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## Mitigating Alcohol Health Hazards Through Health Warning Labels and Public Education

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## MITIGATING ALCOHOL HEALTH HAZARDS THROUGH HEALTH WARNING LABELS AND PUBLIC EDUCATION

Alcohol is the most commonly abused drug in America today; yet, there has been no serious national effort to warn or educate the American public about the non-obvious dangers of its consumption.<sup>1</sup> Courts refuse to impose liability on alcoholic beverage manufacturers for injuries arising out of their failure to warn consumers of the dangers of alcoholic beverages.<sup>2</sup> They reason that the risks of alcohol consumption are widely known among the consuming public.<sup>3</sup> Yet, Americans are actually less aware of the dangers of alcohol consumption than of the risks of smoking.<sup>4</sup>

This problem may be solved in several ways. A first step would be to impose tort liability on manufacturers for harm to consumers due to failure to warn. A second step would involve federal regulatory action. Congress could institute a national, uniform public education and labeling program which would make specific health hazard messages available to all alcoholic beverage consumers.<sup>5</sup> Two bills requiring such health hazard warnings on the labels of all alcoholic beverage containers were recently introduced in Congress.<sup>6</sup> If enacted, they could provide consumers with the same basic information on alcohol that is available on most other legal drugs, as well as identify specific dangers associated with alcohol. By expanding the proposed legislation to include a public education program, Congress could decisively promote public awareness.

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1. S. 2047, 100th Cong., 2d Sess., 134 CONG. REC. S663 (daily ed. Feb. 4, 1988). This bill explains the dangers of alcohol and the nation's efforts to cope with the problem.

2. Moreover, until recently, no judge had held a tobacco company liable for the health effects of smoking. *See, e.g., Sitomer, Despite Setbacks in Court, Tobacco Foes are Optimistic*, Seattle Times, Feb. 15, 1988, at A11, col. 1.

3. *See, e.g., Garrison v. Heublein, Inc.*, 673 F.2d 189, 192 (7th Cir. 1982) (dangers of alcohol consumption are common knowledge; therefore, manufacturer has no duty to warn).

4. S. 9331-03, 99th Cong., 2d Sess., 132 CONG. REC. 9331 (daily ed. July 1, 1986) (citing a recent report from the National Center for Health Statistics).

5. *Id.* A 1984 Roper survey of alcohol problems showed that 64% of business, government, and military leaders, 68% of the public, and numerous health and consumer organizations endorse health warning labels on alcoholic beverage products.

6. S. 2047, 100th Cong., 2d Sess., 134 CONG. REC. S663 (daily ed. Feb. 4, 1988) (bill to require a health warning on the labels of all alcoholic beverage containers). A bill entitled "A bill to amend the Federal Food, Drug, and Cosmetic Act to require a health warning on the labels of bottles containing alcoholic beverages" was introduced in Congress on April 21, 1988. H.R. 4441, 100th Cong., 2d Sess., 134 CONG. REC. H2472-06 (daily ed. Apr. 21, 1988).

## I. THE SCOPE OF THE ALCOHOL PROBLEM IN THE UNITED STATES

The alcohol abuse problem in the United States rivals the tobacco problem in the health hazards it poses. Alcoholic beverage consumption has been linked to serious medical problems in pregnant women, youths, and others susceptible to risk. Media advertising that stimulates alcohol consumption, without providing attendant warnings, exacerbates these problems.

### A. *Current Medical Evidence of the Dangers of Alcohol Consumption*

Excessive or even moderate alcohol consumption causes significant health problems in the United States.<sup>7</sup> Modern medicine views alcoholism as a disease, not a product of "moral weakness," as many believe.<sup>8</sup> Both excessive *and* moderate use of alcoholic beverages have been linked to liver, pancreatic, gastrointestinal, and neurological diseases.<sup>9</sup>

Excessive consumption of alcohol causes hypertension and heart disease.<sup>10</sup> Alcohol consumption also causes fetal alcohol syndrome ("FAS"), a disease consisting of physical, mental, and behavioral abnormalities.<sup>11</sup> FAS is the third leading cause of birth defects in the United States, yet many Americans are unaware of this danger.<sup>12</sup>

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7. An estimated 18.3 million Americans are "heavy" drinkers. The National Institute on Alcohol Abuse and Alcoholism defines "heavy" drinking as consuming more than 14 drinks per week. Moreover, the number of American adults with symptoms of alcoholism has risen at least 8.2% since 1980. S. 2047, 100th Cong., 2d Sess., 134 CONG. REC. 663 (daily ed. Feb. 4, 1988).

8. M. MOORE & D. GERSTEIN, *ALCOHOL AND PUBLIC POLICY: BEYOND THE SHADOW OF PROHIBITION 10* (1981).

9. *Hon v. Stroh Brewery Co.*, 835 F.2d 510, 511 n.2 (3d Cir. 1987) (affidavit of Dr. Plotnick, a toxicologist and pharmacologist). Nearly 25,000 annual liver cirrhosis deaths result from the use of alcohol; one-half of these deaths occur in drinkers who are alcoholics. Persons who consume an average of three to four drinks daily over a long period are also at risk of developing liver disease. M. MOORE & D. GERSTEIN, *supra* note 8, at 82. Heavy alcohol use is as strongly associated with cirrhosis of the liver as smoking is linked with lung cancer. *Id.* at 213.

10. M. MOORE & D. GERSTEIN, *supra* note 8, at 213.

11. Fetal Alcohol Syndrome ("FAS") is a leading cause of mental retardation, growth retardation, central nervous system disorders, craniofacial dysmorphism, and limb and joint abnormalities. The number of women who continue to drink during pregnancy may be as high as nine percent.

