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PRODUCTS AT THE MILLENNIUM: TRAVERSING A TRANSVERSE SECTION*

MARSHALL S. SHAPO**

I. INTRODUCTION

Products liability, a principal legal creation of twentieth-century-private law, continues to fascinate observers as the new millennium dawns. Now rooted in tort, partly an offshoot of contract, it presents many facets of interest across the spectra of behavioral science, economic theory, and practical philosophy. In this Essay, I seek to illustrate some of the principal ideas that courts have fixed in our law or are currently developing through their products jurisprudence.

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I have selected decisions in 2000 and 2001 from a range of courts, including trial courts, that epitomize the gritty realities—including some dilemmas—of modern entrepreneurial and consumer life. Taken together, these decisions comprise a transverse section of a very large body of case law. This survey spans a range of legal issues that are representative of both the romance and the anguish of our society-wide love affair with tangible possessions. One specific product that recurs in the analysis is cigarettes, which present some of the most important legal issues in the products catalog, and are the subject of fierce controversy not only in courts but also in Congress.

II. A MIXED HERITAGE THAT CONTINUES: THE LEGAL DNA OF THE ECONOMIC LOSS ISSUE

The debates about "economic loss" issues continue to reflect the tension between the now-established rooting of products law in tort and its continuing heritage of contract. The ordinary motoring consumer who consistently reads summaries of products cases across the country might find disturbing the number of decisions that deal with fires that suddenly erupt in motor vehicles. The Indiana Supreme Court, like several other courts, has drawn the line against tort recovery in such situations. The occasions were a decision involving consolidated appeals on vehicle fires[1] and a decision involving a motor home fire in which the major damage was to the motor home, but there also was some damage to other property.[2]

In the case involving the consolidated appeals, the court refused recovery under the state products liability act to insurers of the vehicles.[3] It rejected the plaintiff insurers' effort to distinguish between allegedly defective wiring in a vehicle and the vehicle itself, noting that the United States Supreme Court in denying claims in admiralty for economic loss had viewed the components of a turbine as "one unit."[4] The Indiana court conceded the power of the arguments that a product that catches fire poses safety concerns and that "the absence of personal harm was a matter of luck in an event that could have resulted in personal injury."[5] However, the court noted that if the defects at issue were not corrected, then manufacturers would be "exposed to enormous liability under tort law."[6] It commented that to give recovery to the plaintiff insurers "would amount to an expanded warranty as a matter of law, but one the consumer will ultimately pay for in the form of pricing increases to support the expanded warranty exposure."[7] In response to the insurers' argument that it was "unfair for them to bear the burden of the cost of compensating

1. *See* Progressive Ins. Co. v. Gen. Motors Corp., 749 N.E.2d 484 (Ind. 2001).
2. *See* Fleetwood Enters. v. Progressive N. Ins. Co., 749 N.E.2d 492 (Ind. 2001).
3. *Progressive Ins.*, 749 N.E.2d at 490-91.
4. *Id.* at 490 (citing East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 867 (1986)).
5. *Id.*
6. *Id.*
7. *Id.*

consumers for products that are defective," the court replied that the insurers could "rewrite their policy exclusions to deal with this if they choose."[8]

In the case involving the motor home, in which the damages to the motor home were ninety-six percent of the plaintiffs' total damages, the court stood firm on the idea that those damages were unrecoverable under the state products legislation, although it permitted recovery for damages to personal property in the home.[9]

This is a true conundrum, resolved by a rough-edged, policy judgment. The arguments are now fairly standardized, including the idea that sophisticated parties can and ought to handle economic loss problems by contract and the countervailing point that a key feature of products liability law is to deter the sale of goods that carry physical danger. As in any unhappy marriage where no divorce is possible, tort and contract will squabble forever.

III. DEFECT: THE HEART OF THE MATTER

A. General Definitions

However divided analysts of products law may be about definitions, most would agree that the heart of the matter in products liability is the concept of defect. In discussions of the *Restatement (Third) of Torts: Products Liability,* debate on the subject consumed more floor time in the American Law Institute than any other single subject in the history of the Restatements.

The *Products Restatement*'s definition of design defect,[10] a focal subject of that debate, has encountered a reaction in courts that calls into question its restatementhood. The highest courts of Connecticut,[11] Wisconsin,[12] Kansas,[13] and New Hampshire[14] have challenged the Restatement on either the ground of its insistence on a risk-utility analysis, its requirement that plaintiffs show a reasonable alternative design, or both.

Going even further, indeed apparently turning the clock back to California's initial definition of defect in 1972,[15] the Montana Supreme Court in 2000 held that a plaintiff only had to show that a product was "merely in a 'defective condition,' " rather than in a " 'defective condition unreasonably dangerous.' "[16] In this herbicide case, the court said that the phrase " 'defective condition unreasonably dangerous' . . . creates a vague and imprecise dual test."[17] Opining that the term was

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8. *Id.* at 491.

