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Case for Alcohol Beverage Warning Labels: Duty to Warn of Dangers of Consumption, A

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A CASE FOR ALCOHOL BEVERAGE WARNING LABELS: DUTY TO WARN OF DANGERS OF CONSUMPTION

Hon v. Stroh Brewery Co.[1]

I. INTRODUCTION

Alcoholic beverage manufacturers traditionally have enjoyed immunity from civil liability despite the fact that alcoholism remains one of the most prevalent and deadly diseases in the United States.[2] Courts consistently have held that the public "generally knows" of the dangers of alcohol ingestion.[3] Therefore, alcohol manufacturers have not had a legal duty to warn of the dangerous propensities of their products.[4] The Third Circuit decision in *Hon v. Stroh Brewery Co.*[5] is the first case in which a court found potential liability for failure to warn of the dangerous propensities of liquor. It is now a jury question in the Third Circuit whether plaintiffs injured by alcohol ingestion will be able to recover under a theory of strict liability based on a finding that an alcoholic beverage product was defective due to the absence of an adequate warning. This Note will examine previous case law in which manufacturers have enjoyed civil immunity, as well as the Third Circuit decision in *Hon.*

II. CASES GRANTING CIVIL IMMUNITY TO MANUFACTURERS

In previous product liability cases, courts held that manufacturers of alcoholic beverages have no duty to warn of the danger of consuming alcoholic beverages because such dangers are apparent and well-known.[6]

The Fourth Circuit, in *Abernathy v. Schenley Industries, Inc.*,[7] was the first circuit to decide that a cause of action against an alcohol beverage manu-

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1. 835 F.2d 510 (3d Cir. 1987).
2. In 1985, the combined number of alcoholics and those suffering from the negative effects of alcohol use, age 18 years and older, was 17.7 million. In addition, alcohol accounts for approximately 97,500 deaths annually. NATIONAL COUNCIL ON ALCOHOLISM PAMPHLET (available from the Washington, D.C. office).
3. *See infra* notes 14, 26, 39, 50 and accompanying text.
4. *See generally* Note, *A Spirited Call to Require Alcohol Manufacturers to Warn of the Dangerous Propensities of Their Products*, 11 NOVA L. REV. 1611 (1987).
5. 835 F.2d 510 (3d Cir. 1987).
6. Annotation, *Products Liability: Alcoholic Beverages*, 42 A.L.R. 4TH 253, 261 (1985); *see generally* 45 AM. JUR. 2D *Intoxicating Liquors* § 559 (1969).
7. 556 F.2d 242 (4th Cir. 1977), *cert. denied*, 436 U.S. 927 (1978).

facturer should be dismissed if the beverage was neither mislabeled nor "adulterated".[8] In *Abernathy*, the administrator of the estate of Eural Frank Abernathy, who died of acute ethanol poisoning after drinking whiskey, brought an action against the manufacturer, Schenley, and the seller, Mecklenburg Board of Alcoholic Beverage Control.[9] The causes of action, which alleged a violation of federal statutes[10] for failing to have labels warning of the hazards of whiskey poisoning, were dismissed.[11] The court of appeals, in affirming the dismissal by the district court, found that, where the whiskey is neither misbranded nor adulterated, a distiller which complies with relevant federal regulations as to official approval of its label on whiskey bottles has met its labeling obligation under the statute.[12] Therefore, the manufacturer was not liable for a death resulting from acute ethanol poisoning on the theory that its labels failed to warn of the risk of such poisoning.[13]

A few years later, the Seventh Circuit in *Garrison v. Heublein, Inc.*,[14] held that a manufacturer and distributor of vodka did not have a duty to warn consumers of the common "propensities" of alcohol ingestion. The plaintiffs filed a complaint against Heublein, the manufacturer and distributor of Smirnoff Vodka, alleging that Kenneth Garrison had suffered "physical and mental injuries," including impairment to his physical and motor skills for periods after consumption, effects on the personality, addiction, and decreased driving ability as a result of consuming Heublein's product over a twenty year period.[15]

