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AN INSURANCE-BASED COMPENSATION SYSTEM FOR PRODUCT-RELATED INJURIES

Richard C. Ausness*

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I. INTRODUCTION

In recent years, an increasing number of commentators have begun to express doubts about the effectiveness of the tort system.1 According to these critics, tort law does not deter accidents,2 nor does it spread accident costs efficiently.3 Worst of all, the tort system is extremely expensive to operate.4 Some of this criticism has spilled over into the products liability area.5 Products liability law has been condemned as expensive,6 ineffective,7 and regressive;8 in addition, it has been blamed for higher product prices,9 foreign competition,10 problems within the liability insur-

1. See Richard J. Pierce, Jr., Encouraging Safety: The Limits of Tort Law and Government Regulation, 33 VAND. L. REV. 1281, 1317 (1980) ("It is hard to conjure up a system of accident cost control more irrational and less reflective of social values than the present tort system."); Stephen D. Sugarman, Doing Away with Tort Law, 73 CAL. L. REV. 555, 616-17 (1985) ("My judgment is that the mammoth social costs of ordinary tort law, importantly including the socially undesirable behavior prompted by tort law, outweigh its benefits.").

2. See Steven D. Smith, The Critics and the "Crisis": A Reassessment of the Current Conceptions of Tort Law, 72 CORNELL L. REV. 765, 775 (1987) ("[T]he argument that tort law can allocate to injurers the correct costs of injuries and thereby prompt the correct level of safety investment seems manifestly implausible.").

3. See Sugarman, supra note 1, at 592-96 (arguing that compensation under tort law is both overinclusive and underinclusive).

4. See John G. Fleming, Is There a Future for Tort?, 44 LA. L. REV. 1193, 1207 (1984) ("The most formidable criticism that can be levied against the tort system is its inordinate expense."); Sugarman, supra note 1, at 596 ("[T]he tort system is fabulously expensive to operate in comparison to modern compensation systems.").

5. See Carl T. Bogus, War on the Common Law: The Struggle at the Center of Products Liability, 60 MO. L. REV. 1, 5 (1995) ("The literature overflows with criticism, and anyone perusing the law reviews in recent years might well come away believing that the predominant view is that products liability has been a disaster."); William Powers, Jr., A Modest Proposal to Abandon Strict Products Liability, 1991 U. ILL. L. REV. 639, 639 ("Current products liability law is a mess. Its foundation is flawed, its content is exceedingly complex, and its effect on personal injury litigation is pernicious.").


7. See Powers, supra note 5, at 644 ("It is debatable, both analytically and empirically, whether strict liability increases product safety, much less whether it tends to optimize product safety.") (emphasis removed).


9. See Tim Moore, Comment, Comment K Immunity To Strict Liability: Should Prescription Drugs Be Protected?, 26 Hous. L. REV. 707, 718 (1989) ("Only two manufacturers of DTP vaccine remain in the market, and the cost of each dose rose from 11 cents in 1982 to $11.40 in 1986, $8 of which was for an insurance reserve.").

10. See William A. Worthington, The "Citadel" Revisited: Strict Tort Liability and the Policy
Much of the problem appears to lie with the concept of enterprise liability, which has provided the intellectual foundation for strict products liability for more than thirty years. The theory of enterprise liability assumes that product sellers are always in the best position to prevent injuries and to spread accident costs. However, not only is this proposition often untrue, but it has encouraged courts to invent new remedies for consumers and to impose new duties on producers whenever a new liability issue has arisen. Although the courts have not yet imposed abso-
lute liability on product sellers, this steady expansion of liability has now reached the point where the entire system of products liability is in danger of collapsing under the weight of excessive producer liability.18

This has led some reformers to recommend that the existing products liability regime be modified or replaced by a different system. Proposals have ranged from ingenious neo-contractual arrangements19 to comprehensive social insurance programs.20 One such alternative, which will be examined in greater detail below, is to replace the existing system of products liability with a statutory compensation scheme based on insurance principles. This approach assumes that consumers who buy a product also purchase protection against product-related injuries. In return

risk-spreading" function); Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727, 733 (Minn. 1980) (approving of punitive damages in strict liability cases because manufacturers have "virtually exclusive access to much of the information necessary for effective control of dangers facing product consumers"); Beshada v. Johns-Manville Prod. Corp., 447 A.2d 539, 549 (N.J. 1982) (imposition of liability on product sellers for unknowable risks justified on the grounds that it will increase product safety research and spare victims "the burdensome financial consequences of unfit products"); Cintrone v. Hertz Truck Leasing & Rental Serv., 212 A.2d 769, 778 (N.J. 1965) (extending strict liability to bailor because bailor's expertise "ought to put him in a better position than the bailee to detect or to anticipate flaws or defects or fatigue in his vehicles").


20. See, e.g., Sugarman, supra note 1, at 642-51 (proposing that tort law, including products liability, be replaced by a combination of increased government regulation and compensation programs to cover disability and medical expenses).
for a "premium," which is reflected in the price of the product, the product seller agrees to compensate the consumer on a no-fault basis for certain types of product-related losses. Under such an arrangement, therefore, payments made by product sellers to accident victims are considered indemnification payments rather than damage awards. This perspective opens up many avenues that are foreclosed under the traditional enterprise liability rationale of products liability. For example, by rejecting enterprise liability, it is no longer necessary to design a products liability regime which must balance product safety and compensation goals; instead, the system can focus solely on providing compensation to accident victims at the cheapest cost.

In this article, I examine an approach under which product sellers would be obligated to reimburse injured consumers on a no-fault basis for economic losses and nothing more. This arrangement promises to be less complicated and cheaper to administer than the present products liability system. The article is divided into four parts. Part II analyzes the concept of enterprise liability and the assumptions that underlie it: (1) that consumers need protection against the superior knowledge and economic power of product manufacturers; (2) that strict liability will encourage manufacturers to optimize product safety; and (3) that manufacturers are better able than consumers to spread product-related losses. 21 However, I find that all of these assumptions are suspect and, therefore, conclude that enterprise liability does not really provide a credible foundation for products liability.

Part III considers whether products liability can be conceptualized as a form of insurance. First, I examine the traditional theory which some commentators rely upon as a rationale for the existing system of products liability. I conclude that it is impossible to reconcile first-party insurance principles with the system of open-ended liability that prevails under products liability law. However, I also find that the insurance rationale will support a more modest compensation scheme under which producer liability is limited to net economic losses.

Part IV identifies a number of characteristics that one would expect to find in a coherent insurance-based compensation scheme for product-related injuries. These features include: (1) a strong regulatory compliance defense in design defect and failure to warn cases; (2) elimination of awards for nonpecuniary damages; (3) exclusion of punitive damage

awards; (4) limitations on the doctrine of joint and several liability; (5) prohibition of suits against product sellers by employees who have already received workers compensation awards; and (6) abolition of the collateral source rule in products liability cases.

Finally, Part V addresses some additional issues that are relevant to the adoption of an insurance-based compensation scheme. One such issue is whether the implementation of an insurance-based compensation mechanism would adversely affect product safety. A second consideration is whether switching from the present products liability regime to one based on insurance principles would have undesirable distributional effects. Another concern is how attorneys' fees will be paid if damage awards are drastically reduced. A fourth issue is whether principles of comparative fault should be applied in products liability litigation. Yet another topic for discussion is whether product sellers should be allowed to increase or decrease their liability through the use of warranties and disclaimers. Finally, there is the question of whether an insurance-based scheme should be implemented at the state or the federal level.

II. ENTERPRISE LIABILITY AS A RATIONALE FOR PRODUCTS LIABILITY

The theory of enterprise liability provides that businesses that engage in activities which impose risks on others ought to compensate those who are injured. This theory is grounded on principles of fairness and economic efficiency. In the 1960's and 1970's, enterprise lia-

22. See Fleming James, Jr., An Evaluation of the Fault Concept, 32 Tenn. L. Rev. 394, 399-400 (1965) ("This point of view, which may be called enterprise liability, is most simply stated by the proposition that an activity . . . should pay for the accident loss it causes because, as a general proposition, each enterprise in our society should pay its own way."); Klemme, supra note 16, at 158 ("In its broadest terms the enterprise liability in torts is that losses to society created or caused by an enterprise or, more simply, by an activity, ought to be borne by that enterprise or activity."); Priest, supra note 15, at 463 ("This conception, which its proponents called the theory of enterprise liability, provides in its simplest form that business enterprises ought to be responsible for losses resulting from products they introduce into commerce.").

23. See Fleming James, Jr., Accident Liability Reconsidered: The Impact of Liability Insurance, 57 Yale L.J. 549, 550 (1948) ("If a certain type of loss is the more or less inevitable by-product of a desirable but dangerous form of activity it may well be just to distribute such losses among all the beneficiaries of the activity though it would be unjust to visit them severally upon those individuals who had happened to be the faultless instruments causing them.").

24. See James, supra note 22, at 400 ("The proposition that an enterprise should pay its way has been defended on general considerations of fairness and on the economist's argument that this leads to a proper allocation of limited resources in a free society."); Gary J. Highland, Note, Sales of Defective Used Products: Should Strict Liability Apply?, 52 S. Cal. L. Rev. 805, 813 (1979) ("Enterprise liability in the form of strict products liability tends to optimize the allocation of resources by forcing businesses to include, as part of the cost of doing business, the costs of injuries caused by defects in products that they sell.").
bility provided the principal theoretical justification for the expansion of
strict liability, particularly in the area of products liability.25

Legal scholars have traditionally justified the application of enter-
prise liability principles to product sellers on the basis of three assump-
tions: (1) that producers have superior knowledge and bargaining power
as compared to ordinary consumers; (2) that shifting accident costs to
product sellers causes them to optimize accident costs; and (3) that pro-
ducers can spread product-related accident costs more cheaply than con-
sumers.26 However, each of these assumptions has been challenged in re-
cent years. For example, some critics of strict liability have questioned
whether the power of product sellers vis a vis consumers is as great as it
was formerly believed.27 In addition, many legal commentators and econ-
omists now openly doubt that strict liability influences product safety
very much.28 Finally, an increasing number of legal scholars have begun
to question whether producers can spread the costs of product-related in-
juries more cheaply than existing public and private compensation sys-
tems.29 Each of these issues will be discussed in more detail below.

25. See, e.g., Hügel v. General Motors Corp., 544 P.2d 983, 988 (Colo. 1975) (holding that a
manufacturer's liability in strict tort is predicated upon the concept of enterprise liability for placing
defective goods into the stream of commerce); Schipper v. Levitt & Sons, Inc., 207 A.2d 314, 326
(N.J. 1965) ("The public interest dictates that if such injury does result from the defective con-
struction, its cost should be borne by the responsible developer who created the danger and who is in a
better economic position to bear the loss rather than by the injured party who justifiably relied on
the developer's skill and implied representation."); Santor v. A & M Karageusian, Inc., 207 A.2d
305, 311-12 (N.J. 1965) ("The obligation of the manufacturer thus becomes what in justice it ought to
be—an enterprise liability, and one which should not depend upon the intricacies of the law of sales."). But see Robert L. Rabin, Some Thoughts on the Ideology of Enterprise Liability, 55 Md. L.
Rev. 1190 (1996) (suggesting that enterprise liability has not been limited to products liability, but
has influenced fault-based areas of tort law as well).

26. See Croley & Hanson, supra note 21, at 706.

27. See Alan Schwartz & Louis L. Wilde, Intervening in Markets on the Basis of Imperfect In-
formation: A Legal and Economic Analysis, 127 U. PA. L. REV. 630, 638 (1979) ("Rather than assign
whether an idealized individual is sufficiently informed to maximize his own utility, the appropriate
normative inquiry is whether competition among firms for particular groups of searchers is, in any
given market, sufficient to generate optimal prices and terms for all consumers.").

28. See Jeffrey O'Connell, An Alternative to Abandoning Tort Liability: Elective No-Fault In-
surance for Many Kinds of Injuries, 60 MINN. L. REV. 501, 518 (1976) ("Despite exhaustive attempts
to identify them, little, if any, deterrent effects of the present product liability system could be dis-
covered by the National Commission on Product Safety."); Powers, supra note 5, at 644 ("It is de-
batable, both analytically and empirically, whether strict liability increases product safety . . . .");
adoption of the strict liability standard is likely to have increased the rate of personal injury losses
from defective products.").

29. See, e.g., JOHN G. FLEMING, THE AMERICAN TORT PROCESS 18-21 (1988); Sugarman, supra
note 1, at 596.
A. Consumer Knowledge and Bargaining Power

It is a fundamental tenet of enterprise liability that producers typically possess greater control than consumers over the allocation of product-related risks.\textsuperscript{30} It is further assumed that sellers, unless restrained by legal rules, will take advantage of their superior market power to sell unsuspecting consumers shoddy or dangerous goods.\textsuperscript{31} There is little doubt that consumers generally know less than producers about product safety. Because producers are familiar with the design and quality of their products, they can predict the incidence and gravity of product-related risks.\textsuperscript{32} Consumers, on the other hand, are seldom knowledgeable about product safety.\textsuperscript{33} Furthermore, even when consumers are reasonably well-informed about safety-related risks, they often ignore or discount certain types of risks when they purchase products.\textsuperscript{34}

\begin{itemize}
\item[30.] See Priest, supra note 15, at 520 (“Manufacturers possess vastly greater power than consumers with respect to all relevant aspects of the product defect problem.”).
\item[31.] See Thomas A. Cowan, Some Policy Bases of Products Liability, 17 STAN. L. REV. 1077, 1087 (1965) (“To put the matter bluntly, a large proportion of mass products are consciously made as inferior as the traffic will bear and are advertised by conscious misrepresentation as far superior to their known quality. The combination of low quality production and high quality lying makes it impossible for those using the products of mass manufacture to distinguish good merchandise from bad without the services of a general testing laboratory.”).
\item[32.] See David G. Owen, Rethinking the Policies of Strict Products Liability, 33 VAND. L. REV. 681, 711 (1980) (“Manufacturers today, especially those of products that are technologically complex, often are in a far better position than consumers to discover, evaluate, and act upon, dangers that inhere in the products that they make and sell.”); Robert A. Prentice & Mark E. Roszkowski, "Tort Reform" and the Liability "Revolution": Defending Strict Liability in Tort for Defective Products, 27 GONZ. L. REV. 251, 281 (1991-1992) (“It is also clear that manufacturers are better informed regarding their product than consumers and, accordingly, are better situated to minimize the risk of harm arising from product-related injuries and to anticipate some hazards and prevent the recurrence of others in a manner which the public cannot.”); Stephen M. Bressler, Note, The Warning Claim in an Arizona Products Liability Action: Limitations on the Duty To Warn, 25 ARIZ. L. REV. 395, 395-96 (1983) (“Only the manufacturer is in a position to be apprised of the risks involved and have an adequate opportunity to inspect the product.”).
\item[33.] See Alan Schwartz & Louis L. Wilde, Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests, 69 VA. L. REV. 1387, 1440-41 (1983). This is partly due to the fact that consumers do not spend as much time searching for information about inexpensive products as they do searching for information about big-ticket items. However, some inexpensive products can be very dangerous when they are defectively designed or manufactured. See Note, Enforcing Waivers in Products Liability, 69 VA. L. REV. 1111, 1129 (1983).
\item[34.] See Howard A. Latin, Problem-Solving Behavior and Theories of Tort Liability, 73 CAL. L. REV. 677, 687 (1985) (“Because any risk assessment makes demands on time, money, and psychological resources, people often do not consider low-frequency hazards even when catastrophic losses would occur if the risks materialize.”); Gary T. Schwartz, Economic Loss in American Tort Law: The Examples of J'Aire and of Products Liability, 23 SAN DIEGO L. REV. 37, 65 (1986) (“[O]rdinary people, operating under a variety of psychological limitations, may be likely to do a particularly bad job in making decisions about very low probability catastrophes.”); Stephen F. Williams, Second
Consequently, consumers do not always bargain as vigorously as they should for warranty protection against personal injury.\textsuperscript{35}

Additionally, even individuals who know about product-related risk seldom have sufficient bargaining power to secure adequate protection against such risks.\textsuperscript{36} Therefore, instead of providing consumers with meaningful choices, product sellers tend to offer non-negotiable standard form contracts that provide little protection to consumers.\textsuperscript{37} In fact, entire industries have been known to offer the same adhesion contract in order to avoid competition over warranty terms.\textsuperscript{38}

On the other hand, there is reason to believe that this vision of producer-consumer relationships may no longer be accurate. Recent research, focusing on the behavior of markets rather than the activities of individuals, suggests that consumers are not completely helpless in their dealings with product sellers.\textsuperscript{39} For example, the evidence indicates that, in most markets, sellers will compete for business by offering better warranty terms if that is what consumers genuinely demand.\textsuperscript{40} Moreover, even

\textit{Best: The Soft Underbelly of Deterrence Theory in Tort,} 106 Harv. L. Rev. 932, 932 (1993) ("At least for low-probability risks, for which consumers may 'not have much intuitive feel,' deterrence theory assumes that consumers will rationally invest little time or effort in informing themselves.").

