Survey of Recent Developments in Products Liability Law

Traditionally in this section, the Seton Hall Law Review *presents synopses of recent New Jersey cases of interest to practitioners. In connection with this symposium issue, we present digests of recent products liability cases which have emanated from various jurisdictions. In so doing, we hope to assist the legal community in keeping abreast of some of the significant developments in this field of law.*

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ADMIRALTY—COMMERCIAL PARTY MAY NOT RECOVER ECONOMIC LOSSES UNDER PRODUCTS LIABILITY CLAIM—*East River S.S. Corp. v. Transamerica Delaval*, 106 S.Ct. 2295 (1986).

In 1969, Seatrain Shipbuilding Corporation (Seatrain) contracted with defendant Transamerica Delaval, Inc. (Delaval) "to design, manufacture, and supervise the installation of turbines" needed for four oil-transporting supertankers then under construction by Seatrain. 106 S.Ct. at 2296. Once completed, the tankers were conveyed to subsidiaries of Seatrain under a charter agreement which granted the charterers full ownership rights for a period of twenty or twenty-two years. The subsidiaries were responsible for costs of maintenance and repairs to the ships. *Id.* In December, 1977, one of the ships, while on its maiden voyage, experienced problems with the high-pressure turbine manufactured by Delaval. In 1978, two of the other vessels suffered comparable damage to their turbines. *Id.* at 2296-97. On its maiden voyage in 1980, the fourth ship's low-pressure turbine was damaged due to an installation error. *Id.* at 2297.

The charterers, claiming admiralty jurisdiction, filed suit against Delaval in the United States District Court for the District of New Jersey. *Id.* The complaint alleged five counts of tortious conduct and sought damages for the cost of repairing the tankers as well as for income lost while the ships were under repair. The first four counts alleged that the defendant was strictly liable for design defects in each of the four tankers' high-pressure turbines. The fifth count alleged that the defendant negligently supervised the installation of the fourth ship's low-pressure turbine. Since a statute of limitations defense barred any contract action, the charterers were limited to their tort claim. *Id.*

Holding that the action was not cognizable in tort, the district court granted summary judgment for the defendant. *Id.* In affirming, the Court of Appeals for the Third Circuit ruled that only when a defective product creates an unreasonable likelihood of harm to persons or to property besides the product itself, and this harm in fact materializes, will damage occurring to a defective product be actionable in tort. *Id.* The court of appeals held that customer dissatisfaction with the product's quality was best handled by warranty law. *Id.*

The United States Supreme Court, in resolving a conflict among the circuits, unanimously affirmed the decision of the lower courts. *Id.* at 2298, 2305. The Court first held that since

the alleged tort was committed either on navigable waters or on the high seas, admiralty jurisdiction was satisfied. *Id.* at 2298. The Court then determined that the body of maritime tort principles should incorporate products liability concepts. *Id.* at 2299. Justice Blackmun acknowledged that products liability actions are grounded on negligence and strict liability principles already incorporated into general maritime law. With those principles in mind, the Court proceeded to "determine whether a commercial product injuring [only] itself is the kind of harm against which public policy requires manufacturers to protect, independent of any contractual obligation." *Id.* at 2300. The Supreme Court, in adopting the majority land-based approach, held that when the only injury is the failure of a product to function properly, a plaintiff may only pursue a contract claim. *Id.* at 2302. The Court reasoned that when a product malfunctions without causing injury to either persons or property, the purchaser suffers a purely economic loss which is not actionable in tort. Thus, when the harm to the product results in repair costs, lost profits, and decreased value, the purchaser has lost the benefit of his bargain, a "core concern of contract law." *Id.*

The Court averred that contract and warranty law controlled instances involving damage solely to a defective product because such actions constituted claims of "insufficient product value." *Id.* at 2303. Commercial disputes, the Court reasoned, are best resolved by contract law because the parties are free to contractually allocate their risks and liabilities in the terms of their purchase agreement. Therefore, in exchange for a reduction of the purchase price, the manufacturer may limit its liability through warranty disclaimers. The Court concluded that, absent a large disparity of bargaining power, it need not interfere with the parties' contractual allocation of risk.

Lastly, the Court noted that damages in contract and warranty actions are limited by privity and the "foreseeable result of the breach." *Id.* at 2303-04. Products liability law, in contrast, has no such limitation on damages. Thus, the Court concluded, under products liability law, manufacturers would be liable for unlimited damages as the charterers, subcharterers, and the charterer's customers would all be able to assert economic losses caused by the defective turbines. *Id.* at 2304.

