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BUZZKILL: USE OF PRODUCT LIABILITY DOCTRINES IN LITIGATION AGAINST ENERGY DRINK MANUFACTURERS

*Jeremy Kogan**

I. INTRODUCTION

Not too long ago, people scoffed at the idea that playing tackle football bore some relation to head trauma. Before then, people were equally dismissive of the unhealthy consequences of tobacco in cigarettes. With each new generation comes new knowledge, new research, and ultimately new conclusions about the adverse health consequences of actions or items previously considered above concern. We must continue to ask ourselves, “What products, in use today, adversely affect us in ways yet unknown?” This paper poses the theory that energy drinks represent the answer to that question. Even more important than the answer itself is how will our society—specifically our legal system—adapt to such revelations?

Beverage consumers today buy more energy drinks and energy shots such as Monster, Red Bull, 5 Hour Energy and NOS than ever before.¹ The manufacturers typically market the drinks to teenagers and young adults while emphasizing the consumer’s ability to focus and maintain high levels of energy throughout the day.² These companies primarily appeal to teenagers’ thirst for adventure and risk-taking.³ Many studies and experts conclude

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¹ Michele Simon & James Mosher, *Alcohol, Energy Drinks, and Youth: A Dangerous Mix*, Marin Institute 1, 3 (2007), [http://www.odmhsas.org/resourcecenter/\(S\(qtb4qlzedjc32v45lbt2cw55\)\)/ResourceCenter/Publications/Current/330.pdf](http://www.odmhsas.org/resourcecenter/(S(qtb4qlzedjc32v45lbt2cw55))/ResourceCenter/Publications/Current/330.pdf).

² *Id.* at 4.

³ Monster Energy Drinks, <http://www.monsterenergy.com/us/en/home/#!/pages%3Aabout> (last visited Feb. 14, 2014) (poking at the mundaneness of 9-5 jobs, playing on children’s

that these drinks contain seriously unsafe ingredients that can cause rapid heart rates, increased blood pressure, and a host of side effects including neurological symptoms.⁴ Yet, because some of these manufacturers characterize their products as “dietary supplements” instead of a conventional food (or drink), they escape some of the more onerous regulations the Food and Drug Administration (FDA) imposes under the Federal Food, Drug and Cosmetic Act (FFDCA).⁵ The FDA does not require active ingredients in dietary supplements to be pre-approved before production; therefore, the FDA shoulders the burden to prove the product unsafe before taking it off the market.⁶ Interestingly, the FDA classifies food products as either dietary supplements or conventional foods, not based on their ingredients, but, *rather how the manufacturer decides to market the product*.⁷ Thus, as long as the energy drink manufacturer continues to market its drink as a dietary supplement, the manufacturer will skirt the more burdensome regulations usually required of conventional drinks.⁸

Congress could amend the FFDCA to provide for energy drinks as conventional drinks, rather than dietary supplements. However, a number of factors make this prospect unlikely. First, as scrutiny over energy drinks increases, so too will the money “Big Energy Drink” spends on lobbyists to maintain the status

dreams of becoming athletes, musicians and “living the life”, referring to this demographic as the “new generation”); Monster Energy Drinks, <http://www.monsterenergy.com/us/en/athletes/> (last visited Jan.) (list of nearly 230 extreme sports athletes who are sponsored by Monster alone); see Simon, *supra* note 1 (use of product names).

⁴ Lawyers and Settlements, *Monster Energy Drinks Plaintiff Attorney Weighs In*, (May 28, 2013, 4:30 PM), http://www.lawyersandsettlements.com/articles/monster-energy-drink-deaths-hospitalizations/interview-monster-energy-drink-deaths-18756.html?utm_expid=3607522-2&utm_referrer=http%3A%2F%2Fwww.lawyersandsettlements.com%2Fsearch.html%3Fkeywords%3Denergy%2Bdrinks#.Uo_Sx5TwL0i (American Academy of pediatrics and American Heart Association have warned heavily about the dangers of energy drinks); Lawyers and Settlements, *Energy Drink Side Effects*, http://www.lawyersandsettlements.com/lawsuit/energy-drink-heart-attack.html#.Uo_LZpTwL0h (last updated Oct. 30, 2013) (side effects of energy drinks).

⁵ Peter B. Hutt, *FDA Statutory Authority to Regulate the Safety of Dietary Supplements*, 31 Am. J.L. & Med. 155, 156 (2005).

⁶ Lawyers and Settlements, *supra* note 4.

⁷ 21 U.S.C. § 321(ff); See Hutt, *supra* note 5.

⁸ Hutt, *supra* note 5.

quo.⁹ The government would likely require the FDA to launch a lengthy and detailed investigation into the effect of energy drinks on consumer health,¹⁰ always with the possibility that its findings may be “inconclusive”. Further, the difficulties of recent Congressional gridlock make an amendment to the law unlikely. Finally, the efficient and profit-driven energy drink companies will always attempt to stay one step ahead of FDA regulations.

Without more stringent FDA oversight or a Congressional amendment to the FFDCRA, who can hold these energy drink manufacturers accountable? The answer lies with the judicial system. This very new area of product liability law will expand as courts continue to refine the law in this area. American courts have not yet held energy drink manufacturers liable to individuals who are injured using their products. Individuals have filed a handful of lawsuits, mostly within the last six months, using predominantly product liability theories in an attempt to hold manufacturers liable.¹¹ However, no resolution has yet occurred.

