The Future of Products Liability in America

Gary L. Wilson
Vincent Moccio
Daniel O. Fallon

Follow this and additional works at: http://open.mitchellhamline.edu/wmlr

Recommended Citation
Available at: http://open.mitchellhamline.edu/wmlr/vol27/iss1/11

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.fellofer@mitchellhamline.edu.
© Mitchell Hamline School of Law
THE FUTURE OF PRODUCTS LIABILITY IN AMERICA

Gary Wilson, Vincent Moccio and Daniel O. Fallon¹

I. INTRODUCTION ........................................................................ 86
II. TORT REFORM MEASURES ...................................................... 88
   A. Statutes Of Repose ............................................................. 89
   B. Damages Caps ................................................................. 91
   C. Federal Tort Reform ....................................................... 93
III. THE FUTURE OF OTHER SUBSTANTIVE LAW LIMITATIONS
     ON PRODUCTS LIABILITY SUIT ............................................. 94
   A. Federal Preemption Of Products Liability Causes Of Action ...94
   B. The Reasonable Alternative Design Requirement Of The
      Restatement (Third) Of Torts: Products Liability ..................98
   C. Daubert, The Reasonable Alternative Design
      Requirement Of The Restatement (Third) And The End Of
      Products Liability ................................................................ 101
IV. MULTI-DISTRICT LITIGATION: THE MDL BAR AND ITS EF-
    FECT ON THE RIGHTS OF INDIVIDUAL PRODUCTS LIABIL-
    ITY PLAINTIFFS ...................................................................... 103
   A. The Rise Of MDL Mass Tort Litigation In The 1990s ............104
      1. The Class Action Attorneys ........................................... 105
      2. The Traditional Individual Case Practitioner ......................106
      3. The Mass Marketing, High Volume Attorneys ................. 107
   B. Disputes Among Plaintiffs' Lawyers In The Multidistrict
      Litigation Setting ..................................................................108
   C. MDL Fees ........................................................................... 109
   D. The Specter Of Bankruptcy .................................................111
   E. The MDL Good Or Bad? .................................................... 112
V. FEWER BUT BIGGER VERDICTS .............................................. 115
VI. THE ULTIMATE SWING BACK TO GREATER PLAINTIFFS'
    RIGHTS ................................................................................. 118
VII. CONCLUSION ....................................................................... 120

¹The authors are trial attorneys with the Minneapolis office of Robins, Kaplan, Miller & Ciresi L.L.P.
I. INTRODUCTION

Like the common law generally, products liability law and its remedies have an historical ebb and flow. The last twenty years or so, beginning roughly with the election of Ronald Reagan to the White House in 1980, have seen a pro-business, anti-consumer cycle. During these last two decades, barrier after barrier has been erected between persons injured by products and recovery for those injuries. These barriers have come in many forms: intentional tort reform measures designed to curb manufacturer liability and cap damages, heightened liability and evidentiary standards that make it more difficult for plaintiffs to prove their cases, and procedural impediments to individual plaintiffs ability to control their cases, minimize costs and collect judgments. This so-called "Quiet Revolution" repudiated the alleged pro-consumer protection slant of the law, the courts and our society, making it increasingly difficult for injured persons to recover. Driven by an obsession with the supposed social cost of manufacturer liability for product related injuries, these reforms essentially became victim take-away programs. The insurance industry and ideologue commentators convinced legislatures, judges and jurors that America was in the midst of a tort crisis that was imposing too high a cost on businesses, stifling innovation and undermining the economy.

While tort reformers had mixed success in getting their legislative initiatives formalized into law, the national debate that the proposals sparked, and the one-sided portrayal of the need for such reforms, shifted public, judicial and juror attitudes against plaintiffs. The combination of this shift in attitude with reform measures that did get enacted into law—such as statutes of repose and damages caps—has seriously changed the atmosphere encountered in the courtroom by most plaintiffs. Added to this mix is a host of

1. James A. Henderson & Theodore Eisenberg, The Quiet Revolution in Products Liability: An Empirical Study of Legal Change, 37 UCLA L. Rev. 479 (1990). One irony in the history of products liability law is that it was on the heel of these reforms—changes which some thought would be a bullet in the head of products liability reform—that the most vociferous and successful calls for limits on plaintiffs' rights were heard. Theodore Eisenberg & James A. Henderson, Inside The Quiet Revolution in Products Liability, 39 UCLA L. Rev. 731, 733 (1992).


3. Marc Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. Rev. 4, 5 (1983).
developments not traditionally considered to be tort reform measures but that nonetheless impact plaintiffs’ ability to maintain suit. These include the evolution of federal preemption of many products liability causes of action, the adoption of a new standard for the admissibility of expert opinion as set forth by the United States Supreme Court in *Daubert v. Merrill Dow Pharmaceuticals* and its progeny,\(^4\) the adoption of a heightened liability standard in the *Restatement (Third) of Torts*, the increasing specter of bankruptcy by manufacturers facing multiple products claims and the establishment of an institutional Multi-District Litigation plaintiffs’ bar that exerts control, sometimes seemingly self-interested control, over claims of plaintiffs who are not even their clients.

In the near future, all these forces will likely continue to shape on-going reforms and changes in the law that will make it more and more difficult for plaintiffs to maintain products suits.\(^5\) The ultimate scope and longevity of these reforms may soon be decided at the polls. Tort reform measures that have been overturned as unconstitutional are beginning to appear on ballots as constitutional amendments. More importantly, the Republican candidate for president, George W. Bush, has made tort reform a major emphasis of his political career.\(^6\) Should Bush, a man called a wholly owned subsidiary of corporate America,\(^7\) ascend to the Presidency, he will no doubt do all he can to accelerate the anti-consumer drift of products liability law.

In the long term, however, the reversal of this protectivism of product manufacturers is assured by the very rationale used to champion it—cost. Tort reformers take a narrow view when they compute the social cost of products liability rules. They ignore the

---


\(^5\) All predictions in this article are purposefully wishy-washy. It takes a certain arrogance to predict the future, and attempts at doing so can seem foolish in retrospect. For example, in 1991, eminent tort commentators James A. Henderson, Jr. and Aaron D. Twerski wrote *Stargazing: The Future of American Products Liability Law*, 66 N.Y.U. L. Rev. 1332 (1991), in which they predicted that “to expect that courts will open their doors to litigating the fate of politically unpopular products such as cigarettes and alcoholic beverages, providing causes of action for hundreds of thousands of alleged victims, is fantasy.” *Id.* at 1337. By the end of the 1990’s, the cigarette industry had agreed to pay hundreds of billions of dollars to settle suits pending against it.


initial cost that sets the whole process in motion — the injury to some poor soul. The injury-related costs including suffering, lost earnings, ruined lives, family distress, etc. exist regardless of whether compensation by settlement or jury verdict is provided to the victim. Thus, the cost issue in product liability law is not whether costs will be paid, but by whom. Should the costs be spread over all persons who use a negligently manufactured or designed injury-inflicting product by adding the accident costs to the price of the product, or must the injured victim bear them alone? Alternatively, should the American taxpayer shoulder the brunt of these hard costs in the forms of increased taxes to pay for Medicaid, social security, and disability payments needed to support the injured person and his or her family? In the end, the need for rational cost spreading and compassion for victims whose human suffering goes uncompensated while those responsible go unpunished will always turn the tide back toward a more fair legal environment for products claimants. As important, the products liability laws will continue to reward manufacturers who design and produce safe products, and punish those who do not.

II. TORT REFORM MEASURES

The tort reform movement was borne out of, and nourished by, a series of perceived crises in the American justice system: the medical malpractice crisis of the late 1960s, the products liability crisis of the mid-1970s, and the torts crisis of the 1980s. The degree to which such crises were real—indeed, whether they were just fantastically successful public relations ploys by vested interests—will forever be unresolved. These crises were preceded by dra-
matic rises in insurance premiums. The explanation for the sudden rise in premiums—usually supplied by the insurance companies themselves—was that there had been an explosion in case filings and jury awards. There has, however, been little evidence of such a cataclysm. Even an investigation by the U.S. Congress could conclude only that state-by-state variations in products law created liability uncertainties, not a liability explosion. Nonetheless, those who faced declining insurance profits as well as those subjected to higher premium notices, demanded, and often achieved, the passage of state legislation designed to curb the products liability crises by limiting liability and/or damages. In the products liability area, they were successful in getting two major types of legislative reforms enacted: damages caps and products liability statutes of repose.