In *East River*, the Supreme Court established a parity between admiralty law and land-based law that a commercial party may not recover purely economic losses through products liabil-

ity theory. In so holding, the Court helped delineate the provinces of tort and contract law in the products liability field. Further, the Court's ruling recognized and reaffirmed the right of parties to contractually establish the degree of liability for expectation losses. The contractual allocation of economic liability allows manufacturers to competitively market their products. Notions of freedom of contract are obscured, however, in situations involving great disparity of bargaining power between the contractual parties. Unfortunately, no clear standard for determining the existence of such gross disparity has been established.

Paul E. Paray

DEFENSES—IN STRICT PRODUCTS LIABILITY CLAIM, FAILURE TO READ PRINTED WARNING GIVES RISE TO DEFENSE OF PRODUCT MISUSE—*Uptain v. Huntington Lab, Inc.*, 723 P.2d 1322 (Colo. 1986).

Tonya Uptain's hands were seriously burned after using Sani-Tate, a cleaning compound containing a twenty-three percent hydraulic acid solution manufactured by Huntington Lab, Inc. (Huntington). The Sani-Tate labels warned against skin contact with the product due to potential chemical burns and to wash skin thoroughly with water should contact occur. 723 P.2d at 1323-24. Uptain, an employee in the housekeeping department of Southwest Memorial Hospital, was instructed to apply Sani-Tate with a swab which required periodic rinsing. Although there was a conflict whether she was instructed to wear rubber gloves, Uptain used her bare hands to wring the swab after each rinsing. Uptain's hand soon became red and blistered, necessitating immediate medical attention. Due to the severity of the burns, Uptain required numerous skin graft operations. Her hand became permanently scarred. *Id.* at 1324.

Uptain instituted a products liability claim against Huntington on the grounds that inadequate warnings on the bottle of Sani-Tante rendered the product defective. Huntington raised the defense of misuse, asserting that the warnings were adequate and that Uptain assumed the risk of injury by failing to read and adhere to the instructions. *Id.* The jury returned a verdict in favor of Huntington and the court of appeals affirmed. *Id.* The

Supreme Court of Colorado granted certiorari to determine several issues, including whether the court of appeal's definition of misuse was correct and whether evidence of Huntington's newly designed label was properly excluded at the trial level. *Id.* The Supreme Court affirmed on both counts. *Id.* at 1325.

Justice Kirshbaum, writing for the majority, first noted that contributory negligence is not a viable defense in strict liability claims. The justice observed, however, that the *Restatement (Second) of Torts*, § 402A comment h, provides an exception to this rule "when unforeseeable abnormal handling of an otherwise safe product causes injuries." *Id.* at 1324. Accordingly, the court held that misuse is a "particularized defense" which requires that the plaintiff's injuries arise from the unintended and unforeseeable use of a product. *Id.* at 1325. Justice Kirshbaum explained that the concept of misuse encompasses the "use of a product in a manner other than that which was intended as well as use for an unintended purpose." *Id.* at 1326. The court ruled that the failure to read and heed the warnings printed on the product may constitute an unforeseeable use of Sani-Tate. In support of its position, the court cited *Restatement* § 402A, comment j, which established the assumption that printed warnings would be "read and heeded." *Id.* The court held that whether Uptain's bare-handed application of Sani-Tate coupled with her failure to read the warning was unforeseeable was a question of fact and thus properly left to the jury. *Id.*

The court dismissed Uptain's assertion that the trial court erred in denying admission of a new warning label drafted by the defendant prior to the date of the accident. *Id.* at 1329. The proposed new Sani-Tate label included all of the prior warnings plus an instruction to wear rubber gloves. *Id.* at 1326-27. Uptain argued that evidence as to the new label should be permitted under Colorado Rules of Evidence 407 (identical to FRE 407) in order to prove the feasibility of the precautionary measures. *Id.* at 1327. The court ruled that Rule 407 addressed only post-event corrective measures; therefore, it would not apply to the present case because the defendant submitted the proposed label one year before Uptain was injured. *Id.* at 1328. Thus, the court concluded that the trial court did not abuse its discretion in ruling that the prejudicial effect of the new label precluded its admission into evidence. *Id.* at 1329.

