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## Honoring a Friend and His Extraordinary Contributions to Understanding and Improving Tort Law

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# HONORING A FRIEND AND HIS EXTRAORDINARY CONTRIBUTIONS TO UNDERSTANDING AND IMPROVING TORT LAW

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I. INTRODUCTION	

Gary Schwartz was a prodigiously productive scholar whose works have challenged and inspired his contemporaries in the academic community, in the Bar and Bench, and in the American Law Institute (ALI). He has served the ALI with extraordinarily distinctive contributions to its publications on products liability and principles of tort law.

His interest in the law of products liability developed from his preparation for teaching the subject to students in his torts classes, early in his teaching career. It led to a comprehensive and probing article, *Understanding Products Liability*, published in the *California Law Review* in 1979.<sup>1</sup> His interest continued through intervening years and flourished when he served as an Adviser to the Reporters for the ALI's *Restatement (Third) of Torts: Products Liability*<sup>2</sup> and Reporter for the *Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles)*.<sup>3</sup>

In the 1950s through the 1970s, the three decades just before Gary Schwartz's influence began to come to bear on the subject, the law of products liability was in a state of significant change. The trigger for change was a set of creative and provocative judicial decisions in state courts of last resort. The courts making these decisions were among those most respected by the courts of other states and by tort

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1. Gary T. Schwartz, *Understanding Products Liability*, 67 CAL. L. REV 435 (1979).

2. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998).

3. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) (Tentative Draft No. 1, 2001) [hereinafter BASIC PRINCIPLES Tentative Draft No. 1].

scholars in the law schools around the country. The scholarly ferment also led to reconsideration in the ALI of its then ongoing development of the *Restatement (Second) of Torts*.<sup>4</sup> Tort law was undergoing rapid change and was unusually susceptible to thoughtful influence.

Doctrines of privity and warranty, their relationships to common law contract and tort reasoning, and their relationships to old and new statutory mandates, were all in controversy. Conflicting views were expressed both in courts and in law offices where lawyers were advising clients on both sides of potential claims. Products liability law in action was a thriving source of work and income for professionals in law. Professional advocates represented claimants and defendants in increasing numbers of cases before courts in pretrial motion practice and in jury trials when claims survived pretrial screening. The increasing case load was manifest especially in state courts but also extended to federal courts, primarily under diversity jurisdiction but occasionally with federal-question issues thrown into the mix.

In this climate of ferment, fundamental ideas about relationships among intentional tort, negligence, and strict liability were open to re-examination. Gary Schwartz was especially sensitive to the potential influence of this point. Not only could it affect products liability law, it might have an even greater effect because of its bearing upon underlying principles of tort law more generally, and relationships among tort, contract, and statutory law.

To illustrate my assessment of Gary Schwartz's special interest in and influence on tort law, I will use a flash-forward and flash-back method of presentation that Gary Schwartz used in his 1979 contribution to *California Law Review*.<sup>5</sup> I do so, among other reasons, because, as I understand this article, he was using this method with more wit, irony, and wisdom than many readers have seen in it.

## II. THE FLASH FORWARD

The flash forward is to Gary Schwartz's draft for the ALI's *Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles)*.<sup>6</sup> In the Discussion Draft (April 5, 1999), and again in Tentative Draft No. 1 (March 28, 2001), the Blackletter and Comments of § 2 concerned, among other matters, meanings of "intent" and "recklessness."<sup>7</sup>

"Reckless" or some variation on this root word (such as "recklessly" or "recklessness") is used more often than any other word or phrase to signify conduct that has two characteristics. First, it is less blameworthy in kind, and not just degree, than intentionally causing harm. Second, it is far more blameworthy than

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4. RESTATEMENT (SECOND) OF TORTS (1965).

5. Schwartz, *supra* note 1, at 435.

6. BASIC PRINCIPLES Tentative Draft No. 1, *supra* note 3.

7. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 2 (Discussion Draft 1999) [hereinafter BASIC PRINCIPLES Discussion Draft]; BASIC PRINCIPLES Tentative Draft No. 1, *supra* note 3, § 2.