The trial court dismissed the plaintiffs' complaint, which alleged negligence, willful and wanton conduct, products liability, fraud, and false and misleading advertising.[16] The *Garrison* court found that, under Illinois law, section 402(a) of the Restatement (Second) of Torts[17] provided the analytical

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8. *Id.* at 243-44.
9. *Id.* at 243.
10. The federal statutes considered were the Food, Drug and Cosmetic Act and the Consumer Products Safety Act. The trial court dismissed the claims and the court of appeals affirmed, finding that the Consumer Product Safety Act did not apply to food; alcoholic beverages being "food" under the Act. *Id.* at 243-44.
11. *Id.*
12. *Id.* at 244.
13. *Id.*
14. 673 F.2d 189 (7th Cir. 1982).
15. *Id.*
16. *Id.*
17. RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides that:

(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 was sold.

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

framework to decide whether strict liability should be imposed on alcoholic beverage manufacturers.[18] The *Garrison* court, relying on comments h, i, and j of section 402, found that it should not impose liability upon the manufacturer for failure to warn of the dangerous propensities of alcoholic beverages.[19] Comment h states that when a product is safe for normal consumption it is not defective, unless it is foreseeable to a seller that danger may result from a particular use.[20] As the *Garrison* court pointed out, the "foreseeable use" qualification in comment h contains caveats in comments j and i.[21] Comment j uses alcoholic beverages as an example of a product that has effects on health only when consumed in excessive quantity or over a long period of time.[22] No warning is required with respect to these products.[23] Comment i, relating to the consumer expectations test, states that "good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics. . . ."[24] Thus, the *Garrison* court concluded that under Illinois law, a manufacturer and distributor of alcohol was not under a duty to warn consumers because the dangers of the use of alcoholic beverages are common knowledge. Therefore, the product can't be objectively viewed as unreasonably dangerous.[25]

(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.

Id.

18. *Garrison*, 673 F.2d at 190.

19. *Id.* at 190-91.

20. Comment h states:

[w]here . . . [a seller] 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, [the seller] may be required to give adequate warning of the danger . . . and a product sold without such warning is in a defective condition.

RESTATEMENT (SECOND) OF TORTS § 402A comment h (1965).

21. 673 F.2d at 191.

22. Comment j states:

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

RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965).

23. *Id.*

24. Comment i states:

The article sold must be 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. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous.

RESTATEMENT (SECOND) OF TORTS § 402A comment i (1969).

25. *Garrison*, 673 F.2d at 192. The plaintiffs also argued that there are mis-

The Supreme Court of Tennessee, in *Pemberton v. American Distilled Spirits Co.*[26] similarly found no duty to warn of danger apparent to the ordinary user. In *Pemberton*, the decedent's father brought an action against a grain alcohol retailer, wholesaler, and manufacturer seeking damages for the death of his minor son caused by the ingestion of Everclear grain alcohol.[27] Although the trial court dismissed the action, the court of appeals reversed; finding cognizable causes of action against the manufacturer for strict liability, negligence, and breach of warranty.[28] The supreme court reversed the court of appeals, finding that, under the Tennessee version of section 402A, there was no cause of action because the product was not defective in that it was not unreasonably dangerous at the time it left the manufacturer's control.[29] Additionally, the court reasoned that because the danger was open and obvious, there was no duty to warn an occasional inexperienced user.[30]

Interestingly, the court failed to consider that minors can hardly be considered occasional users.[31] Ignoring this fact, the court concluded that "[a]lcohol has been present and used in society during all recorded history and its characteristics and qualities have been fully explored and developed and are a part of the body of common knowledge . . . ." Therefore, "manufacturers are entitled to rely upon the common sense and good judgment of consumers."[32]