A. Statutes Of Repose

In response to the perceived products liability crisis many states adopted products liability statutes of repose. As opposed to a statute of limitations, which cuts off a plaintiff's right to bring suit after a given period of time after the cause of action accrues, a statute of repose begins to run at the time of manufacture or sale of the product and may extinguish the cause of action even before it arises. Most repose statutes set forth an arbitrary number of years after which suit may not be brought. The statutes create a com-

12. Page, supra note 8, at 650.
13. The characterization of liability and damages limitations as reforms was a stroke of public relations genius on the part of those seeking the limitations. It put the opposition in the position of opposing reform—a concept considered inherently good and progressive. As a matter of perception, those seeking limitation of tort rights were reformers, while those seeking to uphold individual rights were defenders of the old, malfunctioning system.
15. The following is at least a partial list of statutes of repose that set forth an arbitrary number of years after which suit may not be brought: ARIZ. REV. STAT. ANN. § 12-551 (West 1992) (no action may be commenced if cause of action accrues more than 12 years after product was first sold for use); GA. CODE ANN. § 51-1-11(b)(2) (1992) (no action shall be brought after 10 years from date of first sale for use); 735 ILL. COMP. STAT. 5/13-213(b) (West 1992) (no action shall be commenced after 10 years from date of first sale or 12 years from date of first sale to initial user, whichever period expires earlier); IND. CODE ANN. sec. 34-20-3-1 (West
plete bar to the injured person's recovery, no matter how negligent the conduct of the manufacturer and no matter how diligent the injured person is in seeking legal redress for his injuries.16

State products liability statutes of repose have, by and large, survived enumerable state and federal constitutional challenges and today severely limit the rights of millions of consumers.17 There is no reason to believe they will be repealed in the near future. On the contrary, the matrix of repose restrictions is being

Supp.1999) (action must be commenced within 10 years after delivery to initial user); NEB. REV. STAT. § 25-224(2) (1995) (action must be commenced within 10 years after first sale for use); N.C. GEN. STAT. § 1-50(6) (LEXIS 1999) (no action shall be brought more than six years after date of initial purchase for use); N.D. CENT. CODE § 28-01.1-02(1) (Michie 1991) (no action may be maintained unless harm occurred within 10 years after date of initial purchase for use, or within 11 years of date of manufacture of product); OR. REV. STAT. § 30.905(1) (1988) (action shall be commenced no later than eight years after first purchase for use).

16. A variation of these statutes—useful life statutes of repose—has been adopted by a smaller number of states. These statutes are not an absolute bar to the products liability action, but arbitrarily establish a rebuttable presumption of the product's useful life. The plaintiff may maintain the suit if she can show that the product's useful life had not, in fact, expired at the time the injury was sustained. COLO. REV. STAT. ANN. § 13-21403(3) (West 1997) ("Ten years after a product is first sold for use or consumption, it shall be rebuttably presumed that the product was not defective and that the manufacturer or seller thereof was not negligent and that all warnings and instructions were proper and adequate."); CONN. GEN. STAT. ANN. § 52-577a(c) (West 1991) (10-year presumption); IDAHO CODE § 6-1403(2) (1998) (10-year presumption); KAN. STAT. ANN. § 60-3303(b)(1) (Supp.1994) (10-year presumption after time of first delivery); KY. REV. STAT. ANN. § 411.310(1) (Michie 1992) (presuming product not defective if harm occurs either more than five years after date of sale to first consumer or more than eight years after date of manufacture); MINN. STAT. ANN. § 604.03(1) (West 1988) (providing for a useful safe life defense "that the injury was sustained following the expiration of the ordinary useful life of the product"); WASH. REV. CODE ANN. §7.72.060(2) (West 1992) (12-year presumption after time of first delivery). Useful life statutes of repose are not as much a new barrier to the products plaintiff as they are a codification of the useful life defense that has existed in most jurisdictions for many years.

expanded both by new, more specific state statutes and by federal repose statutes. Both of these developments, and their interplay, is illustrated by the infamous Payne Stewart Learjet crash that occurred in October 1999. Just 24 days before the Stewart crash, Florida enacted a statute exempting commercial airplanes that are more then twenty years old from products liability claims. This statute combines with 1994's federal General Aviation Revitalization Act, which provides an 18 year statute of repose for aircraft that seat fewer than 20 passengers, to ensure that the families of the victims of that crash will have no legal recourse, even if it turns out that the manufacturer's negligence caused the crash. The future will probably bring even more federal repose statutes, because, despite the severity of such statutes, Congress continues to debate adding more limitations. For example, in June 1999 a bill calling for an 18 year statute of repose for workplace products was introduced in the United States House of Representatives. It would bar employees covered by worker's compensation from maintaining suit against a product manufacturer if the injury-causing product was more than 18 years old. However, management, third-parties and others not covered by workers compensation could still sue. The bill made it out of the House Judiciary Committee but was not voted on by the full House. Support for it, and bills like it, remains strong, however, and, depending on the outcome of the 2000 presidential and congressional elections, may be enacted into law in the next few years.

B. Damages Caps

In the last twenty-five years, numerous states have adopted statutes limiting the amount of damages that can be recovered by injured plaintiffs. These caps, which apply regardless of the amount of damages assessed by the jury, come in many sizes. Some limit only the non-economic damages (pain, suffering, etc.)
awarded by the jury. Others limit all damages, including economic (lost wages, medical bills, etc.) damages. While many caps, especially those that attempted to limit economic damages, have been ruled violative of the particular state's constitution, there remain caps on non-economic damages, applicable to products liability actions, in over 15 states.

The future will bring continued constitutional challenges to these caps, especially by the constitutional litigation team established by the Legal Affairs Department of the Association of Trial Lawyers of America. Challenges have been successful. In 1999, Oregon's $500,000 cap on non-economic damages was struck down when the Oregon Supreme Court ruled that it violated the right to jury guaranteed by the Oregon Constitution. However, within a few days of the Court's decision, the Oregon legislature referred a measure to the May 2000 ballot that would amend the Constitution to include the $500,000 cap on damages in all civil actions. On May 16, 2000, in the nation's first vote-by-mail primary, Oregon voters overwhelmingly rejected the Amendment by a 3-to-1 margin. Thus, the ultimate future of these types of caps may be decided at the polls, regardless of the opinions of the appellate courts. To the extent that these caps are upheld as constitutional,

24. Smith v. Schulte, 671 So. 2d 1334, 1344 ( Ala. 1995) (holding that a damage cap violated the equal protection and jury trial provisions of the Alabama constitution); Carson v. Maurer, 424 A.2d 825, 833-39 (N.H. 1980) (holding, under a test more stringent than rational basis, that a damage cap violates the equal protection provision of the New Hampshire constitution); Morris v. Savoy, 576 N.E.2d 765, 770-72 (Ohio 1991) (holding that a damage cap violates the due process provision, but not the equal protection provision, of the Ohio constitution); Knowles v. United States, 544 N.W.2d 183, 191 (S.D. 1996) (holding that a damage cap violated the due process provision of the South Dakota constitution). See also Smith v. Dep't. of Ins., 507 So. 2d 1080, 1087-89 (Fla. 1987) (holding that statutory cap violates access to the courts provision of Florida constitution); Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1078 (Ill. 1997) (holding that statutory cap violates special legislation and separation of powers provisions of Illinois constitution); Lucas v. United States, 757 S.W.2d 687, 690-92 (Tex. 1988) (holding that statutory cap violates access to the courts provision of Texas constitution).


or adopted in the form of constitutional amendments, they will make it impossible for future plaintiffs to recover the full costs imposed upon them in the form of a product inflicted injury.

C. Federal Tort Reform

The future of tort reform lies in the federalization of products liability laws. As inevitable as the return of swallows, each session of Congress sees attempts at legislative tort reform. In 1996, the so-called Common Sense Product Liability Legal Reform Act, which contained sweeping preemption of state products liability law, was actually passed by Congress, but was vetoed by President Clinton. Similar bills were introduced in Congress in 1997 and 1998, but died there. Currently, the Small Business Liability Reform Act is making its way through committee. Although billed as a protection for small businesses, the Act's draconian liability and damages limitations will be applicable to very large, very profitable businesses. Since the Act includes all unincorporated business in its definition of small business, privately held businesses—even behemoth ones—would be protected by its provisions regardless of their size. Further, the Act defines small business as any business that has fewer than 25 employees, regardless of the business annual revenues or sales. Thus, companies having fewer than 25 employees, regardless of the number of products they put in the stream of commerce, and regardless of the amount of harm their products potentially may inflict upon consumers, would be protected by the bill. The bill also has provisions that protect product retailers regardless of their size.