9. *Fleetwood Enters.*, 749 N.E.2d at 495.

10. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1998) [hereinafter PRODUCTS RESTATEMENT].

11. Potter v. Chicago Pneumatic Tool Co., 694 A.2d 1319, 1331-33 (Conn. 1997).

12. Green v. Smith & Nephew AHP, Inc., 629 N.W.2d 727, 752 (Wis. 2001).

13. Delaney v. Deere & Co., 999 P.2d 930, 946 (Kan. 2000).

14. Vautour v. Body Masters Sports Indus., 784 A.2d 1178, 1182 (N.H. 2001).

15. Cronin v. J.B.E. Olson Corp., 501 P.2d 1153, 1162-63 (Cal. 1972).

16. McAlpine v. Rhône-Poulenc Ag. Co., 16 P.3d 1054, 1059 (Mont. 2000).

17. *Id.* at 1058.

"not plain, clear and concise," the court declared that an instruction with that language "creates a new hurdle to plaintiffs in strict products liability cases which was never intended under this Court's interpretation of strict products liability law."[18] The court pointed out that it had said in a precedent "that a plaintiff can establish that a product is defective by proving that it is 'capable of causing injury to the user beyond that which would be expected by the ordinary user.' "[19]

To be sure, the Montana decision is unusually reductionist. Generally, courts and commentators have tended toward ever more complex definitions of defect. Quantitatively, Dean Wade's factor list may still rule the roost.[20] Yet one must account for the resurgence of a seemingly tautologous definition, essentially defining defect by itself, at the dawn of the new millennium.

It may be that the Montana decision represents no more than a desire for a simpler life, conceptually speaking. There is an ironically interesting parallel track on which the train runs in the opposite direction. This is section 2(b) of the *Products Restatement*, with its blackletter requirement of proof of a reasonable alternative design.[21] Yet persistent arguments of critics have driven wedges into the general requirement, in addition to those crafted by the drafters.[22] Whether one tilts toward plaintiffs or defendants, her initial reaction is likely to be that simpler sounds better; but simpler is not always sufficiently responsive to reality. The Montana court's apparent preference for a consumer expectations test, which effectively chooses sides against the *Third Restatement*'s preference for risk-utility analysis, indicates that there is a background of meaning even to the abstract phrase "in a 'defective condition.' " For scholars, the defect battle involves the search for a golden mean. Can the prize be captured without choosing sides in that dichotomy?

B. Handguns: Defect Not an Explosive Concept

The issue of gun manufacturers' liability is a cause celebre, emblematic of the problem of imposing liability for the inherent characteristics of legal products. The *Products Restatement* captures an important component of the case against liability with a declaration it specifically applies to firearms, along with alcoholic beverages and above-ground swimming pools, 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."[23] The drafters contend

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18. *Id.* at 1059.

19. *Id.* (quoting Wise v. Ford Motor Co., 943 P.2d 1310, 1312 (Mont. 1997)).

20. John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 837-38 (1973).

21. PRODUCTS RESTATEMENT, *supra* note 10, § 2(b).

22. *See, e.g., id.* § 2, cmt. e, at 21-22 (referring to designs "so manifestly unreasonable, in that they have low social utility and high degree of danger, that liability should attach even absent proof of a reasonable alternative design").

23. PRODUCTS RESTATEMENT, *supra* note 10, § 2, cmt. d., at 21.

that there should be no liability for gun injuries when there is no showing of the existence of a reasonable alternative design that would have prevented the injury.[24] One should emphasize that the "desirability" of a product does not settle the question of liability for its externalities. Yet, it is a fair general statement of the law to say that courts have been very reluctant to impose liability for gun-caused injuries.[25] The case law of the new millennium continues in that vein.

The New York Court of Appeals, answering certified questions, illustrates this judicial disposition. In one branch of a response to the Court of Appeals for the Second Circuit, the New York court opined that handgun manufacturers do not have a duty to shooting victims.[26] Noting that the "pool of possible plaintiffs" could number in the thousands, the court pointed out that there were "several links" in any causal chain between the defendants and the plaintiffs.[27] It said that "[s]uch broad liability . . . should not be imposed without a more tangible showing that defendants were a direct link in the causal chain that resulted in plaintiffs' injuries, and that defendants were realistically in a position to prevent the wrongs."[28] At the same time, the court rejected a negligent entrustment theory, saying that to impose what in effect was "an affirmative duty to investigate and identify corrupt dealers" was "neither feasible nor appropriate for the manufacturers."[29]

Answering a separate certified question, the New York court also declared that it would not apply the market share theory to handgun manufacturers.[30] The state court pointed out that "[u]nlike DES, guns are not identical, fungible products."[31] Noting that the plaintiffs before it had not claimed "that the manufacturers' marketing techniques were uniform," it stressed that the defendants had "engaged in widely-varied conduct creating varied risks."[32]

A policy-oriented duty analysis colored the Second Circuit's conclusion, employing the state court's answer to its certified question, that the defendant should get judgment as a matter of law on the plaintiffs' negligence claim.[33] The federal court noted the plaintiffs' argument that the state court had not been responsive to a question posed by the federal court concerning whether the defendants owed the plaintiffs a duty—the plaintiffs having criticized the state court's focus "on defendants' duty to control the conduct of third-party distributors and retailers" and its importation of "concepts of causation into the duty analysis."[34] However, the Second Circuit pointed out that in certifying the question it had recognized that "the existence under New York law of a duty to exercise care in

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24. *See id.* § 2, cmt. d., at 20-21.