35. See Schwartz & Wilde, supra note 33, at 1389 ("Consumers who lack . . . information [about product-related risks and the way they are allocated in the sales contract] may accept poor bargains because they do not know that better ones exist . . . .").

36. See William L. Prosper, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099, 1119 (1960) ("Undoubtedly the practice exists [of offering product warranties] on a large scale; but it is limited, on the part of almost every one, to replacement, repair, or return of the purchase price to make good the original bargain; and it does not extend to compensation for injuries to the person of the buyer, or his other property.").


Standard contracts are typically used by enterprises with strong bargaining power. The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses.

\textit{Id; see also} W. David Slawson, \textit{Mass Contracts: Lawful Fraud in California}, 48 S. Cal. L. Rev. 1 (1974) (discussing how standard form contracts often qualify or limit promises and representations made by advertising or sales personnel).

38. See George G. Bogert & Eli E. Fink, \textit{Business Practice Regarding Warranties in the Sale of Goods}, 25 Ill. L. Rev. 400, 413 (1930) ("Many manufacturers . . . have formed trade organizations and agreed to the universal use of these limited warranty clauses."). The adhesion contracts offered by the automobile industry in the 1940's and 1950's are illustrative of this practice. See Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 87 (N.J. 1960) ("The form warranty is not only standard with Chrysler but, as mentioned above, it is the uniform warranty of the Automobile Manufacturers Association.").

39. See generally Schwartz & Wilde, supra note 33.

40. See \textit{id.} at 1414 ("[W]hen consumers prefer warranties, markets frequently will supply just the warranty coverage they desire.").
when sellers offer warranty protection through nonnegotiable standardized contracts, the terms of these warranties often vary from seller to seller. Therefore, consumers who desire greater protection can often purchase from those sellers who offer it, if they are willing to shop around for the best terms. Moreover, not every consumer needs to search for superior warranty protection in order to make sellers responsive to their preferences. If enough comparison shoppers exist to sustain a competitive equilibrium, nonshoppers can benefit from their efforts because the standard warranties offered by sellers to attract the comparison shoppers will be made available to all customers.

In addition, consumers can often rely on warranties as "signals" of product quality and, therefore, do not have to actually know very much about the product in order to make comparative judgments about product quality. According to this theory, a consumer may look to the warranty as an indication of product reliability because reliability is correlated negatively with the costs of warranty coverage. Thus, a producer whose product is safer or more reliable than average can offer warranty protection at less cost than its competitors. Additionally, producers of higher quality products have an incentive to signal this fact to consumers by providing more comprehensive warranties. Thus, although the consumer may have no first-hand experience with the product, he or she can make an informed judgment about the product's quality merely by evaluating the terms of the warranty. Furthermore, because consumers will assume that a product is shoddy if the warranty protection falls below the average protection afforded by competing sellers, warranties that deviate from

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41. Even though product quality and product safety are not the same, the former can often serve as a surrogate for the latter. Thus, while manufacturers may not offer warranty protection against personal injury, well-built products are likely to be safer than poorly-built ones. Therefore, consumers who value safety may take advantage of this principle when they compare warranty protection terms among competing products.

42. See Schwartz & Wilde, supra note 33, at 1450 ("Hence, if enough shoppers exist to sustain a competitive equilibrium, that the nonshoppers do not read is irrelevant; they benefit from the shoppers' efforts.").

43. See Priest, supra note 28, at 1303 ("A consumer, however, may look to the warranty as a 'signal' of product reliability because reliability is correlated negatively with the costs of warranty coverage; that is, the more reliable the product, the lower the costs of warranty coverage for the manufacturer, and the more extensive the coverage for the consumer.").

44. See Schwartz & Wilde, supra note 33, at 1397 ("Firms with products whose quality is better than the low expectation consumers start with have an incentive to signal this better quality. . . [T]hey can best do this by making 'strong' warranties.").

45. See Priest, supra note 28, at 1303 ("Thus, although a consumer has neither experience with nor knowledge of a product, he may infer its mechanical reliability by inspecting the terms of the warranty alone.").
the norm will almost always provide more, rather than less, protection to the consumer.\(^{46}\)

All of this suggests that consumers can no longer be viewed as bereft of either knowledge or bargaining power. Certainly, few consumers have the expertise to evaluate product quality or safety solely by personal inspection. However, consumers now have access to information from other sources such as government agencies, independent consumer organizations, and even the product sellers. Furthermore, in most industries, producers compete for business by offering differing levels of warranty protection, thereby allowing consumers to make meaningful choices about the products. Consequently, I would argue that the case for enterprise liability is weak insofar as it relies on the assumption that consumers cannot fend for themselves in the marketplace.

**B. Accident Cost Avoidance**

Another critical assumption of enterprise liability is that accident costs will be optimized if product sellers are held responsible to consumers for product-related injuries.\(^{47}\) According to this argument, because of their control over design and production, producers are usually in the best position to discover and rectify dangerous conditions in their products.\(^{48}\) At the same time, producers have little incentive to improve the safety of their products as long as costs of product-related injuries are borne by others. The imposition of strict products liability internalizes these costs and forces producers to choose between paying damages for product-related injuries or spending money to prevent the occurrence of accidents.\(^{49}\)

This does not mean that strict liability compels producers to make their products as safe as technologically possible; rather, it encourages them to achieve an efficient level of expenditures on product safety.\(^{50}\)

\(^{46}\) See id. at 1304.

\(^{47}\) See Priest, supra note 15, at 520 ("Society will benefit from internalizing the costs of operation to product manufacturers, including losses resulting from product-related injuries.").

\(^{48}\) See Mary J. Davis, Individual and Institutional Responsibility: A Vision for Comparative Fault in Products Liability, 39 Vill. L. Rev. 281, 347 (1994) ("Manufacturers have control over product quality and, therefore, have specific knowledge of product conditions."); Owen, supra note 32, at 711 ("Manufacturers today, especially those of products that are technologically complex, often are in a far better position than consumers to discover, evaluate, and act upon, dangers that inhere in the products that they make and sell.").

\(^{49}\) See Craig Brown, Deterrence and Accident Compensation Schemes, 17 U.W. ONL. L. Rev. 111, 128 (1977-1978) ("[Strict liability] provides an incentive for those engaged in a particular activity to make it safer, for by doing so, their costs will be lower.").

\(^{50}\) See W. Kip Viscusi et al., Deterring Inefficient Pharmaceutical Litigation: An Economic
Thus, a producer who is held liable for product-related injuries will spend money on accident cost avoidance measures as long as the marginal cost of additional accident cost avoidance is less than the marginal reduction of expected tort liability. Conversely, a producer will elect to pay damage claims at that point where the marginal cost of accident cost avoidance exceeds the marginal benefit of further accident cost savings. In this way, cost internalization encourages producers to devote an appropriate, but not excessive, level of resources to accident cost reduction.

However, not everyone agrees that strict liability encourages product safety. Indeed, some observers claim that strict liability may have actually increased product-related accident costs. In the absence of conclusive empirical data on the subject, we can never know for certain what impact strict liability has on product manufacturers. However, a number

_Rationale for the FDA Regulatory Compliance Defense, 24 SETON HALL L. REV. 1437, 1448 (1993) (“Law and economics posits that the tort system should maximize social welfare by creating incentives that deter some, but not all, accidents.”)._

51. _See James A. Henderson, Jr., Product Liability and the Passage of Time: The Imposition of Corporate Rationality, 58 N.Y.U. L. REV. 765, 768 (1983) (“[A] manufacturer will respond to threatened liability by investing in safety up to, but not beyond, the point at which the marginal costs of the investment equal the marginal costs of accidents thereby avoided.”)._

52. _See Richard A. Posner, A Theory of Negligence, 1 J. LEGAL STUD. 29, 33 (1972) (“When the costs of accidents is less than the cost of prevention, a rational profit-maximizing enterprise will pay tort judgments to the accident victims rather than incur the larger cost of avoiding liability.”); David Rosenberg, The Causal Connection in Mass Exposure Cases: A “Public Law” Vision of the Tort System, 97 HARV. L. REV. 851, 865 (1984) (“[A] rational firm will act to minimize the sum of [accident + accident avoidance] costs by investing in safety, but only up to the optimal care level.”)._

53. _See Izhak Englard, The System Builders: A Critical Appraisal of Modern American Tort Theory, 9 J. LEGAL STUD. 27, 50 (1980) (“The deterrent effect of legal rules in the field of accidents is in itself very problematic.”); Powers, supra note 5, at 644 (“It is debatable, both analytically and empirically, whether strict liability increases product safety, much less whether it tends to optimize product safety.”) (emphasis removed)._

54. _See HUBER, supra note 13, at 154 (“As the tort system expanded, innovation was suppressed, not encouraged. Safety was set back, not advanced. And the consumer ended worse off, even in his personal security, than he would have been had the legal system been slower to rush to his rescue.”); Priest, supra note 28, at 1351 (“Again, the adoption of the strict liability standard is likely to have increased the rate of personal injury losses from defective products.”)._

55. There is relatively little empirical data on the effect of tort liability on product safety. Data collected by Professor Gary Schwartz in a recent article supports the notion that products liability law does provide producers with some incentive to develop and market safer products. _See Gary T. Schwartz, Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?, 42 UCLA L. REV. 377, 407-13 (1994)._ Professor Schwartz identified several surveys conducted in the 1980's which suggested that corporate managers were responsive to potential tort liability. _See George Eads & Peter Reuter, Designing Safer Products: Corporate Responses to Product Liability Law and Regulation, 7 J. PROD. LIAB. 263, 263 (1984) (noting that many larger manufacturers have responded to potential tort liability by establishing corporate safety offices); Egon Zehnder, Int'l USA, The Litigious Society: Is It Hampering Creativity, Innovation, and Our Ability to Compete?, 2, 3 CORP. ISSUES MONITOR 1, 2 (1987) (reporting that half of those responding indicated that their companies had in-
of factors clearly weaken the economic effects of strict liability and thus suggest that it may not have much influence on accident costs. For example, liability rules often send weak signals to product sellers because these rules are not specific enough to tell sellers what they must do or not do to avoid liability.\textsuperscript{56} Also, corporate officers often cannot estimate the size potential of damage awards accurately and, therefore, cannot engage in meaningful cost-benefit analyses.\textsuperscript{57} In addition, the nature of corporate decisionmaking frequently inhibits rational responses to product-safety concerns.\textsuperscript{58} Finally, producers are frequently able to externalize much of their liability costs to other producers through insurance.\textsuperscript{59}

No system of deterrence can work properly unless it sends clear and predictable signals to those whose conduct it wishes to influence. Unfortunately, liability rules seldom give adequate guidance to corporate decisionmakers.\textsuperscript{60} For example, producers often cannot determine the scope

\textsuperscript{56} See Eads & Reuter, supra note 55, at 290 (product liability rules frequently provide vague signals to producers).

\textsuperscript{57} See Pierce, supra note 1, at 1290-95 (describing the difficulty of assigning a monetary value to human life); see also infra note 65 (discussing Grimshaw v. Ford Motor Co.).

\textsuperscript{58} See Sugarman, supra note 1, at 568-69 (describing some of the reasons why corporations find it difficult to implement accident cost avoidance measures).

\textsuperscript{59} See id. at 573-81 (describing how liability costs are externalized by insurance to other members of risk pools).

\textsuperscript{60} See Eads & Reuter, supra note 55, at 290 ("Although product liability exerts a powerful influence on product design decisions, it sends an extremely vague signal. Because the linkage between good design and the firm's liability exposure remains tenuous, the signal says only: 'Be careful, or you will be sued.' Unfortunately, it does not say how to be careful, or, more important, how
of their duty to warn because it is subject to amorphous concepts such as proximate cause and foreseeability. Likewise, the use of balancing approaches, such as the risk-utility test, in design defect cases frequently leaves producers with no idea of whether a particular design will pass muster with a jury. This sort of ambiguity sometimes causes producers to make inappropriate responses; depending on the circumstances, some producers may engage in dangerous marketing practices, while others may make excessive investments in product safety. Furthermore, corporate managers must have accurate information about safety costs and potential liability costs if they are to make intelligent decisions about product safety. Safety (or accident avoidance) costs, in the form of safer product design, better materials, or more effective warnings, can be calculated without much difficulty. However, expected liability costs are quite another matter. Although corporate managers may be able to predict the type and frequency of product-related accidents under various scenarios, they have great difficulty estimating their expected liability costs.

61. See James A. Henderson, Jr. & Aaron D. Twerski, Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn, 65 N.Y.U. L. Rev. 265, 270 (1990) ("Concepts such as risk foreseeability, risk-utility balancing, and proximate causation are so devoid of content in the failure-to-warn context that they cannot hope to test the bona fides of the plaintiff's claim."); Viscusi et al., supra note 50, at 1468 ("In the context of warnings litigation, the absence of meaningful standards is quite troublesome.").

