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A REMEDY FOR INDIANA'S PRODUCT LIABILITY MALADY

“[Public policy] is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you away from the sound law. It is never argued at all but when other points fail.”*

I. INTRODUCTION

Since its inception, strict liability has evolved rapidly to become the primary basis of recovery for product-related injuries.¹ One purpose behind the adoption of strict liability for manufacturers and sellers was to create an incentive to market safe products at a time when society had become quite complex and mechanized.² Lawmakers further reasoned that manufacturers, though innocent, could better absorb the losses as a cost of doing business.³ Accordingly, strict liability was adopted as a matter of public policy.

The policy measure, designed to protect consumers from defective products, has resulted in major problems for product manufacturers and sellers.⁴ The high degree of liability exposure created by strict liability has

* *Richardson v. Mellish*, 2 Bingham 229, 252 (1824) (Burroughs, J., concurring).

1. See generally Spacone, *The Emergence of Strict Liability: A Historical Perspective and Other Considerations, Including Senate 100*, 8 J. PROD. LIAB. 1 (1985) (“... strict liability in tort has replaced negligence . . . as the primary basis of recovery for personal injury caused by products.”).

2. Justice Traynor elucidated compelling policy reasons for the imposition of strict liability in his famous concurring opinion in *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436, 440 (1944) (Traynor, J., concurring). This concept later became the majority opinion in the landmark decision for strict product liability. See *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

3. *Greenman*, 59 Cal. 2d at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701; *Escola*, 24 Cal. 2d at 462, 150 P.2d at 441. See also RESTATEMENT (SECOND) OF TORTS § 402A comment c (1965), *infra* note 46.

4. The existence of the problems faced by manufacturers was confirmed in 1978 by an Interagency Task Force created by the U.S. Department of Commerce. U.S. Dep't of Commerce, *Interagency Task Force on Product Liability, Final Report* (1978) [hereinafter *Task Force Report*]. In a lengthy report, the Task Force found that the cost of liability insurance for product manufacturers had increased tremendously between 1975 and 1976. *Id.*

Increases for liability premiums ranged from 200% to 1000% during that one year. U.S. Dep't of Commerce, *Interagency Task Force on Product Liability, Options Paper* p. 14612-13, 43 Fed. Reg. No. 67, 4/6/78. [hereinafter *Options Paper*]. But see Vargo, *Products Liability*, 15 IND. L. R. 289, n.2 (1982). For a detailed report on premium increases, see Product Liabil-

caused insurance rates to soar, making it difficult for some businesses to obtain or afford the necessary coverage.⁵ Thus, the consequences of strict product liability have undermined the soundness of the loss-distribution rationale.

Indiana lawmakers have recognized the problems created by strict liability's consequences. The Indiana Supreme Court has demonstrated a restrictive approach⁶ in applying Indiana's Product Liability statute.⁷ In addition, the court has recently adopted the "open and obvious" danger rule,⁸ which totally bars recovery,⁹ even though the trend in other jurisdictions has been to reject the rule.¹⁰ The Indiana legislature has also shown concern over the liability exposure.¹¹ Amendments made in 1983 to the Indiana products liability statute also appear to restrict the scope of manufacturers' liability¹² as a reaction to the consequences of strict liability's adoption.

The consequences of strict liability are similar to problems which have plagued the area of medical malpractice.¹³ Excessive insurance costs for health care providers prompted legislative action to preserve the availability of health care services. Several states, including Indiana,¹⁴ responded by

ity Insurance: Hearings Before the Subcommittee on Capital, Investment and Business Opportunities of the House Committee on Small Business, 95th Cong., 1st Sess. Part 1 at 15 (1977).

The increases were greater for small businesses and high risk industries. See U.S. Dep't of Commerce, *Interagency Task Force on Product Liability, Final Report, Executive Summary* (1978). [hereinafter *Executive Summary*]. Contrary to the general sentiment, some of these manufacturers will not be able to pass on the additional costs to consumers. *Id.* The study suggested that the premium increases contribute to the failure of some small businesses and to the discontinuation of some existing product lines. See *Options Paper*, 14613. Thus, the loss-distribution rationale, which had formed the basis for strict liability, is no longer a sound theory.

5. Justice Department officials are concerned about the insurance crisis "warning that soaring insurance rates are threatening small business (sic) and driving some manufacturers to discontinue product lines susceptible to lawsuits." Tarr, *Tort Reform - ABA, Reagan Administration Move on Liability 'Crisis'*, Natl. L. J., Dec. 2, 1985, at 8, col. 1. See also, *Options Paper*, *supra* note 4, at 14613 (increased liability costs may be a factor in causing small manufacturers to terminate operations).

6. Executive Summary, *supra* note 4, at 4; Options Paper, *supra* note 4, at 14613.

7. IND. CODE ANN. § 33-1-1.5-1 (West 1983 & Supp. 1986).

8. The "open and obvious" danger rule limits liability to those defects which are hidden and not normally observable; i.e. latent dangers. *Bemis Co. v. Rubush*, 427 N.E.2d 1058, 1061 (Ind. 1981), *cert. denied*, 459 U.S. 825 (1982). If a danger is open and obvious, a manufacturer has no duty to warn of the danger. *Id.*

9. See *infra* note 105 and accompanying text.

10. See *infra* note 110 and accompanying text.

11. See *infra* note 135.

12. See Vargo, *infra* note 93.

13. Richards, *Statutes Limiting Medical Malpractice Damages*, 32 FIC QUARTERLY No. 3, 247, 260 (1982) (the same insurance problems that prompted major reforms in the medical malpractice area are brewing in the products liability area).

14. Medical Malpractice Act of 1975, IND. CODE § 16-9.5-1-1 to -10-5 (1976).

placing statutory limits on the amount of recovery available in malpractice claims.¹⁵ A constitutional challenge to California's medical malpractice recovery cap was dismissed on appeal by the United States Supreme Court.¹⁶ Other restrictions include mandatory, prerequisite submission of claims to a medical review panel¹⁷ and elimination of the collateral source rule.¹⁸ These measures in medical malpractice have been effective in curbing the insurance cost problems,¹⁹ which closely parallel the problems currently facing product manufacturers.

This note will present an overview of the development and the consequences of strict product liability. Since these consequences are similar to problems encountered in the medical malpractice area, legislative attempts taken to remedy those problems will be examined. After addressing the constitutionality of the medical malpractice legislation, which limits the plaintiff's ability to recover, this note will propose that an amendment be made to Indiana's Product Liability Act which will incorporate appropriate provisions of the medical malpractice acts. Enactment of such an amendment would alleviate the problems currently facing the product manufacturers.

II. DEVELOPMENT OF STRICT PRODUCT LIABILITY

The doctrine of strict product liability resulted from the socio-economic forces of an increasingly complex and mechanized society.²⁰ As early as 1944, Justice Traynor expounded the compelling policy reasons underlying strict liability. In his famous concurring opinion in *Escola v. Coca Cola*

15. See *infra* note 195.

16. See *infra* note 202.

17. IND. CODE ANN. § 16-9.5-1-1 to -10-5 (West 1984 & Supp. 1986).

18. CAL. CIV. CODE § 3333.1 (West 1970 & Supp. 1986).

19. LaPorte Herald-Argus, Nov. 16, 1985, at 11, col. 1, [hereinafter Mullin]. The article reported that Michael Mullin, who is the executive vice president and chief legal officer for the Medical Protective Co., spoke at the 1985 Indiana State Medical Association convention. Mr. Mullin stated that the Medical Malpractice Act has helped curb insurance costs for Indiana health care providers. Although they will still incur some increase, it will be slight compared to rates for health care providers in other states. *Id.* See also, South Bend Tribune, Nov. 16, 1985, at 1, col. 1 (reporting that Mullin directly credited Indiana's control over malpractice costs to the Indiana General Assembly's adoption of the Medical Malpractice Act of 1975).

20. *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978). The *Daly* court held that:

[g]eneral dissatisfaction continued with the conceptual limitations which traditional tort and contract doctrines placed upon the consumers and users of manufactured products, this at a time when mass production of an almost infinite variety of goods and products was responding to a myriad of ever-changing societal demands stimulated by wide-spread commercial advertising. From an historic combination of economic and sociological forces was born the doctrine of strict liability in tort.

Id. at 732, 575 P.2d at 1165-66, 144 Cal. Rptr. at 383-84.

Co.,²¹ Justice Traynor stressed that the responsibility for injuries should be posited on the manufacturers, since they are in the best position to guard against hazards to life and health.²² Regardless of the absence of negligence, a manufacturer was required to bear the costs of injuries, since he had placed the goods on the market without inspection for defects.²³

Justice Traynor reasoned that assigning the risk to the manufacturers not only created an incentive to market safe products,²⁴ but more importantly, the manufacturer was able to assimilate the loss as a cost of doing business.²⁵ Thus, a recurring theme running through this policy of cost distribution was that as between the innocent consumer, who was considered powerless to protect himself, and the innocent manufacturer, the burden of loss should rest upon the one who could most afford it.²⁶ When this deep-pocket theme was finally adopted as the law,²⁷ conditions were ripe for its acceptance.

The landmark case which established this doctrine for product cases was *Greenman v. Yuba Power Products, Inc.*²⁸ *Greenman* involved a serious injury caused by the mismanufacture of a combination power tool.²⁹ The court held the manufacturer strictly liable in tort for the manufactur-

21. 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring). In *Escola*, the plaintiff was injured when a Coca Cola bottle exploded. Following a jury verdict for the plaintiff, the California Supreme Court affirmed on the theory of *res ipsa loquitur*. Justice Traynor, in his concurrence with the result, advocated the adoption of strict liability in tort.

22. Justice Traynor stated that:

[e]ven if there is no negligence . . . public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot.

Escola, 24 Cal. 2d at 462, 150 P.2d at 440-41.

23. Justice Traynor reasoned that:

[i]t is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market.

Escola, 24 Cal. 2d at 462, 150 P.2d at 441.

24. *Escola*, 24 Cal. 2d at 463, 150 P.2d at 441.

25. The theory is that "[t]he cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business." *Escola*, 24 Cal. 2d at 462, 150 P.2d at 441.

26. Note, *In the Stream of Commerce: The Liability of Non-Manufacturers in Product Liability Actions*, 13 CAP. U.L. REV. 405 (1984) (where there is no fault involved, fairness and availability of resources tip the scales against the manufacturer).

27. See Spacone, *supra* note 1, at 26.

28. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

29. *Id.* at 59, 377 P.2d at 898, 27 Cal. Rptr. at 698.

ing defect.³⁰ The *Greenman* court stated that the purpose behind strict liability was to shift the burden of product-related injuries onto the party or parties who put a defective product on the market rather than to place this burden on the helpless victim.³¹ To accomplish this end, the *Greenman* court held a manufacturer strictly liable for personal injuries caused by the defective power tool, because the manufacturer placed the product on the market knowing the user would not inspect it for defects.³² By imposing strict liability, the *Greenman* court eliminated the concepts of care,³³ fault,³⁴ and negligence³⁵ as determinants of liability,³⁶ and at the same time abolished the requirement of privity of contract.³⁷

After *Greenman*, most jurisdictions throughout the country eagerly adopted the doctrine of strict liability.³⁸ Eventually, the doctrine was extended to include not only manufacturers, but product sellers as well.³⁹ The publication of Restatement (Second) of Torts section 402A, in 1965, aided the widespread acceptance of strict product liability,⁴⁰ by stating that the seller of an unreasonably dangerous and defective product would be held liable for injuries if the product reached the user without a substantial

30. *Id.* at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

31. The *Greenman* court stated that strict liability was adopted "to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." *Greenman*, 59 Cal. 2d at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

32. The court held that "a manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." *Greenman*, 59 Cal. 2d at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

33. In strict liability, the defendant can be held liable even if he did not depart from a reasonable standard of care. W. KEETON, PROSSER AND KEETON ON TORTS § 75 (5th ed. 1984).

