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Inherent Product Hazards*

BY DAVID G. OWEN**

INTRODUCTION

All products are dangerous; each amalgamation of molecules involves some risk of harm. Unavoidable dangers inhere in every product—they cannot be eliminated without destroying the product's purpose or desirability. Conspiring with the frailty of human cognition and skill, gravity and other natural forces assure that thousands of children are injured, and sometimes killed, on bicycles, jungle gyms, and trampolines each year. Thousands of adults die annually from misadventures with automobiles, prescription drugs, cigarettes, alcohol, and guns. Under circumstances of extended or improper use, even the most innocuous products can become instruments of injury, disease, or death. Peanut butter and marshmallows can gag and suffocate young children; baseballs hit with aluminum bats can strike pitchers in the head; cotton garments can ignite and burn those who wear them; hot chocolate, tea, and coffee can scald those who drink them; sleds can propel riders down snowy hills into

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2 Compare Sanchez v. Hillerich & Bradsby Co., 128 Cal. Rptr. 2d 529 (Cal. Ct. App. 2002) (holding that pitcher was allowed to pursue a claim that a bat was defectively designed) with Vincer v. Esther Williams All-Aluminum Swimming Pool Co., 230 N.W.2d 794, 799 (Wis. 1975) (Wilkie, J., dissenting) (stating that a baseball bat is an unavoidably unsafe product).

3 E.g., Ellsworth v. Sheme Lingerie, Inc., 495 A.2d 348, 351 (Md. 1985) (noting that an adult was severely burned when her flannel nightgown caught fire); Gryc v. Dayton–Hudson Corp., 297 N.W.2d 727, 729 (Minn. 1980) (recounting a situation in which a child's pajamas caught fire).

trees; and, over time, butter and fast foods can cause obesity, diabetes, heart attacks, and death. In a world in which risk is a certain result of every step and breath, courts must be cautious in assuming the responsibility of declaring entire categories of products—especially those widely understood to be inherently hazardous because of their inescapable, generic risks—to be "good" or "bad." The question of whether courts should make such sweeping judgments has been called the "last frontier" of products liability law, a border land where fights erupt over whether manufacturers should be held responsible, without the usual proof of defect, for selling products adjudged by a court or jury to do more harm than good.

hot chocolate in his lap and providing an extensive review of hot beverage cases); Immormino v. J & M Powers, Inc., 91 Ohio Misc. 2d 198, 200 (Ohio Ct. Com. P1 1998) (recounting a situation in which plaintiff suffered burns after spilling tea in her lap).


7 E.g., Pelman v. McDonald's Corp., 237 F. Supp. 2d 512, 516 (S.D.N.Y. 2003) (noting that plaintiffs alleged that McDonald's' description of its products caused minors to become obese), vacated in part by 396 F.3d 508 (2d Cir. 2005); RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965) (noting that butter can cause cholesterol and heart attacks).

In a legal world where responsibility is formally based on fault, the scope of a manufacturer's liability for supplying products of whatever degree of danger is quite clear: the manufacturer must take all reasonable measures proportionate to the risk to reduce foreseeable risks of harm. Normally, this means that a manufacturer must exercise reasonable care to eliminate from its products all substantial dangers that can reasonably be designed away, warn consumers about all substantial hidden dangers that remain, make its products carefully to minimize dangerous manufacturing flaws, and act carefully to avoid misrepresenting its product's safety. Under a negligence regime, if manufacturers exercise reasonable care in all of these respects, consumers must bear responsibility for any dangers remaining in daily use of the products, whether those dangers are characterized as "defects," "inherent hazards," or "generic risks."

During the 1960s, the foundation of the legal regime governing product accidents in America changed nominally from requiring a finding of fault to "strict liability." At its inception, the doctrine of strict products liability appeared to accomplish a broad-based shift of responsibility for product-related injuries away from consumers and onto product suppliers and manufacturers, who were viewed as better risk-bearers than the victims of product accidents. This far-reaching shift in the apparent basis of liability for product accidents raised fundamental questions about how far a manufacturer's liability should extend for the inevitably harmful results of generically hazardous products. For example, butter causes cholesterol problems and heart attacks, drugs have dangerous side-effects, cigarettes cause lung disease, and alcohol results in liver damage. Indeed, when the nascent concept of strict products liability in tort was first debated and developed in the 1950s and 1960s, the question of the proper scope of supplier responsibility for such inherent or "generic" risks in certain categories of products—for example, food, drugs, whiskey, and cigarettes—was one of the central issues of concern to Dean Prosser and other scholars of the day.


9 See OWEN, supra note 8, at ch. 2.
10 Id.
11 See id. § 5.2.
12 See id. § 5.4.
13 See id. § 6.2 (discussing development of comments i, j, and k to § 402A on liability for generic risks); id. § 10.4 (discussing unavoidable dangers and state of the art); David G. Owen, The Puzzle of Comment j, 55 HASTINGS L.J. 1377 (2004).
It was clear to these scholars, particularly as they molded and debated section 402A of the *Restatement (Second) of Torts*, that manufacturers of unavoidably hazardous products could only be expected to assure that their products were free of production defects and contained warnings of foreseeable hidden dangers.\(^4\) Presumably, in order to avoid the possibility that the new "strict liability" doctrine might be stretched further and misconstrued as permitting a challenge to the design of products possessing such inherent dangers, Dean Prosser and the American Law Institute ("ALI") explicitly excluded such an obligation from the new strict tort doctrine. In particular, comments \(i\), \(j\), and \(k\) to section 402A of the Restatement made clear that the only duties of manufacturers of inherently dangerous products—such as alcoholic beverages, prescription drugs, cigarettes, certain foods, and other products whose risks cannot be designed away—are to avoid manufacturing defects and to warn consumers of hidden dangers.\(^5\)

Thus, even though such products are unavoidably unsafe precisely because their risks cannot be removed without destroying their utility, the *Restatement* does not allow a claim that such products are defective in design.

This article examines a manufacturer’s responsibility for harm resulting from inherently dangerous products by exploring the doctrinal debate and judicial and statutory experience concerning several prominent types of inherently dangerous products. Part I considers the struggle to define product "defect" in a manner compatible with evolving theories on whether manufacturers or consumers properly bear responsibility for inherent product hazards. Part II surveys several types of inherently hazardous products that have generated significant litigation: alcoholic beverages, cigarettes, firearms, drugs, asbestos, lead paint, and fast foods. Part III examines various types of reform legislation designed to protect manufacturers and other sellers from responsibility for accidental harm involving such products. Part IV concludes that manufacturers of inherently

\(^4\) See *Restatement (Second) of Torts* § 402A cmts. \(i\), \(j\), \(k\) (1965).

\(^5\) See *Owen*, *supra* note 8, §§ 6.2, 10.4. Comment \(i\) provides that products such as ordinary food and drugs are not unreasonably dangerous. It also notes that sugar is deadly to diabetics, castor oil was used as an instrument of torture by Mussolini, and that uncontaminated whiskey, tobacco, and butter are similar examples of products containing inherent, but not unreasonable, dangers. *Restatement (Second) of Torts* § 402A cmt. \(i\) (1965). Comments \(j\) and \(k\) further develop the notion that sellers of inherently dangerous food and drugs (assuming that they are properly prepared and packaged) have only one duty: to warn consumers of hidden risks. *Id.* cmts. \(j\), \(k\).*
dangerous products properly bear responsibility for failing to warn consumers of hidden dangers, and certainly must bear it for misleading consumers about substantial product hazards. However, consumers must remain responsible for the residuum of risk from inherent hazards of which they are aware.

I. Judicial Rejection of Design Liability for Inherent Dangers

In recent decades, the doctrinal debate over liability for inherent product hazards has centered on whether a product can properly be viewed as legally "defective" because its overall social costs exceed its overall social benefits. Two prominent and controversial examples are cheap handguns that are used by criminals to maim and kill, but possess little positive value, even for self-defense, and cigarettes, which sicken and kill hundreds of thousands of Americans each year for the "benefit" of satisfying an addiction. A handful of courts and a number of com-

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16 See Professor Carl Bogus's explanation of the essence of the "generic liability" debate:

Generic liability, or product category liability as it is also called, involves products that remain unreasonably dangerous despite the best possible construction, design and warnings. Some argue that products liability should end at this point, that a manufacturer who has done everything feasible to make its product reasonably safe ought not be subject to strict liability. Others contend that a manufacturer has a duty not to put unreasonably dangerous products, i.e., products that have a greater social cost than social benefit, into the stream of commerce, and that a manufacturer who cannot feasibly make his product reasonably safe can elect not to distribute his product at all [or, Bogus might say, pay for its accident costs]. To many, generic liability is a radical concept: it raises the specter of courts deciding which products may and may not be distributed, and they perceive it as a judicial usurpation of legislative authority.

Bogus, supra note 8, at 8–9.

17 Compare Gary T. Schwartz, Cigarette Litigation's Offspring: Assessing Tort Issues Related to Guns, Alcohol, & Other Controversial Products In Light of the Tobacco Wars, 27 Pepp. L. Rev. 751, 751 (2000) (noting the "undeniably significant benefits" of cigarettes, such as their flavor, ability to enhance concentration, and service as antidepressants and tranquilizers, which make them, "[t]o that extent... a kind of miracle drug [that is] available... without going through the costly intervention of any physician"), with Wertheimer, supra note 8, at 1443 (stating that cigarettes are an "example of a product which is dangerous, useless, and without alternative feasible design").

18 Three such cases were noted in the Products Liability Restatement Reporters: Halphen v. Johns–Manville Sales Corp., 484 So. 2d 110, 115–16 (La. 1986) (finding that asbestos manufacturers are subject to strict liability for products that fail the social
mentators have taken the position that a product can fail a risk–utility test applied to the product as a whole, as distinguished from the normal risk–utility test based on proof that the manufacturer's failure to adopt a particular safety feature rendered the product's design defective. In some risk–utility test); Kelley v. R.G. Indus., Inc., 497 A.2d 1143, 1158–59 (Md. 1985) (holding a manufacturer of a “Saturday Night Special” cheap handgun liable for criminal use of the gun where its overall danger exceeded its benefits); O'Brien v. Muskin Corp., 463 A.2d 298, 306–07 (N.J. 1983) (holding that a jury could find that the slippery vinyl bottom of a swimming pool rendered the pool defective even if there was no way to avoid risk). Each of these cases was eventually overruled by statute. \textsc{Restatement (Third) of Torts} § 2 cmt. d & reporter's note (IV)(D) (1998).