62. See Schwartz, supra note 8, at 388 ("This procedure [risk-utility analysis] gives firms little guidance in constructing products and turns design defect litigation into a lottery."); Viscusi, supra note 18, at 575-76 (contending that the risk-utility test for design defects is too vague to be useful).

63. For example, manufacturers who cannot determine their legal duty may place unnecessary safety devices or warnings on their products. Excessive fear of liability may also cause manufacturers to discontinue existing products or decline to market new ones. See Priest, Puzzles of the Tort Crisis, supra note 18, at 500 (reporting the results of a study which found that 25% of the country's largest 500 companies dropped existing products or services because of potential tort liability).

64. See Viscusi et al., supra note 50, at 1449 ("In order for tort law to achieve this goal [optimal deterrence], however, it must have perfect information about both the costs of accidents and the costs of avoiding them.").

65. See Pierce, supra note 1, at 1311. One reason for this is that juries often place different values on consumer injuries than corporate decisionmakers. For example, in Grimeshaw v. Ford Motor Co., the defendant estimated the value of a human life at $200,000. See Gary T. Schwartz, The Myth of the Ford Pinto Case, 43 Rutgers L. Rev. 1013, 1020 (1991). Although this figure seems low, it was the amount apparently used for cost-benefit purposes by the U.S. Department of Transportation. See id. at 1022-25. Relying on the $200,000 figure, Ford concluded that it would not be cost-effective to redesign the fuel tanks on its automobiles in order to prevent extremely rare fuel tank explosions in rear-end collisions. See id. at 1020. Nevertheless, the jury in Grimeshaw concluded that the automobile was defective and awarded the victim over $2.5 million in compensatory damages (along with another $125 million in punitive damages for good measure). See Grimeshaw v. Ford Motor Co., 174 Cal. Rptr. 2d 348, 358 (Cal. Ct. App. 1981). Thus, Ford's accident cost esti-
Moreover, corporate decisionmaking is often made in a manner that diffuses individual responsibility and thereby encourages decisionmakers to discount or ignore risks. Additionally, the reward structure encourages corporate managers to generate short-term profits for their firm while ignoring the long-term consequences of their decisions. Even when they are responsive to tort liability concerns, corporate managers often have difficulty making their intentions clear to the lower-level employees who design and build the company's products.

Finally, the existence of liability insurance also weakens the deterrent effect of products liability. Unless insurers utilize experience rating techniques, insurance rates usually do not reflect the claims experience of individual companies within an industry. Consequently, producers whose products are more dangerous than the norm are able to externalize some of their liability to others in the insurance pool.

mate proved to be considerably lower than that of the jury.

66. See John C. Coffee, Jr., "No Soul to Damn: No Body to Kick"; An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 Mich. L. Rev. 386, 395 (1981) ("[E]xperiments have found . . . small groups of businessmen willing to ignore extremely strong evidence of social irresponsibility and legal obstacles when making business decisions involving the introduction of dangerous or unsafe products.").

67. See Clayton P. Gillette & James E. Krier, Risk, Courts, and Agencies, 138 U. Pa. L. Rev. 1027, 1040 (1990) ("The decision to discover and address possible long-term risks requires that costs be incurred in the short term, and managers with an interest in profits now will be disinclined to dedicate firm resources to programs the benefits of which will accrue to the firm, if at all, only in the distant future."); Pierce, supra note 1, at 1301 ("[I]ndividual decisionmakers tend to emphasize the short-term consequences of their decisions and to deemphasize the long-term consequences . . . ."); Christopher D. Stone, The Place of Enterprise Liability in the Control of Corporate Conduct, 90 Yale L.J. 1, 22 (1980) ("[I]ndividual agents may seek to maximize their own welfare in ways inconsistent with the welfare of the enterprise.").

68. See John C. Coffee, Jr., Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response, 63 Va. L. Rev. 1099, 1132-34 (1977) (discussing the inability of senior management to communicate to those on the operational level); Fred A. Manuele, Product Safety Program Management, 2 J. Prod. Liab. 97, 98 (1978) ("Executives responsible for decisions affecting product safety do not always have adequate communication with each other on the subject.").

69. See Englard, supra note 53, at 46 ("The ubiquity of liability insurance is a fact; it puts into question the practicability of market deterrence in almost all accident cases.").

70. Under the experience rating system, premiums for individual insureds are adjusted periodically based on their loss experience during the previous period. See Kenneth S. Abraham, Distributing Risk 72 (1986).

71. See Pierce, supra note 1, at 1299 ("Although most insurance companies maintain that premiums reflect differences in the risks of accidents, most firms that purchase liability insurance believe there is no relationship between the reduction of product-related accident risks and the liability insurance premium they must incur.").

72. See Sugarman, supra note 1, at 575-76 ("[S]o long as individual firms pay on the same basis, individual accident records and safety measures will have no impact on premiums.").
All of this suggests that, while corporate managers are worried about tort liability, they often find it difficult to make economically rational decisions about product safety. If this conclusion is correct, claims about the deterrent effects of tort liability will have to be scaled back considerably.

C. Loss Spreading

An important principle of enterprise liability theory is that loss spreading is desirable and that business enterprises are generally better loss spreaders than consumers. Proponents of loss spreading argue that the consequences of product-related injuries will be lessened if their economic effects are spread among a large group of persons rather than being borne entirely by individual accident victims. The principal justification for this proposition is the declining marginal utility of money theory. According to this principle, as a person’s wealth increases, each additional dollar provides less utility than the previous dollar. Consequently, overall utility is arguably increased if losses are spread because the high-utility dollars lost by accident victims are replaced by relatively low-utility dollars obtained from a large group of loss bearers.

73. See Escola v. Coca Cola Bottling Co., 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring) ("The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."); Prosser, supra note 36, at 1120 ("Entitled to more respect is the 'risk-spreading' argument, which maintains that manufacturers, as a group and an industry, should absorb the inevitable losses which must result in a complex civilization from the use of their products . . . .").

74. See Guido Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 YALE L.J. 499, 517 (1961) ("Taking a large sum of money from one person is more likely to result in economic dislocation, and therefore in secondary or avoidable losses, than taking a series of small sums from many people . . . ."); Stanley Ingber, Rethinking Intangible Injuries: A Focus on Remedy, 73 CAL. L. REV. 772, 794 (1985) ("Rather than seeking to reduce the frequency or severity of such injuries, secondary cost avoidance involves allocating injury costs so as to decrease the economic dislocation caused by injuries. Spreading the impact of loss over time or among a class of individuals will decrease economic dislocation, thereby reducing secondary costs.").

75. See Steven P. Croley & Jon D. Hanson, The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law, 108 HARV. L. REV. 1785, 1794 (1995) ("That principle holds that, in general, the marginal utility a person derives from her first dollar is greater than the marginal utility the person derives from her second dollar."); Herbert Hovenkamp, Legislation, Well-Being, and Public Choice, 57 U. CHI. L. REV. 63, 70 (1990) ("Most people believe that money is subject to declining marginal utility. That is, as a person's wealth increases, she derives less utility from each individual dollar.").

76. This same principle provides a rationale for the purchase of first-party insurance. For a discussion of how products liability law serves a loss-spreading function similar to first-party insurance, see infra part IIIA.
Furthermore, conventional wisdom assumes that product sellers are able to spread losses more cheaply and more effectively than consumers.\textsuperscript{77} Producers can compensate consumers who are injured by defective products and can then pass these costs on to their customers in the form of higher prices.\textsuperscript{78} Because most producers sell to a mass market, the incremental cost to each consumer from liability-induced price increases is likely to be small.\textsuperscript{79} In contrast, injured consumers, who must rely on first-party insurance, not only pay more for protection, but cannot obtain complete coverage against potential losses.\textsuperscript{80} Not only do first-party insurance contracts typically contain deductibles and coinsurance provisions, but they also exclude any compensation for pain and suffering.\textsuperscript{81}

Nevertheless, in recent years a number of observers have questioned whether imposing strict liability on product manufacturers is the most efficient way to spread product-related losses.\textsuperscript{82} They observe that manufacturer liability often duplicates other loss-spreading schemes, such as workers compensation and private insurance.\textsuperscript{83} In effect, consumers who

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\textsuperscript{77} See Sheila L. Birnbaum, Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence, 33 Vand. L. Rev. 593, 596 (1980) ("The manufacturer can spread the risk through insurance and price adjustments, whereas the injured individual might suffer a crushing financial blow underwriting the loss himself."); James A. Henderson, Jr., Coping with the Time Dimension in Products Liability, 69 Cal. L. Rev. 919, 934 (1981) ("In general, manufacturers are believed to be better able to obtain insurance than are consumers, and are assumed to be able to pass on most, if not all, of the insurance costs by raising the prices of products.").

\textsuperscript{78} See Page Keeton, Products Liability—Some Observations About Allocation of Risks, 64 Mich. L. Rev. 1329, 1333 (1966) ("The assumption is that the manufacturer can shift the loss to the consumers by charging higher prices for the products.").

\textsuperscript{79} See James B. Sales, The Service-Sales Transaction: A Citadel Under Assault, 10 St. Mary's L.J. 13, 16 (1978) ("Since the retailer, manufacturer and others participating in the marketing chain possess a reasonably vast marketing public, the proportionate increase in cost to the public is theoretically minimal when compared to the loss suffered by the injured consumer.").

\textsuperscript{80} See George L. Priest, Can Absolute Manufacturer Liability Be Defended?, 9 Yale J. on Reg. 237, 242-43 (1992) ("[F]irst-party insurance provides no coverage whatsoever of pain and suffering loss, while pain and suffering comprises a significant portion of tort law damages for almost all injuries.").

\textsuperscript{81} See id.

\textsuperscript{82} See, e.g., James E. Brittain, Product Honesty Is the Best Policy: A Comparison of Doctors' and Manufacturers' Duty To Disclose Drug Risks and the Importance of Consumer Expectations in Determining Product Defect, 79 Nw. U. L. Rev. 342, 410 (1984) ("The blithe assumption underlying loss-spreading arguments that manufacturers are in a better position than consumers to both bear and spread losses has never been empirically verified.").

\textsuperscript{83} See George L. Priest, The Continuing Crisis in Liability, 1 Prod. Liab. L.J. 243, 248 (1988) ("Today, the compensation insurance provided by the legal system is largely redundant. The workers filing 60 percent of products liability claims are already covered for disability losses and full medical expenses through workers' compensation. Similarly, the vast majority of the U.S. population possesses medical coverage, and a large number possesses general disability coverage."); Stephen D. Sugarman, Serious Tort Law Reform, 24 San Diego L. Rev. 795, 798 (1987) ("Furthermore,
purchase their own insurance are required to pay higher prices for products in order to purchase protection that they do not need. In addition, critics of strict products liability maintain that tort liability is regressive because all consumers pay the same "premium" to insure against injury, but wealthier victims receive greater damage awards because their medical expenses and lost wages are greater and because they can afford to employ better lawyers.

As recent events have shown, producers cannot always pass the full costs of tort liability on to consumers. When liability costs become excessive, producers either seek bankruptcy protection or go out of business altogether, leaving subsequent accident victims with no source of compensation.

However, the most serious problem with tort liability is that it costs far more to operate than comparable loss-spreading mechanisms. A 1986 study by the Rand Corporation's Institute for Civil Justice concluded that in the aggregate plaintiffs spent between $6 billion and $8 billion in legal fees and expenses. To this figure was added another $1 billion to reflect the value of plaintiffs' time devoted to the litigation process. Thus, according to the Rand Corporation study, total litigation costs for plaintiffs ranged from $7 billion to $9 billion. The Rand Corporation study also estimated that defendants spent a total of $4.7 billion to $5.7 billion for legal fees and related expenses and an additional $2.5 billion to $3.5 billion in non-lawyer time and other expenses.

once tort law finally does deliver money to victims, a considerable sum goes to duplicate compensation that they otherwise have or will receive from other sources, such as health insurance, sick leave, Social Security, and the like.

84. See Owen, supra note 32, at 707 ("Nor may it be fair (or efficient) to penalize the prudent consumer who insures himself through health and wage insurance plans by forcing him to pay again through higher prices to overinsure himself and also to insure his less prudent neighbors.").
85. See Priest, supra note 8, at 17 ("[T]ort law's lumping of low-income consumers and high-income consumers into the same insurance pool and charging each of them a similar premium for the insurance, forces low-income consumers to subsidize high-income consumers.").
87. See John G. Fleming, THE AMERICAN TORT PROCESS 18 (1988) ("The most negative feature of the tort system is its staggering overhead cost."); Sugarman, supra note 1, at 596 ("[T]he tort system is fabulously expensive to operate in comparison to modern compensation systems.").
88. See James S. Kakalik & Nicholas M. Pace, COSTS AND COMPENSATION PAID IN TORT LITIGATION viii (1986).
89. See id.
90. See id. at vii.
tion, the Rand Corporation study determined that insurance companies spent another $0.8 billion to process claims against policyholders. The total cost for defendants was thus estimated at $8 billion to $10 billion.

Adding the study’s estimates of plaintiffs’ and defendants’ expenditures, total resources spent on the adjudication of tort claims should range from $15 billion to $19 billion. The Rand Corporation study also concluded that plaintiffs received $21 billion to $25 billion in total compensation, or about $14 billion to $16 billion in net compensation after deducting their overall litigation costs. In other words, plaintiffs and defendants spent between $15 billion and $19 billion to generate between $14 billion and $16 billion in net compensation for accident victims.

Unfortunately, the Rand Corporation study did not identify the costs of products liability litigation specifically. However, I would estimate that products liability litigation accounts for at least ten percent of the tort system’s administrative costs. Thus, if litigation costs for the entire tort system are between $15 billion and $19 billion, the costs that can be fairly attributed to products liability litigation should be in the range of $1.5 billion to $1.9 billion. When these figures are adjusted for inflation, the current costs of products liability litigation would be at least $2.1 billion, and might easily exceed $2.7 billion.

91. See id.
92. See id.
93. We should add another $0.5 billion to this figure to reflect the cost of operating state and federal courts. See id. at viii.
94. See id. at ix.
95. This figure was arrived at by extrapolating data from several sources. According to one estimate, about one-third of all tort cases filed in federal courts involved defective products. See Marc Galanter, News from Nowhere: The Debased Debate on Civil Justice, 71 U. CHI. L. REV. 77, 93 (1993). This would amount to about 14,000 out of the 42,000 tort cases that are filed in federal court each year. Another study by the National Center for State Courts, revealed that 28,000 of 700,000 tort cases filed annually in state courts involved defective products. See United States General Accounting Office, Products Liability: Extent of “Litigation Explosion” in Federal Courts Questioned, GAO/HRD-88-36BR (Jan. 1988). If these figures are correct, products liability cases would account for about 32,000 cases out of 728,000 tort cases filed each year in federal and state courts combined. Thus, products liability cases would account for about five percent of all tort cases filed.