34. *Id.* (Strict liability means that liability will be imposed on an actor regardless of whether the actor breached a duty to exercise reasonable care, i.e. whether the actor was negligent.)

35. *Id.*

36. 72 C.J.S. *Products Liability* § 7 (Supp. 1975).

37. *Greenman*, 59 Cal. 2d at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701. Prior to *Greenman*, a plaintiff could not sue a manufacturer for injuries received from a defective product unless a contractual relationship existed between them. "[R]ules defining and governing warranties that were developed to meet the need of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by their defective products unless those rules also serve the purposes for which such liability is imposed." *Id.*

38. See *supra*, note 1, at 26. See also Leete, *Product Liability for Non-Manufacturer Product Sellers: Is it Time To Draw The Line?* 17 FORUM 1250 (1981-82) ("Products Liability has been one of the fastest growing areas of the law in the last twenty years.").

39. *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964). For an in-depth analysis of nonmanufacturer liability, see Leete, *supra* note 38; Note, *supra*, note 26.

40. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

change in condition from the time it was sold.⁴¹ This rule applied although no privity of contract existed⁴² and even though the seller exercised all reasonable care.⁴³ Accordingly, the focus of liability in product cases shifted from the conduct of the manufacturer to the condition of the product.⁴⁴ Culpability was no longer a requirement for liability.⁴⁵

The Restatement comments justify the imposition of strict liability on the grounds that the seller has undertaken a special responsibility by marketing his product, and that the public has a right to expect the seller to stand behind his goods.⁴⁶ Comment c of the Restatement echoes the economic argument of Justice Traynor⁴⁷ by stating that the proper person to afford the burden of injuries should be the one who can treat it as a cost of production.⁴⁸ Subsequent to publication, this doctrine and its variations became firmly imbedded in the laws of most jurisdictions.⁴⁹

41. RESTATEMENT (SECOND) OF TORTS § 402A provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

42. Privity of contract is the contractual relationship between parties. BLACK'S LAW DICTIONARY 1079 (5th ed. 1979).

43. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

44. *Ortho Pharmaceutical Corp. v. Chapman*, 180 Ind. App. 33, 388 N.E.2d 541 (1979) (citing *Phillips v. Kimwood Machine Co.*, 269 Or. 485, 525 P.2d 1033 (1974)).

45. See *supra*, note 34.

46. Comment c provides that:

[o]n whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

RESTATEMENT (SECOND) OF TORTS § 402A comment c (1965).

47. See *supra* note 23.

48. RESTATEMENT (SECOND) OF TORTS § 402A comment c (1965), *supra* note 46.

49. Note, *supra* note 26, at 408, n.16. See also, [2 Product Liability Statutes] Prod. Liab. Rep. (CCH) §§ 90,112-95,265 (1981-85) (a state-by-state report of product laws); State Chart-Acceptance of Strict Liability [Manufacturers, Distributors, Retailers] 1 Prod. Liab. Rep. (CCH) § 4016 (June 1984) (a graphic comparison of the fifty states' provisions).

The Indiana Supreme Court expressly adopted the principles of section 402A in 1970.⁵⁰ The court in *Cornette v. Searjeant Metal Products, Inc.*, stated that the fundamental policy behind its adoption was to protect consumers from product injuries.⁵¹ Just as earlier case law was a response to the "privity" barrier,⁵² Indiana's adoption of strict liability in *Cornette* was a response to the "proof of negligence" barrier.⁵³

In 1978, the Indiana Legislature codified the basic principles of section 402A by enacting the Indiana Product Liability Act.⁵⁴ Amendments to the law were made in 1983,⁵⁵ for the purpose of conforming the statute to the law of section 402A as interpreted by Indiana case law.⁵⁶ Thus, Indiana statutorily embraced the strict liability concepts which originated in *Greenman*.

III. CONSEQUENCES OF STRICT PRODUCT LIABILITY

A. Background

Initially, strict liability accomplished its intended objective of establishing a fair judicial balance between consumers and manufacturers.⁵⁷ Recently, however, the concept of strict liability has been criticized for two reasons: the scales of justice have been tipped in favor of the plaintiffs,⁵⁸ and the costs of liability insurance have soared due to prolific litigation and heightened jury awards.⁵⁹

50. See *Cornette v. Searjeant Metal Products, Inc.*, 147 Ind. App. 46, 52, 258 N.E.2d 652, 656 (1970) ("We think these principles are sound and we expressly adopt § 402A . . . as the law of this state."). *Id.*

51. *Id.* at 52, 258 N.E.2d at 656.

52. *J.I. Case Co. v. Sandefur*, 245 Ind. 213, 197 N.E.2d 519 (1964) was the first Indiana case to hold a manufacturer liable for third party injuries, notwithstanding the lack of privity.

53. *Cornette*, at 52, 258 N.E.2d at 656.

54. IND. CODE ANN. § 33-1-1.5-1 (West 1983 & Supp. 1986) (as added by Acts of 1978, Pub. L. 141 § 28).

55. IND. CODE ANN. § 33-1-1.5-1 (West 1983 & Supp. 1986) (as amended by Acts of April 21, 1983, Pub. L. 297).

56. Interview with Indiana Senator William Vobach, author of the 1983 amendments, in Indianapolis (Dec. 17, 1985), transcript p. 2 (The transcript of the interview is on file at the Law Review Office, Valparaiso University School of Law, Valparaiso, Indiana). (Senator Vobach is the author of the 1983 amendments to Indiana's Product Liability Act.)

57. Although the word "manufacturer" is used throughout this paper, the term shall encompass sellers, retailers, wholesalers, and other middlemen, as they are all subject to the same liability exposure. See *supra* note 39 and accompanying text.

58. Spacone, *supra* note 1, at 34 (weakening or eliminating traditional defenses has effectively "stacked the deck" against manufacturers).

59. Smith & Cuzmanes, *Insurance Protection - Product Liability*, 40 FOOD DRUG COSM. L. J. 112 (1985) (crediting the rise in costs to the development of strict liability, the whittling of certain defenses, and manifestation of latent diseases); Spacone, *supra* note 1, at

Strict liability has been criticized for being too biased in favor of the plaintiffs.⁶⁰ Although the imposition of strict liability supposedly balances the need for compensation for the injured person and the need for viable enterprise,⁶¹ the manufacturer has seemingly been designated as the consumer's guardian angel.⁶² The manufacturer has become more responsible for injuries than consumer advocates had ever hoped.⁶³ The tort system has evolved from a compensation system to a social insurance system at the expense of product manufacturers.⁶⁴

The negative image acquired by product manufacturers over time⁶⁵ and the perception that product users were helpless victims⁶⁶ exacerbated the evolution of the compensation system. The notion that manufacturers were impersonal monoliths who were indifferent toward product safety may have had a significant effect on product law.⁶⁷ Regardless, there are those who conclude that although strict product liability was once a responsive philosophy for our society, the doctrine has exceeded its intended purpose.⁶⁸ Nevertheless, courts still adhere to the doctrine.⁶⁹ Strict liability has arguably posed serious threats to the continued functioning of manufacturers,⁷⁰ particularly the small manufacturers.⁷¹

26 (noting the subtle shift of the liability burden to the defendants, as well as weakened defenses; Reply Letter from Keith Kendall, Administrative Officer, Indiana Dep't of Insurance, (Nov. 27, 1985) (letter on file at the Law Review Office, Valparaiso University School of Law, Valparaiso, Indiana) (blaming high jury awards and court interpretations of liability).

60. Leete, *supra* note 38, at 1250-51 (questioning whether "the pendulum has swung too far").

61. 72 Supp. C.J.S. *Products Liability* § 7 (1975).

62. Barry & DeVivo, *The Evolution of Warnings: The Liberal Trend Toward Absolute Product Liability*, 20 FORUM 38, 47 (1984).

63. *Id.*

64. Spacone, *supra* note 1, at 27 ("manufacturers went from virtual immunity . . . to almost certain and substantial liability"). See also comments by Asst. Attorney General Richard K. Willard, chief of the Justice Department's Civil Division, stating that tort lawyers and some judges are trying to use strict liability as a "vehicle to restructure society and administer a massive social insurance scheme." Tarr, *Tort Reform - ABA, Reagan Administration Move on Liability 'Crisis'*, Nat'l L. J., Dec. 2, 1985, at 8, col. 1. [hereinafter *Tort Reform*].

65. See Spacone, *supra* note 1, at 32 (claiming that much of the negative image was unwarranted, but attributable to "anti-Big Business" rhetoric).

66. Spacone, *supra* note 1, at 31.

67. Spacone, *supra* note 1, at 32.

68. Spacone, *supra* note 1, at 31 ("Ideas may persist long after their immediate relevance has passed, and thus may act as independent variables in later circumstances.").

69. Spacone, *supra* note 1, at 31.

70. Barry & DeVivo, *supra* note 62, at 48 (" . . . countervailing considerations must be raised in the hope that the present evolution of product liability law can be retarded . . . if not reversed.").

71. Dauer & Kolmar, *Lawyers' Roles in Products Liability Prevention for the Small Business Client*, 7 J. PROD. L. 31, 31 (1984), stating that:

[b]ecause the damages in question are measured by the characteristics of the plaintiff and not by the scale of the defendant, a business risk which might create a mere disrupt-

Product manufacturers have incurred tremendous increases in the costs of insuring against liability. These extreme costs may be prohibitive, especially to smaller businesses.⁷² Although the courts recognize that the manufacturer is not an insurer against accidents,⁷³ the rising tide of products liability litigation has become both striking and notorious.⁷⁴ The proliferation of lawsuits is due to the development of strict liability and the elimination of traditional defenses,⁷⁵ rather than an increase in the number of product-related accidents.⁷⁶

The fact that strict liability for products has become one of the fastest growing areas of the law,⁷⁷ coupled with the increasing size of jury awards has contributed to the dramatic upsurge in insurance rates for manufacturers.⁷⁸ Of particular significance are the generous awards for non-economic damages,⁷⁹ such as pain and suffering. In addition, the Indiana Department of Insurance attributes the high insurance rates to the judicial interpretations of liability and the costs of defending a lawsuit.⁸⁰ Unfortunately, since insurance is a necessary cost of doing business,⁸¹ the high premiums, which result from the liability exposure, have increased to such a degree that some small manufacturers may be priced out of the market.⁸²

tion for a large industrial firm could be ruinous for a smaller one. Even when the liability is successfully defended, or is fully insured which is seldom the case the business interruption and consequent injury to a product's market position can by themselves take a heavy toll on the defendant corporation and, ultimately, on its shareholders.

72. See *supra* notes 4 and 5.

73. J.I. Case Co. v. Sandefur, 245 Ind. 213, 197 N.E.2d 519 (1964). "There must be reasonable freedom and protection for the manufacturer. He is not the insurer against accidents and is not obligated to produce only accident-proof machines." *Id.* See also, *Daly*, 20 Cal. 3d at 733, 575 P.2d at 1166, 144 Cal. Rptr. at 384. "From its inception . . . strict liability has never been and is not now, *absolute* liability. . . . [U]nder strict liability, the manufacturer does not thereby become the insurer of the safety of the product's user." *Id.*

74. Dauer & Kolmar, *supra* note 71, at 31.

75. Executive Summary, *supra* note 4, at 4-5.

76. See *supra* note 59.

77. See *supra* note 38.

78. See *supra* note 59.

79. *Tort Reform*, *supra* note 64, at 8, col. 1 (Justice Department officials consider increased awards for pain and suffering and punitive damages a contributing factor in the insurance crisis.).

