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PRODUCTS LIABILITY Problems and Process

Eighth Edition



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PRODUCTS LIABILITY

Problems and Process Eighth Edition

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From Jim To Marcie

From Aaron To Kreindel

From Doug To Christine

Preface to the Eighth Edition

The Eighth Edition of *Products Liability: Problems and Process* represents a substantial revision of prior iterations of the casebook. In addition to updating the book to reflect new cases, commentary, and problems, we have also significantly shortened and reorganized the material in order to make the book more user-friendly.

We have been aided in this process by Doug Kysar, who joins as a new co-author for this Edition. Doug brings additional perspective to the subject of products liability, which all three authors continue to regard as a fascinating, challenging, and important field of law. We hope that our enthusiasm comes through to the reader.

James A. Henderson, Jr. Aaron D. Twerski Douglas A. Kysar

October 2015

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- Ramseyer, Liability For Defective Products: Comparative Hypotheses And Evidence From Japan, 61 Am. J. Comp. L. 617 (2013).
- Reimann, Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?, 51 Am. J. Comp. L. 751 (Fall 2003)
- Uniform Law Commission, Uniform Contribution Among Tortfeasors Act. Copyright © 1939 and 1955 by The National Conference of Commissioners on Uniform State Laws. All Rights Reserved.
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