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The Products Liability Shell Game: A Response to Victor E. Schwartz and Mark A. Behrens

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THE PRODUCTS LIABILITY SHELL GAME: A RESPONSE TO VICTOR E. SCHWARTZ AND MARK A. BEHRENS

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I. INTRODUCTION

This essay responds to Victor Schwartz and Mark Behrens's article, *Federal Product Liability Reform in 1997: History and Public Policy*

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*Support its Enactment Now.*¹ Their article is based on several assumptions: (1) there is a products liability crisis, (2) the source of the crisis lies in products liability law, and (3) the federal statute they advocate² will help resolve any crisis that may exist. This essay contends that Schwartz and Behrens have failed to prove any of these assumptions. Schwartz and Behrens argue that the statute should be enacted now, and rely on a twenty year-old report to justify their position.³ While this report may have justified such a statute in 1976, there is no evidence that one is needed today.

This essay centers around the metaphor of a shell game. In the shell game, a prestidigitator places a pebble under one of several shells, and then shuffles them. The player, who has wagered on his or her ability to find the pebble, then guesses under which shell the pebble resides. The player is almost always wrong.

The pebble in this essay is the products liability crisis. There are two shells, products liability law and insurance law. First, this essay contends that Schwartz and Behrens have failed to show that there is a pebble at all. Alternatively, assuming there is a pebble, enacting a federal products liability statute amounts to a guess that the pebble lurks under the products liability shell rather than under the insurance law shell. Because Schwartz and Behrens present no evidence that the pebble is under the products liability shell, and there is evidence that it is not, choosing that shell is at best a guess that might be as wrong as a guess in the shell game usually is. If the pebble is under the insurance law shell, then a statute dealing with products liability is completely useless because it is aimed at the wrong target. Surely federal statutes should not be enacted on the basis of such a hit-or-miss process. Finally, assuming that there is a pebble and that it is under the products liability shell, this essay argues that the proposed statute is tantamount to ignoring the shells altogether and looking for the pebble on

1. Victor E. Schwartz & Mark A. Behrens, *Federal Product Liability Reform in 1997: History and Public Policy Support Its Enactment Now*, 64 TENN. L. REV. 595 (1997).

2. Common Sense Product Liability Reform Act, H.R. 956, 104th Cong. (1996) (approved by the Joint Conference Committee on March 14, 1996). President Clinton received the Conference Report bill on April 30, 1996, and vetoed it on May 2, 1996. See John F. Harris, *Clinton Vetoes Product Liability Measure*, WASH. POST, May 3, 1996, at A14; Neil A. Lewis, *President Vetoes Limits on Liability*, N.Y. TIMES, May 3, 1996, at A1; *The Lawyers' Veto*, WALL ST. J., May 3, 1996, at A12. A veto override that was attempted in the House on May 9, 1996 in order to preserve a record on the issue fell twenty-three votes short of passage. Victor E. Schwartz & Mark A. Behrens, *The Road to Federal Product Liability Reform*, 55 MD. L. REV. 1363, 1365 n.78 (1996).

For the full text of H.R. 956, see Symposium, *Is H.R. 956 Really "Common Sense"? A Symposium on Federal Tort Reform Legislation*, 64 TENN. L. REV. 557, 559-94 (1997).

3. They rely heavily on the Final Report of the Interagency Task Force on Product Liability. INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT (1976) [hereinafter Task Force Report]. Mr. Schwartz chaired the production of the Task Force Report.

the floor. In other words, the statute does not respond to the problem in any meaningful way.

The bottom line is, of course, that in tort reform, as in a shell game, the real action is other than what it appears to be. In tort reform, the entire process is thoroughly political. Schwartz and Behrens amply demonstrate that where one comes out on the question of tort reform depends upon one's orientation with respect to products liability litigation. If one is defense-oriented, one supports any initiative that may lead to a decrease in liability, and will use just about any argument that will plausibly support that result. If one is plaintiff-oriented, one supports any initiative that may assist in making compensation available to those injured by products, with an equal and opposite willingness to accept arguments favoring that outcome. In this highly partisan context, most participants are so eager to make their wagers and play the game that few stop to take a good look at the pebble and the shells with which they are playing, let alone studying the magician.⁴

II. IS THERE A PRODUCTS LIABILITY PEBBLE AT ALL: DO SCHWARTZ AND BEHRENS PROVE THAT THERE IS A PRODUCTS LIABILITY CRISIS?

Schwartz and Behrens argue strenuously that the country needs a federal products liability law to solve various problems with existing state law, including those problems generated by the fact that products liability law varies from state to state.⁵ As proponents of the statute, the burden is on them to justify both the need for the statute and the provisions it should include. This Part deals with whether Schwartz and Behrens have demonstrated a need for federal legislative action at all, and concludes that the five reasons offered in support of a federal statute fail to justify having one.

Before playing a shell game, there must be a pebble to hide. Any effort to justify a federal statute must first prove that there is a problem requiring a solution. If the products liability crisis relied upon by Schwartz and Behrens does not exist, then no federal statute is needed to fix it, and the statute which is the focus of the article is unnecessary.

