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Products Liability in the Twenty-First Century: A Review of Owen's Products Liability Law

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PRODUCTS LIABILITY IN THE TWENTY-FIRST CENTURY: A REVIEW OF OWEN'S *PRODUCTS LIABILITY LAW*

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I. INTRODUCTION

Professor David Owen's elegant and comprehensive treatise, *Products Liability Law*,[1] is now available to students, legal scholars, and practicing lawyers. Professor Owen is one of the leading authorities on American products liability law, and his treatise is the culmination of more than thirty years of work in this important and controversial area of the law.[2] *Products Liability Law* packs an enormous amount of information in one volume. Its over 1,300 pages cover all of the traditional

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1. DAVID G. OWEN, PRODUCTS LIABILITY LAW (2005) [hereinafter PRODUCTS LIABILITY LAW].

2. In addition to his many law review articles, Professor Owen is also the coauthor of a popular products liability casebook and a highly regarded three-volume treatise on products liability. *See* DAVID G. OWEN ET AL., PRODUCTS LIABILITY AND SAFETY (4th ed. 2004); DAVID G. OWEN ET AL., MADDEN & OWEN ON PRODUCTS LIABILITY (3d ed. 2000). In addition, Professor Owen coauthored *Products Liability in a Nutshell* (7th ed. 2005) and served as editorial advisor for the *Restatement (Third) of Torts: Products Liability* (1998). The fifth edition of his casebook, *Products Liability and Safety*, is scheduled for publication in early 2007.

aspects of products liability law, as well as new areas of interest such as public nuisance liability for handgun manufacturers, negligent marketing, and lawsuits against fast food purveyors. Professor Owen's treatise also provides detailed and comprehensive coverage of the new *Restatement (Third) of Torts: Products Liability* (*Third Restatement*).

Products Liability Law is exceptionally well researched and contains numerous citations to leading cases, statutes, and legal scholarship on every aspect of products liability law. The treatise's organization is logical, and the detailed index makes it easy to find any topic. *Products Liability Law*'s treatment of historical developments and policy rationales will be especially helpful to anyone interested in understanding products liability law. All readers will appreciate the fact that *Products Liability Law* is completely up-to-date and contains the latest cases, statutes, and tort reform proposals. In addition, both students and practicing lawyers will benefit from the treatise's compilation of American and foreign products liability materials.[3]

Importantly, Professor Owen's treatise identifies a number of emerging trends in twenty-first century products liability law. First, Professor Owen describes how negligence principles have displaced much of strict liability in products liability law. *Products Liability Law* also describes liability theories like misrepresentation, civil conspiracy, the malfunction theory, and negligent marketing, which do not require the plaintiff to explicitly prove the existence of a product defect. Finally, Professor Owen's treatise demonstrates how products liability law has become increasingly "federalized" due to the intrusion of preemption and other federal constitutional doctrines into this traditional area of state tort law.

II. AN OVERVIEW OF *PRODUCTS LIABILITY LAW*

The scope of *Products Liability Law* is revealed by a journey through its various chapters. The first chapter is introductory in nature. The rest of the treatise is divided into five parts. Part I covers the major theories of liability: Chapter 2 discusses negligence, Chapter 3 deals with misrepresentation, Chapter 4 covers warranty, Chapter 5 is concerned with strict liability in tort. Part I provides a detailed and comprehensive treatment of modern products liability law's doctrinal structure and policy rationales.

Part II provides an in-depth discussion of the concept of product defect. Chapter 6 describes the various forms of product defect and examines proof of defect issues. It also provides a detailed examination of the *Third Restatement*'s treatment of the defect requirement. Chapter 7 discusses manufacturing defects, including "defective" food and drink, while Chapter 8 considers design defects and the various tests that courts have devised to evaluate product designs, including special issues of a manufacturer's liability for the design of prescription drugs and medical devices. Chapter 9 focuses on the duty to warn, including the warning content and methods of communication. Chapter 9 also identifies limitations on the

3. PRODUCTS LIABILITY LAW, *supra* note 1, § 1.1, at 8–10.

duty to warn that apply to sophisticated users, bulk suppliers, and manufacturers of prescription drugs and medical devices. Chapter 10 addresses a variety of subtle limitations on the concept of defectiveness, such as obvious and inherent product dangers and the "state of the art" defense, which limit liability for defective design and failure to warn.

