TORT LIABILITY STANDARDS AND THE FIRMS RESPONSE TO REGULATION pdf

1: Legal liability of certified public accountants - Wikipedia

Abstract: Much of the recent regulation literature is concerned with the impact of regulation on the value of firms. Previous research has indicated that regulation can be either beneficial or harmful to firms. Increasingly, financial models using an event study methodology are used to measure the.

Administrative systems are driven mainly by government agencies that police the market through standard setting and enforcement. Tort liability is privately driven and occurs after injuries arise from product use and failure. Its impact is primarily felt through the monetary judgments that courts impose on industry actors deemed liable under the law. With respect to these three considerations, this review maintains the following: Tort liability historically preceded and then played an overlapping role with modern administrative systems. Each country of interest to the committee faces different challenges in its own product liability system and civil justice institutions, as well as in its regulatory agencies. This review provides a general historical and conceptual introduction, primarily from the perspective of the U. Because legal systems are rooted in particular historical and cultural contexts, the determination of the appropriate scope of tort and administrative responsibility with respect to food and medical products in a specific country depends on a detailed examination of the social context there. The key variables identified in this discussion may serve as a starting point for such a detailed examination. It also provided for civil liability, which could be pursued through private legal action in some instances. Early English history also reflected public and private enforcement of food standards. Under old English law, the Crown established basic quality systems such as uniform weights and measures, bread and grain standards, and officials to ensure compliance. At the same time, the common law permitted a buyer to sue a seller of substandard food for damages. In the United States, the rise of the modern regulatory agency in the first half of the 20th century also coincided with expansion of the scope of product liability. Food and Drug Administration itself grew from its niche in the Bureau of Chemistry within the Department of Agriculture into the Food and Drug Administration and took on broader regulatory powers. However, by mid-century, those barriers had severely eroded. Lawyers for industry told their clients: Foremost among these was the concept of strict liability. Under strict liability, the plaintiff need only show that the product was defective and caused the injury, he or she need not prove that the manufacturer was at fault or had breached a duty owed to the plaintiff. Over the course of the s and s, both judges and scholars emphasized that such rules would result in safer products because manufacturers would be incentivized to take greater precautions to reduce their tort liability costs. More recently, cases against medical products producers are largely brought on grounds of inadequate warning and defective design, and questions increasingly grew over whether such suits improved safety or thwarted the development of beneficial products. In the next section, this review considers these objectives and the factors that influence the effectiveness of the product liability system. An administrative regulatory system for food, drugs, and medical devices is primarily designed to oversee safety and effectiveness of the products in the marketplace. It accomplishes this by setting standards that industry must meet, and by enforcing those standards throughout the design, production, and marketing process using a variety of tools, including registration, pre-marketing approval, guidance, recall, detention, and seizure. Regulators and other law enforcement officials also have access to more coercive tools such as civil and criminal penalties. The modern tort liability system has a hybrid purpose, particularly in the United States. Settlements may have similar effects. The fear of such potential damages, the media and public scrutiny they bring, can foster greater care and discipline on the part of producers. This, in turn, may have other intended or unintended consequences, such as price increases that could be passed on to consumers. This section proceeds in three parts. Third, it discusses ways in which other significant product liability systems, namely the European and New Zealand models, vary from the U. The tort system affects each of these objectives in a range of ways. Safety By imposing monetary damages on tortfeasors, the tort law increases the costs to them of their activities. In the case of a defectively manufactured FDA-regulated product, the tort law penalizes the

producer or potentially others along the supply chain , and thus incentivizes companies to take greater precautions to prevent future production of defective goods. For example, as discussed earlier, as a general matter, a rule establishing strict liability for product defects will shift costs to the producer, while a negligence rule may reduce the burden. Compensation One of the key distinctions between administrative and tort systems is that tort systems require legally responsible private parties to compensate the injured. In fact, this compensating of the plaintiff by the legally responsible defendant is at the core of tort liability. The definition of compensation, including the scope and calculation of costs, such as pain and suffering, are different from jurisdiction to jurisdiction. Administrative systems typically do not provide compensation to injured parties, 18 and any fines or penalties assessed as a result of regulatory enforcement action inure to the treasury. Regulatory bodies can set up compensation funds and administer them, although in the U. Availability The increased cost to manufacturers as a result of product liability lawsuits can also impact the availability of FDA-regulated products by making it no longer economically feasible to continue selling the product. This may produce a social benefit by driving out substandard products. The Dalkon Shield case is often described in this way. For FDA-regulated products in the United States, one of the more visible examples of this phenomenon was product litigation over childhood vaccines, which resulted in shortages of key medicines until the government intervened to reduce the scope of liability for vaccine-makers. Increasing the cost to producers of certain FDA-regulated products may impact innovation by driving companies to abandon projects that may be too risky. Experts all acknowledge the problems in obtaining and interpreting the pertinent data. Factors Influencing Results and Effectiveness of the Tort Liability System The way in which the tort system affects regulatory outcomes such as safety for food and medical products is largely affected by three main factors: This subsection discusses access and institutional concerns. Access The civil liability system in most countries is based in the judicial system. Many practical factors influence the relative ease of plaintiffs to use the courts for redress: The most well known is the class action. This vehicle allows plaintiffs to combine their lawsuits, which contain the same nucleus of law and fact, thus saving the need to litigate individually across many courts. Some of the principal elements of a functioning judicial system include: Without a functioning set of judicial institutions, substantive tort law rules are not meaningful. Contextualized Determinations Although tort and administrative systems have different goals, they overlap and influence safety outcomes for FDA-regulated products. Precisely how and to what extent is a combination of the specific institutional design of the tort and the administrative system, the substantive rules governing them, as well as their available resources. The United States itself has a contoured approach that has precluded lawsuits for some types of product liability claims with respect to particular pharmaceutical and medical device products. The European Union moved toward a greater acceptance of product liability when it adopted regional legislation. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someones â€¦ labor. While European jurisdictions have begun to permit class action-styled, group lawsuits, they differ in significant ways, reflecting a desire to control the growth of such litigation. As a general matter, lawsuits for accidental injuries caused by FDA-regulated products cannot be brought under tort. The ACC system reduces substantially the ability of the traditional tort system to deter actions of product manufacturers. It arguably places a larger burden on the administrative agency to provide adequate oversight and to ensure compliance. What constitutes the optimal mix of administrative regulation and product liability may depend not only on the state of the civil justice system, but also on the quality of the public agencies charged with overseeing the safety of FDA-regulated products. As a general matter, administrative systems are largely affected by 1 resource constraints and 2 regulatory independence. Without adequate financial, technical, and human resources, agencies cannot meet existing or expanding responsibilities. For example, when an agency is unduly dependent upon industry, its policies may reflect those viewpoints in a manner that compromises its mission. Because FDA-regulated products, particularly pharmaceuticals and medical devices, require substantial scientific expertise to develop and to evaluate, a developing country may have a smaller pool of domestic scientific expertise. Those individuals may be highly sought after by both regulators and