If there is a products liability crisis, it must mean that manufacturers are failing to produce useful products—products which would pass a properly applied risk-utility test—for fear of being held liable when those products

4. Schwartz and Behrens make several references to the Association of Trial Lawyers of America's ("ATLA") lobbying efforts, pointing to ATLA's "very ample resources" and lobbying efforts. Schwartz & Behrens, *supra* note 1, at 597. My objection to this is that it makes it sound as though the defense-oriented participants in the political process do no lobbying of their own. Such a suggestion is fatuous. Everyone lobbies, and everyone acts in their own perceived self interest, a fact which further highlights the political nature of the statute involved.

5. *Id.* at 601-02.

cause injury.⁶ The article provides no evidence that this is the case, merely proceeding on an anecdotal basis.⁷ The article needs to prove (1) that manufacturers are inhibited, and (2) that their inhibitions are inappropriate, *i.e.*, that they are being prevented from producing non-defective products. The article proves neither.⁸

The article offers five reasons why a national products liability system would be a good idea. The five reasons, which do not include the existence of a crisis in their number, do not add up to a crisis. Schwartz and Behrens seem rather to presuppose a crisis without supplying proof that one exists.⁹ But if there is no pebble, there is no shell game, and a magician who asks the player to find the pebble is likely to find him or herself in trouble if there is none.

The first of the five proffered reasons for a national products liability law is that commerce in products is national.¹⁰ While this may be true, this fact does not justify changing the traditional state-by-state approach to tort law unless the national character of the products market creates problems that state systems are unable to handle.¹¹ Schwartz and Behrens point to no specific problems generated by the national nature of manufacturing. To the contrary, they imply that the state-to-state nature of tort law is *not* problematic when they point out that insurance rates are already

6. If, of course, manufacturers are prevented from manufacturing products which would be defective if made, then products liability is doing its job and there is no crisis. Viewing manufacturing inhibitions as a crisis implies that the inhibitions are undesirable.

7. The article asserts that the 18-year statute of repose set by the General Aircraft Revitalization Act of 1994 created "thousands" of new jobs. Schwartz & Behrens, *supra* note 1, at 597. It would be interesting to see supporting data for this. In any event, it is only one example.

8. Indeed, it is clear that products in the past several decades have become much safer than they were before. While it is not clear that strict products liability law caused products to become safer, since the development of strict products liability might itself have been caused by consumer safety concerns, the fact of increased safety is irrefutable. To rely on the anecdotal, as Schwartz and Behrens do, one need only look at changes in products for children and at automobiles to see the progress that safety concerns has created.

9. Schwartz and Behrens assert that the current system involves "overdeterrence caused by excessive and uncertain liability." Schwartz & Behrens, *supra* note 1, at 597. The anecdotes they supply in support of the existence of overdeterrence are too limited to justify the conclusion that there is a crisis. They cite the Task Force Report as support for the assertion that the state-by-state nature of tort liability law is the root of the crisis. *Id.* at 598. The Task Force Report is over twenty years old. If there was a crisis in 1976, it should have worsened since then because the recommended steps to cure it were not taken. Thus, liability should have become even more extensive and capricious. Schwartz and Behrens provide no evidence that this has happened.

10. *Id.* at 605.

11. Indeed, many of the subjects of state law, ranging from real estate development to corporate organization to education, are national in scope, yet that does not justify replacing state legal codes with national ones.

national and that "[a manufacturer's] product liability insurance costs will not [change when the company moves to a different state]."¹² Furthermore, if the source of the problem lies in variations in the law among states, as opposed to the content of the state rules, then the substance of a federal products liability law is not as important as the uniformity of the standards set. If the crisis, if any, is caused by the variation itself, then a plaintiff-oriented, defendant-oriented, or even neutral federal response would each solve the problem equally well. If, on the other hand, the problem is with the substance of the law developed by the states, then the content of a federal statute takes on a significance of its own. Schwartz and Behrens evidently believe that liability under state law is excessive (a substantive problem), and they use that belief as support for a federal law. This means that this first reason for the statute, variations among the states, lacks force, since it is a procedural, not a substantive, argument for depriving the states of the power to make product liability law.

The second reason offered for a national products liability system is that the National Governors' Association, the American Legislative Exchange Council, and the Defense Research Institute have recognized "both the need for products liability reform and the necessity of federal action to effectuate that reform."¹³ Again, this may be true, but without more information it is impossible to tell on what basis these organizations made their recommendations or whether one agrees with them. Nor can one determine whether their support arises from concern for the public interest or from more partisan motives.

The third reason for national products liability reform offered by the article is that three "prominent judges and authors"¹⁴ think that such reform would be a good idea. Again, this may be true, but it hardly decides the case.

