Products Liability Law in the Nineties: Will Federal or State Law Control?

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By Vicki Lawrence MacDougall

Introduction

Products Liability Law has been under attack for years from groups advo-
cating tort reform. Products liability has been described as "an undisguised wolf who has invaded company headquarters everywhere." The 1994 elections which gave control of both the United States Senate and House to the Republican party may yet produce tort reform at the federal level. Indeed, the Republicans' Contract with America promised change in the civil litigation system. Proposed federal tort reform is centering on products liability law based upon criticisms that have plagued this field of the law almost since its inception in the late 1960s.

An ongoing criticism of products liability law has been the uncertainty created by having the liability of products manufactured on a national basis determined by inconsistent state laws. Uncertainty and inconsistent state laws drove insurance prices upward during the 1970s and 80s. The "availability, affordability, and adequacy of liability insurance" became an increasing concern for most product sellers and manufacturers.

Next, the cost of product liability litigation is alleged to have increased the price of products making them too costly for many consumers or causing the removal of some products from the market. Products liability law has also been blamed for destroying or limiting job opportunities as well as depriving consumers of needed products. Further, the public perceives compensatory and punitive damage awards to be skyrocketing and unpredictable. "Moreover, the current U.S. product liability system has hurt our competitive position in world markets because the excessive costs of the system result in higher prices for American products." Finally, products liability law may act as a disincentive for innovation in the development of new products:

New products and methods may carry unforeseeable risks to con-
sumers. If substantial liability can be imposed no matter how carefully the new product or service is produced and delivered to the consumer, then risk adverse individuals and businesses will choose not to pursue these new techniques. The fact that businesses will face significant problems acquiring insurance for their new products or services will further deter interest in development. The effect is that the nation as a whole suffers from the lost benefits that come from technological and methodological innovation. This effect, in time, could have a significant adverse effect on the general quality of life in this country and on our nation's ability to compete internationally.13

Advocates of the current system of products liability law contend that the facts do not support the criticisms. The litigation explosion has not been in products liability; rather the explosion is to some extent corporations suing other corporations over property, intellectual property, and contractual disputes. Only four percent of new cases filed nationally in state courts were product liability cases. There was, in fact, a forty percent decline in the filing of products liability cases in federal courts between 1985 and 1991, without consideration of the asbestos litigation.14

The response to the criticism that the cost of products liability litigation is too high is that compensatory damage awards generally reflect the severity of the injury. Furthermore, plaintiffs recovered punitive damages in only 355 cases nationwide between 1965 to 1990. “Of these 355 cases, one-quarter were rendered in asbestos cases, and one-quarter were reversed or remanded on appeal.”15 Opponents of tort reform contend that the impact of products liability litigation on the price and availability of insurance and cost of consumer goods has been exaggerated. “Products liability insurance premiums in 1991 represented only 14 one-hundredths (.14) of one percent of products retail sales. Insurance costs represented a relatively small proportion of businesses’ annual gross receipts—sixthousandths (0.6) of one percent for large businesses, and about one percent for small businesses.”16 Insurance availability and affordability has stabilized in comparison to the increases seen in the 1970s and 1980s.

There is “virtually no solid data” regarding the effect of product liability law on innovation.17 “In several industries—most notably some types of pharmaceuticals and small aircraft—the combined effects of uncertainty and high awards seem to have discouraged the research, development, and marketing of entire categories of products.”18 Admittedly, some products have been removed from the market as a result of the threat of products liability litigation. For example, there is currently one domestic manufacturer of IUDs due to other manufacturers withdrawing their IUDs from the market. Only two manufacture the DPT vaccine for children. “Health care isn’t the only industry in which products have been discontinued because of insurance and litigation costs. There are now only two domestic makers of trampolines and the number of football helmet makers has dwindled from 10 to three.”19 However, products liability law was developed to promote safer products. The football helmets from the 1960s were poorly designed and caused severe injuries, including quadriplegia. Today, football helmets are safer due to the litigation.20 Perhaps, the system is, in fact, working to provide safer products and the removal of some products from the market is just an inevitable consequence of that goal.

Proponents of products liability law contend that the ability of American manufacturers to compete with foreign producers is not affected by the current law. Foreign manufacturers selling products in this country “will be subject to the same products liability laws as would a domestic company.”21 Furthermore, domestic businesses are earning “48 percent of the profits in global markets.”22 It is argued that a need for uniformity of products liability law necessitates tort reform on the federal level. The opponents of tort reform disagree. Historically, tort law has been developed by the individual states and any attempt to nationalize tort law is a “usurpation of a traditional state function.”23 Federalism is at the heart of the debate regarding a national product liability law. Clearly, Congress has the power to legislate in the products liability area under the commerce clause. The question is whether Congress should legislate. Opponents emphasize:

13 Id.
15 Id. at 2669.
16 Id.
18. A Prejudice Against Prejudices, supra note 17, at 167-68.
20 Id. at 1025.
22 Id.
23. Legal and Economic Barriers, supra note 1.
nic and cultural differences of its citizens.  

Furthermore, federal bureaucracy is inefficient and more costly compared to state government.  The last argument in favor of states' rights is that diversity can lead to meaningful change. The evolution of products liability law occurred in fifty different jurisdictions which allowed states to experiment and learn from each other. A more meaningful body of law may develop if the "separate laboratory experiments" are allowed to continue rather than be disrupted by federal legislation. Products Liability is certainly a newly created branch of law. The differences between the states can be seen as merely growing pains in a nation-wide effort to create a balanced body of law.

The debate regarding federalization of products liability law has lasted for over twenty years. It is interesting that reform on the national level is more likely to occur at this point in time when both products liability litigation and the cost of insurance are declining. Products liability law was created by the judiciary throughout the country. The trend of judicial decisions in the 1970s was plaintiff-oriented and tended to create new theories of recovery. However, the 1980s brought legislative reform at the state level as well as judicial decisions that favored the manufacturer-defendant. ''Viewing the products area as a whole, this tally of important recent developments suggests a clear trend... Courts once favorably inclined to break new ground and to discard doctrine blocking recoveries now are inclined to reflect more cautiously on the implications of their decisions. Courts continue to break new ground and discard doctrine in ways that favor plaintiffs. But they are increasingly apt to change the law to preclude liability rather than to promote it. Contrary to popular opinion, the judiciary's "quiet revolution" is currently restricting recovery for injuries caused by defective products. At least one author suggests that the real crisis is that there are not enough people seeking recovery for product-related injuries at the present time to promote safety.

The purpose of this article is to provide an understanding of why products liability law evolved, to discuss the substantive law of products liability law and to examine recent trends in the area. Finally, the federal law protecting manufacturers of small airplanes, the General Aviation Revitalization Act of 1994, and the proposed federal reform legislation, the Product Liability Fairness Act of 1995, will be discussed. Whether reform is needed is a question that can only be answered after examination of the existing law throughout the county.

II. The Development of Products Liability Law

Strict Products Liability evolved due to sound public policy reasons and due to barriers to recovery under the pre-existing causes of action for breach of warranty and negligence. Prior to the advent of strict products liability, consumers injured by defective products could bring suit only for negligence or breach of implied or express warranty. The original obstacle to recovery was the privity requirement; the injured party had to have a contractual relationship with the defendant to establish the duty of care for negligence recovery or to allow suit on the warranty attached to the sales contract. Consumers had privity with the retailer; yet, the retailer was rarely the party in the distributive chain responsible for the defective condition. Typically, the manufacturer was the person who created the defective condition but was not answerable in either negligence or breach of warranty because the manufacturer and injured consumer had not entered into any contractual relationship. The negotiation of the sales contract took place at the retail level. Therefore, lack of privity protected the manufacturer.

The privity requirement was abolished for negligence in MacPherson v. Buick Motor Co., which held that the manufacturer owed a duty to the consumer to use reasonable care in the production of a product even though the consumer did not purchase the product from the manufacturer and the contract of sale, cr privity of contract, only existed between the retailer and consumer. "We have put aside the notion that the duty to safeguard life and limb, when the consequences of negli...
ligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law. It was not until forty-four years after *MacPherson* that a direct action against the manufacturer for breach of warranty was allowed in *Henningsen v. Bloomfield Motors, Inc.*, thereby abolishing the need for vertical privity. Vertical privity refers to the relationship of the parties up and down the distributive chain. Issues of vertical privity deal with issues of who are proper defendants. Today, all sellers of goods give to purchasers an implied warranty of merchantability on their products without regard to a requirement of vertical privity.

Consumers injured by defective products were not afforded adequate relief even after the "citadel of privity" fell. Suits under negligence law mandated that the consumer prove specific acts of negligence that created the defective product. For example, *MacPherson* dealt with a defective wooden wheel which shattered while the Buick was in operation. It was difficult to prove a specific act of negligence on the assembly line that caused the defective wheel. The negligence alleged was failure to use reasonable care in the quality control process; i.e., a reasonable inspection process would have revealed the inferior wood used in the wheel. The manufacturer, however, introduced rebuttal evidence that reasonable measures were taken to inspect for flaws on the assembly line. The wheel was purchased from a reputable component part manufacturer and the wheels were delivered to Buick painted. No test existed to determine if inferior wood was used in a finished wheel. Although the plaintiff prevailed in *MacPherson*, a fair reading of that landmark case indicates that probably the manufacturer used reasonable care. Defective products can still result from a manufacturing process despite the use of "reasonable care." Responsible care has never mandated perfection nor total safety.