One case that articulates the global risk–utility (“macro–balancing”) approach to design liability in dictum (since the case involved warnings claims), and distinguishes this approach from the conventional, narrower, micro–balance standard is \textit{Beshada v. Johns–Manville Products Corp.}, 447 A.2d 539, 545 (N.J. 1982):

[W]e can distinguish two tests for determining whether a product is safe: (1) does its utility outweigh its risk? and (2) if so, has that risk been reduced to the greatest extent possible consistent with the product’s utility? The first question looks to the product as it was in fact marketed. If that product caused more harm than good, it was not reasonably fit for its intended purposes. We can therefore impose strict liability for the injuries it caused without having to determine whether it could have been rendered safer. The second aspect of strict liability, however, requires that the risk from the product be reduced to the greatest extent possible without hindering its utility. Whether or not the product passes the initial risk–utility test, it is not reasonably safe if the same product could have been made or marketed more safely.

\textit{Id.}

Also, in dictum, other courts have opined that, in rare cases, a court may justifiably find that a product’s overall dangers exceed its overall social benefits. \textit{See, e.g.}, Armentrout v. FMC Corp., 842 P.2d 175, 185 n.11 (Colo. 1992) (en banc); Kallio v. Ford Motor Co., 407 N.W.2d 92, 97 n.8 (Minn. 1987) (“Conceivably, rare cases may exist where the product may be judged unreasonably dangerous because it should be removed from the market rather than be redesigned.”); Rix v. Gen. Motors Corp., 723 P.2d 195, 201 (Mont. 1986); Wilson v. Piper Aircraft Corp., 577 P.2d 1322, 1328 n.5 (Or. 1978).


\textit{20 On the perils of judicial “macro–balancing,” as compared to the more limited judicial task of “micro–balancing,” the costs and benefits of particular design improvements, see \textsc{Restatement (Third) of Torts} reporter’s note (IV)(D) cmt. f (1998); David G. Owen,
cases, the argument goes, even though there is no practicable way to design away the product's inherent danger, a product may still be adjudged defective at a global level if it fails a "macro-balance" of its social costs and benefits—i.e., if, on balance and in the aggregate, the product is simply "bad." Yet, the vast majority of courts have been markedly unreceptive to the call that they displace markets, legislatures, and governmental agencies by decreeing whole categories of products to be "outlaws."\(^{21}\)

Both the Second and Third Restatements endorse this highly restrained judicial approach. As previously stated, the Second Restatement addresses unavoidably dangerous products in comments i, j, and k. These comments make clear that a manufacturer of such products must avoid manufacturing defects (such as contamination) and must warn of hidden dangers.\(^{22}\) But the central message of the Second Restatement's comments, written in response to the main concern at the time about the reach of the new strict liability doctrine, is that a manufacturer of useful but unavoidably dangerous products is not liable for making them available to a public who desires them, despite knowledge of their inherent risks.\(^{23}\)

The Third Restatement adheres to the principle that entire categories of products commonly understood to be inherently dangerous—such as alcoholic beverages, firearms, and above-ground swimming pools, but not cigarettes\(^ {24}\)—cannot, as a general rule, be judicially classified as

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\(^{21}\) See, e.g., Jones v. Amazing Prods., Inc., 231 F. Supp. 2d 1228, 1248–51 (N.D. Ga. 2002) (dealing with drain cleaner containing 97% sulfuric acid). For a discussion of individual products, see infra notes 33, 36–38. Manufacturers of cigarettes and cheap handguns could ill afford, of course, to pay for all the harm they cause without increasing the prices of their products considerably. However, a judicial policy that would require manufacturers to internalize the full injury costs of such products, despite its inefficiency, does have a variety of social benefits to commend it. See OWEN, supra note 8, § 5.4. Judicial decisions do not, of course, truly outlaw the sale of such products because manufacturers may continue to sell them and compensate persons injured thereby. See David G. Owen, Product Outlaws, 10 Kan. J.L. & Pub. Pol'y 126, 127 (2000). See generally RESTATEMENT (THIRD) OF TORTS § 2(b), reporter's note IV(D) (1998).

\(^{22}\) RESTATEMENT (SECOND) OF TORTS § 402A cmts. i, j, k (1965).

\(^{23}\) See, e.g., Myers v. Philip Morris Co., 50 P.3d 751, 755–56 (Cal. 2002); see also OWEN, supra note 8, at § 6.2; Owen, supra note 13.

\(^{24}\) RESTATEMENT (THIRD) OF TORTS § 2(b) (1998). Restatement (Third) of Torts section 2 (Proposed Final Draft 1997) included tobacco among the small category of products
“defective” in design. That is, the Third Restatement takes the position that plaintiffs in design defect cases must establish that the manufacturer failed to adopt a reasonable method for designing away the danger—an impossible task, of course, if a product’s inherent risks are, by hypothesis, unavoidable. Similar to the Second Restatement, however, the Third Restatement proclaims that provisional immunity from design liability in no way immunizes manufacturers of inherently dangerous products from the duties to manufacture such products free of dangerous defects or to warn consumers of any foreseeable, hidden dangers they may contain, for these are independent duties for manufacturers of every type of product. In addition, the Third Restatement recognizes that some courts have quite reasonably retained wiggle room to rule, in rare cases, that an “egregiously unacceptable” product may be of “manifestly unreasonable design,” even if there is no reasonable way to design the danger away. In these cases, “the extremely high degree of danger posed by [the product’s] use or consumption so substantially outweighs its negligible social utility that no rational, reasonable person, fully aware of the relevant facts, would choose immunized from judicial scrutiny. During the American Law Institute [hereinafter ALI] debate on final approval, Professor Dratler of the University of Hawaii moved to strike the word “tobacco” from the list, arguing that the then-escalating assault on the tobacco industry made the ALI sanctuary for tobacco inappropriate. Over objection by the Reporters, who reasoned that the law did not justify removing tobacco from its protected position, the ALI membership voted narrowly to strike tobacco from the list of examples of generically dangerous products for which manufacturers are not subject to claims for defective design. American Law Institute, 74 A.L.I. Proc. 169, 209–10 (1997); Owen, supra note 8, § 8.8; ALI Membership Grants Final Approval to Influential Product Liability Treatise, 25 Prod. Safety & Liab. Rep. (BNA) No. 21, at 509 (May 23, 1997); Daniel Givelber, Cigarette Law, 73 Ind. L.J. 867, 870–71 (1998); see generally James A. Henderson & Aaron D. Twerski, Achieving Consensus on Defective Product Design, 83 Cornell L. Rev. 867, 905–08 (1998). Cigarette litigation is discussed infra Part II(B).

25 See, e.g., Jones, 231 F. Supp. 2d at 1248–50. See generally Restatement (Third) of Torts § 2 cmt. d (1998) (recognizing that “courts generally have concluded that legislatures and administrative agencies can, more appropriately than courts, consider the desirability of commercial distribution of some categories of widely used and consumed, but nevertheless dangerous, products”).

26 See Restatement (Third) of Torts § 2 cmt. d (1998); Owen, supra note 8, § 6.2.

27 See Restatement (Third) of Torts § 2, reporter’s note (IV)(D) (containing a section entitled “Rejection by a Majority of Jurisdictions of Liability Based on Nondefective Products That Are Nevertheless Egregiously Dangerous”).

28 Id. cmt. e.
to use, or to allow children to use, the product.\textsuperscript{29} This category of egregiously dangerous products is at once both narrow and open-ended, and it might fairly include such products as toy guns that shoot hard pellets at high velocity,\textsuperscript{30} exploding novelty cigars,\textsuperscript{31} lawn darts,\textsuperscript{32} and clothing made of highly flammable fabrics.\textsuperscript{33} While it may be that such products should be banned altogether by legislatures or administrative safety agencies (as they sometimes are), it seems self-evident that courts should allow products liability claims by persons injured by products that in fact can be proven to produce far more harm than good.\textsuperscript{34} Yet, the list of such products should be short, including only those products that courts can confidently say possess far greater risk than utility, such that they probably should not be sold at all. Moreover, courts should be wary of allowing such claims to go to the jury, and often should bar such claims as a matter of law.\textsuperscript{35}

II. PARTICULAR PRODUCTS

As commentators have debated the desirability of a broad or narrow judicial role in cases involving design liability for generic product risks, the

\textsuperscript{29} Id.
\textsuperscript{30} See id.
\textsuperscript{31} Id. cmt. e, illus. 5.
courts have been busy handling expanding dockets involving various types of inherent dangers litigation. Alcohol, cigarettes, and firearms might be singled out as the prototypical objects of such litigation, containing inherent risks that victims have sought to shift judicially to manufacturers.

Some types of products generate very little litigation, but might still be classified as inherently dangerous, e.g., marshmallows, peanut butter, snow sleds, jungle gyms, bullet-proof vests, and aluminum baseball bats. Other products, like ladders or trampolines, are dangerous enough to trigger substantial litigation. Finally, some products have dangers that are so substantial and widespread that they have spawned a multitude of lawsuits around the nation, e.g., various prescription drugs, asbestos, lead paint, and, most recently, fast foods. With the exception of fast-food litigation, which has just recently appeared on the judicial landscape, a court or lawyer confronting such litigation can typically draw from an enormous body of case law and commentary in each particular area.

Judicial decisions in cases involving the liability of manufacturers of generically dangerous products, such as those described above, involve a panoply of complex substantive and procedural issues. Only rarely do courts address the underlying social welfare question of whether such a


39 For a discussion on prescription drugs, see OWEN, supra note 8, at sections 8.10 and 9.6, and infra notes 147–50 and accompanying text. Concerning asbestos, lead paint, and fast foods, see infra notes 151–91 and accompanying text.


41 See supra note 39.
product may be characterized as defective (in design) because its global injury costs exceed its global social benefits. Occasionally, however, courts do address issues of personal autonomy that often lie close to the heart of these cases. Concepts of free choice and individual responsibility support the idea that consumers who choose to accept the benefits of an obviously and unavoidably dangerous product must also accept responsibility for the product’s risks as well. This powerful ideal finds doctrinal expression in the consumer expectations test of product defectiveness and in rules that impose on the user an assumption of risk or, alternatively, absolve the manufacturer of its duty to warn of commonly known dangers. More often, however, it lies hidden below discussions of unrelated legal doctrines. Embedded to some extent in the rules of products liability law, personal responsibility is surely the reason why plaintiffs have had so little success convincing courts and juries that cigarette manufacturers should pay for the hundreds of thousands of American smokers who die each year.

The following discussion highlights a number of recurring issues that have arisen in litigation concerning several types of products notorious for their substantial inherent hazards. As discussed below, although most of the litigation involving generically dangerous products has been brought by private plaintiffs (individually and in class action lawsuits), such claims are increasingly being instituted by cities, states, and national governments.

