Liability of Alcoholic Beverage Manufacturers: No Longer a Pink Elephant

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NOTES

LIABILITY OF ALCOHOLIC BEVERAGE MANUFACTURERS: NO LONGER A PINK ELEPHANT

Water is best.¹

Governments have long recognized the need to protect their citizens from the ill effects of alcohol. In 1641, for example, King Charles sent instructions to Sir William Berkeley, Governor of Virginia, that “any ... liquors, such as may endanger the health of the people, and shall so be found upon the Oaths of sufficient persons appointed for the Tryall, That the Vesell be Staved.”² Today, recently passed federal legislation may insulate alcoholic beverage manufacturers from liability for the dangers inherent in their products.³ Although the new statute requires manufacturers to put several health warnings on alcoholic beverage containers, it also contains language that could preempt an inadequate warning suit against the manufacturers.⁴ The preemption language is arguably

¹. Pindar, Olympian Odes (quoted in The New International Dictionary of Quotations 10 (1988)).
². Hutt & Hutt, A History of Government Regulation of Adulteration and Misbranding of Food, 39 Food Drug Cosm. L.J. 2, 37 (1984). The concern in King Charles’ time was with adulterated beverages, not with the inherent dangers of otherwise “safe” liquors. Id.
⁴. 134 Cong. Rec. S17,300 (daily ed. Oct. 21, 1988) (statement of Sen. Ford). Senator Wendell Ford of Kentucky, one of the Act’s sponsors, said that his understanding was that the preemption language of section 205 of the law was “to be red [sic] and administered so as to preclude any State or local authority, through legislation, regulation, or judicial interpretation, from requiring a different warning lable [sic] on beverage alcohol containers.” Id. at S17,301. Senator Strom Thurmond, one of the Act’s principal authors and sponsors, said that he viewed the language as

a narrow preemption relating to statements on containers, or boxes, cartons and packages which contain such containers. It does not in any way prevent
unnecessary. Very few courts have been willing to apply strict liability’s "unreasonably dangerous product" or "inadequate warning" analysis to alcoholic beverages,\(^5\) even though statistics indicate that alcohol's risks outweigh its utility, and that some form of warning is needed because of a lack of public knowledge about the risks of alcohol use and abuse.\(^6\)

The main obstacle to inadequate warning suits against manufacturers of alcoholic beverages is that the Restatement (Second) of Torts, which many states consider very persuasive authority, uses alcohol as an example of a product to which courts cannot apply inadequate warning analysis because the dangers of alcoholic beverages are purportedly commonly known.\(^7\) In most recently reported cases, courts have held that the Restatement's reasoning precluded strict liability claims against alcoholic beverage manu-

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the alcoholic beverage industry from voluntarily providing further consumer information. Moreover, the preemption should not be construed to indicate that the States do not have the authority in other areas—such as industry advertisement, warning posters, and other educational campaigns—to protect the health and safety of their citizens.

Id. at S16,008 (daily ed. Oct. 14, 1988).

5. See infra notes 81-92, 104-18, 136-46 and accompanying text.

6. See infra notes 54-58 and accompanying text.

7. Restatement (Second) of Torts § 402A (1965). Section 402A says: "One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property . . . ." Id.

Comment i says:

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 . . . . Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics . . . .

Id. comment i.

Comment j says:

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. . . . [A] seller is not required to warn with respect to products, or ingredients in them, which are only dangerous . . . when consumed in excessive quantity, or over a long period of time, when the danger . . . is generally known and recognized. Again, the dangers of alcoholic beverages are an example . . . .

Id. comment j.
facturers for inadequately warning of the dangers inherent in their products.

This Note argues that courts should hold alcoholic beverage manufacturers liable for the injuries their products cause, and that courts cannot rely on the Restatement's pronouncement of what is common knowledge. The Note begins with an examination of the recent warning label legislation and the potential effect of its pre-emption language on products liability suits. Because the Act's preemption language is not retroactive and therefore would not af-

8. See infra notes 81-92, 104-18, 136-46 and accompanying text; see also Annotation, Products Liability: Alcoholic Beverages, 42 A.L.R. 4th 253, 256 (1985) ("Manufacturers of alcoholic beverages do not have a duty to warn the consumer of the possible ill effects of the beverage, the courts' reasoning that the ill effects of alcohol are so well known that no warning is necessary."). In M. Moore & D. Gerstein, ALCOHOL AND PUBLIC POLICY: BEYOND THE SHADOW OF PROHIBITION 6-7 (1981), the authors attribute the policies underlying the ALR cases and the Restatement to a misconception of alcohol abuse. They explain:

Current policy is profoundly shaped by a body of conventional wisdom, including the belief that alcohol problems are created largely by a small group of alcoholics who require intensive, prolonged treatment and that any effort to restrict drinking practices in the general population is doomed to failure. The power of these ideas is apparent in that they are widely treated as the most obvious and incontrovertible facts. . . . Simplification inevitably distorts our perception of a problem.

Id.

The theory behind a duty to warn case is that the nature of the product carries the implicit representation of safety. One commentator noted, "Even if the defendant has said nothing about his product, the product itself makes, by its very appearance, certain implied representations about both its use and its limitations. The question is always whether the initial false impressions created by the product are neutralized . . . by further disclosures . . . ." R. Epstein, MODERN PRODUCTS LIABILITY LAW 94 (1980). A product made for human consumption, particularly a beverage that will be consumed often, would seemingly carry a greater implicit representation of safety than most other products.

9. For related discussions, see Britt, Alcohol Manufacturer's Duty to Warn, 38 Fed'N Ins. & Corp. Couns. Q. 247 (1988) (arguing that the Restatement's position toward the dangers of alcohol use must be reexamined as to fetal alcohol syndrome and alcohol-drug interactions because the public is "largely ignorant" of those risks); Note, A Case for Alcohol Beverage Warning Labels: Duty to Warn of Dangers of Consumption, 53 Mo. L. Rev. 557 (1988) (discussing a chronology of cases in which the courts held that the dangers of alcohol are commonly known); Note, Mitigating Alcohol Health Hazards Through Health Warning Labels and Public Education, 63 Wash. L. Rev. 979 (1988) (arguing that warning labels and public education are effective tools for battling alcohol abuse); Note, A Spirited Call to Require Alcohol Manufacturers to Warn of the Dangerous Propensities of Their Products, 11 Nova L.J. 1611 (1987) (arguing that the issue of common knowledge of the risks of alcohol should be presented to the jury).

fect claims in which damages were suffered before enactment, the Note then discusses possible avenues of action against alcoholic beverage manufacturers in claims for damages suffered before the legislation became effective.

The Note addresses three situations for possible claims involving alcohol use: the effects of long term alcohol use, death by acute alcohol poisoning, and drunk driving. It contrasts the reasoning courts have used to dismiss and to uphold actions against alcoholic beverage manufacturers in recent cases involving these three scenarios.

Additionally, the Note examines the applicability of a second theory of action, breach of express warranty, against alcoholic beverage manufacturers. A breach of express warranty claim recently earned a plaintiff $500,000 in his suit against cigarette manufacturers in *Cipollone v. Liggett Group, Inc.* The verdict in the *Cipollone* case is significant because of the strong analogy between alcohol and tobacco products, particularly because the *Restatement* mentions both tobacco and alcohol as products whose dangers are supposedly commonly known.

**THE ALCOHOLIC BEVERAGE LABELING ACT**

The most remarkable aspect of Congress' passage of the Alcoholic Beverage Labeling Act, which requires several health warnings on alcoholic beverage labels, is that the legislature took so long to pass the bill. Congressmen have introduced similar legislation off and on since the mid-1960s. In all likelihood, Congress'
failure to act is attributable to strong lobbying by alcoholic beverage manufacturers. Little else explains Congress’ neglect of its constituents, an overwhelming majority of whom have favored health warnings on liquor labels since at least 1984.16 The fact that Senator Wendell Ford of Kentucky negotiated the current Act’s preemption language17 is particularly telling because Kentucky produces ninety percent of the nation’s bourbon.18

The Act requires a label that incorporates several health and safety warning messages. The label must state that drinking by a pregnant woman increases health risks to her unborn child, impairs the drinker’s ability to drive or operate machinery, and “may cause health problems.”19 Furthermore, according to the Act, “No statement relating to alcoholic beverages and health, other than the statement required . . . shall be required under State law to be placed on any container of an alcoholic beverage . . . .”20 The Act’s preemption language prevents states from requiring any other warning on alcoholic beverage labels. The Act’s sponsors, however, disagree on the preemptive effect of the language used.

**Preemption Analysis**

Congress may preempt state law expressly by statement, or implicitly by indicating its interest “‘to occupy a field’ ” in a given area of the law.21 The latter determination depends on whether

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16. 132 CONG. REC. S9,331 (daily ed. July 21, 1986) (statement of Sen. Thurmond). When he introduced the 1986 version of the current Act, Senator Thurmond cited a 1984 Roper survey of alcohol problems that said 64% of the nation’s business, government and military leaders, and 68% of the general public endorsed warning label requirements on alcoholic beverages. *Id.* at S9,332.


18. *Id.*


federal regulation of the field is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement" the federal scheme. In some cases, a federal law may not entirely preclude state participation in the legislation's area of operation. When state law is not completely preempted, it is preempted to the extent that it conflicts with the federal law.

Some courts determine the extent of federal preemption by examining the impact of a state court's ruling on the federal regulations. As one court noted, "[I]f the state law disturbs too much the congressionally declared scheme . . . it will be displaced through the force of preemption." For this analysis, courts must look to the policies of the federal regulation and whether they are aided or hindered by the state law. In making a preemption determination, however, a court must impose a heavy presumption that Congress did not intend to preempt state law.