12. In 1981, the Surgeon General officially advised women to abstain from consuming alcohol during pregnancy; yet, "a 1985 Government survey revealed that only 57% of Americans had even heard of Fetal Alcohol Syndrome." S. 2047, 100th Cong., 2d Sess., 134 CONG. REC. S663 (daily ed. Feb. 4, 1988). FAS is one of the only preventable causes of birth defects. *Id.* Studies indicate that "all of the reported cases of FAS have occurred in children of chronic alcoholic mothers who drank heavily throughout pregnancy." Balisy, *Maternal Substance Abuse: The Need to Provide Legal Protection for the Fetus*, 60 S. CAL. L. REV. 1209, 1212 (1987). While

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Even moderate consumption of alcohol poses significant chronic health risks to users. Moderate alcohol consumption has been linked to heart disease,<sup>13</sup> breast cancer,<sup>14</sup> stroke,<sup>15</sup> and oral cancers.<sup>16</sup> In addition, excessive alcohol consumption is linked to thousands of overdose deaths, traffic fatalities, and suicides each year.<sup>17</sup>

Alcohol consumption by the nation's youth has reached epidemic proportions. Moreover, most young people fail to recognize that alcohol is a drug that poses serious health risks.<sup>18</sup> An estimated thirty percent of all teenagers are affected by alcohol-related problems.<sup>19</sup>

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heavy alcohol consumption is most strongly associated with fetal defects, moderate alcohol consumption is also correlated with lower birth weights and decreased motor and mental development in childhood. *Id.* at 1211; *see also Moss, Parents Sue Liquor Companies*, 74 A.B.A. J., Mar. 1988, at 17. Alcohol consumption by men during the month before conception has also been linked to lower birth weights in infants. Little & Sing, *Association of Father's Drinking and Infants Birth Weight*, 314 NEW ENG. J. MED. 1644 (1986) (letter to the editor).

13. While research shows that moderate consumption of alcohol actually decreases the incidence of ischemic heart disease, these studies inconsistently determine whether or when an increase in consumption beyond two drinks per day "ceases being 'protective.'" M. MOORE & D. GERSTEIN, *supra* note 8, at 213.

14. Several studies indicate that moderate alcohol consumption by women can increase the risk of breast cancer by up to 50%. *See Schatzkin, Alcohol Consumption and Breast Cancer in the Epidemiologic Follow-up Study of the First National Health and Nutrition Examination Survey*, 316 NEW ENG. J. MED. 1169 (1987).

15. For moderate drinkers, the risk of hemorrhage stroke is more than twice the risk of non-drinkers. S. 9331-03, 99th Cong., 2d Sess., 132 CONG. REC. 9331 (daily ed. July 21, 1986).

16. Alcohol consumption also causes cancer of the larynx, pharynx, and mouth; cancer locations vary according to the amount of daily alcohol consumption. Lower consumption of alcohol was found to cause cancer of the lips and glottis, while higher alcohol intake is more frequently associated with cancer of the epilarynx, hypopharynx, and the floor of the mouth. Brugere, *Differential Effects of Tobacco and Alcohol in Cancer of the Larynx, Pharynx, and Mouth*, 5 CANCER J. AM. CANCER SOC'Y 391 (1986).

17. M. MOORE & D. GERSTEIN, *supra* note 8, at 23, 213-14. Nearly 10,000 annual overdose deaths are attributed to alcohol. Moreover, an estimated 12,000 traffic fatalities per year are linked to driving while intoxicated. Alcohol is also present in approximately one-third of annual U.S. suicides.

18. In 1983, a National Weekly Reader Survey on Drugs and Alcohol showed that less than half of elementary school children recognized that alcohol was a drug. S. 2047, 100th Cong., 2d Sess., 134 CONG. REC. S663 (daily ed. Feb. 4, 1988). The tendency in young persons to label alcohol as a drug actually decreases as they enter high school. One study showed that 70% of fourth graders labeled alcohol as a drug, while only 20% of high school students think that alcohol is a drug. KING Radio 1090-AM Broadcast, Mar. 22, 1988 (tape on file at the *Washington Law Review*); *see also* N.Y. Times, Apr. 28, 1988, at 13, col. 1 (citing a report by the National School Boards Association on the rising number of children drinking more often and at a significantly earlier age, as early as eight years old). Alcohol abuse among teenagers has been linked to drug abuse, juvenile crime, health problems, automobile accidents, teenage suicide, and poor scholastic achievement. Alcohol-related automobile deaths are the leading cause of death in 15-24 year-olds. AMERICAN BAR ASSOCIATION, POLICY RECOMMENDATION ON YOUTH ALCOHOL AND DRUG PROBLEMS 5 (1985 & 1986 update) [hereinafter ABA POLICY RECOMMENDATION].

19. S. 2047, 100th Cong., 2d Sess., 134 CONG. REC. S663, S663 (daily ed. Feb. 4, 1988).

*B. Advertising and Marketing: The Media's Influence on Consumption of Alcohol in the United States*

Media advertising of alcoholic beverages attempts to stimulate consumption through an unrealistic portrayal of alcoholic beverage consumption.<sup>20</sup> Alcohol beverage commercials commonly present drinkers in social situations which depict drinking as socially acceptable, athletic, masculine, feminine, and romantic.<sup>21</sup> Critics of the advertising feel these commercials are often directed at youth, aggravating an already serious problem.<sup>22</sup> Alcoholic beverage advertising also tends to minimize the health risks associated with drinking.

The alcoholic beverage industry is unlikely to change its marketing strategy, unless compelled,<sup>23</sup> because it depends heavily on advertising to promote sales of its products.<sup>24</sup> A few large manufacturers compete intensely in the race to win consumers; therefore, any attempt to regulate the advertising of alcoholic beverages is likely to encounter strong opposition from the industry.<sup>25</sup>

## II. EXISTING COMMON LAW LIABILITY OF ALCOHOLIC BEVERAGE MANUFACTURERS

To date, courts have been reluctant to impose liability on alcoholic beverage manufacturers. Most courts follow the products liability

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20. ABA POLICY RECOMMENDATION, *supra* note 18, at 81. "[Fifty-seven] percent of the public favors banning alcohol advertising from the broadcast media." *Id.* at 80.

21. *Id.* at 80.

22. *Id.* at 83.

23. Alcoholic beverage manufacturers maintain that advertising is directed at brand selection rather than encouraging abuse and increased consumption. *Id.*

24. *Id.* at 82. The alcoholic beverage industry spends over \$750 million annually on product advertising. *Id.*; see also McBride, *Industry Structure, Marketing, and Public Health: A Case Study of the U.S. Beer Industry*, 1985 CONTEMP. DRUG PROBS. 593, 616.