Presumably, products liability cases should also account for about five percent of the total costs of tort litigation. However, I believe that products liability cases account for a higher proportion of overall tort litigation costs. I believe that the typical products liability case is much more complex, and therefore, much more expensive to litigate, than the average tort case. Therefore, I would attribute at least ten percent of the tort system’s administrative costs to products liability litigation.

96. The figures generated by the Rand Corporation study were based on data collected in 1985. See KAKALIK & PACE, supra note 88, at vi. Assuming an average inflation rate of three percent compounded for twelve years, an inflation adjustment of 40% seems reasonable. This would result in an estimate of current products liability litigation costs in the neighborhood of $2.1 billion to $2.7 billion.
It can be seen that loss spreading at best provides weak support for the present system of products liability. Not only does product liability provide unnecessary and duplicative coverage for most consumers, but it is also highly regressive. More importantly, the tort system's administrative costs are grossly excessive. In general, tort victims receive less than half of the money paid out by producers to settle product-related claims. In contrast, other indemnification schemes, such as workers compensation, private health insurance, and Social Security, are much cheaper to operate.

III. PRODUCTS LIABILITY AS A FORM OF INSURANCE

In part II, I concluded that the existing products liability regime, which is based upon enterprise liability, is not very effective. In this part, I shall consider the merits of a system of products liability which expressly relies upon insurance principles.

A. The Traditional Insurance Rationale

Some legal scholars have suggested that products liability is essentially a form of insurance. According to this view of products liability,
when a consumer purchases a product, he or she also purchases insurance protection against product-related injuries.\textsuperscript{102} It is assumed that product sellers can insure against product-related injuries (either by purchasing liability insurance or by self-insuring) more cheaply than individual consumers.\textsuperscript{103} Thus, even though consumers pay for this insurance coverage in the form of higher products prices, they benefit by obtaining insurance protection at lower cost.

However, there are problems with this view. First, producers do not necessarily see themselves as insurers nor do they consciously reserve a specific amount of the selling price of their products to serve as a “premium” for the payment of consumer claims. For this reason, the insurance rationale is more of a legal fiction than a description of commercial reality. More importantly, the insurance rationale ignores the distinction between first-party insurance and the sort of third-party insurance that is currently provided to consumers by product sellers. For example, first-party insurers try to make risks more predictable by employing a strategy of diversification.\textsuperscript{104} This involves pooling together large numbers of similar insureds so that unexpected losses are offset by unexpected gains.\textsuperscript{105} However, producers cannot diversify their risks in this manner under the present system of products liability because many of the risks they insure against are not uncorrelated.\textsuperscript{106} In particular, the risk exposure product sellers are subjected to can be affected in a non-random manner by unforeseen changes in tort liability rules.\textsuperscript{107}

\textsuperscript{102} See Schwartz, supra note 8, at 362 (“An element of the price thus is an insurance premium, whose size ideally varies with the amount of ‘coverage’ against loss that consumers demand.”).

\textsuperscript{103} See Priest, The Current Insurance Crisis, supra note 18, at 1535 (“A provider, especially a corporate provider, is in a substantially better position than a consumer to obtain insurance for product- or service-related losses, because a provider can either self-insure or can enter one insurance contract covering all consumers—in comparison to the thousands of insurance contracts the set of consumers would need—and can easily pass the proportionate insurance premium along in the product or service price.”).


\textsuperscript{105} See id. at 927. The strategy of diversification takes advantage of the law of large numbers. According to this principle, as the number of pooled risks increases, it becomes easier to predict the probability of each risk occurring. See Michael H. Schill, An Economic Analysis of Mortgagor Protection Laws, 71 Va. L. Rev. 489, 498 (1991).

\textsuperscript{106} An uncorrelated risk is one which is random or statistically independent. This means that the occurrence of a particular event does not increase or decrease the likelihood of another event happening. See Priest, The Current Insurance Crisis, supra note 18, at 1540.

\textsuperscript{107} See Bovbjerg et al., supra note 104, at 927 (“Non-random fluctuation, however, cannot be diversified away, and the possibility that the tort system will convulsively increase available dam-
Insurers also try to segregate insureds into separate, narrowly-defined risk pools for purposes of calculating premiums. This helps to reduce the problem of adverse selection and thereby makes insurance more attractive to the low-risk members of the risk pool. Producers, on the other hand, cannot easily segregate consumers into narrowly-defined risk pools because third-party insurance coverage is not based on individualized contracts. Under the present system of products liability, each consumer pays the same premium for insurance protection, regardless of whether he or she is a high-risk or low-risk user of the product. In addition, producers cannot take advantage of deductibles, co-payments or other devices that first-party insurers employ in order to reduce moral hazard problems.

Finally, damage awards under tort law overcompensate accident victims when compared with first-party insurance compensation levels. A number of commentators have suggested that compensation levels should be based on the amount of insurance consumers would purchase (prior to

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108. See Priest, The Current Insurance Crisis, supra note 18, at 1545. Insurers employ a variety of techniques to narrow risk pools. For example, they may classify insureds according to the of likelihood or size of loss they may be expected to sustain. Premiums also vary according to the level of insurance protection desired. See id.


110. See Priest, The Current Insurance Crisis, supra note 18, at 1543. The insurance premium for the entire pool must be set according to the average level of risk in the pool. See id. at 1541. The wider the range between high-risk and low-risk members, the greater the difference between the average risk and the risk of low-risk members. See id. If this range is narrow, low-risk individuals will find it advantageous to remain in the pool. See id. However, if this range is wide, it will attract high-risk individuals to the pool and will encourage low-risk individuals to leave the pool. See Jon D. Hanson & Kyle D. Logue, The First-Party Insurance Externality: An Economic Justification for Enterprise Liability, 76 Cornell L. Rev. 129, 140 (1990).

111. See Priest, The Current Insurance Crisis, supra note 18, at 1557-59.

112. See Epstein, supra note 101, at 668. Manufacturers attempt to segregate consumers into risk pools by product design and by advertising and marketing techniques. See Priest, The Current Insurance Crisis, supra note 18, at 1548-49. Narrowing the pools allows the manufacturer to charge different premiums for the two markets [e.g. professional versus occassional users] and to increase product sales. See id. at 1549. However, these methods of risk segregation are not nearly as effective as the methods available to first-party insurers. See id. at 1548-49.

113. Coinsurance requires the insured to pay some fraction of the amount of each claim. Deductibles and coinsurance encourage insureds to prevent losses from occurring and they also encourage insureds to limit the amount of insured services that they use. See Hanson & Logue, supra note 110, at 142.

114. See Priest, The Current Insurance Crisis, supra note 18, at 1552 ("In comparison to first-party insurance, third-party tort law insurance provides coverage in excessive amounts . . . .")
any injury) from first-party insurers.\textsuperscript{115} Moreover, these commentators also conclude that most consumers do not wish to insure against nonpecuniary losses.\textsuperscript{116} Therefore, to the extent that tort law compensates for nonpecuniary losses, it forces consumers to obtain more insurance coverage than they would willingly purchase on a first-party basis.

B. The Insurance Rationale Revisited

The problem with products-liability law is that it simultaneously tries to provide compensation to injured consumers and to optimize accident costs. Unfortunately, these goals are often incompatible.\textsuperscript{117} As a result, the existing system of products liability fails to promote either of these goals very effectively. I would avoid this trap by expressly disclaiming accident cost avoidance as an objective of products liability and suggest that it be solely concerned with providing compensation to injured consumers. Product safety would be left to market forces and government regulation, which can operate more efficiently in this area than tort liability.

Like a number of other commentators,\textsuperscript{118} I accept the proposition that product sellers provide insurance protection when they place their products on the market. Thus, when a consumer buys a product, the seller treats a portion of the purchase price as an insurance premium. The seller may either use the premiums it collects from consumers to

\textsuperscript{115} See Patricia M. Danzon, Tort Reform and the Role of Government in Private Insurance Markets, 13 J. LEGAL STUD. 517, 520 (1984) ("The optimal compensatory award is the amount of insurance the victim would have purchased voluntarily, at the price implied by the load of the defendant's liability insurance.").

\textsuperscript{116} The reason for this is that it is not efficient to insure against such losses because they do not affect the marginal utility of money. See Schwartz, supra note 8, at 362-66. Insurance is a mechanism for equalizing the expected marginal utility of money. See id. Individuals who purchase insurance seek to maximize their utility by transferring money from a pre-loss state, where it yields less utility, to a post-loss state, where it will yield greater utility. See id. However, nonpecuniary losses do not affect the marginal utility of money and, therefore, it is not efficient to insure against such losses. See id.; see also Jason S. Johnston, Punitive Liability: A New Paradigm of Efficiency in Tort Law, 87 COLUM. L. REV. 1385, 1435 (1987); Schwartz, supra note 8, at 362-66. But see Croy & Hanson, supra note 75, at 1791 ("By our account, the evidence supports the conclusion that, although several significant impediments prevent the emergence of a robust market for insurance against pain-and-suffering losses, consumers in fact do demand such insurance.").

\textsuperscript{117} See Pierce, supra note 1, at 1289 ("It is much easier to establish and administer a mechanism designed to serve only the goals of compensation and secondary accident cost reduction than it is to attempt to pursue all three goals with the same legal mechanism.").

\textsuperscript{118} See, e.g., Abraham & Liebman, supra note 101, at 87-88; Epstein, supra note 101, at 668; Owen, supra note 101, at 487; Pryor, supra note 101, at 99; Schwartz, supra note 8, at 362.
purchase liability insurance from corporate insurers or it may treat these premiums as a reserve from which to pay future claims.

Because consumers and producers cannot negotiate face to face for insurance protection, the basic terms of the contract must be determined collectively. These terms, however, should resemble, as closely as possible, the type of insurance coverage that first-party insurers typically provide and that consumers presumably want. I assume that most consumers ex ante would not want full coverage (equivalent to a damage award under tort law) because their existing insurance would already cover much of their personal injury losses. At most, they might prefer some sort of supplemental coverage, but would be unwilling to pay for anything more. This means that an insurance-oriented compensation system would pay injured consumers much less than they would receive in a successful tort action.

IV. Principal Features of an Insurance-Based Compensation System for Product-Related Injuries

This part describes some of the features that an insurance-based compensation system might have. First, liability would be based on regulatory standards whenever possible. Second, damage awards would only compensate for economic losses. Third, punitive damages would not be allowed. Fourth, plaintiffs would not be allowed to recover from more than one source. Fifth, employees who received payments for their injuries from a workers’ compensation fund would not be able to bring tort actions against product sellers. Sixth, the collateral source rule would be modified to prohibit double recoveries and subrogation. Finally, producers would be allowed to offer greater insurance coverage through express warranties if they wish to do so.

A. The Regulatory Compliance Defense

Presently, the rules relating to product design and the duty to warn are so vague and unstable that producers neither know what they must do to avoid liability nor to estimate expected liability losses accurately. For example, most courts employ a risk-utility test to determine if a product’s design is defective.119 Under this approach, a producer is held liable if

the risks of a product, as designed, outweigh its utility. In theory, this is determined by balancing such factors as technological feasibility, economic costs, product utility, and marketability. As a practical matter, however, the standards for design defect liability are so vague that design litigation is often little more than a lottery. Similar problems also affect the duty to warn. Product sellers have an obligation to provide adequate instructions and warnings to foreseeable users, consumers, and others who may be injured by their products. This responsibility appears to be


120. See Mary J. Davis, Design Defect Liability: In Search of a Standard of Responsibility, 39 Wayne L. Rev. 1217, 1239 (1993) ("This multi-factor approach requires a determination of whether the utility of the product in its risky condition, which complies with the manufacturer's design and process specifications, outweighs the risks it imposes.").

121. See Moylan, supra note 119, at 478 ("To assess an intended design fairly and justly, a court must weigh numerous interrelated economic and social factors, such as market forces, functional utility, aesthetics, and safety."); Angela C. Rushton, Comment, Design Defects Under the Restatement (Third) of Torts: A Reassessment of Strict Liability and the Goals of a Functional Approach, 45 Emory L.J. 389, 398 (1996) ("The risk-utility test weighs a variety of factors including the likelihood of harm, the seriousness of the harm, the nature of the danger as compared to the need for the product, the feasibility of a safer design, and the availability of substitute products.").

The drafters of the Restatement (Third) of Torts have proposed a slightly different test for design defects. According to section 2(b) of the new draft, approved by the American Law Institute in 1995, "[A] product is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe." Restatement (Third) of Torts: Products Liability § 2(b) (Tentative Draft No. 2 1995).

122. See Richard A. Epstein, Products Liability: The Search for the Middle Ground, 56 N.C. L. Rev. 643, 652 (1978) ("The modern design litigation case may be welcomed by some, but it is an invitation to the kind of standardless adjudication that reduces a lawsuit to a glorious, if expensive, game of chance."); Schwartz, supra note 8, at 388 ("This procedure gives firms little guidance in constructing products and turns design defect litigation into a lottery.").

123. See Dix W. Noel, Products Defective Because of Inadequate Directions or Warnings, 23 Sw. L.J. 256, 281 (1969) ("The duty to warn runs to those the manufacturer should expect to use the chattel, or be endangered by its probable use, and the warning must be reasonably calculated to reach such persons, directly or indirectly."). Not only must product sellers provide adequate warnings, they must also furnish proper directions or instructions for safe use of their products. See, e.g., Edwards v. California Chem. Co., 245 So. 2d 259, 264-65 (Fla. Dist. Ct. App. 1971) (holding manufacturer liable because instructions on insecticide failed to advise customers to wear respirator and protective clothing while using product); Tompkins v. Log Sys., Inc., 385 S.E.2d 545, 547-48 (N.C. Ct. App. 1989) (holding that a reasonable person could find that instructions for pre-packaged log
fairly straightforward; unfortunately, many courts have muddied the waters by expanding the scope of the duty to warn in wholly unpredictable ways.

home construction kits were inadequate because they failed to explain how to make sure that building walls were plumb).

124. For a brief discussion of the duty to warn, see Richard C. Ausness, Learned Intermediaries and Sophisticated Users: Encouraging the Use of Intermediaries to Transmit Product Safety Information, 46 SYRACUSE L. REV. 1185, 1187-94 (1996).

125. For example, some courts have concluded that manufacturers must warn about obvious hazards. See, e.g., Horen v. Coleco Indus., Inc., 426 N.W.2d 794, 796 (Mich. Ct. App. 1988) ("Although such a determination [that the danger is obvious] may be utilized as one factor among others to conclude that the manufacturer has no duty to warn because the product is not unreasonably dangerous, the new test is whether the risks are unreasonable in light of the foreseeable injuries."); Campos v. Firestone Tire & Rubber Co., 485 A.2d 305, 309-10 (N.J. 1984) ("[I]n our state the obviousness of a danger, as distinguished from a plaintiff's subjective knowledge of a danger, is merely one element to be factored into the analysis to determine whether a duty to warn exists.").