Comments by senators and representatives about the Alcohol Beverage Labeling Act are virtually unanimous in stating that the Act is designed to further public health goals and to "remind the American public about the possible hazards that may result from alcohol consumption or abuse." The Act itself also mentions "the health and safety of the Nation's population" as a chief congressional concern. Fueling arguments for preemption, the Act states clearly that it intends to provide "national uniformity" for warning labels "to avoid the promulgation of incorrect or misleading information and to minimize burdens on interstate commerce."

However, many of the Act's sponsors apparently contemplated state law tort actions against alcoholic beverage manufacturers. For example, Senator Strom Thurmond, who introduced the origi-
nal bill with language specifying that it did not intend to preempt state law claims, described the Act's language as "a narrow preemption."31

Comments by other congressmen flesh out Senator Thurmond's interpretation of the preemption language. For example, Representative Henry A. Waxman, speaking of the House version of the Senate's bill, said the Act preempts states from the field of warning label requirements in the interests of uniformity of labeling requirements and the availability of other means of achieving state goals.32 He suggested, however, that states could regulate the alcoholic beverage industry's advertising,33 a significant suggestion because it supports an inference that Congress does not intend to preempt breach of warranty claims.34 Representative Waxman also said that "the legislation does not affect the duty that manufacturers, bottlers, and sellers of alcoholic beverages have to inform and warn the public through all appropriate means of any known hazards associated with their product . . . . Nor can there be any question about the authority of courts to enter judgments with respect to warnings other than those directly on the labels of containers."35

Paradoxically, Representative Waxman also indicated that the Act does not preempt actions for liability at all. "[I]t was not Congress' intent to affect the liability of manufacturers either positively or negatively,"36 he said.

Expanding on Representative Waxman's statements, Representative John Conyers, Jr., of Michigan, a House sponsor of the Act, said that its preemption language establishes "a floor for safe conduct; it should not be construed . . . as a ceiling for or a limit on

31. Supra note 4.
32. 134 Cong. Rec. E3,729 (daily ed. Nov. 10, 1988) (extension of statement of Rep. Waxman). Representative Waxman also said, "It is critical that the States, which have primary authority for the regulation of alcohol sales, adopt additional policies and programs which will reduce the toll of alcoholism and alcohol abuse on our communities." Id.
33. Id.
34. Id. ("[C]ertain advertising practices might be found to undermine the public perception of the Federal health warning label."); see infra notes 178-93 and accompanying text.
35. 134 Cong. Rec. at E3,729.
36. Id. The Act "deals only with warning labels, not liability. There is no mention of liability or immunity in the legislation or in the Senate committee report. The omission was deliberate and reflects Congress' unwillingness to interfere in product liability actions." Id.
safe conduct. . . . Most importantly, it should not be seen as reflecting any intent to prevent the States from compensating alcohol victims and encouraging the manufacturers to adopt more adequate warnings through traditional product liability litigation and remedies."37

On the other hand, Senator Ford views the preemption language broadly. "This preemption 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," Ford said, adding that "[s]tate and local governments are therefore precluded from imposing their own requirements . . . ."38 Ford, who negotiated the inclusion of the preemption language,39 described the language as "critical to the success" of the Act.40

If the preemption language is as narrow as some of its sponsors indicate, then the Act will have little effect on an inadequate warning claim. Those sponsors' comments are significant because they indicate that Congress contemplated the viability of inadequate warning claims against alcoholic beverage manufacturers. In fact, the preemption language itself supports the viability of inadequate warning claims because, if the dangers of alcohol were common knowledge, no need to preempt inadequate warning claims would exist; the claims would be inherently untenable.41

37. Id. at E3,763 (extension of statement of Rep. Conyers). Representative Conyers said: State tort damages actions would not hinder the accomplishment of Congress' purposes. . . . Courts should interpret this statute as one which establishes minimum regulatory objectives in the area of alcohol warning labels. A State court may rule that this act's label is inadequate under State law, even though the labels meet Federal requirements, if the trier of fact decides that the label fails to warn against the foreseeable, significant risk. It need not be assumed that the company can be held liable for failure to warn only if the State could have required a company to alter its warning.

Id. at E3,764.

Representative Conyers suggested that despite the Act's preemption language, a state can indirectly "control the use of alcohol for compensatory reasons by holding alcohol producers liable for injuries that could have been prevented by a more adequate label." Id. Further, he said, "warning labels cannot be considered adequate for health hazards that [the labels] do not specify." Id.

39. See supra notes 17-18 and accompanying text.
40. 134 Cong. Rec. at S17,301.
41. See infra notes 47-52 and accompanying text.
Furthermore, the Act will not preempt a state law claim if the claim does not conflict with the goals of promoting health or uniformity of warning requirements. Because the effect of allowing state law claims against alcoholic beverage manufacturers could not logically thwart health goals, the only valid concern is that state court judgments might upset the desired "uniformity" for warning labels. On the other hand, even if the Act's language is so broad as to preempt post-Act inadequate warning claims, it should have no effect on actions for damages incurred before the Act's passage, because those suits would in no way conflict with the stated congressional goals.

**Pre-Act Damages**

In *Cipollone v. Liggett Group, Inc.*, the court allowed the plaintiff to sue for damages incurred before 1965, the year in which Congress passed a federal law mandating health warnings for cigarette labels. The 1965 law contained preemption language similar to that found in the Alcoholic Beverage Labeling Act. The court in *Cipollone* found that the cigarette labeling law could not preempt a claim for injuries incurred before the law's passage. Although the plaintiff in *Cipollone* failed to recover on his inadequate warning claim because the jury apportioned to his deceased wife more than fifty percent of the fault for her injuries, the case supports an argument for sustaining a claim for damages incurred before the passage of the Alcoholic Beverage Labeling Act.

Because the Act does not indicate any intent for retroactive application, it cannot preclude claims for injuries incurred before its passage. At the very least, this alcoholic beverage labeling legislation provides a legislative nod to warning labels as effective means for educating the public about the health risks of drinking. The legislation acknowledges a current social harm and a remedy for

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44. *Cipollone*, 693 F. Supp. at 210; see also *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986).
46. See supra note 27 and accompanying text.
the future. It does not attempt, nor should it preclude, compensation for past harm.

Unfortunately, the Act's potential preemptive effect is a small obstacle compared to that posed by the Restatement (Second) of Torts. The Restatement's blanket pronouncement that the dangers of alcohol consumption are common knowledge presents a much larger hurdle, over which few inadequate warning claims have been able to jump.

**THE RESTATEMENT (SECOND) OF TORTS SECTION 402A**

The Restatement's section 402A allows products liability suits against manufacturers that put on the market defective products that are "unreasonably dangerous." A product that "is safe only in limited doses" may be defective when the manufacturer fails to give adequate warning of the product's danger. The Restatement recognizes, however, that manufacturers cannot make some products entirely safe for consumption. For the products to be "unreasonably dangerous," they must be "dangerous to an extent beyond that which would be contemplated by the ordinary consumer . . . ." The Restatement also offers the risks of drinking alcoholic beverages as an example of dangers that are commonly known.

The Restatement's use of the risks of alcohol use as an example of common knowledge causes most of the trouble for plaintiffs when they ask courts to apply inadequate warning analysis to suits involving alcoholic beverages. Most courts follow the Restatement's analysis step-by-step and then balk at the plaintiff's claim when they reach the question of whether the dangers of alcohol are commonly known. The courts do not evaluate the claims substantively, but rely instead on the blanket statement by the Restatement's comments that the risks of drinking are commonly known.

47. See supra note 7.
48. RESTATEMENT (SECOND) OF TORTS § 402A comment h (1965).
49. Id. comment i; see supra note 7.
50. RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965).
51. See, e.g., infra notes 81-92, 109-24, 142-54 and accompanying text.
52. Id.
The *Restatement* issued the equivalent of ungrounded dicta. Medical technology has advanced to a point at which the causal connection between the consumption of alcohol and many of its effects cannot be labeled common knowledge. Science has uncovered a number of esoteric connections between alcohol consumption and health. Additionally, many beliefs about alcohol must be modified as science shakes their foundations. One can no longer say accurately, for example, that only excessive and prolonged use of alcohol leads to health problems. Even moderate use of alcohol, over time, can lead to a variety of disorders. Regardless of medical technology, however, the law is on shaky ground whenever it presumes to state that something is unequivocally a matter of common knowledge. Such matters, by definition, should be decided by a jury, which as a trier of fact represents community judgment.

**AN ASSESSMENT OF COMMON KNOWLEDGE AND RISK/UTILITY ANALYSIS APPLIED TO INADEQUATE WARNING CLAIMS**

*How Commonly Known Are the Risks of Alcohol Consumption?*

"Americans are less knowledgeable about the adverse effects of alcohol on health . . . than they are about the harmful effects of smoking." In a report to the President and Congress on the

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53. The *Restatement*’s position is particularly ironic in light of some authors’ interpretation that § 402A’s governing policy is “grounded in economic reality.” J. BEASLEY, PRODUCTS LIABILITY AND THE UNREASONABLY DANGEROUS REQUIREMENT 60 (1981). Fleshing out the policy behind the *Restatement*’s defective products/inadequate warning section, Beasley said:

The best way to protect the consumption-oriented public from senseless injury is to place the burden on the enterprise profiting from the consumers. The manufacturer is in the best position to bear the risk of injury from product deficiency. It can do so without substantial economic detriment by spreading the cost of injury . . . over the entire spectrum of its products by a proportionate increase in the selling price of the average unit.