An analysis of the modern history of the beer industry shows four main points about economic structure and marketing: One, the big producing companies have mounted enormous efforts to promote consumption of their products, and these efforts are increasing over time; Two, this massive marketing has been based on a sophisticated, complex, and long-run strategy which has two general components: a) the normalization—or better said, the universalization—of beer along with other alcoholic drinks, and b) a specific marketing strategy based on market segmentation and what we might call a concept of "total marketing"; Three, this marketing strategy is determined by the very nature of competition within this industry—that is, intense rivalry among a few giant monopolistic firms; in turn, this kind of marketing strategy reinforces the monopolistic position of the dominant firms; Four, as a result of the above factors, partial regulation of the industry is likely to have little effect on the incidence of alcohol-related problems; to be successful, an alcohol control strategy will have to redefine the place of alcohol in society and in particular will have to redefine the interests to which the industry is accountable.

*Id.* at 593–94.

25. McBride, *supra* note 24, at 617.

standard articulated in the *Restatement (Second) of Torts* (“*Restatement*”) Section 402A. They have held that manufacturers do not have a duty to warn because consumers are aware of the dangers of alcohol. The *Restatement* comments should be modified to incorporate newly discovered health information which would change the level of public awareness required to impose liability. Requiring alcoholic beverage manufacturers to compensate consumers for injuries suffered by those who were unaware of the risks involved in alcohol consumption could help to meet the public health problem.

### A. *The Duty To Warn of the Dangers of Alcohol Under Traditional Products Liability Law*

#### 1. *Most Courts Follow the Restatement Rule*

In their approach to suits against alcoholic beverage manufacturers, most courts follow the product liability standards in the 1965 version of § 402A of the *Restatement* and the guidelines and accompanying commentary.<sup>26</sup> A manufacturer is strictly liable for harm caused by an “unreasonably” dangerous product.<sup>27</sup> A product is unreasonably dangerous if it is in a defective condition and unsafe for the user or consumer.<sup>28</sup> A product may be in a legally defective condition if it fails to include necessary instructions for its proper use, even where the seller has exercised care to ensure correct preparation and sale of the product.<sup>29</sup> A product is also defective when the seller has reason to anticipate that the product may cause harm, even if properly made and used as intended, and the seller fails to include warnings to consumers.<sup>30</sup> A product is sufficiently dangerous to require a warning if an ordinary consumer with ordinary knowledge purchasing the prod-

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26. For example, in *Maguire v. Pabst Brewing Co.*, 387 N.W.2d 565 (Iowa 1986), the Iowa Supreme Court, applying § 402A, held that the brewery could not be held liable for failure to warn of the dangerous propensities of alcohol because it was not legally required to warn of “widely known risks” and because brewers could not practically devise warnings adequate for the particular tolerance of each consumer. *Id.* at 569. Similarly, a federal appeals court held that the dangers of alcohol consumption were common knowledge “to such an extent that the product cannot be considered to be unreasonably dangerous.” *Garrison v. Heublein*, 673 F.2d 189, 192 (7th Cir. 1982). The plaintiff had been injured by the consumption of the defendant’s product over a twenty-year period.

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

28. *Id.*

29. *Hon v. Stroh Brewery Co.*, 835 F.2d 510, 513 (3d Cir. 1987). Where a manufacturer “should have knowledge” that harm may result from a particular use, warnings must be provided regarding possible risks and limitations of the product. RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965).

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

uct would fail to realize its danger.<sup>31</sup> If an ordinary consumer knows of the potentially dangerous characteristics of a nondefective product, the seller has no duty to warn the consumer.

The commentary to § 402A concludes that the dangers of alcohol consumption are generally known and therefore require no warnings. In the twenty-three years since the *Restatement* was published, new evidence of the harmful effects of alcohol consumption has surfaced. This information is not widely known among the consuming public.<sup>32</sup> Yet, most courts continue to apply the *Restatement's* assumption that the ordinary consumer knows the dangers of alcohol. Consequently, they exonerate manufacturers under products liability law.<sup>33</sup>

Alcoholic beverages are not an "unreasonably dangerous" product under the *Restatement* view because they cannot be made entirely safe for consumption, and any risks posed by their consumption are generally known.<sup>34</sup> Even though alcohol consumption may cause harm, the *Restatement* would impose no duty on beverage manufacturers to warn of the dangers of consumption as long as the ordinary consumer is presumed to know the risk of harm. Once the manufacturer has properly manufactured the product, the consumer bears any known risks of harm from consuming the beverage.<sup>35</sup>

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31. *Id.*, comment i.

32. *See supra* notes 12-18.

33. *See Note, A Spirited Call to Require Alcohol Manufacturers to Warn of the Dangerous Propensities of Their Products*, 11 NOVA L. REV. 1611, 1618 (1987). Courts have been criticized for failing to consider changing scientific evidence in other contexts as well. For example, Justice O'Connor expressed disapproval of *Roe v. Wade*, 410 U.S. 113 (1973), for failing to consider changing medical technologies in prescribing a standard of review for abortion cases. *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (O'Connor, J., dissenting).

34. Note, *supra* note 33, at 1618. The RESTATEMENT (SECOND) OF TORTS § 402A (1965) cites "good whiskey" as an example of a product which is not unreasonably dangerous "merely because it will make some people drunk, and is especially dangerous to alcoholics." *Id.*, comment i. The reasons underlying this rule are that many products cannot be made "entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption." *Id.* The *Restatement* analogizes the dangers of consuming alcoholic beverages to the dangers involved in consuming foods containing saturated fats which, over time, may be harmful to the heart. According to the *Restatement*, a seller is not required to provide warnings for products, or their ingredients, which are "dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, or where the danger, or potentiality of danger, is generally known and recognized." *Id.*, comment j. The dangers of consuming alcoholic beverages are given as an example of which no warning is necessary. *Id.*

35. For example, in *Pemberton v. American Distilled Spirits Co.*, 664 S.W.2d 690, 692 (Tenn. 1984), a father claimed that the beverage his son consumed was an inherently dangerous product "unwholesome, poisonous, and unfit for human consumption in that it contained a content of pure grain alcohol far in excess of that which can be safely consumed by a human being." Following the *Restatement*, the court rejected this argument, because manufacturers are not required to warn of the "widely known" risks of alcohol consumption. *Id.* at 692.