In a dissenting opinion, Chief Justice Quinn asserted that the defense of misuse is appropriate only upon a showing that

adequate warnings were given. *Id.* at 1332 (Quinn, C.J., dissenting). Chief Justice Quinn felt that Uptain's failure to read the label would be immaterial if the warnings were inadequate or would not have prevented her injuries. The dissent criticized the majority for strongly intimating that failure to read a warning automatically gives rise to the defense of misuse regardless of the warning's adequacy. *Id.* Under this approach, Chief Justice Quinn believed that, in the instant case, the jury was permitted to render a verdict for the manufacturer even though it may have already found the product defective. *Id.* at 1334 (Quinn, C.J., dissenting). Consequently, the justice determined that this instructional flaw warranted a new trial. *Id.*

While the defense of misuse is needed to guard against the unintended and unforeseeable abuse of a manufacturer's product, a logical presumption is that abuse results when *adequate* warnings are not heeded. If, as the majority suggests, conduct is relevant in duty to warn cases, primary focus should be centered on the manufacturer's conduct in communicating with the consumer. A plaintiff's conduct must remain a secondary concern if the rational imposition of products liability law is to be served. Judicial failure to review a manufacturer's communications may allow defective products to remain on the market until a more "literate" plaintiff suffers injury due to inadequate warnings. The approach used by the *Uptain* majority is unfortunate, as proof of adequacy would have substantiated the defense of misuse without exposing the public to undetected dangers.

Stephan W. Milo

STRICT LIABILITY—PAVING CONTRACTOR MAY NOT BE CHARACTERIZED AS MANUFACTURER AND IS NOT LIABLE FOR PATENT DEFECTS KNOWN TO OWNER—*Edward M. Chadbourne, Inc. v. Vaughn*, 491 So.2d 551 (Fla. 1986).

In January 1981, Mary Vaughn and her husband were involved in an automobile accident on County Road 1087 in Walton County, Florida. 491 So.2d at 552-53. While attempting to change lanes, Mrs. Vaughn lost control of her car as a result of a two-inch drop off in the road's pavement. *Id.* at 552. In the ensuing accident, Mrs. Vaughn was killed and her husband was seri-

ously injured. *Id.* at 553. Edward E. Chadbourne, Inc. (Chadbourne), a contractor had manufactured the paving materials and repaved County Road 1087 in October and November of 1978. *Id.* at 552.

In April 1979, the Florida Department of Transportation (DOT) tested and approved the paving materials. *Id.* Walton County subsequently became responsible for the maintenance of the road. *Id.* Approximately three weeks prior to the accident, a Walton County commissioner, acting in his official capacity, inspected the portion of Road 1087 where the Vaughns' accident occurred. *Id.* This investigation revealed that erosion of the pavement had created height differentials on the road's surface. *Id.*

Mr. Vaughn instituted an action against Chadbourne for personal injuries and the wrongful death of his wife. *Id.* at 553. The complaint alleged that Chadbourne, as manufacturer and contractor of the road, was liable under the theories of negligence, strict liability, and warranty. *Id.* The trial court, without articulating a basis for its decision, granted summary judgment in favor of Chadbourne. *Id.* On appeal, the appellate court determined there were material issues of fact in dispute and thus reversed the decision of the lower court. *See id.* In reversing the lower court's decision, the district court of appeal determined that Chadbourne was a manufacturer. *Id.*

On appeal, the Supreme Court of Florida quashed the appellate court's decision and remanded the case for reinstatement of the trial court's order of summary judgment for the defendant. *Id.* at 554. The court held that an action in strict liability as applied to Chadbourne was inappropriate because the public road did not constitute a product. *Id.* at 553. Chief Justice McDonald, writing for the majority, noted that public roads, unlike other products placed into the stream of commerce, are not available for purchase in the open market. *Id.* Additionally, the supreme court found that Mr. Vaughn "failed to make a prima facie showing that Chadbourne's acts proximately caused the injury." *Id.* The court noted that the DOT was a sophisticated, knowledgeable purchaser which tested the paving materials and the completed road at both the time of purchase and three weeks prior to the accident. *Id.* at 554. Relying on prior decisions, the court determined that the county's knowledge of the dangerous condition coupled with its responsibility for repair and maintenance of the road negated any claim that Chadbourne's activities were the

proximate cause of the injuries sustained by the Vaughns. *Id.* According to the majority, public policy would be violated if a person, categorized as a manufacturer or a contractor, was held strictly liable for patent defects known to the owner. *Id.*

In a lengthy dissent, Justice Adkins strongly criticized the majority's decision. *See id.* at 554 (Adkins, J., dissenting). The justice disagreed with the court's refusal to acknowledge paving material, manufactured and applied by a contractor, as a product. *See id.* Such refusal, according to the dissent, was not only inconsistent with prior decisions but would also cause difficulty in insuring that manufacturers bear their share of the liability for harm caused by their defective products. *Id.* at 554-56 (Adkins, J., dissenting). Additionally, Justice Adkins found the majority's conclusion regarding the plaintiff's proof of proximate causation to be equally without merit. *Id.* at 556 (Adkins, J., dissenting).