Id. at 60-61.

Considering the minuscule cost of label warnings, see infra notes 76-77 and accompanying text, deciding the issue of common knowledge as a matter of law flies in the face of the *Restatement*’s own policies.

54. Seessel, *Should Liquor Have Warning Labels?*, Wash. Post, July 2, 1986, at A23, col. 3. Additionally, one commentator said:

To the millions of individuals who become alcohol abusers, alcoholic beverages have properties that cause the user to misperceive alcohol’s effect on him and eventually undermine his ability to assume the risks of continued use. Alcoholic beverages are not only addictive, but release sensations of freedom,
health hazards of drinking, the United States Departments of the Treasury and Health and Human Services concluded that the public is not sufficiently aware of the specific health effects of short and long term alcohol use. The report said that the risks of alcohol overdose and other health hazards are not commonly known. Surveys indicate just how knowledgeable Americans are of long term risks. For example, only thirty-three percent of those surveyed by the National Center for Health Statistics knew that alcohol was associated with cancers of the throat and mouth. Only forty-eight percent knew that heavy drinking during pregnancy increased the risk of birth defects.

Matching these surveys up with conclusions of the scientific community about specific dangers of alcohol consumption clouds the issue of how commonly known these risks are. For example, alcohol is implicated in a variety of cardiovascular disorders, including phlebitis, varicose veins and angina pectoris. Evidence links two drinks per week by pregnant women with spontaneous power, heightened popularity, and so forth—sensations that belie the actual damages of the product and render them far from obvious to the user.

Rubin, supra note 15, at 7. Furthermore, the author said, “[s]ince . . . alcohol is a mind-altering substance which directly affects the user’s mental perceptions (and ability to assume the risks of continued use), alcohol [should be a suitable] vehicle for product liability initiatives . . . .” Id. at 8.

55. U.S. DEP'TS OF TREASURY AND HEALTH AND HUMAN SERV., REPORT TO THE PRESIDENT AND CONGRESS ON HEALTH HAZARDS ASSOCIATED WITH ALCOHOL AND METHODS TO INFORM THE GENERAL PUBLIC OF THESE HAZARDS (Comm. print, Nov. 1980) [hereinafter TREASURY AND HHS REPORT]. The Report, relying on 1978 data, said that one in twelve people surveyed believed that the regular use of alcohol posed no risk to the user. Id. at 34. The report said: “People are insufficiently aware that consumption of large amounts of alcohol in a short period of time, such as may occur in a drinking contest, can cause death. They are also unaware that drinking can cause or contribute to . . . various health hazards . . . .” Id.

56. Id.

57. Seessel, supra note 54.

58. Rubin, supra note 15, at 4-5. Nearly 60% of those surveyed had never heard of fetal alcohol syndrome, the nation’s third leading cause of birth defects. Id. Rubin also said that although the term “alcoholism” is commonly used to describe a variety of conditions, the term is not commonly understood. Id. at 7. Addressing the “common knowledge” bar to products liability suits, he concluded that “if the dangers and dynamics of alcohol-related problems such as alcoholism, fetal alcohol syndrome, and teenage alcohol abuse are not genuinely understood by the public, members of the alcoholic beverage industry may have a common law duty to warn the public about the dangers of their products.” Id.

and medical experts link even moderate drinking by pregnant women to low birth weight, behavioral dysfunction and impaired motor and mental skills of their children. Alcohol abuse is the most common cause of nutritional problems such as vitamin and trace element deficiencies in adults. These nutritional deficiencies can lead to anemia, convulsions, small bowel dysfunction and brain disorders.

Because surveys and instincts suggest that at least some of these disorders are not commonly known, courts have no business deciding that alcohol's attendant risks are commonly known as a matter of law; that decision is the jury's to make. Furthermore, the traditional risk/utility analysis of products liability suggests that courts should not automatically insulate alcohol manufacturers from liability.

Risk/Utility Analysis Applied to Alcoholic Beverages

When a court decides that a product is not defective as a matter of law, it is making a policy decision. Implicit in its dismissal of the suit is the court's decision that the product's dangers do not outweigh its benefits. Courts also use risk/utility balancing to determine whether a product is unreasonably dangerous. Examining whether a product is more dangerous than a consumer would expect is an alternate method of making this determination, although

60. Treasury and HHS Report, supra note 55, at iv.
63. Id.
64. Additional potential health consequences of drinking have been found. "Alcohol misuse has a potentially detrimental effect on the body from its point of entry at the mouth through the entire gastrointestinal tract and to related organs such as the liver and the pancreas." Id. An association between alcohol and depression exists, and one-third of all suicides involve alcohol. Id. Even for light drinkers, the risk of hemorrhage or stroke is more than double the risk for abstainers. Seessel, supra note 54. Heavy drinkers suffer a 300% greater likelihood of death from strokes. L. West, supra note 59, at 10.
65. See, e.g., Hon v. Stroh Brewery Co., 835 F.2d 510 (3d Cir. 1987). The court in this case termed the risk/utility analysis "social policy considerations." Id. at 513; see also Wade, On Product "Design Defects" and Their Actionability, 33 VAND. L. REV. 551, 568 (1980) ("[S]afety must be a relative matter, and a balancing process of some sort is necessary to determine whether a product is sufficiently safe . . . .").
66. 2 Travers, American Law of Products Liability 3d § 17.22 (1987).
some courts use a combination of these approaches.\textsuperscript{67} An examination of the risks and benefits of alcoholic beverages makes it difficult to accept an off-the-cuff dismissal of a products liability suit against alcoholic beverage manufacturers for inadequate warnings on beverage containers.\textsuperscript{68}

The following facts illustrate the "human cost"—i.e., the product's risks—of alcohol use and abuse in America: Alcohol costs the American economy nearly $120 billion annually in expenses including increased medical expenses and decreased productivity of the work force;\textsuperscript{69} one in ten deaths annually is alcohol related;\textsuperscript{70} about

\begin{itemize}
\item Id. One author said that courts should base their evaluation of a duty to warn on: the nature of the product and the harm risked, the information available to the seller or supplier, the user's information, the position of the seller or supplier in the chain of distribution, the cost or other burden of adding efficacious warnings or instructions, the probability that harm will result from the absence of warnings or instructions, and the causal relation between the absence or inadequacy of warnings or instructions and the harm suffered. Madden, \textit{The Duty to Warn in Products Liability: Contours and Criticism}, 89 W. Va. L. Rev. 221, 225 (1987) (footnotes omitted).
\item Id. Goodman argued that warnings place "the onus . . . on the individual to make an unending series of health decisions and risk assessments merely to get through the day . . . . We often accept the notion that our health and safety are merely a matter of proper warning and personal choice." Id. She concluded: "In this world, warnings are often used as an excuse. Maybe this announcement should carry a warning label of its own. Caution: Even warnings can be hazardous for our public health." Id.
\item Id. Goodman argued that warnings place "the onus . . . on the individual to make an unending series of health decisions and risk assessments merely to get through the day . . . . We often accept the notion that our health and safety are merely a matter of proper warning and personal choice." Id. She concluded: "In this world, warnings are often used as an excuse. Maybe this announcement should carry a warning label of its own. Caution: Even warnings can be hazardous for our public health." Id.
\item 134 CONG. REC. S16,008 (daily ed. Oct. 14, 1988) (statement of Sen. Thurmond); see 132 CONG. REC., S9,331, S9,332 (daily ed. July 21, 1986) (statement of Sen. Thurmond) (saying the adverse consequences of alcohol use are "one of our most serious health problems . . . .")
\end{itemize}

The following facts illustrate other human costs of alcohol use: More than 50\% of all traffic deaths are alcohol related. Id. Fetal alcohol syndrome is present in two of every 1,000 live births. As many as 36,000 newborns each year show signs of the disease. Britt, \textit{supra} note 9, at 255. Fetal alcohol syndrome is considered to be the third leading cause of birth defects and the only leading cause that is preventable. 134 CONG. REC. at S16,008. Approximately $670 million each year is spent to treat the nation's children who suffer from fetal alcohol syndrome and more than $760 million annually is spent to treat the nation's adults who suffer from fetal alcohol syndrome. 132 CONG. REC. at S9,332.
one-third of adult patients in hospitals have alcohol related problems;\textsuperscript{71} about 12 million adults have symptoms of alcoholism;\textsuperscript{72} and more than 18 million adults have more than two drinks per day.\textsuperscript{73}

Arguably, the sole utility of alcohol is the pleasure derived by drinking. Alcoholic beverages serve no utilitarian function other than recreational purposes.\textsuperscript{74} Although courts are willing to dismiss products liability claims against alcoholic beverage manufacturers, "[i]t is by no means clear that the pleasure people derive from alcohol outweighs the cost in human lives imposed by alcohol abuse."\textsuperscript{75} Risk/utility analysis leads to the conclusion that alcoholic beverages are both "defective" and "unreasonably dangerous."

