THE LOUISIANA 1988 PRODUCTS LIABILITY REFORM ACT: THE CHANGES AND THEIR EFFECTS

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I was promised on a time,
To have reason for my rhyme;
From that time until this season,
I received nor rhyme nor reason.[1]

I. Introduction

In 1986, the Louisiana Supreme Court in *Halphen v. Johns-Manville Sales Corp.* rewrote Louisiana's products liability law and set forth several theories by which an injured party can recover from a manufacturer of a product.[2] The court in *Halphen* answered a certified question from the United States Fifth Circuit Court Appeals as to whether a manufacturer could assert as a defense that it could not have known of the defect in its product at the time it was manufactured. In delineating theories of recovery, the *Halphen* court crystallized a collage of prior Louisiana jurisprudence with current trends in the common law. The *Halphen* court rejected the "state-of-the-art defense"[3] that is made under certain theories of strict liability and held that a manufacturer's knowledge of the risks presented by its product at the time the product was manufactured makes no difference.[4] Thus, under *Halphen*, there are circumstances under which a manufacturer

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1. T. Fuller, *The Worthies of England* 366 (J. Freeman ed. 1952) (Edmund Spenser presented this stanza in the form of a petition to the queen for the pension he was promised for his poetry.).

2. Halphen v. Johns-Manville Sales Corp., 484 So.2d 1110 (La. 1986); *see* F. Stone, *Tort Doctrine* § 433 (12 Louisiana Civil Law Treatise 1977 & Supp. 1988). The supreme court's opinion was a response to a certified question from the United States Fifth Circuit Court of Appeals. Halphen v. Johns-Manville Sales Corp., 755 F.2d 393 (5th Cir. 1985).

3. The concept of a "state-of-the-art defense" has been the subject of many interpretations. *See* Wade, *On the Effect in Products Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. Rev. 734, 750-51 (1983); *see, e.g.*, Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1088 (5th Cir. 1973) ("[T]he manufacturer is held to the knowledge and skill of an expert. . . . The manufacturer's status as an expert means that at a minimum he must keep abreast of scientific knowledge, discoveries, and advances and is presumed to know what is imparted thereby.") (citing Keeton, *Product Liability--Problems Pertaining to Proof of Negligence*, 19 S.W.L.J. 26, 30-33 (1965)); Wiska v. St. Stanislaus Social Club, Inc., 7 Mass. App. Ct. 813, 390 N.E.2d 1133, 1138 n.8 (1979) ("the level of pertinent scientific and technical knowledge existing at the time").

4. *Halphen*, 484 So.2d at 114.

can be liable even if it could not have discovered the risks by using the then current technology. In response to the *Halphen* opinion, the Louisiana Legislature in 1988 enacted the Louisiana Products Liability Act[5] "to provide for the liability of manufacturers for damage caused by their products."[6] The "reform" legislation reestablished "the four traditional ways under traditional products liability doctrine that a product may be unreasonably dangerous" and also "provides for a state of the art defense for manufacturers."[7]

The recently enacted products liability law was aimed at providing predictability for manufacturers so that they would not be discouraged from entering Louisiana.[8] "Reform" legislation such as the recent Louisiana Products Liability Act has traditionally been directed at stabilizing insurance premiums by establishing predictable standards for tort recovery.[9] These *raisons d'etre* must be questioned from several perspectives: (1) Will manufacturer's alter their behavior and rush into Louisiana because the legislature overruled *Halphen*? (2) Do insurance companies actually consider localized laws in setting premiums? And (3) will "reform" legislation on a state level make any

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5. La. Rev. Stat. Ann. §§ 9:2800.51-:2800.59 (West Supp. 1990).

6. *Id.* at 109.

7. *House Committee on Civil Law and Procedure Hearing on Senate Bill No. 684*, at 4 (June 7, 1988) [hereinafter *Committee Hearing*] (statement of John Kennedy, spokesman for Governor Buddy Roemer) (transcribed by Laurie Gehling, House Committee on Civil Law and Procedure Secretary).

8. *Id.* at 10 (statement of Wayne Fontana, Chairman of the Liability Task Force). Mr. Fontana stated,

> In manufacturing jobs alone, since 1981, we've lost fifty-five thousand jobs. The sole competition that Louisiana is in can not simply be to look every month to see [who], [either] West Virginia or Louisiana, has the highest unemployment rate. It's time for us to take some steps to try to stimulate this economy. We believe the passage of this particular bill[, Senate Bill No. 684,] is the one of those necessary steps.

Id.

9. *See* U.S. Department of Justice, Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability 45-51 (1986) [hereinafter *Justice Department Report*] (insurance crisis attributed to increases in both tort claims and the sizes of awards); *see generally* Achampong, *The Liability Insurance Capacity Crunch and Tort Reform Liability*, 16 Cap. U.L. Rev. 621 (1987); Hensler, *Trends in Tort Litigation: Findings from the Institute for Civil Justice's Research*, 48 Ohio St. L. J. 479 (1987); McKay, *Rethinking the Tort Liability System: A Report From the ABA Action Commission*, 32 Vill. L. Rev. 1219 (1987); O'Connell, *Balanced Proposals for Product Liability Reform*, 48 Ohio St. L. J. 317 (1987); Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 Yale L. J. 1521 (1987).

difference given there will be fifty different standards, or will federal legislation be required to establish predictability through a uniform standard? While the recent Louisiana legislation will establish more predictability in products liability law, it is questionable whether the legislation will serve to encourage manufacturers to come to Louisiana and allow insurers to appraise more precisely risks associated with a product in order to stabilize insurance premiums.

This article will first review the codal roots of products liability and the application of these principles prior to the supreme court's decision in *Halphen*. The paper will then analyze *Halphen*, its categorization of products liability theories, and the errant results which some of those theories have produced. Finally, the paper will study the new legislation's impact on *Halphen* and the societal impact with respect to Louisiana's economy and the insurance industry.

II. Background

A. Codal Basis for Products Liability

1. The Code: Tort Law and Warranty

Under the Louisiana Civil Code, products liability law can be approached either from tort principles or from contract warranty principles. The tort analysis can be approached from two perspectives: (1) negligence-based liability[10] and (2) custodial liability.[11] With respect to negligence-based liability, article 2315 reads in pertinent part, "Every act whatever of man that causes damage to another obliges him

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10. *See, e.g.*, Whitacre v. Halo Optical Prods., Inc., 501 So.2d 994 (La. Ct. App. 2d Cir. 1987) (manufacturer liable for failure to provide a warning--an omission); *see also* F. Stone, *supra* note 2, §§ 11(A), 59-61.

11. *See, e.g.*, Ross v. La Coste de Monterville, 502 So.2d 1026 (La. 1987) (actor liable for object which remained *sous sa garde*); *see also* Note, *ROSS V. LA COSTE DE MONTERVILLE: The Extension of LOESCHER V. PARR*, 62 Tul. L. Rev. 276 (1987). In one French decision, the manufacturer of a bottle of lemonade was found liable for injuries caused when the bottle exploded although the bottle had passed through the hands of several parties, because manufacturer had retained custody--or *garde*--of its structure. *See* Judgment of June 5, 1971, Cass. civ. 2e, Fr., 1971 Bulletin des arret de la Cour de cassation, chambres civile, Deuxieme section civile [Bull. Civ. II] 146.

by whose fault it happened to repair it."[12] Article 2316 continues, "Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill."[13] These two Civil Code articles form the basis of liability for the negligent acts or omissions of a seller[14] or manufacturer[15] in the design or construction of a product. Article 2315 fault consists of conduct which does not meet the standard of conduct of a prudent and diligent person under the circumstances.[16] When a party has superior knowledge, skill and intelligence, "the law will demand of that person conduct consistent with it."[17]

The custodial liability approach is rooted in articles 2317 through 2322.[18] Article 2317 reads, "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or the things which we have in our custody."[19] Articles 2318 through 2322 delineate specific examples for strict liability due to the custody of the damage-causing object.[20] The principle embodied in article 2317 and its companion articles is that there is legal fault due to "a legal relationship [between the tortfeasor and] a person or thing whose conduct or defect creates an unreasonable risk of injuries to others."[21] If injuries are caused by a reasonable risk, the custodian is not liable for any damages caused.[22]

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12. La. Civ. Code art. 2315 (West Supp. 1990).

13. *Id.* art. 2316 (West 1979).

14. *See, e.g.*, Jones v. Robbins, 289 So.2d 104, 106-07 (La. 1974); Coignard v. F. W. Woolworth & Co., 175 So. 123, 124-25 (La. Ct. App. Orleans 1937); *see also* F. Stone, *supra* note 2, § 425, at 554.

15. *See, e.g.*, Purvis v. American Motors Corp., 538 So.2d 1015 (La. Ct. App. 1st Cir. 1988); *see also* F. Stone, *supra* note 2, § 437, at 564-65.

16. *See* Colin & Capitant, *Cours Elementaire de Droite Civil Francais* no. 190, at 179 (8th ed. 1935); *see also* W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Torts* § 32 (5th ed. 1984) [hereinafter *Prosser and Keeton*].

17. *Prosser and Keeton*, *supra* note 16, § 32, at 185; *see also* Restatement (Second) of Torts § 289 comment m (1965).

18. *Halphen*, 484 So.2d at 116; *see also* Palmer, *A General Theory of the Inner Structure of Strict Liability: Common Law, Civil Law, and Comparative Law*, 62 Tul. L. Rev. 1303, 1334 n. 126, 1334-35 (1988).

19. La. Civ. Code Ann. art. 2317 (West 1979).

20. *See* La. Civ. Code Ann. arts. 2318 (child in custody of parent); 2319 (insane person in custody of curator); 2320 (servants, students or apprentices in custody of masters or employers); 2321 (animal in custody of owner); 2322 (building in custody of owner) (West 1979 & Supp. 1990).

21. Palmer, *supra* note 18, at 1337 (emphasis in original); *see also id.* 1337 n. 149 (quoting Loescher v. Parr, 324 So.2d 441, 446 (La. 1975)).