25. *See generally* MARSHALL S. SHAPO, THE LAW OF PRODUCTS LIABILITY ¶ 8.05[6] (4th ed. 2001).

26. Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1061-63 (N.Y. 2001).

27. *Id.* at 1061-62.

28. *Id.* at 1062.

29. *Id.* at 1065.

30. *Id.* at 1067.

31. *Id.*

32. *Hamilton*, 750 N.E.2d at 1067.

33. Hamilton v. Beretta U.S.A. Corp., 264 F.3d 21, 30 (2d Cir. 2001).

34. *Id.* at 29.

marketing and distributing a product would depend upon a number of moral, logical, and social policy factors," including "both the appropriateness of requiring defendants to restructure their relations with third parties in the handgun market," and "whether defendants had any real opportunity to prevent the harm that ensued."[35] The federal court said that it was in that context that the New York court had "discussed the asserted duty to control the conduct of third parties as well as defendants' role in the chain of causation," and found the state court's answer "entirely responsive" to the duty question.[36] The Second Circuit concluded, on the basis of the New York court's response, that "[b]ecause there was no duty owed in this case, there can be no liability."[37]

There are many ways for gun makers under siege to construct their own legal earthworks. One example, somewhat ironic in light of much of the *sturm und drang* concerning the proper test for defect, is a Texas statute that exclusively adopts a consumer expectation test for suits against makers or sellers of firearms that allege design defect.[38] In a case in which a 12-year-old accidentally killed his 10-year-old friend after finding a shotgun in a closet of his house, the court viewed the Texas legislature's exclusive reference to the consumer expectation test as "unequivocally indicat[ing] that a firearm defect cannot be shown by a balancing of the risks and benefits."[39] Noting that the owner of the weapon acknowledged that the gun had " 'handled perfectly,' " and that "it never fired when he did not intend it to fire," the court concluded the plaintiff had not provided evidence that the weapon did not "function in a manner reasonably expected by an ordinary consumer of firearms"—the language of the state statute.[40] The court also denied a claim based on failure to warn, summarizing state law on the proposition "that there is no duty to warn of the obvious dangers of owning or selling a handgun."[41]

At least in the context of products liability precedents, putting aside creative efforts to bring handgun injuries under public nuisance law, these results are unsurprising. However, as I have noted elsewhere, the use of the consumer expectation argument to immunize gun manufacturers borders on the macabre.[42] In any event, not only are handguns a legal product, but the subject of their distribution has also been a topic of the most intense public debate. Therefore, one might have expected courts to stop at the edge of a very political arena.

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35. *Id.*
36. *Id.*
37. *Id.* at 30.
38. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 82.006 (Vernon 1997).
39. Keene v. Sturm, Ruger & Co., 121 F. Supp. 2d 1063, 1067 (E.D. Tex. 2000).
40. *Id.*
41. *Id.* at 1069.
42. *See* SHAPO, *supra* note 25, ¶ 8.05[6], at 4057 (discussing applicability of "consumer contemplation" test to handgun injuries).

C. Cigarettes: Social Tension and Judicial Fragmentation

The subject of cigarettes, especially controversial in the Restatement debates, has continued to produce judicial fragmentation. Two decisions of the Court of Appeals for the Sixth Circuit during 2000 reflect the tensions that have riven courts and legislatures as well.[43] In one case, the court concluded that at least concerning the period between 1950 and 1965, a "rational jury could find the absence of 'common knowledge,' . . . of the nature of the link between smoking and lung cancer."[44]

In the other decision, the Sixth Circuit invoked the "common knowledge" doctrine in affirming a dismissal where the plaintiff's decedent had begun smoking in 1969.[45] In a part of its opinion analyzing claims under state products liability legislation, the court pointed out that this was "well after" the Cigarette Labeling and Advertising Act of 1965 had required warning labels on cigarette packages and that the plaintiff had "continued to smoke even after" the strengthening of those warnings by the Public Health Cigarette Smoking Act of 1969.[46] It commented that "from the time [the decedent] began smoking up until the time of her death, there existed a widespread public awareness of the health risks associated with smoking such that we must impute this 'common knowledge' to her and presume that she was aware of and assumed those risks."[47] Even here, speaking to a common law fraud claim, the appellate court rejected the trial court's argument that "common knowledge, as a matter of law, makes any reliance non-justifiable for purposes of common law fraud."[48] The Sixth Circuit pointed out that "common knowledge of one thing, *i.e.*, the general health risks associated with smoking, is by no means common knowledge of another, *i.e.*, the manipulation of nicotine levels in its products."[49] However, in the end the appellate court rejected the plaintiff's fraud claim because he "alleged no facts whatsoever that would support a finding that his decedent relied on Defendants' alleged misrepresentations and concealment."[50]