This article examines which specific theories of product liability give plaintiffs the best case against energy drink companies, in addition to a number of the more pressing questions that plaintiffs will encounter. Specifically, should plaintiffs bring suit under strict liability doctrines or negligence doctrines? Alternatively, should plaintiffs allege defective design, defective manufacture or failure to warn?

This paper provides an overview of the regulatory scheme currently governing energy drinks and what the judiciary can do to hold these manufacturers accountable moving forward. Part I explores the FDA’s regulatory authority over energy drinks, which is at best, ineffective, and at worst, backwards. Part II looks specifically at pending lawsuits against energy drink com-

⁹ Catherine Ho, *Monster Energy, Red Bull turn to lobbyists for help*, Washington Post (Jan. 28, 2013), http://articles.washingtonpost.com/2013-01-28/business/36585615_1_energy-drinks-monster-energy-5-hour-energy.

¹⁰ Investigations Operations Manual 366, 376-77. <http://www.fda.gov/downloads/ICECI/Inspections/IOM/UCM123515.pdf> (last updated Sept. 5, 2013).

¹¹ *Adler v. Innovation Ventures, LLC*, No. 2:13-CV-01256, 2013 WL 1088915 (D.N.J. filed Mar. 1, 2013); *Zuckman v. Monster Beverage Corp.*, No. 12-1978 JDB, 2013 WL 3992932 (D.D.C. Aug. 6, 2013) (order granting motion to remand); *People v. Monster Beverage Corp.*, No. CGC-13-531161, 2013 WL 1874733 (Cal. Super. filed May 6, 2013); *Carroll v. Vital Pharmaceuticals, Inc.*, No. 3:13-CV-00088, 2013 WL 2390473 (N.D.G.A. May 23, 2013) (notice of removal); *Crossland v. Monster Beverage Corp.*, No. RIC 1215551, 2012 WL 5007518 (Cal. Super. filed Oct. 17, 2012); *Morris v. Monster Beverage Corp.*, No. RG 13685028, 2013 WL 3197674 (Cal. Super. filed June 25, 2013).

panies and explores the plaintiffs' various theories of liability. Part III examines how various product liability doctrines apply in the context of litigation against energy drink manufacturers. Part III additionally analyzes which avenue of product liability law most likely leads to plaintiff recovery as well as several of the possible, but significant, troubles a plaintiff may run into in litigation against energy drink companies.

II. FDA REGULATION OF ENERGY DRINKS

A. Background

Federal regulation of food and drinks began in 1906 when Congress passed the Pure Food and Drug Act (PFDA) in 1906.¹² The PFDA was the beginning of federal regulation of the food and beverage industry.¹³ The PFDA imposed liability on a person or company who adulterated or misbranded any food item.¹⁴ Although the law provided for removal of any adulterated or misbranded food, the law failed to impose liability on those who made false claims regarding the food's effectiveness.¹⁵ Congress amended the law in 1912, but the PFDA became moot once Congress passed the Federal Food, Drug, and Cosmetic Act (FDCA) in 1938, which provided for the official creation of the Food and Drug Administration (FDA).¹⁶

The FDA's authority to regulate food products continued to grow through a 1962 amendment to the FDCA,¹⁷ the Medical Devices Act (MDA) of 1970,¹⁸ and the Dietary Supplement

¹² Federal Food and Drug Act of 1906 (Pure Food and Drug Act), Pub. L. No. 59-384, 34 Stat. 768 (1906) (repealed by 21 U.S.C. § 329(a)).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Deborah F. Buckman, *Remedies Available for Violations of Federal Food, Drug, and Cosmetic Act (FDCA)*, 25 A.L.R. Fed. 2d 431 (2008) (providing a general overview of the Federal Food, Drug, and Cosmetic Act). In 1911, in *United States v. Johnson*, 221 U.S. 488, 498 (1911), the Supreme Court held that although the Pure Food Act prohibited mislabeling of drug ingredients, it did not forbid other kinds of fraudulent claims made on product labels.

¹⁶ Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. § 321 (2006)).

¹⁷ Drug Amendments of 1962, Pub. L. No. 87-781, § 101, 76 Stat. 780, 780-96 (1962) (codified as amended at 21 U.S.C. § 351 (2006)) (generally requiring manufacturers of drugs demonstrate their products are safe and effective with "substantial evidence").

¹⁸ Medical Device Amendments of 1976, Pub. L. No. 94-295, 90 Stat. 539 (1976) (requiring heightened government oversight for the safety and effective-

Health and Education Act of 1994 (DSHEA).¹⁹ Read together, these acts and statutes give the FDA the difficult and burdensome duty of ensuring that food, drug, and cosmetic products are of high integrity so that consumers can trust product safety without question.²⁰

The DSHEA also created a subcategory of products that are not necessarily regulated by the FDA, but rather by the Center for Food Safety and Applied Nutrition (CFSAN).²¹ CFSAN sets its own statutory requirements for dietary supplement classification, and imposes its own regulatory requirements on dietary supplement manufacturers.²² Therefore, a manufacturer can choose which regulatory scheme to follow, by classifying its product as a dietary supplement or a conventional food product.

B. Regulatory Requirements of Conventional Beverages and Dietary Supplements

The DSHEA permits dietary supplement manufacturers to market its product without receiving any pre-market authorization by the FDA.²³ The DSHEA grandfathered into its regulatory scheme any products marketed as dietary supplements before the enactment of the DSHEA in 1994.²⁴ On its face, the DSHEA seems to require dietary supplement manufacturers to list the product's nutritional facts and ingredients, including caffeine, as well their amounts, on the product label.²⁵ However, DSHEA permits the manufacturer to avoid listing the specific content of

ness of medical devices intended for human use).