22. *Id.*

The analysis of products liability from a contract perspective involves the theory of redhibition, which is rooted in the sales articles of the Louisiana Civil Code.[23] Article 2520 of the Civil Code defines redhibition as "the avoidance of a sale on account of some vice or defect in the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it, had he known of the vice."[24] The seller is not responsible for "apparent defects,"[25] but only for latent defects not declared to the buyer by the seller.[26] If the seller is in good faith and does not know of the latent defects, he must either repair the item sold to the buyer or restore the purchase price and reimburse reasonable expenses "occasioned by the sale, as well as those incurred for the preservation of the thing, subject to credit for the value of any fruits or use which the purchaser has drawn from it."[27] If the seller knows of the vice in the product sold and does not declare it to the buyer, he is also liable for reasonable attorney's fees and damages.[28]

For a buyer to recover damages in a redhibition action, the seller must have been in bad faith. Damage actions against manufacturers, however, were facilitated by the doctrine that the manufacturer was presumed to know of defects in his product and therefore was presumed to be a bad faith vendor.[29] Thus damage actions in redhibition were a significant feature of products liability in Louisiana. The Products Liability Reform Act, however, now establishes itself as the exclusive remedy for damage actions against manufacturers by providing: "A claimant may not recover from a manufacturer for damage caused by a product on the basis of any theory that is not set forth in this Chapter."[30] The effect will be to cut back upon the Civil Code's role in products liability and to channel

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23. *See* La. Civ. Code Ann. arts. 2520-2548 (West 1952 & Supp. 1989).
24. *Id.* art. 2520 (West 1952).
25. *Id.* art. 2521 (West 1952).
26. *Id.* art. 2521-2522 (West 1952).
27. *Id.* art. 2531 (West Supp. 1990).
28. *Id.* art. 2545 (West Supp. 1990).
29. Doyle v. Fuerst & Kramer, 8 Orl. App. 408 (1911)). George v. Shreveport Cotton Oil Co., 38 So. 432 (1905); Philippe v. Browning Arms Co., 395 So.2d 310 (1980).
30. *Supra* note 5, at § 2800.52.

these important cases into the sphere of tort. Thus this article will limit discussion to the tort analysis.

2. The Court's Struggle With Tort Principles

The Louisiana Supreme Court has struggled to draw a line between negligence-based liability and strict liability in products liability cases.[31] The court's opinion in *Entrevia v. Hood* identifies the analysis under article 2317 as "similar to that employed in determining whether a risk is unreasonable in a traditional negligence problem . . . and in deciding the scope of duty or legal cause under the duty/risk analysis."[32] The opinion continues, "This [similarity] is not because strict liability under Article 2317 is equivalent to liability for negligence, but because in both delictual areas the judge is called upon to decide questions of social utility that require him to consider the particular cases in terms of moral, social and economic considerations . . . ."[33] However, even if there is a hypertechnical or even academic distinction between the two delictual theories, and if the analysis of the negligence calculus is the same as that under the strict liability approach, the question remains whether the criteria for liability under each theory are the same? If the answer is yes, then is superior knowledge a relevant factor under both theories?

The court in *Kent v. Gulf States Utilities Co.* stated that to determine liability, the owner's knowledge must be presumed and the reasonableness of the owner's conduct would be determined "in light of that presumed knowledge."[34] Thus, as noted by Professor Vernon V. Palmer, "[u]ltimately liability will not attach [under the strict liability analysis] unless the risks presented are *unreasonable* risks, as determined by the negligence calculus."[35] The only distinction between strict liability based on custody and the traditional negligence analysis under article 2315 "pertains to the knowledge of the condition creating the unreasonable risk of injury. The assumption is that the

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31. Palmer, *supra* note 18, at 1340.
32. 427 So.2d 1146, 1149 (La. 1983) (citations omitted).
33. *Id.*
34. 418 So.2d 493, 497-98 (La. 1982) (citing *Wade, Strict Liability for Manufacturers*, 19 Sw. L.J. 5, 15 (1965)
35. Palmer, *supra* note 18, at 1341 (emphasis in original).

knowledge of risk constitutes a prerequisite of fault, and strict liability results when such knowledge is legally unnecessary."[36]

This distinction--whether knowledge of a risk is necessary for liability--is at the heart of the confusion. The distinction is important for clarity in the jurisprudence because if knowledge is not necessary, the analysis should consist of pure strict liability theory. If knowledge is necessary, the analysis is then directed to the well-established duty-risk analysis[37] under ordinary negligence law. The Fifth Circuit's certified question in *Halphen* centered on whether knowledge was a factor under Louisiana products liability law.[38] The 1988 reform legislation is directed at the criterion of knowledge.[39] For the purposes of this article, three classifications of knowledge are considered: (1) known risks; (2) unknown risks, but knowable under the then current technology; and (3) unknowable risks, given the technology at the pertinent time.

Before analyzing *Halphen* and the new legislation, it is necessary to look at the birth of products and custodial liability in Louisiana and the motley jurisprudence which grew from it. This hybrid jurisprudence developed during the late 1970s and early 1980s, and it served as a gyroscope for the court's decision in *Halphen*.[40]

B. Pre-*Halphen* Jurisprudence

Products liability achieved prominence in Louisiana with Justice Albert Tate, Jr.'s decision in *Weber v. Fidelity & Casualty Insurance*

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36. *Id.* (footnote omitted).

37. *See* Hill v. Lundin & Assocs., Inc., 260 La. 542, 547-48, 256 So.2d 620, 622 (La. 1972) ("[I]f [a] defendant's conduct is a cause in fact of the harm, we are then required in a determination of negligence to ascertain whether the defendant breached a legal duty imposed to protect against the risk involved.").

38. The Fifth Circuit certified the following question:

> In a strict products liability case, may a manufacturer be held liable for injuries caused by an unreasonably dangerous product if the manufacturer establishes that it did not know and reasonably could not have known of the inherent danger posed by its product?

Halphen v. Johns-Manville Sales Corp., 755 F.2d 393, 394 (5th Cir. 1985) (en banc).

39. *See infra* section IV.

40. For a thorough discussion of the interaction between the pure strict liability analysis and the duty-risk analysis, *see* Palmer, *supra* note 18, at 1334-50.

Co. of New York.[41] The court's opinion in *Weber* was based on defectiveness.[42] In a concise distillation of principles which had developed in Louisiana, Justice Tate established the foundation for products liability law in Louisiana:

> A manufacturer of a product which involves a risk of injury to the user is liable to any person, whether the purchaser or a third person, who without fault on his part, sustains an injury caused by a defect in design, composition, or manufacturer of the article, if the injury *might have been reasonably anticipated.*[43]

Under *Weber*, a plaintiff needed to prove "that the product was defective, *i. e.*, unreasonably dangerous to normal use."[44] However, proof of "any particular negligence by the maker" of the thing was not necessary; Justice Tate stated that "the manufacturer is presumed to know of the vices in the things he makes, whether or not he has actual knowledge of them."[45]

Although Justice Tate dispensed with any requirement of actual knowledge, the standard he established implied that knowledge with respect to the defect was available to the manufacturer--*i.e.*, knowable even if unknown by the tortfeasor. How could a manufacturer reasonably anticipate a risk if experts or academicians had not pushed the frontier of knowledge past the level required to anticipate the risk? Thus, although *Weber* did not address a state-of-the-art defense as did *Halphen*, the general theory of products liability in Louisiana implicitly allowed for such a defense in its genesis.

Seizing on *Weber's* requirement that a product be "unreasonably dangerous to normal use," the court in *Chappuis v.*

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41. 259 La. 599, 250 So.2d 754 (La. 1971). The underlying dispute in *Weber* concerned the death of plaintiff's son's seven cattle after the application of cattle dip. *Id.* at 602, 250 So.2d at 755. The plaintiff's two minor sons also became ill. *Id.* The chief factual issue in the case was whether there was an excessive amount of arsenic in the dip due either to a defective batch or to improper mixing by plaintiff's two sons. *Id.* at 604, 250 So.2d at 756.

42. F. Stone, *supra* note 2, § 433, at 157 (Supp. 1988).

43. *Weber*, 259 La. at 602-03, 250 So.2d at 755 (emphasis added).

44. *Id.*

45. *Id.* at 603, 250 So.2d at 756.

Sears Roebuck & Co. considered whether a manufacturer was liable for the failure to warn that a chipped hammer should be discarded without further use.[46] In this context, the court immediately looked to "fault" under article 2315.[47] The court stated "that the knowledge [that a chipped hammer is dangerously likely to chip once again in normal use] is peculiarly with the manufacturer and the experts."[48] However, in the underlying dispute, there was little or no dispute that this knowledge was available to the manufacturer. The court found that because industry literature concerning the risks posed by a chipped hammer was readily available, "[i]t would have been reasonable, in this case, for the manufacturer to add to the warning label the words 'discard the hammer if it becomes chipped.'"[49] Thus, because the information was readily available, the court had no problem in holding the manufacturer liable under a fault-based analysis. If such information had not been readily available, would the court have stretched its analysis to hold a chipped hammer inherently dangerous? Given the court's preoccupation with fault in the opinion,[50] it probably would not have done so if the risks were unknowable.

The court added another interesting twist to products liability law in *Hunt v. City Stores, Inc.*[51] In *Hunt*, a twelve-year-old boy was injured when his right tennis shoe was caught in an escalator.[52] The court considered the store owner's liability under article 2317.[53] After quoting the *Weber* rule, the court shifted its analysis to the following balancing test: "if the likelihood and gravity of harm outweigh the benefits and utility of the manufactured product, the product is unreasonably dangerous."[54] The court explained, "If the product is unreasonably dangerous to normal use, the manufacturer is ultimately responsible to one injured in the course of that use."[55] The court then

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46. 358 So.2d 926, 929 (La. 1978).
47. *Id.*
48. *Id.*
49. *Id.* at 930.
50. *Id.* at 929-30 n.2.
51. 387 So.2d 585 (La. 1980).
52. *Id.* at 587.
53. *Id.*
54. *Id.* at 589.
55. *Id.* (citing Phillips, *A Synopsis of the Developing Law of Products Liability*, 28 Drake L. Rev. 317, 322-325 (1978-1979)).

proceeded to hold the store owner and the manufacturer of the escalator liable because they *knew* of the risks posed.[56]

On its face, the balancing test in *Hunt* did not require an inquiry into the knowledge of the tortfeasors. If the likelihood and gravity of a known harm with respect to the escalator outweighed the benefits and utility of the escalator, then the escalator was simply unreasonably dangerous. However, such a conclusion would have been unreasonable in and of itself.[57] Would store owners then be required to remove all escalators from their establishments? The answer is obviously no. Although *Hunt* left these implications, the supreme court has since exercised sound judgment and has clearly stated that escalators are not unreasonably dangerous as a matter of law.[58]

In 1981 in the context of a case arising out of hepatitis- infected blood, Louisiana products liability law took a turn toward the common law and the *Restatement (Second) Torts* § 402A. Justice Dennis, a member of the court's civilian majority,[59] in *DeBattista v. Argonaut-Southwest Insurance Co.* looked to section 402A in an attempt to define the "unreasonably dangerous" limitation of *Weber*.[60] *DeBattista* addressed the issue of whether a blood bank was liable for the distribution of diseased blood though it was not negligent.[61]

Justice Dennis began his analysis under article 2315 to determine whether the blood bank was negligent in distributing the infected blood.[62] He concluded that the blood bank was not

56. *Id.* at 588-89.