A. Alcoholic Beverages

While alcoholic beverages provide widespread pleasure and relaxation, they also wreak widespread harm. Alcoholism, cirrhosis and other diseases, birth defects, car accidents, family discord, and violence are all too frequently the direct results of alcohol consumption. Put simply, “water

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is best." Although one might plausibly argue that the social costs of alcohol consumption exceed the social benefits, the courts and the Restatements reject this macro-balance, risk-utility reasoning because the dangers of alcoholic beverages are inherent, unavoidable, and widely known. Indeed, almost all adults know and understand, at least generally, the serious risks that can result from the excessive consumption of alcohol. Accordingly, and because over-consumption is plainly product misuse, ordinary alcoholic beverages cannot reasonably be viewed as defective.

The unavoidability of alcohol’s inherent dangers, is highlighted in two comments to section 402A of the Second Restatement. Comment i uses alcoholic beverages as a paradigmatic example of how products that contain commonly known dangers cannot be classified as “unreasonably dangerous.” Noting that “any food or drug necessarily involves some risk of harm, if only from over-consumption,” comment i declares that the strict liability doctrine only applies to a product that is “dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics . . . ." The Third Restatement preserves this safe harbor for alcoholic beverages. In addition, manufacturers do not have a duty to warn consumers about the dangers of drinking alcoholic beverages in


45 This is despite the fact that alcohol misuse is foreseeable and, hence, falls outside the conventional definition of this “defense.” See OWEN, supra note 8, § 13.5.


excess because these dangers are already widely known.\textsuperscript{48}

Comment \textit{j} in section 402A of the \textit{Second Restatement} provides that a seller does not have a duty to warn with respect to products that are dangerous only "when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized. Again the dangers of alcoholic beverages are an example.\ldots\textsuperscript{49}\) The \textit{Third Restatement} provides, in comment \textit{j} to section 2, that sellers need not warn about risks "that should be obvious to, or generally known by, foreseeable product users.\textsuperscript{50}\) Accordingly, most decisions have held that manufacturers of uncontaminated alcoholic beverages simply are not subject to liability in negligence, implied warranty, or strict liability for harm from their consumption.\textsuperscript{51}\) However, a couple of courts,\textsuperscript{52}\) supported by some commentators,\textsuperscript{53}\) have reasonably

\textsuperscript{48} See, e.g., \textit{Bruner}, 153 F. Supp. 2d at 1360 (noting "the 'universal recognition of all potential dangers associated with alcohol'"); \textit{Pemberton v. Am. Distilled Spirits Co.}, 664 S.W.2d 690, 693 (Tenn. 1984); \textit{Joseph E. Seagram & Sons, Inc. v. McGuire}, 814 S.W.2d 385, 388 (Tex. 1991) ("From ancient times, the danger of alcoholism from prolonged and excessive consumption of alcoholic beverages has been widely known and recognized."); \textit{Morris v. Adolph Coors Co.}, 735 S.W.2d 578, 583 (Tex. App. 1987) ("The ordinary consumer in today's society\ldots knows of the dangers of driving while intoxicated.").

\textsuperscript{49} \textit{RESTATEMENT (SECOND) OF TORTS} § 402A cmt. \textit{j} (1965).

\textsuperscript{50} \textit{RESTATEMENT (THIRD) OF TORTS} § 2 cmt. \textit{j} (1998).

\textsuperscript{51} See, e.g., \textit{Garrison v. Heublein, Inc.}, 673 F.2d 189 (7th Cir. 1982) (applying Illinois law and finding no liability for physical and mental injuries from consumption of Smirnoff vodka over 20 years); \textit{Maguire v. Pabst Brewing Co.}, 387 N.W.2d 565 (Iowa 1986) (denying recovery against a brewer for injuries from an automobile collision caused by a driver drunk on Pabst beer); \textit{Pemberton}, 664 S.W.2d at 690 (finding no duty under the Tennessee Products Liability Act to warn of dangers of grain alcohol that would be apparent to an ordinary user); \textit{Seagram}, 814 S.W.2d at 388 (holding that there is no duty to warn of risk of developing alcoholism from prolonged and excessive consumption of alcoholic beverages); \textit{Morris}, 735 S.W.2d at 583 (dismissing claims against manufacturer stemming from a car accident caused by a driver drunk on beer).

\textsuperscript{52} See \textit{Hon v. Stroh Brewery Co.}, 835 F.2d 510, 511, 515–16 (3d Cir. 1987) (holding that the question of whether the risk of death from pancreatitis caused by long-term moderate beer consumption is a known danger to the general public is a triable issue of fact); \textit{Bruner v. Brown Forman Corp.}, 758 S.W.2d 827, 828–29 (Tex. App. 1988) (dealing with the risk of death to a co-ed from acute alcohol poisoning as a result of chugging tequila).

concluded that manufacturers should have a duty to warn of the lesser-known dangers of alcohol consumption, such as the risk of death from diseases other than liver disease or from a single act of over-consumption. However, now that the duty to warn is mandated by federal statute, most warnings claims would appear to be barred by the doctrine of federal preemption, and may also be precluded by the inherent-risk provision of a state reform act. Both of these possibilities are discussed below. For all of these reasons, it is safe to conclude that, generally, manufacturers of alcoholic beverages are not liable for injuries resulting from their consumption.

B. Cigarettes

1. In general

Few products pose health risks as significant to the nation and to the world as cigarettes. Presently, some fifty million Americans are smokers,
and each year over 400,000 of these individuals, and as many as 4.5 million others globally, die from lung cancer, heart disease, and other tobacco-related illnesses. In the late 1990s and early 2000s, litigation against tobacco manufacturers—including the state health care expense recoupment cases that resulted in a $246 billion settlement between the states and the tobacco industry, and a $145 billion punitive damages verdict in a smoker class action suit in Florida, which was later reversed—figured among the most high-profile products liability litigation in America.

During the early 1900s, when products liability law was in its infancy, little thought was given to holding manufacturers of cigarettes liable for the illnesses their products might cause. Indeed, during the 1930s manufacturers advertised some cigarettes as “harmless” and even “healthful.” As the years progressed, however, knowledge mounted about the harmful effects of cigarette smoking. By the 1950s, when about half of all American adults were smokers, studies had begun to establish a clear link between cigarettes and disease. Public disclosure of this connection promptly led to a ten percent drop in cigarette consumption over a two-year period.

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57 See Wertheimer, supra note 8, at 1454 n.59 (1994) (reporting that cigarette smoking is responsible for 450,000 deaths in the U.S. per year); see also Gilbert J. Birnbrich, Forcing Round Classes Into Square Rules: Attempting Certification of Nicotine Addiction-as-Injury Class Actions Under Federal Rule of Civil Procedure 23(B)(3), 29 U. Tol. L. Rev. 699, 699 (1998); Alison Langley, U.S. to Support World Tobacco-Control Treaty, N.Y. Times, May 18, 2003, at A3 (citing national figure and World Health Organization estimate of 4.9 million annual cigarette deaths around the world, a number it predicts will double over the next 20 years).

58 This litigation is discussed infra notes 98–105 and accompanying text...


60 Liggett, 853 So. 2d at 470. The Florida Supreme Court has granted review. See Grele v. Liggett Group, Inc. 873 So. 2d 1222 (2004).

61 See Ellen Wertheimer, Pandora’s Humidor: Tobacco Producer Liability in Tort, 24 N. Ky. L. Rev. 397, 422 & n.4 (1997); Wertheimer, supra note 8, at 1449.


64 See Daniel Givelber, supra note 24, at 889.
period, spurring the tobacco industry to hire a public relations firm to help it combat the growing concern over cigarettes and health. The consultants advised the industry to attack the issue head-on by creating an ostensibly independent organization, the Tobacco Industry Research Committee, for the purpose of studying the relationship of tobacco smoking and disease. From this point forward, the industry’s message to smokers was united, plain, and unequivocal: cigarettes did not cause cancer.

As products liability litigation began to accelerate during the 1960s, the cigarette industry sought legal cover. Two important developments in this decade served to construct a strong fortress around the tobacco industry for most of the remainder of the twentieth century. The first of these was the inclusion of tobacco in the safe harbor provided by the Second Restatement for certain inherently dangerous products. Second, federal labeling legislation mandated that cigarette manufacturers place Surgeon General warnings about smoking hazards on its cigarette packages, a decision that provided the industry with both an iron-clad assumption of risk defense and a defense based on federal preemption.

2. Tobacco Litigation

Tobacco litigation, long the subject of scholarly debate, has been divided into three waves: the first, from 1954 to the 1960s or early 1970s; the second, from the early 1980s to the early 1990s; and the third,
beginning in the early to mid-1990s and continuing to the present. In the first wave, plaintiffs' claims for negligence, breach of warranty, and deceit were hampered by the absence of substantial scientific evidence linking smoking with disease. Sparing no expense in their tenacious defense of each case, tobacco lawyers consistently emerged victorious. In the second wave of litigation, plaintiffs often had considerably better scientific evidence relating to causation, but their strict liability design and warnings claims were usually thwarted by section 402A comment i's safe haven for tobacco and the assumption-of-the-risk argument. The tobacco


71 On the implied warranty of merchantability in cigarette litigation, see Franklin E. Crawford, Note, Fit for Its Ordinary Purpose?: Tobacco, Fast Food, and the Implied Warranty of Merchantability, 63 OHIO ST. L.J. 1165 (2002).


73 [T]he most salient theme in the second wave litigation has been freedom of choice.... [T]obacco litigation is a last vestige of a perhaps idealized vision of nineteenth century tort law as an interpersonal morality play. The sophisticated plaintiffs' lawyers... counted on the advent of comparative fault, buttressed by their ability to depict a socially irresponsible industry overpromoting a highly dangerous product, to counter—or, at least, blunt—the personal choice argument. In doing so,... they simply failed to grasp how intensely most jurors would react to damage claims by individuals who were aware of the risks associated with...
lawyers fought on, relentlessly outspending every plaintiff's lawyer and winning every case.\textsuperscript{74}

Prior to the third wave of litigation, the tobacco industry was an "impenetrable fortress,"\textsuperscript{75} litigating relentlessly and boasting that it had never paid a dime in damages in the hundreds of lawsuits it had defended since the 1950s.\textsuperscript{76} In the third wave, spurred largely by new revelations of misleading and manipulative conduct on the part of the tobacco industry, the industry's fortunes began to change. First, after several years in the lower courts, the Supreme Court in 1992 decided the carefully prosecuted case of \textit{Cipollone v. Liggett Group, Inc.}\textsuperscript{77} Although the \textit{Cipollone} Court ruled that the congressionally mandated cigarette warnings preempted the plaintiffs' warnings claims, it also held that certain other claims (such as design defectiveness, breach of express warranty, and fraud) fell outside the preemptive reach of the federal labeling act.\textsuperscript{78} Then, in 1994, documents and testimony provided by two whistle-blowers revealed stark new evidence on the industry's conspiracy to deceive the public about the smoking and nonetheless chose to continue the activity over a long time period.