IV. THE SHARP DOUBLE EDGES OF MORALITY

Overt references to the moral implications of decisions appear only sporadically in products cases, as is so with judicial opinions generally. Yet, probably because of the nature of the cases, products decisions often do exhibit moral judgments in various ways.

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43. *See* Glassner v. R.J. Reynolds Tobacco Co., 223 F.3d 343 (6th Cir. 2000); Tompkin v. Am. Brands, 219 F.3d 566 (6th Cir. 2000).
44. *Tompkin*, 219 F.3d at 572.
45. *Glassner*, 223 F.3d at 352.
46. *Id.*
47. *Id.*
48. *Id.* at 353.
49. *Id.*
50. *Id.*

An interesting outcropping of the theme of moral responsibility appears in a case concerning a prescription drug.[51] Two different branches of the case present the lessons that manufacturers are responsible for what they say, but consumers are still responsible for what they do.[52] In this Louisiana case, the plaintiff's decedent suffered an anaphylactic reaction from an injected drug that sent her into a vegetative state.[53] Her pharmacist was her husband, who filled the prescription.[54] The court concluded that a jury could have found that oral representations made by an agent of the manufacturer had "diluted or confused the connection between 'alarming' chest pains and cardiac dangers," possibly lulling the patient and her husband into "a false sense of security concerning [her] sometimes 'alarming' chest pains."[55] However, the court also allowed a comparative negligence defense, noting that the decedent's husband had suggested that she tell her doctor about chest pains and vomiting after injections of the drug.[56] Despite the "diluted" warnings, the court concluded that the oral representations of the defendant's agent "were not sufficient to relieve [the plaintiff's decedent] of all responsibility for her health care."[57] It noted she suffered increasingly severe pain and vomiting to a point where these reactions instilled in her "a 'fear' of the drug" that she recorded in her journal.[58] The court said that her realization that side effects "had seriously changed in type and intensity," in the context of a patient insert accompanying the drug that told consumers to notify doctors of severe chest pain, had "placed a duty on any reasonable . . . user" of the drug to report those changes to her physician.[59] The court opined that the decedent had breached her own duty by "not reporting the increasingly severe side effects," and concluded that she had been at least thirty percent contributorily negligent.[60]

It has been a long-held idea of the author that much of the key to products liability law is representational,[61] and that is clear on the face of this case. But even when a pharmaceutical company's agent goes beyond puffs—that all-purpose immunizer of representations—courts still hold consumers to a certain skepticism, or at least to a minimum level of self-preservation. Comparative negligence makes it easier than did a fully contributory negligence regime to divide up what is essentially a moral burden.

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51. Brown v. Glaxo, Inc., 790 So. 2d 35 (La. Ct. App. 2000).
52. *Id.* at 41-42.
53. *Id.* at 38.
54. *Id.* at 37.
55. *Id.* at 40.
56. *Id.* at 37, 42.
57. *Brown*, 790 So. 2d at 41-42.
58. *Id.* at 42.
59. *Id.*
60. *Id.* at 42-43.
61. *See generally* Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974).

V. OVERLAPS IN BEHAVIOR AND LEGAL CONCEPT

Because products law represents so many different tendencies in our consumer souls, it is logical that its locutions should feature many overlaps in terminology and even concept.

A. Obviousness

A multipurpose defense argument is that the danger of a product was obvious—a rhetorical device that appears to serve as a synonym, variously, for more muscularly doctrinal concepts of contributory negligence, assumption of risk, and no duty to warn. We now have a small battery of cases that present a particularly graphic image under the obviousness rubric, applied against people who ride in the back of trucks.[62] Even good ol' boys take their chances, as is manifest in a Texas appellate court's state-oriented spin on the obviousness rule.[63] Responding to the testimony of a safety engineer who employed an exhibit asserting that "Texans continue to ride in the back of trucks because it is a 'Texas way of life,' " the court remarked that this "does not tend to show that Texans are ignorant of the risks involved."[64] In this 2000 opinion, the court commented that "[p]eople often do dangerous things for reasons we may not understand, while fully appreciating the risks involved."[65] It declared that the "open nature" of the pickup truck bed and its "lack of restraining devices . . . make it immediately apparent to the ordinary and reasonable observer that the potential for ejection exists for anyone riding there."[66]