The bill's protections are sweeping. With few exceptions, the bill would apply to every civil suit brought against these small businesses. The Act would severely limit retailer liability both in the strict products liability context and by undermining state law on implied warranties. It would cap punitive damages at three times the compensatory damages or $250,000, whichever is less, and it

32. *Id.* at Title I, 102 (10)(A).
33. *Id.* at Title II.
34. *Id.* at Title I, 103-104.
35. *Id.* at Title II, 204(a)(1).
would all but destroy joint and several liability.\textsuperscript{36} Should it be passed this year, it would almost certainly be vetoed by President Clinton. However, should George W. Bush become president, such legislation, or perhaps even more sweeping products legislation, has a good chance of being enacted into law in the next few years.\textsuperscript{37} In any event, the future promises continued debate in Congress, and an ever-present threat that Congress will act to curtail plaintiffs state law rights.

III. THE FUTURE OF OTHER SUBSTANTIATIVE LAW LIMITATIONS ON PRODUCTS LIABILITY SUITS

A. Federal Preemption Of Products Liability Causes Of Action

In many disparate areas of law, courts are finding that the provisions for compensation found in state common law are simply a nullity—preempted by federal regulatory regimes. Under the Supremacy Clause of the United States Constitution, federal legislation can nullify conflicting state and local causes of action.\textsuperscript{38} Congressional intent is the ultimate touchstone of whether preemption exists,\textsuperscript{39} but preemption may be implied by the legislative scheme.\textsuperscript{40} Courts will not preempt state law absent an unambiguous Congressional mandate to that effect.\textsuperscript{41} This presumption against preemp-
tion was formerly nearly insurmountable when finding preemption left an injured person without a remedy. Beginning in the late eighties, however, courts began expanding the instances in which common law remedies are preempted. Additional Congressional action in the future may increase this trend.

A great battle over the issue of whether product liability claims are preempted is currently being fought in the area of medical devices. In response to mounting consumer injuries caused by devices used to treat health conditions, Congress passed the Medical Device Amendments of 1976 (AMDA). The MDA brought medical devices under the province of the Food, Drug and Cosmetic Act and, for the first time, brought regulation by the Food and Drug Administration (AFDA). At first, courts held that the MDA didn't preempt state tort law or found limited preemption where the FDA had promulgated specific regulations applicable to the device at issue. That all changed in 1992, when the Supreme Court decision in Cipollone v. Liggett Group, Inc. influenced preemption decisions in King v. Collagen Corp. and Stamps v. Collagen Corp.

In King and Stamps, which involved injuries caused by a treatment for facial wrinkles made from bovine tissue, the First and Fifth Circuits held that since the product had passed the premarket FDA approval process, state law causes of action were preempted. The First Circuit was concerned that allowing strict liability would force the court to determine the product was not safe in contradiction of the FDA. The Fifth Circuit was concerned that applying Texas tort law would constitute a requirement either different from, or in addition to, a requirement...that the MDA has made applicable to the product. Three years later, the Ninth Cir-

47. 505 U.S. 504 (1992) (plurality opinion). In Cipollone, a smoker made claims of design defect, failure to warn, warranty and fraud against the three cigarette manufacturers. A plurality of the Court ruled that portions of two of her five claims were preempted. Id. at 505-6.
49. 984 F.2d 1416 (5th Cir. 1992), cert. denied, 510 U.S. 824 (1993).
50. King, 983 F.2d at 1135.
51. Stamps, 984 F.2d at 1421.
cuit created a split among the Circuits by ruling that tort law causes of action are not preempted by the MDA.\(^{52}\)

Hopes that the United States Supreme Court would clarify this law were dashed in the hopelessly divided decision *Medtronic, Inc. v. Lohr*.\(^{53}\) *Lohr* ruled that the MDA did not preempt all state tort actions against a pacemaker manufacturer, where the approval granted to the manufacturer was not based upon a finding of safety and effectiveness. The decision was a contradictory plurality: four Justices opined that few, if any common law claims are preempted;\(^{54}\) four partially dissenting Justices voted for substantial preemption and the swing Justice stated that the MDA will sometimes preempt a state-law tort suit.\(^{55}\) Post-*Lohr*, the courts remain split, with some deciding that plaintiffs harmed by medical devices simply cannot sue for damages.\(^{56}\)

In addition, the Court's earlier ruling in *Freightliner v Myrick*\(^{57}\) made it easier for courts to find implied preemption. Thus, preemption is regularly injected as a defense almost any case involving a product that has arguably been subject to federal regulation. Even when unsuccessful, the defense, and the motions that it spawns, has made products liability cases more expensive for plaintiffs and their counsel. Worse for plaintiffs, however, is that the preemption defense is often successful. The last decade has seen federal legislation employed to preempt a wide variety of products claims. As discussed above, federal statutes of repose, such as the repose period found in the General Aviation Revitalization Act,\(^ {58}\) preempt state actions brought after the period has expired.\(^ {59}\) That Act has also been held to preempt all failure to warn claims by aircraft passengers against the plane's manufacturer, regardless of when brought.\(^ {60}\) The Federal Boat Safety Act of 1971\(^ {61}\) has been

---

\(^{52}\) Kennedy v. Collagen Corp., 67 F.3d 1453, 1453 (9th Cir. 1995).


\(^{55}\) *Id.* at 503.

\(^{56}\) Mitchell v. Collagen Corp, 126 F.3d 902, 915 (7th Cir. 1997) and Oja v. Howmedica, 111 F.3d 782, 792 (10th Cir. 1997) (finding preemption). *But see* Goodlin v. Medtronic, 167 F.3d 1367, 1367 (11th Cir. 1999) (holding that even pre-market approval does not create preemption).


\(^{59}\) *Supra* text accompanying notes 18-20.

\(^{60}\) Burroughs v. Precision Airmotive Corp., 93 Cal. Rptr. 2d 124, 133-34 (Cal.

http://open.mitchellhamline.edu/wmlr/vol27/iss1/11
held by a majority of courts to preempt actions by boaters and swimmers injured or killed by inadequately guarded propellers of outboard boat motors. The Federal Boiler Inspection Act has been held to preempt claims against locomotive manufacturers for asbestos exposure by railroad workers exposed to asbestos used in locomotives. The Federal Insecticide, Fungicide and Rodenticide Act is regularly held to preempt actions against pesticide manufacturers, and has even preempted a failure to warn claim against the manufacturer of pool chlorine tablets. The Federal Meat Inspection Act has preempted claims alleging that plaintiffs' children became seriously ill as a result eating meat contaminated with E. coli. bacteria. And the MDA continues to be advanced as a defense with success. Recently, for example, the New Jersey Supreme Court held that a failure to warn claim against the manufacturer of a blood screening test by a patient who received HIV infected blood was preempted by the MDA.

Against this backdrop of judicial willingness to preempt state products law and leave victims with no legal recourse, Congress continues to enact legislation specifically designed to preempt state products liability law. For example, the Biomaterials Access Assurance Act of 1998 and the National Childhood Vaccine Injury Compensation Program restrict common law remedies. The former is intended to alleviate a critical shortage of biomaterials for use in medical device implants by protecting suppliers from law-
suits. The latter supplants state law remedies with a federal legislative compensation system for children injured or killed by vaccines. Among its many limitations on recovery is a wrongful death award limit of $250,000. Most likely, the future will find the passage of more preemptory legislation, and continued judicial decisions allowing legislation—both expressly and impliedly—to leave injured plaintiffs without a remedy.

B. The Reasonable Alternative Design Requirement Of The Restatement (Third) Of Torts: Products Liability

Over thirty five years ago, the American Law Institute (ALI) issued the Restatement (Second) of Torts. Section 402A of the Restatement (Second), drafted by William Prosser, adopted strict products liability, stating that a seller of any product in a defective condition unreasonably dangerous to the user is subject to liability. In the subsequent thirty five years, courts throughout America have adopted the reasoning of 402A while developing guidelines for the determination of when a product is in a defective condition unreasonably dangerous to the user. Now, the ALI has issued The Restatement (Third) of Torts: Products Liability, and has sparked great controversy by revising the strict liability section in a way that will restrict plaintiffs' ability to recover for injuries caused by defectively designed products.