Another difficulty with the negligence cause of action was proof of which party in the distributive chain was the negligent party. "Proof of negligence in the air, so to speak, will not do." Plaintiffs must prove who was the negligent party. Mass production of products created the need for component part manufacturers. Indeed, the term "manufacturer" is really a misnomer in today's marketplace. A "manufacturer" is usually a final product assembler who assembles components made by component part manufacturers. A single component part might contain products processed by many subcomponent part manufacturers. Most products are also handled by distributors, wholesalers, and retailers who might damage a finished product and create a dangerous condition. Proof of which party in the distributive chain was the party at fault in creating the defective condition in a product was an insurmountable burden in some cases. For example, the party most likely at fault in *MacPherson* was probably the maker of the wheel not the manufacturer. It is likely that the wrong entity was held liable in that landmark decision. "Even if it could be shown that the manufacturer was... the party at fault in the distribution process... the manufacturer could be outside the jurisdiction of the court, dissolved, insolvent, or the least financially responsible person in the entire chain of distribution."

The difficulty of proof associated with the negligence cause of action led most plaintiffs to use the warranty alternative. Prior to the advent of strict product liability in tort, the cause of action used most frequently to recover for injuries caused by defective products was breach of implied warranty. The implied warranty of merchantability under the Uniform Commercial Code means that a warranty of reasonable safety is implied as a term of a contract accompanying any sale of a product. A defective product that causes personal injury breaches the implied warranty of merchantability. The warranty is breached regardless of fault; in other words, why or how the product became defective is not an issue. Breach of the implied warranty of merchantability was a form of strict liability. However, it was strict liability founded in contract, not tort. Plaintiffs could avoid proof of specific acts of negligence and could avoid proof of fault by which party created the defective condition. The mere act of selling a defective product would breach the implied warranty.

The Uniform Commercial Code was created to govern commercial transactions. Some provisions of the Code that work well between commercial buyers and sellers are perceived by the plaintiffs' counsel to be inappropriate when dealing with recovery for personal injuries caused by defective products. There are obstacles to recovery built into the Code. These include the following:

2. Sec. 2-314 of the Uniform Commercial Code provides in pertinent part, as follows:
   (1) Unless excluded or modified (Sec. 2-316), a warranty that the goods shall be merchantable is implied by contract for their sale if the seller is a merchant with respect to goods of that kind.
   (2) Goods to be merchantable must be at least such as
       (a) are fit for the ordinary purposes for which such goods are sold; or
       (b) the seller has reason to know satisfy the ordinary purposes for which such goods are sold because the product performs such purposes." A defective product as a strict product liability claim will usually breach the implied warranty of merchantability. *Products Liability Law in Oklahoma, supra note 36, at 5.

39. Id., 111 N.E. at 1933.
41. *PRODUCTS LIABILITY LAW IN OKLAHOMA, supra note 36, at ch. III (1980).*
42. See, *Assault Upon the Citizen: Full of the Citizen, supra note 35.
43. *PRODUCTS LIABILITY LAW IN OKLAHOMA, supra note 36, at 5-7.
44. *MacPherson, 217 N.Y. 382, 111 N.E. 1096 (1916).*
45. 51. Id. at 47.
46. Sec. 2-314 of the Uniform Commercial Code provides in pertinent part, as follows:
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       (a) are fit for the ordinary purposes for which such goods are sold; or
       (b) the seller has reason to know satisfy the ordinary purposes for which such goods are sold because the product performs such purposes. A defective product as a strict product liability claim will usually breach the implied warranty of merchantability. *PRODUCTS LIABILITY LAW IN OKLAHOMA, supra note 36, at 5.*
into the framework of the Code, including disclaimers, limitation of remedies provisions, notice defense, inspection, and lack of horizontal privity. Furthermore, the statute of limitations for breach of warranty runs four to six years from the date of purchase, not from the date of injury as in tort law. A plaintiff injured by a product that is older than the four to six year statute available in a particular jurisdiction may be time-barred before realizing that he or she has a cause of action.

All these defenses are appropriate contractual defenses that are part of a carefully crafted balancing of interests that is typical of the uniform law drafting process and consistent with contract law tradition. However, plaintiffs' lawyers argue that this approach is misplaced in the context of recovery for personal injuries. Personal injuries have always been primarily the subject of tort law. Inasmuch as there was already strict liability under the contract law for breach of warranty, it was argued that there should also be strict liability in tort for defective products. A cause of action for strict products liability in tort would shed the contractual defenses. As Professor Prosser remarked: "If there is to be strict liability in tort, let there be strict liability in tort, declared outright, without an illusory contract mask." In one sense, the creation of strict products liability in tort was not that drastic because there was already a strict liability cause of action for breach of implied warranty. On the other hand, the judicial imposition of strict products liability did circumvent contractual defenses built into the Uniform Commercial Code through duly enacted legislation.

The judicial creation of strict products liability in tort was based on public policy considerations, including the difficulties of proof surrounding the negligence cause of action and the availability of contractual defenses to breach of warranty. The public policy reasons for adoption of strict products liability in tort were first articulated by Justice Traynor in his concurring opinion in Escola v. Coca Cola Bottling Co. of Fresno. It was perceived to be in the public interest to discourage defective products from entering the marketplace. It was argued that the imposition of strict liability for defective products would create an incentive to produce safer products. The public policy of "loss minimization" was cited as requiring that the loss caused by defective products should be placed where it will most effectively reduce the risk of harm. The manufacturer was perceived to be the party best able to recognize and eliminate potential risks created by a product. Therefore, it was argued that the manufacturer should bear any loss caused by a defective condition. The "risk spreading" argument holds that the members of the distributive chain who profited from the sale of a defective product should also bear the cost of any injury caused by the defective product, instead of the cost of the injury falling on the shoulders of a randomly injured consumer. The cost of product-related injuries would thus be reflected in price increases and spread throughout society.

"Corrective justice" dictates that the loss caused by a defective product should be placed on the shoulders of the entity who caused the harm to occur; i.e., the members of the distributive chain who were responsible for the defective product entering the market. Lastly, "reliance" was said to justify the imposition of strict liability. The consumer no longer has means or skill enough to investigate for (Continued from previous column)

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himself the soundness of a product ... and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices. Consumers no longer approach products warily but accept them on faith, relying on the reputation of the manufacturer or the trademark. It was argued that a manufacturer should be accountable for injuries caused by defects in his goods when he has invited and solicited their use.

California became the first jurisdiction to adopt Justice Traynor's viewpoint of strict products liability in tort in the 1963 decision of Greenman v. Yuba Power Products, Inc. The American Law Institute followed the lead of the California Supreme Court with the adoption of Section 402A of the Restatement (Second) of Torts in 1964. In less than two decades, as a result of Greenman and Section 402A, almost all courts throughout the country adopted some form of strict products liability in tort.

The adoption of strict products liability in tort eliminated the requirement of proof of fault. Although the plaintiff need not prove fault, strict products liability does not mean liability without proof. The plaintiff must prove that (1) the product was defective when the product was used as intended or in a foreseeable manner, (2) the defective condition caused the plaintiff's injuries, (3) the defendant was a seller of the product, and (4) the defective condition existed when it left the defendant's possession and control, i.e., there was no substantial change in the condition of the product, and (5) the plaintiff was somehow foreseeably unharmed by the defective condition.

The elements of the prima facie case of strict products liability in tort remain difficult to establish despite the removal of the requirement of fault. Courts throughout the country agree on the basic elements of the cause of action. However, the courts have differed on the appropriate test for definitiveness.

III. Defectiveness in Strict Products Liability in Tort

Courts adopting strict products liability agree that compensation for product-related injuries should only occur when a "defective" product is responsible for the injuries. The difficulty has been to develop a meaningful test for definitiveness. Definitiveness connotes flawed; yet, a product can be flawed but not dangerous. Therefore, a product defect has to be not just flawed but also create a risk of harm to the user or consumer. However, the mere fact an injury coincides with the use of a product does not prove that the product is defective. Further...

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74. Some cases give the term "intended use" a restrictive definition. For example, Pennsylvania decided that a product is defective if it leaves the manufacturer "lacking any element necessary to make it safe for its intended use." Attleboro v. Tri-City Elec. Co., 491 Pa. 574, 424 A.2d 1029, 1032 (1980). In Griggs v. Riccar Corp., 381 F. Supp. 1529 (D. Conn. 1974), applying New York law, the plaintiff sued for injuries caused by a product by a child playing with a Riccar lighter. The defect alleged was failure to make the lighter child-proof. The court held there existed a risk of severe injury to children, and the Riccar lighter was not a children's lighter. The court held that the product was not defective under the concept of strict products liability.

