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NOTES

STRICT LIABILITY IN FEDERAL COURTS: PROBLEMS OF PREDICTING STATE LAW UNDER *ERIE*

Under the doctrine of *Erie Railroad v. Tompkins*,¹ a federal court deciding a diversity case must apply the substantive law that the state in which it sits would apply. One problem left unanswered in *Erie* involves the determination of state law in areas where the law is changing or no state decisional law exists.² The Supreme Court has held that in such cases the federal court must look to "all available data" and, on that basis, decide the case as would the state's highest court.³ In other words, the federal court must predict state law where, in fact, none exists.

Recent developments in the area of products liability have brought this problem to the fore.⁴ In deciding cases involving strict liability

¹ 304 U.S. 64 (1938).

² The late Judge Clark, commenting on the situation posed where state law is confused or non-existent, remarked that "this . . . is the most troublesome, the most unsatisfying in its consequence" of the problems arising from the application of *Erie*. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 290 (1946).

³ *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940). Although the *West* case ultimately turned on the decision of an intermediate state appellate court, the standard has been applied in cases where no state precedent existed. See I A J. MOORE, FEDERAL PRACTICE ¶ 0.039[2], at 3325 (2d ed. 1959).

⁴ The rapid advance of the doctrine of strict liability in products cases is without parallel in the history of the law. Dean Prosser dates the beginning of this advance as the famous case of *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960): "What has followed has been the most rapid and altogether spectacular overturn of an established rule in the entire history of the law of torts." Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 793-94 (1966) (footnote omitted).

The number of jurisdictions that have followed the New Jersey Supreme Court's lead is difficult to determine. In 1966 Prosser was able to list 18 that had imposed a rule of strict liability, without privity and without negligence, on manufacturers of all products—Arizona, California, Connecticut, the District of Columbia, Florida, Illinois, Iowa, Kentucky, Michigan, Minnesota, Missouri, New Jersey, New York, North Dakota, Ohio, Oregon, Tennessee, and Washington. *Id.* at 794-95. Since that time, at least 6 more states have followed suit—Alaska, Mississippi, Nevada, Pennsylvania, Texas, and Wisconsin. *Clary v. Fifth Ave. Chrysler Center, Inc.*, 454 P.2d 244 (Alas. 1969); *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113 (Miss. 1966), *cert. denied*, 386 U.S. 912 (1967); *Shoshone Coca-Cola Bottling Co. v. Dolinski*, 82 Nev. 439, 420 P.2d 855 (1966); *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966); *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967); *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

Not all states have passed on the issue of strict liability. See 1 CCH PROD. LIAB. REP.

claims,⁵ federal courts have often been confronted with a lack of state precedent. They have been forced to predict state law on the basis of an "Erie-educated guess"—often with the consequence of expanding the manufacturer's liability.

Federal court decisions on products liability raise fundamental problems under *Erie*. Although *Erie* provides no guidelines for decision, important *Erie* policies may be violated in the process of extending liability.⁶ Federal decisions may affect the conduct of manufacturers dealing in state markets who rely upon these decisions. Given the possibility of a contrary state court decision, such reliance may be misplaced.⁷ Furthermore, forum-shopping may be encouraged if federal courts extend liability.⁸ These problems suggest the need for a new approach to predicting state law under *Erie*.

I

PROBLEMS OF PREDICTION

A. Federal Courts and the Privity Doctrine

The problem of predicting state law on products liability has arisen most frequently on the issue of the privity doctrine. In the ab-

¶ 4060, at 4026-27 (1968). Some states have considered the doctrine only in terms of food products or products for intimate bodily use (*id.* at ¶ 4100); others have no decisional law at all on strict liability (*id.* at ¶ 4060). More important, many state courts have not yet ruled on important secondary issues of strict liability, such as economic loss (*id.* at ¶ 4230) or recovery by innocent bystanders (*id.* at ¶ 4210).