Justice Adkins explained that since the issues of causation, liability, and comparative negligence were never adjudicated, Mr. Vaughn had been denied "his constitutionally guaranteed right of access to the courts." *Id.* at 554, 557-58 (Adkins, J., dissenting). Furthermore, Justice Adkins emphasized that proximate cause is a question of fact to be determined by a jury and not by the court. *Id.* at 556 (Adkins, J., dissenting). In the dissent's view, the majority opinion failed to recognize that, absent a jury determination, neither Chadbourne's cognizance of the subsequent DOT inspection of the road nor the alleged obvious nature of the defects were sufficient to absolve Chadbourne of liability. *Id.* at 557-58 (Adkins, J., dissenting).

In *Chadbourne*, the court, without determining issues of causation or comparative negligence, held that an individual may escape liability for patent defects simply by a judicial determination that he or she is not a manufacturer. The dissent correctly observed that a constitutional deprivation of access to the courts occurred as a result. The majority's focus upon the sophistication of the purchaser as a means of summarily disposing of questions of fact is clearly unjustified. When an innocent third party is injured as a result of an admitted defect in an item of manufacture, a denial of judicial relief frustrates the intended purpose of an action in strict liability. Thus, the ultimate effect of the *Chadbourne* decision is likely to stagnate the field of products liability law in jurisdictions that choose to follow its rationale.

Marianne Benevenia

DAMAGES—COMPARATIVE FAULT PRINCIPLES ARE INAPPLICABLE IN STRICT PRODUCTS LIABILITY CASES—*Lippard v. Houdaille Industries, Inc.*, 715 S.W.2d 491 (Mo. 1986).

As part of his employment, Thomas Lippard was responsible for operating a planing machine. 715 S.W.2d at 492. The machine had been manufactured by Houdaille Industries (Houdaille) and was equipped with a metal guard designed to prevent the operator from coming into contact with the blades. While Lippard was operating the machine, a board slipped from his hand. As he reached for the board, Lippard was severely injured because the protective guard failed to operate properly. *Id.*

Lippard filed suit against Houdaille alleging that the machine was defective and unreasonably dangerous. He further alleged that the defendant had not adequately warned of the possible danger. *Id.* The defendant sought and received a comparative negligence jury instruction on the ground that Lippard operated the planing machine negligently. *Id.* The jury subsequently determined that the plaintiff had incurred $75,000 in damages. *Id.* The jury also determined, however, that each party had been equally at fault. *Id.* As a result, the court entered a judgment in favor of the plaintiff for $37,500.

The trial court's ruling was affirmed by the court of appeals. The pivotal issue on appeal to the Supreme Court of Missouri was whether comparative fault analysis was applicable in products liability cases. At the outset, the Missouri Supreme Court recognized that other jurisdictions have dealt with this issue in various ways. *Id.* at 493 n.2. A number of courts, for example, had held the principle of comparative fault to be wholly inapplicable to strict liability cases. *Id.* (citations omitted). Conversely, other courts had totally integrated comparative fault into the law of strict liability. *Id.* (citations omitted). In addition, several courts had decided to steer an intermediate course between these two extremes. *Id.* (citations omitted).

Writing for the majority, Justice Blackmar relied solely on the Missouri common law rule that a "plaintiff's contributory negligence is not at issue in products liability case." *Id.* at 493. Accordingly, the court averred that manufacturers should be liable for injuries caused by their defective products irrespective of the degree of the plaintiff's own carelessness. *Id.* at 494. Thus, the court determined that the defendant may not seek an instruction regarding comparative fault. *Id.* at 493. The majority, how-

ever, noted that a products liability defendant may use the plaintiff's alleged carelessness to demonstrate that the product either was not unreasonably dangerous or that it was not the cause of the plaintiff's injury. *Id.*

According to the *Lippard* court, even a negligent plaintiff may recover damages if the trier of fact determines that his injuries were caused by a defective product. *Id.* The court noted, however, that an instruction relating to the degree of the plaintiff's carelessness would not be precluded if the plaintiff voluntarily and unreasonably exposed himself to a known danger. *See id.* at 493-94.

