PRODUCT LIABILITY INSTRUCTIONS

Introduction

Scope of Product Liability

The RAJI (CIVIL) 7TH Product Liability Instructions refer only to manufacturers and sellers. However, liability for injuries caused by defective products is not limited to manufacturers and sellers. Liability is also extended to other entities which are "in the chain of distribution" of the defective products. *Torres v. Goodyear Tire & Rubber Co.*, 163 Ariz. 88, 91 (1990) (product liability extends to trademark licensor). *See also* A.R.S. 12-681(9) (seller defined to include wholesalers, distributors, and lessors); *Gaston v. Hunter,* 121 Ariz. 33, 45 (Ct. App. 1978)(product liability extended to supplier of investigational drug). *But see Antone v Greater Arizona Auto Auction*, 214 Ariz. 550 (App. 2007) (product liability does not extend to auctioneers) and *Grubb v. Do It Best Corp.,* 230 Ariz. 1 (App. 2012) (product liability does not extend to cooperative which warehoused goods). The instructions will need to be modified in cases involving claims against defendants who are not manufacturers or sellers.

Strict Liability vs. Negligence

A.R.S. 12-681(5) defines "product liability actions" to include "any action brought against a manufacturer or seller of a product for damages for bodily injury, death or property damage" caused by a defective product. This includes actions based on both strict liability and negligence.

Although the product liability statutes relate to both negligence claims and claims of strict liability in tort, these instructions have been drafted only for strict liability claims. The strict liability "hindsight test" adopted by the court in *Dart v. Wiebe Manufacturing, Inc.,* 147 Ariz. 242 (1985), is not applicable in informational defect cases. *Powers v. Taser Int'l, Inc.,* 217 Ariz. 398 (App. 2008). *See* Product Liability Instruction 4.

Comparative Fault

In 1984 the Arizona legislature adopted the Uniform Contribution Among Tortfeasors Act (UCATA). *See* A.R.S. 12-2501 *et seq*. In 1987 the UCATA was amended to abolish joint and several liability. *See* A.R.S. 12-2506. In *State Farm Ins. Co. v. Premiere Manufactured Systems, Inc.,* 217 Ariz. 222 (2007), the court held that the comparative fault system was applicable to product liability actions. *Id.* at 226-227. *See also Zuern v. Ford Motor Co.,* 188 Ariz. 486 (App. 1996). In product liability cases involving multiple claims of fault against parties and non-parties, the product liability instructions will need to be used together with the fault instructions.

Alternate Safety Features and 'Foolproof Designs'

In *Anderson v. Nissei ASB Machine Co., Ltd.*, 197 Ariz. 168, 178-179 (App. 1999), the court held that the trial court did not err in refusing the request for the following jury instructions: (1) "the fact that an alternate safety feature may be available does not in and of itself render a product, which has adopted a different type of safety device, defective and unreasonably dangerous" and (2) "[a] manufacturer is not under a duty to make or design a foolproof product, nor is the manufacturer an insurer of the safety of the user." *Id.* at 178. The court in *Anderson* reasoned that the requested instructions were unnecessary because they duplicated the RAJI instructions that had been given in the case. *Id.*

PRODUCT LIABILITY 1

Statement of Claim; Definition of Fault; Causation

[*Name of plaintiff*] claims that [*name of defendant*] was at fault for manufacture or sale[1] of a defective and unreasonably dangerous product.

Before you can find *[name of defendant*] at fault on this claim, you must find that [*name of defendant*] manufactured or sold a product that was defective and unreasonably dangerous at the time it left [*name of defendant*]'s control, and that the defect was a cause of [*name of plaintiff*]'s injury.

A defect causes injury if it helps produce the injury, and if the injury would not have happened without the defect.

SOURCE: *Jimenez v. Sears, Roebuck & Co.*, 183 Ariz. 399, 402 (1995); *Gosewich v. American Honda Motor Co.*, 153 Ariz. 400, 403 (1987). RAJI (CIVIL) Product Liability 1; RAJI (CIVIL) 3d Fault 1 and 2, as modified.

USE NOTE: This instruction is drafted for a noncomparative fault case. If the case is a comparative fault case, additional transitioning and modification will be necessary to blend the Product Liability Instructions and the Fault 5-11 Instructions.

[1] **"Manufacture or Sale":** A.R.S. § 12-681(1) provides: "'Manufacturer' means a person or entity who designs, assembles, fabricates, produces, constructs or otherwise prepares a product or component part of a product prior to its sale to a user or consumer, including a seller owned in whole or significant part by the manufacturer or a seller owning the manufacturer in whole or significant part."