Several cases granting civil immunity for the absence of warning labels on alcoholic beverages were decided in 1986. In another Tennessee case, *Russell v. Bishop*,[33] plaintiffs sought damages from a distiller for the wrongful death of their seventeen year old daughter. She died in a car accident with an eigh-

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perceptions about the use of alcohol, but the court found that the dangers alleged in the plaintiffs' complaint were not among those misperceptions. *Id.* at 192 n.6. *See generally* U.S. DEPARTMENT OF THE TREASURY AND U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, REPORT TO THE PRESIDENT AND THE CONGRESS ON HEALTH HAZARDS ASSOCIATED WITH ALCOHOL AND METHODS TO INFORM THE GENERAL PUBLIC OF THESE HAZARDS (1980).

26. 664 S.W.2d 690 (Tenn. 1984).

27. *Id.* at 691.

28. *Id.* The court of appeals also found causes of action against the retailer and wholesaler on the basis of breach of warranty. *Id.*

29. *Id.* at 692.

30. *Id.* at 692-93. *See also* Simmons v. Rhodes & Jamieson, Ltd., 46 Cal. 2d 190, 293 P.2d 26 (1956); Katz v. Arundel-Brooks Concrete Corp., 220 Md. 200, 151 A.2d 731 (1959); Baker v. Stewart Sand & Material Co., 353 S.W.2d 108 (Mo. 1961); Dalton v. Pioneer Sand & Gravel Co., 37 Wash. 2d 946, 227 P.2d 173 (1951). For a discussion of the application of the "open and obvious danger" rule to minors, see, e.g., Williams v. Beechnut Nutrition Corp., 185 Cal. App. 3d 135, 229 Cal. Rptr. 605 (1986).

31. Recent surveys indicate the first drinking experience usually occurs around age 12. Alcohol is the most widely used drug among American youth. NATIONAL COUNCIL ON ALCOHOLISM, *supra* note 2.

32. *Pemberton*, 664 S.W.2d at 693 (quoting Motlow v. State, 125 Tenn. 547, 563, 145 S.W. 177, 182 (1912)).

33. No. 88 (Tenn. Ct. App. Jan. 7, 1986) (WESTLAW, 1986 WL 653).

teen year old intoxicated driver who had consumed a pint of Canadian Mist Whiskey with a friend before the accident.[34] The case was one of first impression in the United States.[35] The court found *Pemberton* to have set a controlling precedent despite an affidavit submitted by plaintiffs' expert in opposition to a motion for summary judgment.[36] Basically, the affidavit of the Director of Traffic Safety Coordinating Committee for Shelby County, Tennessee, who ran a DWI school, stated that a normal drinker actually has no conception as to how much alcohol he or she may consume without becoming impaired.[37] Plaintiffs' expert went on to voice his approval for placing a warning guideline for use on alcoholic beverage labels.[38]

Obviously, the *Russell* case is quite different from the *Abernathy*, *Garrison*, and *Pemberton* cases. *Russell* involves an alleged duty to warn of the intoxicating effects of alcohol as to impairment of driving ability, while *Abernathy*, *Garrison*, and *Pemberton* involved consumption as a direct cause of death. Despite this difference, the *Russell* court used the section 402A analysis as applied in *Pemberton.*

A few days after *Russell* was decided, an Ohio court of appeals ruled in favor of the distiller in *Desatnik v. Lem Motlow, Property, Inc.*[39] *Desatnik* parallels *Abernathy*, *Garrison*, and *Pemberton* in that the injury directly involved the consumption of alcohol. In *Desatnik*, a father brought an action against the manufacturer of Jack Daniel's Whiskey for the death of his minor son which resulted from acute alcohol poisoning after drinking the manufacturer's whiskey.[40] In arguing for the application of strict liability for failure to warn, plaintiff focused on the fact that the decedent was a minor and an inex-

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34. *Id.* at *1.