“negligence.” Yet, “reckless” (or a variation on this root word) is also used sometimes to signify conduct that is only a little more, rather than far more, blameworthy than “ordinary negligence” (or “failure to exercise ordinary care” as distinguished from “failure to exercise greater than ordinary care”).

In comment *b* to § 2 of Tentative Draft No. 1, Gary Schwartz, calling attention to conduct that is more blameworthy in kind than careless conduct (“negligence”) rather than merely especially bad in degree, refers to it as “aggravated misconduct.”<sup>8</sup> Also, in comment *a* to this section, he explains:

Terms conveying the idea of wrongdoing that is *aggravated*—even though falling short of the wrongdoing involved in intentional torts—are common in the discourse of torts. Sometimes, the term used is “gross negligence.” Taken at face value, this term simply means negligence that is especially bad. Given this literal interpretation, *gross negligence* carries a meaning that is *less than recklessness*.<sup>9</sup>

Both in his seminal article of 1979 and in the ALI’s Tentative Draft No.1, Gary Schwartz calls attention to an underlying conception about conduct that is “morally deficient” as part of the explanation for social perceptions that influence legal doctrine. In 2001, after reciting illustrations of negligent failures that are instances of “simple inattentiveness,” or the failure of a landowner to inspect the property to determine some condition, characterizing them as “the person’s failure to appreciate the risk that mainly constitutes the person’s departure from reasonable care,” he comments, “such failures, while properly regarded as negligent, normally are not morally deficient in a way that justifies a finding of recklessness.”<sup>10</sup>

Comment *d* to § 2 of Tentative Draft No. 1 discusses problems associated with “the balance between the magnitude of the risk and the burden of precautions”<sup>11</sup> and is succeeded by comment *e* on “likelihood of harm” as a factor that is relevant but not decisive.<sup>12</sup>

If a high probability of harm is not always a necessary condition for a finding of recklessness, neither is it always a sufficient condition for such a finding. To be sure, in many situations a high probability is generally indicative of recklessness, in light of the fact that when the actor’s conduct actually makes harm probable convenient precautions are generally available. Rarely, for example, are there conditions on land that create a “probability” of injury that cannot be rectified

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8. BASIC PRINCIPLES Tentative Draft No. 1, *supra* note 3, § 2 cmt. b.

9. *Id.* § 2 cmt. a (emphasis added).

10. *Id.* § 2 cmt. c, at 24.

11. *Id.* § 2 cmt. d.

12. *Id.* § 2 cmt. e.

by appropriate precautions. In many cases, then, the probability of injury is a factor that strongly suggests recklessness. Yet under modern conditions, tort-liability rules are often applied to large-scale enterprise, with far-flung operations, in which the correspondence between the likelihood of injury and the preventability of injury does not hold. Consider an automobile, mass-produced and distributed nationally, that lacks some particular crashworthiness feature. The absence of this design feature may render very probable some number of enhanced motorist injuries. Nevertheless, whether the feature's absence renders the car's design defective is a question that cannot be answered without giving full consideration to all relevant factors. Because standing alone the mere fact of several probable injuries does not even justify a finding of design defectiveness, it certainly does not justify the award of punitive damages for reckless misconduct. Similarly, [in an Illustration in section 1], the smelter's knowledge of the substantial certainty that its neighbors will suffer harm renders it liable for compensatory damages; yet despite the defendant's knowledge of certain harm, punitive damages may well be inappropriate. Moreover, given the limits on the substantial-certainty test . . . , a company can have knowledge that harm will certainly follow from its conduct, yet properly bear no liability at all. Thus, a railroad company, knowing that persons will certainly be injured on account of railroad operations, does not for that reason alone bear liability for those injuries; nor does a manufacturer bear liability merely because it produces and distributes a prescription drug, knowing that some number of consumers will suffer adverse reactions.<sup>13</sup>

### III. OUR FLASH BACK TO HIS FLASH BACK

Unquestionably, products liability ranks as one of the most conspicuous legal phenomena of the last twenty years [1959-1979], and the California Supreme Court has played a leading role in the elucidation of products liability doctrine.<sup>14</sup>

After this opening sentence, Gary Schwartz proceeds with a description of what the California Supreme Court did and said in *Greenman v. Yuba Power Products, Inc.*,<sup>15</sup> *Cronin v. J.B.E. Olson Corp.*,<sup>16</sup> and *Barker v. Lull Engineering Co.*<sup>17</sup> He

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13. *Id.* § 2 cmt. e, at 27-28.