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more, some products are inherently dangerous and no amount of precautions will eliminate the potential for harm. Absolute safety is simply not possible from an engineering or cost standpoint. The tests that courts developed reflect these basic concerns. The underlying philosophy was that the manufacturer should not be turned into an insurer.

The Restatement (Second) of Torts Section 402A stated that the product had to be in a "defective condition unreasonably dangerous" in order to impose strict liability. Defective condition unreasonably dangerous means that the "article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." Many jurisdictions adopt the "consumer expectation test" of definitiveness.

The consumer expectation test of definitiveness works best when applied in the context of a manufacturing, production or construction defect. A manufacturing flaw exists in a product when the product does not conform to the manufacturer's own specifications. The product with a manufacturing flaw is the proverbial "lemon." It is simply not the way it was supposed to be. It is a bad product by the standards of the manufacturer. A manufacturing defect occurs on the assembly line if the flaw is not caught by the quality control process. The defective product is thereby injected into the stream of commerce.

The production flaw under the consumer expectation test must also create unreasonable danger, to use the language of the Restatement. For example, a Coca-Cola is more dangerous than the ordinary consumer would expect when the Coca-Cola contains a decomposed worm which causes illness upon consumption. Or, a Chevelle manufactured without a stabilizer link in place causing the Chevelle to suddenly veer is also dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.

Additionally, the consumer expectation test rests on the "fallacious assumption that the ordinary purchaser has definite expectations regarding the dangerousness of the products purchased" or "expectations as to safety regarding many features of the complexity made products that are purchased." The consumer expectation test can also misidentify products as defective as long as they contain a surprise danger. For example, an unknowable side effect within a prescription drug would violate consumer expectations as to safety even if there was no way to have scientifically discovered the side effect at the time of distribution.

Design defects create the most concern under the consumer expectation test. The defect alleged in design-defect cases is that all products manufactured according to the design of the manufacturer are unreasonably dangerous. The defect is created at "the planning stage, not on the assembly line as with the manufacturing defect. ..." The imposition of liability condemns an entire product line as being more dangerous than the ordinary consumer would expect. The consumer expectation test does not work well in design-defect cases because a jury could decide that a product design is more dangerous than expected without balancing the comparative dangers, benefits, or costs of alternative designs.

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82. REMSTATEMENT (SECOND) OF TORTS § 402A comment i (1964).

83. See UNIFORM ACT ON DANGEROUS PRODUCTS, supra note 75, ch. 7. Jurisdictions that adopt the consumer expectation of definitiveness as "true" requirements (Second) jurisdictions. Most jurisdictions have adopted the rule of Section 402A. However, many courts refuse to define the term "ordinary consumer" to stop the consumer expectation definition of unreasonably dangerous. Id. at ch. 8 & 9. Courts that reject the "defective condition unreasonably dangerous" language substitutes their own test of definitiveness into the basic statute contained within Section 402A.

84. PRODUCT LIABILITY LAW IN OKLAHOMA, supra note 36, at 128.


88. REMSTATEMENT (SECOND) OF TORTS § 402A, comment i (1964).

89. UNIFORM ACT ON DANGEROUS PRODUCTS, supra note 75, ch. 4; LAW OF PRODUCTS LIABILITY, supra note 75, at ch. 8.05; David A. Fisher, Products Liability—Functionally Imposed Strict Liability, supra note 8; W. Page Keeton, Review of Basic Principles, supra note 81; Design Hazards, supra note 81; Meaning of Defect, supra note 81; Manufacturer's Liability, supra note 81; Note, Products Liability: Oklahoma's Defective Test for Defect—The Consumer Expectation Test and its Limitations, 79 Okla. L. Rev. 318 (1986).

90. REMSTATEMENT (SECOND) OF TORTS § 402A, at 87-88; LAW OF PRODUCTS LIABILITY, supra note 75, at ch. 8.05; W. Page Keeton, David D. Drew & John E. Klumbisch, PROE (Continued on next column)

91. Products Liability Law in Oklahoma, supra note 36, at 127.
sumer-expectation test is inadequate for that reason.\textsuperscript{96}

The last criticism of the consumer expectation test is that it requires a latent defect in the product.\textsuperscript{57} An open and obvious condition is not more dangerous than contemplated even if it exposes the user to excessive preventable danger.\textsuperscript{98} An obvious general hazard connected with the use of a product can preclude a finding of defectiveness.\textsuperscript{99} The case of Linegar v. Armour of America, Inc.\textsuperscript{99} provides a good example of an open and obvious danger negating liability under the consumer expectation test. Jimmy Linegar was a state trooper killed in the line of duty while wearing Armour's contour-style bullet-resistant vest. Linegar was shot numerous times. Five shots hit the vest and none penetrated the vest. The wounds that caused Linegar's death struck parts of his body not protected by the vest. The contour-style vest left an area under the arms and along the sides of the body exposed. The lethal bullet entered below Linegar's armpit and pierced his heart. There were other styles of bullet-resistant vests that provided more coverage, including Armour's wrap-around style.\textsuperscript{100} The jury found the contour-style vest defectively designed and returned a $1.5 million verdict in favor of Linegar's widow and children.\textsuperscript{101} The Eighth Circuit Court of Appeals found that the evidence was insufficient to present a submissible products liability case as a matter of law.\textsuperscript{100} Under the consumer expectation test, the amount of coverage offered by the contour vest was obvious to anyone and a person wearing the vest would not expect to be shielded from a shot taken under the arm.\textsuperscript{100} It defies logic...to suggest that Armour reasonably should have anticipated that anyone would wear its vest for protection of areas of the body that the vest obviously did not cover."\textsuperscript{102} Arguably, the Linegar court fell into the common trap of obvious dangers under the consumer expectation test. Critics argue that whether the danger was obvious should not be the decisive factor on the question whether the contour vest was reasonably designed. Instead, in this argument, the focus should be whether there was a feasible alternative to the design that could avoid the known risk of injury without increasing the cost or creating other dangers that would make the alternative impractical.\textsuperscript{103} Dissatisfaction with the consumer expectation test of defectiveness in design-defect cases led many courts to adopt the risk-benefit test.

The risk-benefit test is considered by many to be the only meaningful test to determine whether the design of a product is defective;\textsuperscript{104} I.e., whether the design of a product is more dangerous than society will allow because the risk created by the design outweighs its usefulness.\textsuperscript{105} "[A]ll products have both risks and benefits, ...[T]here is no way to go about evaluating design hazards without weighing these factors."\textsuperscript{106}

The risk-benefit test of defectiveness is based on the theory that the only way to determine if a product is improperly designed is to balance the risk of any injury against the cost to change the product to eliminate the risk. The cost to change the current design includes any benefit incorporated into the current design that would be lost with the change and any new danger that would be created with the design modification.\textsuperscript{107}

Thus, the risk-benefit test is a balancing test which weighs all relevant factors before concluding whether a product is or is not defective.\textsuperscript{110} The case of Metal

\textsuperscript{96} 15. 15. [Footnotes have been omitted for this example.]

\textsuperscript{97} 16. Id. at 1151.

\textsuperscript{98} 17. Id. at 1152.

\textsuperscript{99} 18. Id. at 1154.

\textsuperscript{100} 19. Linegar v. Armour of America, Inc., 523 F.2d 99 (8th Cir. 1975).

\textsuperscript{101} 20. Id.

\textsuperscript{102} 21. Id. at 1155.

\textsuperscript{103} 22. Id. at 1155.

\textsuperscript{104} 23. Id. at 1155.

\textsuperscript{105} 24. Id. at 1155.

\textsuperscript{106} 25. Id. at 1155.

\textsuperscript{107} 26. Id. at 1155.

\textsuperscript{108} 27. Id. at 1155.

\textsuperscript{109} 28. Id. at 1155.

\textsuperscript{110} 29. Id. at 1155.

\textsuperscript{111} 30. Id. at 1155.

\textsuperscript{112} 31. Id. at 1155.

\textsuperscript{113} 32. Id. at 1155.

\textsuperscript{114} 33. Id. at 1155.

\textsuperscript{115} 34. Id. at 1155.