A.R.S § 12-681(7) provides: "'Seller' means a person or entity, including a wholesaler, distributor, retailer or lessor, engaged in the business of leasing any product or selling any product for resale, use or consumption."

In some cases, "manufacture or" might be unnecessary in this instruction; in other cases, it might be necessary to add an instruction that provides a definition of manufacturer and/or seller.

COMMENT: Comparative Fault with Both Strict Liability and Negligence Defendants: If a case involves both strict liability (or warranty) and negligence claims, and if the jury applies A.R.S. § 12-2505 because comparative fault was raised by the allegedly negligent defendants, then the strict liability (or warranty) defendants also receive the benefit of the reduction in damages pursuant to A.R.S. § 12-2505(A). *See* A.R.S. § 12-2509(B) and Butler & Gage, *Comparative Negligence & Uniform Contribution: New Arizona Law*, 20 ARIZ. BAR J. (No. 1) 16, 34 (1984).

PRODUCT LIABILITY 2

Defect and Unreasonable Danger Defined (Manufacturing Defect)

[*Name of plaintiff*] claims that the product contains a manufacturing defect. A product is defective and unreasonably dangerous because of a manufacturing defect if it contains a condition which the manufacturer did not intend and, as a result, it fails to perform as safely as an ordinary consumer would expect when the product is used in a reasonably foreseeable manner.

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SOURCE: *Dart v. Wiebe Mfg., Inc.,* 147 Ariz. 242, 244 (1985).

PRODUCT LIABILITY 3

Defect and Unreasonable Danger Defined (Design Defect)

[*Name of plaintiff*] claims that the product contains a design defect.

A product is defective and unreasonably dangerous because of a design defect if the harmful characteristics or consequences of its design outweigh the benefits of the design.

A manufacturer or seller is presumed to have known at all relevant times the facts that this accident and this trial have revealed about the harmful characteristics or consequences of the product's design, whether or not the manufacturer or seller actually knew those facts. If you find that it would not be reasonable for a manufacturer or seller, with such presumed knowledge, to have put this product on the market without changing the design, then the product is defective and unreasonably dangerous because of a design defect.

A product is [also] defective and unreasonably dangerous because of a design defect if it fails to perform as safely as an ordinary consumer would expect when the product is used in a reasonably foreseeable manner.

SOURCE: RAJI (CIVIL) 3d Product Liability 3; RESTATEMENT (SECOND) OF TORTS, 402A, Comments (g) and (i); *Dart v. Wiebe Manufacturing, Inc.*, 147 Ariz. 242 (1985); *Byrns v. Riddell, Inc.*, 113 Ariz. 264 (1976); *Phillips v. Kimwood Machine Co.*, 525 P.2d 1033, n. 16 (Or. 1974).

USE NOTE: Use paragraph one in all design defect cases. Paragraphs two and three define the strict liability risk/benefit test for unreasonably dangerous products. Paragraph four defines the RESTATEMENT consumer expectation test for unreasonably dangerous products. In *Dart*, the court explained that these two tests are "alternative methods" of determining whether a product is unreasonably dangerous. *Id.* at 246. Accordingly, the plaintiff may proceed under either or both of these standards as supported by the evidence. *Id.* at 248. In determining which standard to use the focus is on whether ordinary consumers have developed an expectation regarding the safety of a given type of product. In cases where "the ordinary consumer, through use of a product, has developed an expectation regarding the performance safety of the product," an instruction on the consumer expectation test should be given. When the ordinary consumer has not developed such an expectation, the consumer expectation test is inapplicable and an instruction on the risk/benefit test should be given. In close cases, instructions on both tests may be appropriate. *Brethauer v. General Motors Corp.,* 221 Ariz. 192, 199 (App. 2009). The bracketed word "also" in the last paragraph should be used only when both the risk/benefit and the consumer expectation tests are given together.

COMMENT: 1. Risk/Benefit Test and Hindsight Test: Paragraph two is the *Byrns* risk/ benefit balancing test. Paragraph three is the *Dart* hindsight test. Attribution of knowledge of facts revealed at trial about the harmful characteristics of the product is appropriate under *Dart* in a case of strict product liability, but is not appropriate in a case of negligence product liability.