14. Schwartz, *supra* note 1, at 435 (footnote omitted).

15. 377 P.2d 897 (Cal.1963).

16. 501 P.2d 1153 (Cal.1972).

17. 573 P.2d 443 (Cal.1978).

notes that confusion resulted from this sequence but that notwithstanding the confusion, some things were clear:

*Barker* established a “two-pronged” test for identifying design defects. First, a product’s design is defective if the product “fails to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.” Second, the design is defective if the risks inherent in that design are not justified by the design’s intrinsic benefits—whether measured in terms of cost savings, improved performance, or other factors.<sup>18</sup>

The 1979 article also called attention to other implications of *Barker*. First, it “announced a seemingly dramatic allocation of the burden of proof” under which “once the plaintiff shows that the ‘product’s design proximately caused’” the plaintiff’s injury, in Gary Schwartz’s understanding of *Barker*, “the design is deemed defective unless the manufacturer can persuade the jury that the design’s benefits exceed its associated risks.”<sup>19</sup> Second, “the *Barker* opinion twice indicates that the jury is to render its risk-benefit judgments upon the basis of ‘hindsight.’”<sup>20</sup> Third, “in a provocative footnote, the *Barker* opinion raises the possibility of strict liability without proof of ordinary defect, for injuries caused by products ‘whose norm is danger.’”<sup>21</sup>

This last possibility is by far the most consequential of all. Gary Schwartz concluded his two-page introduction with notice to his readers that his article would briefly trace historical development of the existing products liability rule, compare that rule to a “genuine strict products liability rule,” explore relationships among existing and pre-existing doctrines, and discuss *Barker*’s references to “hindsight” evaluations of design defectiveness and to “norm-is-danger” products. In the course of these efforts [this article] will endeavor to achieve an understanding of strict products liability and, in particular, to establish the relationship between tort and contract principles within products liability.”<sup>22</sup>

In our flash back to Gary Schwartz’s flash back, I believe it appropriate to take into account that he aimed for “an understanding of strict products liability” that is sufficient “to establish the relationship between tort and contract principles within products liability.”<sup>23</sup> Thus, he aimed for understanding not only (in a flash back) the doctrine of strict liability as it had developed in the California Supreme Court through the 1950s, 1960s, and 1970s, but also tort and contract principles imbedded in that doctrine, and as well (in a flash forward) where they might lead thoughtful professionals in law—including judges, lawyers, and scholars. For us, the flash

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18. Schwartz, *supra* note 1, at 436 (footnote omitted).

19. *Id.* (footnote omitted).

20. *Id.* (footnote omitted).

21. *Id.* (footnote omitted).

22. *Id.*

23. *Id.*

forward includes a focus on where this blend of doctrines and principles may lead us in the years beyond 2002.

I believe we can be aided in thinking about this flash forward by more of the stimulus to be derived from other indicia of the seminal thinking of Gary Schwartz as he carried through the exercise he charted for himself in those two introductory pages of the 1979 *California Law Review* article.

I turn next to his history of “One State’s Experience” in Part I of the 1979 article. Here his flash back goes all the way to 1850 and the situation existing immediately after California statehood. Before 1900, “not a single personal injury action against a product manufacturer reached the appellate level, and only one such action against a product retailer did so.”<sup>24</sup>

Gary Schwartz then takes us through developments in tort, contract, and statutory proceedings, as well as negligence, strict liability, and warranty, in California and around the country, through *MacPherson v. Buick Motor Co.*<sup>25</sup> in New York in 1916, its adoption in California in 1934, through *Escola v. Coca Cola Bottling Co.*<sup>26</sup> in California in 1944, and on to *Greenman v. Yuba Power Products, Inc.*<sup>27</sup> in 1963.<sup>28</sup>

