THE ROLE OF THE FEDERAL COURT IN THE EXPANSION OF THE AMBIT OF LIABILITY OF MANUFACTURERS: CONCEPTUAL APPROACHES AND A SUGGESTED SOLUTION

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I. INTRODUCTION

In recent years the tort of "products liability" has been one of the most rapidly expanding areas of the law. The term "products liability" is usually applied to the legal liability of a manufacturer, processor or seller of products which cause injury to the person or property of a buyer, user or other third-party as a result of a defect attributable to the manufacturer, processor or seller.[1] Sometimes the term "enterprise liability" has been used to describe this kind of liability.[2]

Products liability as a uniform body of law does not exist in this country. It is a variegated patchwork of decisional and statutory law, with regulatory accretions, differing from one state to another, from one federal jurisdiction to the next and sometimes even within the same jurisdiction. Its ramifications are diffuse since multiple courts, legislatures and government bureaus appear eager to add their contribution to this complex matrix of the law. In the 1950's, a practicing attorney had a difficult time finding references of works on the subject. In the 1970's, he may be overwhelmed by the mass of referenced texts, law review articles, seminars, periodicals and other statutory and regulatory sources of information.

This Article is intended to review one small part of the field of products liability. It will give an overview of the federal judiciary's intellectual input

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1. *See* R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY 2d § 1.1, at 2-3 (2d ed. 1974).

2. For an introduction to this area of the law the following authorities will prove helpful: R. HURSH, AMERICAN LAW OF PRODUCTS LIABILITY (1961); Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077 (1965); James, *Products Liability*, 34 TEX. L. REV. (1956); Katz, *Liability of Automobile Manufacturers for Unsafe Design of Passenger Cars*, 69 HARV. L. REV. 863 (1956); Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559 (1969); Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816 (1962); Pawlak, *Duty of a Manufacturer to Properly Design its Products*, FOR THE DEFENSE 7; 8 (Sept. 1967); Wilkinson, *Some Indispensable Elements of Products Liability Cases*, 24 OHIO ST. L.J. 435 (1963); Note, *Manufacturer's Liability for Negligent Design*, 14 DRAKE L. REV. 117 (1965); *Products Liability Symposium*, 19 SW. L. J. 1 (1965); *Symposium on Products Liability*, 24 TENN. L. REV. 787 (1957).

into the vast liberalization of products liability law. Hopefully this will provide legal practitioners with a few guidelines to aid them in understanding this mass of material. Finally, the Article will suggest how some order may be rationalized from the present legal chaos in this field of law.

II. Federal Application of State Law in Products Liability Cases

The substantive approach to products liability law in the federal courts today can be traced in part to the landmark decision of *Erie Railroad v. Tompkins*.[3] The Supreme Court in *Erie* theoretically abolished federal "common law" and required courts in diversity actions to apply and follow the substantive law of the state in which the court is located.[4]

An issue which was left unresolved by the *Erie* decision was what the federal court should do in the situation where the state in question has no substantive law applicable to the issue being litigated. More specifically, what should be done when the particular state has no substantive products liability law on the issue before the federal court? Is the federal court to resort to general common law under those circumstances, or is it free to exercise independent judgment as to what the law of the state should or will be? An early attempt to answer this question was made in *West v. American Telephone & Telegraph Co.*,[5] which held that the federal court must decide what rule of law the state's highest court would adopt in such a case and then apply it.[6] This doctrine is a mutation of a similar concept, first articulated in *Swift v. Tyson*,[7] which the *Erie* court disapproved of and overruled. Notwithstanding, as the result of the *West* case, when a novel legal question arises in a federal court, the court may base its decision on how it thinks the state court should or will rule if confronted with the legal issue in question.

In the 1950's and 1960's, products liability law was an unfamiliar doctrine in most jurisdictions. Before that time courts had available only basic principles of negligence or warranty law to apply in products cases. New concepts of implied warranty and strict liability were just becoming known. Because many early consumer legal actions were brought against distant

3. 304 U.S. 64 (1938).

4. 304 U.S. at 78. For a good background discussion of this topic, see 1A Moore's Federal Practice ¶ .318, at 3247 (2d ed. 1978).

5. 311 U.S. 223 (1940).

6. This method of determining the applicable law has been used in several recent cases. *See, e.g.*, McIntyre v. Everest & Jennings, Inc. 575 F.2d 155 (8th Cir. 1978) (deciding whether state or federal test for sufficiency of evidence should govern); Rigby v. Beech Aircraft Co., 548 F.2d 288 (10th Cir. 1977) (where the court decided Utah would adopt strict liability in tort if presented with the problem); Kudelka v. American Hoist & Derrick Co., 541 F.2d 651 (7th Cir. 1976) (decision on whether to allow a prima facie case on slight circumstantial evidence of liability); Higginbottom v. Ford Motor Co. 540 F.2d 762 (5th Cir. 1976) (decision on Georgia law regarding apportionment of damages in a strict liability case); Greiner v. Volkswagenwerk Aktiengeselleschaft, 540 F.2d 85 (3d Cir. 1976) (in which the court tried to discover the Pennsylvania law regarding the duty of a manufacturer to warn a driver of the handling characteristics of a car).