57. Under the *Halphen* regime, however, one Louisiana Court of Appeal has held an escalator to be unreasonably dangerous per se. Brown v. Sears Roebuck & Co., 503 So.2d 1122, 1129 (La. Ct. App. 3d Cir.), *aff'd on other grounds*, 514 So.2d 439 (La. 1987). Although the supreme court affirmed the lower court's decision, it realized the folly of the Third Circuit and of the implications in *Hunt* and emphatically stated that "*Hunt* did not hold that escalators are unreasonably dangerous as a matter of law." Brown, 514 So.2d at 442.

58. Brown v. Sears Roebuck & Co., 514 So.2d 439 (La. 1987); *see also infra* notes 150-60 and accompanying text.

59. Murchison, *The Judicial Revival of Louisiana's Civilian Tradition: A Surprising Triumph for the American Influence*, 49 La. L. Rev. 1, 12 (1988).

60. 403 So.2d 26, 30-31 (La. 1981).

61. *Id.* at 28.

62. *Id.* at 29.

negligent.[63] Justice Dennis then turned to Civil Code articles 2317 through 2324 to determine if the blood bank could be liable without a finding of negligence.[64] To define fault in this context, Justice Dennis turned to the analysis in *Weber* and aligned Louisiana products liability law with the common-law approach under section 402A.[65] Justice Dennis recognized that the "unreasonably dangerous" limitation in *Weber* had been extended to determine legal fault under articles 2317, 2318, 2320, 2321 and 2322.[66]

The comments of section 402A explain that a "defective condition" is one "not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."[67] Comment "i" of section 402A defines "unreasonably dangerous" as "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[68] Thus, Justice Dennis judicially incorporated the standard of "ordinary knowledge" under section 402A into Louisiana's products liability law. *Weber*'s implicit requirement that knowledge of the risk be available obtained some substance under *DeBattista*, albeit thanks to a common-law infusion.

The relevance of the *DeBattista* opinion with respect to the state-of-the-art defense is that Comment "j"[69] of section 402A stipulates that some state-of-the-art knowledge must be available to the manufacturer before it is held liable for any alleged defectiveness in the product.

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63. *Id.*

64. *Id.*

65. *Id.* at 30. Justice Dennis succinctly wrote for the court, "Defining fault is a logomachy. Because of the difficulty in finding fault for all times and purposes and instead of defining fault by listing numerous activities which constitute fault (much as we enumerate the activities which constitute criminal conduct in our criminal code) our law has left this determination in the hands of the court." *Id.* at 29 (citing Langlois v. Allied Chem. Corp., 258 La. 1067, 1076, 249 So.2d 133, 137 (1971)).

66. *Id.* at 30.

67. Restatement (Second) of Torts § 402A comment g (1965).

68. *Id.* comment i.

69. Comment "j" reads in pertinent part:

> [I]f the ingredient is one whose danger is not generally known, . . . the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger . . . .

Restatement (Second) of Torts § 402A comment j (1965).

Thus, if Louisiana has adopted the approach taken by section 402A, knowledge cannot be ignored. Under *DeBattista*, if normal use poses risks that are not contemplated by the ordinary consumer, the manufacturer is liable if those "unreasonably dangerous risks" could be anticipated by the manufacturer. Although the manufacturer need not have actual knowledge of them,[70] the court in *DeBattista* implied, as did the court in *Weber*, that the manufacturer could have reasonably ascertained the risk posed by the product--*i.e.*, the risks were knowable under the then current technology. This requirement is significant because it is not realistic that a manufacturer should become "automatically responsible for all the harm that such things do in the world."[71]

C. Other Approaches to the Problem

The Louisiana Supreme Court in *Halphen* did not address a question of law which was *res nova* from a national perspective. *Halphen* must be viewed against the backdrop of two seminal cases representing the different approaches to the problem: *Borel v. Fibreboard Paper Products Corp.*[72] and *Beshada v. Johns-Manville Sales Corp.*[73] Judge John Minor Wisdom in *Borel* considered the knowledge of a manufacturer to be relevant and a part of the strict liability analysis. Diametrically opposite to the analysis in *Borel*, the New Jersey Supreme Court in *Beshada* adopted a stricter view and held that the knowledge of the manufacturer was not relevant.

1. *Borel v. Fibreboard Paper Products Corp.*

Judge Wisdom in *Borel* addressed "the scope of an asbestos manufacturer's duty to warn industrial insulation workers of dangers associated with the use of asbestos."[74] The plaintiff, Clarence Borel, had been exposed to asbestos dust for a period of 33 years beginning in

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70. *See* DeBattista, 403 So.2d at 30 (quoting *Weber*, 259 La. at 603, 250 So.2d at 755-56).

71. Prosser, *Strict Liability to the Consumer in California*, 18 Hastings L.J. 9, 23 (1966).

72. 493 F.2d 1076 (5th Cir. 1973).

73. 90 N.J. 191, 447 A.2d 539 (1982).

74. *Borel*, 493 F.2d at 1081.

1936 and ending in 1969. Borel contracted asbestosis and mesothelioma from his exposure to the asbestos. He sued eleven manufacturers of asbestos (1) for the failure to warn of the danger to which a worker is exposed, (2) for the failure to inform him of safety equipment he could have used, (3) for the failure to test their products to determine the inherent risks, and (4) for the failure to remove their products from the market after they learned of the risks.[75]

Borel filed suit in a Texas federal district court under diversity jurisdiction. Consequently, the substantive law of Texas applied to the suit. Noting that Texas had adopted the theory of strict liability embodied in section 402A, Judge Wisdom proceeded to analyze the case under the *Restatement.*[76] Consistent with common sense and with Professor Prosser's point of view, Judge Wisdom recognized that "[p]roducts liability does not mean that a seller is an insurer for all harm resulting from the use of his product."[77] Equating "defective" to "unreasonably dangerous," Judge Wisdom explained that under the *Restatement,* the requisite for liability that a product be "unreasonably dangerous" "reflects a realization that many products have both utility and danger."[78] Thus, Judge Wisdom concluded that a product would not be unreasonably dangerous unless the magnitude of the danger outweighed the utility of the product.[79] The "fulcrum" for the utility-danger balance was found to be "the reasonable man as consumer or as seller."[80]

However, Borel's claim was not based on the fact that asbestos is unreasonably dangerous in and of itself, but on the theory that the product was unreasonably dangerous "because of the failure [of the manufacturers] to give adequate warnings of the known or knowable dangers involved."[81] Looking to the section 402A's commentary,

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75. *Id.* at 1086.
76. *Id.* at 1087.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 1088.
81. *Id.*; *see generally* Restatement (Second) of Torts § 402A comment h (1965) ("Where . . . [the manufacturer] has reason to anticipate that danger may result from a particular use, as where a drug is sold which is safe only in limited doses, he may be required to give adequate warning of the danger . . ., and a product sold without such warning is in a defective condition.").

Judge Wisdom concluded that such knowledge is a relevant factor in the analysis. Thus, the *Borel* opinion implies that the risks must be *knowable* to the manufacturer.

As guideposts, the commentary to section 402A steered the *Borel* panel to the conclusion that when a product is unreasonably dangerous because of a failure on the part of a manufacturer to adopt an alternative design or to warn of an inherent danger, the manufacturer should be held to the knowledge available to an expert. Judge Wisdom referenced Comment "j" and explained that "a seller has a responsibility to inform users and consumers of dangers which the seller either knows or should know at the time the product is sold."[82] If the manufacturer knew of potential dangers and did not warn of them, Comment "h" declared the product to be unreasonably dangerous.[83] Reviewing the scholarly opinion then available, Judge Wisdom concluded that "[t]he requirement that the danger be reasonably foreseeable, or scientifically discoverable, is an important limitation of the seller's liability."[84] Because the decision whether to risk unknown dangers in these circumstances was left to the consumer, the *Borel* panel chose an extremely high standard of knowledge for manufacturers: "the manufacturer is held to the knowledge and skill of an expert."[85]

Specifically, Judge Wisdom wrote for the court,

> The manufacturer's status as expert means that at a minimum he must keep abreast of scientific knowledge, discoveries, and advances and is presumed to know what is imparted thereby. But even more importantly, a manufacturer has a duty to test and inspect his product.

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82. *Borel*, 493 F.2d at 1088; *see also* Restatement (Second) of Torts § 402A comment j (1965). For a recent decision relying on both *Borel* and Comment "j" in its conclusion that the manufacturer's knowledge is relevant, see Bernier v. Raymark Indus., Inc., 516 A.2d 534, 538-40 (Me. 1986) ("When a plaintiff alleges that a defendant's product was unreasonably dangerous because of a failure to give adequate warnings, the actionability of the product should be determined according to the knowledge and information available to the manufacturer at the time of distribution.").

83. Restatement (Second) of Torts § 402A comment h (1965).

84. *Borel*, 493 F.2d at 1088 (citing Keeton, *Inadequacy of Information*, 48 Tex. L. Rev. 398, 404, 409 (1970)).

85. *Id. See generally* Wright v. Carter Prods., Inc., 244 F.2d 53 (2d Cir. 1957).

> The extent of research and experiment must be commensurate with the dangers involved. A product must not be made available to the public without disclosure of those dangers that the application of reasonable foresight would reveal.[86]

Consequently, although *Borel* did hold that knowledge was relevant, thus leaving the door open for a state-of-the-art defense, the knowledge required of a manufacturer was extremely high and practically demanded that a manufacturer's expertise extend to the frontier of learning.