He notes that, stimulated by *Greenman*, the ALI approved the 1965 publication of § 402A of *Restatement (Second) of Torts*, essentially as it was drafted by the Reporter, Dean Prosser, “imposing strict liability on the seller of ‘any product in a defective condition unreasonably dangerous to the user or consumer.’”<sup>29</sup> Gary Schwartz adds:

Standing alone, “unreasonably dangerous” is a tort-like phrase that seemingly calls for a comparison of the risks and benefits associated with the alleged product defect. But comment i, appended to section 402A, goes on to explain “unreasonably dangerous” as meaning 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.” This provides a contract or warranty-like explanation of defect.<sup>30</sup>

Here again he reminds us of the more ambitious aim of understanding relationships among the whole swirl of somewhat conflicting and somewhat reinforcing tort, contract, and warranty notions. As he proceeds, he remarks upon Justice Roger Traynor’s recognition in a 1965 address of the “various perplexities

24. *Id.* at 437 (footnote omitted).

25. 217 N.Y. 382 (1916).

26. 150 P.2d 436 (Cal. 1944).

27. 377 P.2d 443 (Cal. 1978).

28. Schwartz, *supra* note 1, at 437-38.

29. *Id.* at 438 (footnote omitted).

30. *Id.* at 438-39 (footnote omitted).

inhering in ‘defect,’”<sup>31</sup> and flashes forward seven years for his next observation:

Then, in its 1972 *Cronin* decision, the [California Supreme Court] took two steps. First, it abandoned Justice Traynor’s “intended use” limitation in favor of a test making liability possible whenever the product’s use is “reasonably foreseeable,” regardless of whether the use is otherwise unintended or improper. Second, *Cronin* held that the basic standard of liability should be “defect” rather than “unreasonably dangerous defect.” On the latter issue, part of the court’s reasoning was that “unreasonably dangerous” is superfluous, since the chief purpose of that language is to negate Reporter Prosser’s fear of automatic liability [for such things as sugar’s harm to a diabetic and liquor’s harm to an alcoholic] and that purpose is fully achieved by “defect” standing alone. But *Cronin* also expressed the view that “unreasonably dangerous” is at least potentially nefarious. Here, the court was concerned with both style and substance. Stylistically, “unreasonably dangerous” is wrong because it “rings of negligence” and has a “negligence complexion.” Also, the court found the language capable of being misunderstood as subjecting the plaintiff to a two-step burden of proof, requiring him to prove not only the existence of a defect but also that the defect rendered the product unreasonably dangerous. Addressing the substance of comment i, the court, critical of the “consumer expectations” approach, indicated an unwillingness to negate liability simply because a consumer’s expectations have been lowered in some way—for example, by the obviousness of a product’s defect.<sup>32</sup>

The next flash forward is to *Barker*, involving a plaintiff-employee who was seriously injured “when he jumped off a high-lift loader that the defendant had manufactured and leased to the plaintiff’s employer.”<sup>33</sup> The employee leaped from the loader when it began to tip over on sloping terrain, a risk of which he had not been warned.<sup>34</sup> The trial in *Barker* occurred after *Cronin* was handed down. The trial judge fashioned his instructions to the jury in a heroic effort to explain *Cronin*’s rulings to them.<sup>35</sup> The jury returned a verdict for the defendant-manufacturer.<sup>36</sup> Without approving the jury instructions, the California Supreme Court’s opinion in *Barker* allowed judgment on the verdict to stand, remarking that

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31. *Id.* at 439.

32. *Id.* at 439–40 (footnotes omitted).

33. *Id.* at 440 (discussing *Barker*).

34. Schwartz, *supra* note 1, at 440 (discussing *Barker*).

35. *Id.* at 440–41 (discussing *Barker*).

36. *Id.* (quoting *Barker v. Lull Eng’g Co.*, 573 P.2d 443, 456 (cal. 1978)).



products liability law “does not cast the manufacturer into the role of an ‘insurer.’”<sup>37</sup>

With this description of a late-nineteenth-century way-station in the long history of products liability law in California, Gary Schwartz closes Part I of his 162-page article of four Parts plus an introduction and conclusion. Repeatedly in the remainder of the article, he continues to expose the embedded influence of nuances of theory, doctrine, pragmatics, and principles of fairness and justice on the development of products liability law throughout the nation. I recommend that any reader who wishes to understand fully where we now are, and where we are likely to go in this development, re-read Gary Schwartz’s seminal article with a view to finding in it the seeds of his extraordinary contributions to the publications of the ALI in recent years, on tort law generally, and on products liability law especially.