In his concurring opinion, Justice Rendlen noted that a prior case had introduced comparative fault principles into the negligence law of Missouri. *Id.* at 495 (Rendlen, J., concurring) (citing *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. 1983)). Justice Rendlen noted, however, that that case "did not and could not have determined the applicability of comparative fault to strict products liability cases." *Id.* The justice further determined that the doctrine of comparative fault was "similarly inapplicable to strict liability." *Id.* Justice Robertson, who also concurred in the result reached by the majority, nevertheless asserted that the "applicability of comparative fault to products liability actions. . ." had not been clearly addressed by prior decisions. *Id.* at 497 (Robertson, J., concurring). He stressed that the issue should be addressed by the state's legislature and not by the courts. *Id.*

In a dissenting opinion, Justice Donnelly advocated the application of a "system of pure comparative fault" to both negligence and products liability actions. *Id.* at 499 (Donnelly, J., dissenting). Similarly, in his dissent, Justice Welliver viewed comparative liability as a crucial aspect of products liability litigation. *Id.* at 501 (Welliver, J., dissenting). Justice Welliver's position was premised on notions of fairness and prior Missouri decisions. *Id.* at 502 (Welliver, J., dissenting) (citing *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. 1983)). Therefore, the justice viewed the majority's ruling as a covert reversal of Missouri common law. *Id.* at 503 (Welliver, J., dissenting).

The issue of whether principles of comparative fault should be applicable to products liability actions has caused sharp division among courts and judges alike. The *Lippard* case demonstrates that logical and well reasoned arguments can be advanced by those on either side of the issue. Although a majority of states, including New Jersey, have held comparative fault or neg-

ligence applicable to strict products liability litigation, *see id.* at 502 n.5 (Welliver, J., dissenting), the issue is far from settled. The *Lippard* court adopting the minority position proves it to be a viable alternative.

Christopher L. Musmanno

STATUTE OF REPOSE—LEGISLATIVE LIMITATION ON ALLOWABLE TIME FOR FILING PRODUCTS LIABILITY CLAIM VIOLATES EQUAL PROTECTION CLAUSE OF THE NORTH DAKOTA CONSTITUTION—*Hanson v. Williams County*, 389 N.W.2d 319 (N.D. 1986).

In 1963, Ingram Manufacturing Company produced a multiton earth packer that, after a series of owners, was ultimately purchased in 1980 by Williams County, North Dakota. 389 N.W.2d at 320. Subsequently, the earth packer was borrowed by the city of Williston. City employee Todd Hefta, the appellant Hanson's twenty-two year old son, was assigned to operate the machine along with another city worker. *Id.* On August 24, 1983, as Hefta walked behind the earth packer, his fellow worker attempted to start it, allegedly checking the clutch to make sure the gears were in neutral. When he pushed the starter button, the machine " 'jumped backwards' " killing Hefta. *Id.* The following year, Hanson filed a wrongful death action charging "negligence, breach of implied warranty and strict liability in tort." *Id.*

The district court granted the defendants' motion for summary judgment, holding that the statute of repose provision of the North Dakota Products Liability Act barred the action. *Id.* (citing N.D. CENT. CODE § 20-01.1-02(1) (1977)). The act provided that no products liability action could be brought unless the injury or death occurred within ten years of the original purchase or within eleven years of manufacture of the defective product. *Id.* A statute of repose differs from a statute of limitation in that the latter bars an action unless it is filed within a specified period after injury occurs while the former terminates any right of action after a specific period of time regardless of whether an injury has occurred. *Id.* at 321.

On appeal, the North Dakota Supreme Court reversed the

grant of summary judgment and remanded the case for trial. *Id.* at 328. The court held that the act violated the state constitution's equal protection clause. *Id.* That clause states in pertinent part that no citizen shall "be granted privileges or immunities which upon the same terms shall not be granted to all citizens." *Id.* at 323 n.8 (citing N.D. CONST. art. I, § 21). Writing for the majority, Justice Gierke limited the court's consideration to the equal protection issue while noting that Hanson also raised other challenges to the act based on both the state and federal constitutions. *Id.* at 322-23.

The court first faced a decision on which of three levels of review to apply in assessing the act's constitutionality. Declaring "that the right to recover for personal injuries is not a fundamental right," the court rejected the appellant's request for application of strict scrutiny, the highest level of review. *Id.* at 323 n.9. The court also declined to apply the lowest level of review which sustains a legislative classification unless shown to be blatantly arbitrary and without a "rational relationship" to a legitimate government purpose. *Id.* at 323. Justice Gierke, instead, viewed the right to recover for personal injury as an important "substantive right" deserving an intermediate standard of review. *Id.* at 325. This standard demands a " 'close correspondence between statutory classification and legislative goals.' " *Id.* at 323 (quoting *Arneson v. Olson*, 270 N.W.2d 125, 133 (N.D. 1978)).