Judge Wisdom began with Comment "k" which acknowledges that manufacturers of products such as drugs cannot always make a product which is absolutely safe in its intended and ordinary use.[87] However, according to Comment "k," just because a manufacturer could not know of potential risks did not free the manufacturer from an obligation to warn the consumers of the potentially unknown risks to which the consumers subject themselves. Such a failure to warn the consumer of potential risks, although not then known, would render the product unreasonably dangerous.[88] Implicit in this determination was the rationale that the balancing between utility and danger was left to the consumer under these circumstances. Judge Wisdom recognized these circumstances as "a true choice situation" and as requiring "a duty to warn . . . whenever a reasonable man would want to be informed of the risk in order to decide whether to expose himself to it."[89]

The *Borel* standard has been followed in later cases. For example, in *Anderson v. Owens-Illinois, Inc.*,[90] the United States First Circuit Court of Appeals rejected a plaintiff's motion to strike the state-of-the-art defense in an asbestos case and to exclude state-of-the-art evidence for the purposes of a warranty claim. The First Circuit in *Anderson* considered whether Massachusetts law allowed a manufacturer of asbestos to assert a state-of-the-art defense. Although

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86. *Borel*, 493 F.2d at 1089-90 (footnotes omitted).
87. *Borel*, 493 F.2d at 1088-89. *See also* Restatement (Second) of Torts § 402A comment k (1965).
88. *Borel*, 493 F.2d at 1089.
89. *Id.*
90. 799 F.2d 1 (1st Cir. 1986).

Massachusetts did not recognize the doctrine in section 402A, the First Circuit found both section 402A and "'strict liability cases of other jurisdictions'" relevant because Massachusetts courts look to both in order to determine the scope of warranty liability.[91]

Rejecting the case law which had held knowledge irrelevant[92] and holding that the broad language of section 402A should not be applied "indiscriminately," the First Circuit concluded,

> But if a danger is unknowable, how can effective warning be given? To warn that a product may have unknown and unknowable risks is to give no meaningful warning at all. That this situation is outside the black letter Restatement is flagged by comment j . . . .[93]

The First Circuit subscribed to the high standard of *Borel* and stated in *obiter dictum* that an approach which rejected the state-of-the-art defense would produce the "socially undesirable" result of requiring manufacturers to purchase insurance on a blind basis.[94] According to the *Anderson* panel, "[i]t should be time enough to charge manufacturers [with knowledge] when there is something to point to beyond scientific[ally] unanticipated consequences."[95]

2. *Beshada v. Johns-Manville Products Corp.*

The question as to the relevance of a manufacturer's knowledge in failure to warn cases was again addressed in 1982 by the New

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91. *Id.* at 2 (citing Correia v. Firestone Tire & Rubber Co., 388 Mass. 342, 353, 446 N.E.2d 1033, 1039 (1983); Back v. Wickes Corp., 375 Mass. 633, 640, 378 N.E.2d 964, 969 (1978)).

92. *Id.* at 3; *see infra* Section II(C)(2).

93. *Anderson*, 799 F.2d at 4 (citing Wade, *supra* note 3, 747). *See also In re* Massachusetts Asbestos Cases, 639 F. Supp. 1, 3,n.3 (D. Mass. 1985) ("In a technical sense, state of the art evidence is always relevant. The finder of fact cannot anticipate tomorrow's scientific developments and so must decide whether the product is unreasonably dangerous on the date of trial.").

94. *Id.* at 4-5; *see also Massachusetts Asbestos Cases*, 639 F. Supp. at 4 ("State of the art evidence is relevant to this standard because it determines what knowledge the manufacturer is presumed to have of the dangers associated with its product at the time of sale.").

95. *Id.* at 5.

Jersey Supreme Court.[96] Although the issue of whether the state-of-the-art defense was viable was certainly not virgin in 1982, the New Jersey Supreme Court decided to chart its own course and for the most part ignored much of the germane analysis offered by other jurisdictions. The *Beshada* court's cavalier analysis of the state-of-the-art defense probably accounted for the court's subsequent retreat from *Beshada*'s conclusion that a manufacturer's knowledge is never relevant to the strict liability inquiry.[97] In 1984 the New Jersey Supreme Court in *Feldman v. Lederle Laboratories* limited *Beshada*'s application "to the circumstances giving rise to [*Beshada*'s] holding."[98]

In *Beshada*, just as in *Borel*, the court considered whether the manufacturers of asbestos could assert that they could not have known of the dangerous effects of asbestos prior to the 1960s.[99] The court held that state-of-the-art knowledge was not relevant in strict liability for failure to provide a warning.[100] The court based this conclusion on the distinction between negligence which addresses culpability and strict liability which is concerned only with a product's propensity for danger.[101] The analysis in *Beshada* was, however, superficial and was probably based on the court's desire to reach a certain result.

The manufacturers in *Beshada* argued "that the question of whether the product can be made safer must be limited to consideration of the available technology at the time the product was distributed."[102] Ignoring this knowledge, the manufacturers contended, would result in absolute liability. After distinguishing its holding in *Suter v. San*

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96. Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 447 A.2d 539 (1982).

97. *See* Feldman v. Lederle Laboratories, 97 N.J. 429, 455, 479 A.2d 374, 388 (1984).

98. *Id.*

99. *Beshada*, 90 N.J. at 196-97, 447 A.2d at 542. The defendants in *Beshada* argued that they could not have known of the dangerous effects of asbestos until the 1960s at which time the medical profession in the United States recognized "that a potential health hazard arose from the use of insulation products containing asbestos." *Id.* In *Borel* and in Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1352 (E.D. Tex. 1981), it was noted that knowledge of the adverse effects of asbestos exposure was known as early as the 1930s.

100. *Beshada*, 90 N.J. at 209, 447 A.2d at 549.

101. *Id.* at 204, 447 A.2d at 546.

102. *Id.* at 202, 447 A.2d at 545.

Angelo Foundry & Machine Co.[103] in which it had labelled state-of-the-art knowledge as a consideration in safety-device cases, the New Jersey Supreme Court immediately characterized the state-of-the-art defense as one only to be asserted in negligence cases.[104] The court stated

> [The state-of-the-art defense] seeks to explain why defendants are not culpable for failing to provide a warning. They assert, in effect, that because they could not have known the product was dangerous, they acted reasonably in marketing it without a warning. But in strict liability cases, culpability is irrelevant. The product was unsafe. . . . Strict liability focuses on the product, not the fault of the manufacturer.[105]

The court then attempted to characterize the "duty to warn" as not encompassed by negligence. The court decided that a manufacturer is strictly liable for its failure to warn, not because of the manufacturer's negligence, but because the product was dangerous.[106] This approach, the court concluded, made knowledge irrelevant. The court then stated, "By imposing strict liability, we are not requiring defendants to have done something that is impossible."[107] However, if the manufacturer could not have known of the dangers, how could it have warned of them?

The true reasons for *Beshada*'s disregarding a manufacturer's knowledge as a factor lie in the latter part of the decision. The court, after providing the academic argument just mentioned, gave three policy reasons for its decision: (1) Risk Spreading; (2) Accident Avoidance; and (3) Fact-Finding Process.[108] The court considered the spreading of the risks of loss as "[o]ne of the most important arguments" advanced in support of "imposing strict liability" because the manufacturers and distributors are in the best position to spread the

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103. 81 N.J. 150, 406 A.2d 140 (1979); *see also* Torsiello v. Whitehall Laboratories, 165 N.J. Super. 311, 398 A.2d 132 (1979).
104. *Beshada*, 90 N.J. at 204, 447 A.2d at 546.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 205-08, 447 A.2d at 547-49.

costs of the risks.[109] Moreover, the court stated that "[i]n this way, the costs of the product will be borne by those who profit from it: the manufacturers and distributors who profit from its sale and the buyers who profit from its use."[110]

Secondly, the court looked to its analysis in *Suter* and asserted that the manufacturer is in the best position to determine how to avoid the risks of a defective product.[111] By imposing the costs of such defects on manufacturers, the court believed that manufacturers would then know how to spend their resources with respect to the foreseeability of risks. Quoting *Suter*, the court wrote, "Using this approach, it is obvious that the manufacturer rather than the factory employee is 'in the better position both to judge whether avoidance costs would exceed foreseeable accident costs and to act on that judgment.'"[112]

Finally, the court believed that presentation of state-of-the-art evidence would confuse jurors. The court in an erratic series of sentences characterized state-of-the-art knowledge as speculative and indeterminable. The court expressed little faith that juries could understand the state-of-the-art defense. However, implicit in the court's analysis was that the manufacturer either erred in evaluating future risks or made "inadequate investment in safety."[113] Was the court actually talking about culpable conduct in this part of its opinion? If social policy directed the court to find liability because the manufacturer's activities were wrong or inadequate, then the court's negligence/strict liability analysis was superfluous and contradicted the latter part of its opinion.

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109. *Id.* at 205, 447 A.2d at 547.
110. *Id.*
111. *Id.* at 206-07, 447 A.2d at 547-48 (citing Suter v. San Angelo Foundry & Machine Co., 81 N.J. 150, 173-74, 406 A.2d 140, 151-52 (1979)).
112. *Id.*
113. *Id.* at 208, 447 A.2d at 548.

III. The Stage is Set: *Halphen v. Johns-Manville Products Corp.*

A. The Underlying Federal Litigation

Samuel J. Halphen after years of working in shipyards contracted and subsequently died "from malignant mesothelioma, a rare form of cancer commonly caused by exposure to asbestos."[114] Halphen filed suit against sixteen manufacturers of asbestos; all except Johns-Manville were dismissed prior to trial.[115] At trial in the Western District of Louisiana, a jury returned a verdict for the plaintiff and against Johns-Manville. Johns-Manville appealed the jury verdict on the ground "that it [could not] be held strictly liable for injuries incurred due to its failure to warn of potential dangers of its product because it could not foresee the particular harm."[116] Specifically, Johns-Manville urged the state-of-the-art defense and that it could not have warned of the risks of asbestos because such risks were unknowable until recently.[117]

Because the action was based on diversity jurisdiction, the court applied Louisiana substantive law to determine the products liability issue. Writing for the majority, Judge Politz reviewed the recently developed Louisiana products liability jurisprudence.[118] From *Weber*,[119] *Hunt*,[120] and *Kent v. Gulf States Utilities Co.*,[121] Judge

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114. Halphen v. Johns-Manville Sales Corp., 737 F.2d 462, 464 (5th Cir. 1984), *vacated*, 752 F.2d 124 (5th Cir.) (en banc), *question certified*, 755 F.2d 393 (5th Cir. 1986) (en banc).