7. 41 U.S. (16 Pet.) 1 (1842).

manufacturing corporations, litigation was often filed in the federal courts based upon diversity of citizenship. When confronted with the possible applicability of newly conceptualized legal theories, the federal courts were required to find and apply state law. When finding none, they took a more or less "educated guess" as to how the state would rule if confronted with the specific legal issue presented.

At times, the federal courts have engaged in this "guesswork" even when prior applicable state law was not lacking. An example is *Necaise v. Chrysler Corp.*,[8] where one of the legal questions on appeal was whether, in Mississippi, an injured party could recover in negligence against an automobile manufacturer if there was no privity of contract between them. Eloquently, the court stated:

> Under the requirements of the Erie doctrine, we must seek to make "an enlightened guess" as to the law of Mississippi on the question of privity of contract, taking our guidance and illumination from the Mississippi cases on the subject.[9]

The court in *Necaise* noted a 1928 Mississippi case[10] which had ruled no recovery was allowed in the absence of privity. However, the *Necaise* court rejected the case as being too old and out-of-step with the times.[11] Thus, in contravention of its understanding of the requirements of *Erie*, the court reached a decision and applied rationale arguably contrary to the law of Mississippi.[12]

The apparent search by the federal courts for law to hold manufacturers liable for a wide variety of injuries resulting from contract with a broad spectrum of products has led to the creation of a federal common law of products liability which the state courts now follow, effectively reversing the entire concept of the *Erie* doctrine. The following section will explore one particular area of this new federal common law.

III. Creation of Federal Common Law

As the legal profession became more and more acquainted with the basic product liability legal theories of negligence,[13] breach of warranty[14] and strict liability,[15] plaintiff's attorneys and federal judges started to hone their skills by developing hybrid theories of recovery which combined these three basis theories. The most controversial and misunderstood of these hybrids is what

8. 335 F.2d 562 (5th Cir. 1964).
9. *Id.* at 568-69.
10. Ford Motor Co. v. Meyers, 151 Miss. 73, 117 So. 362 (1928).
11. 335 F.2d at 571.
12. *See id.* at 569-72. The Fifth Circuit found support for its decision in dictum in a Missouri case succeeding *Ford* and in two federal cases persuaded by that dictum to discredit *Ford* in interpreting the state of Missouri law on the subject.
13. *See* Begford v. Carlem Corp., 156 N.W.2d 355 (Iowa 1968).
14. *See* Peters v. Lyons, 168 N.W.2d 759 (Iowa 1969).
15. *See* Aller v. Rodgers Mach. Mfg. Co., 268 N.W.2d 830 (Iowa 1978).

is commonly known as the "secondary collision" theory.[16]

In general terms, the secondary collision theory addresses itself to the duty owed by the manufacturer of the product when the alleged faulty design, although not causing or contributing to a collision, produces or enhances an injury received in consequence of the collision. In these types of cases, the "first collision" is the collision the vehicle has with another vehicle or object. The "second collision" is the collision the injured party has with an object in the vehicle (*i.e.*, the dash board, steering wheel, mirror, etc.), which produces or enhances an injury. Courts sustaining recovery under the secondary collision theory have reasoned that the alleged defective design created an unreasonable risk of harm to the injured party.[17] This concept has been extended to the situations where a vehicle ignites on fire after a collision and burns the passengers.[18]

The federal courts were faced with a dilemma when at first a gradual onslaught of secondary collision product liability cases became a flood and was accompanied by little or no substantive state law to guide the courts on theory. Both rulings permitting and denying recovery under the secondary collision doctrine could subsequently be overturned by state courts as the law of their states. Moreover, the legal rulings would seriously affect the lives of injured claimants, the economic conditions of manufacturers and the country as a whole.[19]

The leading case supporting recovery under the secondary collision theory is *Larsen v. General Motors Corp.*,[20] while the leading case against recovery under such circumstances is *Evans v. General Motors Corp.*[21] Generally, all decisions dealing with the secondary collision theory of recovery have looked to either *Larsen* or *Evans* for support. Although the court in *Larsen* addressed the manufacturers' conduct, implying that the secondary collision theory was grounded in the basic theory of negligence, later decisions have broadened *Larsen* to apply it to the alleged defective product itself. Such an approach leads one to believe the secondary collision theory is based upon the theories of strict liability and breach of warranty combined.

More and more, courts are espousing the view that the *Larsen* theory is the majority view and that *Evans* is a minority view. Those courts which support the *Larsen* theory usually cite all or part of a group of federal and

16. For a well reasoned explanation of the genesis of the secondary collision doctrine, see Alexander v. Seaboard Air Line R.R., 346 F. Supp. 320 (W.D.N.C. 1971).

See also Wooten v. White Trucks, 514 F.2d 634, 636 (5th Cir. 1975) (lamenting "[i]t seems ironic that the parameters of decision in this diversity-bound theory of liability should be set by federal cases").

17. *See* Larsen v. General Motors Corp., 391 F.2d 495, 503 (8th Cir. 1968).