Three major types of defects have emerged over the years as the bases for strict products liability actions: manufacturing defects, design defects and defect by reason of inadequate warning or instruction. The Restatement (Third) makes no dramatic changes regarding manufacturing or failure to warn defects. Its impact will be in the area of design defects. Section 2(b) of the Restatement (Third) requires that a plaintiff prove the existence of a reasonable alternative design in order to prove defective design:

A product...(b) is defective in design when the foreseeable risks of harm posed by the product could have been

75. RESTATEMENT (SECOND) OF TORTS § 402A (1965).
76. There is widespread suspicion that the Restatement (Third) is not as much a restatement of the law as an instrument of tort reform. Andrew F. Popper, Tort Reform Policy More Than State Law Dominates Section 2 of The Restatement (Third), 8 KAN. J.L. & PUB. POLY 38, 38 (Fall 1998); Larry S. Stewart, The ALI and Products Liability: Restatement or Reform?, TRIAL, Sept. 1994, at 28, 30-31.
reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.\textsuperscript{77}

The development of the law of design defect has led to two major competing theories—the risk/utility test and the consumer expectation test.\textsuperscript{78} Under the consumer expectation test a product is deemed defective if it fails to perform as safely as an ordinary consumer would expect.\textsuperscript{79} The authors of the \textit{Restatement (Third)}, Profs. Henderson and Twerski, reject the consumer expectation test, describing it as "so open ended and unstructured that it provides almost no guidance to the jury" and "leave[s] manufacturers uncertain of the law's demands."\textsuperscript{80} The \textit{Restatement (Third)'}s § 2(b) revision, therefore, amplifies the risk/utility standard, which has been described as "vary[ing] with the surrounding circumstances and...involv[ing] a 'balancing of the likelihood of harm, and the gravity of harm if it happens, against the burden of the precaution which would be effective to avoid the harm'."\textsuperscript{81}

Unfortunately for many future products plaintiffs, the \textit{Restatement (Third)} takes a rigid approach to the utility/risk concept. Although the risk/utility test incorporates many different factors in different states, and alternative design is among those factors in many states,\textsuperscript{82} it is not a mandatory requirement in the majority of states.\textsuperscript{83} With limited exceptions, the \textit{Restatement (Third)} makes it a mandatory requirement, collapsing the intricate and varied risk/utility test into a single factor: Was there a reasonable and safer alternative design at the time of the manufacture of the product? This is not a restatement of a generally agreed upon legal rule, but a narrowing of the law of most states. More importantly, it imposes an unfair burden of evidentiary production on injured

\textsuperscript{77} Restatement (Third) of Torts: Products Liability § 2(b) (1998).
\textsuperscript{78} While generally fitting the rubrics risk/utility and consumer expectations, there are many variations of design defect law across the fifty states and no true consensus on what design defect means. Popper, supra note 74, at 40.
\textsuperscript{81} Bilotta v. Kelley Co., 346 N.W.2d 616, 621 (Minn. 1984) (quoting Holm v. Sponco Mfg., 324 N.W.2d 207, 212 (Minn. 1982)).
\textsuperscript{82} Popper, supra note 75, at 40.
\textsuperscript{83} Potter v. Chicago Pneumatic Tool Co., 694 A.2d 1319, 1331-32 n.11 (Conn. 1997).
consumers and shifts the focus of any product liability lawsuit from reality—what happened to the product?—to speculation—what other similar products could feasibly have been designed?

Comment f to § 2 of the Restatement (Third) states that a plaintiff does not actually have to produce a prototype of the alternatively designed product. Presumably, therefore, a plaintiff will introduce expert testimony about a design envisioned by that expert, but not actually in existence. The comment suggests topics for the plaintiff’s expert testimony:

- the instructions and warnings which might accompany the envisioned design;
- how the alternative design will satisfy consumer expectations;
- the cost of producing the alternative design;
- the effect of the alternative design on product function;
- the effect of the alternative design on product longevity;
- the aesthetics of the proposed design; and
- the marketability of the alternative design.

Comment f insists that the plaintiff may not need to prove all these factors, and even suggests that in certain simple cases reasonable alternative design can be shown without expert testimony. In the real world, however, most cases involve complex products, and proof of most of these factors will have to be adduced in order for plaintiff to meet the burden of showing an alternative design. The plaintiff will have to become an expert in the technology that caused the plaintiff's injury, and will need to re-design the product himself. To the extent that this can even be done, it will make products cases more, and possibly prohibitively, expensive and plunge every trial into the realm of speculation about hypothetical design features.

Some argue that in many instances the new Restatement does not require the production of an alternative design. The excep-

---
85. Id.
86. Id.
87. Popper, supra note 75, at 40-41.
89. Popper, supra note 75, at 40.
tion—that where a product has "low social utility and a high degree of danger," alternative design may not need to be shown—is not in the text, but buried in comment e. The illustration it employs—an exploding cigar—is laughable and underscores how low the utility and high the degree of danger must be to trigger the exception.

The alternative design requirement of the Restatement (Third) has been so widely criticized that it may be ignored by most courts. If, however, the coming years find courts adopting its inflexible alternative design requirement, the future will burden plaintiffs with the difficult and expensive task of designing better products than a defendant's corporate engineers could envision. Even more daunting is the possibility that recent developments in the evidentiary law of expert opinion may combine with the Restatement (Third)'s alternative design requirement to simply make products liability cases unprovable.

C. Daubert, The Reasonable Alternative Design Requirement Of The Restatement (Third) And The End Of Products Liability

In federal court, the admissibility of expert testimony is governed by the Supreme Court's decisions in Daubert v. Merrell Dow Pharm., Inc. Daubert requires that scientific evidence be not only relevant, but reliable. An expert's testimony must be based on scientific knowledge and "connotes more than subjective belief or

91. Id. at § 2 cmt. e, illus. 5.
93. The Connecticut Supreme Court specifically rejected the alternative reasonable design requirement of § 2(b), stating that it imposed an undue burden on plaintiffs that might preclude otherwise valid claims from jury consideration. Potter v. Chicago Pneumatic Tool Co., 694 A.2d 1319, 1331 (Conn. 1997). However, the Ninth Circuit, while not adopting the Restatement (Third), did comment that "it provid[ed] support for our holding that a focus on the design's benefits, risks, and feasible alternatives is a better approach to examining an alleged design defect [than the consumer expectations approach]." Saratoga Fishing Co. v. Marco Seattle, Inc., 69 F.3d 1432, 1441 (9th Cir. 1995). While no Arizona case has adopted the Restatement (Third), Arizona has demonstrated a willingness to look at the Restatement (Third) as the current statement of the law. Gebhardt v. Mentor Corp., 191 F.R.D. 180, 185 (D.C. Ariz. 1999).
95. Id. at 589. The Daubert standards were extended to experienced based expert testimony in Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 137-38 (1999).
unsupported speculation." Federal judges, and an increasing number of state judges, now have much greater discretion to decide both how to test an expert's reliability... and whether that expert's relevant testimony is reliable. As a result, plaintiffs in products liability cases almost inevitably face *Daubert* motions to exclude all or part of the expert testimony they plan to introduce to support their claims. Losing such a motion is devastating to the plaintiff's case, but even when the plaintiff prevails, an additional, and often expensive layer of motion practice, including a very expensive *Daubert* hearing, is added to the case.

Moreover, if future courts adopt the requirements of *Daubert* and the alternative design requirement of Section 2(b) of the Restatement (Third), it may make it impossible for plaintiffs to prove some products liability cases. Manufacturers will want it both ways, insisting that plaintiffs prove reasonable alternative design and then asserting that the scientific opinion supporting the hypothetical is not admissible. Such was the case in *Stanczyk v. Black & Decker, Inc.* where the court applied its view of the *Daubert* requirements to an expert's testimony about a hypothetical alternative design. In *Stanczyk*, plaintiff's expert, an engineer who formerly worked for the defendant, testified that a design was possible that tightened the gap in a miter saw through which the plaintiff's hand had slipped onto the blade. The expert testified that he had done enough engineering analysis to determine that the design was feasible, but that construction of an actual prototype would require several hundred hours of engineering work. The court found that *Daubert* required the production of a testable design and ruled

96. *Daubert*, 509 U.S. at 590.
97. Many state courts have adopted at least some of the requirements of *Daubert*. E.g. Turner v. State, 746 So. 2d 355, 358 (Ala. 1998); State v. Porter, 698 A.2d 739, 739 (Conn. 1997); State v. Foret, 628 So. 2d 1116, 1121-22 (La. 1993).
98. *Kumho*, 526 U.S. at 152.
99. "The purpose of a Daubert hearing is to determine 'the scientific validity and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission.'" Greenwell v. Boatwright, 184 F.3d 492, 497 (6th Cir. 1999) (quoting *Daubert*, 509 U.S. at 594-95). Depending on the complexity of the scientific evidence to be presented, Daubert hearings can take several days and be very expensive to plaintiffs and their attorneys. Allison v. McGhan Med. Corp., 184 F.3d 1300, 1304 (11th Cir. 1999) (noting that the trial court held a three day *Daubert* hearing and then ruled the evidence inadmissible).
101. *Id.*
102. *Id.* at 567.
the expert's testimony inadmissible. This reasoning has been adopted by some other courts. 104

With good reason, the Stanczyk decision makes [plaintiff attorney's] hair stand on end. 105 Widespread adoption of this reasoning would nullify the ALI's position that Section 2(b) of the Restatement (Third) does not require the plaintiff to actually produce a prototype. 106 The combination of Stanczyk's requirement that an alternative design be proved by introduction of a working prototype with the Restatement Third's 2(b) requirement that a reasonable alternative design must be shown to prove a design defect would make design defect cases prohibitively expensive and, in most cases, un-maintainable. Only time will tell if the synergy between these two developments does what tort reformers have been trying to do legislatively for thirty years - kill products liability litigation. A good prediction is that it will not. Most judges won't allow the unintended consequences of these two separate developments to have such a serious effect on all products liability law, and leave injured persons without recourse.