35. Note, *A Spirited Call to Require Alcohol Manufacturers to Warn of the Dangerous Propensities of Their Products*, 11 NOVA L. REV. 1611, 1616 (1987).

36. *Id.* at 1617.

37. *Russell*, 1986 WL 653 at *1.

38. *Id.* at *5. The expert suggested the following to be put on labels:

DID YOU KNOW

1. That you are presumed to be under the influence of Intoxicating liquor If your Blood Alcohol Concentration Is .10 percent by weight or more at the time of your offense.
2. That the Chemical Analysis of your blood or breath regardless of the reading is admissable as evidence in court.
3. That refusal to submit to chemical breath or blood test upon arrest will result in revocation of your license for a period of six months.

DON'T DRIVE DRUNK

1. Report suspected drunk drivers to police immediately
2. If you are over the limit let someone sober drive
3. Don't mix excessive Drinking with Driving

GET THE DRUNK DRIVER OFF THE ROAD FOR HIS SAKE AND YOURS

Id.

39. Desatnik v. Lem Motlow, Prop., Inc., No. 84 C.A. 104 (Ohio Ct. App. Jan 9, 1986) (WESTLAW, 1986 WL 760).

40. *Id.* at *1.

perienced drinker and as such was not in the class of persons to whom such risks are commonly known.[41] The court, however, applied a strict interpretation of section 402A, comment i, stating that the risks of alcohol ingestion are generally known, obviating any duty to warn.[42] Further, the court found no duty to warn under a negligence theory because the harm was caused by a product intended for human consumption rather than by a product not intended for consumption.[43] The court also found that "bad whiskey," with which there would be a duty to warn under comment i, meant whiskey having a manufacturing defect rendering it unusually toxic as opposed to "bad whiskey" meaning whiskey of inferior quality.[44] Thus, the court found no duty to warn.

The Iowa Supreme Court addressed the same issue as the *Russell* court in the 1986 case *Maguire v. Pabst Brewing Co.*[45] In *Maguire*, the plaintiff was seriously injured in a motor vehicle accident with a driver who was intoxicated as a result of drinking Pabst beer.[46] The complaint alleged manufacturer liability for, among other theories, strict liability under section 402A.[47] Plaintiffs argued that persons cannot be expected to know their limits of beverage consumption without an adequate warning by the manufacturer as to the effects of various quantities of beer.[48] In upholding the trial courts dismissal, the court stated that it would be impractical to warn of particular tolerances of each consumer.[49]

Similarly, in the 1987 Texas court of appeals case, *Morris v. Adolph Coors Co.*,[50] plaintiffs injured in an automobile accident brought an action against the manufacturers of Coors beer under theories of strict products liability, negligence, violation of statutory prohibition of deceptive advertising, violation of the Alcoholic Beverage Code and breach of express or implied warranties.[51] The manufacturer's beer was allegedly consumed by an eighteen year old driver who had become intoxicated at a high school party before the

41. *Id.* at *3.
42. *Id.* at *4.
43. *Id.* at *3-4. Surprisingly, the court found no duty to warn, even to minors, who might not generally know of the dangers of consumption of alcohol, but agreed with cases which found a duty to warn adults as well as children of generally known dangers of products (furniture polish, medical burning alcohol) not intended for human consumption. *See, e.g.*, Barnes v. Litton Indus. Prod., 555 F.2d 1184 (4th Cir. 1977) (prison inmates drinking medical burning alcohol); Spruill v. Boyle Midway, Inc., 308 F.2d 79 (4th Cir. 1962) (child swallowing furniture polish).
44. *Desatnik*, 1986 WL 760 at *2. The court states that its interpretation is the "clear meaning" of comment i. *See supra* note 24 and accompanying text.
45. 387 N.W.2d 565 (Iowa 1986).
46. *Id.* at 566.
47. *Id.*
48. *Id.* at 570.
49. *Id.*
50. 735 S.W.2d 578 (Tex. Civ. App. 1987).
51. *Id.*