80. See Reply Letter, *supra* note 59.

81. Smith & Cuzmanes, *supra* note 59, at 112 (stressing the importance of adequate insurance protection and also discussing alternatives to conventional insurance markets).

82. See *supra* note 4. The liability dilemma is not unique to product manufacturers and sellers. The litigious trend has swept the nation's courts, and many professions, as well as businesses, are having difficulty obtaining liability insurance at all. Lindsey, *Businesses Change Ways in Fear of Lawsuits*, N.Y. Times, Nov. 18, 1985, at 1, col. 3 [hereinafter N.Y. Times]. Physicians were the first to encounter the problem. *Id.* Small business owners followed, along with accountants, architects, contractors, and even lawyers. *Id.* at 1, col. 4 (These insureds are angry over the higher premiums and the precautions they must take in order to avoid liability.). Because court decisions and legislative actions have forced insurance rates for

Consistent with these interests at the national level, Indiana lawmakers have become extremely concerned over cost-containment for liability insurance.⁸³ The rates have “sky-rocketed” in all areas of liability protection.⁸⁴ As an indication of the concern, legislation has been sponsored which would offer protection to architects, engineers, and others who suffer from similar insurance difficulties.⁸⁵ The Indiana Department of Insurance has confirmed that rates are much higher than a year ago.⁸⁶

The consequences of the insurance problems are far-reaching. Some businesses face the possibility that they will be forced to discontinue particular product lines,⁸⁷ that they may suffer a business interruption (and consequently, lose a valuable position in the market place),⁸⁸ or ultimately, that they may be forced to close their doors.⁸⁹ These consequences suggest that policy changes are now necessary to eliminate the adverse affects.

In addition to the effect on manufacturers,⁹⁰ consumers ultimately suffer the consequences of strict liability. The manufacturer’s cost of liability insurance coverage along with the expense of defending lawsuits will be reflected in the cost of products to the consumer.⁹¹ Consumers may also pay higher insurance rates and higher taxes as a result of the strict liability.⁹² The broad realm of the doctrine’s side-effects has caused a reevaluation by the courts of product laws and a consideration of possible solutions to the

liability to rise so dramatically, *Id.* at 16, col. 2, two more task forces have been created: (1) the Tort Policy Working Group, formed by the Reagan Administration; and (2) the Action Commission to Improve the Tort Liability System, sponsored by the American Bar Association. *Tort Reform*, *supra* note 64, at 3, col. 1.

83. One Indiana senator noted that “Right now, and you’re going to see a lot of this reported in this session of the legislature, there is an extreme concern over cost containment for liability.” Vobach, *supra* note 56, at 2-3.

84. *Id.* at 3 (“The insurance rates on practically every aspect of existence for liability protection [have] just skyrocketed.”).

85. Senator Vobach is currently sponsoring some legislation that would do the same thing for architects, engineers, and people similarly situated that was done for doctors with the Medical Malpractice Act. *Id.* at 5.

86. Rates are much higher than a year ago and are reflective of the degree of liability exposure. Reply Letter, *supra* note 59. Though the current state of products liability insurance in Indiana is not at a crisis point, high risk manufacturers may find insurance hard to obtain. *Id.*

87. *Tort Reform*, *supra* note 64, at 8, col. 1 (Justice Department officials warn that the insurance rates are forcing some manufacturers to discontinue product lines.).

88. See Dauer & Kolmar, *supra* note 71.

89. See Dauer & Kolmar, *supra* note 71.

90. The Indiana Department of Insurance recognizes that some companies are having difficulty obtaining insurance coverage. “Companies are experiencing capacity problems and [insurers] are very selective in risk selection.” Reply Letter, *supra* note 59. This statement brings into question comment c of § 402A which assumes that insurance can be obtained against the costs of liability. RESTATEMENT (SECOND) OF TORTS, § 402A comment c (1965).

91. Executive Summary, *supra* note 4, at 4; Options Paper, *supra* note 4, at 14613.

92. N.Y. Times, *supra* note 82, at 1, col. 3.

dilemma.

B. Narrowing the Scope of Liability

1. The Indiana Supreme Court

The last several product liability decisions by the Indiana Supreme Court have demonstrated a restrictive approach in interpreting the Indiana Product Liability statute.⁹³ In the last several years, the court allowed recovery in only one products liability case.⁹⁴ In 1981, three product liability cases were decided by the Indiana Supreme Court, each limiting the plaintiff's ability to recover. In a procedural case, *Dague v. Piper Aircraft Corp.*,⁹⁵ the Indiana Supreme Court held that the plaintiff's cause of action was barred⁹⁶ by the statute of limitations provision of the Product Liability Act.⁹⁷ The *Dague* court based the decision on its interpretation of the legislature's intent.⁹⁸ To reach its finding, the court had to make a substitution in the statute's wording, avoiding a term's ordinary meaning.⁹⁹

A more significant restriction imposed by *Dague* is that the Indiana Supreme Court began applying negligence principles to what had been a strict duty to warn.¹⁰⁰ This rule was further developed in another 1981 decision, *Shanks v. A.F.E. Industries, Inc.*¹⁰¹ In *Shanks*, the plaintiff was seriously injured when a grain drying machine automatically engaged without warning while the plaintiff was repairing the auxiliary loading and unloading equipment.¹⁰² The court reinstated an Indiana trial court's finding that a defect can consist of inadequate warnings, and "the test of adequacy is

93. "The restrictive approach of the Indiana Supreme Court . . . seems to be a result of complete deference to the legislature. This restrictive approach does not seem compatible with either negligence or strict liability rationales." Vargo, *Products Liability*, 15 IND. L. REV. 289, 303 (1982).

94. *Hoffman v. E.W. Bliss Co.*, 448 N.E.2d 277 (Ind. 1983). For a survey commenting on the consistency of this decision, see Vargo, *Products Liability*, 17 IND. L. REV. 255, 267 (1984).

95. 418 N.E.2d 207 (Ind. 1981). This case came to the Indiana Supreme Court on an order for certification under Ind. R. App. P. 15 from the U.S. Court of Appeals, Seventh Circuit; see also, *Dague v. Piper Aircraft*, 513 F. Supp. 19 (N.D. Ind. 1980).

96. 418 N.E.2d at 211.

97. IND. CODE ANN. § 33-1-1.5-5 (West 1983 & Supp. 1986).

98. *Dague*, 418 N.E.2d at 211. See Vargo, *supra* note 93.

99. The *Dague* court stated the "[p]laintiff correctly argues that the interpretation of the statute we now adopt, in effect, changes the disjunctive term 'or,' which, of course, appears in the statute, to the conjunctive 'and.'" *Dague*, 418 N.E.2d at 211.

100. As noted in *Dague*, "[t]he alleged failure of a manufacturer or seller to warn a user of its product's latently defective nature is certainly a product liability action based on a theory of negligence." *Dague*, 418 N.E.2d at 212.

101. 416 N.E.2d 833 (Ind. 1981).

102. *Id.* at 834-36.

whether it was reasonable under the circumstances.”¹⁰³ Among other jurisdictions, this view has been only reluctantly accepted.¹⁰⁴

The Indiana Supreme Court established the “open and obvious danger” rule in the most controversial of its 1981 decisions.¹⁰⁵ In *Bemis Co., Inc. v. Rubush*,¹⁰⁶ the plaintiff sustained serious head injuries when he was struck by a visible, moving part of a batt-packing machine.¹⁰⁷ The majority opinion, which drew vigorous dissents from Justices DeBruler and Hunter,¹⁰⁸ stated that in order to constitute liability under section 402A of the Restatement (Second) of Torts, “the defect must be hidden and not normally observable, constituting a latent danger in the use of the product. . . . [A manufacturer] has no duty to warn if the danger is open and obvious.”¹⁰⁹

Though the trend in other jurisdictions has been away from the “open and obvious” rule,¹¹⁰ *Bemis* expanded what the *Sandefur* court had said seventeen years earlier:¹¹¹ that manufacturers must have reasonable freedom and protection, and their duty is “to avoid *hidden* defects or *concealed* dangers.”¹¹² *Sandefur* based its ruling¹¹³ on *Campo v. Scofield*,¹¹⁴ which was subsequently overruled.¹¹⁵ The adoption of the “open and obvious” rule

103. *Id.* at 837.

104. Vargo, *supra* note 93, at 298. The Seventh Circuit cited the Indiana Court of Appeals’ reasoning in *Shanks*, even though that decision had already been vacated by the Indiana Supreme Court. The Seventh Circuit’s approval of the lower court’s decision must have been based on the lower court’s reasoning. *Id.* “The Supreme Court’s finding of unforeseeability is difficult to understand because the Supreme Court adopted the Court of Appeals’ finding that the defendant had designed, manufactured, advertised and sold the [part] with the contemplation and representation that it could be used in conjunction with such [a system].” *Id.* at 297.

105. *Bemis Co., Inc. v. Rubush*, 427 N.E.2d 1058 (Ind. 1981), *cert. denied*, 459 U.S. 825 (1982). The First District Court of Appeals affirmed an award of \$775,000 to the plaintiff. The Indiana Supreme Court vacated the decision based on the lower court’s misinterpretation of strict tort liability under § 402A. *Bemis*, 427 N.E.2d at 1059.

106. *Id.* at 1058.

107. *Id.* at 1059-60.

108. Justice Hunter calls the majority opinion a “harsh and anachronistic rule which defies the considerations underlying the law of product liability.” *Id.* at 1066 (Hunter, J., dissenting).

109. *Id.* at 1061.

110. Leibman & Sandy, *Can the Open and Obvious Rule Coexist with Strict Tort Product Liability?: A Legal and Economic Analysis*, 20 AMER. BUS. L. J. 299, 349 (1982). For a critical analysis of the rule, see Vargo, *Products Liability*, 12 IND. L. R. 227 (1979).

111. *See supra*, note 73.

112. *Sandefur*, 245 Ind. at 222, 197 N.E.2d at 523 (emphasis added).

113. *Bemis*, 427 N.E.2d at 1067 (Hunter, J., dissenting). A series of federal diversity cases following *Sandefur* provided dicta which the majority in *Bemis* ultimately adopted. *Id.* (citations omitted).

114. 301 N.Y. 468, 95 N.E.2d 802 (1950).

115. *See Micallef v. Miehle*, 39 N.Y.2d 376, 384 N.Y.S.2d 115, 348 N.E.2d 571 (1976). The *Micallef* court, in overruling *Campo*, opted instead for a balancing approach to

of *Bemis* has been interpreted as a further method of shielding Indiana manufacturers from devastating losses.¹¹⁶

In addition to the lengthy dissents, *Bemis* has encountered criticism that Indiana's law has deviated from the original policy considerations of strict product liability.¹¹⁷ Further, some feel that the adoption of the "open and obvious" rule will encourage manufacturers to design unsafe products, but avoid liability by making the dangers apparent.¹¹⁸

A recent Indiana Supreme Court decision also denied relief to the injured by finding that the plaintiff was not a "user" or "consumer" within the meaning of Indiana's product liability statute.¹¹⁹ In *Wingett v. Teledyne Industries, Inc.*,¹²⁰ the plaintiff was injured while removing some ductwork in a castings plant.¹²¹ Though the plaintiff supposedly used the standard trade procedure of removal,¹²² an allegedly defective connection caused the ductwork to collapse.¹²³ The court determined as a matter of law that plaintiff's removal of the product was not a reasonably foreseeable use.¹²⁴ The dissent argued that since evidence was presented that a legal duty arises to protect those who ultimately dismantle products, the question of reasonable foreseeability was to be determined by the jury.¹²⁵ These cases indicate that the Indiana courts were reducing the scope of manufacturer's liability.