\textsuperscript{116} 35. Id. at 1155.
Window Products Co. v. Magnusen\(^{12}\) provides a good illustration of the risk-benefit test. Judy Magnusen collided with a sliding glass door made by Metal Window Products. Ms. Magnusen was attending a cookout in her apartment complex and had traveled through the doorway several times and each time the door was open. The last time she tried to pass through, the door was closed, and she struck the glass door. The impact bruised her face and damaged her front teeth.\(^{13}\)

Ms. Magnusen contended that the design of the patio door was defective because there was no permanent object attached to the plain glass that would alert someone approaching the door that it was closed. A permanent decal or an etching could provide the needed notice.\(^{14}\) At trial, the jury awarded $4,431 in damages to Ms. Magnusen.\(^{15}\) On appeal, the jury verdict was overturned because the sliding glass door was not considered defective under a risk-benefit analysis.\(^{16}\) The court acknowledged that there were a large number of injuries each year from people colliding with transparent patio glass doors. However, the injuries were usually minor where, as in this case, the glass did not shatter. On the other hand, the utility of the design of invisible doors includes providing a view, a source of light and ventilation, and a means of creating an illusion of adding space to a room. The quality of invisibility is "the very quality which gives desirability and value to glass doors."\(^{17}\) Any markings on the door would detract from the illusion sought by millions of people.\(^{18}\) "The contrast between the relatively small risk and the rather significant utility renders the risk of harm inherent in the door marketed by appellant less than an unreasonable one."\(^{19}\)

The plaintiff's goal in a design-defect case is to present evidence that "there is a feasible alternative to the current design, one that is practicable from an engineering and cost standpoint and in terms of the overall operation of the product."\(^{20}\) The obvious weakness of this approach is the impossibility of ascertaining this standard in advance. A "warning" case is similar to a design case because a warning defect is actually the defectively-designed packaging of a product. "A warning or marketing defect occurs when the product seller fails to adequately warn consumers in order to allow safe use of the product or does not provide adequate instructions on proper use to avoid foreseeable risks of harm."\(^{21}\) However, the issue of when warnings are or are not adequate is one of the "most vexed issues in the law of products liability."\(^{22}\) Some risk can always be found with almost any product. It would also appear that some language could always be added to the information provided by the manufacturer that would avoid a risk of a particular harm. Hypothetically, it could always be argued that any injury could have been prevented by some warning that the defendant did not give.\(^{23}\)

"[U]nless the theoretical boundaries are set out with some clarity, a ritualistic insistence upon product warning can reverse the time-honored presumption that losses should lie where they fall. No injury will be self-inflicted, because all injuries could have been prevented by some warning."\(^{24}\)

The "theoretical boundaries" are anything but clear in warning defect cases. One difficulty in warning defect litigation is the perceived low cost of adding additional warnings. "Unfortunately, the visible monetary costs of additional warnings are typically quite low—a few pennies for a bit more paper and a little more ink—while the greatest part of the costs of overwarning are nonmonetary and easily ignored."\(^{25}\) Risk-benefit analysis typically centers on the inexpensive nature of additional warnings instead of the true cost of additional warnings, or "warning pollution."

The most significant social cost generated by requiring distributors to warn against remote risks is the reduced effectiveness of potentially helpful warnings directed towards risks which are not remote. Bombarded with nearly useless warnings about risks that rarely materialize in harm, many consumers could be expected to give up on warnings altogether. And the few persons who might continue to take warnings seriously in an environment crowded with warnings of remote risks would probably overreact, investing too heavily in their versions of "safety."\(^{26}\)

The risk-benefit test of defectiveness has not worked well in warning cases because of the widespread assumption that "warnings are free."\(^{27}\) Traditional application of the risk-benefit test led to the conclusion that the risk of the injury outweighed the benefit of the current warning because the current warning could be changed to include additional


\(^{13}\) Id. at 355. The glass did not break or shatter when Ms. Magnusen struck the door. Id.

\(^{14}\) Id. at 357.

\(^{15}\) Id. at 326.

\(^{16}\) Id. at 360.

\(^{17}\) Id. at 358.

\(^{18}\) Id.

\(^{19}\) Id. at 360.

\(^{20}\) Products Liability Law In Oklahoma, supra note 36, at 226.

\(^{21}\) Id. at 227.

\(^{22}\) Id. at 360.

\(^{23}\) Id.


\(^{25}\) Id. at 296.

\(^{26}\) Id. at 297.

\(^{27}\) The Quiet Revolution, supra note 29, at 496.
The concept of definitiveness has been confused by the courts because courts have tried to adopt a single test of definitiveness to cover all types of defective products. The risk-benefit test may work in design-defect cases, but is awkward for warning cases. The consumer expectation test may produce satisfactory results in manufacturing flaw and warning cases, but is unsatisfactory for design cases. The test of definitiveness should vary according to whether the case involves a manufacturing, design, or warning defect in order to reach a satisfactory result in all cases. Indeed, model legislation suggests this approach for the individual states to adopt. Nonetheless, the judicial trend has been to not vary the test of definitiveness according to the type of defect. Judicial trends have centered on other issues in the laws of products liability.

IV. Judicial Trends in Products Liability

The judiciary created strict products liability throughout the country. Since its creation, some decisions have established a new doctrine tailoring to favor the plaintiff in that they generally removed an obstacle that would allow potential recovery. None of these ground-breaking decisions have resulted in development of a trend because none have been adopted throughout the country. Typically, a court would experiment with a new doctrine, speculation would occur that the doctrine might sweep, the doctrine would be subject to vast criticism, and then the doctrine would have very little acceptance by courts in other jurisdictions. Overall, courts have been reluctant to depart from traditional tort doctrine. The judiciary throughout the country tended to learn from criticism of these cases and the "separate laboratory experiments" of other states in the development of their own body of law.

Doctrines that fall into this category include market share liability, the dual capacity doctrine, and the product line

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129. Id.
131. Empty Shell of Failure to Warn, supra note 129, at 380-81; also see the wider factors mentioned supra at note 111.
132. Empty Shell of Failure to Warn, supra note 125, at 262.
133. Products Liability Law in Oklahoma, supra note 56, at 203.
134. Empty Shell of Failure to Warn, supra note 125, at 282.
135. Id.
a potential risk of harm even if the risk was unknowable, and the application of strict products liability in tort to the seller of used goods. Limited adoption of these theories occurred simultaneously with two defense-oriented theories adopted by the United States Supreme Court. The United States Supreme Court created the governmental contractor defense in design-defect cases and limited the use of epidemiological proof of causation in Bendectin litigation. Overall, the current judicial trend appears to benefit the manufacturer-defendant.

Empirical research shows that "[s]ince at least the mid-1980s, published opinions have moved towards benefiting defendants over plaintiffs, have increasingly demanded dismissal of plaintiffs' claims as a matter of law, and have tended increasingly to break new legal ground for defendants." Appellate decisions increasingly have held that a plaintiff's proof was not sufficient to allow the plaintiff to reach the jury. Products liability plaintiff's have fared no better at the trial court level. The rate that plaintiffs have obtained judgments has substantially declined. Furthermore, plaintiffs who did prevail recovered less. Trial courts are apparently applying "stringent legal standards to products claims" because there is an increase in the number of cases.
The court in Brown protected the prescription drug manufacturer from claims of defective design based upon "the broader public interest in the availability of drugs at an affordable price." First, drugs are necessary to save lives, treat illness, and alleviate suffering. Older products subject to strict products liability in torts were viewed by the court as just making lives easier or providing pleasure. This policy reason will not hold up under scrutiny. Not all drugs marketed are to save lives, treat illness, and alleviate suffering. Many are simply to improve the quality of life such as the prescription drug minoxidil to treat baldness, Retin-A to treat wrinkles, and Accutane to treat acne. Furthermore, products other than prescription drugs can be essential to life. No one would suggest that food be exempt from strict products liability in tort because it is necessary.

The second policy reason is that drug manufacturers might withdraw drugs from the market, delay marketing new drugs, or decline to invest in development of new drugs for fear of potential liability. The cost of litigation could increase the price of prescription drugs to "place the cost of medication beyond the reach of those who need it most." This possibility is self-evident; however, the Eighth Circuit found this policy argument was "unconvincing." This policy has no greater relevance to prescription drugs than to other products having life-saving or life-bettering characteristics.

Clearly, the Eighth Circuit is correct that the Brown analysis is equally applicable to other industries, such as manufacturers of automobiles, punch presses, swimming pools, and over-the-counter drugs.
 Prescription Drug Rule, or Learned Intermediary Doctrine, provides that the informational obligation of a manufacturer of a prescription drug is to the prescribing physician, not to the user or consumer of the drug. Only a physician is considered able to evaluate the effectiveness of the drug, given the overall medical history of the patient, so as to determine if the drug should be taken despite the known risks connected with use of the drug. Drug manufacturers, therefore, generally have no duty to warn the patient/consumer of the dangers of the drug prescribed. The physician acts as a Learned Intermediary in weighing the benefits of any medication against its potential dangers. Litigation for failure to provide adequate warnings on a prescription drug is difficult to win because the plaintiff must convince the jury that: (1) the warning given by the drug manufacturer was not adequate to warn the prescribing physician of the dangers connected with the drug; and (2) the doctor would not have prescribed the drug as given if adequate instructions had been provided, thereby avoiding the plaintiff's injury.