Not all courts agree, however, that the ordinary consumer knows all of the long-term dangers of consuming alcohol. At least one court has indicated that it may depart from the *Restatement's* broad assumption of knowledge. In *Hon v. Stroh Brewery Co.*,<sup>36</sup> the Third Circuit reversed the trial court's summary judgment in favor of the beer manufacturer and held that an issue of fact existed as to whether beer is safe for consumption without a warning regarding the risks associated with moderate but prolonged use.<sup>37</sup> On remand, the trial court will determine whether manufacturers may be liable for failing to warn.

### 2. *The Need To Update the Restatement Presumption of Consumer Knowledge*

The comments of the *Restatement* that conclusively presume consumers know all the dangers of alcohol consumption address short-term effects of alcohol consumption, but ignore newly discovered health information about the more subtle health hazards associated with long-term consumption of alcohol. The *Restatement* view properly recognizes that a manufacturer has a duty to warn only when the ordinary consumer lacks knowledge about the danger in question. Alcoholic beverage manufacturers should not have the duty to warn of the obvious risk of intoxication from excessive short-term consumption of alcohol, such as driving while intoxicated.

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36. 835 F.2d 510 (3d Cir. 1987). The plaintiff's decedent died of pancreatitis after consuming two to three cans of beer per night on an average of four nights per week for the six years preceding his death. The court interpreted *Restatement (Second) of Torts* § 402A as stating only that "when the danger is known, no warning is required." *Id.* at 515. Thus, the court held, whether prolonged alcohol consumption created significant risks, and the public was unaware of those risks, was an open question. The Third Circuit in *Hon* merely applied the rationale underlying comment j in the same manner that it has been applied in Pennsylvania cases, such as *Stanton* by *Brooks v. Astra Pharmaceutical Prods., Inc.* 718 F.2d 553 (3d Cir 1981), involving the duty to warn of the dangers of other drugs. *Hon*, 835 F.2d at 516.

37. *Hon*, 835 F.2d at 514. Parents of children suffering from FAS have brought similar suits, arguing that beverage manufacturers should have warned them of the dangers of FAS. Four Washington State parents of children born with FAS have sued seven liquor companies. Moss, *Parents Sue Liquor Companies*, 74 A.B.A. J., MAR. 1988, at 17. These cases are believed to be the first suits against alcoholic beverage producers for claims involving FAS. The plaintiffs are suing on three theories of liability: Negligence, strict liability, and products liability. The children allegedly suffer from mental retardation, impaired growth, hyperactivity, facial and limb deformities, heart defects, and low IQ's. The plaintiffs claim that the manufacturers knew as early as 1968 of medical evidence showing a correlation between drinking alcohol and birth defects. Moss, *supra*. Medical studies showing that drinking is associated with FAS were first published in 1968 and 1973 in *Lemoine* and *Lancet*. Moss, *supra*. The plaintiffs argue that the manufacturers should have displayed health warning labels on their products describing the risks posed to fetuses by mothers who consume alcohol.



However, the more subtle hazards are not widely known to the American public.<sup>38</sup> The *Restatement's* presumption of consumer knowledge, which effectively negates any duty by alcoholic beverage manufacturers to warn of their products' health hazards, needs to be updated by recognizing recent scientific findings and the public's lack of awareness of these hazards. Modifying the *Restatement* presumptions as proposed would only impose liability on alcoholic beverage manufacturers who failed to warn of dangers which were known to the manufacturer but not by ordinary beverage consumers.

### *B. Tort Liability is a Partial Solution*

Courts like the Third Circuit in *Hon v. Stroh Brewery Co.*<sup>39</sup> may now be ready to impose liability on alcoholic beverage manufacturers for failing to warn of non-obvious dangers. But the impact of such a ruling is unpredictable. Relying on litigation pressures to encourage manufacturers to act provides no guarantee that the alcohol industry will initiate adequate and consistent health warning labels. Nor will it provide the necessary incentive for a vigorous public education program. Only congressional action will ensure broad disclosure of important health information.

## III. PENDING CONGRESSIONAL REQUIREMENTS FOR ALCOHOLIC BEVERAGE WARNINGS

Labeling alcoholic beverages with health warnings and promoting public education of alcohol-related risks are important steps toward alleviating the nation's alcohol problem. This approach has been successful in decreasing tobacco consumption. Congress might now be ready to require such a program for alcoholic beverages.

### *A. Proposed Federal Bills To Mandate Labeling on Alcoholic Beverages*

The United States House and the Senate have bills pending which require manufacturers to place rotating health warnings on the labels of all alcoholic beverage containers.<sup>40</sup> The warning labels would be

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38. See *supra* notes 12-18.

39. 835 F.2d 510 (3d Cir. 1987).

40. The current Senate bill would make it unlawful for any person to:

Manufacture, import, distribute, sell, ship, package, or deliver for sale, distribution or shipment, or otherwise introduce in commerce, in the United States, any alcoholic beverage . . . , unless the container of such beverage has a label bearing one of the following statements: Warning: The Surgeon General has determined that the consumption of this product, which contains alcohol, during pregnancy can cause mental retardation and other

conspicuously placed on alcoholic beverage containers. Five different labels would be used equally throughout the year.<sup>41</sup> Under the proposed Senate bill,<sup>42</sup> the Bureau of Alcohol, Tobacco, and Firearms (“BATF”), and under the proposed House bill,<sup>43</sup> the Food and Drug Administration (“FDA”), would have the power to enforce these requirements and issue necessary regulations. Violations of the statutory provisions would constitute a misdemeanor.<sup>44</sup>

Similar legislation has been supported by many public interest groups in the past.<sup>45</sup> However, resistance by alcoholic beverage industry special interest groups prevented its passage.<sup>46</sup> These special interest groups argue that the public knows of the potential dangers of alcohol use, and that labeling would serve no educational purpose and would mislead the public.<sup>47</sup> The proposed labels, however, contain warnings of dangers that the Surgeon General has determined to be supported by medical evidence.<sup>48</sup> Judging by the success that similar health hazard warnings have had on tobacco consumption, the alcohol labeling bill would be very helpful in providing needed warnings for the alcohol consuming public.