2. The Indiana Legislature

The Indiana Legislature has also shown concern over the extent of strict liability exposure.¹²⁶ In adjudicating statute of limitation claims under

weigh the gravity and likelihood of the harm against the burden of the precaution necessary to prevent the harm. *Id.*

116. *Contra* Leibman & Sandy, *supra* note 110, at 301 (noting that the economic policy of reducing liability exposure, the risk allocation aspect of the open and obvious rule, and liability assessment, was reconsidered in many jurisdictions).

117. Vargo, *supra* note 94, at 255 (strict liability policies of promoting safety and compensation for victims were followed consistently in Indiana until *Bemis*).

118. The *Bemis* dissent argued that ". . . [a] manufacturer should refrain from installing protective guards on a product, for those guards might only serve to make the danger less 'open and obvious.'" *Bemis*, 427 N.E.2d at 1069 (Hunter, J., dissenting); *See also* Liebman & Sandy, *supra* note 110, at 301 (open and obvious danger rules actually encourage design and manufacture of unsafe products).

119. *Wingett v. Teledyne Industries, Inc.*, 479 N.E.2d 51, 55 (Ind. 1985).

120. *Id.* at 53.

121. *Id.*

122. *Id.* at 56.

123. *Id.* at 53.

124. The defendants owed no duty to those who dismantle the product. *Id.* at 56.

125. *Id.* at 56 (DeBruler, J., dissenting) (analogizing the duty to one owed by manufacturers of fluorescent light bulbs and aerosol cans to warn of the dangers of improper disposal).

126. *Hansen v. Sears Roebuck & Co.*, 574 F. Supp. 641 (E.D. Mo. 1983) (diversity case where product was manufactured in Indiana and defendants argue that Indiana law applies).

the Indiana Product Liability Act, both the Indiana Second District Court of Appeals¹²⁷ and the U.S. District Court, Northern District of Indiana¹²⁸ recognized the legislature's concern. In *Scalf v. Berkel, Inc.*,¹²⁹ the appellate court explained that the Indiana General Assembly was presented with evidence of tremendous increases in the costs of product liability insurance.¹³⁰ Additionally, the lawmakers were given indications that the victims of allegedly defective products were favored over the manufacturers.¹³¹ Although some disputed the existence of the product liability crisis,¹³² the *Scalf* court refrained from the luxury of second-guessing the legislature.¹³³ The statute of limitation's restrictive provision represents the legislature's direct response to the ever-increasing insurance costs.¹³⁴

The federal court in *Dague* attributed the legislature's limitation to the increasing number of product liability claims.¹³⁵ Such action was considered a rational response to the legislature's appraisal that the situation was pressing.¹³⁶ The court stated¹³⁷ that the Indiana Supreme Court considered protection of liability insurance companies to be a legitimate legislative concern.¹³⁸

The Product Liability Act was amended in 1983.¹³⁹ Changes in that statute's language seem to reflect the same legislative attitude that was evident to the *Scalf* and *Dague* courts. The changes were made for the purpose of conforming the statute to what had developed in Indiana as the law

"Apparently the Indiana Legislature felt that the liability exposure of manufacturers in Indiana was excessive." *Id.* at 645.

127. *Scalf v. Berkel, Inc.*, 448 N.E.2d 1201 (Ind. App. 1983).

128. *Dague v. Piper Aircraft Corp.*, 513 F. Supp. 19 (N.D. Ind. 1980).

129. *Scalf*, 448 N.E.2d at 1201.

130. *Id.* at 1204.

131. *Id.*

132. See Vargo, *Products Liability*, 15 IND. L. REV. 289, 289 n.2 (1982).

133. *Scalf*, 448 N.E.2d at 1204, n.4.

134. According to *Scalf*, "[t]he statute reflects a legislative appraisal that a causal relationship existed between the time period for prosecuting a product liability action and the ever-accelerating insurance cost for product liability protection." *Id.* at 1204.

135. *Dague*, 513 F. Supp. at 25. ("The Indiana Legislature was particularly concerned about the ever increasing number of product liability claims.")

136. *Dague*, 513 F. Supp. at 25.

137. The court cited *Sidle v. Majors*, 264 Ind. 206, 341 N.E.2d 763 (1976), which upheld "a legislative endeavor to promote financial responsibility . . . by protecting liability insurance companies from the human propensities of juries to weigh their 'benevolent thumb' along with the evidence of the defendant's negligence."

138. *Dague*, 513 F. Supp. at 25. This protection serves a public purpose by providing a source for recovery which otherwise might not exist. The legislation also helps hold down manufacturer's cost and resulting product costs. *Id.*

139. Act of Apr. 21, 1983, Pub. L. No. 297 § 1, 1983 Ind. Acts 1814, (codified at Ind. Code Ann. § 33-1-1.5-1 (West 1983 & Supp. 1986)). For a section-by-section analysis of the changes made by the amendments, see Vargo, *supra* note 94, at 272-82.

of section 402A.¹⁴⁰ Some contend that the subtle changes in the statute's language appear to restrict the liability of the manufacturers and sellers.¹⁴¹ If the goal of the 1983 amendments was to parallel the court's interpretations of section 402A,¹⁴² then arguably, the statutory law and the common law have responded harmoniously to the product liability situation.

IV. MEDICAL MALPRACTICE PROBLEMS

Liability insurance problems, similar to those in the products liability area, have plagued the medical profession for over a decade.¹⁴³ In the early 1970's, a "medical malpractice crisis" was proclaimed nationwide.¹⁴⁴ Skyrocketing premiums and the unavailability of insurance coverage prompted reform measures in every jurisdiction.¹⁴⁵ Although the reform provisions varied from state to state, they were all instituted with a common goal: to stabilize the cost of medical malpractice insurance by controlling damage awards.¹⁴⁶ The remedial solutions enacted by the Indiana¹⁴⁷ and California Legislatures¹⁴⁸ offer a number of effective means to reduce liability. Such provisions could be used to amend Indiana's Products Liability Act.

A. Indiana's Medical Malpractice Act

The threat that some health care services would be discontinued as a result of high costs or unavailability of liability insurance¹⁴⁹ provided the

140. The amendments were "an effort to bring the Indiana law code around to conformity with what had been the law of 402A . . . which had suffered some violence, in my opinion, by the statutory enactment of a few years ago." Vobach, *supra* note 83, at 1.

141. See Vargo, *supra* note 93, at 277-79 (subtle language of reasonableness and foreseeability appears to limit seller's liability at each step). *But see* Vobach, *supra* note 83, at 1 (contending that the statute was more restrictive prior to the amendments).

142. See Vobach, *supra* note 83, at 2.

143. Note, *Constitutionality of the Indiana Medical Malpractice Act: Re-Evaluated*, 19 VAL. U.L. REV. 493, 493 (1985) [hereinafter *Constitutionality*]; Scalf, 448 N.E.2d at 1204 ("The legislature enacted limitations . . . [to the Medical Malpractice Act] in an effort to reduce the difficulties in obtaining medical malpractice insurance.") *Id.* See also Richards, *supra* note 13, at 260 (comparing the two areas of liability).

144. See *Constitutionality*, *supra* note 143, at 493. For an assessment of the current plight of Illinois medical professionals, see McHugh, *Insurance Experts Tell of Medical Malpractice 'Crisis'*, Chi. Daily L. Bull., Feb. 11, 1985, at 1, col. 2.

145. See Richards, *supra* note 13, at 247. For a listing of sources that substantiate the crisis, see Note, *California's Medical Injury Compensation Reform Act: An Equal Protection Challenge*, 52 S. CAL. L. REV. 829, 831 n.4 (1979).

146. See Richards, *supra* note 13, at 247. For a list of the various types of reform provisions, see *Id.* at 247-49.

147. IND. CODE ANN. § 16-9.5-1-1 to -10-5 (West 1984 & Supp. 1986).

148. CAL. CIV. CODE § 3333.1-3333.2 (West 1970 & Supp. 1986).

149. The Indiana Supreme Court felt that "[t]he Legislature was undoubtedly moved

impetus for Indiana legislators to enact the Indiana Medical Malpractice Act in 1975.¹⁵⁰ The legislature was confronted with abundant proof of the dismal conditions,¹⁵¹ and in an effort to preserve the vital services and to protect the public health,¹⁵² the legislature enacted limitations on the time allowed for filing¹⁵³ and on the amount recoverable.¹⁵⁴

The limitations of the Medical Malpractice Act were designed as procedural safeguards¹⁵⁵ which would ultimately assure the availability of medical malpractice insurance to health care providers.¹⁵⁶ Furthermore, the Indiana Supreme Court recognized in *Johnson v. St. Vincent Hosp.*,¹⁵⁷ that the public interest would also be preserved, in that, if an insurer is forced into bankruptcy, claimants would be denied a means for collection.¹⁵⁸ Thus, the Act is a reasonable mechanism for spreading the risk and protecting the health care industry.¹⁵⁹

The Medical Malpractice Act has several provisions which further the state's interest in preserving health care services. Principally, the legislature placed an absolute limit of \$500,000 on the amount of damages recoverable.¹⁶⁰ Thus, the plaintiff is precluded from recovering more than \$500,000

because of its appraisal that the services of health care providers were being threatened and curtailed contrary to the health interests of the community because of the high cost and unavailability of liability insurance." *Johnson v. St. Vincent Hosp. Inc.*, 273 Ind. 374, 387, 404 N.E.2d 585, 594 (1980).

150. IND. CODE ANN. § 16-9.5-1-1 to -10-5 (West 1984 & Supp. 1986).

151. *Johnson*, 273 Ind. at 379-80, 404 N.E.2d at 589-90. (Many disturbing problems were elucidated by the *Johnson* court.).

152. *Id.* at 379, 404 N.E.2d at 590. "[The Act] reflects a specific legislative judgment that a causal relationship existed . . . between the settlement and prosecution of malpractice claims against health care providers and the actual and threatened diminution of health care services." *Id.*

153. IND. CODE ANN. § 16-9.5-3-1(a) (West 1984 & Supp. 1986) (no claim can be brought against health care provider, unless filed within two years of the alleged act. Minors under age six years have until their eighth birthday).

154. IND. CODE ANN. § 16-9.5-2-2(a) (West 1984 & Supp. 1986) "The total amount recoverable for any injury or death . . . may not exceed five hundred thousand dollars (\$500,000)." *Id.*

155. See Note, *Malicious Prosecution and Medical Malpractice Litigation in Indiana: A Quest for Balance*, 17 VAL. U.L. REV. 877, 883 (1983) [hereinafter *Malicious Prosecution*] (suggesting the safeguards tip the balance of interest in the favor of health care providers).

156. *Rohrbaugh v. Wagoner*, 274 Ind. 661, 666-67, 413 N.E.2d 891, 894 (1980) (the legislative judgments were made because of actual or threatened loss of reasonably priced malpractice insurance).

157. 273 Ind. 374, 404 N.E.2d 585 (1980).

158. *Id.* at 397, 404 N.E.2d at 601. The *Johnson* court reasoned that if insurance were unavailable, the probability of collecting over \$500,000 would be quite small; therefore, the continued existence of insurance would benefit the entire community, including the malpractice victim. *Id.*

159. *Id.*

160. IND. CODE ANN. § 16-9.5-2-2(a) (West 1984 & Supp. 1986) "The total amount

for his claim,¹⁶¹ no matter how grievous his injuries.