industry, increasing the risk of inappropriate conflicts of interest. Brazil, India, China, and South Africa. Each country has a unique legal system and culture, with its own institutional structure and challenges. This brief review is not exhaustive, but is meant to introduce the central legal doctrines and institutions that bear on the matter of product liability, particularly for food and medical products. It did so through a number of key mechanisms. First, liability for defective products is strict and does not depend on a finding of negligence. Under traditional practice, legal costs were borne by the loser. This rule tends to discourage product litigation because it places substantial financial risk on the plaintiff. The consumer protection code alters the calculus by only shifting costs to the class plaintiff if the suit itself is deemed to be frivolous. If the product is not recalled, that fact is deemed as satisfying a finding of negligence on the part of the manufacturer, which can impose further potential liabilities. For example, unlike in the United States, there is little use of contingency fee arrangements, and plaintiffs have only limited discovery rights. After the end of military rule, the new constitution established a separate and independent judiciary. The courts crafted their own tenure, pay, and disciplinary systems, with little oversight by other branches of government. However, as a result of rising concerns over consumer rights, it substantially reformed its approach to civil liability in by enacting the Consumer Protection Act. Under the Act, a consumer can recover for injuries suffered but must establish that the manufacturer was negligent. Complainants can litigate with or without a lawyer. Moreover, the law includes consumer-friendly provisions allowing consumer associations or similar public interest groups to sue on behalf of injured parties. In that forum, the ability of plaintiffs to obtain discovery is greater than in non-common law systems. Plaintiffs can also file class actions, but such actions have been rare in mass tort lawsuits. The food safety regulatory system was reformed under the Food Safety and Standards Act of A notable feature of this legislation is the empowerment of Adjudicating Officers and a special Tribunal to summarily handle cases of food safety arising under the law, and regulators can seek civil compensation for victims in that forum in addition to fines and penalties. However, institutional problems caused by docket congestion and corruption plague the effectiveness of the civil justice system, and place in question its ability to serve as a backstop for product safety. It relies heavily upon government agencies to conduct inspections and to penalize violations, either through fines or criminal prosecution. Usually, these are organized as periodic crackdowns, and in recent years, such campaigns have been waged on identified products of public concern, such as dairy and cooking oil. It provides for strict liability for defective products. Court institutions are not formally independent, and accordingly are subject to directives from various political authorities, which have tended to discourage such lawsuits. Under the new law, producers are strictly liable to consumers for producing goods that are unsafe, defective, or hazardous, regardless of whether the producer was negligent. Although the text of the law suggests every type of product defect is subject to strict liability, this approach is a significant departure from its own past practice and in some ways different from comparative practice. Despite these changes in the substantive law, access-to-justice issues in South Africa remain a significant barrier. This type of representative litigation may also ease access-to-justice problems. CONCLUSION Assessing the role that the tort system has in the regulation of food and medical products in developing countries requires a highly factual and context-dependent understanding of the potential capacity of both the civil justice and administrative regulatory systems.

TORT LIABILITY STANDARDS AND THE FIRMS RESPONSE TO REGULATION pdf

2: Tort - Wikipedia

Get this from a library! Tort liability standards and the firm's response to regulation. [Robert W Moreschi].

Common law liability arises from negligence, breach of contract, and fraud. Statutory law liability is the obligation that comes from a certain statute or a law, which is applied, to society. Some of these theories are: CPAs and their clients enter into a contract with an agreement to perform certain services. Liability occurs when there is a breach of contract. Negligence can be referred to as ordinary negligence and gross negligence. Ordinary negligence is defined as failure of duty in accordance with applicable standards, and gross negligence is the lack of concern for the likelihood that injuries will result. Fraud is defined to be a misrepresentation of a material fact by a person who is aware of his or her actions, with the intention of misleading the other party with the other party injured as a result. CPAs have statutory liability under both federal and state securities laws. Statutory liability provides cover for defense costs, fines and penalties charged against the firm. Under statutory law, an auditor can be held civilly or criminally liable. With an engagement letter, it provides the client and other third parties with rights of recovery. Therefore, if the CPAs are not performing within the agreement set forth in the contract this will be considered a breach of contract. The clients may also claim negligence against the CPAs if the work was performed but contained errors or was not done professionally. This is considered a tort action. In order to recover from an auditor under common law, the client must prove: If a state follows the doctrine of contributory negligence, the auditor may eliminate their liability to the client based on contributory negligence by the client. Many states do not follow this doctrine. This is called comparative negligence. Liability to third parties[edit] Not all suits brought to an auditor are from a direct client. Third parties can also sue an auditor for fraud, in which case a contract privity is necessary. In order for a third party to prevail in a case, there are a number of things they must prove. First, the third party must prove that the auditor had a duty to exercise due care. Second, the third party must prove that the auditor breached that duty knowingly. Finally, the third party must prove that they suffered an actual loss. First is the Privity approach, which states the auditor is liable to a third party if an existence of a contract is in existence. Touche and is the most limiting approach in respect to scope. In addition to the CPAs estimations, Ultramares wrote out several loans to the company shortly before the company declared bankruptcy. Ultramares sued the CPA for ordinary negligence. Rosenblum foreseeable user approach[edit] The "reasonably foreseeable" approach which was created due to Rosenblum v. This system holds an auditor liable to all third parties that rely on financial statements. Lawsuits brought against auditors based on statutory provisions differ from those under common law. While common law can vary from state to state and has the ability to evolve or change, statutory law is constrained to a greater degree by the underlying law. In order to complete registration, the company must include audited financial statements and numerous other disclosures. If the registration statement was to be found materially misstated, both the company and its auditors may be held liable. Those who initially purchase a security offered for sale are the only ones protected by the Act. These security purchasers, known as the plaintiffs, only need to prove a loss was constant and that the registration statement was misleading. They do not need to prove that they relied upon the registration or that the auditors were negligent. The standing precedent on interpretation of due diligence is Escott v. BarChris Construction Corporation, decided in The Securities Exchange Act of requires all companies under SEC jurisdiction to file an annual audit and have quarterly review of financial statements. While the Act creates liability only to those investors involved in the initial distribution of public offerings, the Act increases that responsibility to subsequent purchasers and sellers of the stock. This act provides absolute protection to original and subsequent purchasers and sellers of securities. These plaintiffs must prove that: Hochfelder, [19] plaintiffs must show proof of scienter the intent to deceive, manipulate, or defraud. This act was established as a means of making sure that CPAs who may have been involved with any illegal mob or racketeering activity were brought to justice. This later became an issue of liability in Reves vs. Simon [23] has set the precedent of

severe charges for accountants. In this case, the U. Although the CPAs had proof to establish that they complied with U. In , the SEC established the Private Securities Litigation Reform Act which in essence mandated auditors to have even stricter guidelines as they pertains to any fraudulent or misleading behavior of their clients. According to the guidelines of this Act, auditors are relieved of sanctions if they report required information about clients to the SEC in a timely manner.

TORT LIABILITY STANDARDS AND THE FIRMS RESPONSE TO REGULATION pdf

3: Tort Law is Reformed in Response to Crisis - Newsletters - International Law Office

For example, Moreschi examined the share reaction of pulp and paper companies in response to the Federal Water Pollution Control Act Amendments introduced by the U.S. Environmental Protection Agency.