Part III examines principles of causation. Chapter 11 concentrates on cause-in-fact, including special causation rules that apply to multiple defendants and failure-to-warn claims. Chapter 12 addresses proximate cause; it discusses foreseeability and other tests for proximate cause and addresses the intervening and superseding cause issues that arise in products liability cases.

Part IV surveys the various defenses to products liability claims. Chapter 13 explores the traditional misconduct defenses such as contributory negligence, comparative fault, assumption of risk, and product misuse. Chapter 14 considers more specialized defenses such as the government contractor defense, regulatory compliance defense, federal preemption, and statutes of limitation and repose.

Part V is devoted to "special issues" in the law of products liability where the defendant or the transaction deviates from the normal products liability paradigm involving the manufacturer of a new product sold to a consumer. Chapter 15 discusses the legal issues associated with special types of defendants such as retailers, suppliers of raw materials and components, parent corporations, franchisers, successor corporations, and other participants in the marketing process. Chapter 16 considers recent cases involving special types of transactions and products such as leases, bailments, and licenses; service transactions; repaired, rebuilt, and reconditioned products; used products; electricity; real estate; blood; and communicative products like books, movies, records, and video games. Chapter 17 discusses vexing problems associated with automobile litigation, such as crashworthiness and apportionment of damages. Finally, Chapter 18 examines in detail the proper role of punitive damages in products liability law, an area long recognized as Professor Owen's speciality,[4] and analyzes recent legislative and constitutional reforms that substantially affect this area of law.

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4. "Professor David Owen has probably written more of significance about punitive damages than any other commentator." GERALD W. BOSTON, PUNITIVE DAMAGES IN TORT LAW § 2.27, at 46 (1993). In addition to the extensive discussion in Chapter 18 of his treatise, Professor Owen has written prolifically in journals on this topic over many years. *See, e.g.*, David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363 (1994) (analyzing the nature, functions, criticisms, and reform proposals with regard to punitive damages); David G. Owen, *The Moral Foundations of Punitive Damages*, 40 ALA. L. REV. 705 (1989) (analyzing the philosophical foundations of punitive damages); David G. Owen, *Civil Punishment and the Public Good*, 56 S. CAL. L. REV. 103 (1982) (analyzing punitive damages in terms of fairness and efficiency); David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 103 (1982) (discussing the appropriate use of punitive damages in products liability litigation); David G. Owen, *Crashworthiness Litigation and Punitive Damages*, 4 J. PROD. LIAB. 221 (1981) (discussing the advent of punitive damages in products liability litigation); David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257 (1976) (analyzing and developing the doctrine of punitive damages in products liability litigation).

III. THE RETURN OF NEGLIGENCE

An important recent development that *Products Liability Law* comprehensively describes is the shift from strict liability to negligence. In the early days of products liability, many legal scholars argued that negligence law should be replaced by strict liability in tort because negligence did not provide sufficient protection to consumers who were injured by defective products.[5] The American Law Institute (ALI) endorsed this position in the *Restatement (Second) of Torts*,[6] and for more than three decades, appellate courts steadfastly maintained that liability should be based on the condition of the product rather than on the conduct of the seller.[7] To maintain the integrity of this strict liability regime, many of these courts attempted to exclude every aspect of negligence from products liability law.[8] The courts, however, eventually were forced to concede that negligence principles could not be entirely eliminated from failure-to-warn cases.[9] The triumph of negligence over strict liability in this area was finally confirmed by the *Third Restatement* in 1998.[10] According to the *Third Restatement*, a product may be considered defective because of inadequate instructions or warnings "when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of *reasonable* instructions or warnings by the seller or other distributor."[11]

During the last twenty-five years, a few courts also noted that the risk-utility test that predominated in design defect cases was essentially a negligence-based

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5. Fleming James, Jr., *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 TENN. L. REV. 923, 923 (1957), *see* William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1117–20 (1960); *see also* Escola v. Coca Cola Bottling Co., 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring) (discussing the need for strict liability to protect people injured by defective products).

6. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmts. a, c (1965).