The Indiana Supreme Court in *Johnson* unanimously found that the imposition of the arbitrary ceiling is a rational means of protecting vital societal interests.¹⁶² Although the measure would produce "harsh" applications in some individual cases,¹⁶³ the unfortunate victims will nonetheless recover a substantial monetary amount.¹⁶⁴

A further measure employed by the legislature was a requirement that all medical malpractice claims over \$15,000¹⁶⁵ be submitted to a medical review panel prior to filing suit, unless all defendants agree to waive the procedure.¹⁶⁶ The limited purpose of this provision is for the panel to render an expert opinion¹⁶⁷ after conducting a rational inquiry into the facts surrounding the patient's injury.¹⁶⁸ As a consequence of the knowledge gained, mediation and settlement of claims would be encouraged since the panel's finding would be admissible in court.¹⁶⁹ The *Johnson* court found this provision to be a reasonable means of accomplishing the goals of the

recoverable for any injury or death of a patient may not exceed five hundred thousand dollars (\$500,000)." *Id.*

161. See *Johnson*, 273 Ind. at 397, 404 N.E.2d at 600 (The legislation does not create an irrebuttable presumption that the patient's damages are less than \$500,000, but only reflects the policy of the law.).

162. *Id.* at 400, 404 N.E.2d at 601.

163. See *Rohrbaugh*, 274 Ind. at 667, 413 N.E.2d at 895.

164. *Malicious Prosecution*, *supra* note 155, at 885.

165. The Indiana Code provides that ". . . [a] patient may commence an action against a health care provider for malpractice without submitting a proposed complaint to a medical review panel if the patient's pleadings include a declaration that the patient seeks damages from the health care provider in an amount no greater than fifteen thousand (\$15,000) . . ." IND. CODE ANN. § 16-9.5-9-2.1(a) (West 1984 & Supp. 1986).

166. The Malpractice Act provides:

(a) Except as provided in subsection (b), no action against a health care provider may be commenced in any court of this state before the claimant's proposed complaint has been presented to a medical review panel established pursuant to this chapter and an opinion is rendered by the panel.

(b) A claimant may commence an action in court for malpractice without the presentation of the claim to a medical review panel if the claimant and all parties named as defendants in the action agree that the claim is not to be presented to a medical review panel. The agreement must be in writing and must be signed by each party or an authorized agent of the party. The claimant must attach a copy of the agreement to the complaint filed with the court in which the action is commenced.

IND. CODE ANN. § 16-9.5-9-2 (West 1984 & Supp. 1986).

167. IND. CODE ANN. § 16-9.5-9-7 (West 1984 & Supp. 1986). "Sec. 7. The panel shall have the sole duty to express its expert opinion as to whether or not the evidence supports the conclusion that the defendant or defendants acted or failed to act within the appropriate standards of care as charged in the complaint. . . ." *Id.*

168. *Johnson*, 273 Ind. at 391, 404 N.E.2d at 596. The review panel gives the plaintiff access to an opinion he otherwise may be unable to get. *Id.* at 387, 404 N.E.2d at 594.

169. *Id.* at 388-89, 404 N.E.2d at 595. The knowledge and experience gained by participation in the panel will also "discourage the filing of unreasonably speculative lawsuits." *Id.*

legislature.¹⁷⁰

Another means used to achieve these goals was to substantially reduce the statute of limitations period for minors.¹⁷¹ Prior to the statute, minors were allowed to bring malpractice claims up until their twenty-third birthday.¹⁷² Under the Medical Malpractice Act, however, minors over age six must bring their claims within two years of the alleged malpractice.¹⁷³ Since the purpose of statutes of limitations is to encourage prompt presentation of claims,¹⁷⁴ and the prior law allowed suits up to twenty-three years after the defendant's alleged negligence,¹⁷⁵ the changes in the statute of limitations made it more rational.¹⁷⁶ In *Johnson*, the court noted that the health care provider is still subject to defend suits up to eight years after the alleged injury.¹⁷⁷ The *Johnson* court thus found the competing interests to be reasonably balanced,¹⁷⁸ following the new provision's enactment.

Section 16-9.5-4-1 of the Indiana Medical Malpractice Act establishes a patient compensation fund,¹⁷⁹ which serves an insurance-like function.¹⁸⁰ In the event that damages are awarded by the court, only the first \$100,000

170. *Id.* at 387, 404 N.E.2d at 594 (review panel is reasonable means of preserving health care services).

171. The malpractice statute states that:

[n]o claim, whether in contract or tort, may be brought against a health care provider based upon professional services or health care rendered or that should have been rendered unless filed within two (2) years from the date of the alleged act, omission, or neglect, except that a minor under the full age of six (6) years shall have until his eighth birthday in which to file. This section applies to all persons regardless of minority or other legal disability, except as provided in subsection (b).

IND. CODE ANN. § 16-9.5-3-1(a) (West 1984 & Supp. 1986).

172. *Johnson*, 273 Ind. at 403-04, 404 N.E.2d at 603 (prior statute gave minor until twenty-first birthday, plus two additional years).

173. IND. CODE ANN. § 16-9.5-3-1(a) (West 1984 & Supp. 1986).

174. *United States v. Kubrick*, 444 U.S. 111 (1979).

175. *Johnson*, 273 Ind. at 403-04, 404 N.E.2d at 603.

176. *Id.* at 405, 404 N.E.2d at 604. The *Johnson* court reasoned that:

[a]s the years between injury and suit increase, so does the probability that the search for truth at trial will be impeded and contorted to the benefit of the plaintiff. This harm can be exacerbated where the injured party continues to grow, develop and change, both physically and mentally, after the injury complained of has occurred.

Id. at 404, 404 N.E.2d at 604.

177. *Id.* at 404, 404 N.E.2d at 604.

178. *Id.* The court stated that "[i]n balancing the interests involved here, the Legislature may well have given consideration to the fact that most children by the time they reach the age of six years are in a position to verbally communicate their physical complaints to parents. . . ." *Id.* But see *Malicious Prosecution*, *supra* note 155, at 885. "Some injured patients . . . because of the change in the statute of limitations, may find their causes of action extinguished before any injury is discovered." *Id.*

179. IND. CODE ANN. § 16-9.5-4-1 (West 1984 & Supp. 1986).

180. *Johnson*, 273 Ind. at 399, 404 N.E.2d at 601 (The "government sponsored risk spreading mechanism" provides an alternative to private insurance.).

is paid by the health care provider's insurance.¹⁸¹ The balance of the awarded sum (up to \$500,000) would be paid either by others who are held liable, or by the patient's compensation fund.¹⁸² In effect, the \$500,000 cap placed on recovery serves the same purpose for the compensation fund that limitations on coverage serve in private insurance contracts.¹⁸³ The practical consequence of the fund is that although the patient may be able to collect \$500,000 for a malpractice claim, the liability exposure of the individual health care provider cannot exceed \$100,000.

Chapter five of Indiana's Medical Malpractice Act, which places a 15% limitation on contingent attorney's fees,¹⁸⁴ is concomitant with the compensation fund. This limitation applies only to the recovery received from the patient compensation fund; therefore, no limitation exists with regard to the first \$100,000.¹⁸⁵ This provision serves two purposes: to guard against abuses of contingent fee contracts, and to protect the already diminished compensation of the claimants.¹⁸⁶

Finally, Indiana adopted an *ad damnum* clause which provides that no dollar amount can be stated in the pleadings, but only an award for damages reasonable under the circumstances.¹⁸⁷ The legislature undoubtedly

181. IND. CODE ANN. § 16-9.5-2-2(d) (West 1984 & Supp. 1986). The section provides that:

[i]n the event a health care provider qualified under this article admits liability or is adjudicated liable solely by reason of the conduct of another health care provider who is an officer, agent or employee of the health care provider acting in the course and scope of his employment and qualified under this chapter, the total amount which shall be paid to the claimant on behalf of the officer, agent or employee and the health care provider by such health care provider or its insurer shall be one hundred thousand dollars (\$100,000) and the balance of any adjudicated sum to which the claimant is entitled, if any, shall be paid by other liable health care providers and/or the patient's compensation fund.

Id.

182. The fund is created by an annual surcharge levied on all health care providers in Indiana. IND. CODE ANN. § 16-9.5-4-1(b) (West 1984 & Supp. 1986).

183. *Johnson*, 273 Ind. at 399, 404 N.E.2d at 601.

184. IND. CODE ANN. § 16-9.5-5-1 (West 1984 & Supp. 1986). This section provides that:

(a) When a plaintiff is represented by an attorney in the prosecution of his claim, the plaintiff's attorney fees from any award made from the patient's compensation fund may not exceed fifteen percent (15%) of any recovery from the fund.

(b) A patient has the right to elect to pay for the attorney's services on a mutually satisfactory per diem basis. The election, however, must be exercised in written form at the time of employment.

Id.

185. IND. CODE ANN. § 16-9.5-5-1(a) (West 1984 & Supp. 1986). *See also Johnson*, 273 Ind. at 402, 404 N.E.2d at 603 (since resulting legal fees overall will range between 20% to 35% of recovery, the limitation will not seriously impede plaintiff's ability to employ effective counsel).

186. *Johnson*, 273 Ind. at 401-02, 404 N.E.2d at 602.

187. IND. CODE ANN. § 16-9.5-1-6 (West 1984 & Supp. 1986) ("no dollar amount or

felt that an undue correlation existed between the amount pleaded in a complaint and the amount awarded by the trier of fact.¹⁸⁸ The *Johnson* court explained that the dollar amount in a complaint may be misunderstood as indicative of the injury's seriousness; thus, the final award may be irrationally inflated.¹⁸⁹

The combination of these separate provisions has proved to be an effective solution to the serious problems experienced by medical professionals in Indiana.¹⁹⁰ Insurance companies have credited the Medical Malpractice Act for holding down insurance rates.¹⁹¹ According to insurers, Indiana doctors can expect incremental increases in insurance rates, but they will not experience the 800% to 1000% increases that doctors in other states will incur.¹⁹² This is the specific objective that the Indiana Legislature had hoped to accomplish.¹⁹³

B. California's Medical Malpractice Act

1. Limitation Provisions

California enacted similar limiting provisions to achieve the same objective: to protect the viability of the health care industry.¹⁹⁴ Unlike Indiana, however, California and other states have not imposed absolute ceilings on the amount of damages recoverable. Though a cap is imposed, the approach taken by these states allows recovery for the claimants' pecuniary losses.¹⁹⁵ For the purposes of this note, this method of limiting recovery will

figure shall be included in the demand in a malpractice complaint, but the prayer shall be for such damages as are reasonable in the premises").

188. *Johnson*, 273 Ind. at 405, 404 N.E.2d at 604.

189. *Id.* ("The law does not regard the prayer as evidence of proper damages.").

190. Mullen, *supra* note 19. See also *Johnson*, at 396, 404 N.E.2d at 599 (Evidence was submitted into the record that the act is achieving its intended goal.).

191. Mullen, *supra* note 19, at 11, col. 2. Medical Protective is a dominant insurer of Indiana health care providers. See BEST'S KEY RATING GUIDE, PROPERTY-CASUALTY 1985, 199, 79th Annual Edition (giving Medical Protective Co. an excellent rating and showing their volume to be over \$100,000,000).