#### IV. LEGAL PROBLEMS ASSOCIATED WITH INTERSECTING ACTIVITIES

The geographical area that a particular legal system serves may be a locality, a region, a state, a nation, or, as we look to the future, perhaps even something closer to global.

As economic, political, social, and cultural relationships in the world around us become more complex, the range of significantly intersecting activities grows. As Gary Schwartz recognized in 1979, “Almost any accident, examined closely enough, can be seen as lying at the intersection of more than one activity or enterprise.”<sup>38</sup> The frequency of legal problems associated with intersecting activities grows more significant with every increase in the complexity of human relationships. Gary Schwartz also observed that “the process of attributing the accident to a particular activity or enterprise is inherently uncertain,”<sup>39</sup> with further consequences for the legal system. Gary Schwartz calls attention to an example still relevant in 2002:

Indeed, these uncertainties virtually compel the abandonment of the general resource allocation argument for strict liability; instead, about all that can be done is to choose among contributing activities or enterprises on the basis of which of them may be in the best position to reduce the accident risk in a cost-effective way. But this reformulation of the accident prevention strategy brings us back at least to the general vicinity of the defect requirement in existing products liability law.<sup>40</sup>

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37. *Id.* at 441 (discussing *Barker*).

38. *Id.* at 447.

39. *Id.*

40. Schwartz, *supra* note 1, at 447 (footnotes omitted).

Returning in his analysis of underlying principles to negligence law, Gary Schwartz observes:

Negligence law, in its product applications, seems at first to take no account of the point that the product manufacturer stands in a kind of contractual relationship with the product purchaser; it imposes on the manufacturer the same obligation of reasonable care as it places on defendants in “stranger cases” of the sort typified by *Brown v. Kendall*. This obligation is anchored in a fairness principle (that a potential injurer should not egoistically rank his own welfare above the welfare of others) and an accident prevention principle (that a party should be discouraged from engaging in conduct which entails risks to others that exceed its benefits to the actor). Warranty law, by contrast, is drawn directly from the essentially contractual relationship between the consumer and the manufacturer.<sup>41</sup>

Here, again, we see the recurring theme of the interrelationship of doctrine, policy, and principles of fairness.

#### V. COMPARING RISKS AND BENEFITS

Gary Schwartz takes note of a challenge to the efficacy of risk-benefit comparisons on the ground of alleged incompetency of juries, and a judge or panel of judges as well, to perform this function.

The tort dimension of strict “defect” liability has been objected to in recent years on grounds that juries are somewhat prone to be unduly favorable to plaintiffs in product design cases, and on the broader basis that sophisticated risk-benefit balancing is something that the process of adjudication is incapable of handling. Neither of these objections is entirely persuasive. The complaint about the jury lacks empirical verification. . . . The second objection rests on the claim that product design cases are “polycentric” in Lon Fuller’s sense and hence unsuitable for adjudication. Given Fuller’s own examples of polycentricity, this claim seems exaggerated.<sup>42</sup>

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41. *Id.* at 449 (footnotes omitted).

42. *Id.* at 449-450 (footnotes omitted).

Gary Schwartz adds:

If product design litigation is to achieve satisfying results, the law is obliged to formulate standards which identify the proper variables, which are capable of being administered in the civil trial context, and which provide the jury with effective, intelligent guidance.<sup>43</sup>