2. Should the *Byrns* Risk/Benefit Factors be Explicitly Stated? Or should they be omitted from the instruction and left to argument by counsel? In *Byrns*, the court outlined seven factors to be used in analyzing whether a product's design is unreasonably dangerous. These factors were included in brackets in Product Liability Instruction 3. The Committee agreed with prior Committees that such

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PRODUCT LIABILITY 3

Defect and Unreasonable Danger Defined (Design Defect)

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factors should not be included in the jury instructions. [The bracketed language from the earlier RAJI (CIVIL) Instruction was: "Some factors you may consider in weighing the harmful characteristics or consequences against the benefit of the design are the following:

1. The usefulness and desirability of the product;
2. The availability of other and safer products to meet the same need;
3. The likelihood of injury and its probable seriousness;
4. The obviousness of the danger;
5. Common knowledge and normal public expectation of the danger (particularly for established products);
6. The avoidability of injury by care and use of the product (including the effect of instructions or warnings); and
7. The ability to eliminate danger without seriously impairing the usefulness of the product or making it unduly expensive."]

The Committee concluded that the factors should not be included in the instruction for three reasons: First, the list of seven factors in *Byrns* is not intended to be an exclusive list. *See Dart*, 147 Ariz. at 248. Second, any applicable factors are best left to argument by counsel within the context of the general risk/benefit instruction. Third, some of the factors are inconsistent with Arizona product liability law. (*E.g.*, factor 6 would impermissibly interject contributory negligence into a strict liability action.)

The seven *Byrns* factors were originally proposed by Dean Wade as a tool for analyzing whether a product design was unreasonably dangerous. J. Wade, *Strict Tort Liability of Manufacturers*, 19 SOUTHWESTERN L.J. 5, 17 (1965). The author later concluded that the factors ordinarily should not be included in jury instructions. J. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 840-41 (1973). This view has been adopted by the Oregon Supreme Court. *Phillips v. Kimwood Machine Co.*, 525 P.2d 1033, 1040 n.16 (Or. 1974).

3. Hindsight Test and State of the Art: The *Dart* "hindsight test" is contained in paragraph three. Attribution of present knowledge of the harmful characteristics of the product should be distinguished from attribution of present state of the art. *Dart* points out that strict liability imposes constructive knowledge of the harmful condition of the product. Does it also constructively impose technical, mechanical, and scientific knowledge feasible for current use in design and manufacture but not feasible for such use at the time the subject product was placed in commerce? *See* Product Liability Instruction 7 (State of the Art Defense).

PRODUCT LIABILITY 3

Defect and Unreasonable Danger Defined (Design Defect)

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The argument may be anticipated in design defect cases after *Dart* that, even if a certain manufacturing technique or safety design feature was not feasible or practical under the state of the art at the time of design, manufacture, and sale, it is now feasible and practical, and knowledge of this advance in manufacturing or safety design should be imputed by hindsight in weighing whether the product was unreasonably dangerous at the time it was placed in commerce. *Dart* should be carefully analyzed in evaluating this argument, as should the authorities from which the hindsight test is derived. *See Dart,* 147 Ariz. at 247.

Constructive attribution of post-sale advancements or changes in the state of the art would apparently violate A.R.S. §§ 12-683(1) and 686(1). Thus, a related issue is the validity of those statutes. *See* Use Note 3 and Comment to Product Liability Instruction 7.

PRODUCT LIABILITY 4

Defect and Unreasonable Danger Defined (Information Defect)

[*Name of plaintiff*] claims that there was not (an) adequate [warning] [instruction] on/with the product. A product, even if faultlessly made, is defective and unreasonably dangerous if it would be unreasonably dangerous for use in a reasonably foreseeable manner without (an) adequate [warning(s)] [instruction(s)].

[A product is defective and unreasonably dangerous if a manufacturer or seller who knows or should know, in light of the generally recognized and prevailing scientific/ technical/medical knowledge available at the time of the product's distribution, that a foreseeable use of the product may be unreasonably dangerous does not provide adequate [warning(s) of the danger] [instruction(s) for reasonably safe use].]

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SOURCE: RAJI (CIVIL) 3d Product Liability 4; *Powers v. Taser Int'l, Inc.,* 217 Ariz. 398 (App. 2008)

USE NOTE: In *Dart v. Wiebe Mfg, Inc.,* 147 Ariz. 242 (1985), the court expressly left open the question of whether a hindsight test is applied in strict liability information defect cases. The court in *Powers v. Taser Int'l, Inc.,* 217 Ariz. 398 (App. 2008), however, held that the hindsight test does not apply to information defect claims. The court instead upheld use of an instruction consistent with the second paragraph of the above-recommended instruction.