History of contract law Roman law contained provisions for torts in the form of delict , which later influenced the civil law jurisdictions in Continental Europe , but a distinctive body of law arose in the common law world traced to English tort law. Medieval period[edit] Torts and crimes at common law originate in the Germanic system of compensatory fines for wrongs OE unriht , with no clear distinction between crimes and other wrongs. After the Norman Conquest , fines were paid only to courts or the king, and quickly became a revenue source. A wrong became known as a tort or trespass, and there arose a division between civil pleas and pleas of the crown. The trespass action was an early civil plea in which damages were paid to the victim; if no payment was made, the defendant was imprisoned. The plea arose in local courts for slander , breach of contract , or interference with land, goods, or persons. It may have arisen either out of the "appeal of felony", or assize of novel disseisin, or replevin. Later, after the Statute of Westminster , in the s, the "trespass on the case" action arose for when the defendant did not direct force. The English Judicature Act passed through abolished the separate actions of trespass and trespass on the case. Liability for common carrier , which arose around , was also emphasized in the medieval period. As transportation improved and carriages became popular in the 18th and 19th centuries , however, collisions and carelessness became more prominent in court records. English influence[edit] The right of victims to receive redress was regarded by later English scholars as one of the rights of Englishmen. However, tort law was viewed[who? Long Island Railroad Co. Modern development[edit] The law of torts for various jurisdictions has developed independently. In the case of the United States, a survey of trial lawyers pointed to several modern developments, including strict liability for products based on Greenman v. Yuba Power Products, the limitation of various immunities e. However, there has also been a reaction in terms of tort reform , which in some cases have been struck down as violating state constitutions, and federal preemption of state laws. Even among common law countries, however, significant differences exist. For example, in England legal fees of the winner are paid by the loser the English rule versus the American rule of attorney fees. The Jewish law of rabbinic damages is another example although tort in Israeli law is technically similar to English law as it was enacted by British Mandate of Palestine authorities in and took effect in There is more apparent split between the Commonwealth countries principally England, Canada and Australia and the United States, although Canada may be more influenced by the United States due to its proximity. The influence of the United States on Australia has been limited. This occurs particularly in the United States, where each of the 50 states may have different state laws , but also may occur in other countries with a federal system of states, or internationally. Outline of tort law Torts may be categorized in several ways, with a particularly common division between negligent and intentional torts. Quasi-torts may be used to refer to torts which are similar to but somewhat different from typical torts. Particularly in the United States, "collateral tort" is used to refer to torts in labour law such as intentional infliction of emotional distress "outrage" ; [19] or wrongful dismissal ; these evolving causes of action are debated and overlap with contract law or other legal areas to some degree. The tort of negligence provides a cause of action leading to damages, or to relief, in each case designed to protect legal rights, including those of personal safety, property, and, in some cases, intangible economic interests or noneconomic interests such as the tort of negligent infliction of emotional distress in the United States. Product liability cases, such as those involving warranties, may also be considered negligence actions or, particularly in the United States, may apply regardless of negligence or intention through strict liability. Intentional torts include, among others, certain torts arising from the occupation or use of land. Trespass allows owners to sue for entrances by a person or his structure, such as an overhanging building on their land. Several intentional torts do not involve land. In some cases, the development of tort law has spurred lawmakers to create alternative solutions to disputes. In other cases, legal

commentary has led to the development of new causes of action outside the traditional common law torts. These are loosely grouped into quasi-torts or liability torts. Negligence Negligence is a tort which arises from the breach of the duty of care owed by one person to another from the perspective of a reasonable person. Although credited as appearing in the United States in Brown v. Donoghue drank from an opaque bottle containing a decomposed snail and claimed that it had made her ill. She could not sue Mr. Stevenson for damages for breach of contract and instead sued for negligence. The majority determined that the definition of negligence can be divided into four component parts that the plaintiff must prove to establish negligence. The elements in determining the liability for negligence are: The plaintiff suffered damage as a result of that breach The damage was not too remote; there was proximate cause to show the breach caused the damage In certain cases, negligence can be assumed under the doctrine of res ipsa loquitur Latin for "the thing itself speaks" ; particularly in the United States, a related concept is negligence per se. However, as per Esanda Finance Corporation Ltd v. Peat Marwick Hungerfords , such auditors do NOT provide a duty of care to third parties who rely on their reports. An exception is where the auditor provides the third party with a privity letter, explicitly stating the third party can rely on the report for a specific purpose. In such cases, the privity letter establishes a duty of care. Proximate cause Proximate cause means that you must be able to show that the harm was caused by the tort you are suing for. A common situation where a prior cause becomes an issue is the personal injury car accident, where the person re-injures an old injury. For example, someone who has a bad back is injured in the back in a car accident. Years later he is still in pain. He must prove the pain is caused by the car accident, and not the natural progression of the previous problem with the back. A superseding intervening cause happens shortly after the injury. For example, if after the accident the doctor who works on you commits malpractice and injures you further, the defense can argue that it was not the accident, but the incompetent doctor who caused your injury. Intentional tort Intentional torts are any intentional acts that are reasonably foreseeable to cause harm to an individual, and that do so. Intentional torts have several subcategories: Torts against the person include assault , battery , false imprisonment , intentional infliction of emotional distress , and fraud , although the latter is also an economic tort. Property torts involve any intentional interference with the property rights of the claimant plaintiff. Those commonly recognized include trespass to land, trespass to chattels personal property , and conversion. An intentional tort requires an overt act, some form of intent, and causation. In most cases, transferred intent, which occurs when the defendant intends to injure an individual but actually ends up injuring another individual, will satisfy the intent requirement. Statutory torts[edit] A statutory tort is like any other, in that it imposes duties on private or public parties, however they are created by the legislature, not the courts. State of California in which a judicial common law rule established in Rowland v. Christian was amended through a statute. In some cases federal or state statutes may preempt tort actions, which is particularly discussed in terms of the U. Nuisance "Nuisance" is traditionally used to describe an activity which is harmful or annoying to others such as indecent conduct or a rubbish heap. Nuisances either affect private individuals private nuisance or the general public public nuisance. The claimant can sue for most acts that interfere with their use and enjoyment of their land. In English law, whether activity was an illegal nuisance depended upon the area and whether the activity was "for the benefit of the commonwealth", with richer areas subject to a greater expectation of cleanliness and quiet. Fletcher , strict liability was established for a dangerous escape of some hazard, including water, fire, or animals as long as the cause was not remote. Defamation Defamation is tarnishing the reputation of someone; it has two varieties, slander and libel. Slander is spoken defamation and libel is printed or broadcast defamation. The two otherwise share the same features: Defamation does not affect or hinder the voicing of opinions, but does occupy the same fields as rights to free speech in the First Amendment to the Constitution of the United States, or Article 10 of the European Convention of Human Rights. Related to defamation in the U. Abuse of process and malicious prosecution are often classified as dignitary torts as well. Economic tort and Misrepresentation Business torts i. Negligent misrepresentation torts are distinct from contractual cases involving misrepresentation in that there is no privity of contract; these torts are likely to involve pure

economic loss which has been less-commonly recoverable in tort. One criterion for determining whether economic loss is recoverable is the "foreseeability" doctrine. Supreme Court adopted the doctrine in East River S. In the European Union, articles and of the Treaty on the Functioning of the European Union apply but allowing private actions to enforce antitrust laws is under discussion. Touche limited the liability of an auditor to known identified beneficiaries of the audit and this rule was widely applied in the United States until the s. White in Massachusetts, this rule spread across the country as a majority rule with the "out-of-pocket damages" rule as a minority rule.

TORT LIABILITY STANDARDS AND THE FIRMS RESPONSE TO REGULATION pdf

4: IDEALS @ Illinois: Tort Liability Standards and the Firm's Response to Regulation

A fee system resembles a tort liability sys- tem: No fixed standards are set, but firms respond to the cost of damages. The regu- lated entity must purchase the right to im- pose social costs in the same way that a tort judgment requires payment for harms.

