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Away from Ideology: A Review of Products Liability Defenses in the Era of Tort Reform

Norman L. Greene*

Has products liability gone too far? The issue has virtually raised a legal civil war. Those who believe it has gone too far tell horror stories of flimsy evidence resulting in wild verdicts, which are destroying America's competitiveness. Those who believe that products liability has not gone too far — or who question whether it should go further — talk of horrible injuries caused by dangerous products foisted on the American public by corporate greed.¹

Today products liability reformers — those who would restrict liability — hold sway. Much has been done already to limit recoveries and much can and still will be done. But some claim that reform is complete, pointing to the remarks of scholars like James Henderson and Aaron Twerski, who wrote that the “days of wretched excess [of products liability law] are over,

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1. Such selective debates, which depend on the omission or addition of certain details (junk science verdicts for plaintiffs or verdicts for defendants despite catastrophic injuries), can have dramatic results. In military writing, for instance, adding or omitting certain details can change the focus of a book from anti-war to pro-war. For example, consider the depiction of the results of napalm — a controversial product itself. What are we supposed to think about it? It depends on whether you read Philip Caputo or Burke Davis. Phillip Caputo's *A RUMOR OF WAR* states that “napalm sucked air from lungs and turned human flesh to ashes Once I had seen pigs eating napalm-charred corpses — a memorable sight, pigs eating roast people.” PHILIP CAPUTO, *A RUMOR OF WAR* 4 (1977). However, Burke Davis' *MARINE! THE LIFE OF CHESTY PULLER* avoids any reference to charred corpses and states that “[the Americans'] [p]ortable and self-propelled flamethrowers, bazookas, tanks and every mortar of the Second Battalion led the attack and until the last moment planes seared the hills with napalm.” BURKE DAVIS, *MARINE! THE LIFE OF CHESTY PULLER* 204 (1964). In other words, the same product sometimes antiseptically sears the hills and at other times sucks air from lungs and chars corpses.

very probably for the indefinite future.”²

This article does not attempt to dissect the tort reform movement; nor is it primarily about the movement. Rather, it is about how key products liability defenses in New York work. The analysis of such defenses is intended to advance the debate over reform. No academic or practical approach to substantive products liability law may ignore the political context that surrounds it. Furthermore, the decision of whether further reform is needed should proceed on the basis of a full recognition of what we have already — for example, what are the defenses that currently impede recovery for defective products — and not on an illusory perception of our system or on commercial hysteria.³

This article first provides an overview of certain aspects of the reform movement. Next, through an examination of primarily New York law, the article sets out the common defenses already available in products liability. Finally, given the lack of empirical support for the claimed deficiencies of the products liability system, the article concludes that additional research should be undertaken to determine how much, if any, further tort reform is warranted. The conclusion is admittedly utopian. Previous reform preceded such research; therefore, is it reasonable to hope that future reform will await it?

I. Introduction

Although the Clinton Administration has yet to be officially heard from, the outgoing Bush Administration made no secret of its longing for products liability reform.⁴ In particular, former Vice President Dan Quayle leapt into the midst of the debate,

2. James Henderson & Aaron Twerski, *Stargazing: The Future of American Products Liability Law*, 66 N.Y.U. L. REV. 1332, 1342 (1991).

3. The extent to which product liability reform has depended on “the rhetoric of contending interests and ideologies” is well recognized. See Peter Schuck, *Introduction: The Context of the Controversy*, in TORT LAW AND THE PUBLIC INTEREST 39 (Schuck ed. 1991).

4. Cf. Prod. Safety & Liab. Rep. (BNA) 996 (Sept. 11, 1992) (noting comment by President Clinton’s then campaign spokesman George Stephanopolous, that as president, Mr. Clinton would oppose any products liability bill that pretends to reform lawsuits while actually encouraging dangerous products or marketplace fraud).

squarely on the side of the reformers.⁵ Among other things, Mr. Quayle advocated strengthening products liability defenses through federal legislation.⁶ This reform would not occur on a gradual state-by-state basis; instead, proposed legislation would preempt state products liability law.⁷ According to Mr. Quayle, our current products liability system is too expensive and results in "shutting down new technology, adding unnecessary costs, or

5. Dan Quayle, *Now Is The Time For Product Liability Reform*, Prod. Safety & Liab. Rep. (BNA) 306 (Mar. 23, 1990). A response to Mr. Quayle's attack on the current system subsequently appeared in the same publication. Steven E. Angstreich, *Now Is The Time To End the Attack on Lawyers and Victims*, Prod. Safety & Liab. Rep. (BNA) 537 (May 11, 1990). According to the author, "Vice President [Quayle] takes the position that the lawyers and individuals who suffer disabling, maiming, and even fatal injuries are the people responsible for this country's inability to compete in the world market." *Id.* There are "intense feelings" on both sides of the tort reform debate, which is approaching the "theological." Kenneth Jost, *Tampering with Evidence: The Liability and Competitiveness Myth*, 78 A.B.A. J., Apr. 1992, at 44, 46 (quoting Brookings Institution lawyer-economist Robert Litan). With "raw emotions out there, it's hard to find people in the middle" and "[t]he debate is dominated by people at the extremes." *Id.*

If the views of Vice President Gore hold sway, products liability reform may find a cold reception in the Clinton White House. See *infra* note 252 (discussing Mr. Gore's opposition to proposed federal products liability legislation).

6. Quayle, *supra* note 5, at 308. Specifically, the Bush Administration supported Senate Bill 1400, the then-pending federal product liability legislation, as an "important first step" toward products liability reform. *Id.* Senate Bill 1400, which did not become law, was succeeded by other proposed federal products liability legislation, including the PRODUCT LIABILITY FAIRNESS ACT OF 1991, S. 640, 102d Cong., 1st Sess. (1991) and the FAIRNESS IN PRODUCT LIABILITY ACT OF 1991, H.R. 3030, 102d Cong., 1st Sess. (1991). The 1991 proposed legislation also failed to become law since there were insufficient votes to end the Senate debate. Prod. Safety & Liab. Rep. (BNA) 995 (Sept. 11, 1992).

Not focusing on the laws of any particular state, Mr. Quayle recommended establishing a "state of the art" defense to promote safer product designs. Quayle, *supra* note 5, at 308. Without such a defense, he argued that certain manufacturers would be reluctant to introduce new, safer products, fearing that this would expose them to liability for their older products. *Id.* He also advocated defenses which would limit recovery if the plaintiff misused or altered the product and which would provide uniformly restrictive time limits within which suit could be brought. *Id.* at 308-09. Expanding products liability defenses, of course, was only part of the Bush Administration's program for reform. *Id.*

The Bush Administration's interest in product liability reform had been considered incongruous given its expressed opposition to federal regulation. Linda Lipsen, *The Evolution of Products Liability as a Federal Policy Issue*, in TORT LAW AND THE PUBLIC INTEREST 247 (Schuck ed. 1991) (product liability reform penetrates wall between federal intervention and States' rights); S. REP. NO. 640, 102d Cong., 1st Sess. 59 (1991) (minority views of Senators Hollings and Gore that proposed federal legislation would "federalize an area of law that has always been the province of the States. Such an action should never be undertaken lightly.").

7. Quayle, *supra* note 5; S. REP. NO. 640, *supra* note 6.

giving away the store to foreign competitors.”⁸ Even apart from the products liability debate, and the change in administrations in Washington, these concerns may find a sympathetic audience in light of the public perception of the weakened American economy.

Mr. Quayle commented that manufacturers are reluctant to introduce new or “cutting-edge” products because of fear of substantial products liability judgments.⁹ In addition, he noted that much of the amount recovered goes to plaintiffs’ lawyers who “rake in” large legal fees and defendants’ lawyers who are hired to defend against “enormous” awards.¹⁰ Mr. Quayle referred to such legal costs, which supposedly add to the price of the products, as a “‘lawyers tax.’”¹¹ Furthermore, such costs impair the ability of American manufacturers to compete against foreign companies that do not have such costs and may, therefore, sell their products at lower prices.¹² Mr. Quayle advocated federal products liability legislation to resolve these problems.¹³

8. Quayle, *supra* note 5, at 306. But see Roger Miner, *The Soul of a Profession*, N.Y.L.J., October 28, 1992, at 2, where the writer, a judge of the U.S. Court of Appeals for the Second Circuit, questions whether products liability suits have any bearing on competitiveness, noting that foreign product manufacturers are also subject to suit in American courts and that in any event products liability suits serve socially desirable goal of ensuring product safety.

9. Quayle, *supra* note 5, at 307.

10. *Id.* Criticism of the manner in which damages are assessed also comes from academic circles. Henderson & Twerski, *supra* note 2, at 1339-40 (“[W]e allow for the transfer of billions of dollars in our tort system utilizing standards that would not pass scrutiny if they were used for the collection of a grocery bill.”).

11. Quayle, *supra* note 5, at 307. To some extent, this is reminiscent of the Bush Administration’s lawyer bashing which was criticized by Judge Miner. See Miner, *supra* note 8 (objecting to those “in high places” who “unfairly” place “the blame for society’s ills” upon the bar).

12. Quayle, *supra* note 5, at 307.

13. *Id.* at 308. The proponents of the recently proposed federal product liability legislation echo many of Mr. Quayle’s concerns. See S. REP. No. 640, *supra* note 6, at 1-2 (present product liability system is slow and inefficient, stifles innovation, and hampers the competitiveness of American firms; cost of the product liability system results in higher prices for American products). Among other things, the Senate Report notes that American manufacturers and product sellers pay product liability insurance rates 20 to 50 times higher than those of foreign competitors. *Id.* at 9. Mr. Quayle’s Council on Competitiveness made the same point. Jost, *supra* note 5 at 46 (specifically addressing the contentions about insurance costs made by the Council on Competitiveness). A critic of tort reform claims that the Council (and, therefore, presumably the Senate Report) relied on a study based on “just five machine-tool manufacturing industries and was directed by a lobbyist for a group of trade associations pushing product liability legisla-

Mr. Quayle's article is part of the backlash against the products liability revolution that developed in the mid-1960s with the onset of strict tort liability. The revolution expanded the liability of product manufacturers and the rights of buyers and users of dangerous products, reflecting a view that products liability "plays an important social insurance role in making America a safer, better place in which to live and work."¹⁴ The boundaries of the law were extended to new transactions and defendants.¹⁵ Partly through doctrine expansion "and partly through improvements in trial techniques and tactics," it became easier for plaintiffs to reach the jury with product defect claims.¹⁶ Even the name of the field — "products liability" as opposed to "products law," for instance — stresses the concept of expanded liability. The backlash involved not just the Bush Administration, but industry leaders who, in less moderate tones, have characterized plaintiffs' products liability lawyers and their clients as a "plague of locusts" who have not only created a "blood bath" for American business but have also distorted our "traditional values."¹⁷

Mr. Quayle noted that safety is expensive, as at least one of his opponents agrees.¹⁸ Preoccupied with cost, however, Mr. Quayle deemphasized both the compensatory and the deterrent roles of products liability.¹⁹ These roles are designed both to spread the cost of injuries among the members of the public rather than to leave them on the victim alone²⁰ and also to in-

tion." Jost, *supra* note 5, at 46.

14. James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479, 487 (1990).

15. *Id.* at 483-84.

16. *Id.* at 484.

17. *Id.* at 481 (quoting Dee, *Blood Bath*, 10 ENTERPRISE 3 (1986)).

18. Angstreich, *supra* note 5, at 538.

19. Mr. Quayle noted, for example, that "liability insurance costs add more than \$60 to the \$110 price of a football helmet." Quayle, *supra* note 5, at 307, n.5. Mr. Quayle likewise notes that Hepatitis-B vaccine costs \$160 in the United States and only \$12 in Taiwan because of the expense resulting from products liability. *Id.* at 307.

20. See, e.g., *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring) (stating that the goal of compensation rests on the proposition that "[t]he cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."); *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239, 1249 (N.J. 1990) (stating that state-tort

spire manufacturers to manufacture safer products.²¹

Are products safer today and, if so, what role has products liability played? Intuitively, we assume that products are safer today. One need only look, for instance, at the absence of the Dalkon Shield, DES, and asbestos from the marketplace, as well as the multitude of warnings on products resulting from the threat of large judgments for failure to warn or from government regulation.²² Although some cheer the role products liability has played in this, there is some disagreement from sources other than Mr. Quayle.²³ This disagreement is primarily based on a claimed chilling effect on product innovation.²⁴

Despite the troubled tone of Mr. Quayle's article, which may lead one to jump to simplistic conclusions, it is important to remember that American manufacturers are far from defenseless under the present system. Although it is usually the multi-million dollar verdicts that get the most publicity, some commentators have recently contended that there has been a trend in favor of defendants in products liability litigation in the

claims advance a substantial goal of providing "compensation to those injured by deleterious products when that result is consistent with public policy."); *Feldman v. Lederle Lab.*, 479 A.2d 374, 391 (N.J. 1984) ("[T]here is a strong state interest in compensating those who are injured by a manufacturer's defective products.").

21. See, e.g., *Escola*, 150 P.2d at 440-41 (Traynor, J., concurring) ("[P]ublic policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market." The manufacturer is in the best position to anticipate hazards; there is a "public interest to discourage the marketing of products having defects that are a menace to the public.").

22. The recent litigation and claims concerning the safety of silicone gel breast implants, of course, may raise some doubts as to the efficiency of the product liability system in removing questionable products from the marketplace. However, one of the leading manufacturers of such implants, Dow Corning Corp., has announced its withdrawal from the market for business reasons supposedly unrelated to issues of safety or science. *Prod. Safety & Liab. Rep.* (BNA) 311-12 (Mar. 20, 1992). According to Dow Corning chairman, Keith McKennon, "Given the continued controversial environment surrounding this product, I see no prospect for business improving." *Id.* at 312. Dow Corning's claim that its withdrawal is unrelated to safety has been challenged. *Id.* at 312.

