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NOTE

THE REQUISITE SPECIFICITY OF ALCOHOLIC BEVERAGE WARNING LABELS: A DECISION BEST LEFT FOR CONGRESSIONAL DETERMINATION

I. INTRODUCTION

Alcohol has played many roles over the course of history.¹ Despite alcohol's presence in our society for well over 5,000 years,² public health advocates are currently questioning whether there is adequate public awareness of the dangers associated with consuming alcohol.³ These advocates seek to promote the imposition of warning

1. See Zamula, *Bodily Harm: The Health Effects of Excessive Drinking*, 20 FDA CONSUMER 12, 13 (May 1986). Zamula notes the following:

Besides its use as a beverage, at one time or another alcohol has functioned as a form of money, a sacrament in religious ceremonies, and as an instrument of subjugation—our forefathers used firewater to subdue native Americans. As a drug it has been used as a mind-altering substance, antidote against snake-bite poisoning, antiemetic, topical disinfectant, anesthetic, diuretic, tonic, and a purported all-purpose cure-all. Wars, like Pennsylvania's Whiskey Rebellion of 1794, have been fought over alcohol taxes. The 18th Amendment and The Constitution, which, from 1920 until its repeal in 1933, prohibited the manufacture, sale and transportation of intoxicating liquors, precipitated another type of war, whose lingering effects are still felt today.

Id.

2. See Sanders, *We Need Role Models, Not Labels*, N.Y. Times, Mar. 20, 1988, at C2, col. 3.

3. See, e.g., Gordon, *Time to Switch, Not Fight*, WINE SPECTATOR, Oct. 31, 1987, at 12, col. 1 (advocating that voluntary self-assessment labeling may prove advantageous to wine manufacturers by placing them in a "positive light" and thereby disarming critics); Rubin, *The Bad News About Booze*, 60 BUS. & SOC'Y REV. 4 (1987) (equating alcohol with cigarettes, smokeless tobacco, prescription and over-the-counter drugs, aspirin and products containing saccharin); Taylor, *It's Time to Put Warnings on Alcohol*, N.Y. Times, Mar. 20, 1988, at B2, col. 4 (recognizing that a "comprehensive strategy" is necessary to eliminate alcohol problems, and suggesting that health warning labels are an important start); Thurmond, *Should Congress Pass Legislation to Require Warning Labels on Alcoholic Beverages?*, N.Y.

labels on alcoholic beverage containers in order to better inform the public of these dangers.⁴ Their messages are aimed at alcohol manufacturers, despite the recent decline in the amount of per capita consumption⁵ and an increased public awareness of the dangers associated with alcohol.⁶

One result of this public outcry is embodied in the Alcoholic Beverage Labeling Act of 1988 (the Act) requiring alcohol manufacturers to provide health warning labels on certain products.⁷ As of November 18, 1989, all alcoholic beverages manufactured, imported or bottled for sale or distribution in the United States must contain the following warning:

Government Warning: (1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems.⁸

The most important aspect of this federal legislation is its silence with regard to the issue of preempting state law claims challenging the adequacy of alcoholic beverage warnings.⁹ Ultimately, Congress has, by negative implication, left the preemption issue for

Times, July 9, 1986, at B5, col. 4 (claiming that warnings are necessary for informed consumption decisions); Seessel, *Should Liquor Have Warning Labels?*, Wash. Post, July 2, 1986, at 23, col. 3 (noting that alcohol warning labels would serve a necessary educational function regarding the adverse health effects of alcohol).

4. See, e.g., sources cited *supra* note 3.

5. See *Less Booze, More Food*, N.Y. Times, Jan. 7, 1987, at A22, col. 1; cf. *Annual Liquor Survey: Why Consumption Is Down*, Bus. Wk., May 7, 1984, at 120 (attributing annual consumption decline to both the health and fitness boom, and an increase in the concern over drunk driving).

6. See *Awareness of Alcohol Danger Found Growing*, N.Y. Times, June 7, 1987, at A26, col. 1. According to a recent Gallup Poll, 87% of those surveyed, as compared to 79 percent in 1982, agreed that alcoholism is a disease. *Id.* The survey also determined that 69% of those surveyed, compared with 57% in 1982, "strongly agreed" that alcohol could cause birth defects. *Id.* at col. 2. The poll was based on interviews with 1,571 adults around the country, and contains a margin of error of plus or minus three percentage points. *Id.* at col. 1. But see Seessel, *supra* note 3, at 23, col. 2 (discussing a report from the National Center for Health which found that Americans are not very knowledgeable about the adverse effects of alcohol).

7. Alcoholic Beverage Labeling Act of 1988, §§ 201-210, 27 U.S.C.A. §§ 213-219a (West Supp. 1989); see also *infra* notes 38-56 and accompanying text (discussing the Act and its legislative history).

8. 27 U.S.C.A. § 215(a) (West Supp. 1989).

9. See *infra* notes 55-56 and accompanying text (discussing the Act's silence regarding the preemption of failure to warn claims).

judicial determination.¹⁰

In the future, courts faced with "failure to warn" claims will be forced to determine the issue of whether Congress intended to preempt judicial action in this area.¹¹ If Congressional silence is interpreted as the passive approval of judicial action, courts will continue to entertain these suits.¹² However, even if courts conclude that judicial actions are preempted by this federal legislation, by analogizing to cases involving cigarette warnings,¹³ they may continue to entertain suits which claim injuries resulting from alcohol consumption which took place *prior to* the passage of federal alcohol warning legislation.¹⁴ Thus, since it is likely court will continue to entertain failure to warn claims regardless of their conclusions concerning preemption, prior judicial case law would still retain its precedential value.

Over the past decade, many suits have been brought against alcohol manufacturers for failing to warn of the dangerous propensities of their products.¹⁵ In most of these cases, the plaintiffs have

10. See *infra* notes 51-56 and accompanying text.

11. See *id.*

12. See *infra* notes 55-56 and accompanying text.

13. See *infra* notes 62-69 and accompanying text (discussing similarities in the preemption language and stated Congressional policies of both the federal alcoholic beverage and cigarette warning legislation).

14. See, e.g., *Kotler v. American Tobacco Co.*, 685 F. Supp 15, 18 (D. Mass. 1988) (noting that the language of the cigarette legislation does not even hint at retroactive application and that the proper interpretation of the legislation permits the plaintiffs to pursue claims for failure to warn prior to the effective date of the Act); *Gianitis v. American Brands, Inc.*, 685 F. Supp. 853, 859 (D.N.H. 1988) (holding that the federal cigarette labeling legislation does not preempt claims for inadequate warning which arose prior to the Act's passage); *Cipollone v. Liggett Group, Inc.*, 683 F. Supp. 1487, 1496 (D.N.J. 1988) (permitting plaintiff to "submit[] evidence from which the jury could infer that, prior to 1966 [the effective date of the Act], ordinary consumers were not adequately informed of the health risks of smoking."); *Forster v. R.J. Reynolds Tobacco Co.*, 437 N.W.2d 655, 663 (Minn. 1989) (holding that since the Federal Cigarette Labeling and Advertising Act does not specifically provide for the retroactive application, it does not preempt a claim based on failure to warn prior to the effective date of the Act); cf. *Cornelison v. Tambrands, Inc.*, 710 F. Supp. 706, 709-10 (D. Minn. 1989) (holding that in order to avoid preemption by federal statutory warnings, tampon users carried the burden of proving use of the product in a state without warnings prior to the effective date of the federal legislation).

15. See, e.g., *Garrison v. Heublein, Inc.*, 673 F.2d 189, 192 (7th Cir. 1982) (finding no liability against the manufacturer and distributor of vodka for failing to warn consumers of the "common propensities" of alcohol); *Hon v. Stroh Brewery Co.*, 665 F. Supp. 1140 (M.D. Pa.), *vacated*, 835 F.2d 510, 517 (3rd Cir. 1987) (holding that a manufacturer has no duty to warn of risks associated with the prolonged consumption of beer); *Hoover v. Jack Daniels Distillery*, No. 87 C 5509 (N.D. Ill. Sept. 14, 1987) (LEXIS, Genfed library, Dist file) (concluding that manufacturer has no duty to warn of the potential health and social dangers resulting from excessive consumption); *Maguire v. Pabst Brewing Co.*, 387 N.W.2d 565 (Iowa 1986) (re-

relied, in part,¹⁶ upon section 402A of the *Restatement (Second) of Torts (Restatement)*.¹⁷ The *Restatement* provides that a manufacturer is strictly liable for physical harm caused to the consumer even

sponding to certified questions by stating that the manufacturer's beer was not defective absent a warning as to the effects of various consumption levels on one's driving capabilities); *Desatnik v. Lem Motlow, Prop., Inc.*, No. 84 C.A. 104 (Ohio Ct. App. Jan. 9, 1986) (LEXIS, States library, Ohio file) (finding no duty to warn of the possibility that excessive consumption of whiskey could lead to death); *Pemberton v. American Distilled Spirits Co.*, 664 S.W.2d 690 (Tenn. 1984) (finding no duty to warn since the dangers of excessive consumption of grain alcohol are commonly known); *Russell v. Bishop*, No. 88 (Tenn. Ct. App. Jan. 7, 1986) (concluding that whiskey manufacturer had no duty to warn of the amount of alcohol which could safely be consumed before legal intoxication resulted); *Malek v. Miller Brewing Co.*, 749 S.W.2d 521 (Tex. Ct. App. 1988) (holding brewery not liable for injuries caused by a drunk driver); *Morris v. Adolph Coors Co.*, 735 S.W.2d 578 (Tex. Ct. App. 1987) (holding beer manufacturer not liable since it is commonly known that excessive consumption may impair those motor skills necessary to safely operate a motor vehicle).

16. Injured plaintiffs have available three separate tort claims on which to challenge the adequacy of manufacturers' warnings: negligence, breach of warranty and strict liability. See Barry & DeVivo, *The Evolution of Warnings: The Liberal Trend Toward Absolute Product Liability*, 20 FORUM 38, 42 (1984-85); Wade, *On the Nature of Strict Tort Liability For Products*, 44 MISS. L.J. 825, 849 (1973). Although plaintiffs, in an attempt to cover all possible bases, typically allege many theories of recovery, courts often merge these multifaceted claims and concentrate exclusively on the theory of strict liability. See, e.g., *Hon*, 835 F.2d at 514-17; *Desatnik*, No. 84 C.A. 104, slip op. at *2-3; *Pemberton*, 664 S.W.2d at 692-93; *Malek*, 749 S.W.2d at 522-23; see also *Garrison*, 673 F.2d at 190 (noting that the failure to establish a duty to warn under strict liability, the theory with the lowest threshold burden of proof, undercuts the viability of plaintiff's other theories); Barry & DeVivo, *supra*, at 43-44 (describing the dominance of strict liability in warning cases); Wade, *supra*, at 849-50 (describing the steady erosion of the independence of negligence, breach of warranty and strict liability claims). See generally Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966) [hereinafter Prosser, *The Fall of the Citadel*] (tracing the fall of the privity doctrine and evolution of strict products liability).

This Note confines its examination to alcohol manufacturers' duty to warn in the context of strict liability as provided for in the RESTATEMENT (SECOND) OF TORTS § 402A (1965), due to the significant emphasis placed upon the doctrine of strict liability and the vast judicial acceptance of § 402A of the *Restatement* throughout the country. See *infra* note 74 (listing jurisdictions which follow the *Restatement*).

17. Section 402A of the *Restatement* provides, in pertinent part:

Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer . . . is subject to liability for physical harm thereby caused to the ultimate user or consumer . . . if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

though the manufacturer has exercised all possible care in the preparation and sale of its product.¹⁸ If alcoholic beverages are proven to be "in a defective condition unreasonably dangerous to the user or consumer,"¹⁹ manufacturers will be required to give adequate warnings of such dangers in order to escape liability.²⁰ The majority of court decisions, however, have held that alcohol manufacturers are not strictly liable for failing to have health warning labels on their products.²¹ In reaching their decisions, courts have relied predominantly on the comments to the *Restatement*, which cite alcohol as an example of a product which is neither defective,²² nor unreasonably dangerous,²³ since the dangers inherent in its consumption are generally known and recognized.²⁴

Despite these decisions, the Court of Appeals for the Third Circuit in *Hon v. Stroh Brewery Co.*,²⁵ and the Texas Court of Appeals in *Brune v. Brown Forman Corp.*,²⁶ have recently challenged the position taken by the *Restatement* and prior case law.²⁷ These courts concluded that the health hazards associated with alcohol consumption are not necessarily a matter of public knowledge, and the determination of which dangers are commonly known is a question of fact for the jury to decide.²⁸ In light of the consistency with which prior judicial decisions have concluded that alcohol manufacturers have no duty to warn as a matter of law,²⁹ the reasoning of these two cases cannot avoid being called into question.

Part II of this Note begins by examining the events leading up to, and the current status of, federally mandated warning labels.³⁰

18. See *id.* § 402A(2)(a).

19. *Id.* § 402A(1).

20. See *id.* comment h; see also *infra* note 78 (setting forth comment h).

21. See *infra* notes 92-124 and accompanying text.

22. See RESTATEMENT (SECOND) OF TORTS § 402A comments h & j (1965); *infra* note 78 (setting forth comments h and j). For a further discussion of the courts' interpretations of comments h & j, see *infra* text accompanying notes 92-124.

23. See RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965), *infra* note 81 (setting forth comment i). For a further discussion of the courts' interpretations of comment i, see *infra* text accompanying notes 92-124.

24. See RESTATEMENT (SECOND) OF TORTS § 402A comments i & j (1965); *infra* note 78 (setting forth comment j); *infra* note 81 (setting forth comment i).

25. 835 F.2d 510 (3d Cir. 1987).

26. 758 S.W.2d 827 (Tex. Ct. App. 1988).

27. See *infra* notes 125-92 and accompanying text (analyzing case law holding that alcohol manufacturers have a duty to warn).