Regulation by statute is "public" law. How should the two relate to each other in a regulatory state where statutory intervention in private mar- kets is widespread? Both tort and statutory law have regulatory effects. Thus economic policymakers should examine the links be- tween these legal regimes in substantive ar- eas where both systems operate. I argue in this paper that statutes should generally dominate so long as agencies can use rule- making to shape policy. Common-law torts should be limited to areas of activity not covered by statutes and to situations in which courts can complement the statutory scheme with a supplementary enforcement and compensation mechanism. However, if the implementation of a statutory scheme requires that private tort actions be preempted, alternative methods of compensat- ing victims, such as social insurance or statute-based private damage actions, may need to be designed. Statutes The fundamental differences between tort law and regulation center not on substantive standards, or on the distribution of ben- efits and harms, but on procedures. Statu- tory regulation, unlike tort law, uses agency officials to decide individual cases instead of judges and juries; resolves some generic is- sues in rulemakings not linked to individual cases; uses nonjudicialized procedures to tDiscussants: This paper is adopted from my forthcoming article In short, the differences involve who decides, at what time, with what information, under what procedures, and with what scope. He distinguishes between ex post backwardlooking and ex ante forward-looking op- tions, and between privately initiated and state-initiated systems. This framework produces four alternatives: Tort liability ex post, privately initiated ; court injunctions ex ante, privately initiated ; command-and-control regulation or corrective - taxes ex ante, state initiated ; and fines for harm done ex post, state initiated. For our purposes, the most important comparisons are between tort liability and ex ante, state- initiated approaches. Five factors, according to Shavell, should influence the choice between ex ante, state- initiated and ex post, privately initiated ap- proaches. First, state action is desirable when the harm is so diffuse that individuals have little incentive to sue on their own and cannot cheaply organize to sue as a group. Second, if injurers are too poor to pay for the harm they cause, a system based on ex post payments will not effectively deter them. Third, when harm can be demonstrated on a statistical, but not an individ- ual, basis, regulations or taxes applied ex ante can shape behavior without a show- ing of causal links between particular par- ties. Fourth, an ex ante regulatory system will be preferable when the same information about costs and benefits is relevant to many VOL. Fifth, administrative costs are an important consideration. If the prob- ability of harm is low, ex post systems may be preferable since they only need come into play when damage occurs. Ironically, tort law may be most ineffec- tive in precisely those areas where judicial doctrine has been most innovative-toxic torts, products liability, and medical malpractice. These are all areas where ex ante regulation enjoys distinct advantages. Some critics, such as Peter Huber and W. Nevertheless, widespread support for the tort system persists even when the logic of efficient risk control demands ex ante regulation. Given this reality, the remainder of this paper attempts to explain how torts can be used to further. Torts as a Complement to Statutory Regulation Let us consider, then, a situation favoring statutory regulation over torts-for example, the safety of automobiles, drugs, or medical devices, where many people are at risk and information about product design is often relevant to harm. To highlight the differences between statutes and torts, assume that regulatory standards are set through rulemaking under a commandand-control scheme. Ideally, tort law and regulatory standards work together to further deterrence and compensation goals. Torts and regulations can be complementary: However, when the regulatory standard is set optimally while the tort standard of neg- ligence is interpreted to require an even higher level of care, conflicts can arise un- der a system of compensatory damages. Such conflicts are even more likely when punitive damages are available. Legislatures have other

aims besides con- structing rational regulatory systems, and they often fail to establish regulatory pro- grams in all of the areas in which regulation would in theory be superior to tort law. In such cases the first type of complementarity applies. Courts should not idealize the pat- tern of common-law regulation created by their past adjudications, but should instead see tort law as a stopgap pending future statutory regulation. General Motors, , p. Regulatory standards are sometimes de- signed to establish only a baseline. Then the second case holds. While violation of such a standard usually amounts to negligence per se in a tort suit, compliance with the standard is merely evidence for the jury to consider in determining reasonable conduct. Note the asymmetry here. Because the standard sets a minimum, the plaintiff can argue that a higher standard should be im- posed in a particular case, but the defen- dant cannot invoke special circumstances to justify its violation of the basic standard. The courts have taken this approach in product and occupational safety cases; they have ruled, for example, that the Food, Drug and Cosmetic Act sets only minima and does not preempt tort suits for damages. Similarly, tort suits involving automobile design or exposure to nuclear materials Silkwood r. Kerr-McGee, are not pre- empted by regulatory statutes. These first two ways of reconciling tort law and statutory law are logically inconsis- tent but coexist in practice; tort suits with regulatory effect are permitted both when the legislature has not acted and when it has established a statutory minimum. Yet regulations cannot really be minima if the common law operates as a stopgap. If the courts view regulatory standards as minima, there is no conflict with the statu- tory scheme if the agency itself has set a low standard in the belief that case-by-case ad- judication is the best way to respond to the regulatory problem. Although this may sometimes be a plausible strategy, the plain- tiff should bear the burden of demonstrat- ing that the legislature intended it. Absent such a showing, a regulatory statute should be taken to imply a legislative judgment that a comprehensive, state-centered, ex ante approach is the best way to deter harm. The difficulties of judicial standard setting should lead judges to accept the stopgap role. If the regulations are indeed too lax, statutory or administrative reform is appropriate, not ad hoc judicial actions that respond to indi- vidual needs while producing systemwide inequities and inefficiencies. Under the third form of complementarity, the doctrines of either negligence or strict liability can produce both a more consistent tort law and a more effective regulatory system. To accomplish this, however, courts must be prepared to surrender some of their independence in setting standards of care and assessing damages. Consider a negligence rule that seeks to mimic the regulatory standard. In contrast to the asymmetric doctrine of negligence per se, the courts would also recognize a per se defense for injurers who meet the regulatory standard. The wrongdoer could thus be punished twice: While this may seem unfair to the wrongdoer, it is not inefficient even if the sum of the penalties exceeds the social costs of violating the standards. Convicted wrongdoers would pay "too much," but any- one can avoid this overcharge by simply conforming to the regulatory requirements. This optimistic view is true, however, only if agencies set clear standards, courts accept these standards in determining liability, and apply them competently to individual cases. Suppose now that the tort standard is not negligence but true strict liability, which holds a manufacturer liable for all harm caused by its product and only requires the court to determine causation, not to assess the risks and benefits of product design. Under true strict liability, torts and regulation need not conflict if damages are set equal to the harm caused by the tortfeasor. The possibil- ity of a tort judgment will simply give the regulated entity an additional incentive to comply with the statute. The conditions as- suring complementarity, however, do not now exist. To achieve them would require substantial tort reform, yet attempts to re- shape tort doctrine according to its behav- ioral effects would be difficult. In contrast to the complementary options outlined above, tort law can work at cross purposes to statutes when the regulatory standard is set at the socially optimal level of care, but the courts impose a more strin- gent negligence standard. Two cases need to be considered: Judges sometimes sharply distinguish the two, finding punitive damages "regulatory" but not compensatory damages for example Silkwood rl. Kerr-McGee, Powell dissenting, p. Under this view, the goal of com- pensatory damages is merely to make the victim whole, not to induce behavioral changes in potential injurers; thus compen- satory damages cannot conflict with a regu- latory purpose. But these assumptions are always false where no statute exists the stopgap case and are often