23. See PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 170 (1988).

24. *Id.* at 160. Although an effort to avoid liability has led to some improved safety practices, Mr. Huber contends that products liability has primarily deterred product innovation rather than led to safer products; more often than not, deterring innovation has impeded safety since newer products are typically "safer than older [products] in the modern technological world." *Id.* As for warnings, Mr. Huber cautions that they may be excessive and thus ineffective. "[T]o warn of everything is to warn of nothing, and in a torrent of new data" critical information is "likely to go unread." *Id.* at 15.

1980s.²⁵ Judges have expressed a "novel reluctance to expand established products doctrine to benefit plaintiffs"²⁶ and have been "increasingly apt to change the law to preclude liability rather than to promote it."²⁷

Indeed, theories of social insurance aside, many sympathetic plaintiffs lose for failing to overcome a defense and are required to bear what courts have called their "overwhelming misfortune" alone.²⁸ Consider, for example, the well-known case involving a seventeen-year-old former itinerant farm worker.²⁹ During his three-week employ as a machine operator, his hand was crushed in a machine accident.³⁰ He recovered nothing from the

25. See Henderson & Eisenberg, *supra* note 14.

26. *Id.* at 489.

27. *Id.* at 498. The authors note that "[a]fter decades of extending the boundaries of liability, both appellate and trial judges are reaching decisions favoring products defendants in unprecedented numbers." *Id.* at 539. See also Miner, *supra* note 8 (noting that it appears that product liability suits are on the decline). Professor Henderson has recently reaffirmed his thesis. See Henderson & Twerski, *supra* note 2, at 1342. A recent report lends support to the Henderson-Eisenberg theory, noting, among other things, that punitive damages awards in non-asbestos product liability cases are diminishing in frequency. Prod. Safety & Liab. Rep. (BNA) 32 (Jan. 10, 1992) (reporting on PROFESSOR MICHAEL RUSTAD, *Demystifying Punitive Damages in Product Liability Cases, A Survey of a Quarter Century of Trial Verdicts*). The Henderson-Eisenberg view has itself been attacked. See Arthur Havenner, *Not Quite a Revolution in Products Liability*, 1990 MANHATTAN INST. JUD. STUDIES PROGRAM. Arthur Havenner, professor of Agricultural Economics at the University of California at Davis, contends that the data used by Professors Henderson and Eisenberg are "too badly flawed" to yield any "definite conclusion." *Id.* at 2. But if their information were considered "representative," it would tend to show that the American products liability system continued to expand rapidly in the 1980's. *Id.* According to Professor Havenner, "[p]laintiffs are filing more claims, collecting on more claims, and collecting more money in total each year than the last." *Id.* at 18. Furthermore, the Senate Report claims that Professor Henderson supports the adoption of federal product liability legislation, particularly unenacted Senate Bill No. 640. S. REP. No. 640, *supra* note 6, at 48 n.9. Professor Henderson has recently published, with Professor Aaron Twerski, a draft proposed revision to Restatement (Second) of Torts Section 402A, which belies the suggestion that he believes that state product liability either will or should be supplanted by federal legislation: James A. Henderson & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512 (1992). Both were recently appointed reporters for the products liability provisions of the Restatement (Third) of Torts. *Id.* at 1513.

28. *Escola*, 150 P.2d at 441.

29. *Robinson v. Reed-Prentice Div. of Package Mach. Co.*, 49 N.Y.2d 471, 475, 481, 403 N.E.2d 440, 441, 444, 426 N.Y.S.2d 717, 718, 721-22 (1980) (reversing award of damages both against defendant manufacturer where there had been a subsequent modification of product after the machine left manufacturer's possession and control, and against third-party defendant-employer as barred by workers' compensation statute).

30. *Id.* at 476, 403 N.E.2d at 441, 426 N.Y.S.2d at 718.

manufacturer.³¹

Also, consider *Samuels v. American Cyanamid Co.*,³² where a healthy forty-four year-old editor was assigned by his company to take a trip to the Far East.³³ He received routine vaccinations for the trip — tetanus toxoid, typhoid and cholera — at a company clinic.³⁴ Paralyzed by the vaccinations, he was confined to a wheelchair, unable to walk without assistance, with his hands essentially useless.³⁵ Like the plaintiff in *Robinson*, he too recovered nothing from the manufacturer.³⁶

No one suggests a one-sided products liability system that can be administered by a cash machine. Society places too much importance on industry, whose resources are not inexhaustible, and on the principles of responsibility. Even the staunchest advocate of plaintiffs' rights recognizes that a bankrupt business cannot adequately pay the claims of present, let alone future, claimants. Furthermore, an unbalanced pro-plaintiff system would drive up products liability insurance rates, if not render insurance unobtainable.

On the other hand, no one likes to see a plaintiff automatically foreclosed by harsh barriers to recovery, such as the procrustean versions of privity, contributory negligence, and assumption of risk rules. Similarly, we should not relish a system, as one commentator described, which would "force too many innocent victims to thread a legal needle while providing too many defendants with a legal hole large enough to drive a truck through."³⁷

This article introduces the common defenses in products liability cases and explains how they work. Although it does not

31. *Id.* at 475, 403 N.E.2d at 441, 426 N.Y.S.2d at 718.

32. 130 Misc. 2d 175, 495 N.Y.S.2d 1006 (Sup. Ct. 1985) (affirming jury verdict for defendant on basis that manufacturer's failure to warn was not the proximate cause of plaintiff's injury).

33. *Id.* at 177, 495 N.Y.S.2d at 1009.

34. *Id.*

35. *Id.* at 178, 495 N.Y.S.2d at 1009.

36. *Id.* at 179, 495 N.Y.S.2d at 1010-11.

37. PAUL BRODEUR, OUTRAGEOUS MISCONDUCT 352 (1985) (quoting testimony of David I. Greenberg, legislative director of the Consumer Federation of America, in March 1982, before Senator Robert Kasten's Consumer Subcommittee, regarding proposed federal products liability law). Senator Kasten, a proponent of federal products liability legislation, lost his bid for re-election in 1992.

completely analyze whether reform is needed and, if so, how much (a subject on which there is and will continue to be a good deal of debate), understanding these defenses may enable us to comprehend better whether New York's products liability system needs improvement or whether matters should be left as they are.³⁸

II. Products Liability Defenses

A. Culpable Conduct

In 1973, the New York Court of Appeals, in the leading case of *Codling v. Paglia*,³⁹ established that the users' lack of care may bar their recovery in products liability cases.⁴⁰ The case involved a claim by a driver against a car manufacturer for injuries arising out of an automobile accident.⁴¹ The injured driver claimed that the power steering mechanism was defective.⁴² The Court of Appeals, in recognizing a claim for strict products liability, held that if the driver was contributorily negligent, he could not recover even if the power steering was defective.⁴³

According to the Court of Appeals, a person injured by a product is contributorily negligent if that person fails to (1) use the product as intended;⁴⁴ or (2) use reasonable care to discover the defect.⁴⁵ The use of reasonable care, however, must have been sufficient to have averted the injury.⁴⁶ For example, if a

38. See Henderson & Eisenberg, *supra* note 14, at 543. The authors found increasing pro-defendant trends in products liability cases and noted that "legislators considering change" should be "more inclined to observe the reality of the legal products climate in which they operate" and that "[s]ome will be surprised by what they see." *Id.* They also noted that "in assessing whether statutory reform is required notwithstanding the [pro-defendant] change we detect, one must examine the relevant decisional law in the particular jurisdiction." *Id.* at 542.

39. 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973).

40. *Id.* at 343, 298 N.E.2d at 629, 345 N.Y.S.2d at 470-71.

41. *Id.* at 335, 298 N.E.2d at 624, 345 N.Y.S.2d at 463.

42. *Id.* at 337, 298 N.E.2d at 625, 345 N.Y.S.2d at 465.

43. *Id.* at 343-44, 298 N.E.2d at 629, 345 N.Y.S.2d at 470-71. Contributory negligence, of course, no longer bars recovery but only diminishes the amount of damages otherwise recoverable. N.Y. Civ. Prac. L. & R. 1411 (McKinney 1976 & Supp. 1992).

44. *Codling*, 32 N.Y.2d at 343, 298 N.E.2d at 629, 345 N.Y.S.2d at 470-71. This includes, for example, using a product for a purpose for which it was not originally manufactured or in a manner not normally intended.

45. *Id.*

46. *Id.* at 342, 298 N.E.2d at 628-29, 345 N.Y.S.2d at 470.

person knows that a product is toxic, he should not continue to breathe it. In one case, a worker who was injured by toxic fumes repeatedly returned to work in an environment where he was exposed to toxic fumes, despite being warned by doctors that he would be injured if he continued to do so.⁴⁷ The court held that the jury could consider his negligent self-exposure in apportioning comparative culpability.⁴⁸

B. *The Statute of Limitations*

The statute of limitations has been a battleground in products liability law. The general rule is that a cause of action for negligence or strict tort liability must be brought within three years of the date of injury;⁴⁹ when the product was made is irrelevant. It is the date of the injury that is crucial.⁵⁰ For example, if the product was made in 1900 and it causes injury today, suit may be brought, assuming there is a viable defendant, within three years from today.⁵¹

In contrast, some states have statutes of repose.⁵² These statutes typically put an outside limit on products liability claims, usually a certain amount of time after the manufacture, delivery or sale of the product.⁵³ Thus, these statutes focus on

47. *Ward v. Desachem Co.*, 771 F.2d 663, 665 (2d Cir. 1985).

48. *Id.* at 667.

49. N.Y. CIV. PRAC. L. & R. 214(4), (5) (McKinney 1990 & Supp. 1992). See *Victorson v. Bock Laundry Mach. Co.*, 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975); see also *Mendel v. Pittsburgh Plate Glass Co.*, 25 N.Y.2d 340, 342, 253 N.E.2d 207, 208, 305 N.Y.S.2d 490, 492 (1969).

50. *Victorson*, 37 N.Y.2d at 403, 335 N.E.2d at 278-79, 373 N.Y.S.2d at 43-44.

51. In *Victorson*, the court noted that suit based upon an old product complicates both the manufacturer's problem in defending and the plaintiff's problem in proving that the defect existed when the product left the manufacturer's plant. *Id.* at 404, 335 N.E.2d at 279, 373 N.Y.S.2d at 44.

52. See, e.g., ARIZ. REV. STAT. ANN. § 12-551 (1982); COLO. REV. STAT. ANN. § 13-80-107 (West 1987); CONN. GEN. STAT. § 52-577a (1991); FLA. STAT. ANN. § 95.11 (West 1992 & Supp. 1992); IDAHO CODE § 6-1303 (1990); ILL. ANN. STAT. ch. 110, para. 13-213 (Smith-Hurd 1984 & Supp. 1991); IND. CODE ANN. § 33-1-1.5-5 (Burns 1986 & Supp. 1991); N.H. REV. STAT. ANN. § 507-D:2 (1983 & Supp. 1991); N.C. GEN. STAT. § 1-50(6) (1983 & Supp. 1991).

53. 13 AM. LAW. PROD. LIAB. 3d § 47:65 (1990 & Supp. 1991). For example, in Illinois the statute of repose bars claims either after "12 years from the date of the first sale, lease or delivery of possession by a seller or 10 years from the date of first sale, lease, or delivery of possession to its initial user, consumer, or other non-seller, whichever period expires earlier. . . ." ILL. REV. STAT. ch. 110, para. 13-213(b) (1991).

the age of the product, not the date of injury, and impose an absolute barrier on a cause of action after a specified period of time.⁵⁴ Since the time period within which a suit may be brought is unrelated to the date of injury, some actions may be barred by the statute of repose even before a claim arises.⁵⁵ Statutes of repose, however, do not eliminate the need to comply with a statute of limitations.⁵⁶

Claims for breach of warranty are governed by the Uniform Commercial Code's statute of limitations.⁵⁷ Such a claim must be brought within four years from the date of tender of delivery of the product.⁵⁸ An exception applies if there is an express warranty of future performance of the goods.⁵⁹ In that case, the claim may be brought within four years after the date that the breach was or should have been discovered.⁶⁰

Suppose the injury takes place without one knowing about it. For example, a person may be exposed to a toxic substance but may not know of a resulting injury until three years have passed. Does the three-year statute of limitations run from the date of the exposure? It used to, but it does not anymore.

New York courts once held that the injury occurred at the time of exposure, regardless of the victim's knowledge of the injury.⁶¹ The problem was that the victim was frequently barred

The recently proposed federal product liability legislation, *see* S. 640 *supra* note 6, also contained a statute of repose. It barred claims for injuries from certain "capital goods," where the harm is non-toxic, unless the complaint had been served and filed within twenty-five years after the delivery of the product. S. 640, § 304(b)(1). This statute of repose would have been effective only in the limited circumstance in which the claimant had received or was eligible to have received workers compensation benefits for the harm. *Id.*

54. 13 AM. LAW PROD. LIAB. 3D § 47:65 (1990 & Supp. 1991).

55. *See id.* at §§ 47:55-47:64. However, some states exempt from the application of their statutes of repose, among other things, situations in which plaintiffs sustain injuries which manifest themselves over a period of time. *Id.* at § 47:63. For example, Colorado exempts from its repose statute claims that result from prolonged exposure to hazardous material. *Id.* (citing COLO. REV. STAT. § 13-80-107(1)(b)(1987 & Supp. 1990)).

56. *Id.* at § 47:57.

57. *See* U.C.C. § 2-725 (1991).

