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Victor E. Schwartz

Liberty Mahshigian

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FILLING THE INTERSTATE COMMERCE GAP: WHY THE STATES CANNOT EFFECTIVELY ADDRESS PRODUCT LIABILITY REFORM

*Victor E. Schwartz**
*and Liberty Mahshagian***

INTRODUCTION

The liability insurance "crisis" of the 1980s spurred state legislatures to take a hard look at what the courts had done in developing and expanding rules of tort liability. More than thirty states enacted tort reform measures in 1986,¹ and at least six states have enacted measures thus far in 1987.² An issue that was once buried in the writings of legal scholars is now at the forefront of a national debate among doctors, nurses, midwives, day-care centers, architects, municipalities, insurance companies, lawyers and legislators.

While these groups debate whether there is a "liability crisis" and who is to blame, the average consumer thinks the legal system has gone too far. Sixty-nine percent of those polled in a Louis Harris Survey said it is too easy "for people to sue for damages when they think they have been injured or some wrong has been done to them."³ In 1986, sixty-two percent of California voters approved a measure limiting joint and several liability, the so-called "deep-pocket rule."⁴ Small-business owners, perhaps

* Partner in the law firm of Crowell & Moring, Washington, D.C. B.A., Boston University, 1962; J.D., Columbia University, 1965. Mr. Schwartz is the drafter of the Uniform Product Liability Act, former Chairman of the Working Task Force of the Federal Interagency Task Force on Product Liability and Chairman of the Federal Interagency Council on Insurance. He is also co-author of W. PROSSER, J. WADE & V. SCHWARTZ, *Cases and Material on Torts* (7th ed. 1982); author of V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* (2nd ed. 1986); and co-author of V. SCHWARTZ, P. LEE & K. KELLY, *GUIDE TO MULTISTATE LITIGATION* (1985); and co-author of V. SCHWARTZ, P. LEE, F. SOUK, K. KELLY & M. MULLEN, *PRODUCT LIABILITY: CASES AND TRENDS (P-H)*.

** Associate, Crowell & Moring. B.A., Stanford University, 1980; J.D., University of California, Hastings College of Law, 1983.

1. Alaska, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, North Carolina, New Hampshire, New Mexico, New York, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming. See Geisel and Taravella, "Tort Reform Explodes," *Bus. Ins.*, Aug. 18, 1986, at 1, col. 2.

2. Alabama, Arizona, Idaho, Nevada, New Jersey and Texas.

3. See 132 CONG. REC. S7604-05 (daily ed. June 16, 1986) (statement of Sen. Kasten, citing Harris Survey, June 9, 1986).

4. California voters approved Proposition 51 in a primary election on June 3, 1986. The findings and declaration of purpose section of the Act states that:

(a) The legal doctrine of joint and several liability, also known as "the deep-pocket rule," has resulted in a system of inequity and injustice that has threatened financial bankruptcy of local governments, other public agencies, private individuals and busi-

most severely affected by the U.S. liability system, have voted to recommend that Congress and the President enact federal product liability reform legislation.⁵

Even lawyers are taking a second look at the tort law system that, until now, they had fiercely defended against reform efforts. The American Bar Association established a panel, chaired by New York University law professor Robert B. McKay, to study the current tort law system and determine what changes, if any, should be made. In January 1987, this panel issued its recommendations to the ABA House of Delegates, the ABA's policy-setting body.⁶ At its mid-year meeting in February 1987, the 444-member House of Delegates endorsed almost all of the tort law reforms recommended by the Action Commission, including modification of the rule of joint and several liability and clearer, more stringent standards for awarding punitive damages.⁷

In the midst of this national debate, Congress is considering legislation to reform one area of tort law—product liability. Efforts to enact a federal product liability reform bill date back to the late 1970s. Rep. Preyer introduced the first legislation in the House of Representatives in 1980,⁸ and Sen. Kasten followed in the Senate in 1982.⁹ With the amount

nesses and has resulted in higher prices for goods and services to the public and in higher taxes.

(b) Some governmental and private defendants are perceived to have substantial financial resources or insurance coverage and thus have been included in lawsuits even though there was little or no basis for finding them at fault. Under joint and several liability, if they are found to share even a fraction of the fault, they often are held financially liable for all the damage. The people—taxpayers and consumers alike—ultimately pay for these lawsuits in the form of higher taxes, higher prices and higher insurance premiums.

(c) Local governments have been forced to curtail some essential police, fire and other protection because of the soaring costs of lawsuits and insurance premiums.

CAL. CIV. CODE § 1431.1 (West Supp. 1987).

In response to these concerns, the Act instigates the rule that "defendants in tort actions shall be held financially liable in closer proportion to their degree of fault." *Id.* Additionally, the Act states that reforms in tort liability laws are necessary to avoid "catastrophic economic consequences for state and local government bodies as well as private individuals and businesses." *Id.*

In any action for personal injury, property damage or wrongful death based on principles of comparative fault where noneconomic damages are requested (noneconomic damages are defined as "subjective, non-monetary losses" such as pain, suffering, loss of consortium, etc., CAL. CIV. CODE § 1431.2 (b)(2) (West Supp. 1987)), the liability of each defendant for noneconomic damages shall be several and not joint. Each defendant will be liable only for an amount of damages in direct proportion to his or her percentage of fault. *Id.*; see also REPORT OF THE SENATE COMM. ON COMMERCE, SCIENCE, AND TRANSPORTATION ON S. 2760, S. REP. NO. 422, 99th Cong., 2d Sess. 69 (1986) [hereinafter cited as SENATE REPORT ON S. 2760].

