Is Used As Replacement



# Component Parts

Liability Theories: OEM/After Market

## Replacement of Defective Component Part



Brake Parts

# Component Parts

Liability Theories: OEM/After Market

## Replacement of Defective Component Part



## Gasket and Packing Valves

# Component Parts

Liability Theories: Attached or Appurtenant Parts

## Liability For Attached (Appurtenant) Parts



Boilers and  
Thermal Insulation

# Theories Used By Plaintiffs

## Liability Theories: Attached or Appurtenant Parts

- Designed to Use Defective Component Part – “I’m Just Drawn That Way”
- Foreseeable Use With Dangerous Product of Others – Duty to Warn – “Should Have Known It Would Be Hot”



# Theories Used By Plaintiffs

Liability Theories: 2012 Philadelphia Trial - Instruction Against Ford



Ford Designed The Car



It's Really an  
Asbestos  
Grinding Machine



Brake System Could Only  
Use Asbestos Friction Material

# Component Parts

It's Not Your Product: Courts to the Rescue!



No appellate review?!?  
There must be a higher authority.



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# Component Parts

It's Really Not Your Product

## *O'Neil v. Crane Co. (2012) 53 Cal 4th 335*



This case involves the limits of a manufacturer's duty to prevent foreseeable harm related to its

We hold that a product manufacturer may not be held liable in strict liability or negligence for harm caused by another manufacturer's product unless the defendant's own product contributed substantially to the harm, or the defendant participated substantially in creating a harmful combined use of the products.



participated substantially in creating a harmful combined use of the products.

# Component Parts

## It's Really Not Your Product

- *Dreyer v. Exel Industries, S.A.* (6th Cir. May 4, 2009, No. 08-1854) 2009 WL 1184846 (*Dreyer*) [relying on *Taylor* and holding that the maker of a paint sprayer had no duty to warn of injuries caused when a solvent used to clean the sprayer ignited, even though the use of the solvent in question was clearly foreseeable to the sprayer's maker];



- *Exxon Shipping Co. v. Pacific Resources, Inc.* (D.Hawaii 1991) 789 F.Supp. 1521, 1523, 1527 [maker of mooring terminal not responsible for defective "chafe chain" because there was no evidence the defendant "designed, manufactured, distributed, sold or otherwise supplied the specific chafe chain which failed"];



- *Niemann v. McDonnell Douglas Corp.* (S.D.Ill. 1989) 721 F.Supp. 1019, 1028-1030 [rejecting strict liability claims against the manufacturer of an aircraft for exposure to asbestos "chafing strips" on the aircraft engine, when plaintiff was exposed only to replacement chafing strips provided by others];



CONTAINS ASBESTOS FIBERS  
AVOID CREATING DUST  
CANCER AND LUNG DISEASE HAZARD  
AVOID BREATHING AIRBORNE ASBESTOS FIBERS



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# Component Parts

## It's Really Not Your Product



- *Cleary v. Reliance Fuel Oil Associates, Inc.* (N.Y.App.Div. 2005) 17 A.D.3d 503, 505-506 [manufacturer of water heater had no duty to warn of dangers of misplacing a temperature control device it did not manufacture];

- *Rastelli v. Goodyear Tire & Rubber Co.* (1992) 79 N.Y.2d 289, 298 [591 N.E.2d 222, 226] (*Rastelli*) [tire manufacturer not responsible for defective rim it did not place in the stream of commerce because there is no duty to warn when a manufacturer “produces a sound product which is compatible for use with a defective product of another manufacturer”];



- *Walton v. Harnischfeger* (Tex.App. 1990) 796 S.W.2d 225, 227-228 [crane manufacturer had no duty to warn or instruct about rigging it did not place into the stream of commerce];



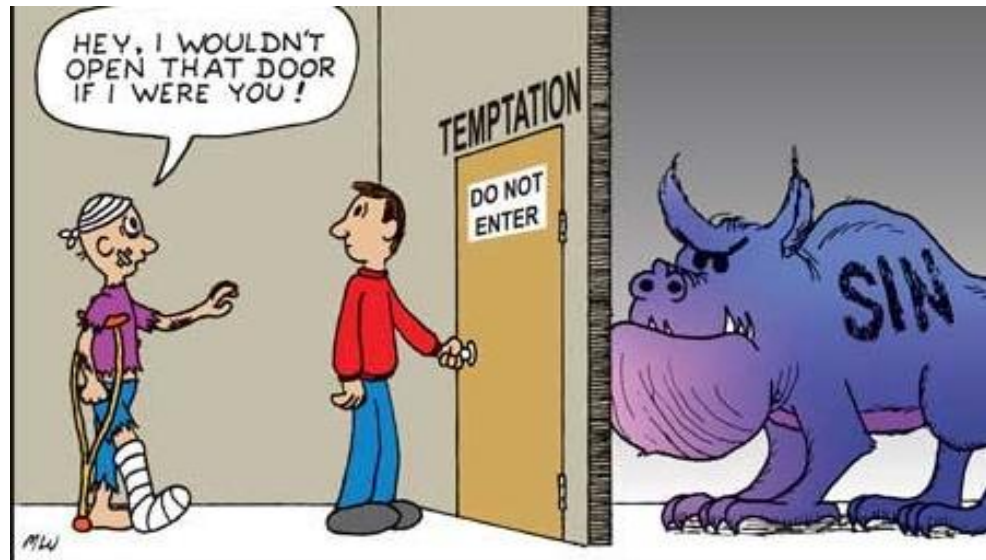
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# Component Parts

Let's Not Make It Your Product: Don't Open The Door

- Product Did Not Substantially Contribute to Injury
- No Substantial Contribution to Creating Harmful Combined Use



# Questions?



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