IV. MULTI-DISTRICT LITIGATION: THE MDL BAR AND ITS EFFECT ON THE RIGHTS OF INDIVIDUAL PRODUCTS LIABILITY PLAINTIFFS

When the American public is exposed to a harmful, mass-produced product, the result can be thousands of similar injuries. Subsequently, there are many similar lawsuits. Over the last thirty years, the judicial system has struggled to deal with these numerous claims—particularly in the asbestos, drug and medical device contexts. 107 One mechanism for handling these cases has been the de-

103. Id. The Stanczyk court went on to find a peer review requirement in Daubert, and rule that under such a requirement, all alternative designs except those used in industry practice were inadmissable. Id. at 565, 567.


105. Palmer, supra note 91, at 36.


107. Of course, individualized treatment of some class of claims is almost im-
development of Multidistrict Litigation (AMDL).

The venue provision of 28 U.S.C. Section 1407 authorizes temporary transfer of litigation pending in multiple federal district courts to a single district court for coordinated pretrial proceedings. Once the pretrial MDL administration is complete, the individual cases are remanded and each moves toward its own trial.\textsuperscript{108} The principles governing Section 1407 are convenience and judicial economy.\textsuperscript{109} These principles are theoretically served by pretrial consolidation, but the rise of an institutional MDL bar and bureaucracy has created controversy. Rather than solving problems, the MDL often becomes a black hole from which cases, plaintiffs and defendants cannot escape. Often, the ultimate resolution of the litigation seems based more on judicial and administrative convenience than on a fair consideration of liability or compensation to victims. In fact, these factors often conspire to wrest control of the lawsuit away from the individual plaintiff and his chosen attorney and vest it in a plaintiffs' steering committee that may lack incentive to always pursue any individual plaintiff's best interests. A basic history of the MDL mass tort litigation of the past decade helps shed some light on these controversies, and may foreshadow changes in the future.

A. The Rise Of MDL Mass Tort Litigation In The 1990s

The consolidation of mass tort cases using the MDL process resulted in the forced union of plaintiffs attorneys with very distinct possible. For example, with regard to the asbestos litigation, the Supreme Court stated:

> [t]he most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed victim's recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose all together.


108. For many years it became the practice for many MDL judges to transfer the MDL cases to themselves for trial. John F. Nangle, \textit{From the Horse's Mouth: The Workings of the Judicial Panel on Multidistrict Litigation}, 66 DEF. COUNS. J. 341, 344 (1999). Frequently, the MDL became like a black hole—once a case entered it, it never escaped. However, in \textit{Lexecon, Inc. v. Millberg, Weiss Bershad Hynes and Lerach}, 523 U.S. 26 (1998), the Supreme Court ruled that an MDL court had no authority to assign a transferred case to itself, and must remand it to the original court for trial. Legislation is currently pending that would overrule \textit{Lexecon}.

philosophies, practices and economic incentives. For the sake of discussion, the practices will be divided into three separate camps: class action attorneys, traditional case personal injury attorneys, and volume attorneys. In any given piece of litigation, these distinctions may be blurred, with an individual attorney falling in any one—or more than one—of the camps.

1. The Class Action Attorneys

Many class action lawyers first cut their teeth doing class action securities and/or antitrust litigation in the 1980s. In the federal courts, class actions are governed by Fed. R. Civ. Pro. 23. Rule 23 states that one or more members of a class may sue or be sued as representative parties on behalf of all provided certain prerequisite conditions exist. The prerequisites are 1) the class is so numerous joinder of all members is impractical; 2) there are questions of law or fact common to the class; 3) the claims or defenses of the representative parties are typical of the class; and 4) the representative parties will fairly and adequately protect the interests of the class. Thus, class action practitioners only need one client to serve as a class representative in order to file a class action lawsuit.

Securities litigation lent itself to class action treatment. Usually, the violation complained of affected all shareholders equally and the loss was easily measured: the diminution of value on a certain share times the total number of shares. While per share losses may have been modest, the total loss could be huge.

Of course, the key to making the cases economical for the plaintiffs' lawyers was class certification under Fed. R. Evid. 23. Once certified, the economics of the cases made sense: relatively few clients (hence, low per case transactions costs), common liability and legal issues, and large, easily measured damages. Absent certification, only the largest shareholders would have incurred enough total damage to economically justify pursuing the cases individually. While a class action attorney may have a fee agreement with the class representative, the class action attorney must petition the court for fees from the absent class members. Moreover, no fee can be requested absent a recovery on behalf of the class.

110. FED. R. CIV. P. 23(a), which is entitled "Prerequisites to a Class Action."
111. Id.
113. 3 NEWBERG & CONTE, supra note 111, at § 14.02. As Newberg states, class
Typically, a fee petition would be made against the total fund recovered based on the time expended increased by a lodestar multiplier. As a result, absent class members would receive a check based on the number of the shares they owned, and the class action attorneys often received a large recovery based on the result obtained, the risk involved and the hours worked.

The class action lawyers were quite successful, but eventually the number of class action lawyers increased and the number of viable securities/antitrust cases decreased. As a result, some of the class action practitioners turned their attention and resources to the mass tort setting, focusing on the burgeoning MDL practice.

2. The Traditional Individual Case Practitioner

Once in the mass tort setting, the something for everyone philosophy of the class action attorneys ran headlong into the traditional personal injury philosophy. Even among the traditional practitioners, their was a split between the traditional trial lawyer who carefully screened cases and the volume attorneys, who would basically take all claimants regardless of the seriousness of the individual's injury.

The traditional mass tort/product liability attorney carefully screened each case and individually represented only those clients with the most severe injuries. The assumption underlying this philosophy was that each case may need to go to trial, and each case had to make economic sense on its own merits. The cases were done on a contingent fee basis, and if the potential recovery would not cover the costs and time expended, the cases would not make economic sense.

As with the class action cases, the traditionalists hoped to eventually settle all their cases. The strategy was to move the best cases forward first, conduct the discovery against the defendant, and try or settle the best cases. If this strategy was successful, the defendant would then face a number of similar cases using the same liability

---

114. Id. at ¶ 14.03. The lodestar multiplier can lead to a fee calculation that essentially leads to a recovery of a percentage of the recovered fund. Id. Factors weighed by the courts in calculating class counsel's attorneys fee include risk involved, performance of counsel and benefits to the class. Id.

115. Id.
evidence for a successive number of seriously injured plaintiffs represented by the same plaintiffs' attorney. The approach contained inherent efficiencies, because the liability was basically the same in each case, with individual damages differing based on the circumstances of each client. The traditional practitioner hoped that, eventually, the defendant would settle his or her entire inventory of cases. These attorneys all expected to be compensated, if successful, from the contingent fees generated from their own clients' cases. Thus, the traditionalists sought the maximum recovery for each client, an arrangement that served the interests of both the attorney and the individual clients.

When faced with an MDL consolidation, the traditionalists would cooperate with each other in conducting discovery, understanding that each would benefit by splitting both the cost and work needed to complete discovery. Moreover, if they all pitched in, presumable the final case put together would also be better, which would increase the recovery both they and their clients received.

3. The Mass Marketing, High Volume Attorneys

As attorney advertising became more accepted, a third group arose, the mass marketing, high volume attorneys. These attorneys often advertised for clients and basically took all clients, the good, the bad and the in-between. These attorneys were somewhat of a hybrid between the class action attorneys and the traditional attorneys. Like the traditional attorneys, they were compensated directly by their clients on a contingent fee basis. They also had an incentive to settle all of the cases if possible. However, unlike the traditional attorneys, they may not have enough serious cases to justify trying a number of cases. Also, because of the high number of cases, they could not afford to provide the extensive discovery to the defendants for each individual case.