5. See WHITE HOUSE CONFERENCE ON SMALL BUSINESS FINAL RECOMMENDATIONS, Nos. 1, 9 and 44 (1986).
6. See AM. BAR ASS'N, REPORT OF THE ABA ACTION COMM'N TO IMPROVE THE TORT LIABILITY SYSTEM (1987) [hereinafter cited as ABA REPORT]. The Commission recommended, among other things, that some limits be placed on joint and several liability between multiple defendants, court review and disallowance of attorneys' fees and greater use of the judges' power to modify excessive verdicts. The Commission specifically rejected, however, the idea of absolute ceilings on monetary judgments. See Marcus, *ABA Panel Recommends Changes for Injury Suits*, Wash. Post, Jan. 12, 1987, at A3, col.
7. See Marcus, *ABA Votes Against Ceilings on Damage Awards*, Wash. Post, Feb. 18, 1987, at A5, col. 1
8. H.R. 7921, 96th Cong., 2d Sess. (1980).
9. S. 2631, 97th Cong., 2d Sess. (1982).

of tort reform activity occurring at the state level, why is the federal government intruding into an area of law that traditionally has been within the province of state courts and state legislatures?

This article will show that federal legislation is needed in the product liability area because piece-by-piece legislation in the states will not resolve the fundamental problem of the current product liability common law system—the lack of predictability for manufacturers and sellers whose products are sold and consumed throughout the country. In addition, this article will explain that federal legislation is appropriate in the product liability area because Congress already has recognized the need for national policy in the area of product safety.

UNIFORM PRODUCT LIABILITY RULES

The federal government has long recognized that liability rules for manufacturers and sellers relating to product injuries should be uniform throughout the states.¹⁰ A federal Interagency Task Force on Product Liability, chaired by the Department of Commerce, examined the product liability insurance “crisis” of the mid-1970s. It found the crisis was caused in part by the uncertainty in the law and standards of responsibility for manufacturers and product sellers.¹¹ This uncertainty lies in the fact that product liability rules vary from state to state, and because the rules were for the most part judicially created, even within a state the rules are constantly changing.

A second task force formed by the Department of Commerce found that “the ‘hodgepodge’ of rules in each of the 50 states makes it almost impossible to set [insurance] rates with any degree of confidence.” So it proposed a solution for this problem—the Uniform Product Liability Act,¹² a model product liability law for adoption by Congress or state legislatures.¹³ The concept was similar to that of the Uniform Commercial Code: states were to use this model act as their guide for product liability

10. In 1978, the Department of Commerce noted that Congress, especially the House of Representatives, appeared to have been sensitized to the product liability problem. More than 100 representatives have endorsed one form or another of a product liability tax reserve measure . . . and approximately 20 product liability bills were introduced in the first session. Options Paper on Product Liability, 43 Fed. Reg. 14,612, 14,613 (1978) [hereinafter cited as Options Paper].

In 1983, Sen. Kasten introduced S. 44, the proposed Products Liability Act. In his opening remarks, Sen. Kasten traced the extensive history of the bill, beginning with the development in 1979 of the Uniform Product Liability Act and continuing to the date of the introduction of S. 44. This discussion illustrates the attention that Congress has given the idea of a federal product liability law. See 129 CONG. REC. S283-84 (daily ed. Jan. 26, 1983).

For further discussion of these issues, see Schwartz and Mahshigian, “A Permanent Solution for Product Liability Crises: Uniform Federal Tort Law Standards,” 64 U. Denv. L. Rev. ____ (1987); Schwartz and Bares, Federal Reform of Product Liability Law: A Solution That Will Work, 13 CAP. U.L. REV. 351 (1984).

11. See U.S. DEP’T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT (May 1977) (noting that the instability in product liability law appears to have increased defense and investigation costs, and that insurance sales reflecting these increased costs are made on a nationwide, not a local basis).

12. Uniform Product Liability Act, 44 Fed. Reg. 62,714 (1979).

13. Options Paper, *supra* note 10, at 14,612, 14,624.

legislation. The rules of liability would have become uniform throughout the states, and manufacturers and product sellers would have been more able to predict their liability. The states, however, enacted varying rules and only bits and pieces of UPLA. The UPLA was not adopted in full by any state.¹⁴

STATE REFORM EFFORTS

The mid-1980s brought a new liability insurance "crisis," as insurance prices increased dramatically and insurance became unavailable for many.¹⁵ Ralph Nader and the organized plaintiff's bar claimed the insurance industry caused the crisis, but that accusation does not explain why liability costs skyrocketed for those who self-insured, as well as those who purchased commercial insurance.¹⁶ The liability insurance "crisis" of the 1980s was not confined to manufacturers and product sellers; it also affected doctors, lawyers and municipalities, among others.¹⁷

This time, the states took it upon themselves to enact legislation reforming tort liability rules.¹⁸ Uniformity of liability rules was not, however, an objective or a result of the 1986 tort reform activity by state legislatures. Instead, state legislatures focused on the liability problems confronting their own doctors, businesses and municipalities.¹⁹ Reform measures involved some issues that transcend all tort cases. Twenty states enacted measures to limit the amount of damages that could be awarded to injured persons in tort lawsuits.²⁰ These damage "caps" range from \$225,000²¹ to \$1 million.²²

Aside from the question of whether caps on damages are a fair or appropriate way of making tort liability more predictable, a cap on damages in one state does not provide a great deal of predictability for manufacturers and sellers of products that are distributed and consumed throughout the states.²³ Furthermore, in some states, the recovery caps apply only to medical malpractice lawsuits.²⁴

14. See SENATE REPORT ON S. 2760, *supra* note 4, at 8.

15. See Wermiel, *The Costs of Lawsuits, Growing Ever Larger, Disrupt the Economy*, Wall St. J., May 16, 1986, at 1, col. 6; Bunker, *Insurance and Insurance Broking, "Year of the Roller Coaster,"* Fin. Times, Apr. 14, 1987, at 1.

