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JUDGE RUDOLPH J. GERBER: Thank you, Ellen. Professor David Owen teaches at the University of South Carolina School of Law, and he is going to share some thoughts with us regarding product outlaws.

PROFESSOR DAVID OWEN: "Product category liability" brands a product as an outlaw. To understand this point, it might help to first examine a little riddle: What is the difference between tossing a dart and tossing a dwarf? Dart tossing, as most of us know, involves throwing a small pointed object at a circular target on a wall, and sometimes involves throwing outside a much larger pointed object at a target on the ground. Dwarf tossing, you may recall, is a sport and form of entertainment migrating to America from England and Australia, which involves tossing a dwarf as far as possible, usually in a tavern or sports arena, usually into a pile of mattresses, in an effort to win a prize.

In attempting to solve the riddle of the difference between dart tossing and dwarf tossing, we might first examine their similarities. Both involve tossing a tangible mass. The goal of both involves accuracy over distance. Both can be played in and out of doors, although both oftentimes are done in bars. The enjoyment of both may be enhanced by the consumption of alcoholic beverages. The accuracy of both is usually diminished by the consumption of alcoholic beverages. Finally, the likelihood of harmful that results from both is generally increased by the consumption of alcoholic beverages.

Which brings us to a few of the differences between tossing darts and tossing dwarfs. Darts usually do not have names like Joe and Pete; dwarfs are heavier; and the law treats darts and dwarfs differently, in that some kinds of darts "lawn darts", are illegal, but tossing darts is not, whereas all dwarfs are legal, but tossing dwarfs (in some states), is not.

This brings us to our topic "Product Outlaws" which concerns the question of what, if anything, the law should do about certain inherently dangerous products which give many people pleasure, but which many people abuse, causing many people harm. If we assume the propriety here of legal intervention in some form, a fundamental question which arises is whether the law should outlaw the product, whether it should outlaw how the product is used, or whether it should outlaw both. I use the term "outlaw" here broadly and advisedly to include certain forms of regulation. The

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law may outlaw certain specially dangerous products altogether, as the Consumer Product Safety Commission has banned lawn darts, and as Congress, of course, banned alcoholic beverages during Prohibition. The law may ban the use of dangerous products by certain categories of persons most likely to abuse them, as it has the sale of cigarettes and alcoholic beverages to children, the sale of guns to certain types of people who fail the background test, and as it does for other products as well. Or the law may outlaw the use of such products in especially dangerous situations, such as outlawing driving under the influence of alcoholic beverages, shooting guns inside a city limit, smoking cigarettes or drinking alcoholic beverages in certain public places, or tossing dwarfs in bars. Some leading candidates for outlaw status today, because of their inherent and unavoidable dangers and potentials for abuse, are: 1) lawn darts, which too easily hit and penetrate the bodies of humans, 2) assault rifles, small handguns, and Saturday night specials, which kill and maim untold persons, 3) cigarettes, which cause, of course, all sorts of diseases, 4) alcohol, which causes many types of victims from drunk driving, shootings, liver damage, dwarf tossing injuries, and amorous encounters regretted in the light of day after the effects of the alcohol wear off.

Products may be classified as outlaws according to certain outlaw rules promulgated by legislatures, agencies, and, of course, the courts. The underlying debate in product category liability, the topic of our discussion, is whether the responsibility for making certain types of outlaw rules should rest principally with legislatures and agencies on the one hand, or with the courts, on the other. Legislatures, of course, may simply outlaw the sale or use of a particularly dangerous product, such as alcoholic beverages during prohibition, certain flammable clothing during the 1950s, marijuana, cocaine, and other dangerous and addictive drugs today. Other products include certain types of guns, which increasingly are being banned by Congress and certain municipalities, and dangerous fireworks in most states, but not in South Carolina.

As an alternative to outlawing a product by banning altogether its sale or use, a legislature theoretically could "outlaw" it indirectly, by providing that the seller may sell it but must *compensate* a person injured by the product. An analogy might be the civil damages or dram shop acts that most states have, which prohibit the sale of alcohol to persons particularly likely to abuse it, such as children, alcoholics, and intoxicated persons. Theoretically, at least, a legislature could provide that a cigarette manufacturer may sell cigarettes but must compensate all persons under a civil damages act who are injured by the product. Regulatory agencies such as the Consumer Product Safety Commission and the Food and Drug Administration, of course, may classify and ban particularly dangerous products as, for example, lawn darts were banned by the CPSC some years ago, and saccharine was banned as a sweetener for use in soft drinks and foods by the FDA.

Now we proceed to the particular issue of product category liability and how it fits in the broader product outlaw scheme. Courts are not generally authorized to outlaw products altogether, but they may effectively do so by ruling that all associated costs of

using and abusing a product, including the costs, of all resulting injuries, must be borne by the manufacturer. Appellate courts provide for this type of outlaw status with rules defining design defectiveness. The prevailing outlaw standard of this type is usually formulated by appellate courts. Typically, a product is declared defectively designed if its safety costs exceed its benefits, if the product causes society more harm than good, as Professor Wertheimer previously mentioned. Such a standard is beguiling, because we would not want the law to protect a product that causes society more harm than good, that is on balance bad.

Yet, for a variety of reasons, courts generally are not well suited to make such determinations. Moreover, the judicial outlaw standard just mentioned, which asks whether a product's risks exceed its benefits, misstates the rule that courts, in fact, apply in adjudicating questions of design liability. Almost always, the issue tried in design defect litigation is not the global balance of a product's costs and benefits but the much narrower question of whether the product's manufacturer failed to adopt some reasonable and safer alternative design feature proposed by the plaintiff, such as adding a guard to a dangerous machine. This much more focused way of testing design defectiveness, applied in the vast majority of ordinary product cases and which is the central principle of Section 2(b) of the new Restatement, gives way, however, in a very small category of Habush Amendment cases, which now appears in comment e to Section 2. It addresses the case of a product design danger that, while it cannot be designed away, nevertheless is defective since the design is manifestly unreasonable because the product's extremely high degree of danger so substantially outweighs its negligible social utility that it clearly causes society much more harm than good.

The law of how and by whom a product should be declared an outlaw has developed in a sensible fashion in American jurisprudence and its embodiment in the new Restatement makes good sense. It preserves the market's principal responsibility for determining what products should be made and sold. It allows legislatures and regulatory agencies limited oversight over especially dangerous products. And, in very limited situations, it leaves residual oversight to the courts. The product outlaw principle by which American law has properly been guided may be summarized as follows: some especially dangerous products of minimal utility (perhaps like cigarettes), may be "outlawed" by the courts. The list of such outlawed products, however, should be very small.

Declarations of outlaw status generally should be made by legislatures and agencies and the courts should retain a narrowly defined realm in which products may be categorized as outlaws but only if they are proved to be egregiously dangerous and to possess minimal social value. In other words, products whose dangers *dwarf* their benefits.