A 1997 decision from the Court of Appeals for the Ninth Circuit had also given summary judgment for the maker of a pickup truck against plaintiffs injured while they rode unrestrained in the cargo bed.[67] However, even in the back of the vehicle there are legal nuances. A Pennsylvania federal district court decision in 2000 applied an interesting melding of warnings law and design law to a suit by a plaintiff injured in a collision when he was riding without passenger restraints on the uncarpeted floor of the cargo area in the rear of a sport utility vehicle (SUV).[68] Rejecting the manufacturer's argument that the obviousness of the danger barred the action as a matter of law, the court distinguished the Ninth Circuit decision.[69] The court in the SUV case found an "important distinction" in the fact that the pickup truck in the precedent "had a defined cargo area separated from the front

62. *See* Maneely v. General Motors Corp., 108 F.3d 1176 (9th Cir. 1999); Bowersfield v. Suzuki Motor Corp., 111 F. Supp. 2d 612 (E.D. Pa. 2000); Roland v. DaimlerChrylser Corp., 33 S.W.3d 468 (Tex. Ct. App. 2000).

63. *Roland*, 33 S.W.2d at 468.

64. *Id.* at 470.

65. *Id.*

66. *Id.*

67. *Maneely*, 108 F.3d at 1179-82.

68. Bowersfield v. Suzuki Motor Corp., 111 F. Supp. 2d 612 (E.D. Pa. 2000).

69. *Id.* at 624.

compartment by a physical barrier," saying that "[s]uch design features unquestionably serve to warn prospective passengers that they should not ride in the rear of a pick-up truck."[70] The court contrasted the case before it on the ground that the defendant's vehicle "[did] not contain either tie-downs or a divider between the two front seats and the rear cargo area."[71]

The federal court in the SUV case also distinguished *Dreisonstok v. Volkswagenwerk, A.G.*,[72] an important precedent that refused to impose liability for lack of front-end collision protection in a microbus.[73] The SUV maker had argued that "vehicles with multiple intended uses can not be deemed defective simply because they possess an open area for cargo in which passengers might decide to ride."[74] However, the court, in denying summary judgment, focused on the feasibility of installing a divider between the front seats of the vehicle and the rear cargo area where the plaintiff was riding.[75]

B. No Failure to Warn/Assumption of Risk

In another area of conceptual overlap, courts commingle judgments that there was no actionable failure to warn with assumption-of-risk locutions. There is a tangle of legal ideas here. Illustrative is a Rhode Island case in which the plaintiff was operating an excavator that slid down an embankment.[76] The plaintiff argued that the maker of the machine had failed to warn about the risk that when the cab rotated he could become disoriented and drive in a direction he did not intend.[77] However, the plaintiff admitted that he knew "that the excavator levers were oriented toward the dozer blade side of the excavator," and testified he had demonstrated the machine at least sixty times over a period of five years.[78] He also admitted that he knew that "using the excavator on the edge of an embankment required extra precautions."[79] Concluding that there was no error in giving judgment as a matter of law to the defendant on the plaintiff's claims of failure to warn, the court said that "[t]he absence of a warning on the excavator did not constitute an unreasonably dangerous defect because [the plaintiff] was aware of the special hazards inherent in his demonstration."[80] The court cited three authorities that it characterized as involving the defense of assumption of risk.[81]

The chordal basis of such holdings combines notes of efficiency and morality. Decisions of this kind seem to cut through the defense-oriented idea of no defect

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70. *Id.*
71. *Id.*
72. 489 F.2d 1066, 1075 (4th Cir. 1974).
73. *See Bowersfield*, 111 F. Supp. 2d at 625-26 (drawing the distinction).
74. *Id.* at 625.
75. *Id.* at 625-26.
76. *See* Raimbeault v. Takeuchi Mfg. (U.S.), Ltd., 772 A.2d 1056 (R.I. 2001).
77. *Id.* at 1059, 1063.
78. *Id.* at 1064.
79. *Id.*
80. *Id.*
81. *Id.*

court concluded that they amounted to "minimum contacts with Texas on a continuous and systematic basis" that provided a foundation for jurisdiction.[92]

Yet, the strictures of *Asahi*[93] still set boundaries in the jurisdictional landscape. Also potently symbolic, because of the role of cigarettes in the overall products drama, is a Maryland decision denying jurisdiction as to a filter manufacturer, Hollingsworth & Vose.[94] The Maryland Court of Special Appeals took "judicial notice of the obvious—that all manufacturers' profits are directly contingent upon the commercial success of the finished product and that H & V profited from its sale of filters that were used in the cigarettes" at issue.[95] Acknowledging that "the more cigarettes Lorillard sold, the more H & V filters Lorillard purchased," the court yet asked "[h]ow can this be any indication of minimum contacts by H & V?"[96] It said that if it were to follow the reasoning of the plaintiff's argument for jurisdiction, "then all manufacturers will be subject to personal jurisdiction for the acts of retailers."[97] The court observed that H & V "did not maintain an office in Maryland," and did not ship its filters there.[98] Moreover, it pointed out that there was no evidence H & V had "designed or manufactured its filters specifically for the Maryland market, nor did it advertise or market its filters in Maryland."[99]