115. *Id.*

116. *Id.*

117. *Id.*

118. *See supra* section II(B).

119. *See supra* notes 39-43 and accompanying text.

120. *See supra* notes 49-56 and accompanying text.

121. 418 So.2d 493 (La.1982). Judge Politz relied on footnote 6 of *Kent* in which the court stated:

> In products liability cases, the manufacturer is presumed to know the dangerous propensities of its product and is strictly liable for injuries resulting from the product's unreasonable risk of injury in normal use. The claimant nevertheless must prove that the product presented an unreasonable risk of injury in normal use (regardless of the manufacturer's knowledge), *thus in effect proving the manufacturer was negligent in placing the product in commerce with (presumed) knowledge of the danger.*

Politz distilled the Louisiana view of the state-of-the-art defense. Judge Politz concluded that under "Louisiana law[,] . . . a manufacturer is presumed to know the defects in its product. Foreseeability is not an element in that equation."[122] Thus, under the plurality opinion, a manufacturer was responsible for unknowable risks.

Judge Clark dissented from the majority opinion on the basis that Louisiana products liability law was rooted in the traditional civilian notion of fault as found in Louisiana Civil Code article 2315.[123] According to Judge Clark, *Weber*,[124] *Chappuis*,[125] and *DeBattista*[126] established that fault was an integral part of Louisiana products liability law and under fault-based liability knowledge was a relevant factor.[127] According to the dissent, there could be liability only for knowable risks.

Judge Clark's analysis cut to the core of the problem. Relying more on common sense than esoteric dogma, he began by distinguishing asbestos from defective goods such as the contaminated blood in *DeBattista* or a radio which may shock a consumer at the rate of one in a million.[128] Thus, concluded Judge Clark, "Such defects, though not preventable, are nevertheless foreseeable in conducting the business of handling blood for resale or manufacturing radios."[129] The risks are either known or knowable. Judge Clark continued,

> This case presents altogether different considerations of product "defect." The world now knows that all asbestos will cause harm if breathed. That does not make asbestos defective. Many high-risk products are commonly used, such as electrical devices, poisonous or toxic chemicals, heavy machinery, and tobacco. They carry a potential for serious injury in the course of normal use. Like the hammer that becomes dangerous once it is chipped, these products may be "defective" if

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Id. at 498 n.6 (emphasis in original).

122. *Halphen*, 737 F.2d at 466.
123. *Id.* at 467 (Clark, J., dissenting).
124. *See supra* notes 39-43 and accompanying text.
125. *See supra* notes 44-48 and accompanying text.
126. *See supra* notes 58-69 and accompanying text.
127. *Halphen*, 737 F.2d at 468-69 (Clark, J., dissenting).
128. *Id.* at 469 (Clark, J., dissenting).
129. *Id.*

> the potential danger is foreseeable yet the supplier provides no adequate warning or instructions as to safe use.[130]

Relying on Judge Wisdom's opinion in *Lartigue v. R.J. Reynolds Tobacco Co.*,[131] Judge Clark asserted that a line can be drawn and that if knowledge is not considered, manufacturers would be made the insurers of their products irrespective of fault--a result in contravention of the *Restatement* and the pre-*Halphen* Louisiana jurisprudence.

Because of the court's sharply divided opinion on the issue of Louisiana's view of the state-of-the-art defense in products liability cases, the Fifth Circuit *en banc* decided to vacate the panel's opinion and certify the question to the Louisiana Supreme Court.[132]

B. The Response to the Certified Question

In its response to the certified question, the Louisiana Supreme Court pigeonholed Louisiana products liability law into several categories. The court began with a statement of the legal precepts of Louisiana products liability law. The basic tenets of *Weber*,[133] *Chappuis*,[134] *Hunt*[135] and *DeBattista*[136] were not in dispute. The application of the basic principles of this jurisprudence to a dangerous product whose dangers may not have been known at a relevant time was at the heart of the question posed by the Fifth Circuit. The basis of the court's opinion lay in its distinction between "pure strict liability" and other products liability theories such as a "fail[ure] to give an

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130. *Id.*

131. 317 F.2d 19 (5th Cir. 1963). In considering the liability of tobacco manufacturers, Judge Wisdom wrote

> [I]t is reasonable to draw a line somewhere: a manufacturer of food products is not like one who keeps a tiger for a pet in a crowded city. Louisiana draws the line at knowable risks. For strict liability to apply there must be foreseeability of harm.

Id. at 36.

132. Halphen v. Johns-Manville Sales Corp., 752 F.2d 124 (5th Cir. 1985) (en banc).

133. *See supra* notes 39-43 and accompanying text.

134. *See supra* notes 44-48 and accompanying text.

135. *See supra* notes 49-56 and accompanying text.

136. *See supra* notes 58-69 and accompanying text.

adequate warning or adopt an alternate design to make the product safer."[137]

Under pure strict liability, the court set out two categories of liability: (1) products which are unreasonably dangerous per se and (2) products which are unreasonably dangerous in construction or composition.[138] The court then delineated four categories under what it considered to be the more recent theories of strict liability: (1) unreasonably dangerous because of a failure to warn about "a danger related to the way the product is designed"; (2) unreasonably dangerous because "[a] reasonable person would conclude that the danger-in-fact, whether foreseeable or not, outweighs the utility of the product"; (3) unreasonably dangerous because "[a]lthough balancing under the risk-utility test leads to the conclusion that the product is not unreasonably dangerous per se, alternative products were available to serve the same needs or desires with less risk of harm"; and (4) unreasonably dangerous because "[a]lthough the utility of the product outweighs its danger-in-fact, there was a feasible way to design the product with less harmful consequences."[139]

Under *Halphen*'s pure strict liability categories a product is "unreasonably dangerous per se if a reasonable person would conclude that the danger-in-fact of the product, whether foreseeable or not, outweighs the utility of the product."[140] Under this category, knowledge is irrelevant because the focus is on the product, not the manufacturer. For a product to be unreasonably dangerous in construction or composition, it must contain "an unintended abnormality or condition [at the time it leaves the control of the manufacturer] which makes the product more dangerous than it was designed to be."[141] According to the court, knowledge is not relevant in this category because the manufacturer failed to conform to its own standard. Thus, a manufacturer could be liable for unknowable risks.

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137. Halphen v. Johns-Manville Sales Corp., 484 So.2d 110, 113 (La. 1986). A question I must pose at the outset of this section is did the court distinguish different theories of strict liability here, or strict liability from negligence and in the process confuse itself.

138. *Id.* at 114.

139. *Id.* at 115.

140. *Id.* at 114 (citations omitted).

141. *Id.* (citations omitted).

The court, however, did find knowledge relevant in three of the four more recent theories of products liability. Under a failure to warn theory, the court stated that in performing its duty to provide an adequate warning, "a manufacturer is held to the knowledge and skill of an expert. It must keep abreast of scientific knowledge, discoveries, and advances and is presumed to know what it imparted thereby."[142] The court then found that the second category in these more recent theories was identical to its unreasonably dangerous per se category and that the analysis was the same. Liability then was limited under these latter categories to knowable risks.

Under the third of these categories, when an alternate product was available which posed less harm, the court stated that "the standard of knowledge, skill and care is that of an expert, including the duty to test, inspect, research and experiment commensurate with the danger."[143] The court required the same level of knowledge under the final theory in which a manufacturer is charged with the failure to use a less harmful, feasible design.[144]

Thus, the court answered the Fifth Circuit's certified question by concluding that "a manufacturer may be held liable for injuries caused by an unreasonably dangerous product, although the manufacturer did not know and reasonably could not have known of the danger."[145] The court's rationale for its answer lay in the principle of legal fault in Civil Code articles 2317 through 2322.[146] The court rested its analysis on the strict liability opinions in *Loesher v. Parr*,[147]

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142. *Id.* at 115 (citing Keeton, *Product Liability--Problems Pertaining to Proof of Negligence*, 19 Sw. L. J. 26, 30-33 (1965)). *Cf. supra* notes 83-84 and accompanying text.

143. *Id.* (citing Brady v. Melody Homes Mfg., 121 Ariz. 253, 589 P.2d 896 (1979); 2 Frumer & Friedman, *Products Liability* § 16A[4][f][iv][C] (1986)).

144. *Id.*

145. *Id.* at 116.

146. *See supra* section II(A)--notes 10-22 and 29-34 and accompanying test.

147. 324 So.2d 441 (La. 1975). In *Loescher*, the court found a homeowner strictly liable where a decayed tree on its property fell and damaged a neighbor's automobile.

Holland v. Buckley,[148] *Turner v. Bucher*[149] and *Olsen v. Shell Oil Co.*[150]

However, the court's reliance on custodial liability does not provide a sound rationale for disregarding knowledge in asbestos and other related cases. In all of the examples cited by the court, the dangers are discoverable, even if not obvious. For example, the owner of the decaying tree in *Loescher* could have discovered the state of his tree had he taken a sample of the core of the tree. Such information is not beyond the grasp of technology--albeit it may be impractical for tree owners annually to sample the cores of their trees to determine if they are rotting. However, such risks *are* knowable. As explained by Judge Clark in his *Halphen* dissent, some risks are foreseeable even if they are not preventable. The pre-*Halphen* jurisprudence relies on Civil Code articles which are written from the perspective expressed by Judge Clark in his dissent.

Articles 2317 through 2322 are a product of a rural society which had not experienced industrialization. One can hardly argue that the activities of mischievous children are as unforeseeable as the dangers of asbestos were at the beginning of this century. To say that knowledge is relevant for liability under Civil Code articles 2318 and 2321 is to state the obvious. The antics of children have always produced some injury. What animal is not capable of biting or damaging someone? The risks contemplated by these Code articles are

148. 305 So.2d 113 (La. 1973). In *Holland*, the court held that a dog owner is strictly liable for the dog's first bite of another individual even if the dog owner could not have known of the dog's propensity to bite. The court's reliance on this decision is misplaced because the Civil Code specifically addresses the liability of an animal owner in article 2321. *See* La. Civ. Code Ann. art. 2321 (West 1979). Knowledge is specifically not mentioned in article 2321.