Rabin, supra note 65, at 870–71.

\textsuperscript{74} See, e.g., Roysdon v. R.J. Reynolds Co., 849 F.2d 230, 236 (6th Cir. 1988); Rogers v. R.J. Reynolds Tobacco Co., 745 N.E.2d 793, 796 (Ind. 2001) (affirming trial court judgment on verdict for defendant in case initiated in 1980s). \textit{See generally} Birnrich, supra note 57, at 700, 700–01; Rabin, supra note 65, at 867–68 (1992) (detailing the tobacco industry's "no—holds—barred defense of every claim"). "As a tobacco industry lawyer would put it, . . . the industry's hardball tactics made the litigation 'extremely burdensome and expensive for plaintiffs' lawyers . . . . To paraphrase Gen. [George] Patton, the way we won these cases was not by spending all of Reynolds' money, but by making [the enemy] spend all of his." \textit{Id.} at 868.


\textsuperscript{76} See Birnrich, supra note 57, at 700 (noting that tobacco companies have "yet to pay a single dollar to a plaintiff"); Cupp, supra note 70, at 468 n.17 (stating that the industry by then had prevailed in over 800 lawsuits); Rabin, supra note 65, at 874 (noting that after thirty–five years of litigation, the tobacco industry had paid out not "a cent"). \textit{But see} Jeffrey J. Rachlinski, \textit{Regulating in Foresight Versus Judging Liability in Hindsight: The Case of Tobacco}, 33 GA. L. REV. 813, 813 (1999) (stating that no longer can the industry say that it has paid not "one dime" in damages).


\textsuperscript{78} \textit{Id.} at 519–20; \textit{cf.} Owen, supra note 8, § 14.4 (discussing the intricacies of federal preemption).
hazards of smoking and, in particular, the addictive qualities of nicotine. As early as 1963, for example, one of the industry's top lawyers observed that "[w]e are, then, in the business of selling nicotine, an addictive product." These revelations, combined with increasing public antipathy toward "Big Tobacco," prompted the plaintiffs' bar, newly enriched from the coffers of the (former) asbestos industry, to pool their resources and aggressively begin the third round of litigation that has continued to this day.

In the post-\textit{Cipollone} world, though plaintiffs continue to lose many cases, lower courts have allowed claims for negligence, design defectiveness, fraud, conspiracy, and failure to warn prior to the 1966 federal labeling act. A recurring defense in third-wave litigation is that

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79 Both whistleblowers had worked for Brown & Williamson—one was a paralegal at the company's defense law firm who copied internal documents prior to his dismissal, and the other was the head of research and development for the company, fired after years of contention over the company's failure to responsibly address the perils of tobacco. See \textit{Rabin}, supra note 63, at 183–85.

80 \textit{Id. at} 184.


82 Claims that cigarettes are defectively designed because they cause lung cancer and other diseases must confront the fact that the risks of nicotine are unavoidable: such problems are a generic risk of cigarette smoking that seem impossible to remove without removing the pleasure (including the satisfaction of an addiction) people receive from smoking. The broader generic risk issue treated earlier is addressed in terms of design defectiveness in \textit{Owen}, supra note 8, § 8.8.

the dangers of smoking were common knowledge. Although this defense succeeded in some courts, it has been roundly rejected by others on the grounds of "moral estoppel," that is, knowing the general hazards of smoking does not amount to knowing that it can cause particular diseases or that it can be highly addictive, and the user's awareness of a product risk, rather than being dispositive, is merely one factor in a risk–utility analysis of defectiveness. On convincing evidence of fraud and conspiracy, a few juries have returned substantial verdicts, comprised mostly

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E.g., Glassner, 223 F.3d at 353–54; Sanchez v. Liggett & Meyers, Inc., 187 F.3d 486, 491 (5th Cir. 1999); Allgood, 80 F.3d at 172 (applying Texas law); see also Insolia, 216 F.3d at 602–03, 608 (holding that because smokers probably understood health risks of smoking, including fact that it is habit-forming, when they began smoking in 1935 and early 1950s, their strict liability claims were precluded under the consumer expectations test); Toole, 980 F. Supp. at 425–26 (holding that the federal labeling act does not apply to loose tobacco used for rolling cigarettes and that there was no duty to warn of obvious hazards).

If there were such a thing as moral estoppel, the outcome of this appeal would be plain. For decades tobacco companies have assured the public that there is nothing to fear from cigarettes, yet they now slough off lawsuits like this one by professing that everybody knew all along that smoking was risky.

Insolia, 216 F.3d at 598.

See, e.g., Tompkin, 219 F.3d at 572 (applying Ohio law):

The pertinent issue here is not whether the public knew that smoking was hazardous to health at some undifferentiated level, but whether it knew of the specific linkages between smoking and lung cancer. Public awareness of a broad-based and ambiguous risk that smoking might be tenuously connected to lung cancer does not suggest "common knowledge" of the known scientific fact that cigarette smoking is a strong precipitant of lung cancer.

Id.; see also Wright, 114 F. Supp. 2d at 810 (providing a thorough analysis of whether various smoking claims were barred by common knowledge doctrine, and concluding that because "there is a considerable difference between knowing that smoking is bad and knowing that smoking is addictive," the risk of addiction is not a "lesser included risk" of the risks of smoking); Wright, 652 N.W.2d at 170–71 (answering certified questions).
of punitive damages, with some favorable appellate results.  

Class action claims against the tobacco industry, however, have met with limited success. In *Castano v. American Tobacco Co.*, plaintiffs brought a national class action which was certified by the trial court, but reversed on appeal.  

Plaintiffs' counsel thereafter brought a large number of state class actions, almost all of which eventually were lost.  

*R.J. Reynolds Tobacco Co. v. Engle,* a smoker's class action brought in Florida, led to a spectacular verdict of approximately $145 billion, but the judgment was reversed and the class decertified on appeal. An Illinois smoker class action for economic losses resulted in a verdict for $10.1 billion, but that case is presently on appeal. In addition, Judge Weinstein

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87 In a half century of litigation prior to the state settlements in the late 1990s, only three smokers had ever prevailed in cigarette litigation, and two of those cases were reversed on appeal. See Owen, supra note 8, at 656 n.79. In the years following the 1998 state settlement discussed below, individual smokers have won a number of cases. See, e.g., Burton, 205 F. Supp. 2d at 1265 (assessing punitive damages of $15 million); Williams, 48 P.3d at 828, 843 (discussing fraud and reinstating $79.5 million punitive damages verdict remitted by trial court to $32.8 million); Henley v. Philip Morris, Inc., 5 Cal. Rptr. 3d 42, 86 (Cal. Ct. App. 2003) (remitting further a punitive damages award, which had been previously remitted by the trial court from $50 million, to $25 million, to $9 million); Boeken v. Philip Morris, Inc., No. BC 226593, 2001 WL 1894403, at *15 (Cal. Ct. App. Aug. 9, 2001) (remitting $3 billion punitive damages verdict to $100 million), aff'd as modified by 19 Cal. Rptr. 3d 101 (Cal. Ct. App. 2004); R.J. Reynolds Tobacco Co. v. Kenyon, 826 So. 2d 370, 371–72, 374 (Fla. Dist. Ct. App. 2002) (agreeing to hear appeal concerning a $165,000 compensatory award).


89 E.g., Estate of Mahoney v. R.J. Reynolds Tobacco Co., 204 F.R.D. 150, 161 (S.D. Iowa 2001) (denying certification of class of Iowa smokers). See generally Rabin, supra note 63, at 188. The lawsuits were grounded in theories developed in Raymond E. Gangarosa et al., *Suits by Public Hospitals to Recover Expenditures for the Treatment of Disease, Injury and Disability Caused by Tobacco and Alcohol*, 22 FORDHAM URB. L.J. 81 (1994).


91 Rabin, supra note 63, at 188.


93 Price v. Philip Morris, Inc., 793 N.E.2d 942, 945, 947, 951 (Ill. App. Ct. 2003) (holding that a trial court verdict of $7.1 billion in compensatory damages and $3 billion in punitive damages was error, and reducing $12 billion appeal bond); see also Vanessa
of the United States District Court of New York has certified a class action seeking punitive damages for fraud on behalf of most injured smokers in the United States.\textsuperscript{94} A few claims have been brought for injuries allegedly caused by second-hand smoke, with varying success.\textsuperscript{95} Additionally, at least one proposed class action was filed (also in Florida) on behalf of users of chewing tobacco who claim to have suffered various cancers from the product.\textsuperscript{96}

3. Litigation by States, Nations, and Insurers

Probably the most significant development in cigarette litigation thus far was the tobacco industry’s settlement of the health care reimbursement claims brought by the states.\textsuperscript{97} During the mid-1990s, the individual states, beginning with Mississippi, sued the industry on a number of grounds, including public nuisance, unjust enrichment, and restitution,\textsuperscript{98} to recoup their accumulated Medicaid health care expenditures resulting from tobacco use.\textsuperscript{99} In 1998, after pre-verdict settlements with Mississippi for

\textsuperscript{94} In re Simon II Litigation, 211 F.R.D. 86, 185–86 (E.D.N.Y. 2002) (Weinstein, J.) (certifying national tobacco class action seeking punitive damages for fraud).


\textsuperscript{98} Other claims include fraud, negligence, breach of warranty, strict liability in tort, and antitrust and consumer protection statutory violations.

$3.6 billion, Texas for $15.3 billion, Florida for $11.3 billion, and Minnesota for $7.1 billion, the tobacco industry saw the futility of continuing to fight the well-organized and well-funded state attorneys general and plaintiffs' lawyers and negotiated a global settlement with the states for a total of $246 billion, payable over 25 years.

Following this highly successful tobacco litigation by the states, a number of health insurers, welfare funds, and hospitals filed similar suits seeking recompense of the costs they had incurred as a result of smokers' health care expenses. None of these claims were successful. The courts generally reasoned that the costs to these types of institutional plaintiffs were too remote to give them standing to complain. In addition, in 1999 the United States Department of Justice filed its own suit against the tobacco industry seeking disgorgement of $289 billion in unlawful profits that the

100 See Ausness, supra note 97 (describing each state's litigation). The total Minnesota recovery was comprised of $6.6 billion for the state and $469 million for Blue Cross–Blue Shield of Minnesota, which had joined in the suit.

101 This figure is comprised of the four state settlements of roughly $40 billion (also payable over 25 years) together with a global settlement for the other 46 states plus the District of Columbia and four territories, amounting to $206 billion, payable primarily from 2000 to 2025. RABIN, supra note 63, at 189–93; Ausness, supra note 97.