16. The experience of New York City, a self-insured, shows "the problem is not dramatically different, whether the costs are spread through the insurance mechanism or whether they are borne directly through self-insurance." 1 GOVERNOR'S ADVISORY COMMISSION ON LIABILITY INSURANCE; INSURING OUR FUTURE 5 (1986).

17. See generally U.S. GEN. ACCT. OFF., REPORT TO CONGRESSIONAL REQUESTORS, MEDICAL MALPRACTICE; INSURANCE COSTS INCREASED BUT VARIED AMONG PHYSICIANS AND HOSPITALS (1986).

18. See generally NAT'L CONF. OF STATE LEGISLATURES, RESOLVING THE LIABILITY INSURANCE CRISIS: STATE LEGISLATIVE ACTIVITIES IN 1986 (1986).

19. See generally *id.*

20. See INS. INFORMATION INST., 1986-87 PROPERTY/CASUALTY FACT BOOK 60 (1986) [hereinafter cited as PROPERTY/CASUALTY FACT BOOK].

21. *E.g.*, MICH. COMP. LAWS § 600.1483 (1986).

22. *E.g.*, W. VA. CODE § 55-7B-9 (1986) (limiting noneconomic losses in the medical malpractice contest to \$1 million).

23. Caps cannot be relied upon in setting insurance prices until they have survived constitutional challenges. In some states, caps on recovery have been challenged or held as violative of

In a climate where it is difficult to predict what one's liability will be, the problem is exacerbated when that person may also be liable for someone else's wrongful conduct. Thirteen states have addressed this problem by modifying or abolishing the rule of joint and several liability, which holds any defendant liable for the full amount of damages if other defendants cannot pay their share.²⁵ State reforms of joint and several liability varied from elimination²⁶ to modification.²⁷ California has abolished joint and several liability only for that portion of damages representing non-economic losses, such as pain and suffering, emotional distress, and loss of companionship.²⁸

Some states attempted to reduce the "strike-it-rich" aspect of tort litigation by imposing penalties on attorneys for filing frivolous lawsuits. Eleven states modified the collateral source rule, to provide that benefits obtained by injured persons from sources other than the defendants, such as health insurance, may be introduced as evidence at trial or used to reduce the award.²⁹ Other areas of state tort reform included attorney contingency fee regulation,³⁰ provisions for periodic payment of judgments,³¹ limits on punitive damages,³² and limits on the liability of governments,³³ servers of liquor³⁴ and doctors.³⁵

The reforms enacted by states will, in the long run, stabilize liability costs within those states because they control liability costs, limit liability to the person's own responsibility, reduce double payment of compensation and help protect persons from having to defend frivolous lawsuits. But for those whose businesses are interstate—product manufacturers and sellers—state tort reforms are not a complete solution to the problem of uncertain and unpredictable standards of liability. The fact that the rules

provisions in state constitutions, either because they apply only to a particular class of injured persons, and thus, deny those persons equal protection of the laws, or because they deny a right to recovery provided in the state constitution. *See, e.g.*, *Boyd v. Bulala*, 647 F. Supp. 781 (W.D. Va. 1986) (cap on medical malpractice recovery in Virginia held unconstitutional).

24. *See, e.g.*, KAN. STAT. ANN. § 60-3407 (1986); MICH. COMP. LAWS § 600.1483 (1986).
25. *See* PROPERTY/CASUALTY FACT BOOK, *supra* note 20, at 60. *See also, e.g.*, COLO. REV. STAT. § 13-21-111.5 (1986).
26. *See, e.g.*, COLO. REV. STAT. § 13-21-111.5 (1986).
27. *See, e.g.*, ALASKA STAT. § 09.17.080(d) (1986) (a party who is allocated less than 50% of the total fault allocated to all the parties may not be held jointly liable for more than twice the percentage of fault allocated to that party).
28. *See* CAL. CIV. CODE § 1431.2 (1987); *see also supra* note 4 and accompanying text.
29. *See, e.g.*, FLA. STAT. § 768.76 (1986); *see also generally* Geisel and Taravella, *supra* note 1.
30. States with attorney contingency fee provisions include Connecticut, Maine, Massachusetts, Minnesota and Wisconsin (medical malpractice only). *See* Geisel and Taravella, *supra* note 1, at 1, col. 2.
31. Alaska, Connecticut, Florida, Hawaii, Maine, Michigan, New York, South Dakota and Washington are among the states that have periodic-payment provisions. *See id.*
32. Colorado, Florida, New Hampshire, Oklahoma and West Virginia (public entities only) are among states that place limits on punitive damages. *See id.*
33. States that statutorily limit the liability of governmental entities include Colorado, Connecticut, Mississippi, New Hampshire, South Carolina, Tennessee and Wyoming. *See id.*
34. Connecticut, Indiana, Louisiana, Maine, Michigan, New Mexico, Tennessee, Utah and Wyoming are among the states that limit liability of liquor servers. *See id.*
35. States that limit the liability of health care providers include Maine, Massachusetts, Michigan, Missouri, South Dakota, Utah, West Virginia and Wisconsin. *See id.*

vary from state to state creates special problems in product liability.³⁶ Unless the current uncertainty and unpredictability is resolved, product liability risks of manufacturers and sellers will continue to be uncertain, and product liability crises will continue to occur.

THE INTERSTATE COMMERCE GAP

The gap left open by state tort reform measures is a lack of uniform liability rules. The lack of uniformity is not a problem in all areas of tort law, but only in those areas that are inherently a matter of interstate commerce.³⁷ The interstate commerce gap poses at least two problems. First, there are areas in which the states are diverse, and a national policy is necessary for products that move in interstate commerce. In these areas, the lack of uniformity poses difficult problems for manufacturers who are producing goods to be sold and used in various states with conflicting standards or requirements for those products.³⁸ Second, the lack of uniformity makes it particularly difficult for insurers to determine what a manufacturer should do.