In *Golonka v. General Motors Corp.*, 204 Ariz. 575 (App. 2003), the court held that the "heeding presumption" applies in informational defect cases. The heeding presumption is a rebuttable presumption used in strict liability information defect cases to allow the fact-finder to presume that the person injured by product use would have heeded an adequate warning, if given. *Id.* 204 Ariz. at 586. In *Golonka* the court held that the issue of whether the manufacturer has rebutted the heeding presumption is determined by the trial judge. *Id. See also Sheehan v. Pima County,* 135 Ariz. 235 (App. 1982). *But see Dole Food Co. v. North Carolina Foam Ind., Inc.,* 188 Ariz. 298 (App. 1996) (holding that the heeding presumption shifts the burden of proof to the defendant to show that the plaintiff would not have heeded an appropriate warning/instruction). If the judge determines that the manufacturer has rebutted the presumption, the presumption is destroyed, and the existence or non-existence of the presumed fact must be determined by the jury as if the presumption had never operated in the case, and the jury is never told of the presumption. *Id.* 204 Ariz. at 590-591. However, the jury may still draw reasonable inferences from the facts giving rise to the presumption. *Id.* 204 Ariz. at 591. If the court determines the manufacturer has failed to rebut the presumption, Product Liability 4 should be expanded to inform the jury of the heeding presumption.

COMMENT: Adequacy of Warnings or Instructions: The Committee attempted to draft a specific instruction on adequacy, and concluded that what is "adequate" is inevitably dependent on the facts and products involved in each case, and cannot be explained in a general instruction.

PRODUCT LIABILITY 5

Plaintiff's Burden of Proof (Product Liability)

[*Name of plaintiff*] must prove:

1. [*Name of defendant*] was a manufacturer or seller of a product;[1]
2. The product was defective and unreasonably dangerous;
3. The defect was a cause of the [*name of plaintiff*]'s injury; and
4. [*Name of plaintiff*]'s damages.

SOURCE: RAJI (CIVIL) 3d Product Liability 6.

USE NOTE: [1] RAJI (CIVIL) 3d Product Liability 6 did not include this element. In most cases, the status of defendant as a manufacturer or seller will not be a contested issue. *See also* Use Note to Product Liability Instruction 1.

In a comparative fault case, modify the instruction as appropriate to include defendant's burden of proof. *See* Fault Instruction 7.

COMMENT: Defect and unreasonable danger are included together in subparagraph 2. *See* Comment at Product Liability Instruction 2.

PRODUCT LIABILITY 6

Statement of Liability Issues (Product Liability)

If you find that [*name of defendant*] was not at fault for sale of a defective and unreasonably dangerous product, your verdict must be for [*name of defendant*].

If you find that [*name of defendant*] was at fault for sale of a defective and unreasonably dangerous product, and that product caused the injury alleged, then [*name of defendant*] is liable to [*name of plaintiff*] and your verdict must be for [*name of plaintiff*].

SOURCE: RAJI (CIVIL) 7TH, Fault 4.

USE NOTE: The instruction is drafted for a non-comparative fault case. For a comparative fault case, use an appropriately modified version of Fault Instruction 8.

PRODUCT LIABILITY 7

State of the Art Defense

[*Name of defendant*] claims that a state of the art defense is applicable to [*name of plaintiff*]'s claim that the product contains a [manufacturing] [design] defect.[1]

[*Name of defendant*] is not at fault if [*name of defendant*] proves that [the plans or designs for the product] [or] [the methods and techniques of manufacturing, inspecting, testing, and labeling][2] the product conformed with the state of the art at the time the product was first sold by [*name of defendant*].

"State of the art" means the technical, mechanical, and scientific knowledge of manufacturing, designing, testing, or labeling the same or similar products which was in existence and reasonably feasible for use at the time of manufacture.

SOURCE: A.R.S. § 12-683(1); A.R.S. § 12-681(6).

USE NOTE: [1] The statute from which this instruction is derived, A.R.S. § 12-683(1), refers to cases in which a defect is alleged to result from inadequate design or fabrication. The Committee is uncertain whether the effect of the statute is to prohibit the raising of a state of the art defense in information defect (warnings or instructions) cases. In any event, the Committee believes it is for the trial judge to determine whether the particular case is one in which the defense can be raised, before the jury is instructed on state of the art.