28. See *infra* notes 131-51, 172-78 and accompanying text.

29. See, e.g., cases cited *supra* note 15.

30. See *infra* notes 38-56 and accompanying text.

Although the Act does not explicitly preempt state failure to warn claims, an examination of the policies underlying this legislation fosters the conclusion that such claims were intended to be preempted.³¹ Part III examines the *Restatement*³² and the rationale behind the majority of cases holding that alcohol manufacturers are not strictly liable for failing to provide health warning labels.³³ After this explanation, the problems presented in the courts' reasoning in *Hon* and *Brune* are demonstrated³⁴ and the natural consequences which will inevitably result from these two decisions.³⁵ Finally, this Note concludes in Part IV with the recommendation that courts give little deference to *Hon* and *Brune* in any future failure to warn cases and should therefore conclude, as a matter of law, that the dangers associated with consuming alcoholic beverages are generally known and recognized.³⁶ A consequence of giving little deference to *Hon* and *Brune* is that courts will not induce manufacturers to voluntarily provide additional warnings on their products in order to avoid liability in the future. As a result, courts will, in effect, be deferring the decision concerning the requisite specificity of alcoholic beverage warning labels to Congress, a body which is better suited to make such a determination.³⁷

II. CONGRESS' ROLE

A. Alcoholic Beverage Labeling Act of 1988

On October 22, 1988, after nearly a full decade of unsuccessful attempts,³⁸ Congress passed the Alcoholic Beverage Labeling Act of

31. See *infra* notes 57-69 and accompanying text.

32. See *infra* notes 70-91 accompanying text.

33. See *infra* notes 92-124 and accompanying text.

34. See *infra* notes 138-51, 172-92 and accompanying text.

35. See *infra* notes 157-66, 190-92 and accompanying text.

36. See *infra* notes 193-202 and accompanying text.

37. See *infra* notes 203-06 and accompanying text.

38. The first major effort regarding federal health warnings occurred in May, 1979 when, during consideration of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act Amendments of 1979, the Senate passed an amendment requiring all alcoholic beverages containing more than 24% alcohol contain the following warning: "Caution: Consumption of alcoholic beverages may be hazardous to your health." S. 440, 96th Cong., 1st Sess., 125 CONG. REC. 9980-92 (1979); see *National Council on Alcoholism, Federal Action to Require Health Warning Labels on Alcoholic Beverages*. See generally Wehr, *Industry to Fight Amendment: Senate Votes for Warning Labels on Liquor*, 37 CONG. Q. WEEKLY REP. 964 (May 19, 1979) (describing the bill's history in detail).

In the House-Senate Conference on S. 440, however, a compromise was reached which required a joint report by the Departments of the Treasury and Health, Education, and Welfare concerning the methods to inform the public of the health hazards associated with con-

1988.³⁹ The Act mandates that a federal health warning label be placed on all alcoholic beverages⁴⁰ manufactured, imported, or bottled⁴¹ for sale or distribution in the United States.⁴² Congress stated that a clear, nationally uniform warning is necessary in order to “re-

suming alcohol. *See* SENATE COMM. ON COMMERCE, SCIENCE, AND TRANSP., REPORT ON S. 2047, ALCOHOLIC BEVERAGE LABELING, S. REP. NO. 596, 100th Cong., 2d Sess. 2 (1988) [hereinafter SENATE COMMITTEE REPORT]. In their report, both departments recommended against federal action, claiming that it was not clear whether warning labels could effectively convey the health risks associated with consuming alcohol. *See* U.S. DEP'T OF THE TREASURY AND U.S. DEP'T OF HEALTH AND HUMAN SERVS., 96TH CONG., 2D SESS., REPORT TO THE PRESIDENT AND THE CONGRESS ON HEALTH HAZARDS ASSOCIATED WITH ALCOHOL AND METHODS TO INFORM THE GENERAL PUBLIC OF THESE HAZARDS 41 (Comm. Print 1980) [hereinafter ALCOHOL REPORT]. Moreover, the departments feared that adding alcohol to the list of products currently carrying warning labels might cause the public to be saturated with warnings, and thereby reduce their effectiveness. *Id.*

The issue of alcohol warning labels remained dormant until May 1986, when the Alcohol, Drug Abuse, and Mental Health Amendments of 1986, was introduced and referred to the Senate Labor and Human Resources Committee for consideration. S. 2595, 99th Cong., 2d Sess., 132 CONG. REC. 87 (1986). The Committee unanimously adopted an amendment requiring all alcoholic beverages to contain a series of alternating warning labels. *See* STAFF OF SENATE COMM. ON LABOR AND HUMAN RESOURCES, 99TH CONG., 2d Sess., Report on Alcohol, Drug Abuse, and Mental Health Amendments of 1986, at 13 (Comm. Print 1986). The required labels included:

Warning: The Surgeon General has determined that the consumption of this product, which contains alcohol, during pregnancy may cause birth defects.

Warning: Drinking this product, which contains alcohol, can impair your ability to drive a car or operate heavy machinery.

Warning: This product contains alcohol and is particularly hazardous in combination with some drugs.

Warning: The consumption of this product, which contains alcohol, can increase the risk of developing hypertension, liver disease and cancer.

Id. at 14. Significantly, the Committee emphasized that although the proposed legislation would preempt a state's ability to require additional health warnings, it did not intend to preempt state law claims challenging the adequacy of warnings. *Id.*; Rubin, *supra* note 3, at 6. Due primarily to parliamentary maneuvers by senators interested in protecting the alcoholic beverage industry, however, the proposal died before reaching the Senate floor during the 99th Congress. *See* Britt, *Alcohol Manufacturers' Duty to Warn*, 38 FED'N INS. COUNS. Q. 247, 261 (Spr. 1988); Rubin, *supra* note 3, at 6.

39. Pub. L. No. 100-690, 102 Stat. 4518 (1988) (codified at 27 U.S.C.A. §§ 213-219a (West Supp. 1989)).

40. All beverages containing more than one-half of one percent of alcohol by volume must bear a warning. 27 U.S.C.A. § 214(1) (West Supp. 1989). While distilled spirits, beer, wine and wine coolers fall within the scope of the federal legislation, cough syrups and other medicinal products which contain alcohol are excluded. SENATE COMMITTEE REPORT, *supra* note 38, at 5.

41. By its terms, the federal warning legislation imposes the obligation to affix warning labels on manufacturers, rather than on wholesalers or retailers whose only roles are to sell finished products. SENATE COMMITTEE REPORT, *supra* note 38, at 6. *But cf.* RESTATEMENT (SECOND) OF TORTS § 402A (1965) (imposing strict liability on “sellers” of defective products which are unreasonably dangerous).

42. 27 U.S.C.A. § 215(a) (West Supp. 1989).

mind" the public of the health hazards associated with consuming or abusing alcoholic beverages.⁴³

As of November 18, 1989,⁴⁴ all alcoholic beverages whose manufacture and sale affects interstate commerce⁴⁵ must bear a statement that warns the consumer of the dangers of consuming alcohol during pregnancy, before operating a car or heavy machinery, and of the risk that alcohol may cause health problems.⁴⁶ The warning is to appear in a "conspicuous and prominent place" on the container,⁴⁷ so as to ensure that it is noticed by all consumers.⁴⁸ A manufacturer's failure to comply with these warning requirements could result in the imposition of fines of up to \$10,000 for each day that the

43. *Id.* § 213(1).

44. The legislation provides a twelve month period, from the date of its enactment, for manufacturers to make adjustments necessary in order to comply with its provisions. *See id.* § 215(a).

45. Congress noted that it intended to exercise the full scope of its constitutional powers in order to create a "comprehensive Federal program." *Id.* § 213. This program is intended to affect "alcoholic beverages manufactured and sold in or affecting interstate commerce, including those alcoholic beverages manufactured and sold in a single [s]tate." SENATE COMMITTEE REPORT, *supra* note 38, at 5.

Alcoholic beverages manufactured, imported or bottled for export, however, need not bear the federal warning label provided they are not shipped to members or units of the Armed Forces stationed outside of the United States. 27 U.S.C.A. § 215(c) (West Supp. 1989).

46. 27 U.S.C.A. § 215(a) (West Supp. 1989); *supra* text accompanying note 8 (setting forth the Act's warnings). It is important to note that this warning requirement is potentially subject to change. The Act provides that the Secretary of the Treasury is vested with the power to ensure that the provisions of the Act are enforced. 27 U.S.C.A. § 215(d)(1)(A) (West. Supp. 1989). If after two years the Secretary determines, upon investigation and consultation with the Surgeon General, that a change in the warning statement is necessary, the Secretary can report its findings and recommendations to Congress. *Id.* § 217. Congress can then make whatever changes it deems appropriate. *See id.*; SENATE COMMITTEE REPORT, *supra* note 38, at 8.

47. 27 U.S.C.A. § 215(b) (West Supp. 1989). The warning must appear on the "innermost sealed container" in which the beverage is placed. *Id.* § 214(5). Therefore, warnings appearing on cardboard containers in which alcoholic beverages are contained will not absolve a manufacturer of liability.

48. The term "all consumers" is perhaps over-expansive. The federal warning legislation applies only to "sealed" containers. *See id.* § 214(5). Therefore, individuals consuming alcoholic beverages in bars and other alcohol serving establishments will not be apprised of this warning.

If courts determine that by enacting the federal legislation, Congress intended to preempt state products liability claims, *see infra* notes 55-69 and accompanying text, an open question exists as to whether claims brought by consumers who never saw the warning, but who allege that the manufacturer failed to *effectively* warn them of the dangers through, for example, an alternative medium, will also be preempted. *See Note, Mitigating Alcohol Health Hazards Through Health Warning Labels and Public Education*, 63 WASH. L. REV. 979, 995 (1988) (authored by Elizabeth L. Kruger) [hereinafter *Note, Mitigating Alcohol Health Hazards*] (posing the question of whether manufacturers should be required to constructively warn or should be required to effectively warn consumers).

violation exists,⁴⁹ and an injunction to prevent further violations.⁵⁰

B. Preemption

In passing the Alcoholic Beverage Labeling Act, Congress stressed the need for national uniformity in health hazard warning requirements.⁵¹ Congress recognized that permitting states to independently propose their own requirements might lead to the dissemination of incorrect or misleading information, and result in the burdening of interstate commerce.⁵² In order to avoid these problems, Congress expressly stated that the Act preempts all state legislative attempts to mandate a different warning label requirement.⁵³ The Act, however, does not affect a state's ability to regulate other mediums through which alcohol warnings can be disseminated.⁵⁴

49. 27 U.S.C.A. § 218 (West Supp. 1989); SENATE COMMITTEE REPORT, *supra* note 38, at 4.

50. 27 U.S.C.A. § 219(a) (West Supp. 1989).

51. *Id.* § 213; *see infra* note 62 (setting forth Congress' motivation for enacting such warning requirements).

52. *Id.*

53. *Id.* § 216. The Act provides that "[n]o statement relating to alcoholic beverages and health, other than the statement required by section 215 of this title, shall be required under State law to be placed on any container of an alcoholic beverage, or on any box, carton, or other package . . . that contains such a container." *Id.*

54. SENATE COMMITTEE REPORT, *supra* note 38, at 7. For example, both states and localities can require warning posters to be displayed in bars and other establishments which serve alcohol. *See id.* Currently, both the State of New York and the City of Philadelphia require alcohol servers to display signs warning against fetal alcohol syndrome. AMERICAN BAR ASSOCIATION, POLICY RECOMMENDATIONS ON YOUTH ALCOHOL AND DRUG PROBLEMS 86-87 n.415 (1985 & 1986 Supp.). Additionally, states are free to require sealed alcoholic beverage retailers to post "point-of-sale" warnings. *See* SENATE COMMITTEE REPORT, *supra* note 38, at 7; *cf.* Note, *supra* note 48, at 990 n.64 (describing "point-of-sale" warnings as a "recent trend" in warning requirements).

Television advertising is another medium which states may employ to disseminate warnings. Some courts and commentators recognize that commercial advertising promoting alcohol consumption may lower consumer perceptions of the dangers associated with consuming alcohol. *See, e.g.,* *Hon v. Stroh Brewery Co.*, 835 F.2d 510, 514-15 (3d Cir. 1987); Note, *A Spirited Call to Require Alcohol Manufacturers to Warn of the Dangerous Propensities of their Products*, 11 NOVA L.J. 1611, 1625-27 (1987) (authored by Donna D'Amico) [hereinafter Note, *A Spirited Call*]. However, banning alcohol advertising may confront first amendment constitutional barriers. *See* Note, *The First Amendment and Legislative Bans of Liquor and Cigarette Advertisements*, 85 COLUM. L. REV. 632 (1985) (authored by Matthew L. Miller) [hereinafter Note, *The First Amendment*]; Note, *Restraints on Alcoholic Beverage Advertising: A Constitutional Analysis*, 60 NOTRE DAME L. REV. 779 (1985) (authored by Karen L. Sterchi) [hereinafter Note, *Restraints on Alcoholic Beverage Advertising*]; Note, *Liquor Advertising: Resolving the Clash Between the First and Twenty—First Amendments*, 59 N.Y.U. L. REV. 157 (1984) (authored by Richard S. Mandel); Note, *Alcoholic Beverage Advertising and the First Amendment*, 52 U. CIN. L. REV. 861 (1983) (authored by John Sackett); Note, *Tension Between the First and Twenty - First Amendments in State Regulation of Alcohol*

The most important aspect of the Act, however, is its silence with regard to whether or not it preempts judicial claims challenging the adequacy of warnings. Although the Act's legislative history supports arguments on both sides of the preemption issue,⁵⁵ it provides no solution. Even those members of Congress who were instrumental in getting the legislation enacted cannot agree on this issue.⁵⁶ Ulti-

Advertising, 37 VAND. L. REV. 1421 (1984) (authored by Brian S. Steffey); *see also* Tiajolloff, *Is Advertising Protected Under the First Amendment?*, 58 WIS. B. BULL., Aug. 1985, at 14 (noting that opponents of the federal cigarette advertising ban consider the legislation an aberration of first amendment rights). *But cf.* Note, *We Can Share the Women, We Can Share the Wine: The Regulation of Alcohol Advertising on Television*, 58 S. CAL. L. REV. 1107 (1985) (authored by Marc L. Sherman) (concluding that limited federal regulation designed to prohibit advertising which encourages the consumption of alcohol is constitutional). Counter-advertising, a system which permits equal broadcasting time for commercials depicting the negative aspects of alcohol consumption, is thought to raise far fewer constitutional issues. *See* Note, *The First Amendment*, *supra*, at 652-55; Note, *Restraints on Alcoholic Beverage Advertising*, *supra*, at 794.

55. When the Senate Committee on Commerce, Science, and Transportation originally passed the Alcoholic Beverage Labeling Bill, they stated that it "preempts State law requiring the imposition of statements relating to alcoholic beverages and health" on all beverage containers. SENATE COMMITTEE REPORT, *supra* note 38, at 7. It may be argued that a question arises as to whether the scope of the term "State law requiring" is to be read narrowly so as to merely encompass legislation, or rather it is to be given a broader reading which also encompasses judicial interpretation. When a court permits plaintiffs with failure to warn claims to reach the jury, they are, by implication, requiring manufacturers to voluntarily warn consumers of the dangers associated with consuming their products. *See infra* note 198 and accompanying text. Thus, since the judicial interpretation of state law may impliedly require the imposition of warning labels, this action may fall within the guise of the Act's preemption language if given a broad meaning. However, the very next sentence in the Act's legislative history states that "[t]he provision should not be read to indicate that the states do not have the authority in other areas to impose standards to protect the health and safety of their citizens from hazards associated with the products they consume." SENATE COMMITTEE REPORT, *supra* note 38, at 7. Although warning posters are cited as an example, *see id.*, perhaps failure to warn suits constitute "other areas" for which a state may still retain control. If this is true, state judiciaries would, arguably, not be preempted from hearing failure to warn claims, and the terms "State law requiring" in the preceding sentence, would merely refer to legislative action.