7. *E.g.*, Jackson v. Harsco Corp., 673 P.2d 363, 365 (Colo. 1983) (citing Bradford v. Bendix-Westinghouse Auto. Air Brake Co., 517 P.2d 406, 413 (Colo. Ct. App. 1973)) ("[T]he focus is upon the nature of the product, . . . rather than on the conduct either of the manufacturer or of the person injured because of the product."); Phipps v. Gen. Motors Corp., 363 A.2d 955, 958 (Md. 1976) (focusing on the nature of the product rather than the manufacturer's conduct); Lenhardt v. Ford Motor Co., 683 P.2d 1097, 1099 (Wash. 1984) (citing Estate of Ryder v. Kelly-Springfield Tire Co., 587 P.2d 160, 164 (Wash. 1978); Little v. PPG Indus., Inc., 594 P.2d 911, 914 (Wash. 1979) (same).

8. *See* Cronin v. J.B.E. Olson Corp., 501 P.2d 1153, 1162 (Cal. 1972); Beshada v. Johns-Manville Prods. Corp., 447 A.2d 539, 547, 548 (N.J. 1982); Suter v. San Angelo Foundry & Mach. Co., 406 A.2d 140, 148 (N.J. 1979); Azzarello v. Black Bros. Co., 391 A.2d 1020, 1027 (Pa. 1978).

9. *E.g.*, DiPalma v. Westinghouse Elec. Corp., 938 F.2d 1463, 1466 (1st Cir. 1991) (finding the proper standard in duty to warn cases was "the same standard as the duty to warn that is enforceable in a negligence cause of action"); Smith v. Walter C. Best, Inc., 927 F.2d 736, 741–42 (3d Cir. 1990) (acknowledging the negligence standard in a duty to warn case); Olson v. Prosoco, Inc., 522 N.W.2d 284, 289–90 (Iowa 1994) (same); Germann v. F.L. Smithe Mach. Co., 381 N.W.2d 503, 508 (Minn. Ct. App. 1986) (citing Bilotta v. Kelley Co., 346 N.W.2d 616, 622 (Minn. 1984)) (same), *aff'd en banc*, 395 N.W.2d 922 (Minn. 1986); Crislip v. TCH Liquidating Co., 556 N.E.2d 1177, 1183 (Ohio 1990) (same).

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

11. *Id.* (emphasis added).

approach.[12] Again, the *Third Restatement* appears to have given its approval to this replacement of strict liability by negligence.[13] According to the *Third Restatement*, a product "is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a *reasonable* alternative design by the seller or other distributor."[14]

IV. LIABILITY THEORIES WITHOUT A DEFECT REQUIREMENT

Plaintiffs' lawyers have also shifted away from traditional theories based on product defect and have begun to focus more on liability theories that do not require proof of defect, which include misrepresentation, civil conspiracy and the Racketeer Influenced and Corrupt Organizations (RICO) statute, the malfunction doctrine, and negligent marketing.[15]

A. Misrepresentation

As *Products Liability Law* explains, "misrepresentation is the communication of false or misleading information to another."[16] The "classic" form of tortious misrepresentation, commonly called deceit or fraud,[17] requires the defendant to know that the factual statement made to the plaintiff is false,[18] and the defendant must intend for it to deceive or mislead.[19] Some states also recognize negligent misrepresentation.[20] In these states, the defendant must negligently provide false information instead of intentionally doing so.[21] Thus, under misrepresentation, liability is based on false statements about the product and not on whether the product is defective. In recent years, misrepresentation claims have figured prominently in litigation against the manufacturers of inherently dangerous, but not

12. Wright v. Brooke Group, Ltd., 652 N.W.2d 159, 169 (Iowa 2002) (citing RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. n); Prentis v. Yale Mfg. Co., 365 N.W.2d 176, 185–86 (Mich. 1984).

13. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b).

14. *Id.* (emphasis added).

15. *E.g.*, *In re* Welding Fume Prods. Liab. Litig., 364 F. Supp. 2d 669, 673 (N.D. Ohio 2005) ("Among other theories of liability, the plaintiffs assert claims for strict liability, negligence, fraud, and conspiracy."); Tetuan v. A.H. Robins Co., 738 P.2d 1210, 1215 (Kan. 1987) (noting the plaintiff alleged civil conspiracy and fraud).

16. PRODUCTS LIABILITY LAW, *supra* note 1, § 3.1, at 111.

17. *Id.*

18. *Id.* § 3.2, at 121.

19. *Id.* § 3.2, at 121–22.