A few courts have even held that manufacturers must warn consumers about risks that were scientifically unknowable at the time of purchase. See, e.g., In re Hawaii Fed. Asbestos Cases, 960 F.2d 806, 816 (9th Cir. 1992) ("[E]vidence as to the possible extent of a defendant's knowledge concerning the dangerousness of its own products is inadmissible in ... failure-to-warn cases."); Kisor v. Johns-Manville Corp., 783 F.2d 1337, 1341 (9th Cir. 1986) ("Owens-Illinois's [sic] inquiries about medical knowledge in the industry ... impermissibly put negligence concepts before the jury."); Halphen v. Johns-Manville Sales Corp., 737 F.2d 462, 465 (5th Cir. 1984) ("[I]n a strict products liability case, the manufacturer is presumed to know the defects of its product."); Beshada v. Johns-Manville Prod. Corp., 447 A.2d 539, 547 (N.J. 1982) ("It is precisely the imputation of knowledge to the defendant that distinguishes strict liability from negligence.").

Finally, several courts have suggested that manufacturers provide warnings in Spanish or sign language for the benefit of those who cannot read English. See, e.g., Hubbard-Hall Chem. Co. v. Silverman, 340 F.2d 402, 405 (1st Cir. 1965) ("[T]he jury could reasonably have believed that defendant should have foreseen that its admittedly dangerous product would be used by, among others, persons like plaintiffs' intestates who were farm laborers, of limited education and reading ability, and that a warning ... would not, because of its lack of a skull and bones or other comparable symbols or hieroglyphics, be 'adequate ....' "); Stanley Indus., Inc. v. W.M. Barr & Co., 784 F. Supp. 1570, 1576 (S.D. Fla. 1992) ("In light of the defendants' joint advertising in Miami's Hispanic media and the nature of the product, this court likewise finds that it is for the jury to decide whether the defendant could have reasonably foreseen that boiled linseed oil would be used by persons such as Gallery's Nicaraguans, Spanish-Speaking unskilled laborers."); Ramirez v. Plough, Inc., 12 Cal. Rptr. 2d 423 (Cal. Ct. App. 1992), rev'd, 863 P.2d 167 (Cal. 1993); Campos v. Firestone
One solution to the problem of shifting and uncertain liability standards is to rely more heavily on existing federal product safety standards. Many products are already subject to federal regulation. For example, the Consumer Product Safety Commission issues safety standards for a variety of consumer products; the Environmental Protection Agency regulates the manufacture, sale and use of pesticides; the Department of Transportation enforces safety standards for motor vehicles; the Federal Aviation Agency regulates aircraft safety; and the Food and Drug Administration licenses drugs and medical devices. Unlike tort liability rules, federal regulatory standards are uniform throughout the country, are relatively specific, operate prospectively, and can only be changed in accordance with prescribed agency rulemaking procedures.

The best way to displace tort liability rules with federal regulatory standards is to strengthen the regulatory compliance defense. Currently,
unexcused violations of government safety regulations by product manufacturers result in liability as a matter of law, but compliance with such regulations is merely deemed to be evidence that a product is not defective. Thus, a producer can comply with all relevant regulatory requirements and still be found liable by a jury in a civil action for damages. This rule originated at a time when government regulations were often primitive in nature and limited in scope. However, now that government safety regulations tend to be more complex and comprehensive, the traditional approach to regulatory compliance may no longer be justified. In fact, a number of states have already enacted legislation to


134. \textit{See, e.g.}, Orthopedic Equip. Co. v. Eustler, 276 F.2d 455, 461 (4th Cir. 1960) (holding that a violation of FDA labeling requirements by a manufacturer of a surgical nail is negligence per se); Lukaszewicz v. Ortho Pharm. Corp., 510 F. Supp. 961, 964-65 (E.D. Wis. 1981) (holding that failure to comply with FDA warning requirements for oral contraceptives could be negligence per se); Elsworth v. Beech Aircraft Corp., 691 P.2d 630, 634 (Cal. 1984), \textit{cert. denied}, 471 U.S. 1110 (1985) (holding that plaintiff is entitled to a jury instruction on negligence per se if the aircraft manufacturer fails to comply with FAA regulations).

135. \textit{See, e.g.}, Shorter v. Champion Home Builders Co., 776 F. Supp. 333, 338 (N.D. Ohio 1991) (holding that compliance with National Manufactured Housing Construction and Safety Standards Act is not conclusive on the issue of whether a mobile home that had formaldehyde in the flooring was defectively designed); Blasing v. P.R.L. Hardenbergh Co., 226 N.W.2d 110, 115 (Minn. 1975) (finding that compliance by a manufacturer of flammable liquid finish remover with federal labeling requirements was not conclusive on the issue of a duty to warn); Stone v. Sterling Drug, Inc., 111 A.D.2d 1017, 1019 (N.Y. App. Div. 1985) (finding that compliance with federal labeling standards for industrial strength acid is not conclusive on the question of due care).

136. \textit{See Jason Scott Johnson, Uncertainty, Chaos, and the Torts Process: An Economic Analysis of Legal Form, 76 CORNELL L. REV. 341, 382 (1991) ("Under this approach, a manufacturer can comply with all relevant product design and product warning specifications and still be found liable under the risk-utility test, and possibly even liable for punitive damages.").}

137. \textit{See Noah, supra} note 133, at 965 ("The statutory safety standards in many of the earliest cases were quite limited in scope, often lacked an enforcement mechanism, and sometimes expressly preserved common-law tort remedies.").

138. \textit{See Paul Dueffert, Note, The Role of Regulatory Compliance in Tort Actions, 26 HARV. J.}
strengthen the regulatory compliance defense in products liability cases. However, many of these statutes only apply to certain products, such as pharmaceuticals, or merely create weak presumptions in favor of manufacturers whose products comply with government safety standards rather than providing complete immunity from liability.

A strong regulatory compliance defense would provide that no product seller be held liable for any injury caused by some aspect of the product's design as long as the defendant proved by a preponderance of the evidence that the product's design complied with mandatory safety standards adopted and promulgated by an appropriate federal regulatory agency. In such cases, suit against a producer would be barred unless the claimant proved by clear and convincing evidence that the safety standards or regulations were grossly inadequate to protect the public from unreasonable risks of injury or damage. The regulatory compliance defense would also be applicable to product sellers in design defect cases where their products were licensed or approved for marketing by an appropriate federal regulatory agency.

In addition, no product seller would be held liable for any injury caused by some aspect of the product's labeling if the defendant proved by a preponderance of the evidence that the product's labeling complied with mandatory safety standards adopted and promulgated by an appropriate federal regulatory agency, unless the claimant proved by clear and convincing evidence that the safety standards or regulations were "grossly inadequate to protect the public from unreasonable risks of injury or damage." The same protection would be extended to product sellers whose products were licensed or approved for marketing by a federal regulatory agency.

\[\text{ON LEGIS. 175, 217 (1989) ("Against such complex regulatory schemes, the rule that regulatory compliance cannot shield a defendant from liability seems archaic.").}\


140. \text{See Ausness, supra note 126, at 1251-53.}\

141. \text{See id. at 1253-57.}\

142. \text{See id.}\

143. \text{Id. at 1254. This proposal is based on a proposed federal statute. See James A. Henderson, Jr., Manufacturers' Liability for Defective Product Design: A Proposed Statutory Reform, 56 N.C. L. REV. 625, 630-32 (1978).}\

144. \text{See Ausness, supra note 126, at 1253-57.}
It should be noted that the proposed regulatory compliance would not be available to a product's sellers if there were no safety standards applicable to the product risk that allegedly caused a claimant's injury.\textsuperscript{145} Additionally, the proposed defense should not immunize a producer who failed to comply with applicable safety standards or who withheld or misrepresented test data or other information required to be submitted as part of a licensing or market approval process.\textsuperscript{146} However, the implementation of a strong regulatory compliance defense, such as that described above, will provide both producers and consumers with specific safety standards with which to evaluate product performance. This increased certainty will reduce disputes over liability and promote the prompt settlement of claims.\textsuperscript{147}

\textbf{B. Nonpecuniary Damages}

Damages in tort law can be divided into two broad categories: pecuniary or special damages and nonpecuniary or general damages.\textsuperscript{148} Pecuniary damages compensate accident victims for monetary losses such as medical expenses, lost wages and diminution of future earning capacity.\textsuperscript{149} Nonpecuniary damages,\textsuperscript{150} on the other hand, compensate for such intangible losses as physical pain and emotional distress.\textsuperscript{151} Pecuniary damages, of course, can be determined by objective criteria.\textsuperscript{152} However, converting pain and suffering into monetary damages is more difficult.

\textsuperscript{145} See id.; Henderson, supra note 143, at 630-32.
\textsuperscript{146} See Ausness, supra note 126, at 1253-57; Henderson, supra note 143, at 630-32.
\textsuperscript{147} See Isaac Ehrlich & Richard A. Posner, \textit{An Economic Analysis of Legal Rulemaking}, 3 J. LEGAL STUD. 257, 265 (1974) ("The costs of settling a dispute will be lower if [the] outcome is more certain, for there will be less disagreement over the outcome and this will facilitate the negotiation of a mutually satisfactory settlement price.").
\textsuperscript{150} Nonpecuniary damages are frequently referred to as "noneconomic damages." Strictly speaking, however, this terminology is not correct since intangible losses do affect economic behavior. See Neil K. Komesar, \textit{Injuries and Institutions: Tort Reform, Tort Theory, and Beyond}, 65 N.Y.U. L. REV. 23, 57 n.66 (1990).
\textsuperscript{152} See Bovbjerg et al., supra note 104, at 910 ("Computation of 'special' damages—items of economic expense that plaintiffs must specifically plead and prove, like medical bills or wage loss—seems relatively straightforward and amenable to common-sense resolution without detailed jury instructions.").
because there is no market to provide objective criteria for measuring intangible losses. 153 Furthermore, courts seldom give juries adequate guidance about how to calculate nonpecuniary damages 154 and fail to overturn jury verdicts when they are excessive or improper. 155 For these reasons, awards which include nonpecuniary damages are often inconsistent and unpredictable. 156

Many commentators agree that accepted principles of compensation do not require that injured consumers be allowed to recover nonpecuniary damages. 157 As mentioned earlier, first-party insurance does not ordinarily compensate for nonpecuniary losses. 158 Therefore, if we assume

153. See Ingber, supra note 74, at 778 ("Transcending pain and suffering or emotional distress into monetary terms poses tremendous problems of proof because, unlike the situation with property, no market exists to provide a standard for compensating a victim of such a loss."); Jeffrey O'Connell, Two-Tier Tort Law: Neo No-Fault & Quasi-Criminal Liability, 27 Wake Forest L. Rev. 871, 872 (1992) ("If basic determinations of liability are uncertain, perhaps even more so are the calculations of damage awards for such indeterminate categories as pain and suffering, grief, loss of consortium, and the relatively novel category of 'hedonic damages,' for which there are no readily available market referents.").

154. See David Baldus et al., Improving Judicial Oversight of Jury Damages Awards: A Proposal for the Comparative Additur Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages, 80 Iowa L. Rev. 1109, 1124 (1995) ("[J]urors currently are not given any external standards or ranges to guide their damage assessments."); David W. Leebron, Final Moments: Damages for Pain and Suffering Prior to Death, 64 N.Y.U. L. Rev. 256, 265 (1989) ("The law provides no guidance, in terms of any benchmark, standard figure, or method of analysis, to aid the jury in the process of determining an appropriate award."); Paul C. Weiler, Fixing the Tail: The Place of Malpractice in Health Care Reform, 47 Rutgers L. Rev. 1157, 1179 (1995) ("The law gives no meaningful guidance at all to jurors engaged in their one and only attempt to put a dollar figure on such non-financial injury.").

155. There are several reasons why courts find it difficult to exercise proper control over jury verdicts. In the first place, judges, like juries, also lack objective standards for deciding when a jury award is proper and not excessive. See Boyajian et al., supra note 104, at 915. In addition, courts find it hard to police excessive noneconomic damage awards because juries normally return general verdicts and are not required to explain their rationale or methods in arriving at a particular award. See James F. Blumstein et al., Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury, 8 Yale J. on Reg. 171, 175 (1991).

156. See Jeffrey O'Connell & Chad M. Oldfather, A Lost Opportunity: A Review of the American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury, 30 San Diego L. Rev. 307, 316 (1993) ("Because of this lack of standards [with respect to determining damages for pain and suffering], it is virtually impossible to determine what a jury will do with a particular case.").

157. See Johnston, supra note 116, at 1435 ("There is little reason to think that an optimal compensation scheme would include recovery for pain and suffering.").

158. See Priest, supra note 80, at 242-43 ("[F]irst-party insurance provides no coverage whatsoever of pain and suffering loss, while pain and suffering comprises a significant portion of tort law damages for almost all injuries."). Public compensation programs do not cover nonpecuniary losses either. See Sugarman, supra note 1, at 648 ("[P]lain and suffering are generally not compensable from social-insurance, employee-benefit, or private-insurance schemes.").
that consumers are not willing to pay for insurance protection against nonpecuniary losses, then there is no reason to require producers to compensate for them. At the same time, there is no harm in allowing producers to offer warranty protection against nonpecuniary losses if some consumers do, in fact, desire such coverage (and are willing to pay for it).

C. Punitive Damages

Punitive damages constitute an award to an injured party over and above what is necessary to compensate for the actual loss. They are

159. A number of states have enacted legislation to impose limits or caps on the amount that can be awarded for noneconomic damages in general tort actions. See, e.g., ALASKA STAT. § 09.17.010 (Michie 1996) (setting a $500,000 limit on noneconomic damages; no limit on damages for disfigurement or severe physical impairment); COLO. REV. STAT. § 13-21-102.5(3)(a), (5) (1987) (setting a $250,000 limit on noneconomic damages; up to $500,000 for noneconomic damages if court finds justification thereof under clear and convincing evidentiary standard; no limit for physical impairment or disfigurement); MD. CODE ANN., CTS. & JUD. PROC. § 11-108 (1995) (mandating a $350,000 limit on noneconomic damages); N.H. REV. STAT. ANN. § 508:4-d (cum. supp. 1995) (placing a $875,000 limit on noneconomic damages); WASH. REV. CODE ANN. § 4.66.250 (West 1972) (limiting noneconomic damages to an amount determined by multiplying .43 by the average annual wage and life expectancy of the claimant).