56. Compare 134 CONG. REC. S16008 (daily ed. Oct. 14, 1988) (statement of Senator Thurmond) (stating that the Act's preemption is narrow and does not prevent the alcoholic beverage industry from voluntarily providing additional warnings) and 134 CONG. REC. S16009 (daily ed. Oct. 14, 1988) (statement of Senator Hollings) (stating that the provision is very narrow: no state can require health warning labels on containers, but other state prerogatives are not preempted) and 134 CONG. REC. E3763-64 (daily ed. Nov. 10, 1988) (statement of Representative Conyers) (stating that "the preemption provision of this bill does not preempt any State tort or common law remedies for personal injury or property damage based on a failure to warn theory," and "the bill does not prevent manufacturers, distributors, or sellers of alcoholic beverages from voluntarily using more stringent warnings in their labeling for whatever reason, including their concern for consumers' welfare or their desire to satisfy State tort or common law standards.") with 134 CONG. REC. S17300-01 (daily ed. Oct. 21, 1988) (statement of Senator Ford) (stating that Congress possesses the exclusive power to regulate

mately, Congress has, by negative implication, left the preemption issue for judicial determination.

Although the Act is silent on the issue of preemption, this Note argues that courts should find state "failure to warn" claims preempted.⁵⁷ The Supremacy Clause of the Constitution⁵⁸ permits the laws of the United States to preempt state law.⁵⁹ Thus, the key question one must ask is "whether Congress intended that federal regulation supersede state law."⁶⁰

While Congress' intent concerning preemption is not explicit, a careful examination of the policies behind the enactment of the Act⁶¹ leads to the conclusion that Congress intended to preempt such claims. This examination is best conducted by comparing the reasons stated for enacting the alcoholic beverage labeling legislation⁶² with

labeling of alcoholic beverages and no state, through legislation or judicial interpretation, may require a different warning) and 134 CONG. REC. E3729 (daily ed. Nov. 10, 1988) (statement of Representative Waxman) (stating that "the legislation does not affect the duty that manufacturers, bottlers, and sellers of alcoholic beverages have to inform and warn the public" and "the legislation does not preclude manufacturers from voluntarily providing consumers of alcoholic beverages information about the adverse health effects of alcoholic beverages including the placement of additional warning statements or disclaimers on container labels."). Representative Waxman further noted that there cannot "be any question about the authority of courts to enter judgments with respect to warnings other than those directly on the labels of containers." *Id.*

57. See 134 CONG. REC. E3729 (daily ed. Nov. 10, 1988) (statement of Representative Waxman) (noting that "[i]n the passage of this legislation was not Congress' intent to affect the liability of manufacturers either positively or negatively. The Congress intended that any implications to be drawn from a manufacturer's compliance with this legislation are left to the discretion and interpretation of the courts.").

58. U.S. CONST. art. VI, cl. 2. The Supremacy Clause provides, in relevant part: This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

59. See *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355 (1986). In *Louisiana Public Service Commission*, the Court noted that implied preemption can exist when federal and state law actually conflict; where compliance with both laws is physically impossible; when federal law acts as a barrier to state law; where federal legislation is comprehensive and thereby occupies the entire field of regulation; or where state law interferes with the execution of Congress' objectives. 476 U.S. at 368-69.

60. *Id.* at 369.

61. See *infra* note 62 (setting forth the policies behind the enactment of the federal alcoholic beverage warning legislation).

62. The purposes stated by Congress for enacting the Alcoholic Beverage Labeling Act of 1988 were, in pertinent part, as follows:

The Congress finds that the American public should be informed about the health hazards that may result from the consumption or abuse of alcoholic beverages, and has determined that it would be beneficial to provide a clear, nonconfusing

those of the cigarette labeling legislation.⁶³ The stated Congressional purposes, in both instances, are remarkably similar.

Despite the fact that the cigarette labeling legislation does not expressly preempt state law claims,⁶⁴ several courts have interpreted

reminder of such hazards, and that there is a need for national uniformity in such reminders in order to avoid the promulgation of incorrect or misleading information and to minimize burdens on interstate commerce. . . . It is therefore the policy of the Congress, and the purpose of this subchapter, to exercise the full reach of the Federal Government's constitutional powers in order to establish a comprehensive Federal program . . . to deal with the provision of warning or other information with respect to any relationship between the consumption or abuse of alcoholic beverages and health, so that—

(1) the public may be adequately reminded about any health hazards that may be associated with the consumption or abuse of alcoholic beverages through a nationally uniform, nonconfusing warning notice on each container of such beverages; and

(2) commerce and the national economy may be—

(A) protected to the maximum extent consistent with this declared policy,

(B) not impeded by diverse, nonuniform, and confusing requirements for warning or other information on alcoholic beverage containers with respect to any relationship between the consumption or abuse of alcoholic beverages and health

27 U.S.C.A. § 213 (West Supp. 1989).

For the text of the Act's preemption language, see *supra* note 53.

63. Cf. *Hoover v. Jack Daniels Distillery*, No. 87 C 5509, at *2 (N.D. Ill. Sept 14, 1987) (LEXIS, Genfed library, Dist File) (relying upon a cigarette case for the proposition that future federal alcoholic beverage labeling legislation will probably preempt state failure to warn claims). The Federal Cigarette Labeling and Advertising Act mandates the imposition of health warning labels on all cigarette packages. The Act originally stated its purposes to be as follows:

It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal Program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331 (1982), amended by 15 U.S.C. § 1331(1) (Supp. V 1987).

In 1984, the first paragraph was amended to state the following:

(1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes. . . .

15 U.S.C. § 1331(1) (Supp. V 1987).

In addition, the Act's preemption section states, in pertinent part, the following:

(a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

15 U.S.C. § 1334(a) (1982).

64. See *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230, 234 (6th Cir. 1988); *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 625 (1st Cir. 1987); *Stephen v. American*

Congress' reference to national uniformity and protection of interstate commerce as forbidding state courts from inducing cigarette manufacturers to voluntarily provide additional warnings.⁶⁶ These courts have recognized Congress' efforts to balance the policies of health protection through education with the need to protect the national economy.⁶⁸ The Court of Appeals for the First Circuit best expressed this concept when it stated that "[i]t is inconceivable that Congress intended to have that carefully wrought balance of national interests superseded by the views of a single state, indeed, perhaps of a single jury in a single state."⁶⁷

Since the stated Congressional policy behind enacting the alcoholic beverage labeling legislation mirrors that of the cigarette labeling legislation, where courts have recognized Congress' implied intent to preempt failure to warn claims,⁶⁸ courts in future alcoholic beverage labeling suits should similarly conclude that these claims are preempted by the federal alcoholic beverage labeling legislation.⁶⁹

Brands, Inc., 825 F.2d 312, 313 (11th Cir. 1987) (per curiam); *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 185-86 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987).

65. See, e.g., *Roysdon*, 849 F.2d at 234 (concluding that since failure to warn claims tip Congress' balance of purpose, they "actually conflict" with the Act); *Palmer*, 825 F.2d at 626 (concluding that allowing failure to warn claims "abrogate[s] utterly" Congress' established scheme of health protection); *Stephen*, 825 F.2d at 313 (adopting the decision and reasoning of the Third Circuit in *Cipollone*); *Cipollone*, 789 F.2d at 187 (recognizing that state failure to warn claims have the effect of imposing requirements which "actually conflict" with the Act); *Forster v. R.J. Reynolds Tobacco Co.*, 437 N.W.2d 655, 660 (Minn. 1989) (holding that "state tort claims based on a state-imposed duty to warn are impliedly preempted."); *Gianitsis v. American Brands, Inc.*, 685 F. Supp. 853, 859 (D.N.H. 1988) (recognizing that failure to warn claims disrupt Congress' carefully wrought balance of purpose).

For a discussion of the various effects products liability suits may have on uniformity and interstate commerce, see *infra* text accompanying notes 198-202.

66. See *Roysdon*, 849 F.2d at 234-35; *Palmer*, 825 F.2d at 626; *Cipollone*, 789 F.2d at 187; *Gianitsis*, 685 F. Supp. at 859.

67. *Palmer*, 825 F.2d at 626.

68. See *supra* notes 62-66 and accompanying text.

69. See 134 CONG. REC. E3729 (daily ed. Nov. 10, 1988) (statement of Representative Waxman) (recognizing that courts in future failure to warn cases may well conclude that penalizing manufacturers for failing to provide additional warnings would be unjustified since the Act prevents state legislatures from requiring additional warnings in order to promote uniformity); 134 CONG. REC. S17300-01 (daily ed. Oct. 21, 1988) (statement of Senator Ford) (stating that the preemption section of the alcoholic beverage labeling legislation "recognizes that the effectiveness of the warning label contained in the Act would be diminished if other, perhaps conflicting, statements were allowed to be added to alcoholic beverage containers."); see also Note, *Liability of Alcoholic Beverage Manufacturers: No Longer a Pink Elephant*, 31 WM. & MARY L. REV. 157, 165 (1989) [hereinafter Note, *Liability*] (authored by Clay Campbell) (recognizing the potential for state court judgments to upset Congress' desire for uniformity of alcoholic beverage warning labels).

III. JUDICIAL RESPONSE TO ALCOHOL LABELING SUITS

A. Strict Liability Under the Second Restatement

Alcoholic beverages are deemed as "unavoidably dangerous" products under the *Restatement*.⁷⁰ "Unavoidably dangerous products" are those which are incapable of being made safe for their intended use under the present state of scientific knowledge.⁷¹ A manufacturer, who has undertaken to supply the public with a beneficial and desired, albeit unavoidably dangerous product, does not automatically become liable for all injury resulting from its use.⁷² In fact, it was precisely to forestall the imposition of such broad liability that the drafters of the *Restatement* limited a manufacturer's liability to products in a "defective condition unreasonably dangerous to the user or consumer."⁷³

In order to hold alcohol manufacturers strictly liable under the *Restatement*, a plaintiff must prove that the proximate cause of his injury was a defect in the product which rendered it unreasonably dangerous.⁷⁴ This burden requires proving that the product was both

70. See RESTATEMENT (SECOND) OF TORTS § 402A comment k (1965); Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9, 23 (1966) [hereinafter Prosser, *Strict Liability*]; Prosser, *The Fall of the Citadel*, *supra* note 16, at 807; Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 19-20 (1965).

71. RESTATEMENT (SECOND) OF TORTS § 402A comment k (1965). See generally Prosser, *Strict Liability*, *supra* note 70, at 23-27 (discussing the application of strict liability theories to various unreasonably dangerous products); Prosser, *The Fall of the Citadel*, *supra* note 16, at 807-14 (providing a detailed analysis of unavoidably dangerous products).

72. See RESTATEMENT (SECOND) OF TORTS § 402A comment k (1965); Prosser, *Strict Liability*, *supra* note 70, at 23-27; Prosser, *The Fall of the Citadel*, *supra* note 16, at 807-14; Wade, *supra* note 70, at 19-20; see also Note, *The Liability of Pharmaceutical Manufacturers for Unforeseen Adverse Drug Reactions*, 48 FORDHAM L. REV. 735, 742-44 (1980) (authored by Kathleen H. Wilson) (discussing the risk-utility test employed in comment k and its applicability to pharmaceutical products). In discussing whether there should be liability for these beneficial yet unavoidably dangerous products, Professor Prosser posed the question as such:

Take whiskey. It is really dreadful stuff. It causes a variety of unpleasant consequences, ranging from delirium tremens and cirrhosis of the liver to drunken driving; and you really should not drink as much of it as you do. Is the maker of good whiskey—as distinguished from whiskey full of fusel oil, strychnine or old cigar stubs—to be held liable . . . for all the harm that may result from its consumption? In other words, is the maker who has supplied a popular demand to be held responsible for the drinking habits of the American public? And is the manufacturer of an automobile to be held liable for the way people drive it?

Prosser, *The Fall of the Citadel*, *supra* note 16, at 807.

73. Prosser, *Strict Liability*, *supra* note 70, at 23; cf. RESTATEMENT (SECOND) OF TORTS § 402A (1965) (setting forth the elements of a strict products liability claim).

74. See RESTATEMENT (SECOND) OF TORTS § 402A (1) (1965). The doctrine of strict products liability as stated in § 402A of the *Restatement* has been applied and/or explicitly

in a defective condition *and* unreasonably dangerous at the time it left the manufacturer's hands.⁷⁵

A product which is flawlessly designed and manufactured⁷⁶ may

adopted in the following jurisdictions: Arizona, *O.S. Stapley Co. v. Miller*, 103 Ariz. 556, 447 P.2d 248 (1968); Colorado, *Hiigel v. General Motors Corp.*, 190 Colo. 57, 544 P.2d 983 (1975); Connecticut, *Wachtel v. Rosol*, 159 Conn. 496, 271 A.2d 84 (1970); District of Columbia, *Fisher v. Bell Helicopter Co.*, 403 F. Supp. 1165 (D.D.C. 1975); Florida, *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976); Hawaii, *Stewart v. Budget Rent-A-Car Corp.*, 52 Haw. 71, 470 P.2d 240 (1970); Idaho, *Shields v. Morton Chem. Co.*, 95 Idaho 674, 518 P.2d 857 (1974); Illinois, *Kirk v. Michael Reese Hosp. and Medical Center*, 117 Ill. 2d 507, 513 N.E.2d 387 (1987); Indiana, *Ayr-Way Stores, Inc. v. Chitwood*, 261 Ind. 86, 300 N.E.2d 335 (1973); Iowa, *Hawkeye Sec. Ins. Co. v. Ford Motor Co.*, 199 N.W.2d 373 (Iowa 1972); Kansas, *Brooks v. Dietz*, 218 Kan. 698, 545 P.2d 1104 (1976); Kentucky, *Dealers Transp. Co. v. Battery Distrib. Co.*, 402 S.W.2d 441 (Ky. Ct. App. 1965); Louisiana, *Weber v. Fidelity & Casualty Ins. Co.*, 259 La. 599, 250 So. 2d 754 (1971); Maine, ME. REV. STAT. ANN. tit. 14, § 221 (1964); Maryland, *Phipps v. General Motors Corp.*, 278 Md. 337, 363 A.2d 955 (1976); Minnesota, *McCormack v. Hanksraft Co.*, 278 Minn. 322, 154 N.W.2d 488 (1967); Mississippi, *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113 (Miss. 1966), *cert. denied sub nom. Yates v. Hodges*, 386 U.S. 912 (1967); Missouri, *Keener v. Dayton Elec. Mfg. Co.*, 445 S.W.2d 362 (Mo. 1969); Montana, *Brandenburger v. Toyota Motor Sales*, 162 Mont. 506, 513 P.2d 268 (1973); Nebraska, *Kohler v. Ford Motor Co.*, 187 Neb. 428, 191 N.W.2d 601 (1971); Nevada, *Shoshone Coca-Cola Bottling Co. v. Dolinski*, 82 Nev. 439, 420 P.2d 855 (1966); New Hampshire, *Buttrick v. Arthur Lessard & Sons, Inc.*, 110 N.H. 36, 260 A.2d 111 (1969); New Mexico, *Stang v. Hertz Corp.*, 83 N.M. 730, 497 P.2d 732 (1972); North Dakota, *Johnson v. American Motors Corp.*, 225 N.W.2d 57 (N.D. 1974); Ohio, *Temple v. Wean United, Inc.*, 50 Ohio St. 2d 317, 364 N.E.2d 267 (1977); Oklahoma, *Kirkland v. General Motors Corp.*, 521 P.2d 1353 (Okla. 1974); Oregon, *Rice v. Hyster Co.*, 273 Or. 191, 540 P.2d 989 (1975); Pennsylvania, *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966); Rhode Island, *Ritter v. Narragansett Elec. Co.*, 109 R.I. 176, 283 A.2d 255 (1971); South Carolina, S.C. CODE ANN. §§ 15-73-10 to 15-73-30 (Law. Co-op. 1976); South Dakota, *Engberg v. Ford Motor Co.*, 87 S.D. 196, 205 N.W.2d 104 (1973); Tennessee, *Gann v. International Harvester Co.*, 712 S.W.2d 100 (Tenn. 1986); Texas, *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967); Utah, *Ernest W. Hahn, Inc. v. Armco Steel Co.*, 601 P.2d 152 (Utah 1979); Vermont, *Zaleskie v. Joyce*, 133 Vt. 150, 333 A.2d 110 (1975); Washington, *Ulmer v. Ford Motor Co.*, 75 Wash.2d 522, 452 P.2d 729 (1969); Wisconsin, *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967); Wyoming, *Ogle v. Caterpillar Tractor Co.*, 716 P.2d 334 (Wyo. 1986).

