Product Liability and Game Theory: One More Trip to the Choice-of-Law Well

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Abstract
Modern scholarship defends the view that current choice-of-law trends are conducive to a balanced approach to product liability law, in which each state’s substantive law is unlikely to favor plaintiffs or defendants. This paper takes issue with that scholarship. Using the insights of game theory, this essay explains why American product liability law under current choice-of-law constraints results in systematic and increasingly pro-plaintiff adjudication. Federalizing the substantive law is the usual remedy offered for “prisoners’ dilemma” problems in the states. This paper criticizes the idea of substantive federal product liability law, and proposes in its stead a federal choice-of-law rule developed either legislatively or through the courts. A federal choice-of-law rule, if correctly crafted, would be compatible with constitutional mandates and suitable for the resolution of the game theoretic problem. Several possible federal choice-of-law rules are examined, but only one, a “law of first retail sale” rule, passes the needed constitutional and game-theoretic musters. Practical and jurisprudential implications of this rule are also fleshed out in the paper.

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