My views about the inapplicability to strict products liability of Lon Fuller's seminal explanations of polycentricity and fitness for adjudication, and the ALI's published comments on comparison of costs and benefits, are compatible with the excerpts from Gary Schwartz's 1979 *California Law Review* article, quoted immediately above. With respect to comparing costs and benefits, I have so stated elsewhere recently in *Judging in the American Legal System*,<sup>44</sup> where I considered "three comparisons that might influence one's views about what the law in some jurisdictions now says, or should say if the law is now unsettled, about whether the manufacturer of a product line is subject to liability for all or part of the loss of which the product line is a cause."<sup>45</sup> The three comparisons are identified as, first, "Is the COST greater than the benefit?"; second, "Is the RISK greater than the utility?"; and third, "Is the BURDEN less than the PL?"<sup>46</sup> Then follows a consideration of the various possible meanings of each of these capitalized terms (COST, BURDEN, and PL) and the pragmatic consequences of using one or another of the possible meanings in particular contexts of the law of tort, contract, warranty, and strict legal accountability.<sup>47</sup> Also noted there is the fact that one of the possible meanings of "defect" is very close to a meaning proposed by Professor David Owen in *Toward a Proper Test for Design Defectiveness: "Micro-Balancing" Costs*.<sup>48</sup>

All in all, Gary Schwartz's repeated reminders of the fluidity and interdependence of all the rules, rulings, policy analyses, and discussion of underlying principles help us understand that he is interested in bridging gaps in our present knowledge and understanding. Thus, when describing a ruling by the California Supreme Court in 1978, in *Daly v. General Motors Corp.*,<sup>49</sup> he says, "This ruling all but bridges the dramatic gap that previously separated negligence from strict liability."<sup>50</sup>

43. *Id.* at 451.

44. ROBERT E. KEETON, *JUDGING IN THE AMERICAN LEGAL SYSTEM* § 19.3.3, at 513-17 (1999)

45. *Id.* at 513.

46. *Id.* (using "PL" as in Judge Learned Hand's metaphor).

47. *Id.* at 513-17.

48. *Id.* at 516 (referencing David G. Owen, *Toward a Proper Test for Design Defectiveness: "Micro-Balancing" Costs*, 75 TEX. L. REV. 1661, 1689-92 (1997)).

49. 575 P.2d 1162 (1978).

50. Schwartz, *supra* note 1, at 456.

## VI. EXPECTATIONS FOR THE FUTURE

The thoughtful reflections by Gary Schwartz on tort law and products liability law throughout his professional career are indicative of his own expectations for the future, and they surely influence our own. His perceptive and insightful comments on comparing risks and benefits are as relevant in 2002 as they were in 1979. Also his expression, in the ALI's *Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles)*,<sup>51</sup> of insights about different potential meanings of "recklessness," dependent on context and other factors, is likely to influence judicial reasoning not only in the more general context of discussing principles of tort law but also in reasoning about the nature and scope of liability for harm to which a product contributes.

Courts must still grapple not only with the relationships and distinctions between intentional tort and negligence but also with the relationships between negligence and strict liability, and with relationships between strict liability and liability for aggravated misconduct. One reason this is so is that sources of guidance to the courts, including the ALI's Restatements as well as the "primary" guidance in statutes and precedents, are susceptible to contrasting and conflicting interpretations.

One of many ways in which courts' needs for aid and guidance are especially acute is that courts need aid and guidance in relation to issues about whether responsibility of a corporate entity for harms that have already materialized, in part but not yet fully, can be escaped through withdrawal of assets of the corporate entity. As the problem has become more pervasively recognized, managers of corporate entities and their liability insurers have become increasingly sophisticated in developing ways of protecting assets from being reached through legal processes. These ways have included transfers among entities having interlocking ownership and management. How will courts resolve disputes of this kind?<sup>52</sup>

As all of us who came under the influence of Gary Schwartz and his distinguished scholarly contributions in varied contexts know, he had a unique combination of interests and talents for scholarly contributions that are both stimulating and seminal. I join the *South Carolina Law Review* and others in saluting a treasured friend and colleague.

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51. BASIC PRINCIPLES Tentative Draft No. 1, *supra* note 3.

52. See, e.g., RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 12 cmt. e Reporters' Note (1998) (citing *Schmoll v. AC&S, Inc.*, 703 F. Supp. 868 (D. Or. 1988) where "the court found that a complete corporate restructuring was undertaken to avoid . . . liability to persons who were certain to suffer asbestos-related illness").

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