¹⁹ Dietary Supplement Health and Education Act (DSHEA), Pub. L. No. 103-417, 108 Stat. 4325 (1994) (providing statutory requirements for a product to be classified as a dietary supplement. The DSHEA imposes additional regulatory requirements for those products so classified).

²⁰ Joseph G. Hoflander, *A Red Bull Instead of A Cigarette: Should the FDA Regulate Energy Drinks?*, 45 Val. U. L. Rev. 689, 696 (2011).

²¹ DSHEA, *supra* note 17; See About the Center for Food Safety and Applied Nutrition, FDA, <http://www.fda.gov/aboutfda/centersoffices/officeoffoods/cfsan/default.htm> (last updated November 25, 2013) (providing general information about the CFSAN).

²² 21 U.S.C. § 321(ff)(1) (2006) (defines a "dietary supplement" as "a product (other than tobacco) intended to supplement the diet that bears or contains one or more of" several exclusively listed ingredients).

²³ See Barbara A. Noah, Foreword: Dietary Supplement Regulation in Flux, 31 Am. J.L. & Med. 147, 148 (2005)(explaining Congress's intention in drafting the DSHEA).

²⁴ *Id.*

²⁵ DSHEA, *supra* note 17.

the blended amounts on its labels, if the manufacturer claims that it uses its ingredients in a proprietary blend.²⁶ As a result, a consumer who compares the labels of energy drinks to Diet Coke, for example, is told that both drinks contain caffeine, but not told that one contains significantly more of the ingredient than the other.

From these DSHEA provisions, it may be inferred that dietary supplements could possibly contain unsafe ingredients, as long as the ingredients were used in supplements before the enactment of the 1994 law.²⁷ However, the FDA mandates most dietary supplement manufacturers to report any adverse side effects of their products to the FDA in an adverse event report (AER).²⁸ However, how the FDA handles AERs from dietary supplement manufacturers remains unclear. Further, many AERs do not contain sufficient information to allow the FDA to properly evaluate the claim.²⁹ It is also worth noting that between the years 2008 and the second quarter of 2012, the FDA received an excess of three million AERs from consumers, healthcare professionals, attorneys, and industry-specific mandated reporters, including the dietary supplements industry.³⁰

The regulatory environment of conventional food and beverages, on the other hand, tells another story. Since conventional beverages do not qualify as over-the-counter drugs or dietary supplements, conventional beverage manufacturers do not have to file an AER with the FDA, even if the manufacturer is aware that the product produces adverse consequences.³¹ Beverage manufacturers must receive pre-market authorization by the FDA, thereby ensuring that it contains only safe ingredients.³² Also, in contrast to FDA regulations for dietary supplements, conventional beverages must disclose the amount of its ingredients, including, in some cases, caffeine, on the label.³³ However, a re-

²⁶ *Id.*

²⁷ *Id.*; See Lawyers and Settlements, *supra* note 4.

²⁸ 21 U.S.C. § 379aa-1(b).

²⁹ FDA Adverse Event Reporting System, FDA, <http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Surveillance/AdverseDrugEffects/default.htm> (last updated September 10, 2012).

³⁰ FDA Adverse Drug Experience Reporting, <http://www.fda.gov/AboutFDA/CentersOffices/OfficeofMedicalProductsandTobacco/CDER/ucm082056.htm> (last updated January 22, 2010).

³¹ *Id.*

³² 21 U.S.C.A. § 348 (West 2013).

³³ 21 U.S.C.A. § 343 (West 2013) (the listing of dietary ingredients shall include the quantity of each such ingredient per serving).

cent study by Consumer Reports found that of sixteen energy drinks that conspicuously include caffeine content on their labels, at least five labels significantly understate the actual amount of caffeine present in the drink.³⁴ Some of these understatements occur in energy drinks containing guarine, which in itself contains concentrated amounts of caffeine, and the manufacturers overlook the caffeine present in such ingredients when calculating the caffeine content in the drink.³⁵

In sum, a tradeoff exists between the FDA regulating products as a dietary supplement or a conventional food and beverage. Dietary supplement manufacturers, in general, do not need to disclose the full blend of ingredients on their labels, and may use ingredients that the FDA would not otherwise recognize as generally safe. The FDA does, however, mandate adverse event reporting by dietary supplement manufacturers for any known adverse side effects of the product. The FDA does not require conventional food and beverage manufacturers to report adverse side effects to the FDA, but they may only use ingredients that are generally recognized as safe, and they must list their ingredients on the label.³⁶ The FDA has been traditionally lax in regulating the caffeine content of energy drinks—at least those classified as conventional beverages—and the agency does not require warning labels or the amount of caffeine in the product the way that it does for over-the-counter caffeine-containing stimulants.³⁷

There is nothing inherently shocking about the regulatory differences between conventional foods and dietary supplements. Curiously, however, the FDA does not classify products based on its ingredients, but, rather how the manufacturer *markets* its product.³⁸ Therefore, manufacturers can essentially *choose* which

³⁴ *The Buzz on Energy Drink Caffeine*, CONSUMER REPORTS (Dec. 2012), <http://www.consumerreports.org/cro/magazine/2012/12/the-buzz-on-energy-drink-caffeine/index.htm>.