⁵ As used in the text, the term "strict liability" includes both the theories of implied warranty and strict tort. For a discussion of the similarities and differences, see Prosser, *supra* note 4, at 800-05.

⁶ For a discussion of the *Erie* policies, see both the majority opinion and Justice Harlan's concurring opinion in *Hanna v. Plumer*, 380 U.S. 460 (1965).

Some commentators have argued that the *Erie* doctrine does not apply to cases where no state law exists. See Parker, *Erie v. Tompkins in Retrospect: An Analysis of Its Proper Area and Limits*, 35 A.B.A.J. 19, 83 (1949).

⁷ One policy sought to be advanced by *Erie* was the promotion of predictability in state law. This may be termed the "private ordering" policy. *Erie* attempted to eliminate the situation where "[t]he result was to subject citizens at the crucial level of everyday activity to dual and often inconsistent systems of substantive law, without means of foretelling which system, in the unforeseeable contingency of litigation, was going to apply." Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 505 (1954).

Federal decisions in products liability cases, by inducing private reliance on a federal rule that may be rejected by the state courts, may create just such a dual and inconsistent system of law. Although, on the surface, this situation is distinguishable from *Erie*—where two rules of law existed side by side—the policy of effective "private ordering" applies in each case.

⁸ The prevention of forum-shopping is a well-known *Erie* policy. For an example of the problem, see *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518 (1928).

sence of state precedents, federal courts have uniformly rejected the privity defense and imposed strict liability on the manufacturer for personal injuries to the user or consumer.⁹ They have been aided in this regard by trends in state law, both in products liability and in other rapidly developing areas of the law.

In *Putman v. Erie City Manufacturing Co.*,¹⁰ the Fifth Circuit Court of Appeals rejected the privity doctrine and imposed strict liability for personal injuries on the manufacturers of a wheelchair. After concluding that no direct precedent for the claim existed in Texas law, the court, in adopting section 402A of the *Restatement of Torts*,¹¹ rested its decision in part on a 1942 Texas food case.¹²

⁹ *E.g.*, *Dagley v. Armstrong Rubber Co.*, 344 F.2d 245 (7th Cir. 1965) (Indiana law); *Putman v. Erie City Mfg. Co.*, 338 F.2d 911 (5th Cir. 1964) (Texas law); *Deveny v. Rheem Mfg. Co.*, 319 F.2d 124 (2d Cir. 1963) (Vermont law); *Hughes v. Kaiser Jeep Corp.*, 40 F.R.D. 89 (D.S.C. 1966) (South Carolina law); *Greeno v. Clark Equip. Co.*, 237 F. Supp. 427 (N.D. Ind. 1965) (Indiana law); *Crusan v. Aluminum Co. of Am.*, 250 F. Supp. 863 (E.D. Tex. 1965) (Texas law); *Chairaluce v. Stanley Warner Mang. Corp.*, 236 F. Supp. 385 (D. Conn. 1964) (Connecticut law); *Chapman v. Brown*, 193 F. Supp. 78 (D. Hawaii 1961), *aff'd*, 304 F.2d 149 (9th Cir. 1962) (Hawaii law).

Where state precedent requires privity, federal courts ordinarily follow the state rule. *E.g.*, *Schultz v. Tecumseh Prod. Co.*, 310 F.2d 426 (6th Cir. 1962) (Kentucky law); *Johnson v. General Motors Corp.*, 243 F. Supp. 695 (E.D. Tenn. 1965) (Tennessee law); *Tomle v. New York Cent. R.R.*, 234 F. Supp. 101 (N.D. Ohio 1964) (Ohio law); *Barlow v. DeVilbiss Co.*, 214 F. Supp. 540 (E.D. Wis. 1963) (Wisconsin law). The recent case of *Klimas v. International Tel. & Tel. Corp.*, 297 F. Supp. 937 (D.R.I. 1969), is a striking exception. There the district court imposed strict liability on the manufacturer of a fuse that exploded causing personal injuries to the plaintiff. Four years before, the Rhode Island Supreme Court, in *Henry v. Eshelman & Sons*, 99 R.I. 518, 209 A.2d 46 (1965), had reaffirmed the privity doctrine and held that adoption of strict liability was for the state legislature. In "overruling" *Henry*, the district court pointed to the abolition of the forms of action in Rhode Island as the reason for its decision. Aside from the apparent violation of the letter, as well as the spirit, of *Erie*, the *Klimas* case may indicate a new trend toward judicial activism in federal products liability decisions.