As this slice of cases indicates, jurisdictional battles will usually turn on clusters of tangible geographical linkages. Beyond that, one can surely discern that the story itself will influence decision—it seems likely that selling pathogens to Iraq is likely to tilt a court toward a finding of jurisdiction, even when the percentage of sales in the target state is in the single digits. And the newest frontier will be the intangible one of the Internet, with skirmishes foreseeable over such matters as the significance of whether websites are active, interactive, or passive.[100]

VII. PREEMPTION

The technicality of the federal preemption doctrine should not obscure the legal drama inherent in the specific product areas where litigation has arisen. No fewer than five cases have reached the U.S. Supreme Court in three of those areas, each socially significant in various ways: motor vehicle design,[101] cigarettes,[102] and

92. *Id.* at 43-44, 50.
93. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987).
94. *See* Hollingsworth & Vose Co. v. Connor, 764 A.2d 318 (Md. Ct. Spec. App. 2000).
95. *Id.* at 324.
96. *Id.*
97. *Id.*
98. *Id.* at 330.
99. *Id.* at 330-31.
100. *See, e.g.*, DAVID C. JACOBSON, MARSHALL S. SHAPO, & ANNE NICHOLSON WEBER, eds., INTERNATIONAL ECOMMERCE: BUSINESS & LEGAL ISSUES § 2.03 at 14,517-21 (2001).
101. *See* Geier v. Am. Honda Motor Co., 529 U.S. 861, 861 (2000); Freightliner Corp. v. Myrick, 514 U.S. 280, 280 (1995).
102. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 504 (1992).

for failure to warn as well as the conceptual undergrowth of design defect and ultimately fix moral responsibility. The information actually available to the plaintiff leads to a judgment about where that responsibility lies. Yet, there is a nettle that the manufacturer must grasp, in cases when it is aware that users will tend to employ its product dangerously though knowingly, and when it could have designed the product to eliminate the hazard. As Professor Latin pointed out[82]—and as the Restatement drafters largely accepted[83]—there is a strong case to be made that warnings are not enough.

VI. THE JURISDICTIONAL COMPONENT

Products law's response to a changed environment must take into account the growth of worldwide markets, and now the boundless world of cyberspace. A particularly fascinating case combines international sales and the grim specter of biowarfare in the terrifying guise of the well-advertised buildup of the Iraqi bio-arsenal.[84] Fittingly inserting a precedent on jurisdiction into the products corpus, the case involved a truly worldwide marketer, organized under District of Columbia law with its principal place of business in Maryland, which found itself subject to jurisdiction in Texas.[85] This defendant was a mail-order seller of biological materials to forty-five countries including the United States.[86] Its sales in Texas accounted for about three and a half percent of its worldwide sales and five percent of its U.S. sales, and Texas was its sixth largest sales market in this country.[87] The 1,800 plaintiffs in the case, about 185 of whom were Texas residents, sued the defendant for selling pathogens to Iraq, which used them in the Persian Gulf War.[88] The defendant advertised "only in national and international periodicals," and listed its biological materials "in catalogues that are sent to customers or prospective customers only upon request."[89] It had "sold its products to Texas residents for at least 18 years."[90] Specifically, it had contracted with the University of Texas Southwestern Medical Center "to propagate and test cell lines at [the defendant's] Maryland facilities," and its employees had attended five scientific conferences in Texas over a seven-year period.[91] Taking all of these facts together, although indicating that some of them would not support jurisdiction by themselves, the

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82. *See* Howard Latin, *"Good" Warnings, Bad Products, and Cognitive Limitations*, 41 UCLA L. REV. 1193 (1994).

83. *See* PRODUCTS RESTATEMENT, *supra* note 10, § 2, cmt. l, at 33 (saying that "[i]n general, when a safer design can reasonably be implemented and risks can reasonably be designed out of a product, adoption of the safer design is required over a warning that leaves a significant residuum of such risks").

84. Am. Type Culture Collection, Inc. v. Coleman, 26 S.W.3d 37 (Tex. Ct. App. 2000).

85. *Id.* at 41, 50.

86. *Id.* at 41.

87. *Id.* at 42.

88. *Id.* at 40.

89. *Id.* at 41.

90. *Am. Type Culture Collection*, 26 S.W.3d at 41.

91. *Id.* at 42-43.

medical devices.[103] The close division of the Court on these matters, sometimes its splintering, symbolizes the intensity of often conflicting preferences for safety, uniformity, and freedom of maneuver for entrepreneurs.