A cause of action for failure to provide adequate warnings is still available after Brown. There are numerous cases against drug manufacturers for failure to provide adequate warnings in strict product liability cases. However, there are a few cases where the flaw in the prescription drug is not just lack of information. The flaw is with the design of the drug itself. Almost all prescription drugs are unavoidably unsafe; yet, a few prescription drugs are defectively designed regardless of warnings. Thalidomide, DES, breast implants, the Dalkon Shield IUD, and E-Ferol® have been judicially determined to be defective products, unreasonably dangerous. The risks connected with the use of these products have been determined to outweigh any benefit derived. They should not automatically be included within the class of unavoidable unsafe products merely because they are prescription drugs. Thalidomide, DES, breast implants, Bendectin, and the Dalkon Shield should not be placed in the same category of products as the Pasteur treatment for rabies, vaccines, penicillin and cortisone. Arguably, prescription drug manufacturers who marketed such products as E-Ferol® and breast implants should not be given blanket immunity from claims of defective designs. On the other hand, the Brown analysis may have logical application in some non-pharmaceutical cases.

The approach of the Brown case, exempting all prescription drugs from defective design claims under strict product liability in tort, on grounds that such products carry unavoidable risks, has not been accepted by most courts. Most courts decide whether a drug is unavoidably unsafe and whether to grant comment k protection on a case-by-case basis. Cases decided after Brown have generally declined to follow the lead of

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117. Drug Manufacturers Get Immune, supra note 167, at 454.
118. "Sixteen pharmaceutical companies are ranked in the top 300 companies in the United States. The industry sheds for pharmaceutical companies in 1986 for returns to investors was 27.3%. ... It has been said that if ever there was an industry which could easily withstand the impact of liability ... it is the drug industry." Id., quoting Nout, Strict Liability in Tort: In Applicability to Manufacturers of Prescription Drugs, J.T.C. Davis, L. Rev., Oct. 487, 518 (1974). In response to these figures, it has been suggested that drug manufacturers are paying more money for less insurance coverage.

120. Brown, 751 P.2d at 477. It should be noted that suits against a drug manufacturer could still be pursued under negligence for failure to use reasonable care in the design of a prescription drug.

121. Product Liability Law in Oklahoma, supra note 36, at 255-56.


123. id.; id.

124. There are two exceptions to the prescription drug rule. The first exception occurs when the FDA mandates drug information be given directly to the patient/consumer, such as with birth control pills. Product Liability Law in Oklahoma, supra note 36, at 211. The second exception occurs when vaccines are administered during a mass immunization program. The drug manufacturer need not warn the consumer because there is no individualized balancing of the risks by a physician to such mass programs. Kemp v. Wyeth Laboratories, Inc., 499 P.2d 1264 (Okla. 1974); Davis v. Wyeth Laboratories, Inc., 739 P.2d 123 (Okla. 1987); Cunningham v. Charles Finse & Co., Inc., 533 P.2d 1377 (Okla. 1974).

125. Product Liability Law in Oklahoma, supra note 36, at 210.


127. E-Ferol® was an unsterilized preparation of intravenous vitamin E sold by O'Neil, Jones, and Feldman, Inc. to nursing infants. Physicians around it had only tested and approved by the FDA. In 1954, E-Ferol killed 58 infants. In 1959, thirty employees of O'Neil, Jones, and Feldman, Inc. were fined $10,000 each and 29 were indicted on 45 counts of mail fraud. See Lacey, M.D., Do You Know E-Ferol? The Penalty for Selling Unsterilized Drugs in Neonatology: Finest a Null Sentence, 10 Pediatrics 1, 119 (1952); see also Boven, The Practical Aspects of Neonatal Antioxidants (1967) on the first instance of E-Ferol in neonatology.

128. id.

the California Supreme Court.\textsuperscript{182} Brown is, however, symbolic of a dramatic shift in judicial attitude.\textsuperscript{183} The California Supreme Court was the first court to adopt strict products liability in tort\textsuperscript{184} and created the market share theory of liability,\textsuperscript{185} the product line theory,\textsuperscript{186} the Barker test of defectiveness,\textsuperscript{187} and the dual capacity doctrine.\textsuperscript{188} The fact that the same court that has been so influential in the development of strict products liability would grant prescription drug manufacturers absolute immunity from claims for defective design, is clearly a loud statement in the "quiet revolution" of the judiciary.

V. Federal Legislation

A. The General Aviation Revitalization Act of 1994

Congress took the first step toward federalization of products liability law with the enactment of the General Aviation Revitalization Act of 1994.\textsuperscript{189} The General Aviation Revitalization Act creates a "rolling" statute of repose. No civil actions for personal injury or death may be brought against the manufacturer of an aircraft or the manufacturer of a component part of an aircraft\textsuperscript{190} 18 or more years\textsuperscript{191} after the date of delivery of the aircraft or component part to its first purchaser.\textsuperscript{192} The statute of repose is considered a "rolling" statute of repose because the 18 year period begins to run again if a new part is put into an airplane.\textsuperscript{193} The statute of repose "rolls" over as to the new part. Thus, a plaintiff would have 18 years from the date of installation of the new part to bring suit even if the airplane itself was older than 18 years. The plaintiff could not sue contending the plane was defective; however, the plaintiff could sue contending the replacement part was defective. The statute of repose applies only to aircraft that have been issued an airworthiness certificate, that have a maximum seating capacity of less than 20 passengers, and which are not engaged in carrying passengers at the time of an accident.\textsuperscript{194} Furthermore, the statute of repose does not apply if the manufacturer knowingly misrepresented facts or concealed information to the Federal Aviation Administration regarding the performance or maintenance of the aircraft or one of its components.\textsuperscript{195}

Normally, the statute of limitations for tort actions runs from the date of injury. Airplanes, unlike most automobiles and consumer products, may be used 30 or 40 years after being injected into the stream of commerce.\textsuperscript{196} A manufacturer could potentially remain liable for a 40 year old product because an injured consumer has two years from the date of his injury to file suit. "A virtually limitless products liability tail presented an unacceptable risk to most manufacturers, insurers, and lenders."\textsuperscript{197} Suits dealing with aircraft older than 18 years are frequently filed even though a claimant is not likely to succeed.\textsuperscript{198} Most defects are discovered early in an airplane's life; therefore, a meritorious suit against the manufacturer of an airplane more than 18 years of age is not likely.\textsuperscript{199} However, the average cost of defending these claims was $500,000.\textsuperscript{200}

Products liability claims were partially responsible for the decline of the general aviation industry in this country. In 1978, domestic manufacturers were world leaders in general aviation aircraft, producing 18,000 airplanes. By 1993, production had dwindled to only 555 aircraft causing the loss of 100,000 jobs.\textsuperscript{201} An important factor in the decline of the general aviation manufacturing has been the industry's product liability costs, which have increased from $24 million in 1978 to more than $200 million a year in recent years.\textsuperscript{202} Plaintiffs were awarded large recoveries in only a few cases.\textsuperscript{203} The huge increase in costs was due almost entirely to defense costs because most lawsuits were resolved in favor of the manufacturer-defendant.\textsuperscript{204} The world insurance market withdrew coverage "en masse" for the American general aviation industry\textsuperscript{205} as a result of the potential exposure and because of the "product liability tail."

The General Aviation Revitalization Act was enacted to "help regenerate a once-thriving industry...before consumer and competitor pressure from the aerospace industry and low-cost foreign imports force an American manufacturer into bankruptcy by their judgments."\textsuperscript{206}
along with frequently not likely discovered before, 1 manufacturer's of age, cost, economy, was partially the general. In 1978, old leading produc- in 1978 ear in re-awarded cases 1 due to 1 because the favor of the world stage "the aviation potential industry is not currently a monopoly, 1 and not be made in this one extremely limited instance." 215

B. The Product Liability Fairness Act of 1995

The "uniqueness" of the aviation industry may well justify federal product liability legislation in that area. Aircraft as products have always been federal products from the standpoint of regulatory control. But this justification does not apply to all products. Congress admits that product liability law has traditionally been developed by state law. However, further justification can be found in the "unique nature of the general aviation industry." 209 Federal regulatory oversight follows an aircraft from its "cradle to grave." 210 The Federal Aviation Administration sets rigid standards for airplanes 211 and before any aircraft flies, it must be certified as air- worthy. Only federally licensed pilots can fly aircraft and only federally certified maintenance facilities can perform certain repairs. Additionally, the FAA oversees air routes, fuel handling operations, and the review of aircraft accidents. 212

"The result of this extensive federal involvement is an industry whose products are regulated to a degree not comparable to any other." 213 The food and pharmaceutical industries are "not subject to anywhere in the smallness of Federal supervision over the lifespan of the product." 214 Aircraft were perceived by Congress as unique compared to other products. This uniqueness justified federal legislation. "Given the conjunction of all these exceptional considerations, [Congress] was willing to take the unusual step of preempting State law in this one extremely limited instance." 215

212. Id.; President Clinton vetoed the Act on May 2, 1996. The Act referred to in this article refers to the latest version of the Bill, House Resolution 956. The earlier version, passed by the Senate, Resolution 563, will be referred to when there is a significant difference between the Senate version and House Bill 956. Many unsuccessful attempts at products liability reform legislation have occurred at the federal level in the past. The Product Liability Fairness Act of 1995 or a similar version is now more likely to be ultimately enacted simply due to the change in political climate. History teaches us that future attempts at federal product liability reform legislation are likely.