¹⁰ 338 F.2d 911 (5th Cir. 1964).

¹¹ RESTATEMENT (SECOND) OF TORTS § 402A (1965):

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

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

- (a) the seller is engaged in the business of selling such a product, and
- (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

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

- (a) the seller has exercised all possible care in the preparation and sale of his product, and
- (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

¹² *Jacob E. Decker & Sons, Inc. v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942). The court's reliance on *Decker* is questionable, since many states imposed strict liability without privity on manufacturers of food long before the *Henningsen* decision. See Jaeger, *Privity of Warranty: Has the Tocsin Sounded?*, 1 DUQUESNE L. REV. 1, 63-90 (1963).

Although the court considered law review commentary and cases from other jurisdictions, it clearly indicated that the trend in Texas law was a decisive factor.¹³

A similar approach was taken in *Chapman v. Brown*,¹⁴ where a district court, sitting in Hawaii, imposed strict liability on the manufacturer of a hula skirt for personal injuries sustained when the skirt caught fire. The court, again reviewing cases from other jurisdictions, based its decision in part on the tendency of the Hawaiian courts, in other areas of the law, to "adopt the enlightened view of *extending the remedy* rather than restricting it."¹⁵

Although trends within the state's law have been important, federal courts have often given equal or greater consideration to cases from other jurisdictions and to legal commentary. In *Deveny v. Rheem Manufacturing Co.*,¹⁶ the Second Circuit Court of Appeals, predicting the law of Vermont, imposed strict warranty liability¹⁷ without privity on the manufacturers of a water heater and a component part for personal injuries sustained when the heater exploded. In rejecting the privity doctrine, the court relied solely on authorities from other jurisdictions,¹⁸ citing not a single Vermont case in support of strict

¹³ 338 F.2d at 915-17, 923. The decision in *Putman* was foreshadowed in *Siegel v. Braniff Airways, Inc.*, 204 F. Supp. 861 (S.D.N.Y. 1960). There the district court in New York, applying Texas law, rejected the privity doctrine in an action by the survivors of the victims of an airplane crash. In adopting strict warranty liability, the district judge stated that

[i]n view of the evident trend in the State of Texas and elsewhere, I am inclined to conclude that the Supreme Court of Texas would not apply the requirement of privity to the causes of action or claims which are attacked by this motion [to dismiss].

Id. at 865. In *Sales Affiliates, Inc. v. McKisson*, 408 S.W.2d 124 (Tex. Civ. App. 1966), an intermediate appellate court rejected the extension of *Decker* in a case involving a hair preparation. After noting the *Putman* decision, the court stated:

Unlike the Fifth Circuit Court of Appeals . . . this court is not in a position to make "an Erie educated guess" and speculate whether the Texas Supreme Court will extend the rule of the *Decker* case to nonfood cases. In our judgment it is not proper for an intermediate appellate court to place Texas among those "enlightened jurisdictions" which have applied strict liability without privity in nonfood products liability cases.

Id. at 126.

On appeal, however, the federal court was vindicated. The Texas Supreme Court reversed the decision of the appellate court and imposed strict liability without privity, citing, *inter alia*, *Putman*. *Sales Affiliates, Inc. v. McKisson*, 416 S.W.2d 787 (Tex. 1967).

¹⁴ 198 F. Supp. 78 (D. Hawaii 1961), *aff'd*, 304 F.2d 149 (9th Cir. 1962).

¹⁵ *Id.* at 111 (emphasis in original).