However, there are serious problems with damage caps. See Baldus et al., supra note 154, at 1122 (“With respect to both general and special compensatory damages, the dollar limits selected cannot be morally justified because they are arbitrary and completely unrelated to the level of compensable harm suffered by the plaintiff. The burden of legislative caps is borne almost entirely by seriously injured plaintiffs, many of whom are infants or relatively young and are confronting long-term, very expensive health care.”); Gregory A. Hicks, Statutory Damage Caps Are An Incomplete Reform: A Proposal for Attorney Fee Shifting in Tort Actions, 49 L.A. L. REV. 763, 775 (1989) (“By reducing the total damages recoverable, such caps diminish the likelihood that the damage award will be adequate to meet the expenses of litigation while providing for the plaintiff’s injuries.”); Colleen P. Murphy, Determining Compensation: The Tension Between Legislative Power and Jury Authority, 74 TEX. L. REV. 345, 404-05 (1995) (arguing that the seventh amendment right to a jury trial may prohibit the use of compensatory damage caps in federal trials); Jerry J. Phillips, To Be or Not To Be: Reflections on Changing Our Tort System, 46 MD. L. REV. 55, 60 (1986) (“A fixed damage figure, however, is as arbitrary as the uncertainty in amount of recovery it seeks to cure.”); David J. Wiggins & Robert S. Caldwell, Liability-Limiting Legislation: An Impermissible Intrusion into the Jury's Right to Decide, 36 Drake L. Rev. 723, 726 (1986-87) (arguing that damage caps invade the province of the jury); Richard S. Kuhl, Note, A Proposal to Cap Tort Liability: Avoiding the Pitfalls of Heightened Rationality, 20 U. Mich. J. L. Reform. 1215, 1220 (1987) (“Recoveries by victims who have suffered the gravest injuries, with potentially lifelong aftereffects, may be limited by the damage cap, while those who have relatively slight injuries may receive complete restitution for both the pecuniary and noneconomic damages they have suffered.”); Nancy L. Manzer, Note, 1986 Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability, 73 CORNELL L. REV. 628, 646 (1988) (“[C]apping damages in some sense unjustly enriches those defendants whose liability is capped.”); Ruda, supra note 149, at 204 (“Opponents of damage caps argue that they interfere with the jury’s power to determine the extent of damages.”).

160. See Elizabeth Ann Obier, Note, Insurance for Punitive Damages: A Reevaluation, 28
traditionally based on punishment and deterrence grounds.\textsuperscript{161} Punitive damages are also said to promote optimal accident cost avoidance by supplementing compensatory awards, thereby offsetting the fact that many injured parties fail to sue.\textsuperscript{162} Punitive damages may be assessed when the jury concludes that the defendant injured the plaintiff intentionally or maliciously, or where the defendant's conduct reflects a reckless, wanton or oppressive disregard for the rights of another.\textsuperscript{163}

However, there are a number of problems with the way punitive damages are imposed in products liability litigation. In the first place, liability standards are vague and unpredictable.\textsuperscript{164} In addition, the rules for calculating damage awards are also unclear.\textsuperscript{165} Moreover, punitive dam-

\textsuperscript{161} See Clay R. Stevens, Comment, \textit{Split-Recovery: A Constitutional Answer to the Punitive Damage Dilemma}, 21 Pepp. L. Rev. 857, 869 (1994) ("Promotion of societal norms through deterrence and punishment of outrageous conduct is the central purpose of punitive damage awards."); Note, \textit{"Common Sense" Legislation: The Birth of Neoclassical Tort Reform}, 109 Harv. L. Rev. 1765, 1771 (1996) ("Whatever the rationale in ancient times, punitive damages have been justified throughout American history on punishment and deterrence grounds.").

\textsuperscript{162} See Alan Howard Scheiner, Note, \textit{Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power}, 91 Colum. L. Rev. 142, 174 (1991) ("Under optimal deterrence, punitive damages are merely an enhancement of actual damages to counterbalance the improbability of liability."); Amelia J. Toy, Comment, \textit{Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective}, 40 Emory L.J. 303, 306-07 (1991) ("The standard tort model allows for punitive damages solely to restore the injurer's expected compensatory damages award to the proper level, so that optimal deterrence and an economically efficient level of care are achieved."); Note, \textit{An Economic Analysis of the Plaintiff's Windfall from Punitive Damage Litigation}, 105 Harv. L. Rev. 1900, 1901 (1992) ("The intuition that underlies the deterrence rationale is that, if not all victims litigate a certain type of tort, courts should increase the defendant's total liability in the litigated cases to force defendants in the aggregate to internalize their harm fully.").


\textsuperscript{164} See E. Donald Elliott, \textit{Why Punitive Damages Don't Deter Corporate Misconduct Effectively}, 40 Ala. L. Rev. 1053, 1057 (1989) ("The central failing of punitive damages that renders them incompatible with modern tort law is unpredictability."); David G. Owen, \textit{Civil Punishment and the Public Good}, 56 S. Cal. L. Rev. 103, 114 (1982) ("Uncertainty both in the meaning and in the application of punitive damages 'rules' diminishes substantially their fairness as well as their utility, increasing the social costs involved."); Victor E. Schwartz & Mark A. Behrens, \textit{The American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury: A Timely Call for Punitive Damages Reform}, 30 San Diego L. Rev. 263, 265 (1993) ("Vagueness and uncertainty in punitive damages law undermines confidence in the civil justice system and has a substantial and detrimental impact on American industry.").

\textsuperscript{165} See Dorsey D. Ellis, Jr., \textit{Fairness and Efficiency in the Law of Punitive Damages}, 56 S. Cal. L. Rev. 1, 53 (1982) ("Jury instructions on the permissible magnitude of punitive damage assessments generally provide even less guidance than do those that purport to explain the bases of punitive damages liability."); David G. Owen, \textit{The Moral Foundations of Punitive Damages}, 40 Ala. L. Rev. 705, 731 (1989) ("Yet a more vague basis for measurement could hardly be devised, explaining the largely unprincipled manner in which amounts of punitive damages are determined in
ages may be awarded even though liability for compensatory damages is not based on fault.\textsuperscript{166} This mixture of fault and no-fault concepts may confuse the jury and prejudice it against the defendant.\textsuperscript{167} More importantly, a single inadequate warning or design flaw can result in numerous punitive damage awards because each product-related injury gives rise to a separate claim for punitive damages.\textsuperscript{168} This massive liability can affect the solvency of even the largest business enterprise and, thereby, impair the prospects of future accident victims for compensation.\textsuperscript{169}

Furthermore, punitive damage awards have no place in an insurance-based compensation system. Insurance is not concerned with punishment or retribution; its sole purpose is to compensate accident victims. Thus, from an insurance perspective, awarding punitive damages to a plaintiff who has already received a compensatory award results in overcompensation. In addition, the uncertainty associated with punitive damage awards makes it difficult for producers to calculate their expected losses or to settle claims cheaply and expeditiously.\textsuperscript{170} For these reasons, punitive

\textsuperscript{166} See, e.g., Acosta v. Honda Motor Co., 717 F.2d 828, 835 (3d Cir. 1983) ("The fact that some sellers therefore will be found liable in the absence of fault does not mean that those who are at fault—and outrageously so—should not be punished."); Neal v. Carey Canadian Mines, Ltd., 548 F. Supp. 357, 378 (E.D. Pa. 1982) ("The Court finds that there is no theoretical problem in a jury finding that a defendant is liable because of the defectiveness of a product and then judging the conduct of the defendant in order to determine whether punitive damages should be awarded on the basis of 'outrageous conduct' in light of the injuries sustained by the plaintiff."). \textit{aff'd sub nom.} Buskirk v. Carey Canadian Mines, Ltd., 760 F.2d 481 (3d Cir. 1985); Racer v. Utterman, 629 S.W.2d 387, 396 (Mo. Ct. App. 1981), \textit{cert. denied}, 459 U.S. 803 (1982) ("If plaintiff, in addition to proving the conduct necessary to support the strict liability claim, can also establish a degree of fault in such conduct sufficient to justify punitive damages, those damages may also be recovered.").

\textsuperscript{167} See Paul C. Nelson, \textit{Punishment for Profit: An Examination of the Punitive Damage Award in Strict Liability}, 18 Forum 377, 389 (1982) ("Isn't the punitive damages count simply a 'throw away' count intended solely to influence the jury on the underlying liability and compensatory count?").

\textsuperscript{168} See James B. Sales, \textit{The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on the Citadel}, 14 St. Mary's L.J. 351, 370 (1983) ("Consequently, the application of punitive damages in the product liability context does not punish for injuries caused by a single event or occurrence; rather, it sanctions repeated and unfettered punishment for each product of a particular design line.").

\textsuperscript{169} See Ellen Wertheimer, \textit{Punitive Damages and Strict Products Liability: An Essay in Oxy-moron}, 39 Vill. L. Rev. 505, 507 (1994) ("Because the ability of subsequent plaintiffs to recover compensatory damages may depend on the manufacturer remaining solvent, punitive damages are a luxury that courts should avoid awarding in order to protect the broader-based right of all claimants to compensatory payment.").

\textsuperscript{170} See Malcolm E. Wheeler, \textit{A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation}, 40 Ala. L. Rev. 919, 943 (1989) (Punitive damages may "spawn frivolous lawsuits, prolong trials, generate more appeals, and, by generating unpredictability, increase judicial costs by making it more difficult for defendants and plaintiffs
D. Joint and Several Liability

The principle of joint and several liability provides that one tortfeasor may hold liable to the plaintiff for all of the harm caused by the combined acts of several tortfeasors.\textsuperscript{171} Its purpose is to ensure that the plaintiff will be fully compensated even though one or more of the defendants is insolvent or unavailable for suit.\textsuperscript{172} Joint and several liability is fairly common in products liability law. For example, retailers, wholesalers and others in the distributive chain may be held liable for an independent breach of duty along with the manufacturer of a defective product. Furthermore, under certain circumstances, both the suppliers of raw materials or component parts and the manufacturer of a defective finished product may be held liable to an accident victim.

In recent years, some commentators have criticized the doctrine of joint and several liability.\textsuperscript{173} It is said that joint and several liability encourages plaintiffs to sue and recover from parties with "deep pockets," even though other tortfeasors are more culpable.\textsuperscript{174} Joint and several liability may also increase the cost of resolving claims. For example, if all parties are not joined in a single lawsuit, further litigation in the form of contribution or indemnity actions will be necessary to apportion liability among the various defendants. Even when all parties are joined in a single lawsuit, such litigation will inevitably be more complex and expensive than traditional two-party lawsuits. Consequently, joint and several liability is often the subject of criticism, but it remains a common feature of products liability law.

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\textsuperscript{171} See Manzer, supra note 159, at 635 ("Under joint and several liability, a tort victim who is injured by two or more tortfeasors may recover his total damages from any one of the tortfeasors, regardless of the portion of fault attributable to that tortfeasor.").

\textsuperscript{172} See Richard W. Wright, Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure, 21 U.C. DAVIS L. REV. 1141, 1142-43 (1988) ("[U]nder joint and several liability the risk of insolvent or otherwise unavailable tortfeasors and the expense of multiple actions is placed on the solvent tortfeasors, if any, from whom the plaintiff initially obtains compensation.").

\textsuperscript{173} See Aaron D. Twerski, The Joint Tortfeasor Legislative Revolt: A Rational Response to the Critics, 22 U.C. DAVIS L. REV. 1125, 1143 (1989) ("The common-law joint and several tortfeasor doctrine accentuates all the imperfections that exist in the present tort compensation system.").

\textsuperscript{174} See Alfred W. Cortese, Jr. & Yosef J. Riemer, Defining the Agenda for Serious Tort Reform, 24 SAN DIEGO L. REV. 903, 909 (1987) ("In practical terms, this means that a plaintiff can collect an award from the defendant with the most money—the so-called 'deep pocket'—rather than the defendant with the greatest culpability."); Senator Larry Pressler & Kevin V. Schieffer, Joint and Several Liability: A Case for Reform, 64 DENV. U. L. REV. 651, 652 (1988) ("[P]laintiffs often target persons they perceive to have the greatest resources from which to pay claims.").
liability should be eliminated or sharply curtailed in products liability cases.

1. Retailers and Others in the Distributive Chain

The majority of states hold nonmanufacturers, such as retailers, wholesalers, and distributors, strictly liable for injuries caused by defective products. Proponents of strict liability for such nonmanufacturers claim that retailers and others will be more selective about the products they sell if they are held strictly liable for product-related injuries. In addition, the prospect of liability is thought to cause retailers and others to pressure manufacturers to make their products safer. Furthermore, liability is sometimes justified on the basis that nonmanufacturers contribute to the entry of products into the market and benefit financially from their sale.

However, other legal scholars have questioned the wisdom of holding retailers and others strictly liable to injured consumers, and a num-

175. See, e.g., Vandermark v. Ford Motor Co., 391 P.2d 168, 172 (Cal. 1964) ("Accordingly, as a retailer engaged in the business of distributing goods to the public, . . . [the defendant] is strictly liable in tort for personal injuries caused by defects in cars sold by it."); Kleve v. General Motors Corp., 210 N.W.2d 568, 571 (Iowa 1973) ("It is further understood the rule of strict liability in tort applies to a retailer as well as the manufacturer of a defective product."); Blackburn v. Johnson Chemical Co., Inc., 490 N.Y.S.2d 452, 454 (N.Y. 1985) ("As the law of strict liability has evolved in this jurisdiction, liability extends not only to those who manufacture the defective product, but also to any party in the direct distributive chain."). But see Sam Shamberg Co. v. Barlow, 258 So. 2d 242, 244-45 (Miss. 1972) ("Where the wholesaler or distributor purchases an article from a reputable and reliable manufacturer, sells it to a retailer in its original condition, and the retailer in turn sells the article—exactly as it came from the manufacturer—to a customer in the regular course of business, no duty devolves on the wholesaler or retailer to inspect and discover a latent defect.").

176. See Andrew F. Popper, A Federal Tort Law Is Still a Bad Idea: A Comment on Senate Bill 687, 16 J. PRODS. & TOXICS LIAB. 105, 117 (1994) ("If the giant retailers believe that a particular product they sell could be the basis of a product liability action, that product, in all likelihood, will be dropped.").

177. See id. ("Retailers push hard to insist on high quality in the products they sell, in part because they are exposed to strict liability in tort.").

178. See Frank J. Cavico, Jr., The Strict Tort Liability of Retailers, Wholesalers, and Distributors of Defective Products, 12 NOVA L. REV. 213, 221 (1988) ("Thus, although not responsible for the manufacture and production of the product, retailers, wholesalers, and distributors occupy a position in, and derive benefit from, the marketing chain, which is sufficient to impose strict tort liability.").

179. See Burt A. Leete, Products Liability for Nonmanufacturer Product Sellers: Is It Time to Draw the Line?, 17 FORUM 1250, 1268 (1981-1982) ("There certainly appears to be a substantial reason for modifying the current doctrine of strict liability as it is applied to nonmanufacturers."); Owen, supra note 32, at 712-13 ("Retailers, for example, although broadly considered subject to strict tort liability, seem unfairly covered by the doctrine when the defect was concealed from view and the manufacturer is solvent and within the jurisdiction of the court.").
ber of states have enacted statutes to limit the liability of wholesalers and retailers in cases where the manufacturer is solvent and subject to suit. It can certainly be argued that it is unfair to hold nonmanufacturers liable for injuries over which they have no control. More importantly, the imposition of liability upon nonmanufacturers provides only marginal benefits to accident victims while unnecessarily increasing litigation costs for everyone. For example, nonmanufacturers who are sued by accident victims cannot rely on the product manufacturer to look out for their interests, but must participate in any litigation that occurs. In addition, wholesalers and retailers frequently have to bear the expense of a second lawsuit in order to obtain indemnity from responsible manufacturers.