58. U.C.C. § 2-725(1)-(2) (1991).

59. U.C.C. § 2-725(2) (1991).

60. *Id.*

61. *See* Steinhardt v. Johns-Manville Corp., 54 N.Y.2d 1008, 430 N.E.2d 1297, 446 N.Y.S.2d 244 (1981) (holding that the claim for asbestos exposure accrued at time of inhalation of asbestos and was therefore time-barred), *cert. denied*, 456 U.S. 967 (1982);

from bringing suit before even knowing of the injury. This result has frequently been regarded as unfair.⁶² An adult victim of a dangerous drug is as helpless as a child if the effect of the drug is delayed or unknowable.⁶³

The rule in New York changed for certain cases as of July 30, 1986.⁶⁴ Where the injury is caused by the "latent effects of exposure" to a toxic substance, the three-year statute of limitations begins to run from either the date the injured person first discovered or should have discovered ("through the exercise of reasonable diligence") the injury, whichever was earlier.⁶⁵ Suppose a person knows he has been injured but does not know what caused it. How then can he sue within the three-year period? A special provision allows suit to be brought within one

Thornton v. Roosevelt Hosp., 47 N.Y.2d 780, 391 N.E.2d 1002, 417 N.Y.S.2d 920 (1979) (holding that the action was time-barred because claim accrued at time of injection of substance that caused cancer twenty years later); *Schwartz v. Heyden Newport Chemical Corp.*, 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714 (1963) (holding that the statutory period of limitations began to run when the plaintiff inhaled the foreign substance), *cert. denied*, 374 U.S. 808 (1963); *Schmidt v. Merchants Despatch Transp. Co.*, 270 N.Y. 287, 200 N.E. 824 (1936) (holding that the claim for inhalation of dust that caused plaintiff to contract a disease accrued at the time of inhalation).

62. See, e.g., *Thornton*, 47 N.Y.2d at 785, 391 N.E.2d at 1005, 417 N.Y.S.2d at 924 (Fuchsberg, J., dissenting).

63. *Id.*

64. The new rule has a limited retroactive effect. Although the discovery rule applies to "acts, omissions or failures" which occurred before July 1, 1986, it will not apply if the resulting injury was or should have been discovered before that date and if the old statute of limitations would have barred an action brought before July 1, 1986. See N.Y. Civ. PRAC. L. & R. 214-c(6)(a)-(c) (McKinney 1990). For certain time-barred claims, however, a special revival statute permits suit for one year past July 30, 1986. See N.Y. Civ. PRAC. L. & R. 214-c (Hist. & Stat. Note) (McKinney 1990). The temporarily revived claims include those for personal injury and for injury to property or for death (under certain circumstances) arising from the latent effects of exposure to DES, tungsten-carbide, asbestos, chlordane and polyvinylchloride. See *id.*

65. N.Y. Civ. PRAC. L. & R. 214-c(2) (McKinney 1990 & Supp. 1992). Exposure means "direct or indirect exposure by absorption, contact, ingestion, inhalation, implantation or injection." *Id.* at 214-c(1). "Implantation" was added to 214-c by Chapter 551 of the 1992 Session Laws, effective July 24, 1992. The purpose of the change was reportedly to ensure that the discovery rule in the statute of limitations applies to breast implant cases. *Product Liability News Developments In Brief*, Prod. Safety & Liab. Rep. (BNA) 837 (Aug. 7, 1992). The "discovery" rule applies to any action "to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property . . ." N.Y. Civ. PRAC. L. & R. 214-c(2) (McKinney 1990 & Supp. 1992). It does not, however, apply to actions for medical or dental malpractice. *Id.* at 214-c(5).

year after discovery of the cause, so long as suit is brought within five years after the injury was or should have been discovered.⁶⁶ However, if the claim would otherwise be time-barred, an additional requirement must be met: plaintiff must show that it was not technologically feasible for him to have discovered the cause of the injury during the normal statute of limitations period.⁶⁷

New questions have been raised where exposure causes a minor injury that is followed by a more serious injury. For example, exposure to asbestos may, in the first instance, lead to asbestosis, which is not fatal, and later to mesothelioma, which is fatal.⁶⁸ Does the statute of limitations run from the date of the first injury or the second? Lower New York court authority has held that, where the second injury is a separate one, a new limitations period begins to run upon discovery of the second injury. Several appellate courts in other jurisdictions have agreed.⁶⁹

If the injury results from a device that becomes defective after it is implanted, the statute of limitations begins to run

66. *Id.* at 214-c(4).

67. *Id.*

68. The Tenth Circuit gives an in-depth background of asbestos diseases:

Asbestos is a naturally occurring mineral fiber with fireproof and corrosion-resistant properties that have made it valuable as an insulator. Unfortunately, it is also hazardous to one's health. The fibers are breathable and can cause asbestosis (a scarring of the lungs), mesothelioma (a cancer of various linings of various organs, notably of the lungs and abdomen) and lung cancer. Asbestosis is a type of pulmonary fibrosis produced by infiltration of microscopic asbestos fibers into lung tissue. It is a progressive disease for which there is no cure; the asbestos fibers are essentially indestructible and their scarring effect is cumulative over time. The latency period can be anywhere from five to thirty years, R. Vol. 5 at 217, depending on the intensity and duration of the exposure. Mesothelioma is an incurable cancer that can be caused by as little as an intense two to three month episode of breathing asbestos dust. R. Vol. 6 at 714. The latency period is typically 30 years or more, R. Vol. 5 at 367, but can range from less than 20 to more than 50 years, R. Vol. 6 at 751.

Menne v. Celotex Corp., 861 F.2d 1453, 1456 (10th Cir. 1988).

69. *Fusaro v. Porter-Hayden Co.*, 145 Misc. 2d 911, 548 N.Y.S.2d 856 (Sup. Ct. 1989) (stating that the time to sue for mesothelioma runs from the discovery of the disease and that it was irrelevant that plaintiff's time to sue for asbestosis had expired). See also *Marinari v. Asbestos Corp. Ltd.*, 612 A.2d 1021, 1023-24 (Pa. Super. Ct. 1992) (collecting cases); *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111 (D.C. Cir. 1982); *Eagle-Picher Indus. v. Cox*, 481 So. 2d 517 (Fla. Dist. Ct. App. 1985); *Mauro v. Raymark Indus.*, 561 A.2d 257, 262 (N.J. 1989). See 2A LOUIS R. FRUMER & MELVIN I. FRIEDMAN, *PRODUCTS LIABILITY* § 12.02 [3][d][ii] at 12-36 to 12-39 (1961).

from the date of the malfunction and not from the date of implantation.⁷⁰

C. Preemption

The key question for the preemption defense today is: where to? Before the United States Supreme Court decision in *Cipollone v. Liggett Group, Inc.*,⁷¹ no one knew how strong the preemption defense would be, at least in tobacco cases. Now we know that it is not as strong as it once was. But like a new case of silly putty, no one knows how far it will stretch or what its effect will be on products other than cigarettes.

The rules of preemption are not endemic to products liability cases, but do play an important role in them despite the general presumption that "Congress did not intend to displace state law."⁷² Preemption becomes a problem primarily when Congress regulates in a certain field but does not clearly state whether or not its regulations bar state regulation or damage actions by injured parties.

To restate the rules, Congress, pursuant to its power under the Supremacy Clause of the United States Constitution,⁷³ may expressly declare that state law is preempted or a federal law may be so comprehensive in a given area that state legislation is excluded.⁷⁴ Also, state law may conflict with (and thus be preempted by) federal regulations⁷⁵ or state law may otherwise block congressional objectives.⁷⁶

The *Cipollone* story, which recently concluded when the plaintiff voluntarily discontinued the case, was a remarkable one of persistence.⁷⁷ It was an action to recover damages for the

70. *Martin v. Edwards Lab., Div.*, 60 N.Y.2d 417, 422, 457 N.E.2d 1150, 1152, 469 N.Y.S.2d 923, 925 (1983) (disintegration of artificial heart valve, not its implantation, triggers the running of the statute of limitations).

71. 112 S. Ct. 2608 (1992).

72. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

73. U.S. CONST. art. VI, § 2.

74. *Maryland*, 451 U.S. at 746 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

75. *Id.*

76. *Id.* (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

77. After years of litigation, the parties stipulated to dismiss the case with prejudice by stipulation and order filed November 5, 1992. *Cipollone v. Liggett Group, Inc.*, Civil Action No. 83-2864 (D. N.J. filed Nov. 5, 1992). The chief attorney for the plaintiff, Marc

death of Rose Cipollone who began smoking in 1942 and died of lung cancer in 1984.⁷⁸ Plaintiff claimed that the tobacco companies were responsible for breaching express warranties in their advertising, failing to warn of the hazards of smoking, fraudulently misrepresenting the hazards of smoking to consumers, and conspiring to deceive the public regarding medical and scientific information about smoking.⁷⁹

In *Cipollone*, the Third Circuit upheld a preemption defense as against plaintiff's claims.⁸⁰ According to *Cipollone*, Congress struck a balance in the Federal Cigarette Labelling and Advertising Act of 1965⁸¹ between the needs of national health and the national economy. As part of the balance, claims challenging the adequacy of the warnings on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes were impliedly preempted.⁸² Looking at the statutory scheme, as discussed in *Cipollone*, court after court barred claims for personal injuries asserted after the advent of the Act.⁸³

But plaintiffs in cigarette cases did not go away. After 1990, chinks began to appear in the cigarette companies' defense. Appellate courts in New Jersey and Texas held that the smoking claims were not preempted — either expressly or impliedly.⁸⁴

Edell, had fought the case for years. When his firm withdrew from the case, he was quoted as saying, "The firm got tired of pouring money down a bottomless pit." Margolick, *Tobacco Its Middle Name, Law Firm is Thriving*, N.Y. TIMES, November 20, 1992, at B16. The withdrawal cannot diminish the tenacity and skill (regardless of one's opinion of the merits) with which the case was prosecuted and defended. See also Prod. Safety & Liab. Rep. (BNA) 1249-50 (Nov. 13, 1992) (discussing reasons for termination of case).

78. *Cipollone*, 112 S. Ct. at 2613.

79. *Id.*

80. *Cipollone v. Liggett Group*, 789 F.2d 181 (3d Cir. 1986), cert. denied, 479 U.S. 1043 (1987).

81. Federal Cigarette Labelling and Advertising Act, 15 U.S.C. §§ 1331-41 (1982 and Supp. III 1992).

82. *Cipollone v. Liggett Group*, 789 F.2d at 187.

83. Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-41 (1982 & Supp. III 1992). See the following cases which held cigarette claims to be preempted: *Kotler v. American Tobacco Co.*, 926 F.2d 1217 (1st Cir. 1990); *Pennington v. Vistrion Corp.* 876 F.2d 414 (5th Cir. 1989); *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230 (6th Cir. 1988); *Stephen v. American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987); *McSorley v. Phillip Morris*, 170 A.D.2d 440, 565 N.Y.S.2d 537 (2d Dep't 1991).

84. *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239, 1243 (N.J. 1990) (jury may

The Texas court struck a familiar theme. The cigarette statute proposed minimum warning standards; a jury, however, could hold a cigarette company responsible for not warning more.⁸⁵ Because of a conflict among various appellate courts, the Supreme Court granted petitioners' writ of certiorari in *Cipollone*.⁸⁶

In *Cipollone*, the Supreme Court departed from the prior cases in predicating its decision on whether or not there was express (not implied) preemption. It also rejected the majority view by upholding a number of plaintiff's claims. But there was no bright line rule as to whether all or none of plaintiff's claims were preempted, although two separate opinions would have established one.

According to the Court, when Congress has expressly considered the question of preemption and has included a preemption provision in the legislation, there is no basis for implying preemption.⁸⁷ To determine whether a claim is preempted, the analysis must begin and end with the preemption provision.⁸⁸ Either the claim is expressly preempted or it is not preempted at all.⁸⁹ Looking at the plaintiff's claims one by one, the Court held that some survived and some did not.⁹⁰

decide that a cigarette manufacturer should bear the cost of injuries that could have been prevented with a more detailed warning than that required under the cigarette act); *Carlisle v. Philip Morris, Inc.*, 805 S.W.2d 498, 517 (Tex. Ct. App. 1991) (cigarette labeling act does not show "expressly or by necessary implication . . . the clear, manifest, and unambiguous expression of congressional intent needed to require preemption of the common-law tort claims alleged here").

85. *Carlisle*, 805 S.W.2d at 517.

86. The Supreme Court found a conflict between the holdings of *Cipollone* and other federal courts, on the one hand, and the decisions of the Supreme Courts of New Jersey and Minnesota, on the other. *Cipollone*, 112 S. Ct. at 2613.

87. *Cipollone*, 112 S. Ct. at 2618.

88. *Id.*

89. Justice Scalia's partial concurrence and dissent phrased the rule as follows: "The statute that says *anything* about pre-emption must say *everything*; and it must do so with great exactitude, as any ambiguity concerning its scope will be read in favor of preserving state power." *Id.* at 2634 (Scalia, J., concurring in part and dissenting in part) (emphasis in original). According to Justice Scalia, "only the most sporting of congresses will dare to say anything about pre-emption" if that is to be the rule. *Id.*

90. In so doing, the Court adopted a compromise position, despite the finding by three justices (Blackmun, Kennedy and Souter) in one separate opinion that none of plaintiff's claims was preempted, 112 S. Ct. at 2625 (Blackmun, J., concurring in part and dissenting in part), and by two justices (Scalia and Thomas) in another opinion that the failure to warn claims were barred by the 1965 act and all of plaintiff's claims by the

The Court started with the preemption provisions of the Cigarette Act, both the 1965 and 1969 versions.⁹¹ According to the Court, the 1965 version did not preempt state law damage claims; rather it “merely prohibited state and federal rule-making bodies from mandating particular cautionary statements on cigarette labels or in cigarette advertisements.”⁹² The fact that there was a required warning alone was not enough for a finding of preemption.⁹³ “That Congress requires a particular warning label does not automatically preempt a regulatory field.”⁹⁴

The 1969 version preempted the warning claims because its language barred any “requirements or prohibitions imposed under state law.”⁹⁵ The distinction made by the Court was far from clear to the litigants.⁹⁶ Both sides had taken the position that there was no difference in the preemptive effect of the 1965

1969 act. *Id.* at 2634-36 (Scalia, J., dissenting). Justice Blackmun specifically rejected the Court's claim by claim analysis. He stated that Congress never provided that any particular claim was or was not preempted for an obvious reason — it never intended to displace state law claims. *Id.* at 2625 (Blackmun, J., concurring in part and dissenting in part).