Justice Gierke noted that the North Dakota statute of repose divided plaintiffs in products liability claims into two classes—those who had been injured within eleven years of manufacture and those who had not and were therefore barred from recovery. *Id.* at 326-27. The question before the court was whether there was "such a close correspondence between this statutory classification and the legislative goals" to justify the class distinction. *Id.* at 327 (citations omitted). Observing that the state legislature was responding to a perceived crisis of unaffordable products liability insurance, the court found that the act's purpose was to create a climate of stability within the insurance arena that would stimulate reasonable rates and expedite claim settlements. *Id.* at 327-28. Although the court did not question the legislature's finding of facts as to the crisis, it nevertheless required more justification for the arbitrary classification. *Id.* at 328. Justice Gierke pointed out that when human life and safety are at stake, a rational basis must exist other than merely the economic interests of manufacturers or suppliers. *Id.*

In her concurring opinion, Justice Levine emphasized the legislative history of the act. *See id.* at 329 (Levine, J., concurring). The interim legislative committee working on the act received testimony that the bill "would not alleviate. . .increasing premiums because of the lack of information and the resultant uncertainty about insurance industry rate-making methods." *Id.* (Levine, J., concurring). The justice found that a close correspondence between the legislative goal of controlling rising products liability rates and the statutory classification could not be found in a statute "grounded on guesswork, frustration and little more than a wing and a prayer." *Id.* (Levine, J., concurring).

In a lengthy dissent, Justice Erickstad argued that the statute did not violate the equal protection clause of the state constitution. *Id.* at 330 (Erickstad, J., dissenting). While Justice Erickstad agreed with the majority that the intermediate level of review was appropriate, *id.* at 337 (Erickstad, J., dissenting), he found a close relationship between the legislative goals and the classifications. *Id.* at 343 (Erickstad, J., dissenting). While the debate in the North Dakota Legislature concerned whether one state's enactment of a statute of repose would have any effect on insurance rates (which are set based on a national standard), Justice Erickstad pointed to the information also received by the legislature that "[a]t least twenty-one states have had statutes of repose intended specifically for products liability cases." *Id.* at 341 (Erickstad, J., dissenting). Justice Erickstad noted that similar and collective efforts by other states could impact the legislative goal of stabilizing or reducing insurance rates in North Dakota. Thus, the justice found a close correspondence between the ends and the means of the act. *Id.* at 343 (Erickstad, J., dissenting).

Public policy demands that death or injury due to a faulty product be compensated. By putting manufacturers on notice that they will be held liable for product defects arising many years after the initial manufacture, they are encouraged to strictly supervise the production of their products with public safety as an underlying concern. There is, however, also a competing public policy calling for certainty in the marketplace. This certainty is upended by soaring insurance rates and ageless claims. Neither a statute of repose nor, alternatively, legislative silence satisfies the public's needs.

As of this date, there is no consensus in either state or federal courts as to the constitutionality of such statutes. Recent

cases directly contradict the instant opinion. In *Jones v. Five Star Engineering*, 717 S.W.2d 883 (Tenn. 1986), for example, the Tennessee Supreme Court upheld that state's statute of repose and barred the wrongful death action by the family of a man fatally injured while using a power-driven posthole digger. The court found the statute to be a legitimate exercise of legislative authority and not in conflict with either federal or state constitutional due process or equal protection provisions. *Id.* at 882-83.

A more enlightened approach to this area is the middle ground suggested favorably in dicta by both the majority and dissenting opinions in *Hanson*, as set forth in the Commerce Department's proposed Model Uniform Product Liability Act. *Hanson*, 389 N.W.2d at 328, 342 (citing 44 Fed. Reg. 62,732 (1979)). The Model Act creates a presumption, which is rebuttable by clear and convincing evidence, that harm caused more than ten years after delivery of the product arose after the expiration of the useful safe life of the product. *Id.* This presumption, rather than a harsh, arbitrary cut-off date, would provide for the competing public interests while giving all sides a level playing field.

Donna M. duBeth

DUTY TO WARN—MACHINE DESIGNER HAS DUTY TO WARN END USERS OF POSSIBLE DANGER INHERENT IN ITS PRODUCTS—*Alm v. Aluminum Company of America*, 717 S.W. 2d 588 (Tex. 1986).