20. *Id.* § 3.3, at 129–30 & nn.6–7.

21. *E.g.*, Jimenez v. DaimlerChrysler Corp., 269 F.3d 439, 447 (4th Cir. 2001) (discussing the elements of negligent misrepresentation under South Carolina law); Maneely v. Gen. Motors Corp., 108 F.3d 1176, 1181 (9th Cir. 1997) (listing the elements of negligent misrepresentation under California law).

defective, products such as cigarettes,[22] fast food,[23] and alcoholic beverages.[24] Plaintiffs have also increasingly relied on misrepresentation in pharmaceutical cases because of the difficulty of proving that pharmaceutical products are defective.[25]

B. Civil Conspiracy and RICO Violations

Civil conspiracy and RICO have become popular liability theories in recent years.[26] A civil conspiracy involves two or more persons who act together to achieve an unlawful objective or to achieve a lawful objective in an unlawful manner.[27] A civil conspiracy is not a tort, and therefore, the plaintiff must prove the existence of an underlying tort, such as fraud.[28] However, a finding of civil conspiracy increases liability by holding each defendant jointly liable for the all of the consequences of all the conspirators' actions.[29] According to *Products Liability Law*, a civil conspiracy claim is not concerned with whether a product is defective, but instead is based on the defendant's wrongful conduct.[30] This theory is particularly helpful to plaintiffs in suits against sellers of products, like cigarettes, that may not be defective in and of themselves.[31]

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22. PRODUCTS LIABILITY LAW, *supra* note 1, § 3.2, at 113 n.4 (discussing the prominent role of fraudulent misrepresentation in tobacco litigation).

23. Pelman v. McDonald's Corp., 237 F. Supp. 2d 512, 524 (S.D.N.Y. 2003), *vacated in part*, 396 F.3d 508 (2d Cir. 2005) (addressing plaintiffs' claim of deceptive advertising).

24. Gawloski v. Miller Brewing Co., 644 N.E.2d 731, 732 (Ohio Ct. App. 1994) (claiming "fraudulent concealment and misrepresentation").

25. *See, e.g.*, Kemp v. Medtronic, Inc., 231 F.3d 216, 232–36 (6th Cir. 2000) (discussing plaintiffs' fraudulent misrepresentation claim against pacemaker manufacturer); Miller v. Pfizer Inc., 196 F. Supp. 2d 1095, 1119–23 (D. Kan. 2002) (discussing plaintiffs' misrepresentation claims against prescription drug manufacturer), *aff'd*, 356 F.3d 1326 (10th Cir. 2004); Dow Chem. Co. v. Mahlum, 970 P.2d 98, 110–11 (Nev. 1998) (alleging fraudulent concealment and fraudulent misrepresentation).

26. *See generally* PRODUCTS LIABILITY LAW, *supra* note 1, § 11.3, at 754–56 (discussing the use of civil conspiracy in products liability actions); *id.* § 10.3, at 658–59 (addressing civil RICO claims against tobacco companies).

27. *Id.* § 10.3, at 754; *see also* Christian v. Minn. Mining & Mfg. Co., 126 F. Supp. 2d 951, 959 (D. Md. 2001) ("[T]he plaintiff must establish 'a meeting of the minds in an unlawful arrangement.'" (quoting Elecs. Store, Inc. v. Cellco P'ship, 732 A.2d 9980, 992 (Md. 1992))); Brenner v. Am. Cyanamid Co., 732 N.Y.S.2d 799, 800 (App. Div. 2001) ("Rather, '[a]llegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort.'" (quoting Alexander & Alexander of N.Y., Inc. v. Fritzen, 503 N.E.2d 102, 103 (N.Y. 1986))); Anderson v. Fortune Brands, Inc. (*In re* Kings County Tobacco Litig.), 723 N.Y.S.2d 304, 307–08 (Sup. Ct. 2000) (requiring a plaintiff prove "by clear and convincing evidence . . . the existence of an agreement to willfully fail to supply information" to allow a civil conspiracy claim in a products liability action for failure to warn) (footnote omitted).