¹⁶ 319 F.2d 124 (2d Cir. 1963).

¹⁷ See note 5 *supra*.

¹⁸ The court did cite several Vermont cases on the separate issues of negligence and *res ipsa loquitur*. 319 F.2d at 129. It did not refer to these cases, however, in treating the independent warranty claim.

liability.¹⁹ Similarly, in *Greeno v. Clark Equipment Co.*,²⁰ a district court in Indiana imposed strict liability on the manufacturer of a fork-lift truck. After reviewing cases from other jurisdictions, including the *Putman* case, the court adopted section 402A as the law of Indiana, concluding that "[t]he direction of the law is clear."²¹

B. *Related Issues of Strict Liability*

More serious problems have faced federal courts in predicting state law on related issues of products liability. Such issues involve refinements of liability in personal injury cases or an extension of the protection of the doctrine to different parties or interests; examples are liability of the manufacturer for economic loss, application of strict liability to inherently dangerous products, recovery by innocent bystanders, and the manufacturer's duty in the design of products.²² On these issues there often is no clear trend of the law, either within the state or in other jurisdictions. The case law is generally undeveloped and, because of the complexity of the issues, there is little accord among either courts or commentators. As a result, the *Erie* problems of predicting state law are compounded, and the federal courts, in the absence of state precedent, have hesitated to extend the manufacturer's liability into new areas.²³

¹⁹ Speaking for the court, Judge Clark argued that the court's duty was not to surmise which line of judicial precedent a Vermont court would follow . . . , but rather, by looking to the same sources which a Vermont court would presumably consult and by weighing the comparative reasoning of learned authors and conflicting judicial decisions for their intrinsic soundness, to define the pertinent law which when thus ascertained is presumably the law of Vermont

Id. at 129-30, quoting *Socony-Vacuum Oil Co. v. Continental Cas. Co.*, 219 F.2d 645, 647 (2d Cir. 1955).

Judge Clark was never ranked among the friends of *Erie*. See Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U.L. REV. 383, 384 n.11 (1964). Clark argued for a more flexible approach to *Erie* in cases where no precedent existed, allowing federal judges to exercise the "judicial functions." Clark, *supra* note 2, at 290-95.

²⁰ 237 F. Supp. 427 (N.D. Ind. 1965).

²¹ *Id.* at 432.

²² For a discussion of these issues, see Prosser, *supra* note 4, at 800-40.

²³ One major difficulty arising from such issues is that of formulating a rule. Where privity has been at issue, federal courts have been presented with a ready-made rule—§ 402A of the *Restatement*. This is not the case with other issues such as refinements in liability or the scope of damages recoverable. Federal and subsequent state formulations, therefore, could differ. For example, in deciding a case involving an inherently dangerous drug, two rules may result, both imposing liability without privity. The federal court may find liability for any defect in the drug, whether known or unknown. The state—also extending liability—may require knowledge and impose only a duty to warn. Cf. *Davis v. Wyeth Laboratories, Inc.*, 399 F.2d 121 (9th Cir. 1968). A similar problem arises on the economic-loss issue. See text at notes 37-42 *infra*.

Federal courts that have predicted liability on the privity issue for personal injuries have declined to extend liability on other issues without clear state precedent. In *Evans v. General Motors Corp.*,²⁴ the Seventh Circuit Court of Appeals was presented with the issue of whether, under Indiana law, an automobile manufacturer was under a duty to so design its product as to protect against collisions not caused by a design defect. No case, in Indiana or in any other jurisdiction, dealt with the issue directly. Although the same court had adopted section 402A as the law of Indiana after the *Greeno* decision,²⁵ it refused to extend liability in *Evans*. Speaking for the court, Judge Knoch advocated judicial restraint: "Perhaps it would be desirable to require manufacturers to construct automobiles in which it would be safe to collide, but that would be a legislative function, *not an aspect of judicial interpretation of existing law.*"²⁶ Although the *Evans* court did not elaborate, it undoubtedly realized that an imposition of novel liability would have had a substantial impact on automobile manufacturers' production standards.²⁷ The possibility of a contrary state court decision or legislative enactment made the court unwilling to predict liability for such design defects.