91. The 1965 version stated at Section 5 of the Act:

(a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.

(b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Cipollone, 112 S. Ct. at 2616 (citing 15 U.S.C. § 1331 (1982)).

The 1969 Act replaced the original Section 5 (b) preemption provision with one that read:

“(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.” *Id.*

92. 112 S. Ct. at 2618.

93. *Id.*

94. *Id.* at 2618. The Court adverted to the Comprehensive Smokeless Tobacco Health Education Act of 1986, noting that there is no “inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common law damages actions.” *Id.* at 2618. In that act, there was express preemption of state and local requirements regarding statements on the use of smokeless tobacco products and health; at the same time, the act preserved state law damage actions based on these products. *Id.*

95. *Id.*

96. *See id.* Nor was it clear to Justice Blackmun in his partial concurrence and dissent. Justice Blackmun noted that the 1969 version did not “clearly or manifestly” preempt state law damage actions and that the Court's analysis rested on a “fragile textual hook.” *Id.* at 2627 (Blackmun, J., concurring in part and dissenting in part).

and 1969 versions.⁹⁷ The parties simply came to different conclusions, the tobacco companies having found preemption and plaintiff having found none.⁹⁸

In holding that the 1969 version barred certain common law damage actions, the Court rejected plaintiff's view that common law damage actions did not impose requirements or prohibitions — a view which had found some support in the cases involving cigarettes and other products.⁹⁹ The Court concluded that state regulation may be as effectively exerted through an award of damages as through some form of preventive relief: the obligation of paying compensation can be a “‘potent method of governing conduct and controlling policy.’”¹⁰⁰

The Court's finding of express preemption was new; typically, courts had been finding implied preemption of state damage actions, not express. The Court, citing a “strong presumption against preemption,” then decided that it must “narrowly construe” the preemptive provision and determine, one by one, whether each of plaintiff's claims was preempted.¹⁰¹ Again departing from the majority of cases which had precluded all claims such as plaintiff's on the grounds of preemption, the Court decided that there was preemption of some common law damage claims, but for purposes of the cigarette legislation, the

97. *Id.* at 2618.

98. *Id.* at 2619-21.

99. *Id.* at 2620.

100. *Id.* (quoting *San Diego Bldg. Trades Council v. Garman*, 359 U.S. 236, 247 (1959)). The Supreme Court appeared to disapprove the position that damage verdicts do not have regulatory effect. However, that position was not only accepted by the partial concurrence and dissent by Justice Blackmun, but also by prior commentaries and cases. According to Justice Blackmun, a damage verdict does not require a manufacturer to change its behavior in any particular way. “[A manufacturer] may decide to accept damages awards as a cost of doing business and not alter its behavior in any way.” *Id.* at 2628 (Blackmun, J., concurring in part and dissenting in part). *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1541 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984) (seller of paraquat may comply with both federal and state law by using EPA-approved label and paying damages to successful tort plaintiffs; denying claim that Federal Insecticide, Fungicide and Rodenticide Act and EPA labeling requirements preempt claim under state law for failure to warn). See also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 490-91 (2d ed. 1988) (permitting a state damage action does not require more stringent warnings to be used; rather this, in effect, provides that if such warnings are not used the defendant may have to pay for the resulting damages).

101. *Cipollone*, 112 S. Ct. at 2621.

"common law is not of a piece."¹⁰²

The first claims the Court looked at were those involving a breach of duty to warn. These claims alleged that the cigarette companies' post-1969 advertising should have involved different or more clearly stated warnings.¹⁰³ One of plaintiff's claims alleged that tobacco companies had neutralized the warnings through positive images of glamorous and happy people in their advertising and promotion.¹⁰⁴ These claims were held to be preempted.¹⁰⁵

But at the same time, the Court went on to state that the 1969 Act did not preempt other claims: for example, claims that "rely solely on" the cigarette companies' "testing or research practices or other actions unrelated to advertising or promotion."¹⁰⁶ Thus express warranty claims were not preempted even though they were primarily based on statements made in cigarette advertising.¹⁰⁷ A breach of warranty claim did not rest on a duty imposed under state law but rather on a "contractual commitment voluntarily undertaken" by the cigarette companies.¹⁰⁸ If that duty was imposed by anyone, it was imposed by the companies on themselves.¹⁰⁹

102. *Id.*

103. *Id.*

104. *Id.* at 2623. See also note 119, *infra*.

105. *Id.* Although the Supreme Court did not reach the question, some commentators have argued that because the courts lack expertise in this area, deference should be given to the legislature and administrative agencies to prescribe warnings, unless there is clear and convincing evidence that the warning is insufficient. See James Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 321 (1990). Furthermore, they contend that the courts should be reluctant to permit litigation resulting from the failure by defendants to add "small increments" of warnings to those legislatively mandated. *Id.* at 322. According to these commentators, the holdings in many preemption cases involving failures to warn are a result of common sense or "common law preemption," not federal preemption. *Id.*

106. *Cipollone*, 112 S. Ct. at 2622.

107. *Id.* at 2623.

108. *Id.* at 2622.

109. *Id.* at 2622 n.24. The Court cited as an example of an express warranty claim a hypothetical case in which a manufacturer agreed to pay the smoker's medical bills if he contracted emphysema. *Id.* at 2622. Precisely how significant the existence of express warranty claims is in deterring current conduct by tobacco companies is unclear. Although explicit health claims about cigarettes were purportedly common before and during the 1950s, that is less the case today. R. Daynard, *Cipollone Ruling Sends Industry A Message: Say Goodbye to Federal License to Lie*, Prod. Safety & Liab. Rep. (BNA)

Another claim which survived preemption was fraudulent misrepresentation of material facts or concealment of such facts.¹¹⁰ To begin with, the Court noted that some of those claims could involve a duty to disclose outside the channels of advertising or promotion and therefore would not be preempted.¹¹¹ For instance, the Court suggested, a state law might require the disclosure of certain facts to an administrative agency.¹¹²

Nevertheless, even if the misrepresentation or concealment claims related to false statements in advertising, they would not be preempted.¹¹³ They do not rest on a duty related to smoking and health but on a "more general obligation — the duty not to deceive."¹¹⁴ Also, unlike state law obligations regarding the sufficiency of warnings, claims with respect to fraudulent misrepresentation would involve a uniform standard, namely, whether or not the misrepresentation was false.¹¹⁵

The last common-law claims to survive were those alleging a conspiracy to "misrepresent or conceal material facts concerning the health hazards of smoking."¹¹⁶ The Court referred to evidence described in the district court decision that the cigarette industry was involved in a "sophisticated" conspiracy to "refute," "undermine," and "neutralize information coming from the scientific and medical community."¹¹⁷ Finding that this claim rested on a duty not to conspire to commit fraud, the Court held that it was likewise not preempted by the cigarette legislation.¹¹⁸

Who won and what difference does this all make? In con-

712, 713 (July 3, 1992). However, advertising for filter and low-tar cigarettes may contain representations of their relative safety which might arguably qualify as express warranties. *Id.* So might health claims made by legal and public relations representatives of tobacco companies. *Id.* In the district court in *Cipollone*, the jury awarded \$400,000 against the cigarette manufacturer for breach of express warranty, but the award was reversed on appeal. See *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541 (3d Cir. 1990).

110. *Cipollone*, 112 S. Ct. at 2623.

111. *Id.*

112. *Id.*

113. *Id.* at 2623-24.

114. *Id.* at 2624.

115. *Id.*

116. *Id.*

117. *Id.* at 2625.

118. *Id.* at 2624-25.

trast to the pre-*Cipollone* landscape, on balance, the decision favored plaintiffs in cigarette cases. In case after case, plaintiffs' cigarette claims were being swept aside on preemption grounds. In the future, this will not be the case — except to the extent that the claims rest on breach of duty to warn. But although plaintiffs may be better off, the Court perhaps has left them with only a dry crust. Plaintiffs who seek to establish fraud and express warranty claims may find both to be more difficult to establish than the breach of duty to warn claim.¹¹⁹ Fraud essentially requires the establishment of intentional misconduct; express warranty virtually requires explicit health claims.

What about plaintiffs in cases involving other products where preemption defenses are raised? The future looks promising for them too. The Court confirmed a disinclination to find claims preempted: there is a strong presumption against preemption and preemptive provisions must be narrowly construed.¹²⁰ The Court potentially eliminated any implied preemption analysis where there is an express preemption claim. This limits the use of an implied preemption defense. Finally, the Court disclaimed a broad brush approach, instead picking and choosing among the claims to decide which will survive and which will not. Such a narrow approach should benefit plaintiffs who more often than not would find themselves on the wrong side of the courthouse door following a preemption decision.

The point of the lawsuits is to win and it remains uncertain to what extent plaintiffs will be able to win cigarette actions. Tobacco companies are formidable adversaries, prepared to litigate despite great expense; and few plaintiffs may have the staying power to prevail against them.¹²¹ Although the tobacco com-

119. The failure to warn claim would have required a showing that additional or more clearly stated warnings were required. *Id.* at 2621. One of plaintiff's fraudulent misrepresentation theories was that cigarette advertising tended to neutralize the federally-mandated warnings by associating smoking with positive attributes such as contentment, glamour, romance, youth and happiness. The Supreme Court found this claim inextricably tied to the failure to warn claim and therefore preempted. *Id.* at 2623.

120. *Id.* at 2608, 2618.

121. Although the plaintiff in *Cipollone* discontinued the case after the Supreme Court decision, the case involved unusual expense and ended up in the Supreme Court where it had to be argued twice. *Cipollone* was a groundbreaking case and not every future plaintiff will have the same obstacles to overcome. See Joseph Kelner and Robert S. Kelner, *The Tobacco Industry and 'Cipollone'*, N.Y.L.J., Aug. 25, 1992, at 3 (volume of

panies have lost what has been essentially a complete defense, they have not lost their other defenses. For example, in cases based on post-1966 injuries, even where there is no preemption defense, plaintiffs will encounter the defense that they voluntarily assumed the risk of injury in light of the warnings.¹²² However, as a result of *Cipollone*, the tobacco companies now stand more evenly with other products liability defendants.

Preemption in products liability has also prominently arisen in cases involving air bags.¹²³ In *Gardner v. Honda Motor Co.*,¹²⁴ the court held that the National Traffic and Motor Vehicle Safety Act of 1966 impliedly preempted plaintiff's claim of the uncrashworthiness of his automobile because of the absence of an air bag.¹²⁵ The court noted that while a jury finding of liability would not specifically require a manufacturer to install air bags, it would have the same practical effect.¹²⁶ It would be a short time before manufacturers would be required to install air bags in new cars in order to avoid the risk of liability.¹²⁷ Such decisions have been found to undercut an area that provided "great promise for the plaintiffs' bar earlier this decade."¹²⁸

Litigation of other products liability cases utilizing the preemption defense have involved vaccines,¹²⁹ fungicides,¹³⁰ air-

litigation against tobacco companies certain to accelerate after *Cipollone*).

122. Kelner and Kelner, *supra* note 121 (noting that in all tobacco litigation, the usual defense is that the smoker was adequately warned that smoking is dangerous to his health and assumed the risk).

123. See *Gardner v. Honda Motor Co.*, 145 A.D.2d 41, 536 N.Y.S.2d 303 (4th Dep't 1988), *appeal dismissed*, 74 N.Y.2d 715, 541 N.E.2d 430, 543 N.Y.S.2d 401 (1989); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988); *Kelly v. General Motors Corp.*, 705 F. Supp. 303 (W.D. La. 1988); *Kolbeck v. General Motors Corp.*, 702 F. Supp. 532 (E.D. Pa. 1988); *Schick v. Chrysler Corp.*, 675 F. Supp. 1183 (N.D.S.D. 1987); *Wickstrom v. Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. Ct. App. 1987); see also Beverly L. Jacklin, Annotation, *Federal Pre-Emption of State Common-Law Products Liability Claims Pertaining to Motor Vehicles*, 97 A.L.R. FED. 853 (1990).

124. 145 A.D.2d 41, 536 N.Y.S.2d 303 (4th Dep't 1988), *appeal dismissed*, 74 N.Y.2d 715, 541 N.E.2d 430, 543 N.Y.S.2d 401 (1989).

125. *Gardner*, 145 A.D.2d at 46, 536 N.Y.S.2d at 306.

126. *Id.* at 47, 536 N.Y.S.2d at 306-07.

127. *Id.* (citing *Wattelet v. Toyota Motor Corp.*, 676 F. Supp. 1039 (D. Mont. 1987); *Vanover v. Ford Motor Co.*, 632 F. Supp. 1095 (E.D. Mo. 1986)).

128. *Henderson & Eisenberg*, *supra* note 14, at 495.

129. *Abbot v. American Cyanamid Co.*, 844 F.2d 1108 (4th Cir.) (holding that state laws regarding liability for defective design of vaccine or manufacturer's failure to warn are not preempted by federal law where plaintiff sues for neurological injuries sustained as a result of inoculation with defendant's DPT vaccine), *cert. denied*, 488 U.S. 908

craft,¹³¹ and tampons.¹³² Preemption analysis in future cases is likely to follow the *Cipollone* model, with strict attention being paid to express preemption provisions; reluctance to find implied preemption where there is an express preemption clause; and claim by claim analysis, where possible, applying an express preemption clause to determine which claims are preempted and which are not.¹³³ Finally, where a preemptive provision approaches the language of the 1965 cigarette act ("no statement shall be required"), a court may well find state law preempted yet permit common law claims for damages.