102 See, e.g., Regence Blueshield v. Philip Morris, Inc., 5 Fed. App. 651, 652–53 (9th Cir. 2001) ("Their claimed damages were not proximately caused by the Tobacco Firms' unlawful conduct, but were instead derivative of the personal injuries of smokers afflicted by tobacco–related illnesses."); Serv. Employees Int'l Union Health & Welfare Fund v. Philip Morris, Inc., 249 F.3d 1068, 1069, 1076 & n.6 (D.C. Cir. 2001) (holding that claims were too remote and not proximate, and that the employment health care funds lacked standing); Allegheny Gen. Hosp. v. Philip Morris, Inc., 228 F.3d 429, 423–33 (3d Cir. 2000) (dismissing common law and RICO claims because the unreimbursed health care costs incurred by the 16 hospital plaintiffs on behalf of indigent patients were too remote to satisfy requirement of proximate cause); Int'l Bhd. of Teamsters Local 734 Health & Welfare Trust Fund v. Philip Morris, Inc., 196 F.3d 818, 820, 824 (7th Cir. 1999) ("[S]mokers (and their employers) pay for the medical costs, in advance, through higher insurance rates (or, equivalently, lower wages in a medical–care–plus–wage compensation package. The Funds and the Blues are just financial intermediaries."); Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 937 (3d Cir. 1999) (discussing remoteness and proximate cause). See generally Gangarosa et al., supra note 89.

103 Id.

104 United States v. Philip Morris, Inc., 319 F. Supp. 2d 9, 13 (D.D.C. 2004) (dismissing defendants' summary judgment motion); United States v. Philip Morris, Inc., 321 F. Supp. 2d 72, 82 (D.D.C. 2004). As of the time of this article in 2005, this case is still active. See generally Eric Lichtblau, U.S. Seeks $289 Billion in Cigarette Makers' Profits, N.Y. TIMES, Mar. 17, 2003, at C1, ("[T]he Justice Department asserts in more than 1,400 pages of court documents that the major cigarette companies are running what amounts to a criminal enterprise by manipulating nicotine levels, lying to their customers about the dangers of
tobacco industry garnered with over a half century of fraud and deceit.\textsuperscript{105}

Several foreign nations have also sued the tobacco industry for health care costs resulting from tobacco–related diseases, but such cases have been dismissed because the plaintiffs’ damages were too remote to satisfy the requirements of proximate cause and standing.\textsuperscript{106} An entirely different type of litigation by foreign nations and the European Community\textsuperscript{107} involves civil RICO\textsuperscript{108} and tort law\textsuperscript{109} claims, which allege that certain tobacco companies aided and abetted cigarette smuggling across their borders, using black market operations typically associated with money laundering, organized crime, and even terrorism.\textsuperscript{110} Such operations are

tobacco and directing their multibillion–dollar advertising campaigns at children.”) In recent filings, the Justice Department contends that the “defendants’ scheme to defraud permeated and influenced all facets of defendants’ conduct—research, product development, advertising, marketing, legal, public relations, and communications—in a manner that has resulted in extraordinary profits for the past half–century, but has had devastating consequences for the public’s health.” \textit{Id.}

\textsuperscript{105} United States v. Philip Morris, Inc., 116 F. Supp. 2d 131 (D.D.C. 2000) (allowing RICO claim, but not others, to proceed); Lichtblau, \textit{supra} note 104. A 1971 Philip Morris research report purportedly refutes the industry’s persistent denial of tobacco’s addictive qualities in its acknowledgment of the depression, irritability and “neurotic symptoms” that can result from attempting to quit. The Justice Department’s filings disclose that the cigarette manufacturer’s research report “mocked an antismoking commercial that depicted an exuberant couple leaping for joy after they quit smoking” and that “[a] more appropriate commercial would show a restless, nervous, constipated husband bickering viciously with his bitchy wife who is nagging him about his slothful behavior and growing waistline.” \textit{Id.}


\textsuperscript{108} The claims brought under the Racketeer Influenced and Corrupt Organizations Act (“\textit{RICO}”), 18 U.S.C. §1961 \textit{et seq.}, alleged that the defendant tobacco companies engaged in and directed a pattern of racketeering activity in conducting cigarette smuggling and money laundering activities. \textit{European Cnty.}, 186 F. Supp. 2d at 233.

\textsuperscript{109} The tort law claims alleged fraud, public nuisance, restitution for unjust enrichment, negligence, and negligent misrepresentation. \textit{Id.}

\textsuperscript{110} \textit{See} 147 CONG. REC. S11, 028–29 (2001) (remarks of Sen. Kerry) (“Smuggling, money laundering, and fraud against our allies are an important part of the schemes by which terrorism is financed.”); \textit{BAT and Tobacco Smuggling: Submission to the House of
highly lucrative to manufacturers who want to keep their prices relatively low by avoiding the sometimes steep cigarette taxes imposed by foreign governments. As a result of these operations, the plaintiff nations (and the E.U.) lose enormous tax revenues and must bear a variety of other costs, including the cost of maintaining anti-smuggling forces, and the economic and social costs of a sometimes violent criminal black market for cigarettes.\textsuperscript{111}

In the first such smuggling case to reach the courts, *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*,\textsuperscript{112} a federal district court dismissed Canada’s case on the basis of the “revenue rule” and, in a split decision, the Court of Appeals affirmed. The revenue rule is an archaic doctrine first promulgated by the English courts in the 1700s for the purpose of protecting the lucrative smuggling trade that British merchants then controlled around the world under the protection of the British navy, which ruled the seven seas.\textsuperscript{113} In its present form, the revenue rule has evolved into an abstention doctrine by which a court may choose whether to hear a tax claim brought by a foreign government seeking recovery from a foreign tax debtor under foreign law.\textsuperscript{114} Parochially perverse from its inception, the revenue rule has been roundly criticized by modern courts and commentators; and it is also an unseemly blight on American

\textsuperscript{111} See \textit{Owen}, supra note 8, at 659. These harms are in addition to the health care problems from increased consumption due to the enhanced availability of cigarettes to price-sensitive consumers at lower black market prices. Id. at n.102.

\textsuperscript{112} Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc., 103 F. Supp. 2d 134, 144 (N.D.N.Y. 2000) (dismissing complaint alleging civil RICO violations and common law fraud), aff’d, 268 F.3d 103 (2d Cir. 2001) (affirming the decision, 2 to 1). In a powerful dissent, Judge Calabresi reasoned: “It is manifest that the suit before us in no way requires our courts to enforce foreign judgments or claims; it simply is an action for damages provided for and brought under federal law.” 268 F.3d at 135.

\textsuperscript{113} See \textit{Owen}, supra note 8, at 659.

jurisprudence, especially in a shrinking global environment where nations must cooperate in deterring transnational criminal conspiracies hatched in, directed from, and carried out in different nations.\(^\text{115}\) Despite its serious flaws, the rule has been applied to steer clear of international disputes that could enmesh American courts, if only indirectly, in enforcing the tax laws of other nations.\(^\text{116}\)

Although Canada was largely denounced by commentators,\(^\text{117}\) it has caused a couple of district judges to dismiss smuggling claims against tobacco companies. Once such case involving a claim brought by


\(^{116}\) "The revenue rule is a longstanding common law doctrine providing that courts of one sovereign will not enforce final tax judgments or unadjudicated tax claims of other sovereigns. It has been defended on several grounds, including respect for sovereignty, concern for judicial role and competence, and separation of powers." Attorney Gen. of Canada, 268 F.3d at 109; see also Republic of Ecuador v. Philip Morris Co., 188 F. Supp. 2d 1359, 1363–64 (S.D. Fla. 2002), (quoting earlier American decisions approving revenue rule), aff’d, 341 F.3d 1253 (11th Cir. 2002). But see Milwaukee County, 296 U.S. at 272, 274 (1935); King of Spain v. Oliver, 14 F. Cas. 577 (D. Pa. 1810).

Ecuador, and another more significant consolidated action was brought by the Republic of Colombia, the European Community, and most of its member states against certain cigarette manufacturers for smuggling, money laundering, and related activities. After the district court dismissed most of their claims on the basis of Canada, the plaintiffs in European Community refiled with an emphasis on the defendants' money laundering, racketeering, and other tortious activities. The case was again dismissed, and the dismissal was affirmed, with apparent finality.

C. Firearms

1. Background

The menace of guns in American society, particularly handguns but also various assault rifles, has spawned a morass of litigation and debate.

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118 Republic of Equador, 188 F. Supp. 2d at 1369.
119 European Cmty., 186 F. Supp. 2d at 245 (holding that the revenue rule required dismissal of smuggling claims seeking lost tax revenue, but that the money laundering claims seeking other types of damages were dismissed without prejudice to replead).
120 European Cmty. v. RJR Nabisco, Inc., 355 F.3d 123, 139 (2d Cir. 2004).
Each year, tens of thousands of Americans are killed by guns—roughly the same number as are killed in car accidents.\(^1\) In fact, there are almost as many firearms in the United States as people.\(^2\) While some ninety-eight percent of all firearms are used lawfully,\(^3\) the two to three million that are used illegally each year cause enormous injury and suffering.\(^4\) A perennially-debated topic in legislatures across the nation is the question of whether products liability law should have anything to say about criminally inflicted losses of this type;\(^5\) it is a controversial issue that has been litigated with increasing frequency and intensity in recent years.

2. Injury Victim Litigation

A spate of decisions in the 1970s and 1980s were hostile to damage claims brought by shooting victims alleging that handguns were inherently defective. In their decisions, those courts frequently cited to the refusal of

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2. \(^{122}\) Gun fatalities divide as follows: 48% suicides, 47% homicides, 4% accidents, and 1% legal justice system. In addition, another 125,000 people are injured by guns each year. *Tort Claims*, supra note 121, at 2–3.

3. \(^{123}\) There were 9390 gun-related homicides in the U.S. in 1996, in contrast to thirty in Great Britain and fifteen in Japan. Frank J. Vandall, *Economic and Causation Issues in City Suits Against Gun Manufacturers*, 27 Pepp. L. Rev. 719, 719 (2000). One American child dies from a gunshot every ninety-two minutes, an average of more than fifteen each day. *Id.*

4. \(^{124}\) Of course, like other manufacturers, manufacturers of firearms and ammunition are subject to liability for misrepresentation and defects in design, warnings and instructions, and manufacture. *See, e.g.*, Halliday v. Sturm, Ruger & Co., 792 A.2d 1145, 1149–57 (Md. 2002); Smith ex rel. Smith v. Bryco Arms, 33 P.3d 638, 643 (N.M. Ct. App. 2001).
legislatures to ban handguns. Two cases in the 1980s, however, were decided the other way. In the first case, *Richman v. Charter Arms Corp.*, a federal district judge ruled that, while handguns are not defective under ordinary products liability principles, the sale of such products might constitute an ultra-hazardous activity. In the second case, *Kelley v. R.G. Industries, Inc.*, an action against the manufacturer of a handgun used in a grocery store robbery, the Maryland Court of Appeals ruled that a manufacturer may be subject to strict liability for selling a type of product that is bad for society. *Kelley* held that strict tort liability could be imposed on sellers of “Saturday Night Specials” for harm to victims from the use of such guns. In response to the holding in *Kelley*, the National Rifle Association conducted a multi-million dollar campaign to have the decision overturned, first by the Maryland legislature, and then by the people in a referendum petition. In time, the gun lobby and gun control

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[D]espite this Court’s admiration for such a delightfully nonsensical claim: that a product which does not have a defect can nevertheless, under the law, be defective—the plaintiff’s attorneys are simply wrong. Under Texas law, there can be no products liability recovery unless the product does have a defect. Without this essential predicate, that something is wrong with the product, the risk/utility balancing test does not even apply.