The case law of the new century carries forward these arguments. An example in the cigarette area is a holding that there is no preemption of fraud claims "premised on a general 'duty not to deceive' rather than a 'duty based on smoking and health.' "[104] The Court did find that claims "based upon fraudulent misrepresentation and concealment are preempted to the extent that they are predicated on a duty to issue additional or clearer warnings through advertising and promotion."[105]

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)[106] presents a varied packet of issues about the purpose and scope of preemption. The relevant language of the statute requires that a state "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required" in the Act.[107] Only illustrative of the combat on these issues is a 2000 Montana decision that overruled a 1997 case to hold that the FIFRA preemption provision did not bar state tort actions.[108] The court concluded that Congress meant the term "requirements" in the preemption clause "to mean enactments of positive law by legislative or administrative bodies, not state law damage actions."[109] The court said that the legislative history "reveal[ed] no suggestion of a Congressional intent to preempt state tort law."[110] The court implemented its decision in a companion case,[111] in which it held that evidence of a product label was admissible on behalf of the plaintiffs.[112] Even in an earlier decision in that case, in which it affirmed summary judgment for a herbicide maker on claims of negligent failure to warn, the court had refused to impose preemption on a number of counts.[113]

These decisions are just examples of the large and growing body of case law across almost a full alphabet of regulatory statutes relating to product safety.[114] It is in the nature of the statutory preemption beast that much of this jurisprudence is

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103. Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 341 (2001); Medtronic, Inc. v. Lohr, 518 U.S. 470, 470 (1996).

104. Glassner v. R.J. Reynolds Tobacco Co., 223 F.3d 343, 349 (6th Cir. 2000).

105. *Id.*

106. 7 U.S.C. §§ 136-136y (1994).

107. *Id.* § 136v.

108. Sleath v. W. Mont Home Health Servs., Inc., 16 P.3d 1042, 1053 (Mont. 2000) (overruling McAlpine v. Rhône-Poulenc Ag. Co., 947 P.2d 474 (1997) on the question of preemption of failure to warn claims).

109. *Id.* at 1053.

110. *Id.* at 1052.

111. McAlpine v. Rhône-Poulenc Ag. Co., 16 P.3d 1054 (Mont. 2000). This case is discussed in another connection, *supra* notes 16-19.

112. *See id.* at 1059.

113. *See McAlpine*, 947 P.2d at 475, 479.

114. *See* SHAPO, *supra* note 25, ¶11.03[6][a]-[u] (summarizing twenty-one different sets of preemption issues).

very technical.[115] Yet the pushing and hauling in the decisions reflects the parallel dramas involved in the proprietary interest of the state courts in their homegrown private law, the compromises embedded in safety legislation generally, and the tensions in the architecture of federalism. Down to the district court level, the opinions manifest all these things, played out in a kind of legal theater in the round.

VIII. DISCOVERY UNDER STATUTES OF LIMITATIONS

The fighting is fierce and factual over the application of discovery rules in cases involving statutes of limitations. A Florida decision in a cigarette case symbolizes the realities of the typical discovery situation—the injured or ill plaintiff coping with the burdens of her misfortune; the ambiguity of the facts; the difficulty, on top of coping with personal travails caused by the allegedly defective product, of finding out the facts and summoning the energy to enter the legal system.[116]

The Florida Supreme Court pushed through these factors to assign to the jury a question of plaintiff diligence where medical information communicated to the plaintiff was arguably ambiguous on the subject of lung cancer.[117] On the one hand, the court said that a jury could reasonably have decided the plaintiff at least should have known about a link between smoking and cancer on a day when he coughed and spit up blood or, a few days later, when a physician told him that he had seen a spot on his lung and that the spot "could be related to several things including cancer or tuberculosis."[118] However, the court also noted that the doctor had given the plaintiff "at least two possible explanations for the spot"—and that the tuberculosis hypothesis had been based on the plaintiff's contact with someone who had tuberculosis.[119] The court inferred from this that "a reasonable person could conclude that the spot was not related to smoking or cancer."[120]

The infighting in such cases will produce decisions that might be tilted back and forth across the line by the slightest puff of wind. And the procedural posture may be crucial. In the most famous of the cigarette cases, *Cipollone v. Liggett Group, Inc.*,[121] the court rejected a partial summary judgment for the plaintiff's decedent on a limitations issue where the plaintiff's doctor had "formulated five differential diagnoses of her condition, one of which was primary lung cancer."[122] Although the physician did not discuss the possibility of lung cancer, the decedent "quit smoking for the first time in twenty-four years" when she left the doctor's

115. A particular example of the detailed statutory analysis often required in such cases appears in the medical devices area, for example, in *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475-80 (1996) (distinguishing between two types of review processes for devices).

116. *See* Carter v. Brown & Williamson Tobacco Corp., 778 So. 2d 932 (Fla. 2000), *quashing* 723 So. 2d 833 (Fla. Dist. Ct. App. 1998).

117. *Id.* at 938.

118. *Id.*

119. *Id.*

120. *Id.*

121. 893 F.2d 541 (3d Cir. 1990).