(1988).

130. *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir.) (denying claim that Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") and EPA labelling requirements preempt state law failure-to-warn claim for injuries arising from a toxic herbicide, paraquat), *cert. denied*, 469 U.S. 1062 (1984); *Davidson v. Velsicol Chem. Corp.*, 834 P.2d 931 (Nev. 1992) (failure to warn claims arising from injuries sustained from broadcast spraying of termiticide on partially constructed home; although FIFRA does not expressly preempt claims, it impliedly does; court does not find *Cipollone* instructive on whether FIFRA preempts claims). *But see* *Little v. Dow Chem. Co.*, 148 Misc. 2d 11, 559 N.Y.S.2d 788 (Sup. Ct. 1990) (holding that improper labelling and failure to warn claims for injuries caused by worker's exposure to insecticide are preempted by FIFRA). *Cf. Burke v. Dow Chemical Co.*, 797 F. Supp. 1128, 1141-2 (E.D.N.Y. 1992) ("not conceivable that [after *Cipollone*] any New York State court would now find FIFRA to have completely preempted all state tort law"; denying motion for summary judgment as against plaintiffs who claim that they were brain damaged when their mother was exposed to a household insecticide while pregnant with them).

131. *Holliday v. Bell Helicopters Textron, Inc.*, 747 F. Supp. 1396 (D. Haw. 1990) (holding that crashworthiness claim against helicopter manufacturer arising from personal injuries sustained in helicopter crash was not preempted by Federal Aviation Act).

132. *Krause v. Kimberly-Clark Corp.*, 749 F. Supp. 164 (W.D. Mich. 1990) (holding that plaintiff's failure-to-warn claim was preempted). In the area of tampons, claims of preemption are based on the Medical Device Amendments of 1976, which amend the Federal Food, Drug and Cosmetic Act of 1938, 21 U.S.C. § 360 c-k (1981 & Supp. 1992), and associated 1982 FDA regulations imposing labelling requirements for tampons, 21 C.F.R. § 801.430 (b)-(d) (1992). The regulations bar the states from imposing certain contrary requirements, and in contrast to the legislation discussed in *Cipollone*, the regulations specifically include court decisions within the definition of requirements. *See Krause*, 749 F. Supp. at 168; *Berger v. Personal Prod., Inc.*, 797 P.2d 1148 (Wash. 1990) (holding that FDA labelling and warning requirements for tampons preempt state law in failure-to-warn claims arising out of death from toxic shock syndrome).

133. *Cipollone*, 112 S. Ct. at 2618-20.

D. *Learned Intermediary Defense*

The learned intermediary defense is entrenched in the prescription drug area. It is the defense that a drug manufacturer will interpose if a plaintiff claims that she was not warned of the side effects suffered from a prescription drug.¹³⁴ The argument is that the manufacturer warned the doctor and therefore satisfied its duty to warn.¹³⁵ If the manufacturer successfully invokes the defense, the only issue for the plaintiff then becomes whether the doctor adequately warned the plaintiff (the patient) and whether informed consent was given by the plaintiff.¹³⁶

The theory underlying the defense is that the doctor is best suited to convey the warnings to the patient, to assess the patient's needs, and to explain to the patient the pros and cons of the drug.¹³⁷ It is only in the rare situation, such as where medication is administered without meaningful appraisals of the risks and benefits to the patient, that it has been held that the manufacturer may have an obligation to warn the patient directly.¹³⁸

134. *Thomas v. Hoffman-LaRoche, Inc.*, 949 F.2d 806, 811 (5th Cir. 1992) (applying Mississippi law); see also *Billsborrow v. Dow Chem., U.S.A.*, 139 Misc. 2d 488, 491, 527 N.Y.S.2d 352, 354 (Sup. Ct. 1988).

135. *Thomas*, 949 F.2d at 811.

136. See, e.g., *Calabrese v. Trenton State College*, 392 A.2d 600, 605 (N.J. Super. Ct. App. Div. 1978) (reversing summary judgment granted in favor of defendant physicians on issue of whether informed consent was given, while relieving defendant drug manufacturer, distributor and seller of liability on learned intermediary grounds). See Judith P. Swazey, *Prescription Drug Safety and Product Liability in THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION*, 291, 319 (Peter W. Huber and Robert Litan, eds., 1991) (hereinafter, *THE LIABILITY MAZE*) ("[p]resumptively physicians will both read and carefully heed the labeling information, and in prescribing a drug they will explain its indications, risks, and proper administration so that the patient can informedly consent to its use;" refers to sort of "Norman Rockwell" image of ignorant patient sitting in presence of all-knowing doctor (citing Paul Rheingold, *The Expanding Liability of the Drug Manufacturer to the Consumer*, 40 *FOOD DRUG COSM. L.J.* 135 (1985))). Prescription drugs are considered to be unavoidably unsafe products. *Lindsay v. Ortho Pharm. Corp.*, 637 F.2d 87, 90 (2d Cir. 1980); *Wolfgruber v. Upjohn Co.*, 72 A.D.2d 59, 61, 423 N.Y.S.2d 95, 97 (4th Dep't 1979), *aff'd*, 52 N.Y.2d 768, 417 N.E.2d 1002, 436 N.Y.S.2d 614 (1980). However, they are not unreasonably dangerous so long as they are properly prepared and accompanied by suitable warnings. See *RESTATEMENT (SECOND) OF TORTS* § 402A cmt. k (1965). As noted above, these warnings are to doctors, not patients.

137. *Lindsay*, 637 F.2d at 91.

138. See *Samuels v. American Cyanamid Co.*, 130 Misc. 2d 175, 180-84, 495 N.Y.S.2d 1006, 1011-13 (Sup. Ct. 1985) (vaccine administered by company clinic in connection with overseas travel). But see Paul Rheingold, *What Distinguishes Drug Litigation From Other Product Liability Litigation*, *Prod. Safety & Liab. Rep.* (BNA) 136

How are these warnings conveyed? They are typically conveyed to doctors through: (1) package inserts which come with the drug; (2) the Physicians Desk Reference¹³⁹; (3) letters to physicians; (4) product information available at medical conventions; or (5) specially-trained field representatives of the manufacturers.¹⁴⁰ If the warnings conveyed to the doctors are insufficient, the manufacturer is still responsible.¹⁴¹

Defendants have tried, with limited success, to expand the defense beyond the medical field.¹⁴² For example, in one case, a manufacturer argued that it was sufficient to warn the employer about the dangers of an employee's use of dry ice and, therefore, the manufacturer was not responsible for the employee's death resulting from inhaling harmful fumes.¹⁴³ The court held that the manufacturer had a duty to warn the employee directly and upheld the award against it for wrongful death.¹⁴⁴

In another case, a New York court held that a manufacturer of trichloroethylene had an obligation to warn an employee directly of the dangers of its use.¹⁴⁵ Although the manufacturer had given extensive warnings to the bulk chemical supplier to which it had sold the chemical, the court found that that was not enough.¹⁴⁶

(Dec. 6, 1991) (commenting that doctors are sparing and rushed with what they tell patients and few doctors pass along risks); Swazey, *supra* note 136, at 327 ("[doctors] are not omniscient about diseases and treatments . . . ; they usually do not do a very good job of communicating with their patients; and they do misprescribe.").

139. PHYSICIANS DESK REFERENCE (Adele L. Dowd ed., 1990). The Physicians Desk Reference is a book which contains information and warnings on a host of drugs.

140. *Lindsay*, 637 F.2d at 92.

141. *Id.*

142. *Cohen v. St. Regis Paper Co.*, 109 A.D.2d 1048, 487 N.Y.S.2d 406 (4th Dep't), *aff'd*, 65 N.Y.2d 752, 481 N.E.2d 562, 492 N.Y.S.2d 22 (1985).

143. *Id.* at 1050, 487 N.Y.S.2d at 408.

144. *Id.*

145. *Billsborrow v. Dow Chem., U.S.A.*, 139 Misc. 2d 488, 527 N.Y.S.2d 352 (Sup. Ct. 1988).

146. *Id.* at 492, 527 N.Y.S.2d at 355. The court distinguished the role of the bulk chemical supplier from that of a doctor. Unlike the bulk chemical supplier, the primary function of the doctor is to promote the health of the patient, as the doctor is an expert on health risks. The supplier's function is to market the product, and it is primarily knowledgeable about the industrial uses and disadvantages of the chemical. *Id.* But see *Rivers v. AT&T Technologies, Inc.*, 147 Misc. 2d 366, 372, 554 N.Y.S.2d 401, 405 (Sup. Ct. 1990) (refusing to hold that bulk supplier of chemical solvent had duty directly to warn decedent allegedly injured by exposure to solvent, where, among other things, the bulk supplier extensively warned its immediate distributees, each of which was a "re-

In a third case, the court reversed a judgment against a seller of heat blocks.¹⁴⁷ The seller had adequately warned the purchaser (a fire department) to insulate the heat blocks before using them and not to let them touch the user's skin.¹⁴⁸ A nurse used the product in the presence of a fireman, who had received the warning, without insulation, causing severe injury to an infant.¹⁴⁹ In reversing the judgment, the court reasoned that the fireman (who had received the warning) had the means and opportunity to warn the nurse on the use of the heat blocks since he knew of the safety requirement; but instead, he had stood by idly without providing a warning.¹⁵⁰

E. *Substantial Alteration*

Assume that a manufacturer sells a machine with a safety guard attached. The buyer purchases the machine to make jewelry but finds that the machine cannot be used to make any jewelry without cutting a hole in the safety guard. The buyer subsequently does so with the manufacturer's knowledge. While working on the machine, the buyer's employee accidentally sticks his hand through the hole in the guard and is injured. Who may the employee sue? First, the employee cannot sue the employer; the employer has the workers' compensation defense. Second, the employee cannot sue the manufacturer under the substantial alteration defense.¹⁵¹

Indeed, in *Robinson v. Reed-Prentice Div.*,¹⁵² the manufacturer had previously sold the buyer several jewelry making machines that the buyer had altered in precisely the same way.¹⁵³

sponsible intermediary, fully aware of the implications of exposure . . .").

147. *McLaughlin v. Mine Safety Appliances Co.*, 11 N.Y.2d 62, 72, 181 N.E.2d 430, 435, 226 N.Y.S.2d 407, 414 (1962) (reversing judgment and remanding for a new trial because of an erroneous instruction).

148. *Id.* at 70, 181 N.E.2d at 435, 226 N.Y.S.2d at 413.

149. *Id.* at 65, 181 N.E.2d at 431, 226 N.Y.S.2d at 409.

150. *Id.* at 72, 181 N.E.2d at 435, 226 N.Y.S.2d at 414.

151. *See Henderson & Eisenberg, supra* note 14, at 493 (courts once believed that the "next best solution," which was "superior to leaving the employees to their limited worker compensation remedies" was to allow recovery in tort against product manufacturers; however, "a trickle of judicial doubt has, in the last several years, turned into a stream of growing proportions"). *Id.*

152. 49 N.Y.2d 471, 403 N.E.2d 440, 426 N.Y.S.2d 717 (1980).

153. *Id.* at 477, 403 N.E.2d at 442, 426 N.Y.S.2d at 719.

The manufacturer was aware of the alteration. Nonetheless, the court denied recovery to an employee injured by one of the machines.¹⁵⁴ Where, as here, a party other than the manufacturer destroys an integral safety feature of the machine and the alteration of the machine causes the injury, there is no remedy against the manufacturer.¹⁵⁵ The court found it irrelevant that the manufacturer knew what the buyer was doing to the machines.¹⁵⁶

Suppose, however, that the safety feature was designed in a way to permit its easy removal and operation of the machine without it. Where the user removes such a device, the substantial alteration defense will not apply.¹⁵⁷ If the user is injured, the user may recover against the manufacturer.¹⁵⁸

The substantial alteration defense is not limited to situations in which the buyer disables a safety device. For example, it may apply where the buyer disables the starting device on a machine, the device malfunctions, and it injures a user.¹⁵⁹ It also may apply when a buyer rewires a machine¹⁶⁰ or replaces a part¹⁶¹ and the rewiring or replacement causes the injury.

154. *Id.* at 481, 403 N.E.2d at 444, 426 N.Y.S.2d at 722.

155. *Id.* at 479, 403 N.E.2d at 443-44, 426 N.Y.S.2d at 720-21.

156. *Id.*

157. *Lopez v. Precision Papers, Inc.*, 67 N.Y.2d 871, 873, 492 N.E.2d 1214, 1215, 501 N.Y.S.2d 798, 799 (1986) (holding that where the safety guard on the forklift was designed for removal, manufacturer was not entitled to summary judgment based upon substantial alteration defense). *Cf. Darsan v. Guncallito Corp.*, 153 A.D.2d 868, 545 N.Y.S.2d 594 (2d Dep't 1989) (exception for easily removable devices inapplicable; safety guard of meat grinder affixed with three fairly heavy rivets which would have to be removed forcibly). However, the defense may be unavailable where the plaintiff establishes that the manufacturer failed to warn of the dangers of using the machinery without the safety guard in place. *Id. See also Tavares v. Hobart Waste Compactor*, 151 A.D.2d 251, 542 N.Y.S.2d 170 (1st Dep't 1989) (waste compactor fails to contain warning of the dangers of operation without a properly functioning safety interlock in place; complaint upheld despite substantial alteration defense).

158. *Precision Papers*, 67 N.Y.2d at 873, 492 N.E.2d at 1215, 501 N.Y.S.2d at 799.