In the interest of reducing administrative costs, therefore, nonmanufacturers should not ordinarily be held liable to injured consumers. Manufacturers, on the other hand, should be free to adjust liability between themselves and others in the distributive chain through indemnity agreements.

2. Suppliers of Component Parts and Raw Materials

Manufacturers and suppliers are also subject to potential joint and several liability. For example, when a defective component part is incorporated into a finished product, both the manufacturer of the finished product and the supplier of the component part may be liable for injuries suffered by the user or consumer. Furthermore, both manufacturer and supplier may be held liable to the consumer when a nondefective component part is incorporated into the finished product in such a way as to make the finished product unreasonably dangerous; the manufacturer of the finished product may be held liable for defective product design, while the supplier is potentially liable for failing to warn the manufacturer or the ultimate consumer about potential dangers.


181. See Cavico, supra note 178, at 229 ("Product retailers, wholesalers, and distributors, routinely sued in product liability cases, are forced to incur substantial legal costs to achieve this 'shifting' process [by means of indemnity actions].").

182. However, consumers should be permitted to sue domestic distributors of foreign manufacturers when the foreign producer cannot be reached for suit in the United States.

183. See Ausness, supra note 124, at 1213.

184. See id. at 1213-16.
A similar principle applies to suppliers of raw materials.\textsuperscript{185} Both the supplier and the manufacturer may be held liable to the ultimate consumer of the finished product if the raw materials are defective in some way. Moreover, even if the raw materials supplied are not defective, some courts hold that suppliers owe a duty to warn manufacturers, and even consumers, about potential risks.\textsuperscript{186} In such cases, an injured party may have a cause of action against both the manufacturer of the finished product and the supplier of the raw materials for that product.

The best way to deal with the inefficiencies of joint and several liability is to allow the injured party to sue only the manufacturer of the finished product. Suits by consumers against suppliers of component parts or raw materials would be prohibited. This would reduce litigation costs for everyone. Suppliers would obviously benefit because they would no longer have to incur legal expenses to participate in consumer-manufacturer litigation. Consumers would also save money because they would not have to sue everyone involved in the production process. Eliminating multiparty litigation would also benefit manufacturers by reducing their legal costs. At the same time, manufacturers could protect themselves against defective components or raw materials by demanding indemnification agreements from their suppliers.\textsuperscript{187}

\section*{E. Workers and Employers}

Many work-related injuries involve defective products.\textsuperscript{188} In such cases, injured parties may be able to recover under both products liability and workers' compensation. Workers' compensation programs provide compensation on a no-fault basis to employees who are injured during the course of their employment.\textsuperscript{189} Some injuries are compensated by a single award calculated according to statutory schedules,\textsuperscript{190} while others

\begin{itemize}
  \item[\textsuperscript{185}]  See generally id. at 1216-24 (examining various liability scenarios).
  \item[\textsuperscript{186}]  See, e.g., Forest v. E.I. DuPont de Nemours & Co., 791 F. Supp. 1460, 1469 (D. Nev. 1992) (holding that a bulk supplier's duty to warn depended upon whether vendee knew of the danger and whether the bulk supplier acted reasonably in relying upon vendee to warn the ultimate consumer).
  \item[\textsuperscript{187}]  Although disputes between manufacturers and suppliers might arise over these indemnification agreements, manufacturers and suppliers who engaged in long-term commercial relationships, would probably settle their differences by arbitration or mediation rather than by litigation.
  \item[\textsuperscript{188}]  Approximately 60\% of the personal injury claims filed against product manufacturers arise from workplace accidents. See Priest, supra note 80, at 258 (citing AAIA/AlA JOINT INDUSTRY STUDY, PRODUCT LIABILITY CLAIMS CLOSED IN 1985 (1986)).
  \item[\textsuperscript{189}]  See O'Connell, Balanced Proposals, supra note 19, at 320.
\end{itemize}
are compensated by disability benefits based on medical expenses and pre-injury wages.\textsuperscript{191} Under the law of workers’ compensation, the benefits provided under the statute are the exclusive remedy of an employee against his or her employer.\textsuperscript{192} However, workers can also recover against producers even though they have already been compensated by their employers.\textsuperscript{193} Furthermore, if a worker obtains damages from a producer, his or her employer may seek reimbursement for any workers’ compensation award paid to the employee.\textsuperscript{194}

There are a number of problems with this system of dual compensation. Arguably, suits by employees against product sellers are unfair to employers. Not only are employers required to contribute to the workers’ compensation system, but they must also pay for employee injuries in the form of higher prices for workplace supplies and equipment because the producers of such goods pass their tort liability costs on to their customers.\textsuperscript{195} Another problem, is the cost of shifting losses from one compensation system to another when subrogation by employers is allowed.\textsuperscript{196}

If an insurance-based compensation scheme was adopted, workers would be restricted to the amounts provided by the workers’ compensation statute and employers would not be allowed to sue product sellers for any benefits paid to workers. At the same time, employers and manu-

\textsuperscript{191} See Note, Compensating Victims of Occupational Disease, 93 HARV. L. REV. 916, 919 (1980) [hereinafter Compensating Victims] (“Compensation [for occupational disease] includes both medical benefits and payments for lost income; the latter are a percentage of the victim’s wages, subject to fairly low ceilings.”).


\textsuperscript{193} See Compensating Victims, supra note 191, at 919 (“The employee can file suit against third parties: either the manufacturer of the machine or the party who supplied it to the employer.”).

\textsuperscript{194} See Paul C. Weiler, Workers’ Compensation and Product Liability: The Interaction of a Tort and Non-Tort Regime, 50 OHIO ST. L.J. 825, 836 (1989) (“In all but three jurisdictions . . . the employer is given a statutory lien against the employee’s tort right to secure reimbursement of workers’ compensation benefits that the employer has or will pay to the injured worker.”).

\textsuperscript{195} See Jeffrey O’Connell, Bargaining for Waivers of Third-Party Tort Claims: An Answer to Product Liability Woes for Employers and Their Employees and Suppliers, 1976 U. ILL. L.F. 435, 441 (“But now, in addition to paying workers’ compensation benefits, the employer increasingly pays the equivalent of common law liability reflected in increased costs of machinery or indemnity agreements with his capital goods suppliers.”).

\textsuperscript{196} See id. (“However, as legal and insurance scholars have been pointing out for years, these so-called subrogation claims, whereby insured losses are shifted and reshifted in multiple insurance arrangements, always shortchange insureds in the end, since multiple and expensive layers of insurance are thereby required of everyone.”).
facturers would be permitted to shift their liability by entering into indemification agreements.\(^{197}\) Restricting suits by workers and their employers against product sellers would preserve the efficiencies of the workers compensation system, and would avoid the costs associated with shifting losses from one compensation program to another.\(^{198}\)

F. The Collateral Source Rule

The collateral source rule is both a rule of evidence and a rule of damages.\(^{199}\) As a rule of evidence, the collateral source rule bars the defendant from introducing evidence of payments the plaintiff has received from other sources.\(^{200}\) As a rule of damages, the collateral source rule forecloses the defendant from reducing the judgment by the amount of money received by the plaintiff from collateral sources.\(^{201}\) Benefits that are covered by the rule include wages, gratuitous payments, health and disability insurance payments, pensions or retirement benefits, and payments from government programs.\(^{202}\) The collateral source rule is followed in nearly all jurisdictions, although in recent years many states have abolished or limited the rule in medical malpractice cases.\(^{203}\)

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197. See Weiler, supra note 194, at 851 (noting that the parties who are often in a continuing business relationship with each other would be more likely to adjust liability \textit{ex ante} by contract or to rely on informal means of dispute resolution).

198. At first glance, it may appear harsh to prohibit workers from suing producers if workers compensation benefits are insufficient to fully compensate workers for their injuries. See Jerry J. Phillips, \textit{In Defense of the Tort System}, 27 Ariz. L. Rev. 603, 604 (1985) ("Commonly, payments for workplace injuries and industrial diseases are woefully inadequate."); Note, \textit{Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes}, 96 Harv. L. Rev. 1641, 1643 (1983) ("The exclusive remedy rule and the various limitations on benefits combine to create a substantial risk that job-related injuries will leave workers significantly worse off financially than they were before being injured."). However, workers compensation benefits have increased in many states and may now be adequate. See W. Kip Viscusi, \textit{Toward a Diminished Role for Tort Liability: Social Insurance, Government Regulation, and Contemporary Risks to Health and Safety}, 6 Yale J. on Reg. 65, 98 (1989) (arguing that workers' compensation awards are now fairly generous). Even if workers compensation benefits are not adequate, it seems better to tackle that problem directly rather than relying on tort claims to supplement workers compensation benefits.

199. See James P. Moceri & John L. Messina, \textit{The Collateral Source Rule in Personal Injury Litigation}, 7 Gonz. L. Rev. 310, 310 (1972) ("The Collateral Source Rule has been applied as both a rule of damages and a rule of evidence.").


202. See Moceri & Messina, supra note 199, at 310.

The collateral source rule has been justified on various policy grounds. First, the rule promotes deterrence by ensuring that individuals and business enterprises fully pay for the damages they cause. Additionally, the collateral source rule prevents wrongdoers from receiving unmerited windfalls by refusing to credit them for payments made to the plaintiff from collateral sources. Furthermore, the collateral source rule encourages individuals to obtain insurance against injury and financial loss. Finally, the rule ameliorates the effect of damage rules that do not fully compensate accident victims for their losses.

However, there are a number of serious problems with the collateral source rule. First of all, it seems illogical to compensate a victim twice for the same loss. More importantly, the collateral source rule increases the costs of compensating accident victims. To the extent that victims are compensated twice, these additional payments are passed on to the public in the form of higher insurance costs. Also, once losses have been


204. See John G. Fleming, The Collateral Source Rule and Contract Damages, 71 CAL. L. REV. 56, 58 (1983) ("Traditionally, the principal defense of the collateral source rule has been that for the sake of both deterrence and equity vis-a-vis his victim, a wrongdoer should not escape the full cost of the injury he has caused.").

205. See Grayson v. Williams, 256 F.2d 61, 65 (10th Cir. 1958) ("If there must be a windfall certainly it is more just that the injured person shall profit therefrom, rather than the wrongdoer shall be relieved of his full responsibility for his wrongdoing.").


207. See Moceri & Messina, supra note 199, at 312 ("[I]n many cases the legal, compensatory damages are inadequate to compensate for the actual harm done."). In particular, the plaintiff can use such payments to pay for attorneys' fees and other nonreimbursed litigation costs. See Weller, supra note 154, at 1176 ("Duplicate payments for their health care costs give successful plaintiffs some of the money that they need to pay for the lawyers who acted on their behalf to collect damage awards that compensate the plaintiffs' remaining actual losses.").

208. See O'Connell, A "Noe No-Fault" Contract, supra note 19, at 901 ("[I]f there is no subrogation] an eligible accident victim can receive an additional dollar from the tortfeasor for every health insurance dollar expended. This procedure amounts to coining money!"); Christopher J. Eaton, Comment, The Kansas Legislature's Attempt to Abrogate the Collateral Source Rule: Three Strikes and They're Out?, 42 U. KAN. L. REV. 913, 921 (1994) ("Allowing an injured party to recover damages for benefits he has already received creates a double recovery for the injured party.").

209. See John L. Antragoli, Note, California's Collateral Source Rule and Plaintiff's Receipt of
spread by means of insurance, it is expensive to redistribute the losses to another insurance system. This is what happens when losses that are covered by first-party insurance are then shifted to tortfeasors (and their insurers).

Consequently, the collateral source rule should not be allowed in product liability cases if the present system is replaced. Nor should first-party insurers be permitted to include subrogation provisions in their insurance contracts. Such an approach is consistent with the view that payments in products liability actions should only be used to compensate for out-of-pocket losses. In addition, abrogation of the collateral source rule will lower the amount of money that producers must pay to accident victims and, thereby, reduce the size of the premium they must charge consumers to insure against product-related losses. Finally, changing the collateral source rule will help to keep the system’s administrative costs down by discouraging further loss-shifting once accident victims have been compensated.

V. LOOSE ENDS

This part discusses some of the difficult issues that must be addressed if existing products liability law is replaced with an insurance-based compensation scheme. These include: (1) what effect would such an approach have on product safety; (2) what would be the distributional effects of switching from the present products liability system to one that pays much lower benefits; (3) how should plaintiffs’ attorneys’ fees be paid; (4) should comparative fault be allowed in an insurance-based compensation system; (5) should product sellers be able to modify the basic coverage provided for under such a plan; and (6) should existing products liability laws be changed by state or federal legislation?

Uninsured Motorist Benefits, 37 Hastings L.J. 667, 671 (1985) ("Additionally, because insurance companies usually pay the judgment against a tortfeasor, this double recovery leads to an unnecessary increase in insurance costs to the public in exchange for an unnecessary windfall to plaintiffs.").

210. See Victor E. Schwartz, Tort Law Reform: Strict Liability and the Collateral Source Rule Do Not Mix, 39 Vand. L. Rev. 569, 573 (1986) ("When the tort system distributes a previously compensated-for risk, it, in effect, redistributes the risk to a different insurance system. This redistribution makes poor economic sense.").

211. Policies issued by first-party insurers, such as health and disability insurance companies, often contain subrogation provisions. See Kenneth S. Abraham, What Is a Tort Claim? An Interpretation of Contemporary Tort Reform, 51 Md. L. Rev. 172, 192 (1992). According to these provisions, once the insurance company indemnifies the insured for the loss, it may recover that amount from the tortfeasor. See John G. Fleming, The Collateral Source Rule and Loss Allocation in Tort Law, 54 Cal. L. Rev. 1478, 1498 (1966).
A. Product Safety

The compensation scheme described in part IV would greatly reduce the liability exposure of product sellers. Arguably, this lessening of liability may cause them to devote fewer resources to product safety than are currently devoted under existing products liability law.\textsuperscript{212} However, tort liability is not the only way to induce producers to make their products safer. An alternative is to allow market forces to determine the safety level of products. If consumers demand safer products, and some product sellers are willing to provide them, then other sellers will have to follow suit or they will lose their share of the market. On the other hand, if some, but not all, consumers prefer safer products, manufacturers can offer various levels of product quality or warranty protection in response to these differing consumer preferences.