On June 3, 1976, James Alm's eye was severely injured when he was struck by an aluminum bottle cap which had exploded off a soft-drink bottle. 717 S.W.2d at 590. The resealable aluminum cap was produced by a capping machine which had been designed and patented by Aluminum Company of America (Alcoa). *Id.* at 589. JFW Enterprises Inc., (JFW) bottled the soft-drink using a capping machine purchased from Alcoa. Alm sued Alcoa, JFW, and the supermarket which sold him the soft-drink under the theories of negligence and strict liability. *Id.* at 590. Alcoa, however, was the only defendant that did not settle with Alm.

At trial, Alm contended, *inter alia*, that Alcoa possessed a duty to warn consumers "of the hazard of bottle cap blow off."

Id. The jury found Alcoa liable but determined that strict products liability was inapplicable. *Id.* The jury, however, awarded Alm one million dollars in punitive damages. The trial judge rejected the jury's findings with respect to negligence and strict liability, and held Alcoa liable under the principles of simple negligence. *See id.* at 590. The trial court awarded Alm $300,500 in compensatory damages. *Id.*

The court of appeals reversed the trial court's decision and held the evidence did not support a finding that Alcoa was negligent in warning of the hazards inherent in its capping method. *Id.* In so holding, the court stated that while Alcoa did not possess a duty to directly warn consumers, it was obligated to provide warnings to the bottlers. The appellate court ruled that Alcoa had satisfied this duty. *Id.*

On appeal, the Supreme Court of Texas noted that, in some instances, a manufacturer's duty to warn may be satisfied by providing notice to an intermediary. *Id.* at 591. Writing for the majority, Justice Kilgarlin offered the example of a drug manufacturer satisfying its duty to warn ultimate consumers by providing adequate information to doctors. In such a situation, the doctor acts as a "learned intermediary" between the manufacturer and the public. *Id.* Thus, the drug manufacturer is liable under failure to warn principles only if it gives the doctor inadequate or misleading information concerning the use of the drug. *Id.* at 592.

Additionally, the court noted that bulk manufacturers of raw materials may similarly satisfy the duty to warn consumers of defects via an intermediate distributor. *Id.* In its ruling, the court likened Alcoa's position to a bulk supplier. Specifically, the court noted that "Alcoa [had] no package of its own on which to place a warning and no control, except by contractual requirements, over the final package labeling which reaches consumers." *Id.*

The court then held that Alcoa's duty to warn consumers would be satisfied if the intermediate manufacturer or distributor was given adequate warning of the dangers inherent in the product. *Id.* at 593. According to the *Alm* court, factors used in determining whether the warnings are adequate include the level of the distributor's training, its knowledge about the product, and its ability to warn consumers. *Id.* at 592-94. The court, however, did not decide the question whether the warnings from Alcoa were adequate under these guidelines; instead, it remanded the case to the appellate level for reconsideration. *Id.* at 595.

In dissent, Justice Gonzalez viewed the duty of care owed by Alcoa slightly more narrowly than the majority. *Id.* at 595 (Gonzalez, J., dissenting). Instead of requiring either a warning to the consumer, or an effective warning to the intermediary, the dissent stated that the duty to the consumer would be met if there was an adequate warning to the bottler who stood between Alcoa and the consumer. *Id.* at 596-97 (Gonzalez, J., dissenting). More troubling to the dissent was the majority's position regarding Alcoa's burden of proving that its warnings were accurate. *See id.* at 599 (Gonzalez, J., dissenting). The majority stated that Alcoa should carry the burden of proving that the bottler "was adequately trained and warned, familiar with the propensities of the product, and capable of passing on the warning." *Id.* at 592. The dissent contended that a plaintiff who brings a cause of action traditionally has the burden of proving that the warnings were inadequate. *Id.* at 599 (Gonzalez, J., dissenting). The dissent concluded that the majority's view constituted "an unprecedented reversal of the burden of proof." *Id.*

The *Alm* majority held that Alcoa, as designer and manufacturer of a machine used in the bottling of carbonated beverages, had a duty to warn the ultimate consumer. This duty could be satisfied either by a direct warning to the consumer or by a warning to the intermediary manufacturer. Labelling this a duty to warn misinterprets the real duty of care owed to the consumer. A warning that would satisfy the first alternative proposed by the majority would tell a consumer that an improperly sealed bottle cap could explode and cause personal injury. This warning would be of little value to a consumer who would never be in a position to know whether or not a bottle cap was properly sealed.

The better view is that the duty of care owed by the designer or manufacturer in a case such as this is to insure that a safe product is put into the hands of consumers in the first instance. Alcoa should have had a duty to warn the intermediary. In addition, a designer or manufacturer who licenses the use of his ideas or equipment to an intermediary should be required to insure that all needed safety precautions be taken by the intermediary. This added burden would not unduly interfere with or halt the flow of commerce. It may, however, reduce the incidence of personal injuries suffered by the public.