159. *Jiminez v. Dreis & Krump Mfg. Co.*, 736 F.2d 51 (2d Cir. 1984) (involving press that employer altered from foot-activated to electric-pneumatic hand-activated; employee injured when press inadvertently recycled).

160. *Bingham v. Godfrey*, 114 A.D.2d 987, 495 N.Y.S.2d 428 (2d Dep't 1985), *appeal dismissed*, 67 N.Y.2d 753, 500 N.Y.S.2d 102 (1986) (person electrocuted while using vacuum; death caused by third-party's rewiring of the plug).

161. *Hansen v. Honda Motor Co.*, 104 A.D.2d 850, 851, 480 N.Y.S.2d 244 (2d Dep't 1984) (replacement of wheel on motorcycle).

F. Government Contractor Defense

Although this defense appears to have a limited scope, its impact is substantial. It shields government military contractors from responsibility for defective designs under circumstances where manufacturers may otherwise be held liable.¹⁶² As a government spokesman stated, "When you join the military, you take an oath to defend the country and there's an understanding it involves risk."¹⁶³

This defense was established in *Boyle v. United Technologies Corp.*¹⁶⁴ The Supreme Court, in *Boyle*, barred recovery for the death of a pilot of a Marine Corps helicopter which crashed in the ocean.¹⁶⁵ At trial, the petitioner alleged that the manufacturer had defectively designed the copilot's emergency escape system; the escape hatch opened outward rather than inward. The water pressure prevented the pilot from opening the hatch underwater and getting free after the helicopter hit the ocean and the pilot drowned.¹⁶⁶

In holding that there could be no recovery, *Boyle* established a three-part test for applying the defense: (1) the federal government approved reasonably precise specifications; (2) the equipment conformed to the specifications; and (3) the supplier warned the federal government about dangers in the use of the equipment which the supplier knew about, but which the federal government did not.¹⁶⁷ The Court grounded its decision in the preemption doctrine and the discretionary function exception of the Federal Tort Claims Act.¹⁶⁸

The Court's rationale was that a suit would cause a conflict between state and federal policies.¹⁶⁹ The duty to manufacture

162. Henderson & Eisenberg, *supra* note 14, at 495 (*Boyle* "effectively bars states from further developing pro-plaintiff case law in another significant class of products liability cases: federal government contractor liability.").

163. *When Soldiers Go to War, They Assume the Risks*, N.Y. TIMES, Jan. 18, 1991, at B16 (quoting Larry Wilson, spokesperson for the Defense Logistics Agency, the supply procurement arm of the Defense Department, which also supervises most military contracts).

164. 487 U.S. 500 (1988).

165. *Id.*

166. *Id.* at 502-03.

167. *Id.* at 512.

168. *Id.* at 511-12.

169. *Id.* at 512.

escape hatches pursuant to the government's specifications would conflict with the duty to equip helicopters with the escape hatch mechanism plaintiff alleged was necessary in his state tort claim.¹⁷⁰

As the Court noted, selecting a design for military equipment may include a trade-off between greater safety and greater combat effectiveness.¹⁷¹ Permitting state tort suits against contractors would permit second-guessing these judgments.¹⁷² Also, holding the contractor responsible may cause potential contractors either to refuse to manufacture the product as specified or to increase their prices to account for the increased liability risk.¹⁷³

The defense has generally been restricted to cases involving contractors for military equipment although attempts have been made to expand it to nonmilitary products.¹⁷⁴ *Boyle* was silent

170. *Id.* at 511.

171. *Id.* The Supreme Court exempted from the government contractor defense the situation where the government orders by model number a stock item from the contractor and therefore does not participate in the design process. *Id.* at 509. Furthermore, where the government rubberstamps the contractor's design, and therefore does not meaningfully participate in the design process, the defense is inapplicable. In re Aircraft Crash Litigation: Frederick, Maryland, May 6, 1981, 752 F. Supp. 1326, 1337-38 (S.D. Ohio 1990); see also *Trevino v. General Dynamics, Corp.*, 865 F.2d 1474, 1480 (5th Cir.), cert. denied, 110 S. Ct. 327 (1989) (defense not available where government relies on contractor's design of submarine diving chamber).

172. *Boyle*, 487 U.S. at 511.

173. *Id.* at 510.

174. *Nielsen v. George Diamond Vogel Paint Co.*, 892 F.2d 1450, 1454 (9th Cir. 1990) (declining to apply government contractor defense to manufacturer of paint in claim for personal injuries sustained by civilian painter employed by U.S. Army Corps of Engineers, but holding that "underlying premise in *Boyle* applies to all government contracts, and is not limited to the military context"). See, e.g., *Reynolds v. Penn Metal Fabricators, Inc.*, 146 Misc. 2d 414, 550 N.Y.S.2d 811 (Sup. Ct. 1990) (holding that manufacturer of mail cart for U.S. Postal Service may not interpose government contractor defense to claim for injuries from mail cart). See also 13 AM. LAW PROD. LIAB. 3d § 45:36 (1990) (describing attempts to expand rule to nonmilitary equipment).

Nor does the defense apply where the allegedly defective product is generally available to commercial non-military users, without the military's needs in mind. See In re Hawaii Federal Asbestos Cases, 960 F.2d 806, 812 (9th Cir. 1992) (not enough that the contractor seeking to interpose the defense supplied goods to the military, where the product (asbestos insulation) was not manufactured with the special needs of the military in mind; military was relatively insignificant purchaser of product which was primarily designed for applications by private industry). But see In re Chateaugay Corp. v. LTV Corp., 132 B.R. 818 (Bankr. S.D.N.Y. 1991), *rev'd*, 146 B.R. 339 (S.D.N.Y. 1992) (a manufacturer of postal vehicle, even though a nonmilitary contractor, may assert govern-

on the application of the defense to nonmilitary equipment. The defense applies to claims brought by civilians against military contractors.¹⁷⁵ The defense may also apply in failure to warn cases where the government dictates the content of the warnings. If the contractor is entitled to issue whatever warnings it wants, however, the defense may not apply.¹⁷⁶ Although the defense does apply to defective design claims, it does not apply to claims of defective manufacture.¹⁷⁷

G. *State of the Art*

Where the claimed defect is one of design, it is a defense that the product, however imperfectly designed, was the best available at the time of manufacture.¹⁷⁸ The defense may also be used to exclude post-accident safety studies which were not available at the time of the manufacture.¹⁷⁹ The defense is premised on the manufacturer's awareness of "the safety, technical, mechanical and scientific knowledge in existence and reasonably feasible for use at the time of the manufacture."¹⁸⁰ As one court has stated, post-accident knowledge should not be used to prove that the manufacturer, "wiser and more experienced on law day, was foolish before."¹⁸¹

ment contractor defense in action for personal injury based on defective design of postal vehicle).

175. In re Aircraft Crash Litigation, 752 F. Supp. 1326, 1336 (S.D. Ohio 1990) (although *Boyle* involved claim brought on behalf of a military serviceman, the defense applies to claim brought against military contractors by or on behalf of civilians).

176. In re Joint E. and S. Dist. New York Asbestos Litig., 897 F.2d 626, 633 (2d Cir. 1990) (involving action for personal injuries arising from exposure to asbestos-based cement that was manufactured to precise Navy specifications).

177. *Mitchell v. Lone Star Ammunition*, 913 F.2d 242, 246 (5th Cir. 1990) (defectively manufactured mortar shell); *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311, 1317 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1479 (1990) (holding that shoddy workmanship does not invoke a federal interest; whether a defect is a manufacturing or design defect, however, is a matter of federal common law); *Zinck v. ITT Corp.*, 690 F. Supp. 1331, 1337 (S.D.N.Y. 1988) (allegedly defective night vision goggles).

178. *Voss v. Black and Decker Mfg. Co.*, 59 N.Y.2d 102, 111, 450 N.E.2d 204, 210, 463 N.Y.S.2d 399, 404 (1983) ("the design of the product in light of the state of the art at the time of production is the issue").

179. *Bolm v. Triumph Corp.*, 71 A.D.2d 429, 437, 422 N.Y.S.2d 969, 975 (4th Dep't 1979).

180. *Id.* at 438, n.2, 422 N.Y.S.2d at 975, n.2.

181. *Rainbow v. Albert Elia Bldg. Co.*, 79 A.D.2d 287, 295, 436 N.Y.S.2d 480, 485 (4th Dep't 1981), *aff'd*, 56 N.Y.2d 550, 434 N.E.2d 1345, 449 N.Y.S.2d 967 (1982).

The state of the art defense is not the same as custom in the industry.¹⁸² A manufacturer may defend itself by pointing out that an alternative design was not within the state of the art at the time of manufacture.¹⁸³ It is irrelevant to the defense, however, that none of the manufacturer's competitors used the alternative design.¹⁸⁴ The theory is that an entire industry may lag behind in what it should know about a particular product.¹⁸⁵

The defense does not permit the manufacturer to ignore the state of the art, as it develops after the date of manufacture.¹⁸⁶ A manufacturer has a post-sale duty to warn of dangers in the use of its product that come to its attention after manufacture or sale, including subsequent accidents.¹⁸⁷ The extent of the duty depends on the degree of danger involved and the number of incidents reported.¹⁸⁸

H. *Economic Loss*

The economic loss doctrine is restricted to the area of property damage.¹⁸⁹ Where a defective product injures only itself but not persons or other property, no tort action lies, only a contract

182. *Opera v. Hyva, Inc.*, 86 A.D.2d 373, 450 N.Y.S.2d 615 (4th Dep't 1982) (custom in the industry does not establish state of the art).

183. *Bolm*, 71 A.D.2d at 438, n.2, 422 N.Y.S.2d at 975, n.2.

184. *See, e.g., Opera*, 86 A.D.2d at 378, 450 N.Y.S.2d at 618 (holding that it was irrelevant that at the time of the accident, none of the defendant's competitors' manuals contained alternative method of adjusting ski bindings which plaintiff claimed should have been used); *Bolm*, 71 A.D.2d 429, 422 N.Y.S.2d 969.

185. *George v. Celotex Corp.*, 914 F.2d 26, 28 (2d Cir. 1990) ("a manufacturer may not rest content with industry practice, for the industry may be lagging behind in its knowledge about a product, or in what, with the exercise of reasonable care, is knowable about a product."). *But see Henderson & Twerski, supra* note 2, at 322 (courts have good reason to suspect custom defense since an entire industry may have an interest in conforming to suboptimal standard of care; however, courts should give substantial weight to widespread industry custom with respect to warnings).

186. *Cover v. Cohen*, 61 N.Y.2d 261, 274, 461 N.E.2d 864, 871, 473 N.Y.S.2d 378, 385 (1984).

187. *Id.* at 275, 461 N.E.2d at 871, 473 N.Y.S.2d at 385.

188. *Id.*; *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1344 (5th Cir. 1978) (alleged post-sale duty to warn of defectively designed fuel tank); *cf. Rekab v. Hrubetz*, 274 A.2d 107, 111 (Md. 1971) (post-sale warnings of danger involved in amusement park Ferris wheel); *Comstock v. General Motors Corp.*, 99 N.W.2d 627, 634 (Mich. 1959) (post-sale duty to warn purchasers of 1953 Buick with latent defects in power brakes).

189. *See, e.g., East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986) (applying admiralty law).

action.¹⁹⁰ The defense is most useful where the statute of limitations has expired for a contract action, but not for a tort action. For a tort claim, as noted above, the statute of limitations does not even begin to run before the injury has occurred,¹⁹¹ however, the contract statute of limitations, which runs from the date of tender of delivery,¹⁹² may have long since passed.

The defense applies to both strict products liability and negligence claims.¹⁹³ An open issue is whether the defense applies where there was a serious risk of injury to persons or property, even though there was no actual injury. In *East River Steamship Corp. v. Transamerica Delaval Inc.*,¹⁹⁴ the first Supreme Court decision to address substantive products liability issues, the Court held that the risk of injury was irrelevant as long as no actual injury occurred.¹⁹⁵ The Court reasoned that when there is only injury to the product itself, the plaintiff is merely seeking to recover the benefit of his bargain or for his disappointed expectations.¹⁹⁶ Traditionally, this would be a contract case¹⁹⁷ governed by the Uniform Commercial Code. Although *East River* did not rule on the necessary magnitude of injury to other property that must occur to permit tort recovery, authority exists that states it must be more than *de minimis*.¹⁹⁸ *East River* has been influential since it was decided; however, it arose in admiralty and so is not binding on issues of state law.¹⁹⁹

190. *Id.* at 872.

191. Under certain statutes, the limitations period begins to run when the injury has occurred or should have been discovered.

192. See U.C.C. § 2-725(1), (2).

193. *Schiavone Constr. Co. v. Elgood Mayo Corp.*, 81 A.D.2d 221, 439 N.Y.S.2d 933 (1st Dep't 1981), *rev'd on dissenting opinion of Silverman, J.*, 56 N.Y.2d 667, 436 N.E.2d 1322, 451 N.Y.S.2d 720 (1982) (strict tort liability); *Cayuga Harvester, Inc. v. Allis-Chalmers Corp.*, 95 A.D.2d 5, 465 N.Y.S.2d 606 (4th Dep't 1983) (negligence).

194. 476 U.S. 858 (1986).

195. See *id.* at 870.

196. *Id.*

197. *Id.*

198. See *Veeder v. NC Mach. Co.*, 720 F. Supp. 847, 853 (W.D. Wash. 1989) (holding that "other property damage" consisting of oil sprayed on certain surfaces and a rug as a result of failure of engine is *de minimis*).