192. Mullen, *supra* note 19, at 11, col. 1. Mullen stated that "[w]hen the average award goes up there are increases and your insurance will go up in small, incremental increases but under 25 percent." He said, "you won't have the 800 to 1,000 percent increases of other states." *Id.*

193. *Johnson*, 273 Ind. at 392, 404 N.E.2d 597 (The clear legislative purpose is to protect the health of citizens by preventing reduction of health care services.).

194. CAL. CIV. CODE §§ 3333.1-3333.2 (West 1970 & Supp. 1986).

195. CAL. CIV. CODE § 3333.2 (West 1970 & Supp. 1986) (the cap is placed only on "noneconomic losses", such as pain and suffering, inconvenience, physical impairment, and disfigurement); see also LA. REV. STAT. ANN. § 40:1299.42(B)(1) (West 1977 & Supp. 1986) (the recovery cap excludes the costs of future medical care and related benefits); N.M. STAT. ANN. § 41-5-6(A) (1978) (excepting punitive damages and damages for medical care and

be referred to as the "California approach."¹⁹⁶ A constitutional challenge to California's recovery cap approach was dismissed on appeal by the United States Supreme Court, a decision on the merits of the case.¹⁹⁷

In 1975, the California Legislature declared that a major health care crisis existed in the State of California.¹⁹⁸ The crisis, attributed to skyrocketing malpractice insurance premiums, resulted in a potential breakdown of the health care industry.¹⁹⁹ In response, the legislature enacted the Medical Injury Compensation Reform Act (MICRA).²⁰⁰

The California Civil Code²⁰¹ allows a plaintiff recovery for all economic losses²⁰² in a medical malpractice action, but noneconomic losses, such as pain and suffering, are limited to \$250,000.²⁰³ The legislature concluded that limiting noneconomic damages would further the public interest.²⁰⁴ The reasoning was that plaintiffs may have trouble collecting *any*

related benefits from the limitation); S.D. CODIFIED LAWS ANN. § 21-3-11 (1979 & Supp. 1985) (stating no limitation applies to special damages); TEX. REV. CIV. STAT. ANN. art. 4590i (Vernon 1976 & Supp. 1986) (limitation does not apply to necessary medical, hospital, and custodial care).

196. "California approach" will mean limiting recovery on non-pecuniary losses only.

197. See *infra* note 202.

198. 1975 Cal. Stat. 4007.

199. *Id.* The legislature also found that the crisis created "severe hardships for the medically indigent, a denial of free access for the economically marginal, and depletion of physicians such as to substantially worsen the quality of health care available to citizens of this state." *Id.*

200. 1975 Cal. Stat. 3949, codified as CAL. CIV. CODE § 3333.1-2 (West 1970 & Supp. 1986).

201. CAL. CIV. CODE § 3333.2 (West 1970 & Supp. 1986).

202. *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985), *appeal dismissed*, ___ U.S. ___, 106 S. Ct. 214 (1985). The court explains that:

[t]he "general damage/special damage" distinction is similar to the "noneconomic damage/economic damage" distinction established by section 3333.2. "General damages" are defined as "damages for loss of reputation, shame, mortification and hurt feelings" and "special damages" are defined as "all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and not other."

Fein, 38 Cal. 3d at 137, 695 P.2d at 680, 211 Cal Rptr. at 383 n.15.

203. CAL. CIV. CODE § 3333.2 (West 1970 & Supp. 1986). Section 3333.2 provides in part:

(a) In any [medical malpractice] action . . . the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage.

(b) In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars (\$250,000).

Id.

204. *Fein*, 38 Cal. 3d at 160, 695 P.2d at 681, 211 Cal Rptr. at 384. The *Fein* court recognized that:

damages if insurance costs were not reduced.²⁰⁵ Moreover, the California Supreme Court noted that the wisdom of awarding damages for pain and suffering had been seriously questioned for some time,²⁰⁶ making this imperfect compensation the logical target for cost reduction.²⁰⁷ Since the California Act places no restriction on the plaintiff's right to recover all economic, pecuniary damages,²⁰⁸ the cap seems less harsh than Indiana's absolute limitation.²⁰⁹

2. Miscellaneous Provisions

In addition to recovery cap variations, California offers another method of limiting the liability exposure of health care providers. California's MICRA provides an alteration of the "collateral source" rule.²¹⁰ Traditionally, the collateral source rule has not allowed juries to consider benefits

[f]aced with the prospect that, in the absence of some cost reduction, medical malpractice plaintiffs might as a realistic matter have difficulty collecting judgments for any of their damages—pecuniary as well as nonpecuniary—the Legislature concluded that it was in the public interest to attempt to obtain some cost savings by limiting noneconomic damages.

Id.

205. *Id.*

206. *Id.* at 159, 695 P.2d at 680, 211 Cal Rptr. at 383-84.

207. The *Fein* court explained that an inherent difficulty exists in assigning monetary values to such intangible losses. *Id.* Furthermore, no California case has ever suggested that a right exists to recover these damages. *Id.* at 159-60, 695 P.2d at 681, 211 Cal Rptr. at 384.

208. *Id.* at 160, 695 P.2d at 680, 211 Cal. Rptr. at 383.

209. Several other jurisdictions have enacted medical malpractice caps similar to California's. The Louisiana Medical Malpractice Act limits the amount recoverable for malpractice claims to \$500,000 (plus interest and costs), but excludes all expenses necessary for future medical care and related benefits. LA. REV. STAT. ANN. § 40:1299.42(B)(1) (West 1977 & Supp. 1986). In New Mexico, the amount recoverable is \$500,000, excluding punitive damages, medical care costs, related benefits, and possibly future medical expenses. N.M. STAT. ANN. § 41-5-6 (1978). South Dakota and Texas also set \$500,000 limitations on medical malpractice recoveries. The South Dakota cap does not apply to special damages. S.D. CODIFIED LAWS ANN. § 21-3-11 (1979 & Supp. 1985). The Texas statute excludes only the costs of past and future medical, hospital, and custodial care. TEX. REV. CIV. STAT. ANN. art. 4590i § 11.02 (Vernon 1976 & Supp. 1986). The Texas Legislature included an alternative cap provision in the event that § 11.02 is invalidated. TEX. REV. CIV. STAT. ANN. art. 4590i § 11.03 (Vernon 1976 & Supp. 1986). The substitute measure, which would limit liability for noneconomic damages to \$150,000, ostensibly shows the legislature's anticipation of constitutional attacks. Keith, *The Texas Medical Liability and Insurance Improvement Act — A Survey and Analysis of Its History, Construction and Constitutionality*, 36 BAYLOR L. REV. 265, 307 (1984). All these variations on damage limitations allow compensation for actual medical costs, while "capping" the recovery amounts for such intangible losses as pain and suffering, shame, loss of reputation, mental anguish, and disfigurement. Since these elements of damage are not excluded as actual medical expenses, then by negative implication, they are included under the caps.

210. CAL. CIV. CODE § 3333.1 (West 1970 & Supp. 1986).

which the plaintiff has received from "other sources"²¹¹ when determining the plaintiff's damages.²¹² In a medical malpractice action, however, the California statute allows a defendant to offer evidence of such payments.²¹³ The legislature apparently reasoned that this evidence would lower the jury's award for damages and thus would reduce the burden on the health care industry.²¹⁴

If a defendant offers evidence of collateral payments, the plaintiff may then introduce evidence of plaintiff's costs to secure the benefits; i.e. insurance premium payments.²¹⁵ The code provides that even though evidence of the collateral source is introduced, the source of those benefits shall not be subrogated.²¹⁶ The rule assures that if the jury reduces the plaintiff's award based on the collateral source evidence, the deduction will not be duplicated by repayment to the source.²¹⁷ The section of MICRA acts to reduce the costs to medical malpractice defendants by redistributing some of the burden to others.

MICRA, like Indiana's Medical Malpractice Act, imposes a limitation on attorney's contingent fee arrangements.²¹⁸ A maximum fee of forty percent is allowed on the first \$50,000, but as the recovery amount increases, the maximum percentage allowed for contingent fees is reduced.²¹⁹ Al-

211. These sources include payments from any medical insurance program or any disability payments. CAL. CIV. CODE § 3333.1(a) (West 1970 & Supp. 1986).

212. *Fein*, 38 Cal. 3d at 164, 695 P.2d at 684, 211 Cal. Rptr. at 387.

213. CAL. CIV. CODE § 3333.1(a) (West 1970 & Supp. 1986). The collateral source section of MICRA provides that:

[i]n the event the defendant so elects, in an action for personal injury against a health care provider based upon professional negligence, he may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the personal injury pursuant to the United States Social Security Act, any state or federal income disability or worker's compensation act, any health, sickness or income-disability insurance, accident insurance that provides health benefits or income-disability coverage, and any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the cost of medical, hospital, dental or other health care services. Where the defendant elects to introduce such evidence, the plaintiff may introduce evidence of any amount which the plaintiff has paid or contributed to secure his right to any insurance benefits concerning which the defendant has introduced evidence.

Id.

214. *Fein*, 38 Cal. 3d at 164-65, 695 P.2d at 684-85, 211 Cal Rptr. at 388.

215. CAL. CIV. CODE § 3333.1(a) (West 1970 & Supp. 1986).

216. CAL. CIV. CODE § 3333.1(b) (West 1970 & Supp. 1986). "No source of collateral benefits introduced pursuant to subdivision (a) shall recover any amount against the plaintiff nor shall it be subrogated to the rights of the plaintiff against a defendant." *Id.*

217. *Fein*, 38 Cal. 3d at 165, 695 P.2d at 685, 211 Cal Rptr. at 388.

218. CAL. BUS. & PROF. CODE § 6146(a) (West 1970 & Supp. 1986).

219. *Id.* The statute provides that:

[a]n attorney shall not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence in excess of

though the California provision operates differently than the Indiana code section, the purposes and effects are the same: to preserve health care services for the preservation of the general welfare by restricting the parameters of liability exposure.²²⁰

C. Constitutionality of Recovery Caps

The legislative measures taken to facilitate health care services have prompted constitutional challenges.²²¹ In upholding the constitutionality of the Medical Malpractice Act, the Indiana Supreme Court found that the limitations are not arbitrary or irrational, but further the public purpose of the Act.²²² The *Johnson* court stated that altering a standard procedure for

the following limits:

- (1) Forty percent of the first fifty thousand (\$50,000) recovered.
- (2) Thirty-three and one-third percent of the next fifty thousand dollars (\$50,000) recovered.
- (3) Twenty-five percent of the next one hundred thousand dollars (\$100,000) recovered.
- (4) Ten percent of any amount on which the recovery exceeds two hundred thousand dollars (\$200,000).

***The limitations shall apply regardless of whether the recovery is by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind.

Id.

220. *Johnson*, 273 Ind. at 379, 404 N.E.2d at 590; *Fein*, 38 Cal. 3d at 158-59, 695 P.2d at 680, 211 Cal. Rptr. at 383-84.

221. See, e.g., *Johnson v. St. Vincent Hosp. Inc.*, 273 Ind. 374, 381, 404 N.E.2d 585, 594 (1980); *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985), *appeal dismissed*, ___ U.S. ___, 106 S. Ct. 214 (1985).