false even when one does. To see the judicial error, suppose that a regulatory agency has set a product standard at the optimal level, but courts nonetheless find that complying firms have been negligent or have defectively designed their product. At this care level, however, it will surpass the optimal agency standard, and marginal costs will exceed marginal benefits. Judges who distinguish between compen- satory and punitive damages, however, are not completely misguided. Punitive damages also influence caretaking and product design but may produce a different outcome than compensatory damages. If the courts impose a higher standard of care than is required by socially optimal statute, economic distortions will occur. The regulated firm subject to punitive damages will choose one of two options depending upon which is profit maximizing: Regulatory Reform Commentators have long urged legisla- tors and regulatory agencies to charge fees set to reflect the risks created by regulated firms. Incentive-based reforms allocate reg- ulatory costs to those who can bear them most efficiently, encourage firms to search for innovative ways to reduce harms, and force producers to reflect the risks they impose on society. Such reforms, however, could be under- mined by a poorly informed judiciary. If courts equate regulation with standard set- ting, then they may treat only command- and-control regulation as behaviorally sig- nificant. If the courts set the damages multiplier to correct for this, the earlier analysis of compensatory damages applies. Shore Realty, , p. Incentive schemes require a fundamental rethinking of the relationship between tort law and statutory law. How should courts handle claims by defendants that incentive- based regulatory statutes preempt tort actions? Judges who view regulation as con- fined to standard setting might allow tort actions on the ground that these statutes are not "regulatory" because they do not establish uniform standards but "only" create incentives. Yet the argument for pre- emption of tort law is even stronger in the case of incentive-based regulations than in the case of command-and-control regulation. A well-designed incentive system sig- nals to a firm the social costs of its activities. A fee system resembles a tort liability sys- tem: No fixed standards are set, but firms respond to the cost of damages. The regu- lated entity must purchase the right to im- pose social costs in the same way that a tort judgment requires payment for harms. The main difference is the comprehensiveness of a fee schedule, which the state sets so that all firms are covered. Thus incentive-based statutes should include a provision clearly preempting tort actions. The only role for lawsuits by private individuals would be to force the agency to enforce its own rules; such suits might per- mit private recovery of damages for harm caused by lax enforcement. Although ordi- nary tort actions would be preempted, cer- tain specialized private remedies might sup- plement agency enforcement just as tort actions do which use regulatory standards as the standard of negligence. Compensation Tort law provides more than a set of regulatory incentives; behavior modification is not its only legitimate function. If a regulatory statute bars pri- vate tort actions, those who were previously able to sue for damages will be disadvan- taged, a result courts seem reluctant to permit Silkwood Kerr-McGee, p. Yet retaining con- ventional tort actions in the face of regula- tory statutes can undermine the behavioral impact of statutes. Other solutions must be found to the problem of providing compen- sation.

TORT LIABILITY STANDARDS AND THE FIRMS RESPONSE TO REGULATION pdf

5: Chinaâ€™s Top Court Clarifies Environmental Tort Liability Standards | The National Law Review

Read chapter Product Safety Regulation and the Law of Torts: Product liability is a contentious issue. Proponents argue that American tort law promotes pr.

Overview Our Clients Katten handles a broad range of product, premises and other tort liability claims for manufacturers, retailers, distributors, real estate owners, contractors and other businesses. We have represented clients in individual and class action matters involving a range of products, including medical devices, chemicals, consumer products, automotive, sporting goods, safety and industrial equipment, construction materials, and protective gear. We regularly try high-exposure product, premises and other tort cases to verdict in federal and state courts, and bring a measured, strategic approach to cases across the country. Katten serves as national, regional, statewide or trial counsel, providing the resources appropriate to the case at hand in an efficient and effective manner. We determine early on which cases are defensible, which present unique opportunities for industry defense, andâ€”most importantlyâ€”which do not. When a trial is called for, our trial lawyers stand ready to take the case to verdict, with a proven track record of successful results before juries. Several Katten attorneys hold advanced degrees in technical and scientific fields and have relevant industry experience. We maintain relationships with experts in virtually every field, including engineering, industrial hygiene, chemistry and material science, fire, safety equipment, computer forensics, engineering forensics, failure analysis, toxicology, construction, architecture, industry standards, government regulations, biomechanics, product design, human factors, medicine, life care planning, economics, product warnings, and accident reconstruction. A significant portion of our practice is devoted to helping clients avoid litigation involving the products they sell. We routinely advise on the risks related to testing, marketing and labeling, warnings, and other product liability issues. This includes the unique issues that may confront clients facing a product recall or a government investigation. We also work closely with clients to develop corporate product liability policies and consult on new product development. Even the most careful and conscientious business cannot avoid the risks associated with the design, manufacture and sale of products. Katten attorneys do not simply point out these risksâ€”we help clients address the risks while accomplishing their business objectives. HIDE TEXT Experience Lead counsel in the defense of a maker of food storage, home storage, disposable cookware and tableware, and trash disposal products in an industrial accident involving traumatic brain injuries. Case was successfully settled. Lead trial counsel in the successful representation of a company in premises liability and catastrophic tort lawsuit involving quadriplegic injuries from a swimming pool incident and a request for eight-figure damages. After a long trial, plaintiff voluntarily dismissed with prejudice, and an extremely favorable settlement was obtained on behalf of defendant. Lead trial counsel in the successful representation of a large national dairy company in catastrophic tort lawsuit involving wrongful death claim and quadriplegic injuries. Defense verdict in first trial, and after appeal, a second trial is pending. Lead trial counsel in the successful defense of a publicly traded company in a wrongful death action arising from the death of a senior executive of another company. Defense verdict at third and final trial of the matter after an eight-figure jury demand by a nationally known Florida plaintiff lawyer.

TORT LIABILITY STANDARDS AND THE FIRMS RESPONSE TO REGULATION pdf

6: IMPACT OF THE SARBANES-OXLEY ACT ON ACCOUNTANT LIABILITY

Public administrative systems and private tort liability11Although this paper refers to tort liability (the common law term), it intends to include the similar concept of delict in civil law systems. both play important roles in product regulation in the United States and elsewhere in the world.