The fourth reason offered by the article is that thirteen countries in the European Economic Community have adopted a uniform products liability law; Australia and Japan have likewise followed a similar course.¹⁵ Again, the impact of this on the United States is unclear. Presumably, uniformity in European law affects products exported to that continent; its impact on American goods produced for the American market is unclear. The article provides no data which would support a conclusion that uniformity in European law, if it exists, disadvantages American companies competing for the American market. As far as the reader can ascertain, American goods will be subjected to European law in Europe, and European goods will be subjected to American law here. Consequently, European law has no impact upon products liability suits in this country. On the other side of the equation, American law should have no impact upon products liability suits

12. Schwartz & Behrens, *supra* note 1, at 602.

13. *Id.*

14. *Id.* at 603.

15. *Id.* at 604.

abroad. Moreover, if the goal is to achieve international uniformity of product liability law, a unilateral American system is little better than a system left to the several states. What would be necessary for a truly international resolution would be a multilateral treaty on product liability similar in character to the General Agreement on Tariffs and Trade ("GATT").¹⁶

The final reason offered by the article is that the opponents of national products liability law are incorrect when they argue that Congress should stay out of the process.¹⁷ The question of congressional involvement would only be reached if in fact there is a crisis and, beyond that, if a federal statute would help in its resolution. Getting the Congress involved (or, for that matter, keeping it out) is not in itself a goal of the debate. Federal law is an instrument for attaining a goal, but has no intrinsic value absent its usefulness. One should first decide whether a national system is a good idea, and then debate about how to implement it.¹⁸

As was demonstrated above, the five reasons the article offers for the adoption of federal products liability legislation fail to justify enacting a statute. Thus, it would seem that federal inaction is the wisest approach. If something is not broken, there is no need to fix it. Schwartz and Behrens fail to show that the state-by-state system is broken.

III. ASSUMING THERE IS A PEBBLE, UNDER WHICH SHELL DOES IT LURK, PRODUCTS LIABILITY LAW OR INSURANCE LAW?¹⁹

Let us move past the five specific reasons discussed above, and assume for the sake of argument that there is a crisis. In order to justify a federal products liability statute, Schwartz and Behrens must now show that the crisis is one of products liability law, and not one emanating from some other source. Thus, this essay now turns to the question of whether

16. A limited statute could readily foreclose inappropriate forum shopping, if any exists.

17. Schwartz & Behrens, *supra* note 1, at 604.

18. This also answers the constitutionality argument. The statute proposed here is probably constitutional. The fact that a law may be constitutional, however, does not in itself mean that the law is worth enacting. A law is not a good idea because it is constitutional. Nor is it constitutional because it is a good idea.

For this reason, this essay will not deal further with constitutionality issues. It will be time enough to deal with constitutionality if there is evidence that reform is needed and that the proposed reform will fix the problem. For a debate on the constitutionality of the proposed statute, see Cynthia C. Lebow, *Federalism and Federal Product Liability Reform: A Warning Not Heeded*, 64 TENN. L. REV. 665 (1997).

19. There may, of course, be other shells that we do not even know about. This essay assumes the existence of only the two shells—state tort liability law and insurance law. However, the fact that there may be others could cause this assumption to be invalid. Additional shells would also, of course, further undercut the choice of state tort liability law as the source of any crisis.

Schwartz and Behrens have shown that the crisis lurks under the products liability shell.

Let us assume that manufacturers are inhibited from producing non-defective products, and that this constitutes a crisis. Schwartz and Behrens fail to identify the source of that inhibition. One source might be state tort law. Another, however, might be insurance law. Surely manufacturers do not pay most liability judgments directly out of their own treasuries; rather, they purchase insurance to cover those judgments. The threat of liability threatens their insurance rates, which are set by the companies from which they purchase the insurance. The question then becomes whether the rates which the manufacturers are compelled to pay are appropriate and fairly set. Any manufacturer inhibitions pass through the filter of insurance rates. The manufacturers do not pay the judgments; they pay for the insurance which pays the judgments. It is not the judgments themselves that manufacturers fear, it is the insurance rates. And corporate liability insurance is wholly unregulated at a national level.

The Interagency Task Force on Product Liability, which was chaired by Victor Schwartz, in 1976 "identified three primary causes for the rise in product liability insurance premiums: the insurance industry's rate-making procedures, the tort-litigation system, and unsafe manufacturing practices employed by those seeking to be insured."²⁰ The third of these may readily be eliminated as a basis for reform, because presumably no one would argue that liability based on unsafe manufacturing processes is inappropriate. The essay offers no basis for deciding which of the other two problems identified in 1976 is the source of any current crisis.

Thus, the Task Force Report leaves us with two possible explanations for any crisis that may exist.²¹ When one confronts two possible explanations for a phenomenon, it makes little sense to disregard one of them. Yet Schwartz and Behrens do just this, when they disregard insurance issues without explaining why. One response to their call for tort reform thus becomes a call to insurance law reform. As Professor Mark Rahdert points out, the insurance industry is unique:

Because the insurance industry is so dependent on successful investment [of the premiums it collects], it is, like any investment industry, extremely sensitive to changes in the business cycle. . . . [B]ecause certain

20. Frank J. Vandall, *Our Product Liability System: An Efficient Solution to a Complex Problem*, 64 DENV. U. L. REV. 703, 705 (1988) (discussing Task Force Report).