28. Brown *ex rel.* Estate of Brown v. Philip Morris, Inc., 228 F. Supp. 2d 506, 517 (D.N.J. 2002).

29. PRODUCTS LIABILITY LAW, *supra* note 1, § 11.3, at 754.

30. *See id.*

31. *See id.* § 11.3, 754–55; *see also* Hearn v. R.J. Reynolds Tobacco Co., 279 F. Supp. 2d 1096, 1117 (D. Ariz. 2003) (allowing plaintiffs' action against a cigarette manufacturer because the "[p]laintiffs plead[ed] all necessary elements of a civil conspiracy"); Waterhouse v. R.J. Reynolds Tobacco Co., 270 F. Supp. 2d 678, 685–86 (D. Md. 2003) (allowing a civil conspiracy claim based on fraudulent representation).

Products Liability Law also examines the RICO statute.[32] RICO imposes criminal and civil liability on any person who invests in an enterprise that has been acquired through a pattern of racketeering activity.[33] Although Congress originally enacted RICO to prevent organized crime from infiltrating legitimate businesses,[34] both federal and state governmental plaintiffs have used it against the tobacco industry.[35] For example, in *United States v. Philip Morris, Inc.*,[36] the United States alleged that the tobacco companies withheld information about the health risks of smoking and the addictive nature of nicotine, misled the public about the safety of "low tar/low nicotine" cigarettes, suppressed research about the development of less hazardous cigarettes, and manipulated nicotine levels in cigarettes.[37] By invoking RICO, the government sidestepped the issue of whether cigarettes were "defective," and thus was able to focus instead on the bad conduct of the tobacco companies.[38]

C. *The Malfunction Doctrine.*

The malfunction doctrine[39] as set forth in section 3 of the *Third Restatement*,[40] ultimately derives from the old negligence doctrine of res ipsa loquitur.[41] Although this liability theory does not expressly do away with the defect requirement, it does allow plaintiffs to sidestep the defect requirement when circumstances indicate that the product's failure—its "malfunction"—"most probably resulted from a [manufacturing] defect."[42] Even before the malfunction doctrine was formally incorporated into the *Third Restatement*, many courts already recognized the doctrine in products liability cases.[43] The *Third Restatement*'s endorsement of the malfunction doctrine seems to further weaken the importance of the defect requirement.

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32. PRODUCTS LIABILITY LAW, *supra* note 1, § 10.3, at 658–59.

33. *See* 18 U.S.C. §§ 1962–1964 (2000).

34. *See* Gramercy 222 Residents Corp. v. Gramercy Realty Assocs., 591 F. Supp. 1408, 1413 (S.D.N.Y. 1984) (citing United States v. Turkette, 452 U.S. 576, 590 (1981)); Bryce A. Jensen, Note, *From Tobacco to Health Care and Beyond—A Critique of Lawsuits Targeting Unpopular Industries*, 86 CORNELL L. REV. 1334, 1354 (2001).

35. *See, e.g.*, United States v. Philip Morris USA, Inc., 396 F.3d 1190, 1192 (D.C. Cir. 2005) (addressing the United States' civil claim against a tobacco company under RICO); Texas v. Am. Tobacco Co., 14 F. Supp. 2d 956, 969 (E.D. Tex. 1997) (addressing the State's civil claim against a tobacco company under RICO).

36. 116 F. Supp. 2d 131 (D.D.C. 2000).

37. *Id.* at 136–38.

38. *See* PRODUCTS LIABILITY LAW, *supra* note 1, § 10.3, at 658 & nn.95–96.

39. *Id.* § 6.5, at 409.

40. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 (1998).

41. *See* PRODUCTS LIABILITY LAW, *supra* note 1, § 6.5, at 409.

42. *See id.*

43. *See, e.g.*, Marcus v. Anderson/Gore Homes, Inc., 498 So. 2d 1051, 1052 (Fla. Dist. Ct. App. 1986); Cassisi v. Maytag Co., 396 So. 2d 1140, 1152–53 (Fla. Dist. Ct. App. 1981); Farmer v. Int'l Harvester Co., 553 P.2d 1306, 1311 (Idaho 1976) (citations omitted); Stackiewicz v. Nissan Motor Corp., 686 P.2d 925, 928 (Nev. 1984); Harkins v. Calumet Realty Co., 614 A.2d 699, 705 (Pa. Super. Ct. 1992) (citing Rogers v. Johnson & Johnson Prods., Inc., 565 A.2d 751, 754–55 (Pa. 1989)).