George G. Campion

ADEQUACY OF WARNING—MANUFACTURER IS NOT LIABLE FOR INJURIES CAUSED BY PRODUCT'S USE WHERE THERE ARE NO DEFECTS AND WARNINGS ARE ADEQUATE—*Baughn v. Honda Motor Company*, 107 Wash.2d 127, 727 P.2d 655 (1986).

On August 14, 1972, two young boys, Douglas Bratz and Bradley Baughn, were injured when the Honda mini-trail bike they had been riding collided with a truck. 106 Wash.2d at 130, 727 P.2d at 658. The parents of each boy were familiar with the use of motorcycles and had purchased mini-bikes for their children on prior occasions. *Id.* at 131, 727 P.2d at 658. Prior to the accident, the boys' parents repeatedly warned them not to ride the mini-bikes on the public streets. *Id.* In addition, a label located on the mini-bike, as well as instructions contained in the owner's manual, clearly stated that the bike was designed strictly for off-the-road use. *Id.* at 129-30, 727 P.2d at 658.

In September 1976, Jack Baughn instituted an action on his son's behalf, against Bratz's parents, in Pierce County Superior Court. *Id.* at 131, 727 P.2d at 658. The suit was dismissed in February 1978. In November 1982, Baughn amended his complaint and filed an action in federal district court against the Honda Motor Company and two other Honda affiliates (collectively referred to as Honda). *Id.* In August 1983, each claim was dismissed without prejudice and the case was refiled in Pierce County Superior Court. *Id.* at 131-32, 727 P.2d at 658-59. In September 1983, Douglas Bratz also instituted an action against Honda. *Id.* at 132, 727 P.2d at 659. In 1984, the trial judge ordered the two cases consolidated and ultimately granted Honda's motion for a summary judgment. *Id.*

On appeal to the Supreme Court of Washington, both plaintiffs contended that Honda was liable under the theories of strict liability, negligence, and breach of express and implied warranties. *Id.* at 133, 727 P.2d at 659. Additionally the plaintiffs challenged the court's well established standard for "determining when a product may be considered defective." *Id.*

In affirming the lower court's decision, the supreme court focused on whether a manufacturer would be liable if children were injured while operating minibikes "in violation of manufacturer and parental warnings." *Id.* at 132, 727 P.2d at 659. The court affirmed the trial court's disposition of the case and held that if a product is not defective and adequate warnings concern-

ing its use are issued, the manufacturer is not liable for injuries resulting from its products' use. *Id.* The court found that the bike was designed solely for off-the-road use and that the accident resulted because the boys ignored manufacturer and parental warnings not to ride the bike on public streets. *Id.* Therefore, the court concluded that Honda was not liable for the boys' injuries. *Id.* at 132-33, 727 P.2d at 659.

The *Baughn* court observed that most jurisdictions "require that there be something wrong with the product before a risk-utility analysis is permitted." *Id.* at 134-35, 727 P.2d at 660. Baughn argued, however, that the court should adopt a risk utility standard similar to that adopted in New Jersey. *Id.* at 135, 727 P.2d at 660. Under this approach, the "plaintiff need not offer preliminary proof that a product is defective." *Id.* If the jury finds that the risks associated with the product's use outweighs its utility, the risk-utility rule requires the product to be deemed defective. The *Baughn* court refused to adopt what it viewed as an expansive standard. *Id.* at 136, 727 P.2d at 661. Instead, the court chose to adhere to well established principles requiring a consideration of consumer expectations in addition to the risk-utility analysis in determining whether a product is unreasonably dangerous and therefore defective. If the court had adopted the standard advanced by the plaintiff, the jury would be permitted to decide whether the manufacturer of a well made and designed product should be absolutely liable for all injuries resulting from its product's use. According to the court, such an approach would transform "strict liability into absolute liability." *See id.* at 135, 727 P.2d at 660. Thus, the court held that the manufacturer could not be liable unless the product is deemed not to be reasonably safe. *Id.* at 135-36, 727 P.2d at 660-61.

The court's decision to adhere to its own firmly established strict liability principles represents sound policy decision. To hold otherwise would force manufacturers to pass the cost of additional insurance onto consumers. Thus, the ultimate cost of many products would be excessively inflated. In addition, some manufacturers may find it necessary to totally withdraw their products from the market. The decision whether to impose liability on a manufacturer of a product that is not defective properly rests with the state legislature.

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