21. Schwartz and Behrens point out that some very limited reform was accomplished in the insurance industry in the form of making self-insurance easier for small companies which had been priced out of the market. Schwartz & Behrens, *supra* note 1, text accompanying notes 12-16. This minor reform does not eliminate the insurance industry as a possible cause of any crisis, however. Instead, it highlights the fact that high insurance premiums became a problem. Why they became a problem is unexplained. One explanation for the increase may be tort law. But there are others. See *infra* text accompanying notes 22-24.

monopolistic pricing practices are legally permitted in the insurance industry, it responds to changes in the business cycle in a unique fashion. When times are good, insurers compete intensely with one another for market share, attempting to attract the maximum number of premium dollars to invest for those high returns. This competition drives premium prices down, sometimes to artificially low levels, which insurers rationalize with the prospect of handsome offsetting investment returns. When, however, the economy turns sour and return on investment plummets, insurers that may have deliberately underpriced their product during boom times fall back on their ability to engage in legalized price collusion, raise premium rates sharply, and thus attempt to restore profitability. During these bad times the insurers always find it convenient to blame, not their own previous investments or marketing strategy, but the courts and tort doctrine, for the need to raise premiums.²²

Professor Rahdert points out that there are those who contend that this scenario was precisely what happened in the 1970s and into the recessions of the 1980s. Under this argument, the insurance industry

used [its] monopolistic pricing, and [its] ability to manipulate rate-setting procedures, to orchestrate sharp increases in liability premiums in order to offset their disappointing investment results. Blaming the tort system for the increases became a convenient means of putting these rate increases through and covering for the shortsighted marketing strategies of the previous decade.²³

If this explanation of the product liability crisis is correct, then the crisis, if any, has nothing to do with tort law and everything to do with insurance law. Those who espouse this view "call[] for elimination of the insurer exemption from federal antitrust laws, more aggressive rate and investment regulation by state insurance commissioners, and possibly some national regulation of insurance practices."²⁴

Before going to the trouble of changing the nation's tort system, it would make sense to ascertain the source of any problem that may exist. If the problem lies with the absence of national regulation of the insurance industry (to say nothing of the fact that the insurance industry is exempt in its ratemaking practices from the antitrust laws that apply to everyone else), then the answer is national regulation of the insurance industry, not national control over products liability. Indeed, one could just as easily say of insurance, as Schwartz and Behrens do of tort law, that it is a national market for which a uniform regulatory regime would be desirable.

Schwartz and Behrens's choice of tort law as the source of the crisis becomes all the more inexplicable when one examines changes in the law over the twenty years since the Task Force Report was generated. These

22. MARK C. RAHDERT, COVERING ACCIDENT COSTS 114 (1995).

23. *Id.*

24. *Id.* at 115.

last twenty years themselves provide evidence that any crisis is in fact unlikely to lurk under the tort law shell. Since the 1970s, state products liability law has become vastly more favorable to defendants.²⁵ Insurance rates stand in sharp contrast to this tort law trend. As Professor Rahdert points out, insurance rates escalated during the recessions of the 1980s.²⁶ Thus, if there is a crisis, and if that crisis has remained static or continued to deepen, then the inference seems inescapable that insurance ratemaking, and not tort law, is the cause of that crisis. Twenty years ago, the Task Force Report pointed to two possible causes of a products liability crisis: insurance and tort law. Twenty years later, the states have undergone extensive, defense-oriented changes in their law, but insurance law has not changed, and insurance rates have escalated. If there is still a crisis, surely it lies with the state-by-state regulation of insurance ratemaking, and not with tort law at all.²⁷

Even if this argument fails, however, it is incumbent upon Schwartz and Behrens to show that the problems identified in the Task Force Report twenty years ago still exist and continue to have the same source. They fail to do so. In the absence of any evidence that the source of the crisis lies in state tort law, it is risky to assume that this is the shell concealing the pebble. In the shell game, when the player guesses the wrong shell, the player loses his or her money. Picking the wrong shell is thus not simply a mistake, it is a costly and harmful mistake. Similarly, to deal with any crisis as one in tort liability can cause harm if tort law is not in fact the source of the problem. Before we select a shell, we should study the possible sources of the problem in order to reach a scientific solution to the problem.

IV. A LOOK AT THE PROPOSED STATUTE: IF THE PEBBLE LURKS UNDER THE PRODUCTS LIABILITY SHELL, DOES IT HELP TO SEEK IT ON THE FLOOR?

A. A General Remark

In this Part, this essay examines the specific provisions of the statute supported by Schwartz and Behrens. But before turning to the provisions, it seems appropriate to make one point about the overall analysis presented

25. See generally Ellen Wertheimer, *Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back*, 60 U. CIN. L. REV. 1183 (1992) (discussing state backtracking from strict products liability).