The Product Liability Fairness Act of 1995 was promulgated "because product liability law is a problem of national concern." The criticisms of the current product liability system and the arguments in favor of tort reform have previously been discussed. The current system of compensation for product-related injuries is perceived as too costly and unpredictable. Yet, products liability litigation adds "less than one percent to the price of most products" and insurance premiums exceed 1 percent in only three industries. Furthermore, tort reform is not likely to reduce the cost of product...
liability insurance. Another argument in favor of the Product Liability Fairness Act is that the current system of product liability hampers the competitiveness of the United States in a global market. There is a "total lack of reliable information" regarding this issue. The Office of Technology Assessment studied the competitiveness of American manufacturers and recommended options for government action to address the challenge of foreign businesses. The study did not include federal products liability law as an option. Nonetheless, there may be some validity to this concern. Of course, it could also be addressed at the state level.

Current products liability law has been criticized as being unpredictable and uncertain because the law is developed by the individual states. The stated goal of the Product Liability Fairness Act is to provide greater certainty and "promote uniformity." However, a major failure of the Product Liability Fairness Act can be seen in its attempt to provide uniformity of product liability law.

C. The Issue of Uniformity

First, the Product Liability Fairness Act does not address the fundamental issue of the proper test for defectiveness. As previously discussed, the courts throughout the country have drastically disagreed on the proper tests to determine whether a product is defective. Potential liability for a product hinges on the test for defectiveness. The starting point for a uniform law would be a law that would provide to manufacturers a uniform standard by which to judge their products. Congress recognized this when it stated: "On average, over seventy percent of the products that are manufactured in a particular state are shipped out of the state and sold. The current patchwork of over 51 state and District of Columbia and territorial product liability laws sends confusing and often conflicting signals to those who make, sell, or use products in the United States. [...] The current product liability system does not distinguish well between good and bad products." In this regard, the Product Liability Fairness Act would fail to accomplish its essential purpose because it does not distinguish at all between what is a good product and what is a bad product. Products alleged to be defective would still be judged by standards developed by the different states. A product could be defective in California, but not in Pennsylvania. On the other hand, the concept of defectiveness has yet to be fully developed by the state courts. Courts are still refining all the issues and developing tests that will best achieve certain goals. Courts are learning from their sister states when they address problem areas of the law. Perhaps, it is best not to push for uniformity too quickly. Rather, it may be better to allow the "separate laboratory experiments" to continue until the best test for defectiveness can be attained. As Professor Eisenberg has stated:

The changing nature of products liability law makes me cautious about wishing for Congress to implement a single rule. For the rule Congress adopts had better be a good one, since it may preempt further experimentation and change by the states. I see no basis for believing that the rules embodied in S. 1400 [a similar bill introduced in the 101st Congress] are superior to the collection of rules embodied in various state laws and to the ability of the states to adopt the best rules of their sister states, as those rules evolve over time. The one thing we do know is that state product law does change. I worry that Congress may freeze the law with the wrong set of rules at a time when there is no clear reason to do so.

The second reason that the Product Liability Fairness Act would likely fail to achieve its goal of uniformity is that it would create non-uniform laws within the Act itself. The Act proposes a statute of repose, but an individual state's statute of repose would still apply if it is shorter than that provided for in the Product Liability Fairness Act. The Act would also leave intact state laws that are more restrictive than its own punitive damage provision. Several liability would be created for non-economic losses under the Act. This section, however, does not preempt other limitations on joint liability with respect to economic damages, which have been imposed by individual jurisdictions. There would not be a uniform national law on any of these issues because the Product Liability Fairness Act would codify that different state's laws will still apply to some of the issues within the scope of its coverage.

Third, the goal of a uniform body of law would not be achieved because the Act states that the federal courts would not have jurisdiction over any product liability action; state courts would continue to have jurisdiction unless there is an independent ground for federal Jarvis.

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232. Id.
233. Product Liability Fairness Act, supra note 219, at Section 102 (D).
235. Legal and Extralegal Barriers, supra note 1.
is the liability of the non-manufacturer seller. Traditionally, any seller regularly engaged in the business of selling a product is potentially liable in both strict products liability in tort as well as breach of the implied warranty of merchantability. This includes retailers, wholesalers, and distributors of products. Under the Product Liability Fairness Act, a product seller, other than a manufacturer, is only liable if there is proof of negligence, breach of an express warranty, or intentional wrongdoing. This provision follows the lead of nineteen states that have similar laws. Under state laws, retailers are held liable in only five percent of the cases and usually are dismissed or indemnified.

The purpose of this provision is to force plaintiffs to sue the manufacturer and avoid wasteful litigation. However, a plaintiff receiving only minor injuries from a defective product might not be able to afford expensive litigation against an out-of-state manufacturer if the cause of action is predicated against the local retailer who profited from the sale of the defective product. Furthermore, this proposal would dramatically change well-established law that product sellers provide an implied warranty that their products are reasonably safe as part of the sales contract. The Act does provide that a non-manufacturing seller can still be sued if the manufacturer is not subject to service of process or the plaintiff would be unable to enforce a judgment against the manufacturer. Statutes such as these do not attempt to provide a viable defendant. However, it seems strange to condition the potential legal liability of one party on the amenability of another party to be sued. Policy reasons should justify whether a retailer should or should not be subject to strict products liability and implied warranty, not whether the manufacturer is subject to service or solvent.

The Product Liability Fairness Act purports to create a "uniform" statute of repose. The statute of repose would not apply if a state has a shorter one nor would it apply to cases covered by the 18 year statute of repose enacted by the General Aviation Revitalization Act. Thus, the statute of repose would hardly create a uniform national law. The Act proposes a 20 year statute of repose; a cause of action could not be brought after 20 years from the date of delivery of the product. Most manufacturers win lawsuits dealing with older products. However, the purpose of this provision is to reduce the high cost of defending stale claims. It was felt that this provision would help American manufacturers compete globally. "Foreign competitors rarely have machines in this country that are 40 or more years old, so they pay less liability insurance than their American competitors and can offer their products at lower prices."

E. Comparative Responsibility

The Product Liability Fairness Act does not attempt to articulate a standard of behavior to govern the conduct of the manufacturer because it does not set forth a standard for product defectiveness. The Act does, however, address the standard of behavior for an injured claimant. A claimant under the influence of alcohol or an illegal drug is precluded from recovery if the alcohol or illegal drug use was more than 50 percent responsible for


244. Product Liability Fairness Act, supra note 219, at 1 (14).

245. Id. at 11.

246. Product Liability Fairness Act, supra note 219, at 84 (A) (1).

247. Senate Report, supra note 216, at 35.

248. Id. at 16.

249. Stenographing, supra note 217.

250. Product Liability Fairness Act, supra note 219, at 194 (B).
of potential recovery in modified jurisdictions when a plaintiff is more than 50 percent responsible for his injuries. In other jurisdictions, comparative negligence is inapplicable to strict products liability in tort. Miseuse and product alteration totally preclude recovery. Application of comparative negligence would allow partial recovery where previously it was totally barred. Under these provisions of the Product Liability Fairness Act, plaintiffs in many jurisdictions would prevail more often than under the current law.

F. Impact on Worker's Compensation

Many injuries caused by allegedly defective products occur in the workplace. There has been a constant tension between the laws of products liability and worker's compensation. In the lawsuit against the manufacturer of a defective product, many times the manufacturer will argue that the employer or a co-worker was at fault in causing the accident. The fault of the employer can be argued as an intervening cause to negate all liability or can be used in a comparative negligence system to potentially reduce recovery. Some jurisdictions, the employer's responsibility in causing the accident will be assessed a percentage and the plaintiff's recovery will be reduced according to that percentage. Yet, the plaintiff will never be able to collect the portion of the judgment represented by that percentage of responsibility because the employer is immune from civil tort actions under the exclusive remedy doctrine of worker's compensation. The plaintiff will collect only the amount of the benefits, which are typically lower than a judgment for personal injuries. Moreover, the employer would be a ghost or non-party defendant in the litigation against the manufacturer. Typically, the manufacturer will attempt to shift the blame onto the shoulders of the ghost or non-party defendant because he is not present in court to defend himself. In other jurisdictions, the plaintiff's judgment against the manufacturer is not reduced, but the employer or his insurer is allowed subrogation to recover the amount of benefits paid under worker's compensation. In these jurisdictions, the employer can recover the full amount of workers compensation benefits paid to the employee if the employee has a successful product liability claim against a manufacturer. The employer can recoup the the total or receive paid as a high income place in sa.