Basis of Liability

Perhaps the most fundamental area of uncertainty in product liability law is the liability of a manufacturer or product seller for an injury caused by a product. In some states, liability is based on negligence.³⁹

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36. A manufacturer's or seller's future exposure to liability often cannot be predicted with any degree of precision because it may be subject to rules of liability in any state, and those rules are constantly changing. *See, e.g., Special Project: An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 VAND. L. REV. 573, 729-30 (1983) (examining the effect of unpredictability of asbestos lawsuit liability on insurability, investment and premiums). In other lines of insurance where the law is predictable, such as private passenger automobile liability coverage, fluctuations in financial markets do not create the drastic price and availability problems that occurred in commercial liability insurance. Medical malpractice suits, for example, usually are not problematic.
 37. The liability of a state's own doctors generally will be determined by that state's tort law because the doctor's conduct occurs in that state. In contrast, product liability suits are prone to problems because the majority of products are sold and used throughout the nation. Consequently, product manufacturers and sellers are potentially subject to the laws of any state in which an injury occurs.
 38. An example is whether a drug manufacturer should warn the patient or the physician. Most states follow the "learned intermediary" rule and require that the pharmaceutical manufacturer warn the physician. *See, e.g., Conafay v. Wyeth Laboratories*, No. 83-0637 (D.C. Cir. Mar. 19, 1985) (available on LEXIS and WESTLAW); *Polley v. Ciba-Geigy Corp.*, No. A86-327 (D. Alaska Feb. 11, 1987) (available on LEXIS and WESTLAW). A few states, however, have carved out exceptions to the rule. *See, e.g., Walker v. Merck & Co., Inc.*, 648 F. Supp. 931 (M.D. Ga. 1986) (polio cases); *Williams v. Lederle Laboratories, Division of American Cyanamic Co.*, 591 F. Supp. 381 (S.D. Ohio 1984) (drugs denominated as prescription drugs but not dispensed as such). This disparity makes it difficult for an interstate pharmaceutical manufacturer to determine and fulfill its warning requirements. The creation of such exceptions as the "learned intermediary" rule also makes uncertain the continued vitality of the rules in those states that still embrace them.
 39. *See, e.g., Goodbar v. Whitehead Bros.*, 591 F. Supp. 552 (W.D. Va. 1984) (Virginia has not adopted strict liability in tort).

Most states, however, have adopted some form of strict liability.⁴⁰ The principal difference between negligence and strict liability is the primary focus of the test. Negligence tests focus on the conduct of the manufacturer, and strict liability tests focus on the product. Nevertheless, the *behavior* of the manufacturer and whether it was at fault is almost always a key factor when strict liability tests are applied.

Although states have created various tests for determining whether a defendant will be strictly liable for producing an unreasonably dangerous product, most courts hold manufacturers responsible only for those dangers that were known or reasonably should have been known at the time the product was made.⁴¹ This is often referred to as the state of the art issue. Under the various tests for imposing strict liability, such as the risk-utility balancing test, which weighs the risks of a product against its benefits, the risks that are considered are those that were known or knowable in light of the state of scientific and medical technology at the time the product was made.⁴²

A few states have gone further, however, and have refused to consider evidence regarding the state of medical or scientific technology at the time