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birth defects; Warning: Drinking this product, which contains alcohol, impairs your ability to drive a car or operate machinery; Warning: This product contains alcohol and is particularly hazardous in combination with some drugs; Warning: the consumption of this product, which contains alcohol, can increase the risk of developing hypertension, liver disease, and cancer; Warning: Alcohol is a drug and may be addictive.

S. 2047, 100th Cong., 2d Sess., 134 CONG. REC. S663, S663 (daily ed. Feb. 4, 1988). These warnings would rotate throughout the year, similar to the rotation used by cigarette manufacturers.

41. *Id.*

42. *Id.*

43. H.R. 4441, 100th Cong., 2d Sess., 134 CONG. REC. H2472-06 (daily ed. Apr. 21, 1988).

44. S. 2047, 100th Cong., 2d Sess., 134 CONG. REC. S663, S664 (daily ed. Feb. 4, 1988). Conviction would result in a fine of not more than \$10,000.

45. This legislation has been endorsed by the American Medical Association, the American Academy of Pediatrics, the National Council on Alcoholism, the Center for Science in the Public Interest, the General Association of General Baptists, Mothers Against Drunk Driving, the American Council on Alcohol Problems, the National Rainbow Coalition, the National PTA, the Christian Life Commission of the Southern Baptist Convention, the Association for Retarded Citizens of the United States, and the National Woman's Christian Temperance Union. *Id.* at S664-66.

46. In 1979, the Senate passed a bill requiring warning labels on all alcoholic beverages, but the House of Representatives failed to pass this bill. In 1986, a similar bill introduced in Congress failed to pass. See Note, *supra* note 33, at 1627-28.

47. The Distilled Spirits Council of the United States opposes such legislation on the grounds that labels may “mislead” the public. Advocates of the bill argue that opponents fear that labels will reduce alcohol consumption. S. 9331-03, 99th Cong., 2d Sess., 132 CONG. REC. S9331, S9332 (daily ed. July 21, 1986) (Statement of Sen. Thurmond).

48. S. 9331-03, 99th Cong., 2d Sess., 132 CONG. REC. S9331, S9332 (daily ed. July 21, 1986); see also S. 2047, 100th Cong., 2d Sess., 134 CONG. REC. S663, S664 (daily ed. Feb. 4, 1988).

The 1988 Senate bill includes a liability 'savings' clause similar to that in the Smokeless Tobacco Act,<sup>49</sup> which reserves to consumers the right to bring suits in state and federal courts for injuries they may suffer as a result of a manufacturer's failure to warn them of a hazard about which the consumers were unaware.<sup>50</sup>

Current federal law prohibits alcoholic beverage manufacturers from disclosing alcohol content information.<sup>51</sup> A companion amendment to the proposed labeling legislation would mandate disclosure of alcoholic content of malt beverages on labels and would permit advertising of these beverages to disclose the product's alcohol content.<sup>52</sup>

### *B. Predicted Effects of Labeling Alcoholic Beverages*

The proposed mandatory labeling of alcoholic beverages would be a significant step toward educating the American public of the non-obvious dangers of alcohol consumption. It could effectively disseminate information to consumers, reduce consumption by those persons at risk, satisfy consumers' desire to know product dangers, and prevent promulgation of conflicting local standards for warnings.

First, although alcoholic beverages are dangerous, most people are unaware of the specific dangers.<sup>53</sup> The required labels, in conjunction with other educational efforts, would be a cost-effective means for informing consumers of the specific dangers of alcohol consumption.<sup>54</sup> Requiring warning labels on alcoholic beverages would cost the alco-

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49. Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. §§ 4401-4408 (Supp. IV 1986).

50. S. 2047, 100th Cong., 2d Sess., 134 CONG. REC. S663, S664 (daily ed. Feb. 4, 1988). Part D, "Public Awareness Concerning the Health Effects of Alcoholic Beverage Consumption," Section 550(i), "Liability," states that "[n]othing in this section shall be construed to relieve any person from any liability under Federal or State law to any other person." *Id.*

51. 27 U.S.C. § 205 (1982). When Adolph Coors Company recently attempted to inform the public through its advertisements about the alcoholic content of its product, the Bureau of Alcohol, Tobacco, and Firearms ("BATF") denied its application, citing a federal statute prohibiting alcoholic beverage manufacturers from disclosing alcohol content on beer labels or in advertising. Moss, *How Much Alcohol in Beer?*, 73 A.B.A. J., Nov. 1987, at 36 (27 U.S.C. § 205 prohibits beer and malt beverage manufacturers from disclosing the alcohol content of beer or malt beverages on labels or in advertisements). Adolph Coors Company has filed suit challenging this federal regulation on the grounds that it violates its First Amendment right to inform the public of the percentage of alcohol in its product. Coors conducted a public opinion poll in 1984 which showed that 95% of consumers wanted to know the alcohol content in their beer. *Id.* at 36.

52. S. 9331-03, 99th Cong., 2d Sess., 132 CONG. REC. Exhibit 1 (daily ed. July 21, 1986).

53. *See supra* notes 12-18.

54. *See* S. 2047, 100th Cong., 2d Sess., 134 CONG. REC. S663, S663 (daily ed. Feb. 4, 1988) (statement of Sen. Thurmond).

holic beverage industry little,<sup>55</sup> yet it would effectively disseminate information to consumers.<sup>56</sup> Warning labels designed to inform consumers of the subtle, non-obvious and long-term effects of alcohol consumption would enable them to make educated choices before exposing themselves to risk. For example, FAS is one significant non-obvious, long-term effect of alcohol for pregnant women. The traditional view has been that young women face the problem of learning how much they can drink.<sup>57</sup> Pregnant women, believing their decision affects only themselves, make choices that significantly affect the well-being of their fetuses as well. In light of the widespread ignorance of the risk of FAS, adequate and effective warnings of that risk must be made to women early in their first trimester.<sup>58</sup> Because many pregnant women do not seek medical care right away, or do not receive information on FAS from their doctors, they must be told by alcoholic beverage producers to abstain from consuming alcohol when they have reason to believe they are pregnant.<sup>59</sup> Labeling would provide a cost-effective means of disseminating this information directly to at-risk women.