Courts are not very good at acting like agencies. When one sees this happening, that is an argument for establishing regulatory institutions. First, when various dangers exist that have not been regulated, the tort system provides a stop-gap measure pending the passage of legislation. Thus in Larsen v. General Motors F. Thus, the courts are filling in the gaps, albeit in an imperfect way. Second, statutes are often treated as baselines in tort suits. The federal courts have taken this approach in product and occupational health and safety cases. They have ruled, for example, that the Food, Drug, and Cosmetic Act sets only minima and does not preempt tort suits for damages Abbot v. Similarly, tort suits involving automobile design 15 U. Then bargaining between workers and management could establish higher standards in particular workplaces or industries. The tort system, then, would make it possible for people to argue that the standards should be higher in particular cases. In the context of a statute that was explicitly a baseline, the tort system would accommodate special cases, given the fact that the world is more diffuse than the regulation indicates. By the same token, a manufacturer should be able to argue that it should not be held to as high a standard as others because of the particular way its product is used. The court system could provide for these exceptions. The third possibility for complementarity is a tort system that acts as a supplemental enforcement device. This is possible when the negligence rule in torts is equal to or less stringent than the regulatory standard. It is also possible in a pure, strict or absolute liability system that imposes liability whenever a product-linked injury occurs. When the tort system acts as such a compensation system, or when the negligence standard is no Page Share Cite Suggested Citation: Product Liability and Innovation: Managing Risk in an Uncertain Environment. The National Academies Press. If the company meets the regulatory standard, it would not be held liable. By doing so, it undermines the notion that the regulatory system sets standards where benefits are balanced against costs. Under such conditions the two systems would work at cross-purposes. The conflict between torts and regulation would be exacerbated by the existence of punitive damages. In two circuit courts ruled on federal preemption of tort claims, one under the pesticide statute and the other under the hazardous substance law. Both clearly preempt state statutes that try to impose different labeling requirements. The laws do not directly address the issue of tort suits. The cases were decided by the fourth and the eleventh circuits. Under the principles articulated here, the fourth circuit made the correct ruling, and the eleventh circuit did not. The eleventh circuit, in a case involving the pesticide law, simply concluded that lawsuits challenging the adequacy of labels were preempted. In a case dealing with an exploding paint thinner, the court found that the labels conformed with the law. It then went on to argue that preemption only applies to suits claiming that a label, which complies with the federal standard, should have been stronger. A tort suit is permitted, however, if one can demonstrate that the label did not conform to federal standards. It supplements the limited resources of public regulatory agencies without undermining statutory goals. Incentive-based reforms allocate regulatory costs to those who can bear them most efficiently, encourage firms to search for innovative ways to reduce harms, and force producers to reflect the risks they impose on society. Such reforms, however, could be undermined by a poorly informed judiciary. If courts equate regulation with standard setting, then they may treat only command-and-control regulation as behaviorally significant. Shore Realty, F. Incentive schemes require a fundamental rethinking of the relationship between tort law and statutory law. Following the conventional wisdom of economists and policy analysts, regulators have begun to use incentives and subsidies to affect behavior in lieu of command-and-control standards. Similar proposals exist to pay workers to use protective devices under the Occupational Safety and Health Act and to establish marketable rights for water pollution. How should courts handle claims by defendants that incentive-based regulatory statutes preempt tort

actions? Judges who view regulation as confined to standard setting might allow tort actions on the ground that these statutes are not "regulatory" because they do not establish uniform standards but "only" create incentives. Yet the argument for preemption of tort law is even stronger in the case of incentive-based regulations than in the case of command-and-control regulation. With standard setting based on either technology or performance, tort actions can complement regulatory agency activity if agency enforcement is not comprehensive or if the fines levied bear little relationship to damages. In contrast, a well-designed incentive system signals to a firm the social costs of its activities. A fee system resembles a tort liability system: No fixed standards are set, but firms respond to the cost of damages. The regulated entity must purchase the right to impose social costs in the same way that a tort judgment requires payment for harms. The main difference is the comprehensiveness of a fee schedule, which the state sets so that all firms are covered. Tort judgments would undermine such a regulatory scheme, especially if courts applied a strict liability standard, the type of standard that some judges have found least "regulatory" Silkwood v. Kerr-McGee, at n. Thus, incentive-based statutes should include a provision clearly preempting tort actions. For example, if the Environmental Protection Agency charges effluent fees, those damaged by the discharges that occur should not be able to sue since this would create inefficient care-taking incentives on the margin. The only role for lawsuits by private individuals would be to force the agency to enforce its own rules; such suits might permit private recovery of damages for harm caused by lax enforcement. In situations where the damages are too diffuse to motivate private litigation, the recovery could be some multiple of fees that the agency could have exacted and could be paid to the Treasury with the public interest litigant recovering legal fees. Thus, although ordinary tort actions would be preempted, certain specialized private remedies might supplement agency enforcement just as tort actions do which use regulatory standards as the standard of negligence. If a regulatory statute bars private tort actions, those who were previously able to sue for damages will be disadvantaged, a result courts seem reluctant to permit. In finding that Karen Silkwood could sue for punitive damages in state court despite a federal statute that preempted state regulation of the nuclear industry, the Supreme Court noted that the statute did not provide for compensation and stated that "It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct" Silkwood v. If compensation of victims is not addressed by a purely regulatory statute yet remains a policy goal, conflict may arise between the statute and tort law. Compensation-oriented courts may apply conventional tort doctrines that are at cross purposes with regulatory policies. We need to focus on situations where regulatory policies conflict with a compensation-oriented tort law. Where truly innocent victims exist, denying compensation to those who formerly could bring damage actions may be unjust and unwise. Yet retaining conventional tort actions in the face of regulatory statutes can undermine the behavioral impact of statutes. Other solutions must be found to the problem of providing compensation. In contrast, if the victims are few in number and their problems are idiosyncratic, the law should either permit private rights of action for damages analogous to those permitted under the Consumer Product Safety Act and the Comprehensive Environmental Response, Compensation, and Liability Act Superfund , 13 or it should allow tort actions under strict liability principles solely as a means of achieving compensation. Page Share Cite Suggested Citation: The innovations that the courts have developed to manage class actions and consolidate cases are transforming the courts into quasi-regulatory agencies. Real agencies are likely to perform better than awkward judicial hybrids that have many of the disadvantages of both forms. If Congress reforms the regulatory system to rely more heavily on incentive schemes, the judicial role should become even more modest. Under incentive schemes that require firms to pay for the damage they cause, statutes should preempt tort actions in order to avoid overdeterrence. For programs affecting many people, compensation should be effected through a separate system of social insurance. Private lawsuits would be permitted under the statute only to compel regulated entities to comply with existing regulatory standards. But in policy areas that have not yet been reformed, a limited role remains for tort law or, at least, for private causes of action embedded in statutory schemes. Conversely, a true, strict or absolute liability regime would obviate a judicial risk-benefit

calculation; only a determination of causation would be required. The choice between negligence and strict liability should then depend on how society evaluates the importance of giving victims an incentive to take care versus the distributive effects of initially shifting all losses to injurers. An efficiently operating system of tort and regulatory law might indeed affect the research choices of business firms, but that would be a result to applaud, not condemn. If manufacturers are induced to take into account the costs imposed by their products on society, this will give them an incentive to make appropriate research and development choices. Innovation will not be discouraged, but it may be redirected. The current mixture of tort law and direct statutory regulation, however, does not appear to conform to the economic ideal. Policymakers should, however, seek a more consistent system, not impose artificial limits on either tort judgments or regulatory initiatives.

TORT LIABILITY STANDARDS AND THE FIRMS RESPONSE TO REGULATION pdf

7: Product and Tort Liability Litigation | Katten Muchin Rosenman LLP

The Market for Safety There are three major forces for safety. We tend to think first of regulation and second of litigation in the form of tort law (including malpractice and product liability) to increase safety, but in fact the most important force for safety is the market itself.