A similar problem has been presented in cases involving inherently dangerous products, where the issue of the manufacturer's liability has generated much debate among courts and commentators but no clear consensus has emerged.²⁸ In *Green v. American Tobacco Co.*,²⁹ the Fifth Circuit Court of Appeals was confronted with the issue

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

²⁵ *Dagley v. Armstrong Rubber Co.*, 344 F.2d 245 (7th Cir. 1965).

²⁶ 359 F.2d at 824 (emphasis added). The decision in *Evans* was subsequently followed in *Schemel v. General Motors Corp.*, 384 F.2d 802 (7th Cir. 1967), and *Shumard v. General Motors Corp.*, 270 F. Supp. 311 (S.D. Ohio 1967). In *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968), the court held an automobile manufacturer liable for negligence in design while, at the same time, rejecting a claim based on the theory of strict tort. The court stated that "[t]he doctrine of strict liability is one of policy for the states and the National Congress, and we do not think there has been a sufficient showing on the Michigan law as respects this point, particularly in the automotive field." *Id.* at 506.

²⁷ Liability was found in the recent case of *Dyson v. General Motors Corp.*, 298 F. Supp. 1064 (E.D. Pa. 1969). There the district court, applying Pennsylvania law, held the automobile manufacturer strictly liable for personal injuries sustained when the roof of the car collapsed during the course of an accident. Finding no direct precedent in Pennsylvania, the court based its decision on trends in state products liability law, holding that the state courts were "in the forefront of liberally construing and applying the principles of Section 402A of the Restatement." *Id.* at 1070.

²⁸ See generally Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 TEXAS L. REV. 855 (1963).

²⁹ 304 F.2d 70 (5th Cir. 1962), *certified question to* 154 So. 2d 169 (Fla. 1963), *conformed to*, 325 F.2d 673 (5th Cir. 1963), *cert. denied*, 377 U.S. 943 (1964).

of whether a cigarette manufacturer could be held strictly liable for death resulting from lung cancer. Although the state courts had abolished privity and adopted strict liability in other cases,³⁰ as in *Putman*, the court found no direct precedent for the claim in Florida law.³¹ Unlike *Putman*, however, the court refused to predict state law on the issue. Instead, a certified question was submitted to the state court under a rule of Florida procedure.³² One year later in *Lartigue v. R. J. Reynolds Tobacco Co.*,³³ the same court predicted that Louisiana law would deny liability.

Clearly, an extension of liability in either *Green* or *Lartigue* would have had a great impact on cigarette manufacturers.³⁴ Perhaps more important, victims of cigarette smoking would have been encouraged to sue in federal courts. Again, although it did not explain its decision, these considerations apparently made the court unwilling to extend liability in the absence of a clear state precedent or a clear trend of products liability decisions in other jurisdictions.

II

STRICT LIABILITY AND THE *Erie* POLICIES

Where the trend of products liability law has been clear, federal courts lacking state precedents have adopted the modern rule of strict liability without privity in cases of personal injury to the user or consumer. Few *Erie* problems arise here. A federal court decision establishing

³⁰ *Matthews v. Lawnlite Co.*, 88 So. 2d 299 (Fla. 1956); *Smith v. Platt Motors, Inc.*, 137 So. 2d 239 (Fla. Dist. Ct. App. 1962); *Continental Copper & Steel Indus., Inc. v. E.C. "Red" Cornelius, Inc.*, 104 So. 2d 40 (Fla. Dist. Ct. App. 1958).

³¹ Originally, the court had sustained a jury verdict for the defendant. On rehearing, it determined that there was no precedent for the claim. 304 F.2d at 86.