18. Nanda v. Ford Motor Co., 509 F.2d 213 (7th Cir. 1974).

19. *See generally* Stewart v. Ford Motor Co., 553 F.2d 130 (D.C. Cir. 1977) (providing a good example of the liberal tendencies of the federal court regarding evidentiary matters in cases such as this); Wooten v. White Trucks, 514 F.2d at 637 & n.8 (setting out the type of jury instruction to give in a secondary collision case).

20. 391 F.2d 495 (8th Cir. 1968).

21. 359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966).

state cases which have been referred to as being in accord with *Larsen*.[22] However, a brief examination of some of the federal cases often cited as support for the *Larsen* decision will reveal that such cases are not as solidly in the *Larsen* column as some courts think. Another criticism that may be lodged against the federal decisions supporting the secondary collision theory is their subjective quality. Frequently, behind the facade of predicting future state law, the federal judges are basing their decisions on what they think the law ought to be.

One example is *Perez v. Ford Motor Co.*,[23] in which the decedents died when the cab of a pickup in which they were riding separated from the chassis and overturned after being hit in the rear by an automobile. Faced with the decision of whether the collision would constitute "normal use" of the vehicle and thus permit the imposition of liability against the manufacturer under Louisiana law, the Fifth Circuit first examined the dichotomy of viewpoints represented by *Larsen* and *Evans*. Under the *Evans* view, the manufacturer is not liable because the purpose of an automobile does not include its involvement in collisions. But under the *Larsen* view, manufacturers have a duty to guard against injuries caused by the foreseeable collisions that frequently and inevitably result from normal automobile use.[24] However, rather than expressly adopting either theory as the law of Louisiana, the court sought to resolve the issue by turning to Louisiana decisions. Accordingly, it carefully distinguished the language of the *Evans* and *Larsen* decisions, which focused upon the "intended use" of the product, from the language of Louisiana decisions, which focused upon "normal use."[25] Nonetheless, the court found that prior Louisiana decisions defining "normal use" were not broad enough to cover the issue of collision in *Perez*.[26] Thus, its conclusion that the occurrence of a collision does not preclude a finding that there was "normal use" of an automobile was based only on its belief of what the Louisiana courts would decide.[27]

Another example of this rather subjective decision-making is *Turcotte v. Ford Motor Co.*,[28] which involved a collision to the rear-end of a 1970 Maverick causing it to burst into flames. The decedent, a passenger in the car, died in the fire. The lower court, in a conflicts of law decision, applied Rhode Island's strict liability law in the case.[29] In light of that determination, the appellate court reviewed the trial court's holding "that under Rhode Island law automobile manufacturers can be held strictly liable for defects in design which do not cause highway collisions but instead exacerbate injuries there-

22. A good example of this judicial tactic can be seen in the district court opinion of Huddell v. General Motors Corp., 395 F. Supp. 64 (D.N.J. 1975) and the cases cited therein.
23. 497 F.2d 82 (5th Cir. 1974).
24. *Id.* at 84-85.
25. *Id.* at 85.
26. *Id.* at 86-87.
27. *Id.* at 87.
28. 494 F.2d 173 (1st Cir. 1974).
29. *Id.* at 180.

from."[30] Noting that this precise question had never before been considered in Rhode Island, the court briefly reviewed *Evans, Larsen* and three federal cases which are cited in *Huddell v. Levin.*[31] The court's review of these cases led it to "agree with the trial court that Rhode Island *would* adopt the *Larsen* interpretation of 'intended use' in construing the doctrine of strict products liability."[32]

Passwaters v. General Motors Corp.[33] is yet another decision which was based primarily upon judicial opinion rather than state law. The plaintiff was a passenger on a motorcycle when his leg was severely cut by ornamental blades protruding from the right rear hubcap of an automobile that side-swiped the motorcycle. The Eighth Circuit grappled with the issue of whether the ornamental blades created a high risk of foreseeable harm to the general public so as to fall under *Larsen.* This issue had never been presented before the Iowa Supreme Court. The court in *Passwaters,* noting its dislike for predicting what law the state supreme court might choose to follow, concluded that "in the present case the Iowa court would apply the doctrine of strict liability to a person in the plaintiff's status."[34]

The oft cited case of *Bremier v. Volkswagen of America, Inc.*[35] is but another example of a federal court's precarious analysis of the law of the state in question to justify its personal decision. In *Bremier* a vehicle hit a 1964 Volkswagen station wagon head-on. The occupants of the Volkswagen died after the vehicle burned, rolled down an embankment and came to rest upside-down. The question before the court on a motion for summary judgment was "whether or not under Maryland law one's involvement in an automobile collision constitutes a normal, intended, ordinary or proper use of an automobile."[36] The court, after citing the conflict between *Evans* and *Larsen,* adopted the *Larsen* approach when it stated:

> The *Larsen* court based its definition squarely on one formulated by the United States Court of Appeals for the Fourth Circuit in Spruill v. Boyle-Midway, Inc., 308 F.2d 79 (4th Cir. 1962). While the court, in *Spruill,* in developing its definition, was applying the law of Virginia, it is more probable than not to believe the Court of Appeals in Maryland would adopt the same definition of "intended use."[37]

Finally, in *Grundmanis v. British Motor Corp.*[38] the plaintiff incurred injuries when an MGB in which he was a passenger collided with another vehicle. In an attempt to review the applicable Wisconsin law with respect to the *Evans* and *Larsen* controversy, the court noted that no Wisconsin

30. *Id.*
31. 395 F. Supp. 64 (D.N.J. 1975).
32. 494 F.2d at 181 (emphasis added).
33. 454 F.2d 1270 (8th Cir. 1972).
34. *Id.* at 1277.
35. 340 F. Supp. 949 (D.D.C. 1972).
36. *Id.* at 952.
37. *Id.*
38. 308 F. Supp. 303 (E.D. Wis. 1970).