The "human cost" of alcohol is especially appalling when contrasted with the economic cost of warning labels. For example, the Cigarette Labeling and Advertising Act, as amended in 1984, costs cigarette manufacturers an estimated $1 million annually, or about 0.0004 cents per cigarette pack.\textsuperscript{76} Although figures are not available for the cost of warning labels on alcoholic beverages, the fact that the Cigarette Labeling and Advertising Act is more complex than

\textsuperscript{71} Additional human costs include the fact that exposure to alcohol can lead to dependence, Treasury and HHS Report, supra note 55, at vi; 4.5 million children between the ages of 14 and 17 have experienced problems associated with alcohol abuse, Rubin, supra note 15, at 4; alcohol is a factor in 15\% of the nation's health care expenditures, Seessel, supra note 54; alcohol related causes account for between 100,000 and 200,000 deaths annually, id.; alcohol related traffic accidents are the leading cause of death among 15- to 24-year-olds, id.; alcohol is the most widely abused chemical in the Western world and is "implicated in far more deaths than any other substance," L. West, supra note 59, at 9; as a poison, alcohol is second only to carbon monoxide in annual deaths in the United States, id.; approximately 10\% of the 100 million Americans who drink "have significant alcohol related problems affecting their work, family life, social adjustment, or health." Id. at 2; see 132 Cong. Rec. at S9,331, S9,332.

\textsuperscript{72} L. West, supra note 59, at 2.

\textsuperscript{73} See Seessel, supra note 54.

\textsuperscript{74} Rubin, supra note 15, at 4.

\textsuperscript{75} 132 Cong. Rec. at S9,332.

\textsuperscript{76} O'Shea, Alcohol and Tobacco Manufacturers and Sellers: Liability in a Post-Alvis Era, 73 ILL. B.J. 510, 512 (1985).


the Alcoholic Beverage Labeling Act\(^{77}\) suggests that labels on alcoholic beverages will cost even less.

That the benefits of warning labels on alcoholic beverages outweigh their minimal cost is beyond reasonable dispute. Congress apparently agrees, as indicated by its passage of the federal alcoholic beverage labeling law. Other evidence of labeling's efficacy includes a report submitted by the Senate Committee on Commerce, Science and Transportation, which said that a warning label requirement would "inform the public regarding health hazards" and "promot[e] the health and safety of the American people."\(^{78}\) The Committee believes that warning labels are an effective way to inform the public of the risks of alcohol use and, given the minimal cost of the labels themselves, the informational benefit of the labels outweighs that cost. Furthermore, although "[i]t is always possible in principle to argue that any mishap could have been prevented in advance, cheaply and effectively, by some warning or instruction that the defendant might have given but did not give,"\(^{79}\) a cost/benefit analysis of requiring labels combined with a risk/utility analysis of the product prevents the overuse of duty to warn claims.\(^{80}\) Given the risks involved with alcohol use, the mini-

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\(^{78}\) S. REP. No. 596, 100th Cong., 2d Sess. 5 (1988).

\(^{79}\) R. Epstein, supra note 8, at 93.

\(^{80}\) See id. at 95. To prevent the overuse of duty to warn claims, "it must be asked in every case whether the benefits [the warnings] create justify the administrative costs that they impose." Id.

The theory behind a duty to warn case, Epstein said, is that the nature of the product was such that it carried the implicit representation of safety.

Even if the defendant has said nothing about his product, the product itself makes, by its very appearance, certain implied representations about both use and its limitations. The question is always whether the initial false impressions created by the product are neutralized either by further disclosures or by other features of the product design.

Id. at 94. Applying that reasoning to alcoholic beverages, the strongest case for implied representations of safety comes from products that are to be consumed. The danger of an alcoholic beverage is the alcohol itself. Epstein said that when a design change would not be effective the question then is whether the manufacturer has supplied the consumer or user with sufficient knowledge of the product to take specific precautions on
mal cost of general health warning labels, and congressional recognition that health warning labels are an effective means of altering consumer behavior, little room remains for argument that manufacturers should not be liable for failing to provide warning labels on alcoholic beverages.

THREE SCENARIOS FOR INADEQUATE WARNING LIABILITY

Three common scenarios for products liability suits against alcoholic beverage manufacturers are: the adverse effects of long term drinking, acute alcohol poisoning (or alcohol overdose), and drunk driving. In the first situation, the plaintiff claims that drinking over an extended period caused some adverse health consequence. In the second situation, the plaintiff claims that a relative, often a teenager, died from drinking a large quantity of alcohol over a short period. In the final situation, the plaintiff claims a drunk driver injured the plaintiff.

Although the courts' standard approach to any of these three inadequate warning claims has been to reject the claims based on the Restatement (Second) of Torts' comments about the common knowledge of the risks of drinking, courts in a few recent cases have tried to circumvent the Restatement. The following discussion of recent cases involving the three scenarios, with holdings both for and against the plaintiffs, illustrates the different approaches courts have taken toward inadequate warning claims against alcoholic beverage manufacturers.

Long Term Effects

*Garrison v. Heublein, Inc.*\(^{81}\) involved an appeal from the dismissal of a suit alleging that the plaintiff husband suffered physical and mental injuries as a result of drinking Smirnoff Vodka over a

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\(^{81}\) 673 F.2d 189 (7th Cir. 1982).
twenty-year period. Although the couple sued on five theories, the crux of the plaintiffs' claim was that the defendant failed to warn Mr. Garrison of the dangerous propensities of drinking vodka, including that it could cause physical damage, was addictive, and could affect a consumer's personality.

The trial court said that the imposition of any duty to warn must rest on the "'premise that liquor poses latent risks not appreciated by its users.'" The court held that those risks in this case were a matter of common knowledge.

Giving only a cursory treatment to the claim, the appellate court consulted the Restatement and agreed that the dangers of drinking vodka are so commonly known that, as a matter of law, the defendant's product "cannot objectively be considered to be unreasonably dangerous." This finding is significant because, as the appellate court acknowledged, a strict liability inadequate warning theory "involves the lowest threshold for establishing" a duty to warn. In light of such a low threshold, the court's determination that no such duty existed is all the more bold.

The court analogized the obviousness of the dangers of long term drinking to the dangers of using electrical arcing equipment near power lines. The analogy is absurd. Although the connection between the danger of electrical shock and use of conductive equipment near power lines is readily apparent, the same is not true for the dangers of alcohol's ill effects. In its treatment of Mr. Garri-

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82. Id. at 189.
83. The plaintiff's five theories were negligence, willful and wanton misconduct, products liability, fraud and false and misleading advertising. Id.
84. Id.
85. Id. at 190 (quoting trial court's dismissal order).
86. Id.
87. In Illinois, finding a duty to warn is a question of law. Id. (citing Genaust v. Illinois Power Co., 62 Ill. 2d 456, 466, 343 N.E.2d 465, 471 (1976)).
88. Id. at 192. The court also said:
'The determination of whether a duty to warn exists involves a question of foreseeability, which must be resolved under a standard of objective reasonableness. . . . We find 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.

Id. at 191-92 (citing Genaust at 466, 343 N.E.2d at 471).
89. Id. at 190.
90. Id. at 191-92 (referring to the facts of Genaust).
91. See supra notes 54-64 and accompanying text.
son's claim involving the effects of long term alcohol use, the court decided as a matter of law issues that the medical community continues to debate: whether drinking warps consumers' personalities and whether alcoholic beverages are addictive.

The court found support for its position in the explicit language of the Restatement. Comment j reads in part: "[A] seller is not required to warn with respect to products, or ingredients in them, which are only dangerous . . . when consumed in excessive quantity, or over a long period of time, when the danger . . . is generally known and recognized."92 The court apparently ignored the statement that the danger must be "generally known and recognized," emphasizing only that no duty to warn of the dangers of long term consumption exists. If courts gave the ignored language due treatment, they would ask seriously whether the danger involved in the suit was in fact "generally known and recognized." To answer that necessarily factual question, courts must resort to the members of the jury as representatives of the community. Committing this issue to the jury is warranted especially considering that the medical community has only recently turned its full attention to assessing the risks and dangers of drinking. Surveys and common sense suggest that many of these risks, particularly those involving long term drinking's effects, are not commonly known.93 In the recent case of Hon v. Stroh Brewery Co.,94 the United States Court of Appeals for the Third Circuit reasoned similarly.

In Hon, the plaintiff's 26-year-old husband died from pancreatitis after drinking, on average, eight to twelve beers each week for six years.95 Prior to contracting the disease, he was in excellent health.96 The plaintiff's suit included a claim that the defendant inadequately warned the plaintiff's husband of the health effects of long term consumption of the defendant's product.97 Buttressing her case, the plaintiff offered expert testimony that pancreatitis was not a risk commonly associated with drinking and that her

92. RESTATMENT (SECOND) OF TORTS § 402A comment j (1965); see supra note 7.
93. See supra notes 54-64 and accompanying text.
94. 835 F.2d 510 (3d Cir. 1987).
95. Id. at 511.
96. Id.
97. Id. at 513. The plaintiff also sued for damages under a breach of express warranty claim. See infra notes 179-181 and accompanying text.
husband's drinking was not excessive, although it was prolonged.\footnote{Id. at 511. The expert testified that:}

(1) the understanding shared by members of the public is that excessive \textit{and} prolonged use of alcoholic beverages is likely to result in disease, principally of the liver; (2) Mr. Hon'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 \textit{either} excessive \textit{or} prolonged, even though moderate, use of alcohol may result in diseases of many kinds, including pancreatic disease.

\footnote{Id. at 512.}

\footnote{Id.}

\footnote{Id. at 513.}


\footnote{See id.}
pose is missing." The court held that whether a needed warning was missing was an issue for the jury, unless the plaintiff failed to establish a factual basis for concluding that warnings were needed to make the product safe. The jury would make its determination in light of what risks it considered to be common knowledge.