³² FLA. STAT. ANN. § 25.031 (Supp. 1969). The certified question submitted to the Florida Supreme Court did not settle the issue in the case. Rather than asking whether the defendant could be held strictly liable for an inherent defect that could not be eliminated, the Fifth Circuit asked only whether the defendant must have had knowledge of the defect at the time of sale. The Florida Supreme Court answered the latter question in the negative, but did not answer the former, and crucial, question. 154 So. 2d 169 (Fla. 1963), *conformed to*, 325 F.2d 673 (5th Cir. 1963), *cert. denied*, 377 U.S. 943 (1964).

³³ 317 F.2d 19 (5th Cir. 1963). *See also* *Ross v. Philip Morris & Co.*, 328 F.2d 3 (8th Cir. 1964); *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292 (3d Cir. 1961). Only in *Pritchard*—the initial case—did the federal court extend liability.

³⁴ Unlike *Evans*, an extension of liability in *Green* or *Lartigue* would probably not have affected production standards. By definition, inherently dangerous defects are those which, given the current state of human knowledge, may not be eliminated. However, liability would have affected the manufacturer's conduct in other ways—for example, requiring the purchase of insurance or the raising of prices, with consequent loss in sales.

strict liability for personal injuries where state law is silent has little effect on outside reliance—that is, on the “private ordering” of the manufacturer.³⁵ Given the abolition of the privity requirement in over twenty jurisdictions,³⁶ a federal decision is not likely to affect the behavior of a large manufacturer dealing in a national market. The manufacturer is likely to have anticipated the consequences of the obvious national trend by, for example, purchasing insurance covering liability for personal injuries and perhaps property damage caused by defective products. In other words, it is not the federal rule on which the manufacturer relies. Similarly, although forum-shopping is encouraged by an extension of liability, the likelihood of a state court decision upholding the privity defense in a subsequent personal injury case is slight. Thus, although the *Putman* and *Chapman* cases, which emphasized the trend within the particular state, are closer in spirit to *Erie* than is *Deveny*, which relied on a national trend, none of these cases seriously undermines the policies of *Erie*.

Where the trend of products liability law is unclear, however, serious *Erie* problems arise. Liability for economic loss is a good example,³⁷ the few state courts that have considered the issue are divided,³⁸ and legal commentators generally are not in agreement.³⁹

³⁵ Note 7 *supra*.

³⁶ Note 4 *supra*.

³⁷ See generally Prosser, *supra* note 4, at 820-23; Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 912 (1966).

Only one federal court has considered the manufacturer's liability for business losses sustained by the purchaser of a defective product, and there state precedent existed denying recovery. *Atlas Aluminum Corp. v. Borden Chem. Corp.*, 233 F. Supp. 53 (E.D. Pa. 1964).

In *Atlas*, the purchaser of an adhesive brought an action against the manufacturer for property damage and lost profits resulting from the adhesive's failure to hold glass in window frames. Although it rejected the implied warranty claim, the district court upheld a negligence claim.

³⁸ The two leading cases on the economic-loss issue are *Santor v. A. & M. Karagheuisan, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965), and *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965). In *Santor*, the New Jersey Supreme Court held a rug manufacturer strictly liable to the consumer for economic loss sustained when the rug developed several lines down its length. The purchaser was allowed to recover his loss-of-bargain damages on the basis of both implied warranty and strict tort. In *Seely*, the California Supreme Court, in dicta, rejected a recovery of business losses by the purchaser on the strict tort theory. The purchaser was allowed to recover, however, on the theory of express warranty.

That the two most progressive tort-law jurisdictions have reached contrary conclusions on this issue indicates its complexity. For decisions in other states, see *Continental Copper & Steel Indus., Inc. v. E.C. "Red" Cornelius, Inc.*, 104 So. 2d 40 (Fla. Dist. Ct. App. 1958). *Contra*, *Price v. Gatlin*, 241 Ore. 315, 405 P.2d 502 (1965); *Dimoff v. Ernie Majer, Inc.*, 55 Wash. 2d 385, 347 P.2d 1056 (1960).