Supreme Court decisions or federal court decisions construing Wisconsin law had been presented by the parties' counsel.[39] In denying the defendant's motion to dismiss, the court adopted the dissenting view in *Evans*, thereby basing its decision generally on its feeling of what the law should be.[40]

This sampling of cases illustrates not only the subjectiveness of the federal court decisions concerning the issue of secondary collisions, but also their reinforcing tendencies. Case authority builds and builds as new cases are decided and thus may provide additional authority. It is a vicious cycle, whereby new federal decisions, which are all based only upon what a judge thinks the law in a particular state was rather than what the actual law is. For example, *Turcotte*[41] cited *Bremier*[42] with approval and *Passwaters*[43] cited *Grundmanis*[44] with approval.

One other federal decision cited by *Larsen* proponents is worth mentioning in this regard. In *Knippen v. Ford Motor Co.*[45] the federal court followed other federal decisions and not the law of the District of Columbia in a case in which the plaintiff injured his left leg when he was struck by a car while driving his motorcycle. In dealing with the *Larsen* and *Evans* concepts, the court stated that its own "research has not revealed a case from this jurisdiction which deals dispositively with the issue raised by Ford."[46] The court then briefly reviewed *Evans* and *Larsen* and noted the similarity of the present case to *Passwaters*. Based in part upon the facts that *Passwaters* also was a motorcycle case and that *Passwaters* had adopted *Larsen*, the *Knippen* court also adopted *Larsen*.[47]

An additional complication of basing decisions upon the personal opinions of judges rather than substantive state legal principles is the conflicting "educated guesses" at state law that may result. North Carolina is a state in which there is now divergence of opinion as to whether the doctrine of *Evans* or *Larsen* applies. As of this writing there is no known decision by the North Carolina Supreme Court on the subject. In 1971, two North Carolina federal district court decisions which adopted *Evans* were handed down.[48] Then, in 1976, the Maryland Court of Appeals was confronted with the question of how to interpret North Carolina law on the same point of law.[49] In commenting on the trial court's decision to follow *Evans*, the court stated in part that

39. *Id.* at 306.

40. *Id.* In adopting this viewpoint, the court made the following observation: "It is my opinion that the direction of the law in this area [is] and should lead . . . 'to greater responsibility of the manufacturer' . . . ."

41. Turcotte v. Ford Motor Co., 494 F.2d 173 (1st Cir. 1974).

42. Bremier v. Volkswagen of America, Inc., 340 F. Supp. 949 (D.D.C. 1972).

43. Passwaters v. General Motors Corp., 454 F.2d 1270 (8th Cir. 1972).

44. Grundmanis v. British Motor Corp., 308 F. Supp. 303 (E.D. Wis. 1970).

45. 546 F.2d 993 (D.C. Cir. 1976).

46. *Id.* at 997.

47. *Id.* at 1001.

48. Alexander v. Seaboard Air Line R.R., 346 F. Supp. 320 (W.D.N.C. 1971); Bulliner v. General Motors Corp., 54 F.R.D. 479 (E.D.N.C. 1971).

49. *See* Frericks v. General Motors Corp., 278 Md. 304, 363 A.2d 460 (1976).

"while the court found that the Supreme Court of North Carolina has not yet decided the issue . . . it predicted that the North Carolina court would follow the rationale of *Evans v. General Motors Corporation* . . . ."[50] Notwithstanding, the Maryland Court, after acknowledging that no North Carolina law existed on the point[51] reviewed North Carolina products liability cases generally and ruled that North Carolina law, with respect to the duty of a manufacturer, is governed by "traditional principles of tort law."[52] The court then referred to its decision of *Volkswagen of America v. Young*,[53] which also rested on general principles of tort law, stating that "we think it more likely that the North Carolina Court would apply the *Larsen* principles to 'automobile crash-worthiness' cases such as the present one."[54] North Carolina law is even more confusing today. Subsequently, in the recent federal decision of *Simpson v. Hurst Performance, Inc.*,[55] the district court acknowledged the controversy between *Evans* and *Larsen* and noted that even though no North Carolina Supreme Court decisions existed on the issue at hand, two federal district court opinions had predicted that North Carolina would reject the *Larsen* rule.[56]

As previously mentioned, a second problem with the federal decisions concerning secondary collisions is the inaccurate use of prior case authority. In particular, cases are often cited incorrectly as supportive of *Larsen*. Compounding the problem is the fact that, for various reasons, once cases are cited on a *Larsen* list, they are automatically cited by courts and lawyers alike for the *Larsen* proposition regardless of what the case actually said or on what basis the decision was made.