122. *Id.* at 580.

office.[123] The court opined that "[t]he statute of limitations did not start running when Mrs. Cipollone knew that she had cancer from smoking; it started to run when she, by exercising reasonable diligence, should have known that she *might* have had cancer from smoking."[124]

Results that straddle the discovery line simply illustrate the Solomonic nature of decisions in this area. Courts must account for the stress that arises from illness and the personal concerns that illness generates, which make the prospect of legal action take a back seat. At the same time, they must confront the basic amputational philosophy of any statute of limitations and the ever-present fairness claims of manufacturers.

IX. THE MEANING OF NEGLIGENCE: AIDS IN AMERICA

It seems appropriate to conclude our review of substantive law by reference to the way AIDS infects products law, even as it hangs over the social landscape. The medium of blood transfusion and blood related products has produced a remarkable set of decisions focusing on a compressed time period, presenting almost a tableau of what negligence means in the products context.[125] A 2000 Missouri appellate decision, not yet released, confirmed that blood suppliers do not have to be better than peer groups.[126] The court employed the rubric of the learned intermediary doctrine in a case involving HIV transmission through a blood factor product.[127] The crucial time period was the window in 1983-1984 when the transmissibility of the virus was just becoming clear to the medical community.[128] At issue was a cautionary view concerning the risks of HIV transmission through blood products, which had been incorporated in an in-house memorandum in March 1983 to the defendant supplier's personnel.[129] The court said that the plaintiff had not proven that the defendant had knowledge of the risk that was "superior" to the knowledge of the physician who treated the plaintiff's decedent for hemophilia.[130] The court noted that the record did not show that during the time period at issue, the plaintiff's physician "was not aware of the then-available information" about the risk of HIV transmission through blood products.[131] It concluded that to the extent the plaintiff was relying on the defendant's knowledge of that information as being superior to that of the decedent's doctor, the defendant's knowledge of that risk as

123. *Id.*
124. *Id.* at 581.
125. *See* SHAPO, *supra* note 26, ¶5.08[6][b][ii], at 2528-30 (summarizing cases involving transfusions in the 1983-1984 time period).
126. Doe v. Miles, Inc., [2000 Transfer Binder] Prod. Liab. Rep. (CCH) ¶ 15,891(Mo. Ct. App. May 23, 2000).
127. *Id.* at 55,263-65.
128. *Id.* at 55,265.
129. *Id.*
130. *Id.*
131. *Id.*

disseminated in its in-house memorandum "was not enough to support a finding of proximate cause."[132]

The court also gave a dictum confirming the general bias against imposing nonfault liability for blood products, saying that the Missouri blood shield statute would bar a claim for implied warranty of fitness for a particular purpose.[133] The court declared that a defect must "at least . . . be detectable before a failure to remove the defect may permit a claim for a breach of implied warranty of merchantability or fitness for a particular purpose" under the statute.[134] It reasoned that an opposite holding would impose "a form of strict liability" against makers and distributors of blood products for "undetectable yet potentially removable defects."[135]

Products law and theory exhibit a certain ambivalence about whether, and to what degree, courts should make judgments regarding the utility of products beyond those clearly established by the market. In cases involving contamination of blood products by disease, courts seem to have made a forceful judgment about utility, reinforcing the legislative determination in the "blood shield" statutes. That judgment reinforces a preference for fault as the touchstone of tort liability, even when there is at least some theory indicating that strict liability might be more efficient.[136] The anguish that the subject produces pushes conventional ideas of rationality to the limit. In the end, it appears that a fairness argument for suppliers, which appears to embody fears about market effects that may be unfounded, trumps a fairness argument for consumers.

X. CONCLUSION

Products law at the millennium covers a wide range of risk, behavior, legal and economic theory, and basic political science. It seeks to facilitate working markets, and decisions for both plaintiffs and defendants reflect conclusions about the party who is in the best position to make an informed judgment about loss avoidance. Inevitably, though, the issue of which party is the "best" loss avoider involves more than a judgment of which one is cheapest in some economic sense; on scrutiny, the seeming precision of that concept turns out to be phantasmagoric. Rather, courts appear to make curbstone policy judgments reflecting a sense of where ordinary people would think society should place the burden of an injury as a moral matter. This is why some of the most difficult cases are those where the manufacturer knows of the risk, but also knows that the user will know of the risk. In the end, judges appear to formulate some of the most difficult product issues as questions of oughts, and not of the is's of cost numbers that often are difficult, if not impossible, to acquire.

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132. *Id.*

133. *Id.* at 55,261.

134. *Id.*

135. *Id.*

136. *See, e.g.*, Reuben A. Kessel, *Transfused Blood, Serum Hepatitis, and the Coase Theorem*, 17 J. L. & ECON. 265, 286-89 (1974) (suggesting that strict liability will enhance "the incentive to obtain good blood").