26. RAHDERT, *supra* note 21, at 114.

27. It is still the case, of course, that tort law is set by the states. The argument that state-by-state variation in tort law is itself the cause of the crisis was dealt with above, in the context of the first reason for a federal statute offered by Schwartz and Behrens, and will be referred to below, in the context of the remarkable uniformity in pro-defense development that the states have undergone in the last twenty years.

by Schwartz and Behrens in their examination of the statute's sections. There is only one possible reason why the federal government should intervene in the tort arena, which represents the epitome of areas of law left to the states. That reason can only be that leaving the law to the states has failed in some way; if the states have not failed, we do not need a federal law.

Schwartz and Behrens want a federal law. This must mean that they feel that the states have failed, at least within the scope of their definition of failure. But in their analysis of the federal provisions, Schwartz and Behrens assert time after time that the states have already adopted the rules contained in the federal statute.²⁸ Far from criticizing the states, Schwartz and Behrens continually rely on state laws as proof that the federal proposals are desirable, and use the fact that the states have already adopted the laws they seek as support for their federal statute. In doing so, they effectively prove that leaving the development of the law to the states has not failed.

By their own accounting, Schwartz and Behrens have demonstrated that leaving the law to the states has not produced the sort of lopsided pro-plaintiff law that could bring about a manufacturing crisis. To the contrary, the state-by-state process has worked to bring about many of the legislative steps that Schwartz and Behrens advocate. Instead of realizing that this militates against federal involvement, they instead use the argument that the state-by-state approach has been successful itself to justify the federal statute. This sleight of hand reasoning is as follows: if so many states have already accomplished this result, then it must be the correct result; thus, the federal government should adopt it as well.²⁹

If this reasoning is sound, one would expect Schwartz and Behrens to reject any federal products liability law that the states have not already adopted. They do not do so, however. Instead, when the federal provision they advocate does not reflect state law, Schwartz and Behrens imply that the state-by-state process has led them to conclude that the state-by-state process has not worked, and contend that this failure necessitates federal action. This selective approach to the validity of state action enhances the now-you-see-it, now-you-don't aura of their article. State solutions are evidence of good policy when they fit with the federal proposal; when they do not, they become evidence of a need for reform and intervention. While this approach is understandable, since it is the only one that allows Schwartz and Behrens to advocate their position in favor of a federal statute, it hardly provides for consistency of analysis.

Of course, all parties to this controversy employ result-oriented analyses. That is because all parties bring their chosen perspectives to the controversy,

28. See Schwartz & Behrens, *supra* note 1.

29. This of course profoundly undercuts the argument that we need a federal products liability law because the states have failed to establish appropriate rules.

and thus the positions they take depend on their answer to the question of whether manufacturers or consumers should pay for the injuries caused by products. Thus, we may as well all admit that strict products liability is entirely political in this sense. A statute advocated by a defendant-oriented organization is unlikely to be even-handed; the same is true for any position taken by a plaintiff-oriented organization. But that is not the point here. Whoever supports a statute must justify the provisions in that statute. This essay now turns to the question of whether Schwartz and Behrens have effectively justified the provisions of the proposed federal statute.

B. The Statute

Even if there is a crisis, and even if that crisis lurks under state tort law, the statute advocated by Schwartz and Behrens does not solve anything. It is as though, having found out that the pebble is under the state tort law shell, Schwartz and Behrens deliberately seek it on the floor. The time for the statute they advocate, if it ever had one, has come and gone.

The statute supported by Schwartz and Behrens contains several principal provisions. This essay will examine these, and the reasons adduced for their adoption, *seriatim*.

1. The Middle Person Rule³⁰

The statute proposed by Schwartz and Behrens would exempt product sellers³¹ from strict liability unless the manufacturer were unavailable for one reason or another. If the manufacturer were unavailable, the persons in the middle would be strictly liable. This would not affect the liability of persons in the middle for their own negligence.

This provision makes little sense for several reasons. The first relates to the chance that a middle person will be strictly liable at all. Schwartz and Behrens present no evidence that there is a real risk under today's law that "product sellers . . . [potentially will be held liable] for defects that they are neither aware of nor able to discover."³² If the authors of the Third Restatement are correct, strict liability—liability without fault—has essentially ceased to exist.³³ Requiring that plaintiffs make their arguments

30. Schwartz & Behrens, *supra* note 1, Part V.A.

31. The sellers in this context are persons in the chain of retail between the manufacturers and the consumers. They are not themselves manufacturers.

32. *Id.* at 607.

33. In the Third Restatement of Products Liability, product defects (other than mismanufacture) are defined in terms of their "foreseeable risks." RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (Proposed Final Draft, April 1, 1997). This means that defendants in products liability suits under the Third Restatement will not be liable for unforeseeable dangers: "[t]he harms that result from unforeseeable risks . . . are not a basis

in negligence should thus have no effect on the ultimate result. Under the law as the authors of the Third Restatement believe it to be, there is no such thing as liability without fault any more, and a statute exempting middle persons from strict liability will accordingly have little if any impact.