40. In cases involving an alleged design defect or a failure to provide adequate warnings, the strict liability analysis inevitably involves consideration of the defendant's fault. See *Casrell v. Altec Industries, Inc.*, 335 So. 2d 128, (Ala. 1976); *Clary v. Fifth Ave. Chrysler Center, Inc.*, 454 P.2d 244 (Alaska 1969); *Nalbandian v. Byron Jackson Pumps, Inc.*, 97 Ariz. 280, 399 P.2d 681 (1965); *General Motors Corp. v. Tate*, 257 Ark. 347, 516 S.W.2d 602 (1974); *Greenman v. Yuba Power Products, Inc.*, 27 Cal. Rptr. 697, 377 P.2d 897 (1963); *Larson v. Clark Equip. Co.*, 33 Colo. App. 277, 518 P.2d 308 (1974); *Wachtel v. Rosol*, 159 Conn. 496, 271 A.2d 84 (1970); *Cottom v. McGuire Funeral Service, Inc.* 284 A.2d 50 (D.C. 1971); *Schreiber Express, Inc. v. Mayo*, 342 So. 2d 474 (Fla. 1977); *Center Chemical Co. v. Parzini*, 136 Ga. App. 396, 221 S.E.2d 4 (1975); *Stewart v. Budget Rent-A-Car Corp.*, 52 Haw. 71, 470 P.2d 240 (1970); *Robinson v. Williamson Idaho Equipment Co.*, 94 Idaho 819, 498 P.2d 1292 (1972); *Suvada v. White Motor Co.*, 32 Ill. 2d, 612, 210 N.E.2d 182 (1965); *Ragsdale v. K mart Corp.* 468 N.E.2d 524 (Ind. App. 1984); *Hawkeye-Security Ins. Co. v. Ford Motor Co.*, 199 N.W.2d 373 (Iowa 1972); *Brooks v. Dietz*, 218 Kan. 698, 545 P.2d 1104 (1976); *Dealers Transport Co. v. Battery Distributing Co.*, 402 S.W.2d 441 (Ky. 1965); *Weber v. Fidelity & Casualty Ins. Co.*, 259 La. 599, 250 So. 2d 754 (1971); *Adams v. Buffalo Forge Co.*, 443 A.2d 932 (Me. 1982); *Phipps v. General Motors Corp.*, 278 Md. 337, 363 A.2d 955 (1976); *McCormack v. Hanksraft Co.*, 278 Minn. 322, 154 N.W.2d 488 (1967); *State Steve Mfg. Co. v. Hodges*, 189 So. 2d 113 (Miss. 1966); *Lifritz v. Sears Roebuck & Co.* 472 S.W.2d 28 (Mo. App. 1971); *Brandenburger v. Toyota Motor Sales, U.S.A., Inc.* 162 Mont. 506, 513 P.2d 268 (1973); *Kohler v. Ford Motor Co.*, 187 Neb. 428, 191 N.W.2d 601 (1971); *Shoshone Coca-Cola Bottling Co. v. Dolinski*, 82 Nev. 439, 420 P.2d 855 (1966); *Buttrick v. Arthur Leard & Sons, Inc.*, 110 N.H. 36, 260 A.2d 111 (1969); *Cintrone v. Hertz Truck Leasing & Rental Service*, 45 N.J. 434, 212 A.2d 769 (1965); *Stang v. Hertz Corp.*, 83 N.M. 730, 497 P.2d 732 (1972); *Sheppard v. Charles A. Smith Well Drilling & Water Systems*, 93 App. Div. 2d 474, 463 N.Y.S.2d 546 (3d Dept. 1983); *Johnson v. American Motors Corp.*, 225 N.W.2d 57 (N.D. 1974); *Lonzrick v. Republic Steel Corp.*, 6 Ohio St. 2d 227, 218 N.W.2d 185 (1966); *Kirkland v. General Motors Corp.*, 52 P.2d 1353 (Okla. 1974); *Heaton v. Ford Motor Co.*, 248 Or. 467, 435 P.2d 806 (1967); *Wevv v. Zern*, 422 Pa. 424, 220 A.2d 853 (1967); *Ritter v. Narragansett Electric Co.*, 109 R.I. 176, 283 A.2d 255 (1971); *Lane v. Trenholm* 87 S.D. 196, 205 N.W.2d 104 (1973); *Ford Motor Co. v. Lonon*, 217 Tenn. 400, 398 S.W.2d 240 (1966); *Dennis v. Allison*, 698 S.W.2d 94 (Tex. Civ. App. Amarillo 1966); *Zaleskie v. Joyce*, 133 Vt. 150, 333 A.2d 110 (1975); *Ulmer v. Ford Motor Co.*, 75 Wash. 2d 522, 453 P.2d 729 (1969); *Morningstar v. Black & Decker Mfg. Co.* 162 W. Va. 857, 253 S.E.2d 666 (1979); *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

41. See Klein, "Old Products": Admissibility of State of the Art Evidence in Products Liability Cases, 9 J. PROD. LIAB. 233 (1986).

42. See *id.* at 237-39.

the product was made.⁴³ Under this minority rule, knowledge of risks associated with a product is imputed to the manufacturer and the question is whether, in hindsight, the risks of the particular design outweigh its utility.⁴⁴ In cases alleging a failure to provide adequate warning instructions, liability is imposed if the product did not contain a warning concerning the aspect of the product that caused the harm, regardless of whether that particular risk was knowable at the time of manufacture.⁴⁵ This hindsight test, or strict-strict liability, makes product liability much more unpredictable.

When insuring a manufacturer, an insurer must take into account the possibility that the manufacturer could be subject to new liability at any time under this strict-strict liability theory—liability for a product made years ago, at a time when newly discovered risks had not been contemplated. There is additional uncertainty because product liability rules are made, for the most part, by judges. A judicial decision adopting strict-strict liability subjects product manufacturers and sellers to new types of claims that could not have been brought or anticipated when the insurance policy was written. An insurer cannot predict whether other states will expand liability by adopting this minority rule of strict-strict liability.

The uncertainty of available defenses also makes it difficult to assess the expected future losses of product manufacturers and sellers. For example, there is no clear, uniform rule establishing when a product user's unreasonable or unforeseeable misuse or alteration of a product will bar recovery. It is unclear whether liability will be imposed even though a product was made in compliance with government standards or was subject to pre-market approval by a federal government agency.

Product Warnings

As has been suggested, in the warnings area, conflicting state rules create special problems for products made, sold and used in a nationwide market. Consider, for example, products that contain dangers obvious to the product user. In some states, manufacturers will be held liable if they do not warn about obvious dangers.⁴⁶ In other states, however, the law requires manufacturers not to warn about obvious dangers, because such warnings may detract from other, more important warnings.⁴⁷

Given that manufacturers put the same warnings on all of their products sold in more than one state, they are faced with a difficult

43. See *Beshada v. Johns-Manville Products Corp.*, 90 N.J. 191, 447 A.2d 539 (1982) (the New Jersey Supreme Court subsequently limited this ruling to asbestos cases in *Feldman v. Lederle Laboratories*, 97 N.J. 429, 479 A.2d 374 (1984)); *Dart v. Wiebe Mfg., Inc.*, 147 Ariz. 242, 709 P.2d 876 (1985); *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110 (La. 1986); *Hayes v. Ariens Co.*, 391 Mass. 407, 462 N.E.2d 273 (1984); *Elmore v. Owens-Illinois, Inc.*, 673 S.W.2d 434 (Mo. 1984); *Phillips v. Kimwood Machine Co.*, 269 Ore. 485, 525 P.2d 1033 (1974).