automobile collision.[52] Plaintiffs argued that the present social conditions and changes in circumstances in recent years regarding drunk drivers require that beer manufactures must undertake the duty to warn the public of the dangers of drunk driving.[53] The trial court dismissed the plaintiffs' suit for failure to state a cause of action.[54] Applying the defective, unreasonably dangerous test, the court held that the beer was not defective because it was safe for normal handling and consumption.[55] The court further stated that the ordinary consumer understands that over-consumption of an alcoholic beverage may impair driving ability.[56] The court also found that there was not an implied civil remedy in the Texas statutory prohibition on deceptive advertising or the Alcoholic Beverage Code for claims against manufacturers.[57] Finally, the court found no express warranty and no breach of any implied warranty.[58]

III. THE *Hon* CASE

Hon v. Stroh Brewery Co.[59] was the first case to hold that a genuine issue of material fact existed as to whether alcoholic beverages were safe for their intended purpose without a warning, thus precluding summary judgment under Pennsylvania law. In *Hon*, Nancy Hon sought recovery for the death of her husband, who died at age twenty-six from pancreatitis caused by the consumption of alcohol.[60] Evidence of Mr. Hon's drinking habits for the past six years suggested that Mr. Hon consumed two to three cans of Old Milwaukee Beer and Old Milwaukee Light Beer per night.[61] The trial court granted Stroh's motion for summary judgment.[62] In opposition to the motion, one of plaintiff's experts, a toxicologist and pharmacologist, submitted an affidavit stating that Mr. Hon's drinking caused his pancreatitis.[63] Additionally, the expert stated that the general public's understanding is that only excessive and prolonged use of alcoholic beverages is likely to result in disease. The expert asserted that this view is contrary to new evidence in the medical community suggesting that moderate use of alcohol, as in the case of Mr. Hon, may result in many types of diseases, not simply liver disease.[64] Plaintiff's other expert, a medical doctor, submitted an affidavit stating that medical literature supports the contention that even small amounts of alcohol taken during a brief period

52. *Id.* at 581.
53. *Id.*
54. *Id.*
55. *Id.* at 582.
56. *Id.* at 583-84.
57. *Id.* at 586-87.
58. *Id.* at 587.
59. 835 F.2d 510 (1987).
60. *Id.*
61. *Id.* at 511. Old Milwaukee and Old Milwaukee Light Beer are manufactured by Stroh Brewery.
62. *Id.* at 510.
63. *Id.* at 511.
64. *Id.* at 511 n.2.

may be lethal.[65]

As in the cases discussed previously, the *Hon* court analyzed the case under section 402A.[66] Under Pennsylvania law, the trial judge decides, as a matter of law, whether the product is defective and unreasonably dangerous using a risk versus utility analysis based upon the social policy considerations underlying strict liability.[67] If the case goes to the jury, the jury will only consider the truth of the plaintiff's allegations, the judge having already decided that strict liability applies.[68] Further, under Pennsylvania law a plaintiff must prove that the product was defective when it left the hands of the manufacturer and the defect proximately caused the injury.[69]

The court reasoned that a product may be defective not only because of a faulty design or a manufacturing flaw, but also because it lacks warnings or instructions which are needed to make the product safe for its intended purpose.[70] As in the cases discussed previously, the *Hon* court stated that liability only arises for dangers not generally known.[71]

The court noted that in actions alleging inadequate warnings, the "threshold" social policy considerations under Pennsylvania law are relatively simple. A warning requirement does not detract from a products' utility, and the small cost of adding a warning almost always outweighs the risk of harm.[72] Both parties, however, argued over the feasibility of a warning. The trial court suggested that allowing strict liability in this case could impose an impractical burden on manufacturers of alcoholic beverages. Mrs. Hon argued that the warning, "Alcohol can have adverse effects on your health even when consumed in moderate amounts" would suffice.[73] The court of appeals decided that this issue would benefit from a more fully developed record and remanded the claim.[74]