Finally, the court circumvented the problematic issue of common knowledge by interpreting the Restatement's language, "no warning is needed for products that are made dangerous only 'when consumed . . . over a long period of time, when the danger . . . is generally known and recognized,'" as meaning simply that "when the danger is generally known, no warning is required." The court thus rested its decision on the circular proposition that only the commonly known dangers of alcohol use are examples of the Restatement's common knowledge rule.

Aside from the circularity of that part of its reasoning, the Third Circuit's approach in Hon presents the strongest possibility for applying inadequate warning analysis to all alcoholic beverage cases. The court's approach properly limits its role to making the "social policy" decision of whether to allow the suit, without invading the jury's domain. Members of the community should decide what is common knowledge or generally known in the community, especially in cases like Hon, in which the plaintiff presents expert testimony that the risks involved are not common knowledge. Because of the minimal cost of warning labels and the gravity of the health risks posed by alcohol use, the cost/benefit analysis, termed "social policy considerations" in Hon, allows most plaintiffs to present their claims and the common knowledge issue to the jury.

104. Id.
105. Id. at 514.
106. Id.
107. Id. at 515 (quoting Restatement (Second) of Torts § 402A comment j (1965)).
108. Id. at 515-16. The court concluded, "Thus, [the Restatement's] comment j does not preclude liability for prolonged alcohol consumption absent a determination that the quantity of alcohol consumed was sufficiently large and the period of use was sufficiently long to present dangers that are generally known." Id. at 516.
Acute Alcohol Poisoning

In Pemberton v. American Distilled Spirits Co., the plaintiff's son died from acute alcohol poisoning after drinking half a bottle of Everclear Grain Alcohol. The plaintiff sued Everclear's retailer, wholesaler and manufacturer. The complaint alleged that the defendants' product had an alcohol content far in excess of what humans could consume safely and that the defendants failed to warn of the unreasonable risk their product presented. Although the trial court dismissed the plaintiff's claim as insufficient, the court of appeals overturned that decision. The Tennessee Supreme Court then overturned the court of appeals.

Just as the federal appeals court did in Garrison, the Tennessee Supreme Court in Pemberton relied on the Restatement's section 402A to support its dismissal of the suit. Quoting the dissenting opinion in the court of appeals' decision, the supreme court said that "'[a]lthough deceased was a minor, whether the product was defective or unreasonably dangerous . . . is determinable from . . . the knowledge of the ordinary consumers of the product.'" The court then referred to the Restatement's comment j, which gives the risk of excessive consumption of alcohol as an example of a commonly known danger. The court also noted that Tennessee courts determine the existence of a duty to warn as a matter of law.

The court in Pemberton further supported its position by reasoning that alcohol has long been recognized as toxic, and has been "'used in society during all recorded history . . . .'" Further-

109. 664 S.W.2d 690 (Tenn. 1984).
110. Id. at 692.
111. Id.
112. Id. at 691.
113. Id.
114. Id. at 692. In addition to using the Restatement, the court relied on the Tennessee Products Liability Act, TENN. CODE ANN. § 29-28-105 (1980), the language of which is very similar to that of the Restatement's § 402A. Pemberton, 664 S.W.2d at 692.
116. Id.
117. Id.
118. Id. at 693 (quoting dissenting opinion of appellate court). The court ignored, however, that "recorded history" is hardly clear or accurate on the dangers of alcohol use. The
more, the court said, "'[c]ourts, legislatures, parents, ministers, and temperance organizations and others have long recognized and decried the dangers inherent in alcohol.'"\textsuperscript{119} Based on the universal use of alcohol and the claimed general understanding of the drug's dangers, the court declared those dangers "'part of the body of common knowledge.'"\textsuperscript{1120}

A significant fact that the court did not address fully was the special potency of the alcoholic beverage involved in this case. Grain alcohol is usually close to 100\% pure.\textsuperscript{121} The potency of grain alcohol makes it much more difficult for experienced drinkers, not to mention teenagers as this case involved, to gauge the amount of alcohol consumed and its probable effects.\textsuperscript{122} The court merely noted, however, that "'the content of the bottle [in this

\begin{itemize}
  \item Bible, for example, perpetuates the myth that drinking is actually beneficial to one's health. It says: "Drink no longer water, but use a little wine for thy stomach's sake and thine often infirmities." II Thessalonians 5:23.
  \item 119. Pemberton, 664 S.W.2d at 692 (quoting dissenting opinion of appellate court).
  \item 120. Id. (quoting dissenting opinion of appellate court). The court concluded that the risks of "'death or serious injuries resulting from either excessive or prolonged consumption of alcohol'" are risks for which "'manufacturers are entitled to rely upon the common sense and good judgment of consumers.'" Id. (quoting dissenting opinion of appellate court).
  \item 121. Everclear Grain Alcohol, bottled by Worldwide Distilled Products Co., St. Louis, Mo., is 95\% alcohol by volume. It now carries the following warning: "CAUTION!! EXTREMELY FLAMMABLE HANDLE WITH CARE," "WARNING!! OVER CONSUMPTION MAY ENDANGER YOUR HEALTH," and "CAUTION: DO NOT APPLY TO OPEN FLAME — CONTENTS MAY IGNITE OR EXPLODE. DO NOT CONSUME IN EXCESSIVE QUANTITIES. NOT INTENDED FOR CONSUMPTION UNLESS MIXED WITH NON-ALCOHOLIC BEVERAGE."
  \item 122. The court noted that "'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 (quoting dissenting opinion of appellate court) (citations omitted). The court's definition of what can constitute common knowledge as a matter of law was that "'facts which are universally known may be judicially noticed provided they are of such universal notoriety and so generally understood that they may be regarded as forming a part of the common knowledge of every person.'" Id. (citations omitted). The court attributed the knowledge of experienced users to foreseeable neophyte consumers, which arguably runs counter to the policies of strict liability. Comment c of § 402A, Restatement (Second) of Torts says:

\begin{quote}
[T]he justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect . . . that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of
\end{quote}
case] approached pure alcohol’” and then assessed only whether the dangers of alcohol in general are commonly known,\textsuperscript{123} not whether the dangers of grain alcohol in particular are commonly known.\textsuperscript{124} Considerations such as these point away from deciding as a matter of law whether the risks of excessive drinking are common knowledge.

A case factually similar to Pemberton, Brune v. Brown Forman Corp.\textsuperscript{126} had a different outcome. The plaintiff’s daughter in Brune, an 18-year-old college freshman, died of acute alcohol poisoning after drinking straight shots of Pepe Lopez Tequila.\textsuperscript{128} The plaintiff sued the manufacturer, wholesaler and retailer of the liquor, claiming that although many of the risks of alcohol are commonly known, “many teenagers are unaware that the mere ingestion of the drug in excess quantity can cause an overdose resulting in death.”\textsuperscript{127} The trial court granted summary judgment to the defendants.\textsuperscript{128} The sole issue on appeal was “whether the risk of death resulting from acute alcohol poisoning is a matter of common knowledge to the community such that there was no duty on the manufacturer to warn of the danger as a matter of law.”\textsuperscript{129}

Assessing the defendant’s duty to warn, the appellate court said:

If a manufacturer knows or should know of potential harm to a user because of the nature of its product, the manufacturer is required to give an adequate warning of such dangers and pro-

\begin{itemize}
  \item \textsuperscript{123} Pemberton, 664 S.W.2d at 693 (quoting dissenting opinion of appellate court).
  \item \textsuperscript{124} Not only did the court fail to consider how commonly known are the risks of particularly potent alcoholic beverages such as grain alcohol, but surveys suggest, contrary to the court’s holding, that the risk of lethal alcohol overdose is not commonly known. See supra note 55 and accompanying text.
  \item \textsuperscript{125} 758 S.W.2d 827 (Tex. Ct. App. 1988).
  \item \textsuperscript{126} Id. at 828. Significantly, the very nature of alcohol prevents a drinker from fully appreciating the risk of acute alcohol poisoning; often the drinker is already intoxicated before he or she rapidly consumes to fatal excess. If the drinker is intoxicated, he or she cannot appreciate fully the risks of rapid overconsumption. See L. West, supra note 59, at 9 ("Slow alcohol ingestion generally leads to unconsciousness before the drinker consumes enough to reach a lethal blood level. Rapid alcohol ingestion \textit{while sober} often causes vomiting. However . . . rapid alcohol ingestion by a person \textit{already intoxicated} can be fatal.").
  \item \textsuperscript{127} Brune, 758 S.W.2d at 828.
  \item \textsuperscript{128} Id.
  \item \textsuperscript{129} Id.
\end{itemize}
vide instructions for the safe use of the product. . . . This includes the duty to warn against foreseeable misuse.\textsuperscript{130}

The defendant argued that no duty to warn existed because the dangers involved were commonly known, basing its argument on the Restatement's comments h, i and j.\textsuperscript{131}

The court in \textit{Brune} used the same reasoning as the court in \textit{Hon v. Stroh Brewery Co.}\textsuperscript{132} when determining the common knowledge issue. Rather than ignore the language of the Restatement's comments i and j\textsuperscript{133} as the court did in \textit{Hon},\textsuperscript{134} the court in \textit{Brune} made an end run around the comments. The court reasoned that the language of the comments specifically addressed only the dangers of "general intoxication and dangers peculiar to alcoholics."\textsuperscript{135} The comments did not, the court claimed, specifically mention the risk of fatal overdose of alcohol as being common knowledge. Citing to \textit{Hon}, the court also said that the Restatement's comment j does not offer alcohol as an example of a product, \textit{all} the risks of which are commonly known. Rather, the court said, the Restatement puts forth only the proposition that no warning is required when the dangers involved are commonly known, and the Restatement offers alcohol only as an example of a product, \textit{many} of the