44. See, e.g., *Dart v. Wiebe Mfg. Inc.*, 147 Ariz. 242, 709 P.2d 876 (1985).

45. See, e.g., *Beshada v. Johns-Manville Products Corp.*, 90 N.J. 191, 447 A.2d 539 (1982).

46. See, e.g., *O'Brien v. Muskin Corp.*, 94 N.J. 169, 463 A.2d 298 (1983).

47. See, e.g., *Morgan v. Bethlehem Steel Corp.*, 481 N.E.2d 836 (Ill. App. 1985).

decision. No matter what they do, their warnings might be inappropriate in some states. Even if manufacturers attempted to change the warnings to comply with different state rules, products are moved from state to state and may be subject to lawsuits in states other than where they originally were sold. The lack of a national policy in this area thus places a difficult burden on manufacturers of products that move in interstate commerce.

Product Improvements

The subsequent repair rule is a rule of evidence that precludes a plaintiff from introducing into evidence the fact that a manufacturer changed its product design or provided different warnings after the plaintiff's injury occurred.⁴⁸ The rule's policy is that evidence of product improvement is not relevant to the issue of liability, because liability is based on the condition of the product at the time it was sold, rather than at a subsequent time.⁴⁹ Furthermore, excluding the evidence encourages manufacturers to improve product safety without fear that such evidence will be used against them.⁵⁰ Finally, if such evidence were admissible, the manufacturer who improved the safety of its product could be put in a worse position at trial than a manufacturer who did not improve its product, which would create an inequitable result.⁵¹

Although most courts continue to apply the subsequent repair rule, precluding the introduction of such evidence regardless of whether the underlying theory of liability in the case is negligence or strict liability,⁵² a number of jurisdictions have refused to apply the rule in strict liability cases.⁵³ Without a national policy on this issue, the policy objectives underlying the subsequent repair rule are diminished. A state that does not apply the subsequent repair rule undercuts the policy to be served by those states that apply the rule by creating a disincentive for manufacturers to make product improvements out of the fear that their improvements will be used against them in lawsuits in the state that does not have the rule.

Punitive Damages Standard

Product liability experts have noted that "hardly a month goes by without a report of a punitive damages verdict exceeding one million

48. See FED. R. EVID. 407.

49. See, e.g., *Grenada Steel Industries v. Alabama Oxygen Co.*, 695 F.2d 883 (5th Cir. 1983), *rehg. denied*, 699 F.2d 1163.

The legislative history of proposed federal product liability legislation recognized, "Evidence of a product improvement, if admitted, may lead a jury to infer that the changes would not have been made if the product was reasonably safe or had adequate warning at the time of manufacture." See Senate Report on S. 2760, *supra* note 4, at 75.

50. *Id.*

51. *Id.* at 76.

52. *Id.* at 75.

53. *Id.* at 75. See also *Herndon v. Seven Bar Flying Service, Inc.*, 716 F.2d 1322, 1328 (10th Cir. 1980), *cert. denied*, 466 U.S. 958 (1984). See generally Henderson, *Product Liability and Admissibility of Subsequent Remedial Measures: Resolving the Cost by Recognizing the Different between Negligence and Strict Liability*, 9 J. PROD. LIAB. 187 (1986).

dollars against a manufacturer, and appellate courts regularly affirm punitive awards in excess of one million dollars in product liability cases."⁵⁴ Although there is continued debate about the actual number of cases in which punitive damages are awarded, it is now almost universally recognized that punitive damage rules need to be clarified, and even the American Bar Association recommends reforms in this area.⁵⁵ The problem in this area results largely because of the lack of a clear standard for punitive damage awards.

Courts have developed various standards for instructing juries of the conduct that may give rise to a punitive damage award. Most courts use broad, vague standards, such as willful, wanton, conscious or reckless disregard of the rights of others.⁵⁶ The lack of a clear definition of the prescribed misconduct makes punitive damages highly unpredictable.

The Role of Punitive Damages

Punitive damages are a quasi-criminal remedy in civil lawsuits. Their function is to deter truly bad conduct and to punish bad actors. In the criminal law, statutes clearly describe the proscribed misconduct, and punishment may not be imposed in the absence of clear statutory language putting the general public on notice of the proscribed conduct. Similarly, it is unfair to impose this punishment in product liability lawsuits without clear guidelines for the standard for prohibited conduct. Furthermore, the lack of a clear distinction between the type of conduct that should give rise to only compensatory damages and the type of conduct that may give rise to punitive damages diminishes the deterrent function of punitive damages.

The lack of a clear standard for punitive damages makes it difficult for juries to understand the level of misconduct that distinguishes liability for punitive damages from that which merely gives rise to compensatory damages. It is difficult for juries to apply such concepts as "reckless

54. Birnbaum & Wheeler, *Punitive-Damages Law Paves Way for Massive Design-Defect Awards*, Nat'l L.J., Nov. 17, 1986, at 40, col. 2.

55. See ABA Report, *supra* note 6, at 10-15. The Action Commission's report argued against proposals advocating ceilings on damage awards for pain and suffering. *Id.* at 13. The Commission thought it would be unjust to discriminate against the relatively small number of accident victims who suffer devastating physical and psychological injuries by imposing such damage caps, absent substantial evidence that the occasional multi-million dollar verdicts create havoc in the tort-insurance system. *Id.* at 10-14.

The Commission also recommended greater use by judges of their authority to modify excessive or inadequate verdicts (*Id.* at 13-14), as well as provide greater guidance to juries regarding appropriate ranges for pain and suffering damages. *Id.* at 15. Other recommendations included permitting non-unanimous jury decisions in personal injury cases in order to avoid hung juries and costly retrials (*Id.* at 37); court review of attorney's fees with fees found plainly excessive disallowed (*Id.* at 25-27); and where more than one defendant is found at fault, the defendant whose responsibility was substantially disproportionate to the others would not be held liable for the entire amount of pain and suffering. *Id.* at 23-25. See also Marcus, *ABA Panel Recommends Changes for Injury Suits*, Wash. Post, Jan. 12, 1987, at A3, col. 3.