222. The *Johnson* court explained that:

It would appear that the limitation upon recovery is the natural consequent [sic] of the establishment of an insurance type program. It provides a factor for calculating premiums and charges to those covered. An insurance operation cannot be sound if the funds collected are insufficient to meet the obligations incurred. It must, however, be accepted that the badly injured plaintiff who may require constant care will not recover full damages, yet at the same time we are impressed with the large amount which is recoverable and its probable ability to fully compensate a large proportion of injured patients. In the same vein, badly injured patients would have little or no chance of recovering large sums of money if the evil the act was intended to prevent were to come about, i.e., that an environment would develop in the State in which private or public malpractice insurance were unavailable or unused. Of some relevance here is also the fact that after suit and recovery against a health care provider is completed, there continues a total lifetime dependency upon other health care providers for vital treatment of the residuum of illness from the prior negligence and of new and unrelated illnesses. Thus to the extent that the limitation upon recovery is successful in preserving the availability of health care services, it does so to the benefit of the entire community including the badly injured plaintiff. Finally, there is evidence in the record before us that the Act with its limitation upon recovery is achieving its intended goal. Accordingly, we find that the limitations upon patient recoveries is not arbitrary and irrational, but furthers the public purposes of the

achieving a remedy or restricting a longstanding remedy does not necessarily violate due process.²²³ The *Johnson* court drew extensive support from the United States Supreme Court decision in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, which upheld the Price-Anderson Act limitations on the liability of nuclear power companies.²²⁴ Furthermore, the Indiana court noted that a legislature can constitutionally terminate a valid claim entirely through the enactment of a statute of limitations.²²⁵

The Indiana Supreme Court has previously held that no vested interests exist in any rule of the common law.²²⁶ In *Sidle v. Majors*,²²⁷ the court (citing a United States Supreme Court decision) explained that "the Constitution does not forbid the . . . abolition of old [rights] . . . to attain a permissible legislative object."²²⁸ The legislative object of *Sidle* was the same as in *Johnson*: to protect insurance companies from the tendency of jury members to weigh their sympathetic generosity along with the evidence when determining damage awards.²²⁹ The Indiana Supreme Court found that the Medical Malpractice Act was a reasonable means by which to achieve the legislature's goals.²³⁰

The California Supreme Court also found a rational purpose to their legislature's actions.²³¹ More significantly, the United States Supreme Court dismissed an appeal which challenged the constitutionality of Cali-

Act in a manner consistent with due process of law guaranteed by our state and federal constitutions.

Johnson, 273 Ind. at 396, 404 N.E.2d at 599.

223. *Id.* at 387, 404 N.E.2d at 594.

224. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978). For the Indiana Supreme Court's analysis, see *Johnson*, 273 Ind. at 395-96, 404 N.E.2d at 599.

225. *Johnson*, 273 Ind. at 401, 404 N.E.2d at 602.

226. *Sidle v. Majors*, 264 Ind. 206, 341 N.E.2d 763, 774 (1976) ("Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, within constitutional limits, may be changed at the will of the legislature."). *Id.*

227. *Id.*

228. *Id.* at 223, 341 N.E.2d at 774, citing *Silver v. Silver*, 280 U.S. 117 (1929).

229. The Indiana Supreme Court stated:

[i]t is . . . not unreasonable to credit the legislature with recognizing . . . that the real defendant is an insurance company and will relax the standard of proof traditional in negligence actions and render biased judgments in favor of plaintiffs. [An act] may, therefore, logically be a legislative endeavor to promote financial responsibility for damages . . . by protecting liability insurance companies . . . from the human propensities of juries to weigh their 'benevolent thumbs' along with the evidence of the defendant's negligence.

Id. at 219-20, 341 N.E.2d at 772.

230. *Johnson*, 273 Ind. at 400, 404 N.E.2d at 601.

231. *Fein*, 38 Cal. 3d at 158, 695 P.2d at 680, 211 Cal Rptr. at 383.

fornia's approach to its medical malpractice statute.²³² The dismissal, based on the lack of a substantial federal question,²³³ is a decision on the merits which the lower courts are not free to disregard.²³⁴

In a subsequent decision, the United States Supreme Court similarly dismissed an appeal²³⁵ for lack of a substantial federal question challenging California's limitation on attorney's fees in malpractice cases.²³⁶ Although these decisions seem to end the argument that limitations of this nature violate federal rights,²³⁷ the rulings may not be conclusive as to Indiana's Medical Malpractice Act. The Court's dismissals in the California cases bind the lower courts on the issue of noneconomic damage limits,²³⁸ but the question of an absolute limitation on malpractice awards (such as Indiana's cap) has not been specifically addressed.

232. *Fein v. Permanente Medical Group*, 106 S. Ct. 214 (1985). Prior to the U.S. Supreme Court decision upholding California's cap on general damages, a similar recovery cap was adjudged unconstitutional by the Texas courts, but only as applied to hospitals, *Baptist Hosp. of S.E. Texas, Inc. v. Babar*, 672 S.W.2d 296, 298 (Tex. App. 1984) and as applied to pharmacies, *Malone & Hyde v. Hobrecht*, 685 S.W.2d 739, 753 (Tex. App. 1985).

233. Only Justice White dissented. *Fein v. Permanente Medical Group*, 106 S. Ct. 214 (1985). Justice White stated:

[w]hether Due Process requires a legislatively enacted compensation scheme to be a quid pro quo for the common law or state law remedy it replaces, and if so, how adequate it must be, thus appears to be an issue unresolved by this Court, and one which is dividing the appellate and highest courts of several states. The issue is important, and is deserving of this Court's review. Moreover, given the continued national concern over the 'malpractice crisis,' it is likely that more states will enact similar types of limitations, and that the issue will recur. I find, therefore, that the federal question presented by this appeal is substantial, and dissent from the Court's conclusion to the contrary.

Fein, 106 S. Ct. 214, 216 (1985) (White, J., dissenting).

234. *Fein*, 106 S. Ct. at 214. When the U.S. Supreme Court declines to hear arguments in a case, the ruling is not normally an adjudication on the merits. However, when the case is brought as an appeal rather than as a petition for certiorari, a dismissal is a decision on the merits which binds the lower courts until the Supreme Court informs them otherwise. *Hicks v. Miranda*, 422 U.S. 332, 343-46 (1975).

235. *Lauter, High Court Rejects Challenge to Calif. Fee 'Cap'*, Nat'l L.J., Dec. 2, 1985, at 5, col. 1 (this is the second summary dismissal this fall of challenges to California's Medical Malpractice Act).

236. *Roa v. Lodi*, ___ U.S. ___, 106 S. Ct. 421 (1985). *See also* *Walters v. Nat'l Ass'n of Radiation Survivors*, ___ U.S. ___, 105 S. Ct. 11, 12 (1985) (upholding a federal statute limiting attorney or agent's fees to \$10 for representing a veteran seeking death or disability benefits from the Veteran's Administration).

237. *Lauter, Constitutionality of Malpractice Cap is Upheld*, Nat'l L.J., Oct. 28, 1985, at 5, col. 1-2.

238. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) ("lower courts are bound by summary actions on the merits by this Court").

V. PROPOSALS FOR INDIANA'S PRODUCT LIABILITY ACT

The same problem with insurance costs encountered by the medical professionals has been developing in the products area.²³⁹ Excessive insurance costs have caused a reexamination of Indiana's product laws by the courts and, accordingly, by the legislature.²⁴⁰ Similar cost problems prompted the major medical malpractice reforms of Indiana and many other states.²⁴¹

Just as the viability of Indiana's health care industry justified the reforms of 1975, the preservation of our business enterprises and consequent employment opportunities requires remedial legislation. This note proposes that liability limits, such as those imposed upon medical malpractice claims, be applied to claims for personal injuries from products.²⁴² Other protective provisions from the Medical Malpractice Acts of Indiana and other states could also be effective. These measures should be incorporated into Indiana's existing product liability statute in order to guarantee future economic stability throughout the state.

A. *Recovery Cap*

A liability cap on malpractice claims has been an effective means of approaching desired economic stability. Although no state has applied a recovery cap in the area of products liability, the application could similarly produce favorable results. The approach used by Indiana for its malpractice cap may provide a viable solution; however, the California approach may be more equitable. Either method could be adapted to the product liability statute in order to limit the recovery amounts.

1. *Indiana's Approach*

The Indiana Medical Malpractice Act placed an absolute limit on the amount of recovery for personal injuries.²⁴³ This solution could be applied to product cases in two ways. First, the cap could apply to all product liability actions, regardless of whether the claim is one for strict liability, negligence, or breach of warranty. This manner of application would most effectively parallel the malpractice system, since a personal injury, no matter

239. Richards, *supra* note 13, at 260.

240. *Supra* notes 93 and 126.

241. Richards, *supra* note 13, at 260.

242. For suggested methods to limit liability in general, see Lindsey, *Rising Tide of Liability Suits in Nation Forcing Changes in Lives*, N.Y. Times, Nov. 18, 1985, at 16, col. 4.

243. IND. CODE ANN. § 16-9.5-2-2(a) (West 1984 & Supp. 1986) ("The total amount recoverable for any injury or death of a patient may not exceed five hundred thousand dollars (\$500,000).")

how grievous, could be worth no more than \$500,000.

The major disadvantage of this version is that the incentive to create safe products may be effectively eliminated. Unlike malpractice defendants, manufacturers are subject to strict liability as well as a negligence standard. The policy reasons behind the imposition of strict liability remain,²⁴⁴ though perhaps faded over time: to encourage the manufacture of safe products.²⁴⁵

If the legislature imposed a cap for all product liability actions, regardless of the standard of care required for the particular theory, then the extent of liability for a manufacturer who has exercised all due care is just as great as that of a manufacturer who is negligent. With the exception of punitive damages, no other disincentive remains. Thus, the rationale behind strict liability for product manufacturers may be defeated.²⁴⁶

On the other hand, an across-the-board cap would produce profound results. If an insurer knew *absolutely* that each manufacturer is only subject to liability up to \$500,000,²⁴⁷ the effect on insurance costs could be as dramatic as it has been for health care providers.²⁴⁸ Adoption of this approach would depend on how critical the legislature views the liability problem, and how much protection the legislature is willing to afford the product makers and sellers.

An alternative to this proposal which would mitigate the harshness of the absolute cap, is to apply the cap only to claims based on strict liability in tort. According to this method, a plaintiff can recover a maximum of \$500,000 if his injuries were caused by a defective product. However, if the plaintiff can further prove that the defendant was negligent, recovery on that count is unlimited.

The distinction between strict liability and negligence becomes critical. The legislature has already differentiated between the two theories.²⁴⁹ In strict liability, care or lack of care is irrelevant.²⁵⁰ The focus is on the condition of the article, not the reasonableness of the defendant's conduct.²⁵¹

244. See *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436, 440 (1944) (public's interest is to discourage the marketing of defective products).

245. See *Spacone*, *supra* note 1, at 32.

246. One should note that a manufacturer would still be subject to punitive damages upon the proper showing; therefore, a safeguard is still available.

247. This arbitrary amount can be set at whatever amount the legislature deems appropriate.

248. See *supra* note 13.

249. See, e.g., 1983 Ind. Acts 1814 (By amendment, the legislature deliberately omitted negligence actions from the scope of the products liability act.).

250. *Cornette v. Searjeant Metal Products, Inc.*, 147 Ind. App. 46, 258 N.E.2d 652 (1970).

251. *Ortho Pharmaceutical Corp. v. Chapman*, 180 Ind. App. 33, 388 N.E.2d 541

By adopting strict liability, the legislators created a cause of action which, in effect, allows access to an otherwise unavailable deep pocket. Logically, the legislature should be able to say how deep that pocket will be.