\textsuperscript{130} \textit{Id.} (citations omitted).
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} 835 F.2d 510 (3d Cir. 1987).
\textsuperscript{133} \textit{See supra} note 7 and accompanying text. The court did, however, implicitly reject the Restatement's edict as to what constitutes common knowledge when it looked to Black's Law Dictionary for a definition of common knowledge: "'Common knowledge . . . [i]s what a court may declare applicable to action without necessity of proof. It is knowledge that every intelligent person has. It includes matters of learning, experience, history, and facts of which judicial notice may be taken.'" \textit{Brune}, 758 S.W.2d at 830 (quoting \textit{BLACK'S LAW DICTIONARY} 250 (6th ed. 1979)). Then, the court fleshed out that definition with its own statement: Specifically, common knowledge encompasses those facts which are so patently obvious and so well known to the community generally, that there can be no question or dispute concerning their existence. For instance, there can be no dispute that there are twelve inches in a foot, that the sun rises in the morning, or even that a person drinking alcoholic beverages will become intoxicated. On the other hand, the length of a particular object, the location of the sun at a particular point in time, or the level of intoxication and its effect on a particular person at a specific time, all involve facts which could be subject to dispute and which could never be ordinary common knowledge to the community.
\textit{Brune}, 758 S.W.2d at 830-31.
\textsuperscript{134} \textit{See supra} notes 107-08 and accompanying text.
\textsuperscript{135} \textit{Brune}, 758 S.W.2d at 829.
risks of which are commonly known.\footnote{136} "[W]hen read in context," the court in \textit{Brune} said, "comment j does nothing more than extend to the duty to warn the \textit{Restatement}'s general exception for cases in which the consumer knows or should know of the product's dangerous propensities."\footnote{137}

Defining common knowledge as knowledge that "encompasses those facts which are so patently obvious and so well known to the community generally, that there can be no question or dispute concerning their existence,"\footnote{138} the court said that the risk of fatal alcohol overdose could not meet that definition as a matter of law. Ironically, the court also decided in dictum what is common knowledge about the risks of drinking. According to the court:

Although there is no question that drinking alcoholic beverages will cause intoxication and possibly even cause illness is a matter of common knowledge, we are not prepared to hold, as a matter of law, that the general public is aware that the consumption of an excessive amount of alcohol can result in death.\footnote{139}

The strength of the decision in \textit{Brune} stems from the court's unwillingness to hold that the dangers of excessive drinking are commonly known as a matter of law. The court's reasoning, however, is of little use in inadequate warning claims against alcoholic beverage manufacturers, at least to the extent that the court purported to abide by the intent of the \textit{Restatement}'s drafters. Apparently, the court chose simply not to read language in the comments that would preclude suits based on overconsumption.\footnote{140} Because the comments contain language addressing excessive consumption of alcohol, in addition to alcohol's effects on alcoholics and alcohol's tendency to make one drunk,\footnote{141} only a suspiciously selective reading of the \textit{Restatement} would allow suits for adverse health

\footnotetext{136}{\textit{Id.}}
\footnotetext{137}{\textit{Id.} (citing Hon v. Stroh Brewery Co., 835 F.2d 510, 515 (3rd Cir. 1987)) (footnote omitted).}
\footnotetext{138}{\textit{Id. at} 830.}
\footnotetext{139}{\textit{Id. at} 831.}
\footnotetext{140}{\textit{See supra} note 7 and accompanying text. Comment j, in particular, uses alcohol as an example of a product carrying no duty to warn of the dangers of consumption "in excessive quantity." \textit{RESTATEMENT (SECOND) OF TORTS} § 402A comment j (1965).}
\footnotetext{141}{\textit{See supra} note 7.}
effects of long term drinking, drunk driving, or even acute alcohol poisoning. Only by rejecting all of the Restatement's pronouncements regarding what is common knowledge about alcohol use can a court allow an inadequate warning claim to go to a jury. The language of the Restatement's comments is otherwise broad enough to preclude any such suit. As a matter of legal analysis, a court is on stronger ground when it rejects a faulty rule than when it ignores the rule's existence.

**Drunk Driving**

The plaintiff in *Maguire v. Pabst Brewing Co.* sued the manufacturer of the beer that a drunk driver consumed before he crashed his car into the plaintiff's car. The drunk driver had consumed an undisclosed amount of the defendant's Pabst Blue Ribbon Beer over a six-hour period before the crash. The plaintiff relied in part on a claim that the manufacturer's beer was unreasonably dangerous because it did not have adequate warnings or instructions governing its use.

The Iowa Supreme Court relied on the comments to the Restatement's section 402A for its refusal to apply inadequate warning analysis to this case. In response to the plaintiff's argument that a consumer cannot be expected to know how much beer is too much without adequate warnings—that different amounts of beer affect different people in varying degrees—the court indicated that the consumer has a duty to learn his own drinking limits. "This contention brings to mind the suggestion wisely advanced by Eleanor Roosevelt in 1932 that 'the average girl faces the problem of learning, very young, how much she can drink of such things as whiskey and gin, and sticking to the proper quantity,'" the court

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142. 387 N.W.2d 545 (Iowa 1986).
143. Id. at 567.
144. Id. at 566.
145. Id. at 569-70. After quoting pertinent parts from the Restatement's comments i and j, the court determined that "the risks of intoxication presented to consumers of draft beer is sufficiently known to consumers at large that the allegations of plaintiff's complaint fail to state a claim or cognizable cause of action under Iowa law for the type of liability recognized by section 402A of the Restatement (Second) of Torts . . . ." Id. at 570.
146. Id. But see infra note 156.
The court also said that it is not "practical to expect a wholesale purveyor of alcoholic beverages to devise an adequate warning of the particular tolerance of each consumer." The court concluded that "the risks of intoxication presented to consumers of draft beer" are commonly known.

Several specifics of the court's analysis are suspect. For instance, placing a duty on the consumer to learn his or her limits arguably encourages overconsumption of alcohol. As William Blake wrote, "You never know what is enough unless you know what is more than enough." In order to know one's "limits," one must go beyond them. Furthermore, a simple label listing the correlative effects—such as the increase in blood/alcohol ratio—of a certain number of drinks over time on a person of a specific weight is not impractical, nor is it prohibitively expensive.

In Malek v. Miller Brewing Co., a drunk driving case with an outcome similar to Maguire, the plaintiff also unsuccessfully asserted, inter alia, that the defendant was liable for failing to warn of the dangers of, or to provide adequate instructions, for the consumption of its beer. The lower court in Malek held that the dangers of drinking were commonly known thereby precluding the plaintiff's claim for damages and injuries caused when a drunk driver crashed her car into the plaintiff's car. The Texas Court of Appeals upheld the lower court's summary judgment based on its holding that the brewer lacked a duty to warn about its prod-

147. Maguire, 387 N.W.2d at 570. The court said that:

"[a]lthough 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 reached the proscribed level, they should, in the exercise of reasonable intelligence, understand what type of conduct places them in jeopardy of violating the [law]."

Id. (quoting State v. Block, 357 N.W.2d 29, 34 (Iowa 1984)).

148. Id.

149. Id.


151. See supra notes 77-78 and accompanying text.


153. Id. at 524.
uct's dangers. In a strong dissent, however, one judge argued that the majority's dismissal of the case was too "sweeping." The dissent asserted that the manufacturer could be liable for failing to provide "safety instructions to its consumers about how much Miller Lite Beer a person could safely consume before becoming too inebriated to drive." The dissent would have allowed the plaintiff's inadequate instruction claim to proceed, although he seemed to acquiesce in the majority's position toward the plaintiff's inadequate warning claim.

"There is an important difference between a manufacturer's duty to warn and its duty to provide information that will enable the consumer to use the product with safety," the dissent said. "Although general awareness of a product's dangerous characteristics may relieve the product manufacturer of a duty to warn, the manufacturer may yet have the duty to issue instructions for the safe use of the product." Because a manufacturer is held to be an expert regarding its products, it could also be held to have information "about how many beers a person may consume within a given time before reaching an illegal state of intoxication . . . ."

154. Id. at 522.
155. Id. at 524 (Evans, C.J., dissenting).
156. Id. at 525 (Evans, C.J., dissenting). In discussing the many variables that aggravate the intoxicating effect of alcohol, authors M. Moore and D. Gerstein noted that the number of these variables produces a complex causal relationship that arguably removes the individual effects of drinking in a specific situation from the realm of "common knowledge." The authors said:

[T]he effects of alcohol depend on such factors as the spacing of drinks, the drinker's size and weight, how recently he or she has eaten, his or her own hopes and expectations about the effects of drinking, and even the expectations and demands of the people present in addition to the amount consumed. An excited, skinny teenager anticipating a big night with pals can become quite exhilaratingly "drunk" on a quantity of alcohol that would produce no effect . . . [on] a heavy, middle-aged man who had just finished dinner and had no greater aspiration than to pass the evening quietly.


157. Malek, 749 S.W.2d at 525 (Evans, C.J., dissenting) (citation omitted). Distinguishing warnings from instructions, one author said, "[w]arnings call attention to a danger, while instructions are intended to describe procedures for effective and reasonably safe product use." Madden, supra note 64, at 224.

