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The state of the art defense in the information age

Under general principles of law, every product we purchase is warranted to be free from material defects. If a defect exists, and causes injury, the retailer, distributor and manufacturer of that product face exposure to civil liability.

What sounds simple in explanation becomes much more complex in application. Courts that are called upon to determine the existence of a product defect are often required to decide whether the design of the product conforms to the industry "state of the art." This is known as the state of the art defense recognized in all jurisdictions across the country.

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Essentially, any product placed in the stream of commerce must meet or exceed realistic engineering standards at the time of its manufacture relative to its safety. Whether it is a consumer product such as a hair dryer or lawn mower, or a piece of complex industrial equipment, the same standard applies.

When the manufacturer fails to design the product consistent with reasonable engineering standards, an injured party can successfully argue that the design is defective in that it deviates from the state of the art in the industry, *Lancaster Silo & Block Company*, 427 N.Y.S.2d 1009 (4th Dept. 1980).

One court phrases it as follows: "a manufacturer … is held to the knowledge of an expert in its field, and therefore, has a duty to 'keep abreast of scientific knowledge, discoveries and advances and is presumed to know what is imparted thereby," *George v. Celotex Corp.*, 914 F.2d 26 (2nd Cir. 1990).

In the information age of the 21st century, where available technical data changes by the minute, these issues will become increasingly difficult for the courts to resolve. One can access laboratory analyses, test data, operations manuals, industry studies and a host of information — and it's only a search engine away.

In one case, a court was persuaded by an expert's reliance upon exiting industry standards when defending the properties of New York City firemens' protective gear. In *Halliday v. Stevens*, 890 N.Y.S.2d 369 (2006), the plaintiff was badly injured in a fire when his gear failed to protect him against a "flashover" in which temperatures reached 1000º to 1800º Fahrenheit. The court had the ability to assess national fire prevention standards and a number of technical studies critical of those standards and, despite "volumes of papers" submitted by plaintiff; the court refused to find the safety gear defective.

In another state of the art defense case, the court was called upon to determine the existence of elevator design standards in 1918, *Fernandez v. Otis Elevator Co.*, 4AD 3d 69 (1st Dept. 2004). In yet another, a court was required to evaluate the U.S. Navy's knowledge of the hazards of asbestos in 1940, *Viscosi v. American Optical Corp.*, 2008 WL 4426884 (Dist. Ct. Conn. 2008). All of this historical state of the art information is now more readily accessible because of the advent of computer databases.

Presently, it is becoming apparent that manufacturers will be held to even broader standards discovered through countless resources, many now accessible online. More and more frequently, even foreign literature and publications are being weighed in evaluating domestic manufacturing customs and standards, see *Topliff v. Wal-Mart Stores East, LP*, 2007 WL911891.

One interesting application of the state of the art defense involved the hazards of cigarette smoking, *Frankson v. Brown & Williamson Tobacco Corp.*, 791 N.Y.S.2d 896 (2004). In that case, the defendant tobacco company attempted to introduce a document known as the "Brooks Memo" in defense of its claim that in the 1950s it was not yet common knowledge that smoking was harmful. The Brooks Memo consisted of a survey of "distinguished scientists" that challenged the health risks of smoking. The court declined to permit defendant to rely upon the memo because it consisted of "off the cuff" opinions, rather than peer-reviewed, scientific studies.

In a more recent environmental exposure case, the courts exhaustively analyzed the science behind toxic mold claims, *Cor-*

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nell v. 360 West 51st Street Realty, LLC, 939 N.Y.S.2d 434 (1st Dept. 2012). In that series of decisions, the courts were required to ascertain the state of the art of scientific understanding of the cause of toxic mold exposure.

Clearly, the vast expansion of readily-available knowledge in the manufacturing and production processes, in theory, will change our marketplace. Manufacturers will be confronted in the courtroom with increasing frequency with industry studies and analyses concerning their products' safety profile. Hopefully, the eventual outcome will be a more responsive manufacturing industry concerned not only with the significant exposure of product liability litigation, but more importantly, making products safer.

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