Economically, the incentive was to handle a large number of cases as cheaply as possible, and hope for a large global settlement in which all claimants, even those not seriously injured, would receive some compensation. Clearly, a global resolution of all claims benefitted the volume attorneys. In this sense, the volume attorneys economic interests could align with the class action attorneys, who pushed for and often obtained a global resolution of all claims, including the claims of the absent class members. On the other hand, like the traditionalists, the volume attorneys also would
benefit by achieving as high a recovery as possible for each client.

B. Disputes Among Plaintiffs' Lawyers In The Multidistrict Litigation Setting

Not surprisingly, when these three groups were thrown together in the MDL process, disputes soon arose, especially over compensation. As Newberg points out in his section on mass torts, when there is a class action, the potential plaintiff's counsel is faced with the choice of either participating in the class action or being substantially preempted and, consequently, collecting only a substantially reduced fee from his or her client. The incentive for class counsel is just the opposite: they can represent all similarly situated persons in the mass tort with the potential for a greatly enhanced recovery for the class and a similarly enhanced fee.

The battleground initially centered on appointments to the Plaintiffs' Steering Committee (PSC) posts. Since the PSC spoke for the plaintiffs before the court, and controlled the manner in which discovery and major issues (including settlement) would be handled, spots on the committee were greatly prized. Often, the negotiating and bargaining that went on behind the scenes concerning the appointments resembled Washington-styled lobbying. Unfortunately, once the appointments were made, the disputes did not end. Predictably, given the divergent economic interests of the various plaintiffs' attorneys, the internal disputes ultimately taken to the MDL judge for resolution centered on attorneys' fees.

116. Id. at § 17.01.
117. Id. Although Newberg does not discuss the reasons for this, it is clear that class counsel benefits by getting a higher total recovery for everyone, even if this is at the risk of undercompensating the most seriously injured. Id.
118. As Herr pointed out in his treatise, Multidistrict Litigation, the Multidistrict Panel has recognized the benefits of having lead and liaison counsel. DAVID F. HERR, MULTIDISTRICT LITIGATION: HANDLING CASES BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION § 9.7.7. Thus, although not required, most MDL judges appoint lead counsel for the parties. Id. Where the litigation is large and there are numerous plaintiffs, the MDL judges will pick several of the plaintiffs' lawyers to act as a Plaintiffs Steering Committee. In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295, 300 (1st Cir. 1995). The purpose of the PSC is to look "after the big picture: mapping the overarching discovery, trial and settlement strategies and coordinating the implementation of those strategies." Id. (quoting In re Nineteen Appeals, 982 F.2d 603, 605 (1st Cir. 1992)). The individually retained attorneys handle individual client communications, prepare for and attend their client's depositions, take damages depositions, etc. Id.
C. MDL Fees

In the last five years, several courts have commented on the unseemly struggle between groups of MDL plaintiffs’ attorneys for a greater share of the attorney’s fees pie or the available overall settlement fund. For example, in *In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litigation*, the court described the struggle between the Plaintiffs’s Steering Committee (APSC) and individually retained lawyers over finite attorneys’ fees as a war zone that the court was forced to revisit. The court took matters into its own hands and decided the controversy because it was reluctant to prolong a matter, that like the proverbial cat, seems to have nine lives. However, two years later the First Circuit was again faced with many of the same lawyers fighting over litigation costs stemming from the same case. The court noted that internecine differences (between plaintiffs’ attorneys) “as to subsidiary matters—particularly the appropriate allocations from the common fund for their respective attorney fees and costs—are commonplace.” Ultimately, the court reversed several PSC costs, including a counting process that gave a profit for photocopies. In total, the PSC was required to return over $1,000,000 in costs to the Clerk of Court. Obviously, the United States Supreme Court’s admonition that a request for attorney’s fees should not result in a major second litigation has taken a back seat to the fight for every last available dollar.

While infighting among members of the bar is sufficiently unbecoming, the situation becomes even more unseemly when attorneys petition the court for a larger share of the same common fund from which their clients will be compensated. These petitions

119. *In re Thirteen Appeals*, 56 F.3d 295 (1st Cir. 1995).
120. *Id.* at 299.
121. *Id.*
122. *In re San Juan Dupont Plaza Hotel Fire Litig.*, 111 F.3d 220, 227 (1st Cir. 1997).
123. *Id.* at 237.
124. *Id.* at 239.
126. Also of great concern is the phenomenon of plaintiffs lawyers formulating their position on fees issues solely on the basis of whether it will result in a greater fee. These positions are taken regardless of concerns of precedent, case administration, justice or client well-being. This phenomenon can be seen in the facts relayed in footnote 2 of *In re Thirteen Appeals*, 56 F.3d at 300 n.2, where certain PSC members opposed a larger PSC award because they stood to make more money in their roles as independently retained lawyers.
put the attorney in the position of asking for money that might otherwise go to his clients, making his interests potentially adverse to those of his clients. In *In re Copley Pharmaceutical Inc*, for example, the plaintiffs' attorneys asked for 25% of the $150 million fund (a $37.5 million fee). The court awarded 13% or $19.5 million. The amount denied the lawyers—$18 million—went into pockets of their injured clients.

The future will more than likely bring the continued involvement of the institutional MDL bar which will exert greater pressure on plaintiffs' net recoveries as more hands reach for a piece of the Apie. The usual MDL bar members—the so-called experts in mass tort litigation will vie for positions on PSC's in high stakes products litigation nationwide. For example, in the recent FenPhen MDL in Philadelphia, the Wall Street Journal reported that the PSC includes some familiar faces in mass-disaster cases as well as lawyers whose experience ranges from suits on behalf of holocaust victims to cable-televison subscribers. Spots on the Committee were sought after because [A]side from the prestige of running what some said could be one of the largest injury cases ever, the positions offer financial rewards, assuming the plaintiffs prevail, with committee members often ending up with the lion's share of any fee award. Eighty lawyers submitted resumes vying for eleven spots on the Committee, and the judge held a beauty contest to determine who would get the prize positions.

Ultimately, the Fen-Phen Common Benefit Attorneys, as they became known, laid claim to a portion of the recovery of every plaintiff whose case had been transferred to the MDL. The MDL court ordered that the defendants pay 9% of every MDL plaintiff's recovery to a fund from which the committee would be paid. The 9% payment would reduce the fee owed to the plaintiff's individually retained attorney. Certainly, this would place the common benefit attorneys at odds with the individually retained attorney

128. *Id.* at 1408.
129. *Id.* at 1415.
130. *In re San Juan Dupont Plaza Hotel Fire Litig.*, 111 F.3d 220, 223 (1st Cir. 1997).
132. *Id.*
133. *Id.*
who may not have requested, or ever wanted, the PSC's help.

The MDL order further makes clear that in determining the amount each Common Benefit Attorney will receive from this fund, consideration will be given to the experience [and] talent of each CBA in addition to the contribution made by each CBA....

It appears, therefore, that once you have established yourself as an expert in mass tort litigation and secure a place on the PSC controlling any given MDL mass tort, you can get a piece of the pie based on your reputation, with some consideration to the work you may have actually performed on behalf of your involuntary clients.

D. The Specter Of Bankruptcy

Not only are more hands now in the MDL pie, the pie itself can be shrunk by hefty transaction costs associated with the pretrial and trial activities of complex, aggregated litigation. For example, Judge Parker of the Federal District Court for the Eastern District of Texas calculated that in that district's mammoth asbestos litigation, transaction costs consumed $.61 of each asbestos-litigation dollar with $.37 going to defendants litigation costs; the plaintiffs receive only $.39 from each litigation dollar. Although Judge Parker's calculation were with regard to a class action suit, the same huge transaction costs can easily be encountered in large MDL.