Next, the court addressed whether a warning was necessary for Stroh's beer to be safe for human consumption.[75] Under Pennsylvania law, if there is a factual basis for finding that such a warning would be necessary, the jury

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65. *Id.* at 511.
66. *Id.* at 512.
67. *Id.*
68. *Id. See also, e.g.*, Holloway v. J.B. Sys., 609 F.2d 1069 (3d Cir. 1979); Azzarello v. Black Bros. Co., 480 Pa. 547, 391 A.2d 1020 (1978); Berkbile v. Brantly Helicopter Corp., 462 Pa. 83, 337 A.2d 893 (1975) (plurality opinion).
69. *Id.* Stroh did not argue absence of proximate cause at trial, so it was not preserved for appeal. *Id.* at 513 n.3.
70. *Id.* at 513. *See, e.g.*, Conti v. Ford Motor Co., 743 F.2d 195, 197 (3d Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985); *Berkbile*, 462 Pa. at 100, 337 A.2d at 902; Incollingo v. Ewing, 444 Pa. 263, 287, 282 A.2d 206, 219 (1971).
71. *Id.*
72. *Id. See, e.g., Azzarello*, 480 Pa. at 541, 391 A.2d at 1023; Dambacher v. Mallis, 336 Pa. Super. 22, ____, 485 A.2d 408, 423 (1984) (en banc).
73. *Id.* at 513-14.
74. *Id.* at 514.
75. *Id.*

decides the question.[76] The appellate court held that the trial court erred in holding, as a matter of law, that Mr. Hon knew or should have known that the amount of beer he consumed was potentially deadly.[77] This, the court stated, is a question for the jury.[78]

The *Hon* court found no evidence on the record that the general public knows moderate consumption can be lethal.[79] In addition, the court concluded that a jury could find that Stroh's marketing and advertising strategy aided the dangerous consumption of beer by promoting that moderate consumption is "part of the 'good life' " and is associated with "healthy, robust activities."[80] The court noted that it was unimportant whether Mr. Hon relied on the advertisements; the proper standard to be used is the advertisements' effects on the general public.[81]

A major difference between *Hon* and the other cases discussed is the court's reluctance to give a strict reading of section 402A comment j.[82] Stroh's argued that comment j means "that 'the dangers of the prolonged consumption of alcohol are well known to the public.' "[83] The court rejected this argument, stating that *when* the dangers of alcohol are generally known, then no warning is required; comment j does not suggest that *all* dangers of consumption are generally known and a warning might be required for those dangers.[84] The court saw no basis for predicting that Pennsylvania courts would treat alcohol any differently than they treat any other drugs; when there are hazards of which the average consumer has no knowledge, the manufacturer must provide the necessary warnings.[85] The court then vacated the summary judgment and remanded the case to the district court.[86]

This is not to say that the *Hon* court would have decided the cases discussed previously in this Note any differently. The court stated that those cases, with the possible exception of *Garrison*, involved situations were the consumer knew or should have known that his or her consumption of alcohol created a substantial risk of danger.[87] No other case has involved beer con-

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76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 514-15.
81. *Id.* at 514 n.4.
82. *Id.* at 515. *See supra* note 22 and accompanying text.
83. *Id.* at 515 (quoting Appellee's Brief at 20).
84. *Id.* The court also notes that comment i uses alcohol as an example of an exception to liability only because the dangers of intoxication and alcoholism are within the general knowledge of the ordinary consumer. *Id.* at 515-16 n.6.
85. *Id.* at 516.
86. *Id.* at 517.
87. *Id.* The court considered Rohe v. Anheuser Busch, Inc., 732 F.2d 155 (6th Cir. 1984); Garrison v. Heublein, Inc., 673 F.2d 189 (7th Cir. 1982); Maquire v. Pabst Brewing Co., 387 N.W.2d 565 (Iowa 1986); Desatnik v. Lem Motlow, Prop., Inc., No. 84 C.A. 104 (Ohio Ct. App. Jan 9, 1986) (WESTLAW, 1986 WL 760); Pemberton v. American Distilled Spirits Co., 644 S.W.2d 690 (Tenn. 1984); Russell v. Bishop, No.