³⁵ *Energy Drink Ingredients and What They Do*, Caffeine Informer, <http://www.energyfiend.com/energy-drink-ingredients> (last updated Dec. 5, 2013); Laura Johannes, *Can a Caffeine-Packed Plant Give a Boost?* *The Wall Street Journal*, March 2, 2010, <http://online.wsj.com/news/articles/SB10001424052748704299804575095581735183488>.

³⁶ See DSHEA, *supra* note 17.

³⁷ Reissig, C.J., et al., *Caffeinated Energy Drinks—A Growing Problem*. *Drug Alcohol Depend* (2009), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2735818/>.

³⁸ See 21 U.S.C. § 321(ff) (2006); Peter Barton Hutt, *FDA Statutory Authority to Regulate the Safety of Dietary Supplements*, 31 *Am. J.L. & Med.* 155, 156 (2005).

regulatory scheme they wish to comply with (food and beverage or dietary supplement) simply by altering marketing strategies. The inconsistencies that result in this sort of scheme are readily apparent. For example, energy drinks like Red Bull, Monster and Amp classify themselves as conventional beverages while Rockstar classifies itself as a dietary supplement,³⁹ despite the obvious similarity of the products and their respective ingredients. Further complicating the matter, energy drink manufacturers can switch back and forth between dietary supplement and a conventional food classification as a means to suit business needs. Indeed, in 2013 Monster took advantage of this procedural loophole by switching from a dietary supplement classification to a conventional beverage classification.⁴⁰

C. Summary

By definition, a regulation is a mandatory compliance requirement that an administrative body imposes on any entity properly within the regulation's scope. That is, if regulations apply, the administrative body should not allow a company to skirt those regulations simply because they might harm corporate profits. While the regulatory system surrounding energy drinks is more compulsory than a self-regulation system, the present system is essentially one of self-classification. Energy drink manufacturers may not escape regulation entirely, but they can choose which set of regulations to comply with—a concept wholly opposite to mandatory regulation. In this light, FDA oversight is not so much a strong hand designed to ensure safety in consumer food products, but is rather just one of a myriad of factors that energy drink companies will consider when trying to boost their bottom line.⁴¹

Without new legislation or changes to the FDCA or the

³⁹ Lawyers and Settlements, *supra* note 4.

⁴⁰ Jacques Wilson, *Monster Energy adds caffeine content to labels* (3/21/2013), http://www.cnn.com/2013/03/21/health/monster-energy-beverages/index.html?hpt=hp_bn13 (while the switch would require Monster to list its ingredients on its label, Monster no longer has to report adverse side effects of its products to the FDA. The negative media coverage surrounding Monster and some of the hospitalizations some have claimed as a result of drinking Monster is a likely motive for the switch from dietary supplement to conventional beverage).

⁴¹ It is not the profit-driven nature of the energy drink companies that should draw scrutiny here, but rather the FDA which allows the regulatory environment to be so egregiously taken advantage of, that should draw the ire of criticism.

DSHEA, energy drink companies will continue to operate under the regime of self-classification. FDA regulations, drafted to protect consumers, end up in a pliable regulatory system and the regulations lose their protective purpose. If the regulatory arm (and by extension the legislature as well) of the government cannot hold energy drink manufacturers accountable for the harms their products cause, the question becomes who will assume that role?

III. CURRENT ENERGY DRINK LITIGATION

While the congress and the FDA struggle to find a more comprehensive way to regulate energy drink manufacturers, the judicial system has the ability to hold these companies civilly liable for any harm they may cause. Judicial “regulation”⁴² is compensatory in nature; meaning injured consumers benefit from court decisions. Furthermore, litigation, or the threat of litigation, has the ability deter energy drink companies who use inadequate warning labels or grossly excessive amounts of caffeine or other unsafe ingredients in their products.

Individuals have filed several lawsuits against energy drink manufacturers in the last six months, and that number will grow as more research, on the effects of energy drinks on the human body, is conducted and becomes available.⁴³ Currently, most claims fall into one of two categories: class actions or personal injury claims.⁴⁴

Class action lawsuits have taken aim at the misleading advertising claims energy drink companies make, and/or violation of other general consumer protection laws.⁴⁵ For example, the plaintiff’s allegations in *Adler v. Innovation Ventures* stem

⁴² The term “judicial regulation” here is not intended to convey support for a form of judicial activism, but is intended as a description for how consumers can hold energy drink companies accountable through effective use of the judiciary.

⁴³ Ho, *supra* note 9.

⁴⁴ An even more creative category separate from the following two involves a claim that Monster’s classification as a dietary supplement is itself a violation of state consumer protection laws. Although this is probably the most creative argument against an energy drink manufacturer, the claim will more than likely run into preemption concerns as it is possible that federal FDA regulations would preempt any state consumer protection statutes. *See* California ex. rel. Herrera v. Monster, No. CGC-13-531161 (Cal. Superior, filed 5/6/2013).