These costs and added layers of attorney's fees not only limit potential plaintiffs recoveries but, when added to a defendant's desire to escape its proper measure of liability, can be the catalyst for driving a products defendant into bankruptcy. The last twenty years have seen several notable litigation driven bankruptcies, including the numerous asbestos manufacturers' bankruptcies result-

135. Id. at 3.
136. While the assumption would be that aggregated litigation would provide substantial efficiencies for the resolution of individual claims, the available data suggests otherwise. Report on Mass Tort Litigation, 187 F.R.D. 295, 308-09 (1999) (citing 1982 RAND study on asbestos cases).
137. Cimino v. Raymark Indus., Inc., 751 F.Supp. 649, 651 (E.D. Tex. 1990). These immense transaction costs were calculated by Judge Parker in November of 1990. The Fifth Circuit vacated in part Judge Parker's ruling eight years later and remanded for further trial proceedings. Cimino v. Raymark Indus., Inc., 151 F.3d 297 (5th Cir. 1998). The costs, no doubt, have risen substantially, and continue to rise. But see Report on Mass Tort Litigation, 187 F.R.D. at 309 (arguing that transaction costs in asbestos litigation may have been reduced over time given the development of the Asbestos Claims Facility and Center for Claims Resolution).
ing from the asbestos litigation of the 1970's and 1980's,\textsuperscript{138} and Dow Corning Corporation's 1995 bankruptcy in the midst of the breast implant litigation.\textsuperscript{139} In discussing the asbestos bankruptcies, Judge Parker laid blame squarely on increased litigation and attorney costs: the [bankrupt asbestos] companies and plaintiffs have been victims of a system that has seen a substantial majority of the compensation dollar go to witnesses and lawyers in the form of transaction costs.\textsuperscript{140}

There is little doubt that in the future, bankruptcy reorganization will be an alternative of choice of product manufacturers faced with mounting litigation costs and liability exposure. This is particularly true in light of the Supreme Court's recent decision in \textit{Ortiz v. Fibreboard Corp.} where the court held that limited fund class settlements can only be certified where the fund is limited by more than the agreement of the parties.\textsuperscript{141} The unavailability of negotiated limited fund settlements will give product defendants fewer negotiated options for avoiding bankruptcy.\textsuperscript{142}

\textbf{E. The MDL: Good Or Bad ?}

Generally, MDL transfer has been a black hole. Cases are aggregated in a single court and, with pressure applied from the MDL bar, are resolved there and never returned for trial by the individual attorneys. While the settlements may allow claimants to opt-out of the global resolution, MDL judges have proven resistant to a quick remand of the opt out cases to the local federal district court's for trial. In fact, the United States Supreme Court was recently forced to clarify that the MDL judge must remand the cases back to the local federal district courts for trial, and cannot remand the case to himself/herself for trial.\textsuperscript{143} Prior to \textit{Lexecon}, critics with a defense bias noted that this practice created an unfair pressure on defendants to settle.\textsuperscript{144} However, plaintiffs and their individual at-

\textsuperscript{138} \textit{Cimino}, 751 F. Supp. at 651.
\textsuperscript{140} \textit{Cimino}, 751 F. Supp. at 651.
\textsuperscript{141} \textit{Ortiz v. Fibreboard Corp.}, 527 U.S. 815 (1999).
\textsuperscript{142} Nangle, \textit{supra} note 138, for an excellent assessment of the extraordinary litigation costs consumed when an MDL defendant goes into bankruptcy.
\textsuperscript{144} \textit{E.g.}, James M. Wood, \textit{The Judicial Coordination of Drug and Device Litigation}:
torneys who want to try their cases rather than participate in a global settlement are faced with the same pressure, especially when the remand and trial come only after years of slow-moving pretrial activity in the MDL. While this pressure may ease a bit in light of *Lexecon*, all pretrial settlement efforts in these cases will be still be controlled by a distant steering committee whose own interests may be better served by a global settlement than the quick remand of individual cases.145

When the individual plaintiff's case is transferred to an MDL, that plaintiff and the plaintiff's chosen individual attorney loses a good deal of control over the case. The major decisions concerning MDL litigation, including discovery decisions and settlement strategy, will be controlled by the institutional MDL bar acting as the PSC. The institutional MDL bar has thus become a new breed of organizational actor at a time when the law is increasingly shaped by and for large organizational actors.146 Corporate products defendants are such organizational actors—they consume an ever increasing amount of the nation's legal resources, are familiar with the process and help shape the rules of the process.147 Individuals cannot attain this type of influence over the system since they partake in the system only fortuitously, in life emergencies, and are thus not big time players with respect to trying to shape the rules that govern the arena.148

With its clout and experience, the institutional MDL bar could balance the influence of the large corporate defendants. It could influence substantive law and procedures, and bring financial wherewithal to the table. However, because of the economic incentives MDL players have to pursue their own interests, there has been much dissension in the bar as to whether the MDL process offers great advantage to injured consumers. Class action attorneys or common benefit attorneys, especially those who have few individual clients, have an economic incentive to obtain a large global settlement while the MDL is still pending, prior to remand. Volume attorneys may have the same incentive. Trying each case for

---

145. H.R. 2112, which is currently before the United States House of Representatives, would amend 28 U.S.C. § 1407 to specifically allow the MDL judge to retain the transferred cases for trial.


147. Id.

148. Id.
them will be prohibitively expensive, and they will do better if the global settlement provides something for everyone.

These realities put plaintiffs and their individual attorneys (assuming these attorneys are not on the PSC) in a difficult position. If the attorneys are not on the PSC, they will not generally be involved in the nuts and bolts of the day-by-day MDL litigation. Unless they have state cases and the resources, i.e. the money and the manpower, to conduct discovery independent of the PSC and the MDL, they are left in the position of either taking the deal the PSC has hammered out or opting out of a global settlement and trying the case using the PSC generated discovery.\(^{149}\) Even then, they may be stuck with rulings and strategic decisions made by the PSC in the MDL discovery. In the fen/phen litigation, attorneys with state cases were denied access to the PSC generated work product unless they agreed to coordinate their state litigation with the federal litigation via a coordination agreement that allowed the PSC to obtain a fee from the state cases.\(^{150}\) In fact, the fen/phen PSC even obtained a statement in the order clarifying that the order did not abrogate their entitlement to seek fees in the state court cases.\(^{151}\)

Certainly, the MDL process has limited the ability of traditional products liability attorneys and individual claimants to pur-

\(^{149}\) It has been opined that *Lexecon* also prevents an MDL judge from certifying a class, which would prevent certification of a settlement class. Wood, *supra* note 143, at 342. If so, the influence of the institutional MDL bar, which will lose its ability to control settlement in the MDL, and to skim a profit off the top of those settlements, will be greatly reduced in the future. But see *In re New England Mut. Life Ins. Co.*, 183 F.R.D. 33, 38 (D. Mass. 1998) (holding that although questions remain unanswered under *Lexecon*, class will be certified by MDL court under FED. R. CIV. P. 23(a) and 23(b)(1)) .

\(^{150}\) Pretrial Order 467, *In re Diet Drugs Products Liab. Litigation*, (MDL Docket No. 1203, U.S.D.C. Pa. 1998) and 13c. of the Order states that parties in each state-court action subject to the state-court order are prohibited from using any of the PMC's or plaintiffs' work product or products of state-federal coordination described in paragraph 14 of this Pretrial Order for any purpose other than litigation of actions pending in federal court and action pending in state courts which qualify for state-federal coordination pursuant to the terms of this Pretrial Order. In other words, plaintiffs' attorneys who had cases pending in the MDL could not take the PSC work product (for which they were paying 9% of the total recovery) and use it in state court cases on behalf of their other clients.

\(^{151}\) *Id.* The PSC went so far as to preserve their right to seek compensation for the benefits of their services to attorneys and parties in state court litigation which is not coordinated pursuant to the terms of this Order, including the benefits conferred by their preparation for and conduct of depositions of generally applicable fact witness and generic witnesses retained by them.
sue their individual product liability cases independent of the PSC. State forums are still available, but in many cases there is not a viable non-diverse defendant available in order to keep the case in state courts. Most defendants will remove a case to federal court if the case does not include a non-diverse defendant.

Is the MDL process better? An argument can be made that it is more efficient in handling large numbers of cases, but that begs the question of whether large numbers of cases would be filed if each case had to live or die on its own merits. The argument can be made that if each case had to be tried, the claimants with marginal injuries would never find an attorney willing to take the case due to the low potential recovery. Similarly, absent a common benefit fund, the so-called mass tort experts who currently show up as members of the various PSCs but have few individual clients would have less incentive to participate in the MDL process. In fact, it would be interesting to see who would participate in the PSC (and the number of cases that would ultimately be filed) if the MDL judge made it clear from the start that the PSC would only receive compensation from their own clients or, in the case of class action attorneys, if and when a class action was certified. Until that time, the debate will continue as to whether the MDL process is the best way to adjudicate major products liability litigation.