Consumers who would be exposing themselves to an unacceptable risk by drinking alcoholic beverages would likely respond to the proposed warnings of adverse health effects by reducing their consumption. When, in 1979, the Surgeon General reported that smoking is addictive, causes lung cancer, and harms fetuses,<sup>60</sup> more Americans tried to quit smoking during the two-week period following the report than had tried to quit during any two-week period since 1964, when the first health hazard report was issued.<sup>61</sup>

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55. The estimated cost to the tobacco industry of using a rotational warning label system similar to the proposed alcohol labels is less than one million dollars, or 0.0004 cents per cigarette pack. Comment, *Judicial and Legislative Control of the Tobacco Industry: Toward a Smoke-Free Society?*, 56 U. CIN. L. REV. 317, 326 n.51 (1987) (citing Milio, *Health Policy and the Emerging Tobacco Reality*, 21 SOC. SCI. MED. 603, 607 (1985)).

56. S. 9314-02, 99th Cong., 2d Sess., 132 CONG. REC. S9314 (daily ed. July 17, 1986).

57. *Maguire v. Pabst Brewing Co.*, 387 N.W.2d 565, 570 (Iowa 1986) (quoting M. SANDMAIER, *THE INVISIBLE ALCOHOLICS: WOMEN AND ALCOHOLISM* (1980)).

58. *See* S. 2047, 100th Cong., 2d Sess., 134 CONG. REC. S663, S664-65 (daily ed. Feb. 4, 1988) (quoting a letter from the American Academy of Pediatrics to the effect that alcohol consumption poses significant risks of FAS).

59. Goeringer & Morosco, *Preventing Fetal Alcohol Syndrome*, ALCOHOL HEALTH AND RES. WORLD, Fall, 1983, at 31.

60. S. 9314, 99th Cong. 2d Sess., 132 CONG. REC. S9314 (daily ed. July 17, 1986) (statement of Sen. Kerry).

61. *Id.*

Consumers want to know this health information and are accustomed to obtaining it by reading labels on other types of products.<sup>62</sup> The warning labels on alcoholic beverages would allow consumers to make an informed decision to use the product, similar to the choice made about other labeled products, such as tobacco, aspirin, and tampons.<sup>63</sup>

A uniform national standard will also provide consistency by preempting states from adopting local standards. An increasing number of cities already require health warnings in places serving alcohol.<sup>64</sup> A regulation similar to that imposed on the tobacco industry would serve the public's need for disclosure of the hazards of alcohol consumption while protecting alcoholic beverage manufacturers from the burden of complying with conflicting requirements. National regulations will thus benefit alcohol manufacturers through uniformity.

### C. *Comparison With Successful Federal Regulation of the Tobacco Industry*

The problems addressed by the proposed alcohol labeling statute are similar to those addressed in statutes aimed at the tobacco industry. An examination of the tobacco industry regulations provides useful insights into the potential effect of the proposed alcohol industry statute.<sup>65</sup>

In 1965, Congress passed the Federal Cigarette Labeling and Advertising Act ("CLAA").<sup>66</sup> This act had two objectives. First, Congress wished to fully inform the public that cigarette smoking may

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62. See Schmid, *Shoppers Want Labels That Will Tell It Like It Is*, Seattle Times, Apr. 20, 1988, at D4, col. 1.

63. *Id.*

64. In Philadelphia and New York, all alcohol servers must display warning signs regarding FAS. ABA POLICY RECOMMENDATION, *supra* note 18, at 86-87 n.415. Recent trends in requiring warnings about the dangers of alcoholic beverages include point-of-sale warnings about the dangers of alcoholic beverage consumption in markets, restaurants, bars and taverns. California has recently enacted "Proposition 65," a law requiring warnings about dangerous chemicals, including ethyl alcohol in alcoholic beverages. Reinhold, *New Law Will Warn Californians of Chemical Risks of Modern Life*, N.Y. Times, Feb. 22, 1988, at 1, col. 1 (national ed.). Proponents of this law call it "the dawn of a new environmental age that will sweep east across the country." *Id.* Critics of the law feel that companies, in fear of lawsuits, will be forced to provide consumers with an "overdose" of confusing, costly and redundant warnings. *Id.* at 10, col. 3. The wine industry is particularly opposed to warning labels on bottles because they brand wine "a hazardous concoction." *Id.* at 10, col. 5.

65. Thirty-three million Americans have quit smoking since 1970 as a result of advertising bans and warning labels. S. 9314, 99th Cong., 2d Sess., 132 CONG. REC. S9323 (daily ed. July 17, 1986) (statement of Sen. Kerry).

66. 15 U.S.C. §§ 1331-1340 (1982).

be hazardous to health.<sup>67</sup> Second, Congress wanted to avoid “diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to smoking and health.”<sup>68</sup> The act accomplished this dual purpose by requiring that particular rotating warnings be placed on cigarette packages and in advertisements of cigarettes. The CLAA preempts states from imposing additional labeling requirements; however, it does not prevent cigarette manufacturers from adding warnings to labels.<sup>69</sup>

Interestingly, the CLAA failed to indicate whether state common law tort claims challenging the adequacy of health warnings could be brought against tobacco manufacturers. So far, the tobacco industry has successfully cited federal preemption as a defense against state law claims of inadequate warnings.<sup>70</sup> Currently, authorities are split over whether cigarette manufacturers who obey federally mandated labeling requirements can be sued under state law for not adequately warning consumers of the dangers of smoking.<sup>71</sup>

The Federal Communication Commission (“FCC”), through the fairness doctrine,<sup>72</sup> aided the tobacco hazard awareness program by imposing a requirement for equal access on media which carry cigarette advertisements. The tobacco industry has traditionally relied heavily on advertising. In 1967, an FCC ruling required television and radio stations that carried cigarette commercials to grant equal air time to anti-smoking forces.<sup>73</sup> Counteradvertising, under the fairness doctrine, proved to be effective for informing the consumers of the

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67. *Id.* § 1331.