⁴⁵ *Adler v. Innovation Ventures, LLC*, No. 2:13CV01256 (D.N.J. filed 3/01/2013); *Zuckman v. Monster*, No. 2012-CA-008653-B (D.C. Super. Ct. filed 11/13/2012).

from 5-Hour Energy's misleading claims that the product provides "hours of energy now" and "no crash later".⁴⁶ The plaintiff, on behalf of the members of his class, pointed out that despite 5-Hour Energy's claim of "no crash later" (indeed, the company advertised it as the product's primary benefit),⁴⁷ microscopic language on both the bottle, which is itself extremely small, and its website, pointed out that "no crash" actually means "no *sugar* crash."⁴⁸ Since the product itself contained no sugar, 5-Hour Energy's claims merely stated the obvious—that users will not experience a sugar-crash because they have not consumed any sugar—but the company failed to disclose that the product did indeed cause a caffeine crash.⁴⁹ The plaintiff in *Adler* alleged that since 2007, 5-Hour Energy knew that about 25% of its users suffered a caffeine crash.⁵⁰ As a result, the plaintiff sought to hold 5-Hour Energy liable for untruthful or deceptive advertising claims in violation of the New Jersey Fraud in Sales or Advertising of Merchandise Law.⁵¹ The plaintiff also sought to hold the defendant liable for breach of express warranty,⁵² breach of implied warranty of merchantability,⁵³ and unjust enrichment.⁵⁴ These contract claims stemmed from the same factual allegations that the New Jersey Fraud in Sale claim and demonstrated that in addition to product liability claims (which plaintiff does not make here), plaintiffs may succeed on both contract theories of liability and violation of state consumer protection statutes.

While some plaintiffs like Mr. Adler pursued class action claims stemming from false or deceptive advertising, the majority of plaintiffs, however, allege some sort of direct personal injury from the use of the product.⁵⁵ Research on the effects of energy drinks on the human body now show a correlation between energy drinks and cardiovascular problems including high blood

⁴⁶ Pl.'s compl. at 4, *Adler v. Innovation Ventures, LLC*, No. 2:13CV01256 (D.N.J. filed 3/01/2013).

⁴⁷ See e.g. <http://www.5hourenergy.com/commercials.asp>.

⁴⁸ See <http://www.5hourenergy.com/index.asp>; *Adler*, *supra* note 43.

⁴⁹ See <http://www.5hourenergy.com/index.asp>; *Adler*, *supra* note 43.

⁵⁰ *Adler*, *supra* note 43.

⁵¹ Pl.'s compl. at 9, *Adler v. Innovation Ventures, LLC*, No. 2:13CV01256 (D.N.J. filed 3/01/2013).

⁵² *Id.* at 10.

⁵³ *Id.*

⁵⁴ *Id.* at 11-12.

⁵⁵ See e.g. *Carrol v. Vital Pharmaceuticals*, No. 3:13CV00088 (N.D.G.A. filed 5/23/2013); *Crossland v. Monster*, No. RIC1215551 (Cal. Superior, filed 10/17/2012); *Morris v. Monster*, No. RG13685028 (Cal. Superior, filed 6/25/2013).

pressure, heart palpitations, cardiac arrest, and, in some cases, even death.⁵⁶ Over 39,000 energy drink-related emergency department visits were recorded between the years 2007 and 2009.⁵⁷ Germany, for example, tracked energy drink-specific-related incidents of children, adolescents and young adults since 2002. Reported adverse outcomes included liver damage, kidney failure, respiratory disorder and tachycardia, among many others.⁵⁸ Consumers who combine energy drinks with alcohol or other drugs often experience even more drastic and pronounced side effects.⁵⁹

The respective deaths of Anais Fournier,⁶⁰ a fourteen-year-old female, and Alex Morris,⁶¹ a nineteen-year-old male spurred two of the most visible product liability personal injury lawsuits against energy drink manufacturers. Mr. Morris began drinking Monster energy drinks when he was a teenager, and by the time he was sixteen years old, he was drinking at least two sixteen-ounce cans, and occasionally up to four per day.⁶² Mr. Morris suffered a cardiac arrest in July, 2012, and the cause of death was later determined to be cardiac arrhythmia and cardiomyopathy.⁶³ Anais Fournais, 14, suffered a similar fate when she too suffered a heart attack after drinking two 16-ounce cans of Monster in the preceding 24-hour period.⁶⁴ Ms. Fournais's autopsy report concluded cardiac arrhythmia as her cause of death due to caffeine toxicity.⁶⁵

The Fournais and Morris lawsuits each allege strict liability for design defect and failure to warn; negligent design, sale and manufacture; negligent failure to warn; fraudulent concealment; breach of implied warranties; and wrongful death.⁶⁶ The

⁵⁶ Seifert, et. al., *Health Effects of Energy Drinks on Children, Adolescents, and Young Adults*, Pediatrics (March, 2011), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3065144/> (hereinafter "Pediatrics").

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Emergency Department Visits Involving Energy Drinks*, The DAWN Report (Nov. 22, 2011) (hereinafter "DAWN Report"), http://www.samhsa.gov/data/2k11/web_dawn_089/web_dawn_089_html.pdf.

⁶⁰ *Crossland v. Monster*, No. RIC1215551 (Cal. Super., filed 10/17/2012).

⁶¹ *Morris v. Monster*, No. RG13685028 (Cal. Super., filed 6/25/2013).

⁶² Pl.'s Compl. at 3, *Morris v. Monster*, No. RG13685028 (Cal. Super., filed 6/25/2013).

⁶³ *Id.*

⁶⁴ *Id.* at 2.