75. See RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965); *supra* note 17. *But cf.* Wade, *supra* note 16, at 830-31 (noting that these phrases are redundant since "defective condition" is defined in the comments in terms of being unreasonably dangerous).

Controversy exists as to the independent meaning of these two terms. In fact, California has abandoned the "unreasonably dangerous" terminology. See *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972). However, the abolition of the phrase "unreasonably dangerous" has met with opposition. See, e.g., Keeton, *Products Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 30-32 (noting that when the Supreme Court of California rejected the unreasonably dangerous requirement and failed to replace it with a similar notion, they usurped all content from the term defective); Wade, *supra* note 16, at 829-41 (stating that the position taken by the California court is not sustainable in design and warning cases since the product defect results from an intentional manufacturing process).

76. A product may be in a defective condition unreasonably dangerous as marketed for any of the following reasons: (1) a manufacturing defect; (2) a defect in design; or (3) a

nevertheless be in a "defective condition unreasonably dangerous" if it is not accompanied by an adequate warning of the potential dangers inherent in its use.⁷⁷ Generally, where manufacturers have reason to anticipate injuries resulting from a particular use of their product, whether normal or abusive, they may have a duty to warn potential consumers.⁷⁸ A manufacturer's failure to warn of potential

failure by the manufacturer to warn of the risks associated with the use of the product. W. KEETON, PROSSER & KEETON ON TORTS § 99, at 695 (5th ed. 1984). A manufacturing defect is one which causes the product to be dangerous when used in a reasonably expected manner given the product's nature and intended function. 1 Prod. Liab. Rep. (CCH) ¶ 4050 (Oct. 1987). A manufacturing defect involves a flaw in the product or a condition that was unintended and makes the product more dangerous than it otherwise would have been if constructed as intended. W. KEETON, *supra*, § 99, at 695. A product with a design defect, however, is the result of an intended design process and, thus, is in a condition actually contemplated by the manufacturer. 1 Prod. Liab. Rep. (CCH) ¶ 4060 (Oct. 1987).

77. Gallub, *Limiting the Manufacturer's Duty for Subsequent Product Alteration: Three Steps to a Rational Approach*, 16 HOFSTRA L. REV. 361, 417 (1988); Note, *Product Liability After Woodill v. Parke Davis: The Failure to Warn as a Basis for Recovery*, 13 LOY. U. CHI. L.J. 523, 528 (1982) (authored by Sheryl Ann Marcouiller); see RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965); *infra* note 78 (setting forth comment j); 1 Prod. Liab. Rep. (CCH) ¶ 4095 (Oct. 1987). For a comprehensive discussion of manufacturers' duty to provide adequate warnings under the *Restatement*, see Keeton, *The Meaning of Defect in Products Liability Law—A Review of Basic Principles*, 45 MO. L. REV. 579, 586-92 (1980); Noel, *Products Defective Because of Inadequate Directions or Warnings*, 23 SW. L.J. 256, 267-72 (1969).

78. RESTATEMENT (SECOND) OF TORTS § 402A comment h (1965). Comments h & j of the *Restatement* govern a manufacturer's duty to warn. Comment h provides, in pertinent part:

A product is not in a defective condition when it is safe for normal handling and consumption. If injury results from abnormal handling . . . or from abnormal consumption . . . the seller is not liable. Where, however, he has reason to anticipate that danger may result from a particular use, as where a drug is sold which is safe only in limited doses, he may be required to give adequate warning of the danger (see Comment j), and a product sold without such warning is in a defective condition.

Id.

Although alcohol manufacturers have reason to anticipate that danger may result from abnormal consumption of their products, a manufacturer's duty to warn is subject to comment j of the *Restatement*. Comment j states, in pertinent part:

In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. . . .

But a seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized. *Again the dangers of alcoholic beverages are an example*, as are also those of foods containing such substances as saturated fats, which may over a period of time have a deleterious effect upon the heart.

Id. at comment j (emphasis added).

Many courts have relied upon comment j of § 402A in reaching their decisions. See, e.g., *Alabama, Atkins v. American Motors Corp.*, 335 So. 2d 134, 143 (Ala. 1976); *Alaska, Prince*

dangers could result in a finding that the product is defective.⁷⁹

Strict liability can only be imposed on a manufacturer where the defective condition of the product makes it unreasonably dangerous to the consumer.⁸⁰ A product is unreasonably dangerous if it is dangerous to an extent beyond the contemplation of the ordinary consumer.⁸¹ This fictitious user is charged with the knowledge com-

v. Parachutes, Inc., 685 P.2d 83, 87 (Alaska 1984); Arizona, O.S. Stapley Co. v. Miller, 103 Ariz. 556, 560, 447 P.2d 248, 252 (1968); Colorado, Union Supply Co. v. Pust, 196 Colo. 162, 173, 583 P.2d 276, 283 (1978); Connecticut, Tomer v. American Home Prod. Corp., 170 Conn. 681, 689, 368 A.2d 35, 39 (1976); District of Columbia, Payne v. Soft Sheen Prod., Inc., 486 A.2d 712, 722 (D.C. 1985); Florida, Giddens v. Denman Rubber Mfg. Co., 440 So.2d 1320, 1322-23 (Fla. 1983); Idaho, Chancellor v. American Hardware Mut. Ins. Co., 107 Idaho 953, 955, 694 P.2d 1301, 1303 (Idaho Ct. App.), *rev'd on other grounds*, 109 Idaho 841, 712 P.2d 542 (1985); Illinois, Woodill v. Parke Davis & Co., 79 Ill. 2d 26, 33-34, 402 N.E.2d 194, 197-98 (1980); Indiana, Ortho Pharmaceutical Corp. v. Chapman, 180 Ind. App. 33, 40-41, 388 N.E.2d 541, 546-47 (1979); Iowa, Cooley v. Quick Supply Co., 221 N.W.2d 763, 768-69 (1974); Kansas, Wooderson v. Ortho Pharmaceutical Corp., 235 Kan. 387, 399-400, 681 P.2d 1038, 1048-49, *cert. denied*, 469 U.S. 965 (1984); Kentucky, Ulrich v. Kasco Abrasives Co., 532 S.W.2d 197, 200 (Ky. 1976); Louisiana, Tenneco Oil Co. v. Chicago Bridge & Iron Co., 495 So. 2d 1317, 1323 (La. Ct. App. 1986); Maine, Bernier v. Raymark Indus., Inc., 516 A.2d 534, 538 (Me. 1986); Maryland, Ellsworth v. Sherne Lingerie, Inc., 303 Md. 581, 591-95, 495 A.2d 348, 353-55 (1985); Minnesota, Magnuson v. Rupp Mfg., Inc., 285 Minn. 32, 38-39, 171 N.W.2d 201, 206 (1969); Mississippi, Pridgett v. Jackson Iron & Metal Co., 253 So. 2d 837, 843 (Miss. 1971); Missouri, Racer v. Utterman, 629 S.W.2d 387, 393 (Mo. Ct. App. 1981), *cert. denied*, 459 U.S. 803 (1982); Montana, Rost v. C.F. & I. Steel Corp., 189 Mont. 485, 616 P.2d 383, 385 (1980); Nebraska, McDaniel v. McNeil Laboratories, Inc., 196 Neb. 190, 197-99, 241 N.W.2d 822, 826-27 (1976); New Hampshire, Bellotte v. Zayre Corp., 116 N.H. 52, 54-55, 352 A.2d 723, 725 (1976); New Jersey, Torsiello v. Whitehall Laboratories, Div. of Home Prod. Corp., 165 N.J. Super. 311, 398 A.2d 132, 136 (Super. Ct. App. Div. 1979); New Mexico, Rudisaile v. Hawk Aviation, Inc., 92 N.M. 575, 592 P.2d 175, 176 (1979); North Dakota, Olson v. A.W. Chesterton Co., 256 N.W.2d 530, 534-35 (N.D. 1977); Ohio, Leichtamer v. American Motors Corp., 67 Ohio St. 2d 456, 468, 424 N.E.2d 568, 578 (1981); Oklahoma, Smith v. United States Gypsum Co., 612 P.2d 251, 253-54 (Okla. 1980); Oregon, Phillips v. Kimwood Machine Co., 269 Or. 485, 496-97, 525 P.2d 1033, 1038 (1974); Pennsylvania, Incollingo v. Ewing, 444 Pa. 263, 287-88, 282 A.2d 206, 219-20 (1971); Rhode Island, Thomas v. Amway Corp., 488 A.2d 716, 722 (R.I. 1985); Tennessee, Pemberton v. American Distilled Spirits Co., 664 S.W.2d 690, 692-93 (Tenn. 1984); Texas, Technical Chem. Co. v. W. T. Jacobs, 480 S.W.2d 602, 606 (Tex. 1972); Washington, Haysom v. Coleman Lantern Co., 89 Wash. 2d 474, 478-79, 573 P.2d 785, 788-89 (1978); Wisconsin, Krueger v. Tappan Co., 104 Wis. 2d 199, 203-08, 311 N.W.2d 219, 222-24 (Ct. App. 1981).

79. See RESTATEMENT (SECOND) OF TORTS § 402A comment h (1965).

80. *Id.* at comment i; see also *supra* note 76.

81. *Id.* Comment i explains the "unreasonably dangerous" criteria as follows:

Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. . . . The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. *Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is*

mon to the community as to the product's dangerous characteristics.⁸² Therefore, where a manufacturer fails to warn the unsuspecting general public of dangers which are both reasonably anticipated and inherent in the use of the product, the product is deemed to be in a "defective condition unreasonably dangerous," thereby subjecting the manufacturer to strict liability under the *Restatement*.⁸³

Not all potentially dangerous products, however, are defective in the absence of a warning.⁸⁴ A duty to warn is premised on the notion that consumers are entitled to have access to information so that they may intelligently decide whether the product's benefits outweigh its potential risks of harm.⁸⁵ Where the dangers inherent in the use or abuse of a product are already appreciated by the ordinary consumer, it is clear that a warning serves no viable purpose.⁸⁶ In such an instance, a manufacturer's failure to warn will not result in strict liability.⁸⁷

Under the strict liability standard set forth in the *Restatement*,

especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous.

Id. (emphasis added). For a comprehensive examination of the "consumer expectation" test, see Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109, 1370-71 (1974) and Twerski, *From Risk-Utility to Consumer Expectations: Enhancing the Role of Judicial Screening in Products Liability Litigation*, 11 HOFSTRA L. REV. 861 (1983). But see Keeton, *supra* note 77, at 588-92 (criticizing the consumer expectation test as a measure of defectiveness).

82. RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965).

83. See *id.* comments h, i & j. See generally Noel, *supra* note 77, at 267-72, 274 (discussing a manufacturer's duty to warn under § 402A).

84. See, e.g., RESTATEMENT (SECOND) OF TORTS § 402A comment h (1965). Comment h notes that where injury results from

abnormal handling, as where a bottled beverage is knocked against a radiator to remove the cap, or from abnormal preparation for use, as where too much salt is added to food, or from abnormal consumption, as where a child eats too much candy and is made ill, the seller is not liable.

Id. Furthermore, Professor Prosser observed that "[f]ew, if any products, of course, are absolutely safe. Any knife will cut, any hammer wielded unskilled will mash a thumb, any food can cause indigestion; and no one [sic] supposes that the producer of such things is to be held liable when someone is hurt." Prosser, *The Fall of the Citadel*, *supra* note 16, at 807.

85. 1 Prod. Liab. Rep. (CCH) ¶ 4095 (Oct. 1987).

86. See Noel, *supra* note 77, at 272; Wade, *supra* note 16, at 842-43.

87. Under the *Restatement*, a product is neither defective, nor unreasonably dangerous, where the manufacturer fails to warn of dangers already contemplated by the ordinary consumer. See RESTATEMENT (SECOND) OF TORTS § 402A comments j & i (1965); see also cases cited *supra* note 15 (holding that alcohol manufacturers were not strictly liable under section 402A for failing to warn since the dangers associated with alcohol consumption were already commonly known).

alcoholic beverages are products which are neither defective, nor unreasonably dangerous in the absence of a warning.⁸⁸ The drafters of the *Restatement* cited "good whiskey" as an example of a product which is not unreasonably dangerous since it is not "dangerous to an extent beyond that which would be contemplated by the ordinary consumer."⁸⁹ Additionally, the *Restatement* notes that a product which lacks a warning is not defective where it is "only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized."⁹⁰ Moreover, the *Restatement* cites the dangers associated with consuming alcoholic beverages as an example of those for which no warning is necessary.⁹¹ As a consequence, the *Restatement's* position has proven very troublesome for plaintiffs' attorneys attempting to bring strict liability suits against alcohol manufacturers for failing to place health warning labels on their products.

B. *Analysis of Recent Case Law Holding that Alcohol Manufacturers Have No Duty to Warn*

1. *Extended Use Cases.*— In 1982, the United States Court of Appeals for the Seventh Circuit, in *Garrison v. Heublein, Inc.*,⁹² was the first court to hold that alcohol manufacturers were not strictly

88. See RESTATEMENT § 402A comments i & j (citing alcohol as an example of a product whose dangers are generally known and recognized); see also cases cited *supra* note 15.

89. RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965); *Desatnik v. Lem Motlow, Prop., Inc.*, No. 84 C.A. 104, slip op. at *7-8 (Ohio Ct. App. Jan. 9, 1986)(LEXIS, States library, Ohio file) (following the *Restatement* view); *Malek v. Miller Brewing Co.*, 749 S.W.2d 521, 522 (Tex. Ct. App. 1988) (following the *Restatement* view); *Britt, supra* note 38, at 250; Note, *Liability, supra* note 69, at 166-67; Note, *A Spirited Call, supra* note 54, at 1620-21; Note, *Mitigating Alcohol Health Hazards Through Health Warning Labels and Public Education, supra* note 48, at 984; see also W. PROSSER, HANDBOOK OF THE LAW OF TORTS 660 (4th ed. 1971) (noting that whiskey cannot be regarded as unreasonably dangerous since the dangers associated with its consumption are commonly known).

A "plain meaning" reading of comment i indicates that alcohol manufacturers will only be strictly liable where their product contains harmful ingredients which are not generally considered to be present in such products. See *infra* note 124 (discussing the Ohio Court of Appeals' "clear meaning" analysis and reliance upon comment i in *Desatnik*).

90. RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965), set forth *supra* note 78.

91. *Id.*; see *Desatnik*, No. 84 C.A. 104, slip op. at *9; *Britt, supra* note 38, at 252; Note, *A Spirited Call, supra* note 54, at 1621; Note, *Mitigating Alcohol Health Hazards, supra* note 48, at 985 n.34. But cf. *infra* text accompanying notes 125-96 (discussing cases in which plaintiffs attempted to negate this conclusion).

92. 673 F.2d 189 (7th Cir. 1982).

liable⁹³ for failing to warn consumers of the health hazards associated with consuming their products.⁹⁴ The plaintiffs sued the manufacturer/distributor of Smirnoff vodka alleging that the plaintiff had "suffered physical and mental injuries as a result of consuming the defendant's product over a twenty-year period."⁹⁵

In affirming the district court's dismissal of the complaint for its failure to state a claim, the court of appeals based its decision on the doctrine of strict products liability.⁹⁶ Relying primarily upon comments h, i and j of the *Restatement*,⁹⁷ the court concluded that "even though there are dangers involved in the use of alcoholic beverages, because of the common knowledge of those dangers, the product cannot be regarded as unreasonably unsafe."⁹⁸

Five years after *Garrison*, the United States District Court for the Northern District of Illinois was confronted with a similar issue

93. Note, however, that *Garrison* is not the first case to challenge the absence of warning labels on alcoholic beverages. In 1977, the United States Court of Appeals for the Fourth Circuit held that whiskey was neither misbranded, nor adulterated, within the meaning of the Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 331, 334, 351 (1976). *Abernathy v. Schenley Indus.*, 556 F.2d 242, 243-44 (4th Cir. 1977). The court also concluded that since the manufacturer "had followed federal regulations in having its label approved, it had met its obligation under the statute pertaining to the labeling of intoxicating liquor" *Abernathy*, 556 F.2d at 244 (citations omitted).

94. *Garrison*, 673 F.2d at 192.

95. *Id.* at 189. The plaintiff urged five theories for recovery: products liability, negligence, fraud, willful and wanton conduct, and false and misleading advertising. *Id.* Specifically, each theory rested upon defendant's failure to warn of the product's propensities to cause physical damage to the consumer . . . [.] to cause impairment to physical and motor skills for a period of time after consumption . . . [.] to cause impairment to mental capacity and facilities for a period of time after consumption . . . [.] to affect the personality of the consumer; to be addictive; and to create dangers in the operation of a motor vehicle.

Id. at 189 n.2.

96. *See id.* at 189-90. Note that this decision is based upon Illinois law, which had previously adopted § 402A of the *Restatement*. *Id.* at 190; *see Suvada v. White Motor Co.*, 32 Ill. 2d 612, 621-22, 210 N.E.2d 182, 187 (1965); *Genaust v. Ill. Power Co.*, 62 Ill. 2d 456, 462-63, 343 N.E.2d 465, 469 (1976) (recognizing the adoption of § 402A in *Suvada*); *see also supra* note 74 (setting forth jurisdictions who have adopted § 402A).

97. *See supra* notes 88-91 and accompanying text (discussing comments h, i and j and the ways in which they stand for the proposition that the health hazards associated with alcohol are commonly known).

98. *Garrison*, 673 F.2d at 192 (citing W. PROSSER, *supra* note 89, at 660). The plaintiff in *Garrison* relied upon a report prepared by both the United States Departments of Treasury and Health and Human Services to support the proposition that there are many misconceptions about the dangers associated with alcohol. *Id.* at 192 n.6; *see ALCOHOL REPORT*, *supra* note 38, at 45. The court held, however, that the report was insufficiently compelling to disturb its finding that certain health hazards, including those alleged by the plaintiff, were commonly known to be associated with the consumption of alcohol. *Garrison*, 673 F.2d at 192 n.6.

involving injuries resulting from the extended consumption of alcohol. In *Hoover v. Jack Daniels Distillery*,⁹⁹ the plaintiff sought to recover for his seven years of alcoholism, and past and continued suffering of embarrassment and mental anguish from being labeled an alcoholic.¹⁰⁰ The plaintiff alleged that the manufacturers of Jack Daniels Whiskey breached their duty to warn consumers that extended use of their product could become addictive.¹⁰¹ The complaint requested that the defendant be "ordered to properly label its products with adequate warning of the health and social dangers of excessive use."¹⁰²

The *Hoover* court, applying Illinois law,¹⁰³ reaffirmed the position taken in *Garrison* by recognizing that the defendant had no duty to warn the consuming public of dangers which were already commonly known.¹⁰⁴ The court dismissed the plaintiff's argument that, in the five years since *Garrison*, scientific research had uncovered new health hazards associated with consuming alcoholic beverages.¹⁰⁵ The court stated that "[u]ndoubtedly there have been additional clinical findings, but they merely reinforce what has long been generally known: that alcohol abuse presents very serious public health hazards."¹⁰⁶

2. *Acute Alcohol Poisoning Cases.*— In addition to the extended use cases discussed above,¹⁰⁷ suits have been brought claim-

99. No. 87 C 5509 (N.D. Ill. Sept. 14, 1987) (LEXIS, Genfed library, Dist file).

100. Since the court's opinion in *Hoover* does not discuss the nature of the plaintiff's allegations, this Note relies upon various secondary sources for this information. See Middleton, *Liquor-Label Suit Will Test Warning Issue*, NAT'L LAW J., Sept. 22, 1986, at 12; see also *Before the Bar: The Case of Jack Daniel's*, NEWSWEEK, Sept. 15, 1986, at 36; Lewin, *A Liquor Issue: Warning Label*, N.Y. Times, Sept. 30, 1986, at D2, col. 1.

101. Middleton, *supra* note 100, at 12; Lewin, *supra* note 100, at D2, cols. 1-3. The complaint alleged liability on the part of the defendant based upon the following three theories of recovery: (1) strict products liability, (2) negligence and (3) willful and wanton conduct. See Note, *A Spirited Call*, *supra* note 54, at 1629 n.142 (quoting Plaintiff's Complaint at 17, *Hoover v. Jack Daniels Distillery*, No. 86 L 19211 (Ill. Cir. Ct. filed September 2, 1986)).

102. Note, *A Spirited Call*, *supra* note 54, at 1629 n.142 (quoting Plaintiff's Complaint at 17, *Hoover v. Jack Daniels Distillery*, No. 86 L 19211 (Ill. Cir. Ct. filed September 2, 1986)); see also Middleton, *supra* note 100, at 12.

103. See *Hoover*, No. 87 C 5509, at *2. Illinois previously adopted RESTATEMENT (SECOND) OF TORTS § 402A (1965). See *supra* note 96; see also *supra* note 74 (listing those jurisdictions which have adopted § 402A of the Restatement).

104. *Hoover*, No. 87 C 5509, at *1-2. The court granted the defendant's motion to dismiss for failure to state a claim upon which relief could be granted. *Id.* at *1.

105. See *id.* at *1-2.

106. *Id.* at *2.

107. Although not directly relevant to the health hazards associated with consuming alcohol, a third type of suit brought against alcohol manufacturers is worthy of brief mention.

ing that alcohol manufacturers breached their duty to the consuming public by failing to warn that excessive consumption of their product may potentially cause acute alcohol poisoning.¹⁰⁸ In *Pemberton v. American Distilled Spirits Co.*,¹⁰⁹ a father instituted a strict products liability action against a grain alcohol manufacturer, seeking to recover damages for the death of his minor son who died as a result of the over-consumption of alcohol.¹¹⁰ The father alleged that the defendant's product approached pure alcohol, and as such, was unfit for human consumption.¹¹¹ The plaintiff claimed that the manufac-

These are cases in which a person is injured as a result of the negligent operation of an automobile by an intoxicated driver. Injured plaintiffs have brought suits against the alcohol manufacturers for failure to warn that their product should not be consumed prior to driving an automobile, or alternatively, to warn of the amount of alcohol which can be consumed safely before legal intoxication results. Courts faced with these claims have unanimously held in favor of the manufacturers. See, e.g., *Maguire v. Pabst Brewing Co.*, 387 N.W.2d 565, 570 (Iowa 1986) (answering certified questions for the federal district court and stating that "although persons engaging in consumption of alcoholic beverages may not be able to ascertain precisely when the concentration of alcohol in their blood, breath, or urine reaches the proscribed level, they should, in the exercise of reasonable intelligence, understand what type of conduct places them in jeopardy of violating the [law]." (quoting *State v. Bock*, 357 N.W.2d 29, 34 (Iowa 1984))); *Russell v. Bishop*, No. 88 (Tenn. Ct. App. 1986) (affirming summary judgment for manufacturer and quoting at length from *Pemberton v. American Distilled Spirits Co.*, 664 S.W.2d 690 (Tenn. 1984)); *Malek v. Miller Brewing Co.*, 749 S.W.2d 521, 522 (Tex. Ct. App. 1988) (affirming summary judgment for manufacturer and recognizing that alcoholic beverages are specifically excluded as a product which is not unreasonably dangerous in the comments to the *Restatement*); *Morris v. Adolph Coors Co.*, 735 S.W.2d 578, 582-83 (Tex. Ct. App. 1987) (concluding that plaintiffs' strict liability theory failed to state a claim upon which relief could be granted since the ordinary consumer knows that over-consumption may impair those motor skills necessary to drive an automobile). These courts have concluded that the premise that alcohol consumption will lead to intoxication, and intoxicated persons should not operate motor vehicles, is already a matter of common knowledge. See *Maguire*, 387 N.W.2d at 570; *Malek*, 749 S.W.2d at 523; *Morris*, 735 S.W.2d at 583-84. In response to plaintiffs' arguments that the specific amount of alcohol which can be consumed over a given period of time before legal intoxication results is not a matter of common knowledge, the courts have concluded that that degree of knowledge is not necessary for ordinary consumers, nor feasible to disseminate. See *Maguire*, 387 N.W.2d at 570; *Malek*, 749 S.W.2d at 523.

108. Acute alcohol poisoning is an abnormal condition, taking place within hours of ingestion "resulting from an extreme state of alcohol intoxication, from which it differs only in degree." See R. O'BRIEN & M. CHAFETZ, *THE ENCYCLOPEDIA OF ALCOHOLISM* 18 (1982); see also R. SLOANE, *THE SLOANE-DORLAND ANNOTATED MEDICAL-LEGAL DICTIONARY* 10 (1987) (defining "acute" by citation to *Woodall Indus., Inc. v. Massachusetts Mut. Life Ins. Co.*, 483 F.2d 986, 1000 (6th Cir. 1973)). In general, blood alcohol concentrations above 0.4% result in the occurrence of alcohol poisoning. R. O'BRIEN & M. CHAFETZ, *supra*, at 18; see also J. WYNGAARDEN & L. SMITH, 1 *CECIL TEXTBOOK OF MEDICINE* 48-49 (18th ed. 1988) (noting that blood alcohol levels exceeding 500 mg per deciliter may result in death for sporadic drinkers).

109. 664 S.W.2d 690 (Tenn. 1984).

110. *Id.* at 691.

111. *Id.* at 692.

turer knew, or should have known, that over-consumption of its product could be lethal, and that absent a proper warning, the product was in a defective condition unreasonably dangerous.¹¹²

As in *Garrison*, the *Pemberton* court relied upon comment j of the *Restatement* in concluding that a manufacturer has no duty to warn of dangers inherent in the use of its product which are commonly known and recognized.¹¹³ In concluding that the plaintiff's complaint did not state a claim upon which relief could be granted, the court took judicial notice of the dangers associated with consuming alcohol.¹¹⁴ Specifically, the court stated that "[a]lcohol has been present and used in society during all recorded history and its characteristics and qualities have been fully explored and developed and are a part of the body of common knowledge."¹¹⁵ With regard to certain risks posed by a product, the court held that the manufacturer is entitled to rely upon the "common sense and good judgment" of the consumer.¹¹⁶ The court therefore held that "death or serious injuries resulting from either excessive or prolonged consumption of alcohol" fall within this category of risk.¹¹⁷

The Ohio Court of Appeals, in *Desatnik v. Lem Motlow Prop., Inc.*,¹¹⁸ reached a result similar to the holding in *Pemberton*. In *Desatnik*, the plaintiff brought a wrongful death action against the manufacturer/distributor of Jack Daniel's Whiskey.¹¹⁹ The plaintiff alleged that the manufacturer had a duty to warn unsuspecting users that over-consumption could be fatal.¹²⁰ In granting summary judg-

112. *Id.* Although the plaintiff alleged causes of action under strict liability, negligence and breach of warranty theories, *id.* at 691, the issue before the court was whether the complaint stated a claim under the Tennessee Products Liability Act, *id.*; see also TENN. CODE ANN. §§ 29-28-101 to 108 (1980 & Supp. 1989).

113. *Pemberton*, 664 S.W.2d at 692. Note that although the deceased was a minor, whether a product is in a "defective condition unreasonably dangerous" depends upon the knowledge of the ordinary consumer of the product. *Id.*; see RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965). Moreover, "where the danger is evident to most users of a product, there is no duty to warn an occasional, inexperienced user." *Pemberton*, 664 S.W.2d at 693.

114. *Pemberton*, 664 S.W.2d at 693-94.

115. *Id.* at 693. As an example, the court noted that "[c]ourts, legislatures, parents, ministers, and temperance organizations and others have long recognized and decried the dangers inherent in alcohol." *Id.*; cf. *supra* note 1 (discussing the various functions performed by alcohol over the course of history).

116. *Pemberton*, 664 S.W.2d at 693.

117. *Id.*

118. No. 84 C.A. 104 (Ohio Ct. App. Jan. 9, 1986) (LEXIS, States library, Ohio file).

119. *Id.* at *2.