149. 308 So.2d 270 (La. 1975). In *Bucher*, the parents of a child were held strictly liable for the child's acts even if the parents could not have prevented the child's actions. Once again, the court's reliance is misplaced on this opinion because the Code in Civil Code article 2318 specifically establishes such liability regardless of an ability to prevent such acts. *See* La. Civ. Code. Ann. art. 2318 (West Supp. 1990).

150. 365 So.2d 1285 (La. 1979). In *Olsen*, the court similar to its decision in Loescher held that a building owner was liable for the dangerous conditions in its premises in spite of the owner's ignorance and ability to detect such defects. *Olsen* is also inapposite to a consideration of asbestos. Its justification also lay in the Code in article 2322. *See* La. Civ. Code Ann. art. 2322 (West 1979).

either known or knowable. The Code on its face does not contemplate liability for unknown risks.

The Louisiana Supreme Court placed asbestos which, in and of itself is not defective, but which is dangerous if inhaled by humans, in the same category as items such as the Dalkon shield or the tampons which caused toxic-shock syndrome. These latter items were dangerous because of their design and their risks outweighed their utility. While the risk-utility balance may make sense with these items, it hardly makes sense with a product like asbestos which is not designed by anyone. The movement away from fault as embodied in article 2315 produces this anomaly which the Louisiana Supreme Court attempted to justify.

Legal fault is embodied in Civil Code articles 2317 through 2322 because the tortfeasors in those situations should know of the risks and dangers posed by the situations. The information is available, even if a great deal of effort is required to obtain it. Therefore, strict liability under these Code articles does not blaspheme the civilian notion of fault in article 2315. These tortfeasors are at fault because the information was available, and they could have found it. In the products liability arena, such information is not always available unless a manufacturer is held to a god-like knowledge with respect to all of the risks which new products have been known to pose. Such a standard is as ludicrous as disregarding knowledge *in toto* for products such as asbestos which in and of themselves are not defective but which may cause adverse affects on humans. Justice Marcus described the majority's error in his dissent:

> To impose liability on a manufacturer when the defects in its product were not discoverable under the state of the art would require a presumption that the manufacturer knew what it could not have known. Such a presumption would be fundamentally unfair and would impose liability on a manufacturer who was powerless to prevent the injury.[151]

151. *Halphen*, 484 So.2d at 121 (Marcus, J., dissenting).

A recent court of appeals case following *Halphen* illustrates the incorrect consequences that result from a products liability jurisprudence which disregards knowledge.

C. The *Halphen* Progeny

An example of the error that can result from the *Halphen* products liability categories was the Louisiana Third Circuit Court of Appeals decision in *Brown v. Sears Roebuck & Co.*[152] In *Brown*, two-year-old Marcus Brown sustained injuries when he placed his finger "into the air space separating the moving tread from the left wall of the escalator."[153] The trial court in *Brown* granted the plaintiff's motion for a directed verdict on the issue of liability. On appeal, the Third Circuit relied on the *Halphen* court's citation of *Hunt v. City Stores, Inc.*,[154] in its discussion of the unreasonably dangerous per se category and held that the escalator--which was manufactured by Westinghouse Electric Corporation--was unreasonably dangerous per se.[155] The court ignored the defendants' argument that the utility of an escalator outweighs the risk it poses to young children.[156] The Third Circuit affirmed the trial court's directed verdict on the issue of liability because, in the Third Circuit's opinion, the escalator was unreasonably dangerous per se although it conformed to the requirements of the American National Standards Institute for escalators--arguably the state-of-the-art standards for escalators.[157] Thus, the defendants were deprived of having the jury decide whether the escalator met accepted standards.

The supreme court granted a writ of certiorari to consider whether the straightforward application of its *Halphen* test required that a product as useful as an escalator is to be classified as unreasonably dangerous per se.[158] Preempting a mass removal of escalators from Louisiana, the supreme court emphatically stated, "*Hunt* did not hold

152. 503 So.2d 1122 (La. Ct. App. 3d Cir.), *aff'd on other grounds*, 514 So.2d 439 (La. 1987).
153. *Id.* at 1124.
154. *See supra* notes 49-56 and accompanying text.
155. *Id.* at 1128-29.
156. *Id.*
157. *See id.* at 1124-25.
158. 506 So.2d 105 (La. 1987).

that escalators are unreasonably dangerous as a matter of law."[159] Choosing to read *Halphen* narrowly to avoid obviously absurd consequences, Justice Watson wrote for the court that although *Halphen* cited *Hunt* in its discussion of products which are unreasonably dangerous per se, *Halphen* only concluded that a manufacturer could be liable regardless of knowledge in the case of a product unreasonably dangerous per se.[160] Justice Watson then proceeded to describe how useful escalators are.[161]

Justice Watson's distinction, however, made very little difference. The Third Circuit's opinion properly applied the *Halphen* classifications. In its technical terms, if the risks posed outweigh the utility, then a product should be held to be unreasonably dangerous per se. Implicit in the Third Circuit's analysis was that under *Halphen*, knowledge is irrelevant. Clearing up the confusion that was evident in the Third Circuit's opinion, the supreme court stated, "There is no question that the injury here was foreseeable, which would make the manufacturer liable under *Weber* . . . ."[162] Thus, the supreme court indicated that because the risks posed were or should have been within the defendants' knowledge, the defendants were liable--an apparent limitation on the spirit of *Halphen*.

In *Strain v. Mitchell Manufacturing Co.*,[163] the Louisiana Fourth Circuit Court of Appeals held a manufacturer liable for either the failure to warn of the weight of a cafeteria table or for not designing the table in a less harmful way.[164] Mary Strain sustained injuries when she "attempt[ed] to operate a spring loaded cafeteria table."[165] Although she had folded and stored these tables on a regular basis over a four-year period, she was injured one day when a co-worker "failed to bear her share of the weight while lifting the table."[166] Based on

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159. *Brown*, 514 So.2d at 442.
160. *Id.*
161. *Id.* at 442-44.
162. *Id.* at 445.
163. 534 So.2d 1385 (La. Ct. App. 4th Cir. 1988), *writ denied*, 537 So.2d 1165 (La. 1989).
164. *Id.* at 1389. Plaintiffs did not choose any of the theories in *Halphen* until on appeal in the Fourth Circuit. *Id.* at 1387. One must wonder what trial strategy one must take in the presentation of evidence if one has no settled theory of liability.
165. *Id.* at 1386.
166. *Id.*

scattered evidence concerning the table's weight and the closing mechanism which operated the table's legs, the jury found the manufacturer liable. No evidence was presented which established by a preponderance of the evidence that the table was dangerous to normal use as required by *Weber*, nor did the plaintiff prove that a table is unreasonably dangerous per se.[167] How could a cafeteria table be unreasonably dangerous per se? How could the failure to warn of a table's weight be unreasonably dangerous to normal use given Strain had regularly stored the table for over a four-year period?

Unlike the Third Circuit in *Brown*, the Fourth Circuit in *Strain* was fortunately not lacking in common sense to the point of calling a cafeteria table unreasonably dangerous per se. The decision did hold the manufacturer liable for either a failure to warn or for not adopting a less harmful design. However, it held a manufacturer liable because someone who had repeatedly lifted a table for four years could no longer lift that weight. Was this the manufacturer's fault, or Strain's fault for not realizing the weight?

The *Strain* opinion illustrates the danger of absolute liability under *Halphen* and the paternalistic approach that courts have taken. This all-encompassing liability removes predictability from the law. Manufacturer's as well as consumers need to know where the lines of liability are so that all can choose the appropriate course of behavior. To remove all responsibility from the users in this context arguably will discourage manufacturers from producing or selling their products in Louisiana by placing all of the risks on a manufacturer.[168] Even if a manufacturer could anticipate that someone would lift more than his share and be injured, are we prepared to make the manufacturer the insurer against all risks?

Finally, in *Toups v. Sears, Roebuck & Co.*,[169] the Louisiana Supreme Court reversed both the trial court's and Fourth Circuit's findings that a hot water heater was not defective. In Toups, three-

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167. *Id.* at 1390 (Barry, J., dissenting).

168. *See Committee Hearing, supra* note 7, at 19-26 (statements of Wayne Fontana and Representative Robert Garrity).

169. 507 So.2d 809 (La. 1987).

year-old Shawn Toups was burned when a hot water heater exploded.[170] Shawn's twelve-year-old brother had finished cutting the grass and placed both the lawn mower and a gasoline can in a shed where the hot water heater was located. Shawn had gone outside to play.[171] When the hot water heater ignited the gasoline, there was an explosion which burned Shawn.[172]

Although this case is tragic, it exemplifies the unfairness to which manufacturers may be subjected by the potential absolute liability under *Halphen*.[173] The Fourth Circuit affirmed the trial court's determination that the hot water heater was not defective in light of the evidence indicating that the gasoline can was knocked over and spilled, that Shawn's brother had negligently left the can open, and that Shawn's parents had failed to supervise his activities.[174] Although the case turned on evidentiary issues, implicit in the supreme court's analysis was that manufacturers will be liable under *Halphen* for injuries caused regardless of the negligence of the injured party and regardless of the quality of the evidence put forth in a duty to warn case. In all reality, would any hot water heater not be defective if gasoline were spilled near it?