⁶⁵ *Id.*

⁶⁶ *Id.* at 1; Pl.'s Compl. at 1, *Crossland v. Monster*, No. RIC1215551 (Cal. Super., filed 10/17/2012).

plaintiffs allege that Monster knew of the significant risks associated with consumption of its product, and that further, Monster masked or otherwise failed to warn customers, particularly teenagers, of the potentially significant risks associated with the product.⁶⁷ The complaints set out a number of medical findings regarding energy drink consumption, especially consumption by teenagers and adolescents. The complaints specifically include brief synopses of reports⁶⁸ detailing the adverse health consequences of caffeine,⁶⁹ teenagers' vulnerability to caffeine toxicity,⁷⁰ appropriate daily caffeine limits,⁷¹ and Monster's marketing strategy of targeting teenage consumers.⁷² The plaintiffs have seemingly set the stage for a "battle of the experts" to demonstrate whether or not Monster's products were unreasonably dangerous and defective when they left Monster's control.⁷³ The failure to warn claim has a similar logic to it, but instead alleges a product defect because Monster failed to warn or instruct of the potential risks and side effects associated with the drink.⁷⁴ The more broad negligent design, manufacture and sale claim similarly alleges that Monster did not exercise reasonable care in, *inter alia*, the design, formulation, testing, manufacture, labeling, marketing and/or distribution of Monster energy drinks.⁷⁵

Fournais filed the complaint on October 17, 2012, and Morris filed the complaint on June 25, 2013, both in the Alameda

⁶⁷ Pl.'s Compl. at 5, *Crossland v. Monster*, No. RIC1215551 (Cal. Super., filed 10/17/2012).

⁶⁸ *Id.* at 3-6.

⁶⁹ *Id.* at 3; Committee on Nutrition and the Council on Sports Medicine and Fitness, *Sports Drinks and Energy Drinks for Children and Adolescents: Are they Appropriate?* 127 *Pediatrics* 1183 (2011).

⁷⁰ *Id.*

⁷¹ *Pediatrics* at 1185; John P. Higgins, et. al, *Energy Beverages: Content and Safety*, *Mayo Clinic Proc.*, Nov. 2010.

⁷² DAWN Report, *supra* note 53; Committee on Nutrition and the Council on Sports Medicine and Fitness, *supra* note 63, at 1182; *Monster Energy Drinks*, www.monsterenergy.com/us/en/products/.

⁷³ The claim is essentially the same in the complaint's negligence charge, but since negligence contains a culpability requirement where strict liability does not, the plaintiff additionally alleges that Monster knew or should have known of its product's unreasonably dangerous or defective conditions.

⁷⁴ Again, the negligent failure to warn claim differs from strict liability only in that it requires the plaintiff to demonstrate that Monster knew or should have known that its products were likely to be dangerous when used in a foreseeable manner and that therefore, Monster had an affirmative duty to warn of the dangers associated with consumption.

⁷⁵ Petitioner Complaint at 10-11, *Crossland v. Monster*, 2012 WL 5007518 (Cal. Super.) (No. RIC1215551).

County Superior Court in California.⁷⁶ At the time of this writing, both cases appear to be in the early phases of discovery and whether the parties anticipate going to trial over the matter remains unclear.⁷⁷ However, these two cases represent just the beginning for plaintiffs seeking to hold energy drink companies liable for damages via product liability litigation. An American court has yet to resolve any product liability dispute against energy drink manufacturers, so courts currently facing the question are thus given the unique opportunity to set the stage for the future of energy drink safety and accountability.⁷⁸

IV. PRODUCT LIABILITY THEORIES AND APPLICATION TO ENERGY DRINK LITIGATION

A plaintiff's most consequential decision is whether to bring a claim under negligence or strict liability. A brief explanation of the distinction must occur to show the significant difference between the two theories. As a preliminary matter, a majority of states will allow a case to proceed on theories of both strict liability and negligence in the alternative.⁷⁹ On the other hand, a minority of courts have abolished the distinction between strict liability and negligence entirely.⁸⁰ Thus, these minority states have rendered the question of a claim via negligence or strict liability a moot point. One can generally characterize the distinction between the two theories based on the *focus* of the allegations.⁸¹ It is worth noting that the condition of the product is an element of

⁷⁶ *Morris v. Monster*, 2013 WL 3197674 (Cal. Super.) (No. RG13685028) (filed Jun. 25, 2013); *Crossland v. Monster*, 2012 WL 5007518 (Cal. Super.) (No. RIC1215551) (filed Oct. 17, 2012).

⁷⁷ *Morris*, 2013 WL 3197674; *Crossland*, 2012 WL 5007518.

⁷⁸ One American court has resolved a product liability case in favor of an energy drink manufacturer, but the product in question contained alcohol. *Cook v. MillerCoors, LLC*, 872 F. Supp. 2d 1346 (M.D. Fla. 2012), appeal dismissed (Nov. 30, 2012). Energy drinks mixed with alcohol are a markedly distinct product from non-alcoholic energy drinks and consequently there are numerous product liability doctrines—the “inherently dangerous product” doctrine, for example— at play in alcoholic products that are not similarly present in non-alcoholic energy drink litigation.

⁷⁹ 63 AM. JUR. 2D *Products Liability* § 208.

⁸⁰ *Id.*; *See e.g. Tirrell v. Navistar Int'l, Inc.*, 591 A.2d 643 (N.J. Super. Ct. App. Div. 1991); *Washington Water Power Co. v. Graybar Elec. Co.*, 774 P.2d 1199 (Wash. 1989), opinion amended on other grounds, 779 P.2d 697 (Wash. 1989).

⁸¹ 63 AM. JUR. 2D *Products Liability* § 208.

both a claim of negligence and strict liability.⁸² That is, in both cases, the plaintiff must show that the product was defective when it left the defendant's control and that it reached the consumer in an unreasonably dangerous condition.⁸³ Courts also require proof of causation and injury just like any other tort claim.⁸⁴ However, product liability law additionally focuses on the *conduct* of the defendant in negligence cases, as well as the condition of the product.⁸⁵ The plaintiff in a negligence case must prove that the defendant had a duty to act reasonably and that the defendant breached that duty by acting outside the scope of the requisite standard of care.⁸⁶ Since a negligence claim contains a culpability element, the plaintiff would generally have an easier time proceeding under a strict liability theory because it requires no investigation into the reasonableness of the defendant's conduct.