68. *Id.* § 1331(2).

69. *Id.* § 1334(b).

70. See Comment, *supra* note 55, at 318. The Third Circuit held that federal preemption prohibits state law claims relating to inadequate warnings and advertising or promotional activities by tobacco companies. *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 907 (1987); see also *Roysdon v. R.J. Reynolds Tobacco Co.*, 623 F. Supp. 1189 (E.D. Tenn. 1985) (CLAA preempts common law claims for failure to warn because such claims are incompatible with the act). *But see Palmer v. Liggett Group, Inc.*, 633 F. Supp. 1171 (D. Mass. 1986) (CLAA does not preempt state common law actions). The Comprehensive Smokeless Tobacco Health Education Act of 1986 imposes similar health warning labeling requirements on smokeless tobacco products. After pressure from the Smokeless Tobacco Institute, Congress provided a “preemption” clause similar to its cigarette counterpart. This time, however, Congress included a “savings” clause which states that, by preempting state and local laws requiring additional warnings, Congress did not intend to preempt product liability suits based on failure to warn. Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. §§ 4401–4408 (Supp. IV 1986).

71. See *supra* note 70.

72. Communications Act of 1934, 47 U.S.C. § 301 (Supp. IV 1986).

73. S. 9314, 99th Cong., 2d Sess., 132 CONG. REC. S9314, S9318–19 (daily ed. July 17, 1986) (statement of Sen. Kerry).

health risks of tobacco.<sup>74</sup> The counteradvertising seriously impacted the cigarette industry during 1968 and 1969, when cigarette smoking declined sharply.<sup>75</sup> Subsequently, cigarette manufacturers voluntarily removed their commercials from broadcast media, to avoid the free counter-advertising.<sup>76</sup>

#### IV. DEFICIENCIES IN THE PROPOSED ALCOHOL HEALTH WARNINGS STATUTE

Although the current bills before Congress would provide needed warning labels, they suffer from several deficiencies. The proposed warnings do not warn of all the non-obvious dangers of alcohol. The proposed statutes also fail to provide for public education or regulation of misleading advertising. Finally, the proposed statutes do not adequately define alcoholic beverage manufacturers' liability.

##### A. *The Proposed Warnings Are Inadequate*

The currently proposed warnings fail to warn of all of the known, non-obvious dangers of alcohol. For example, the proposed warnings do not warn of the danger of developing pancreatitis. Thus, the decedent in *Hon v. Stroh Brewery Co.*<sup>77</sup> would not have been warned of this danger, even if the proposed warning labels had been available. The proposed statute should require the Surgeon General and the Food and Drug Administration ("FDA") to periodically review the health hazards of alcohol consumption and update the list of required warnings.

The proposed bills should also require ingredient labeling on alcoholic beverages. Alcoholic beverage containers do not always specify that the beverage contains alcohol. Thus, alcoholic beverages can look deceptively like ordinary soft drinks. Current federal regulations of the alcoholic beverage industry do not require ingredient, including alcohol content, labeling.<sup>78</sup> Ingredient labels are provided on nearly all other types of prepared foods and beverages. The FDA requires content labeling on food products and cosmetics.<sup>79</sup> Most drugs carry

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74. *Id.*

75. *Id.*

76. *Id.* In 1982, advertising of cigarettes by the tobacco industry was banned on radio and television. 15 U.S.C. § 1335 (1982).

77. 835 F.2d 510 (3d Cir. 1987).

78. *See, e.g., Kaizer, I'd Like to Read the Label But It Isn't There*, 33 MED. TRIAL TECH. Q. 47, 47 (1986).

79. *Id.*

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warnings of possible side effects.<sup>80</sup> There is even a labeling requirement for dog food.<sup>81</sup> In 1975, however, the BATF decided that ingredient labeling of alcoholic beverages was not necessary, citing reasons such as cost, lack of consumer interest, and the effect on foreign trade.<sup>82</sup> This ruling denies consumers essential information and should be corrected by the proposed legislation.

### *B. Additional Public Education Is Needed To Alleviate the Alcohol Problem*

A requirement for warning labels will partially protect consumers from unknowingly exposing themselves to alcohol-related hazards and protect manufacturers from the expense of complying with conflicting labeling requirements. The current bill, however, should be expanded to provide for a wider range of educational programs.

Labeling is an important first step toward educating consumers about alcoholic beverages; however, not everyone reads warning labels. Education is the most effective way to provide specific people who engage in specific drinking activities with the necessary information to make informed decisions.<sup>83</sup> In particular, youths and pregnant women, who often are not aware of the health risks of consuming alcohol, must be educated about the dangers.

To educate Americans adequately about the risks of using alcohol, Congress should earmark federal excise taxes on alcoholic beverages for public information campaigns and other educational programs. Current educational measures have proven ineffective and the alcohol problem continues to grow, perhaps because the current education program is largely undermined by the alcohol industry's promotional advertising.<sup>84</sup> The effect of advertising on alcohol consumption and education needs to be examined and addressed in any legislation designed to ameliorate alcohol related health hazards.

### *C. The Need to Regulate Alcoholic Beverage Advertising*

Advertising is a powerful means for alcoholic beverage producers to stimulate demand for their products. It could also be an effective means for educating the public. Yet, little formal regulation of alco-

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80. *Id.*

81. *Id.* at 57.

82. *Id.* at 51, 52.

83. See e.g., KING Radio 1090-AM Broadcast, *supra* note 18.

84. M. MOORE & D. GERSTEIN, *supra* note 8, at 89-96. Current educational efforts include school programs, mass media information campaigns, and community based health information and training.



holic beverage advertising exists, either to inhibit manufacturers or to educate the public.<sup>85</sup> A ban on television advertising could be as effective in decreasing alcohol consumption as it was for tobacco use. Both the beverage industry and the broadcast media would oppose such a ban. A complete ban on advertising might also meet constitutional barriers.<sup>86</sup> By requiring in the proposed legislation that the alcoholic beverage industry refrain from misleading "glamour" advertising, and by implementing a consumer alcohol awareness education program through advertising on television, Congress could effectively ensure that the public is equipped to make informed decisions regarding alcohol consumption.