In addition, the Committee recognizes that in design defect cases as opposed to manufacturing defect cases, there is an apparent tension between the hindsight test announced in *Dart v. Wiebe Manufacturing, Inc.*, 147 Ariz. 242 (1985) and the statutory state of the art defense. For further explanation on this point, see Comment 3 at Product Liability Instruction 3.

[2] For each paragraph, use the bracketed language applicable to the case.

COMMENT: When Is State of the Art Determined if the state of the art has advanced between the date of manufacture (A.R.S. § 12-681(6)) and the date the product was first sold by the defendant (A.R.S. §§ 12-683(1) and 686(1))?

Time passes as a product moves through the stream of commerce. The state of the art might advance in the interim. A design feature not feasible at the time of manufacture might have become feasible by the time the product was first sold by a defendant. Where a pertinent advance occurs, this instruction requires statutory interpretation to determine the appropriate point of temporal reference for state of the art. A.R.S. § 12-681(6) defines state of the art as "the technical, mechanical and scientific knowledge . . . in existence and reasonable feasible for use at the time of manufacture." A.R.S. § 12-683(1) relieves a defendant of liability if he proves conformity with the state of the art "at the time the product was first sold by the defendant." A.R.S. § 12-686(1) makes

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PRODUCT LIABILITY 7

State of the Art Defense

Continued

evidence of change in the state of the art inadmissible as direct evidence of defect if the change has occurred after "the time the product was first sold by the defendant."

PRODUCT LIABILITY 8

Modification of Product Defense

[*Name of defendant*] claims that [*name of plaintiff*] [*a third party*][1] was at fault for modifying or altering the product.

On this claim, [*name of defendant*] must prove:

1. [*Name of plaintiff*] [*Third party*] altered or modified the product after the product was manufactured or sold by [*name of defendant*];
2. The alteration or modification was not reasonably foreseeable; and
3. The alteration or modification of the product was a cause of [*name of plaintiff*]'s injury.

SOURCE: A.R.S. § 12-683(2); *Jimenez v. Sears Roebuck & Co.,* 183 Ariz. 399 (1995).

USE NOTE: [1] A.R.S. § 12-683(2) provides that unforeseeable modification of a product after it is sold by defendant is a defense. Such alteration may be done by the plaintiff or a third party. Use the appropriate bracketed language.

This instruction should be used in conjunction with Fault Instructions 7, 8, and 11.

COMMENT: In *Jimenez v. Sears Roebuck & Co., supra,* the court held that misuse of a product was a comparative defense pursuant to A.R.S. § 12-2506. Accordingly, the Committee has concluded that modification of the product defense is also a comparative defense.

PRODUCT LIABILITY 9

Misuse of Product Defense

[*Name of defendant*] claims that [*name of plaintiff*] was at fault for [using] [consuming][1] the product [in an unforeseeable manner] [or] [contrary to [instructions] [warnings]][2].

On this claim, [*name of defendant*] must prove:

1. The product was [used] [consumed] [for a purpose, in a manner or in an activity which was not reasonably foreseeable] [or] [contrary to any express and adequate [instructions] [warnings] appearing on or attached to the product, or on its original container or wrapping, and [*name of plaintiff*] knew, or with the exercise of reasonable and diligent care should have known, of the [warnings] [instructions]]; and
2. Such [use] [consumption] of the product was a cause of [*name of plaintiff*]'s injury.

SOURCE: A.R.S. § 12-683(3); *Jimenez v. Sears Roebuck & Co.,* 183 Ariz. 399 (1995).

USE NOTE: [1] Use the applicable words or phrases.

[2] A.R.S. § 12-683(3) sets forth two types of conduct which may be considered as product misuse. Use either or both bracketed phrases as supported by the evidence.

This instruction should be used in conjunction with Fault Instructions 7, 8, and 11.

COMMENT: Product Liability Instruction 9 has been modified as a result of the supreme court's decision in *Jimenez, supra.* The prior instruction permitted misuse as a defense only if the misuse was the sole cause of the plaintiff's damages. *See Gosewisch v. American Honda Motor Co.,* 153 Ariz. 400, 407 (1987) (citing A.R.S. § 12-683(3)). The court's decision in *Jimenez* effectively overruled that portion of the *Gosewisch* decision. Pursuant to the *Jimenez* decision, the instruction now provides for a comparative defense if the jury concludes that the misuse was a cause of the plaintiff's damages.