120. *Id.* at *3. The plaintiff advanced the following three theories of liability: (1) strict liability, (2) negligence and (3) implied warranty. *Id.* at *2-3. The court noted that Ohio adopted § 402A of the *Restatement*. *Id.* at *5 (citing *Temple v. Wean United, Inc.*, 50 Ohio

ment for the manufacturer, the court held that a manufacturer could not be held strictly liable for failing to warn of dangers commonly known by the ordinary consumer of his product.¹²¹ Despite the plaintiff's assertion that *Restatement* comments i and j did not specifically refer to the danger of death by a single overdose of alcohol as being commonly known,¹²² the court concluded that the drafters of the *Restatement* used alcohol as an example of a product whose dangers are generally known and recognized.¹²³ As a result, the court concluded that alcohol manufacturers are excluded from strict liability under the *Restatement*.¹²⁴

St. 2d 317, 364 N.E.2d 267 (1977)). In *Desatnik*, court held that under Ohio law the theories of strict liability and implied warranty are virtually indistinguishable, and as a result the concept of implied warranty is included within the scope of strict products liability. No. 84 C.A. 104, slip op. at *4-5.

121. *Desatnik*, No. 85 C.A. 104, slip op. at *11. Although the plaintiff claimed that the decedent had no knowledge of the possible toxic or fatal effects of over-consumption of the manufacturer's whiskey, the court nevertheless held that a manufacturer has no duty to warn of open and obvious dangers associated with alcohol. *Id.* The court stated that "[t]he test to determine whether a danger is obvious is an objective standard, not dependent upon actual knowledge. Such knowledge and the realization of the danger are imputed where an awareness is possessed by the ordinary consumer who purchases or uses the product." *Id.*

122. *Id.* at *5-*8.

123. *Id.* at *9.

124. *See id.* Beginning its analysis with comment i, the court stated that it "does not misunderstand the clear meaning of the phrase 'Good whiskey is not unreasonably dangerous . . . but bad whiskey . . . is unreasonably dangerous.[]'" *Id.* at *7. Since the plaintiff did not allege that the manufacturer's whiskey was defective because it was produced in such a way as to render it toxic (i.e. "containing a dangerous amount of fusel oil") and, therefore, unreasonably dangerous, the court concluded that no claim existed under comment i. *Id.* at *7-8; *see* RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965).

Thus, by applying the court's analysis above, merely alleging that excessive consumption of whiskey can be fatal is not sufficient for recovery under comment i, since this is a matter of common knowledge. To successfully state a claim under comment i, the plaintiff must, therefore, allege that the particular defendant's whiskey is bad whiskey, containing more toxicants than are found in ordinary whiskey. *See Desatnik*, No. 84 C.A. 104, slip op. at *7-8. The danger presented by these additional toxicants is not one which is likely to be perceived by an ordinary consumer without the presence of a warning and, therefore, the potentiality of danger would not be commonly known. *See id.*

The court then examined whether the plaintiff could successfully bring a claim under comment j. *See id.* at *8-9. Comment j requires manufacturers and sellers to warn consumers of those dangers inherent in the use of their products which are not commonly known. RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965), *see also supra* note 78 (setting forth comment j). The plaintiff alleged that the risk of over-consumption of alcohol leading to toxic and fatal results was a danger not generally known and recognized. *Desatnik*, No. 84 C.A. 104, slip op. at *9. The court rejected the plaintiff's claim under comment j when it stated the following:

Clearly, the authors of the *Restatement* [(Second)] used alcohol as an example of a product which is only potentially dangerous when consumed over a long period of time or in excessive quantity and the dangers of which are generally known and

C. *Analysis of Recent Case Law Holding Alcohol Manufacturers May Have a Duty to Warn*

1. *Extended Use Cases.*— The Court of Appeals for the Third Circuit, in *Hon v. Stroh Brewery Co.*,¹²⁵ was the first court to allow a strict products liability claim against an alcohol manufacturer to reach the jury.¹²⁶ The court, determining that triable issues of fact existed, was unable to conclude, as a matter of law, that the dangers associated with the consumption of alcoholic beverages were commonly known.¹²⁷ In *Hon*, the plaintiff sought recovery for the death of her husband who died of pancreatitis resulting from consuming beer manufactured by the defendant over at least a six year period.¹²⁸ Conceding that it is common knowledge that long-term consumption of alcohol can be addictive and lead to physical injury,¹²⁹ the plaintiff claimed that Stroh had a duty to warn of lesser known dangers; specifically, that moderate consumption, even though prolonged, can result in certain types of physical injuries not likely to be anticipated by the consumer.¹³⁰

recognized. [Plaintiff] can infer no duty to warn from comment j.

Id.

In addition to concluding that the authors of the *Restatement* regarded the dangers associated with alcohol consumption as a matter of common knowledge, the court itself came to a similar conclusion. *Id.* at *11-12. The court relied upon *Garrison v. Heublein, Inc.*, 673 F.2d 189 (7th Cir. 1982), and stated "that in light of [the] common knowledge concerning alcohol and its effects, 'the defendant (manufacturer) had no duty to add, by labels or advertising, to the flow of information.'" *Id.* at *11 (quoting *Garrison*, 673 F.2d at 190).

125. 835 F.2d 510 (3d Cir. 1987).

126. See Comment, *Alcohol Manufacturers and the Duty to Warn: An Analysis of Recent Case Law in Light of the Alcoholic Beverage Labeling Act of 1988*, 38 EMORY L.J. 1191, 1202 (1989) (authored by Carter H. Dukes); Note, *A Case For Alcohol Beverage Warning Labels: Duty to Warn of Dangers of Consumption*, 53 MO. L. REV. 555 (1988) (authored by Stacy M. Andreas).

127. *Hon*, 835 F.2d at 516-17.

128. *Id.* at 511. Specifically, the decedent consumed two to three cans of beer per evening, approximately four nights per week, for a period of at least six years. *Id.*

Although not directly relevant to the issue of summary judgment, it is important to note that the decedent's consumption consisted "mainly" of beer manufactured by Stroh. *Id.* At the trial on the merits, the defendant's consumption of many varieties and brands of alcoholic beverages could complicate the determination of the extent of an individual manufacturer's liability.

129. *Hon v. Stroh Brewery Co.*, 665 F. Supp. 1140, 1142 n.3 (M.D. Pa.), *vacated*, 835 F.2d 510 (3d Cir. 1987) (quoting at length from plaintiff's brief submitted in opposition to Stroh's motion for summary judgment).

130. In her brief submitted in opposition to Stroh's motion for summary judgment, the plaintiff introduced testimony of a doctor of toxicology and pharmacology. *Hon*, 835 F.2d at 511. The court summarized the doctor's opinions as follows:

(1) the understanding shared by members of the public is that excessive and pro-

The court applied Pennsylvania law¹³¹ and summarily dismissed the plaintiff's contention that the public is not generally aware that extended consumption of alcohol could result in pancreatitis.¹³² Rather, the court focused its attention on the issue of whether the ordinary consumer is aware that moderate consumption of alcohol over an extended period of time could lead to serious bodily injury.¹³³ Basing its decision solely on the affidavit of the plaintiff's expert witness¹³⁴ and Stroh's commercial advertising,¹³⁵ the court

longed use of alcoholic beverages is likely to result in disease, principally of the liver; (2) [decedent's] case was not within the risk thus appreciated by the public both because (a) his use was prolonged but not excessive and (b) his disease was of the pancreas; and (3) the public's understanding is "archaic" because medical science has now established that *either excessive or prolonged*, even though moderate, use of alcohol may result in diseases of many kinds, including pancreatic disease.

Id. (emphasis in original). Since Stroh did not challenge the doctor's expertise, the court assumed he was qualified to testify on all matters contained in his affidavit. *Id.* at 511 n.1.

131. Since the court based its jurisdiction on diversity grounds, the court was required to apply the law of the state in which it sat. *See id.* at 512; *see also* *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Pennsylvania has adopted § 402A of the *Restatement*. *See Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966); *see also supra* note 74 (setting forth jurisdictions which have adopted § 402A). In applying the *Restatement*, the Supreme Court of Pennsylvania has held that the trial judge must first decide, as a threshold issue and matter of law, whether the defendant's product could be considered "unreasonably dangerous." *Hon*, 835 F.2d at 512 (applying the rule as stated in *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 391 A.2d 1020 (1978)). A plaintiff asserting a strict products liability claim under Pennsylvania law need only establish that the product was defective when it left the defendant's (manufacturer's) possession, and that the defect was the proximate cause of the plaintiff's injury. *Id.* This burden is met by proving that given the common knowledge of the community as to the dangers associated with consuming alcoholic beverages, a warning is necessary in order to render the product safe for its intended use (i.e. consumption). *See id.* at 514 (applying the second half of the test established in *Azzarello*).

132. *Hon*, 835 F.2d at 516 n.8 (stating that "[i]t is not necessary that consumers be aware of each type of malady to which prolonged consumption of alcohol makes them susceptible, nor is it necessary for them to know every organ which is endangered."). If the plaintiff knows, or should know, that his consumption "creates a substantial risk of bodily injury" this is sufficient knowledge to negate the manufacturer's duty to warn. *Id.* It is of no consequence that the ordinary consumer is not aware that prolonged consumption of alcohol can cause pancreatitis, if he is aware that the same consumption can lead to cirrhosis of the liver. *See id.*

133. *See id.* at 515-17. Under Pennsylvania law, the determination of this issue is for the jury, unless the record reveals "no factual basis" for finding for the plaintiff. *Id.* at 514. *But cf. Pemberton*, 664 S.W.2d at 692 (Tenn. 1984) (concluding that under Tennessee law, where the facts are undisputed, the issue of whether the manufacturer has a duty to warn is to be determined as a matter of law); *see also supra* notes 109-17 and accompanying text (discussing *Pemberton*).

134. *See supra* note 130 (stating the court's summary of the doctor's testimony as it appeared in his affidavit).

135. The court determined that the jury could find that Stroh's commercials impressed upon the alcohol consuming public the notion that consuming eight to twelve cans of beer per week is "part of the 'good life' and is properly associated with healthy, robust activities" *Hon*, 835 F.2d at 514-15.

concluded that a trier of fact could find that the ordinary consumer is not aware that the amount of alcohol consumed by the decedent was potentially fatal.¹³⁶ The court held that where the ordinary consumer does not appreciate the health hazards associated with consuming alcohol, the manufacturer has a duty to warn of those dangers, and failure to do so could result in the manufacturer being held strictly liable to injured consumers.¹³⁷

In order to allow the question of common knowledge to go to the jury, the court distinguished the positions adopted by both the comments to the *Restatement* and prior case law. Comment j of the *Restatement* cites alcohol as an example of a product whose dangers, resulting from prolonged consumption, are commonly known and recognized.¹³⁸ Arguably, the *Restatement's* presumption is over-inclusive.¹³⁹ In fact, the *Hon* court was unwilling to give the *Restatement* authors' reference to consumer knowledge such a broad interpretation.¹⁴⁰ The court noted that comment j does not suggest that consuming alcohol "for any extended period, no matter how short, in any quantity, no matter how small, presents generally known dangers."¹⁴¹ As such, the court interpreted comment j as stating that

136. *Id.* at 514.

137. *Id.* at 515; see also RESTATEMENT (SECOND) OF TORTS § 402A comments h, i & j (1965); *supra* notes 70-91 and accompanying text (discussing inadequate warnings as a basis for strict liability under the *Restatement*).

138. See RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965); *supra* note 78 (setting forth comment j); sources cited *supra* note 91 (recognizing the *Restatement* authors' assumption that the dangers associated with the excessive, or prolonged, consumption of alcohol are commonly known).

139. See Britt, *supra* note 38, at 252-53 (arguing that courts must look beyond the common knowledge presumption in the *Restatement* since the dangers arising from the interaction of drugs and alcohol, and the dangers associated with drinking during pregnancy are not commonly known); Note, *A Spirited Call*, *supra* note 54, at 1620-21 (indicating that recent scientific findings undercut the examples relied upon in the comments to the *Restatement*); Note, *Mitigating Alcohol Health Hazards*, *supra* note 48, at 985-86 (stating that the *Restatement's* presumption of consumer knowledge must be modified to reflect recent scientific developments).

140. See *Hon*, 835 F.2d at 515.

141. *Id.* The court adopts a similarly narrow interpretation for the authors' reference to the dangers associated with alcoholic beverages in comment i. Comment i cites "good whiskey" as an example of a product which is not unreasonably dangerous since it is not dangerous to an extent beyond that contemplated by the ordinary consumer. See RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965); sources cited *supra* note 89 (recognizing authors' reference to alcoholic beverages as products which are not unreasonably dangerous); *supra* note 81 (setting forth comment i). The *Hon* court, however, was unwilling to read the comment so broadly. Instead, the court noted that alcohol manufacturers are excepted from liability only because the dangers of intoxication and alcoholism are already appreciated by the ordinary consumer. *Hon*, 835 F.2d at 515-16 n.6.

"when the danger is generally known, no warning is required," and that alcohol is merely cited as an example of a product falling within this rule.¹⁴²

In finding that a triable issue of fact existed, the court also distinguished all of the previous cases which held, as a matter of law, that the dangers associated with alcohol consumption were com-

142. *Id.* at 515' (emphasis in original). The court's interpretation of comment j faces many obstacles. First, the court's reading renders the latter portion of comment j meaningless. Comment j exempts manufacturers from a duty to warn when: (1) their product is only dangerous when consumed excessively; (2) the danger arises only after prolonged consumption; and (3) when the danger or potential danger is commonly known. RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965). This portion of comment j is very straightforward and, therefore, examples are not necessary to clarify its meaning. By stating that the comment's reference to alcohol was merely an example of a product falling within this rule, the court brought forth an unprecedented interpretation of the comment. Thousands of products exist which are potentially dangerous when consumed excessively; or over a prolonged period of time. *See Wade, supra* note 16, at 846 (noting that nearly all food and drugs are dangerous when consumed excessively). No rational purpose could have been served by the authors of the *Restatement* using a single product as an example to clarify an unambiguous statute, where thousands of such products potentially exist. If the existence of the authors' reference to the dangers associated with alcoholic beverages is to be given any rational purpose, it can only be as an example of a product whose dangers, given excessive or prolonged consumption, are generally known and recognized. *See Desatnik v. Lem Motlow Prop., Inc.*, No. 84 C.A. 104, slip op. at *9 (Ohio Ct. App. Jan. 9, 1986) (LEXIS, States library, Ohio file); *Malek v. Miller Brewing Co.*, 749 S.W.2d 521, 522 (Tex. Ct. App. 1988); *Britt, supra* note 38, at 252; *Note, A Spirited Call, supra* note 54, at 1621; *Note, supra* note 69, at 66-67; *Note, Mitigating Alcohol Health Hazards, supra* note 48, at 984 n.34.