56. See, e.g., *Leichtamer v. American Motors Corp.*, 67 Ohio St. 2d 456, 472, 424 N.E.2d 568, 580 (1981). See also Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 21 (1982); Birnbaum & Wheeler, *supra* note 54, at 40.

disregard of the right of others" without further guidelines. These words alone do not clearly articulate a threshold of conduct over and beyond ordinary negligence. A jury should understand, for example, that mere negligence in choosing among alternative designs or warnings is not, in itself, the type of conduct for which an award of punitive damages would be appropriate.⁵⁷ The standard should explain that punitive damages are appropriate only in cases of an extreme departure from accepted safety norms.⁵⁸

The Need for Uniformity

There is a host of punitive damages issues for which there should be a national policy. This national policy should be predicated on the recognition that punitive damages serve the function of punishing and deterring truly reprehensible behavior, and that they are awarded in addition to the damages that compensate a claimant for his or her injuries. The policy should recognize that these damages are a quasi-criminal penalty and, therefore, should be imposed only when the defendant's conduct is "knowingly far in excess of acceptable behavior" or "an extreme deviation from the ordinary conduct of manufacturers and product sellers."⁵⁹ Furthermore, the national policy should provide immunity for manufacturers' complying with standards established or adopted by the federal government. Such conduct does not evidence the deliberate wrongdoing that is required for imposition of punitive damages.⁶⁰

The national policy also should establish that punitive damages are not allowed in cases where the underlying theory of liability is strict liability. This issue is unsettled in the law today, with only a handful of states permitting punitive damages in strict liability cases.⁶¹ As one commentator has noted, the lack of a clearly defined punishment in application of punitive damages to strict liability cases could be violative of the due process requirements of the fifth and fourteenth amendments.⁶²

In addition to the unfairness to defendants and the difficulties presented to juries by the lack of a clear punitive damage standard, the present situation creates a potential for great abuse in product liability lawsuits. Because the standard is so vague, plaintiff's attorneys may

57. See Senate Report on S. 2760, *supra* note 4, at 50.

58. See Owen, *supra* note 56, at 27.

59. *Id.* at 50. See also W. Keeton, D. Owen, D. Dobbs & R. Keeton, *Prosser and Keeton on Torts*, 214 (5th ed. 1984); Owen, *supra* note 56, at 20-28 (1982); Owen, *Civil Punishment and the Public Good*, 56 S. CAL. L. REV. 103, 116 (1982) ("Punishment becomes appropriate [only] at an 'extreme' distance from the norm, where the conduct has become clearly flagrant").

60. See, e.g., SENATE REPORT ON S. 2760, *supra* note 4, at 51-54 (discussion of a provision in a federal product liability bill establishing a defense to punitive damages where the product was subject to Federal Food and Drug Administration approval or Federal Aviation Administration approval).

61. See, e.g., *Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 512 A.2d 466 (1986). See generally Note, *Punitive Damages in Strict Products Liability Litigation*, 23 WM. & MARY L. REV. 333, 335-37 (1981).

62. See Nelson, *Punishment for Profit: An Examination of the Punitive Damage Award in Strict Liability*, 18 FORUM 377, 383-85 (1983).

routinely add a claim for punitive damages in product liability lawsuits and can use the unpredictable threat of such damages to force defendants to settle cases in situations where it may be unfair or inappropriate to do so.

Merely by alleging a punitive damage claim, the plaintiff's attorney may introduce evidence of the defendant's wealth because that evidence is relevant in determining the amount of damages that would adequately punish that defendant. Even if a jury is instructed that it is to disregard that evidence until, and if, it determines that the defendant is liable for compensatory and punitive damages, it is difficult to erase the prejudice that may have occurred when the plaintiff's attorney introduced evidence that the defendant is worth millions of dollars. A bifurcated procedure to separate liability issues from the amount of punitive damages would prevent introduction of this prejudicial evidence until liability had been established and would help prevent this type of abuse.

Finally, a clear standard for determining the amount of punitive damages would serve the public interest. The law is unclear as to what happens in situations where there are multiple claims for punitive damages arising out of a single wrongful act. Whether that fact should be considered when determining the amount of punitive damages to award against a defendant should be established by a national policy. Otherwise, one state could determine that a certain number of multiple claims have already served as a sufficient punishment for a particular defendant, while another state could allow repetitive awards of punitive damages. An additional question is whether the prospect of bankruptcy should be considered when determining whether punitive damages should be awarded, because bankruptcy may affect the defendant's ability to pay compensatory damages in other cases. These are questions that transcend state lines and effect persons bringing lawsuits throughout the states.

FILLING THE INTERSTATE COMMERCE GAP

Although state legislatures are taking up tort reform measures, they are not acting in a uniform manner. State tort reform measures provide more predictability within a state, but uniform rules are needed in key issues that arise in product liability litigation.⁶³

Congress already has recognized the need for a national policy in the area of product safety. Congress demonstrated this recognition by enacting several federal product safety statutes.⁶⁴ In 1967, Congress established the National Commission on Product Safety, which examined existing product safety laws at the federal, state and local levels, including the common law. The Commission found that the existing laws were piecemeal and "hodgepodge."⁶⁵

63. See SENATE REPORT ON S. 2760, *supra* note 4, at 8.

64. See *supra* note 10 and accompanying text.

65. "Our studies of state and local laws show a hodgepodge of tragedy-inspired responses to challenges that cannot be met by restricted geographical entities. . . ." See NATIONAL COMMISSION ON PRODUCT SAFETY FINAL REPORT 2-3 (1970).