D. Negligent Marketing

Unlike traditional products liability theories, negligent marketing focuses on the marketing practices of product sellers and not on whether the products they sell are defective.[44] This liability theory includes claims based on product design, advertising or promotional activities that target high-risk consumers, and inadequate supervision of distributors or retail sellers.[45] Most negligent marketing cases have been concerned with non-defective firearms.[46] Plaintiffs in these cases have alleged that manufacturers designed their handguns in a way that would appeal to criminals,[47] or that manufacturers targeted their advertising at consumers who were likely to commit violent crimes.[48] Plaintiffs in such cases have often claimed that handgun manufacturers marketed their products in a way that facilitated the operation of illegal secondary markets for handguns in urban areas.[49]

V. FEDERAL CONSTITUTIONAL PRINCIPLES AND PRODUCTS LIABILITY LAW

Federal statutes have regulated product safety for many years.[50] Recently, however, product manufacturers have begun to invoke principles of federal preemption and constitutional law in order to avoid or limit their liability to consumers for product-related injuries. For example, manufacturers have raised federal preemption as a defense in cases where they have complied with federal safety standards.[51] Manufacturers have challenged large punitive damage awards on due process grounds[52] and have invoked the First Amendment right of free

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44. *See generally* Richard C. Ausness, *Tort Liability for the Sale of Non-Defective Products: An Analysis and Critique of the Concept of Negligent Marketing*, 53 S.C. L. REV. 907, 913 (2002) ("[S]ince negligent marketing focuses on the marketing process rather than whether the product is defective, it allows parties who sue under this theory to sidestep the defect issue.").

45. Andrew Jay McClurg, *The Tortious Marketing of Handguns: Strict Liability is Dead, Long Live Negligence*, 19 SETON HALL LEGIS. J. 777, 799–818 (1995).

46. *See* PRODUCTS LIABILITY LAW, *supra* note 1, § 10.3, at 663 & n.128.

47. *E.g.*, Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 808 (E.D.N.Y. 1999) (discussing the plaintiffs' "claim that the manufacturers' indiscriminate marketing and distribution practices generated an underground market in handguns, providing youths and violent criminals like the shooters in these cases with easy access to the instruments they have used with lethal effect."), *vacated sub nom.*, Hamilton v. Beretta U.S.A. Corp., 264 F.3d 21 (2d Cir. 2001).

48. *E.g.*, Merrill v. Navegar, Inc., 28 P.3d 116, 121 (Cal. 2001) ("[P]laintiffs alleged, [the gun manufacturer] 'acted negligently by manufacturing, marketing, and making available to the public'" a handgun with a "'reputation as a weapon favored by criminals.'").

49. *See Hamilton*, 62 F. Supp. 2d at 808.

50. For a discussion of federal product safety legislation, see Richard C. Ausness, *The Case for a "Strong" Regulatory Compliance Defense*, 55 MD. L. REV. 1210, 1214–17 (1996).

51. PRODUCTS LIABILITY LAW, *supra* note 1, § 14.4.

52. *Id.* § 18.7. *See generally* Thomas C. Galligan, Jr., *U.S. Supreme Court Tort Reform: Limiting State Power to Articulate and Develop Tort Law—Defamation, Preemption and Punitive Damages*, 74 U. CIN. L. REV. 1189, 1243–57 (2006) (discussing due process challenges to punitive damage awards in products liability cases).

expression to avoid liability for the sale of materials that contain violent[53] or sexually explicit content.[54]

A. Federal Preemption

As Professor Owen observes, "the defense of federal preemption in recent years has grown from little more than a blip on the radar screen to one of the most powerful defenses in all of products liability law."[55] The preemption doctrine overrides state statutes, administrative regulations, and common law doctrines that conflict with federal law.[56] Congress or federal administrative agencies, when authorized by Congress, can *expressly* preempt state law, including the law of products liability.[57] In addition, a state's products liability law may be superseded by *implied* preemption.[58] Implied preemption occurs when a federal regulatory scheme is so pervasive that it "occupies the field" and thereby excludes any form of state regulation.[59] Alternatively, state laws, including common law rules, are impliedly preempted when they conflict with federal regulatory provisions.[60]

Products Liability Law provides an excellent overview of the Supreme Court's recent preemption jurisprudence,[61] including *Cipollone v. Liggett Group, Inc.*,[62] *Freightliner Corp. v. Myrick*,[63] *Geier v. American Honda Motor Co.*,[64] *Medtronic v. Lohr*,[65] *Buckman Co. v. Plaintiffs' Legal Committee*,[66] and *Sprietsma v. Mercury Marine*.[67] Professor Owen's treatise also discusses a number of lower court preemption cases involving the Consumer Product Safety Act and the Occupational Safety and Health Act (OSHA).[68] Although the courts have not been entirely consistent in their treatment of preemption, it is clear that the preemption doctrine has caused federal safety standards to displace substantial areas of state products liability law.