sumption in the same quantity and manner as that of Mr. Hon.[88]

IV. CONCLUSION

Unlike manufacturers of prescription drugs,[89] over the counter drugs,[90] and other potentially dangerous products intended for human consumption, alcoholic beverage producers have not been required to put warning labels on their products because the dangers of alcohol are generally known.[91] *Hon* is the first case that changes this overwhelming precedent.

Alcoholic beverages are a legally unique product. Cigarettes, another commonly used product with known adverse health effects, are required to have federally mandated labels warning of their danger.[92] Despite these federally mandated warning labels, cigarette manufacturers are often forced into litigation concerning the label's adequacy.[93] No plaintiff, however, has prevailed in cigarette litigation. These common law claims are impliedly preempted by the Federal Cigarette Labeling and Advertising Act.[94] While most courts hold that this Act does not expressly preempt common law claims, it contains no "savings clause" which expressly allows common law claims based on a failure to warn.[95] Thus, if Congress were to pass legislation requiring that a particular warning label be placed on alcoholic beverages, as it did with cigarettes, then the issue in alcoholic beverages cases would change from whether dangers of consuming liquor are generally known to the issue of whether common law claims are preempted. Should Congress decide to include a "savings clause" in their legislation, thereby preserving common law

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88 (Tenn. Ct. App. Jan. 7, 1986) (WESTLAW, 1986 WL 653); Morris v. Adolph Coors Co., 735 S.W.2d 578 (Tex. Civ. App. 1987). The court found the result in *Garrison* not surprising because a court could reasonably infer that the consumption of vodka over a 20 year period is "excessive." *Id.* at 516 n.7. However, the *Hon* court states that *Garrison* does not stand for the proposition that any danger caused by the prolonged consumption of alcohol can be considered common knowledge. *Id.* The court also noted that Stroh's did not argue that it was protected from strict liability on the basis of compliance with federal laws pertaining to advertising and labeling, as was argued in *Abernathy*, *supra* note 7. Therefore, the court did not address the issue. 835 F.2d at 517 n.9.

88. *Id.* at 517.

89. *See, e.g.*, Peterson v. Park Davis & Co., 705 P.2d 1001 (Colo. App. 1985); Crocker v. Winthrop Laboratories., 514 S.W.2d 429 (Tex. 1974).

90. *See, e.g.*, Torsiello v. Whitehall Laboratories, 165 N.J. Super. 311, 398 A.2d 132 (1978).

91. For a criticism of this reasoning, see generally Note, *A Spirited Call to Require Alcohol Manufacturers to Warn of the Dangerous Propensities of Their Products*, 11 NOVA L. REV. 1611 (1987).

92. 15 U.S.C. § 1331-1340 (1965).

93. *See, e.g.*, Palmer v. Liggett Group, Inc., 825 F.2d 620 (1st Cir. 1987); Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 907 (1987); Roysdon v. R. J. Reynolds Tobacco Co., 623 F. Supp. 1189 (E.D. Tenn. 1985).

94. *See supra* note 92 and accompanying text.

95. Federal Cigarette Labeling and Advertising Act, *supra* note 92.

tort claims, then plaintiffs will have a greater chance to recover in strict liability.

Until Congress passes such a labeling requirement, however, the issue in alcoholic beverage product liability cases will remain whether such dangers were generally known. At the very least, the *Hon* case has opened the door for recovery in strict liability for plaintiffs harmed in a way not commonly known by the general public. It is likely that more courts will give a less strict interpretation of comments h, i, and j of section 402A, allowing more of these cases to go to the jury.

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