Perhaps the prime example of "blind citation" is the repeated principle that *Larsen* was based upon Michigan law. The parties stipulated in *Larsen* that Michigan law was to apply. However, the *Larsen* court then decided counts I and II of the case on the basis of general common law principles of negligence rather than on the basis of Michigan law.[57]

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50. *Id.* at ____, 363 A.2d at 462.

51. The Maryland court made the following observation regarding North Carolina law and the case being decided:

> The parties have referred us to no decisions by the North Carolina Supreme Court, and we are aware of none, on the question of whether, under North Carolina law, the principles of *Larsen* or of *Evans* would apply to a case involving secondary impact injuries in an automobile collision, where the injuries result from an allegedly defective design.

Id. at ____, 363 A.2d at 466.

52. *Id.*

53. 272 Md. 201, 321 A.2d 737 (1974). This case is one of the many cases which has adopted the *Larsen* theory and is repeatedly cited as support for *Larsen*-type decisions.

54. 278 Md. at ____, 363 A.2d at 467. In so holding, the court referred to *Alexander* but declined to follow it because of the recent decision in Isaacson v. Toyota Motor Sales, U.S.A., Inc., 438 F. Supp. 1 (E.D.N.C. 1976).

55. 437 F. Supp. 445 (M.D.N.C. 1977) (the plaintiff in *Simpson* was impaled upon a floor mounted gear shift lever in the vehicle in which she was riding).

56. *Id.* at 447 (citing the *Alexander* and *Bulliner* cases).

57. In support of its decision to decide the case on this basis the court stated:

Another example of possible misuse of authority may be found in the decision of *Nanda v. Ford Motor Co.*,[58] in which the plaintiff incurred burns when his 1967 Cortina was struck by two cars and burned. Illinois law was to control the case. The court reviewed the leading Illinois Supreme Court cases on the subject and concluded that they had not adopted either *Larsen* or *Evans*.[59] In fact, the Illinois case on point had distinguished the two cases from the case at hand. Fortunately or unfortunately, the Supreme Court used in its opinion the phrases, "unreasonable risk or injury" and "unreasonable danger." Those phrases had also been mentioned in *Larsen*. Even though no Illinois case had adopted *Larsen* per se, the mere mention of those phrases in the Illinois case proved sufficient for the *Nanda* court to justify its adopting a rule of law similar to *Larsen*, basing its decision on what it "believed the law of Illinois to be . . . ."[60]

Another example of improper research is the case of *Friend v. General Motors Corp.*,[61] which is cited as authority for the proposition that Georgia has adopted *Larsen*. Had the court and attorneys properly researched the issue, they would have learned that the Georgia Supreme Court, on the first appeal from the Court of Appeals, cited *Evans*, not *Larsen*, with approval.[62]

Bolm v. Triumph Corp.[63] is another case which is automatically cited in support of a secondary collision concept. However, the case states otherwise, holding: "accordingly, we reject the 'secondary collision rule' in favor of traditional rules of negligence and warranty."[64]

IV. Danger of Federal Activism

From the brief examples mentioned above, one appreciates one of the weaknesses of our present system with respect to products liability law. Federal judges' personal thoughts, whims and speculation have created a significant portion of national product liability law. This situation is not unique to products liability. On the contrary, practically every area of law is occasionally subject to the same problem. However, the malady is especially acute in the area of products liability because of the complexity of the issues and the expanse of litigation in that area.

Another difficulty created by the system is the divergence of authority which results from a federal judge's opinion of how a state court should rule

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We, however think the duty in this evolving field of the law *should* and can rest, at this time, on general negligence principles, with each state free to supplement common law liability for negligence with a doctrine of strict liability for tort as a matter of social policy expressed by legislative action or judicial decision.

391 F.2d 495, 503 n.5 (8th Cir. 1969).

58. 509 F.2d 213 (7th Cir. 1974).
59. *See, e.g.*, Meiher v. Brown, 54 Ill. 2d 539, 301 N.E.2d 307 (1973).
60. 509 F.2d at 218.
61. 118 Ga. App. 763, 165 S.E.2d 734 (1968).
62. *Id.* at 766, 165 S.E.2d at 738 (special concurring opinion of Eberhardt, J.).
63. 33 N.Y.2d 151, 305 N.E.2d 769, 350 N.Y.S.2d 644 (1973).
64. *Id.* at 160, 305 N.E.2d at 774, 350 N.Y.S.2d at 651.

and a subsequent state court decision to the contrary. Depending upon when and in which court the case is filed, the litigants may have a genuine dispute on what the law actually is, thus delaying litigation.