Id. at 1210–11; see also Martin v. Harrington & Richardson, Inc., 743 F.2d 1200, 1202 (7th Cir. 1984) (applying Illinois law and rejecting manufacturer’s strict liability under ultra–hazardous activity theory); *Patterson*, 608 F. Supp. at 1210–11; *Mavilia v. Stoeger Indus.*, 574 F. Supp. 107, 111 (D. Mass 1983) (rejecting tort claim for marketing handguns and holding “as a matter of law . . . the .38 caliber Llama automatic pistol . . . is not inherently defective”); *Burkett v. Freedom Arms, Inc.*, 704 P.2d 118, 120–21 (Or. 1985) (rejecting strict liability claim based on manufacturer’s conducting abnormally dangerous activity). The *Patterson* court further noted that “the theory advanced by the plaintiffs perverts the very purpose of the ‘risk/utility balancing test’ [which] incorporates the idea that a defect is something that can be remedied or changed.” *Id.* at 121.


131 *Id.* at 1159.

132 *Id.* “Saturday Night Specials” are poorly made, cheap, small, inaccurate, and easily concealed handguns used principally for criminal activity rather than self-protection or other legitimate activity. *Id.* at 1158–59.
advocates agreed to a compromise: legislation that overturned *Kelley* but prohibited the sale of Saturday Night Specials in the state of Maryland. The voters, by referendum, approved the law.\footnote{133}

A number of subsequent suits against manufacturers of handguns,\footnote{134} assault rifles,\footnote{135} and ammunition\footnote{136} have involved claims for design defects, negligent marketing, and strict liability for selling products that are abnormally dangerous. While plaintiffs had some initial success in a number of cases in the lower courts, and while an occasional court still allows such a claim,\footnote{137} most of these gunshot victim cases have been dismissed on grounds such as no duty to the victims, no defect (the guns only did what they were designed to do), and the intervening event of criminals putting them to improper use (the abuse of the guns by people, not the guns themselves, are the proximate cause of harm).\footnote{138}
3. Municipality Litigation

Following the successful partnership of state attorneys general and major plaintiffs' law firms in cigarette litigation, a number of municipalities filed claims against the gun industry for blanketing their cities with an oversupply of guns, particularly cheap handguns, that far exceeded the lawful market for such firearms. Following the first such suit by New Orleans in 1998, over thirty cities and counties have instituted "recoupment" lawsuits seeking to recover various municipal costs associated with gun violence, such as the increased expenses of law enforcement, emergency rescue services, medical care for gunshot victims, prosecutorial and prison services, social services, and lost tax revenues. Such lawsuits typically make claims against gun manufacturers, distributors, trade associations, and major retailers for defective design because of the absence of safety features, failure to provide adequate warnings, negligent marketing and negligent distribution, public nuisance, deceptive trade practices, and restitution for unjust enrichment. To date, most of these cases have been dismissed, but a number have survived.


motions to dismiss and several have withstood appeal. In view of the diminishing likelihood of success, the increasing costs of litigation, and the possibility that Congress may bar such lawsuits, at least a couple of cities have simply abandoned their cases against the gun industry.

It is still too early to predict with confidence the ultimate outcome of municipality gun litigation. While the public nuisance claim might be a viable basis of recovery, courts will have to find a way around a large variety of common law obstacles, including proximate cause (or remoteness), standing, duty, the appropriateness of public nuisance and restitution in this new type of litigation, and the "municipal cost recovery rule," the persistent (if dubious) doctrine prohibiting public bodies from recovering the costs of emergency governmental services. In addition, another particularly formidable obstacle to recovery is the growing number of state statutes that generally prohibit actions against gun manufacturers. In Virginia, such a statute prohibits claims by local governments against

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Wesson Corp., 785 So. 2d 1 (La. 2001) (finding that a subsequently enacted statute barred New Orleans' lawsuit).


143 See Gifford, supra note 139, at 764-69.

144 Also referred to as the "free public services doctrine." Compare Mayor James, 820 A.2d 27 (rejecting doctrine and allowing action to proceed), with Mayor Baker, 2002 WL 31741522 (applying doctrine and dismissing action). See generally Timothy D. Lytton, Should Government Be Allowed to Recover the Costs of Public Services from Tortfeasors?: Tort Subsidies, the Limits of Loss Spreading, and the Free Public Services Doctrine, 76 TUL. L. REV. 727, 727, 730 (2002) (arguing for the rule's abrogation because it "shields industrial tortfeasors from liability, ... constitutes a tort subsidy to industry and functions as an insurance scheme for industrial accidents paid for by taxpayers"); David C. McIntyre, Note, Tortfeasor Liability for Disaster Response Costs: Accounting for the True Cost of Accidents, 55 FORDHAM L. REV. 1001 (1987).
manufacturers and other sellers for injuries caused by guns. 145

D. Other Products

As mentioned at the outset, every type of product is inherently dangerous in some respect; as such, there is virtually no end to the list of products that might be included in this category.146 However, a small number of particular products must be briefly mentioned here because of the serious and widespread nature of their inherent risks.

1. Drugs

The largest category of all generically dangerous products consists of prescription drugs147 which are designed to alter the human body. Normally, the chemical compounds in prescription drugs are properly researched,

145 VA. CODE ANN. § 15.2-915.1 (Michie 2000).


Defendants prevailed in many others, often because the plaintiffs failed to prove causation. E.g., Meister v. Med. Eng’g Corp., 267 F.3d 1123 (D.C. Cir. 2002) (holding that the expert testimony on causation failed to meet the Daubert standards); Allison v. McGhan Med. Corp., 184 F.3d 1300 (11th Cir. 2001) (applying Georgia law and finding that the expert testimony on causation failed to satisfy the Daubert admissibility standards); see Gina Kolata, Company Making Case to Allow Breast Implants, N.Y. TIMES, Oct. 11, 2003, at A5 (discussing the Institute of Medicine committee study in 2000, which reviewed epidemiological data and found no evidence that breast implants cause any serious disease, including cancer, neurological diseases, autoimmune diseases like lupus, and connective tissue diseases like arthritis).


147 Dangers of over-the-counter drugs are normally less serious but, nonetheless, they may be substantial in individual cases. See OWEN, supra note 8, §§ 8.10, 9.6.
designed, tested, produced, and labeled so they accomplish their goal of improving human pathologies effectively and with relatively minimal (or at least acceptable) side effects. However, drug manufacturers sometimes fail to discover or anticipate harmful side effects or, worse yet, they may deliberately overlook or even conceal the risks of a profitable new drug. Reports of new prescription drug side-effect problems, such as heart valve damage attributed to the diet drugs called "fen-phen," appear with disturbing frequency. Apart from the typical warning adequacy issues in drug products liability litigation, the most significant generic risk issue is whether a drug manufacturer may be subject to liability for design defectiveness, an issue treated elsewhere from a variety of perspectives.

2. Asbestos

Asbestos has had a crushing effect on workers, manufacturers, and the courts. Since the 1970s, the courts have been hit by a barrage of cases involving the ravages of asbestos. Asbestos is a mineral converted into

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150 See OWEN, supra note 8, §§ 8.10, 9.6, 10.4. Prescription drug claims normally are not subject to the defense of federal preemption. See id. § 14.4.

insulation materials which can generate deadly dust that causes various lung diseases. Despite its highly useful insulation characteristics, asbestos has caused so much death and suffering that it may be fairly viewed as inherently defective in design in a "macro-balance" of its aggregate social costs and benefits.\textsuperscript{152} From the start of the asbestos litigation, however, the theory of liability generally has not been that asbestos is defective per se, but that manufacturers failed to provide sufficient warnings to alert workers of the lethal dangers of inhaling asbestos dust.\textsuperscript{153}

The seminal asbestos case was \textit{Borel v. Fibreboard Paper Products Corp.},\textsuperscript{154} the first strict products liability case to uphold a verdict for an installer of asbestos insulation against the insulation manufacturers. Clarence Borel worked as an industrial insulation worker from 1936 until he was disabled in 1969 by asbestosis, a lung disease. Thereafter, he developed mesothelioma, a fatal form of lung cancer which eventually killed him. Both asbestosis and mesothelioma result from asbestos fibers lodging in the lungs of a person who inhales asbestos dust. In his employment, Borel was regularly and necessarily exposed to heavy concentrations of asbestos dust generated by the insulation materials he installed.\textsuperscript{155} Ruling that "[a] product must not be made available to the public without disclosure of those dangers that the application of reasonable foresight would reveal,"\textsuperscript{156} the court affirmed the verdict for the plaintiff.\textsuperscript{157}

\textit{Borel} opened the floodgates for asbestos litigation, and the resulting compensatory and punitive awards, together with the enormous litigation costs of defending hundreds of thousands of cases, have bankrupted much

\textsuperscript{152} See Johnstone v. Am. Oil Co., 7 F.3d 1217, 1223 (5th Cir. 1993) (approving jury finding that asbestos was not defective, based on proof that its effectiveness as a heat insulator on Navy ships during World War II helped win the war); Halphen v. Johns–Manville Sales Corp., 484 So. 2d 110, 114 (La. 1986). \textit{But see} Owens–Corning Fiberglass Corp. v. Stone, No. 03–94–00449–CV, 1996 WL 397435, at *2 (Tex. App. July 17, 1996) (finding by jury that defendant's asbestos product "was not defective, taking into consideration 'its utility and the risk involved in its use'").

\textsuperscript{153} Inadequate warning remains the principal theory of defectiveness in these cases. \textit{See}, \textit{e.g.}, \textit{In re Asbestos Litig.}, 799 A.2d 1151 (Del. 2002).


\textsuperscript{155} \textit{Id.} at 1082–83.

\textsuperscript{156} \textit{Id.} at 1090.