The court's misinterpretation is further apparent upon a careful examination of the way in which alcohol is referred to in comment j. The comment states: "again the dangers of alcoholic beverages are an example." RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965) (emphasis added). The word "again" refers to the use of alcohol as an example in comment i. Comment i cites "good whiskey" as an example of a product which is not unreasonably dangerous, since it is not "dangerous to an extent beyond that which would be contemplated by the ordinary consumer." *See* RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965); sources cited *supra* note 89 (recognizing the authors' reference to alcoholic beverages as products which are not unreasonably dangerous).

In view of this introductory language, the same treatment accorded the dangers associated with consuming alcoholic beverages in comment i should be used in determining the purpose for citing alcohol as an example in comment j. Since alcohol is used in comment i as an example of a product whose dangers are commonly known, it is likely that the authors intended the same treatment to be accorded the use of alcohol as an example in comment j. Instead of twisting the authors' reference to the dangers associated with alcohol so as to effectuate the ends which the court sought, the court could have concluded that it was not bound by the authors' opinions on common knowledge, which were formulated over two decades ago. *See Britt, supra* note 38, at 252-53; *Note, A Spirited Call, supra* note 54, at 1620-21; *Note, Mitigating Alcohol Health Hazards, supra* note 48, at 985-86. The latter approach is more efficient and less obtrusive than the reconstruction undertaken by the court. The court's action, however, can be rationalized by interpreting the *Restatement's* common knowledge presumption as precluding alcohol manufacturers from strict liability thereunder. *See supra* notes 122-24 and accompanying text (discussing preclusion).

monly known.¹⁴³ The court found that each of those cases presented records from which a trier of fact could only conclude that an ordinary consumer should have been aware that his consumption created a substantial risk of injury,¹⁴⁴ thereby alleviating those manufacturers from a duty to warn as a matter of law.

In distinguishing these cases, the court also distinguished *Garrison v. Heublein, Inc.*¹⁴⁵ The court differentiated *Garrison* despite the fact that both cases dealt with plaintiffs who had suffered injuries as a result of consuming alcohol over an extended period of time.¹⁴⁶ The court read into comment j the requirement that the plaintiff's consumption must have been excessive, in addition to prolonged, for the defendant to be relieved of liability.¹⁴⁷ Specifically, the court concluded that alcohol manufacturers are not precluded from liability for a consumer's prolonged consumption under comment j, absent a determination that the quantity of plaintiff's consumption was sufficiently large, and the period sufficiently long, to present dangers which are within the contemplation of the ordinary consumer.¹⁴⁸ Looking to the plaintiff's alleged injuries in *Garrison*,¹⁴⁹ the court concluded that except for physical damage caused to the consumer, all of the allegations involved the excessive use of alcohol.¹⁵⁰ The court therefore found that despite the fact that there was no mention of the plaintiff's excessive consumption in the *Garrison* court's opinion, one could reasonably infer that the plaintiff's consumption, in

143. See cases cited *supra* note 15.

144. *Hon*, 835 F.2d at 516-17.

145. 673 F.2d 189 (7th Cir. 1982); see *supra* notes 92-98 and accompanying text (discussing *Garrison*).

Note that although another extended use case was decided three months prior to *Hon*, *Hoover v. Jack Daniels Distillery*, No. 87 C 5509 (N.D. Ill. Sept. 14, 1987), it is not referred to in the latter decision.

146. In *Garrison*, the plaintiff consumed vodka that was manufactured by the defendant over a twenty year period. 673 F.2d at 189. The issue of whether twenty years constituted "a long period of time" within the meaning of comment j was never specifically addressed by the court in its decision. However, it is fair to assume that the court took judicial notice of the fact that twenty years constituted an extended period. See *id.* at 191.

Although the plaintiff in *Hon* consumed Stroh's beer for at least six years, the court accepted the plaintiff's expert witness' opinion that such a time period was "prolonged." 835 F.2d at 511 n.2; see *supra* note 130 (discussing and quoting the court's summary of the expert's testimony as contained in his affidavit).

147. *Hon*, 835 F.2d at 516.

148. *Id.*

149. See *supra* note 95 (listing the injuries alleged to have resulted from the plaintiff's consumption of alcohol in *Garrison*).

150. *Hon*, 835 F.2d at 516 n.7.

addition to being prolonged, was also excessive.¹⁵¹

Although the *Restatement*¹⁵² and prior case law¹⁵³ have consistently held that the dangers associated with the prolonged consumption of alcohol are commonly known, the *Hon* court's conclusion that some degree of excessiveness must accompany prolonged use appears logical.¹⁵⁴ Applying the *Hon* court's analysis, a manufacturer has a duty to warn unsuspecting consumers of the minimum quantity of alcohol¹⁵⁵ which, if consumed over a prolonged period, creates a substantial risk of bodily injury.¹⁵⁶

While the court's conclusion is theoretically sound, in reality it is impractical. Requiring the design of effective warnings imposes an impractical burden on alcohol manufacturers.¹⁵⁷ This burden stems

151. *Id.* Interestingly, the same test that the *Hon* court used to determine that the plaintiff's consumption in *Garrison* was excessive, can be used to infer that the decedent's consumption in *Hon* was excessive. One can conclude that consuming two to three cans of beer per evening, approximately four nights per week is excessive, if the test for excessiveness is, as the *Garrison* court stated:

to cause physical damage to the consumer; to cause impairment to physical and motor skills for a period of time after consumption; to cause impairment to mental capacity and facilities for a period of time after consumption; to affect the personality of the consumer; to be addictive; and to create dangers in the operation of a motor vehicle.

673 F.2d at 189 n.2. Moreover, in *Garrison*, the plaintiff's consumption of vodka over a twenty year period merely resulted in physical injury, while in *Hon*, the plaintiff's consumption of beer over a six year period resulted in death. This is yet another basis for concluding that the decedent's consumption in *Hon* was excessive, in addition to being prolonged.

152. See RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965), set forth *supra* note 78; sources cited *supra* note 91.

153. See *supra* notes 92-124 and accompanying text.

154. Clearly, if a case arose where the plaintiff's consumption of one glass of beer per week over a prolonged period was proven to have resulted in bodily injury, this would be an example of an instance where a trier of fact could reasonably conclude that the danger would not have been contemplated by the ordinary consumer. Cf. *Hon*, 835 F.2d at 511 (summarizing a toxicologist's affidavit which states that the understanding of the general public is that excessive and prolonged consumption is likely to result in serious bodily injury).

155. See *Hon*, 835 F.2d at 514. The court concluded that the trier of fact could properly find that the quantity and manner of plaintiff's consumption—specifically two to three cans of beer per evening, approximately four evenings per week, for six years—was potentially fatal, and that this fact was neither known to him nor to the consuming public. *Id.*

156. It is important to note that the *Hon* court, when presented with the specific facts of that case, did not consider the potential risk of a *particular* bodily injury as a variable in determining an alcohol manufacturer's duty to warn. See *id.* at 516 n.8; see *supra* note 132 and accompanying text (discussing the court's holding). If alcohol manufacturers were required to consider this variable, the job of devising adequate warnings would become vastly more complicated. See *infra* notes 190-92 and accompanying text (discussing the need to warn of potential health hazards).

157. *Hon v. Stroh Brewery Co.*, 665 F. Supp. 1140, 1146 (M.D. Pa.), *vacated*, 835 F.2d 510 (3rd Cir. 1987). Although the Third Circuit vacated the district court's opinion, the appel-

from the notion that a general warning of the risk of moderate consumption is inappropriate¹⁵⁸ since that amount of consumption has not been scientifically proven to be harmful to most consumers.¹⁵⁹ To the contrary, some medical studies have determined that alcohol may actually be beneficial to one's health when moderately consumed.¹⁶⁰ Under such circumstances, requiring manufacturers to provide blanket warnings of the risk of moderate consumption not only promotes the dissemination of potentially inaccurate and misleading information, but also unduly burdens manufacturers.

How an individual's body will react to the presence of alcohol, i.e., positively or negatively, is dependent upon a number of subjective factors, such as nutrition.¹⁶¹ While small quantities of alcohol consumed over relatively brief periods can potentially be lethal for some consumers,¹⁶² similar consumption may, in fact, enhance other consumers' health.¹⁶³ In order for manufacturers to provide *effective* warnings, the warnings must incorporate these subjective factors since, as previously demonstrated, a general warning may be inappropriate. An effective warning, therefore, must disclose those factors which make an individual particularly susceptible to bodily in-

late court expressly left open the issue of the feasibility of devising an effective warning for a more complete development of the record on remand. 835 F.2d at 514.

158. See *Hon*, 835 F.2d at 514 (noting Stroh's contention); cf. ALCOHOL REPORT, *supra* note 38, at 41 (concluding that the risks associated with alcoholic beverages may not be effectively communicated through a label since, unlike cigarettes, moderate consumption is not necessarily hazardous, and therefore, a general warning such as "Alcohol may be hazardous to your health" may not be convincing to the general public).

159. ALCOHOL REPORT, *supra* note 38, at 41; see Wilber, *Is All Alcohol Equal? The Chemists Say Yes, but the Answer May Be More Complicated*, 94 SCI. DIGEST 17 (May 1986); Sanders, *supra* note 2, at C2, col. 3.

160. See generally ALCOHOL REPORT, *supra* note 38, at i (noting that moderate alcohol consumption has been related to "increased positive feeling states," a reduction in stress and tension, and lower incidence of coronary heart disease); Wilber, *supra* note 159, at 17 (citing a recent study conducted by the Johns Hopkins School of Medicine for the Alcoholic Beverage Medical Research Foundation in which it was found that moderate beer consumers appeared healthier than non-consumers, and were 13% less likely to report illness); Sanders, *supra* note 2, at C2, col. 5 (noting a recent American Journal of Public Health report which states that women who drink moderately are approximately 33% less likely to be hospitalized than those who have never had a drink, and although the result for men is similar, the percentage is slightly lower at 25%).

161. *Hon*, 665 F. Supp. at 1146 (quoting plaintiff's expert in toxicology and pharmacology).

162. See *id.* (quoting plaintiff's expert); see, e.g., *supra* note 107 (discussing acute alcohol poisoning); *supra* text accompanying notes 109-11, 119-22, 169-72 (discussing acute alcohol cases and describing various amounts of consumption which led to plaintiffs' deaths).

163. See *supra* note 160 (discussing the positive effects associated with the moderate consumption of alcohol).

jury when consuming moderate amounts of alcohol. Such an approach essentially results in requiring manufacturers to devise warnings suitable for the particular tolerance of individual consumers—an impractical burden.¹⁶⁴

Assuming *arguendo*, that manufacturers are able to devise warnings which take into consideration all subjective factors which make one susceptible to bodily injury, thereby eliminating individual characteristics as an issue subject to litigation, a second issue arises regarding the threshold level of consumption necessary to cause physical injury. The term "moderate consumption" is arguably too vague to provide adequate information to alcohol consumers and thereby invites attack by potential plaintiffs.¹⁶⁵ Devising a more specific warning, however, is not plausible since the level of alcohol consumption which may result in serious bodily injury varies depending upon the length of the "prolonged period." Additionally, various consumption patterns such as binge drinking, and their unknown effects on the level of consumption necessary to produce serious bodily injury¹⁶⁶ further complicate a manufacturer's ability to provide adequate warnings to individuals.

2. *Acute Alcohol Poisoning*.—As in *Hon*, the Texas Court of Appeals in *Brune v. Brown Forman Corp.*,¹⁶⁷ also permitted the question of the scope of common knowledge to go to the jury.¹⁶⁸ In *Brune*, the plaintiff sought recovery for her daughter's death, which was caused by acute alcohol poisoning.¹⁶⁹ The decedent, a college student, purchased tequila manufactured and bottled by the defendant, and began consuming straight "shots" until death resulted.¹⁷⁰ The plaintiff alleged that Brown Forman was strictly liable for failing to warn that excessive consumption of their product could be fatal.¹⁷¹

164. *Hon*, 665 F. Supp. at 1146; accord *Maguire v. Pabst Brewing Co.*, 387 N.W.2d 565, 570 (Iowa 1986) (noting the impracticality of requiring manufacturers to devise warnings suitable for the tolerance level of each consumer).

165. See *supra* note 155 (demonstrating the Third Circuit's willingness to look to the plaintiff's actual consumption when determining whether a triable issue of fact exists).

166. Cf. ALCOHOL REPORT, *supra* note 38, at 7 (noting that the question still remains with respect to "inter-individual" and "different patterns of consumption").

167. 758 S.W.2d 827 (Tex. Ct. App. 1988).

168. *Id.* at 831.

169. *Id.* at 827-28.

170. *Id.* at 828.

171. *Id.* The plaintiff's original complaint also sought recovery against the distributor and retailer of defendant's tequila. *Id.* at 827-28. However, the plaintiff only appealed from that portion of the court's order granting summary judgment for the manufacturer, Brown

In concluding that the question of common knowledge posed a triable issue of fact, the court's analysis relied upon weak authority. The court first noted that the decedent had had little exposure to the use of alcohol and as a result, was unfamiliar with the dangers associated with excessive use.¹⁷² This fact was of little importance, however, since the appropriate standard for measuring common knowledge was the knowledge possessed by the ordinary consumer of the product, with the knowledge common to the community as to its characteristics.¹⁷³ The decedent's naivete should not have been dispositive in determining the knowledge common to the general public¹⁷⁴ and as a result, does not provide support for the conclusion that the dangers associated with consuming alcohol are not commonly known and recognized.

Second, the court cited the facts that Congress had been considering warning legislation and that Mexico had already instituted such legislation as authority for the proposition that the dangers resulting from consuming alcohol may not be generally known.¹⁷⁵ The possibility of future Congressional regulation, however, does not translate into a reason for concluding that the dangers are not commonly known.¹⁷⁶ Congress' intent behind enacting warning legislation may be to "remind" the general public of the health hazards associated with consuming alcohol, rather than to instruct them of those hazards.¹⁷⁷ In addition, the court's reference to Mexico's warn-

Forman. *Id.*

It should also be noted that Texas had previously adopted § 402A of the *Restatement*. See *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 789 (Tex. 1967); *Shamrock Fuel & Oil Sales Co. v. Tunks*, 416 S.W.2d 779, 783 (Tex. 1967).

172. *Brune*, 758 S.W.2d at 830.

173. RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965); *supra* note 81 (setting forth comment i); see *supra* notes 81-84 and accompanying text (discussing unreasonably dangerous criteria).

174. See, e.g., *Desatnik v. Lem Motlow Prop., Inc.*, No. 84 C.A. 104, slip op. at *11 (Ohio Ct. App. Jan. 9, 1986) (LEXIS, States library, Ohio file); *Pemberton v. American Distilled Spirits Co.*, 664 S.W.2d 690, 692-93 (Tenn. 1984).

175. *Brune*, 758 S.W.2d at 830.