Although a limit on this legislatively-created liability is attractive, a disadvantage to this theory exists. Since many product claims proceed on more than one theory, the cap only on strict liability recovery may not have a significant impact on reducing the cost of insurance.²⁵² Only the strict liability claim can guarantee a manageable award. Other theories may still yield tremendous verdicts. A further drawback to this suggested reform is that it may be confusing to jurors to be instructed that on one count there is no limit to the amount they can award, but on another count there is a limit.²⁵³

The constitutionality of the suggested reform must also be considered. Although the United States Supreme Court dismissed the appeal challenging the constitutionality of noneconomic award limits in medical malpractice cases,²⁵⁴ the issue of limiting economic awards has not been specifically addressed by the Court. The Indiana Supreme Court has ruled on the question, and found the limit to be constitutional in medical malpractice cases.²⁵⁵ Since a similar public purpose would be served by limiting awards for product-related injuries and the limitations would be no more arbitrary or irrational than those of the malpractice statute,²⁵⁶ these proposals should also pass constitutional muster.

2. California's Approach

The limiting provision's constitutionality is more certain using the California approach to limiting liability, since challenges to California's cap on noneconomic damage awards have been rejected by the United States Supreme Court.²⁵⁷ Using this prototype, Indiana could limit noneconomic recoveries for all product liability claims to a set amount.²⁵⁸ However, full

(1979) (citing *Phillips v. Kimwood*, 269 Or. 485, 525 P.2d 1033 (1974)).

252. Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1114 (1960). (" . . . [T]here's not one case in a hundred in which strict liability would result in recovery where negligence does not."). *Id.*

253. *But see* Vobach, *supra* note 56, at 5. " . . . [W]hat's new about that? The legislature just got done saying that product cases aren't governed by the same kind of comparative fault that regular cases are. . . ."

254. *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 221 Cal. Rptr. 368 (1985), *appeal dismissed*, ___ U.S. ___, 106 S. Ct. 214 (1985).

255. *Johnson v. St. Vincent Hosp. Inc.*, 273 Ind. 374, 404 N.E.2d 585, 594 (1980).

256. *Id.* at 396, 404 N.E.2d at 599.

257. *Fein*, 106 S. Ct. at 214.

258. If the cap is limited to noneconomic losses, and further limited to strict liability claims only, the provision would likely be ineffectual in its purpose.

recovery on actual, economic losses would be allowed. This plan seems less harsh than those drawn from Indiana's Medical Malpractice Act, because it provides complete compensation for the injured's pecuniary losses. Under the Indiana plan, victims who have losses exceeding the \$500,000 cap, whether economic or noneconomic, must somehow bear the excessive amount. The limit in the California model applies only to awards for pain and suffering, disfigurement, inconvenience, and other non-pecuniary damages.²⁵⁹ Although the victim may have actually suffered these losses, the lack of reimbursement for the harm is not financially detrimental to the victim.

Since the plaintiff is being compensated completely for economic losses, the cap for noneconomic losses may be set lower than the \$500,000 absolute limit previously discussed, yet still allow a substantial recovery. This approach would satisfy the objective of the legislature, which is to reduce the defendant's insurance costs by limiting their exposure.

B. Compensation Fund

The compensation fund provided by Indiana's Medical Malpractice Act²⁶⁰ would be valuable in the proposed reform of the Product Liability Act if the fund were created by levying an annual surcharge on all Indiana manufacturers and sellers.²⁶¹ If damages are awarded in a product liability action against a qualifying²⁶² manufacturer, only the first \$100,000²⁶³ will be paid by the manufacturer's insurance. The balance of the award would be paid either from other defendants or from the compensation fund.²⁶⁴ This insurance-type program removes the individual insurers from the risk of high exposure; thus, allowing them to reduce their rates. This provision would also assure that the imposition of a liability cap will not simply result in unwarranted protection for foreign manufacturers at the expense of Indi-

259. See *supra* note 195.

260. IND. CODE ANN. § 16-9.5-4-1 (West 1984 & Supp. 1986).

261. IND. CODE ANN. § 16-9.5-4-1(b) (West 1984 & Supp. 1986). In the Medical Malpractice Act, the surcharge was levied on all health care providers. This provision could operate the same in the product area.

262. A manufacturer would qualify in the same manner that health care providers qualify according to IND. CODE ANN. § 16-9.5-2-1 (West 1984 & Supp. 1986).

263. See IND. CODE ANN. § 16-9.5-2-2(b) (West 1984 & Supp. 1986). The legislature may want to raise this figure if a California-type cap is imposed, which requires payment for all economic damages. Moreover, the level of the fund can be regulated if necessary by adjusting the annual surtax. See IND. CODE ANN. § 16-9.5-4-1.1 (West 1984 & Supp. 1986). If possible, an attractive vehicle to increase this fund would be to require all punitive damages awarded against manufacturers or sellers be paid into the compensation fund. Since the purpose of exemplary damages is to punish and not to compensate, an argument could be made that the plaintiff is not being deprived a right to the award.

264. IND. CODE ANN. § 16-9.5-2-2(c) (West 1984 & Supp. 1986).

ana plaintiffs. If a manufacturer seeks protection under the statute, it must actively participate in the compensation program.

C. Other Provisions

California's modification of the collateral source rule²⁶⁵ is a purposeful tool to decrease liability exposure. As previously discussed,²⁶⁶ the jury will be allowed to hear evidence that the plaintiff received payments from other sources.²⁶⁷ Consequently, the jury may weigh this evidence in determining the amount of damages.²⁶⁸ Indiana has already adopted a similar collateral source rule²⁶⁹ for personal injury and wrongful death actions. Indiana's recently adopted rule applies to product liability cases and will effectively aid in distributing the burden of accidental injuries caused by defective products.

The establishment of limitations placed on attorney's contingent fees has a rational basis. Both Indiana²⁷⁰ and California²⁷¹ have enacted constitutional restrictions that help preserve the plaintiff's diminished award.²⁷² Since either variation would effectively perform its function, there is no apparent reason not to use the form already chosen by Indiana. Furthermore, if the compensation fund is used, the Indiana-type fee limitation would be most adaptable.

The aspect of the review board, though an appropriate mechanism for providing an expert opinion and encouraging settlements in medical malpractice actions, is not easily adaptable to product liability acts. Malpractice plaintiffs often find it difficult to obtain the extremely technical expert testimony vital to a fair adjudication of their claims.²⁷³ Plaintiffs in product actions are not faced with the same unavailability of witnesses. The remaining benefits of this provision — serving to encourage settlements and facilitating fact finding²⁷⁴ — would apply to product liability claims as well. The

265. CAL. CIV. CODE § 3333.1(a) (West 1970 & Supp. 1986).

266. See *supra* note 213.

267. CAL. CIV. CODE § 3333.1(a) (West 1970 & Supp. 1986).

268. *Fein*, 38 Cal. 3d at 164-65, 695 P.2d at 684-85, 211 Cal Rptr. at 388.

269. IND. CODE ANN. § 34-4-36 (West 1983 & Supp. 1986). This section provides for admission into evidence of collateral source payments, but excludes certain payments of life insurance or death benefits. The section also excludes certain payments made by the State of Indiana or the United States. *Id.* Evidence of money that the plaintiff must repay as a result of the collateral benefits is admissible, as well as evidence of the plaintiff's cost to receive such collateral benefits. *Id.*

270. IND. CODE ANN. § 16-9.5-1-1 (West 1970 & Supp. 1986).

271. CAL. BUS. & PROF. CODE § 6146(a) (West 1970 & Supp. 1986).

272. *Johnson*, 273 Ind. at 402, 404 N.E.2d at 602.

273. *Id.* at 397, 404 N.E.2d at 596. (Unbiased medical opinions were not readily available to the litigants.).

274. See Note, *Constitutionality of the Indiana Medical Malpractice Act: Re-Evalu-*

establishment of a review board comprised of technically trained hearing officers for product cases has been suggested as a reform method by insurance companies.²⁷⁵

The reform method of disallowing specified damage amounts in the pleadings²⁷⁶ is logical. The Indiana Legislature's belief that the amount of damages pleaded influences jury awards is easily transferable from malpractice litigation to product actions. This rule should be included in the reform proposals to insure that awards accurately assess the jury's appraisal of the manufacturer's liability.

The statute of limitations in the Medical Malpractice Act²⁷⁷ is designed for specific purposes which arise from the nature of malpractice acts. An exception to the two-year limit was made for children under six years of age. Children under this age may be victims of malpractice, but may be unable to communicate the nature of their health problems to their parents.

These provisions are inapplicable to a product action. Though more restrictive, the medical malpractice statute of limitations does not contemplate the special circumstances surrounding some product injuries. Whereas an injury resulting from malpractice will generally manifest itself within two years, the possibility of latent product defects requires the ten-year statute of repose found in the Product Liability Act.²⁷⁸ In fact, the statutes of limitations and repose provided in the current Product Liability Act are best suited to fairly accommodate product-related injuries; therefore, no change is necessary.

In sum, any of the provisions recommended in this section would aid in reducing the extent of liability for makers and sellers of products. Of the alternatives available for imposing the cap, California's model seems to be most equitable, though the legislature may opt for a more restrictive cap if deemed necessary. The compensation fund should be adopted as a valuable mechanism for limiting the extent of exposure. The modification of the collateral source rule and the prohibition against pleading a specified amount of damages allow the juries to more accurately assess damages; therefore, the legislature should incorporate them into the Product Liability Act. Fi-

ated, 19 VAL. U.L. REV. 493, 514-15 (1985) (adding that the admissibility at trial will encourage litigants to be better prepared for the review process).

275. Cohen, *Trends & Issues, Current Directions in Products Liability Law*, 1 J. OF PROD. LAW 50, 51 (1982) (listing eight suggestions by insurance companies and products manufacturers).

276. IND. CODE ANN. § 16-9.5-1-6 (West 1984 & Supp. 1986).

277. IND. CODE ANN. § 16-9.5-3-1 (West 1984 & Supp. 1986).

278. Indiana's statute of repose is a period of limitations that commences when the product is delivered to the first consuming entity. *Whittaker v. Federal Cartridge Corp.*, 466 N.E.2d 480, 482 (Ind. App. 1984).

nally, the contingent fee limitation is a natural response to legislation which has diminished the amount of possible recovery. A provision of this type should logically be included with the other proposals of this section.

VI. CONCLUSION

Although strict product liability was once a responsive doctrine to societal needs, changed circumstances have vitiated the earlier needs. At the same time, burdens posited on manufacturers have created significant problems. The high cost or unavailability of adequate liability insurance coverage is causing a detrimental impact on businesses. The Indiana Supreme Court and the Indiana Legislature have made apparent attempts to restrict the scope of liability for product manufacturers.

The liability insurance problem in the products area is analogous to the medical malpractice crisis which was first recognized in the 1970's. Tremendous increases in malpractice insurance premiums prompted legislative enactments to protect the viability of the health care industry. Indiana's Medical Malpractice Act, which placed an absolute limit on the amount of damages recoverable, has ameliorated the situation in Indiana. Other jurisdictions have adopted similar recovery caps, applying a limitation on general damages, but allowing full recovery for actual, pecuniary losses. California's statute, which uses this latter approach, withstood a constitutional challenge before the United States Supreme Court. In addition to recovery caps, various other restrictive provisions have been employed to ease the liability burden faced by the medical profession.

Since Indiana lawmakers have recently taken a restrictive approach to the product liability laws in an effort to protect manufacturers, the legislature could consistently adopt provisions from the medical malpractice acts. By amending the Products Liability Act to include a recovery cap, the legislature could mitigate the consequences of strict liability, while still holding manufacturers responsible for the safety of their products. Other methods utilized in the medical malpractice area could also be incorporated into the products liability statute to help restore a proper judicial balance. Just as the legislature recognized the threats posed to health care services, it must now reevaluate the stability of our business enterprises and consider remedial legislation.

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