The state two acts of comp. nec. responsibility after he would press right empl. duce in rel. reducibility. In cases to be. Conclusively, the above facts set the e.
the benefits through subrogation even if the employer was partially responsible for the injury.\textsuperscript{237} Allowing employers to recover workers compensation benefits paid out of a product liability damage award, irrespective of fault, has been highly criticized by workers compensation experts, because it places no incentive on employers to keep their workplaces safe and to train their employees in safe workplace practices.\textsuperscript{238}

There is no agreement among the states on how to resolve the tension between worker's compensation and products liability. The Product Liability Fairness Act would not allow a percentage of responsibility to be assigned to the employer's or co-employee's fault,\textsuperscript{239} rather it would reduce recovery only by the amount of benefits that the plaintiff would, in fact, recover.\textsuperscript{240} The Act would preserve the employer's or his insured's right of subrogation.\textsuperscript{241} However, the employer's subrogation lien could be reduced if the employer was found at fault in causing the injuries.\textsuperscript{242} Subrogation is reduced by the percentage of responsibility attributed to the employer.\textsuperscript{243} In sum, if an employer was found at fault in causing a workplace injury, it will have to bear the costs of workers compensation.\textsuperscript{244} The total amount the employee would recover for product-related injuries occurring at work would be unaffected.\textsuperscript{245} The Act merely provides that the employer will not be able to fully recover worker's compensation benefits it paid to the employee if it is responsible in full or in part for the harm.\textsuperscript{246}

A manufacturer who attempts to use the employer's misconduct to reduce a claimant's recovery, and the corresponding subrogation lien, would have to give notice to the employer of the allegation.\textsuperscript{247} The employer, although immune from suit, could participate in the trial as if the employer was a party to the litigation.\textsuperscript{248} The employer would be entitled to collect attorney fees and costs if the employer were found free of responsibility for causing the accident.\textsuperscript{249} The Product Liability Fairness Act would create a uniformity and clarity in this area. Furthermore, the net recovery of an injured worker would increase in some jurisdictions if the Product Liability Fairness Act were adopted because the judgment against the manufacturer could only be reduced by the amount of benefits actually received, not a percentage of responsibility. Conversely, the Act would preempt provisions of worker compensation statutes enacted by state legislatures throughout the country addressing employer's rights and third party actions.\textsuperscript{250}

G. Misuse and Assumption of Risk

A major ambiguity exists within the Product Liability Fairness Act with its definition of misuse and its failure to mention the defense of assumption of the risk. The usual definition of misuse is a use of a product in a way unintended by the manufacturer or a use that is not foreseeable by the manufacturer.\textsuperscript{251} The Product Liability Fairness Act provides two definitions for conduct that would amount to misuse. Neither definition is the traditional one. The first defines misuse as a use that is in violation of adequate warnings or instructions provided with the product.\textsuperscript{252} Use of a product in violation of express warnings or instructions is a typical form of misuse.\textsuperscript{253} However, an unforeseeable or unintended use that was not specifically warned against by the manufacturer would not come within the scope of the Act. The famous case dealing with Tigress cologne provides a good example. Two young girls decided to pour Tigress on a Christmas candle to scent the candle and the plaintiff received burns injuries as a result. The manufacturer had not warned that Tigress cologne was flammable and was held liable for failure to warn.\textsuperscript{254} Use of Tigress to scent the candle was an unintended use. Yet, this unintended use, that many feel was an unforeseeable use, would not come within the scope of the Product Liability Fairness Act because there was no warning not to use it to scent the candle. Outlandish misuse would rarely be warned against by the manufacturer.

The second definition of misuse contained within the Act is a product "involving a risk of harm which was known or should have been known by the ordinary person who uses or consumes the product with the knowledge common to the class of persons who used or would be reasonably anticipated to use the product."\textsuperscript{255} This second definition coincides with the traditional definition of assumption of the risk. Assumption of the risk is defined as a voluntary use of a product with a known risk of harm with full appreciation of the risk of harm.\textsuperscript{256} Most jurisdictions also require that the encontr
ter with the risk must be unreasonable to preclude or diminish recovery.\textsuperscript{293} Assumption of the risk is a total bar to recovery in many jurisdictions.\textsuperscript{294} Therefore, the question is whether Congress intends the Product Liability Fairness Act to include assumption of the risk within the definition of misuse because of the similarity of definitions. If assumption of the risk comes within the scope of the Act, then pure comparative responsibility would apply. If assumption of the risk is not included within the definition of misuse, then applicable state law would apply. In many states, assumption of the risk is a total bar to recovery.\textsuperscript{295}

The Product Liability Fairness Act provides that it would supersede "state law concerning misuse or alteration of a product only to the extent that state law is inconsistent with [the Act]."\textsuperscript{296} Varied interpretations by state and federal courts are likely on the issue of whether conduct amounts to "misuse" within the scope of the Product Liability Act or whether the conduct is misuse governed by the principles of state law. Courts will also likely reach different conclusions on whether assumption of the risk is controlled by the applicable state law or whether it merges within the system of pure comparative responsibility set forth in the Product Liability Fairness Act. This section of the Act will likely add much confusion to the law of products liability.

H. Joint and Several Liability

The common law rule of joint and several liability provided that multiple defendants were each jointly liable for the entire amount of the damages sustained by the plaintiff. One defendant could be forced to pay the entire judgment.\textsuperscript{297} Jurisdictions across the country have taken varied approaches to the joint and several liability rule. Some have abolished it; some, retained it; and some have modified it.\textsuperscript{298} The Product Liability Fairness Act would leave intact joint and several liability for economic damages, "pecuniary loss resulting from harm, including any medical expense loss, work loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities."\textsuperscript{299} However, noneconomic damages would be allocated to each defendant in direct proportion to the percentage of responsibility of that defendant. The Act would abolish joint and several liability for noneconomic damages.\textsuperscript{300} Noneconomic damages are nonmonetary losses including pain and suffering, "inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, and humiliation."\textsuperscript{301} Many times product-related injuries are indivisible and any apportionment among defendants is likely to be artificial.\textsuperscript{302} Furthermore, it is feared that this provision could discriminate against women, minorities, the elderly, and children because a larger proportion of their recoveries consist of noneconomic losses compared to other segments of the population.\textsuperscript{303} Full and adequate compensation for injuries caused by defective products could be jeopardized for certain classes of individuals without the benefit of the common law rule of joint and several liability because the collection of the portion of the judgment dealing with noneconomic damages will be more difficult.

I. Punitive Damages

Punitive damages are constantly debated. The purpose of punitive damages is to punish and deter aggravated misconduct, conduct that goes beyond ordinary negligence and amounts to willful or wanton misconduct or flagrant disregard for the public safety. The level of the misconduct intended to be covered approaches an intentional tort.

Punitive damages are awarded for the sake of example to prevent similar misconduct in the future.\textsuperscript{304} The purpose of punitive damages is not to provide compensation to the plaintiff. Compensatory damages are supposed to make the plaintiff "whole" and compensate the plaintiff for economic and noneconomic losses caused by the tortious conduct of the defendant.
Punitive damages are awarded to punish and are "quasi-criminal in nature." The size of punitive damage awards are alleged to create uncertainty, instability, and a "chilling effect on innovation." The punitive damage provision of the Product Liability Fairness Act purports to create "clear, rational rules...to promote innovation and responsible manufacturing practices, while at the same time provid[ing] assurances that wrongdoers will be justly punished and deterred from future misconduct."

The opponents of the Act contend that the punitive damage provision is unnecessary. "If there is an issue that has been terribly exaggerated in this debate, it is the issue of punitive damages. Much new data is available on punitive damages, which show, among other things, that very few punitive damage awards have been made in all state and federal product liability cases over the last 25 years. Punitive damages simply are not a factor in any but the rare product liability case, and have little effect on the business community." The proponents of tort reform counter with regional evidence that the frequency of punitive damage awards is escalating and the dollar amounts of the awards are skyrocketing. Punitive damages were awarded 14 times more often and the amount of the award was 19 times higher in the 1990s as compared to the 1980s in Dallas County, Texas. In Houston, "total awards were up 26 fold and the average award was up eightfold."

In Chicago, Illinois, the average punitive damage award was $43,000 for the period of 1965 through 1969. It was $729,000 between 1980 and 1984. The data suggests that there is a problem, though it may not be a national problem. Perhaps, Illinois and Texas and some other states have a problem with punitive damage awards and the state legislatures should respond appropriately. Legislation reforming punitive damages is common among the states. Congressional action may not be appropriate nor necessary.

The original proposal by the Senate would have permitted the award of punitive damages if the claimant was able to show by clear and convincing evidence that the conduct which caused the claimant's harm was carried out by the defendant with a "conscious, flagrant indifference to the safety of others." The Senate resolution would have limited punitive damages to the greater amount of either three times the amount awarded to a claimant for economic loss or $250,000. The argument against this proposal is that adequate deterrence for conduct that was "conscious, flagrant indifference to the safety of others" might not be provided in cases where the plaintiff suffered low economic losses and the defendant was a huge corporation. A $250,000 award might not deter mega-corporations from engaging in flagrant misconduct.