199. See *Bellevue S. Assocs. v. HRH Constr. Corp.*, 78 N.Y.2d 282, 292, 579 N.E.2d 195, 199, 574 N.Y.S.2d 165, 169 (1991). Recently proposed federal products liability legislation followed the economic loss rule, excluding recovery for harm for "loss or damage caused to a product itself, or commercial loss." See S. 640, *supra* note 6, § 102(8). "Commercial loss" is defined as "economic injury, whether direct, incidental, or consequential,

The rule in New York is not so clear. There is authority that an action lies in tort where the defective product endangers, but does not injure, persons or other property.²⁰⁰ For example, where a defectively constructed wall posed an imminent danger of collapse on a crowded college campus, the court permitted recovery in tort for repair of the wall.²⁰¹

Nevertheless, the law appears to be drifting towards *East River*, and the New York Court of Appeals seems only to be waiting for the proper case in which to adopt it. In *Bellevue South Associates v. HRH Construction Corp.*,²⁰² the Court of Appeals denied recovery in strict products liability for the replacement of defective floor tiles installed in residential apartments.²⁰³ The court cited *East River* with approval and noted that it had "significant influence."²⁰⁴ It found no reason, however, to adopt it in the case because plaintiff failed to meet even a less restrictive test.²⁰⁵ Not only was there no damage to persons or other property, there was not even a risk of such injury from the defective tiles.²⁰⁶ Among other things, the court noted

including property damage and damage to the product itself." *Id.* § 102(5). See also S. REP. NO. 640, p. 22 (noting, among other things, that majority of case law follows the rule in *East River*).

Some states reject the *East River* rule. See *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc.*, 831 P.2d 724, 733 (Wash. 1992) (noting that Washington rejects the *East River* "bright-line approach" and that the majority of courts distinguish "economic loss from other damages principally according to the manner in which the product failure has occurred"). The court noted that where the failure results from a "sudden and dangerous event, it is remediable under tort principles." 831 P.2d at 733. Otherwise, it is not. *Id.* See also *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.*, 652 F.2d 1165 (3d Cir. 1981).

200. *The Trustees of Columbia Univ. v. Mitchell/Giurgola Assocs.*, 109 A.D.2d 449, 455, 492 N.Y.S.2d 371, 376 (1st Dep't 1985). See also *John R. Dudley Constr. Co. v. Drott Mfg. Co.*, 66 A.D.2d 368, 412 N.Y.S.2d 512 (4th Dep't 1979) (crane crashes to ground due to defective bolt).

201. *Columbia Univ.*, 109 A.D.2d at 454, 492 N.Y.S.2d at 376.

202. 78 N.Y.2d 282, 579 N.E.2d 195, 574 N.Y.S.2d 165 (1991).

203. *Id.* at 287, 579 N.E.2d at 196, 574 N.Y.S.2d at 166.

204. *Id.* at 292, 579 N.E.2d at 199, 574 N.Y.S.2d at 169.

205. *Id.* at 293, 579 N.E.2d at 200, 574 N.Y.S.2d at 170.

206. The court of appeals noted that over a dozen years, only three residents of the buildings in which the tiles had been installed had allegedly fallen. Although the court did not dwell on the point, it may have regarded any personal injury in the case as *de minimis*. The court also commented that there was no evidence that plaintiff had been held responsible for any injuries to persons or property. *Id.* at 294, 579 N.E.2d at 200, 574 N.Y.S.2d at 170.

that the tiles were not an inherently dangerous product, and the injury, delamination of the tiles, was not considered an abrupt, cataclysmic event.²⁰⁷

I. *Seat Belt Defense*

The seat belt defense applies to one product — the automobile. It is a key component, however, in products liability cases because automobile manufacturers are frequent products liability defendants. The seat belt defense mitigates the manufacturer's damages where the manufacturer can show that had the seat belts been worn, the injuries would have been less severe.²⁰⁸

Like the second collision (or "crashworthiness") doctrine, the seat belt defense relates to what happens after an accident has occurred.²⁰⁹ Car manufacturers have a duty to design automobiles to avoid unreasonable risks of injury to the user resulting from collision, impact, or the user's contact with the interior parts of the car and the ground.²¹⁰ The theory is as follows: had the car been properly designed, the injuries to the plaintiff would have been less severe.²¹¹

The seat belt defense is now codified in the Vehicle and Traffic Law.²¹² The defense was established in the 1974 New

207. *Id.*

208. *Spier v. Barker*, 35 N.Y.2d 444, 323 N.E.2d 164, 363 N.Y.S.2d 916 (1974); see also N.Y. VEH. & TRAF. LAW § 1229-c(8) (McKinney 1986); see *infra* note 209.

209. *Caiazza v. Volkswagenwerk, A.G.*, 647 F.2d 241, 243 n.2 (2d Cir. 1981) (defining "second collision" as usually referring to the collision between a passenger and an interior part of the vehicle after a collision; it also has been applied to ejection cases where the second collision occurs between the occupant and the ground). Cf. *Henderson & Eisenberg*, *supra* note 14, at 484 (noting that "when a driver of an automobile inadvertently crashed into a tree, courts traditionally refused to consider seriously the argument that the vehicle should have been designed to prevent or reduce injury to its occupants").

210. *Caiazza*, 647 F.2d at 243.

211. *Id.*

212. N.Y. VEH. & TRAF. LAW § 1229-c(8) (McKinney 1986) which states in pertinent part:

[n]on-compliance with the provisions of this section [operation of vehicles with safety seats and safety belts] shall not be admissible as evidence in any civil action in a court of law in regard to the issue of liability but may be introduced into evidence in mitigation of damages provided the party introducing said evidence has pleaded such non-compliance as an affirmative defense.

York Court of Appeals decision in *Spier v. Barker*,²¹³ which arose from an accident between a 1964 Ford convertible and a tractor trailer.²¹⁴ The Ford had a seat belt, but the plaintiff driver did not wear it. She was ejected from the car, which rolled over her and broke her leg.²¹⁵ The defendant's expert said that the plaintiff would have stayed in the car and sustained only minor injuries had she worn the seat belt.²¹⁶

Was plaintiff's failure to wear a seat belt contributory negligence?²¹⁷ In those days, contributory negligence would have completely barred recovery.²¹⁸ The court said it was not contributory negligence.²¹⁹ Instead, the failure to wear a seat belt was evidence in mitigation of damages.²²⁰ The court held that plaintiff may not recover for injuries that she would not have received had she worn the seat belt.²²¹ The failure to wear a seat belt must be pleaded as an affirmative defense.²²²

There must also be a relationship between the failure to wear a seat belt and an injury. Sometimes the seat belt might not have mattered, and in those cases the defense is unavailable. For example, in *Baginski v. New York Telephone*,²²³ the court recognized that the seat belt might have prevented certain fatal head injuries, but other internal injuries would have occurred anyway that would have made survival unlikely.²²⁴

J. *Workers' Compensation*

There is a tension between workers' compensation and products liability law. Workplace accidents fill the reported products liability decisions, and employers are natural products liability defendants. But workers' compensation doctrines gener-

213. 35 N.Y.2d 444, 323 N.E.2d 164, 363 N.Y.S.2d 916 (1974).

214. *Id.* at 446-47, 323 N.E.2d at 165, 363 N.Y.S.2d at 918.

215. *Id.* at 453, 323 N.E.2d at 169, 363 N.Y.S.2d at 923.

216. *Id.*

217. *Id.* at 450, 323 N.E.2d at 167, 363 N.Y.S.2d at 920.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* at 451, 323 N.E.2d at 168, 363 N.Y.S.2d at 921.

222. *Id.*

223. 130 A.D.2d 365, 515 N.Y.S.2d 23 (1st Dep't 1987).

224. *Id.* at 366, 515 N.Y.S.2d at 26.

ally bar the employee's suit against the employer.²²⁵ In New York, the compromise has been to free the employer from the employee's direct suit, but nonetheless, to permit the employer to be dragged into the case through the back door.²²⁶

As a general rule, under the Workers' Compensation Law, the employer is immune from the employee's suit for injury or death arising out of and in the course of employment, even if the employer would otherwise be liable. The sole remedy for the employee is under the Workers' Compensation Law.²²⁷ This means that if the employer is responsible for a product-related injury to his employee, the employee may not sue the employer and may only seek workers' compensation benefits.

Workers' compensation, however, has no effect on the employee's right to sue the manufacturer of the offending product. But if the employee sues the manufacturer, may the manufacturer then file a claim against the employer? In *Dole v. Dow Chemical Co.*,²²⁸ known for its analysis of the law of contribution rather than workers' compensation, the New York Court of Appeals said that it could. In *Dole*, suit was brought against a manufacturer of a fumigant by the estate of an employee killed by its fumes.²²⁹ The manufacturer was permitted to assert a claim against the decedent's employer who allegedly had caused the decedent to be exposed to the fumes.²³⁰

The courts have considered whether it is fair to permit the manufacturer to implead the employer.²³¹ In one sense, allowing this may be unfair to the employer; it permits recovery against the employer indirectly (by the manufacturer) which would not be permitted directly (by the employee). Also, the employer is exposed to a potentially larger liability than it would be if it were held responsible for the entire injury; if the employer were solely responsible, it would be shielded by the workers' compensation law.

225. N.Y. WORK. COMP. LAW §§ 10-11 (McKinney 1992).

226. *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

227. N.Y. WORK. COMP. LAW §§ 10-11 (McKinney 1992).

228. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

229. *Id.* at 145-46, 282 N.E.2d at 290, 331 N.Y.S.2d at 385.

230. *Id.* at 153, 282 N.E.2d at 294, 331 N.Y.S.2d at 391-92.

231. See generally *Gregory v. Garrett Corp.*, 578 F. Supp. 871 (S.D.N.Y. 1983).

In another sense, however, preventing the manufacturer from bringing in the employer would be unfair to the manufacturer. It would make the manufacturer bear responsibility for liability it did not cause, just because an employer is involved. Why should the manufacturer be required to subsidize the workers' compensation system?²³²

Creative lawyers have attempted to hold employers directly responsible to their injured employees where they are also manufacturers of the product under a "dual capacity" doctrine. But in *Billy v. Consolidated Machine Tool Corp.*,²³³ the court of appeals held that it would not permit a suit against the employer to proceed on that basis.²³⁴ Among other things, the court stated that the dual capacity theory treats the employer as a type of "Jekyll and Hyde."²³⁵ Therefore, although the employer in *Billy* was the successor by merger to the manufacturer of the defective machinery (a 4600 pound ram which struck and killed the employee), the court held that this fact alone did not preclude the employer from invoking the workers' compensation defense.²³⁶ Yet in *Billy*, despite the workers' compensation defense, the court held that the employer could be held responsible to the employee on a separate ground.²³⁷ The court noted that the employer had assumed the tort liabilities of the manufacturer of the machinery as a result of mergers.²³⁸ According to the court, it was therefore proper to hold the employer responsible, not because of its acts as an employer, but because of its assumption of liability.²³⁹ In other words, the employer should not be permitted to escape the responsibility that it had assumed just because the decedent also happened to be his employee.

III. Analysis

The attack on the products liability system by tort reformers has proceeded with vigor. The zealous, like former Vice-Pres-

232. *Id.*

233. 51 N.Y.2d 152, 412 N.E.2d 934, 432 N.Y.S.2d 879 (1980).

234. *Id.* at 159, 412 N.E.2d at 941, 432 N.Y.S.2d at 886.

235. *Id.* at 160, 412 N.E.2d at 938, 432 N.Y.S.2d at 883.

236. *Id.* at 162, 412 N.E.2d at 940, 432 N.Y.S.2d at 885.

237. *Id.* at 163, 412 N.E.2d at 941, 432 N.Y.S.2d at 886.

238. *Id.* at 160, 412 N.E.2d at 939, 432 N.Y.S.2d at 884.

239. *Id.* at 160-61, 412 N.E.2d 939-40, 432 N.Y.S.2d at 884.

ident Quayle, may assume that the problem or crisis in the tort system "consists simply in businesses facing too many legal claims and burdensome insurance premiums";²⁴⁰ others take a more temperate position.²⁴¹ Reformers have already registered impressive legislative and judicial gains; many state legislatures have reacted to a perceived crisis from expanded liability, for example, by enacting "breathtakingly large numbers of changes in products liability law, ranging from the trivial to the drastic to the draconian."²⁴²

240. A.L.I., REPORTERS' STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, Vol. 2, at 9 (1991) [Hereinafter, "ALI Study"]. The ALI Study is in two volumes: Volume 1 entitled "The Institutional Framework," and Volume 2 entitled "Approaches to Legal and Institutional Change". The American Law Institute, while considering this a useful study, has not adopted the Reporters' Study as an official American Law Institute Study. *Prod. Liab. & Safety Rep.*, (BNA) 285 (March 13, 1992). The American Law Institute is now engaged in a revision of Restatement (Second) of Torts, beginning with its product liability sections in section 402A. *Id.*

The ALI Study distanced itself from the extreme approach of certain reformers, commenting on "how many people suffer serious personal injuries and how often these victims do *not* have ready access to a legal system that can provide effective redress." *Id.* (emphasis in text). The study also did not endorse "more radical scholarly proposals made during the last decade for dispensing wholesale with tort liability." *Id.* at 51.

Although the ALI Study acknowledged that expanded tort liability bore "a significant share of the responsibility" for the liability insurance crisis which occurred during the 1980's, it recognized the possibility of other causes. *Id.*, Vol. 1 at 102. For example, it noted that "in the clearer light of hindsight, it seems quite possible that insurers exhibited a kind of panic mentality and reacted as a group to their fear that a tort liability revolution was occurring." *Id.*, Vol. 1, at 75-76. See also S. REP. No. 640, *supra* note 6, at 69 (minority views of Senators Hollings and Gore) (increases in product liability insurance the result of "cyclical nature of insurance industry and industry's rate-making practices," not the result of product liability). It has been noted that product liability insurance "is now generally available and well-priced." *Id.* at 68.