The reasonableness requirement can pose a substantial problem for plaintiffs pursuing a claim in a relatively new area of product liability law. Reasonableness requires a plaintiff to prove the manufacturers owed a duty of care to consumers and, *ipso facto*, requires a plaintiff to point out exactly what that duty is in order to determine whether or not the defendant has breached it. Industry standards set the most probative guideline for the duties a manufacturer owes to its consumers.⁸⁷ However, since energy drink manufacturers often vary greatly with regards to what its label warns of and what ingredients are used in its products, pointing to a discrete standard that one manufacturer must abide by would be especially difficult.

Furthermore, plaintiffs may face an uphill battle attempting to prove that the defendant manufacturers owed a duty to the consumer in the first place. The algebraic formula crafted by Judge Learned Hand in *U.S. v. Carroll Towing* serves as a reference point for whether a legal duty even exists to the plaintiff.⁸⁸

⁸² *Id.*; *Calles v. Scripto-Tokai Corp.*, 864 N.E.2d 249 (Ill. 2007).

⁸³ 63 AM. JUR. 2D *Products Liability* § 530.

⁸⁴ *Id.*

⁸⁵ 63 AM. JUR. 2D *Products Liability* § 208; *Boles v. Sun Ergoline, Inc.*, 223 P.3d 724 (Colo. 2010) (explaining that in strict liability, the focus is not on either the manufacturer's or injured person's conduct); *Haglund v. Philip Morris, Inc.*, 847 N.E.2d 315 (Mass. 2006).

⁸⁶ 63 AM. JUR. 2D *Products Liability* § 208; *Hollinger v. Shoppers Paradise of New Jersey, Inc.*, 340 A.2d 687 (N.J. Super. Ct. Law Div. 1975), *aff'd*, 361 A.2d 578 (N.J. Super. Ct. App. Div. 1976).

⁸⁷ *Id.*

⁸⁸ *U.S. v. Carroll Towing*, 159 F.2d 169 (2d Cir. 1947); Of course, the

In short, the Hand formula posits that the defendant owes a duty only where the defendant's burden of taking precautions is less than the product of the probability of a plaintiff's injury and the gravity of such injury.⁸⁹ All three factors—burden of precautions, probability of injury, and gravity of injury—are inherently difficult to identify in a new area of the law. The science and other research remains in early phases, and the sample size of cases is relatively small, tending to produce wildly varying results with regards to the probability and gravity inquiries.

What specific defect the plaintiff alleges presents another large decision that plaintiffs may face in this new area of law. Product liability law recognizes a number of theories to recovery and, while none are mutually exclusive and generally any number of them may be alleged,⁹⁰ it can save the plaintiff more time and resources in the pleading process and discovery period by specifically pleading the allegations. Defective design, defective manufacture and failure to warn represent the most common theories of liability in product liability litigation.⁹¹

A "manufacturing defect" exists when a product deviates, in its construction or quality, from the specifications or planned output in a manner that renders it unreasonably dangerous.⁹² Secondly, a design defect exists when a product is built in accordance with its intended specifications, but the design itself is inherently defective or poses unreasonable dangers to consumers.⁹³ Thus, in a defective manufacturing claim, the focus of the charge is not on the manufacturer's specifications or design plans, but rather what went wrong during the product's manufacturing process. In contrast, in a defective design claim, the plaintiff focuses on the product's inherent design rather than in the specific manufacturing of a product. The manufacturer's documentable decisions and deliberate designs are generally evidence of defective design.⁹⁴ These first two avenues of product liability do not fit well into the energy drink litigation area for many reasons.

question of duty is a question of fact usually reserved for the jury and, although this formula is rarely given as an express jury instruction, most commentators view it as an algebraic expression of common-sense thinking about the question of duty.

⁸⁹ *Id.*

⁹⁰ 63 AM. JUR. 2D *Products Liability* § 5; *Sherk v. Daisy-Heddon*, 427 A.2d 657 (Pa. 1981).

⁹¹ 63 AM. JUR. 2D *Products Liability* § 535.

⁹² *Id.*

⁹³ 63A AM. JUR. 2D *Products Liability* § 869.

⁹⁴ *Id.*

Practitioners should note that distinctions between negligence and strict liability are based on jurisdiction. Some courts maintain the traditional distinction between negligence and strict liability—knowledge of the condition of the product and the risks involved in that condition will be imputed to the manufacturer in design defect cases based on strict liability—whereas in cases based on negligence, these elements must be proven.⁹⁵ Other courts have found the distinction between negligence and strict liability regarding design and manufacturing defects effectively moot since under both theories, the plaintiff must prove that the manufacturer defectively designed the product, thereby exposing the user to an unreasonable risk of harm.⁹⁶

In any event, a plaintiff pursuing these claims must prove that the defendant manufacturer breached some sort of duty of care either in manufacturing the product or in its design. Again, proving such a breach poses a problem for plaintiffs in the energy drink field because of the newness of the product, and manufacturing and production processes vary so widely between different manufacturers. As a result, the plaintiff may have difficulty finding uniform, or even merely generally-accepted-industry standards of care. If the plaintiff will have difficulty specifying exactly what standard the manufacturer has to abide by, he or she will no doubt have an even more difficult time proving that they breached it.