Consider the case where a manufacturer of an artificial knee joint knew that the parts to the knee joint were mismatched and the components did not comply with its own specifications. In other words, the manufacturer knew the artificial knee joint was defective based on its own internal standards. The manufacturer allowed the defective artificial knee joints to be injected into the stream of commerce which resulted in unknowing physicians surgically placing defective artificial knee joints in innocent patients. However, the compensatory damage award was lower than $250,000. Some would argue that the cap of $250,000 within the Senate Bill would not have been sufficient punishment for the conscious, flagrant indifference to the safety of others shown by the pharmaceutical company due to the wealth of the defendant.

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506. Senate Report, supra note 216, at p. 40, n.122. In fact, compensatory awards rarely make the plaintiff whole. Attorney fees, expert witness fees, and the costs of litigation are paid from any award granted to the plaintiff. Thus, full compensation for injuries rarely occurs. Punitive damages are awarded to the plaintiff, although technically they are not awarded to compensate the plaintiff. In many instances, they do help to make the plaintiff "whole" or restore the plaintiff to the position the plaintiff occupied before the tortious conduct of the defendant caused the plaintiff's injuries.

507. Id. at 42.

508. Id. at 42. Punitive damages are necessary because we punish in the criminal justice system the individuals responsible for decisions with no compensation that incentivize reckless disregard for the public safety. Many times these decisions are made knowing the result could be death or severe injury. See the description of the criminal prosecutions dealt with in S. Sen. Rep., supra note 179. Punitive damages might not be as necessary if we were aggressively pursue white collar crime.

509. Minority Report, supra note 226, at 68. "The Rest Study Survey 355 punitive damage awards in product liability cases between 1963 and 1990. Opponents, however, generally fail to acknowledge...[that] the actual number of punitive damage awards in product liability litigation is unknown and possibly unknowable because we have no comprehensive recording system exists." Senate Report, supra note 216, at 42.

510. Id. at 42. Clear and convincing evidence standard for punitive damages is the "clear and convincing evidence" the evidence which is the "clear, compelling, and unambiguous evidence which is the typical burden of proof in civil litigation." Senate Report, supra note 216, at 42. The House Bill also requires proof by clear and convincing evidence to award punitive damages. Product Liability Fairness Act, supra note 219, at § 107 (A).

511. Id. at 107 (A).

512. Senate Bill, supra note 220, at § 107 (A).

513. Senate Bill, supra note 220, at § 107 (B).


515. Id.

516. The compensatory damage award in Weiler was only $25,000. Id.

517. See supra notes 226, 225 and accompanying text for the details of the senator's plan.
The House bill attempts to resolve this problem. The general rule under the House bill would be that the award of punitive damages would be the greater of either $250,000 or two times the sum of the economic and non-economic damages. However, the House Bill provides an exception. The cap would not apply if the judge, not the jury, finds that the amount would be "insufficient to punish the egregious conduct of the defendant." The court then decides upon the amount of an additur, the additional amount of punitive damages necessary to deter such conduct in the future. The court must consider the following factors in deciding the amount of the additur: (1) the extent the defendant acted with actual malice; (2) the likelihood that serious harm would result; (3) the defendant's knowledge of the risk of harm; (4) the profitability of the misconduct; (5) the duration and concealment of the misconduct; (6) the attitude of the defendant upon discovery of the misconduct; (7) the financial condition of the defendant; and (8) the cumulative deterrent effect of other punishments, including other punitive damage awards in other civil cases, civil fines or criminal penalties, the economic effect of loss of reputation, and cease and desist or enforcement orders. The court must articulate its reasons for any additur.

The exception which allows a court to order an additur would assure that wrongdoers are justly deterred from future misconduct when a wealthy corporation is the defendant. However, an additur above the general cap on punitive damages contained within the House bill could devastate a small business. The purpose of punitive damages is to deter, not destroy. Accordingly, the exception allowing an additur would not apply to smaller businesses, whose net worth is less than $500,000 or who have fewer than 25 full-time employees. A punitive damage award of the greater of $250,000 or two times compensatory damages would provide adequate deterrence when a smaller business acts with conscious, flagrant indifference to the safety of others.

The goal of the punitive damage provision in the Product Liability Fairness Act is to provide uniform standards for punitive damages. Yet, the punitive damage provision only applies "to the extent permitted by applicable state law." The Act would not restore the availability of punitive damages in jurisdictions that have eliminated them or restricted them more than would occur under the Act. Thus, a uniform standard would not be created.

Assuming that punitive damage awards are a matter of national concern, the conduct of manufacturers who show flagrant indifference to the safety of others when they knowingly inject defective products into the stream of commerce should also rise to the level of national concern. Arguably, Congress should create the needed uniformity and make the provisions applicable to all jurisdictions if punitive damages are, indeed, a matter of national concern.

Conversely, the Product Liability Fairness Act would, at least, create a uniform maximum standard. Again assuming that punitive damages awards are a matter of national concern, such a maximum is arguably a legitimate solution leaving room for state variations.

VI. Conclusion

Strict products liability in tort was created by the judiciary in the individual states throughout the country. The courts felt that strong policy reasons justified the imposition of strict liability upon sellers of defective products that caused injuries to the public. The doctrine is a new one without parallel in the common law. Certainly, courts have struggled in the thirty years since its inception to create a balanced set of principles to govern liability. The growing pains of products liability can best be seen in the ongoing struggle to create a meaningful test for the concept of defectiveness.

Many perceive products liability law as too costly and uncertain, hampering innovation and America's ability to compete globally. It is argued that America cannot afford this cost in the modern competition for world markets, and that American products liability law benefits lawyers at the expense of American workers. It is also argued that the development of the law by the individual states has failed to produce needed uniformity. These concerns have led to many attempts at tort reform at the federal level. The first reform measure to actually become federal law was the General Aviation Revitalization Act of 1994, which created a "rolling" statute of repose. The general aviation industry faced many unusual problems that led to its decline. The long product liability "tail" was one of several factors contributing to its decline. Furthermore, aircraft manufacturers have always been regulated by the federal government more than other product manufacturers. The unique nature of the aviation industry justified federal reform legislation in an attempt to salvage the production of small airplanes. Hopefully, the General Aviation Revitalization Act of 1994 will help...
the economy and provide needed jobs as promised. But the justifications behind the General Aviation Revitalization Act do not necessarily support the adoption of the Product Liability Fairness Act of 1995.230

The Product Liability Fairness Act proposes to create needed uniformity. Yet, the Act would fail to achieve this goal because it does not address the fundamental issue of defectiveness. The Act would be subject to various interpretations by both state and federal courts because the Act would not create a federal cause of action. Different interpretations, leading to increased confusion in the law, would be likely to occur as a result of the provisions dealing with misuse and product alteration. Furthermore, the Act would specifically retain state law if the state law was more restrictive to recovery in the areas of punitive damages, the statute of repose, and joint and several liability of economic losses. The Act needs to boldly replace state law if the objective of uniformity is to be achieved. Instead, the Act would codify on a national level non-uniform standards of product liability.

Many of the proposals contained within the act are solid from the standpoint of the substantive law of products liability. The provisions addressing comparative responsibility, punitive damages, worker's compensation, the statute of limitations and repose, the alcohol/drug defense, and the liability of the non-manufacturer seller might provide needed reform. However, the fundamental issue remains federalism. “The proponents of this legislation want Washington to dictate the legal standards and evidentiary rules which the fifty state court systems use to adjudicate disputes over allegedly defective products. There is no precedent for such a congressional imposition of federal rules by which state courts will be forced to decide civil disputes.”234

Ironically, Congress is attempting to usurp this area of state responsibility at the same time many of its members are “insisting that control over major issues be surrendered by the Federal Government and returned to the states.”235

A proposal to reform products liability law on the federal level implies that somehow the states are not doing their job. This is simply not true. The states are, in fact, reacting to reform products liability law to create a fair playing field. Forty-six states have passed some form of tort reform to address problems in their respective jurisdictions since 1983.236

State legislatures would seem to be very attentive to problems in the area. Furthermore, the judicial trend has been to closely scrutinize any theory to broaden recovery and is cautious toward efforts to expand products liability law. “This quiet revolution is a significant turn in the direction of judicial decision making away from extending the boundaries of products liability and toward placing significant limitations on plaintiffs’ right to recover in tort for product-related injuries.”237

The quiet revolution of the judiciary is striving to create a fair system from the standpoint of both product manufacturers and consumers injured by defective products.

Products liability law in the 1990s does not have a precise route. Congress may intervene in the development of products liability law with the Product Liability Fairness Act of 1995 or with other similar legislation in the future. Federal products law likely will not lead to uniformity and could well contribute confusion and more uncertainty. If Congress does not usurp products liability law, the individual states will further refine the law, learn from the laboratory experiments of their sister states, and hopefully will develop a meaningful body of law. The one certainty, whether state or federal law controls, is that products liability law will continue to change. “For anyone who follows products liability, these developments bring to mind the ancient Chinese curse: ‘May you live in interesting times.’”238

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335. Id. at 64.
336. Id. at 63.
337. The Quiet Revolution, supra note 29, at 480.
338. Legal and Extralegal Barriers, supra note 1.
339. The Quiet Revolution, supra note 29, at 480.

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