Australia has long been considered highly litigious. Outside the United States a corporation is most likely to face a product liability claim or a class action in Australia. The country has even more lawyers per head of population than the United States. Over the past 12 months a series of events has brought matters to a head. These include several high-profile negligence cases in which plaintiffs were awarded large sums for losses for which they might have been considered responsible or as a consequence of events over which the defendants had little, if any, control. A major Australian insurer, HIH, collapsed in spectacular circumstances and a leading medical indemnity insurer folded under the weight of medical malpractice claims. The events of September 11 did little to help the situation. At the same time there has been a significant hardening in the insurance market. For many insurers this involved increasing premiums, reducing the amount of business they were willing to write, or in some cases withdrawing entirely from sections of the market. The spiralling costs of insurance or in many cases an inability to obtain cover has had a devastating effect on the community. Doctors have withdrawn from practice, community organizations have closed down and small businesses have failed as a direct result. All of this led to urgent calls for inquiry and reform. The Civil Liability Act On March 27 the responsible federal, state and territory ministers convened to address the increases in insurance premiums and the apparent inability of some organizations to secure insurance for their activities. The ministers agreed that many of the issues to be resolved are complex and cross-jurisdictional, requiring collective action from governments and industry both immediately and in the long term. Most states and territories established taskforces as a matter of urgency to review systematically a range of reform options. In New South Wales, by far the most litigious state in Australia, government initiatives have already resulted in the introduction of the Civil Liability Act The act has retrospective effect back to March 20 , the date on which the NSW government announced that it was considering a range of legislative reforms to personal industry law. It is anticipated that many other states and territories will adopt as much of the act as is relevant to their jurisdiction. The Civil Liability Act is designed to tighten controls on damages payouts and impose additional requirements on lawyers to discourage unmeritorious claims and over-servicing. It sets out to achieve these objectives by making a number of changes to legal professional responsibility legislation and the law in respect of civil actions for damages. Application of the act The act applies to and in respect of awards for personal injury damages, save for a number of exceptions. Canvassed in these terms, it is contended that the legislation may apply to a broad spectrum of claims not necessarily founded in tort. Indeed, it is expressly provided that the legislation extends to apply to an award of personal injury damages even if the damages are recovered in an action for breach of contract or in any other action. General Damages The act imposes the following restrictions on awards of damages for non-economic loss: It is intended that this maximum amount would only be awarded in the most extreme cases. A court cannot order the payment of interest on damages awarded for non-economic loss. This provision is based on the rationale that general damages do not represent financial loss to the injured person. Damages for Economic Loss The act makes a number of changes to the law in respect of assessment of damages for past and future economic loss: If the court makes an award for future economic loss, it must adjust the amount determined by reference to the percentage possibility that, but for the injury, certain events may have occurred that would have resulted in economic loss. In delivering its judgment, the court must state the assumptions on which the award was based and the relevant percentage by which the damages were adjusted. Damages Awarded for Gratuitous Care In recent years the courts have been awarding sums intended to compensate family members for domestic and other assistance to a plaintiff - even though no payment had been demanded, let alone paid. The act defines and limits the damages that may be

awarded for attendant care services, such as nursing or domestic help, that are provided on a gratuitous basis: Such damages cannot be awarded unless the court is satisfied that there is or was a reasonable need for the services, which has arisen solely as a result of the injury sustained. The court must be of the mind that the services would not be or would not have been provided to the claimant but for the injury. No damages may be awarded for gratuitous attendant care services if the services are provided, or are to be provided, for less than six hours per week and for less than a total period of six months. There are certain restrictions on the amount of damages that can be awarded for gratuitous attendant care services. The court is not permitted to order the payment of interest on gratuitous attendant care services. Exemplary, Punitive or Aggravated Damages The act prohibits awards for exemplary, punitive and aggravated damages in negligence cases. Significantly, the government rejected an amendment that would have preserved the possibility of awards of exemplary damages in tobacco or asbestos-related cases. Structured Settlements by Consent The act establishes a regime whereby the payment of damages may be made in periodic instalments. However, such structured settlements may only be instituted where the parties to the claim agree to settle under such terms and apply to the court for a consent order. Costs Recoverable in Small Claims In an attempt to reduce the role that lawyers have had in the explosion of claims, the act imposes limitations on the legal costs recoverable in the case of small claims. There are a number of exceptions to this provision, namely: Claims and Defences Lacking Merit The act also seeks to deter lawyers for both the plaintiff and defence from pursuing frivolous claims or defences. It sets out to achieve this objective by the following means: Lawyers are prohibited from providing legal services to a plaintiff or defendant unless they have reasonable grounds for believing, on the basis of "provable facts and a reasonably arguable view of the law", that the claim or defence has reasonable prospects of success. To this end, the Legal Profession Act NSW has been amended to provide that contravention of this prohibition can be deemed as unsatisfactory professional conduct or professional misconduct. A lawyer acting on behalf of a claimant or defendant must certify that there are reasonable grounds for believing that the claim has reasonable prospects of success when the Statement of Claim of Defence is filed. The Legal Profession Act NSW has been amended to provide that if a lawyer renders legal services to a party with no reasonable prospects of success, the court may order the lawyer to repay not only the legal costs of that party, but also any part of the costs that the party has been ordered to pay to a third party. It is anticipated that the second stage reforms will address more complex issues pertaining to the tort of negligence. Specifically, the second stage of reform will involve the examination and potential reformulation of the concept of negligence. It will see the reintroduction of the test for professional standards, meaning that it will no longer be up to a court to find a professional eg, a doctor liable in tort if he or she acted in accordance with a respected body of opinion. Further, legislative amendments will see volunteers protected against being held liable in tort, save in cases of gross negligence. Other changes include preventing claims by those injured in the course of committing a crime and preventing plaintiffs who are injured while intoxicated from seeking special consideration. On the public liability front, proposed reforms include ensuring that public authorities have a credible defence to a negligence claim if they meet the relevant standards set for the particular activity. In short, organizers and businesses will be able to effectively exclude liability provided that they comply with safety standards and issue appropriate risk warnings. The Clayton Utz website can be accessed at www. The materials contained on this website are for general information purposes only and are subject to the disclaimer. ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription.

TORT LIABILITY STANDARDS AND THE FIRMS RESPONSE TO REGULATION pdf

8: Cal-OSHA Regulations Can Form the Basis of Tort Claims | Kring & Chung Attorneys LLP

Firm; Find a Person. Name or keyword. Toxic Torts, Environmental Tort; Transactions, Due Diligence Latin American Environmental Regulation Resource Center;.

It was intended to restore public confidence in our capital markets. Much of the SOA is directed at corporate and securities industry behavior. But the SOA also raises the regulatory bar far higher for the accounting profession, especially for accounts who audit public companies. The SOA also imposed high ethical standards, including prohibiting conflicts of interest and even potential conflicts of interest. Civil and criminal penalties for violations were increased. The net effect was to substantially increase the legal liability of accountants. Business schools are trying to include SOA materials into their curricula. However, as the AACSB publication BizEd pointed out in August , there is a lack of material that is appropriate for classes in accounting and business law. This paper will help to fill that need. It reviews the origins and current attitudes towards the SOA. To provide context it reviews the law of accountant liability. The paper then examines and assesses those parts of the SOA that impact accountant liability, particularly the new regulatory agency and also accountant independence. A new conceptual framework for regulation is suggested, in which it is seen that the SOA is essentially a form of regulation that seeks to prevent a harmful event from happening, as opposed to merely providing a remedy to those harmed by that event. Finally the SOA will be assessed and its future considered. Corporate scandals involving Enron, WorldCom and others had shaken public confidence in American capital markets. Public outrage [2] plus the obvious need for reform led to the passage of the SOA which was signed into law on July30, The SOA significantly increased the legal liability of accountants. Conflicts of interest were prohibited, and a high wall was erected separating the audit function from consulting and other non-audit functions. Audits of public companies became riskier for accountants but also more profitable, reflecting the greater amount of work and risk involved [3]. The topic of accountant liability is an important one in accounting and business law classes, especially at the Junior, Senior and Graduate level. The SOA significantly impacted this liability. However, business schools have had difficulty incorporating SOA material into their curricula. Most of what has been written on the SOA deals with corporate compliance and is directed at lawyers and practicing accountants. The contribution of this paper is to help fill that void. Consider the following titles and headlines: These articles focus on the downside of increased regulation: On the other hand [10] other titles are positive: These articles focus on the benefits of increased regulation: Reviewing the origins of the SOA will provide insight to the conflicting attitudes towards it. Congress was anxious to act. A Conference Committee reconciled the differences, which is normal procedure. As public outrage at the unfolding scandals grew, Congress passed the conference bill by the overwhelming votes of 99 to 0 in the Senate and to 3 in the House of Representatives [17]. Congress had passed the most sweeping statute affecting securities regulation and corporate governance since the s. Congress had acted with uncharacteristic haste and unanimity, just as it did when it passed the U. And, as with that Act, second thoughts would later emerge. The scandals that broke in and had their origins in the dot-com boom of the late s. Cozy relationships between investment analysts, auditors and corporations were tolerated while the economy and stock market were booming. The first major break, and probably still the best known, involved the Enron Corporation. Formed in as the result of mergers with energy pipeline companies, Enron quickly became a rising star on the investment horizon. By it had become the seventh largest U. But GAAP allows this only if two rules are met [21]: Billions of dollars of debt were hidden. Once the truth became known Enron collapsed. Investors were shocked that a company that had been touted as a star was in fact a fraud. Billions of dollars were lost to pension funds, mutual funds and individual investors. Another prominent example of a corporate scandal involving accounting manipulation was Global Crossing. This company was formed in Its business plan consisted of laying fiber optic cables under the Atlantic and Pacific Oceans in order to capture telecommunications business. With pro forma accounting a company can inflate its earnings by applying accounting rules that it