\textsuperscript{157} \textit{Id.} at 1103.
of the asbestos industry.\textsuperscript{158} The litigation has swamped the dockets of many courts.\textsuperscript{159} Weary of the lengthy litigation, many of these courts have sought to manage asbestos cases more efficiently through procedural mechanisms such as aggregation, while preserving present and future victims' rights to reasoned judicial resolution of their claims.\textsuperscript{160} The courts and Congress continue to struggle to find ways to manage and resolve the complicated issues of fairness, practicality, and bankruptcy that surround this specific product.\textsuperscript{161}

3. Lead Paint

An increasingly frequent type of litigation concerns lead poisoning.\textsuperscript{162}

\textsuperscript{158} Johns-Manville, the most prominent asbestos firm, declared bankruptcy in 1983, and about 60 more firms have followed in its wake, filing for Chapter 11 bankruptcy protection. Joseph E. Stiglitz et al., \textit{The Impact of Asbestos Liabilities on Workers in Bankrupt Firms}, 12 J. BANKR. L. & PRAC. 51, 52–54 (2003) (noting also that 47 states have experienced at least one asbestos–related bankruptcy); see also Joel Slawotsky, \textit{New York's Article 16 and Multiple Defendant Product Liability Litigation: A Time To Rethink the Impact of Bankrupt Shares on Judgment Molding}, 76 ST. JOHN'S L. REV. 397 (2002).

\textsuperscript{159} See, e.g., Steven Harras, \textit{Asbestos Reform Summit Held on Capitol Hill; Congress, Business, Lawyers Seek Solution}, 31 Prod. Safety & Liab. Rep. (BNA) No. 14, at 298 (Apr. 7, 2003) (noting estimates that “approximately 250,000 asbestos claims are currently pending in courts across the country, with up to 3.1 million claims anticipated in the future,” and that “the courts have adjudicated $30 billion in asbestos claims, with about $200 billion in claims pending or anticipated”; Carroll et al., \textit{supra} note 151, at 40 (corroborating the aforementioned figures and noting that more than 600,000 people have filed claims against 6000 defendants and that estimates are for 1–3 million future claimants).

\textsuperscript{160} See, e.g., Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

\textsuperscript{161} See, e.g., Chavers v. Gatke Corp., 132 Cal. Rptr. 198, 201 (Ct. App. 2003) (affirming that neither civil conspiracy nor concert–of–action theory were available to support a claim against a manufacturer who did not make the asbestos products to which the plaintiff was exposed); \textit{Long– Awaited Asbestos Reform Bill Released; Hatch Proposes $108 Billion Trust Fund}, 31 Prod. Safety & Liab. Rep. (BNA) No. 21, at 458 (May 26, 2003); Slawotsky, \textit{supra} note 158.

For much of the twentieth century, until its use in household paints was banned in 1978, lead pigment was an important ingredient of paint because it increased durability and made it smooth and easy to wash. For many decades, coat upon coat of lead–based paint covered the walls of most of the nations’ residences. As the century progressed, some of this housing began to deteriorate and paint began peeling off the walls, leaving piles of lead paint chips in decaying houses around the nation. The problem is that lead, said to taste as “sweet as candy,” is also highly toxic—particularly when ingested by toddlers ever on the lookout for objects to place in their mouths. As a result, approximately one million young American children currently have damaging levels of lead in their blood. The consequences of ingestion can be severe, including speech impairment, decreased memory and intelligence, learning disabilities, brain damage, autism, kidney damage, and even death. For at least a century paint manufacturers have known of the hazards lead poses to humans, but they were slow to inform the public; while our government did not ban lead in residential paint until the late 1970s, other nations began banning its use as early as the 1920s.

Beginning in the late 1980s, a number of products liability claims were brought against paint manufacturers for lead poisoning in children. To date, lead poisoning victims have faced the apparently insurmountable problem of identifying the particular manufacturers that made the pigments and paints in the chips eaten by particular victims. The plaintiffs’ inability to meet their conventional burden of proof on causation has been fatal in these cases, with most courts refusing to apply market share liability (or other theories of joint liability) to hold the industry liable as a whole.
Following in the footsteps of the successful cigarette litigation, a large number of cities, and the state of Rhode Island, sued the paint industry on various grounds, seeking to recover the enormous costs of cleaning up lead paint hazards, caring for poisoned children, and educating the public on the hazards of lead. Though a couple of the early suits brought by Philadelphia and New Orleans ran into statutes of limitations problems, New York brought a subsequent claim with more success. Additional cities have brought similar claims. A number of claims in the Rhode Island suit, which included counts for public nuisance, other torts, and unfair trade practices, survived motions to dismiss, but the trial judge declared a mistrial when the jury became deadlocked. The next week, a lawsuit brought by two dozen New Jersey municipalities was dismissed. The trial judge in the Rhode Island suit subsequently ruled that the state could retry the public nuisance component of the case. It is too early to predict whether the public entity claims against lead paint manufacturers will ultimately prove successful, but the litigation results to date, reflecting plaintiffs' difficulties with manufacturer identification and statutes of limitations, illustrate the significant problems confronting these claims.


See Dean, supra note 162, at 915–16.


See, e.g., Michael Bologna, Chicago Uses Public Nuisance Theory to Sue Paint Makers Over Lead–Based Risks, 30 Prod. Safety & Liab. Rep. (BNA) No. 36, at 808 (Sept. 16, 2002). Other major cities, such as New York, St. Louis, Milwaukee, and San Francisco filed similar actions. See Owen, supra note 8, at 669 n. 162.


4. Fast Foods

The most recent, perhaps the “ultimate,” type of generic liability lawsuit is represented by two putative class actions filed against fast food retailers for obesity and other health problems alleged to have resulted from the consumption of too much “junk food” sold by the defendants.\footnote{177}{The litigation is championed by public interest law professor John Banzhaf of George Washington University Law School, who teaches courses in Legal Activism, Tort Law, and Administrative Law. See Professor John F. Banzhaf III, at www.banzhaf.net (last visited Oct. 9, 2004).} The first suit filed, Barber v. McDonald’s Corp.,\footnote{178}{Barber v. McDonald’s Corp., N.Y. Sup. Ct., Bronx Cty., No. 23145/2002, (filed July 24, 2002), http://news.findlaw.com/hdocs/docs/mcdonalds/barbermcds72302cmp.pdf; see New York Man Files National Class Action Alleging Fast Food Chains Make People Fat, 30 Prod. Safety & Liab. Rep. (BNA) No. 30, at 674 (Aug. 5, 2002); Henry Fountain, Living Large; Our Just (Burp!) Desserts, N.Y. TIMES, Oct. 12, 2002, § 4, at 6.} sought to certify a national class action against McDonald’s, Burger King, KFC, and Wendy’s for intentionally and negligently selling food that is high in fat, salt, sugar, and cholesterol without properly labeling the food or warning consumers of its risks.\footnote{179}{Cf. Franklin E. Crawford, Note, Fit for Ordinary Purpose? Tobacco, Fast Food, and the Implied Warranty at Merchantability, 63 OHIO ST. L.J. 1165 (2002) (discussing the applicability of the implied warranty of merchantability to fast-food litigation).} The named plaintiff, fifty-six-year-old Caesar Barber, stood five feet eleven inches tall and weighed 285 pounds at the time of his second heart attack, which occurred after eating two or three fast food meals a day over an extended period of time. The class for which certification was sought consisted of persons who consumed the defendants’ fast foods and became obese or developed coronary heart disease, diabetes, high blood pressure, high cholesterol levels, or other health problems. The lawyer for the plaintiffs reportedly decided not to pursue Barber, focusing instead upon Pelman v. McDonald’s Corp.,\footnote{180}{Pelman v. McDonald’s Corp., 237 F. Supp. 2d 512 (S.D.N.Y. 2003), vacated in part by 396 F.3d 508 (2d Cir. 2005).} a different class action against McDonald’s brought on behalf of obese children, including one 400-pound fifteen–year–old suffering from Type II diabetes who claims to have eaten at McDonald’s daily since he was six.\footnote{181}{Id. at 519; see also Roger Parloff, Is Fat the Next Tobacco?, FORTUNE MAGAZINE, Jan. 21, 2003, available at http://www.fortune.com/fortune/articles/0,15114,409670,00.html.}
Observing that its failure to act decisively "could spawn thousands of similar 'McLawsuits,'" the court promptly dismissed the *Pelman* complaint on several grounds: that fast food restaurants have no duty to warn consumers of the open, obvious, and well-known fact that such foods contain high levels of cholesterol, fat, salt, and sugar; that the complaint failed adequately to plead proximate cause because it did not specify how often the children ate such foods and failed to account for other factors that may have contributed to the children's health problems; that the complaint failed to specify how the fats, sugars, and other substances may have been addictive; and that it failed to allege whether the defendants purposefully manufactured the fast foods with addictive qualities. At its core, the court observed that the lawsuit raised vital questions of personal responsibility, an issue highlighted by the derisive popular reactions to the filing of these lawsuits, as noted by the press. Simply put, because the complaint failed to allege that consumers are unaware of "the potential ill health effects of eating at McDonald's, they cannot blame McDonald's if they, nonetheless, choose to satiate their appetite with a surfeit of super-sized McDonald's products." The plaintiffs refiled and later abandoned their warnings

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182 *Pelman*, 237 F. Supp. 2d at 518, 543.
183 *Id.* at 531–43.
184 "The issue of determining the breadth of personal responsibility underlies much of the law: where should the line be drawn between an individual's own responsibility to take care of herself and society's responsibility to ensure that others shield her?" *Id.* at 516.
185 See *id.* at 518 n.5 (quoting, among others, the following reports: Debra Goldman, *Consumer Republic: Common Sense May Not Be McDonald's Ally For Long*, 14 *ADWEEK*, E. ed. (Dec. 12, 2002), available at 2002 WL 103089868 ("[T]he masses have expressed their incredulity at and contempt for the litigious kids—and their parents—who won't take responsibility for a lifetime of chowing down Happy Meals. With much tongue-clucking, the vox populi bemoans yet another symptom of the decline of personal responsibility and the rise of the cult of victimhood"); Amity Shlaes, *Lawyers Get Fat on McDonald's*, CHI. TRIB., Nov. 27, 2002, at 25 ("Every now and then America draws a cartoon of herself for the amusement of the rest of the world. Last week’s fat lawsuit against McDonald's is one of those occasions."); see also Parloff, *supra* note 181 ("News of the lawsuit drew hoots of derision."); Jonathan Turley, *Betcha Can't Sue Just One*, L.A. TIMES, July 24, 2002, available at 2002 WL 2492444 ("Finally, there is the question of personal responsibility, which seems often ignored in these massive lawsuits. We may soon see campaigns from the industry reminding us that 'Twinkies don't kill people, people kill people.'").
186 *Pelman*, 237 F. Supp. 2d at 517–18. It should be recalled that, in the 1960s, the ALI included butter in section 402A's safe harbor of inherently dangerous food products commonly known to produce cholesterol and increase the risk of heart attacks.
claim. The court dismissed the remaining claims of deceptive advertising under the state Consumer Protection Act. Plaintiffs have had more success with other food claims, and they reportedly have decided to pursue such claims with vigor, assuming that state legislatures do not interfere. Time alone will tell whether plaintiffs' counsel in the future will be able to muster sufficiently weighty arguments for "McLawsuits" of this type.