While not all cases subsequent to *Halphen* have produced outlandish results,[175] *Halphen* opened the door for unpredictability

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170. *Id.* at 811.
171. *Id.*
172. *Id.*
173. For an overall discussion of *Toups'* weaknesses, see Note, *TOUPS V. SEARS, ROEBUCK AND CO.: Admissibility of Subsequent Remedial Measures in Products Liability Cases*, 62 Tul. L. Rev. 660 (1988).
174. Toups v. Sears Roebuck & Co., 499 So.2d 344, 346-47 (La. Ct. App. 4th Cir. 1986), *rev'd*, 507 So.2d 809 (La. 1987).
175. *See, e.g.*, Ingram v. Caterpillar Machinery Corp., 535 So.2d 723 (La. 1988) (manufacturer of forklift liable for failure to warn that forklift truck may laterally overturn); Bloxom v. Bloxom, 512 So.2d 839 (La. 1987) (automobile manufacturer not liable for defect in automobile or for failure to warn for damages caused by fire resulting from plaintiff's parking recently driven car over hay in barn); Purvis v. American Motors Corp., 538 So.2d 1015 (La. Ct. App. 1st Cir. 1988) (manufacturer of Jeep CJ-5 liable because of design defect); Nevils v. The Singer Co., 533 So.2d 157 (La. Ct. App. 5th Cir. 1988) (portable circular saw not defective due to lack of "riving knife" and "an automatic blade brake"); Duncan v. Louisiana Power & Light Co., 532 So.2d 968 (La. Ct. App. 5th Cir. 1988) (manufacturer of scaffolding not liable for failure to warn or for defective design of scaffolding); Savoie v. Deere & Co., 528 So.2d 724 (La. Ct. App. 5th Cir. 1988) (manufacturer of tractor not liable for alleged designed defect causing fire); Gines v. State Farm Fire & Casualty Co., 516 So.2d 1231 (La. Ct. App. 2d Cir. 1987)

and potentially absolute liability in some cases for manufacturers. The 1988 reform legislation was aimed at establishing predictability in Louisiana products liability law.[176]

IV. The 1988 Louisiana Products Liability Act

A major purpose of the 1988 Louisiana Products Liability act is to overrule *Halphen* by eliminating the unreasonably dangerous per se category and by providing for a state-of-the-art defense for manufacturers.[177] The legislation established the "four traditional ways under traditional products liability doctrine that a product may be unreasonably dangerous and . . . [may] subject . . . manufacturers [to] the liability for damage caused by a product."[178] According to John Kennedy, Governor Charles "Buddy" Roemer's spokesman to the House Committee on Civil Law and Procedure,

> [M]y instructions, from the governor, were to draft legislation that is not fair to either or, or not unduly fair or unfair to any particular product, to plaintiffs or defendants. My instructions were to try to draft a bill that reflects mainstream product liability law in the United States.[179]

Thus, the professed purpose of the legislation is to establish fairness to all concerned in light of the current trends in products liability law.

In furtherance of its proposed goal, the Louisiana Products Liability Act[180] outlines four theories of recovery: (1) unreasonably

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(manufacturer of gas central heating unit liable for failure to warn with respect to proper installation procedures), *writ denied*, 519 So.2d 127 (La. 1988); Safeco Ins. Co. v. Baker, 515 So.2d 655 (La. Ct. App. 3d Cir. 1987) (manufacturer of fireplace not liable for failure to warn when installer did not read instructions), *writ denied*, 519 So.2d 130 (La. 1988); Rhoto v. Ribando, 504 So.2d 1119, 1123 (La. Ct. App. 5th Cir.) ("A drug manufacturer has no duty to warn consumer directly of any risks or constraindications associated with its product."), *writ denied*, 506 So.2d 1225 (La. 1987).

176. *Committee Hearing, supra* note 7, at 6-7 (statement of John Kennedy), 10 (statement of Wayne Fontana).

177. *Id.* at 5 (statement of John Kennedy).

178. *Id.*

179. *Id.* at 18 (statement of John Kennedy).

180. La. Rev. Stat. Ann. §§ 9:2800.51-:2800.59 (West Supp. 1990).

dangerous in construction or composition;[181] (2) unreasonably dangerous in design;[182] (3) unreasonably dangerous because of inadequate warning;[183] and (4) unreasonably dangerous because of nonconformity to express warranty.[184] The Act then provides that a manufacturer will not be liable if it can prove that it did not or could not have known of the defect or alternative design "in light of the then-existing reasonably available scientific and technological knowledge."[185] The act also takes into consideration "then-existing economic practicality" when the theory of liability is that the manufacturer failed to adopt an alternate safer design.[186]

A. Impact on *Halphen*

The 1988 Louisiana Products Liability Act ideologically obliterates the underlying theory of *Halphen*. *Halphen*'s *raison d'etre* rests in the United States Fifth Circuit Court of Appeals' difficulty with the state-of-the-art defense under Louisiana law. In one fell swoop, the Louisiana legislature has pronounced that the state-of-the-art defense is viable in Louisiana. The new legislation is more consistent with the approach taken by the *Restatement* and Judge Wisdom's analysis in *Borel*.[187] Unlike the analysis in *Halphen*, the 1988 Act is consonant with the Louisiana jurisprudence which existed before *Halphen* and which considered the knowledge of a manufacturer as relevant to the issue of liability.

By adopting an approach that is consistent with Comment "j" of the *Restatement (Second) of Torts § 402A*,[188] Louisiana products liability law has returned to the course charted by Justice James Dennis in *DeBattista v. Argonaut-Southwest Insurance Co.*[189] The new

181. *Id.* § 9:2800.55.
182. *Id.* § 9:2800.56.
183. *Id.* § 9:2800.57.
184. *Id.* § 9:2800.58.
185. *Id.* § 9:2800.59.
186. *Id.* § 9:2800.59(A)(3).
187. While the current reform legislation can be explained in terms of fault as rooted in articles 2315 and 2316, the influence of the common law on the legislation is apparent. *See generally Prosser and Keeton, supra* note 16, §§ 95-99.
188. Restatement (Second) of Torts § 402A comment j (1965).
189. 403 So.2d 26 (La. 1981). For a discussion of DeBattista, *see supra* notes 58-69 and accompanying text.

legislation implicitly returns Louisiana products liability law to the codal precepts in Civil Code articles 2315 and 2316. With knowledge as the fulcrum of the analysis, the manufacturer's actions will be judged against a reasonable standard. Although this analysis may be academically characterized as based on "legal fault," the new legislation is in spirit, if not actually in fact, a descendant of Louisiana's civilian-based tort law. It would be hypertechnical to distinguish what a reasonable manufacturer would have done to make its product safer from what a reasonable person would have done to avoid article 2315 liability. The civilian notion of fault has once again returned in full force to Louisiana products liability law. The legislature has achieved a civilian solution which is consistent with the approaches taken by Louisiana's common-law brethren. Such a solution is reminiscent of the jurisprudential solutions adopted by the supreme court under the leadership of Justice Tate in the 1970s.[190]

B. Societal Impact

1. Will the New Legislation Stimulate the Economy?

The 1988 reform legislation will hold a manufacturer to the level of knowledge reasonably available to members of the scientific and technological communities. Supporters of the new products liability legislation argued that because a manufacturer will be judged by the knowledge reasonably available to these groups, manufacturers will arguably have a basis from which to predict what is required for each product. According to Mr. John Kennedy, the governor sought to achieve fairness in Louisiana product liability law through greater predictability.[191] The enactment sought to encourage manufacturers to come to Louisiana, or at least not to discourage them from coming to Louisiana. Mr. Wayne Fontana, Chairman of the Liability Task Force, argued to the Committee on Civil Law and Procedure (the Committee) that members of industry have "looked at Louisiana and [have] looked

190. Murchison, *supra* note 57, at 25-31 ("The content of the decisions of the Louisiana civilians [Tate, Barham, Dixon, and Calogero] has been equally American.").

191. *See Committee Hearing, supra* note 7, at 4-8 (statement of John Kennedy), at 19 (statement of Wayne Fontana).

at the liability laws and . . . [have] determined that Louisiana isn't a good place to do business because of the liability laws."[192]

However, this justification for changing Louisiana's products liability law was quickly rebutted. Representative Robert Garrity proclaimed, "I've listened to the news, read the papers, and all I heard was a collapse of the oil industry and the bottom falling out of the oil industry and I didn't hear . . . . I never heard a single, solid word about our products liability law laying somebody off[.]"[193] Debate before the Committee revealed that the law of the place where the product is manufactured can make very little difference as to the applicable law in a products liability case.[194] The Committee hearing revealed that no matter where a product is manufactured, if the product causes damage in Wisconsin, Wisconsin law will apply and that similarly if the product causes damage in Louisiana, *Halphen* would apply.[195] When pressed by Representative Garrity, Mr. Fontana admitted that the relationship between economic development and product liability law was not such that "if you pass the product liability [legislation,] . . . tons of jobs . . . are going to come to Louisiana."[196] The supporters of the legislation had to concede that the law of the forum was only one factor in the "big picture."[197]

Although the new product liability legislation will not cause a turnaround in Louisiana's depressed economy, the legislation can have a positive effect on the manner in which manufacturers from around the world do business in Louisiana. As conceded by Mr. Fontana, the product liability law of a state is a single factor in a big picture: "one of the hurdles that business has to jump over when they decide whether [they will come] to Louisiana . . . is the legal climate . . . ."[198] The query then is what effect will the new legislation have.

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192. *Committee Hearing, supra* note 7, at 19.
193. *Id.*
194. *Id.* at 20-22.
195. *Id.*
196. *Id.* at 22.
197. *Id.* at 22-23.
198. *Id.* at 23.

If the costs of injuries caused by products are imposed on a manufacturer, a manufacturer will pass these costs on to the consumer.[199] A manufacturer will also seek to "reduce costs to an optimal level by undertaking safety-related measures."[200] However, for a manufacturer to incorporate the costs of tort liability into its product, it is necessary that the manufacturer be able to predict "the total liability that a product line will incur over its lifetime."[201] Thus, if a manufacturer can accurately predict a range of liability based on a fixed standard, there will be an incentive for the manufacturer to do so rather than incur unforeseen liability in the future. Absent a predictable basis of liability, the manufacturer needs to wander aimlessly, attempting to ascertain all potential risks, both knowable and unknowable. Assuming competitive markets and that corporations are driven to minimize costs, manufacturers would be prone to weigh potential liability costs against a quest for unknown and even unknowable risks.[202]

The 1988 Louisiana Products Liability Act decreases the likelihood that manufacturers will trade off safety costs for estimated tort liability. Given the standard established by the legislation, manufacturers can now gauge their products against the knowledge now available to the academic and technological communities. This information is available and can serve as a cornerstone for an industry's appraisal of the future impact of a new product. Able to look forward from an ascertainable standard, manufacturers can more accurately appraise their potential liability and take action either by adopting alternative designs or by providing adequate warnings. The cost of these measures will be passed on to the consumers of such products. Thus, although this certainty may not create "tons of jobs" in Louisiana, it will at a minimum serve not to discourage industry from doing business in Louisiana because anyone now entering Louisiana's stream of commerce will know the standard by which their products will be judged.