#### *D. The Proposed Statute Does Not Adequately Define Alcoholic Beverage Manufacturers' Liability*

The pending Senate bill contains a "savings clause" that permits suit against alcoholic beverage manufacturers under state or federal law for failing to warn consumers of a non-obvious danger of alcohol.<sup>87</sup> That provision leaves open a number of questions. Under the *Restatement* view that most state and federal courts will follow, manufacturers may be liable for consumer injuries if the manufacturer failed to warn the consumer of a danger created by its product and the manufacturer had or should have had knowledge of the danger. The *Restatement* standard actually protects a manufacturer who provides a warning.<sup>88</sup> But, the *Restatement* fails to provide any guidelines on how to judge the adequacy of those warnings.<sup>89</sup>

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85. See Comment, *We Can Share the Women, We Can Share the Wine: The Regulation of Alcohol Advertising on Television*, 58 S. CAL. L. REV. 1107 (1985). Alcohol advertising is primarily regulated by the BATF, while the FCC has jurisdiction over television advertisements. Both agencies are concerned with preventing misleading or deceptive advertisements.

86. The cigarette advertising ban is considered an "aberration constitutionally" by those who feel that first amendment rights are violated by such bans. Tiajolloff, *Is Advertising Protected Under the First Amendment?*, 58 WISC. B. BULL., Aug. 1985, at 14. Many legal scholars and public officials feel that counter-advertising raises fewer constitutional issues and is more effective in educating the public. Comment, *supra* note 85. But see *Posadas De Puerto Rico Ass'n. v. Tourism Co.*, 106 S. Ct. 2968 (1986) (if Congress has power to ban sale of product or service, Congress may also have power to restrict advertising of the product or service); see also Comment, *Alcoholic Beverage Advertising and the First Amendment*, 52 U. CIN. L. REV. 861 (1983).

87. S. 2047, 100th Cong., 2d Sess., 134 CONG. REC. S663, S663 (daily ed. Feb. 4, 1988).

88. *Restatement (Second) of Torts* § 402A, comment j states: "Where warning is given, the seller may reasonably assume that it will be read and heeded . . . ."

89. The *Restatement* has been interpreted by courts to absolve the manufacturer of responsibility if the consumer fails to read the label. *Technical Chem. Co. v. Jacobs*, 480 S.W.2d 602, 606 (Tex. 1972) (no liability where a label containing no warning was provided and the consumer failed to read it).

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The adequacy of warnings has generally been deemed an issue of fact even where the warnings are required by the government.<sup>90</sup> Compliance with government regulations has been held to be admissible evidence on the issue of a warning's adequacy;<sup>91</sup> however, it is not conclusive.<sup>92</sup> Including the proposed alcohol health warning labels on their beverage containers will not, by itself, necessarily protect manufacturers from liability.

To avoid liability for their defective products, manufacturers must *effectively* warn consumers.<sup>93</sup> The proposed labeling system will not necessarily be effective in warning consumers of the hazards of alcohol consumption. Under the rotating warning label scheme, only one of several possible warnings appears on each alcoholic beverage container. Moreover, consumers may not be aware that the warnings actually rotate throughout the year and, therefore, may not take the time to read each container's warning. Consumers who drink in bars and restaurants will not usually see the labels on the products they drink. For any of these reasons, a consumer may never see the warning for a particular danger of consumption. A manufacturer may therefore comply with the mandatory warning requirements and still not effectively warn a consumer because the consumer did not see the pertinent warning on a particular container. Should the manufacturer still be liable or will courts consider the labels as a constructive warning to all consumers? The proposed labeling bill must resolve this question by explicitly defining circumstances under which alcoholic beverage manufacturers will be liable for failure to warn of a non-obvious danger of alcohol consumption.

Consistent with existing product liability law, Congress could shield manufacturers who comply with the proposed warnings from liability for those specific hazards which Congress finds the manufacturer *effectively* warned beverage consumers. But, Congress should find that particular warnings are effective only if the warning scheme provided

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90. See Sales, *The Marketing Defect (Warning and Instructions) in Strict Tort Liability, Duty to Warn and Other Current Issues*, 1980 DEFENSE RESEARCH INSTITUTE 7. An adequate warning must forcefully communicate a message that will cause a reasonable prudent person to exercise appropriate caution and must be in a form which will alert the reasonably prudent person. See, e.g., *Trimble v. Irwin*, 441 S.W.2d 818 (Tenn. 1968); *Bitumious Casualty Corp. v. Black and Decker Mfg.*, 518 S.W.2d 868 (Tex. Civ. App. 1974). The content of the warning must clearly convey the severity of the nature and extent of the danger. Other factors which establish the adequacy of warnings include the conspicuousness of the warning, the use of symbols rather than words, sufficient communication of the risk of harm, location of the warning, and the clarity of the warning. Sales, *supra* at 25-27.

91. See, e.g., *Simien v. S.S. Kresge Co.*, 566 F.2d 551, 554 (5th Cir. 1978).

92. See, e.g., *Raymond v. Riegel Textile Corp.*, 484 F.2d 1025, 1026 (1st Cir. 1973).

93. See *supra* note 90.

actual or constructive notice to the "ordinary" consumer of the particular hazard for which immunity from suit is sought. The proposed statute should therefore grant immunity only where the warning label system, coupled with a vigorous public education program, warned of that particular health risk. Any warning scheme that provided less should not shield manufacturers from liability.

## V. CONCLUSION

The non-obvious dangers of alcohol consumption poses a greater problem than generally acknowledged. Currently, courts do not hold manufacturers liable for damages for failure to warn of these subtle dangers. Alcoholic beverage manufacturers should be required to provide adequate warning to consumers. These warnings would benefit both consumers and manufacturers. They would help consumers make knowledgeable choices and shield manufacturers from liability.

Congress is moving to require manufacturers to provide needed warnings, but the current bills should also address public education and industry advertising. Manufacturers are in a position to most directly influence consumer choices. Failure by Congress to adequately address these concerns and to require manufacturers to act will not alleviate the nation's alcohol problem.

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