Finally, courts have held that the duty to warn in a strict liability case relies upon the notion that, absent a warning, a product is defective in that it is not reasonably fit, suitable, or safe for its intended purpose.⁹⁷ In failure-to-warn cases, courts have held that, unless the danger is obvious or known, a manufacturer has a strict duty to warn when its product is inherently

⁹⁵ 63A AM. JUR. 2D *Products Liability* § 873; Oregon, Washington and South Carolina are examples of jurisdictions that maintain the distinction. *See e.g.* *Roach v. Kononen*, 525 P.2d 125 (Or. 1974); *Haugen v. Minnesota Mining & Mfg. Co.*, 550 P.2d 71 (Wash. Ct. App. 1976); *Little v. Brown & Williamson Tobacco Corp.*, 243 F. Supp. 2d 480 (D.S.C. 2001) (applying South Carolina law).

⁹⁶ 63A AM. JUR. 2D *Products Liability* § 1019; Maryland, Kentucky, Maine and New York are some examples of jurisdictions that have effectively abandoned the distinction. *See e.g.* *Holman v. Mark Industries, Inc.*, 610 F. Supp. 1195 (D. Md. 1985); *Jones v. Hutchinson Mfg., Inc.*, 502 S.W.2d 66 (Ky. 1973); *Stanley v. Schiavi Mobile Homes, Inc.*, 462 A.2d 1144 (Me. 1983); *Voss v. Black & Decker Mfg. Co.*, 450 N.E.2d 204 (N.Y. 1983).

⁹⁷ 63 AM. JUR. 2D *Products Liability* § 1019.

dangerous or has dangerous propensities.⁹⁸ Thus, most of the litigation in this area stems from the question whether a danger is obvious or known and whether the product is inherently dangerous or has dangerous propensities. Resolution of both of these questions can occur in the plaintiff's favor in a claim against energy drink manufacturers. The research is becoming increasingly clear to members of the scientific community—particularly cardiologists and pediatricians—that energy drinks contain a potentially dangerous amount of caffeine, especially considering that teenagers constitute a large majority of the energy drink market.⁹⁹ A growing number of researchers and physicians have concluded that heavy energy drink consumption, especially by teenagers who have lower levels of caffeine tolerance, can lead to liver damage, kidney failure, respiratory disorders, tachycardia, cardiac arrests, and even death.¹⁰⁰ These symptoms represent just some of the ways a plaintiff can show energy drinks have inherently dangerous properties.¹⁰¹

A defendant manufacturer can quite possibly defend against these charges with the defense that consumers know of these dangers and as such, they do not have a duty to warn against every possible danger of the product including those which are obvious or well-known to consumers. However, one cannot understate the significance of *who* exactly these energy drinks are intended to reach. As mentioned previously, teenagers and young adults represent energy drink companies' core demographics. In other words, their product is geared specifically towards a group who cannot be held to the same standard as adults in terms of appreciation of the product's danger. Courts should not allow energy drink companies' to argue that since many adults know of the dangers of excessive caffeine use, they do not have to warn consumers about it because adults are not the primary consumers.

This Note's purpose is not to explore what type of warning might be necessary here, how visible it must be or what must even be included in it. Before companies and courts can answer

⁹⁸ *Id.*

⁹⁹ Seifert, et. al., *Health Effects of Energy Drinks on Children, Adolescents, and Young Adults*, PEDIATRICS (March, 2011), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3065144/>.

¹⁰⁰ *Id.*; It is especially these last two side effects—cardiac arrest and death—which have given way to the bulk of energy drink litigation in the United States.

¹⁰¹ 63A AM. JUR. 2D *Products Liability* § 1019.

any of those questions, the courts must first acknowledge that some duty to warn should indeed exist for energy drink companies. Only once the judiciary acknowledges that global fact—by appreciating the increasing gravity of research on caffeine, adolescent caffeine intake and Big Energy Drink’s marketing strategies—can courts begin to answer the more specific concerns about warnings on energy drinks.

Still, perhaps the biggest issue plaintiffs may run into in this area exists in proving injury causation, not whether their claim lies in strict liability or in negligence. The defendant’s most potentially useful defense could be that the connection between the injury and the energy drink may simply be too attenuated, too remote, or even too unknown to impose liability. More research and more literature on the adverse effects of energy drinks is simply the most effective way to guard against this defense. Ideally, an energy drink trial would be staged as a battle of the experts, each making their respective case for the real side effects of energy drinks. Judicial recognition that energy drinks are inherently dangerous products which can cause serious adverse health effects to its users would be the ultimate goal. The only way that the judiciary can effectively reach that conclusion is by litigation that advances far enough to allow plaintiffs and defendants to make their respective cases.

V. CONCLUSION

The current FDA regulatory scheme covering energy drinks has proven ineffective and self-defeating. Although the issue of the adverse side effects of energy drinks has gained steam in recent months, how Congress will respond is not yet clear. While Congress, and potentially state legislatures, debate what, if anything, should be done, it is increasingly becoming a concern of the courts through product liability litigation against energy drink manufacturers. Plaintiffs have used a variety of product liability theories in their initial complaints, but which theory will gain most favor with the courts is unclear. What should be clear, however, is that energy drinks contain dangerous caffeine levels, especially considering the product’s core target demographic. If Congress and the FDA are not willing to hold manufacturers accountable, injured plaintiffs themselves must be willing to shoulder that burden.