Second, Schwartz and Behrens themselves acknowledge there is little chance that a middle person will be liable in strict liability in any event, even if true strict liability still existed. They state that "[p]roduct sellers . . . rarely pay the judgment, because in more than ninety-five percent of the cases, the manufacturer is responsible for the harm."³⁴ In the face of this assertion, it seems incumbent upon Schwartz and Behrens to produce some data to support the need for a middle person exemption, and they produce none. Certainly some transaction costs are involved, but Schwartz and Behrens need to produce data to show that their proposed exemption will have an impact on those costs in order to justify their proposal. It is far more likely that the proposed exemption will simply cause a change in terminology: instead of suing in strict liability, attorneys will allege and endeavor to prove negligence against the middle persons. Such a change has no chance of affecting transaction costs. Moreover, the middle person in a case where the availability of the manufacturer is in question will have transaction costs in any event. Schwartz and Behrens provide no evidence as to how frequently this situation will arise.

Ironically, Schwartz and Behrens point out that "twenty-one states have changed their law and now hold product sellers, such as wholesalers and retailers, liable in tort only if they were negligent."³⁵ Assuming that there is a difference in exposure depending upon whether liability is negligence-based or strict, then the statute may have the effect of increasing the potential liability of middle persons in those twenty-one states. This is true because if federal law applies they may be strictly liable if the manufacturer is unavailable. The federal law thus reinstates strict liability for middle persons in those states which have already abolished it—an odd result if middle person liability (in the five percent or so of cases where it happens) is part of the products liability crisis.

of liability." *Id.* § 2 cmt. 1.

It is worth noting that, as defense-oriented as it is, the Third Restatement does not advocate eliminating a plaintiff's right to sue the middle person, even though the middle person will "be able to pass liability costs up the chain of product distribution to the manufacturer." This is because "holding retailers and wholesalers strictly liable creates incentives for them to deal only with reputable, financially responsible manufacturers." *Id.* § 2 cmt. a.

34. Schwartz & Behrens, *supra* note 1, at 607.

35. *Id.* at 608.

2. The Drunkenness Bar³⁶

The statute proposed by Schwartz and Behrens allows the defendant to use the intoxication of the plaintiff as a defense if that intoxication was a substantial cause of the injury. Schwartz and Behrens note that eleven states currently allow an intoxicated plaintiff to recover, even if their intoxication was a substantial cause of the injury.³⁷ By their own argument, the federal statute will only affect the law in eleven states. In the other thirty-nine, it will be superfluous. It thus seems clear that leaving tort law to the states has been remarkably effective in producing the developments that Schwartz and Behrens seek. Moreover, allowing intoxication as a defense will not save any transaction costs, because the issues of intoxication and the causal link between it and the injury must still be tried. Thus, this provision of the statute will only change the law in eleven states at the most,³⁸ and leaves intact the factual issues that will go to the jury in all states. One is forced to question whether this section of the statute is worth all of the fuss.

3. Product Misuse³⁹

The statute proposed by Schwartz and Behrens would include a provision that a plaintiff could not recover that portion of his or her damages attributable to the misuse of the product. Once again, Schwartz and Behrens point out that a majority of states already have this rule.⁴⁰ They also provide no citations to cases in which plaintiffs have been able to recover 100% of their injury when the plaintiffs have misused the product. Product misuse goes to the question of whether the product was defective at all (an unforeseeably misused product cannot be defective), causation (a defect must have caused the injury), and damage (comparative negligence issues arise here). Thus, products liability law, even at its strictest, has never allowed plaintiffs who had "grossly misuse[d]"⁴¹ products to recover damages. Moreover, when such abuse has occurred it

36. *Id.* Part V.B.

37. *Id.* at 609. Schwartz and Behrens do not specify whether such recovery is in whole or in part, with the plaintiff not recovering that portion of his or her injury caused by the intoxication.

38. Schwartz and Behrens do not say whether those eleven states have decided not to allow drunkenness as a defense, or whether they have not reached the issue. If the latter, they might rule that drunkenness is a defense were they to confront the situation. Another permutation would be that one or more of those eleven states might have adopted a comparative negligence system since the decision disallowing drunkenness as a defense was issued.

39. *Id.* Part V.C.

40. *Id.* at 609.

41. *Id.*

is more than likely to constitute comparative negligence, and the plaintiffs will be unable to recover for that portion of their damage in any event.

4. Limitations and Repose⁴²

The statute contains various limitations and repose periods. These seem basically sound. They do not seem, however, to be justified by Schwartz and Behrens's arguments. As Schwartz and Behrens themselves acknowledge, small business manufacturers usually win cases based on very old products, although they face litigation costs. The extent of the problem as applied to larger manufacturers is unclear.