Tort reformers have claimed that the expansion of tort liability has hurt not only the business community but the poor. See George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1585 (1987) (current system leads to increases in price level of goods which place them out of the reach of low income consumers).

241. See, e.g., the ALI STUDY, *supra* note 240; Henderson & Eisenberg, *supra* note 14.

242. Henderson & Eisenberg, *supra* note 14, at 480. As an example of an "ill conceived" and "draconian" change, Henderson and Eisenberg note a North Carolina statute of repose which bars all product liability claims (regardless of when injury occurs) six years after the product is distributed in commerce. *Id.* at 543. See also Lipsen, *supra* note 6, at 248 (noting other state tort law changes, including revisions of doctrine of joint and several liability, modifying the collateral source rule, altering common law treatment of punitive damages, and establishing defenses based upon compliance with government standards and the state of the art).

But how much further should it go? Or, put another way, how much more ammunition should products liability defendants have?²⁴³ Maybe not as much as many people think. Commentators have noted that despite the generosity of the tort system to claimants in some cases, the system has played a small role in compensating accident victims as a whole²⁴⁴ and may even be playing a smaller one already.²⁴⁵ There are also risks that limiting recoveries further — assuming that there is validity to the concept of deterrence — will turn loose unsafe products on the unsuspecting public.²⁴⁶ Because it is not known pre-

243. The goal of reform, of course, is not to relax existing defenses but to add even more obstacles to recovery. See Robert E. Litan & Clifford Winston, *Policy Options, in LIABILITY - PERSPECTIVES AND POLICY*, 223, 229 (1988) [hereinafter, Litan & Winston]. The authors state that “[v]irtually all the tort reform measures would reduce compensation available through the [tort] system.” *Id.* at 229. They also note that limiting compensation through the tort system has been popularly labelled tort reform. *Id.* at 223. Tort reform once had quite a different connotation. See Joseph A. Page, *Deforming Tort Reform*, 78 GEO. L.J. 649, 651 (1990) (tort reform formerly evoked a notion of changing pro-defendant common law rules so that plaintiffs could win judgments and recover full damages).

The ALI Study singled out the New York workers’ compensation defense for comment, suggesting that the defense should be expanded. The authors noted, among other things, that they were attracted to the concept of eliminating an employee’s right to sue a product manufacturer in tort for injuries sustained in the workplace in exchange for significant improvements in workers’ compensation benefits for employees. ALI STUDY, *supra* note 240, at 197-98.

244. The ALI Study notes that far more people are injured than ever consider suing. ALI STUDY, *supra* note 240, Vol. 1 at 22. Few victims actually take advantage of rights supposedly available to them under the tort system. *Id.* at 51. The number of tort claims filed is much smaller than the number of tort injuries actually inflicted. *Id.* Vol. 2 at 4-5. Victims of injury and disease bear a major portion of their own losses; the tort system plays a “comparatively small role” in compensating them. *Id.* at 59. Cf. S. REP. NO. 640, *supra* note 6, at 2 (persons “with the severest injuries tend to receive far less than their actual economic losses, while those with minor injuries are overcompensated”).

Even for those who sue, the results are uncertain. See Huber, *supra*, note 23 at 17. Huber notes that because of the “lottery like mechanics of litigation,” injury victims should not spend or rely on any winnings “before they are firmly in hand.” *Id.*; see also ALI STUDY, *supra* note 240, Vol. 1, at 23. The authors of the ALI Study note that there is a wide gap between negligent injuries and successful suits for such injuries. *Id.* The Senate Report likewise stresses the unpredictability of the product liability system, noting that “identical cases can produce startlingly different results.” S. REP. NO. 640, *supra* note 6, at 2.

245. See Henderson & Eisenberg, *supra* note 14, at 534.

246. According to Litan & Winston, see *supra* note 243, at 229, “reducing compensation could weaken deterrence.” They noted that there is “relatively little empirical information” to show how compensation could be “modified” without “compromising deterrence.” *Id.* The problem with this argument, of course, is that it presumes the rela-

cisely how successful the present tort system is, there is a need for further study before acting too rashly to produce reform. As one commentator has stated, "[t]oday we simply know too little to be confident that any major overhaul of the U.S. tort system would produce more benefit than harm."²⁴⁷ In the area of tort reform, we seem to be "flying blind," and it is unclear when the visibility will improve.

This lack of knowledge is evident, among other places, in the safety versus innovation controversy. Consider the debate over whether the primary effect of products liability is the desired one — encouraging the manufacture of safer products — or the undesired one — discouraging the manufacture of newer products, which are presumably safer. There seems to be agreement that there is insufficient evidence to substantiate either assertion.²⁴⁸ The inadequate proof of the system's effectiveness apparently stems to some extent from an inherent difficulty in measuring results.²⁴⁹ For example, in attempting to evaluate the success of the tort system in ensuring safer products, a

tionship between expanded liability and deterrence.

Furthermore, liability is arguably only one of a number of deterrent factors. For example, it has been recognized that automobile safety is promoted not only by liability but by consumer demand for safer products, government regulation (which, of course, does not affect all products), and professional responsibility of the manufacturer. John D. Graham, *Product Liability and Motor Vehicle Safety*, in *THE LIABILITY MAZE*, *supra* note 136, at 127; Peter W. Huber & Robert E. Litan, *Overview*, in *THE LIABILITY MAZE*, *supra* note 136, at 1-2.

247. Litan & Winston, *supra* note 243, at 241.

248. Huber & Litan, in *THE LIABILITY MAZE*, *supra* note 136, at 1-2. However, the nature of the evidence varies from industry to industry.

249. Judith Swazey, *Prescription Drug Safety and Product Liability*, in *THE LIABILITY MAZE*, *supra* note 136, at 327. Swazey notes that solid evidence as to the effects of the product liability system on prescription drug safety is either non-existent or unavailable; evidence generally consists of single cases, anecdotes, opinions and poorly defined surveys. *Id.*; see also ALI STUDY, *supra* note 240, Vol. 1 at 400. The ALI Study notes that the argument that increases in insurance costs and reductions in insurance availability have led to, among other things, a decrease in socially beneficial innovations, products and services rests primarily on anecdotal evidence. *Id.*; Lipsen, *supra* note 6, at 254 (reliance based on "host of anecdotes about ridiculous-sounding cases in which undeserving consumers and lawyers get rich quick from out-of-control juries"). See also *id.* at 252 (insurance industry "steadfastly refuses to produce hard evidence" of linkage between "tort theories or recoveries and insurance rate increases"). Accord, Kenneth Jost, *Tampering with Evidence: The Liability and Competitiveness Myth*, A.B.A. J. Apr., 1992, at 44 (tort reform message "is fundamentally false — the product of dubious anecdotes, questionable research, concocted statistics, factual and legal misstatements, and willful disregard of contradictory evidence").

problem lies in determining how many accidents have been *avoided* because of the threat of liability to manufacturers. In attempting to evaluate the tort system's ability to chill innovation, a problem lies in determining how many safe products have *not* been marketed because of fear of liability.²⁵⁰ Framed in this manner, the problem has been noted to be as difficult as determining how many "dogs don't bark in the night."²⁵¹

In light of this lack of knowledge concerning the effectiveness of the tort system, tort advocates and reformers alike should proceed with caution. Pending completion of additional research, the courts and the legislatures would be well advised to refrain from gratuitous evaluations of the tort system which even scholars cannot substantiate, let alone to use such evaluation as a basis for decision-making. Senators who have opposed the adoption of the proposed federal products liability legislation have adopted a similar position.²⁵²

What are the chances that the courts and legislatures will act cautiously? Regrettably, problems which stump scholars sometimes pose no obstacle for the legislatures or courts, perhaps because they believe that they know what is unknowable. Law will be made despite the absence of evidence.²⁵³ Thus in the

250. Huber & Litan, in *THE LIABILITY MAZE*, *supra* note 136, at 10. The authors state that there is difficulty in obtaining empirical evidence of things that do not happen. *Id.* Peter H. Schuck, *Introduction in TORT LAW AND THE PUBLIC INTEREST* 37 (Peter H. Schuck ed. 1991) ("few questions are more difficult to investigate empirically and answer conclusively"; other factors than desire to avoid tort liability also influence manufacturers). Even when there is empirical evidence available, there is uncertainty about how well the tort system achieves its objectives and whether alternative systems would do better or worse. ALI STUDY, *supra* note 240, Vol. 1, at 351.

251. Huber & Litan, in *THE LIABILITY MAZE*, *supra* note 136, at 10.

252. See S. REP. NO. 640, *supra* note 6, at 59 (minority views of Senators Hollings and then Senator (and now Vice President) Gore) ("what is deeply disturbing about this legislation [*i.e.*, S. 640, *supra* note 6] is the total lack of verifiable, objective data which supports the proponents' claims"); *Id.* at 61 ("[b]efore we make dramatic changes in the product liability law, we should, at the least, have information to demonstrate that the current system needs fixing"); *id.* at 80 ("[e]nactment of S. 640 would amount to legislation which dramatically revises our current legal system without any serious factual predicate for such a change").

253. See Huber & Litan, in *THE LIABILITY MAZE*, *supra* note 136, at 20. "[T]he one issue beyond dispute is that legal rules are policy, and policy *will* be made, in courts if not in legislatures, with or without data." *Id.* (emphasis in text). See also Judith Swazey, *Prescription Drug Safety and Product Liability*, in *THE LIABILITY MAZE*, *supra* note 136, at 292 ("it is interesting to wonder how policy is made" in the absence of solid data).

recent case of *Enright v. Eli Lilly & Co.*,²⁵⁴ the New York Court of Appeals had no trouble — despite the lack of empirical evidence to support its conclusion — in embracing one of the tort reformers' pet concepts to bar third generation victims of DES from recovery. As one of its rationales, the court noted that permitting recovery by these victims might "overdeter" pharmaceutical manufacturers from marketing safe drugs.²⁵⁵

Finally, what significance do products liability defenses have in the products liability reform debate? To some extent, after all, defenses are of limited significance since they are only one part of the products liability system. They represent only some of the arrows in the defendant's quiver; others include limitations on damages. But are they doing their job to keep the system within manageable bounds? Or are matters getting out of hand? For example, shall we add a statute of repose in New York? Make compliance with government-approved warnings exculpatory? Expand the learned intermediary defense beyond the doctor-patient context? Squarely place New York behind the *East River* economic loss rule? Prevent direct suits by employees covered by workers' compensation against manufacturers? How far back should we draw the line? For the reasons stated, tampering with the system here as elsewhere should be done with extreme caution.

254. 77 N.Y.2d 377, 388, 570 N.E.2d 198, 204, 568 N.Y.S.2d 550, 556, *cert. denied*, 112 S. Ct. 197 (1991) ("[W]e are aware of the dangers of overdeterrence — the possibility that research will be discouraged or beneficial drugs withheld from the market."). *But see* *Andrulonis v. United States*, 924 F.2d 1210, 1220-21 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 2992 (1992) (rejecting claim that holding government researcher liable would chill scientific research).

255. *Enright*, 77 N.Y.2d at 388, 570 N.E.2d at 204, 568 N.Y.S.2d at 556.

Of course, tort reformers can fairly point out that there was a dearth of empirical evidence underlying the concept of deterrence at the time that it was brought into products liability law years ago, and there still is one now. It is not surprising that *Enright*, which embraced the difficult to prove concept of overdeterrence, likewise recognized the similarly difficult to prove concept of deterrence. *See id.* at 386, 570 N.E.2d at 203, 568 N.Y.S.2d at 555 ("imposing liability on the manufacturer . . . also serves to encourage the development of safer products"). Although it is logical that people facing liability should seek to be careful, the law mainly accepts the deterrent value of the liability system on faith. Randall R. Bovbjerg, *Problems and Solutions in Medical Malpractice: Comments on Chapters Six and Seven*, in *THE LIABILITY MAZE*, *supra* note 136, at 283.

IV. Conclusion

Given the lack of knowledge regarding the efficacy of the tort system, the decision whether to proceed, and if so, how fast, with products liability reform presents difficult choices. Do we wish to risk having more uncompensated or under-compensated victims by cutting back on the tort system?²⁵⁶ Or do we wish to risk economic harm to society at large by not doing so? Although it is fanciful to believe that tort reform will stop in its tracks after the inroads the reformers have made thus far, there is some hope that it will be temporarily slowed.²⁵⁷ Until we can better understand the effects of our system, it seems to be the wisest course for radical surgery to take a back seat to accelerated research. Although some reformers may believe that this would leave us at least temporarily with a flawed and overly expensive system, they may nevertheless take solace in the many reforms already in place and in the many defenses which have served defendants well over the years.

256. To the extent that reforms are already in place, supporters of expanded liability may derive some consolation in the controls and incentives — other than liability — which arguably encourage the manufacture of safe products. See *Enright*, 77 N.Y.2d at 387, 570 N.E.2d at 203, 568 N.Y.S.2d at 555 (noting that limitation of liability did not “unduly impair” deterrence, since Federal Food and Drug Administration also plays a role in encouraging prescription drug safety). But see Judith Swazey, *Prescription Drug Safety and Product Liability*, in *THE LIABILITY MAZE*, *supra* note 243, at 327 (FDA subject to criticism as to quality of its staff, timeliness and competence of reviews, its failure to act on information, and labeling requirements that sometimes stifle manufacturers’ attempts to issue warnings).

257. No one may realistically suggest that the legal process should stop in its tracks. See Henderson and Twerski, *supra* note 2, at 1342 (products liability will become tougher on claimants; “it can go no other way”; primary movement in that direction will come from courts, although there may be statutory changes at the state or federal level). The courts and the legislatures must remain vigilant to create new rights when victims properly demand them and new defenses when defendants truly require them. But there should be a *clear* need in both cases.