In its final report, the National Commission on Product Safety found that the existing regulatory scheme for product safety was inadequate to protect the public—federal regulatory authority was scattered among many federal agencies, and state, local and volunteer agencies lacked the authority to issue uniform regulations and mandatory standards nationwide.⁶⁶ Thus, the Commission recommended establishing an independent federal product safety agency. In addition, the Commission recommended modifications of common law tort rules, such as uniformly applying strict liability and seeking modification by state legislatures of obsolete statutory provisions that impinge on claimants' rights of redress.⁶⁷

In response to these recommendations, in 1972 Congress enacted the Consumer Product Safety Act.⁶⁸ In its findings and purposes section of the Act, Congress recognized that state control of product safety was inadequate and may be burdensome to manufacturers.⁶⁹ Congress also noted that one of the purposes of the Act was to develop uniform safety standards for consumer products and to minimize conflicting state and local regulations.⁷⁰ The legislative history of this Act reveals that Congress took up the issue of product safety under its Commerce Clause power—that it was regulating interstate commerce as it involved products that moved in interstate commerce.⁷¹ Congress recognized the need for increased federal government involvement in this area because a piecemeal approach to product safety would not adequately protect consumers.⁷²

Similarly, Congress recognized the need for a national policy in the area of motor vehicle safety. State safety requirements for motor vehicles would result in varying and inconsistent standards that would apply to motor vehicles as they move from state to state. Thus, Congress enacted the National Traffic and Motor Vehicle Safety Act of 1966.⁷³ Again, Congress recognized that the primary responsibility for regulating the U.S. automobile industry must fall on the federal government.⁷⁴ This Act establishes national standards for motor vehicle safety and provides that no state may establish or have any motor vehicle standard applicable to the same aspect of performance of a vehicle or equipment not identical to the federal standard.⁷⁵

Federal legislation to regulate the safety of products exists in other areas.⁷⁶ In response to the argument that product liability has been a

66. Indeed, the Commission observed that because there are so few controls placed on product hazards, there is a need for a "major Federal role in the development and execution of methods to protect the American consumer." *Id.* at 3.

67. *Id.* at 5-8.

68. Pub. L. No. 92-573, 86 Stat. 1207 (1972) (codified as amended at 15 U.S.C. §§ 2051-2083 (1982)).

69. 15 U.S.C. § 2(a)(4) (1982).

70. 15 U.S.C. § 2(b)(3) (1982).

71. See SENATE LABOR COMM. REPORT ON S. 3419, S. REP. NO. 835, 92nd Cong., 2d Sess. 7 (1972).

72. See SENATE COMMERCE COMM. REPORT ON S. 3419, S. REP. NO. 749, 92nd Cong., 2d Sess. 1-5 (1972).

73. Pub. L. No. 89-563, 80 Stat. 718 (codified as amended at 15 U.S.C. §§ 1381-1443 (1982)).

74. See S. REP. NO. 1301, 89th Cong., 2d Sess. 1-5 (1966).

75. See National Traffic and Motor Vehicle Safety Act of 1966, *supra* note 73, at § 102(d).

76. See, e.g., Federal Food, Drug and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. §§ 301-392 (1982)).

matter of state law and should not be taken from the states, Congress already has recognized that there should be a national policy in the area of product safety and that it has the power to establish that national policy under the Commerce Clause of the Constitution.⁷⁷ The same basis for establishing a national policy on the regulatory side of product safety justifies creating a national policy on the liability side.

CONCLUSION

There are certain key areas in product liability law in which the states are diverse, and a uniform national policy is necessary for products that move in interstate commerce. Manufacturers should not be subject to different and inconsistent liability rules from state to state. This situation creates a heavy burden on manufacturers who are choosing designs and warnings for products to be used throughout the states. On the other hand, claimants' rights to recover for injuries allegedly caused by use of products should not vary depending on the state in which the lawsuit is brought.

After opposing the concept of federal legislation in the product liability area for a number of years, the National Governors Association adopted a resolution to support federal product liability legislation at its annual conference in August 1986. At the 1986 White House Conference on Small Business, U.S. small business representatives voted to recommend that Congress and the President enact federal product liability reform legislation.⁷⁸ The Executive Branch itself has recognized the need for federal liability rules, and the Reagan Administration has proposed bills in the 99th and 100th Congresses.⁷⁹ The American Bar Association finally has recognized the need for tort reform, although it did not address the mechanism for achieving these reforms.⁸⁰

Although state tort reform measures are helpful in addressing the liability problem, there is an interstate commerce gap when it comes to product liability. This interstate commerce gap poses great problems for manufacturers and product sellers who do business in a national market. For them, liability remains unpredictable and uncertain. The only thing

77. U.S. CONST. art. I, § 8, cl. 3.

78. See THE WHITE HOUSE CONFERENCE ON SMALL BUSINESS: A REPORT TO THE PRESIDENT OF THE UNITED STATES 21, 25, 34 (1986). The Conference formulated 60 recommendations for congressional and Executive Branch action. Recommendation 1 called for the pursuit of a four-pronged effort at reform: civil justice reform; uniform standards for product, professional and commercial liability; regulation of the insurance and reinsurance industries; and viable affordable alternatives to liability coverage.

Recommendation 9 called for the enactment of S. 2760 with the Kasten-Lugar-Kassebaum amendment to provide uniform fault defenses, and the Pressler amendment to eliminate joint and several liability.

Recommendation 44 urged Congress to pass legislation creating a uniform national product and general liability law that bases liability on fault (no liability without responsibility) and eliminates joint and several liability.

79. See H.R. 4766, 99th Cong., 2d Sess. (1986) and Amdt. No. 1814 to S. 100, 99th Cong., 2d Sess. (1986). The Administration proposed similar legislation as one measure to improve competitiveness in its package of trade proposals sent to Congress Feb. 19, 1987.

80. See *supra* note 55 and accompanying text.

we can be certain of is that liability insurance will continue to be unstable as long as the interstate commerce gap exists.