158. Malek, 749 S.W.2d at 525 (Evans, C.J., dissenting) (citation omitted).
159. Id. at 524 n.1 (Evans, C.J., dissenting).
Although the dissent offered an alternate theory of recovery against alcoholic beverage manufacturers, the reasons that shoot down inadequate warning claims also shoot down inadequate instruction claims. Commentators suggest that the common knowledge of risks plays the same role in both types of claims. If this is the case, an inadequate instruction claim serves the plaintiff no better than an inadequate warning claim. Unless a court is willing to abstain from deciding as a matter of law the common knowledge issue, both claims fail. If the court abstains, however, both claims go forward to the jury.

Weaknesses in the dissent's reasoning in Maguire aside, drunk driving cases present the strongest argument for dismissing inadequate warning and inadequate instruction claims because the argument that the dangers of drinking and driving are common knowledge is a strong one. After all, one ordinarily becomes aware of diminishing motor skills simultaneously with the consumption of the alcohol. However, given the number of factors that affect the degree of drunkenness one experiences—for example, alcohol could have a greater effect on an inexperienced drinker of light weight and with an empty stomach than someone not so situated—a court is presumptuous to decide even this type of common knowledge issue as a matter of law. In all likelihood, the jury will decide that it is common knowledge that a person who drinks too much will become drunk and therefore unable to drive. But that determination should remain where it belongs: with the jury. The jury should decide the common knowledge issue because what the Restatement and the courts confidently assert is common knowledge is not.

ANALYSIS OF APPROACHES TO INADEQUATE WARNING CLAIMS

The first hurdle in bringing a suit for inadequate warning of the risks attendant to drinking may be the preemption language of the

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160. See Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825, 842 (1973). "Instructions are similar to warnings. If the product must be used in a particular way to be safe and this necessity would not be apparent to the user, adequate instructions may be required for the product to be duly safe." Id. The author also offers the dangers of liquor and cigarettes as examples of products that would not require instructions. Id.

161. See supra note 156.
recently passed Alcoholic Beverage Labeling Act.\(^{162}\) The Act requires health warnings on alcoholic beverages, but may preempt state law claims for inadequately warning of those health risks. The reasoning of several tobacco products liability cases offers a way around this problem: bring suit only for damages incurred before the Act’s passage. The Act will not preempt a claim for those damages.

The second and more formidable hurdle is the general bias of state courts disfavoring inadequate warning claims against alcoholic beverage manufacturers. These courts take the position that no duty to warn exists for dangers that are commonly known, and that the risks of drinking are so commonly known that no duty to warn of those risks exists as a matter of law. These courts often cite to the *Restatement (Second) of Torts* for support.

The *Restatement*, however, offers no support for its position, which therefore should be reexamined as nothing more than ungrounded dicta. Surveys suggest that the *Restatement*’s position is incorrect. Furthermore, a number of medical authorities and commentators take a stance contrary to the *Restatement*. Because the issue is clouded, the question of common knowledge cannot be decided as a matter of law. In fact, the very nature of that inquiry—what is generally known among the community—requires a determination by a jury, which represents the community.

Courts citing to the *Restatement* generally use it as their sole authority for deciding that the risks of drinking are common knowledge. Their analysis, if it can be called that, should be rejected simply on grounds of complacency. Medical research has shattered the presumptions established in the *Restatement*’s comments i and j, which were written more than 20 years ago. Medical research has uncovered new links between drinking and a variety of adverse health effects since the drafting of the *Restatement*. Courts should never have done so, but are especially wrong now to rely on the *Restatement* as an authority of what is and is not commonly known.

Some courts point to the prevalent use of alcohol throughout history and the fact that community leaders have long decried the dangers of drinking to support holding that the dangers of alcohol are commonly known. This position ignores that many myths about alcohol consumption have been perpetuated throughout history. If courts are willing to impute to consumers history's valid information about alcohol use, they must also be willing to impute history's misinformation. Furthermore, the historical prevalence of alcohol use provides no support when an 18-year-old neophyte drinker consumes too much and dies of acute alcohol poisoning. Courts should not impute the bulk of knowledge supposedly permeating recorded history to someone not exposed to it. This argument is strongest for many of the adverse effects of long term drinking, especially when those effects were not known until recently. Even the fact that community leaders speak out regularly about the dangers of alcohol does not address the specific issue of whether the community is aware that drinking can triple the risk of getting a stroke or increase the risk of cancer of the mouth or throat. Unless community leaders speak specifically of these risks, and do so with great frequency and to massive audiences, their speeches do not influence common knowledge of the specific health consequences that any particular plaintiff suffers.

Furthermore, under a risk/utility analysis, courts should not insulate alcoholic beverage manufacturers from liability as a matter of law. The utility of drinking is minimal, despite its pervasiveness, and the risks of drinking are great. The cost of attaching labels to containers is slight—probably less than the cost of litigating several claims, and certainly less than the alcoholic beverage industry's collective advertising budget of $2 billion—while the potential benefit of the labels as a tool for public education is clear. Given these considerations, little justifies preventing a jury from considering the imposition of liability.

The court in Hon v. Stroh Brewery Co. adopted a good approach to examining an alcoholic beverage manufacturer's liability under inadequate warning analysis. After evaluating "social policy considerations" under a cost/benefit analysis, the judge should

163. Infra note 186.
164. 835 F.2d 510 (3d Cir. 1987).
send the case to the jury to determine the issue of common knowledge. Other approaches are less effective for jumping the hurdles the Restatement imposes. The court in Brune v. Brown Forman Co.\textsuperscript{165} pretended that its ruling did not conflict with the Restatement, but in fact the court ignored language that specifically rebutted its position. Only by rejecting the Restatement's edict as to what is commonly known can a court properly send the matter to a jury when the case involves alcoholic beverages. The Hon approach is strongest for claims involving adverse health effects of long term drinking, and can also apply to suits involving acute alcohol poisoning. This approach is not as strong in drunk driving cases because it requires the plaintiff to argue that the causal statement "drinking makes one drunk" is not common knowledge.

Another approach, set forth in the dissenting opinion of Malek v. Miller Brewing Co.,\textsuperscript{166} has problems of its own. The dissent would have applied inadequate instruction analysis rather than inadequate warning analysis, but the underlying premise for both is basically the same: One is not required to warn of or minimize by instruction dangers that are commonly known. Even if a court chooses to apply inadequate instruction analysis, it must still address the question of whether the safe use of the product is common knowledge.

Combining the approaches of the Brune and Hon cases, however, makes stronger a weak argument for imposing liability when the danger to be avoided is drunk driving. Brune offers the alternative of applying inadequate instruction analysis; Hon offers a rejection of what is and is not commonly known. Under a combined approach, the plaintiff would argue that the variables of experience, diet, weight, inherent susceptibility to intoxication, and time span of consumption create a situation in which the court cannot presume that a consumer knows how to safely use the defendant's product without instruction. The consumer cannot know how much alcohol is too much given the list of variables he or she must consider. The manufacturer, on the other hand, is held to the level of an expert, and will have that knowledge imputed to it. The

\textsuperscript{165} 758 S.W.2d 827 (Tex. Ct. App. 1988).
\textsuperscript{166} 749 S.W.2d 521 (Tex. Ct. App. 1988) (Evans, C.J., dissenting).
question then becomes whether the manufacturer is liable for failing to impart that knowledge to the consumer.

In drunk driving cases, as in acute alcohol poisoning cases and cases involving the effects of long term alcohol use, the most liberal approach appears in *Hon*: Allow the court to make a general cost/benefit analysis and send the case forward to the jury for a determination of the common knowledge issue on the facts of the case. Of the three situations discussed—effects of long term alcohol use, acute alcohol poisoning, and drunk driving—courts are on their strongest ground when they hold as a matter of law that it is common knowledge that drinking can make one drunk. Courts are on shaky ground, however, when they purport to assess, as a matter of law, the common knowledge of risks of a more arcane medical nature, because many of the strictly medical risks inherent in drinking are not commonly known.

**AN ALTERNATE THEORY OF LIABILITY: BREACH OF EXPRESS WARRANTY**

One author defined a warranty as "a promise on the part of the seller that a product will possess certain performance, safety, or quality characteristics. Under warranty, the standard of responsibility is whether the character of the product differs from its implied or express capabilities." Advertisements may communicate an implied or express warranty, according to the author. Furthermore, not all states require reliance on those representations.

The recent judgment in *Cipollone v. Liggett Group, Inc.*, provides encouragement for breach of warranty suits, especially in cases involving extensively advertised products, such as alcoholic

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167. Plaintiffs ordinarily bring breach of express warranty claims under a state's equivalent to the Uniform Commercial Code's § 2-314, which provides that "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." B. CLARK & C. SMITH, THE LAW OF PRODUCT WARRANTIES § 5.01(1) (1984) (quoting U.C.C. § 2-314(1) (1977)). This U.C.C. section contemplates goods that are unfit for their ordinary purposes and can include manufacturing and design defects, as well as failure to warn claims. *Id.* § 12.03(1).


169. *Id.* § 2.08.

170. *Id.*

beverages, the risks of which are supposedly commonly known and often held so as a matter of law. Although Cipollone involved a breach of warranty claim against cigarette manufacturers, it provides a strong analogy to alcohol cases because of the similarity between the products. The Restatement (Second) of Torts mentions both alcohol and tobacco as products the inherent risks of which are supposedly commonly known. The products are addictive, both products involve health risks from long term use, and the risks of both products have been extensively studied and documented recently, although medical research continues to uncover risks of both products.

The jury in the Cipollone case awarded $400,000 for the defendants' breach of express warranty as to the safety of their products. The alleged warranty was that the cigarettes sold would not cause injury. The basis for this claim was that the defendants' advertisements suggested that no harm could come from cigarette smoking. In an alcoholic beverage case using this approach, the plaintiff would try to show that the defendant ran advertisements that downplayed or contradicted the risks attendant to alcohol consumption.