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53. *See* Rice v. Paladin Enters., Inc., 128 F.3d 233, 241 (4th Cir. 1997).
54. Galligan, *supra* note 52, at 1218–20.
55. PRODUCTS LIABILITY LAW, *supra* note 1, § 14.4, at 895.
56. *Id.* § 14.4, at 896–97.
57. *Id.* § 14.4, at 897–98 & n.14.
58. *Id.* § 14.4, at 897.
59. *Id.* § 14.4, at 898–99.
60. *Id.*
61. *See id.* § 14.4, at 904–16.
62. 505 U.S. 504, 508, 530–31 (1992) (cigarette labeling).
63. 514 U.S. 280, 283 (1995) (anti-lock brakes).
64. 529 U.S. 861, 865 (2000) (airbags).
65. 518 U.S. 470, 474, 503 (1996) (medical devices).
66. 531 U.S. 341, 343–44 (2001) (medical devices).
67. 537 U.S. 51, 54, 70 (2002) (boat propeller guards).
68. PRODUCTS LIABILITY LAW, *supra* note 1, § 14.4, at 917–19.

B. Punitive Damages

Punitive damages may be awarded to a plaintiff in a civil action, in addition to compensatory damages, when the defendant is found to have acted maliciously or in flagrant violation of the plaintiff's rights.[69] In recent years, punitive damages have been awarded in a wide range of products liability cases, and some of these awards have been quite large.[70] As Professor Owen points out, this trend has led product manufacturers to seek constitutional protection against excessive or otherwise improper punitive damages awards.[71] Although the Court rejected an excessive fines challenge to a punitive damages award in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,[72] it held in *Pacific Mutual Life Insurance Co. v. Haslip*[73] that the Due Process clause requires punitive damages to be "reasonable in their amount and rational in light of their purpose to punish . . . and . . . deter."[74] The Court adhered to this approach in subsequent cases,[75] culminating in *State Farm Mutual Automobile Insurance Co. v. Campbell.*[76] In that case, the Court provided three criteria or "guideposts" for determining whether a punitive damage award is excessive on due process grounds.[77] Professor Owen concludes "it is clear for now that the Supreme Court takes seriously the idea that the due process clause limits the size of punitive awards, a development that is beginning to ripple through punitive damages awards in products liability cases."[78]

C. First Amendment Issues

Products liability claims against producers of books, songs, movies, and video games are becoming increasingly common.[79] While some of these cases are concerned with books that publish inaccurate information,[80] others involve

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69. *Id.* § 18.1, at 1120–21.

70. *Id.* § 18.1, at 1129.

71. *Id.* § 18.7, at 1216–17.

72. 492 U.S. 257, 279 (1989).

73. 499 U.S. 1 (1991).

74. *Id.* at 21.

75. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 436 n.9 (2001); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996); Honda Motor Co. v. Oberg, 512 U.S. 415, 420–21 (1994); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 458 (1993) (quoting *Haslip*, 499 U.S. at 18).

76. 538 U.S. 408 (2003).

77. *Id.* at 1418 (citing *Gore*, 517 U.S. at 575); PRODUCTS LIABILITY LAW, *supra* note 1, § 18.7, at 1223–25.

78. PRODUCTS LIABILITY LAW, *supra* note 1, § 18.7, at 1231–32.

79. *Id.* § 16.8, at 1057.