Several issues are presented here. Does the doctrine of strict liability protect the economic as well as the personal and property interests of the purchaser?⁴⁰ Should the manufacturer be liable for both direct and consequential damages—that is, for both the purchaser's loss of bargain and for lost profits? Should the manufacturer be allowed to disclaim liability for economic loss?⁴¹ Resolution of these issues depends on important considerations of state policy—particularly the possibility of economic disruption and the availability of insurance.⁴²

A federal court that extends liability in these circumstances has no assurance that a state court will also do so. Faced with possible liability for economic loss if taken into federal court, the manufacturer will rely on the federal court's decision by purchasing additional insurance, greater in amount and broader in coverage. In the absence of a federal decision in favor of liability, additional insurance is unnecessary. With the possibility of a subsequent contrary state court decision, reliance on the federal decision may be misplaced.⁴³ Extending liability in these circumstances will also encourage forum-shopping by plaintiffs, since, if a decision in the state court can go either way, plaintiffs will always choose the federal forum.

CONCLUSION

In areas of product liability where state precedent provides few guidelines for an "Erie-educated guess," two avenues are open to a

³⁹ Prosser argues that consequential economic loss—lost profits—should be compensated, but not direct economic loss—loss of bargain. He reasons that the latter is more a matter of bargaining between the purchaser and the dealer than of a manufacturer's responsibility to the purchaser. Prosser, *supra* note 4, at 821-23. The reasoning of student commentators, based on an insurability argument, appears to point to an opposite conclusion. Note, *supra* note 37, at 954-58.

⁴⁰ Courts have traditionally hesitated to give protection to economic interests, even in negligence cases. See Note, *supra* note 37, at 943-50.

⁴¹ Refusal to recognize a disclaimer may conflict with UNIFORM COMMERCIAL CODE § 2-316. See Note, *Manufacturer's Liability to Remote Purchasers for "Economic Loss" Damages—Tort or Contract?*, 114 U. PA. L. REV. 539, 546 (1966).

⁴² See Note, *supra* note 37, at 955-58.

⁴³ The possible cost of such misplaced reliance may be considerable. Consider a small manufacturer of a component part. Under existing law, he may be able to shift the risk of economic loss down the distributive chain by a disclaimer of warranty. If a federal court decision removed this right on a strict tort theory, economic disaster could follow. The small manufacturer could neither obtain adequate insurance, nor absorb potential loss, under the theories of "deep-pocket" or "risk-spreading." Given this possibility, there is little comfort to such a manufacturer that in the future a state court may overrule the federal decision. The damage will already have been done.

federal court. It may refuse to extend liability into new areas. This approach, adopted in *Evans*, treats a lack of state precedent as a denial of liability by the state courts.⁴⁴ It avoids the problems of misplaced reliance and forum-shopping involved in the prediction of novel liability,⁴⁵ but it deprives the parties of a determination on the merits.

Another approach, suggested by the *Green* decision, is to expand the abstention doctrine that enables a federal court to retain jurisdiction over the case while it refuses to determine a question of state law.⁴⁶ The Supreme Court has recognized federal court abstention in diversity cases where unclear questions of state *public* law have been raised.⁴⁷ This recognition may be extended to important issues of *private* law, such as products liability, where a federal determination of state law would impair "some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred."⁴⁸

As in *Green*, the certified question procedure provides an effective means of abstention. At the present time, at least five states, either by statute or court rule, recognize such a procedure.⁴⁹ In those states where certified questions are permitted, federal courts may, after making find-

⁴⁴ An example is *Davidson v. Leadingham*, 294 F. Supp. 155 (E.D. Ky. 1968). There the occupants of an automobile involved in a collision with a truck brought an action in strict tort against the manufacturer of the truck. Finding no precedent in Kentucky law for recovery by an innocent bystander, neither a "user" nor "consumer" within the terms of § 402A, the district court denied liability, holding that absent a "clear and persuasive" statement by the state courts, such liability did not exist in state law. *Id.* at 158. See also *Mull v. Colt Co.*, 31 F.R.D. 154 (S.D.N.Y. 1962).