172. Restatement (Second) of Torts § 402A, comment i (1965); see supra note 7 and accompanying text.

173. See, e.g., supra notes 57-63 and accompanying text. For a discussion of the health effects of tobacco products, see Ross, supra note 76.


175. Id.

176. Id. at 212-14.

177. Fact findings in a case that did not involve a breach of warranty claim are particularly relevant here. The court in Maguire v. Pabst Brewing Co., 387 N.W.2d 565 (Iowa 1986), noted that the defendant's advertisements depict young people, both male and female, most of whom appear to be in their twenties. The bartenders are represented in these commercials by older actors. The characters in the commercials appear to be predominantly blue collar but some white collar types appear as welcome guests in a friendly, festive "slice-of-life" drama.

These characters wear working clothes for the most part and talk like "regular guys." They are gregarious, fun-loving people who express an appreciation for good friends and "real beer." The setting is always a tavern which is crowded in a way that suggests popularity. The patrons are always in a highly festive mood, and the bartender gives strong recommendation to Pabst beer. The contents of oversized pitchers of frosty amber liquid representing Pabst draft beer is freely dispensed among the glasses of the assembled patrons. At
Plaintiffs made breach of warranty claims in several recent cases involving alcoholic beverages, and the claims received distinct treatment by their respective courts.

In *Morris v. Adolph Coors Co.*,\(^{178}\) which involved a suit against Adolph Coors Company by a plaintiff whose car was struck by an 18-year-old drunk driver's car, the court's holding was reminiscent of most inadequate warning cases. The court rejected the plaintiff's claim and grounded its holding on a determination that the alcoholic beverage in this case was "safe for consumption."\(^{179}\) The court's "reasoning" was no different nor more sound than cases in which courts have dismissed inadequate warning claims because the dangers of alcohol consumption were purportedly commonly known. The court in *Morris* simply raised another impossible hurdle to another cause of action against alcoholic beverage manufacturers. Here, the court essentially decided as a matter of law that alcoholic beverages, despite reams of medical evidence to the contrary,\(^{180}\) are "safe for consumption." The court's only saving grace is that this case did not involve the health effects of long term alcohol use, nor overconsumption—both being situations that refute the proposition that alcoholic beverages are "safe for consumption."

In order to recover for breach of an express warranty, the court in *Morris* said, the plaintiff must prove:

1) an express affirmation of fact or promise by the seller relating to the goods;

2) that such affirmation of fact or promise became a part of the basis of the bargain;

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the conclusion of some commercials, one character says to another: "Let's have another."

*Id.* at 567-68. The plaintiffs in this case described the defendant's marketing practices "as an 'invitation to excess,' through exaltation of hedonistic tendencies over good judgment." *Id.* at 569. The court in *Maguire* also noted that Pabst spent more than $50,000,000 on advertising for its beer in 1982 and 1983. *Id.* at 568.


179. *Id.* at 587.

180. *See supra* notes 54-63 and accompanying text.
3) that the plaintiff relied upon said affirmation of fact or promise;
4) that the goods failed to comply with the affirmations of fact or promise;
5) that the plaintiff was injured by such failure of the product to comply with the express warranty; and
6) that such failure was the proximate cause of plaintiff’s injury.\textsuperscript{181}

In addition to holding that the plaintiff’s claim failed because alcoholic beverages are safe for consumption, this court held that the plaintiff’s claim failed because the manufacturer’s “failure to provide warnings is not an affirmation of fact or promise.”\textsuperscript{182} The court’s “reasoning” missed its mark again, however. The plaintiff’s claim did not rest on the manufacturer’s failure to provide warnings as an affirmation of fact or promise. The fact or promise that the manufacturer affirmed was that its product could be consumed safely, and the manufacturer’s failure to warn otherwise was simply its failure to prevent its advertisements’ implicit affirmation that the product could be consumed safely. The court in \textit{Hon v. Stroh Brewery Co.}\textsuperscript{183} reached a different result from the \textit{Morris} court when the plaintiff in \textit{Hon} claimed that the defendant’s advertisements created the warranty that drinking its beer was risk-free.

The plaintiff’s husband in \textit{Hon} died from pancreatitis at the age of 26, after drinking the defendant’s beer for six years.\textsuperscript{184} The court noted that

the story boards of Stroh’s commercials provide additional evidence from which a jury could conclude that the general public is unaware of the hazard that allegedly led to Mr. Hon’s death. If a jury finds that Stroh’s marketing of its product has effectively taught the consuming public that consumption of beer on the order of eight to twelve cans of beer per week can be a part of the “good life” and is properly associated with healthy, robust activities, this conclusion would be an important consideration for the jury in determining whether an express warning was nec-

\textsuperscript{181} \textit{Morris}, 735 S.W.2d at 587.
\textsuperscript{182} Id.
\textsuperscript{183} 835 F.2d 510 (3d Cir. 1987).
\textsuperscript{184} Id.
Supplementing the court's analysis in *Hon*, another important consideration in assessing the validity of applying breach of warranty analysis to alcoholic beverage manufacturers is the fact that alcoholic beverage manufacturers spend roughly two billion dollars per year on advertising, which far exceeds any reasonable estimate of the cost of warning labels. One commentator said that alcoholic beverage ads portray the products as "liquid pathways to friendship, camaraderie, and virtually all other experiences to which humans aspire . . . ." A glance through almost any magazine, or watching the commercials that run during most sports events provide the reader with objective support for that proposition.

Two possible problems with a breach of warranty approach are that traditional warranty analysis sometimes requires consumer reliance on the seller's assurance of the fitness of its product, and that courts generally do not favor this theory of recovery. If the consumer did not rely on the advertisements' representations, the claim will fail in some states. However, if reliance can be shown in those states, the claims should be allowed, the preferences of courts for theories more solidly based in tort notwithstanding.

185. *Id.* at 514-15 (footnote omitted).
186. See 132 CONG. REC. 16,008, 16,009 (daily ed. Oct. 14, 1988) (statement of Sen. Thurmond). Discussing the recently passed federal law mandating alcoholic beverage health warning labels, Senator Thurmond said that the warnings "will provide some educational balance to the $2 billion spent each year by the alcohol beverage industry in its product advertising." *Id.*
187. See *supra* notes 76-77 and accompanying text.
189. See J. CAVANAGH & F. CLAIRMONTE, ALCOHOLIC BEVERAGES: DIMENSIONS OF CORPORATE POWER (1985) ("In the case of alcohol, advertising technology has been a catalyst of consumption, with all its attendant health-related problems . . . ." *Id.* at 129-30); TREASURY AND HHS REPORT, *supra* note 55, at 34 (Alcoholic beverage advertisements, "particularly the beer advertisements, associate the use of the product with attractive individuals, enjoyable activities, and pleasant surroundings, without communicating any of the potential negative consequences.").
Points that support this approach include the fact that the recently passed Alcoholic Beverage Labeling Act could preempt inadequate warning claims. If a plaintiff is also shut off from the breach of warranty avenue of recovery, he or she has no legal remedy for his or her injury. Also, a breach of express warranty suit contains an element of the manufacturer's culpability that makes the claim for redress compelling; breach of warranty is a claim of misfeasance rather than nonfeasance. Finally, the fact that the legislative history of the Alcoholic Beverage Labeling Act refers specifically to not preempting state regulation of alcoholic beverage advertising provides additional support for a breach of express warranty approach to holding alcoholic beverage manufacturers liable for injuries that their products cause.

Analysis of Breach of Warranty Claims

The breach of warranty approach may be the strongest argument for imposing liability on alcoholic beverage manufacturers, especially if courts choose to read very broadly the preemption language in the recently passed alcoholic beverage health warning law. Because a claim for breach of express warranty does not involve labeling requirements, such a claim should not conflict with any federal labeling mandate, and therefore should not be preempted. In some states, however, a plaintiff must still prove that the manufacturer prompted the injured party to rely on suggestions that the alcoholic beverage posed no adverse health consequences. Under this approach, as in inadequate warning or instruction claims, the defendant may argue that the plaintiff knew the risks and therefore cannot justify his reliance on the manufacturer's contrary statements or implications. At least in breach of warranty claims, however, the Restatement (Second) of Torts does not prevent the issue of the plaintiff's knowledge from reaching the jury.

192. See supra notes 27-40 and accompanying text.
193. See supra note 20 and accompanying text.
194. See supra notes 7-8, 47-51 and accompanying text.
CONCLUSION

Alcoholic beverages unquestionably pose serious and substantial health risks. Furthermore, the connections between many of the risks and their alcoholic sources are arcane and beyond the realm of common knowledge. In fact, many of the causal links have only recently come within the ken of modern medical science. Relying on the ungrounded dicta of the Restatement (Second) of Torts and holding that the risks involved are within common knowledge as a matter of law transcend the bounds of reason.

Recently passed federal legislation recognizes the unreasonable-ness of such reliance. If the risks of consuming alcohol were common knowledge, Congress would have no reason to warn the public of those risks. Furthermore, despite any potential preemptive effect of the legislation on inadequate warning claims, courts can at least allow products liability claims for injuries suffered before the federal law's enactment. If courts continue to balk at inadequate warning claims because of misplaced confidence in what constitutes common knowledge, however, plaintiffs should use breach of warranty claims for redress of their injuries. Those claims generally require only a showing that the defendant's advertising downplayed the risks of alcohol consumption, and that the claim does not conflict with the contemplated federal legislation.

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