One problem for Schwartz and Behrens's advocacy of the repose period is that the repose period in the federal statute "was not preemptive of state statutes,"⁴³ although it sets a maximum. Thus, it cannot cure the problem of state-by-state variation. The fact that Schwartz and Behrens do not object to this potential for variation lends support to the idea that their goal is to curtail liability, with uniformity readily sacrificed to that goal. If this essay is correct on this point, it further highlights the possibility that the call for uniformity found in the first of the five reasons given for the federal statute⁴⁴ is more in the nature of an excuse to limit the liability of defendants.

In this context, Schwartz and Behrens point out that "the Association for Manufacturing Technology . . . has testified before Congress that its members spend seven times more on product liability costs than on research and development."⁴⁵ But how much of this is spent on defending stale claims? Without this piece of information, at a minimum, this statistic cannot by itself help the case for the federal repose period.

Finally, Schwartz and Behrens state that "foreign companies generally do not face liability costs for very old products."⁴⁶ The import of this assertion is unclear. Wouldn't a foreign company which sells products in this country face the same risks of lawsuits as an American company selling products in this country? And wouldn't an American company selling goods abroad face the same liability as a company based in that foreign country faces? The fact that a foreign company does not face liability for old products in its home country should not decide what the law is in this country, unless that fact has an impact on liability here.⁴⁷

42. *Id.* Parts V.D.1-2.

43. *Id.* at 612.

44. See discussion *supra* Part II.

45. Schwartz & Behrens, *supra* note 1, at 611.

46. *Id.*

47. It would in any event seem that any forum-shopping problems generated by differing repose periods in different countries could readily be solved with statutes aimed at the specific issue.

5. Alternative Dispute Resolution⁴⁸

Schwartz and Behrens claim that consumer groups are concerned about the inaccessibility of the current products liability system to injured consumers.⁴⁹ They advocate alternative dispute resolution on the ground that it will relieve this problem.⁵⁰ If the problem of inaccessibility is real, it further undercuts any argument that there is a crisis in the first place. The defense bar has been complaining of too much plaintiff access to the courts, not too little. On the other hand, if there is no real accessibility problem, then including this provision in the statute constitutes a meaningless sop to consumer groups, allowing the proponents of the statute to claim that they are acting in an evenhanded manner.

Putting that aside, the provision in the federal statute is baffling because it seems so unnecessary. It sounds as though it simply allows parties to take advantage of alternative dispute resolution options that are already in place. Accordingly, it does not seem to make any significant changes in accessibility. The fact that the statute seems so utterly trivial encourages and supports the theories postulated in the preceding paragraph.

6. Punitive Damages Reform⁵¹

The law advocated by Schwartz and Behrens sets forth several changes in punitive damages rules. The first is to apply a clear and convincing evidence standard to the plaintiff's burden of proof.⁵² As Schwartz and Behrens point out, however, this standard is already in effect in approximately one quarter of the states, and shows signs of spreading yet further.⁵³ The state-by-state approach seems to be working just fine.

The proposed federal statute would also require some proportionality between the actual and the punitive damages in a particular case.⁵⁴ Since only one-quarter of states have adopted such a rule, from the authors' point of view the state-by-state process has been found wanting in this arena. Schwartz and Behrens do, however, cite to a study that shows that "punitive damages . . . have almost always been within the two times compensatory limit proposed in the Conference Report."⁵⁵ So why do we need the statute? The authors contend that a cap would reduce transaction costs, pointing out that punitive damages are reduced on appeal and that a cap

48. Schwartz & Behrens, *supra* note 1, Part V.E.

49. *Id.* at 612.

50. *Id.* at 612-13.

51. *Id.* Part V.F.

52. *Id.* Part V.F.3

53. *Id.* at 616.

54. *Id.* Part V.F.4.

55. *Id.* at 618.

"will reduce appeals and legal costs."⁵⁶ The cap will only reduce transaction costs if the defendants are filing appeals solely to attack the amount of punitive damages awarded. Schwartz and Behrens present no support whatsoever for this proposition. The only cases cited⁵⁷ by Schwartz and Behrens include such high compensatory damage awards that it is impossible to believe that the appeal would be based solely on the punitive damages awards involved.

7. Bifurcation⁵⁸

Bifurcating the compensatory and punitive damages phases of a trial seems like a good idea. It is so good that, as Schwartz and Behrens point out, many courts and state legislatures have already adopted or enacted the procedure into law.⁵⁹ Even where bifurcation is not required, it is often done as a discretionary matter by the trial court. In the absence of any evidence at all that courts routinely fail to bifurcate, and/or that the failure to bifurcate is prejudicial, it seems safe to leave this issue to the states.

8. Joint and Several Liability⁶⁰

Schwartz and Behrens point out that thirty-seven states have abolished joint and several liability.⁶¹ The proposed statute abolishes joint and several liability for non-economic damages but allows states to retain it for economic damages.⁶² This seems like tinkering with a system which is doing all right on its own, but also appears relatively non-threatening, if only because it has happened already.