However, many commentators are skeptical about the market's ability to achieve an acceptable level of product safety.\textsuperscript{213} Therefore, a more promising solution might be to rely more heavily on government regulation to achieve a satisfactory level of product safety. Arguably, regulation can attain safety goals much more cheaply and effectively than tort liability.\textsuperscript{214} As stated above, the federal government already extensively regulates product safety.\textsuperscript{215} Although some observers have questioned the adequacy of existing regulations,\textsuperscript{216} I believe that they generally achieve an acceptable level of product safety.\textsuperscript{217} To the extent that safety standards

\textsuperscript{212} See Peter Charles Choharis, \textit{A Comprehensive Market Strategy for Tort Reform}, 12 \textit{Yale J. on Reg.} 435, 452 (1995) ("Faced with limited potential damage payments, producers will have less incentive to sell safer products or even to invest in research to develop them."); Stephen F. Williams, \textit{Second Best: The Soft Underbelly of Deterrence Theory in Tort}, 106 \textit{Harv. L. Rev.} 932, 933 (1993) ("Thus, but for tort liability, producers would have inadequate incentives to compete either in reducing risk or in offering warranties.").

\textsuperscript{213} See Pierce, \textit{supra} note 1, at 1284 ("Four major factors impair the ability of the market to channel safety spending into patterns deemed optimal by all: externalities; transaction costs; limited cognitive ability of participants; and the relationship of market choices to preexisting patterns of wealth distribution. Each factor alone might be manageable; but together they prevent the market for safety from performing satisfactorily in many circumstances.").

\textsuperscript{214} See Ausness, \textit{supra} note 126, at 1221-23.

\textsuperscript{215} See \textit{id}. at 1224.

\textsuperscript{216} See, e.g., Anita Johnson, \textit{Products Liability "Reform": A Hazard to Consumers}, 56 N.C. L. Rev. 677, 687 (1978) ("Manufacturers have enormous power to influence the formation of government standards, with the result that the standards are frequently political compromises at best."); Teresa Moran Schwartz, \textit{The Role of Federal Safety Regulations in Products Liability Actions}, 41 \textit{Vand. L. Rev.} 1121, 1122 (1988) (noting that the Reagan administration's hostile policies weakened the federal regulatory system).

\textsuperscript{217} See Ausness, \textit{supra} note 126, at 1257-61 (criticizing the theory that existing regulations do not achieve adequate levels of product safety).
are not satisfactory, it makes more sense to improve them than it does to rely on tort liability to correct deficiencies in the regulatory system.

B. Distributional Effects

Changes in products liability law, such as those described in this article, will also have significant distributional effects. Adoption of a strong regulatory compliance defense will benefit product sellers at the expense of accident victims whose claims will be foreclosed. Abrogation of damage awards that include nonpecuniary losses and punitive damages will benefit product sellers by reducing their potential liability, but will leave accident victims with less. On the other hand, eliminating joint and several liability will help suppliers, wholesalers and retailers at the expense of manufacturers. Restricting employees' remedies to payments provided by workers' compensation will benefit product sellers, but will adversely affect injured workers and their employers. Lastly, doing away with the collateral source rule will benefit product sellers, but will disadvantage accident victims and first-party insurers.

At first glance, these changes in the present liability regime appear heavily skewed in favor of product sellers. Potential liability for manufacturers is increased in one area, joint and several liability, but is otherwise substantially decreased. Other product sellers do even better; no element of my proposal increases their potential liability, while most elements substantially decrease it. In contrast, accident victims appear to gain virtually nothing and lose much under an insurance-based compensation scheme. Also, employers and first-party insurers would be forced to give up potential claims against product sellers and would get nothing back in return.

Such a drastic transfer of wealth from consumers to producers would be intolerable if it actually occurred. However, I believe that producers will not be able to pocket all of these savings, but will be forced by competitive pressures to pass them on to consumers in the form of lower prices for their products. Thus, while consumers will receive less protection, they will ultimately pay much less for the products they buy. For many, these savings will be more beneficial than the added protection that tort law provides.

Finally, the compensation scheme proposed above will be less regressive than the present system of products liability. As mentioned earlier, wealthy victims generally obtain larger damage awards in tort ac-
tions against producers because their compensable losses are greater.\textsuperscript{218} However, this disparity will be lessened under an insurance-based compensation system because wealthier victims are more likely to be insured against such losses and will, therefore, recover less from product sellers.\textsuperscript{219} This will not only reduce the cost of coverage for all consumers, but will also largely eliminate the subsidy that wealthy purchasers receive under the existing products liability regime.

C. Attorneys' Fees

In the United States, it is customary for plaintiffs' attorneys to represent their clients on a contingent fee basis.\textsuperscript{220} The typical contingent fee arrangement calls for the attorney, if successful, to receive one-third of the plaintiff's recovery.\textsuperscript{221} Traditionally, nonpecuniary damages, and to a lesser extent, punitive damages, have served as a fund to pay attorneys' fees and other litigation expenses.\textsuperscript{222} For some plaintiffs, payments received from collateral sources also serve this purpose.\textsuperscript{223} If the damage awards no longer include nonpecuniary damages, punitive damages or expenses already paid for from collateral sources, claimants will be required to pay attorneys' fees out of their own pocket and, consequently, will receive less than full compensation for their injuries.

This argument, however, confuses the goals of insurance with those of tort law. The purpose of damage awards in tort actions is to make the plaintiff whole again, and for this reason it is proper for plaintiffs to seek compensation for all of their losses, including the expenses of litigation.\textsuperscript{224} The practice is otherwise in insurance cases; first-party insurers

\textsuperscript{218} See supra note 85 and accompanying text.

\textsuperscript{219} Most Americans have health insurance and many are also eligible for workers compensation protection or have private disability insurance. See Abraham, supra note 211, at 193. These individuals would receive very little from producers under an insurance-based compensation scheme.

\textsuperscript{220} See Fleming, supra note 87, at 145. Defendants, on the other hand, almost always pay their attorneys on an hourly fee basis. See Kakalis & Pace, supra note 88, at 97.


\textsuperscript{222} See Ingber, supra note 74, at 810-11 ("Because juries cannot easily increase the award for injuries of a provable and calculable nature, they tend to provide for attorney costs by increasing general damages for intangible injuries."); Note, Class Actions for Punitive Damages, 81 Mich. L. Rev. 1787, 1790 (1983) ("Such [punitive damage] awards often provide a plaintiff with the means to defray litigation expenses, especially attorney's fees.").

\textsuperscript{223} See Weiler, supra note 154, at 1176 (stating that duplicate payment from insurers give plaintiffs some of the money they need to pay their attorneys' fees).

\textsuperscript{224} Of course, one should keep in mind that tort claimants are not entitled to attorneys' fees
rarely obligate themselves to compensate insureds for all of their losses. Rather, insurers typically require insureds to bear some portion of their losses. The purpose of this policy, implemented by deductibles and copayments, is to reduce moral hazard problems. Arguably, the same policy would justify requiring claimants to bear their share of litigation expenses, including attorneys’ fees.

Furthermore, disallowing payment of attorneys’ fees might have a beneficial effect on the litigation process. If claimants are forced to pay their own attorneys’ fees, they may drive down existing contingent fee rates. If that happened, lawyers would refuse to accept marginal cases. The net effect would be less litigation, more settlements, and less overall expense.

For these reasons, product sellers should generally not be required to compensate claimants for their attorneys’ fees. An exception might be where a producer acted in bad faith in refusing to settle a case. In such cases, the court should be allowed to authorize payment of attorneys’ fees, based on a reasonable hourly rate, if the plaintiff won on the merits and offered clear and convincing evidence of bad faith on the part of the producer.

**D. Comparative Fault**

Until about twenty years ago, most courts refused to bar recovery in products liability cases for negligent conduct on the part of the victim, unless it amounted to assumption of the risk. However, since that time most states have adopted some form of comparative fault system for use in products liability cases. Although there are theoretical problems with

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225. Of course, the parties would be free to negotiate the issue of attorneys’ fees as part of the settlement process.


227. See, e.g., Daly v. General Motors Corp., 575 P.2d 1162, 1172 (Cal. 1978) (“[W]e conclude that a system of comparative fault should be and it is hereby extended to actions founded on strict products liability.”); West v. Caterpillar Tractor Co., 336 So. 2d 80, 92 (Fla. 1976) (“Contributory or comparative negligence is a defense in a strict liability action if based upon grounds other than the failure of the user to discover the defect in the product or the failure of the user to guard against the possibility of its existence.”); Coney v. J.L.G. Indus., Inc., 454 N.E.2d 197, 203 (Ill. 1983) (“[W]e hold that the defense of comparative fault is applicable to strict liability cases.”); Busch v. Busch Construction, Inc., 262 N.W.2d 377, 394 (Minn. 1977) (“We find no difficulty in applying comparative concepts to products liability cases.”); Thibault v. Sears, Roebuck & Co., 395 A.2d 843, 850 (N.H. 1978) (“We judicially recognize the comparative concept in strict liability cases parallel to the legislature’s recognition of it in the area of negligence.”); Suter v. San Angelo Foundry & Machine Co., 406 A.2d 140, 153 (N.J. 1979) (“We hold that the Comparative Negligence Act
mixing fault and no-fault principles, the comparative fault doctrine does force negligent consumers to assume their fair share of responsibility for product-related losses.

Also, one can argue that comparative fault is an appropriate tool to combat moral hazard problems because it encourages consumers to exercise care for their own safety. On the other hand, there is no analogy to comparative fault in the law of insurance. Although first-party insurers may subsequently discontinue coverage or raise premiums when insureds suffer losses due to their own carelessness, they cannot refuse to pay such claims. This suggests that comparative fault concepts should not be introduced into an insurance-based compensation scheme. In addition, allowing product sellers to introduce consumer negligence into the claims process would complicate the dispute and increase the costs of the settlement process. Consequently, comparative fault should be excluded from an insurance-based system of products liability.

E. Contractual Modification of Basic Insurance Coverage

With conventional first-party insurance, insurers can offer various types of insurance policies to their clients. Thus, insureds can choose the sort of protection that best fits their needs. In contrast, those who insure on a third-party basis ordinarily must provide the same coverage to all purchasers because it is difficult to contract with them on an individual

is applicable in strict liability to those situations in which contributory negligence would have been a defense.

228. See Harvey R. Levine, Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault, 14 San Diego L. Rev. 337, 356 (1977) ("Comparative fault cannot logically and consistently be applied to the strict liability cause of action."); Dwight L. Armstrong, Note, Products Liability, Comparative Negligence, and the Allocation of Damages Among Multiple Defendants, 50 S. Cal. L. Rev. 73, 79 (1976) ("There is . . . a foreseeable difficulty in 'comparing' a plaintiff's culpable conduct with the defendant's strict liability."); see also Daly, 575 P.2d at 1167 ("The task of merging the two concepts is said to be impossible, that 'apples and oranges' cannot be compared, that 'oil and water' do not mix, and that strict liability, which is not founded on negligence or fault, is inhospitable to comparative principles.").

229. See Jack Feinberg, The Applicability of a Comparative Negligence Defense in a Strict Products Liability Suit Based on Section 402A of the Restatement of Torts 2d, 42 Ins. Couns. J. 39, 52 (1975) ("The manufacturer would still be held accountable for all harm which his defective products cause, but the inequitable results of holding the manufacturer liable for that part of the harm caused by the consumer's own contributory conduct . . . would be eliminated.").

230. See David A. Fischer, Products Liability—Applicability of Comparative Negligence, 43 Mo. L. Rev. 431, 433 (1978) ("Comparative fault is very desirable because the policies of risk-spreading and providing the plaintiff with an incentive to act carefully can be simultaneously advanced . . . .")
basis. However, it might be possible for product sellers to offer more than one kind of insurance protection to consumers by using warranties and disclaimers in connection with the sale of their products. For example, producers whose products were safer than average could signal this fact to consumers by offering more generous warranty protection. This would provide more choices for consumers, and possibly encourage more competition among producers in the areas of product quality and warranty protection.

The principle of consumer sovereignty supports the notion that product sellers also be allowed to disclaim liability. Thus, consumers who already had first-party insurance could take advantage of disclaimers and thereby avoid purchasing unnecessary third-party insurance protection. On the other hand, if market conditions were not sufficiently competitive (and they are not in some industries), producers might conspire to provide a standard disclaimer and refuse to pass the resulting liability savings on to their customers. If this occurred, not only would it unjustly enrich producers, but it would leave some consumers without adequate protection against product-related injuries. Thus, though one would not want to rule out disclaimers completely, it might be prudent to limit their use, at least for the present.

F. Implementation

The reform package outlined in this article would almost certainly have to be implemented by legislation. The question is whether this legislative initiative should come from Congress, or whether it should be left to the states to implement. A strong case can be made for federal intervention. First, the federal government already extensively regulates product safety. Second, products liability law affects interstate commerce, and thus deserves national attention. Third, whatever the liability rules are, it is more efficient if they are uniform throughout the country.

Conversely, the states have a strong interest in promoting public health and safety within their borders. Moreover, if a radical change in

231. See Ausness, supra note 126, at 1211-13 (describing federal product safety legislation).
232. See Schwartz & Mahshigian, supra note 11, at 695 ("The current complex system of state common and statutory product liability laws hampers trade among the states because products are subject to varying and conflicting rules.").
233. See Atwell, supra note 119, at 228 ("The states have a greater interest in protecting the health and safety of [their] citizens than they have in other areas."); Marilyn P. Westerfield, Comment, Federal Preemption and the FDA: What Does Congress Want?, 58 U. Cin. L. Rev. 263, 271
products liability law is to be introduced, it might be wise to initially implement it in a few states to see if it works as anticipated. For these reasons, perhaps the products liability scheme set forth in part IV should first be offered as a uniform act rather than as a federal statute. If this approach failed, federal legislation could then be considered.

VI. CONCLUSION

Many legal scholars feel that the existing products liability regime does not do its job very well; it does not encourage producers to make safer products, it does not provide accident victims with fair and equal treatment, and it is enormously expensive to operate. This article has examined an alternative whose sole purpose would be to provide a reasonable level of compensation to injured consumers. Benefits under this compensation scheme would replicate, as far as possible, the type and level of benefits that consumers expect to receive when they purchase first-party insurance.

Although the benefits provided would be less generous than those available to successful tort claimants, I believe that the savings to consumers and producers from such a program would be enormous. It is better to put money in the pockets of consumers than to force them to pay higher prices for products in order to finance an insurance system that is excessively expensive to operate, and which grossly overcompensates those accident victims who are lucky enough to prevail in court. Another advantage of an insurance-based compensation system is that it is flexible enough to allow product sellers to offer increased coverage through express warranties to consumers who desire more protection.

There are, admittedly, a number of legitimate concerns about the fairness and effectiveness of an insurance-based compensation system. For this approach to work, markets must be reasonably competitive, federal product safety standards must be adequate to protect consumers, and the majority of consumers must be able to make intelligent and informed choices about the products they buy. Opponents of products liability reform are skeptical that any of these conditions exist and are, therefore, willing to live with the inefficiencies of the present system. I am more optimistic and would prefer to try something new, even though there are some risks involved.

(1989) ("Historically, health and safety concerns are viewed as being totally within the sphere of interest of the state.").