Another problem is the possibility of a reverse application of the *Erie* doctrine. For example, in a case in the state court involving the *Larsen* theory, upon which the state has not yet ruled but the federal court sitting in that state has ruled, the state court can adopt a position based upon federal precedent rather than upon how it actually believes it should rule. This type of situation arose recently in Indiana. In *Greeno v. Clark Equipment Co.*,[65] the United States district court was faced with the question of whether the state of Indiana would adopt strict liability in products liability. After recognizing that the Indiana State Supreme Court had not yet ruled upon the issue, the court held that strict liability was applicable to products cases in Indiana.[66] Five years later, in *Cornette v. Searjeant Metal Products, Inc.*,[67] the Appellate Court of Indiana was faced with the same issue. Recognizing that an Indiana appellate court had never before ruled on the issue in question, the court adopted the doctrine of strict liability in products liability as law of the state. As support for its decision, the Indiana court cited *Greeno*,[68] thereby effectively reversing the process contemplated by *Erie*.

Another disadvantage of the present system is that it often increases the expenses of litigating a products liability case. Such cases are ordinarily costly because the subject matter of the litigation is complex and the technical preparation is both time consuming and expensive. This situation is further complicated by the federal courts' not knowing what state law to apply in a case. Tens of thousands of dollars and hundreds of man hours can be spent by trial counsel merely attempting to determine what law the federal court should apply.

Moreover, the present system also fosters increased costs by increasing the likelihood of additional products liability litigation. In state courts when a litigant realizes that the judge has taken it upon himself to rule the way he personally feels the law should be, the obvious remedy is to appeal an adverse ruling. Yet, depending upon the psychic and economic strength of a client, an appeal may not be taken. In such a situation, the trial judge has dictated his independent concept of law in the state and the state appellate courts have still not ruled upon the issue. Thus, the field is left wide open for hundreds of other lawsuits to be litigated, possibly based upon the very issue, just because the highest state court of appeals has not ruled upon the issue litigated. This same situation exists in the federal court system until the highest state court has had the opportunity to rule upon the issue in question.[69] In fact, it is worse in that system because even the federal appellate courts cannot dispositively determine the law of the state.

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65. 237 F. Supp. 427 (N.D. Ind. 1965).
66. *Id.* at 433.
67. 147 Ind. App. 46, 258 N.E.2d 652 (1970).
68. *Id.* at ____, 258 N.E.2d at 656.
69. A good example of the confusion which exists in the federal courts can be seen in Polk

V. A Suggested Solution

At least a partial remedy is available and is presently being used in many jurisdictions though perhaps not to its fullest potential. This remedy is a procedure whereby the federal court certifies state questions of law to the highest court of the state for decision.

This procedure is relatively new in American jurisprudence. Prior to 1965, Florida was the only state which had a specific certification procedure.[70] In 1967, the Commissioners of Uniform State Laws adopted a Uniform Certification of Questions of Law Act.[71] The Uniform Act, unlike the Florida statute, permits certification by federal district courts, thus providing a solution to many product liability "ills" at the trial level.

Presently, some eleven states have adopted the Uniform Certification Act.[72] Other states, although not adopting the Uniform Act, have adopted a certification procedure. These states include Georgia,[73] Indiana[74] and Michigan.[75] Georgia and Indiana, like Florida, do not permit federal district court certification.[76] Regardless of the form of the various certification procedures, the important element is that, in fact, a certification procedure exists.

The benefits of certification are obvious, particularly in federal products liability litigation. When a United States district court or a United States circuit court of appeals encounters a novel question of law, the judge does not have to guess what the state law would be. Thus, an obstacle is created to prevent federal judge's personal opinions from influencing the development of state law. By certifying the question, the highest state court will have the chance to give clear, definitive law on the subject involved.[77] This, in turn, shortens the federal trial and appellate process as well as gives guidelines to the state courts and lawyers so as to prevent undue trial delays and appeals in the state courts, which sometimes result when a state court relies on a

v. Ford Motor Co., 529 F.2d 259 (8th Cir.), *cert. denied*, 426 U.S. 907 (1976), in which the Eighth Circuit en banc reversed the decision of a divided panel to refuse to adopt the secondary collision doctrine as Missouri law.

70. *See* Fla. Stat. Ann. § 25.031 (West 1974). This statute allowed only the United States Supreme Court or a United States circuit court of appeals to certify questions to the Florida Supreme Court. Florida Appellate Rule 4.61 is essentially the same as Fla. Stat. Ann. § 25.031 (West 1974).

71. Uniform Certification of Questions of Law Act. The complete text of the Act and the Commissioner's comments are set out in Appendix A.

72. The states which have adopted the Act are: Colorado - Colo. App. R. 21.1; Florida - Fla. App. R. 4.61; Maine - R. Civ. P. 76B; Maryland - Md. Cts. & Jud. Proc. Code Ann. §§ 12-601 to 609 (1974); Massachusetts - R. Sup. Jud. Ct. Mass. 3:21; Minnesota - Minn. Stat. Ann. § 480.061 (West Supp. 1978); New Hampshire - N.H. Rev. Stat. Ann. § 490: App. R. 20 (Supp. 1977); Oklahoma - Okla. Stat. Ann. tit. 20, §§ 1601-1613 (West Supp. 1978); Rhode Island - Sup. Ct. R. 6; Washington - Wash. Rev. Code Ann. §§ 2.60.010-.900 (West Supp. 1978); W. Va. Code §§ 51-1A-1 to 12 (Supp. 1978).