9. Safe Workplaces⁶³

According to Schwartz and Behrens, this section of the statute allows an employer to be reimbursed for workers' compensation costs if (1) the employee has recovered against the manufacturer of the instrumentality of the injury, and (2) the employer was not negligent.⁶⁴ This approach is one of three alternatives for employer reimbursement. The first is the one that seems to be in place in some states: that the employee recovers from the

56. *Id.* at 619.

57. *Id.* at 618 n.153.

58. *Id.* Part V.F.5.

59. *Id.* at 620.

60. *Id.* Part V.G.

61. *Id.* at 621.

62. H.R. 956, 104th Cong. § 110 (1996).

63. Schwartz & Behrens, *supra* note 1, Part V.H.

64. *See id.* at 622.

manufacturer, and the employer is automatically reimbursed in full for the workers' compensation paid to the employee. This alternative clearly has an adverse impact upon the employer's incentive to provide a safe workplace, because it allows reimbursement even in cases where the employer could efficiently avoid injury by instituting safer workplace practices. This approach is, however, consistent with the idea that workers' compensation is not dependent upon employer negligence, and it does not involve the courts in lengthy trials on that issue.

The second alternative is that the employee recovers damages, and the employer is reimbursed for workers' compensation only if the employer was not negligent. This approach is apparently the one included in the statute.⁶⁵ It eliminates the safe workplace problem, but reinstates the negligence trials that workers' compensation was developed to avoid. Except for the increased risk that the employer will face substantial litigation costs, this approach seems sensible.

The third alternative is that the employer is not reimbursed for workers' compensation at all. This alternative has two sub-alternatives. The first is that the employee keeps both the workers' compensation and any damages he or she received in the suit against the manufacturer. This approach creates double compensation for the employee, and seems unjustifiable. The second sub-alternative is that the manufacturer deducts the amount of workers' compensation from the damage award, and pays the remainder to the employee. This allows the manufacturer to benefit in the amount of the workers' compensation costs the employee has received, but leaves the employer unreimbursed. In a situation where the manufacturer has caused the injury, allowing the manufacturer to benefit in the amount of workers' compensation seems inappropriate, to say the least.

10. Biomaterials Access⁶⁶

Schwartz and Behrens point out in this section that "[e]ven though courts are not finding suppliers [of biomaterials] liable, suppliers have found that the risks and costs of responding to litigation related to medical implants far exceed potential sales revenues."⁶⁷ It is thus difficult to see how protecting suppliers by limiting liability to "instances of genuine fault" will help.⁶⁸ The transaction costs will not change because negligence suits

65. *Id.*

66. *Id.* Part V.I.

67. *Id.* at 623.

68. For an explanation of how the proposed statute deals with the liability of suppliers of biomaterials, see H.R. 956, 104th Cong. § 205 (1996). While it is true that section 205(a)(1) ostensibly protects suppliers from liability, the protection is limited as set forth in section 205(c).

will be filed in any event, and it seems to be those costs which are the source of the problem.

11. The Statute in General

If there is a products liability crisis of the nature postulated by Schwartz and Behrens, and if the crisis lies in products liability law, this statute seems substantively to be a baby step, and a very small one at that, towards repairing the problem. Just what impact it might in fact have is a question left open by Schwartz and Behrens, who provide no information on that point. Clearly, it could only have a very limited impact, if only because so many states have already made so many of the changes included in the federal law.

One is forced to wonder why Schwartz and Behrens want this statute so badly. Two reasons emerge. The first might be that this statute will represent a first step toward a complete federal overhaul of the entire products liability system, a process which Schwartz and Behrens might feel would be easier to accomplish once this statute is on the books as a "foot in the door." Once it has been enacted, this statute will stand as precedent for the proposition that federal action in this arena is a good idea.

The second possible reason why Schwartz and Behrens so strongly support this statute may be, simply, that it is there. Judging from the section of their article dealing with the history of products liability reform, bills similar to this one have been regularly introduced in the Congress in each of the last several legislative sessions, possibility extending back almost twenty years.⁶⁹ Those introducing the bills have worked hard on drafting them and have campaigned relentlessly for their enactment. Thus, the idea of federal products liability legislation has achieved a momentum of its own, a momentum that has nothing to do with the actual content of the proposed statute. Surely habit is not a strong enough argument to warrant a new federal statute in a new arena of federal involvement.

V. CONCLUSION

Schwartz and Behrens fail to prove that there is a crisis. They fail to prove that, if there is a crisis, its source is either substantive state products liability law or the state-by-state approach to products liability law. They finally fail to justify the provisions of the statute they advocate even if there is a crisis and the crisis lies in products liability law.

One fact clearly emerges from Schwartz and Behrens's article. This fact is that the manufacturing sector and the defense bar seem to want this statute enacted. This must mean that the defense bar and the manufacturing sector feel that they will be liable less often and for fewer dollars under a

69. Schwartz & Behrens, *supra* note 1, Part II.

federal system than they are under state governance. This result is only desirable if liability under existing law is excessive or inappropriate. Schwartz and Behrens have failed to show that it is. Shell games may be fun to watch, but they can be expensive to play, and this one is not worth a wager.