⁴⁵ An adjudication of no liability may lead to a form of reverse forum-shopping—that is, forum-shopping by defendants who seek to remove cases from state to federal courts. This is not as serious a problem as forum-shopping by plaintiffs, however, since it is possible only where all of the defendants are nonresidents. 28 U.S.C. § 1441 (1964). In the ordinary products liability case, the local retailer—a citizen of the forum state—is joined as a defendant. Removal to a federal court is impossible in such a case.

⁴⁶ For a discussion of this and other types of abstention, see Note, *Abstention and Certification in Diversity Suits, "Perfection of Means and Confusion of Goals,"* 73 YALE L.J. 850 (1964), suggesting certification by federal courts.

⁴⁷ *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959). In *Thibodaux*, the Supreme Court allowed abstention where an uninterpreted state statute was involved in eminent domain proceedings. The district court had ordered a stay in the proceedings and requested the parties to seek a declaratory judgment in the state courts on the question of law.

⁴⁸ *Meredith v. City of Winter Haven*, 320 U.S. 228, 234 (1943). Although *Meredith* contained dicta to the effect that abstention be exercised only in equity, this view was repudiated in *Thibodaux*. 360 U.S. at 28.

⁴⁹ FLA. STAT. ANN. § 25.031 (Supp. 1969); HAWAII REV. LAWS §§ 602-36 (1968); ME. REV. STAT. ANN. tit. 4, § 7 (Supp. 1968); WASH. REV. CODE ANN. § 2.60.020 (Supp. 1968); N.H. SUP. CT. R. 21. Florida and Hawaii allow certified questions only from federal appellate courts.

ings of fact, submit unresolved questions of products liability law to the highest state court, and thus avoid an uncertain prediction of state law. This procedure is a speedy and inexpensive method of determining state law that preserves the federal forum for fact-finding. Moreover, the Commissioners on Uniform State Laws and Proceedings have recently proposed an act that provides for the use of certified questions by both federal appellate and district courts.⁵⁰ As the Commissioners' proposal is adopted by state legislatures, this method of determining products liability law should become increasingly important.⁵¹

Charles F. Rechlin

50 Section 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.

UNIFORM CERTIFICATION OF QUESTIONS OF LAW [ACT] [RULE] § 1 (1967 Draft) [brackets in the original].

51 The recently proposed amendments to title 28 adopted by the American Law Institute specifically provide for certified questions to state courts. The proposed § 1371(e) provides:

A court of the United States may certify to the highest court of a State a question of State Law, if (1) the State has established a procedure by which its highest court may answer questions certified from such court of the United States; (2) the question of State law may be controlling in the action and cannot be satisfactorily determined in the light of State authorities; and (3) the court expressly finds that certification will not cause undue delay or be prejudicial to the parties.

ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 50 (1968 Draft). Although the proposed § 1371(e) appears, on its face, to allow certification of important questions of private law as well as public law, the comments leave this in doubt. *Id.* at 296-97. Several questions concerning the certified question procedure remain unanswered. One involves the problem that may arise when the law to be determined is that of a non-forum state. It appears that personal jurisdiction of the defendant would not be required in the non-forum state. Because the state court would not be deciding the case, but merely determining an issue of law, the parties could submit briefs and make oral arguments without personal jurisdiction. UNIFORM CERTIFICATION OF QUESTIONS OF LAW [ACT] [RULE] § 6 (1967 Draft).

A related problem involves the validity of the procedure under state constitutional provisions prohibiting advisory opinions. A recent case has held that the answers to certified questions are not advisory opinions where there are adversary parties, all fact issues have been determined, and the issues of law are determinative of the case. *In re Richards*, 223 A.2d 827 (Me. 1966).

Finally, a question arises as to the force of state court answers as precedent. Because the answering court does not decide the case, its answers may be considered dicta; but such answers are clearly preferable to unfounded federal court prediction of state law.