III. REFORM LEGISLATION

A. Inherent Risk Legislation Generally

A number of states and the federal government have enacted legislation addressing, in one way or another, the issue of products that contain substantial inherent risks. Some state and federal statutes ban the sale of such dangerous products as fireworks, cigarettes, alcohol, and controlled substances to unauthorized persons, while other states have enacted products liability reform legislation that limits a manufacturer's liability for generic product risks. North Carolina's provision, for example, shields manufacturers from design defect claims arising out of "an inherent characteristic of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability and that is

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


189 See Kate Zernike, Lawyers Shift Focus From Big Tobacco to Big Food, N.Y. TIMES, Apr. 9, 2004, at A1 (reporting that McDonald's paid $12 million to settle a claim for failing to disclose that its French fries contained beef fat, that Kraft stopped using trans fats in Oreos, and that the makers of a puffy cheese snack, Pirate's Booty, paid $4 million to settle a claim that it understated fat grams).

190 See id.

191 Louisiana has already enacted legislation prohibiting such suits. Congress held hearings on such a bill in 2004. See infra Part III.

recognized by the ordinary person with the ordinary knowledge common to the community." Statutes of this type quite clearly contemplate products such as alcohol and cigarettes. Other states have enacted similar generic risk statutes, but often with important variations. New Jersey's statute, for example, generally shields manufacturers of such products from design defect claims, but allows these types of claims for industrial machinery and products whose designs are "egregiously unsafe." California and Texas enacted nearly identical reform statutes, adopting the safe harbor list of inherently dangerous products in comment i to the Second Restatement, which shelters manufacturers of such products from most products liability exposure. In 1998, however, California's legislature deleted "tobacco" from the safe harbor list of protected products and added new provisions specifically authorizing products liability suits against the tobacco industry. Some statutory provisions are more specific, such as a North Carolina provision that protects manufacturers of prescription drugs that are unavoidably unsafe as long as adequate warnings are provided.

193 N.C. GEN. STAT. § 99B-6(c) (2003).
194 See, e.g., Lane v. R.J. Reynolds Tobacco Co., 853 So. 2d 1144 (Miss. 2003) (holding that the inherent characteristic provision of a products liability reform statute bars all tobacco cases), reh'g denied, 2003 Miss. LEXIS 482 (Miss. Sept. 25, 2003).
195 E.g., CAL. CIV. CODE § 1714.45(a), (b) (West 1998); MICH. COMP. LAWS § 600.2947(5) (2000); MISS. CODE ANN. § 11-1-63(b) (1999); N.C. GEN. STAT. § 99B-6(c) (2003); N.J. STAT. ANN. § 2A:58C-3 (West 2000); TEX. CIV. PRAC. AND REM. CODE ANN. § 82.004 (Vernon 1997).
197 CAL. CIV. CODE § 1714.45(a), (b); TEX. CIV. PRAC. AND REM. CODE ANN. § 82.004 (providing that manufacturers and sellers are immunized from products liability, except for manufacturing defects and breach of express warranty, if:

(1) the product is inherently unsafe and the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community; and
(2) the product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, tobacco, and butter, as identified in Comment i to section 402A of the Restatement (Second) of Torts).

198 CAL. CIV. CODE § 1714.45(e), (f), (g).
199 N.C. GEN. STAT. § 99B-6(d) (2003).
B. Alcoholic Beverages

Beginning in the 1960s and continuing through the 1970s and 1980s, the FDA and Senator Strom Thurmond of South Carolina, as well as other members of Congress, pressed the alcohol industry to adopt a voluntary labeling program warning of the dangers of their beverages.\textsuperscript{200} One proposed statute would have required every alcoholic beverage container to be labeled, on a rotating basis, with warnings that alcohol consumption 1) during pregnancy can cause mental retardation and other birth defects to the baby; 2) impairs a person's ability to drive a car or operate machinery; 3) is particularly hazardous in combination with some drugs; 4) can increase the risk of developing hypertension, liver disease, and cancer; and 5) is a drug and may be addictive.\textsuperscript{201} An earlier bill had substituted for 5) a warning that its rapid consumption can cause immediate death.\textsuperscript{202}

By the late 1980s, proposed legislation of this type was widely debated in Congress, state legislatures, and the media. Bills were filed and rejected in Florida and California, and one passed in the Massachusetts house in 1987. More than sixty national health organizations supported the federal bill summarized above, and a Gallup poll found that nearly eighty percent of Americans favored the labeling of alcoholic beverages with health warnings.\textsuperscript{203} A national editorial contended: "Consumers need to be able to make informed choices about everything they eat or drink or take as medicine. Especially alcoholic beverages. They need to know what's in them. And to be alerted to any possible hazards."\textsuperscript{204} Citing frightening statistics—that 100,000 Americans die from alcohol use each year, that thousands of children are born each year with alcohol-related birth defects, that "18 million Americans and their families are torn apart by addiction and related problems," and that the annual loss to the nation exceeds $100 billion—the House and Senate sponsors of the warning label legislation, Congressman John Conyers and Senator Strom Thurmond, urged its

\textsuperscript{200} See Owen, supra note 8, at 672.
\textsuperscript{201} S. 2047, 100th Cong. (1988).
\textsuperscript{203} See Owen, supra note 8, at 673.
\textsuperscript{204} John Conyers & Strom Thurmond, We Can't Wait for the Industry to Act, USA Today, April 8, 1988, at 10A.
Finally, Congress enacted a compromise bill, the Alcoholic Beverage Labeling Act of 1988, requiring that alcoholic beverages be labeled as follows: "GOVERNMENT WARNING: (1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems." This legislation preempts products liability claims for warnings inadequacies, at least on beverage containers.

C. Firearms

In recent years, a number of states have enacted legislation seeking to protect makers and sellers of firearms and ammunition from liability for injury and death resulting from improper use of their products. Some statutes bar the use of a risk–benefit analysis for judging the defectiveness of guns and ammunition, and some provide that it is the unlawful use of guns, not their lawful manufacture and sale, that is the proximate cause of

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205 Id. Noting that they had “waited more than a decade for the industry to heed the Food and Drug Administration’s call for warning labels,” Conyers and Thurmond concluded: “What the alcohol marketers fear is information. What the public needs is that information. If marketers will not act responsibly to educate consumers about the real risks and costs, then Congress should.” Id.
207 Id. § 215.
208 Id. The act’s preemption clause provides that state law may not require any other warning to be placed on any alcoholic beverage container or package. Id. at § 216; see also Davis, supra note 55; Dukes, supra note 53. Claims for adulteration and fraudulent misrepresentation are likely to survive the Act, but warnings claims, even creative ones, are preempted. See Carroll, supra note 43 (proposing implied warranty claims for allergic reaction). On federal preemption generally, see OWEN, supra note 8, § 14.4.

A tragic footnote to this legislation concerns its senatorial champion, Strom Thurmond, who fought for years for its enactment. In 1993, his daughter was struck and killed by a drunk driver. See OWEN, supra note 8, at 673 n.196.
209 See, e.g., CAL. CIV. CODE § 1714.4(a) (West 1998) (repealed 2002) ("[N]o firearm or ammunition shall be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury, damage, or death when discharged."). In 2002, however, California’s legislature repealed the protection of firearms from products liability in § 1714.4.
The National Rifle Association has lobbied diligently for reform legislation along these lines, and many states have now enacted statutes of this type. Virginia has a statute that removes authority from local governments to sue manufacturers and sellers of firearms and ammunition for damages resulting from their lawful manufacture and sale, instead reserving the right to bring such actions for the Commonwealth. Pointing in the other direction, toward gun control, an ordinance in the District of Columbia provides that sellers of assault weapons and machine guns are strictly liable in tort for injury or death caused by the discharge of such weapons in the District.

D. Fast Foods

In 2004, the United States House of Representatives, but not the Senate, passed a "cheeseburger bill" banning obesity-related lawsuits against restaurants and other food sellers. Similar "Baby McBills" were proposed in many states. A flurry of such bills were addressed by state legislatures and, by the end of the 2004 legislative session, about a dozen states had enacted such legislation. The reasonableness of this type of

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210 E.g., S.D. CODIFIED LAWS § 21-58-1 (Michie Supp. 2003) ("[T]he unlawful use of firearms, rather than their lawful manufacture, distribution, or sale, is the proximate cause of any injury arising from their unlawful use.").


212 VA. CODE ANN. § 15.2-915.1 (Michie 2003).

213 D.C. CODE ANN. § 7-2551.02 (2001).


215 Louisiana's statute, enacted in 2003 and perhaps the first of its kind, is typical: [A]ny manufacturer, distributor or seller of a food or non-alcoholic beverage intended for human consumption shall not be subject to civil liability for personal injury or wrongful death where liability is premised upon an individual's weight gain, obesity or a health condition related to weight gain or obesity and resulting from his long term consumption of a food or non-alcoholic beverage.

LA. REV. STAT. ANN. § 2799.6; see also ARIZ. REV. STAT. § 12-681 (2003); COLO. REV. STAT. § 13-21-1101 (2004); FLA. STAT. ANN. § 768.37 (West Supp. 2003); GA. CODE ANN.
statute suggests that legislatures in other states will take similar action in the future.216

IV. CONCLUSION

The extent to which manufacturers should be subject to liability for harm from inherent product hazards, from the risk of cancer from cigarettes to obesity from fast foods, is a fascinating, unresolved domain, lying at the untamed edge of products liability law. It may be hoped that courts will continue to resolve the basic principles of responsibility for such harm largely in the commonsense way they have thus far; that is, manufacturers are properly required to provide warnings of foreseeable hazards that lie hidden in their products, and they surely should be held accountable for tricking consumers into thinking that their products are safer than they truly are. Yet, responsibility for unavoidable dangers of which consumers are aware, because such dangers are warned about or are plainly visible, generally should reside with consumers themselves, as regular risks of life. Normal insurance mechanisms, rather than the products liability litigation system, are preferable institutions to address the inevitable losses from widely known inherent product hazards. In this untamed judicial land, the courts should simply step aside, and legislatures should step up to limit the most dubious types of inherent product hazard litigation—such as responsibility for obesity from fast food—to help relieve both sellers and the courts of burdens that should remain the personal responsibility of individual consumers.


216 At least California, Illinois, Nebraska, Ohio, and Wisconsin considered, but did not enact, such bills in 2004. See OWEN, supra note 8, at 674 n.204.