V. FEWER BUT BIGGER VERDICTS

While mounting impediments decrease the chances of an individual plaintiff’s products liability case getting to the jury, the size of the average verdict for those who make it through the tort reform, preemption, evidentiary and MDL obstacles are rising. Data collected from the 1960’s through the 1980’s showed striking growth in the size of products liability jury verdicts. Across various surveyed jurisdictions, mean and median verdicts increased by nearly ten fold between the early 1960’s and the early 1980’s.

152. As noted above, the United States Supreme Court has cast doubt on whether an MDL judge can certify a class action. Independent of the power of the MDL judge to certify a class, more and more courts are refusing to certify class actions in the personal injury context due to the failure of the parties to demonstrate the Rule 23(a) factors. See, e.g. Castano v. Am. Tobacco Co., 84 F.3d 734, 746, 747 (5th Cir. 1996); Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996).

153. Henderson & Eisenberg, supra note 1, 39 UCLA L. REV. at 764.

154. Id. at 764-66, n.96-105. The increases were adjusted for inflation and thus represented real growth. Id. at 780.
This trend continued in the 1980's despite increased public and jury awareness of the alleged tort crisis. While the data is mixed during this period, and the increases are not as dramatic, the conclusion reached by at least two surveyors was that products verdicts continued to rise from 1980 through 1989, and the 1990's again found growth in median products awards and rapid growth in mean products awards. The National Law Journal (ANLJ) ended the decade by declaring that verdicts overall were up, with juries awarding record amounts in many categories and jurisdictions. NJL's list of top ten verdicts for 1999 included three products verdicts, the compensatory portions of which were $5.3 million, $24 million and $107.6 million. The last, an award totaling $4.93 billion with punitive damages against General Motors Corporation in favor of a family burned in a rear end collision, was the largest products liability verdict ever. The trend of huge products verdicts has also continued into 2000.

The reasons for the continued rise in products liability verdicts have been the subject of much speculation. While exact reasons have not been pinpointed, the popular tort reform notion that uncontrolled juries have become erratic and widely generous has been discredited. Serious studies of jury awards have not found juries to be excessive, irrational or overly generous. For example, the General Accounting Office's study of products liability cases in five states found that damage awards were not erratic or excessive, and that compensatory awards were strongly associated with injury...
severity and economic loss.\textsuperscript{164}

Nonetheless, something has led juries to award larger damage awards where they may have previously been reluctant to make an award commensurate with the damage suffered.\textsuperscript{165} While NLJ has wondered if it this is due to good lawyering,\textsuperscript{166} media coverage of mammoth awards that increases the perception that they are commonplace seems more the reason. For example, studies of tort coverage in national magazines and newspapers in the 1980's and 1990's showed that, on a percentage basis, coverage of products liability lawsuits far outpaced their actual occurrence.\textsuperscript{167} Moreover, the jury verdicts reported in the media were among the largest rendered and were many times the actual mean verdict rendered during the period.\textsuperscript{168} This situation begins to feed on itself as potential jurors are increasing influenced by the large verdicts that have been rendered by other similarly influenced jurors and by media coverage that amplifies the trend.\textsuperscript{169} And jurors are not only influenced by reported verdicts in products cases, but also by huge settlements and verdicts in non-products cases against product manufacturers. Most notably, the public has been inundated with tremendous media coverage of the recent multi-hundreds of billions of dollars settlements in state medicare tobacco cases. While not technically products liability cases,\textsuperscript{170} the public, including perspective jurors, must assume that these hundreds of billions of dollars being paid to atone for the sale of dangerous products that caused harm.


\textsuperscript{165} For example, NLJ reported that in 1999 there were Amassive verdicts in jurisdictions where jurors had never been known for there generosity. Nat'l L. J., Feb. 28, 2000, at C3.

\textsuperscript{166} Id.

\textsuperscript{167} Galanter, \textit{supra} note 145-7.

\textsuperscript{168} Id.

\textsuperscript{169} Another irony: the motive behind some of the reporting of large verdicts is to portray a system run amok and in need of tort reform; the large verdicts reported just beget more large verdicts.

\textsuperscript{170} Most of the state cases against the tobacco industry for recovery of Medicare expenditures, including Minnesota's case, were based on theories of consumer fraud and anti-trust.
VI. THE ULTIMATE SWING BACK TO GREATER PLAINTIFFS' RIGHTS

The recent trends in the law toward limiting or eliminating the rights of products liability plaintiffs to recover for their injuries will likely continue into the near future, particularly if certain pro-Art reform candidates attain high office in the next year. However, the basic aim of products liability law— to spread costs to those who can best bear them and best spread them—must ultimately be met, and will result in the eventual swing back to more consumer friendly products atmosphere. Products liability litigation has been estimated to cost American product manufacturers $300 billion per year. Since this cost is seen as a burden on American business and the economy, many tort reformers champion doing away with, or severely limiting, products liability law as a way of saving society these costs. The $300 billion estimate has been criticized as a gross exaggeration. However, even if the figure were correct, it does not follow that inhibiting victims rights to recovery will reduce the cost of accidents or save society money. The costs will not disappear. Products will still inflict their costs—injuries to real live people—but the costs will be borne solely by the unfortunate victims.

A properly functioning products liability system should redistribute these costs by assigning to those injuries a monetary compensation that is paid to the injured plaintiff by, initially, the manufacture but ultimately all users of the product. This is the purpose of products liability law: "to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." The rationale is that the manufacturer is both in the best position to prevent the harm and to spread and loss if it occurs. Viewing the compensation paid by a product manufacture as the reformers do—as an expense unrelated to the actual costs paid by the suffering plaintiff, etc.

172. A very good explanation of the shortcomings in Mr. Huber's math is found in Mark J. Hager, Civil Compensation and Its Discontents: A Response to Huber, 42 STAN. L. REV. 539, 547-51 (1990).
174. E.g., Escola v. Coca Cola Bottling Co., 150 P.2d 436, 441 (Cal. 1944) (stating that "[t]he risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.").
and incurred by society in the form of health and assistance benefits and lost wages, productivity and taxes—loses sight of the important cost shifting function of products liability law. Costs are not being created by the law, they are being shifted by the law.\textsuperscript{175}

Those who see products liability compensation as an artificial cost, imposed on the manufacturer-consumer relationship from the outside, miss the fundamental point, indeed the whole point of, products liability law. It starts from the premise that society must engage in certain risky behavior, and practical considerations dictate that many behaviors can only be made so safe.\textsuperscript{176} At the margin, little can be done, in the first instance, to reduce the number or severity of accidents. However, the social costs of accidents can be reduced by shifting the cost of accident losses, spreading the loss broadly among people\textsuperscript{177}. Products recoveries shift the loss to the manufacturer’s deep pocket in the short term and then allow the manufacturer to spread the loss over all the users of the product. It raises prices, but insures that all the users of the product pay close to the true social cost of the goods they enjoy.\textsuperscript{178} If we fail to spread losses in this way, we actually increase the social cost of the accident, by putting the burden on those who cannot sustain it, who in turn consume greater amounts of societal resources to deal with their plight.

The preoccupation of legislators and commentators with eliminating accident costs simply by limiting the victim’s right to recover for her injuries, which in turn limits society’s available avenues of loss-spreading, has led products liability law so far from its rationale that there must eventually to be a historical correction. As the human costs of accidents—suffering, death, poverty, homelessness—go unrelieved, and take a greater and greater toll on society and on family members and friends, there will eventually be a groundswell of popular opinion to swing the law back to a more pro-consumer stance. This will be particularly true if good economic times continue, underlining the disparity between those who create the harm and get away with it and those who suffer the harm and must bear its full impact. The people who will be clamoring for a return to greater victim’s rights will probably not be aware of

\begin{itemize}
\item \textsuperscript{175} Hager, supra note 171, at 545-46.
\item \textsuperscript{176} GUIDO CALABRESI, THE COST OF ACCIDENTS 17-19 (Yale University Press, New Haven, 1970).
\item \textsuperscript{177} Id. at 27-28, 39-67.
\item \textsuperscript{178} Hager, supra note 171, at 545-46.
\end{itemize}
the need for cost spreading and its role in products liability law, but they will know what is right, fair and just. Thankfully, the future gives no indication that the American public's ability to judge and cherish these principles will be diminished anytime soon.

VII. CONCLUSION

Over the course of the last twenty years, a series of intentional, and not so intentional impediments have been placed in the path of any plaintiff wishing to recover for injuries caused by a defective product. In the near future, creation and expansion of these types of obstacles, and perhaps additional obstacles, will unfortunately continue. However, in the long term, rational economics and a sense of what is right should swing the balance back in favor of plaintiffs' rights.