73. Ga. Code Ann. § 24-3902 (Supp. 1978).

74. Ind. Code Ann. § 33-2-4-1 (Burns 1975).

75. Mich. Gen. Ct. R. 797.

76. *See* notes 73 and 74 *supra*.

77. *See* Lehman Brothers v. Schein, 416 U.S. 386 (1974).

federal court's interpretation of what the state law should be.[78] Everyone, in effect, would know the rules before they play the game, rather than having to play the game first and then discover on appeal what the rules were.

One significant certification decision was *West v. Caterpillar Tractor Co.*[79] In *West*, after certifying the issue to the Florida Supreme Court,[80] the federal court saw fit to adopt the doctrine of strict liability as applied to bystanders in a products liability case. As a result of the *West* case, the Fifth Circuit Court of Appeals was able to base its decision in *Smith v. Fiat-Roosevelt Motors, Inc.*[81] on an accurate determination of whether strict products liability is applicable to bystanders in Florida, thereby saving the time and money which would have been expended had the issue not been previously certified.

A federal court avoided much confusion and expense in certifying the *Larsen* issue to the state court in *Volkswagen of America, Inc. v. Young.*[82] The Maryland Court of Appeals adopted the "intended use" of an automobile as set forth in *Larsen* but applied "traditional rules of negligence" to the design case, citing *Bolm*[83] with approval.[84]

With respect to the earlier comments about the danger in our present system of the state court citing a federal case which was based on the speculation of a federal judge, it is interesting to compare *Young* with *Bremier.*[85] Both cases were filed in the United States District Court for the District of Columbia. As mentioned earlier, the court in *Bremier* thought it "more probable than not" that the Maryland Court of Appeals would adopt the *Larsen* concept of intended use.[86] *Bremier* was decided on March 24, 1972.[87] On July 1, 1972, Maryland adopted the Uniform Certification of Question of Law Act.[88] *Young* was decided on July 8, 1974 pursuant to the certification statute.[89] In reviewing the case law in support of the *Larsen* theory during its certification process, the Maryland Court of Appeals cited *Bremier.*[90]

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78. The North Carolina cases discussed earlier are classic examples of this situation. *See* notes 48-56 *supra* and accompanying text.

79. 547 F.2d 885 (5th Cir. 1977).

80. The Florida Supreme Court's decision was West v. Caterpillar Tractor Co., 336 So.2d 80 (Fla. 1976).

81. 556 F.2d 728 (5th Cir. 1977).

82. 272 Md. 201, 321 A.2d 737 (1974).

83. Bolm v. Triumph Corp., 33 N.Y.2d 151, 305 N.E.2d 769, 350 N.Y.S.2d 644 (1973).

84. 272 Md. at 207, 321 A.2d at 742-43.

Other recent uses of the certification procedure in products liability cases are demonstrated by Wansor v. George Hantscho Co., 570 F.2d 1202 (5th Cir. 1978) and First Nat'l Bank of Mobile v. Cessna Aircraft Co., 365 So. 2d 966 (Ala. 1978).

85. Bremier v. Volkswagen of America, Inc., 340 F. Supp. 949 (D.D.C. 1972).

86. *Id.* at 952.

87. *Id.* at 949.

88. MD. CTS. & JUD. PROC. CODE ANN. §§ 12-601 to 609 (1974).

89. 272 Md. at 201, 321 A.2d at 737.

90. *Id.* at ___, 321 A.2d at 744.

VI. Summary

There is no question that products liability law has become comprehensive and technically complex. From the time a claim is filed to the time the matter is concluded, years have passed. The hundreds of man hours spent by plaintiffs and defendants, as well as the technical preparation incurred, have been not only time consuming but also expensive. If the case is a diversity case in federal court, much briefing will have taken place in order to assist the court in determining what the state law is and how it is to be applied to the case at hand.

Where a particularly novel and controversial issue of law such as the *Larsen-Evans* dichotomy is presented to the court, the judge may very well base his authority on federal decisions which, in turn, are based only on personal speculation. Also the courts are often careless in their legal research, automatically citing cases which another court or lawyer has stated stand for a certain proposition.

In a diversity case, where there is no state law on the issue, perhaps the courts should remind the advocate (plaintiff or defendant) of his burden of proof, and if state law does not exist to support that view, the issue should be dismissed. It is a harsh remedy, but in the long run it may be the most beneficial, for it would put more pressure on state legislatures and appellate courts to rule on such issue or to at least provide an avenue for appellate review early in the trial court proceedings. If a federal court is determined, however, to rule on the substantive nature of the issue, by predicting or speculating as to how the state court would rule, then the court should make an "educated guess" rather than engage in personal and non-judicial speculation. Thorough research is necessary.

The other remedy suggested in this Article pertained to federal certification to state court. The present legal system should go even further and permit state trial courts to certify questions of law to the state's highest court. Most of the weaknesses mentioned with respect to the federal courts exist in the state courts as well. Essentially, certification can be used to streamline, clarify and expedite judicial proceedings.