thinks are relevant [24]. Global Crossing and others using pro forma accounting did disclose what they were doing, and also the financial results obtained using GAAP. But some top stock analysts used the rosier pro forma results instead of GAAP results without telling investors. Moreover, in the case of Global Crossing, that company did not even accurately report its pro forma results [25]. Prior to the SOA the accounting profession was largely self-regulated. However, there was dissatisfaction with the self-regulatory nature of the ASB and its 15 members, who were volunteers and predominantly practicing accountants at large public accounting firms. In the members of the POB voted unanimously to disband. Congress concluded that Enron, WorldCom and other scandals demonstrated that self-regulation by the accounting profession had been inadequate in the areas of standard setting and oversight. The need for improvement in these areas contributed to the passage of the SOA. In order to properly understand how the SOA fits into the context of accountant liability, it is necessary to review that larger scheme. Most accountant liability is based on contract, tort and statute law. The changes brought about by the SOA will be noted in the next section, which describes the Act. Contract Law Liability When an accountant does work for a client a contract of employment exists. In common with all employment contracts, the engagement letter specifies the work to be performed and the compensation to be paid. If an error is made, a question arises whether the accountant has acted with competence. Not all errors are the result of lack of competence. The standard of competence used by the courts is that of a hypothetical reasonably competent accountant. It is essentially a negligence standard, described below. The typical example is a corporation seeking a loan from a bank that hires an accountant to prepare financial statements that the bank will use in evaluating the loan application. Contract liability is important but it is limited. The client or intended third party beneficiary may lose money if the accountant breaches the duty of competence or some other duty, but the amount of money will be limited to the actual losses of just those two parties. Someone claiming a loss would also have to show reliance and proximate cause. Fraud consists of issuing false financial information with knowledge that it is false and with intent to deceive someone. This intent to deceive is called scienter, and is also a requirement for liability under some of the provisions of the Securities Acts, discussed below. Determining how a hypothetical reasonably competent accountant would act is not always easy. Expert witnesses may be called upon to inform a jury as to how the hypothetical competent accountant would act. If a court finds that negligent misrepresentation has occurred, the accountant will be liable for the financial loss that was reasonably foreseeable proximately caused. Two things make negligent misrepresentation a particularly dangerous legal theory of liability for use against an accountant. First, there can be more than one or two plaintiffs. In the discussion of contract liability, we noted that only the client or an intended third party can assert contract liability. But with negligent misrepresentation, a whole class of plaintiffs, perhaps numbering in the thousands, can sometimes assert liability. Touch [33] in In that case Justice Cardozo created a special rule in negligence cases involving accountants. If liability for negligence exists, a thoughtless slip or blunder â€¦ may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences. Cardozo was sensitive to the fact that at that time, before the Securities Acts, independent auditors were the only overseers of the accuracy of financial information relied upon by investors in our capital markets. If accounting firms were destroyed by mass liability for negligence, there would be no reliable affirmation of corporate profitability. The stock market had crashed only two years earlier. Maintaining investor confidence was critical then, just as it was after Enron, Global Crossing, Tyco and Adelphia. Then some courts began to expanded the potential universe of plaintiffs in negligent misrepresentation cases beyond just the client and intended third party. The Restatement of Torts, Section adopted a more expansive rule. The common example is an accountant who prepares a financial statement for a corporation applying for a loan from bank A. Under contact liability, discussed above, only the client and bank A could use negligence as a legal theory of liability. So if bank A turns down the loan, but bank B makes the loan, bank B can hold the accountant liable if negligent misrepresentation causes bank B to lose money. The Restatement rule has

gradually replaced the Ultramares rule as the majority rule used in most States. However, this presents exactly the mass liability problem that Cardozo warned of. California quickly abandoned the foreseeability rule and no jurisdiction uses that rule today. The other tort of concern to accountants is fraud. As noted above, fraud requires proof of scienter, the intent to deceive. Fraud is rare, and even where fraud exists it is hard to prove. But if fraud is proved, there is almost no limit on the size of the universe of potential plaintiffs.

9: Regulation and the Law of Torts | Susan Rose-Ackerman | Academic Room

replace liability, they argue, "preempting" tort law as the basic legal response to technologies which generate health, safety, and environmental risks.' Tort law's critics argue that liability is superfluous, especially where an.

TORT LIABILITY STANDARDS AND THE FIRMS RESPONSE TO REGULATION pdf

Metamorphosis of Jessica Applications of Smarandache Function, and Prime and Coprime Functions Instant etiquette for businessmen. International nutrition in health and disease Pentateuch vindicated Lament: Responding to Loss and Suffering Ann Rankin and the lost valley. Asymptotic methods in statistical decision theory Poison gas exposures Friend, B. Virgin territory: the bonds and boundaries of women in science fiction. A comparison of metals, ceramics, and polymers Negotiating the recent future. Humanism of Miltons Paradise lost Life sketches from common paths Web designing and programming bsc it The cognitive miser : ways to avoid thinking Managing Active Directory for Windows 2000 Server (Syngress) Before i knew jamie beck Introspection and contemporary poetry Drivers ed book massachusetts Why i am not a hindu book The definitive guide to the arm cortex m3 19th Kerala Science Congress Global processes indicating recent creation Semisi Nau, the story of my life Whos Who Among High School Students, 1996-97 (Whos Who Among American High School Students) Assassins creed black flag art book Conduct disorder Popma, A. Vermeiren, R. Differentiating the related concepts of ethics, morality, law and justice Terry T. Ray The In search of a third way Cherokee summer = Receiving a warriors heart Mahler, consciousness and temporality Diamond in the Rough (Precious Gem Romance, 132) Complete Preparation for the PCAT A horse to brag about The Pursuit of Permanence Public Library Staffs Hci bursary application form 2015 From the constructive technique used in the military architecture of the Limes Arabicus to its conservati