80. *E.g.*, Winter v. G.P. Putnam's Sons, 938 F.2d 1033, 1034 (9th Cir. 1991) (addressing a claim against a book publisher for incorrect information on identifying mushrooms); Lewin v. McCreight, 655 F. Supp. 282, 283 (E.D. Mich. 1987) ("How To" book); Birmingham v. Fodor's Travel Publ'g, Inc., 833 P.2d 70, 73 (Haw. 1992) (travel guide).

publications that facilitate violent acts,[81] result in imitative violence,[82] or inspire readers, listeners, or viewers to commit violent or criminal acts.[83] In *Rice v. Paladin Enterprises, Inc.*,[84] a facilitation case, the court refused to find that an instruction manual for aspiring hit men was constitutionally protected against tort actions brought by the relatives of one of the hit man's victims.[85]

In many other cases, however, publishers have successfully argued that the First Amendment limits tort actions based on the content of their products.[86] First, courts have concluded that the contents of books, songs, movies, and even video games are forms of expression.[87] Second, courts have employed *Brandenburg v. Ohio*'s[88] incitement analysis to determine whether such expression is constitutionally protected.[89] Under this approach, speech that inspires violence is constitutionally protected unless the speaker explicitly advocates an unlawful act and intends to incite or produce the act; there is a high likelihood that the act will occur; and the occurrence of the act is imminent.[90] This constitutional standard is strict enough to effectively remove state law in this area of products liability.

VI. CONCLUSION

Products Liability Law comprehensively examines the many changes that have transformed this field in recent years, including the triumph of negligence over strict liability, the abandonment of defect as a core concept of products liability, and the federalization of large areas of state products liability law. Beyond that, *Products Liability Law* offers something for everyone who has an interest in this fascinating and ever-changing area of law. Students will like the treatise's attention to historical development and context. They will also benefit from the clarity of its

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81. Rice v. Paladin Enters., Inc., 128 F.3d 233, 241 (4th Cir. 1997); Braun v. Soldier of Fortune Magazine, Inc., 968 F.2d 1110, 1112 (11th Cir. 1992).

82. Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1018–19 (5th Cir. 1987); Sakon v. Pepsico, Inc., 553 So. 2d 163, 164 (Fla. 1989) (citation omitted); DeFilippo v. NBC, Inc., 446 A.2d 1036, 1037–38 (R.I. 1982).

83. Waller v. Osbourne, 763 F. Supp. 1144, 1145 (M.D. Ga. 1991), *aff'd*, 958 F.2d 1084 (11th Cir. 1992); McCollum v. CBS, Inc., 249 Cal. Rptr. 187, 193 (Cal. Ct. App. 1988).

84. 128 F.3d 233 (4th Cir. 1997).

85. *Id.* at 249–50.

86. *See generally* Richard C. Ausness, *The Application of Product Liability Principles to Publishers of Violent or Sexually Explicit Material*, 52 FLA. L. REV. 603, 641–58 (2000) (addressing the First Amendment protections afforded publishers in products liability actions).

87. *See* Paul E. Salamanca, *Video Games as a Protected Form of Expression*, 40 GA. L. REV. 153, 159, 161–62, 167 n.66, 173–87 (2005).

88. 395 U.S. 444 (1969).

89. *Rice*, 128 F.3d 233, 249 (quoting *Brandenburg*, 395 U.S. at 447); Waller v. Osbourne, 763 F. Supp. 1144, 1150 (M.D. Ga. 1991) (same), *aff'd*, 958 F.2d 1084 (11th Cir. 1992); Herceg v. Hustler Magazine, Inc., 565 F. Supp. 802, 804 (S.D. Tex. 1983) (same); McCollum v. CBS, Inc., 249 Cal. Rptr. 187, 193 (Cal. Ct. App. 1988) (same); Olivia N. v. NBC, Inc., 178 Cal. Rptr. 888, 893 (Cal. Ct. App. 1981) (same); Byers v. Edmondson, 712 So. 2d 681, 690 (same).

90. Andrew B. Sims, *Tort Liability for Physical Injuries Allegedly Resulting from Media Speech: A Comprehensive First Amendment Approach*, 34 ARIZ. L. REV. 231, 256 (1992).

analysis of difficult doctrinal issues. In addition, students will appreciate *Products Liability Law*'s compact size and logical organization. In addition to these features, practicing attorneys will find *Products Liability Law* useful because it is completely current, provides thorough coverage of every area of products liability law, contains voluminous citations to relevant cases and statutes, and treats controversial issues honestly and objectively. Finally, courts and legal scholars will appreciate the depth of Professor Owen's research and scholarship, as well as his treatment of novel topics in products liability law. In conclusion, *Products Liability Law* is a "must read" for students, practitioners, courts, and legal scholars alike.