176. See *Hoover v. Jack Daniels Distillery*, No. 87 C 5509, at *2 (N.D. Ill. Sept. 14, 1987) (LEXIS, Genfed library, Dist file). In *Hoover*, the court concluded that a current interest in federal alcohol warning legislation provided no basis for questioning the long recognized premise that the dangers are commonly known, since the legislation had not been passed. *Id.* Furthermore, the court recognized that such legislation, if passed, would probably preempt any future state products liability suits. *Id.*

177. For a brief discussion of Congress' intent to "remind" the general public of the dangers related to consuming alcohol in passing the Alcoholic Beverage Liability Act of 1988, see *supra* text accompanying note 43; see Alcoholic Beverage Labeling Act of 1988, Pub. L. No. 100-690, § 213(1), 102 Stat. 4518 (codified at 27 U.S.C.A. § 213(1) (West Supp. 1989).

ing legislation provides no support for its argument, as the knowledge possessed by Mexican consumers is not indicative of the knowledge possessed by the ordinary consumer in the United States.¹⁷⁸

In addition, by permitting the plaintiff to present his case to the jury, the court abandoned the positions adopted by both the *Restatement* and prior case law. In both *Pemberton v. American Distilled Spirits Co.*¹⁷⁹ and *Desatnik v. Lem Motlow, Prop., Inc.*,¹⁸⁰ the courts concluded, as a matter of law, that the general public was aware of the potential for excessive consumption of alcoholic beverages to lead to death.¹⁸¹ Although both *Pemberton* and *Desatnik* were decided several years prior to *Brune*, the *Brune* court refers only to the *Pemberton* decision, without ever attempting to distinguish it.¹⁸²

Instead, the *Brune* court based its decision upon an overly narrow reading of comments h, i and j of the *Restatement*. The court concluded that alcohol manufacturers may have a duty to warn users of the potential dangers associated with over-consuming their products under comment h, and that neither comment i nor comment j precludes liability.¹⁸³ Despite the clear use of "good whiskey" as an example of a product which is not unreasonably dangerous in comment i,¹⁸⁴ the court concluded that alcohol manufacturers are only precluded from liability under the comment because the dangers of intoxication and alcoholism are commonly known.¹⁸⁵ Applying a similarly narrow reading to comment j, the court concluded that alcohol was merely cited as an example of a product for which a manufac-

178. The court also referred to the existence of health warning labels on "Everclear" grain alcohol as further support for concluding that the dangers of consuming alcohol may not be commonly known. *Brune*, 758 S.W.2d at 830. Although the manufacturer of Everclear may have voluntarily placed a warning on the product because it felt the general public was uninformed of the dangers inherent in its consumption, a more realistic motivation may have been to avoid future litigation.

179. 664 S.W.2d 690 (Tenn. 1984).

180. No. 84 C.A. 104, slip op. (Ohio Ct. App. Jan. 9, 1986) (LEXIS, States library, Ohio file).

181. *Desatnik*, No. 84 C.A. 104, slip op. at *11; *Pemberton*, 664 S.W.2d at 693; see *supra* notes 109-24 and accompanying text (discussing *Desatnik* and *Pemberton*); cf. *Hon v. Stroh Brewery Co.*, 835 F.2d 510, 516-17 (3d Cir. 1987) (stating that acute alcohol poisoning did not raise a triable issue of fact since a jury could only conclude that the risk of a single overdose of alcohol leading to death is commonly known).

182. See *Brune*, 758 S.W.2d at 828.

183. See *id.* at 829-30.

184. RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965); *supra* note 81 (setting forth comment i); see authority cited *supra* note 89 (recognizing the *Restatement* authors' reference to alcohol as a product which is not unreasonably dangerous).

185. *Brune*, 758 S.W.2d at 829.

turer has no duty to warn *when* the dangers are already appreciated by the ordinary consumer.¹⁸⁶ Although comment j cites alcohol as an example of a product whose dangers resulting from excessive use are generally known,¹⁸⁷ the court noted that the comment does not say that "the dangers of acute ethyl ingestion resulting in death" are necessarily commonly known.¹⁸⁸

Based upon the plaintiff's weak evidence and the court's overly narrow interpretation of the *Restatement's* references to alcohol, the court concluded that the determination of whether the dangers of acute ingestion resulting in death are commonly known is a question of fact for the jury to determine.¹⁸⁹

After *Hon*, the difficulty manufacturers would face in devising adequate warnings¹⁹⁰ would be compounded if the *Brune* reasoning and holding was applied in future alcohol warning cases. While the *Hon* court was concerned with the general public's knowledge as to the *amount* of consumption that may lead to a "substantial risk of bodily injury,"¹⁹¹ the *Brune* court questions the public's knowledge as to the *type* of injury that may result from certain levels of consumption. Given the vast array of potential health hazards associated with consuming alcohol,¹⁹² and the uncertainty as to which particular dangers are generally appreciated by the ordinary consumer, alcohol manufacturers would have to provide a warning booklet with each bottle of alcohol sold in order to adequately protect themselves from liability.

IV. RECOMMENDATIONS AND CONCLUSION

Courts faced with future failure to warn claims will be forced to determine the issue of whether Congress intended to preempt judicial action in this area. Even though Congress' intent regarding preemption is not explicit, a careful examination of the policies underly-

186. *Id.*

187. RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965); *supra* note 78; *see sources cited supra* note 90 (recognizing the *Restatement* authors' reference to alcohol as a product which is not defective).

188. 758 S.W.2d at 829-30.

189. *Id.*

190. *See supra* notes 152-66 and accompanying text (describing the burdensome difficulties manufacturers would face if they were forced to devise warnings).

191. *Hon v. Stroh Brewery Co.*, 835 F.2d 510, 516 n.8 (3d Cir. 1987); *see supra* note 132 (discussing the relevant portions of the *Hon* decision).

192. *See, e.g.*, ALCOHOL REPORT, *supra* note 38, at 1-28 (providing a 28 page summary of many of the health hazards, scientifically proven as of 1980, associated with the consumption of alcohol).

ing the federal alcohol warning legislation leads to the conclusion that Congress intended to preempt such claims.¹⁹³ However, even if courts conclude that Congress intended to preempt judicial action in this area, courts are still likely to continue entertaining extended use cases which claim injuries resulting from consumption dating prior to the effective date of the federal alcohol warning legislation.¹⁹⁴ If courts decide entertain future inadequate warning label cases because they believe these claims are not preempted, or because such claims arose prior to the effective date of the federal alcohol warning legislation, they should give little or no deference to *Hon* and *Brune* because of the many problems inherent in the reasoning and application of those decisions.¹⁹⁵ Alternatively, courts should follow the lead of the *Restatement*¹⁹⁶ and the majority of cases¹⁹⁷ which conclude, as a matter of law, that manufacturers need not warn, since the ordinary consumer is sufficiently aware of the health hazards associated with consuming alcoholic beverages.

When courts entertain failure to warn suits and permit plaintiffs to reach the jury, courts are, in essence, requiring manufacturers to voluntarily place warnings on their products. The threat of insurmountable liability resting upon the unpredictable discretion of a jury is too great a risk for manufacturers to remain idle. Moreover, this type of voluntary self-assessment system is problematic because manufacturers are given no standards by which to judge the adequacy of their warnings. A warning designed to address facts presented in a prior case, where a court permitted the issue to reach a jury, may not adequately cover situations arising in future cases.¹⁹⁸

193. See *supra* notes 61-69 and accompanying text (discussing the implied preemption of state claims challenging the adequacy of alcohol warning labels).

194. See *supra* note 14 and accompanying text.

195. See *supra* notes 138-66, 172-92 and accompanying text.

196. See RESTATEMENT (SECOND) OF TORTS § 402A comments h, i & j (1965); see also sources cited *supra* note 89, 90 (discussing the *Restatement* authors' reference to alcoholic beverages as products which are neither defective, nor unreasonably dangerous).

197. See *supra* notes 92-124 and accompanying text.

198. For instance, a warning deemed adequate by the jury in a previous case may nevertheless be found inadequate in factually similar future cases due to the inherent inconsistencies of jury verdicts. Cf. *Dawson v. Chrysler Corp.*, 630 F.2d 950 (3d Cir. 1980). In *Dawson*, a police officer brought a products liability suit against the patrol car manufacturer for injuries sustained when the car slid into an "unyielding steel pole." *Id.* at 954. The police officer alleged that the patrol car was defective for lack of a continuous steel frame, and that the defect was the proximate cause of his injuries. *Id.* Despite the manufacturer's contention that it complied with the safety standards promulgated by Congress under the National Traffic and Motor Vehicle Safety Act, the Third Circuit noted that the Act expressly provided that compliance would not exempt manufacturers from liability under common law. *Id.* at 958. The

Hence, even if manufacturers were to provide warnings to consumers, they would not be shielded from future liability. Instead, manufacturers would continually remain uncertain as to whether their warnings were adequate to cover the range of potential situations which might arise from future plaintiffs' abuses of their products.

As a result of the likelihood that a court may permit plaintiffs' failure to warn cases to reach a jury, manufacturers will likely counter with one of two types of warnings, both of which are potentially troublesome. First, manufacturers may choose to provide more detailed warnings only in those states which allow plaintiffs' claims to go to the jury, and only to the extent necessary to cover the situations presented by those cases. This stems from the premise that manufacturers would not warn consumers unnecessarily of the health hazards associated with consuming their products.¹⁹⁹ Essentially, manufacturers would be subject to different warning requirements in different states, resulting in a significant burden on interstate commerce.²⁰⁰ In addition, each time a case presenting a new consumption situation was permitted to reach the jury, manufacturers might be forced to change their warnings. Making continuous changes to health warning labels could prove to be both confusing to consumers and burdensome on interstate commerce.²⁰¹

court recognized the problems inherent in permitting a jury to determine the scope of the term "defective product." While the *Dawson* jury held the manufacturer liable for failing to produce a rigid enough frame, the court noted that a jury in a future case might very well hold the manufacturer liable for constructing a frame which is too rigid. *Id.* at 962. The court stated:

In effect, this permits individual juries . . . in different jurisdictions to set nationwide automobile safety standards and to impose on automobile manufacturers conflicting requirements. It would be difficult for members of the industry to alter their design and production behavior in response to jury verdicts in such cases, because their response might well be at variance with what some other jury decides is a defective design. Under these circumstances, the law imposes on the industry the responsibility of insuring vast numbers of persons. . . .

Id. Accordingly, the court determined that permitting individual juries to impose varying obligations on manufacturers is neither fair, nor efficient. *Id.* at 963.

199. See Sanders, *supra* note 2, at C2, col. 3 (arguing that there is no need for alcohol warning labels).

200. One of Congress' purposes behind enacting the Alcoholic Beverage Labeling Act of 1988 was to protect commerce and the national economy from being impeded by "diverse, nonuniform, and confusing" warning requirements. 27 U.S.C.A. § 213(2)(B) (West Supp. 1989); *supra* note 62 (setting forth Congress' legislative purpose); see also SENATE COMMITTEE REPORT, *supra* note 38, at 5.

201. Cf. 27 U.S.C.A. § 213(2)(B) (West Supp. 1989) (providing that commerce and the national economy should not be impeded by confusing and misleading alcoholic warning labels); SENATE COMMITTEE REPORT, *supra* note 38, at 5.

A second alternative would be for manufacturers to provide a single extensive warning. Although manufacturers ordinarily would prefer not to provide such a warning, they may nevertheless be forced to, in order to protect themselves from irrational and inconsistent jury verdicts. The labels would warn consumers of the wide array of potential health hazards which could result from varying degrees of consumption. Apart from the need for a booklet to accompany each bottle of alcohol sold, the warnings might become inaccurate, misleading and ineffective.²⁰² As a result, in an effort for manufacturers to adequately protect themselves, manufacturers may begin to warn consumers of potential injuries which are not yet scientifically proven, in order to counter evidence introduced through future plaintiffs' expert witnesses.

The result of either of the two alternatives above is to completely abrogate Congress' desire for uniformity of alcoholic beverage warning labels.²⁰³ As a result, the requisite specificity of health warning labels on alcoholic beverages is a decision best left for Congressional determination. Imposing stricter warnings involves more than a jury's myopic look at common knowledge or a manufacturers' blind attempts to insulate themselves from liability.²⁰⁴ Should

202. Cf. 27 U.S.C.A. § 213(2)(B) (West Supp. 1989); SENATE COMMITTEE REPORT, *supra* note 38, at 5.

203. See *supra* note 61-69 and accompanying text (discussing Congress' desire for national uniformity in alcoholic beverage warning labels and the likely effects that voluntary self-imposed warning labels will have on the effectiveness of federal labeling legislation).

204. For example, Congress can determine whether stricter warnings will have a negative impact on the state of warnings in general, see ALCOHOL REPORT, *supra* note 38, at 41; see also *supra* note 38 (discussing the report's findings regarding the effects alcoholic beverage labels will have on the current state of product warnings), or whether they will act as a forbidden fruit—enticing adolescents to “take the dare,” see Sanders, *supra* note 2, at C2, col. 3; see also Olin, *This Dud's for You*, 119 NEW REPUBLIC 12 (July 11, 1988) (stating the arguments of those opposed to alcohol warning legislation).

It should be noted that when courts are faced with cases whose ultimate resolution involves policy considerations far beyond the scope of judicial determination, many have deferred resolution of the issue to the legislature. For example, many courts have refused to recognize a cause of action against social hosts for negligently furnishing alcoholic beverages to intoxicated guests. These courts have recognized that adopting social host liability might result in subjecting hosts to limitless liability and, as a result, could dramatically affect social behavior. Because of these policy considerations, the courts rationalized that any change in the law should be made by the legislature. See, e.g., *Holmes v. Circo*, 196 Neb. 496, 244 N.W.2d 65 (1976) (noting that the legislature can hold hearings and debates, and should it determine that a change in the law is necessary, it can draft legislation which balances the interests of all parties); *Edgar v. Kajet*, 84 Misc. 2d 100, 375 N.Y.S.2d 548 (Sup. Ct. 1975) (holding that policies are best weighed in the legislative process after hearings and investigations); *Garren v. Cummings & McGrady, Inc.*, 289 S.C. 348, 345 S.E.2d 508 (Ct. App. 1986) (noting that since the legislature is able to invite public participation, it is better suited to conduct the

stricter warnings be deemed necessary, Congress, unlike the judiciary, has the power to conduct hearings and debates in order to determine the exact wording necessary to communicate a clear and accurate message.²⁰⁵ Moreover, federal warning legislation promotes uniformity. Uniform warning requirements would alleviate the problems of confusion and burdens on interstate commerce which would inevitably result from allowing failure to warn claims to reach the jury.²⁰⁶

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analysis required).

205. See 27 U.S.C.A. § 213 (West Supp. 1989) (stating that Congress' intention to provide a clear, nonconfusing reminder of the hazards associated with consuming alcohol, and recognizing a need for national uniformity in such warnings in order to prevent the promulgation of inaccurate and misleading information).

206. Cf. *supra* note 62 (discussing Congress' purpose behind enacting the Alcoholic Beverage Labeling Act of 1988).