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199. *See* Siliciano, *Corporate Behavior and The Social Efficiency of Tort Law*, 85 Mich. L. Rev. 1820, 1825 (1987).

200. *Id.*

201. *Id.* at 1830.

202. *See generally id.* at 1823-33.

2. The Liability Insurance Crisis

Added predictability in tort law has also served as the supposed cure for stabilizing insurance premiums for liability insurance. However, will the law of a single state have any impact on insurance premiums?

To say that recent trends in tort law have caused a crisis in the insurance industry is no surprise.[203] Recently, premiums for insurance for liability for goods such as vaccines, aircraft, and sports equipment and for services such as obstetrics, ski lifts and commercial trucking have increased drastically.[204] In some of these cases, insurers have decided not to underwrite any risks.[205] The crisis in the insurance industry has been attributed to the unpredictability and magnitude of the risks to be insured at the time the insurance was written.[206] If insurers cannot predict "with certainty how tort law will evolve, they [will] feel compelled to raise premiums to meet the demands of what appears to be a trend of ever-expanding concepts of liability."[207] The "abnegation of predictability" has produced "unintended and undesirable results" in that manufacturers and insurers "fear that insurance losses [will] be too prohibitive for them to pass on to the public."[208] When manufacturers consider premiums to be cost prohibitive, they begin to self-insure, thus decreasing the pool of insureds.[209] The exodus of insureds from the insurance pools

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203. *See generally* Berger, *The Impact of Tort Law Development on Insurance: The Availability/Affordability Crisis and Its Potential Solutions*, 37 Am. U.L. Rev. 285 (1988); Epstein, *The Legal and Insurance Dynamics of Mass Tort Litigation*, 13 J. Legal Stud. 475 (1984); Mooney, *The Liability Crisis--A Perspective*, 32 Vill. L. Rev. 1235 (1987); Priest, *supra* note 9.

204. Priest, *supra* note 9, at 1521 (citations omitted).

205. *Sorry, Your Policy is Cancelled*, Time, March 24, 1986, at 18. *See also* N.Y. Times, March 26, 1986, at C12, col. 4 (coverage refused for wine tasting); N.Y. Times, February 1, 1986, at col. 1 and Wall St. J., February 3, 1986, at 5, col. 1 (coverage withdrawn for intrauterine devices); Wall St. J., January 21, 1986 (coverage refused for day care).

206. Berger, *supra* note 201, at 300-08.

207. *Id.* at 312 (citing Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 Vand. L. Rev. 593, 644-45 (1980)).

208. *Id.* (citing Schwartz & Means, *The Need for Federal Product Liability--and Toxic Tort Legislation: A Current Assessment*, 28 Vill. L. Rev. 1088, 1104 n.71 (1983)).

209. Priest, *supra* note 9, at 1560.

restricts insurance availability because the insurers experience a loss of funds within their risk pools.[210]

Insurance has been described as providing "a method for individuals to equalize the amount of money available to them over diverse states of the world--states in which losses occur and those in which there are no losses."[211] The contractual relationship established by an insurance policy requires that "[t]he insured pay a premium, reducing his or her current wealth, in return for the insurer's agreement to pay some monetary amount to the insured should a loss occur."[212] Providing insurance requires that the insurer be able to characterize losses in a probabilistic manner.[213] The probabilistic quality of a loss enables an insurer to charge an insurance premium which "is set equal to the value of the expected loss for the period, plus a share of the costs of administering the system, called loading costs."[214]

The destabilization of insurance premiums in the 1970s and 1980s has been attributed to several factors. Three factors to consider in an analysis of why insurance premiums fluctuate are (1) flaws in the manner the industry calculates premiums;[215] (2) the relationship between interest rates and insurance company investments;[216] and (3) the insurance industry's lack of full discipline in price setting as a competitive industry.[217] However, although the analysis of premiums may not be simply related to tort law, "the pricing of insurance premiums does require some stability of risk."[218] Any instability in tort law will have a disturbing effect on insurance premiums.[219]

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210. *Id.* at 1550-53. For an excellent discussion about the operation of the insurance industry, *see id.* at 1539-50.

211. Priest, *supra* note 9, at 1539.

212. *Id.*

213. *Id.*

214. *Id.* at 1540 (emphasis in original).

215. Perlman, *Products Liability Reform in Congress: An Issue of Federalism*, 48 Ohio St. L.J. 503, 504 (1987) (citing *Interagency Task Force On Product Liability, Final Report, U.S. Dep't of Commerce* V-9--13 (May 1977)).

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

Louisiana's 1988 products liability legislation provides the predictability which *Halphen* removed from our law. How much will this change affect insurance premiums for Louisiana insureds? This restoration of predictability will enable insurers to evaluate properly risks on the basis of knowable risks, rather than on prophecies of science, later discoveries, or the vagaries of future decisions of the Louisiana Supreme Court. With the elimination of the unreasonably dangerous per se category, manufacturers and insurers will no longer have to anticipate under the present state-of-the-art technology whether a court in the future will consider their products more harmful than useful under future technological knowledge.

A manufacturer can now confidently appraise the design of a product and alternatives in light of the "reasonably available scientific and technological knowledge."[220] This information will also be available to insurers who can use this objective standard to evaluate future risks so that a sufficient pool of funds in allocated for losses. However, the predictability added back into Louisiana law will affect the premiums only to the degree that a state's law is considered by insurers in setting premiums. Because national manufacturers of products place their products in the national stream of commerce, such manufacturers are subjected to the laws of up to fifty states.[221] Thus, even if state law is the sole criterion for determining premiums, Louisiana is only one of fifty states in which national manufacturers sell. Moreover, one commentator recently has written, "I doubt that manufacturers adjust their designs, warnings, or manufacturing techniques to comply with the differences among jurisdictions in the common law of products liability. . . . [Furthermore,] the mobility of products prevents producers from knowing which state law will govern a risk that ultimately materializes."[222] Although the predictability added by the new legislation will have a theoretical impact on insurance premiums in Louisiana, that impact will at most be realized by Louisiana manufacturers who do all of their business in Louisiana.

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220. *See* La. Rev. Stat. § 9:2800.59, Act No. 64, 1988 La. Sess. Law Serv. No. 2 at 113 (West).

221. The lack of uniformity among the fifty state jurisdictions has served as part of the battle cry for advocates of federal tort reform legislation. See Perlman, *supra* note 213, at 504.

222. *Id.* at 506.

Any manufacturer, either in or out of Louisiana, who crosses state lines complicates the risk calculus to include the laws of several states. Thus, the law of any one state is diminished to being only a factor.

This dimunition of significance does not defeat the theoretical stabilization of insurance premiums. It merely places the alleged effects into their proper context. Because insurers need to rely on probabilities of risk, certainty in Louisiana law will aid insurers and will serve as a positive bargaining tool for Louisiana insureds. Over time as "reform" legislation such as Louisiana's 1988 enactment is applied, the concrete standards which such legislation provides will take root and influence product liability law on a national basis. When such concrete standards do become established, insurers will have standards established for their risk pools. Established standards for risk pools would allow insurers to predict future loses more accurately and thus charge more accurate premiums. Such stabilization in the insurance industry will make insurance more economically attractive for manufacturers to purchase. The return of parties to the insurance pool will further increase the stability of the insurance industry and provide larger pools of funds and thus add more to the stability of the insurance industry.[223]

The cause and effect argument is theoretical and relies on the existence of a general standard. The need for uniformity has led some advocates to call for federal tort reform legislation.[224] Such legislation would necessarily preempt state product liability law.[225] However, such legislation raises questions of federalism and whether such legislation would be an intrusion on state autonomy.[226] Federal intervention has been criticized as ineffective and unnecessary.[227] Because of the great difference of opinion over federal tort reform legislation, such legislation has not been successfully enacted.

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223. *See* Priest, *supra* note 9, at 1560-63.

224. *See generally* Perlman, *supra* note 213. For the most recent proposed federal legislation, *see, e.g.*, S. 2631, 97th Cong., 2d Sess. (1982); S. 44, 98th Cong., 2d Sess. (1984); S. 100, 99th Cong., 1st Sess. (1985); S. 2720, 99th Cong., 2d Sess. 1986); *see also* S. Rep. No. 97-670, 97th Cong., 2d Sess. (1982); S. Rep. No. 98-476, 98th Cong., 2d Sess. (1984); S. Rep. No. 99-422, 99th Cong., 2d Sess. (1986).

225. *See, e.g.*, H.R. 4460, 99th Cong., 2d Sess. (1986).

226. *See* Perlman, *supra* note 213, at 507.

227. *See, e.g., id.* at 506-10.

Whether federal legislation is necessary is outside the scope of this article. However, because Congress has been unable to pass comprehensive legislation, the states have been left to themselves to establish product liability standards. Louisiana's 1988 legislation represents one state's attempt to place some rhyme and reason into products liability law. Although by itself the Louisiana legislation will probably not cause a radical reform and stabilization of insurance premiums, it will serve as one more brick in the wall of reform. The legislation will provide needed predictability in Louisiana. Although the legislation will not in and of itself stabilize insurance premiums, it will serve as a stabilizing factor for insureds--the full extent of which only time will tell.

V. Conclusion

The 1988 Louisiana Products Liability Act establishes a predictable standard in Louisiana products liability law. The reform legislation corrects the error of *Halphen* by removing per se liability and by codifying the state-of-the-art defense for manufacturers. The defense has proven workable even though it imposes an extremely high burden of proof, similar to Judge Wisdom's analysis in *Borel*. The removal of the per se category and the return to manufacturer knowledge as a fulcrum for liability returns Louisiana products liability law to a fault-based system and its civilian tradition.

Although the legislation in and of itself will neither stimulate Louisiana's economy nor stabilize insurance premiums, the predictability provided by the new legislation will serve as a positive factor in the accomplishment of both goals. The new legislation will aid our economy by removing one negative factor from the consideration of manufacturers who are considering doing business in or even moving to Louisiana. The 1988 enactment will be a positive force in the insurance environment because manufacturers and insurers will be able to predict more accurately future risks and losses. The new legislation is a small but positive step, signifying a new era in Louisiana, one in which we are willing to change for the better.