As Oklahoma County District Court Judge Joe Cannon stated:

> I believe now is the time to take a new look and give new meaning to the law of responsibility for injuries as it should be applied in the late 20th century. I believe we are headed down a road that only leads to a jungle of legal confusion. I further believe that the jungle of legal darkness is and will be brought about by semantics. We are married to legal terms of the past and when we try to put them in place in our modern decisions it is like packing too many clothes in a suitcase, they keep popping out. The law of responsibility for injuries can be brought into the sunlight and they can be made compatible with each other.
>
> . . . .
>
> Due to the importance of the legal questions presented, I intend to certify this Order to the Supreme Court of Oklahoma in the hope of obtaining rulings and guidelines to aid the trial bench. These issues are presenting themselves to the trial bench daily and we are without precedent on the

> subjects. A ruling by the Supreme Court will save thousands of judicial man hours both now and in the future.[91]

It is hoped more courts and states will follow Judge Cannon's view of the recent products liability litigation and enact more certification procedures for the benefit of injured parties, manufacturers, attorneys and courts.

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91. Walker v. Ford Motor Co., No. CJ 75-1904, slip op. at 3, 18 (Dist. Ct. Okla. County, Okla., filed Dec. 22, 1975).

Appendix A

UNIFORM CERTIFICATION OF QUESTIONS OF LAW ACT

1967 ACT

Sec.

Be it enacted . . . .

§ 1. [Power to Answer]

The [Supreme Court] may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court [or the highest appellate court or the intermediate appellate court of any other state], when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the [Supreme Court] [and the intermediate appellate courts] of this state.

Commissioners' Comment

This section provides that the highest court of the state has the right to answer questions certified to it; it is not mandatory. Under some circumstances it is possible that the court might decide not to answer a certified question. See, for example, *Atlas Life Insurance Co. v. W.I. Southern, Inc.* 306 U.S. 563 (1939), and *National Labor Relations Board v. White Swan,* 313 U.S. 23 (1941) (in both cases the Supreme Court of the United States refused to answer certified questions).

The courts listed as the court which may certify questions are the Supreme Court of the United States, the federal Courts of Appeals and the federal District Courts, which would include three-judge District Courts under 28 U.S.C. 2281 and 2284. Also included, in brackets, are "the highest

appellate court or the intermediate appellate court" of other states. This provision allows certification of questions in conflicts cases.

§ 2. [Method of Invoking]

This [Act] [Rule] may be invoked by an order of any of the courts referred to in section 1 upon the court's own motion or upon the motion of any party to the cause.

§ 3. [Contents of Certification Order]

A certification order shall set forth

(1) the questions of law to be answered; and

(2) a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

Commissioners' Comment

The certification order in the statement of facts should present all of the relevant facts. The purpose is to give the answering court a complete picture of the controversy so that the answer will not be given in a vacuum. The certifying court could include exhibits, excerpts from the record, summary of the facts found by the court, and any other document which will be of assistance to the answering court.

§ 4. [Preparation of Certification Order]

The certification order shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to the [Supreme Court] by the clerk of the certifying court under its official seal. The [Supreme Court] may require the original or copies of all or of any portion of the record before the certifying court to be filed with the certification order, if, in the opinion of the [Supreme Court], the record or portion thereof may be necessary in answering the questions.

§ 5. [Costs of Certification]

Fees and costs shall be the same as in [civil appeals] docketed before the [Supreme Court] and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification.

§ 6. [Briefs and Argument]

Proceedings in the [Supreme Court] shall be those provided in [local rules or statutes governing briefs and arguments].

Commissioners' Comment

This section provides for incorporation by reference of the local rules or statutes governing briefs and arguments.

§ 7. [Opinion]

The written opinion of the [Supreme Court] stating the law governing the questions certified shall be sent by the clerk under the seal of the Supreme Court to the certifying court and to the parties.

§ 8. [Power to Certify]

The [Supreme Court] [or the intermediate appellate courts] of this state, on [its] [their] own motion or the motion of any party, may order certification of questions of law to the highest court of any state when it appears to the certifying court that there are involved in any proceeding before the court questions of law of the receiving state which may be determinative of the cause then pending in the certifying court and it appears to the certifying court that there are no controlling precedents in the decisions of the highest court or intermediate appellate courts of the receiving state.

Commissioners' Comment

Sections 8 and 9 allow a state to provide for certifications from the courts of that state to the highest court of another state. This could prove to be very useful in the case of conflicts of laws where State A's court wishes to apply the law of B. If B's law is unclear on the point, a question could be certified. This is the reciprocal provision to the bracketed provision of section 1.

§ 9. [Procedure on Certifying]

The procedures for certification from this state to the receiving state shall be those provided in the laws of the receiving state.

Commissioners' Comment

See Comment under section 8, supra.

§ 10. [Severability]

If any provision of this [Act] [Rule] or the application thereof to any person, court, or circumstance is held invalid, the invalidity does not affect other provisions or applications of the [Act] [Rule] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] [Rule] are severable.

§ 11. [Construction]

This [Act] [Rule] shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

§ 12. [Short Title]

This [Act] [Rule] may be cited as the Uniform Certification of Questions of Law [Act] [Rule].

§ 13. [Time of Taking Effect]

This [Act] [Rule] shall take effect _____.